

A Lower Bar For Calif. Agencies In Hazardous Waste Cases

By **Ria Rana and John Parker** (February 5, 2018, 11:36 AM EST)

On Jan. 8, 2018, the California Court of Appeal rendered a decision in the City of Modesto v. The Dow Chemical Company that expands the sphere of liability under the Polanco Redevelopment Act and its 2014 policy successor, the Gatto Act, to chemical manufacturers. These statutes seek to impose liability on those who discharge hazardous waste. In the past, the Polanco Act (California Health & Safety Code §§ 33459-33459.8) had been used to only hold owners and operators of hazardous waste sites liable.

However, in the City of Modesto, in addition to suing the owners and operators of dry cleaners, the city opted additionally to sue the manufacturers and distributors of dry cleaning equipment and dry cleaning solvent that had been used at the dry cleaner shops. The city argued that the manufacturers and distributors were also responsible for discharging hazardous waste and thus subject to liability under the Polanco Act. The court largely sided with the city. As further described below, it set forth a circumstantial evidence standard of causation that favors plaintiffs, enabling them to more easily impute defendants for allegedly causing or permitting hazardous waste disposal.

Background

The Polanco Act, passed in 1990, was previously only enforced by state development agencies on areas they would designate as “redevelopment project areas.” However, in 2012, the state legislature dissolved state development agencies while keeping the Polanco Act on the books, leaving open the question of who could enforce the statute. The legislature soon resolved this question by passing the Gatto Act (California Health & Safety Code §§ 25403-25403.8), effective Jan. 1, 2014, which not only restored, but greatly expanded the Polanco Act’s brownfield remediation authority to all of California’s city and county agencies. Health & Safety Code § 25403(l). The Gatto Act explicitly states that any judicial construction or interpretation of the Polanco Act also applies to the Gatto Act. Health & Saf. Code § 25403.8.

Under the Gatto Act, a California city or county agency can investigate and/or clean up hazardous materials on blighted property and require “responsible parties” (defined below) to do the same. If the agency undertakes the cleanup, it can recover any costs it incurred from the responsible party(ies). Health & Saf. Code § 25403.5(a). The legislature specifically wrote into the act that it intended local



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agencies to diligently pursue reimbursement for any incurred investigation and cleanup costs from responsible parties. Health & Saf. Code § 25403.5(c).

A responsible party under both acts is any party who would be subject to liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §9607(a)). Health & Saf. Code, § 33459(h), § 25403(s). This includes current and past business owners, operators, transporters and arrangers that work with hazardous materials. A responsible party is also any party that “has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance.” Id.

Modesto 2018 Decision

The Modesto case, in which the original complaint was filed in 1998, has had a “complex and tortuous path,” including three detours to California’s Court of Appeal and five trials. *City of Modesto v. The Dow Chemical Company, et. al.*, 2018 WL 317043 (Cal. Ct. App., Jan. 8, 2018) at *1, *5.

In the published portion of the court of appeal’s lengthy January 2018 decision, the court focused on the standard of causation that an agency must meet to support a finding of who is subject to and may be found liable under the Polanco Act. The city of Modesto and various local agencies had sued 28 retail dry cleaning businesses as well as manufacturers and distributors of dry cleaning equipment and dry cleaning solvent. The causes of action included negligence, product liability, statutory liability, trespass and nuisance. The plaintiffs alleged that the defendants had contaminated the city’s groundwater, sewer system and easements with perchloroethylene (PCE), a toxic chlorinated solvent used by dry cleaners.

Various defendants settled over the course of litigation. However, several defendants, including two PCE manufacturers and one PCE distributor who also manufactured dry cleaning equipment, moved for summary judgment under the Polanco Act essentially arguing that they were not subject to the act’s provision since they had not discharged waste into the state’s waters. The trial court granted their motions holding that the plaintiffs had not shown that the defendants “either directly participated in or exercised authority or control over on-site activities or disposal activities at Modesto dry cleaners.” *City of Modesto*, supra at *6.

The decision was appealed to the California Court of Appeal. The court concluded that the Polanco Act should be construed in accordance with the principles of nuisance. Under these principles, liability is not limited to those defendants who directly participate in or have control over discharges, but also includes those who assist in creating the pollution. Id. at *7. The court further determined that the plaintiffs’ evidence sufficiently demonstrated that the defendants had instructed the dry cleaners to set up their equipment in a way that water containing PCE would be discharged directly into drains and sewers, and also gave the dry cleaners instructions to dispose of spilled PCE on or in the ground. Id. at *14. On remand to the trial court, the defendants argued that in order to meet the standard of causation, the plaintiffs had to provide direct evidence that the dry cleaners received a specific instruction from the manufacturers, acted on that instruction, and the act caused contamination at a specific site. The trial court again accepted the defendants’ arguments, and the plaintiffs again appealed.

The court of appeal rejected the special “but for” causation standard that the defendants had set forth before the trial court: “direct proof of every link in the chain of causation, on a site-by-site and instruction-by-instruction basis, is not required.” Id. at *19. Instead, the court endorsed a substantial

factor test to determine causation: A defendant's actions only have to be a substantial factor in creating contamination in order to be subject to liability under the Polanco Act. Id. at *18. Under this test, liability can be shown by sufficient circumstantial evidence that would allow a reasonable fact finder to conclude that the defendants' conduct was a contributing factor to the pollution. "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." Id. at *20.

Simply placing a product into the stream of commerce, even a product with inadequate warnings, would not be sufficient to subject a manufacturer to liability under the Polanco Act, as such would amount to a products liability action. Rather, a manufacturer must take affirmative steps directed toward the improper discharge of solvent wastes to be subject to liability under the act. Id. at *21. In this case, the court found that the defendants' alleged affirmative acts and instructions could support a finding of liability.

Analysis

The court's latest holding currently lowers the plaintiff's burden of proof on causation under the Polanco Act, and by extension, the Gatto Act. It is unclear at this juncture whether the decision will be appealed and/or whether other California courts will interpret these standards differently. Meanwhile, the lower standard may result in a higher summary judgment hurdle for the defendants. Nevertheless, even under the current holding, the defendants may still be able to elicit evidence to satisfy the standard on summary judgment and, failing that, obtain evidence to minimize the significance of any alleged affirmative acts proffered by the plaintiffs.

Should the court's latest decision continue to stand, it has broad implications for chemical and equipment manufacturers and distributors who may see themselves being more frequently subjected to liability under the Polanco and Gatto Acts. As such, it will be important for manufacturers to insulate themselves from liability by avoiding actions that would be deemed as affirmatively creating or permitting hazardous waste discharge. Aside from the affirmative actions the court found in the specific factual record in Modesto, it remains to be determined what other actions may qualify as an "affirmative act." The liability hook for manufacturers and distributors will likely depend on the development of case law behind this phrase's meaning.

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