

## Products Liability Law Daily Wrap Up, TOP STORY—CHEMICAL PRODUCTS—E.D. Wash.: PCB contamination claims not time-barred, but standing dooms common-law strict liability claim, (Oct. 27, 2016)

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By Kathleen Bianco, J.D.

Products liability and negligence claims in a toxic tort case brought by the City of Spokane, Washington against the manufacturers of polychlorinated biphenyls (PCBs) were not barred by the applicable statute of limitations, the U.S. District Court for the Eastern District of Washington ruled. However, the city's common-law strict liability claim was dismissed for lack of standing because Spokane was not a user or consumer of the product, nor was it an injured bystander (*City of Spokane v. Monsanto Co.*, October 26, 2016, Mendoza, Jr., S.).

From 1935 to 1979, the Monsanto Company was the manufacturer of one of the most commonly used PCBs, a toxic chemical used in many industrial and commercial applications. PCBs easily migrate out of their original source material and contaminate nearby surfaces, air, water, soil, and other materials, including natural water bodies through runoff during storm and rain events. The Spokane River is contaminated with PCBs and listed as an impaired water body on the Washington State Water Quality Assessment list. In 2011, the City of Spokane participated in a Task Force which was established to uncover the source of toxic chemicals in the Spokane River and identify and implement appropriate actions needed to meet applicable water standards. In 2015, the City of Spokane filed suit against Monsanto and other related entities (collectively, manufacturer) alleging claims for products liability, negligence, equitable indemnity, and public nuisance. The city asserted that the PCBs were not reasonably safe at the time they left the manufacturer's control and sought reimbursement of the costs to remove the PCBs from wastewater and stormwater that the city lawfully discharged into the river. The manufacturer moved to dismiss all of the city's claims, alleging that they were untimely. Alternatively, the manufacturer asserted, among other defenses, that the city lacked standing to bring a products liability action and failed to state a claim for negligence.

**Statute of limitations.** The manufacturer sought dismissal of all of the city's claims, asserting that the applicable statutes of limitation—three-years on products liability and negligence claims, one-year on contribution claim, and two-years on nuisance claim—had all run. The manufacturer contended that the claims began to accrue once the city suffered injury, which, at the latest occurred when the permit for its wastewater plant and combined sewer overflows were issued in June 2011. The court rejected this theory, concluding that under the continuing tort doctrine, the statute of limitation may not have run if the contamination was reasonably abatable. As a result of this determination, it was not clear on the face of the complaint that the statutes of limitation had run.

**Products liability claims.** Initially, the manufacturer argued that the city's common-law products liability claims were preempted by the Washington Products Liability Act (WPLA). This argument was unavailing because substantially all of the injury-producing events occurred before the WPLA was enacted and were, therefore, not covered by the WPLA. Next, the manufacturer challenged the city's standing to file products liability claims, arguing that because the city was not a user or consumer of the PCBs, it lacked standing to bring a claim. Upon review of the evidence, the court concluded that the city did not lack standing to file a claim under the WPLA for conduct occurring after the effective date of the WPLA, but did lack standing to file a common-law claim because it was neither a user or consumer of the product, nor a bystander in close proximity to and directly injured by another's use of a defective product.

**Negligence.** In challenging the negligence claim, the manufacturer argued that it did not owe a duty to the city because manufacturers only owe a duty to consumers for the foreseeable harm from the use of a product. The court rejected this assertion, finding that a manufacturer's duty of care extends to the foreseeable range of danger created by the manufacturer's product. Based on the evidence presented, the city properly established that the PCB contamination was foreseeable and demonstrated that the manufacturer in fact knew that its product was toxic and contaminating the environment. The city also sufficiently showed proximate cause by

demonstrating that the causal chain between the manufacturer's production and distribution of PCBs and the injury at issue was not broken by the intervening action of the city or a third party.

**Damages.** The manufacturer's claim that equitable indemnity had been abolished as a cause of action was unavailing. While the common law right of indemnity between active and passive tortfeasors has been abolished under Washington law, the Tort Reform Act still recognizes a legal duty between non-joint tortfeasors. Thus, the city's claim for equitable indemnity was established through the city's showing of its duty to remove the PCBs from the wastewater and stormwater before the chemical was discharged into the Spokane River, as well as its claim that the manufacturer was responsible for contaminating those water sources. Finally, as to the city's request for clean-up costs and attorney's fees, the court opined that further information was needed to make a determination of the permissible extent of the city's possible damages or whether a basis for attorney's fees existed.

The case is No. 2:15-CV-00201-SMJ.

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Companies: Monsanto Co.; Solutia Inc.; Pharmacia Corp.; City of Spokane

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