

# PCBs/Common Law Claims: Delaware Court Addresses Issues Arising Out of State Damages Action



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The Superior Court of Delaware in a July 11th Opinion addressed issues arising out of a damage action filed by the State of Delaware (“State”) against a manufacturer of polychlorinated biphenyls (“PCBs”). See *State of Delaware v. Monsanto Company, et al.*, 2022 WL 2663220.

The State of Delaware filed a Complaint in the Superior Court of Delaware (“Court”) against Monsanto and another company asserting claims for:

- Public nuisance
- Trespass
- Unjust enrichment

Monsanto filed a Motion to Dismiss the claims.

PCBs are chemical compounds manufactured from the 1930s until about 1977. They have since been classified as a group of toxic chemicals that have negatively impacted the health of wildlife and people. PCBs are “especially stable” due to their chemical composition, “causing them to break down slowly. . .”.

The chemicals have been found to accrue in the fatty tissues of animals. The concerns posed by PCBs include their tendency to “penetrate the food chain” when consumed by small animals. Such effects can be magnified as the size of the animal increases.

Monsanto initiated manufacturing of PCBs in 1935. The company sold PCBs to third-party manufacturers until 1971. Their sale was voluntarily ended that year except for “limited use in electrical capacitors and transformers.”

The State alleged that Zone 5 of the Delaware River, Zone 6 of the Delaware Bay, the Saint Jones River, the Appoquinimink River, the Brandywine River, Red Clay and White Clay Creek and the Christina River are impaired due to PCB contamination. The impairment cited included the inability to consume fish from the waterbodies because of the detection of PCBs in certain fish species. General fish consumption advisories had been issued.

The State also alleged that PCBs entered the environment through “ordinary use, maintenance, and disposal of associated products.” It contended that Monsanto had been aware of the toxic effect of PCBs on animals and humans since 1937. This was alleged to have included the possibility that PCBs could “escape into and pollute the environment” since the 1950s.

The State cited authority holding that a public nuisance claim could be based on air or water pollution. However, the Court found that Delaware authority, and other jurisdictions, “support[s] the conclusion that product claims are not encompassed within the public nuisance doctrine.”

The trespass claim was based on the contention that the State is the “proprietor” of lands and waters. Monsanto was argued to be “substantially certain” that trespass would occur.

The Court found that the State lacked standing to bring a trespass claim. It concluded that the State lacked “exclusive possession” of the bodies of water alleged to have been impaired by PCB contamination. Further, it found “that there can be no trespass action for contamination” because Monsanto lacked “ownership or control over the intruding instrumentality – in this case PCBs.”

The State based its unjust enrichment claim on the notion that Monsanto retained economic benefits. The State was argued to have “relieved [Monsanto] of paying for clean-up by expending taxpayer money to address the PCB contamination.”

The Court found that it lacked jurisdiction because “unjust enrichment is an equitable cause of action.” Thus, it “is not a standalone claim in Superior Court.” It further found that the State’s complaint contained no allegations that Monsanto was “enriched.” There was no Delaware authority “supporting the proposition that relief from future obligations amounts to a claim for unjust enrichment.”

A copy of the Opinion can be downloaded [here](#).