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# CLIENT ALERT

## Vermont Attorney General's PFAS Lawsuits Continue Trend of State Government Product Lawsuits Against Industry

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The Vermont Attorney General announced last week that he has initiated lawsuits against makers of per- and polyfluoroalkyl substances (PFAS) (*State of Vermont v. 3M Co*., *et al*., Chittenden Cty.), and makers of firefighting foams that contain PFAS (*State of Vermont v. 3M Co., et al*., Chittenden Cty.). These new cases, the latest in a series of state-government common-law and statutory liability actions against PFAS manufacturers and users, continues a developing trend of state attorneys general using state tort law aggressively against corporate defendants, usually with the assistance, if not the encouragement, of private contingency-fee law firms.

**The New Attorney General PFAS Lawsuits**

The two new Vermont cases follow on the heels of two virtually identical lawsuits filed in May 2019 by neighboring New Hampshire (*State of New Hampshire v. 3M Co., et al*., No. 216-2019-CV-445, Hillsborough Cty.; *State of New Hampshire v. 3M Co., et al*., No. 216-2019-CV-446, Hillsborough Cty.). These, in turn, were filed not long after the New Jersey Attorney General filed five lawsuits seeking to recover "cleanup and removal costs" and natural resource damages for alleged PFAS contamination at various sites throughout New Jersey. The States of Minnesota, New York and Ohio had previously filed lawsuits against manufacturers of PFAS and PFAS-containing products. And Michigan's Attorney General issued a request for proposals on May 9, 2019, soliciting bids from private law firms "to examine, investigate, recommend, and litigate the State's possible tort and other applicable common law claims against manufacturers of per- and polyfluoroalkyl substances (PFAS)."

Each of the new lawsuits asserts that PFAS chemicals have contaminated groundwater and/or surface waters within the states, and allege some combination of claims for public nuisance, strict product liability, trespass, and state statutory liability. Several of the suits are targeted at specific locations where PFAS chemicals were made, or where they were used in manufacturing processes. A number of them specifically target locations where PFAS-containing aqueous film-forming foam, a firefighting agent, was used. Others seek recovery for alleged PFAS contamination on a statewide basis. Although some of the allegations in the cases vary, they all tend to have three things in common: they allege that PFAS and products containing PFAS constitute a public nuisance; they allege that PFAS-containing products are defective; and in almost every instance, the states are using outside contingency fee counsel to litigate the matters.

Most of these attorney general PFAS cases remain in their infancy. Of particular note, however, is the State of Minnesota's lawsuit against a Minnesota-based PFAS manufacturer, which resulted in an $850 million settlement on the eve of trial in February 2018. The state had claimed its damages were $5 billion. The state's attorney general hired a large Washington, D.C. law firm to litigate the matter for the state.

**The Latest in a Developing Trend?**

The new attorney general PFAS litigation is merely the latest chapter in what has become an ongoing trend of states looking to tort litigation – and private contingency fee lawyers – to replenish state coffers. Beginning with tobacco litigation in the late 1990s, state governments have been aggressively using state common-law and statutory claims to pursue corporate defendants for substantial payouts. Over the years, states have hired contingency fee counsel to pursue pharmaceutical pricing litigation, opioid cases, and environmental lawsuits involving refinery contamination, lead paint, and the gasoline additive MTBE. Attorneys general in Washington State, Ohio and Oregon have hired private plaintiff's law firms to file suit over PCB water contamination, and Rhode Island's attorney general brought on outside counsel to initiate litigation over climate change. In many instances, the states have challenged conduct through litigation that those same states permitted, if not affirmatively encouraged, in the past.

This trend seems likely to continue as private plaintiff's counsel become more and more inventive, and the potential for large settlements and verdicts will prove hard for AGs across the political spectrum to resist. State governments see these lawsuits as a relatively risk-free way to generate revenue from politically unpopular targets. At the same time, some state AGs perceive a current void at the federal level in environmental-law enforcement, among other regulatory areas, that creates an opportunity for their respective states and AG offices to seize the enforcement mantle. The practice of state AGs hiring outside counsel on a contingency fee basis has been criticized for farming out state legal functions to financially-motivated lawyers unaccountable to the state's voters and for the potential conflicts of interest that contingency fee arrangements generate. Nevertheless, it seems likely that the practice is not going away and, if anything, it likely will accelerate over time.

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