Lowenstein Sandler

Environmental Law & Litigation

May 26, 2020

Second Circuit Upholds Medical Monitoring Claim in Litigation Arising From PFOA Groundwater Contamination

By Richard F. Ricci and Mark S. Heinzelmann

On May 18, the U.S. Court of Appeals for the Second Circuit decided in *Benoit, et al. v. Saint-Gobain Performance Plastics Corp., et al.*, No. 17-3941-cv(L), slip op., __ F.3d ___ (2d Cir. 2020), that, under New York law, the plaintiffs pled a cognizable claim for medical monitoring costs allegedly associated with releases of perfluorooctanoic acid (PFOA)[1] from the defendants' manufacturing facility. Contrary to the defendants' assertions, it was of no moment that some physical disease had not yet manifested itself in the plaintiffs. Instead, the plaintiffs' allegation that PFOA had accumulated in their blood was sufficient to meet the injury threshold.

Case Background

Plaintiffs are residents of the Village of Hoosick Falls, New York (Village), the location of a manufacturing facility that was, at various times, owned by the defendants. The facility's operators applied a PFOA-containing solution to fabrics and released to floor drains leftover solution that eventually migrated into groundwater. The groundwater releases contaminated the local wells and drinking water and exposed the plaintiffs to PFOA. In 2014 and 2015, the Village tested the local water supply and discovered PFOA in municipal wells at levels up to 662 parts per trillion (ppt), in private wells up to 412 ppt, and in groundwater near the facility up to 18,000 ppt. *Benoit*, slip op. at 2. For reference, New Jersey will soon complete a rule establishing a maximum contaminant level for PFOA of 14 ppt.

In late 2016, the plaintiffs sued the defendants in the U.S. District Court for the Northern District of New York for negligence, strict liability, trespass, and nuisance (including a claim for property diminution) arising from the defendants' PFOA releases. Most alleged that PFOA had accumulated in their blood, which increased their risk of health problems later in life. The plaintiffs sought as damages the costs that they would incur to test, monitor, and remediate the effects of their PFOA exposure. The defendants in turn moved to dismiss, arguing that the plaintiffs had failed to allege a tort cognizable under New York law, citing principally to *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013) (*Caronia*), for the proposition that recovery for future harm is barred where there is no present physical injury. According to the defendants, a mere accumulation of PFOA in the blood does not constitute such an injury. The District Court denied the motion to dismiss the plaintiffs' medical monitoring claims and certified its decision for interlocutory appeal. The Second Circuit then granted leave. *Benoit*, slip op. at 3-4.

[1] PFOA is a member of the class of chemicals widely known as per- and polyfluoroalkyl substances (PFAS). Because of their extensive use and persistence in the human body (which is associated with adverse health effects over time), PFAS have recently garnered significant media attention. Though PFAS are not yet regulated on a national level, some states (such as New Jersey) have proposed PFAS regulations, and the U.S. Environmental Protection Agency (EPA) is evaluating PFAS for potential future regulation.

Analysis

In affirming the District Court's decision, the Second Circuit closely analyzed *Caronia* and rejected the defendants' contention that the plaintiffs are precluded from bringing a personal injury action "based solely on allegations of elevated blood levels of PFOA without allegation of disease or symptoms of disease . . . ." *Benoit*, slip op. at 5. Under New York law, to recover under a theory of either negligence or strict liability, a plaintiff must prove that there was an injury to his or her person or property. Id., citing, among other authorities, *Akins v. Glens Falls City Sch. District,* 53 N.Y.2d 325, 333 (1981); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation,* 725 F.3d 65 (2d Cir. 2013). *Caronia*, however, concerned a unique spin on that threshold requirement. There, the New York Court of Appeals considered whether "inveterate cigarette smokers," who did not allege personal injury, could nonetheless obtain an order requiring the defendant to fund a medical surveillance program designed for early detection of lung cancer. Framed another way, the question was whether New York law recognized an independent equitable action for medical monitoring, absent physical injury.

As the Second Circuit explained, the Court of Appeals in *Caronia* ultimately answered that question in the negative, recognizing that New York appellate courts have "consistently found that *medical monitoring* is an element of damages that *may be recovered only after a physical injury has been proven, i.e.,* that it is a form of remedy for an *existing* tort." *Benoit*, slip op. at 7, quoting *Caronia*, 22 N.Y.3d at 448-49 (emphasis in original). In *Abusio v. Consolidated Edison Co. of N.Y.*, 656 N.Y.S.2d 371 (2d Dep't 1997), however, which the Court of Appeals cited with approval in *Caronia*, the Appellate Division implicitly held that the presence of a toxin in a person's body constitutes a "physical injury" sufficient to proceed on a claim for medical monitoring. In affirming a trial court's decision to set aside a damages award for medical monitoring, the Appellate Division in *Abusio* focused on the fact that the plaintiffs had not shown the "clinically demonstrable presence of [toxins] in [their] body, or some indication of [toxin]-induced disease . . . ." 656 N.Y.S.2d at 372.

In interpreting the holdings in *Caronia* and *Abusio*, the Second Circuit held that, under New York law, "(a) . . . an action for personal injury cannot be maintained 'absent allegation of *any* physical injury'; (b) . . . it is, however, sufficient to allege 'some injury'; and (c) . . . to meet the requirement to plead 'some' physical injury, it is sufficient to allege that 'in the plaintiff's body' there is either a '*clinically demonstrable presence of toxins' 'or some physical manifestation of toxin contamination*.'" Benoit, slip op. at 7 (emphasis in original). The court then considered an EPA advisory finding that PFOA concentrations in drinking water greater than 70 ppt are harmful to human health, and concluded that PFOA could be considered a "toxin." Thus, because the plaintiffs had alleged that they were exposed to PFOA (a toxin) through the defendants' releases and those releases caused a buildup of PFOA in their blood, the Second Circuit concluded that the plaintiffs had pled physical injuries under New York law sufficient to allow them, under *Caronia*, to seek the costs of medical monitoring.

Importantly, however, the Second Circuit, in reaching its conclusion, left open whether, in a claim for medical monitoring costs, the injury threshold could be satisfied by pleading an injury to property alone. In *Caronia*, the Court of Appeals had at least implied that an injury to property would support such a claim, but because in *Benoit* that question did not meet the 28 U.S.C. § 1292(b) criteria for immediate appellate review, the Second Circuit declined to address it.[2]

If you have any questions about the Second Circuit's holding, the types of damages available in environmental actions, or PFAS chemicals and their related litigation risks, please contact the authors of this client alert.

---

[2] The Second Circuit also affirmed the District Court's refusal to dismiss the plaintiffs' claims for property damages under theories of negligence, trespass, strict liability, and public nuisance, which stemmed in large part from the impact of the groundwater PFOA contamination on some plaintiffs' wells. That discussion, however, was secondary to the court's analysis of the plaintiffs' claim for medical monitoring costs.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

RICHARD F. RICCI
Partner
Chair, Environmental Law & Litigation
T: 973.597.2462
rricci@lowenstein.com

MARK S. HEINZELMANN
Associate
T: 973.422.2946
mheinzelmann@lowenstein.com