

MDL for Claims Against Manufacturers and Distributors of PFAS-Containing AFFFs Focuses Attention on Key Issues

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Claims against manufacturers and distributors of per- and polyfluoroalkyl substances (PFAS)-containing aqueous film-forming foam (AFFF) are hurtling forward. Two important developments in this opening salvo of PFAS-related claims against numerous defendants could have important ramifications not only on future PFAS litigation, but on insurance coverage for potential PFAS liabilities as well. First, ten bellwether cases are progressing closer to trial. Second, the key “government contractor defense” has been slated for briefing.

In December 2018, the Judicial Panel on Multi-District Litigation established a multi-district litigation (MDL 2873) for AFFF PFAS claims in the United States District Court for the District of South Carolina. Unlike previous PFAS lawsuits (primarily against DuPont and/or 3M), the lawsuits in MDL 2873 target dozens of defendants who manufactured and distributed AFFF and its constituent chemicals. MDL 2873 now houses approximately 1,200 member cases, which include the following categories of claims: (i) claims for property damage asserted by water providers, (ii) claims for property damage asserted by property owners, (iii) bodily injury claims, and (iv) claims for medical monitoring for potential future injury.

Presiding Judge Richard M. Gergel has advanced ten bellwether water provider cases in MDL 2873, which were jointly selected by the parties, from the “Core” discovery stage to the “Tier One” discovery stage. The Tier One stage ends in August 2021. The parties must propose Tier Two Trial Pool cases, selected from the Tier One cases, by September 3, 2021. The parties may conduct additional discovery in the Tier Two proceedings, and then the Tier Two cases will advance to trial.

Although the water provider claims constitute a relatively small proportion of the total claims in MDL 2873, Judge Gergel has prioritized them because he believes these claims involve simpler causation issues than the other types of claims. During monthly status conferences, Judge Gergel has explained that, if the water provider claims cannot survive, he doesn’t see how other claims could, either. He has also contemplated that the water provider cases might have a bigger impact on public health than the other varieties of cases.

Meanwhile, the parties continue to conduct Core discovery, which has focused on issues of general liability. Judge Gergel has generally favored broad and fast-paced discovery. He has remarked that the parties in the Lipitor MDL, over which he also presided, accused him of leading them on a “Bataan Death March.”

Because of the focus of Core discovery, the defendants have provided most of the discovery to date. According to status conference transcripts, the defendants have already produced over 2.5 million documents and given or scheduled over 55 depositions. The plaintiffs, for their part, have been responsible for filling out and serving fact sheets describing their claims. So far, the plaintiffs—many of whom brought multi-plaintiff lawsuits and/or assert multiple types of claims necessitating the submission of multiple fact sheets—have served over 14,000 completed fact sheets.

One of the key issues in Core discovery has been the government contractor defense, which immunizes government contractors who produce certain products pursuant to government specifications. Judge Gergel has set the government contractor defense for briefing between August and October 2021. The defendants will likely argue that Military Specification Mil-F-24385, which was promulgated by Naval Sea Systems Command in 1969, absolves them from liability at military sites and airports because it required them to

incorporate PFAS into the AFFF used and stored at those locations. The plaintiffs will likely counter that the defense does not apply for several reasons, including that the defendants failed to disclose information about PFAS risks.

These and other developments in MDL 2873 may affect not only the viability and value of PFAS-related claims in various contexts, but also insurance coverage for potential PFAS liabilities. For example, evidence presented in connection with the government contractor defense could bear on expected or intended exclusions contained in commercial general liability policies. Similar evidence may affect allocation between potentially-covered compensatory damages and non-covered punitive damages. Evidence of how contamination and exposure took place could reveal the extent to which pollution exclusions might apply. Settlement and judgment values may shed light on the likelihood of exposure of varying layers of excess coverage.

MDL 2873, and PFAS litigation more generally, is rapidly evolving. We will continue to provide updates as MDL 2873 progresses, and we will highlight coverage-related developments as they arise.

For additional background on PFAS litigation and related coverage issues, see "The ABCs of PFAS: What You Need to Know About Liabilities for the 'Forever Chemical.'"

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