



DETECTION // TREATMENT // REGULATION

EMERGING CONTAMINANTS
— S U M M I T —

Panel Discussion: The Evolution of PFAS Litigation and Future Drivers

The Many Faces of PFAS Litigation

Nicole Moshang
Manko Gold Katcher & Fox
nmoshang@mankogold.com

March 11, 2020



Introduction to the Evolution

- PFAS litigation has been heating up in recent years
- Heightened public awareness
 - high profile cases
 - Increased regulatory scrutiny at both the Federal and State level
- Understanding what's ahead for PFAS litigation warrants a look back at claims, theories, and procedures used in previous classes of litigation (MTBE, asbestos, opioids)

The Who, What, When, and Where of PFAS Litigation.

- Government plaintiffs
 - States
 - Includes claims brought by states on behalf of citizens *parens patriae*
 - Local municipalities
 - Utilities

The Who, What, When, and Where of PFAS Litigation

- State Statutory Claims
- Standard Tort Theories
 - Negligence
 - Nuisance
 - Trespass
 - Defective Design
 - Strict Liability – Failure to Warn
- Multidistrict Litigation
- Class Actions
- Individual Suits
- Types of Damages Sought
 - Traditional Tort Damages
 - Natural Resource Damages
 - Medical Monitoring
 - Punitive Damages





Tort Theories

- Complaints based on tort theories are advanced by both government plaintiffs and individual plaintiffs
- States frequently bring suits *parens patriae*
 - New Hampshire, Michigan, Minnesota, Vermont, New Jersey
- Claims include: negligence, nuisance, trespass, strict liability – failure to warn, defective design

Tort Theories (cont'd)

- Causation issues persist
 - Lack of scientific evidence between PFAS and alleged health effects makes element difficult to prove
 - Difficult to prove source of PFAS
 - Note: causation issues are not as much of an issue for State claims regarding impacts to drinking water because EPA has issued a Health Advisory setting levels of PFOA and PFOS at a combined 70 parts per trillion

Natural Resource Damages

- Claims brought by States under state-specific statutes/laws
 - Michigan Natural Resources and Environmental Protection Act (NREPA)
 - Minnesota Environmental Response and Liability Act (MERLA)
 - Vermont Civil Action for Natural Resource Damages and Restoration



Natural Resource Damages (cont'd)

- NREPA excerpts:
 - Part 20I: The purpose of this part is to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare, or to the environment from environmental contamination at facilities within the state
 - Part 17: The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.



Natural Resource Damages – Hazardous Substances

- While PFAS are not yet considered hazardous at the Federal level, plaintiffs – government and individuals – are using State-specific hazardous cleanup laws with varied success

Natural Resource Damages – Hazardous Substances

(cont'd)

- New Jersey Spill Compensation and Control Act (Spill Act)
 - “Natural resources” means all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State
 - New Jersey Department of Environmental Protection (NJDEP) has compared PFAS to its pursuits in MTBE litigation
 - On April 1, 2019, NJDEP proposed a rule to add PFOA and PFOS to the List of Hazardous Substances under the Spill Act
 - In advance of the final rulemaking, NJDEP alleged violations of the Spill Act for PFAS contamination on the basis that PFOA would soon be deemed “hazardous substances” under N.J.S.A. 58:10-23.11b
 - NJDEP cases are still pending in the District of New Jersey
 - Jury demand



State Hazardous Cleanup Laws


- Pennsylvania Hazardous Sites Cleanup Act (HSCA)
 - Plaintiffs in *Giovanni v. United States Navy* brought suit under HSCA for the PFOA and PFOS contamination of their water supply
 - Sought costs for medical monitoring
 - The Navy filed a motion to dismiss for failure to state a claim because HSCA requires the release of a “hazardous substance”
 - Motion to dismiss was granted by the Eastern District of Pennsylvania in January of 2020 because neither PFOA or PFOS are considered a “hazardous substance” under HSCA
 - “Court’s duty to decide cases based on what the law is, not what the law may be at some point in the future”



South Carolina Multidistrict Litigation

- PFAS-related multidistrict litigation (MDL) ongoing in the District of South Carolina - 500 cases currently pending
- Discovery began in the Summer of 2019
- The general allegations of the group relate to aqueous film-forming foams (AFFFs) that contain PFAS which contaminated groundwater near military bases, airports, and other industrial sites





South Carolina Multidistrict Litigation (cont'd)

- The South Carolina MDL includes cases that are not solely related to AFFF
 - Plaintiffs in *Ridgewood Water* fought transfer to the MDL due to allegations that contamination was caused by sources other than AFFF, however, the Court ruled that there is no requirement of complete identity of factual and legal issues when the actions arise from a common factual core (citing to the *In re Oxycontin Antitrust Litigation*)

Class Actions

- Class actions are popping up around the country and surviving the motion to dismiss phase
- Ohio Class
 - Former fire-fighter Kevin Hardwick filed class action in Southern District of Ohio
 - Claims for negligence, battery, declaratory judgment, and conspiracy
 - Class: **all individuals residing within the United States**, who at the time a class is certified in this case, have a detectable level of PFAS materials in their blood serum
 - Class does not seek compensatory damages, rather, only seeks relief in the form of a panel of scientists to study the health effects and medical monitoring

Class Actions (cont'd)

- New York Class
 - Individuals who owned or leased property in the Town of Petersburg, or who ingested contaminated water or inhaled PFOA or PFOS particulates in the Town, and had demonstrable evidence of elevated levels of the chemical in their blood filed a class action in the Supreme Court of New York
 - Claims for negligence, private nuisance, trespass, strict liability for abnormally dangerous activity

Class Actions (cont'd)

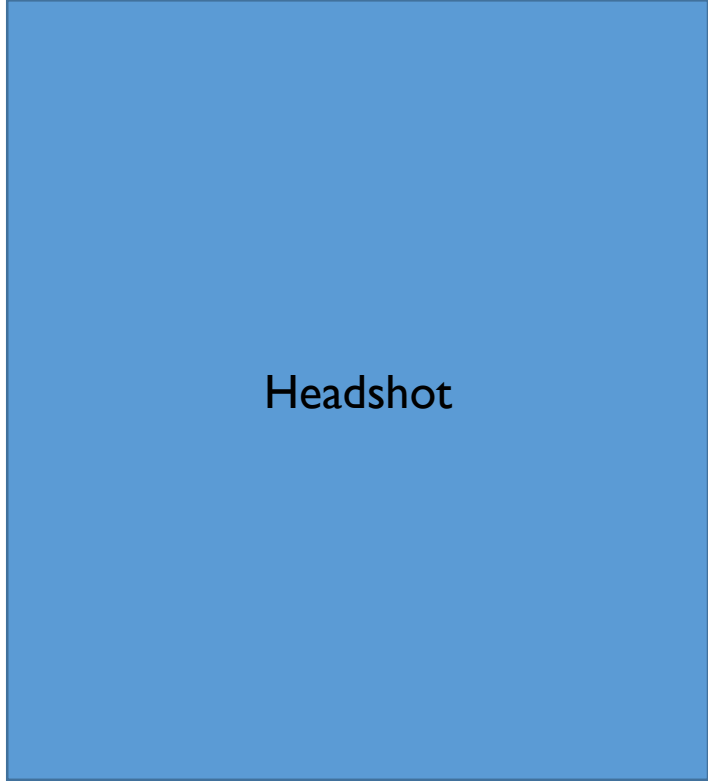
- New York Class
 - Supreme Court Appellate Division recently upheld the class certification
 - The four classes are:
 1. Town Water Property Damage Class
 2. Private Well Water Property Damage Class
 3. Private Well Water Nuisance Class
 4. PFOA/PFOS Invasion Injury Class
 - Class is seeking medical monitoring, property damages, and punitive damages

Damages

- Damages requested are broad and potentially significant
- Include the cost to assess, investigate, monitor, analyze, and remediate the presence of PFAS in the surface waters, groundwater, fish, wildlife, and marine resources whose use has been lost or degraded
- Enhanced compensatory damages
 - Sought by New Hampshire because the wrongful acts were allegedly committed intentionally, wantonly, maliciously, and/or oppressively
- Uncertainty related to cleanup costs and litigation outcomes could lead to a trend in settlements
 - 2017 Ohio/West Virginia settlement
 - 2018 Minnesota settlement

Nicole Moshang

Bio



Slide Title

- A
- B
- C
 - a
 - b
 - c
 - d