



LITIGATION ISSUES FOR UTILITIES FACED WITH PFAS CONTAMINATION

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TOPICS

OVERVIEW of PFAS

- PFAS Family
- PFAS Sources and Impacts
- PFAS Health Impacts
- PFAS Regulations

PFAS LITIGATION

- Parties
- Claims / Theories
- Defenses / Hurdles
- AFFF Multi-District Litigation (MDL)
- AFFF MDL 3M and DuPont Class Settlements
- *Hardwick* Decision

Caveat: *If your entity is contemplating PFAS litigation, consult legal counsel to discuss the facts and law applicable to your claims.*

PFAS FAMILY

- **PFAS** = Per- and Polyfluoroalkyl Substances
 - Fully (per) or partly (poly) fluorinated carbon chain joined with various other groups of chemicals.
- **PFAS** referred to as a “Family” of synthetic chemicals
- Estimates that there are over 9,000 chemicals in the PFAS Family
- PFAS chemicals used to make coatings and products that resist heat, oil, water, grease, and stains.
- “Forever Chemicals” - PFAS persist in the environment and not break down naturally.

PFAS SOURCES AND IMPACTS

- PFAS found in consumer product applications, manufacturing operations, among many other uses.
- Examples:
 - Aqueous Film-Forming Foam ("AFFF") - Teflon products - Scotchgard
 - Clothing, furniture, adhesives, food packaging, electrical wire insulation
- PFAS found at Mount Everest base camps, arctic locations, rivers, lakes.
- CDC National Health and Nutrition Examination Survey (NHANES) identified PFAS in blood serum of nearly all people tested – indicates widespread exposure to PFAS in U.S. population.
- PFAS persist do not degrade and can bioaccumulate.

PFAS PATHWAYS TO HUMANS

PFAS potential pathways to humans:

- Exposure can be from drinking water, dust ingestion, skin exposure, and more.
- Consuming PFAS-contaminated water or food.
- Move through soils and contaminate drinking water sources
- Workplace exposure
- Indoor air, for example, carpets treated with PFAS
- Foods impacted by releases of PFAS, e.g., grown near PFAS manufacturing sites
- Recent studies indicate skin exposure from clothing that uses PFAS chemicals, e.g., firefighting clothing
- Many studies underway and much yet to be learned

PFAS REGULATIONS

- **EPA Executive Council on PFAS (2021)**
 - EPA PFAS Strategic Roadmap to address exposure to PFAS
- **Toxic Substances Control Act:** Manufacturer PFAS reporting requirements.
- **Drinking Water Standards:** Maximum Contaminant Levels to be set for PFAS
 - Estimates of cost to comply \$37B initially; \$650M annually
- **Resource Conservation and Control Act (RCRA):** Feb. 8, 2024, EPA issued Proposed Rules to list 9 PFAS as “Hazardous Constituents.” (not Haz. Waste) To allow Corrective action for releases of PFAS.
- **Comprehensive Environmental Response Compensation and Liability Act: (CERCLA):** Proposed Rulemaking to list PFAS as “Hazardous Substance.”
- **Clean Air Act:** Emission Standards

LITIGATION: PARTIES

PLAINTIFFS:

- Private individuals, e.g., neighbors, employees of manufacturing plants, etc.
- Public water utilities
- State and Federal Environmental / Resource Agencies
- State Attorney Generals

DEFENDANTS:

- PFAS manufacturers (3M, Dupont, others)
- Industrial users – for disposal activities, into soil water
- Consumer product manufacturers
- Retailers selling products with PFAS
- United States, e.g., Department of Defense (AFFF)

PFAS LITIGATION - CLAIMS / THEORIES

Personal Injury

- PFAS risk of diseases, e.g., from contamination in drinking wells or working at a PFAS plant.
- Legal Claims: Trespass, Nuisance, Negligence, Fraud, Violation of State/Federal Statutes/Regulations, etc.

Property Damage

- E.g., devalued property, cost of filtration systems and/or substitute water.
- Legal Claims: Trespass, Nuisance, Negligence, Fraud, Violation of State/Federal Statutes/Regulations, etc.

Products Litigation

- Vs manufacturers and sellers of products with PFAS.
- Legal Claims: Failure to Warn, Design Defect, Breach of Implied or Express warranty, deceptive marketing.

Attorney General cases:

- Legal Claims: Same as above, plus natural resource damages.
- Multiple sites one case, e.g., Recover damages for broad public water projects.

Damages: Compensatory and Punitive.

PFAS LITIGATION - DEFENSES / HURDLES

Causation a/k/a "Product Identification"

- Difficult in PFAS litigation – must "connect the dots" - establish source of PFAS (e.g., manufacturer), type of PFAS, pathway of PFAS release, to a "receptor" (e.g., person, water source) and that type of PFAS caused the harm (e.g., contaminated water source caused harm/injury to person).
- Expert testimony/evidence critical to causation requirement. E.g., lab testing to fingerprint PFAS, hydrogeologists for subsurface soil/groundwater pathways, engineers for costs of treatment, medical experts for harm.

Statute of Limitations: Deadline to file claim - generally, starts from date injury discovered.

- Varies by type of claim; different in each State; failure to timely file may result in dismissal of case.

Statute of Repose: Deadline to file claim - starts with acts of defendant. E.g., Defendant delivered PFAS product 15 years ago; PFAS not reach drinking water source for another 10 years (total 25 years). If Repose limitation is 10 years from date of delivery, claim could be barred/ dismissed.

Government Contractor Immunity:

- Defendant asserts complied with precise government specifications and warned US of any known dangers – claim could be dismissed. Very fact specific.

PFAS LITIGATION - AFFF MDL

Multidistrict litigation process to prevent duplication of cases, address common discovery issues, and help information exchange for cases with similar claims, remedies and damages. (Class Actions)

- Use so-called “bellwether” jury cases to find strengths and weaknesses of claims and defenses of all cases in MDL.

AFFF cases vs 3M, DuPont, and others consolidated into AFFF MDL in South Carolina before Federal Judge Richard Gergel (2018) - 5,000 cases / over 17,000 plaintiffs.

- Common fact: PFAS pathways involved AFFF into groundwater contaminating drinking water supplies.

AFFF MDL Bellwether case – City of Stuart, FL vs Tyco, 3M, Dupont, et. al.

- Prepared for trial by Class Counsel
 - Over \$1M to prepare case for trial, including numerous experts.
 - Day before trial - separate settlements with DuPont and 3M.

PFAS LITIGATION - AFFF MDL SETTLEMENTS

- DuPont: \$1.5 Billion
- 3M: \$10.5 - \$12.5 Billion
- Complex Settlement Agreements
 - Class Members are Public Water Systems throughout US (19,000)
 - “Opt Out” of Class (Request for Exclusion) - proceed as individual case vs 3M or Dupont.
 - Otherwise, Class Member and participate in Settlement Funds and Allocation Process.
 - Two Funds: Phase I – PWS discovered PFAS via testing before June 2023; Phase II no present detection of PFAS, but must test per new EPA rules, if discover PFAS can participate in Phase II Fund.
 - Release of future claims if Opt In – Release all future claims for any impacts to water sources from PFAS. Other systems, e.g., wastewater, biosolids likely “carved out” of general release

Caveat: Counsel for PWS must carefully consider deadlines and Release terms if Opt In.

PFAS LITIGATION – *HARDWICK* DECISION

Claims: Firefighter Hardwick sued PFAS manufacturers (3M, DuPont, others) in Ohio US District Court asserting negligence, battery, and more, related to use of PFAS products.

- Plaintiff Hardwick's blood contained trace amounts of five PFAS chemicals.
- Trial Court certified a class of all Ohio residents.

Defendants appealed to U.S. Court of Appeals for the 6th Circuit – Case shows difficulty of establishing causation between PFAS and injury.

- Appellate Court stated: Plaintiff "does not know what companies manufactured the particular chemicals in his bloodstream; nor does he know, ... whether those chemicals might someday make him sick; nor, as a result of those chemicals, does he have any sickness or symptoms now."
- Court also found that plaintiff did "not know whether those particular PFAS [found in his blood] were present in the [firefighting] foams he used."
- Court determined that Plaintiff lacked standing to bring claim, rejected the class certification, and directed lower court to dismiss the case.

Decision will not stop PFAS Lawsuits. Studies are ongoing and underway to trace PFAS to health problems -- if scientific linkage is made, new PFAS lawsuits will follow.