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PERSPECTIVE

Will the wave of PFAS litigation sweep through California?

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In the last year, litigation involving per- and polyfluoroalkyl substances (PFAS) has spiked across the nation. To date this litigation has been centered in eastern and mid-western states and the wave of litigation has yet to reach California. And while PFAS litigation is not new, increased testing and focus on PFAS by federal and many state regulators has increased the public's awareness surrounding PFAS' health risks, widespread use, and impacts to drinking water and groundwater. As outlined in Part One of this two-part series ["Agencies finally begin to address dangers of PFAS," March 28, 2019], California is stepping up regulatory action on PFAS. In this article — Part Two — we summarize trends in PFAS litigation outside California and discuss a likely on-coming wave of similar, but also unique PFAS litigation in California.

What Are PFAS?

PFAS are highly fluorinated manmade compounds that are resistant to heat, water and oil and used in a wide-range of products designed to be waterproof, stain-resistant or non-stick, such as carpets, furniture, cookware, clothing and food packaging. PFAS also are used in fire retardant foam (also known as aqueous film-forming foam or AFFF) at military bases and airfields and industrial processes involving flammable and combustible liquids. PFAS are resistant to chemical breakdown, soluble and highly mobile in soil and groundwater. PFAS reportedly have adverse health effects, which are the driving factor for regulators to take action.

PFAS Litigation Outside California

Several lawsuits have been filed by states against PFAS manufacturers. One of the leading cases involving PFAS contamination was filed by Minnesota against 3M Corporation for discharges of PFAS to surface waters, and groundwater used as a source of drinking water in Minneapolis and St. Paul. See *State of Minnesota v. 3M Corp.*, 27-cv-10-28862 (Minn. Dist. Ct. filed Dec. 30, 2010). In 2018, the case settled for \$850 million. More recently, both New Hampshire and New Jersey sued PFAS manufacturers

for PFAS contamination in their states alleging various tort claims including negligence, and trespass or nuisance. In the New Hampshire case, *State of New Hampshire v. 3M Co., et al.*, 216-2019-cv-445 (N.H. Super. Ct. filed May 29, 2019), New Hampshire alleges contamination of drinking water in all 10 New Hampshire counties, making the case the first in the United States to seek compensation for statewide contamination. Even

PFAS-related manufacturing operations in California are not as significant as in other states. Nonetheless, as California's active environmental regulatory agencies, including the State Water Resources Control Board, find more sources of PFAS in or threatening drinking water wells, a plethora of PFAS litigation will ensue.

though the New Hampshire case is novel, it has been compared to a 2015 case against ExxonMobil for drinking water contaminated with methyl tert-butyl ethyl (MTBE) that settled for \$236 million.

While not alleging statewide contamination, New Jersey has retained contingency fee law firms to file five separate lawsuits against PFAS manufacturers seeking the costs required to fully investigate AFFF contamination in New Jersey, payment for the costs of remediating, and damages for restoring affected natural resources. Significantly, New Jersey is one of the only states to have adopted its own PFAS standards, making it better positioned to demonstrate the need for cleanup of PFAS found in drinking water above those standards, including through litigation.

In addition to state-initiated lawsuits, a number of class actions have been filed against PFAS manufacturers. One of the earlier PFAS toxic tort cases has spawned the filing of several pending toxic tort actions. *Leach v. E.I. DuPont*, 01-C-608 (Wood County W. Va. Cir. Ct. filed Aug. 31, 2001) was a class action alleging contamination of drinking water with PFOA (also known as C8) in Ohio and West Virginia. The lawsuit settled in 2005, and the settlement included the creation of a scientific panel to evaluate whether there is a probable link between C8 exposure and any human disease. The C8 Panel concluded that there was, with six illnesses. DuPont is now required to fund a medical monitoring program. Since *Leach*, a firefighter in Ohio filed a nearly nation-wide class action, *Kevin D.*

Hardwick v. 3M Company, et al., 2:18-cv-1185 (S.D. Ohio filed Oct. 4, 2018) against PFAS manufacturers, claiming to represent all United States residents with detectable PFAS levels in their blood. Hardwick is asking for an extrajudicial panel of science experts to research and give binding determinations on potential health effects of PFAS. The nearly national class and type of relief sought in *make it unique*, and it is unclear whether the

case will gain any traction. See also Case Nos. 7:17-CV-00189, 7:17-CV-00197, 7:17-CV-00201 (E.D. N.C.) (Consolidated environmental toxic tort class actions filed against DuPont and Chemours).

California PFAS Litigation

PFAS litigation outside California has mainly been focused in states with significant PFAS manufacturing. PFAS-related manufacturing operations in California are not as significant as in other states. Nonetheless, as California's active environmental regulatory agencies, including the State Water Resources Control Board, find more sources of PFAS in or threatening drinking water wells, a plethora of PFAS litigation will ensue. The Water Board-required investigations of PFAS sources are currently on-going and the results will be made public. Like the MTBE and industrial solvent litigation in California, this will likely result in a spike in PFAS litigation seeking reme-

diation, replacement or expensive treatment for water supply wells from private parties and local water supply agencies. As additional PFAS data becomes public, the potential for toxic tort actions is likely to increase. Moreover, PFAS will affect the scope and costs of due diligence for development and purchase and sale transactions, and result in spin-off PFAS litigation.

PFAS compounds are not currently listed hazardous substances under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or California's equivalent — the Hazardous Substances Account Act (HSAA). Thus, for now, there will not be CERCLA or HSAA cost recovery or contribution claims. However, two PFAS compounds, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), were added to California's Proposition 65 chemical list in 2017 and Proposition 65 warnings were required as of November 2018. Thus, PFAS are a new target for Proposition 65 litigation, unique to California, over failure to warn for PFAS, especially in food products.

California's initiatives to investigate PFAS will carry the out-of-state wave of PFAS litigation to California in the not too distant future.

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