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3M PFAS Case on Medical Monitoring Is a Stretch on Standing

K&L Gates's Nathan Townsend explores whether the plaintiffs in a nationwide PFAS class action have standing under a recent Supreme Court decision to ask for future medical monitoring.

If someone thinks they're going to suffer harm in the future for something that happened in the past, can they sue in the present? That's the question the US Court of Appeals for the Sixth Circuit Court will confront in *Hardwick v. 3M Company*, a class action that, if certified, would encompass every person in the US exposed to per- and polyflouroalkyl substances, or PFAS.

According to the plaintiffs, PFAS is everywhere and takes a long time to break down in the environment, meaning it has found its way to the bloodstream of nearly every American. The plaintiffs also say that PFAS exposure could eventually cause various diseases. But, they nonetheless want to sue the companies responsible for PFAS exposure now without waiting for the diseases to manifest.

Medical Monitoring

This, "everyone will be injured eventually" theory of harm comes from a judicial innovation known as "medical monitoring," the tort relied on in *Hardwick*. Unlike a traditional negligence suit, a medical monitoring suit doesn't require a plaintiff to prove he has suffered a disease from toxic substance exposure. Instead, all he needs to prove is a reasonable likelihood of a disease at some point in the future. If a plaintiff prevails in a medical monitoring suit, he can recover the cost of medical exams to diagnose the disease caused by the toxic substance, thereby improving his medical outcome, at least in theory.

The medical monitoring tort is in serious tension with the US Supreme Court's more recent standing precedent. Stemming from the Constitution's Article III provision that federal courts can only hear cases and controversies, the court requires all plaintiffs to show they have suffered an injury that's fairly traceable to the defendant in question and can be redressed by the plaintiff's requested relief.

Writing for the court in the 2021 decision *TransUnion LLC v. Ramirez*, Justice Brett Kavanaugh explained that a "risk of future harm," isn't an injury, the first step in the standing analysis. A possibility always exists that the "harm does not materialize" no matter how negligent the tortfeasor might have been, Kavanaugh said. *TransUnion* concerned the standing requirements for a damages claim, but it left open the question of whether a person can seek injunctive relief for future harm.

Request for Injunction

Unlike damages where a defendant must pay a sum of money to the victim, an injunction is an order from a court commanding the defendant to do (or refrain from doing) some act. “A person,” Kavanaugh wrote, “exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.”

The plaintiffs in *Hardwick* have asked for an injunction to fund research on the effects of PFAS in their bodies. While *TransUnion* left open the possibility that a plaintiff could seek injunctive relief for future harm, it limited what form this injunctive relief could take.

TransUnion made clear that an injunction based on a risk of future harm can satisfy the standing requirement only when a plaintiff seeks an injunction “to prevent the harm from occurring.”

A request for injunctive relief ordering the creation of a fund to address the effects of PFAS would not prevent, reduce, or eliminate, the risk of disease caused by PFAS exposure from occurring. As alleged by plaintiffs in *Hardwick*, the PFAS exposure has already happened, so the diseases are going to happen no matter what.

No amount of funding to research or diagnose the diseases will change the fact that the diseases are going to occur. In the end, relying on a risk of future harm for a past exposure to PFAS wouldn’t fit under *TransUnion*’s requirement to establish an injury, whether the relief is monetary or injunctive. If the Sixth Circuit rules against the plaintiffs in *Hardwick* by relying on *TransUnion*, it may set in motion the end of the medical monitoring tort.

If PFAS is really as harmful as plaintiffs’ claim, everyone will have their day in court when disease starts to manifest. Suing now for a future harm won’t change what happened in the past.

The case is Hardwick v. 3M Company, 6th Cir. No. 22-0305, oral argument 10/19/23.

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