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Allied Chemical, the Kepone Incident, and the Settlements: Twenty Years Later

Authors

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PANEL DISCUSSIONS

ALLIED CHEMICAL, THE KEPONE INCIDENT, AND THE SETTLEMENTS: TWENTY YEARS LATER*

Panel Participants: The Honorable Robert R. Merhige, Jr.; Manning Gasch, Jr.; William B. Cummings; Robert H. Sand; Robert B. Smith, III

*Moderator: Professor W. Wade Berryhill***

* Marc Caden and Sandra Jackson assisted in the editing of these remarks for publication.

** The Honorable Robert R. Merhige, Jr. is a Senior United States District Judge of the Eastern District of Virginia. After a successful law practice in Richmond of 25 years, he was appointed to the federal bench in 1967. He has had a long and distinguished record of service to the bar and the Richmond community. He is very active as an author, teacher and lecturer. Last year he completed a special assignment to Zambia where he assisted the government in creating an independent and autonomous judiciary system. Judge Merhige has received numerous awards and honors.

Manning Gasch, Jr. is a Partner at Hunton & Williams, Richmond, Virginia. Mr. Gasch is a member of the firm's Environmental Team where he specializes in environmental disaster cases. His specific areas of expertise include risk assessment methodology and development of water quality standards for toxics and national resource damages. Mr. Gasch represented Allied Chemical in the civil suits involving Kepone. He is also an active lecturer and author, a member of the Nature Conservancy, and an accomplished fly fisherman.

As the U.S. Attorney from 1975 to 1979, William B. Cummings was charged with the prosecution of the Kepone cases. Admitted to the Virginia Bar in 1964, he has been in private practice since 1979. He specializes in criminal law, civil litigation, business crime law and personal injury law. He is very active as a lecturer and has served as an adjunct professor of law.

Robert H. Sand is Assistant General Counsel of AlliedSignal Corporation. He is responsible for the day-to-day direction of the various lawsuits arising out of the Kepone incident. He is an active author and lecturer publishing numerous articles on safety and health law and has lectured at several law schools. Prior to joining AlliedSignal, he practiced with the New York law firm of Kayes, Scholer, Fiermn, Hays & Handler. He served as corporate counsel for Allied Chemical during the

Professor Berryhill: Twenty years ago this July the happenings at a small chemical plant in Hopewell, Virginia ushered in what has since become an incident of national impact and importance. Through the prosecution of criminal cases, the filing of civil personal injury suits and the closing of the James River to fishing, the release of the chemical from the Kepone manufacturing process gained national attention.

The purpose of this afternoon's panel was to revisit the issues with the hindsight of twenty years.

Each of the members of this panel played a very significant role in the resolution of the Kepone incident. The panel not only provides unique benefit of the reflections of the Judge charged with the responsibility of supervising the numerous cases spawned by the incident, but also the plaintiffs' counsel for injured persons, corporate defense counsel, counsel for the defense of civil suits and the U.S. Attorney charged with the prosecution of the criminal cases.

Judge Merhige: There was a little something special about Kepone, I must admit. I have forgotten a great deal of it for reasons which should be fairly obvious. It was many, many years ago.

Well, let me tell you a little bit about Kepone. Bill Cummings may be able to correct me on some of the details, and if he can't, I'm sure Bob Sand can. Prior to August 19th, 1976 there had been an arraignment or a charge against Allied and a couple of individuals for having permitted refuse into navigable waters. There were, as I recall, 941 counts, the last count being a conspiracy count. In the meantime, or about the same time, we had about fifteen civil suits going. That was really an exercise in motion practice. It was really great for my law clerks because everybody had all kinds of motions.

Kepone litigation. Mr. Sand is a graduate of Harvard College and Harvard Law School.

Robert B. Smith III has practiced law in the Richmond area since being admitted to the bar in 1968. He served as plaintiff's attorney in several Kepone-related suits. Mr. Smith is a graduate of the University of North Carolina and the University of Virginia Law School.

W. Wade Berryhill is a Professor of Law at the T.C. Williams School of Law, University of Richmond.

I recall one day a lawyer representing a group of allegedly injured parties from the Kepone, the people who had worked around Kepone for a company called Life Science.

The men who organized Life Science had worked for Allied and then moved over. Their sole customer was Allied but they owned this business, Life Science, and were making this Kepone. It was their workers who allegedly were terribly injured.

In any event, we had these suits including one or two class actions. One class action I dismissed for failure to prosecute. Finally, we were going to trial on a civil case. It might have been after the criminal conviction, which I'll get back to in just a few minutes. All these media people were subpoenaed to court because they wanted a change of venue and they raised the devil about having to come to court. Media sometimes think they're above that sort of thing, but they did come. They wanted to know who was going to pay them and kind of silly things. I denied the motion for a change of venue, but I said I would reconsider it if something new came up.

We were examining the jury for the first big civil case and I asked the panel of about forty or fifty if they had any knowledge of the Kepone matter, had they ever read anything about it, discussed it, anything, ever heard about it. Nobody said a word. I mean, it was deadly silent. I couldn't believe it. I mean, that thing was in the papers, TV and everything else. I said, perhaps you misunderstood my question; let me rephrase it. I asked the same question that I had just asked. I said, are you sure you haven't read anything about it? Finally, one man jumped up. Before I could stop him, he said, "I did and I think what Allied did was absolutely disgraceful," which, of course, poisoned my whole panel. So I called counsel to the bench. I said, "We're going to Elkins." One of them said, "Where is Elkins?" I said, "That's why we're going there."

Somehow that case disappeared. It got settled as ninety-two percent of the cases that come before the court do.

In any event, we went on to the criminal trial. Bill Cummings would get up every morning, I'm told, at 5:30 and stretch his muscles and lift weights and do all kinds of terrible things that he was going to do to Allied, and Allied fooled him

by pleading *nolo contendere*. They had fine lawyers: Joe Spivey with Hunton & Williams was one, and Murray Janus, who had been in the firm I had left some years before that, was the other and they plead *nolo contendere*. The government, as was their practice, objected to that. It was policy, which I think they still have incidentally, to fight the acceptance of a *nolo* plea, but I saw no valid reason for not taking it.

I explained to the people (who didn't need explanation) it was a corporation that we had and that it was tantamount to a guilty plea. In any event, they were found guilty of 940 counts. Then I got a presentence report, as I was supposed to do. It turned out that Allied, and I said this from the bench, had been a pretty good corporate citizen in Virginia. They had done a lot of good. They were not bad people, but there were a couple of people there who took short cuts and were throwing all this dirt like they owned the James River and they poisoned it. At the same time the state had some kind of a claim against them.

While I was waiting for the presentence report, other suits were developing, about fifteen or sixteen of them. We thought the original group of people who had been allegedly injured were horribly injured. There were reports that their reproductive capacity had gone. In any event, the case was settled well before we realized or got the reports from the doctors that the injuries were nowhere near as bad as we had first anticipated, thank God. That was one of the happy things.

The two men that ran the Life Science, as I recall, were sentenced to serve some time, and fined very substantially. The fine against Allied was something like \$13,400,000. For the first four hundred and some counts it was \$2,500, which was the maximum, and for the last 450 counts, it was \$25,000 which was also the maximum. This was despite the fact that I had a good presentence report. I might add that the one who got away easy was the City of Hopewell, who were a party to the whole thing. They slipped in right quick and pled quickly and I put them on probation. Everybody thought that was kind of a strange thing to put a city on probation, but I did. I guarantee you, I intended to do something about it if they had violated the probation, but be that as it may, that never came to pass.

Then, of course, came the usual motion to reduce the fine. Somebody told me it was the largest fine that had been imposed up until that time for this sort of thing.

I also had suits by fishermen, people who earn their living by fishing, and they could no longer do that because of the poisoned waters. I was being told at these conferences that they were losing their homes, mortgages and all that sort of thing. That was really the beginning of the idea of doing something with this money. I cannot stand here and tell you for sure that it all just popped out of my head. It might have been Joe Spivey or somebody else; I don't know. But I did say from the bench, it's a shame that all this money is going to go up to Washington and the people who have been hurt the most are not going to receive the benefit of it. I wish there was some way that we could help the people of Virginia who were the ones that had been hurt.

My idea at that time was maybe low interest loans to these people because I was under the impression that people were losing their properties and all that sort of thing. That didn't happen because some of those cases got settled for fairly substantial sums and they had the monies, I guess, to take care of that.

We came up with this idea of a trust for the benefit of the environment in Virginia. That was the theory of it. We honestly made no cold turkey deal. I suggested that I would certainly take it into consideration, and I'm not known to double bank anybody. They knew I would take it into consideration if anything was done.

Allied's lawyers came and said, we will set up a trust for eight million dollars and we want you to take a look at it first. I looked at it but I said, no, I've got to have a trustee that I'm sure of because the state had come into it and said, give us the money. I knew that they had a lawsuit against Allied and I didn't think it ought to be paid off out of this criminal fine so I said I wouldn't do that. In any event, we finally worked out a system.

Mr. Cummings complained about it, as he was supposed to as I'm sure his people in Washington told him to. He always did his job, I thought, exceptionally well. He was one of the

best U.S. Attorneys that we've had during my tenure, and I've been at it almost twenty-eight years.

In any event, I asked Mr. Cummings if he would get on the board because under the trust the Senior Judge in the Richmond Division appoints the board of trustees. I asked Mr. Cummings to get on because I knew he was thoroughly familiar with the case, and I didn't want any of the funds used to help Allied buy off their civil liabilities. He accepted. As I recall, I appointed Judge Henry McKenzie, who was an avid sportsman and very much interested in our environment; Admiral Ross P. Bullard, who was the Coast Guard Admiral in charge of the navigable waters around the Chesapeake Bay and the James River, so he was thoroughly familiar. Then I was fortunate enough to get Sydney and Frances Lewis, whose name may be familiar to you, who knew how to spend money from what I read in the paper. Then finally a banker. I thought we needed a banker. George Yowell accepted it. They were a great board.

I remember their first meeting, they brought brown-bagged sandwiches. They wouldn't spend a dime of the money. I really had to fuss with them. I said, this is ridiculous; you're not getting paid. It's silly to bring your own lunch and buy your own dinner. You ought to have a dinner at least once a year. I think I finally talked them into that and they now do it.

The board has changed since. Bill just got off voluntarily. He was president for all these years and just recently got off, much to my regret. We now have Mrs. Baliles, Jerry Baliles' wife; we have Mrs. Holton, Governor Holton's wife; we have Mrs. Kluge; we have Paul Elbling, who is a naturalized citizen very much interested in the environment; Byron Yost, a banker. He took George Yowell's place. They've done a tremendous job.

In any event, that's what I know about the Kepone. It worked out. We've had various people on the board. We've had Tom Wolfe, the author, who made great contributions. We've had Cathy Douglas, Justice Douglas' wife, and a number of other people. The smartest thing the board ever did was the appointment of Jerry McCarthy, who is here with us today, as the executive director, and he has done a tremendous job. We started, I think, with the eight million dollars they have spent

well over thirteen million dollars and still have sixteen million dollars. Thank you.

Mr. Gasch: One of the things you think about when you see this group reassembled is the kind of relationships that were formed during what was really a very intense period of everybody's life.

I look down the table here, and I see Bob Sand, who I first met during the Kepone incident. Robert is with what was then Allied Chemical, now AlliedSignal. He's been one of my closest friends throughout that period since then.

I see Judge Merhige. Judge Merhige I met the first time during that period. Judge Merhige has remained a close friend throughout the whole period. In fact, I am fond of hearing him say at social occasions he and I are on a first name basis. He calls me Chip and I call him Judge Merhige. Some lessons are hard to forget.

What I would like to do for you is just sketch out a little bit of a general overview of Kepone, the incident, what happened, what was behind it, the litigation and so on. I think that may provide a basis for our discussion a little bit later on. My view on this might have been a little bit different than Judge Merhige's in terms of perspective. I think I was about a third or fourth year associate when I was involved in this process instead of a Federal District Judge. I saw things a little bit differently.

Kepone, as a substance, is one of a class of substances called a chlorinated hydrocarbon. For those of you who know a little bit about science, that's a bad actor. It's a DDT and so on. It was first synthesized in the 1940s. It was patented by Allied Chemical as, I think, Compound 1189 if I recall, in the '50s or '60s.

It's an active ingredient, or was at the time, in such things as roach bait. It was used for terminating the existence of evil critters like banana root borers and Colorado potato beetles and things like that. That was its commercial use. It was first produced by Deas Chemical. It was then produced by Hooker Chemical.

From 1966 until 1974, Allied Chemical manufactured Kepone in something called the Semi-Works in Hopewell, Virginia. It was a small pilot plant. Just to give you some idea what kind of an operation this was, the entire discharge, I computed once during the litigation, from that facility could have been carried in a garden hose.

From 1974 until July of '75, Life Science Products manufactured Kepone in what was called a toll processing arrangement with Allied. That meant Allied bought the raw ingredients, had them shipped to Life Science Products and then Life Science Products formulated the Kepone and Allied bought the Kepone from Life Science Products.

In the spring of 1975 there started being employee problems at Life Science Products. People started getting sick and the state health folks got involved.

The discharge was through the municipal system to the City of Hopewell. The Kepone discharges from Life Science killed all the bugs in the Hopewell treatment plant and that thing went down. That sort of blew the whistle on what was going on as far as the problems with the waste water discharges. The Virginia Department of Health closed the plant in July of '75, and the James River essentially was closed shortly after that.

Now, what you have got here is a very interesting period of regulatory transition. That's why it's interesting academically. In the 1940s and the 1950s, you're coming through an era of the miracle chemicals. I remember seeing advertisements on television when I was growing up, movies about the wonders of these modern chemicals that scientists had discovered and how they were going to make this a better world because you could deal with all these pests. People in underdeveloped countries who weren't able to raise crops and support themselves would now be able to. There was great enthusiasm for this kind of development. Coming in on the later end of this, in about the 1960s, you began to see a kind of a countervailing force develop which was the awareness of people of the dangers of these chemicals.

You began to see publications like *Silent Spring* by Rachel Carson, things like that. That's the first thing that really triggered that kind of thinking in my mind.

So here are those two forces really on sort of a collision course. That's basically what you were dealing with here.

Pre-1970, in terms of regulation what you had was the Pesticide Act, the Federal Insecticide, Fungicide, Rodenticide Act, which required registration and labeling. That was one requirement on the use of Kepone. You had the FDA which regulated tolerance levels in residuals in the food crops that were treated with Kepone. In Virginia, you had a very imperfect law, the State Water Control Law, which basically sought to establish limitations on discharges to streams by dictating what water quality standards must be. That was a system that never worked terribly well. So that's coming into 1970.

Coming into 1970 you also had some interesting developments at the federal level. You had, for instance, the Standard Oil case decided by the Supreme Court in 1966.¹ The Supreme Court decided to get activists in the water discharge field, and I think they probably did it advisedly knowing that no one else was doing it. They decided a case which essentially went back to an old act, the Rivers and Harbors Act of 1899 and said that even if the discharges from a commercial facility do not impede navigation, those discharges are in violation of the prohibition against the release of materials into a navigable water body.

That, of course, predictably sent industry into kind of a tail-spin because that meant that essentially every discharging industry in the United States was operating illegally and subject to being shutdown. All of those folks went and talked to President Nixon, and President Nixon predictably went to the Corps of Engineers, which was a fairly well-controlled docile unit, and said, "We've got to do something to neutralize this terrible threat to American industry. Will you get together a permit program?" So they developed something called the Refuse Act Permit Program. They were in the business of trying to issue permits and take applications and things like that. They were never very good at it, really.

This is all during the time that Kepone is taking place.

1. United States v. Standard Oil, 384 U.S. 224 (1966).

Then Congress gets into the act, being embarrassed into it probably by the Supreme Court. In about 1972, they enact the Federal Water Pollution Control Act Amendments, an incredibly complex piece of legislation, which essentially continues today as the Clean Water Act. This established this very delicate regulatory scheme for regulating discharges to water, and they put it under EPA. They didn't put it under the Corps of Engineers. That's the period during which this great period of change, both in attitude and legal requirements, was going on.

Let me just give you an overview to kind of give you a notion of where the forest is and what was going on in terms of litigation. This is a defense lawyer's perspective. It's probably more a defense lawyer's nightmare.

There were three separate criminal proceedings. The first was United States versus Allied Chemical Corporation and certain named Allied employees. There were 940 counts of discharging, in violation of both the Refuse Act and the Clean Water Act.

As Judge Merhige mentioned, the 941st count was on conspiracy. To counts 1 through 940, as Judge Merhige mentioned, Allied pleaded *nolo*. They were fined \$13.24 million. Count 941 on conspiracy was dismissed.

The second prosecution, United States versus Life Science Products included Life Science officers of Allied Chemical and the City of Hopewell. That was for unlawful discharge of Kepone between '74 and '75, basically the period during which Life Science Products was operating. Allied was included as an aider and abettor. Allied was ultimately acquitted. Hopewell was fined \$10,000, I believe. Life Science was fined three million dollars and the Life Science officers were fined \$25,000 each.

A third criminal prosecution, United States versus Life Science, Allied and Life Science officers, was conspiracy. Allied was acquitted. Life Science was fined \$10,000.

On the civil side, there were two suits by the watermen and fishermen. The first was Adams versus Life Science, Allied, etc. That was on behalf of named individual watermen plaintiffs claiming \$20 million damages by people who fished in the James River and related industries. That case was settled.

*Pruitt*² was the class action that survived. There were potential treble damages in that which made it worth as much as 25 billion dollars, and that was adequate to get Mr. Sand's attention at the time. It alleged injury to the seafood industry. It was also settled.

On the personal injury side, the case that Mr. Smith was involved in, Gilbert versus Allied, Hooker, Life Science, one Life Science officer,³ alleged harm to Life Science employees. Damages, I think, ranging up to, depending on how you counted it, about \$108 million. That also was settled.

Collins versus Allied and Hooker alleged harm to Life Science employees in addition to the *Gilbert* case. Damages claimed in that, \$54.7 million. That was settled.

There was one property damage suit brought by the Reverend Curtis Harris in Hopewell. He contented that the value of his home was diminished in the sum of \$100,000. That was settled.

The Commonwealth of Virginia, sued Allied, Life Science and Life Science officers for civil penalties for Life Science's unlawful discharge of Kepone alleging that Life Science and the officers and Allied were owners under the terminology of the state water control law at the time. That case was also settled.

That kind of gives you an idea of what we were looking at and why at the time there was a great deal of angst and nervousness and a lot of meetings and a lot of phone calls and a lot of relationships and friendships developed that have endured until this day. Thank you.

Mr. Cummings: It's a pleasure to be with you all here this afternoon, ladies and gentlemen, to talk about the Chesapeake Bay. I had the distinct pleasure this past June of swimming across the Bay with 600 other crazy people up there in Annapolis. That was an interesting experience and delight to be able to do that despite the fact that twenty years ago we thought the Bay had been doomed by Kepone.

2. *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975 (E.D. Va. 1981).

3. *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505 (E.D. Va. 1976).

This is what Kepone looks like anatomically. It's the little red thing at the top that made it such a bad actor. That's the carbon molecule as I understand it, I'm not a chemist, with a double binding. I'm told that's what causes its extraordinarily long life expectancy something like hundreds of years of life. It just never, never breaks down. That was the real problem with Kepone: unlike so many other things, it just would not go away. The problem we had is that once it got into an animal or fish it would just stay in the fatty tissue and it just kept reprocessing. It would never flush out.

The Bluefish was the worst offender because it was the last of the chain of fish that most of our population would eat, and the Bluefish ate all the other little fishes that had been eating Kepone. So the concentration of Kepone by the time it got into the Bluefish was apparently just extraordinary which caused some of the real scares.

This is an interesting historical perspective as we look back. Twenty years ago this month is when I was sworn in as United States Attorney and had no idea I'd be confronted with an incident or disaster such as Kepone. That sort of came to light, as you heard, in the summer of 1975. We saw it in the newspapers but had not had any referral of the matter to us for criminal investigation or prosecution.

It was not until about a year later when EPA made a referral of the case to our office. In a very unusual act, they made a referral directly to the United States Attorney's Office for our district as opposed to referring the case to the Justice Department which was our normal practice in criminal prosecutions. I think they were just so concerned, they wanted to get something going, and they went directly to us.

We assembled a team of prosecutors to work on the case because of having seen what the papers had generated about the incident and the disaster with the employees at Life Science so we knew it was a big matter. I assigned a fellow from Alexandria because they didn't have anybody in the Richmond office that had enough experience that I felt could handle such a large case. So I got an assistant from Alexandria and one from Richmond, Bob Jasmine, who now has been in the office over twenty-two years.

Together, we assembled a grand jury, some grand jury subpoenas and subpoenaed Allied's documents and the Life Science documents and had to get two rooms in the federal building. We didn't have space for the volume of materials that were brought over by the truckloads from Allied Chemical in response to the subpoena.

So we poured over the documents for several weeks and saw the Kepone discharge. It's interesting to note that the 940 counts that eventually became the backbone of the Kepone indictment and the backbone of the thirteen and a quarter million dollar fine Judge Merhige imposed were for discharges of a chemical compound other than Kepone.

At this Semi-Works Plant facility that Chip Gasch mentioned, the main product that they were making there were Theic and Taic, two compounds that were used for coating of electrical wires.

The discharge of actual Kepone from there and from these other products was relatively small, but it had been going on for years. At the conclusion of each day's operation, as we understood the situation, they would flush out the equipment. It would be the discharge of that cleaning out of the pipes that caused the discharge of the toxic chemicals into the small subsidiary of the James River. The large number of those counts, the bulk of them, were not Kepone.

The indictment was returned on May 7, 1976. As I recall, they were sentenced on October 7 of that year. We put on a whole day presentation to Judge Merhige to show the impact, the total impact, that we thought that the Kepone and other toxic discharges that had occurred. We found that the state had been freezing fish. From time to time they would go out there and catch a few fish and put them in a deep freeze. They had been doing this for years and years, and they still do it today to see if sometime they might want to go back and check for a compound. Apparently, in order to detect a chemical compound in something like a fish, they use gas chromatography, and it is very helpful to know what particular chemical compound you're going to look for. It really saves a lot of money and speeds up the process.

They pulled out some fish from 1968, 1969, and 1970, once they knew about the Kepone discharges. Low and behold, in the Chesapeake and James River, they detected, now that they knew what to look for, Kepone contamination. Based upon his vocal comments at the time, this seemed to get Judge Merhige. He himself had been, I guess, a consumer of Bluefish. I think he swore never to eat Bluefish again, as I recall him saying, because of what he detected to be the horrible consequence because the Kepone builds up so much in the Bluefish. That was quite a revelation to all of us.

Of course, what got everybody exercised about Kepone was what happened at Life Science. The people at Life Science, Virgil Hundtofte, who had been plant manager at Allied and William Moore, who had been the director of research for the division at Allied that made Kepone, really knew better as to how to run a plant. Allied, apparently, had given them quite an extensive book about Kepone that explained how to make it and what safety precautions to take and so forth, and that it was a toxic chemical. In that book were studies showing that Kepone had been detected to be a carcinogenic in rats and so forth. So they had all the information necessary to be careful, and yet Kepone was found by the regulators lying around in the facility.

They had a small gas station; you know, about the size of gas stations twenty years ago. That was the office. They had these tanks and vats out back that they pumped the stuff through and eventually made the product. They had Kepone that would be on the tables or the desk about four or five inches high. It was on the floor.

The workers would come into the office to eat lunch and they would be sitting at the table and have their sandwich laying on the same table with Kepone that thick. What really caused the problem was that they occasionally would have a bad batch of Kepone at Life Science and they just took the hose from the batch and put it right into the sanitary sewer there and pulled the plug and thousands and thousands of pounds of Kepone would hit the system at one time. As Chip mentioned, it sort of destroyed the treatment plant. It killed it. It was that kind of a shock effect that caused people to sit up and realize that something may be going on over at this facility.

A young doctor, whose name I don't recall, was the one who sent a blood sample from an injured or an affected worker that he couldn't quite figure out what was going on. He was displaying some of the symptoms you've heard about, dizziness and shaky hands and so forth. People looked like they had small seizures and they couldn't explain it.

He sent the blood sample down to the Center for Disease Control in Atlanta and got the first confirmation that this person was suffering from Kepone poisoning which prompted Dr. Jackson to come in and shut the plant down. That was in July of '75.

Fortunately, I suppose, we did have a shock effect from it. It's kind of like we were talking about this morning, do you have to wait for another Kepone before the regulators will realize that something like this is going on? We were frustrated that Life Science, the one who had caused the damage in the great magnitude, was a defunct company by that time. It was shutdown. It was bankrupt. They had only the single product that they were working on. We were trying to find deeper pockets to try and make more of an impact, and so we went looking for Allied Chemical.

As we went through the grand jury documents, we discovered an internal memo authored by Mr. Hundtofte, that really got us upset, because he recognized in this memo that the Corps of Engineers' regulations required them to report any discharge of a toxic substance. It turned out that Mr. Hundtofte decided that, "Gosh, if I report that substance, I'm liable then to have to build some kind of screening process to pretreat this stuff and that's going to cost a lot of money and I'm on the career ladder of success here at Allied and that's not going to look good on my resume that I released this information that caused a three-quarters of a million dollar pretreatment facility. In about another year or so, Hopewell is going to build a regional waste water treatment plant, and if we just sort of keep quiet and so forth nobody will know about it, and we'll just be able to get by," and they did. Nobody did know about it.

There were memos back and forth saying, "Well, the thing to do is to do nothing." They wrote this in a memo. The way to respond to the regulations is to do nothing. So we thought we

had the smoking gun. We called it "the do nothing memo." We indicted the people who were in the meeting where that memo was discussed, circulated and the by-product of the meeting. There were four of them altogether, as I recall, and two of them pled guilty. Two of them went to trial.

Those two were acquitted. We felt badly that two had pled guilty and two were acquitted with a trial. So the Justice Department authorized us, in an unusual situation I think, to dismiss the counts against the two who had not yet been sentenced but had pled guilty. None of them ended up with convictions.

Hundtofte and Moore were convicted. Hundtofte pled guilty. Moore went to trial. They were fined, as I recall, \$25,000. I don't think there was any jail term for either one of them.

It was a major event when Judge Merhige announced the fine would be the maximum allowed on all the 940 counts that Allied had pled *nolo contendere*. It was a shock, I think, to everybody and brought a real awareness, because we saw magazine articles in business magazines thereafter that other companies were now finally taking notice. They were saying people can get in trouble if you don't pay attention to the regulations. That's the message he wanted to go out and I think it did go out.

As he mentioned, Judge Merhige did make it known that he was quite upset that all this money would go to the federal treasury. That's where the federal fines go. In fact, as I recall, he even wrote to the Judicial Center on his own to see if there was any way that a fine, once deposited to the treasury, could come back and be used somewhere else and he was told "No. If the money comes in, it doesn't go out." He didn't require Allied to pay the fine right away. He had the option of doing that.

At that time the Federal Rules of Criminal Procedure allowed a defendant who had been sentenced to file a motion any time within four months subsequent to the sentence to have the sentence amended, usually to be reduced. Only the government can file such a motion now. At that time that procedure was available, and I think the comments of the Judge were quite clear to Allied's counsel. If there is any way we can gain something from this from a public relations standpoint or help the

State of Virginia, we may get some benefit from it. So they set about developing plans for the environmental trust which was named The Virginia Environmental Endowment and came back three or four months later, the actual day was February 1, 1977, and announced that they had formed the endowment. They came in with a check for eight million dollars payable to The Virginia Environmental Endowment, and I guess they had a blank check in their back pocket because they didn't know what the fine was going to be. Judge Merhige then reduced the fine by about that amount of money.

So they wrote a check out for five million and some dollars. That itself was some multiple more than any environmental fine had ever been. The thirteen million was by six or seven times bigger as I recall. The five million dollar fine was three or four times. It was quite an impact at the time.

As Judge Merhige mentioned, we formed the endowment. Our first order of business was to tell the Attorney General of Virginia that he couldn't have the money, as I recall. Our first order of business was to follow the Judge's advice and say "No, the money really is not going to go to do that, because the government of Virginia has a responsibility to its own citizens to use its own resources." This money was designed to help the citizens of Virginia in a way that government could not, through its own restrictions and limitations. We decided that was going to be our guiding principle, to use the money in a way that could not be used by government and tell the state that they had to cleanup the James with their own resources, which was a big move for us.

Then the next order of business was to hire Jerry McCarthy. And I'm pleased to say, as Judge Merhige says, that endowment is alive and well and I think doing a great job and it is one of the sponsors of this program. Thank you very much.

Mr. Sand: I feel a little bit like the proverbial blind men holding onto different parts of the elephant. I think one reason is that when you're involved with a news story, you suddenly discover that the press is terribly inaccurate in your case. In fact, the problem is a little bit broader than just your case.

Let me change gears a little bit for the rest of us lawyers and talk a little bit about the media coverage, the impact that

had on the company's operations and a little bit about how the succeeding corporation, AlliedSignal, does business today and how it has changed.

You may have the impression now and then that the incident was something between Bhopal, with thousands of dead bodies, and *Exxon Valdez*, with millions of fish bellied up and dying. That was, and is, the impression. In fact, this was a small pesticide business. Ninety-nine percent went over to Germany where a plant was going to be built by the customer. It was made in a batch operation a couple times a month. It was not one of the world's biggest products for the company, nor were its profits enough to show up on an annual report.

But the media event was enormous then and now. I recall a phone call, very vivid in my recollection saying, "Hi, Bob. Paul Lowenwater here. I'm a producer for CBS 60 Minutes. We've been down here for a day or two and, gee, Life Science really was an independent company. They chose to ignore your instructions and warning labels. What's more, no one is that sick. Gosh, we don't take it very seriously. Do you guys take it seriously?" I replied, "I am shocked to hear CBS say it doesn't take this tragedy seriously. God knows, we at Allied do." He said, and I'll clean up his language, "Ah shit, I don't want a lawyer, I want someone in public relations."

Interestingly, I gathered from other counsel, that CBS had at that time called Bill Moore, the former Allied executive who faced simply being laid off when we got out of the pesticide business and would not relocate, who said, "Gee, we know about this interim product, we'll make it for a while." He got a phone call from the same producer, I gather, and was told, "Gee, you need help because the big guys like Allied and the state and the feds are going to try and blame you. You were really misled by this company." He said apparently, "Gee, I guess my lawyer was wrong; come on over."

A short time later he was having a can of beer with Dan Rather, going through the presentation and was much cheered because, apparently, his side of the story would get out. Rather, who is a lawyer by the way, said, "Let me put my jacket and tie on and we'll do a take."

It really was important to us that Mr. Moore look credible. He was, even then, making six figures after we let him go as a scientist. We really had relied upon him to make this product. If he looked like a light-weight, we obviously had chosen to rely upon the wrong person.

I was watching the eventual TV show which had the normal statement, that AlliedSignal had refused to participate in this show, but Bill Moore had. The camera pans in on Mr. Moore with Dan Rather. Moore, with a very confident, relaxed smile looking at his beer-drinking buddy, Dan Rather, and Rather says to the camera, "Mr. Moore, how do you explain your having chosen to ignore all these detailed instructions from Allied Chemical?" Whereupon, Mr. Moore looked foolish and we were both in trouble.

In terms of the impact of the press aside from the television, it was impossible to turn on a TV set or pick up a paper here or Washington or New York and not read that day's lead story about these "horrible" activities. Perhaps especially because Allied Chemical felt it was a leading good citizen, we were unprepared to cope with this type of problem.

We were used to people like Dow being blamed for Napalm. But our then chairman had resigned from the cabinet of Lyndon Johnson, and was in fact the first business executive to come out against the war in Vietnam. Good guys like us shouldn't have problems.

One result was, and it can happen to you, getting phone calls from senior management saying, "Show them the label." The label we had said, "Danger. May be fatal. Do not inhale."

The press saw the label. But coverage saying "Allied Chemical did something right," doesn't happen. Reporters want to win Pulitzer Prizes. Certainly press coverage affects the judiciary, we all were very aware of the public pressures and the press pressures.

Allied Chemical found itself a corporation whose top management, including the board, was not worrying about business, but was second guessing lawyers.

The total cost of the Kepone affair is probably in the low eight figures. The real cost was far greater than that. Allied

had been an old line chemical company and had recognized times were changing; that they needed to get out of certain businesses, certain commodity chemicals, and get into where we are now. Our chemicals now make the panels in your computers, the carpeting on your floor, the high-tech fiber in your car tire, the laminae boards in your computer. The old bulk chemicals, our fertilizer was the same as their fertilizer, not much intellectual value added.

The board could not address those problems. They were too busy watching the press coverage. A corporation can be not just impacted by the direct dollar cost. A case of this size, accompanied by a shareholder derivative action suing the board members personally for neglect of duty, is a serious distraction. In Virginia we had many thousands of employees working on fibers who had nothing to do with the shut-down agricultural business, who spent much of their time being disillusioned with their own employer. You don't like working for a company that's being criticized.

My mother, for one, was very upset. I spent part of my time defending my corporation to my mother. You can laugh, but it was not a laughing matter.

Eventually we did form a small fairly responsible group to manage the litigation, to settle the cases as rapidly as possible so we could go back about our business, almost regardless of what we felt the cases were really worth, and spent less time worrying about what had actually happened.

I do remember in court, to correct part of the record, management had convinced themselves locally that it was going to get out of the production of Kepone. There was no requirement in those days of limiting what you emitted. The requirement simply was that you file for a permit and in a couple of years you would get a permit. Then sometimes thereafter they'd squeeze down how much you were emitting from your plant. Plant management had convinced itself they could practice law and concluded that they need not file for a permit, reasoning "If we file for this permit, by the time we get it, we'll be out of the business so why should we waste everybody's time and money."

I do remember the Judge turning at one point to the Coast Guard official in charge of the permits in those days saying,

“What would have happened had they listed Kepone on the discharge permit application?” The answer was, “they would have gotten the permit.” That wouldn’t happen today, but this was a long time ago and conduct which we today find deeply reprehensible and indeed clearly criminal was not the case twenty some odd years ago.

Looking at what we do today, I remember one of the first calls I got was from a major chemical company. The first question was, “Bob, I know you’re busy; what’s the lesson learned?” Lesson number one is: Toll processing is a normal business. If you’re going to toll process the manufacture of milk to the Johnson & Johnson Company, don’t worry about it. If you’re going to toll process a chemical which is toxic, either give it to a big responsible company, or if you use a small company, watch them like a hawk.

One thing we do right now is we audit where we are involved in subcontracting. We review their own capabilities for legal compliance, employee protection, what they do, and how they do it. In addition, we have each business area conduct audits of its own practices at the plant level, at the business sector level, and just in case there is anything suspicious, the corporate office has a committee reporting to the board which has full-time auditors and an outside consultant who audits plants for environmental safety and health compliance.

I think the biggest change has been in the type of person we’re hiring and the positions they’re being hired for. Twenty or twenty-five years ago, there were very few industrial hygienists, toxicologists, labeling people. We now have them built into the organization, and if they’re going to be manufacturing a product or developing a new product, these people are involved from day one.

Hopefully whatever it was that did happen twenty years ago, a leak at AlliedSignal Corporation would not happen again; at least I, if not the other side’s counsel, hope so. Thank you.

Mr. Smith: I can speak quickly. Twenty years passes in the wink of an eye. It’s good to see the people that you may not see in twenty years. I saw Bob Sand twenty years ago when I deposed him in Morristown, New Jersey. I remember Chip Gasch twenty years ago reading from a little black book before Judge

Merhige. I remember Judge Merhige very well, because I saw him, generally I thought on a daily basis although it might have been weekly. I remember Bill Cummings coming out of the Judge's chambers the day that Judge Merhige levied his historic fine.

Bill came out. He didn't look happy. His head was down. Murray Janus, the Judge's ex law partner, came out about fifteen minutes later. There were certain ambiences within the courtroom as to what had transpired until the Judge made his statement and levied his fine. I asked Bill about that today, and he said he thought that Murray stayed in the Judge's chambers because he was in shock. I suppose that's what happened.

What I would like to do is give you a little bit of a background from a little guy's point of view, a civil point of view, and more particularly a personal injury point of view.

In the spring of 1975, I was a member of a small five-man law firm located in downtown Richmond. Ed Taylor, as lead counsel, and I as his assistant, tried the Kepone case for a period of nearly eighteen months. We virtually gave up our other practice. We lived in constant fear of being in bankruptcy, and our other three partners were sure we were going to be in bankruptcy.

We came over to this school. We researched a multiple count complaint against Allied and filed it. Then we requested the production of documents. You have heard Bill tell you about what the U. S. Attorney got. I think if we got anything, we got pretty well a railroad boxcar full of documents. It took two of us at least a month and a half to two months, going eighteen hours a day, to read and categorize the documents.

The files have long since gone, but I do remember some documents that come to mind that perhaps I shouldn't remember. I do know that one document that was intriguing to us was that Allied had contracted or was thinking about contracting with a group in Europe to produce Kepone. In lieu of that, they contracted with Life Sciences, which I always thought was somewhat of a misnomer, to produce it here. The reason they did was economic. Life Science could produce the product cheaper even with the cost of transportation to Europe.

At any rate, we proceeded to go through these documents and what we were really looking for was a seminal document that tied Allied to the knowledge of what Kepone was. We found that document in something called the Larson Toxicological Studies.

Professor Larson was a pharmacologist, of all places, at MCV, the same place that treated the victims of the Kepone disaster. His studies revealed that not only was Kepone deadly and it had an enormous half life that's been described to you by Bill, but it was also a suspected carcinogen.

As time passed, we took depositions. Our intent in taking the depositions was not so much to discover, we had the documents, but we wanted to prove our case. The pivotal depositions were taken in Morristown in 1976. What we wanted to show was that Allied knew of the problems in Hopewell in the spring and the early summer months of 1975. We also wanted to show the necessary nexus between Morristown and Hopewell; that Hopewell was aware of how toxic Kepone was.

We took our depositions for a week. We were content. We were encouraged with the testimony given by the Allied employees. I must say that I was not encouraged by the testimony given by Mr. Sand, who I deposed. It turned out well. We came back to Richmond. Upon coming back to Richmond we were supplied another document. The document was basically a document from environmental health to the board of directors of Allied dated some time in the early summer months of 1975 essentially saying, "We have a satellite in the Richmond area that is having difficulties. People are sick. What should we do?" Back came a response from the board of directors, "continue production." With that we took that document to Judge Merhige and our case had a speedy conclusion.

We, as the plaintiffs' attorney, of course, couldn't do anything with the press, but we were surprised that the press, particularly in this area, was so late in coming on board. We couldn't understand why stories were not coming out of the Washington Post about this as they were with the Washington Star. The reporter who reported from the Washington Star obtained a Pulitzer. I, too, got to meet Mr. Lowenwater. I tried to take him to dinner as often as I could. Essentially what Mr. Sand said

about what happened to Bill Moore and Virgil Hundtofte is right on.

One thing I did learn about the press is that if they want the story to go in a certain direction, it will go in that direction. Fortunately for the plaintiffs in this case, the press was sympathetic.

Looking back, and I think what we heard today from Mr. Kostmayer about how people should be interested in their own locales, is what settled this case. There was the individual who caught the fish who testified at the criminal trial and was cross-examined by Mr. Janus. The cross-examination went to the point, "Did you catch the fish?" The answer was, "Yes, I caught the fish." "Well, how did you know they were dead?" "Because they were floating around the boat." "What did you do with them?" "I put them into my cooler." "What did you do with the contents of your cooler?" "That's none of your business." "Once you put the fish in, what did you do?" "I took them back to my locker." "What happened thereafter?" What Murray was trying to show was that the chain of evidence had been broken. Unfortunately, this individual was the same toxicologist for the state who later tested the fish and had kept the fish all these years.

There was Dr. Jackson. Dr. Jackson, while he closed down Life Science rather quickly, received adverse pressure from those within government. He was, in my opinion, a courageous individual. It's curious that not only was Life Science closed down because Dr. Chow's report came back, but also the neighbors were complaining about a white powder coming out of these double bay garage doors of the Life Science building. It literally was in a two-bay garage right on Route 10 as you passed Broyhill Ford. Backing up to Life Science was a railroad track.

Hexachlorocyclopentadiene was brought in on the railroad track, HCL, which is the main ingredient of Kepone. And, of course, on the other side of the railroad track was Allied. These two operations were extremely close.

As you know, the sole product of Life Science was Kepone. Kepone was made in its pure form in Hopewell. It could only be used and marketed in this country in less than one degree

or one percentage point of purity. In Europe it was used in its pure form, at least according to my remembrances, on such things as the Hungarian potato bore and other various insects.

The interplay with the Medical College of Virginia to the plaintiffs' attorneys were important. For some reason we latched on to the Department of Neurology to begin with and stayed away from the Department of Internal Medicine. We had heard that Allied had made a grant to the Department of Internal Medicine and we were somewhat concerned about our relationship with them. If there is anything about this case, at least for 18 months I knew the Federal Rules of Civil Procedure. If I did not learn them by reading them, I learned them because Judge Merhige made sure we all knew them.

Hunton & Williams, who were defense counsel, wanted to have independent medical exams, which, of course, they can do under the rules, of our clients at Duke University. They wanted to perform testicular biopsies, brain biopsies, liver biopsies, and kidney biopsies.

Some of the men in the group were somewhat opposed to some of those tests. Accordingly, Ed Taylor and I, on a Sunday, made a motion to stop the independent medical exam. We really had no evidence. We were begging Judge Merhige not to send these people on busses down to Durham, North Carolina.

About this time was nobody in the courtroom except the Judge, his clerk, the marshals and the lawyers. About halfway through the proceeding in came from the side door this fellow, long beard in a running suit. It was Dr. Philip Guzelian from the Department of Internal Medicine. I thought, "Oh my goodness, he is here to testify for the defendants, and it's a good move by them."

He came up to our table and said, "Can I testify?" We said, "sure," not knowing that we could actually say no to him. He told Judge Merhige in essence if these people are tested under the methodology in Durham, it won't be the practice of medicine, it will be the malpractice of medicine. As a result of that testimony, the independent medical exams, at least those particular biopsies, were never conducted.

You heard some comments about how badly these folks were hurt. I would like to address that to a degree. Dale Gilbert,

who the chief case was named after, in the summer of 1976 was in the Medical College of Virginia. He was photographed and his eyes were wide open. He was medicated with absolutely nothing. His eyes were wide open and they were like ping-pong balls going from one side to the other. Both eyes were fast ping-pong games.

What I would like to say in closing is this: People do make a difference. In this instance we, as the plaintiffs' lawyers, brought a case. To us it was an epic case. It lasted a long time. It was emotionally gut-wrenching. It turned out financially rewarding to some of us; to some it did not.

For the lawyers on the other side, I'm sure that they would say the same thing. For those people who did their jobs, and really I'm talking about Judge Merhige, it changed the way that things are done in this state. His fine, while it appeared initially to be of a punitive nature, sent out a message to the rest of industry, what could be tolerated and what the new standards were. Thank you.

The panel then addressed questions from the audience.

Question: The Virginia General Assembly recently passed a voluntary environmental audit bill that allows companies to privately assess their operations, and the results of that audit may be privileged. Several members of this audience want to know, given the "do nothing memos" that Bill Cummings described, couldn't Allied claim the privilege if it had discovered problems as a result of an environmental audit, and if such a privilege and immunity bill similar to that in Virginia were applicable in federal cases, couldn't the law have crippled or severely hampered discovery and enforcement?

Mr. Sand: If you're going to produce the type of memos which have been alluded to, which have the characterization I don't happen to agree with, the document speaks for itself, that was not part of the audit process. That document would be produced now, as it was then, despite the proposed law. If you're going to have corporations trying to prove their performance, to find those smoking memos while they're still smoking, you might well want to encourage auditing.

It has been my personal position when clients have asked us questions that, despite what happens in Washington, you ought

to assume that any memo you write, including a lawyer's memo, will appear on television the following morning. That tends to be, I think, the better corporate advice and the best legal advice.

Mr. Gasch: It's a policy question, basically. You're providing an inducement to corporations to go in and try to uncover activities that may result in noncompliance and do something about them. You can argue this thing both ways. You can say if you had such a provision in the law at the time of Kepone, you couldn't have had this prosecution or you can argue that perhaps it would have resulted in uncovering the practices that resulted in the prosecution so the problem wouldn't have occurred. It's a balance.

Mr. Sand: In the civil rights area, the courts have *sua sponte*, recognized that civil rights internal audits which are required by law are privileged.

Question: With back sliding by the federal and state government on environmental laws and regulations, are environmental catastrophes like Kepone more likely to occur than they were 20 years ago?

Mr. Gasch: No. I think that's a lay-down. It is virtually inconceivable to me that a Kepone would occur today. There is too much awareness.

Judge Merhige: Let me answer a question that hasn't been asked.

With all due respect, I'm not sure that what I did was the right thing. It turned out in this instance to be the right thing because we were lucky. But what you have to weigh against that, and I've given it considerable thought since then, it just never occurred to me that anybody would think that they could buy part of the judgment.

I'm a runner, not a jogger. I do things, sometimes they're right, and unfortunately sometimes they're wrong. Since then I have never had an environmental case in which I suggested if somebody would make a contribution that would make a difference. That's a dangerous thing for the system. I'm not sure that if somebody were to come to me and say "Look, we want to make a contribution to the environment," without any conversa-

tion about taking that into consideration to reduce the fine or something, I'd throw them out of the office; but, if they just made it, and the probation officer told me this is what they've done, it seems to me that would be a different situation, and I wouldn't be as concerned because that would be indicative of somebody who had seen the errors of their ways and was trying to make up for it.

I don't want any of you to go away thinking I'm unhappy about this one. This one turned out to be exceptional. It turned out that way because, one, we were dealing with a good corporation. I was dealing with lawyers that knew that all the money in the world couldn't have bought me or my opinion. I was primarily concerned with the people who had been hurt. I'm not ready to go around advocating that ought to be done in every instance. It worries the hell out of me, if you want to know the truth, that some of my fellow Judges have said, "Gee, that's a great idea." I think the environmental trust has received money, but it's come primarily, I think, through the U. S. Attorneys who have made plea bargains of some sort.

Mr. Cummings: I have a response different than Chip's about could this happen again. I certainly believe that large corporations like Allied have good quality in-house counsel or good outside counsel that would advise them of the risks and so forth. I don't suspect that would be done intentionally by large corporations. But I'm constantly amazed by the ability of humans to rationalize. I do see the possibility of people like Mr. Hundtofte again rationalizing his actions. There was no proof that we could determine that upper management supported or approved Mr. Hundtofte, and I meant to mention that in my opening remarks. But I do see the ability of people like that to make mistakes, protect themselves, worry about their own job security, what have you, fail to make reports, not necessarily have the benefit and advice of Chip Gasch or somebody like that from a good firm that knows what's going on and go undetected for a while and then cause a problem later on that compounds. I do see that possibility.

I think twenty years ago with the impact of Kepone there was a lot of publicity and a lot of people took heart to it. I am concerned as disasters like that fade into history and so forth, people may not be quite so aware.