

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 three motions in this docket. First, 3M Company moves under 28 U.S.C. § 1407(c) to transfer two 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 *City of Wausau* action listed on Schedule A to MDL No. 2873. Defendants Tyco Fire Products LP and Chemguard, Inc., oppose the motion to vacate and are joined by the *City of Wausau* plaintiff. Finally, plaintiffs and twenty insurer defendants move under Panel Rule 7.1 to vacate our order that conditionally transferred the Southern District of New York *Lloyd's* action listed on Schedule A to MDL No. 2873. Defendant BASF Corporation opposes this motion.

Plaintiffs in the two 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). However, at our last hearing session, we transferred four Alabama actions that likewise involved personal injury claims stemming from the alleged discharge of PFAS into the Tennessee River by defendants' manufacturing facilities in Decatur, Alabama. *See* Transfer Order at 1–2, MDL No. 2873 (J.P.M.L. June 7, 2024), ECF No. 2679 (the “June 2024 Order”) (holding that 3M had established that it manufactured AFFF at its Decatur facility and that, accordingly, the actions involving this facility will share numerous factual questions with the actions pending in the MDL). Plaintiffs' arguments against transfer here are substantially identical to those we rejected in the June 2024 Order, and our analysis in that order applies equally here. Accordingly, transfer of the two Alabama actions is appropriate.

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

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Turning to the Western District of Wisconsin *City of Wausau* action, our June 2024 Order is similarly on point. In that order, we transferred another action (*Bouvet*) that involved both claims against AFFF manufacturers as well as “direct action” claims against those manufacturers’ insurers. We held that the AFFF claims against the manufacturers in *Bouvet* shared common factual questions with the thousands of actions pending in the MDL. *Id.* at 2. We further held, even viewing the direct action claims in isolation, transfer was appropriate. As we stated:

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”).

June 2024 Order at 3. We further concluded that the course of discovery in a coverage action filed by Tyco directly in the transferee court indicated that discovery in *Bouvet* would overlap with that in the MDL. *See id.* (noting that the overlapping discovery included testimony on numerous factual matters central to the MDL, such as Tyco’s knowledge of the health effects and environmental effects of PFAS and its participation in industry groups relating to AFFF and PFAS, as well as common witnesses involved in product development, product stewardship, sales, or other operational roles relating to AFFF).

This analysis readily applies to *City of Wausau*. Like *Bouvet*, the *City of Wausau* action involves both claims against AFFF manufacturers for contamination of the City’s groundwater and direct action claims against those manufacturers’ liability insurers. *City of Wausau* thus will share numerous questions of fact with the actions in the MDL. The City’s direct action claims also will share discovery with the actions in the MDL, including the various coverage claims now pending before the transferee court (including the direct action claims in *Bouvet*). Further, given the coverage claims by various AFFF manufacturers pending before the transferor court, transfer of *City of Wausau* is unlikely to complicate management of the MDL. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, C.A. No. 2:18-mn-02873, 2023 WL 6846676, at *8 (D.S.C. Oct. 17, 2023) (concluding 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.”). Transfer of *City of Wausau* thus is appropriate.

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The Southern District of New York *Lloyd's* action stands in a different position than *City of Wausau*. *Lloyd's* does not involve direct action claims, but rather is a more straightforward coverage action brought by insurers seeking a declaration that they do not have coverage obligations with respect to BASF's AFFF liabilities. Even so, transfer of *Lloyd's* is warranted. Both *Bouvet* and *City of Wausau* involve claims against BASF's insurers that overlap with the declaratory judgment claims here regarding the insurers' obligations to BASF for AFFF liabilities. Those actions thus will involve much the same discovery as *Lloyd's*, and we already have determined that the discovery in *Bouvet* and *City of Wausau* will overlap with the discovery in the MDL generally (*i.e.*, not only with respect to the coverage claims, but to the liability claims that make up most of the actions in the MDL). Similarly, the discovery in *Lloyd's* likely will overlap with the discovery in the MDL.

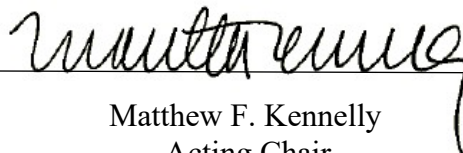
Furthermore, BASF has initiated its own declaratory judgment action in the transferee court, which has been related to the actions in the MDL. As we noted in our June 2024 Order, the course of discovery in a similar coverage action brought by Tyco indicated that discovery of the insurance claims would overlap with discovery in the MDL—such as discovery regarding the manufacturers' knowledge of the health effects and environmental effects of PFAS, as well as their participation in industry groups relating to AFFF and PFAS. *See* June 2024 Order at 3. Transfer of *Lloyd's* will yield significant efficiencies with respect to discovery and pretrial proceedings. Given the various coverage claims pending in the transferee court, transfer of this additional coverage action is unlikely to significantly complicate management of the MDL.

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 Aqueous Film Forming Foams Prods. Liab. Litig.*, 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.

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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



Matthew F. Kennelly
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**IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION**

MDL No. 2873

SCHEDULE A

Northern District of Alabama

ANTONIO, ET AL. v. 3M COMPANY, INC., ET AL., C.A. No. 5:24-00361
LEE, ET AL. v. 3M COMPANY, INC., ET AL., C.A. No. 5:24-00362

Southern District of New York

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL. v. BASF
CORPORATION, ET AL., C.A. No. 1:24-01684

Western District of Wisconsin

CITY OF WAUSAU v. AGC CHEMICALS AMERICAS, INC., ET AL.,
C.A. No. 3:24-00170