

[Products Liability Law Daily Wrap Up, TOP STORY—CHEMICAL PRODUCTS—S.D. W.Va.: Certain negligence, strict liability claims move forward in West Virginia chemical spill action, \(Jun. 4, 2015\)](#)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

In a putative class action relating to a chemical spill that contaminated West Virginia drinking water, a federal district court in the state denied in part a motion to dismiss certain negligence and strict liability claims asserted by affected individuals and businesses against the defending water company and chemical manufacturer ([Good v. American Water Works Co., Inc.](#), June 3, 2015, Copenhaver, J.).

Background. On January 9, 2014, the water supply was interrupted for approximately 300,000 residents in the area in and around Charleston, West Virginia. The interruption was caused by a spill into the Elk River of a coal processing chemical mixture sold and distributed exclusively by Eastman Chemical Company. At the time, the mixture was being stored in a facility owned and operated by Freedom Industries, Inc. The chemical, 4-methylcyclohexane methanol, together with other chemicals, is commonly referred to as “Crude MCHM,” and had infiltrated WV American’s water treatment plant in Charleston. Affected individuals and businesses (plaintiffs) in the action against the defendants, which included American Water Works Company, American Water Works Service Company, Inc., Eastman Chemical Company, and West Virginia-American Water Company (collectively, American Water Works or water company defendants), asserted that the water company defendants could have prevented or avoided the incident by taking better precautionary measures, complying with applicable regulations, and using reasonable care. Some plaintiffs and putative class members operated businesses that lost revenue due to the interruption. Others claimed physical injuries, asserting that exposure to Crude MCHM in the environment through human pathways caused bodily injury and necessitated they be medically monitored. All allege to have incurred costs for water replacement, travel, and other associated expenses.

The first amended class action complaint was filed on December 9, 2014, alleging nineteen claims, including negligence, negligence specifically arising out of the water company defendants’ failure to address the foreseeable risk posed by the Freedom Industries facility, the failure to adequately warn the class members, the failure to design, maintain, and operate the water treatment plant according to industry standards, negligently and unreasonably delivering and placing on plaintiffs’ property the Crude MCHM, and failing to ensure that water tankers were not filled with contaminated water; gross negligence for recklessly ignoring threats to class members both in design and maintenance of their operations, their warnings and attempts to deliver water; breach of certain federal laws; negligent infliction of emotional distress arising out of the failure to establish an alternative water supply; strict products liability for failure to warn concerning the contamination until hours after it occurred and for providing incorrect information that it was safe to drink the water when Crude MCHM was at one part per million (1 ppm); and medical monitoring.

Motion to dismiss. The water company defendants sought the dismissal of 13 of the 19 claims. In particular, they moved to dismiss the negligence and strict liability counts on the grounds that the claims were barred by the “gist of the action doctrine” and the economic loss rule against recovery of solely economic loss in tort. They also requested dismissal of the negligent infliction of emotional distress claim based on the plaintiffs’ failure to plead that they were exposed to a disease medically proven to cause death or substantial injury as required for the claim. The defendants also argued that the strict products liability failure-to-warn claim was deficient because the asserted inadequate warnings were issued pursuant to government recommendations; and that the plaintiffs failed to allege sufficiently a medical monitoring claim.

Gist of the action doctrine. The court denied the water company defendants' assertion that the negligence and strict liability claims should be dismissed under the gist of the action doctrine, under which a tort claim "will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract."

The court agreed with the plaintiffs that the water company had an entirely separate duty in tort not to "invade and contaminate the real and personal property of others" in the process of supplying water to customers. As the plaintiffs were alleging misfeasance as opposed to nonfeasance, they alleged affirmative conduct by the water company defendants in performing their water supply duties, in essence delivering tainted water to homes and businesses as a result of active misfeasance. This was a claim for both tort and contract, the court said.

Economic loss rule. The court did not resolve the economic loss rule question, concluding only that the relevant counts alleged claims for relief and denying the water company defendants' motion to dismiss. The water company defendants had argued that the plaintiffs' tort claims seeking damages for lost profits, business opportunities and unnamed other expenses were barred by the economic loss rule, which holds that an individual who sustains purely economic loss due to another's negligence can only recover when there is neither a contract nor physical harm to person or property and when some special relationship exists between the parties. The court found it could be argued that a special relationship had arisen by statute (West Virginia Code sections 24-3-1 and 24-4-7); and that the special relationship, in addition to a contractual relationship, would permit the party suffering a breach to pursue an action in tort pursuant to a separate duty. The court rejected the water company defendants' argument that the West Virginia statutes were so generally phrased that they could not create a special relationship.

Exposure to a disease medically proven to cause death/substantial injury. Although the water company defendants contended that the plaintiffs failed to plead a viable claim for negligent infliction of emotional distress because they had not alleged that they were exposed to a disease medically proven to cause death or substantial injury, the court did not dismiss the plaintiffs' claim. Based on the plaintiffs' allegations of physical injuries, of the uncertainty occasioned by the effects of crude MCHM, of the young age of the affected putative class members, and on the stage of the litigation, the court concluded that the plaintiffs alleged sufficient facts supporting "real and serious" emotional distress and that they raised a medically established possibility of contracting a disease that would produce substantial disability requiring prolonged treatment to mitigate and manage.

Strict liability for failure to warn. The court held that the plaintiffs' strict liability claim, which arose out of the water company defendants' failure to provide certain warnings, could proceed past the motion to dismiss stage. The water company defendants contended that the Centers for Disease Control (CDC) and other government agencies, not the water company defendants, determined the level of concentration at which the water was deemed safe. The plaintiffs' claim, the court noted, appeared to be one of "use defectiveness," which covers situations when a product may be safe as designed and manufactured, but which becomes defective because of the failure to warn of dangers which may be present when the product is used in a particular manner. The plaintiffs did not assert that the water was manufactured defectively, but rather contended that once the Crude MCHM was used in combination with the water, it became dangerous, and, consequently, the water company defendants should have warned of the danger and its potential consequences.

The water company defendants offered substantial evidence that the applicable warnings were designed by the CDC and other government agencies charged with protecting the public in a rapidly unfolding crisis. A finder of fact could allow significant weight to the proof, and determining whether a defendant's efforts to warn of a product's dangers were adequate was a jury question. As such, the court would not dismiss the failure to warn claim at this stage of the proceedings.

The case is [No. 2:14-01374](#).

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Companies: American Water Works Company, Inc.; American Water Works Service Company, Inc.; West Virginia-American Water Co.; Eastman Chemical Co.

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