

Big Verdict Against Dow Chemical Was Warranted

By Michael Axline

Matthew T. Heartney's Dec. 22 Daily Journal opinion piece "Manufacturers Beware!" complains of the "novel legal theory" employed by the city of Modesto to recover from perchloroethylene manufacturers the costs of removing perc contamination from city wells and property in *City of Modesto v. Dow*, 999643 (San Francisco Super. Ct. June 13, 2006).

But the theory, product liability, is not novel at all: It is a common-law theory applied by courts in every state to hold manufacturers of mass-produced products strictly liable for damages caused by those products.

Heartney doesn't really suggest that product-liability theories are novel; rather, he argues that it is novel to apply product-liability theories to chemical and petroleum products. He asserts that such an application represents "a potentially far-reaching expansion of product-liability principles."

That simply is not the case. In fact, Heartney's suggestion of a special exemption for chemical and petroleum products is "novel."

Perc and other petroleum and chemical products are no different from other mass-produced and mass-marketed products, except perc officially is classified as a hazardous substance, whereas most other products are not. That difference supports stricter applications of product-liability law, not a special exemption.

Heartney offers several policy arguments to support his conclusion that product-liability law is ill-suited to damages caused by chemical contamination. These arguments do not withstand even cursory scrutiny.

He argues that environmental laws prohibit users of hazardous chemicals from releasing them into the environment, and that it is unfair to shift the focus from users to manufacturers. He asserts that holding manufacturers liable "leapfrogs" over dry cleaners and suggests that dry cleaners should bear the entire responsibility for cleaning up perc.

Nearly all products are regulated, though, and all are "used." Courts (and legislatures) nonetheless have adopted product-liability law for the purpose of shifting the focus from the user to the manufacturer. They have done so because manufacturers are in the best position to avoid or minimize harm by changing their products, labels, instructions or marketing practices. That is even more true for chemicals than for other products because the potential harm from chemical products is more complex and more difficult to detect.

Heartney ignores another reason

courts have adopted product liability. Regulatory programs often fail to prevent harm. As the court explained in *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757 (1981), product liability is necessary because "governmental safety standards and regulatory law have failed to provide adequate consumer protection against the manufacture and distribution of defective products." Nowhere is that more true than with respect to chemical and petroleum products.

Legislatures recognize that environmental laws and regulatory agencies are not a panacea because they have placed express savings provisions into environmental laws specifically preserving common-law tort remedies and providing that such laws shall not be used as a shield against strict liability.

Environmental laws failed to prevent contamination of public drinking water in Modesto, just as they have failed to prevent contamination of toxic-waste sites nationwide. Heartney states that he does not want to "minimize the need to prevent environmental damage" but notably fails to suggest that regulatory agencies should receive more funding, or that environmental laws should be strengthened or enforced more aggressively.

Manufacturers made millions selling perc to the very dry cleaners they now say should be solely responsible for damage caused by that chemical. Other manufacturers that have profited handsomely from mass-marketing products with warning of known risks have argued against liability by pointing the finger at users, but that argument is particularly weak with respect to perc.

Perc manufacturers did not simply place their product into the stream of commerce, where sophisticated dry cleaners ignored obvious risks. Because perc is a fungible product, its manufacturers sold their expertise along with their perc.

Manufacturers sent sales representatives to inspect dry cleaners' equipment and operations, published dry-cleaner newsletters, provided technical literature and trained sales personnel to promote reliance on the manufacturers' professionalism, expertise and individualized service. As stated in the court's tentative decision addressing the city's statutory claims:

"The manufacturer defendants in this case did more than simply place their perc products into the stream

of commerce without adequate warnings. ... The evidence included numerous examples of manufacturer instructions, advice and guidance to customers to discharge separator water, which the manufacturers knew to contain perc, into sewers, as well as to release waste perc onto the ground. ... The effect of the manufacturers' recommendations, considered both individually and in combination, was that risky waste-handling and disposal practices became the norm among the customers. ... [T]he manufacturers knew that improper handling or disposal of wastes containing perc presented a risk of groundwater contamination."

Dry cleaners purchase perc in bulk and use it every day, but they are not chemists or toxicologists. Manufacturers,

who employ chemists and toxicologists, did not provide the expertise of their chemists and toxicologists on the environmental risks of perc to dry cleaners because disclosing those risks would have discouraged dry cleaners from using perc and encouraged them to use alternative methods (which dry cleaners are beginning to do).

For decades, manufacturers told dry cleaners it was acceptable to

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discharge perc into sewers, which the manufacturers knew would leak, or simply to dump it behind their shops. Dry cleaners should be incensed that the manufacturers who told them it was proper to dump perc are trying to leave them holding the bag for the consequences of doing so.

The jury in *City of Modesto* had lots of reasons to award an "eye-popping" \$178 million in compensatory and punitive damages to the city. The award might have been a reaction to evidence that, at the same time manufacturers were telling their dry-cleaner customers perc could be thrown out the back door or discharged into sewers, the manufacturers were taking extra precautions to avoid liability for soil and groundwater contamination at their own facilities.

Or the verdict might have been a reaction to evidence that manufac-

turers maintained euphemistically labelled "product-stewardship" programs, the main function of which appeared to be downplaying the risks of perc when forced by law to say something about those risks.

Or the jury simply might have compared the easily understood newsletters and bulletins in which manufacturers complained about unnecessary overregulation of perc with the dry, technical "Material Safety Data Sheets" in which they stated that dry cleaners should "minimize" contamination and "comply with all applicable laws."

Whatever the reasons for the verdict, it is clear the jury reacted differently than did manufacturers upon learning that perc is a hazardous substance turning up in groundwater used as a source of drinking water for families in Modesto. Unless you are a manufacturer of perc or represent such manufacturers,

you probably think the jury's reaction was more responsible than the manufacturers'.

As a policy matter, we should continue to allow juries to make such judgments. As the *Grimshaw* court noted, the deterrence of "objectionable corporate policies" is a principal purpose of punitive damages: "Punitive damages thus remain the most effective remedy for consumer protection against defectively designed mass-produced articles."

That principle applies as much to chemical and petroleum manufacturers as it does to cigarette and automobile makers.

Michael Axline is a partner at Miller, Axline & Sawyer in Sacramento. He represents the city of Modesto and the Modesto Redevelopment Agency in litigation that is the subject of this piece.