6th Circ. Ruling Breathes New Life Into Article III Traceability

By **Geoffrey Wyatt, Jordan Schwartz and Lauren Griffith** (February 16, 2024, 5:12 PM EST)

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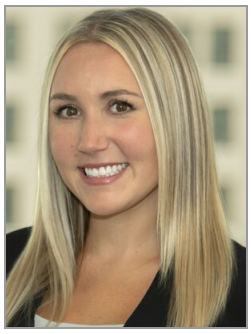

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One of the most hotly contested issues in any mass tort litigation is causation, whether the plaintiff's alleged injury was the result of the defendant's purported fault as opposed to other factors.

In such cases, causation issues are usually fought on the merits in individual actions. But must defendants await expensive discovery or a high-stakes trial to dispute causation when a plaintiff brings a class action for medical monitoring? Not necessarily.

In Hardwick v. 3M Co.,[1] a panel of the U.S. Court of Appeals for the Sixth Circuit, in an opinion by U.S. Circuit Judge Raymond Kethledge, recently **vacated** the U.S. District Court for the Southern District of Ohio's certification of one of the largest class actions in American jurisprudence for lack of Article III standing.

Despite the brevity of the appellate court's ruling, it has potentially broader implications for class action practice in the product liability sphere, particularly in medical monitoring cases involving far-fetched or attenuated theories of causation.

District Court Proceedings

The plaintiff filed the putative class action in 2018 as part of the multidistrict litigation In re: E.I. Du Pont Nemours and Co. C-8 Personal Injury Litigation — where all federal cases challenging the safety of the manufactured chemical C-8 have been coordinated for pretrial purposes.[2]

C-8 is also known as perfluorooctanoic acid, or PFOA, and is part of the per- and polyfluoroalkyl, or PFAS, family of manufactured chemicals.

This family includes thousands of different compounds, manufactured by thousands of different companies and used in the production of medical devices, food packaging, firefighting foam, cookware, semiconductors, building materials and other disparate applications.

The plaintiffs in the multidistrict litigation allege that they suffer from diseases caused by PFOA exposure or are at an increased risk of developing such injuries in the future.

The plaintiff in Hardwick, a former firefighter who had previously used PFOA-containing firefighter foams, alleged that 10 different defendants "caused his blood to be contaminated with PFAS."[3]

Notably, the plaintiff's blood draw revealed the presence of just five particular PFAS compounds in his blood, and he did not know which of the thousands of potentially relevant companies manufactured those particular chemicals.

Nor did the plaintiff allege that he suffered from any present injury; rather, he sought the remedy of

medical monitoring, which is a form of surveillance consisting of repeated testing and other measures to assess individuals who may be at an increased risk of developing disease in the future.

Nonetheless, the district court certified a sweeping medical monitoring class of "[i]ndividuals subject to the laws of Ohio, who have 0.05 parts per trillion (ppt) of PFOA (C-8) and at least 0.05 ppt of any other PFAS in their blood serum."[4]

In so doing, the district court concluded that the plaintiff had standing to sue, finding that the plaintiff had alleged a "direct line of causation" between the defendants and the accumulation of PFAS, and because the defendants allegedly knew that PFAS were harmful for decades.[5]

According to the district court, the traceability requirement of Article III standing was not defeated by the plaintiff's inability to exclude the "independent role of third-party actors" as potential causes of the injury.[6]

The classwide relief approved by the district court included the establishment of a panel of scientists to study the potential effects of PFAS on the human body and medical monitoring of individuals whose PFAS blood levels supposedly put them at an increased risk of future illness.

The Sixth Circuit's Ruling

In their petition for interlocutory review, the defendants emphasized the high stakes of the case, which was "one of the largest class actions in history."

According to the defendants, the plaintiff lacked standing not only because he had suffered no present injury, but also because he could not satisfy the traceability requirement of Article III — i.e., that any, much less all, of the 10 defendants had caused the plaintiff to be at an increased risk of future illness.

In response, the plaintiff argued both that he bore no burden of proving standing with evidence at the class certification stage and that it was immaterial which, if any, of the defendants manufactured the chemicals that were allegedly found in the plaintiff's blood system.

The Sixth Circuit agreed with the defendants and reversed the district court's decision. Although the parties vigorously disputed both the injury-in-fact and traceability elements of Article III standing, the court of appeals grounded its ruling in the latter one, which the court explained required the plaintiff to satisfy as to each defendant.

As a result, even assuming that the presence of five different PFAS compounds in the plaintiff's blood constituted a cognizable injury, Article III required him to plausibly connect those compounds to each of the 10 defendants named in the lawsuit. And contrary to the plaintiff's argument, the fact that he had chosen to bring a putative class action "'add[ed] nothing to the question of standing.'"[7]

Applying these principles, the Sixth Circuit held that the plaintiff had "failed to carry [his traceability] burden as to any of the defendants" for two reasons.[8]

First, the court reasoned that the plaintiff had treated the defendants collectively, alleging, for example, that the "'Defendants' manufactured PFAS and 'released such PFAS materials into the environment'" and that the "'Defendants repeatedly assured and represented to governmental entities' that PFAS were safe[.]"[9]

Applying longstanding U.S. Supreme Court jurisprudence, the court of appeals explained that the plaintiff could not "lump" the defendants together as a collective unit, and instead was required to plead particular facts to "tie" the injury to each individual defendant.[10]

Second, the Sixth Circuit also reasoned that the allegations in the plaintiff's complaint were too "conclusory" and implausible even at the pleading stage.

While there are thousands of different PFAS — the defendants' expert put the number at roughly equivalent to the number of known species of mammals on Earth — the plaintiff had alleged that only five ended up in his blood.

As the court explained, the plaintiff neither alleged that any of the defendants manufactured any of the five compounds at issue nor detailed how the defendants would have "delivered" the compounds into his blood.

Instead, the plaintiff merely alleged in a boilerplate manner that the "'Defendants' manufactured and distributed 'one or more PFAS materials, including in Ohio and this District, in such a way as to cause the contamination of Plaintiff's and the class members' blood'" — which the Sixth Circuit explained was a "textbook example of the type of 'the-defendant-unlawfully-harmed-me accusation'" that contravenes Supreme Court pleading standards.[11]

Takeaways

The Hardwick decision has a number of implications for future practice.

First, Hardwick is a reminder that there are other ways to defeat putative class actions beyond Federal Rule of Civil Procedure 23.

Indeed, because standing is a fundamental constitutional requirement that must exist at every stage of litigation, district courts have an obligation to assure themselves of Article III jurisdiction even without a challenge from a defendant.

Although the Sixth Circuit's ruling was reached on the heels of class certification, the appellate decision rested primarily on the conclusory and implausible allegations alone and could persuade lower courts to scrutinize standing allegations more carefully at the outset of a case, potentially obviating the need for expensive discovery and dispositive or class-related motion practice.

Second, although the principles enunciated in Hardwick are generally applicable across a broad category of cases, they may be particularly instructive in defending against putative medical monitoring class actions.

Federal courts — which oversee the overwhelming majority of purported class action complaints in the United States — have often found it difficult to predict whether state substantive law recognizes medical monitoring as a cause of action or cognizable remedy.

The traceability principles underlying Hardwick show that straightforward causation principles may suffice to terminate a purported medical monitoring class action and avoid thorny questions of state medical monitoring law.

Third, Hardwick is also likely to have significant implications even outside the mass tort and medical monitoring spaces.

In Hardwick, the ubiquitous nature of PFAS and the thousands of potential sources of it made it nearly impossible for the plaintiff to allege how his alleged risk of harm could be traced to each of the 10 defendants he chose to sue.

Although the same would likely be true of many other cases alleging exposure to commonly produced chemicals, the logic of Hardwick would also translate outside the mass tort world, where any number of actors could have contributed to the plaintiff's alleged injuries.

In short, Hardwick essentially teaches that a plaintiff should have basic knowledge of the facts of their case before going to court or risk having their case dismissed outright for lack of standing.

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[1] No. 22-03765 (6th Cir., decided Nov. 27, 2023), ECF BL-94.

[2] See In re E.I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig. , 939 F. Supp. 2d 1374, 1374 (U.S. Jud. Pan. Mult. Lit. 2013); see also Our Current Understanding of the Human Health and Environmental Risks of PFAS, (2023) https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas

[3] Hardwick, No. 22-03765, ECF BL-94 at 4.

[4] See Hardwick v. 3M Company, et al , No. 2:18-cv-01185 (S.D. Ohio, Mar. 7, 2022), ECF BL-233 at 1.

[5] Id. at 16.

[6] Id.

[7] Hardwick, No. 22-03765, ECF BL-94 at 5.

[8] Id. at 6.

[9] Id.

[10] Id.

[11] Id. at 7.