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LITIGATION UPDATE

We are pleased to report that on September 16, 2022 the Court issued an order denying the defendants' summary judgment motion, based on the "government contractor defense." Under certain circumstances, this defense allows private contractors to share the government's immunity from tort liability for products manufactured in compliance with military specifications. Judge Richard M. Gergel, the presiding judge in the AFFF MDL, on Friday issued an order denying motions for summary judgment filed by 3M Company and a group of telomer AFFF manufacturers[1] on the basis of the government contractor immunity defense. His denial of those motions clears the way for the parties to finalize the pre-trial work necessary to hold the first trials in the three remaining water supplier bellwether cases next year. Briefly, the court found that the AFF Mil-Spec does not immunize the manufacturer defendants from civil liability cases on two bases which have a degree of overlap.

Judge Gergel began his opinion by ruling the AFFF Mil-Spec was not "reasonably specific" because it did not require the use of the specific fluorosurfactants that the defendant manufacturers used in their AFFF— PFOS and PFOA—which plaintiffs claim rendered the resulting products defective. Rather, he found there were at least hundreds of chemicals the defendants could have used to satisfy the requirements in the Mil-Spec. As a result, he concluded that use of PFOA and/or PFOS was not required by the Mil-Spec.

The Court then proceeded to find that questions of material fact exist as to defendants' contention that the government continued to purchase AFFF containing PFOA and PFOS with full knowledge of the associated risks. If true, this offers an alternative basis for the defendants' to be protected from liability by the government contractor defense. But the Court found that there were questions of material fact that needed to resolved by a jury regarding whether the manufacturers provided timely warnings to the government about AFFF-related dangers or risks that were known to the manufacturers but not the government.

[1] This group of defendants—which includes Tyco Fire Products LP, Chemguard, Inc., Buckeye Fire Equipment Company, Inc., National Foam, Inc., and the Kidde Defendants—used fluorosurfactants in their AFFF products that were manufactured using a process called telomerizaton, as opposed to the electrochemical fluorination process used by 3M.

While the entire opinion is attached, the following passages provide a useful outline of the Court's ruling and underlying reasoning:

- "It is important to understand at the outset that PFOA and PFOS represented a new class of man-made chemical compounds, known as C8 chemistry, and until recent years the government and the scientific community working outside of the companies manufacturing these chemicals had a very limited understanding of the properties of C8 chemistry or its potential risks to human health and the environment. As set forth below, the record before the Court, viewed in a light most favorable to the Plaintiffs-the nonmoving parties in this summary judgment motion-demonstrates that the Defendants, as manufacturers of C8-based products at issue in this litigation, had significantly greater knowledge than the government about the properties and risks associated with their products and knowingly withheld highly material information from the government." Order at p. 2.
- "The record before the Court contains material factual disputes concerning whether 3M's delay for decades in disclosing its internal studies on the health and environmental effects of PFOS and related compounds retarded the government's knowledge and understanding of the danger PFOS posed to human health and the environment and resulted in a significant delay in the government's discontinuance of the use of 3M's AFFF. In the event Plaintiffs can establish a cause-and-effect relationship between 3M's actions in withholding critical scientific information from the government and the government's continued use of 3M AFFF over a period of time, 3M could not demonstrate satisfaction of the first prong of *Boyle* that the government's continued use was with full knowledge of the product's defects and risks. Further, there are material factual disputes concerning whether 3M's belated disclosures constituted a failure of its duty to warn required under the third prong of Boyle. Under these circumstances, summary judgment is inappropriate and the parties will have the opportunity at trial to litigate, and the jury to decide, these hotly contested issues." Order at p. 23.
- "The record before the Court, viewed in a light most favorable to Plaintiffs, the nonmoving party, contains numerous material factual disputes highly relevant to the issue of government contractor immunity. These include the Telomer Manufacturers' knowledge about the propensity of their products to degrade over time in the environment and whether that knowledge was superior to the government's. There is also a material factual dispute concerning whether the government's decision to continue using telomer AFFF was with full knowledge of its properties and dangers and whether the FFFC misled the EPA and how this adversely impacted the regulatory process. Further, the record contains material factual disputes about whether the Telomer Manufacturers should be held responsible for the allegedly misleading statements of the FFFC, which held itself out as their agent with the EPA and the DoD." Order at pp. 29-30

The Court's decision is an overwhelmingly positive development for the Plaintiffs in the MDL. The defendants have emphasized the government contractor defense since the very beginning of this litigation and repeatedly suggested they expected to win summary judgment on this issue. The Court's ruling has proven them wrong, and while defendants may consider an appeal of that ruling, they are not entitled to an immediate appeal "as of right" in these circumstances. Instead, if the defendants wish to appeal at this stage, they must ask for leave to file an interlocutory appeal. In our opinion, it is doubtful that Judge Gergel or the Fourth Circuit will allow them to pursue an interlocutory appeal (i.e., an appeal made prior to a final resolution of the plaintiffs' claims in the MDL). We also remain confident that even if an appeal did ever reach the 4th Circuit, Judge Gergel's ruling would be upheld.

We will of course keep you updated as the case develops.