

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

---

IN RE GENETICALLY MODIFIED  
RICE LITIGATION

---

)  
) 4:06 MD 1811 CDP  
)  
) TRIAL COMMENCING  
) JANUARY 18, 2011  
)

**PLAINTIFFS OPPOSITION TO THE BAYER DEFENDANTS' MOTION IN LIMINE  
TO EXCLUDE REFERENCES OR COMPARISONS TO THE BP OIL SPILL**

Bayer has filed an open-ended and nebulous motion to exclude references or comparisons to the BP Oil Spill. Bayer's motion is overbroad and, if granted, will unfairly limit Plaintiffs' counsel's ability to effectively advocate on behalf of the Mississippi Plaintiffs.

Meaningful advocacy requires speaking in terms that one's audience understands. Plaintiffs must be able to draw from common everyday life experiences, including those well-published and in the public lexicon. Utilizing references to current events, no matter how widely covered, is not inherently inflammatory or prejudicial. Relevant evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed. R. Evid. 403. It is important to remember that prejudice, when used in this context, requires more than the fact that the evidence in question is damaging to the party who is seeking to exclude it. As Professor McCormick so eloquently stated in his Handbook on the Law of Evidence:

It should be emphasized that prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis . . .

C. McCormick, Handbook on the Law of Evidence, §185, at 439 n. 31 (2d ed. 1972).

Defendants' motion in limine fails to identify how a jury may decide the current case on an improper basis. There is no undue prejudice to referencing news coverage of the oil spill. While the oil spill may be a hot-button item for some, the illustrations that can be made by comparing the two situations are helpful to a jury in giving them context for the organizational structure of foreign companies operating in the United States as well as how other companies address comparable situations. These illustrations have probative value and will cause no undue prejudice.

Bayer argues that it would be prejudicial for Plaintiffs to argue a parallel between the environmental impact of the BP oil spill and the environmental impact of its contamination of the commercial rice supply with genetically modified rice. While, Plaintiffs do not concede that such a parallel is prejudicial, other comparisons are more germane to the issues at trial. For example, a comparison between the *financial impact* of the BP oil spill and the GMO rice contamination to particular groups of affected persons, and the corporate response to those impacted, is entirely relevant and germane to the jury's understanding of the issues, including the issue of punitive damages. Under Mississippi law, [t]he paramount purpose in awarding punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others. Miss. Model Instr. 11:14, 11.15 and 11.16. In doing so, the jury may consider, the defendants' awareness of the amount of harm being caused, the financial condition of the defendant, the impact on the plaintiffs and the relationship between the plaintiffs and defendants. *Id.* Analogies between the financial impact of the BP oil spill on affected persons and the financial impact of the GMO rice contamination on the Plaintiffs are certainly appropriate for argument on the issue punitive damages.

Further, Bayer's motion does not and cannot clearly delineate the line at which Plaintiffs must limit references to current events – making the motion unduly broad. The Bayer Defendants do not specify to what extent such references must be avoided. For example, if Plaintiffs do not specifically reference BP but instead discuss a hypothetical relating to a recent catastrophe covered in the news, this might also violate the Defendants' Motion. Such a ruling is obviously unduly burdensome. Also, if referring to the BP Oil Spill directly is unacceptable, will Bayer also draw a line in the sand regarding references or comparisons to other incidents such as the Exxon Valdez, Enron or AIG? Plaintiffs should be allowed to draw on parallels the jury is familiar with to explain concepts, such as agency and entity relationships, included by way of a hypothetical based on an oil company's corporate organization.

Beyond discussing the media coverage of the BP Oil Spill, which by itself is not unduly prejudicial, Bayer's motion focuses on the involvement of some of Plaintiffs' counsel in litigation related to the BP Oil Spill. Bayer's argument drolly suggests that there is some prejudice associated with mentioning the BP Oil Spill because lawsuits relating to the spill have been filed by Plaintiffs' counsel. This argument is without merit. There is no undue prejudice simply because Plaintiffs' counsel are involved in litigation for the BP Oil Spill and this case. Indeed, Defendant's motion is so open-ended; it could potentially be interpreted to exclude references or comparisons to *any* litigation with which Plaintiffs' counsel are involved, and not only the BP Oil Spill.

Plaintiffs should not be categorically limited in how they may present their case especially when it involves using current events to interact with the jury unless it is unduly

prejudicial. Other than a blank reference to what it characterizes as intense media coverage<sup>1</sup>, Defendants have outlined no basis for inferring undue prejudice from references or comparison to the BP Oil Spill. Instead, the proper course is for the Court to rule upon any objections in view of the evidence as it comes in. The Court should, therefore, deny Bayer's motion in limine. Alternatively, Plaintiffs request that the Court rule as it did in the fourth Bellwether trial, that such comparisons can be made in closing arguments. Ex. B to D.I. 3780, Fourth Bellwether Pretrial Conf. Tr. 67:23-68:3, Oct. 7, 2010.

Respectfully submitted,

**CHAPMAN, LEWIS & SWAN**

By: /s/Ralph E. Chapman

Ralph E. Chapman

Sara B. Russo

**CHAPMAN, LEWIS & SWAN**

501 First Street

P. O. Box 428

Clarksdale, Mississippi 38614

Tel: (662) 627-4105

Fax: (662) 627-4171

*Plaintiffs' Executive Committee*

**GRAY, RITTER & GRAHAM, P.C.**

Don M. Downing, Bar #41786

Gretchen Garrison, Bar #3189

Jason D. Sapp, Bar #5218238

701 Market Street, Suite 800

St. Louis, Missouri 63101-1826

Tel: (314) 241-5620

Fax: (314) 241-4140

[d Downing@grgpc.com](mailto:d Downing@grgpc.com)

[g Garrison@grgpc.com](mailto:g Garrison@grgpc.com)

[j Sapp@grgpc.com](mailto:j Sapp@grgpc.com)

*Plaintiffs' Designated Co-Lead Counsel  
and Liaison Counsel*

---

<sup>1</sup> As the oil spill has now been stopped, comparisons between Bayer CropScience and the BP Oil Spill appear even less prejudicial as time goes on, as the spill is less newsworthy now than a half year ago.

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLC**

Adam J. Levitt  
Stacey T. Kelly  
55 West Monroe Street, Suite 1111  
Chicago, Illinois 60603  
Tel: (312) 984-0000  
Fax: (312) 984-0001  
[levitt@whafh.com](mailto:levitt@whafh.com)  
*Plaintiffs' Designated Co-Lead Counsel and  
Liaison Counsel*

**HARE, WYNN, NEWELL & NEWTON LLP**

Scott A. Powell  
Donald P. McKenna, Jr.  
The Massey Bldg. Suite 800  
2025 Third Avenue North  
Birmingham, Alabama 35203  
Tel: (205) 328-5330  
Fax: (205) 324-2165  
[scott@hwenn.com](mailto:scott@hwenn.com)  
[don@hwenn.com](mailto:don@hwenn.com)

Richard J. Arsenault  
John Randall Whaley  
Jennifer M. Hoekstra  
**NEBLETT BEARD & ARSENAULT, LLP**  
2220 Bonaventure Court, P.O. Box 1190  
Alexandria, Louisiana 71301  
Tel: (800) 256-1050  
Fax: (318) 561-2591  
*Plaintiffs' Executive Committee*

Scott E. Poynter  
**EMERSON POYNTER LLP**  
500 President Clinton Avenue, Suite 305  
Little Rock, Arkansas 72201  
Tel: (501) 907-2555  
Fax: (501) 907-2556  
*Plaintiffs' Executive Committee*

Stephen A. Weiss  
Diogenes P. Kekatos

James A. O'Brien III  
**SEEGER WEISS LLP**  
One William Street  
New York, New York 10004  
Tel: (212) 584-0700  
Fax: (212) 584-0799  
*Plaintiffs' Executive Committee*

Joe R. Whatley, Jr.  
Deborah Clark Weintraub  
Adam P. Plant  
**WHATLEY DRAKE & KALLAS LLP**  
2001 Park Place North, Suite 1000  
Birmingham, Alabama 35203  
Tel: (205) 328-9576  
Fax: (205) 328-9669  
*Plaintiffs' Executive Committee*

William Chaney  
James L. Reed  
William J. French  
Michael Kelsheimer  
Drew York  
**LOOPER REED & MCGRAW**  
1601 Elm Street Suite 4100  
Dallas, Texas 75201  
Tel: (214) 237-6403  
Fax: (214) 953-1332  
*Plaintiffs' Executive Committee*

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this 7<sup>th</sup> day of January, 2011, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/Ralph E. Chapman