



Per- and Polyfluoroalkyl Substances ("PFAS"): Litigation Update

GEORGIA INDUSTRY ENVIRONMENTAL COALITION
ANNUAL GENERAL MEMBERSHIP MEETING

October 7, 2019

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Topics

1. Range of PFAS Cases and Disputes
2. Key Legal Issues
3. PFAS in Transactions
4. Future Litigation Developments

Are You a PFAS Plaintiff or a Defendant?



BREVARD COUNTY CANCER ASSESSMENT

Journal of Science Policy & Governance

POLICY MEMO: PFAS IN DRINKING WATER

Hazardous PFAS chemicals in Georgia's drinking water

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Keywords: Polyfluoroalkyl substances; PFAS; Drinking Water; Groundwater; Contamination

Executive Summary: Polyfluoroalkyl substances (PFAS) are a group of synthetic chemicals found in Georgia's groundwater that have been linked to serious adverse health effects including thyroid disease, ulcerative colitis, testicular and kidney cancers, low infant birth weight, and low vaccine efficacy. Among other reports of PFAS contamination, the United States Air Force recently found high levels of PFAS groundwater contamination in three Georgia air bases. In 2016, the Environmental Protection Agency (EPA) released a non-regulatory "Lifetime Health Advisory" for two PFAS - perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) - recommending a lifetime limit of 70 parts-per-trillion (ppt). However, lifetime health advisories are not enforceable by law and some toxicology studies suggest that PFAS are unsafe at levels below 70 ppt. Eight states have adopted or proposed legally-enforceable maximum contaminant levels of PFAS in groundwater and more states are expected to propose such legislation. We recommend that the Georgia Environmental Protection Division (EPD) of the Georgia Department of Natural Resources (DNR) adopt a maximum contaminant level for PFAS at 27 ppt.

I. The Problem: Groundwater Contamination

Polyfluoroalkyl substances (PFAS) are used in the manufacture of packaged food, water-repellent fabrics, nonstick products such as Teflon, polishes, waxes, paints, electronics, chrome plating, and many other products. PFAS seep into drinking and groundwater from sites that produce and use products containing these chemicals^{1,2}. Due to their chemical makeup, PFAS are extremely difficult and expensive to remove from the environment and have earned the name "forever chemicals"^{3,4}.

In 2016, the EPA released non-enforceable public health advisories for the two most prevalent PFAS (PFOA and PFOS), setting the standard at a combined 70 ppt. However, scientific studies have suggested PFAS have adverse health effects at lower concentrations⁵. New Jersey, a state with enforced maximum PFAS contaminant standards, initiated a toxicological limit of PFOS at 13 ppt⁶ and PFOA at 14 ppt⁷ for a combined level of 27 ppt. Philippe

Grandjean, professor of public health at Harvard University and expert in PFAS contamination, recommends that the EPA limit the amount of acceptable PFAS in drinking water to 1 ppt⁸. Reports vary; therefore, for the purpose of this memorandum, the most stringent studies are considered.

Recent investigations uncovered high levels of PFAS in Georgia groundwater - as much as 375 ppt⁹. The main sources of contamination come from carpet factory waste dumped into rivers and the use of firefighting foam on US Air Force bases¹⁰. The Conasauga river is a major source of drinking water for the Georgia cities of Rome and Calhoun. Tests of downstream river water in Alabama measured 1.5 parts per billion (ppb) PFOA levels¹¹, more than twenty times greater than the recommended standard of 70 ppt¹². It is therefore likely that other drinking water sources, such as residential wells, may be more susceptible to PFAS groundwater

www.sciencepolicyjournal.org

JSPG, Vol. 14, Issue 2, June 2019

Scope of the PFAS Challenge



98%

Americans with PFAS
in blood

>600

US PFAS-contaminated
sites

>4000

PFASs used in
commerce

6 million

Americans with high
PFAS levels in drinking
water

<https://web.uri.edu/steep/>

PFAS Litigation: Parties



Many Plaintiffs

- Individuals.
- States / Counties / Cities.
- Stockholders.
- Class Actions.
- Environmental groups.
- *All residents in the USA?*

For now, Fewer Defendants

- 3M.
- DowDuPont.
- Chemours (2014).
- Buckeye Fire Equipment Co.
- TYCO Fire Products, L.P.
- National Foam, Inc.

PUBLIC HEALTH v. BIG CHEMICALS

A CASE OF SOCIAL JUSTICE



Nationally recognized environmental attorney Robert Bilott, "The lawyer who became DuPont's worst nightmare."
—New York Times

Bilott is a partner at Taft Law based out of Northern Kentucky. He is a seasoned litigator who has handled environmental issues for more than 27 years, including representing thousands of individuals with serious disease claims due to exposure to PFASs released into their drinking water by DuPont in West Virginia.

- COMMUNITIES RESPONDING TO CHEMICAL CONTAMINATION
- LEGAL, REGULATORY, AND SCIENTIFIC CHALLENGES
- LESSONS LEARNED FROM PRIOR LITIGATION
- PROSPECTS FOR FUTURE SOLUTIONS



Thursday, November 15, 2018, 3:00–4:30 PM
URI Kingston Campus – Room 215 Beupre Hall (Chemistry Building)
RSVP: superfundsteep@etal.uri.edu
Light refreshments provided



More STEEP information: uri.edu/steep

PFAS Litigation: Types of Cases



Types of Lawsuits:

- Trespass.
- Nuisance—Private and Public (including inverse condemnation).
- Negligence.
- Product Liability (failure to warn, design defect, manufacturing defect)
- Shareholder suits.
- Fraud / Voidable Transfers.
- Consumer Protection Statutes.
- State statutes.

Seeking:

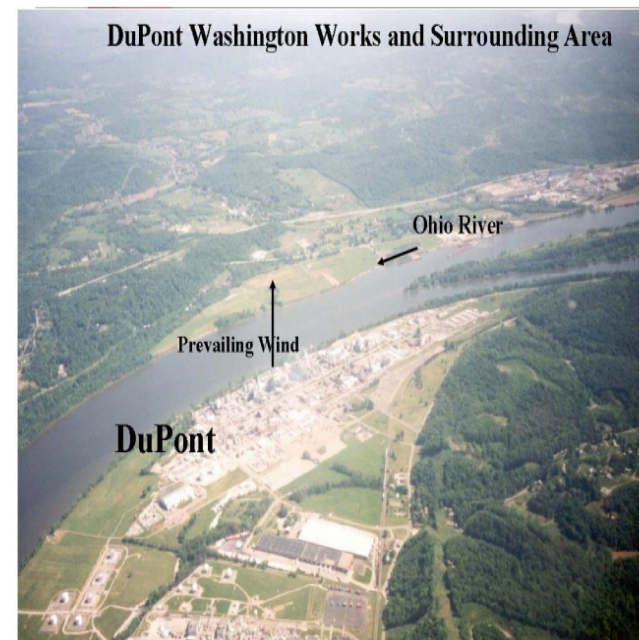
- Personal injury damages.
- Property damage (cost of repair / devaluation).
- Declaratory actions (agreement interpretation).
- Equitable relief (i.e., remediation, change process, etc.).
- Medical monitoring costs.
- Natural resources damages (restoration, damages).

PFAS Litigation—Early, Important Case

Leach v. E.I. DuPont, Case No. 01-C-608 (Wood County W. Va. Cir. Ct., filed 8-31-2014)

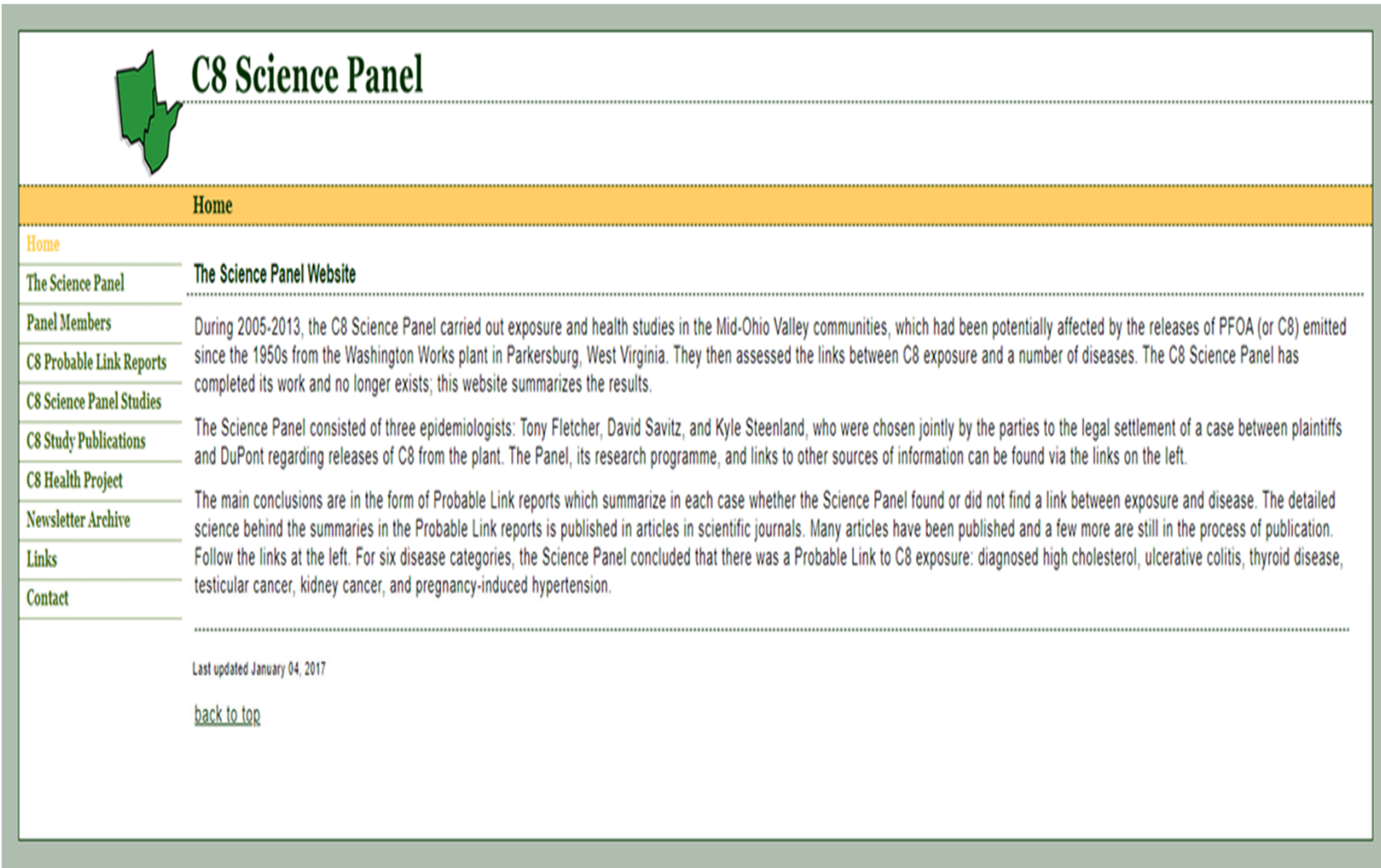
- Class action alleging PFOA drinking water impacts.
- 70,000 Ohio and West Virginia residents.
- Settled 2005 for \$343 Million.
- ***Creation of C-8 Scientific Panel***
- Later, additional 3,500 PI claims filed, became MDL.
- Defendants paid \$671 Million to resolve MDL.

PFOA Emissions from a Teflon Plant in West Virginia



In Re: E.I. duPont de Nemours & Co., C-8 Personal Injury Liability, Case No. 2:13CV00136 (S.D. Ohio)

Take-Away: C-8 Science Panel / *Leach* case



The screenshot shows the C8 Science Panel website. At the top left is a green map of West Virginia. The title "C8 Science Panel" is in a large, dark green font. Below the title is a yellow horizontal bar with the word "Home" in black. To the left of the main content area is a vertical navigation menu with links: "Home", "The Science Panel", "Panel Members", "C8 Probable Link Reports", "C8 Science Panel Studies", "C8 Study Publications", "C8 Health Project", "Newsletter Archive", "Links", and "Contact". The "Home" link is highlighted in orange. The main content area has a heading "The Science Panel Website" followed by a paragraph: "During 2005-2013, the C8 Science Panel carried out exposure and health studies in the Mid-Ohio Valley communities, which had been potentially affected by the releases of PFOA (or C8) emitted since the 1950s from the Washington Works plant in Parkersburg, West Virginia. They then assessed the links between C8 exposure and a number of diseases. The C8 Science Panel has completed its work and no longer exists; this website summarizes the results." Below this is another paragraph: "The Science Panel consisted of three epidemiologists: Tony Fletcher, David Savitz, and Kyle Steenland, who were chosen jointly by the parties to the legal settlement of a case between plaintiffs and DuPont regarding releases of C8 from the plant. The Panel, its research programme, and links to other sources of information can be found via the links on the left." This is followed by a third paragraph: "The main conclusions are in the form of Probable Link reports which summarize in each case whether the Science Panel found or did not find a link between exposure and disease. The detailed science behind the summaries in the Probable Link reports is published in articles in scientific journals. Many articles have been published and a few more are still in the process of publication. Follow the links at the left. For six disease categories, the Science Panel concluded that there was a Probable Link to C8 exposure: diagnosed high cholesterol, ulcerative colitis, thyroid disease, testicular cancer, kidney cancer, and pregnancy-induced hypertension." At the bottom of the main content area, it says "Last updated January 04, 2017" and has a link "back to top".

C8 Science Panel

Home

The Science Panel Website

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Last updated January 04, 2017

[back to top](#)

PFAS Litigation: Thousands of Cases

States

State of New Mexico v. United States, 19CV00178 (D. N.M., filed 3-5-2019)

- Improper disposal of PFO/PFAS at Air Force base.
- Seeks cost recovery for violations of NM HW Act.

New Hampshire v. 3M Co., et al, Case No. 216-2019-cv-445 (N.H. Super. Ct. Hillsborough S.S., filed 5-29-2019)

- Alleges PFC contamination to all counties.
- Seeks compensation for state-wide contamination under “Public Trust.”

Vermont v. 3M Co. et al., Super Ct. Chittenden Unit (filed 6-26-2019)

- Protect groundwater resources
- Seeks restoration costs.

Minnesota 3M PFAS Settlement





Minnesota 3M PFC Settlement

ProjectsAboutNewsWork groups ▾



Get 3M Settlement email updates

You can manage your subscription preferences and make changes as needed.

Next

\$850 Million

On Feb. 20, 2018, the state of Minnesota settled its lawsuit against the 3M Company in return for a settlement of \$850 million. Minnesota's attorney general sued 3M in 2010 alleging that the company's production of chemicals known as PFCs had damaged drinking water and natural resources in the southeast Twin Cities metro area. After legal and other expenses are paid, about \$720 million will be invested in drinking water and natural resource projects in the Twin Cities east metropolitan region.

The Minnesota Pollution Control Agency (MPCA) and Minnesota Department of Natural Resources (DNR) are co-trustees of these funds.

Related links and documents

[MPCA Perfluorochemicals \(PFCs\) webpage](#)

[DNR website](#)

[Minn. Department of Health](#)

PFAS Litigation: Thousands of Cases

Local Governments

Michigan DEQ v. Wolverine World Wide, Inc., No. 18CV00039 (W.D. Mich).

- Recovery of cleanup costs
- WWW third-party litigation against 3M
- EPA UAO in place

Hampton Bays Water District v. 3M Co. et al., Sup. Ct. of New York, Suffolk County, No. 2018CV603477 (filed 2-21-2018)

- Restoration of “sole” aquifer

Suffolk County Water Authority v. Dow Chemical Co., 17CV6980 (E.D.N.Y.)

- Strict product liability
- Public nuisance

PFAS Litigation: Thousands of Cases

Individuals and Others

Yockey v. 3M et al., No. 16CV05553 (E.D. Pa., 10-24-2016)

- Seeking personal injury damages.

Dykehouse v. 3M and Georgia-Pacific, No. 18CV1225, (W.D. Mich., 11-1-2018)

- 3,000-member class action seeking personal injury damages.

In Re: Teflon Product Liability Litigation, No. 4-06-MD-1733 (S.D. Iowa, 2006)

- Rejected certification.
- No traction.



Illustrative PFAS Lawsuits

King v. West Morgan-East Lawrence Water and Sewer Auth., No. 17CV1833 (N.D. Ala., 10-31-2017)

- Class action with personal injuries.
- Also RCRA count.

West Morgan-East Lawrence Water and Sewer Auth. v. 3M Co., No. 5-15CV01750 (N.D. Ala., 10-5-2015)

- Seeks restoration costs.

Water Works and Sewer Board of the Town of Centre v. 3M Co., et al., 13CV2017 (Cir. Court of Cherokee Cty., Ala., 5-15-2017)

- Suit against carpet manufacturers in Georgia.
- Cost recovery for treatment system.

Emerald Coast Utilities Auth. V. 3M Co., et al., 09CV361 (N.D. Fla., 7-8-2009)

- Seeking restoration costs for water treatment system remediation.
- Dismissed.



PFAS “Environmental” Suits

“Citizen Suits”

Cape Fear Public Utility Authority v. Chemours et al., Notice of Intent to Sue, 8-3-2017

- CWA and RCRA citizen suit over GenX.

Tennessee Riverkeeper, Inc. v. 3M Co., No. 5:16-cv-01029-AKK, 2017 WL 784991 (N.D. Ala. 2-10-2017).

- RCRA citizen suit.

Little Hocking v. E.I. DuPont Nemours & Co., 91 F. Supp. 3d 940 (S.D. Ohio, 2015)

- Water supplies impacted.
- RCRA ISE / CWA
- Settlement Agreement.

PFAS Natural Resource Damage



Grewal (New Jersey DEP) v. DuPont et al., Nos. SLM-L-000057-19, PAS-L-0000936-19, MID-L-002448-19 and GLO-L-00388-19 (filed 3-27-2019)

- NRD and consumer fraud claims for PFAS conditions throughout State.
- Followed state-wide order to DuPont and others.

Additional AFF lawsuits against 3M et al. on 5-14-2019)

State of New Jersey
Department of Environmental Protection
P.O. Box 420
Trenton, New Jersey 08625

PHILIP D. MURPHY
Governor

SHERA Y. OLIVER
Lt. Governor

CATHERINE R. MCCABE
Commissioner

IN THE MATTER OF POLY- AND PERFLUOROALKYL :
SUBSTANCES (PFAS) GENERATED BY: :

SOLVAY SPECIALTY POLYMERS USA, LLC; :
SOLVAY SOLEXIS, INC.; :
E.I. DU PONT DE NEMOURS & COMPANY; :
DOWDUPONT, INC.; :
DUPONT SPECIALTY PRODUCTS USA, LLC; :
THE CHEMOURS COMPANY FC, LLC; :
THE CHEMOURS COMPANY; and, :
THE 3M COMPANY :

STATEWIDE PFAS DIRECTIVE,
INFORMATION REQUEST
AND NOTICE TO INSURERS

This Directive, Information Request, and Notice to Insurers (hereafter, "Directive") is issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection ("Department") by N.J.S.A. 13:1D-1 et seq., the Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:10-23.11 et seq., the Water Pollution Control Act ("WPCA"), N.J.S.A. 58:10A-1 et seq., the Air Pollution Control Act ("APCA"), N.J.S.A. 26:2C-1 et seq., and the Solid Waste Management Act ("SWMA") N.J.S.A. 13:1E-1 et seq., to Solvay Specialty Polymers USA, LLC and its predecessor Solvay Solexis, Inc. (collectively, "Solvay"), E.I. du Pont de Nemours & Company, ("DuPont"), DowDuPont, Inc. ("DowDuPont"), DuPont Specialty Products USA, LLC, The Chemours Company FC, LLC ("Chemours FC, LLC"), The Chemours Company ("Chemours") and The 3M Company ("3M") (collectively, the "Respondents") to notify them that the Department believes them to be responsible for the significant contamination of New Jersey's natural resources, including the air and waters of the State, with poly- and perfluoroalkyl substances ("PFAS"), including perfluorononanoic acid ("PFNA"), perfluorooctanoic acid ("PFOA"), and perfluorooctanesulfonic acid ("PFOS"), and their replacement compounds, including but not limited to "GenX".

PFAS are being discovered in drinking water, groundwater, surface waters, sediments, soils, air, fish, plants, and other natural resources across New Jersey on a near daily basis. These PFAS compounds constitute a substantial threat to human health and the environment and a statewide public nuisance: they are extremely resistant to degradation and thus persist indefinitely in the environment; they bioaccumulate; they are commonly contained in consumer and household products; and contamination from PFAS is now ubiquitous in New Jersey. While Respondents and their predecessors in interest have understood the toxic characteristics of PFAS for decades, regulatory agencies around the world are only now coming to understand the true nature and dangers of these global contaminants. As further detailed below, the Department has expended and will continue to expend tremendous resources to identify and investigate the presence of PFAS in New Jersey's environment, as well as to monitor, treat, clean up, and/or remove PFAS in impacted areas. As a result, the Department has determined that it is imperative

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PFAS Business v. Business Disputes

Chemours Co. v. DowDupont Inc., No. 2019-0351 (Court of Chancery, State of Delaware, filed 5-13-2019)

- Who retains PFOS liability for spin-off of Performance Chemicals?

Valero v. 3M Co., No. CJ-19-149, Case 6:19CV00223 (Carter County Dist. Ct., Petition filed 7-11-2019)

- Which company should pay for PFOS liability?



PFAS Securities Litigation



Heavy & General Laborers' Locals 472 & 172 Welfare Fund v. 3M Co., et al., No. 19CV15982 (D. N.J., 7-29-2019)

- Purchasers of 3M stock /drop.
- Allege violation of federal securities laws.
- Alleged 3M publicly denied harm from PFOS, but misrepresented harms based on internal documents.

Rousseau v 3M Co. et al., No. 19CV17090 (D.N.J., 8-22-2019)

- Class action for violations of federal securities laws.
- Stock drop case.



PFAS Litigation—Administrative Challenges

Cape Fear River Watch v. NC DEQ, Petition for Judicial Review, Filed 3-7-2018.

- Challenge to GenX under NC Gen'l Statute.
- GenX conditions = “general condition” causing “imminent danger to human health and safety.”
- Denied because NCDEQ taking action



Centralized PFAS Aqueous Film-Forming Foam (AFF) Cases—MDL

In re Aqueous Film-Forming Foams Product Liability Litigation,
MDL No. 2873 (D.S.C.)

- MDL—centralized cases involving AFF.
- Common questions to be addressed:
 - Toxicity / Properties / Knowledge / Warnings / Conspiracy / Defenses / Airport Practices
- Excludes certain non-AFFF actions (N.D. Ala., Tenn., N.D.N.Y.).
- May drive other PFOS cases.

Battisti v. 3M Co., et al., No. 18CV00642 (M.D. Fla, 12-20-2018) (AFF class action)



PFAS Class Actions

The Big(est) PFAS Class Action

Hardwick v. 3M Co. et al., No. 18CV1185, Complaint Filed 10-4-2018 (S.D. Ohio)

Definition: “*anyone in the United States with detectable PFASs in blood.*”

Hardwick v. 3M Co., S.D. Ohio, No. 18CV1185, Opinion and Order (9-30-2019)

- Denied Defendants motion to dismiss
- Case can proceed—exposure to PFOS can proceed.

PFAS Class Actions—Alabama



W. Morgan-East Lawrence Water & Sewer v. 3M Co.— PFAS Class Actions

- District court certified class of property owners and a municipality alleging property devaluation from PFAS.
- But same counsel for Water Authority and putative class, settlement released absent class members' individualized claims for monetary damages. So a conflict.
- Class representatives not typical, and settlement not fair, reasonable, and adequate.
- Certification reversed.

737 Fed. Appx. 457 (11th Cir. 2018)

Recent PFAS Class Certification Decisions

Sullivan v. Saint-Gobain Perf. Plastics,

5:16CV00125 (D. Vt. 2019)

- PFOS Class Certified
- 8-23-2019
- TBD “medical monitoring”

Burdick v. Tanoga, Inc. (Taconic), 60 Misc. 3d 1212(A) (N.Y. Sup. Ct. 2018):


- PFOA Class Certified
- 7-18-2019
- PFOS medical monitoring

Giovanni et al. v. U.S. Dep’t of the Navy and Palmer et al. v. U.S. Dep’t of Navy, 906 F. 3d 94 (3d Cir., 2018)

- Medical monitoring not CERCLA pre-enforcement review.

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2019 AUG 23 PM 2:22

CLERK
BY:  DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JAMES D. SULLIVAN, LESLIE
ADDISON, WILLIAM S. SUMNER, JR.,
RONALD S. HAUSTHOR, GORDON
GARRISON, LINDA CRAWFORD, TED
CRAWFORD, and BILLY J. KNIGHT,
individually, and on behalf of a Class of
persons similarly situated,

Plaintiffs

v.

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,

Defendant.

Case No. 5:16-cv-125

DECISION ON MOTION FOR CLASS CERTIFICATION
(Doc. 107)

Between April 15 and April 30, 2019, the court conducted hearings on two issues: admissibility of Plaintiffs' expert reports under *Daubert* and Fed. R. Evid. 702, and class certification under Fed. R. Civ. P. 23. The hearing included testimony of experts from both sides as well as the admission of extensive documentation.

The court has previously ruled in favor of the plaintiffs on most of the *Daubert* issues. (Doc. 300.) The same record provides the basis for the court's consideration of the class certification issues. See *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("But even with some limits on discovery and the extent of the hearing, the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met.")

1

Key PFAS Legal Issue #1: Medical Monitoring

- Recovery for “exposure” to hazardous substances, but no physical manifestations, injuries or diseases.
- Case law varies across jurisdictions.
- Recent PFAS trends.

(1) Plaintiff has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of exposure; and (6) monitoring procedures make the early detection of a disease possible

Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290, 1301–02 (N.D. Ga. 2005), aff’d, 230 F. App’x 878 (11th Cir. 2007) (requires injury or disease)

Key PFAS Issue #2: Expert Testimony

- Expert testimony critical for property, environmental, personal injury cases involving PFASs and “emerging contaminants.”
- Role of C-8 Science Panel “probable cause” findings.
- Advances in detection and measurement, evolution of causation, and role of meta-analysis.
- Expertise and experience varies widely.
- Other litigation, recent publicity.

Scapa Dryer Fabrics, Inc. v. Knight, 788 S.E.2d 421 (Ga. 2016) (rejects cumulative exposure—dose important)

Key PFAS Issue #3: Corporate & Real Estate Transactions

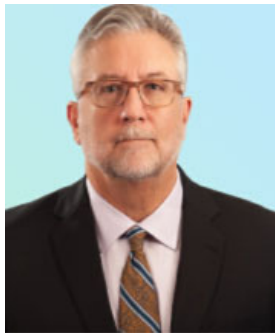
- PFAS in due diligence and day-to-day compliance.
- ASTM 1527 likely will address “emerging” contaminants.
- Agreement terms: “*hazardous substances*.”
- Testing and sampling in Phase II ESA—notification obligations uncertain for certain PFCs.
- PFAS soil and groundwater standards uncertain.
- Lender / secured creditor due diligence requests.
- SEC disclosures.
- Insurance pre-1978.
- Recognize state PFAS differences.

Future of PFAS Litigation



1. To date, lawsuits mainly against PFAS *manufacturers*.
2. Going forward, lawsuits against PFAS *users*.
3. Expect non-detect MCL and remediation standards—increased testing for PFAS.
4. Product liability theories—consumer products, packaging.
5. Reopening CERCLA and state superfund sites.
6. Reissuance of NPDES permits.
7. Is PFAS the next legal/science issue to be resolved globally?

Thank You!



Doug Henderson

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Doug Henderson is a Trial and Global Disputes partner with a national practice in environmental litigation, toxic and mass tort litigation, and property rights litigation. Doug has tried numerous cases to verdict involving chemical exposure, groundwater contamination, wastewater discharges, waste disposal, air emissions, personal injury, stormwater, endangered species, and property rights. Doug also has litigated cases involving water rights, reservoirs, mining, pipelines, and powerlines.

Doug has been named "Lawyer of the Year" three time in Georgia, recently as "Environmental Lawyer of the Year" (2020) and earlier as "Litigation – Environmental Atlanta Lawyer of the Year" (2014) and "Environmental Lawyer of the Year" (2018). In addition, Doug has often been ranked as one of the Top 100 lawyers in the State of Georgia by Atlanta Magazine Superlawyers. Doug also is listed in the Best Lawyers in America in three separate categories (environmental litigation, environmental law, and mass torts), in Chambers USA Band 1, in the Legal 500, and the Georgia Trend Legal Elite.

Note: Nothing in this presentation should be interpreted as or constituting legal advice, and use of this information does not create an attorney-client with any law firm.