The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2019
PHILADELPHIA, TUESDAY, FEBRUARY 25, 2020 VOL 261 • NO. 37 An ALM Publication

ENVIRONMENTAL LAW

Will PFAS Litigation Revive Class Treatment for Medical Monitoring Claims?

BY KATE CAMPBELL
Special to the Legal

Last spring, I participated on a CLE panel presentation for in-house attorneys on creative legal theories that plaintiffs are pursuing in environmental and toxic tort litigation. For many of the theories we covered, we advised our audience that the case law is still developing and it isn't always easy to predict how a court might rule, particularly at the trial court level. But on one topic—the availability of class actions to pursue medical monitoring for alleged exposure to a toxic chemical—I felt fairly certain about the future, suggesting to the audience that we shouldn't see them any longer, at least not in federal court. Now, just a year later, the surge in toxic tort cases on account of PFAS and other so-called "emerging contaminants" has caused me to revisit my prediction, and serves as a reminder of how public health concerns can shape the law in some fairly fundamental ways.

Per- and polyfluoroalkyl substances, or PFAS as they are now commonly known, were manufactured and used in a variety of industries across the country beginning in the 1940s. In the late 1990s and early 2000s, when many environmental lawyers and litigators were focused on a new exposure pathway called vapor intrusion, another firestorm was quietly brewing with PFAS. One of the first, if not the first, class action lawsuit involving alleged PFAS exposure was filed in 2001 in West Virginia state court (*Leach v. E.I. du Pont de Nemours and Co.*, Case No. 01-C-608 (Wood County W. Va. Cir. Ct. filed Aug. 31, 2001)). In 2005, the court certified a settlement class that resulted in the creation of a science panel to conduct research into whether there was a probable link between exposure to perfluorooctanoic acid (PFOA) and various diseases. The class settlement also provided for the establishment of a medical monitoring protocol for the diseases and conditions for which the science panel found a probable link.

In 2016, several years after the science panel concluded its work in the *Leach* case, the U.S. Environmental Protection Agency (EPA) published voluntary health advisories for PFOA and its sister compound, perfluorooctane sulfonate (PFOS), setting a combined lifetime limit of 70 parts per trillion. To put this in perspective, the lifetime advisory limit is said to be the equivalent of 70 grains of sand in an Olympic-size swimming pool. Two years later, the topic of potential human health impacts associated with PFAS exposure became firmly entrenched in the national media, when Politico reported that EPA and the Trump administration had endeavored to block publication of a draft assessment prepared by the U.S. Agency for Toxic Substances and Disease Registry (ATSDR), reportedly due to concerns about the impact on the EPA itself and the U.S. Department of Defense, which historically used PFAS-containing firefighting foam at military bases across the country.

KATE CAMPBELL *is a partner at the environmental, energy and land use law and litigation firm Manko, Gold, Katcher & Fox, located in suburban Philadelphia. She can be reached at 484-430-2316 or at kcampbell@mankogold.com.*

> *"By granting class status to these individuals, both courts ignored a fundamental element of any medical monitoring claim—that the exposure places the individual at a significantly increased risk of contracting a latent disease."*

Since then, the number of class action toxic tort cases has been increasing. In October 2018, a firefighter in Ohio filed a nationwide class action lawsuit against PFAS manufacturers in federal court, seeking to represent all U.S. residents with detectable levels of PFAS chemicals in their blood and who have claimed they have been injured as a result of exposure (*Hardwick v. 3M*, Case No. 2:18-cv-1185 (S.D. Ohio filed Oct. 4, 2018)). The lawsuit seeks equitable relief in the form of a panel of scientists to study the effects of PFAS on the human body, and for medical monitoring. The court denied the defendants' motions to dismiss in September 2019 and the case remains pending, with class discovery presumably ongoing.

Meanwhile, in April 2018, a New York state court granted class certification to a group of New York residents claiming exposure to PFOA releases from a nearby fabric manufacturing facility, see *Burdick v. Tonoga,* No. 527117 (N.Y. Sup. Ct.). The classes include two property damage classes, a nuisance class and a medical monitoring class, defined as all individuals who ingested PFOA-contaminated water within a seven-mile radius of the defendant's facility and who have PFOA in their blood in excess of a stated "national background level." After observing that the "prerequisites to the filing of a New York class action are virtually identical to those contained in" Rule 23 of the Federal Rules of Civil Procedure, the court proceeded to certify all four classes. As to the medical monitoring class, the court rejected the defendant's argument that common issues do not predominate over individual issues of exposure and risk, concluding that "the medical monitoring issue affecting the entire putative class is based upon the common and overriding fact of an above background level of PFOA exposure caused by a single source by a defined method at a level which the plaintiffs allege will significantly increase their risk of the development of numerous health conditions." The appellate division affirmed the trial court's class certification order in November, and on Feb. 6, denied the defendant's motion for permission to appeal to the court of appeals (the state's highest court).

At the same time, a similar case has been steadily making its way through federal court with similar success for the plaintiffs, *Sullivan v. Saint-Gobain Performance Plastics*, Case No. 5:16-cv-125 (D. Vt.)). In August 2019, the U.S. District Court for the District of Vermont certified a property damage class for Bennington residents seeking damages for the costs to connect to the municipal water supply, as well as a medical monitoring class for residents with levels of PFOA in their blood above background. On the medical monitoring claim, the court distinguished previous federal decisions that refused to certify medical monitoring classes under Rule 23, reasoning in part that this putative class is different in that it is defined to only include those with detectable concentrations of PFOA in their blood. On Jan. 17, the U.S. Court of Appeals for the Second Circuit denied leave to appeal the district court's order. As a result, the case is back before the district court to resolve the legal question of whether medical monitoring is available both under Vermont law generally and on the particular facts of the case—a decision that could very well serve as the death knell of the case for one side or the other.

Even a cursory review of these cases will highlight the tie that binds them: in both, the medical monitoring class was defined not just by exposure generically, by the presence of elevated levels of PFAS in the blood specifically. But by granting class status to these individuals, both courts ignored a fundamental element of any medical monitoring claim—that the exposure places the individual at a significantly increased risk of contracting a latent disease. In other words, just because a blood test shows an elevated level of PFAS does not mean that the person tested is at significant risk of disease—a determination that necessarily varies depending not only on the individual's actual dose and duration of exposure but also his background risk and unique medical circumstances.

This is certainly not the end of the story, and as the courts and litigants alike struggle with how to handle claims of exposure to compounds like PFAS, there is still much law that needs to be developed. PFAS are omnipresent in the environment and in the human body, and there remains considerable scientific disagreement regarding what constitutes a safe level of exposure. But this cannot mean that anyone who has been exposed to PFAS is entitled to medical monitoring, and it should not uproot a well-established body of federal case law against certifying medical monitoring claims for class action treatment under Rule 23. With several other PFAS class actions pending and additional "emerging contaminant" cases sure to be brought, it is a particularly active and interesting time for toxic tort practitioners. •

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