UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION MDL No. 2873

TRANSFER ORDER

Before the Panel:* We are presented with two motions in this docket. First, 3M Company moves under 28 U.S.C. § 1407(c) to transfer four actions pending in the Northern District of Alabama and listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Plaintiffs in the Alabama actions oppose this motion. Second, forty-six insurer defendants move under Panel Rule 7.1 to vacate our order that conditionally transferred the Western District of Wisconsin *Bouvet* action listed on Schedule A to MDL No. 2873. A forty-seventh insurer joins the motion. Defendants Tyco Fire Products LP and Chemguard, Inc., oppose the motion to vacate. Their opposition is joined by the *Bouvet* plaintiffs.

Plaintiffs in the four Alabama actions allege they suffered personal injury caused by the discharge of per- or polyfluoroalkyl substances (PFAS) from manufacturing facilities in Decatur, Alabama, operated by defendants 3M, Toray Fluorofibers (America), Inc., and Daikin America, Inc. Plaintiffs disclaim any liability for injuries attributable to the manufacture, use, or disposal of PFAS-containing aqueous film-forming foams (AFFFs). When we initially centralized this litigation, we excluded four actions alleging similar PFAS contamination of the Tennessee River from the same manufacturing facilities. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1396 (J.P.M.L. 2018).

We have consistently held that a party seeking transfer of an action that does not on its face raise claims relating to the use or disposal of AFFF bears a "significant burden" to persuade us that transfer is appropriate. Order Denying Transfer at 2, MDL No. 2873 (J.P.M.L. Dec. 18, 2019), ECF No. 541. 3M has satisfied that burden here. 3M argues that it manufactured AFFF at its Decatur facility and therefore these actions fall within the scope of the MDL. 3M has proffered evidence showing that AFFF compliant with the U.S. Military Specification for AFFF was manufactured at the Decatur plant from at least 1972 to 1990. Plaintiffs do not directly challenge this evidence, but instead contend that 3M has not shown that this AFFF contributed to the alleged PFAS contamination of the Tennessee River. Such a showing of the respective contribution of AFFF and non-AFFF sources to PFAS contamination is not required to determine the merits of

* Judges Nathaniel M. Gorton and David C. Norton did not participate in the decision of this matter.

transfer to the AFFF MDL, and we regularly transfer actions involving both AFFF and non-AFFF claims.[1] *See* Transfer Order at 2, MDL No. 2873 (J.P.M.L. June 5, 2019), ECF No. 446 ("Plaintiff suggests that our initial centralization order limited this MDL to cases alleging only contamination from AFFFs, but our order merely excluded from the MDL actions that did not contain *any* allegations relating to AFFFs. That the Town alleges *additional* sources of contamination is no obstacle to transfer." (internal citation omitted)). It is sufficient that 3M has shown that AFFF was manufactured at its Decatur facility and that these actions therefore will share numerous factual questions with the actions pending in the MDL. *See* Transfer Order at 1–2, MDL No. 2873 (J.P.M.L. Apr. 1, 2021), ECF No. 960 (transferring *Aqua Pennsylvania*, despite plaintiff's argument that its claims related only to PFAS, because defendant National Foam manufactured AFFF at one of the two facilities identified in the complaint).[2]

With respect to our prior order that declined to transfer several actions involving the Decatur facilities, no party at that time argued that AFFF issues were presented in those actions. Indeed, the parties uniformly referred to the actions as "non-AFFF" actions, as 3M at the time was attempting to expand the litigation beyond AFFFs to encompass all PFAS issues, and the Panel adopted this terminology. *See In re AFFF*, 357 F. Supp. 3d at 1392. This prior order therefore does not prevent us from concluding that the actions before us now involve AFFF issues and that transfer is appropriate.

Turning to the Western District of Wisconsin *Bouvet* action, plaintiffs allege they were exposed to PFAS-contaminated groundwater at various military bases where AFFF was used, and that this exposure injured them or their decedents. Plaintiffs assert personal injury claims against AFFF manufacturer defendants as well as "direct action" claims against the manufacturers' liability insurers. Some 46 of these insurers argue that transfer is inappropriate because the AFFF liability claims and the insurance claims are fundamentally different, such that transfer will complicate management of the MDL and will not enhance convenience, justice, or efficiency.

Plaintiffs, though, raise the same AFFF claims against AFFF manufacturers that are at issue in thousands of actions pending in the MDL. *Bouvet* therefore shares numerous common questions of fact with the actions in the MDL. The addition of the "direct action" claims against the insurers does not alter this conclusion. "Section 1407 does not require a complete identity or even a majority of common factual issues as a prerequisite to transfer." *In re Ins. Brokerage Antitrust Litig.*, 360 F. Supp. 2d 1371, 1372 (J.P.M.L. 2005).

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[1] Indeed, many, if not most, of the actions pending in the MDL likely would not have satisfied a requirement that the parties seeking transfer demonstrate even a rough percentage of the alleged PFAS contamination in each action attributable to AFFF versus non-AFFF products.

[2] Plaintiffs cite to various Panel orders in which we declined to transfer actions based on speculation that AFFF may have contributed to the alleged PFAS contamination. *See, e.g.*, Order Denying Transfer at 1–2, MDL No. 2873 (J.P.M.L. Mar. 27, 2020), ECF No. 620. Unlike those actions, here 3M has established that AFFF was manufactured at the Decatur facility that plaintiffs identify *in their complaints* as a source of the PFAS discharges that allegedly caused them injury. Those prior orders are thus inapposite.

Even focusing solely on the "direct action" claims, transfer of *Bouvet* remains appropriate. We generally have declined to transfer insurance coverage disputes to products liability MDLs where there will be little overlap with the discovery in the liability actions. *See, e.g.*, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2010 WL 11747797, at *1 (J.P.M.L. June 15, 2010) (denying transfer where insurance coverage issues presented "strictly legal questions which require little or no centralized discovery"). "Where, however, such actions require and rely on the same factual discovery as the already-centralized actions, transfer may be warranted." *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010*, 764 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011). Here, the potential liability of the AFFF manufacturer defendants in *Bouvet* will drive the "direct action" claims against the insurer defendants—which, after all, are brought not by the AFFF manufacturers, but by the plaintiffs seeking compensation for their exposure to PFAS stemming from AFFF use or disposal. *Cf. Biggart v. Barstad*, 513 N.W.2d 681, 683 (Wis. Ct. App. 1994) (holding that Wisconsin direct-action statute "predicates the liability to which an insurer is exposed on the liability of the insured").

The course of discovery in Tyco's South Carolina coverage action also suggests that discovery in *Bouvet* will overlap with that in the MDL. *See Tyco Fire Prods. LP v. AIU Ins. Co.*, C.A. No. 2:23-02384 (D.S.C.). The insurers in that action have sought testimony on numerous factual matters central to the MDL, such as Tyco's knowledge of the health effects and environmental effects of PFAS, as well as its participation in industry groups relating to AFFF and PFAS. Several deponents in that coverage action purportedly were involved in product development, product stewardship, sales, or other operational roles relating to AFFF.[3] This suggests that transfer will yield significant efficiencies with respect to discovery and pretrial proceedings.

Transfer of *Bouvet* is unlikely to complicate management of the MDL. The transferee court already presides over coverage claims by Tyco and BASF (both AFFF manufacturers) against their respective insurers. In an order denying a motion to dismiss Tyco's South Carolina coverage action, the transferee court emphasized the connections between the coverage claims and the liability claims in the MDL and concluded that "[m]aintaining the coverage litigation with the court responsible for managing the MDL promotes and furthers the purposes of centralizing pretrial proceedings in a transferee court under 28 U.S.C. § 1407." *See In re AFFF*, C.A. No. 2:18-mn-02873, 2023 WL 6846676, at *8 (D.S.C. Oct. 17, 2023).

[3] Tyco and Chemguard, in their opposition to the motion to vacate, attach various written discovery requests and deposition notices that demonstrate the overlap with respect to factual issues and discovery. *See* Resp. in Opp. to Mot. to Vacate CTO, MDL No. 2873 (J.P.M.L. filed Mar. 20, 2024), ECF No. 2458. For instance, the insurers have identified potential witnesses as likely to have relevant knowledge on subjects that are also at the heart of the MDL cases, including "Tyco's manufacturing and sales of AFFF"; "Tyco's knowledge of chemicals in its product which contain and/or degrade into PFAS"; and "Tyco's knowledge, expectation, and/or intention that AFFF and/or PFAS are potentially harmful to human health and/or the environment." Resp. to Interrogs. at 4, MDL No. 2873, ECF No. 2458-5.

Accordingly, after considering the argument of counsel, we find that the actions listed on Schedule A involve common questions of fact with the actions transferred to MDL No. 2873, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. In our order centralizing this litigation, we held that the District of South Carolina was an appropriate Section 1407 forum for actions in which plaintiffs allege that AFFF products used at airports, military bases, or certain industrial locations caused the release of perfluorooctane sulfonate and/or perfluorooctanoic acid (types of PFAS) into local groundwater and contaminated drinking water supplies. The actions in the MDL share factual questions concerning the use and storage of AFFFs; the toxicity of PFAS and the effects of these substances on human health; and these substances' chemical properties and propensity to migrate in groundwater supplies. *See In re AFFF*, 357 F. Supp. 3d at 1394. The actions on Schedule A will share common questions of fact with the AFFF actions in the MDL and will benefit from inclusion in the centralized proceedings.

IT IS THEREFORE ORDERED that the actions listed on Schedule A are transferred to the District of South Carolina and, with the consent of that court, assigned to the Honorable Richard M. Gergel for coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Matthew F. Kennelly
Dale A. Kimball

Roger T. Benitez
Madeline Cox Arleo

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION MDL No. 2873

SCHEDULE A

Northern District of Alabama

COWART, ET AL. v. 3M COMPANY, INC., ET AL., C.A. No. 5:24−00060
BUTLER, ET AL. v. 3M COMPANY, INC., ET AL., C.A. No. 5:24−00069
CARTER, ET AL. v. 3M COMPANY, INC., ET AL., C.A. No. 5:24−00070
WHITAKER, ET AL. v. 3M COMPANY, INC., ET AL., C.A. No. 5:24−00071

Western District of Wisconsin

BOUVET, ET AL. v. THE 3M COMPANY, ET AL., C.A. No. 3:24−00041