JOURNAL OF EMERGING ISSUES IN LITIGATION

Tom Hagy
Editor-in-Chief

Volume 3, Number 2
Spring 2023

fastcase FULL COURT PRESS

Journal of Emerging Issues in Litigation

Volume 3, No. 2 Spring 2023

JOURNAL OF EMERGING ISSUES IN LITIGATION (ISSN 2835-5040 (print) /ISSN 2835-5059 (online)) at $395.00 annually is published four times per year by Full Court Press, a Fastcase, Inc., imprint. For customer support, please contact Fastcase, Inc., 711 D St. NW, Suite 200, Washington, D.C. 20004, 202.999.4777 (phone), 202.521.3462 (fax), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: Morgan Morrissette Wright
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

Cite this publication as:

Journal of Emerging Issues in Litigation (Fastcase)

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

711 D St. NW, Suite 200, Washington, D.C. 20004
https://www.fastcase.com/

POSTMASTER: Send address changes to JOURNAL OF EMERGING ISSUES IN LITIGATION, 711 D St. NW, Suite 200, Washington, D.C. 20004.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Tom Hagy, Editor-in-Chief, tom.hagy@litigationconferences.com

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, scientists, engineers, and anyone interested in the law governing artificial intelligence and robotics. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at mwright@fastcase.com or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2835-5040 (print)
ISSN 2835-5059 (online)

Medical Monitoring and PFAS Litigation—A Significant Growing Trend

John P. Gardella*

Abstract: *Medical monitoring as a tort claim is a hot-button issue in toxic torts, personal injury, and product liability litigation. The ubiquity of PFAS chemical compounds and the real and potential harm to health and the environment they create make examination of the medical monitoring debate specific to this burgeoning litigation worthy of individual attention. This article provides an explanation of PFAS, a brief overview of medical monitoring claims, how PFAS medical monitoring claims have impacted the litigation thus far, and what legal cases are pending that could alter the course of traditional medical monitoring litigation in the future.*

Medical monitoring as a tort claim is receiving ever-increasing attention with courts, legal experts, and practicing attorneys as the number of cases filed in the toxic torts, personal injury, and products liability areas increasingly contain prayers for relief for medical monitoring. In short, the claims ask for relief in the form of a paid medical program that monitors allegedly impacted classes of plaintiffs due to exposure to an alleged toxin or defective product. In virtually all instances, the medical monitoring claims are brought not on behalf of plaintiffs who suffer actual injury from the alleged toxin or defective product, but rather are at some degree of risk for the development of a health issue due to exposure to the toxin or product. Perhaps no area of the law has seen a more significant increase in medical monitoring claims that per-and polyfluoroalkyl substances (PFAS) litigation. What is noteworthy about the trend is that the growth in the number of these claims in PFAS litigation has dramatically increased in just the past two years. It is also important for practitioners to be aware that there are several

Journal of Emerging Issues in Litigation / Spring 2023, Vol. 3, No. 2, pp. 133–140.

ISSN 2835-5040 (print) /ISSN 2835-5059 (online).

significant pending cases before appellate courts or state Supreme Courts in which the viability of medical monitoring claims specific to the PFAS litigation is directly at issue. The importance of the rulings from these decisions cannot be emphasized enough, as they will have direct effects on how other courts address the medical monitoring issue. This article provides an explanation of PFAS, a brief overview of medical monitoring claims, how PFAS medical monitoring claims have impacted the litigation thus far, and what legal cases are pending that could alter the course of traditional medical monitoring litigation in the future.

What Are PFAS?

Per- and polyfluoroalkyl substances (PFAS) are a class of over 12,000 man-made compounds.[1] Chemists at DuPont developed the initial PFAS chemical (polytetrafluoroethylene, or PTFE) by accident in 1938 when researching carbon-based chemical reactions.[2] During one such experiment, an unusual coating remained in the testing chamber, which upon further examination was completely resistant to any methods designed to break apart the atoms within the chemical.[3] The material also had the incredible ability to repel oil and water.[4] After World War II, DuPont commercialized PTFE into the revolutionary product that the company branded "Teflon."[5]

A short while later, 3M invented its own PFAS chemical—perfluorooctane sulfonate (PFOS), which the company also commercialized and branded "Scotchgard."[6] Within a short period of time, various PFAS chemicals were used in hundreds of products—today, it numbers in the thousands.

The same physical characteristics that make PFAS useful in a plethora of commercial applications, though, also make them highly persistent and mobile in the environment and the human body—hence, their nickname, "forever chemicals."[7]

Traditional Medical Monitoring Claims

Medical monitoring claims are not a new phenomenon in American tort law, as they have their origins in the *Friends for All Children Inc. v. Lockheed Aircraft Corp.* ruling from 1984.[8] The case

involved a plane of Vietnamese orphans that crashed, during which the cabin experienced violent decompression and loss of oxygen. The plaintiffs alleged that the children were likely to suffer from brain impairment due to the circumstances. The court determined that medical monitoring was appropriate to follow the children for a period of years to determine if there was any harm, and the defendant in the case was required to fund the monitoring program. While many specific limitations and logistical requirements were part of the court's order that were specific to the case, the *Friends for All Children* case nevertheless serves to this day as the seminal medical monitoring case cited frequently in the legal community.

The arguments in favor of medical monitoring as a cause of action in lawsuits stem from the notion that having such programs funded by allegedly tortious companies promotes the public health benefit of early detection, which in turn often results in lower health care costs to plaintiffs and society at large. In addition, proponents point to the argument that absent conduct by a defendant, the potential for harm or injury would not have occurred, so it is justifiable to require the tortious defendant to pay for medical monitoring that the defendant would have to pay himself to ensure that there are no adverse health effects. Opponents of medical monitoring as a recognized tort claim point to the tenants of tort law, under which proof of some harm is required in order to successfully litigate a case. "Fear of future injury," it is argued, is not an injury and should therefore not be compensable under the law.

Similar to the split in arguments for and against medical monitoring as a remedy under the law, courts are also split on whether medical monitoring claims should be allowed in tort law. While a handful of states have either remained neutral on the issue or have a split among their courts on the issue, about half of the states that have ruled on the issue have allowed medical monitoring to be a compensable tort injury, while the other half that have ruled on the issue have declined to allow medical monitoring claims in cases.

Origins of Medical Monitoring Claims in PFAS Cases

It is certainly true that other alleged toxins or chemicals have been the subject of medical monitoring claims in cases since *Friends*

for All Children. However, the driving force behind today's trend of increasing medical monitoring claims in PFAS litigation originates from the most well-known personal injury PFAS lawsuit (featured in the blockbuster film *Dark Waters*) that was brought by attorney Rob Bilott against DuPont on behalf of approximately 70,000 citizens in Parkersburg, West Virginia. Ultimately, the case settled for $670 million in 2017.[9]

What is most notable about the lawsuit, aside from the settlement amount, is that as part of the negotiations between the plaintiffs and DuPont, the company agreed to fund a medical monitoring and science panel program at a cost of over $200 million for the affected citizens. The results of that medical monitoring program and the science panel are now what are commonly called the "C8 Science Panel findings" (C8 being another name for PFOA, or perfluorooctanoic acid, one type of PFAS). It was the results derived from the medical monitoring program and the Science Panel findings that resulted in the settlement of the personal injury claims.

Increasing Medical Monitoring Claims in PFAS Litigation

Since the 2017 Parkersburg settlement, the world has seen unprecedented attention given to PFAS issues from all angles—legal, political, media, citizen awareness. The legal community also recognized that potential harms from certain PFAS may not manifest until many years from the present, akin to the latency period issues associated with asbestos exposures. It is this fact that has been the foundation for plaintiffs' counsel presenting arguments to courts nationally requesting medical monitoring as a remedy. While reports of the increase in the number of PFAS lawsuits that allege claims for medical monitoring are not uniform in the number of cases reported, a clear trend from such reports is that year-over-year from 2018 to the present, the number of such cases is increasing nationally.

As I can attest to from representing companies embroiled in PFAS litigation, the companies targeted for medical monitoring in PFAS cases go well beyond the traditional manufacturers of the PFAS to the downstream corporate users of the chemicals. Case

numbers are increasing against such companies for environmental pollution, contaminated drinking water sources, and property devaluation claims, which are typically brought by private citizens. Intricately tied into any of these claims is a prayer for relief for the funding of a medical monitoring program. While the size of the certified class of plaintiffs in such cases will necessarily drive the cost of such a program, the Parkersburg, West Virginia, case shows just how costly such programs can be for companies.

The increase in number of PFAS lawsuits with medical monitoring components tied to them is leading to challenges being brought in states that traditionally have not permitted medical monitoring claims or that have leaned more toward precluding such claims. One such example is in New Hampshire. In *Kevin Brown v. Saint Gobain*,[10] the plaintiffs' drinking water was allegedly contaminated with PFOA as a result of a Saint-Gobain facility that discharged PFOA into local waterways, which fed drinking water sources. The case made its way through the United States District Court for the District of New Hampshire, but the defendant certified the question to the New Hampshire Supreme Court of whether New Hampshire law permits the plaintiffs, who are asymptomatic, to bring a claim for the costs of their being periodically medically monitored for symptoms of disease caused by exposure to PFOA. In November of 2022, the New Hampshire Supreme Court heard oral argument on the issue and a ruling is expected in 2023.

Even in states where the issue of medical monitoring claims is unsettled as to how the state's highest court would rule, settlements of PFAS medical monitoring cases are taking place that will necessarily drive plaintiffs' counsels' incentives to bring addition claims for medical monitoring. One such example was seen in Hooksett Falls, New York, in 2021. As part of a proposed settlement in *Baker et al. v. Saint-Gobain Performance Plastics Corp.*,[11] the defendant company agreed to a medical monitoring settlement of up to $22.8 million for affected citizens.

Perhaps the most important PFAS medical monitoring case to watch, though, is the *Hardwick v. 3M*[12] lawsuit brought in Ohio (it was filed by attorney Rob Bilott). In the case, the plaintiffs seek to create a nationwide class action for "all individuals residing within the United States who, at the time the class is certified in this case,

have a detectable levels of PFAS material in their blood serum." Scientists estimate that up to 97% of United States residents have a detectable level of PFAS in their blood serum, making this the largest proposed class action to date in the United States. Notably, this suit does not require the class to have an illness or injury past a detectable level of blood in their serum. In addition, the lawsuit seeks a court order creating an independent science panel funded by the 11 defendants sued, whose findings of correlating illnesses will be binding on the parties in the lawsuit. If deemed appropriate by the science panel, the defendants may have to fund medical monitoring. The lower court certified the class of all citizens of Ohio (roughly 12 million people) and invited additional briefing on whether to include other citizens from other states in which medical monitoring is a recognized claim. The ruling was appealed to the Sixth Circuit Court of Appeals, which accepted interlocutory review of the class certification. Anyone involved in the PFAS litigation would be well advised to follow the case closely, as it will not only have ripple effects on class certification issues but also on medical monitoring claims both in the PFAS realm and more broadly.

It is worth noting that the PFAS aqueous film-forming foam (AFFF) multidistrict litigation (MDL) docket out of South Carolina has over 2,500 cases on the docket at the moment. The cases focus primarily on issues related to PFAS contamination or personal injury from the AFFF product; however, many of the cases on the docket include a prayer for medical monitoring funding. With the first bellwether trial set to take place in June 2023 from the AFFF MDL, resulting verdicts or settlements of the claims, including funding of medical monitoring, will have enormous impacts on the PFAS medical monitoring issue nationally.

New Restatement of Torts, New PFAS Medical Monitoring Support

The American Law Institute (ALI) is a prestigious legal organization that develops "Restatements" of various laws in the United States, including tort law. The ALI's work and the Restatements, while not binding on courts, are widely regarded by attorneys, judges, and legal scholars as a comprehensive understanding of

many of the nuanced parts of legal theories. Through decades of work and revisions, the Restatement (Third) of Torts is now nearing the final stages of completion.

Significantly, the Restatement (Third) is contemplating including recommendations that courts allow plaintiffs to recover monetary damages for medical monitoring expenses, even though the plaintiffs do not have any present bodily harm. While several ALI meetings have been scheduled to discuss the specific language of the newly worded medical monitoring section, no final Restatement has been released publicly to date, although one is expected in the next year or two.

The Restatement (Third) approach opens the door to courts that have traditionally ruled against medical monitoring to change their views. Similarly, courts with split decisions or who are neutral on the issue may rely on the Restatement (Third) to find in favor of plaintiffs seeking PFAS medical monitoring claims.

Key Takeaways for Companies

The issue of permitting PFAS medical monitoring claims without any present injury is one that has enormous impacts not only on PFAS manufacturers but on any downstream commerce company that finds itself in litigation (often class action lawsuits) alleging medical monitoring damages. The litigation is already shifting in such a way that downstream commerce companies (i.e., companies that did not manufacture PFAS, but utilized PFAS in manufacturing or products) are being named in lawsuits for personal injury and environmental pollution at increasing rates. Allowing a medical monitoring component to the recoverable costs that can be pled would significantly raise the risks and potential liability costs to downstream companies.

It is of the utmost importance that businesses along the whole supply chain evaluate their PFAS risk and fully understand the legal arguments that plaintiffs could make against companies in litigation. Public health and environmental groups urge legislators to regulate PFAS at an ever-increasing pace. Each year sees increasing numbers of citizen lawsuits against downstream companies in which medical monitoring is sought as a prayer for relief.

Companies that did not manufacture PFAS, but merely utilized PFAS in their manufacturing processes, are therefore becoming targets of costly monitoring programs at rates that continue to multiply year over year. Legal risk analysis steps can be taken now that can mitigate future risks and future business disruption due to PFAS lawsuits, but proactive steps must be taken now to take full advantage of early action.

Notes

* John P. Gardella (jgardella@cmbg3.com) is a shareholder with CMBG3 Law and a recognized thought leader on PFAS issues. In his environmental and toxic torts practice, he represents companies ranging in size from small shops to the Fortune 100. John is also a member of the Editorial Board of Advisors for the *Journal of Emerging Issues in Litigation*.

1. https://echo.epa.gov/tools/data-downloads/national-pfas-datasets#.
2. Richard D. Lyons, "Roy J. Plunkett Is Dead at 83; Created Teflon While at DuPont." *New York Times* (May 15, 1994).
3. *Id.*
4. *Id.*
5. https://www.aps.org/publications/apsnews/202104/history.cfm#:~:text=April%206%2C%201938%3A%20Discovery%20of,Plunkett.
6. https://www.3m.com/3M/en_US/pfas-stewardship-us/pfas-history/.
7. https://cen.acs.org/sections/pfas.html.
8. 746 F.2d 816 (D.C. Cir. 1984).
9. Arathy S. Nair, "DuPont Settles Lawsuits Over Leak of Chemical Used to Make Teflon." *Reuters* (Feb. 13, 2017).
10. https://newenglandlegal.org/wp-content/uploads/2022/07/NELF-Amicus-Brief-7-8-22.pdf.
11. https://aboutblaw.com/Z1D.
12. https://www.govinfo.gov/app/details/USCOURTS-ohsd-2_18-cv-01185.