

The Travelers

*The Travelers Insurance Company
The Travelers Indemnity Company
The Travelers Fire Insurance Company*

L.F. Butler, President

Hartford, Connecticut

LIABILITY CLAIM DIVISION

30-42 EAST 42d STREET

NEW YORK, N. Y.

LIABILITY

CALVIN P. REID, MANAGER

OSWALD REIN'L, ADJUSTER

RALPH E. LOGAN, ADJUSTER

ADDRESS ALL REPLIES TO LIABILITY DEPARTMENT

CLAIM DIVISION

PHONE 8120 MURRAY HILL

REFER, PLEASE
TO FILE NO.

Ethyl Gasoline Corp.

re

August 27, 1929.

Dr. Robert A. Kehoe,
College of Medicine,
Eden and Bethesda Avenues,
Cincinnati, Ohio.

Dear Doctor:

I am enclosing for your review a copy of a letter
from our attorneys and a copy of the deposition of Dr. Cash.

I have sent copies to Mr. Webb.

Very truly yours,

Calvin P. Reid
Manager.

CPR:LH

C O P Y

THOMPSON, KNIGHT, BAKER & HARRIS

Republic Bank Bldg.,

Dallas, Texas.

August 23, 1929.

Mr. Calvin P. Reid, Manager,
Liability Claim Division,
The Travelers,
30 - 42 East 42nd Street,
New York, N.Y.

Re: [REDACTED] v. Continental Oil
Company - Ethyl Gasoline Corp.

Dear Sir:

On the 25th day of July, 1929, the writer participated in the taking of the deposition of Dr. Cash of Abilene, Texas. The writer went away after that on his vacation, which accounts for the fact that we have not written you with reference to the above matter.

I enclose herewith copy of Dr. Cash's deposition, which gives in considerable detail his connection with the case and his findings and his treatment. I think that Dr. Kehoe would like to consider this deposition.

Since you will probably want to read the deposition, I will not undertake to summarize it. The fact is that Dr. Cash does not seem to know what caused [REDACTED] trouble. He thinks that [REDACTED] is unusually susceptible [REDACTED] effects of gasoline. He also seems to think that Ethyl gasoline had something to do with the trouble, and he says he has had another patient, by the name of [REDACTED], who had handled ordinary gasoline for some time but upon starting to handle Ethyl gasoline he developed this same kind of rash but that [REDACTED] responded readily to the same treatment which they gave McDaniel and that he, [REDACTED], is now a well man. It would seem also that he thinks the burns could have had something to do with the change in the bone structure in the joints, as is evidenced from the question and answer on page 25, as follows:

"Q. That stiffness in the joints and the enlargement that you spoke of, is that evidence of this primary condition that you spoke of?

"A. No. It would be evidence of both. In other words, you could get -- from a burn, lasting over a period of four or five months, you could

get a change in the bone structure itself,
just as in the primary."

Of course, he goes on to say that the arthritis could have been caused by various kinds of poison in the system.

Taken as a whole, I believe this deposition is not damaging to us to any great extent. I believe that Dr. Cash is a fairly good man and thoroughly conscientious.

Mr. Scarborough indicated that the case could be settled for a total of \$7,500.00 and that the U S F & G had tentatively offered to pay \$2,500.00, and that if he could get \$5,000.00 for the Continental people, the case could be settled. I understood Mr. Scarborough to say that the U S F & G had tentatively offered to settle for the compensation claim of \$2,500.00 but Mr. Chamberlain of the Dallas office of the U S F & G, this being a branch office of that Company and Mr. Chamberlain being the Assistant Superintendent of the Claim Department, said they had made no such offer, but that their representative called on Mr. Scarborough before Dr. Cash's deposition was taken and endeavored to procure a release in consideration of the compensation payments already made and the treatments given to McDaniel, and denied liability and further compensation. He took the position that they had never been liable to pay compensation under our law. He further says that Mr. Scarborough offered to take \$2,500.00 at that time and finally came down to \$1,800.00 but they would not pay it, and Mr. Chamberlain advises me they have notified the Industrial Accident Board that they have denied liability and are discontinuing compensation payments and are going to contest any further claim.

Mr. Chamberlain advises that if any payment is made the subrogation rights of his Company will have to be considered as he feels the U S F & G has been the 'goat' all the way along and he would like to recoupe some of his loss, if possible. However, in denying liability on the compensation claim he automatically places his company in the same boat with us. Of course, if any payments are made the subrogation rights of the U S F & G, under the Texas statutes, will have to be considered.

As to Mr. Scarborough's proposition to settle the matter for \$5,000.00 from the Continental Oil Company, I am rather inclined to think said proposition was one made with a view of trading on it, and that he would take less money. I am inclined to think that Mr. Scarborough was wearing his 'poker face' the morning he made that proposition.

I am aware that Mr. Smedley and Mr. Hamilton think that we will not be able to get him to reduce his demands. Of course, I may be mistaken in my judgment, but I have had some dealings with Mr. Scarborough, and his attitude in this matter leads me to believe that he does not think a great deal of his case and will take less money.

Mr. Smedley has been to Denver and consulted with the General Attorney for the Continental Oil Company, and I understand from him that a

letter has been written from Denver to the Ethyl Gasoline Corporation in an effort to find out if the Ethyl Gasoline Corporation will contribute toward a settlement and I understand from him they have about come to the conclusion that they will endeavor to work out a settlement of the case. He has asked us to advise him what we think about a settlement, and we are advising him much in line with the expressions in this letter.

In view of the importance of this case upon the business of the Ethyl Gasoline Corporation, we are all in agreement that same should be handled in such a way as to not injure the business and to prevent other similar claims, if possible. We will state, however, at the outset, that ordinarily we are not in favor of making test suits in damage suit claims. In a great majority of such cases the outcome is adverse to the business concerned.

We have already expressed to you the thought, and, of course, we understand you already had it in mind, that if we contested this case and got a favorable opinion it would be of great benefit in the handling of future claims, if any should arise, but that if an adverse ruling was had it would be detrimental in the handling of future claims. Our thought is that a settlement should be had if it can be had for a nominal sum. I am not inclined, however, to recommend a settlement of \$5,000.00 in this case. The question of whether settlement should be made on the best possible basis, should be determined mostly from the standpoint of policy. After giving the matter some considerable consideration, we recognize that there is some chance of an adverse verdict against the Continental Oil Company, provided the plaintiff hits upon a proper theory and amends his pleadings so as to meet it, then I think that the adverse ruling would probably be based upon the finding that the particular batch of gasoline which [REDACTED] handled was improperly mixed in the refinery of the Continental Oil Company, and the proof would be, as I conceive it, somewhat along this line - [REDACTED] attorney would concede that ordinary commercial Ethyl gasoline, in which the tetra-ethyl fluid was properly mixed in proper quantities, would not be harmful to a filling station attendant and that such harm as came to this man could only come as a result of the presence of large quantities of the fluid in the gasoline, taking the position that tetra-ethyl fluid, being a lead extract of some kind, would actually cause harm, and I am assuming that is a fact, when used pure or in large quantities, and that [REDACTED] having handled this Ethyl gasoline with too much tetra-ethyl fluid in it caused his trouble. But if the decision is based upon this state of facts, it would not necessarily reflect adversely to the Ethyl Gasoline Corporation.

Of course, the Court might not permit such an application of the doctrine of *res ipsa loquitur* and he might not be able to get to a jury on this kind of a theory. The authorities are in conflict in this kind of a situation. Also he is up against the problem of proving by some one that his condition is the result of lead in the system. I really do not see how he is going to prove that.

We have one case in Texas by one of our intermediate Appellate Courts, but which was approved by the Supreme Court in which liability was found in an analogous case. It is the case of *Armstrong Packing Company v. Clem*, 151 SW 576. Mrs. Clem bought a certain brand of laundry soap, manufactured

by the Armstrong people, which she used in the family laundry and her hands, arms and other portions of her body came in contact with the soap and she became poisoned and her skin became infected, causing considerable trouble. From the opinion her condition must have been somewhat like that of McDaniel's, except there does not seem to have been any trouble with the joints, and the proof showed that the Armstrong Packing Company used some kind of poison in the manufacture of the soap, which, when properly processed, was neutralized in the manufacture of the soap and became harmless in the preparation of the soap. The opinion states that the poison used in the soap sold to Mrs. Clem was not neutralized, but I am not sure whether that is based upon direct evidence from an analysis of some of the soap actually sold to Mrs. Clem or whether they arrived at that conclusion by circumstantial evidence to the effect that the poison was always placed in the soap in its preparation and was, when properly processed, neutralized, and that this particular quantity of soap produced the results always obtained from such poison not neutralized, and the Court finds that the evidence was sufficient to show that the Packing Company was negligent in the preparation of this particular batch of soap.

It occurs to us that if plaintiff's attorney hits upon some such theory in the [REDACTED] case they would have a better chance of going to the jury.

In view of the fact that our expert proof will show, undisputedly, that commercial Ethyl gasoline properly mixed will not produce harm, I am inclined to think that the Court would almost be forced to take the view that the Continental Oil Company had a right to place properly mixed Ethyl gasoline on the market and that there would be no liability from the sale of ordinary Ethyl gasoline, but, of course, if they should come in under this other theory that this particular batch of gasoline was not properly mixed and contained too much of the lead fluid, there might be some chance of an adverse verdict, but that should not necessarily reflect against the Ethyl gasoline generally.

Dr. Cash seems to have an idea that this Ethyl gasoline handled by [REDACTED] had something to do with his condition. I am inclined to think he believes that more strongly in view of the experience of this man [REDACTED] but it is interesting to know that [REDACTED] only had a rash which was readily cured by the standard treatment for such things, but, upon this theory, we do not anticipate an adverse ruling by the Courts.

I judge that Dr. Cash's idea is that from these two cases Ethyl gasoline would not be harmful to the ordinary filling station attendant, but that certain people would be more susceptible to the ill effects of Ethyl gasoline much as some people are more susceptible to the ill effects of ordinary gasoline. If the plaintiff should proceed on this theory, I am inclined to think they would lose as a matter of law.

I do not think that the Courts would ever hold, and I have found no authority that would support such a holding, that a manufacturer would be liable under any theory for manufacturing a product generally safe but

that would produce harm in a very, very small percentage of people who might be greatly susceptible to that particular kind of product.

Plaintiff, so far, has not amended his pleading - I am sure if he goes to trial that he will do so. The present pleading, as you know, is very short and merely states that the Continental Oil Company manufactured Ethyl gasoline which contained poison, that this gasoline was sold to the employer of [REDACTED] and that [REDACTED] dispensed it and came in contact with it, absorbed the poison into his system which has produced the harm complained of. I do not think he would be able to substantiate any such allegations and feel certain that he will proceed on some other theory, probably on the theory of the Clem case mentioned above.

I feel reasonably sure too that at least the jury would find, if they were permitted to do so, that the Ethyl gasoline produced the rash on the body of McDaniel.

We think their chances of getting a finding that the arthritis was a result of the Ethyl gasoline are not very good.

To revert again to the advisability of settling this case will state, in my opinion, that settlement of this case would have very little effect, if any, upon the business involved, and I am further inclined to the belief that the local publicity that would result from a trial of the case in the Federal Court at Abilene, even though the result was favorable to the Company, would have more detrimental effect upon the sale of Ethyl gasoline than a settlement of the case out of court. Of course, the newspapers would play it up somewhat and lots of people would read about the trial, and even though the verdict were favorable to the Company a good many people would doubtless become suspicious of even buying Ethyl gasoline.

Mr. Hamilton feels that the case should be settled. He is a man who has had considerable experience in the handling of damage suits for railroad companies and other interests, but we are not inclined to think there is as much danger in the case as he seems to think there is.

Since dictating the above I have received another letter from Mr. Snedley and enclose herewith a copy of my reply.

Yours very truly,

THOMPSON, KNIGHT, BAKER & HARRIS

By (Signed) Pinkney Grissom

EG:D
Enc.

KE 0011522

C O P Y

THOMPSON, KNIGHT, BAKER & HARRIS

D A L L A S , T E X A S .

August 23, 1929.

Mr. G. B. Snedley,
Legal Department,
Continental Oil Co.,
Wichita Falls, Texas.

Re: [REDACTED] Continental Oil Co.

Dear Sir:

I have your letter of August 22nd with reference to this matter. Yesterday afternoon I dictated a letter to our client, and I assume the Ethyl Gasoline Corporation will communicate direct with the Continental Oil Company on the question of settlement.

I advised them, in my opinion there was some little danger in the law suit, but that we had a great deal of confidence in our defense, that I believed if the plaintiff was able to recover he would have to do so upon the theory that this particular gasoline which McDaniel handled was improperly mixed, and that I believed the overwhelming testimony would show that ordinary commercial Ethyl gasoline is not harmful and I believed if the plaintiff expected to recover he would proceed on the theory laid down by the Court of Civil Appeals of Dallas in the case of Armstrong Packing Company v. Clem, 151 SW 576, in which writ of error was refused by the Supreme Court. If you have not examined that case I would like for you to do so and advise us what you think about it. The court undoubtedly applied the doctrine of res ipsa loquitur in that case, but recovery was permitted on the theory that the soap in question contained poison, which I assume was lye, and which had not been neutralized in the manufacture of the soap, and that the plaintiff proceeded on the theory that ordinary lye was neutralized in the manufacture of the soap; that Mrs. Clem bought this particular batch of soap and used it and was burned by the lye; that she could have got the lye from no other source than from this soap; that lye was used in the manufacture of the soap, that, therefore, this must have been the same lye as was used in the manufacture of the soap; that, therefore, the soap was not properly manufactured; that this particular batch of soap which Mrs. Clem bought was negligently manufactured.

I cannot believe that plaintiff could effect a recovery on any other theory than this, and I do not believe that actually that should reflect

8-23-29

against ordinary Ethyl gasoline, but, of course, it would to some extent, but if recovery was allowed upon that theory in this case and same was put upon the books it would not be such a dangerous precedent as would a recovery on the theory that ordinary Ethyl Gasoline was harmful.

I am inclined to think that Mr. Scarborough will take less than \$4,000.00 for this case - I cannot believe he thinks a great deal of his suit.

I further expressed the opinion to our client that I did not believe a settlement of this suit would prejudice the product in question to any appreciable extent, and I expressed the further opinion that a trial of this case in Federal Court at Abilene, even though it might be successful, would damage the product much more than would a settlement. The only thing that the average man would know about the law suit would be that there was a law suit involving personal injuries which were attributed by some one to Ethyl Gasoline and many people would become suspicious of the product. I think these conclusions are correct.

The question of whether or not the suit should be settled should be based more or less upon the policy which the interested parties intend to pursue. I think that in view of the fact that liability, if any exists, will be predicated upon the improper manufacture and improper mixture of commercial gasoline rather than upon the fluid itself, that your client is much more interested in a settlement than is the Ethyl Gasoline Corporation.

I agree with you that we should either have the depositions of Drs. Kehoe and Machle or have them personally present at the trial, and also have some one connected with the Ethyl Gasoline Corporation to testify as to the contents of the fluid and the extent to which Ethyl gasoline is sold throughout the United States and to the probable number of men who handle it in service stations, etc.

I will take this matter up with the Company and see what can be done about making arrangements for personal attendance of these witnesses or the taking of their depositions.

Yours very truly,

THOMPSON, KNIGHT, BAKER & HARRIS

By

PG:D

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