



PFAS Litigation: An Overview of Cases, Claims, Defenses, Verdicts and Settlements

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Executive Summary

An April 3, 2019 article in the *Texas Lawyer* asks whether Per- and polyfluoroalkyl substances (PFAS) is the new asbestos.¹ And it has been reported that there currently are more than one hundred PFAS-related lawsuits across the US, with total potential damages in the billions.² In the short term, Michigan may see a disproportionate share of PFAS-related litigation or PFAS environmental cleanups because the Michigan Department of Environment, Great Lakes & Energy (“EGLE,” formerly DEQ) has been proactive on PFAS site identification, investigation, and cleanup. The EGLE has made it clear that sites contaminated with PFAS are a high priority.³ Moreover, the *Detroit Free Press* opined that PFAS contamination is Michigan’s biggest environmental crisis in 40 years.⁴ So while one may question whether PFAS will be the new asbestos, there is no question that PFAS contaminated sites and PFAS-related litigation are currently a big deal in Michigan.

PFAS litigation can broadly be grouped into two types of cases based on the identity of the plaintiff: (1) cases by private individual plaintiffs who sue employers and various PFAS manufacturers for personal injury, medical monitoring, or other relief; and (2) cases brought by government or governmental agencies primarily against PFAS manufacturers for groundwater contamination. Causes of action include the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and state environmental regulation violations, products-liability and strict-liability claims, various torts including negligence, nuisance, trespass, and claims for medical monitoring. Two notable and recent high-profile settlements include a 2018 settlement by 3M with the State of Minnesota for \$850 million relating to groundwater pollution and a 2017 settlement by DuPont and Chemours with approximately 3,500 residents in Ohio and West Virginia for \$671 million relating to alleged pollution from a manufacturing plant.

Introduction

PFAS compounds are a relatively new concern of high importance due to a number of factors including: (1) the widespread use of fluorinated chemicals since the 1940s; (2) the low health advisory levels set the by EPA of 70 parts per trillion in November 2016 (roughly equal to 3.5 drops of water in an Olympic sized swimming pool); (3) their persistence in the environment due to the inability of natural processes to break these compounds down; and (4) the fact that they bioaccumulate and are present in most peoples’ blood serum at some level.⁵ According to a study released on May 5, 2019, by a Washington, D.C. based nonprofit, Environmental Working Group (EWG), and Northeastern University’s Social Science Environmental Health Research Institute, approximately 19 million people in the United States are exposed to PFAS in contaminated drinking water.⁶



Ben Fruchey's practice focuses on environmental, toxic tort, mass tort and products liability litigation. He assists clients with permitting and resolving alleged regulatory violations. His litigation work includes defending individual and class action lawsuits relating to alleged nuisance odors, particulate matter and groundwater and soil contamination. He has assisted clients in their efforts to obtain environmental permits, resolve alleged permit violations, and contest denied permits under Michigan’s

Natural Resources and Environmental Protection Act (NREPA). Ben is a Council Member of the State Bar of Michigan’s Environmental Law Section. He has been admitted *pro hac vice* in CA, ND, NY, TN, WY and VA. During law school he interned for Justice Elizabeth Weaver of the Michigan Supreme Court. He has an M.S. in geology from the University of Wyoming and worked as an oil and gas geologist and environmental consultant before attending law school.



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Because of the intense focus on PFAS in Michigan by EGLE, the State is known to host a relatively high abundance of PFAS-contaminated sites compared with the rest of the nation. In a recent MLIVE article titled “Michigan has more PFAS sites than other states. There’s a reason,” Director of EGLE, Liesl Clark, is quoted as stating, “We’ve got a lot of locations that have been discovered in the state because we’ve been looking.”⁷ The map below is a compilation of PFAS sites in the US that was prepared by EWG,⁸ showing the relative high abundance of PFAS sites in Michigan compared with the rest of the lower 48 states:

PFAS litigation, which already is underway, can take on a variety of forms, depending on who is exposed, the claimed route of exposure, the dose and duration of exposure, the location and timing of exposure, the specific compounds at issue and the like. A basic understanding of PFAS manufacturing timelines and their uses is helpful to understand the current and future shape of PFAS-related litigation.

PFAS compounds were invented approximately 90 years ago and, since the 1940s, they have been used to create non-stick coatings, stain and water-resistant products, firefighting foam, and waterproof fabrics, among other products.⁹ The EPA reports that PFAS can be found in food packaged in PFAS-containing materials and in commercial

household products, including stain- and water-repellent fabrics, nonstick products (e.g., Teflon), polishes, waxes, paints, cleaning products, and fire-fighting foams, which are a source of groundwater contamination at airports and military bases where firefighting training occurs. The compounds also can be found in and at certain workplace environments that use PFAS as part of its operations, such as chrome plating operations. It also is found in some drinking water supplies and in many living organisms (PFAS compounds bioaccumulate in the food chain).

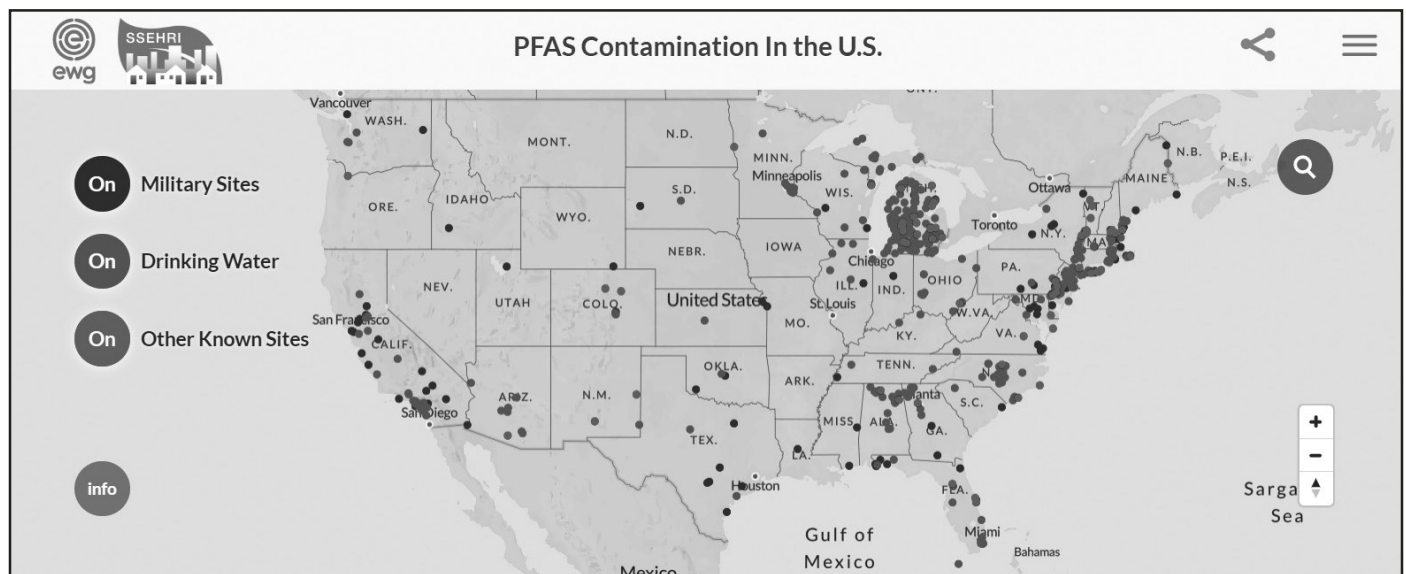
In 2009, the EPA published provisional health advisories for PFOA (Perfluorooctanoic acid) and PFOS (Perfluorooctanesulfonic acid) based on the evidence available at that time. The science has evolved since 2009 and as a result, the EPA replaced the 2009 provisional advisories in 2016 with lifetime health advisories. The lifetime health advisory set by the EPA in 2016 at 70 parts per trillion was developed to provide Americans, including the most sensitive populations, with a margin of protection from a lifetime of exposure to PFOA and PFOS from drinking water.¹⁰ According to the CDC, most people in the United States have one or more specific PFAS compound(s) in their blood, especially PFOS and PFOA.¹¹ Although more research is needed, the Agency for Toxic Substances and Disease

Registry states that some studies in people have been reported to show that certain PFAS may affect growth, learning, and behavior of infants and older children; lower a woman’s chance of getting pregnant; interfere with the body’s natural hormones; increase cholesterol levels; affect the immune system; and increase the risk of cancer.¹²

On March 26, 2019, Governor Whitmer ordered the EGLE to begin the regulatory process for establishing drinking water standards for PFAS in Michigan.¹³ The draft rules are expected to be developed by October 1, 2019, and adopted in the spring of 2020.¹⁴ A science advisory workgroup has been empaneled to review existing and proposed health-based drinking water standards and the goal is to establish Maximum Contaminant Levels, or MCLs, for PFAS that public water purveyors will be required to follow under the Safe Drinking Water Act.¹⁵

A review of published Court of Appeals opinions reveals that the following are counts asserted against defendants in PFAS litigated matters:

- 1) CERCLA and state environmental regulation violations;
- 2) Products liability including failure to warn and design defect,
- 3) Strict liability (unreasonably dangerous activity);
- 4) Torts including negligence, nuisance,



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trespass, battery, spousal derivative claims / loss of consortium, fraud / misrepresentation, negligent / intentional / reckless infliction of emotional distress, unjust enrichment, fraudulent concealment and conversion; and

5) Claims for medical monitoring.

Private Plaintiff and Municipal Litigation

PFAS litigation can be broadly grouped into two types of cases based on the identity of the plaintiff.

The first involves claims by private individual plaintiffs who sue employers, PFAS manufacturers and downstream manufacturers who used PFAS as part of their product, such as manufacturers of firefighting foam, teflon or, more locally, shoes. Some of these cases are being brought as purported class action lawsuits or are combined in Multi-District Litigation (MDL), while others involve one or more plaintiffs in their individual capacity. Claims in these cases range from allegations of personal injury resulting from exposure to claims involving no present injury but requests for medical monitoring. An example of private plaintiff litigation is outlined in the section discussing *Leach, et al v Du Pont de Nemours* detailed below.

The second category are cases involving government or governmental agencies primarily against PFAS manufacturers and secondary manufactures for injuries to natural resources or one or more water supplies. An example is the *Minnesota v 3M* case discussed above. Plaintiffs in these cases can include states, cities and environmental quality or natural resource authorities. A more detailed overview of each of these types of cases, using recent litigated matters as a guide, is presented below.

Type I - Private Plaintiff Litigation: *Leach* Litigation and Post *Leach* Litigation (*Leach* Class Plaintiffs)

Leach et al v Dupont

In 2001, a class action lawsuit against DuPont brought on behalf of persons

in the Parkersburg regional area alleged that DuPont had contaminated the drinking water supply near to its Washington Works plant. DuPont had been using PFOA in its manufacturing process for products such as Teflon. The plaintiffs asserted claims for trespass, battery, nuisance, negligence, fraud, and violation of the West Virginia Consumer Protection Act. The plaintiffs sought relief in the form of abatement, compensatory damages, punitive damages, and medical monitoring.

Class certification was granted and included all people within six named water districts, or users of certain specified private water wells, whose drinking water was contaminated with ammonium perfluorooctanoate (aka "C-8"), and its acidic anion, PFOA, attributable to releases from DuPont's Washington Works plant. This was estimated to include nearly 80,000 people.¹⁶ To qualify as a member of the class, a person must have been drinking contaminated water¹⁷ for at least one year before December 4, 2004, from one of six named water districts or specified private drinking water wells contaminated with C-8. The water districts alleged to be affected were: (1) Little Hocking, Ohio; (2) Lubeck Public Service District, West Virginia; (3) City of Belpre, Ohio; (4) Tupper Plains, Ohio; (5) Mason County Public Service District, West Virginia; and (6) Village of Pomeroy, Ohio. In November 2004, the parties reached a settlement which preserved the individual plaintiffs' personal-injury claims for a future date to allow for both blood testing of said plaintiffs and for the commission of a science advisory panel to study the effects of C-8 on the human body and to make recommendations of "probable links" of C-8 exposure and certain diseases. Additionally, as part of the settlement, DuPont agreed to design and implement water treatment technology to be used to treat the affected water districts and reduce the presence of C-8 in the local water supply.

The science advisory panel commissioned by the *Leach* class settlement was made up of three independent and credentialed epidemiologists who had not acted as

experts for either party or consulted with either party prior to the settlement. In 2011, the science advisory panel, by then known as the "C8 Science Panel," began to issue its "probable link" reports.¹⁸ Pursuant to these reports, the following human conditions were deemed to have a probable link to C-8 exposure: testicular cancer, thyroid disease, kidney cancer, ulcerative colitis, pregnancy related hypertension, and high cholesterol. It was not long after these findings were released that individual lawsuits were pursued by people whose claims were held in abatement by the settlement agreement until their blood was tested and the C-8 science panel released its findings.

In October 2015, a jury verdict in the first of 3,554 individual C-8 cases to be tried was reached. In that lawsuit, plaintiff Bartlett sued DuPont claiming to have kidney cancer as a result of ingesting contaminated water. DuPont had argued that plaintiff Bartlett's cancer was due to her obesity and, alternatively, that they were unaware of any danger to the public posed by C-8 at the time of contamination; however, the jury awarded the plaintiff in *Bartlett v E.I. DuPont De Nemours Co.*, 2:13-cv-170 (Southern District of Ohio) a total of \$1.6 million dollars in compensation for kidney cancer that the jury deemed was related to her exposure to C-8.¹⁹ The jury, however, did not award punitive damages. Shortly thereafter, punitive damages were awarded in the matters brought by individual C-8 plaintiffs Kenneth Vigneron and David Freeman.²⁰ Following these verdicts, DuPont, (and its spinoff Chemours, Inc.) agreed to pay \$670 million to settle the remaining C-8 class claims (3,554 claims were filed).

The success of the C-8 litigants also has spurred similar litigation, with similar success, in Hoosick Falls, New York, surrounding the use of PFAS chemicals by local manufacturers St. Gobain Performance Plastics, Honeywell and others.²¹ In addition to ground-water contamination, the Hoosick Falls cases also allege direct inhalation of PFAS compounds by residents nearby the alleged offending manufacturing plants.²²

Hardwick v 3M et al, 2:18-cv-1185 (Southern District of Ohio) was filed on October 4, 2018, and is a class action suit brought on behalf of everyone in the United States who has PFAS in their blood. In that case, the plaintiffs are seeking further scientific study by an independent panel of scientists (like the C-8 Panel), as well as damages.²³ The complaint alleges that fluorinated compounds beyond PFOA and PFOS caused injury or risk of injury, including PFHxS, PFNA, PFBS, PFHxA, PFHpA, PFUnA, PFDoA, and GenX.²⁴ A motion to dismiss based in part on standing and failure to state a claim is currently pending in the matter.

[T]hat a medical-monitoring claim based on fear of future injury, without any evidence of a current personal injury, fails to state a claim upon which relief can be granted.

Zimmerman v 3M, Wolverine Worldwide and Waste Management

Michigan has a PFAS class action currently pending in the United States District Court for the Western District of Michigan. *Zimmerman v 3M et al*. 1:17-cv-01062 was filed in December 2017, alleging twelve separate tort and equitable claims. In *Zimmerman*, the plaintiffs are alleging that Wolverine Worldwide had been using a product containing PFAS to waterproof its shoes and disposed of waste containing PFAS at 75 sites in Kent County, Michigan. The defendants responded to the complaint with a motion to dismiss alleging lack of jurisdiction under the Class Action Fairness Act “local controversy” exception.²⁵ The defendants’ motion was unsuccessful. The complaint remains unanswered, as the matter was temporarily stayed due to motions brought by a defendant in the lawsuit, and others, pursuant to 28 USC 1407, requesting to combine 84 matters spread out over ten states into a multi-district litigation. In its opinion issued on December 7, 2018, the Judicial Panel

on Multi-District Litigation declined to include the *Zimmerman* matter, among others, in the resulting multi-district litigation (“MDL”) now pending before the District of South Carolina as further explained below.²⁶

Multi-District Litigation - AFFF (Aqueous Film-Forming Foam) Products Liability Litigation

While the MDL panel declined to include *Zimmerman* and other matters not involving AFFF, the MDL panel ruled that 75 PFAS cases across seven states be consolidated for discovery purposes and were assigned the District of South Carolina.²⁷ The cases all center around the use of PFAS chemicals in the manufacturing of firefighting foams, and their discharge into water supplies, mostly involving airports or air force training facilities. The plaintiffs allege PFAS compounds, contained in the foam discharged while fighting fires or in training exercises, seeped into the local water supply either through the soil or through direct exposure to groundwater. The plaintiffs include homeowners and their families whose drinking water is alleged to be contaminated.

One of the larger matters now consolidated into this MDL is *Bell v 3M et al*. 1:16-cv-02352 in the District of Colorado. The *Bell* class action lawsuit asserted negligence, defective products – failure to warn, defective product – design defect, nuisance and unjust enrichment. The plaintiffs are seeking damages for medical monitoring and personal injuries to class members. The defendants have asserted over seventy affirmative defenses, including non-liability for alleged contamination below state action levels, lack of standing due to the plaintiffs’ lack of ownership interest in the affected water supplies, lack of scientific proof that the medical injuries alleged in the complaint were caused by PFAS, and lack of proof that the plaintiffs’ property was physically damaged by PFAS.

Split of Authority Regarding Medical-Monitoring Claims

In the *Bell* matter, the defendants

brought a motion for summary disposition that, *inter alia*, alleged that Colorado does not recognize claims for medical monitoring.²⁸ In ruling on the motion, US District Judge R. Brooke Jackson identified a split in jurisdictions over whether medical monitoring as a cause of action or a form of relief is allowed. The judge noted that cases saying no to medical-monitoring claims came from jurisdictions such as the Western District of Texas, Mississippi, North Dakota, Oregon, Nebraska, North Carolina, the Northern District of Georgia, Michigan, Kentucky, Alabama, the Northern District of Ohio, and Connecticut. Judge Jackson listed cases approving existence of medical-monitoring claims in Arizona, California, Florida, Maryland, Massachusetts, New Jersey, Pennsylvania, Utah, West Virginia, Washington DC, Indiana, Illinois, the Northern District of Ohio, and Colorado.²⁹

The Michigan case that Judge Jackson referred to is *Henry v Dow Chemical* in which the Court held that a medical-monitoring claim based on fear of future injury, without any evidence of a current personal injury, fails to state a claim upon which relief can be granted.³⁰

Type II - Federal, State and Municipal Litigation: *Minnesota v 3M*

In January 2011, the State of Minnesota filed a complaint against 3M Corporation alleging PFAS contamination of several sites throughout the state.³¹ Minnesota alleged that 3M disposed of wastewater containing PFAS directly into soil and groundwater, which seeped into local water supplies contaminating over 100 square miles of groundwater.³² Minnesota further alleged 3M released wastewater into streams with direct connections to the Mississippi River.³³ Minnesota alleged damages pursuant to its state equivalent of CERCLA (known as “MERLA”), under its Water Pollution Control Act, trespass, nuisance and negligence. Minnesota sought recovery for damages to the state’s natural resources and destruction of its drinking water supply.³⁴ On February 20, 2018, the parties entered into a settlement agreement that called for 3M to pay \$850

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million.³⁵ The money from the settlement will be used, in part, to treat the affected waterways and improve the quality of the affected drinking water.³⁶ Other similar actions are now pending in the Northern District of Alabama,³⁷ and the District of Minnesota.³⁸

Conclusion

As outlined at the beginning, while it remains to be seen whether PFAS will become the new asbestos, the prevalence of pending litigation and the sudden interest in PFAS by state and federal regulators almost assures continued clean-ups, regulatory enforcement actions and litigation for years to come.


Endnotes

- 1 <https://www.law.com/texaslawyer/2019/04/03/is-pfas-is-the-new-asbestos/?slretu rn=20190430120744>
- 2 <https://www.circleofblue.org/2018/world/as-pfas-lawsuits-proliferate-legal-tactics-emerge/>
- 3 <https://www.michigan.gov/egle/0,9429,7-135--490376--00.html>
- 4 <https://www.freep.com/in-depth/news/local/michigan/2019/04/25/pfas-contamination-michigan-crisis/3365301002/>
- 5 The CDC reports that "Most people in the

- United States have one or more specific PFAS in their blood, especially PFOS and PFOA." <https://www.atsdr.cdc.gov/pfas/pfas-blood-testing.html>
- 6 <https://www.ewg.org/release/mapping-pfas-contamination-crisis-new-data-show-610-sites-43-states>
- 7 <https://www.mlive.com/news/2019/08/michigan-has-more-pfas-sites-than-other-states-theres-a-reason.html>
- 8 Interactive Map available at https://www.ewg.org/interactive-maps/2019_pfas_contamination_map/.
- 9 <https://www.epa.gov/pfas/basic-information-pfas>
- 10 https://www.epa.gov/sites/production/files/201605/documents/drinkingwaterhealthadvisories_pfoa_pfos_5_19_16.final_1.pdf
- 11 <https://www.atsdr.cdc.gov/pfas/pfas-blood-testing.html>
- 12 https://www.atsdr.cdc.gov/pfas/docs/Talking_to_Doctor.pdf
- 13 <https://www.mlive.com/news/2019/03/michigan-will-draft-pfas-standards-for-public-drinking-water.html>
- 14 https://www.michigan.gov/egle/0,9429,7-135-3308_3323-494996--00.html
- 15 https://www.michigan.gov/egle/0,9429,7-135-3308_3323-494996--00.html
- 16 See Leach Class Action Settlement Agreement, at § 2.1.4, which can be accessed at <https://www.hpcb.com/dupont/Settlement-Agreement.pdf>.
- 17 Which according to the Class Action Settlement Agreement in the case, meant "containing a quantifiable (greater than or equal to .05ppb) amount of C-8.
- 18 http://www.c8sciencepanel.org/prob_link.html
- 19 [https://www.alternet.org/2016/01/dupont-](https://www.alternet.org/2016/01/dupont-duplicity-chemical-giant-hid-cancer-causing-properties-teflon/)

- [duplicity-chemical-giant-hid-cancer-causing-properties-teflon/](https://www.alternet.org/2016/01/dupont-duplicity-chemical-giant-hid-cancer-causing-properties-teflon/)
- 20 <https://www.delawareonline.com/story/money/2016/12/21/jury-orders-dupont-pay-2m-c8-case/95710838/>
- 21 See e.g., *Andrick v St Gobain Performance Plastics, et al*, 1:17-CV-1058 (NDNY).
- 22 *Id.*
- 23 <https://www.documentcloud.org/documents/4956490-Hardwick-Complaint.html>
- 24 https://www.martindale.com/legal-news/article-goldberg-segalla-llp_2511670.htm
- 25 <https://www.courtlistener.com/docket/6379848/zimmerman-v-the-3m-company/>
- 26 *In re Aqueous Film-Forming Foams Prods Liab Litig*, 357 F Supp 3d 1391, 1396 (2018).
- 27 *Id.*
- 28 *Bell v 3M Co*, 344 F Supp 3d 1207 (ID Colo, 2018).
- 29 *Id.* at 1223.
- 30 *Henry v Dow Chem Co*, 484 Mich 483, 498-504; 772 NW2d 301 (2009).
- 31 See generally Complaint filed in *Minnesota v 3M Company*, 27-CV-10-28862, accessed at <http://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CV-10-28862/Complaint-011811.pdf>.
- 32 *Id.*
- 33 *Id.*
- 34 *Id.*
- 35 <https://www.pca.state.mn.us/sites/default/files/c-pfc2-11f.pdf>.
- 36 *Id.*
- 37 *West morgan-East Lawrence Water and Sewer Authority, et al v 3M Co, et al*, 5:15-01750.
- 38 *City of Lake Elmo v 3M Co*, 0:16-02557.


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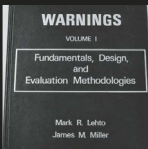

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