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PERSPECTIVE

Manufacturers may face new theory of liability

By Jason F. Meyer and J. Todd Konold

Manufacturers of chemicals face a new potential theory of liability that could expose them to far more extensive litigation than they may have previously faced in connection with products liability cases in the past.

Historically, manufacturers of products that caused harm to individuals or property faced liability for damages if it could be proven that the products were defectively designed or manufactured, or if the warnings accompanying the products were deficient. Additionally, companies that were responsible for placing pollutants into the environment (including ground, air, or water) could be liable for clean-up costs for causing a public nuisance. A recent breed of litigation aims to, in essence, combine those two legal theories of liability and potentially expose companies to lawsuits seeking damages for environmental cleanup costs in circumstances in which the manufacturers of the subject products had no involvement in the actual polluting activities, and even had no involvement in the ultimate products that allegedly caused the pollution.

Lead-Based Paint Manufacturers

In January 2014, a California Superior Court ordered three major paint companies to pay \$1.15 billion to clean up lead paint in homes throughout California. *People v. Atlantic Richfield Co.*, 1-00-CV-788657 (Santa Clara Superior Ct.). In this litigation, Santa Clara County sued five manufacturers and sellers of lead pigment and lead paint. The county alleged the paint companies had created a public nuisance by making and selling dangerous lead paint that wound up in millions of California homes. After extensive litigation, and the addition of further cities joining the lawsuit as plaintiffs, a bench trial was held following which the judge ordered three of the defendants to pay \$1.15 billion into an abatement fund to pay for lead paint investigation and removal programs in homes throughout the various cities and counties.

Before this verdict, other courts had previously dismissed public nuisance claims against paint companies. Courts

had not previously allowed what was essentially a product liability claim to go forward as a public nuisance action. However, the Santa Clara Superior Court found that liability on these paint companies could be imposed if the companies assisted in creating the nuisance by actively selling and promoting lead paint with actual or constructive knowledge about its health hazards.

The significance of the lawsuit against Monsanto, as well as the court's ruling in the lead-based paint litigation, is the precedent of an entirely new theory of liability against a manufacturer of a product that does not possess or control the instrumentality that allegedly causes a public nuisance.

This conclusion was reached without regard to whether or not the paint companies possessed or controlled the instrumentality that allegedly caused the nuisance.

Monsanto Corporation

Under a similar theory of liability for public nuisance, a lawsuit is pending in the U.S. District Court for the Southern District of California against Monsanto Corporation in which the city of San Diego and the San Diego Unified Port District seek millions of dollars in damages for the costs to clean up pollution in their jurisdiction, including in waterways, allegedly caused by the presence of polychlorinated biphenyl (PCB), a product manufactured by Monsanto. Similar lawsuits have been filed in various U.S. district courts by the city of Long Beach, the city of Berkeley, the city of San Jose, the city of Seattle, and the city of Spokane.

PCB was a chemical used widely for decades in the United States for many different applications, including electrical insulation, fluorescent light ballasts, cable insulation, caulk and thermal insulation, among many others. Between 1929 and 1977, Monsanto produced the country's supply of PCB. In 1970, a study was conducted regarding persistent PCB in the environment, which prompted Monsanto to notify its customers and voluntarily cease sales of PCBs for all non-electrical applications. By 1977, Monsanto had ceased all PCB production. While Monsanto

manufactured the PCB, it did not manufacture the ultimate products in which the chemical was used.

Implications

The significance of the lawsuit against Monsanto, as well as the court's ruling in the lead-based paint litigation, is the precedent of an entirely new theory of liability against a manufacturer

of a product that does not possess or control the instrumentality that allegedly causes a public nuisance. Monsanto is not alleged to have manufactured the ultimate (finished) products that are claimed to have caused the environmental contamination. More importantly, Monsanto is not alleged to have directly participated in the activities that ultimately led to the presence of the PCB in the environment. The alleged activities causing the pollution of the environment with PCB was arguably completely outside the power and control of Monsanto. Nevertheless, because the particular product can be traced back to Monsanto, it now faces the prospect of liability for millions of dollars in cleanup costs if the courts permit this relatively new theory of liability to be advanced.

In general, public nuisance litigation can be far more extensive, complicated and expensive than product liability litigation, given the wide array of the types of damages and expert-driven issues involved. Public nuisance litigation involving environmental cleanup costs can involve issues that include:

- Evaluation of sediment issues and the source of the material along the areas at issue;
- In areas involving waterways, the impact of tidal movements that affect the sediment;
- The extent of any dredging that may be necessary;
- Migration patterns of wildlife and impact dredging and other cleanup ac-

tivities may have on the wildlife; and,

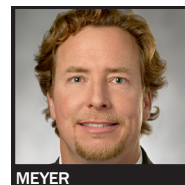
- Overall affect of pollution on human life, aquatic life, benthic life (sediment community) and the interrelated relationships of those ecosystems.

While manufacturers of chemical components of products may not have faced potential exposure for public nuisance litigation in the past, these new lawsuits could open the floodgates for such litigation. Monsanto was the target in the PCB litigation given that it was the primary manufacturer of PCB; however, lawsuits involving other chemicals more widely manufactured by several different companies could lead to much more expansive and complex litigation. Potentially, manufacturers of any chemical used in the automotive, aerospace or general construction industries could see new theories of liability for damages asserted against them, even though those manufacturers had nothing to do with the production of the ultimate products into which the chemicals were incorporated. The scope and breadth of such potential litigation will depend on the case law being developed by these pending lawsuits.

Once it was discovered that exposure to asbestos lead to a specific type of lung injury, asbestos litigation took flight. This area of personal injury litigation has yet to slow down. The new theory of liability for damages associated with environmental cleanup costs against chemical manufacturers could lead to litigation that exceeds the level of asbestos litigation seen in the last few decades. The litigation against Monsanto therefore has potential implications far beyond PCB or claims limited to Monsanto.

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