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ENVIRONMENTAL LAW

The Next Wave of PFAS Defendants: Smaller Industrial Users

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Rarely does a day pass without an update in the environmental blogosphere on per- and polyfluoroalkyl substances, collectively known as PFAS. With minor variations, the story and characters have remained the same: large manufacturers sue, were sued or are about to be sued for issues related to their historic manufacture of PFAS. Amid the flood of PFAS news this year, a new class action in Maine has gotten comparatively less attention from the national media. Yet it is unique, as its principal target is not an industrial giant but a local paper mill. This case portends a shift in the spotlight from big manufacturers of PFAS to smaller industrial users.

By way of background, PFAS is a group of more than 3,000 man-made compounds, including PFOS and PFOA, that are stable, mobile and difficult to remediate. Because of their resilient qualities, they are primarily used to make products that resist heat, oil, water and other external influences. The initial innovators began researching these chemicals in the 1940s, and manufacturing and marketing them in the 1950s. Over time, certain types of PFAS have been phased out of manufacturing. Just last year, the FDA and PFAS manufacturers agreed to eliminate PFAS use to grease-proof food packaging, such as pizza boxes.

On the regulatory front, the federal government has begun to take action. In May 2016, the EPA issued a health advisory of 70 parts per trillion (ppt) for certain types of PFAS, but progress slowed thereafter under the Trump administration. Recent actions from the Biden EPA reflect a more aggressive approach. In February, the EPA took initial steps to establish a federal maximum contaminant limit by issuing a preliminary determination to regulate PFOS and PFOA in drinking water. In April, the EPA announced an "EPA Council on PFAS" to coordinate the agency's work on these chemicals. Rather than wait for a federal mandate, certain states have enacted their own enforceable concentration limits, including New York and New Jersey. Delaware and Pennsylvania have not yet passed PFAS-specific laws, though legislation has been proposed in Delaware and Pennsylvania state officials have signaled the possibility of proposed regulations later this year.

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> *"Regulatory changes may impact the viability of any defenses, which makes it all the more important for companies concerned about this issue to stay informed about the PFAS regulatory landscape and the trends in the courts."*

In the courts, PFAS litigation has exploded over the past few years. At the vanguard of the federal cases is a multidistrict litigation (MDL) involving 3M, DuPont and other major manufacturers pending before the U.S. District Court for the District of South Carolina. The MDL is composed of several hundred cases relating to exposure to PFAS in aqueous film-forming foams used in extinguishing fires. At the state level, various state attorneys general (AGs)—including the New Jersey and New York AGs—have filed suit against PFAS manufacturers to recover cleanup costs at sites in those states. Just last month, Alaska joined the fray, bringing common law claims against manufacturers for strict products liability, trespass, negligence and nuisance. In addition, state public utilities with concerns of water supplies potentially

contaminated with PFAS have also filed actions. In February, Pennsylvania American Water sued these same manufacturers to recover costs allegedly spent treating drinking water supplies impacted by PFAS. The case was transferred to the South Carolina MDL.

Of course, major lawsuits bring financial pressure, and while large companies may have resources to weather the storm, threats of litigation can be particularly taxing for small and midsize companies. Until recently, the customers of PFAS manufacturers, who use PFAS in their various industrial processes, have generally avoided being named as defendants, with the spotlight focused unwaveringly on the major manufacturers.

Enter Somerset Mill, a paper mill abutting the Kennebec River in Skowhegan, Somerset County, Maine. The Berkshire Eagle, a New England publication, recently published a profile on it called "Days Gone By: Images of paper mills from The Eagle's archives," featuring nostalgic photographs of people at work on the Mill's factory floor, along with similar images of other local mills that dominated the area through 1970s. Unlike the other mills profiled, the Somerset Mill is still standing.

On March 5, Somerset County resident Nathan Saunders brought a class action lawsuit, *Saunders v. Sappi North America*, in state Superior Court against the paper mill alleging PFAS contamination over a 50-year period. According to the complaint, the state of Maine conducted private well water sampling, which showed that Saunders' well contained PFAS at 12,910 ppt—orders of magnitude above the EPA's advisory limit of 70 ppt. An investigation of possible sources of contamination led to the Somerset Mill. Allegedly, the mill has been using PFAS (manufactured elsewhere) since 1967 to make water-resistant paper for food packaging. These industrial processes generated liquid PFAS residuals that were allegedly discharged into groundwater, as well as paper mill sludge that was sent to landfills, used as fuel or repurposed as fertilizer.

Named as defendants are the Mill's current and former owners as users and dischargers of PFAS, and the former owner of the landfill as the recipient of the sludge. (Absent from the case caption are any original PFAS manufacturers—perhaps an attempt to avoid transfer to the South Carolina MDL.) Saunders asserts causes of action for medical monitoring, ultrahazardous activity/strict liability, private nuisance, public nuisance, negligence, and willful and wanton conduct. Saunders believes the Mill's PFAS caused his wife's kidney failure. Some residents and putative class members claim it caused their cancer. The proposed class is composed of "all natural persons who lived or owned property in Somerset County, Maine for a period of one year or more at any time between 1967 and the present." Local media reports quote plaintiffs counsel as contending that damages will be in the tens of millions of dollars.

Given the increased national attention to PFAS, this case and a couple others like it (including one in Michigan that just settled for nearly $12 million) may be more of a prelude than a one-off. Federal regulation and new state regulation of PFAS is likely to trigger a torrent of investigations nationwide, as water sources are increasingly sampled to ensure compliance with enforceable standards. As PFAS impacts are found, private individuals and government officials will conduct investigations to locate possible causes—just as they do with any other chemical, and just as they did in Maine. And, these investigations could trace these issues back to local industrial users of PFAS.

All of this said, this new class of defendants will not be without legal defenses. As an initial matter, defendants should vigorously contest class certification for the types of claims brought against the Somerset Mill because (among other reasons) individualized issues are likely to overwhelm common ones. Moreover, apart from the class question, there are a number of merits defenses to assert and develop. For example, historical PFAS disposal was likely not violative of discharge permits, since state regulations have only recently started to incorporate PFAS limitations. While strict compliance with applicable regulations is not always an absolute defense to negligence claims, it is a defense nonetheless, and it could prove significant. Moreover, the scientific literature that plaintiffs rely on to establish the danger of PFAS is relatively new, which is a relevant factor in many of the common law claims of the types pleaded in the Somerset Mill case. In addition, causation will be a particularly difficult hurdle to surmount because a plaintiff will have to establish a clear link between the defendant's alleged PFAS discharges and the plaintiff's alleged injuries. This will require proving not only that the chemical reached the plaintiff through a traceable hydrogeologic pathway, but that it also caused his particular harm. Needless to say, these issues are highly expert-intensive.

Of course, regulatory changes may impact the viability of any defenses, which makes it all the more important for companies concerned about this issue to stay informed about the PFAS regulatory landscape and the trends in the courts. •

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