

# Groundwater Contamination Litigation: Proving and Defending Against Liability

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Today's faculty features:

Andrew W. Croner, Partner, **Napoli Shkolnik PLLC**, Baltimore, MD

Andrew M. Thompson, Partner, **Smith Gambrell & Russell LLP**, Atlanta, GA

R. Trent Taylor, Partner, **McGuireWoods LLP**, Richmond, VA

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**GROUNDWATER CONTAMINATION LITIGATION:**

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# Proving Liability

*Andrew W. Croner*

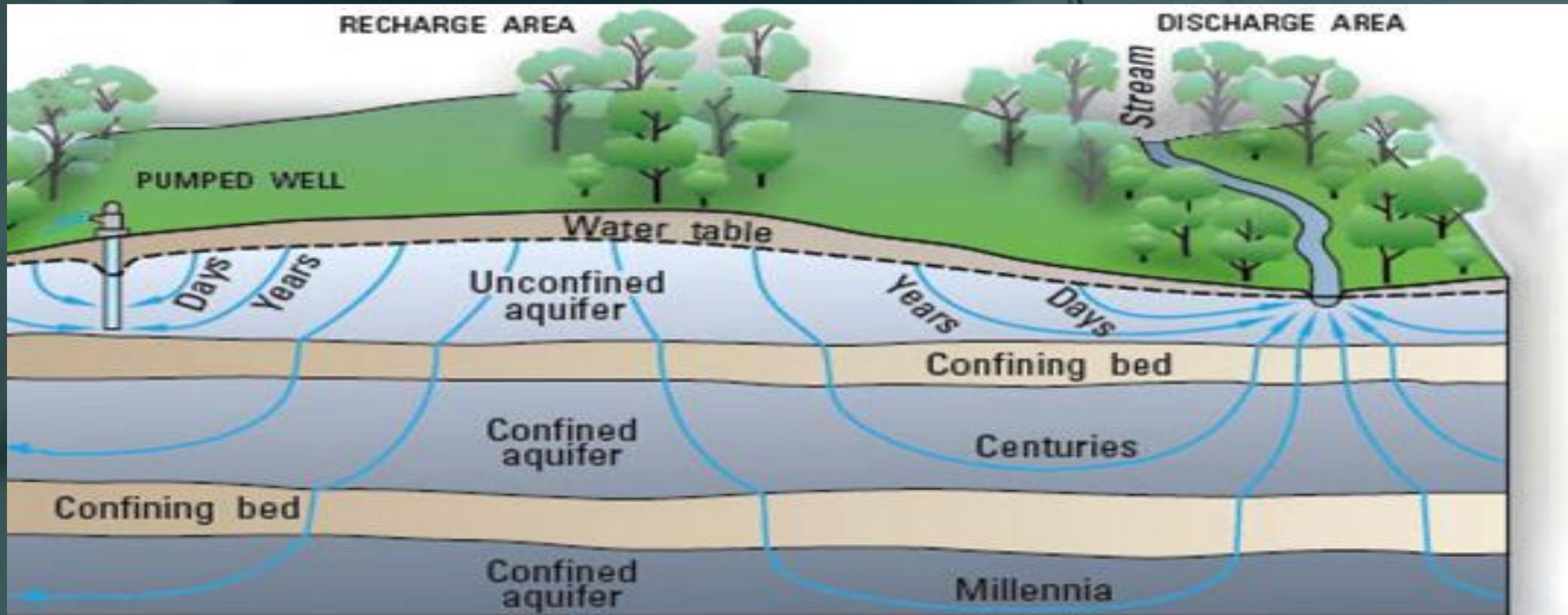
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# What is Groundwater?

*Water held in soil or in pores and crevices in rock formations. These sediment or rock formations are called aquifers, which are either confined or unconfined from above by impermeable rock.*



# How Does Groundwater Become Polluted?

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- ✓ Activities on the land surface such as releases or spills from industrial sites
- ✓ Sources below land surface such as USTs or septic system
- ✓ Structures within the water table such as water or geothermal wells, underground fluid injection for resource extraction (fracking)
- ✓ Contaminated Recharge Water

## Who Are the Plaintiffs?

- Individual Property Owners
  - Municipal Water Districts and Authorities
  - Private Water Companies
  - States and Counties (Natural Resources Damage)
- **Be Aware:** Water rights and ownership vary from state to state – make sure you have standing.

# Starting Your Case

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## Investigation & Consultation

- *Collect publically available water quality data*
- *Carry out your own sampling by a certified lab*
- *Investigate current and historial PRPs*

## Consult With Experts

- *Characteristics of contaminant*
- *Look at travel time and migration pathway*
- *Engineering for the Damages*

**SUCCESS**

# Experts in Groundwater Cases

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- Industrial Hygienist
  - Chemical Engineer
  - Hydrologist/Hydrogeologist
  - Fate and Transport chemist
  - GW Modeler
  - Civil Engineer
  - Industrial Hygienist
  - Warning Experts
- 
- If a Personal Injury Claim:
    - Toxicologist
    - Epidemiologist
    - Medical Doctor

# Typical Causes of Action

- Negligence
- Strict Liability (failure to warn or ultra-hazardous activity)
- Nuisance (Public/Private)
- Trespass (sub-surface)
- Breach of Contract (if gas lease)
- Statutory causes of action
- CERCLA
- RCRA
- SDWA
- State Hazardous Waste and Clean Streams Laws

# Typical Damage Theories

- Capital and O&M Costs for Treatment
- Loss of property value
- Remediation of Property
- Personal injuries
- Fear of future disease and/or cancer
- Medical Monitoring
- Replacement water supply
- Punitive damages for fraud, gross negligence or reckless behavior

# Lead Contamination Cases

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## *What happened in Flint, Michigan?*

- The Flint water system was not prepared for the switch to Flint River water. The Flint River, it turned out, was contaminated with rock-salt chlorides washed into the river from road surfaces over the course of many harsh Michigan winters.
- Between 6,000 to 12,000 Flint children have been exposed to elevated levels of lead in the water. With the elevated lead levels seen in Flint, thousands of children are now susceptible to permanent brain damage and a significantly increased risk of contracting respiratory ailments, intestinal disorders, physical impairments and other serious diseases.

# Litigating the Flint Michigan Case

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- The problems associated with Flint's water have had and are having a significant impact on residential and commercial property values and rental rates in the City.
- Corroded pipes not only present a continuing health threat, but they also risk further damage to one's property because corrosion can result in deep pits in the pipe or tank walls that can eventually break, causing substantial water damage to homes and businesses.
- More tragically, Flint's children have suffered inhibited development and diminished intelligence leading to lower economic productivity over the course of their lives.

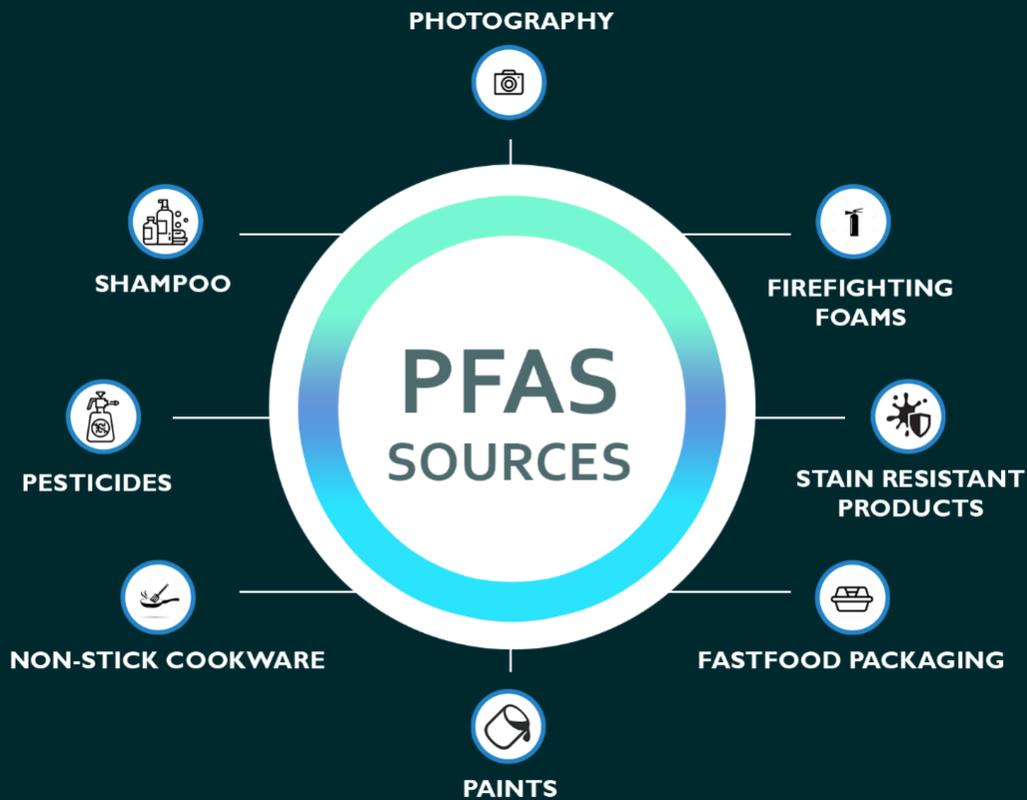
## Other Lead Contamination Cases

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### *La Oroya, Peru*

- Minor plaintiffs lived in or around La Oroya, Peru and were exposed to and injured by the harmful and toxic substances released from the Defendants' metallurgical complex.
- A 2005 study performed by Saint Louis University, showed that over 99 percent of children in La Oroya had blood lead levels greater than 10 µg/Dl (micrograms/deciliter), the level considered to be dangerous and cause permanent injuries.

# PFAS Litigation



Perfluorooctanoic acid (“PFOA”, also known as “C8”) and perfluorooctanesulfonic acid (“PFOS”) are manmade, manufactured chemicals not found in nature that belongs to a group of fluorine-containing chemicals called per- and polyfluoroalkyl substances (PFAS).

- Used in Teflon pots and pans, Gore-Tex, Scotchgard carpet protector, and firefighting foam.
- PFAS are readily absorbed after consumption or inhalation, and accumulate primarily in the blood stream, kidney and liver.

# PFAS Litigation

- Only learned of PFAS groundwater contamination because of the US EPA Third Unregulated Contaminant Monitoring Rule (UCMR 3).
- Everyone who supplied water to over 10,000 people was required to test for PFAS using a 40 ppt detection limit from 2013-2015.
  - Subject to budgetary constraints, UCMR5 will require testing for 29 PFAS for
- US EPA health advisory level (HAL) for PFOA and PFOS is currently 70 parts per trillion (ppt).
- Some states setting lower MCLs (e.g., NJ- 14 ppt PFOA; NY- 10 ppt for PFOS & PFOA; Massachusetts- 20 ppt for 5 different PFAS Combined).



# Recent PFAS Litigation Settlements



**February 2018**

*\$850 Million: Minnesota v. The 3M Co.*



**February 2020**

*\$670.7 Million: Dupont Plant, Parkersburg, WV*



**November 2021**

*\$26.2 million: Saint Gobain, Bennington and North Bennington*



**August 2021**

*\$17.5 million: AFFF manufacturers, Peshtigo, Wisconsin*



## AFFF Litigation

Due to the chemical nature of PFOA and PFOS as a surfactant, it was able to be mixed with water and sprayed as foam on fires, putting a film on the fire to separate oxygen from the fuel surface, and therefore able to stop the chemical reaction from burning.

Aqueous Film Forming Foam (AFFF) was used at civilian and military airports across the country, as well as fire training centers, chemical plants, refineries, and other industrial sites.

## Manufacturer Defendants

### **PFOA/PFOS**

3M/Dyneon  
Asahi Glass  
Arkema  
Ciba

Clariant  
Daikin  
Dupont  
Solvay

### **AFFF**

3M  
Ansul  
Amerex  
Buckeye

Chemguard  
Kidde  
National Foam  
Tyco

**PFOS** was solely produced by 3M in the U.S.



## AFFF MDL

The AFFF MDL is currently comprised of approximately 2,500 cases pending before the United States District Court for the District of South Carolina.

Plaintiffs generally allege that the use of AFFF containing PFOA and PFOS contaminated groundwater near various military bases, airports, and other industrial sites where AFFF was used to extinguish liquid fuel fires.

Plaintiffs have brought a variety of claims, including claims by municipal entities for remediation costs and property damage and individual personal injury, property damage and medical monitoring claims.

Currently the MDL proceedings are undergoing case-specific discovery on the bellwether water supplier cases that are being worked up for trial, with the first trials being scheduled in January 2023.

The proceedings have also focused on the government contractor defense that the Defendants, and the United States of America claim shields them from liability for the design of AFFF used by the U.S. military.

# Hypothetical

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## *Village X Municipal Well Gets Impacted by PFAS*

Your Client, Village X, is mandated by the U.S. EPA's Third Unregulated Contaminant Rule (UCMR 3) to test for PFAS

- ✓ The sampling results show 120ppt in the raw water, which exceeds the state MCL of 12ppt for one PFAS, PFOA
- ✓ They call you and advise to shutdown the well
- ✓ Village X does not have the money for treatment but needs the well.

# Handling Village X's Matter

## ✓ *Investigate*

- Request all public documents from EPA and state departments (DOH, DEC, etc.) on known releases in the area
- Research PRP's within the capture zone and if they used or use PFAS

## ✓ *Consult* with Village engineers and employers to determine the impact the contamination has on the supply.

# Village X's PFAS Contamination

- ✓ *Consult* with experts on the causation-travel time, pathway, cause of release, degradation products, plume delineation, etc.
- ✓ *Sue* the Primary Responsible Party (PRP)
- ✓ *Ensure damages include* capital costs for treatment, ongoing O&M, engineering, legal costs, overtime, added power costs, etc.
- ✓ *Make polluters pay!*

# CONTACT US

Andrew W. Croner  
[acroner@napolilaw.com](mailto:acroner@napolilaw.com)  
(212) 397-1000

360 Lexington Avenue, 11<sup>th</sup> Floor  
New York, New York 10017  
[NapoliLaw.com](http://NapoliLaw.com)



# Groundwater Contamination Litigation: Proving And Defending Against Liability

R. Trent Taylor – McGuireWoods LLP  
[rtaylor@mcguirewoods.com](mailto:rtaylor@mcguirewoods.com)

# Targets

- Fly/coal ash
- Fracking
- Uranium/Radioactive
- Oil Spills
- PFOA?PFAS
- MTBE
- TCE/TCP
- PCBs
- Hexavalent chromium
- Perchlorate
- Lead



# Causes of Action

- Public Nuisance
- Private Nuisance
- Trespass
- Infliction of Emotional Distress
- Failure to Warn
- Battery
- Fraud
- Conspiracy
- Strict products liability



# Recent Litigation



## Recent Litigation

- **\$850 million** – settlement by company with Minnesota on even of trial involving PFCs
- **\$752 million** – settlement amount in MDL MTBE against various corporate defendants alleging exposure to MTBE
- **\$700 million** – settlement amount in a suit by a class of Alabama residents against Monsanto Co. alleging exposure to PCBs
- **\$350 million** – settlements in MTBE litigation with NJ
- **\$236 million** – verdict in MTBE suit brought by New Hampshire against Exxon

## Recent Litigation (in last year)

- **\$205 million** – settlement with Mountaire Farms in Delaware state court case related to air and water contamination from chicken plant (2021)
- **\$98 million** – settlement with defendant in suit brought by Alabama municipalities related to alleged PFAS contamination (Oct. 2021)
- **\$65 million** – settlement with 2 defendants in NY federal court case related to alleged PFOA water contamination (Feb. 2022)
- **\$48 million** – jury verdict in suit brought by City of Pomona related to perchlorate in city's groundwater supply (Sept. 2021)

# Case Study #1

## *City of Pomona v. SQM North American Corp.* (C.D. Cal.)

- In 2018, SQM prevailed in jury trial involving claim by City of Pomona that it was entitled to \$30 million for groundwater contamination by perchlorate.
- Jury apparently held that benefits of fertilizer in the 1930s and 1940s outweighed risks of product.
- SQM had previously prevailed at trial in 2015 but the 9<sup>th</sup> Circuit had reversed and required a new trial.
- Was reversed again by 9<sup>th</sup> Circuit.
- In Sept. 2021, after a week-long trial, a jury awarded Pomona \$48 million in damages.

## Case Study # 2

### *Baker v. Saint-Gobain Performance Plastics Corp.*

232 F.Supp.3d 233 (N.D. N.Y. 2017)

- Held that it is a valid claim that stigma from fear of nonpotable water can cause the property to lose market value
- Held that medical monitoring was appropriate for asymptomatic plaintiffs who had an alleged accumulation of harmful substances in blood
- Held that trespass claim was appropriate even though residents did not own groundwater where it was alleged that defendants should have known contamination would enter private wells

## Case Study # 2 (cont.)

- Second Circuit affirmed district court decision in an interlocutory ruling in May 2020
- District court denied Defendants' motion to exclude experts in May 2021. Experts challenged included expert on causal link between chemical exposure and disease, expert on medical monitoring, real estate expert, a chemical fate and transport expert, an air modeling expert, and a hydrogeology expert.
- Allowed plaintiffs' real estate expert who purported to demonstrate classwide diminution in value due to market-wide stigma.
- **Granted final approval of settlement in Feb. 2022 (\$65 million value and \$12.4 million in fees)**

*Bacon v. Saint-Gobain Performance Plastics Corp.*,  
2018 WL 1010210 (N.D. N.Y. Feb. 20, 2018)

- Holding that defendants' duty to avoid polluting groundwater extends to businesses who suffered economic loss as a result of groundwater contamination within the zone of contamination
- Also held that “even if public fear of PFOA is unfounded, Bacon may still allege property damages so long as the decline in market value is real. . . . In other words, if people do not want to purchase Bacon’s property because it has been contaminated with PFOA, he has stated a claim for negligence.”
- **Second Circuit reversed as to the business but upheld property damage claim of plaintiff in May 2020**

## Case Study #3

- *Cotromano v. United Technologies Corp.*, Case No. 9:13-cv-80928 (S.D. Fla. May 2018)
- Court denied class certification in case attempting to certify a class of property owners claiming \$1 billion in damages from contamination in 60 square mile area
- Noted that the affected community “includes a wide variety and scale of homes of various ages, sizes and conditions—diverse properties which are not logically impacted in the same way by the alleged environmental stigma . . . .”
- Granted motion to exclude Pltfs’ expert on property values

## Case Study #3 (cont.)

- Case continued even without a class but with four property owners
- Court denied both parties' motions for summary judgment in March 2021
- Court excluded three plaintiff experts in March 2021 as well: (1) a geologist, (2) a toxicologist, and (3) a dose-response expert.
- Two other plaintiff experts, a radiologist and a biostatistician, were allowed to testify.
- Court also allowed three defense experts to testify: (1) a statistics expert, (2) a health physicist, and (3) a neurosurgeon.

## Recent Class Action Issues

- *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 2022 WL 872639 (7<sup>th</sup> Cir. Mar. 24, 2022) (affirmed denial of class certification because resolving an affirmative defense set forth by defendant would require individualized adjudication; it did not matter that defendant had not proven the merits of that affirmative defense because courts need not resolve the merits to decide class certification)

## Recent Class Action Issues

- *Olean Wholesale Grocery Cooperative Inc. v. Bumble Bee Foods LLC*, 2022 WL 1053459 (9<sup>th</sup> Cir. April 8, 2022) (en banc) (affirmed certification of three classes and refused to establish a categorical rule that classes cannot be certified if they contain more than a handful of plaintiffs who have not actually been injured)

## Recent Class Action Issues - Standing

- *Johannesson v. Polaris Indus. Inc.*, 9 F.4<sup>th</sup> 981, 987 (8<sup>th</sup> Cir. 2021) (affirming denial of class certification based, in part, on lack of standing of class members)
- Held that “a plaintiff must show . . . An injury in fact” and that “[i]f members who lack the ability to bring a suit themselves are included in a class, the court lacks jurisdiction over their claims.”)

## Recent Class Action Issues - Issue Classes

- *Martin v. Behr Dayton Thermal Products LLC* (6<sup>th</sup> Cir. July 16, 2018) (affirmed district court's certification of an issue class under Rule 23(c)(4) even though no predominance)
- *In re Flint Water Cases*, 558 F. Supp. 3d 459 (E.D. Mich. 2021) (certifying issues class)
- *Sullivan v. Saint-Gobain Perform. Plastics Corp.* (D. Vt. 2019) (similar)

## Class Action Issues - generally

- *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355 (E.D. Ky. March 29, 2018)
- Denied class certification in groundwater contamination case
- “Plaintiffs here present too many potential substances and potential injuries to elicit common answers.”
- “[W]hile Plaintiffs identify 3,000 distinct parcels of property, these properties are not all similarly situated in relation to the Defendants’ property. Variations in distance to the alleged source of contamination, as well as distances to other potential sources of contamination may affect the typicality of named Plaintiffs’ claims.”

## Class issues - generally

- *McCormick v. Halliburton* (W.D. Okla.)
- “The court finds a trial on whether Halliburton released perchlorate into the groundwater, as well as the current and future scope and extent of that groundwater contamination, is unlikely to substantially aid resolution of the ultimate determination of Halliburton’s liability.”
- “Simply put, the individual issues would dwarf whatever common issues there may be, such that a vast array of mini-trials would be required for each class member if certification were granted.”

# Class issues - generally

- *Ebert v. General Mills*, (8<sup>th</sup> Cir.)
- Reversed class certification, holding that no predominance.
- Landowners sued General Mills, alleging that the company caused trichloroethylene (TCE) to be released from its former industrial facility and that TCE vapors migrated into surrounding residential areas, threatening the landowners' health and the value of their properties.
- Illustrates that class action requirements, like predominance of common issues and cohesiveness of claims, can be difficult to establish in the environmental context because issues of liability, causation, and damages are individualized.

## *Parko v. Shell Oil Co.,* (7<sup>th</sup> Cir.)

- “For if the defendants are right, there is no common issue, only individual issues that will vary from homeowner to homeowner: is there benzene in the groundwater beneath his home at a level of concentration that if the groundwater were drunk would endanger health (and is there any possibility it would enter the water supply); what is the source of the benzene in the groundwater beneath a given home (that is, who is the polluter who caused the groundwater to become polluted); could the presence of the benzene in that concentration cause any other form of harm; has the presence of the benzene reduced the value of his property; if so, how great has the reduction been. It is difficult to see how these issues can be managed in the class action format. **But in any event they must be engaged by the district judge before he can make a responsible determination of whether to certify a class.**”

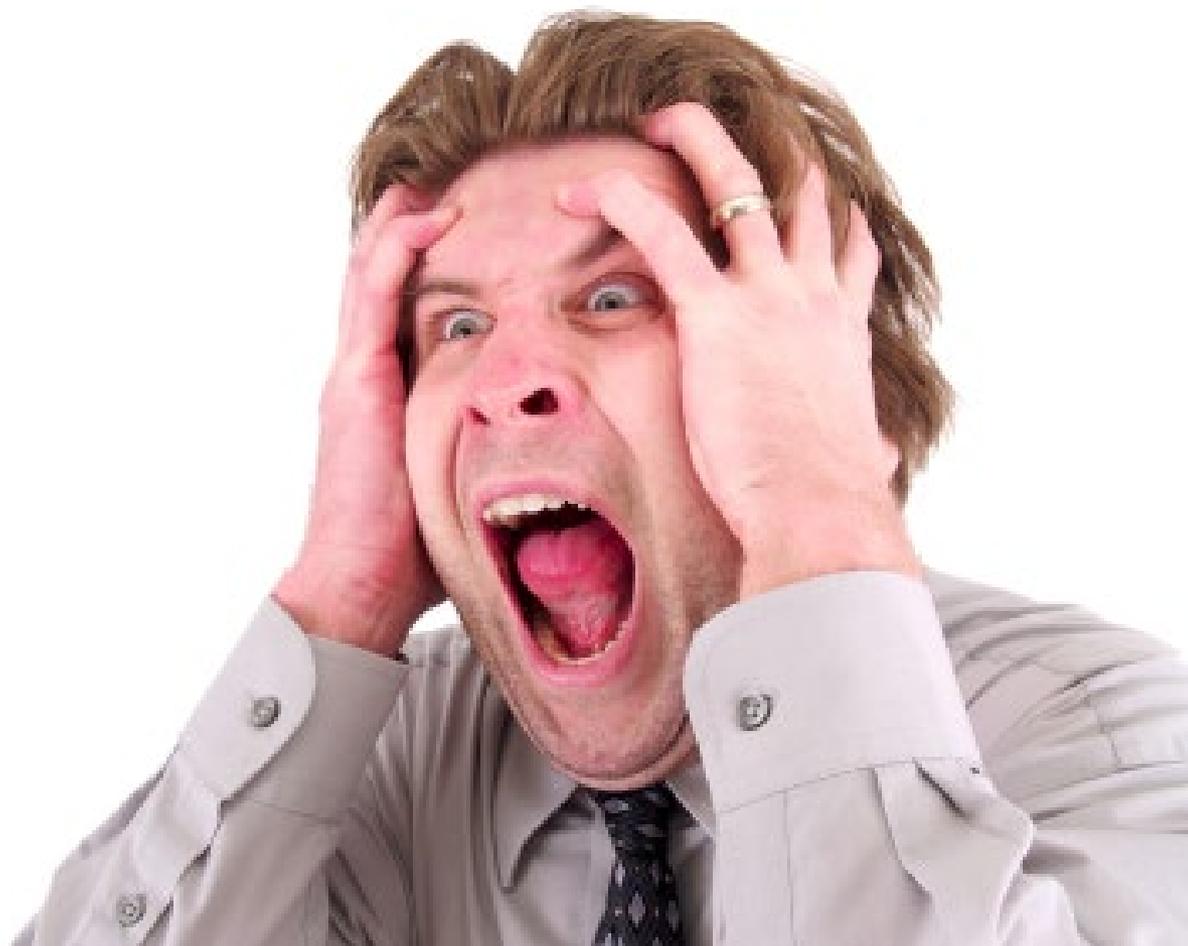
# Evidentiary Standard for Class Certification



# Claim-splitting arguments to defeat class certification

- *Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 296-297 (W.D. Ky.) (holding that plaintiffs' attempt to split claims impermissibly by disavowing personal injuries doomed adequacy)
- *Henke v. Arco Midcon, LLC*, 2014 WL 982777 (E.D. Mo.) (denying class certification where a proposed class representative failed as “guardian[.]” when he sought less than full recovery on behalf of the class)

# “Fear of” & Emotional Distress Damages



## *Reece v. AES Corp.*

- *Reece v. AES Corp.*, (10<sup>th</sup> Cir.)
- “[A] plaintiff in a toxic tort case must prove that he or she was exposed to and injured by a harmful substance . . . [a]lleging reasonable concern about an injury occurring in the future is not sufficient to allege an actual injury in fact ... a cause of action does not accrue until an injury in fact occurs.”
- Also held that pltfs’ allegations of present physical harm were insufficient because “the general statement that pltfs suffer ailments consistent with exposure to [the contaminants at issue] is nothing more than a formulaic recitation.”

- *Smith v. ConocoPhillips Pipe Line Co.*, (8<sup>th</sup> Cir.)
- “In light of the contemporary consensus reached by persuasive authority on the meaning of common law nuisance in the context of environmental contamination, we conclude that the putative class fear of contamination spreading from the West Alton leak site to harm their property is not a sufficient injury to support a claim for common law nuisance in the absence of proof.”

# The Battlefield? Causation!



# How Do You Defend Against Them? Strategies for Defending Against Liability



# Initial Case Assessment - Defense

- Removal?
- Property damage or personal injury?
- Present or future injury?
- Actual contamination or mere fear of it?
- What is the evidence of contamination?
- Alternative causes?
- Co-defendants – Friend or Foe?

# Disaggregation



# Strategies for Defending Against Liability

- Individualize
  - Do not let pltfs get away with making general, non-specific allegations of harm
  - Attack specific causation
  - Consider a motion to sever if appropriate
  - Consider other strategies including bringing in third-parties

# Declarations

- Consider obtaining sworn declarations from putative class member residents that undermine Plaintiff's claims
- Must inform them of class action and who you represent
- Seek to obtain them from all over the class area
- Seek to obtain some from same street as Plaintiff



# Alternative causes

- Look far and wide for possible alternative causes
- Even look at possible exposures at individual properties



# Force Concretization



# Physical Invasion?

Photo # 26-G-2517 LSTs landing vehicles and cargo on a Normandy beach, June 1944



## Example

- *Menkes v. 3M Co.*, 2018 WL 2298620 (E.D. Pa. May 21, 2018)
- “In Pennsylvania, property damages require physical damage to property, even if temporary.”
- “In a case concerning contamination, courts have found that plaintiffs need to show that a hazardous chemical ‘was and continues to be physically present on their properties.’”
- Dismissing property-related damage claims because Pltfs failed to allege that their property had been affected by contaminated groundwater

# Actual Injury?



# Know regulatory regime and actions to address the contamination at issue

- *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 18-5115 (6<sup>th</sup> Circuit)
- District court dismissed suit because defendant had reached an agreement with state regulators to address contamination issues just before lawsuit was filed.
- Sixth Circuit reversed in part.
- Nonetheless, courts sometimes refuse to take action when state regulatory entities are engaged in actively addressing contamination

# Daubert

- *Cotromano v. United Technologies Corp.*, Case No. 9:13-cv-80928 (S.D. Fla. March 2021) (excluded three plaintiff experts)
- *Hall v. Conoco*, No. 17-6086 (10<sup>th</sup> Cir.) (decided in April 2018) (affirming summary judgment dismissal of toxic tort case based on exclusion of 2 of 3 plaintiff's experts)
- *Coleman v. Union Carbide* (S.D. W. Va.) (refused to certify proposed Plaintiff classes in a toxic exposure case because it addressed *Daubert* challenges at the class certification stage and found the expert testimony on which plaintiffs relied to be inadmissible)

# Attack

- *Baker et al. v. Chevron USA, Inc.*, (S.D. Ohio) (court awarded to defendant sanctions of \$250,000 against plaintiffs' attorneys in groundwater contamination suit)
- The court found that the plaintiffs had “utterly failed to produce any individualized exposure data whatsoever.”
- “This amount will have a substantial deterrent effect on these lawyers in light of their financial situations and, the court believes, it will effectively promote general deterrence since very few attorneys, no matter how well off, will want to run the risk of incurring such a penalty under similar circumstances.”
- Affirmed by Sixth Circuit

# Dispositive Motions

- In aggregated cases, individual plaintiffs will ignore or be unable to prove elements of their claims.
- Frequent dispositive motion issues include:
  - Plaintiffs' failure to demonstrate lack of actual injury or physical invasion; and
  - Plaintiffs' inability to demonstrate causation.
- Defendants should also raise legal arguments designed to defeat novel claims or damages theories to guard against expansion of liability.
- Do not leave legal arguments on the table.

# Statute of Limitations Defense

- *Bethpage Water District v. Northop-Grumman Corp.*, 884 F.3d 118 (2d Cir. March 2, 2018)
- Held that claims for negligence, trespass, and nuisance were time barred under New York law
- Held that statute of limitations began to run when the water source was sufficiently contaminated or threat of contamination was sufficiently significant to justify immediate or specific remediation, not years later when the contaminants actually entered the water district's wells
- But reaffirmed that the mere presence of contamination in the water at low levels was not enough to trigger the SOL

# Substantial Participation in Nuisance?

# PARTICIPATION

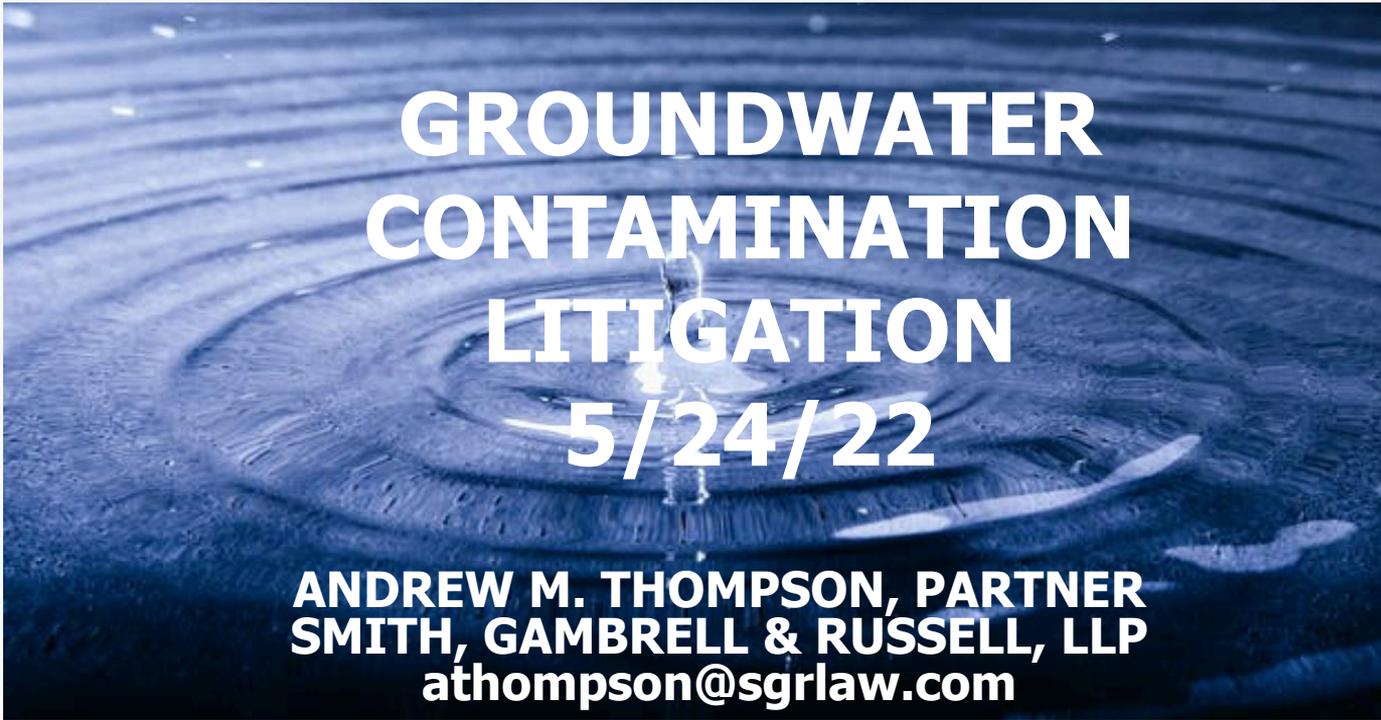


# Possible Expert Witnesses

- Possible Experts
  - Hydrogeologist- Obtain groundwater and soil data to determine the origin of the solvents
  - Groundwater Modeler- Create model of ground water flow system
  - Expert in Groundwater Chemistry- Determine the effect soil and water have on the breakdown of solvents
  - State of the Art Expert (household and manufacturer's tort claims)- Explain that the chemicals were handled with the prevailing scientific knowledge and industry and regulatory standards

# Possible Expert Witnesses

- Household Case
  - Epidemiologist- General causation
  - Toxicologist- General causation
  - Medical Doctor- Specific causation
  - Medical Monitoring
    - Whether the plaintiff is at an increased risk of a serious latent disease
    - Whether early detection is beneficial
    - Whether appropriate monitoring methods exist
    - Possible downsides of monitoring
  - Property Appraiser
- Manufacturer's Case
  - Environmental Engineer- Reasonable cost of cleanup

A close-up photograph of a water droplet hitting a surface, creating concentric ripples. The image is in shades of blue and white.

**GROUNDWATER  
CONTAMINATION  
LITIGATION  
5/24/22**

**ANDREW M. THOMPSON, PARTNER  
SMITH, GAMBRELL & RUSSELL, LLP  
[athompson@sgrlaw.com](mailto:athompson@sgrlaw.com)**

# Groundwater Discharges

- Hot Topic—Does the federal Clean Water Act provide jurisdiction over groundwater?
- “Discharge of any pollutant” under CWA is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)
- “Navigable waters” means “waters of the United States” and waters of the U.S. do not typically include groundwater

# County of Maui, 140 S. Ct. 1462 (2020)

- CWA citizen suit relating to County's decades-old practice of injecting partially treated wastewater into groundwater wells
- Wells leaked and dye testing confirmed over 60% of wastewater reached Pacific Ocean within 3 months of injection
- 9<sup>th</sup> Circuit affirmed district court's grant of summary judgment to plaintiff

# County of Maui continued

- Pacific Ocean is a “navigable water” under CWA
- Question before USSCT—does the CWA require a permit when pollutants originate from a point source but conveyed to navigable waters via groundwater—a non-point source
- Split in Circuit Courts on the issue

# County of Maui continued

- CWA requires permit if addition of pollutants through GW is “functional equivalent” of direct discharge from point source into navigable waters
- Key statutory language—has there been “any addition of any pollutant to navigable waters *from any point source*”

# County of Maui continued

- Plaintiff argues that permit require if pollutant “fairly traceable” to point source
- Defendant argues that point source must be “the means of delivering pollutants to navigable waters”; point source must be the last conveyance of the pollutants to navigable waters

# County of Maui continued

- USSCT adopts middle approach
- Plaintiff's approach leads to absurd results, contrary to how CWA addresses nonpoint source and GW pollution, contrary to legislative history, and inconsistent with regulatory (EPA) practice
- Defendant's approach would interfere with EPA's ability to regulate point sources

# County of Maui continued

- USSCT's functionally equivalent test—time and distance but also many other factors
- Direct hydrological connection test not adopted
- What reaction to USSCT's approach?

# ANATOMY OF A GROUNDWATER CONTAMINATION CASE

- Consider voluntarily providing bottled water/filtration systems



- Productive negotiations with Relevant Regulatory Agency
- Source Investigation and Identification of PRPs

# DEFENSE OF GROUNDWATER CLAIMS

- Putative class actions—removal to federal court under CAFA—28 U.S.C. § 1332(d)
- Class certification is difficult for plaintiffs—individual issues of liability, causation, exposure and damages tend to predominate
- Mass, individual actions—complex even to resolve

# COST RECOVERY ACTIONS

- Accurate and complete record of costs
- Early, specific demand triggers mandatory prejudgment interest. 42 U.S.C. § 9607(b)
- Attorneys' fees recoverable if closely tied to actual cleanup or identifying other PRPs
- Cost recovery vs. contribution claims under CERCLA and related state statutes



# SITE ACCESS IN COST RECOVERY ACTIONS

- Fed. R. Civ. P. 26(c) provides basis for limits
- Importance of a written, detailed access agreement
- Indemnification, Work Plan, Oversight, Data Sharing and Validation, Restoration and Disposal, and Court Involvement

