

## Products Liability Law Daily Wrap Up, TOP STORY—CHEMICALS—9th

### Cir.: Economic loss rule, statutes of limitations no bar to city's recovery of perchlorate contamination remediation costs, (May 5, 2014)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

Neither the economic loss doctrine nor California's three-year statute of limitations for injury to real property barred a California city's lawsuit to recover the costs of investigating and remediating ground water contamination which was linked to sodium nitrate in a fertilizer, the U.S. Court of Appeals for the Ninth Circuit held in upholding a district court's refusal to grant the fertilizer importer's motion for summary judgment. However, the Ninth Circuit reversed the district court's exclusionary ruling with regard to the city's causation expert ([City of Pomona v. SQM North America Corp.](#), May 2, 2014, Simon, M.).

**Background.** After finding excessive levels of the chemical perchlorate in its water system, the City of Pomona, California, undertook an investigation into the source of that contamination as well as remediation efforts to correct the contamination. A scientist hired by the city used a methodology known as "stable isotope analysis" to determine that the most likely source of the perchlorate was sodium nitrate that had been used as fertilizer. The city sued SQM North America Corp. (SQMNA), the company that had imported the sodium nitrate into the United States, to recover the costs of investigating and remediating the perchlorate contamination in the groundwater in and around the city. SQMNA moved for summary judgment on two grounds: (1) the city had not suffered a compensable injury under strict products liability law based on California's "economic loss rule"; and (2) even if the city had suffered a compensable injury, its claim was barred by the applicable three-year statute of limitations. After conducting a per-trial *Daubert* hearing in which it granted SQMNA's motion *in limine* to exclude the city's causation expert, the district court denied SQMNA summary judgment motion on both arguments.

**Economic loss.** California's economic loss rule provides that the recovery of economic loss under strict products liability is appropriate only when there has been physical harm to persons or property *other* than the allegedly defective product itself. The city claimed that it was not seeking to recover economic loss for an allegedly defective product. Instead, it distinguished between the allegedly defective product at issue—SQMNA's fertilizer—and the damaged or physically harmed property—the city's groundwater. The city provided evidence regarding its possessory interest in the groundwater and the damage to the ground water that was sufficient to create a genuine issue of material fact and to overcome the economic loss rule's bar to recovery of economic loss.

**Statutes of limitations.** The California statute of limitations for injury to real property is three years and commences for tort actions with the occurrence of the last element essential to the cause of action. The city argued that the statute of limitations commenced when the state issued an Maximum Contaminant Level (MCL) for perchlorate in 2007; however, SQMNA countered that the city's actions in testing for perchlorate and reporting perchlorate levels to the California Department of Public Health in the years before 2007 established appreciable harm and triggered the limitations period. The Ninth Circuit noted that the test for when appreciable harm has occurrence in water contamination cases had not been well defined in the California courts. In a relatively recent water contamination case, a federal district court applying California law found that "appreciable harm occurs when the contamination 'caused or should have caused' the party to act in response to the contamination" (*In re MTBE Prods Liab. Litig.*, 475 F.Supp.2d 286). Based on the contamination levels discovered before 2007, the Ninth Circuit found that the only action required of the city in response to perchlorate contamination found before 2007 consisted of testing and reporting and that those required actions, standing alone, did not constitute appreciable harm under California law. In addition, there was no program to remove

perchlorate from the water prior to 2007 and any removal prior that date was ancillary to the city's active nitrate treatment program. Thus, SQMNA's argument that the city either acted or should have acted to reduce the perchlorate level in the water supply before 2007 was not supported by the facts, which revealed that any failure to act on the part of the city was reasonable at the time. Other than testing and reporting, all of SQMNA's assertions regarding the city's pre-2007 actions with regard to the perchlorate contamination were based on disputed facts and, therefore, SQMNA could not demonstrate, as a matter of law, that the city's claim was barred by the statute of limitations.

**Expert testimony.** Although the Ninth Circuit affirmed the district court's denial of SQMNA's motion for summary judgment, it reversed the district court's exclusion of testimony by the city's causation. The district court determined that the expert's testimony was not reliable for several reasons including that his opinions were subject to future methodological revisions and had not yet been certified, the procedures he used had not been tested and were not subject to retesting, and the reference database used was too small. The Ninth Circuit concluded that despite the fact that there was no EPA-certified method of analysis, the record showed that the expert's methodology and report were based on the scientific method, practiced by recognized scientists in the field, and had a basis in the knowledge and experience of the relevant discipline. Thus, the report and the expert's testimony were admissible, and SQMNA's challenges went to the weight to be given the testimony, which was clearly a question for the jury, not the court. With regard to the size of the database, the court was presented with conflicting evidence leading to a "battle among experts," and it was the job of the jury, not the trial court, to determine which source was more credible and reliable.

The case numbers are [12-55147](#) and [12-55193](#).

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