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West Coast 'Super Tort' PCB Suits Have Staying Power

By **Gary Smith and Casey Clausen** (March 7, 2018, 11:08 AM EST)

Increasingly, municipalities and states are pursuing public nuisance theories against product manufacturers and distributors. Actions filed by West Coast municipalities and states over the past three years against polychlorinated biphenyl manufacturer Monsanto Company have proven to have surprising staying power.

Polychlorinated biphenyls, or PCBs, are man-made chemicals formerly used in a wide variety of products, including transformers, flame retardants and caulking. Monsanto was the exclusive manufacturer of PCBs from 1935 until 1979, when the federal government banned production in response to a recognition of potentially serious health risks. PCBs are now a contaminant in many waterways.

With the state of Oregon joining the fray on Jan. 4, 2018, twelve West Coast municipalities and states have filed suit against Monsanto.[1] These cases assert public nuisance and other tort theories and are seeking damages for PCB-contaminated waterways. The core argument of these lawsuits is that the costs the municipalities and states have incurred on account of PCB contamination were a foreseeable consequence of Monsanto's PCB production and distribution.

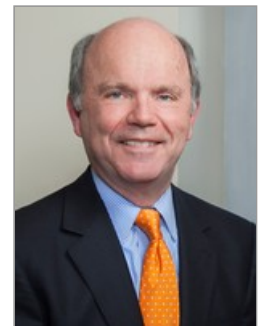
Although the outcome of these cases is uncertain, the courts, at least so far, have permitted them to proceed largely intact. The suits have obvious significance for chemical manufacturers and distributors who might face liability for products that were produced decades ago and disposed or released by other parties. These cases also bear watching for their ramifications for the cleanup of PCB-contaminated waterways and public lands, as municipalities and states seek to shift their costs to the manufacturer.

What Injuries Do the Municipalities and States Claim?

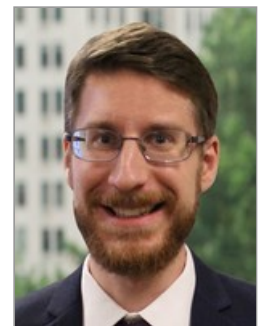
A public nuisance is "an unreasonable interference with a right common to the general public." [2] The "public right" at issue in these cases is the use and enjoyment of waterways for commerce, navigation and recreation. Generally, a party bringing a public nuisance action that does not seek to vindicate the rights of the general public must show a "special injury," different in kind from that suffered by the public at large.

Here, the municipal plaintiffs have alleged they suffer a special injury from the following sequence of events: The municipalities operate stormwater and other water conveyance systems; PCBs enter those systems in runoff; and the PCB-containing runoff is discharged and contaminates various waterways. As a result, the municipalities incur costs to reduce the discharge of PCBs through their stormwater systems.

In addition, because some of the waterways are Superfund sites, some of the municipalities claim



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injury based on their identification as potentially responsible parties at those sites.

While their reasoning is not identical, the courts have ruled that the municipalities have sufficiently alleged injuries through operation and maintenance of their stormwater and other water conveyance systems.

The actions brought by the states of Oregon and Washington are distinct because they are brought in the states' *parens patriae* capacity and complain of PCB contamination throughout their territories. *Parens patriae*, or "parent of the country," refers to a state's power to sue to redress injuries to its sovereign interests. The sovereign interests that Oregon and Washington assert are the health and well-being of their citizens. The Oregon and Washington actions are in their early stages, and as of yet, no dispositive motions have been filed.

"Super Tort"

Monsanto has argued that the municipal plaintiffs are attempting to create a "super tort." That is, the plaintiffs' theory would extend liability for the presence of chemicals in the environment to the chemical's manufacturer — regardless of whether the manufacturer had any involvement in discharging or releasing the chemicals. Monsanto argues that the plaintiffs' claims ignore the lengthy chain of intervening actors who more directly caused PCBs to be released into the environment.

In support, Monsanto points to several earlier cases where similar claims against it for PCB contamination were dismissed for lack of causation. Most recently, in *Town of Westport v. Monsanto Co.*,^[3] the Town of Westport, Mass., asserted a public nuisance claim against Monsanto based on the presence of PCBs in its schools. The court dismissed the claim because Monsanto did not have control over the PCB-containing building materials post-sale and therefore lacked power to prevent the nuisance in the schools.

The West Coast courts, however, have distinguished these earlier PCB cases and found that the plaintiffs adequately allege causation by Monsanto. While the reasoning again is not identical, the key allegation that appears to have persuaded the courts is that the discharge of PCBs was "inevitable." Specifically, the plaintiffs allege that PCBs "regularly leach, leak, off-gas and escape from their intended applications and, after being released into the environment, contaminate runoff from naturally occurring storm and rainwater events."^[4] PCBs then enter the municipalities' stormwater systems, which receive the runoff.

As some of the courts indicate, the municipalities' allegations suggest that PCBs migrated into their stormwater systems without any intervening acts by third parties.^[5] Thus, a direct line of causation between the widespread presence of PCBs in waterways can be traced to the manufacturer — a line of causation that the municipalities allege Monsanto actually foresaw.

Looking Ahead

Despite interim successes by some municipalities, the outcome of this litigation strategy is far from certain. Notably, three of the California actions — Berkeley, Oakland and San Jose — have been stayed in the Northern District of California while the cities exhaust administrative remedies before the California Commission on State Mandates.

The Central District of California invited briefing on this issue in the Long Beach action, and a motion to stay is pending before the court. The Southern District of California, however, declined to stay the City of San Diego's action on this ground.

Monsanto also has argued that the claims should be dismissed because the municipalities were aware or should have been aware of PCB contamination in their waterways decades ago. The municipalities argue in response that PCBs are continuing to migrate into the environment. So far the courts have declined to decide this issue, awaiting a fuller record on summary judgment.

defect and nuisance cases. Casey T. Clausen is an associate at the firm, whose environmental litigation and regulatory practice covers issues including CERCLA, state Superfund laws, the Endangered Species Act and the National Environmental Policy Act.

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[1] Actions have been filed by the cities of Seattle, Spokane, Portland, Berkeley, Oakland, San Jose, Long Beach and San Diego, the ports of Portland and San Diego and the states of Washington and Oregon.

[2] Restatement (Second) of Torts § 821B (1979).

[3] Town of Westport v. Monsanto Co., 2015 WL 1321466 (D. Mass. March 24, 2015).

[4] City of Portland v. Monsanto Co., Civ. No. 3:16-cv-1418 (D. Or.), Dkt. No. 1, Compl. ¶ 5.

[5] City of Spokane v. Monsanto Co., Civ. No. 2:15-cv-0201 (E.D. Wa.), Dkt. No. 74, Order at pp. 21-22.