

CLIENT ALERT

Recent New York State Case Could Encourage an Increase in Class-Action Suits Involving PFOA Contamination

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In July 2018, a New York State trial court in *Burdick v. Tonoga, Inc.*, 60 Misc. 3d 1212(A) (N.Y. Sup. Ct. 2018), certified four classes of plaintiffs in a suit against Tonoga Inc. (d/b/a Taconic) for soil and groundwater contamination and medical monitoring involving perfluorooctanoic acid (PFOA). The case is the first lawsuit involving PFOA contamination in New York State in which a class has been certified, and may be a harbinger of similar toxic tort class actions in the future.

***Burdick v. Tonoga, Inc.* and the decision to grant class certification**

Since the early 1960s, Taconic has owned and operated a facility in Petersburg, NY that produced fabrics coated with Teflon. Plaintiffs allege that Taconic's manufacturing process released contaminants into the air that, when eventually dissolved into the soil, developed into PFOA. According to the complaint, PFOA also contaminated the groundwater beneath the facility; the town's public-water system; and private drinking-water wells located within seven miles of Taconic's facility. In addition, over four hundred town residents allege that they have tested positive for the accumulation of PFOA in their blood serum at levels greater than the U.S. population.

Plaintiffs brought suit against Taconic and proposed certifying four classes: three classes involving individuals who owned property near the facility and obtained water from either the town's public-water system or their own private wells ("Property Classes"), and one class involving individuals who were tested and found to have significant levels of PFOA in their blood (PFOA Invasion Injury Class, referred to as the "Medical Monitoring Class" here).

New York's Civil Practice Law and Rules (CPLR) 901 and 902 govern class certification. The standards are similar to those under Federal Rule of Civil Procedure 23. CPLR 901's requirements are numerosity; commonality; typicality; adequacy of representation; and superiority. CPLR 902's factors include the impracticability of litigating separate actions; any pending litigation by or against class members regarding the same controversy; and the difficulties of managing a class action.

Here, Defendant conceded that the proposed classes met the numerosity and adequacy-of-representation requirements. So the battleground lay with commonality, typicality, and superiority. The court first analyzed the Property Classes and then the Medical Monitoring Class.

The Property Classes met CPLR 901's requirements

Regarding commonality, the important common facts between the named plaintiffs and class members included Defendant's conduct overall (its manufacturing operations), its standing as the source of the contamination in the area, a common contaminant, and common injury (soil and water contamination). These facts led to significant common-liability issues, including

how PFOA was used in Defendant's manufacturing processes and Defendant's liability for trespass with respect to its contamination of the groundwater that entered class members' properties.

By contrast, the court acknowledged that there were some individualized questions, including the amount of damages suffered by each member and the different PFOA exposure levels affecting each property. Nevertheless, the court concluded that the common-liability issues predominated over these individualized issues, and that the putative classes satisfied commonality. Further, the court held that typicality was satisfied because the class representatives' claims were similar to the members' claims. And the court found that a class-action suit would be more efficient than litigating the cases separately.

The Medical Monitoring Class met CPLR 901's requirements, and all of the classes satisfied CPLR 902

Next, the court addressed whether the parties could bring a valid claim for medical monitoring costs. It then proceeded with its class-certification analysis under CPLR 901.

Normally, plaintiffs who do not present physical injury are unable to obtain class certification for medical monitoring. But under New York law, parties can sue for medical monitoring costs if, among other things, they were exposed to a disease-causing agent and had a rational basis for fear of contracting a disease. New York courts have held that the presence of a particular contaminant in a plaintiff's body was enough to show exposure and a rational basis for fear. Here, because tests showed that class members had significant levels of PFOA in their blood, the class members had a cognizable claim for medical monitoring costs.

The court then applied CPLR 901 and found that the class met the commonality, typicality, and superiority requirements for reasons similar to the Property Classes: class members' common issues (*e.g.*, whether medical monitoring was available for the diseases linked to PFOA exposure) predominated over individual questions like whether individuals were at risk for developing illnesses based on their age or sex. In addition, the representative parties' claims were typical of the class members' claims and litigating one lawsuit would be superior to doing so for numerous individual cases.

Finally, the classes satisfied CPLR 902. Among other things, the court held that the similar factual issues among the classes meant that managing a class action would not be difficult.

Conclusion

Burdick is significant. Not only is it the first certified class action in New York State involving PFOA contamination, it is also the rare case in which a court certified a medical monitoring class. Although certifying class actions in these cases will remain difficult to do, *Burdick* presents plaintiffs with a roadmap for potential class certification.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Peter C. Condron

Partner – Washington, D.C.

Phone: +1 202.624.2558

Email: pcondron@crowell.com

Monty Cooper

Counsel – Washington, D.C.
Phone: +1 202.624.2617
Email: mcooper@crowell.com