Establishing and Challenging Standing in PFAS Litigation

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The case of *Hardwick v. 3M*, a per- and polyfluoroalkyl substances (PFAS) class action lawsuit filed in Ohio, has been marked as one of the most significant legal cases in recent history. The Sixth Circuit Court of Appeals granted interlocutory review of this enormously significant case on September 9, 2022. However, on November 28, 2023, the Sixth Circuit Court of Appeals dismissed the class action, holding that the lead plaintiff failed to identify which companies made the "forever chemicals" detected in his blood.

The *Hardwick* case is noteworthy due to the proposed scope of plaintiffs that counsel sought to include in the case. The lawsuit aimed to include any US citizen with detectable levels of PFAS in their blood, which is estimated to be over 95 percent of the US population.

Instead of seeking relief in the form of monetary damages, the suit sought to establish a medical monitoring program for affected citizens. It also sought to establish an independent science panel to study the effects of numerous PFAS on human health. In March 2022, the Ohio court ruled that the class of plaintiffs allowed to proceed with the lawsuit was "[i]ndividuals subject to the laws of Ohio who have 0.05 parts per trillion (ppt) of PFOA (C-8) and at least 0.05 ppt of any other PFAS in their blood serum."

Although the Ohio federal district court rejected the lead plaintiff's proposed nationwide class, it nonetheless certified a class of what the Sixth Circuit's order granting interlocutory review referred to as "nearly all 11.8 million residents of Ohio, along with anyone else otherwise subject to its laws." The court limited the class to individuals subject to Ohio law instead of making it nationwide due to the fact that numerous states do not yet recognize medical monitoring as a legal cause of action, and some states do not permit lawsuits to proceed for an increased risk of disease without any proof of actual harm.

Sixth Circuit Vacates District Court's Class Certification

On November 27, 2023, in a strongly worded order, the Sixth Circuit vacated the district court's class certification and remanded with instructions to dismiss for lack of jurisdiction. [1] The Sixth Circuit stated that "[s]eldom is so ambitious a case filed on so slight a basis," acknowledging that PFAS exposure is a "fact of daily life" for Americans, involving thousands of compounds manufactured by thousands of companies over the last fifty-plus years, with human body concentration reductions varying from days to years depending on the compound type.

The Sixth Circuit held that the plaintiff lacked standing due to the absence of particular allegations about how each defendant manufactured or provided a plausible pathway that likely delivered to the plaintiff's body any

one of the five detected PFAS compounds. The court found that the plaintiff pled only collective and conclusory allegations against all defendants for the trace quantities of only five PFAS compounds, while not knowing which companies manufactured those five PFAS compounds, not having any current sickness or symptoms, and not knowing whether PFAS exposure may someday make him sick. Thus, even at the pleadings stage, a plaintiff must do more than make a conclusory "the-defendant-unlawfully-harmed-me-accusation." Hardwick failed to allege facts "supporting a plausible inference that any of these defendants caused these five particular PFAS to end up in his blood."

Implications

The *Hardwick* decision is instructive in evaluating future PFAS claims. Absent evidence of traceability to the defendant at the time of filing, plaintiffs will have a difficult time surviving dispositive motions on the basis of standing. This decision sets forth a burden for standing plaintiffs must meet in order bring PFAS claims against multiple defendants. Plaintiffs must establish a "plausible pathway" at the time of filing. This will require tying an alleged injury to a particular defendant. In short, plaintiffs will have to show traceability back to the defendants at the time of filing the complaint in order to survive dispositive motions.

Facing PFAS exposure claims, companies may want to consider conducting qualified environmental audits with use of outside counsel in identifying sources where PFAS is used either in their manufacturing process or in their parts received by suppliers. Audits will enable companies to distinguish the type of PFAS in question and trace potential exposure pathways for those PFAS chemicals.

Similarly, on January 12, 2024, a northern California federal district court dismissed the PFAS-related class action case of *Lowe v. Edgewell Personal Care Company* on the grounds that its plaintiffs had not plausibly alleged injury from the products at issue. The *Lowe* plaintiffs brought their actions against two different tampon product lines, claiming that the presence of PFAS rendered the manufacturer's various representations about the products "false and misleading."

The manufacturers filed motions to dismiss the actions on the grounds that the plaintiffs had not plausibly alleged that its products contained PFAS and that any alleged amount of PFAS rendered the products harmful, or that PFAS can be traced back to the manufacturers.

The Court granted defendants' motion to dismiss, holding that plaintiffs' allegations provided no specificity as to the results reached by the independent testing or any other findings that would support their interpretation of the testing results. It also found the plaintiffs to have merely speculated that the tampon components were likely to contain PFAS because those chemicals are "frequently" used to make materials water-repellent.

The court further found that plaintiffs' allegations that the tampons contained PFAS to be insufficient because the plaintiffs did not provide any information showing how much PFAS the tampons might have contained, let alone whether that level of PFAS in a tampon might be harmful.

Conclusion

Hardwick is a virtual roadmap for all companies facing alleged PFAS exposure issues, providing a step-by-step basis for challenging standing. It appears that federal courts will not allow just any complaint containing PFAS allegations to progress past the pleading stage of litigation. Plaintiffs will have to show some plausible pathway that can be traced back to the defendant. Environmental audits focused on a cradle-to-grave examination from the time the PFAS chemical is created or used up through the time it is properly disposed will be invaluable. It will likely require the use of qualified environmental consultants and outside counsel but is well worth the investment of time and expense.

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1. Hardwick v. 3M Co. (In re E.I. du Pont de Nemours), 2023 US App. LEXIS 31297 (6th Cir. Nov. 27, 2023).

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