

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF PRINCETON,

Plaintiff,

v.

PHARMACIA LLC, SOLUTIA INC., and
MONSANTO COMPANY,

Defendants.

Case No.: 4:15-cv-40096

COMPLAINT

I. INTRODUCTION

1. Plaintiff, Town of Princeton, brings this action on behalf of itself.

2. Polychlorinated biphenyls (“PCBs”) were a common component of building products used to construct and renovate schools in Massachusetts during the 1950s, 1960s, and 1970s. PCBs are persistent environmental pollutants that have been demonstrated to cause cancer, as well as a variety of other adverse health effects. Children are particularly vulnerable to the toxic effects of PCBs. On September 25, 2009, the Environmental Protection Agency (“EPA”) issued a press release advising school administrators about the presence of PCBs in school buildings built between 1950 and 1978. Concurrent with the press release, for the first time the EPA established public health levels for PCBs in school indoor air.

3. From 1935 to 1978, “Monsanto Company” was the exclusive manufacturer of PCBs in the United States. “Monsanto Company” reaped enormous profits from its monopoly of the PCB market, all the while knowing about the toxicity of PCBs. Today, “Monsanto Company” is known as defendant Pharmacia Corporation. Defendants Solutia Inc. and Monsanto Company are affiliated companies that have assumed liabilities related to the historical manufacture of PCBs.

4. Through this action, the Town of Princeton seeks compensatory damages for the costs to investigate, remediate, and monitor PCB contamination in its school, the Thomas Prince School; treble and/or punitive damages; and reasonable attorneys' fees and costs for itself.

II. PARTIES

5. Plaintiff, Town of Princeton ("Princeton" or "Plaintiff"), is a town existing under the laws of the State of Massachusetts. Princeton is located in Worcester County and has a population of approximately 3,500. Princeton owns the Thomas Prince School (the "School") located in the Town of Princeton. Pursuant to the Amended Waschuset Regional School District Agreement (available at http://www.wrsd.net/0513Agreement_Final.pdf), Princeton leases the School to the Waschuset Regional School District (the District), of which Princeton is a member along with four other Massachusetts towns. The District operates the School.

6. Defendant Pharmacia LLC ("Pharmacia" or "Old Monsanto") is a Delaware limited liability company with its principal place of business in Peapack, New Jersey. Pharmacia is a wholly-owned subsidiary of Pfizer, Inc. Pfizer is a Delaware corporation with its principal place of business in New York. Accordingly, Pharmacia is a citizen of Delaware and New York. Prior to April 2000, Pharmacia was known as "Monsanto Company," the company that was the exclusive manufacturer of PCBs in the United States for over 40 years.

7. Defendant Solutia Inc. ("Solutia") is a Delaware corporation with its headquarters and principal place of business in St. Louis, Missouri. Solutia is a global chemical manufacturer that was formed in 1997 by the divestiture of the chemical business of the company then known as "Monsanto Company." This transferred the assets and liabilities of the chemical business, including those related to the manufacture and sale of PCBs, to Solutia.

8. Defendant Monsanto Company (“New Monsanto”) is a Delaware corporation with its principal place of business in St. Louis, Missouri. New Monsanto is an agricultural company that was formed in February 2000 under the name “Monsanto Ag Company.” It was formed as a wholly owned subsidiary of defendant Pharmacia, which at that time was known as “Monsanto Company.” In March 2000, “Monsanto Company” changed its name to “Pharmacia Corporation,” and “Monsanto Ag Company” assumed the name “Monsanto Company.”

9. Pursuant to various agreements, Old Monsanto, Solutia, and New Monsanto have apportioned amongst themselves liabilities for claims arising from Old Monsanto’s chemical business, including the manufacture and sale of PCBs. Old Monsanto, Solutia, and New Monsanto are collectively referred to herein as “Defendants.”

III. JURISDICTION AND VENUE

10. This Court has diversity jurisdiction pursuant to 28 U.S.C. sections 1332.

11. Venue is appropriate in this judicial district pursuant to 28 U.S.C. section 1391(a) because a substantial part of the property that is the subject of the action is situated in this judicial district.

IV. FACTUAL ALLEGATIONS

A. The Manufacture and Use of PCBs

12. Polychlorinated biphenyl, or “PCB” for short, is a molecule comprised of chlorine atoms attached to a double carbon-hydrogen ring (a “biphenyl” ring). PCBs are man-made chemicals, and there is no known natural source of PCB.

13. PCBs were first manufactured commercially in the late 1920s by the Anniston Ordnance Company, which subsequently changed its name to Swann Chemical Company. In 1935, Old Monsanto bought Swann Chemical Company, becoming the sole PCB manufacturer in the

United States. Around that time, Old Monsanto licensed companies in other countries to manufacture PCBs for international use. At all material times, Old Monsanto produced at least 98% of PCBs in the United States, if not more, until manufacture and use of the product was discontinued in 1978.

14. PCBs are odorless and tasteless. They are either oily liquids or solids that are colorless to light yellow in appearance. Because they are non-flammable, chemically stable, have a high boiling point, and electrical insulating properties, PCBs have been used in a wide range of industrial applications. PCBs have been used in applications in which the PCBs are held completely within the equipment (*i.e.*, “closed systems”), such as transformers, motor start capacitors, and lighting ballasts. They have also been used in applications in which the PCBs are in direct contact with their surroundings (*i.e.*, “open systems”), such as caulk, paint, adhesives, and flame retardants. The most common trade name for PCBs in the United States was “Aroclor,” which was trademarked by Old Monsanto.

15. Between about 1950 and 1978, products containing PCBs were widely used in the construction and renovation of buildings throughout the United States. For example, Old Monsanto’s manufacture of PCBs just for use in caulk and other plasticizers ranged from three million pounds in 1957 to 19 million pounds in 1969.

16. Between 1950 and 1978, there was a rise in school construction corresponding with the post-World War II “Baby Boom” generation attending school. PCBs were widely and foreseeably used in the construction and renovation of these schools. Accordingly, PCBs are likely to be present in the caulk around windows, door frames, masonry columns, and other masonry building materials in schools built or renovated during this period.

17. PCBs are stable compounds that do not readily degrade. As a result, PCBs persist in the environment for long periods of time. Over time, however, PCBs volatilize and cycle between air, water, and soil, even when not physically disturbed. PCBs easily migrate from building materials such as caulk into surrounding materials such as masonry, wood, drywall, and soil, thereby causing damage to those surrounding materials. PCBs also degrade into lesser chlorinated types of PCBs, which happen to be more potent from a neurotoxic standpoint than higher chlorinated PCBs. Thus, the risks posed by PCBs in building materials are greater as time passes.

B. PCB Toxicity

18. Just as in the environment, PCBs accumulate in the human body. According to the EPA, PCBs have been demonstrated to cause cancer, as well as a variety of other adverse health effects on the immune, reproductive, nervous, and endocrine systems of animals and humans.

19. In 1996, the EPA completed an assessment of PCB carcinogenicity, which was peer-reviewed by 15 experts on PCBs, including scientists from government, academia, and industry. The peer reviewers agreed with the EPA's conclusions that PCBs are "probable human carcinogens."

20. In 2013, 26 experts from 12 countries met at the International Agency for Research on Cancer (IARC) to reassess the carcinogenicity of PCBs and based on the best available science classified them as "carcinogenic to humans."

21. PCBs have been demonstrated to affect the immune system by decreasing the size of the thymus gland, decreasing resistance to pneumonia and infections, and increasing the risk of non-Hodgkin's lymphoma. Studies have been unable to identify a level of PCB exposure that does not cause effects on the immune system.

22. The reproductive effects of PCBs include decreased birth weight and a significant decrease in gestational age with increasing exposures to PCBs.

23. The neurological effects of PCBs include significant deficits in visual recognition, short-term memory, and learning. Children, like the elementary students attending the Thomas Prince School, are particularly vulnerable to these neurological effects.

24. PCBs have been demonstrated to effect thyroid hormone levels. Thyroid hormone levels are critical for normal growth and development, and alterations in thyroid hormones can have significant implications.

25. PCBs are also associated with elevations in blood pressure, serum triglycerides, and serum cholesterol.

26. The primary pathways for PCBs to enter the human body are ingestion, inhalation, and dermal contact. Although children are exposed to PCBs through the same pathways as adults, their intake of PCBs is likely greater than that of adults because children consume more food, air, and water per pound of body weight than adults. Further, children are more vulnerable to PCBs because of their smaller size and developing systems. The Agency for Toxic Substances and Disease Registry explained:

Younger children may be particularly vulnerable to PCBs because, compared to adults, they are growing more rapidly and generally have lower and distinct profiles of biotransformation enzymes, as well as much smaller fat depots for sequestering the lipophilic PCBs.

C. Old Monsanto's Knowledge of PCB Toxicity

27. As early as the 1930s, Old Monsanto knew of the toxicity of PCBs but continued to manufacture, sell, and promote the products. For example:

- An October 11, 1937 Old Monsanto memorandum states that “[e]xperimental work in animals shows that prolonged exposure to [PCB] vapors evolved at high temperatures or by repeated oral ingestion will lead to systemic toxic effects.”
- On September 15, 1938, the Dean of the Harvard School of Public Health provided a report to Old Monsanto on the results of animal studies that showed liver damage to animals exposed to PCBs.
- A February 29, 1952 Old Monsanto memorandum states that the “toxicity hazard of [PCB] fumes is well established.”
- An Old Monsanto document dated September 1, 1953 states: “As I am sure you know, [PCBs] cannot be considered nontoxic.”
- On November 14, 1955, Old Monsanto’s Medical Department recommended that “eating of lunches should not be allowed in [the PCB] department” because “[PCB] vapors and other process vapors could contaminate the lunches[.]”

28. Notwithstanding its knowledge, Old Monsanto willfully and callously failed to provide adequate warnings of PCB toxicity, preferring instead to deny or downplay the dangers of its product. This was motivated by the company’s desire to protect and prolong its “very profitable” PCB business. Old Monsanto recognized that if the dangers of PCBs were known, use of the product would be severely curtailed, if not eliminated altogether.

29. By the late 1960s, public researchers had begun questioning the safety of PCBs. On August 25, 1969, Old Monsanto formed an “ad hoc” committee to respond to these concerns. An October 2, 1969 report from this committee states:

The objective of the committee was to recommend action that will:

1. Protect continued sales and profits of [PCBs];
2. Permit continued development of new uses and sales, and

3. Protect the image of the Organic Division and the Corporation as members of the business community recognizing their responsibilities to prevent and/or control contamination of the global ecosystem.

The report goes on to state:

The committee believes there is little probability that any action that can be taken will prevent the growing incrimination of [PCBs] as nearly global environmental contaminants leading to contamination of human food (particularly fish), the killing of some marine species (shrimp), and the possible extinction of several species of fish-eating birds.

* * *

There are, however, a number of actions which must be undertaken in order to prolong the manufacture, sale and use of these particular [PCBs] as well as to protect the continued use of other members of the [PCB] series.

30. In 1970, the year after Old Monsanto formed the “ad hoc” committee, PCB production in the United States peaked at 85 million pounds.

D. The Federal Ban on PCBs

31. In 1976, Congress passed the Toxic Substances Control Act, which banned most uses of PCBs in the United States effective January 1, 1979. The Toxic Substances Control Act authorized the EPA and other federal and state agencies to apply restrictions related to PCBs. Old Monsanto discontinued the manufacture of PCBs in 1977, but the company’s PCBs continued to be sold and distributed through the end of 1978.

E. The EPA’s Guidance to Schools Regarding Airborne PCB

32. On September 25, 2009, the EPA issued a press release to school administrators recommending they take steps “to reduce exposure to PCBs that may be found in caulk in many buildings constructed or renovated between 1950 and 1978.” The press release further stated:

Building owners and facility managers should also consider testing to determine if PCB levels in the air exceed EPA’s suggested public health levels. If testing reveals PCBs in the air above these levels,

building owners should be especially vigilant in implementing and monitoring ventilation and hygienic practices to minimize exposures.

Owners and managers are encouraged to retest PCB levels in air to determine whether these practices are reducing the potential for PCB exposures. Should these practices not reduce exposure, caulk and other known sources of PCBs should be removed as soon as practicable.

33. Concurrent with the September 25, 2009 press release, for the first time the EPA established public health levels for PCBs in school indoor air. These public health levels, which provide an objective standard for evaluating PCB contamination in air, are as follows:

Public Health Levels of PCB in School Indoor Air

Age 1 ≤ 2	Age 2 ≤ 3	Age 3 ≤ 6	Age 6 ≤ 12 (Elementary School)	Age 12 ≤ 15 (Middle School)	Age 15 ≤ 19 (High School)	Age 19 + (Adult)
70 ng/m ³	70 ng/m ³	100 ng/m ³	300 ng/m ³	450 ng/m ³	600 ng/m ³	450 ng/m ³

(ng/m³ = nanograms per cubic meter)

34. School districts and towns in Massachusetts are statutorily charged with a duty to maintain their school buildings in good order and ensure a healthy environment for students. *See* Mass. Gen. Laws Ann. ch. 71, § 68 (West) (The school committee, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, shall keep them in good order, and shall, at the expense of the town, procure a suitable place for the schools, if there is no schoolhouse, and provide fuel and all other things necessary for the comfort of the pupils.”) This duty is coextensive with the need to comply with health-protective environmental standards, such as public health levels established by the EPA.

F. Princeton’s Membership in the Lexington Class.

35. On September 4, 2012, another town in Massachusetts, the Town of Lexington, filed a putative class action in this Court against these same Defendants. On behalf of a proposed class of

Massachusetts school districts, Lexington alleged PCB contamination in its school and other Massachusetts schools. *See* Case no. 1:12-cv-11645. The Town of Princeton was a member of this putative class.

36. On March 24, 2015, this Court denied Lexington's motion to certify the putative class.

G. Princeton's Detection of PCBs and Response Thereto

37. Princeton owns the School, the Thomas Prince School, and leases it to the School District.

38. The School is an elementary school. Its students range from kindergarten to eighth grade (ages 5-14 years). The School typically serves approximately 380 students, and it has a staff of approximately sixty.

39. The School was constructed in 1962, and a significant addition was added in 1991. The School presently consists of approximately 76,000 square feet. The original portion of the School consists of approximately 32,000 square feet. In 1991, some windows were replaced in the older portion of the School. Replacement of the remaining windows in the older portion of the School was planned for 2011-12 as part of the Massachusetts School Building Authority Green Repair Program initiative.

40. In April 2011, as part of the preliminary window materials assessment performed before the window upgrade, PCBs were detected at concentrations in excess of fifty parts per millions (ppm) in window caulking and glazing. These detection levels exceeded the levels authorized by the EPA.

41. In June 2011, additional window caulking and masonry samples were collected. The results confirmed the presence of PCBs in window caulking and demonstrated that PCBs were also present in joint caulking.

42. As a result of these high detection levels in these building materials, in early August 2011, indoor air samples were collected from the six classrooms for which windows were scheduled to be replaced as part of the window replacement project. PCBs above the EPA guidance levels for indoor air were detected in the initial air samples.

43. Thus, a more comprehensive indoor air sampling program, evaluating indoor air within the entire school building, was performed on August 20, 2011. The results of the comprehensive sampling was that PCBs above appropriate EPA guidance levels were detected in two additional classrooms, also located in the older portion of the building. Elevated levels of PCBs were also detected in other areas of the older portion of the school, but below appropriate EPA guidance levels. PCBs were also detected in the new portion of the school, but at levels well below the guidance levels for the most sensitive receptors in the school. The EPA was informed of these results and agreed with an approach to further assess and mitigate the observed impacts. This approach involved the elimination of potential residual sources of PCBs and the implementation of an incrementally phased pilot test procedure to determine the most successful mitigation methods that result in a reduction in indoor air PCB concentrations to levels below the EPA published guideline values.

44. On September 1, 2011 (the first day of the 2011-12 school year), the PCB contamination at the School prevented the School's third, fourth, and fifth graders from attending classes at the School. These students had to be bused for approximately one year to another school in Rutland, Massachusetts.

45. On January 18, 2012, Princeton's contractor, Environmental Compliance Services, Inc. ("ECS"), submitted to the EPA on Princeton's behalf its Risk Based Site Cleanup and Disposal Plan to address the PCB contamination at the School. This approximately 1000-page Plan is located at <http://www.wrsdonline.net/PCBInfo/ECSReport.pdf>. The report details the sampling and testing for PCBs of air, caulk, and other materials that had been completed at the School as of the end of 2011. The report also proposed Princeton's plans for site cleanup and disposal of the PCB waste, as well as Princeton's plans for continued monitoring, maintenance, and management plan. This proposal was presented to the EPA.

46. On February 21, 2012, the EPA approved, with certain conditions, Princeton's plan for cleaning up, disposing, and abating the PCB-contamination at the School. The EPA's approval letter can be found at <http://www.wrsd.net/PCBInfo/EPAApprovalLetter.pdf>. A copy is also attached as Exhibit A. As summarized in the EPA's letter, Princeton's plan included removal and disposal of PCB caulk, glazing, and associated windows.

47. Since the EPA's approval, Princeton and its contractor, ESC, has been implementing the approved plan. Princeton has sought and obtained from EPA modifications of the plan. The approved modifications and various documents recording the progress of the testing, cleanup, and disposal efforts are located at <http://www.wrsd.net/pcbinfo.cfm>.

48. As a result of the PCB contamination of the School, Princeton has incurred substantial costs, in excess of \$700,000. The costs include, among other things, the costs to: clean-up the School; remove and dispose of PCB-contaminated materials; encapsulate other PCB-contaminated materials; thoroughly clean hard surfaces; modify ventilation systems; and monitor for PCB contamination. These costs also include the costs to transport the School's students in third, fourth, and fifth grade to another school for approximately one year while cleanup efforts were being

undertaken at the School. As a result of the PCB contamination of the School, Princeton will incur future costs for testing and monitoring for PCBs at the School.

49. Based on the fact that the School was constructed when Old Monsanto produced at least 98% of the PCBs in the United States, Princeton alleges on information and belief that the PCBs at the School were manufactured by Defendants.

VI. CLAIMS

FIRST CAUSE OF ACTION

(Breach of Implied Warranty of Merchantability – Design Defect)

50. Plaintiff incorporates by reference paragraphs 1 to 49 as if fully set forth herein.

51. Defendants manufactured and sold PCBs. By doing so, Defendants impliedly warranted that PCBs are merchantable, safe, and fit for ordinary purposes.

52. The PCBs manufactured and sold by Defendants were defective in design because they can contaminate building structures, soil, and air, creating a significant threat to public health and the environment. PCBs are dangerous to an extent beyond that which would be contemplated by the ordinary consumer of PCBs. This design defect constitutes a breach of Defendants' implied warranty of merchantability.

53. As a direct and proximate result of Defendants' design defect, Plaintiff has suffered property damage, requiring investigation, clean-up, abatement, remediation, and monitoring costs in an amount to be determined at trial. Plaintiff also has incurred increased costs in having to transport its students to another school while clean-up and other related efforts were underway at the School. Defendants are strictly, jointly, and severally liable for all such damages.

SECOND CAUSE OF ACTION

(Breach of Implied Warranty of Merchantability – Failure to Warn)

54. Plaintiff incorporates by reference paragraphs 1 to 49 and 51 as if fully set forth herein.

55. The use of PCBs in the construction and renovation of schools was a reasonably foreseeable use. Defendants knew or should have known that PCBs used in this manner can contaminate building structures, soil, and air, creating a significant threat to public health and the environment. Defendants had a duty to warn Plaintiff of these hazards. Defendants, however, failed to provide adequate warnings of these hazards.

56. As a direct and proximate result of Defendants' failure to warn, Plaintiff has suffered property damage, requiring investigation, clean-up, abatement, remediation, and monitoring costs in an amount to be determined at trial. Plaintiff also has incurred increased costs in having to transport its students to another school while clean-up and other related efforts were underway at the School. Defendants are strictly, jointly, and severally liable for all such damages.

THIRD CAUSE OF ACTION

(Negligence)

57. Plaintiff incorporates by reference paragraphs 1 to 49, 51, 52, and 55 as if fully set forth herein.

58. Defendants owed a legal duty to Plaintiff. The use of PCBs in the construction and renovation of schools was a reasonably foreseeable use. Defendants knew or should have known that PCBs used in this manner can contaminate building structures, soil, and air, creating a significant threat to public health and the environment, especially to the health of children. Defendants had a duty to prevent the use of PCBs in the construction of school building.

59. Defendants breached their duties when they negligently manufactured a dangerous product (PCBs), negligently marketed, distributed, and sold that product, and negligently failed to

give adequate warning that such products should not have been used in the construction of buildings, especially buildings, like schools, frequented by children.

60. As a direct and proximate result of Defendants' breaches of their duties, Defendant caused Plaintiff to suffer actual losses. Specifically, Plaintiff suffered property damage, requiring investigation, clean-up, abatement, remediation, and monitoring costs in an amount to be determined at trial. Plaintiff also has incurred increased costs in having to transport its students to another school while clean-up and other related efforts were underway at the School. Defendants are strictly, jointly, and severally liable for all such damages.

FOURTH CAUSE OF ACTION

(Violation of Massachusetts Consumer Protection Act)

61. Plaintiff incorporates by reference paragraphs 1 to 49, 51, 52, 55, 58, and 59 of this Complaint as if fully set forth herein and further alleges as follows:

62. The wrongful acts of Defendants, including its representations and omissions, and breaches of implied warranty, constitute a violation of Massachusetts General Laws, Chapter 93A.

63. As a direct and proximate result of the wrongful acts, Plaintiff has suffered property damage, requiring investigation, clean-up, abatement, remediation, and monitoring costs in an amount to be determined at trial. Plaintiff also has incurred increased costs in having to transport its students to another school while clean-up efforts were underway at the School. Defendants are strictly, jointly, and severally liable for all such damages.

64. Pursuant to Massachusetts General Laws, Chapter 93A, section 9(3), Plaintiff delivered to each Defendant a written demand for relief on behalf of itself. Defendants failed to make a timely and adequate response, thereby entitling Plaintiff to judgment for all damages authorized by statute and reasonable attorneys' fees and costs.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

A. A declaration that Defendants have breached their implied warranty of merchantability to Plaintiff;

B. A declaration that Defendants negligently manufactured, marketed, distributed, and sold PCBs, and that Defendants negligently failed to give an adequate warning;

C. A declaration that Defendants have violated the Massachusetts Consumer Protection Act;

D. An order that Defendants pay all property damages suffered by Plaintiff, including investigation, clean-up, abatement, remediation, and monitoring costs incurred by Plaintiff, or for which Plaintiff is or was legally responsible, to comply with the EPA's public health levels;

E. An order that Defendants pay all costs incurred by Plaintiff, or for which Plaintiff is or was legally responsible, to transport its schoolchildren to another school while clean-up and other related efforts were underway at the School;

F. An award to Plaintiff for the costs of this suit (including expert fees), and reasonable attorneys' fees, as provided by law;

G. An award for treble and punitive damages; and

H. An award for such other and further relief as the nature of this case may require or as this court deems just, equitable and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands a jury trial.

Dated: July 1, 2015

Respectfully submitted,

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