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## PCBs

### Public Nuisance PCB Suits Against Monsanto Could Have Far-Reaching Impact

**A** recent flurry of suits by West Coast cities—seeking to hold Monsanto liable for allegedly polluting public waterways with PCBs it made decades ago—represents an intersection of hazardous waste and product liability law that could have a far-reaching impact on industrial product manufacturers, attorneys and scholars tell Bloomberg BNA.

Six cities—Seattle and Spokane, Wash., and San Diego, San Jose, Oakland and Berkeley, Calif.—have sued Monsanto Co. under a theory of public nuisance during the past eight months and a seventh—Portland, Ore.—will soon join the fray.

The plaintiffs have moved to consolidate the cases in multidistrict litigation in the U.S. District Court for the Northern District of California, in *In re Monsanto PCB Water Contamination Litigation*, U.S.J.P.M.L., No. 2697, *motion to consolidate* 1/26/16.

**‘It’s a Huge Deal.’** “It’s a huge deal,” Professor Noah Sachs at the University of Richmond School of Law in Richmond, Va., told Bloomberg BNA.

“It started out looking like a few municipalities but now there are several up and down the west coast with the arrow pointed at a single defendant.”

Because Monsanto doesn’t fall under any of the categories of parties liable for the clean up of hazardous waste enumerated in the federal Superfund law, the cities can’t pursue claims under that law, Sachs said.

“Here, Monsanto wasn’t arranging for disposal but was selling a commercial product,” he said.

If the cities are successful with these state-law nuisance claims, it would provide another avenue to recover cleanup costs.

The stakes are high, Professor Craig Johnston at Lewis & Clark Law School in Portland, Ore., told Bloomberg BNA. Johnston teaches hazardous waste law.

“It could be \$1 billion just for the cleanup in Portland,” Johnston said.

“I haven’t seen public nuisance suits like this against a manufacturer of a product based on someone else’s usage of the product,” he said.

Johnston declined to predict the likelihood of success but said it’s clear that the Superfund law will not preempt the litigation.

“It’s worth pursuing even if there is only a 20 percent chance of success,” he added.

**Look to Lead Paint Suit.** The suits come on the heels of a \$1.1 billion lead-paint public nuisance award, which is now on appeal in California’s Sixth Appellate District, in *People v. Atlantic Richfield Co.*, Cal. Ct. App., No. H040880.

The outcome of the appeal in that case may determine whether the PCB claims succeed, Sachs said. “If I were Monsanto, I’d be watching the lead paint appeal,” he said.

In *People v. Atlantic Richfield Co.*, three companies that once made lead-based paint were ordered in 2013 to pay the more than \$1 billion award into an abatement fund for lead removal in 10 California cities and counties (29 TXLR 7, 1/2/14).

Here, the cities that have sued are targeting polychlorinated biphenyls (PCBs) which, like lead paint, were banned for use in commercial products in the 1970s.

Monsanto was the sole manufacturer of PCBs, which were used primarily to insulate and cool electrical equipment, including power transformers, from the 1930s until the company voluntarily ceased production in 1977.

The EPA banned their manufacture in 1979 after finding they caused birth defects and cancer in laboratory animals, and they are a suspected cause of cancer and adverse skin and liver effects in humans.

**Useful Products.** Monsanto spokesperson Charla Lord told Bloomberg BNA that PCBs sold at the time were “a lawful and useful product” and that municipal landfill operators and parties that disposed of PCB-containing products should bear responsibility for the contamination.

“These cases do not claim damages due to Monsanto discharging PCBs into the environment itself,” Lord said.

“Where cleanup is required, government regulations provide for procedures where the parties responsible for the discharges participate in the cleanup. In contrast, these cases are filed outside of that government-established procedure.”

Defense counsel representing other industrial product makers are also concerned that a ruling against Monsanto could expand manufacturer liability for other products.

“If the plaintiffs’ theory were to succeed many useful products could be attacked with the risk that such products would not be sold in California,” attorney Peter Hsiao with Morrison & Foerster LLP in Los Angeles told Bloomberg BNA.

Hsiao practices environmental, natural resources and chemical toxic tort law, but is not involved in the Monsanto litigation.

## Six Cases Filed So Far

- *San Diego Unified Port Dist. v. Monsanto Co.*, S.D. Cal., No. 15-CV-578, filed 3/13/15.
- *City of San Jose v. Monsanto Co.*, N.D. Cal., No. 15-CV-3178, filed 7/8/15.
- *City of Spokane v. Monsanto Co.*, E.D. Wash., No. 15-CV-201, filed 7/31/15.
- *City of Oakland v. Monsanto Co.*, N.D. Cal., No. 15-CV-5152, filed 11/10/15.
- *City of Berkeley v. Monsanto Co.*, N.D. Cal., No. 16-CV-71, filed 1/6/16.
- *City of Seattle v. Monsanto Co.*, W.D. Wash., No. 16-CV-107, filed 1/25/16.

“For example, the state of California once brought a nuisance lawsuit against auto manufacturers claiming that their cars created a nuisance because of their greenhouse gas emissions. That lawsuit was dismissed,” Hsiao said.

“This attempt by plaintiffs’ attorneys to use the common law of nuisance to hold manufacturers liable for their chemical products is a new emerging trend in environmental cases.”

But, Hsiao said, “This theory has a serious flaw where the manufacturer did not spill the chemical and therefore did not cause the release to the environment.”

Professor Sachs agreed that the suits could set a precedent beyond the issue of PCBs.

“Courts will struggle with where the line is. For example, a car battery contains hazardous substances. A manufacturer puts that on the market knowing some will end up in a landfill. The manufacturer will argue it is not disposing.”

**From San Diego to Seattle.** In March 2015, Baron Budd P.C. in Dallas and Gomez Trial Attorneys in San Diego filed the first PCB public nuisance suit against Monsanto on behalf of the city of San Diego (30 TXLR 282, 3/19/15).

The complaint alleges that Monsanto knew for decades that PCBs were toxic and couldn’t be contained, that there was no safe way to dispose of PCBs, and that the company concealed these facts. Similar allegations of concealment of toxic hazards were made in the lead paint litigation.

The complaint contends that it was foreseeable that humans would be exposed to PCBs through swimming in contaminated waters or eating fish from those waters.

In July 2015, the firms filed public nuisance actions on behalf of San Jose, Calif., and the city of Spokane, Wash.—the latter also alleged defective design and failure to warn.

By January 2016, the firms had filed public nuisance suits on behalf of the cities of Oakland, Calif., Berkeley, Calif., and Seattle (31 TXLR 104, 2/4/16), and on March 16, 2016, the Portland City Council adopted a resolution authorizing the city attorney to sue Monsanto.

**Novel Theory, Potential Superfund Impact.** “It’s a huge risk to Monsanto and an opportunity for municipalities and users of the products, such as utilities that used transformers containing PCBs,” environmental attorney Loren Dunn with Riddell Williams in Seattle told Bloomberg BNA.

“It’s a novel theory, and how it’s resolved will impact a lot of other cases,” Dunn, who has represented many companies facing hazardous waste cleanup liability, said. “The damages that result are environmental in nature but the cities are using an alternate theory for the recovery of environmental cleanup costs to a normal CERCLA recovery.”

The suits could also impact settlements negotiated under the federal Superfund law, Dunn said.

“Most if not all of the municipalities that are suing are involved in Superfund cleanups with water bodies impacted,” he said, and the remedies at these sites can run into the hundreds of millions of dollars.

“Suddenly, Monsanto is injected as a potentially responsible party” liable for hazardous waste cleanup costs, Dunn said. “The EPA is looking for PRPs to perform the remedy. If they instead can wait to see how the MDL comes down before spending millions of dollars, that introduces a new component into negotiations.”

**Monsanto Argues No Liability.** For its part, Monsanto says it produced a useful product for the times, it didn’t dispose of the chemicals in the cities’ waters and it shouldn’t be held liable for any cleanup activities.

“The cities claim damages for a variety of things in these cases—from remediation, to the building of new water treatment plants and regulatory costs to lawfully discharge PCBs (and other chemicals) in the city’s storm water,” Lord, the company spokeswoman, said.

“However, as is stated in our motions to dismiss, there is no public nuisance liability for a product manufacturer unless a manufacturer actively caused and deposited chemicals in the bays and are among those who polluted the property,” Lord said.

“If the third-party disposal or municipal disposal practices of the past have led four decades later to the state’s development of lawful limits on future PCB discharges into various bays and rivers through storm water, then those third parties and municipal landfill operators bear responsibility for these additional costs.”

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PROF. NOAH SACHS

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In order to prevail on their public nuisance claims, the cities will need to show that Monsanto’s conduct was a “substantial factor” in causing the harm, and that the company knew or should have known that the manufacture and sale of PCBs was causing contamination.

“The question is what did Monsanto know and when did they know it? Whether it knew before the PCB ban in the 1970s,” Sachs said.

“PCBs bioaccumulate,” Sachs said. “It is taken into the tissues of animals and fish and is then eaten by hu-

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mans. The question is whether Monsanto was aware of how easily its product gets into the environment.”

By PETER HAYES

To contact the reporter on this story: Peter Hayes at phayes@bna.com

To contact the editor responsible for this story: Steven Patrick at spatrack@bna.com

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*The complaint in San Diego v. Monsanto is available at [http://www.bloomberglaw.com/public/document/San\\_Diego\\_Unified\\_Port\\_District\\_v\\_Monsanto\\_Company\\_et\\_al\\_Docket\\_No](http://www.bloomberglaw.com/public/document/San_Diego_Unified_Port_District_v_Monsanto_Company_et_al_Docket_No)*

*The complaint in San Jose v. Monsanto is available at [http://www.bloomberglaw.com/public/document/City\\_of\\_San\\_Jose\\_v\\_Monsanto\\_Company\\_et\\_al\\_Docket\\_No\\_515cv03178\\_ND](http://www.bloomberglaw.com/public/document/City_of_San_Jose_v_Monsanto_Company_et_al_Docket_No_515cv03178_ND)*

*The complaint in Oakland v. Monsanto is available at [http://www.bloomberglaw.com/public/document/City\\_of\\_Oakland\\_v\\_Monsanto\\_Company\\_et\\_al\\_Docket\\_No\\_315cv05152\\_ND](http://www.bloomberglaw.com/public/document/City_of_Oakland_v_Monsanto_Company_et_al_Docket_No_315cv05152_ND)*

*The complaint in Berkeley v. Monsanto is available at [http://www.bloomberglaw.com/public/document/City\\_of\\_Berkeley\\_v\\_Monsanto\\_Company\\_et\\_al\\_Docket\\_No\\_516cv00071\\_ND](http://www.bloomberglaw.com/public/document/City_of_Berkeley_v_Monsanto_Company_et_al_Docket_No_516cv00071_ND)*

*The complaint in Spokane v. Monsanto is available at [http://www.bloomberglaw.com/public/document/City\\_of\\_Spokane\\_v\\_Monsanto\\_Company\\_et\\_al\\_Docket\\_No\\_215cv00201\\_ED](http://www.bloomberglaw.com/public/document/City_of_Spokane_v_Monsanto_Company_et_al_Docket_No_215cv00201_ED)*

*The complaint in Seattle v. Monsanto is available at [http://www.bloomberglaw.com/public/document/City\\_of\\_Seattle\\_v\\_Monsanto\\_Company\\_et\\_al\\_Docket\\_No\\_216cv00107\\_WD](http://www.bloomberglaw.com/public/document/City_of_Seattle_v_Monsanto_Company_et_al_Docket_No_216cv00107_WD)*