

**IN THE COURT OF COMMON PLEAS OF PHIALDELPHIA COUNTY
CIVIL TRIAL DIVISION**

JOANNE BRANHAM, Individually and as	:	
the Administratrix of the Estate of	:	
FRANKLIN DELANO BRANHAM,	:	MAY TERM, 2006
	:	
Plaintiffs,	:	NO. 3590
v.	:	
	:	
ROHM AND HAAS COMPANY, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2010, upon consideration of The Dow Chemical Company's Motion to Quash Subpoena, and any response thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and the subpoena to The Dow Chemical Company which is attached to said Motion as Exhibit 1 to Exhibit A is **QUASHED**.

BY THE COURT:

TERESHKO, ALLAN J.

Discovery Deadline: August 4, 2008

CONRAD O'BRIEN PC

By: James J. Rohn (I.D. No. 21636)
Howard M. Klein (I.D. No. 33632)
Jeannette M. Brian (I.D. No. 66169)
1515 Market Street, 16th Floor
Philadelphia, PA 19102-1921
Tel: 215-864-9600/Fax: 215-864-9620
jrohn@conradobrien.com
hklein@conradobrien.com
jbrian@conradobrien.com

Attorneys for The Dow Chemical Company

JOANNE BRANHAM, Individually and as	:	COURT OF COMMON PLEAS
the Administratrix of the Estate of	:	PHILADELPHIA COUNTY
FRANKLIN DELANO BRANHAM,	:	
	:	MAY TERM, 2006
Plaintiffs,	:	
v.	:	NO. 3590
	:	
ROHM AND HAAS COMPANY, et al.,	:	ORAL ARGUMENT REQUESTED
	:	
Defendants.	:	

MOTION OF THE DOW CHEMICAL COMPANY TO QUASH SUBPOENA

The Dow Chemical Company (hereinafter "TDCC"), through its undersigned attorneys, hereby moves this Court to quash plaintiff's subpoena pursuant to Pa. R.C.P. 234.4, and in support thereof states as follows:

1. On March 3, 2010, plaintiff served on TDCC's statutory agent in Pennsylvania a subpoena purporting to compel TDCC to designate one or more witnesses to give a videotaped deposition on May 13, 2010 for use at the trial in this case on seven stated subjects. A copy of the subpoena and list of subjects is attached as Exhibit 1 to Affidavit of Matthew H. Metcalf, Esquire (hereafter "Metcalf Affidavit"), attached hereto as Exhibit A.
2. The subjects in the subpoena seek testimony on cancer research epidemiology studies in which TDCC, Union Carbide Corporation ("UCC"), and a dozen or more other U.S.

manufacturers of poly vinyl chloride plastic and vinyl chloride monomer participated in the 1970s, 1980s and 1990s.

3. The subpoena is improper and should be quashed for four independently sufficient reasons: (1) it is procedurally defective; (2) it is an impermissible attempt to end run around the rulings of the Michigan state courts quashing a previous subpoena plaintiff served on TDCC in Michigan that tracks, and even duplicates, the subjects in the current subpoena; (3) it impermissibly seeks expert testimony and imposes an unreasonable investigatory burden on TDCC; and (4) it arguably seeks disclosure of confidential employee records and health information. Each of these four grounds to quash the subpoena are addressed below seriatim.

4. First: the subpoena is procedurally defective. It is axiomatic that the subpoena power of a Pennsylvania court does not extend beyond the territorial limits of the Commonwealth to compel a non-resident, non-party witness to attend a deposition in Pennsylvania. This principle pertains to a non-resident, non-party corporation, regardless of whether the corporation is otherwise subject to the court's personal jurisdiction. As a foreign, non-party corporation, TDCC is not subject to this Court's subpoena power in this action, and the subpoena should be quashed.

5. Pa. R.C.P. 234.1(a), (b)(1, 2) defines a subpoena as "an order of the court commanding a person to attend and testify at a particular time and place" at a "trial or hearing" or at "the taking of a deposition" in an action pending in the court. Rule 234.2(a), (b) provides that the prothonotary "shall issue a subpoena signed and under the seal of the court," a copy of which "*may be served upon any person within the Commonwealth* by an adult" (emphasis added). Section 5905 of the Pennsylvania Judicial Code, 42 Pa. C.S.A. § 5905, provides that all county courts in Pennsylvania shall have *statewide subpoena power*: "[e]very court of record

shall have power in any civil or criminal matter to issue subpoenas to testify, with or without a clause of duces tecum, into any county of this Commonwealth to witnesses to appear before the court or any appointive judicial officer.”

6. On their face, these rules and provisions limit a Pennsylvania court’s power to issue subpoenas to witnesses *within the Commonwealth*, not to witnesses located outside the Commonwealth.

7. Plaintiff may argue that the geographic limit placed on this Court’s subpoena power does not apply here because TDCC, as a corporation qualified to do business in Pennsylvania, could be subject to the personal jurisdiction of Pennsylvania’s courts as a potential defendant in a Pennsylvania lawsuit.

8. Although it appears that no appellate court in Pennsylvania has directly addressed this issue, appellate courts in others states have considered and rejected the argument that a state court’s subpoena power with respect to a non-resident, non-party corporation is co-extensive with the state court’s power to exercise personal jurisdiction over non-resident parties. See, e.g., Syngenta Crop Protection, Inc. v. Monsanto Co., 908 So.2d 121, 124-26 (Miss. 2005); Phillips Petroleum Co. v. OKC Ltd. Partnership, 634 So.2d 1186, 1187-88 (La. 1994); In re Nat’l Contract Poultry Growers’ Ass’n, 771 So.2d 466, 466, 469-70 (Ala. 2000); AARP v. Am. Family Prepaid Legal Corp., Inc., 2007 WL 2570841, at *3-5 (N.C. Super. Feb. 23, 2007) (collecting and analyzing appellate court cases “recognizing the distinction between a court’s personal jurisdiction over parties and its subpoena power over non-parties”).

9. At least one Pennsylvania trial court has considered this issue and has concluded, like the courts cited above, that a state court’s personal jurisdiction over non-resident defendants doing business in the state does not carry over to the court’s subpoena power over non-resident

witnesses. Simon v. Simon, 6 Pa. D. & C.3d 196, 197, 199-200 (C.C.P. Phila. Cty. 1977) (Takiff, J.).

10. Plaintiff is well aware of, but seeks to circumvent, the appropriate “commission” procedure to be followed in these circumstances, 42 Pa. C.S.A. § 5325, having already used that procedure in this case to seek discovery from TDCC on topics closely related to those sought here.

11. Plaintiff previously petitioned this Court for a commission for the issuance of a subpoena by a Michigan court to take the deposition of the records custodian of TDCC in Michigan in this case. The Petition for Issuance of Subpoena is attached hereto as Exhibit 2 to Metcalf Affidavit. In the Petition, plaintiff acknowledged that “[t]he witness, the Records Custodian of Dow Chemical, is beyond the subpoena powers of this court,” and that “in order to effectuate the deposition . . . and to secure the testimony of the Records Custodian . . . a commission should be issued” to an individual “authorized to administer oaths in the State of Michigan.” Id. ¶¶ 5, 8. On August 13, 2008, this Court issued an Order directing the Prothonotary to issue a Commission to the appropriate judicial authority in Michigan. A copy of the 8/13/08 Order is attached hereto as Exhibit 3 to Metcalf Affidavit. On September 5, 2008, the Michigan Circuit Court for Midland County issued the requested subpoena (copy attached hereto as Exhibit 4 to Metcalf Affidavit).

12. Although plaintiff’s counsel has previously demonstrated his understanding of the proper procedure for seeking discovery from TDCC, a non-party foreign corporation headquartered in Michigan, in this instance plaintiff has disregarded that process. Instead, plaintiff now purports to issue a subpoena upon TDCC directly from this Court, although

Pennsylvania courts do not have the power to compel a non-resident corporation to produce a witness to give in-state testimony in a case in which the corporation is not a party defendant.

13. Further, plaintiff's subpoena purports to compel TDCC to designate a corporate witness to appear for a "video trial deposition." See Letter from A. Freiwald, Esq. to H. Klein, Esq., dated 2/12/10, attached hereto as Exhibit B.

14. There is no provision in the Pennsylvania Rules of Civil Procedure for a "video trial deposition." Videotaped depositions are permitted to be taken during discovery. Pa. R.C.P. 4017.1. This is not a case where a previously-deposed witness is unavailable for trial and videotaped testimony is sought in order to streamline the trial testimony. While videotaped depositions taken during discovery may be used at trial under certain limited circumstances, those are not present here. Pa. R.C.P. 4020(3)(a-e). Plaintiff clearly seeks a discovery deposition of a non-party and, absent agreement, plaintiff is not permitted to take a video or any deposition outside the discovery period.

15. Second: the subpoena is an impermissible attempt to end run around the rulings of the Michigan courts. As noted, plaintiff requested and received a commission from this Court for a subpoena in Michigan, which the Michigan court issued. See Exhs. 2-4. The Michigan subpoena demanded that the witness bring to the deposition ten categories of documents, including documents regarding research conducted by TDCC or in which TDCC participated regarding the alleged carcinogenicity of vinyl chloride.

16. TDCC moved to quash the subpoena, and plaintiff's counsel opposed that motion in briefing and in oral argument in Michigan court on September 26, 2008. After extensive argument the court ruled from the bench, quashing the subpoena with the exception of one category of documents not at issue here. See Hearing Transcript ("9/26/08 Hearing Tr."),

attached hereto as Exhibit 5 to Metcalf Affidavit, at 48-51. The court found that the requests were tantamount to seeking expert testimony from TDCC. Id. at 49:14-50: 7. The court expressly noted the substantial burden inherent in requiring TDCC, as a non-party, to produce voluminous historical documents concerning many decades of TDCC's research activities regarding vinyl chloride. Id. at 37:18-19; 39:10-13; 42:6-13; 50:9-20.

17. On October 7, 2008, the court issued a formal order memorializing its bench ruling. A copy of the 10/7/08 order is attached hereto as Exhibit 6 to Metcalf Affidavit. Plaintiff challenged this order before the Michigan Court of Appeals. On March 16, 2010, the Michigan Court of Appeals issued an opinion affirming the Circuit Court's order agreeing, inter alia, that plaintiff's subpoena seeking "information relating to cancer risks in general" was an impermissible attempt to obtain expert testimony from TDCC in a case in which TDCC is not a party. The Michigan Court of Appeals' Opinion is attached hereto as Exhibit 7 to Metcalf Affidavit.

18. Notwithstanding these Michigan proceedings, on March 3, 2010, plaintiff served on TDCC's statutory agent in Pennsylvania a "trial deposition" subpoena purporting to compel TDCC to produce in Philadelphia a witness to give a videotaped deposition on subjects which track, and even duplicate, the subjects listed in the earlier, quashed Michigan subpoena. (Compare for example, paragraphs 6-10 in the Michigan subpoena (Exh. 4) with paragraphs 1-7 in the subpoena at issue here (Exh. 1).

19. Although the Michigan courts have already held that it would be inappropriately burdensome to require a non-party such as TDCC to identify, assemble, and produce voluminous documentation of TDCC's contributions to vinyl chloride research spanning several decades, plaintiff's present request goes even further. Now, plaintiff demands that TDCC designate and

prepare a representative deponent to provide extensive and detailed “trial” testimony on the very same topics addressed by the prior subpoena – testimony which could only be accomplished based on a comprehensive understanding of those same documents which the Michigan courts ruled plaintiff may not obtain from TDCC. The current subpoena is simply a renewed attempt by plaintiff to secure the same information she has been denied by the Michigan courts. For this additional reason the subpoena is improper and should be quashed.

20. Third: the subpoena impermissibly seeks expert testimony and imposes an unreasonable investigatory burden on TDCC as a non-party foreign corporation. Even a cursory review of the seven areas of inquiry (“AOI”) in the current subpoena reveals that they are not limited to matters of fact or to lay knowledge, but rather are addressed to matters of epidemiology, cancer research and science and would necessarily require TDCC to designate a person with the requisite scientific training to give testimony regarding these matters. Those areas are as follows:

- Epidemiology studies of TDCC’s Freeport, Texas and UCC’s Texas City, Texas plants and “whether brain cancer cases identified among workers at [those] facilit[ies] were ever included in Dr. Mundt’s industry-wide cohort analysis published in 2000. These epidemiology studies include, but may not be limited to” the “Dow-commissioned studies published in March 1979 and in 1994” (attached to the subpoena) and “the 1983 Austin study and the 1994 Mundt study.” (AOI Nos. 1 and 4) (emphasis added).
- Communications between TDCC and UCC on the one-hand, and the Chemical Manufacturer’s Association (CMA) on the other hand, during the 1970s, 1980s and 1990s “regarding brain cancer cases among vinyl chloride workers” at the TDCC’s Freeport and UCC’s Texas City facilities. (AOI Nos. 2 and 5).
- Communications between TDCC and UCC on the one hand, and Dr. Ken Mundt on the other hand, “regarding cases of brain cancer” at the Freeport and Texas City facilities. (AOI Nos. 3 and 6).
- “Dr. Torkelson’s involvement as chairman of the CMA’s Vinyl Chloride Research Committee and commissioning of epidemiology research into brain cancers among vinyl chloride workers.” (AOI No. 7).

21. These topics – scientific research into carcinogenicity – are, as found by the Michigan courts, inherently expert in nature. See Exhibit 7 at 5 (“[P]laintiff contends she is not seeking to conscript Dow as her expert, but instead merely seeks studies Dow may have conducted about the toxicity of vinyl chloride. We find that to be a distinction without a difference.”).

22. Plaintiff’s attempt to require a non-party foreign corporation to designate and prepare a person to give testimony regarding matters of science, expertise and opinion is equally impermissible under Pennsylvania law. Pennsylvania precedent clearly stands for the proposition that a witness may not be compelled to give expert testimony, particularly as a non-party. See Dolan v. Fissell, 973 A.2d 1009, 1013 (Pa. Super. 2009) (“The idea that an expert cannot be compelled to give up the product of his or her brain has been sustained throughout the years, in a variety of circumstances”); Jastarri v. Nappi, 549 A.2d 210, 218 (Pa. Super. 1988) (same); Graham v. I.M.O Industries Inc., 16 Pa. D. & C.4th 492, 503 (C.C.P. Allegn. Cty. 1992) (Wettick, J.) (witness “should not be compelled to provide expert testimony under the policy that protects persons from giving expert testimony in private litigation when they had no involvement in the matter”).

23. As stated in the supporting Metcalf Affidavit, there are no current TDCC employees who have knowledge of all of the epidemiology studies referenced in the subpoena, which were conducted over a nearly 30-year period beginning in the early 1970s, or Dr. Torkelson’s involvement with the CMA Vinyl Chloride Health Committee, which spanned 20 years or more during the same period. Metcalf Aff. ¶ 6. TDCC would necessarily be required to designate an expert familiar with these scientific specialities to undertake to review documents

and attempt to reconstruct the history of TDCC's and UCC's involvement in those matters over that long time span. Id. ¶¶ 6-9.

24. Based on the foregoing, the subpoena is at bottom an improper demand that TDCC designee give expert testimony, and it should be stricken on that basis alone.

25. The subpoena is unduly burdensome because it requests TDCC to designate a person to give broad and unrestricted testimony about the referenced epidemiology studies and communications with the Chemical Manufacturer's Association and Dr. Mundt during a 30-plus-year time span from the 1970s through at least the year 2000. Dr. Torkelson, the person identified in the subpoena, died in 1999. Metcalf Aff. ¶ 7.

26. Any designee, therefore, will necessarily be required to base his or her testimony on a review of the referenced studies and voluminous, unspecified records concerning research and communications spanning that time period. Id. ¶¶ 7-10. Moreover, the areas of inquiry are not limited to specific factual matters but, rather, would require the witness to be sufficiently familiar with the studies and communications to answer virtually all manner of questions about those subjects. As such, the subpoena is so vague and ambiguous as to unfairly place on TDCC and its designees the unreasonable burden of first speculating regarding the intent and breadth of the inquiry and then undertaking to review voluminous records to prepare for oral examination on those topics.

27. This endeavor will take many hours over weeks if not months to enable a witness (or witnesses) to sufficiently comprehend the material to testify on behalf of TDCC, and would require any designee to divert attention from his or her normal duties and focus virtually exclusively on preparing to testify on behalf of TDCC. Metcalf Aff. ¶ 10. In effect, plaintiff

seeks to shift the substantial time and expense necessary to prepare and provide expert testimony on this topic from plaintiff to a non-party, TDCC. Id. ¶ 11.

28. Placing such an unreasonable investigatory burden on a non-party would be unduly oppressive, expensive and unprecedented, and as such the subpoena should also be stricken as unduly burdensome. See E. J. McAleer & Co. v. Iceland Products, Inc., 62 Pa. D. & C.2d 65, 71 (C.C.P. Cumberland Cty. 1973) (“Defendants’ request is so broad as to include practically all of plaintiff’s records for a seven-year period. Although defendants are entitled to any reasonable and relevant discovery in preparing their case, they are not entitled to indiscriminately sift through seven years of records in the remote hope of finding a jewel buried somewhere in the midst.”); Stahl v. First Pa. Banking & Trust Co., 411 Pa. 121, 127, 191 A.2d 386, 390 (Pa. 1963) (“the law is clear that a corporation cannot be subjected to an unreasonable investigation”).

29. Fourth: the subpoena arguably seeks disclosure of confidential employee records and health information. In mortality epidemiological studies such as those referenced in the subpoena, it is the researcher, not the study participants (i.e., the participating companies) who determine the cause of death. The study participants provide the researcher with vital status information about the identity of workers meeting the cohort inclusion definition (i.e., name, social security number, job title or position). The researcher uses that information to obtain death certificates and other health-related information from various federal and state governmental sources in order to correlate specific workers with particular diseases, in effect determining the so-called observed cases, and to obtain the relevant comparative statistics for those diseases in the reference population to develop the number of expected cases.

