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Cancer, Chemicals and History

by JON WIENER

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Twenty of the biggest chemical companies in the United States have launched a campaign to discredit two historians who have studied the industry's efforts to conceal links between their products and cancer. In an unprecedented move, attorneys for Dow, Monsanto, Goodrich, Goodyear, Union Carbide and others have subpoenaed and deposed five academics who recommended that the University of California Press publish the book *Deceit and Denial: The Deadly Politics of Industrial Pollution*, by Gerald Markowitz and David Rosner. The companies have also recruited their own historian to argue that Markowitz and Rosner have engaged in unethical conduct. Markowitz is a professor of history at the CUNY Grad Center; Rosner is a professor of history and public health at Columbia University and director of the Center for the History and Ethics of Public Health at Columbia's School of Public Health.

The reasons for the companies' actions are not hard to find: They face potentially massive liability claims on the order of the tobacco litigation if cancer is linked to vinyl chloride-based consumer products such as hairspray. The stakes are high also for publishers of controversial books, and for historians who write them, because when authors are charged with ethical violations and manuscript readers are subpoenaed, that has a chilling effect. The stakes are highest for the public, because this dispute centers on access to information about cancer-causing chemicals in consumer products.

For Rosner and Markowitz the story began in 1993, when they traveled to Lake Charles, Louisiana, to look at what they were told was "a warehouse of material" about vinyl chloride and cancer. The address they were given turned out to be a "decrepit hovel in the desolate center of town," as Markowitz describes it. They found it "full of chemical industry documents, lining every wall and filling every corner." The material, Rosner told me, was "incredible. Not just company documents but records of meetings of the trade association for the chemical companies. No one had ever seen anything like it."

The material had been obtained through the discovery process by a local attorney, Billy Baggett Jr., who was working alone with a single client: A woman whose husband, a former worker in a chemical plant, had died of a rare cancer, angiosarcoma

of the liver, caused by exposure to vinyl chloride monomer. She was suing the chemical company where he had worked. Baggett "had become obsessed with the case and dropped all the other cases he was supposed to be working on in his father's firm," Rosner told me. "He had not been able to bring the case to trial. So his father went to a bigger law firm asking for help. They asked us to go down to Lake Charles, Louisiana, and find out--is there anything there in the documents? Or is this guy just an obsessive?"

Baggett had sued thirty companies and the Chemical Manufacturers Association (now called the American Chemistry Council) for conspiracy, arguing that they had concealed evidence of disease and death related to vinyl chloride. He had received hundreds of thousands of documents in response to his discovery motions. Apparently the chemical companies had flooded him with material in the belief that he would be overwhelmed by the sheer quantity, and that as a result nothing would happen.

The question about the chemical companies and the health risks of vinyl chloride is the classic one: What did they know, and when did they know it? Rosner and Markowitz used the Baggett materials to show that in 1973 the industry learned that vinyl chloride monomer caused cancer in animals--even at low levels of exposure. Since vinyl chloride was the basis for hairspray, Saran Wrap, car upholstery, shower curtains, floor coverings and hundreds of other consumer products, the implications for public health were massive. Yet the companies failed to disclose that information about cancer to the public and to the federal regulatory agencies.

The bigger issue for the companies stems from the role of vinyl chloride monomer as a propellant in aerosols in the 1950s and '60s. In 1974 the Food and Drug Administration and the Environmental Protection Agency asked for the recall of hairsprays (along with insecticides and other aerosols) that were still on the shelves with vinyl chloride monomer as the propellant--one hundred products in all. No one has studied whether people who worked in beauty parlors, or women who used hairspray, have had higher rates of cancer. But the industry started worrying in the early 1970s that the liability problem could be bigger than that for workers in chemical plants. The problem was "essentially unlimited liability to the entire US population," as one chemical company supervisor wrote in a 1973 memo. Hairspray was a particular concern.

The documents served as the basis for two chapters of Rosner and Markowitz's book, published in 2002 to stellar reviews in the news media as well as medical and scientific journals: the *St. Louis Post-Dispatch* declared that the book "ought to give thousands of corporate executives insomnia" (the key documents have been posted on the Internet at www.chemicalindustryarchives.org/dirtysecrets/vinyl/1.asp).

The documents are of a kind that outsiders have rarely been allowed to see: private corporate records, including internal reports of meetings where corporate officials made decisions about making and marketing products that caused health problems for workers and the public. For example, the key chapter on vinyl chloride in the book is titled "Evidence of an Illegal Conspiracy by Industry." That phrase is not the authors'; it comes from a key 1973 document in the files of the chemical company trade group, the Manufacturing Chemists Association, worrying that a legal memo on concealing the vinyl chloride-cancer link "could be construed as evidence of an illegal conspiracy

by industry if the information were not made public or at least made available to the government."

At issue now in US district court in Jackson, Mississippi, is the claim by another former chemical worker that Airco and other companies are liable for his liver cancer because he was exposed to vinyl chloride monomer on the job. Markowitz is a key expert witness for the plaintiffs, because of the research he and Rosner published in *Deceit and Denial*. But the judge is being told that Rosner and Markowitz's research is "not valid," that the publisher's review process was "subverted" and that Rosner and Markowitz have "frequently and flagrantly violated" the American Historical Association's code of ethics.

Those charges come from another historian enlisted by the chemical companies: Philip Scranton of Rutgers University, who wrote a forty-one-page critique of *Deceit and Denial* and of the ethics of the historians who wrote it. Scranton teaches business history at Rutgers-Camden, where he is University Board of Governors Professor of the History of Industry and Technology. He also works at the Hagley Museum, a museum of early-American business history at the "ancestral home" of the Du Pont family, as it's described on the official website. Scranton directs the museum's research arm, the Center for the History of Business, Technology and Society. He also testified recently for the asbestos companies in their liability litigation.

Although Scranton is serving in this case as an expert witness for the chemical companies, he's not an expert on cancer-causing chemicals; he's best known for his prizewinning book on the textile industry in Philadelphia. In this case, he doesn't claim to be an expert on the postwar chemical industry; instead, he offers himself as an expert on Markowitz's ethics. Markowitz, in contrast, is a genuine expert on the central issue in the case: the question of what the chemical companies knew, and when they knew it.

Scranton in his forty-one-page statement for the chemical companies charges that Markowitz violated "basic principles of academic integrity, historical accuracy, and professional responsibility" and engaged in "sustained and repeated violations" of the official "Standards" of the American Historical Association. Scranton's argument: Markowitz knew the names of the people reviewing his manuscript for the publisher and had suggested names of possible manuscript reviewers to the publisher. "Such practices," Scranton writes, "subverted confidential, objective refereeing of scholarly manuscripts."

But it's a common practice of university presses to ask authors to suggest reviewers, often because authors know better than editors who the most knowledgeable experts are, especially on an obscure topic like vinyl chloride. There's nothing unethical about this practice and nothing in the AHA standards about it. It *is* true, as Scranton suggests, that university presses typically offer manuscript reviewers the option of keeping their report confidential from the authors, and that in this case the publisher revealed the identities of the reviewers to the authors. But that was part of a review process that was much more demanding than the typical case. Instead of the usual two or three manuscript reviewers, Rosner and Markowitz's manuscript had eight outside reviewers, including the former head of the National Cancer Institute and the former chair of the Centers for Disease Control's Lead Advisory Panel. And instead of simply

forwarding the written evaluations to the authors, as is the usual practice, Milbank Memorial Fund, the public health nonprofit that co-published the book with the University of California Press, sponsored a two-day conference that brought together the reviewers, the authors and their editors to go over the manuscript chapter by chapter. To describe this rigorous scholarly process as "unethical" because it revealed the identities of the reviewers to the authors is absurd.

Scranton also objects to what he calls "overgeneralization" in *Deceit and Denial*. For example, the authors use the term "industry." But, Scranton argues, there were only individual companies. Rosner and Markowitz in their response show that the companies formed a trade organization that claimed to speak for "the industry." And Scranton accuses Markowitz of ethical violations for incomplete and selective quotation and one-sided advocacy. However, Scranton violates precisely what he says are the ethical principles he is defending; Scranton's essay is much more incomplete and selective, and is completely one-sided in its defense of the chemical industry.

Could Scranton be right that Markowitz violated the AHA Statement on Standards in his research? I asked the vice president for research of the AHA, Roy Rosenzweig, Distinguished Professor of History at George Mason University. "I've read the AHA Statement on Standards," he says. "I see nothing in Markowitz and Rosner's book that's a violation of the AHA Standards. In my opinion, the book represents the highest standards of the history profession. Scranton should be embarrassed to make the claim that there's an ethical violation here--as opposed to the claim that he disagrees with their interpretation."

The rest of Scranton's argument has a lot in common with the arguments made by the tobacco and lead companies and their attorneys in those historic liability lawsuits, arguments that have been identified by Stanford historian Robert Proctor, writing in *The Lancet*, one of the leading medical journals in the world. The generic arguments go something like this: Although historians have found evidence that industries were aware of the danger posed by their products, that evidence was not definitive; because they had "no proof," they had no obligation to act to protect the health of workers or the public; standards of corporate morality and openness have become stronger only recently, so it's "unfair" to apply today's standards to past conduct; and of course there's always the argument that the historians who claim to have found evidence of corporate misconduct are "biased."

When I asked Scranton by e-mail if he would be willing to talk about his deposition, he replied, "These are matters for a court to address and are not yet issues for public debate." Of course, nothing is more public than a court case--but he told the *Newark Star-Ledger* he "regretted" that Rosner and Markowitz were making the issue public. Columbia historian Elizabeth Blackmar, one of the manuscript reviewers who were subpoenaed by the chemical companies, said, "I respect Scranton's work as a historian, so I was sorry he had turned himself into a hired gun this way."

If it's unprecedented for companies to go after historians in the way Rosner and Markowitz have been attacked, it's also apparently unprecedented to subpoena and depose the peer reviewers who recommended that a university press publish a book. The Blackmar subpoena--"my first," she says--read: "You are commanded to appear" in US district court, and to "produce and permit inspection and copying" of all the

material used in preparing the evaluation of the book manuscript, including "any original written, typewritten, handwritten, printed or recorded material...now or at any time in your possession, custody or control," including all e-mail.

Academics aren't used to being "commanded" to do anything, and are unlikely to have attorneys of their own to accompany them to depositions. In this case, since the book was co-published by the Milbank Fund, the fund provided the subpoenaed historians with attorneys from Milbank, Tweed, the blue-chip Wall Street global legal powerhouse. At the depositions, each historian faced attorneys for fifteen different chemical companies. One of the key questions was whether those who recommended the book for publication had checked the footnotes. That would have been a big job: *Deceit and Denial* has more than 1,200 footnotes, many citing more than one source. The prevailing practice at university presses is that manuscript reviewers are not expected to check footnotes; Lynne Withey, director of the University of California Press, asked, "How could you expect people to do that?" In fact, the documents in Rosner and Markowitz's footnotes were checked thoroughly before publication by attorneys for both PBS and HBO: PBS ran a Bill Moyers documentary in 2001 on cancer caused by chemicals in consumer products, based on Rosner and Markowitz's research; and HBO ran an award-winning documentary in 2002, *Blue Vinyl*, based on some of the same research.

What's the point of deposing manuscript reviewers for university presses? Blanche Wiesen Cook, Distinguished Professor of History at the Graduate Center of the City University of New York, former vice president for research of the AHA, award-winning biographer of Eleanor Roosevelt and one of the historians who were deposed, called it "harassment to silence independent research" and an effort to create "a chilling effect on folks who tell the truth."

What's it like to be deposed in this situation? Markowitz's deposition lasted five and a half days. He said, "You face fifteen or sixteen lawyers, none of whom like you, and all of whom are trying to trick you." Cook's deposition took only an hour, but it was "an hour of battering and legal tricks, and the goal was to trip you up and get you confused," she said. "They kept asking me how long I had known Gerry Markowitz. I said, 'Are you asking if I had an affair?' They said, 'No, why are you asking that?' I said, 'Where I come from, that's the implication of your question.' They said, 'Where do you come from?'" This seems pretty far from the question of vinyl chloride and cancer.

Scholars like Cook and Blackmar who review manuscripts for university presses don't do it for the money--UC Press typically provides \$300 in free books or \$150 in cash--but rather out of a sense of obligation and duty; they certainly don't expect to have to defend their recommendation under oath in the face of hostile questioning from a dozen corporate lawyers. Should UC Press have done more to protect its manuscript reviewers and its review process? Should it have resisted the subpoena for the reviewers' names and information? UC Press director Withey says that if this had been the typical manuscript where the reviewers had been promised confidentiality, "I would not have revealed names of reviewers. That would have gotten us into a sticky situation, I'm sure." William Forbath, Lloyd Bentsen Professor of Law at the University of Texas, says any effort to resist a subpoena for reviewers' names and information would have been "in vain." If the information in question is relevant to

the case, he says, "there is no general privacy privilege outside of the attorney-client privilege, the spousal privilege, the doctor-patient privilege and the priest-penitent privilege--that exhausts it. The publisher promises its manuscript readers confidentiality, but that doesn't count for squat in the context of a legal proceeding."

Rosner and Markowitz are part of a larger trend in which historians are appearing in court more often as expert witnesses. One reason is the growing number of cases in which companies are being accused of wrongdoing based on evidence that workers and consumers are suffering illness and disability because they were exposed to asbestos, lead, silica or other chemicals. In every case, the exposure began decades ago, and thus in every case, the central legal question is a historical one: When did the companies first learn of the health dangers posed by their products? At what point in the past can they be held responsible?

A second reason is a consequence of the failure of governmental regulatory agencies to act. Now, in an era of Republican domination, the Occupational Safety and Health Administration and the Environmental Protection Agency, originally created to protect the health of workers and the public, tend to be industry-dominated. As a result, the courts have become, in the words of Rosner and Markowitz, "one of the last venues where workers and communities might find some form of justice."

In the past, each side in corporate liability cases has presented experts who debated the evidence in the corporate documents. This case marks a new departure, because the strategy of the chemical companies is to charge the plaintiff's expert with unethical conduct. Will this ploy succeed? The logic of the argument is dubious: So what if some of the manuscript reviewers for *Deceit and Denial* knew the authors? What ought to decide the case are the facts about what the chemical companies knew about cancer and when they knew it. On the other hand, juries don't know much about publishing history books. It's possible that a jury could be convinced that something was wrong with a book whose manuscript reviewers didn't check footnotes, and with a publisher that did not maintain strict confidentiality in the manuscript review process.

Most of these corporate liability cases are settled before going to a jury, but the willingness of the companies to settle is based on their estimate of the persuasiveness of the witnesses against them and their guesses about the jury. This case, originally scheduled to go to trial in February, has been rescheduled for September.