



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Natural Resource Damages: A New Angle In PCB Litigation

(April 5, 2017, 10:16 AM EDT)

In an effort to use product liability theories to impose liability on manufacturers of products found in the environment, the Attorney General of Washington state sued PCB manufacturer Monsanto in state court in December.[1] The suit is the first to apply product liability theories, similar to those honed in years of MTBE litigation, to allegations of statewide PCB contamination in waterways.

Washington's lawsuit claims that PCBs are now found in water bodies throughout the state, an alleged injury to the state's public natural resources for which the state may seek damages on behalf of itself and its residents in the state's parens patriae capacity.

Previous PCB litigation has generally focused on alleged actions at particular locations. This suit may signal the beginning of a new era in PCB litigation, and should be closely watched by manufacturers and marketers of other products released to the environment.

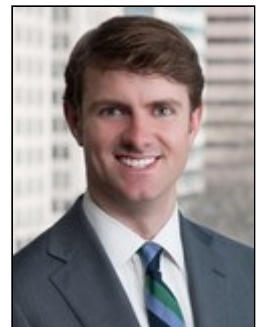
Polychlorinated biphenyls, or PCBs, have flame retardant characteristics and were used in a wide variety of products, including electrical equipment, carbonless copy paper, heat transfer fluids such as hydraulic oils, paints and caulks, and many others. Monsanto manufactured PCBs from 1935 until 1977 when it voluntarily ceased production. The U.S. Environmental Protection Agency banned production of PCBs in 1979, but allowed for their continued use in some electrical equipment until a suitable alternative could be developed.

PCBs have been the target of traditional environmental litigation — some of it brought by state, federal or tribal sovereigns to recover natural resource damages — for many years. For example, state and federal trustees pursued litigation against a number of paper industry defendants under CERCLA to address PCB-laden sediment in Wisconsin's Fox River.[2]

In recent years, a number of municipalities have brought suit to recover damages for alleged PCB impacts to public property.[3] Such litigation focuses on impacts to particular resources caused by particular actors.

Almost two decades ago, plaintiffs' attorneys in MTBE litigation started testing common law tort and products liability theories to recover damages for groundwater contaminated with MTBE, a once broadly used gasoline additive. Plaintiffs set their sights on the product's manufacturers and marketers and their deep pockets, rather than the individual site and underground storage tank owners and operators who may have been the target of traditional environmental litigation.

After failing to assemble a certifiable class,[4] and some success with municipalities and water utilities as plaintiffs,[5] the MTBE bar hit its stride when, in 2013, a New Hampshire jury returned a \$236 million verdict against Exxon Mobil Corp. for statewide damages to groundwater.[6] New Hampshire, through its contingent-fee special counsel, alleged that MTBE was a defective product and that gasoline refiners failed to warn the state and its citizens of the effects MTBE had when released into groundwater; the jury agreed.



Graham Zorn



Eric Klein

No other sovereign-led MTBE case has gone to trial, but similar statewide MTBE cases are currently pending in New Jersey, Puerto Rico, Pennsylvania, Vermont, and Rhode Island.

The Washington PCB suit may portend a similar evolution of litigation to recover damages for alleged PCB releases. Though individuals and localities have brought other suits alleging PCB contamination through the years, Washington's suit is the first to be brought against a PCB manufacturer by a sovereign state alleging statewide contamination and statewide damages on product liability theories.

The structure of the state's allegations bears similarity to those in the statewide MTBE cases. Washington's complaint asserts claims for public nuisance, trespass, equitable indemnity for the state's response costs, and products liability (defective design and failure to warn). Rather than relying on a traditional environmental statute, such as CERCLA or a state analog, Washington bases its claims for damages on common-law torts or statutory codifications of such torts.

Common law claims in environmental cases can provide additional flexibility for resource-strapped states over traditional environmental statutory claims. For example, tort claims can be viewed separately from otherwise applicable regulatory regimes, allowing a state flexibility in how it proves its damages. States also may be able to use awards for other purposes unrelated to the impaired resource, including to pay contingent-fee special counsel.

Tort claims may support relief not available under a state's environmental regulatory authority. Here, Washington seeks compensatory damages, damages for alleged injury to natural resources, and present and future cleanup costs. Plaintiffs in the MTBE cases and other natural resource damages cases have used similar prayers for relief to seek compensation for remediation down to undetectable levels of contamination.

Fundamentally, the argument is that a single molecule of a chemical in the environment can constitute an "injury," regardless of any regulatory limit. Remediation to undetectable levels of contamination is difficult and expensive, and it can dramatically drive up damage awards. And while not available under Washington law, tort claims in other jurisdictions support claims for punitive damages not permissible under environmental statutory claims.

Sovereign plaintiffs in natural resource damages cases like Washington's may also seek compensation for the alleged loss in economic value of the impaired resources. In other words, the state can claim it should be able to recover for the difference between the value of its resources in their unimpaired state and their current state.

For resources with a direct economic use, such as a commercial fishery or a drinking water supply, calculating a loss in value can be a relatively straightforward exercise. Economic experts have posited that such value can be calculated reliably even for natural resources that do not have a direct economic use, such as groundwater not used for drinking water or agricultural purposes.[7] Such damages may further drive up awards in sovereign-led products liability cases.

PCBs and MTBE are just two examples of manmade substances targeted in products liability litigation. Should sovereign plaintiffs find success in prosecuting these claims, other states are likely to pursue similar litigation against manufacturers and marketers of other chemicals that can be found in the environment.

For practitioners who find themselves involved in such litigation, there is much to be learned from the MTBE cases. The New Hampshire MTBE case in particular provides a model of how a sovereign plaintiff can employ products and tort theories of liability to recover damages for environmental contamination.

However, this sovereign-led model of environmental litigation is untested in most jurisdictions. As in the MTBE cases, defendants may face an uphill battle on liability. But important to any defense in such litigation is an attack on each alleged theory of liability plus strong experts to undermine and counter plaintiffs' damages claims.

—By Graham Zorn and Eric Klein, Beveridge & Diamond

Graham C. Zorn is an associate, and Eric L. Klein is a principal, at Beveridge & Diamond PC in Washington, D.C.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Complaint, *Washington v. Monsanto*, No. 16-2-29591-6 (King Co. Super. Ct. Dec. 16, 2016).

[2] *Feds Seek \$33M Win In Fox River Cleanup Suit*, [https://www.law360.com/articles/865410/feds-
seek-33m-win-in-fox-river-cleanup-suit](https://www.law360.com/articles/865410/feds-seek-33m-win-in-fox-river-cleanup-suit).

[3] One example is a suit brought by the cities of San Francisco, Oakland, and Berkeley to address PCBs in San Francisco Bay. See <https://www.law360.com/articles/888597/monsanto-can-t-escape-cities-pcbs-suit-judge-rules>.

[4] *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002) (denying class certification).

[5] See, e.g., litigation brought by Suffolk County against gasoline refiners and marketers in *County of Suffolk et al. v. Amerada Hess Corp., et al.*

[6] Verdict Form, *State of New Hampshire v. Hess et al.*, 03-C-0550 (Merrimack Super. Ct. Apr. 9, 2013) available at <http://www.bdlaw.com/assets/htmldocuments/Hess.pdf>.

[7] See, e.g., *Desvouges et al., Measuring Nonuse Damages Using Contingent Valuation: An Experimental Evaluation of Accuracy* (2d. Ed. 2010) available at http://www.rti.org/sites/default/files/resources/bk-0001-1009_web.pdf.