

The Buffalo Creek Disaster Mediation

Materials for Mediators and Students

On the morning of February 26, 2010¹, on a hillside in Logan County, West Virginia, a dam operated by Buffalo Mining Company collapsed after a night of unusually heavy rain. The dam collapse released approximately 132 million gallons of coal slurry and water onto the residents of Buffalo Creek Hollow. Out of a population of 5,000 people, 125 residents were killed, 1,121 were injured, and over 4,000 were left homeless. 507 houses were destroyed, in addition to forty-four mobile homes and 30 businesses. Dams #1, 2 and 3 (all of which failed) were owned and operated by Buffalo Mining Company, a wholly-owned subsidiary of Pittston Corporation.

A group of 625 plaintiffs has now brought suit against Pittston, alleging that the company had negligently designed, constructed, maintained, and operated the dam. Plaintiffs have pointed to the fact that Dam #3, the first dam to fail, had been built on top of coal slurry sediment instead of bedrock, and the fact that Dam #3 had been constructed without an emergency spillway. In defense, Pittston has argued (in an early motion to dismiss) that the collapse constituted an “act of God,” and that the company was protected from suit as the sole shareholder of Buffalo Mining Company by the corporate veil of immunity. West Virginia U.S. District Judge Hall deferred ruling on the motion to dismiss.

Trial is now just four months away. Most of the discovery has been completed.

In the earlier stages of discovery, the defense has been selective about producing only the documents pertaining to the argument of “piercing the corporate veil.” Even then, plaintiff’s counsel has not gotten all the documents they had requested. Plaintiffs’ counsel has been able to access publicly available documents, but not the Buffalo Mining Company documents that were expected to show corporate knowledge of the defective dam systems. For those documents, plaintiffs’ counsel has had to rely on the formal discovery process, but even so, Pittston has been quite slow to produce documents. As documents are produced, they tend to strengthen the plaintiffs’ case.

Both sides have conducted mental exams of the plaintiffs, to ascertain the degree of emotional distress that they suffered, either in connection with their

¹ This exercise is based on an actual case from 1972, as chronicled in [The Buffalo Creek Disaster](#), by Gerald M. Stern (Vintage Books, 1976). All dates, however, have been moved forward 38 years.

own physical harm, or harm suffered when they watched loved ones get swept away in the floods and perish in the disaster.

Discovery has also unearthed the “Aberfan Report.” This report was prepared by a British tribunal in the aftermath of a major coal mine disaster that occurred in the Welsh village of Aberfan several years prior to the Buffalo Creek disaster. The plaintiffs’ trial team plans to argue to the jury that the Aberfan report (which was made available to the public when it was published in 2005) should have alerted Pittston to the dangers of refuse piles (coal slurry sediment like the type that the Buffalo Creek mining company allowed to build up in its dams).

The parties have now agreed to go to mediation to see if the case can be resolved.² There are many “pressure points” that the parties are likely to raise at mediation. Among them are the following:

- The plaintiffs are expected to make very sympathetic witnesses at trial. The stories that they will tell at trial are truly tragic. In contrast, large energy and coal companies are typically not endearing to the public, particularly when there has already been adverse publicity in the local newspapers concerning the disaster and the “negligence” of the Buffalo Creek Mining Company and Pittston.
- Although plaintiffs’ counsel is eager to try the case, the plaintiffs themselves would rather not go through a lengthy and harrowing trial, where they would be required to relive the disaster through very emotional testimony and cross-examination.
- Pittston is currently attempting to make a bid to build an oil refinery in Maine. Settling before trial would avoid the adverse publicity of a public trial as well as a possible jury finding that Pittston was responsible for the Buffalo Creek disaster. A private settlement would therefore help Pittston in its refinery bid in Maine.
- The defense is plotting to file a series of motions to get certain categories of plaintiffs dismissed from the case based on West Virginia law concerning emotional distress damages. At the time of the mediation, the law in West Virginia has not yet fully developed, making it unclear whether a plaintiff can recover for mental distress unaccompanied by a physical injury. Thus, Pittston intends to move to dismiss 33 plaintiffs who were out

² In 1972, mediation was seldom used as a dispute resolution process for court cases. Even 20 years later, in 1992, mediation was only beginning to be developed and was rarely taught at law schools. Today, it is how court cases are resolved in all but a small percentage of cases. Currently, less than 2% of filed cases ever make it to trial.

of the area when the disaster occurred, on the basis that they cannot recover for psychic impairment alone. If this motion is successful, Pittston intends to next move to dismiss a much larger number of plaintiffs who were present, but who escaped the waters. In that fashion, the defense intends to, “salami style,” slice up the case bit by bit, to significantly reduce its potential liability. At the time of mediation, these motions have not yet been filed, so it is uncertain how the judge will rule.

- The West Virginia Bar Association has been probing plaintiffs’ counsel regarding their representation of the plaintiffs. The allegations concern whether or not the attorneys engaged in unethical solicitation in order to gain these clients. At the time of mediation, there will not yet be a disposition as to the Bar Association’s inquiry.
- Plaintiffs’ counsel does not yet have documents from Pittston’s insurance companies about the scope of their coverage. Although plaintiffs’ counsel expects these documents to be damaging to the defense, they have not yet been turned over.

Students should assume the facts and law as described in Gerald Stern, *The Buffalo Creek Disaster*, except:

38 years should be added to all dates in the book.

All negotiations should be in 2011 dollars. \$1 in 1972 is worth \$5.5 in 2011.

Students should assume that the mediation is taking place between the end of Chapter 21 and the beginning of Chapter 22. That is, plaintiffs’ counsel did not make a settlement demand prior to mediation, nor did defense counsel make a counter-offer. More generally, students should assume that none of the settlement negotiations described in the book took place. Similarly, information described in Chapter 22 or later chapters is unknown to everyone.

About a month before the mediation, Judge Hall got sick and retired. He was replaced by Judge Wall, who has full responsibility for the case, including deciding defendant’s motion to dismiss plaintiffs who suffered emotional distress unaccompanied by physical injury. She will also decide all pretrial motions and preside over trial, if there is one. Judge Wall was appointed to the federal bench only a few months ago. Prior to her appointment, she was a justice of the West Virginia Supreme Court, where she had a reputation for favoring the interests of coal mine owners. In 8 of

10 cases against coal mine owners relating to safety issues, Judge Wall voted in favor of the defense. In five of the cases in which she voted in favor of the coal mine owner's position, a majority of the West Virginia Supreme Court agreed with her, but in the other three cases, she dissented. In two of those dissents, she had been joined by two other justices, but in one she had been the sole dissenter.

In 1976, the West Virginia legislature amended its wrongful death statute to remove all caps on wrongful death damages. See West Virginia Code § 55-7-6 and *Bond v. City of Huntington*, 276 S.E.2d 539 (1981).