



**THE AQUEOUS FILM-FORMING PRODUCTS LIABILITY MULTIDISTRICT
LITIGATION: THE BASICS**

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Per- and polyfluoroalkyl substances (PFAS) are a vast group of synthetic chemicals that are notoriously persistent both in the environment and within organisms.¹ Since the 1940s, they have been used in common products like fire extinguishers, stain- and water-resistant fabrics, nonstick cookware, and even food packaging.² However, more recently, studies have shown that PFAS contamination may lead to a variety of severe health problems, especially in sensitive groups such as children and the elderly.³ As technology and public awareness expand, more effects of these toxic chemicals are revealed and more contaminated sites are identified. As a problem with such widespread, damaging effects, PFAS contamination has sparked a new expanse of litigation. Two compelling litigation approaches have emerged: multidistrict litigation, like the nationwide aqueous film-forming foam multidistrict litigation, and enforceable settlement agreements, such as North Carolina’s Chemours Consent Order.⁴

Multidistrict Litigation (MDL) is a type of federal proceeding used to ensure judicial efficacy in federal courts. Unlike class actions, MDLs temporarily consolidate cases with similar questions for pre-trial proceedings as a way to reduce the burden on courts, before returning cases to their federal district court for proceedings on the merits of the case. MDLs have been used in product liability disputes, mass torts, and other instances where there are numerous plaintiffs seeking relief from one, or a few parties. As the long term effects of prolonged PFAS exposure become known, one such MDL was created to handle all cases related to the manufacturing and use of aqueous film-forming foam containing PFAS—commonly known as Class B firefighting foam. While this MDL is still on-going, with new cases still being added, and the outcome of many of these cases are unknown, the early settlement of other cases allows for important PFAS remediation and mitigation efforts to begin now instead of waiting years for cases to be transferred to back to their original federal district court for hearings.

In 2018, the Judicial Panel on Multidistrict Litigation created a MDL for cases against manufacturers of aqueous film-forming foams (AFFFs), or firefighting foams. The MDL is made up of various cases where plaintiffs alleged that AFFFs contaminated the environment and caused subsequent damage from toxic PFAS chemicals. The MDL has since expanded to include over 9,000 active cases against manufacturers like 3M, DuPont, and Chemours, and they are all currently undergoing consolidated pretrial proceedings and discovery together in the District of South Carolina with Judge Richard Gergel. The MDL cases generally fall into four categories: (1) state natural resources claims, (2) public water system property damage claims, (3) individual property damage claims, and (4) personal injury claims. This report discusses what an MDL is, how the AFFF MDL was formed, and the current state of the AFFF MDL—drawing from examples of ongoing MDL lawsuits to recent settlements.

¹ *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas> (May 16, 2024).

² *Id.*

³ *Id.*

⁴ For more information about the Chemours Consent Order, please see Cheyanne Sharp, *An Overview of North Carolina’s Chemours Consent Order*, NAT’L SEA GRANT L. CTR. (2024), available at <https://bit.ly/nc-chemours-consent-order>.

What is an MDL?

When civil actions involving at least one common question of fact are pending throughout different federal districts, they may be considered for an MDL to improve judicial efficiency.⁵ Under this process, such cases will be “coordinated or consolidated” in a single designated district court for pretrial proceedings and discovery, and then each case will be remanded back to its original district court for the remainder of litigation, if they are not resolved in the pretrial phase.⁶ This is a key distinction between MDLs and class action lawsuits—while class actions involve one trial on behalf of all class members, MDLs allow each individual lawsuit to proceed separately after consolidating them for the pretrial stage.⁷

The Judicial Panel on Multidistrict Litigation (Panel), consisting of seven circuit and district judges chosen by the Chief Justice of the United States, is tasked with deciding: (1) which cases qualify for the MDL; (2) which district court will manage the MDL; and (3) which judge will oversee those proceedings.⁸ An MDL may be created either by the Panel on its own initiative or upon a motion by a party.⁹ The statutory requirements for whether a case is consolidated into an MDL are: (1) the lawsuits must share “common questions of fact”; (2) the transfer must be “for the convenience of parties and witnesses”; and (3) the transfer must “promote the just and efficient conduct of [the] actions.”¹⁰ To determine whether the creation of an MDL will achieve the third criteria, the Panel considers factors such as preventing duplicative discovery, avoiding inconsistent pretrial rulings among similar cases, and maximizing the efficient use of available judicial resources.¹¹

Once the Panel decides that the creation of an MDL is appropriate, it must also decide on the location where the pretrial proceedings will take place.¹² The statute permitting MDLs makes it clear that the Panel may transfer a case to “*any* district” it deems fit,¹³ even if it would otherwise be an inconvenient or procedurally improper location to bring any particular case.¹⁴ Still, in the interests of convenience and efficiency, the Panel is likely to choose a district court where at least one pending action lies, within the geographic region with the most physical evidence or participants, or based on the location of the most common defendant(s) throughout the MDL.¹⁵

⁵ 28 U.S.C. § 1407(a) (2022).

⁶ *Id.*

⁷ *Id.*; Fed. R. Civ. P. 23.

⁸ 28 U.S.C. §§ 1407(d), (a)–(b).

⁹ *Id.* § 1407(c).

¹⁰ *Id.* § 1407(a).

¹¹ *E.g., In re Foundry Resins Antitrust Litig.*, 342 F. Supp. 2d 1346, 1347 (J.P.M.L. 2004).

¹² 28 U.S.C. § 1407(a).

¹³ *Id.* (emphasis added).

¹⁴ *In re Peanut Crop Ins. Litig.*, 342 F. Supp. 2d 1353, 1354 (J.P.M.L. 2004).

¹⁵ David F. Herr & Nicole Narotzky, *The Judicial Panel's Role in Managing Mass Litigation*, SN066 ALI-ABA 249, 290–91 (2008).

Additional factors that may influence the Panel’s decision include: the location’s centrality and accessibility;¹⁶ the locations of the most advanced component suits;¹⁷ the relative congestion of potential courts;¹⁸ the presiding judge’s experience and familiarity with the topic;¹⁹ and even the express preferences of the involved parties.²⁰

Finally, the Panel is responsible for deciding which judge will oversee the consolidated pretrial proceedings.²¹ In some cases, the location of the Panel’s desired judge will influence its district court selection.²² In others, the Panel may first identify the most appropriate district court, and then assign a judge from that district to oversee the MDL.²³ In rare situations, a judge from outside the selected district, but serving within the circuit, may be appointed by the Chief Justice of the United States or the chief judge of the circuit at the Panel’s request.²⁴

If a new lawsuit with sufficient similarity to qualify for consolidation arises after the MDL has been created (called a “tag-along” action), the Panel is likely to move it into the MDL.²⁵ Once the Panel decides that a case belongs in the MDL, both the original district court’s jurisdiction and the Panel’s authority over it terminate unless and until it is remanded for trial.²⁶ “In practice,” however, “remand has proven the exception rather than the rule in multidistrict litigation.”²⁷ A case within the MDL may not ever return to the original district court if, for example, it is resolved through pretrial motions or settlement, or it is permanently transferred to the MDL court as a change of venue.²⁸ Some plaintiffs may even attempt to structure their claims to avoid being pulled into an established MDL. MDLs often result in large scale pre-trial settlements applying to the variety of affected plaintiffs, which could potentially leave individual plaintiffs with a share of the compensation that is not reflective of the merits of their particular case.²⁹

¹⁶ *E.g.*, *In re Am. Gen. Life & Accident Ins. Co. Indus. Life Ins. Litig.*, 175 F. Supp. 2d 1380, 1381 (J.P.M.L. 2001) (preference for relatively central locations); *In re First Nat. Bank, Heavener, Okl. (First Mortg. Revenue Bonds) Sec. Litig.*, 451 F. Supp. 995, 998 (J.P.M.L. 1978) (preference for accessible urban areas).

¹⁷ *E.g.*, *In re Int'l House of Pancakes Franchise Litig.*, 331 F. Supp. 556, 557–58 (J.P.M.L. 1971).

¹⁸ *E.g.*, *In re Corn Derivatives Antitrust Litig.*, 486 F. Supp. 929, 932 (J.P.M.L. 1980).

¹⁹ *E.g.*, *In re Cardiac Devices Qui Tam Litig.*, 254 F. Supp. 2d 1370, 1373 (J.P.M.L. 2003).

²⁰ *E.g.*, *In re Carbon Black Antitrust Litig.*, 277 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003).

²¹ 28 U.S.C. § 1407(b).

²² Herr & Narotzky, *supra* note 15, at 296.

²³ *Id.*

²⁴ *Id.*; 28 U.S.C. § 1407(b).

²⁵ Herr & Narotzky, *supra* note 15, at 300–01.

²⁶ *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 495 (J.P.M.L. 1968); *In re Molinaro/Catanzaro Pat. Litig.*, 402 F. Supp. 1404, 1406 (J.P.M.L. 1975).

²⁷ Herr & Narotzky, *supra* note 15, at 306.

²⁸ *Id.*

²⁹ *Twisted Blackjack: How MDLs Distort and Extort*, INST. FOR LEGAL REFORM 1, 5 (Oct. 2021), <https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-Briefly-MDL-FINAL.pdf>.

Formation of the AFFF MDL

In 2018, the Panel considered initiating an MDL for seventy-five actions—each against manufacturing companies³⁰—alleging that the manufacturers contaminated the plaintiffs’ drinking water supplies with toxic PFAS.³¹ The plaintiffs claimed that the defendants knowingly facilitated the use of AFFFs containing PFAS for extinguishing liquid fuel fires at airports and other industrial locations, ultimately contaminating nearby groundwater sources.³² The lawsuits stemmed from various causes of action, including individual personal injury claims, class actions on behalf of those living near contaminated sites, and claims brought by governmental entities for environmental remediation and water facility upgrades.³³

Two corporate defendants—Tyco Fire Products, LP and Chemguard, Inc.—moved for the Panel to centralize the cases’ pretrial proceedings under the MDL authorization statute, 28 U.S.C. § 1407, requesting for the MDL to be transferred to the District of Massachusetts or, alternatively, the Southern District of New York.³⁴ Although some plaintiffs opposed consolidation of the actions, they all agreed that the Southern District of Ohio would be a preferable transferee district if an MDL was created.³⁵

The Panel found that the designation of an MDL was merited according to the three aforementioned statutory factors.³⁶ It found that each case featured similar circumstances involving PFAS groundwater contamination through AFFFs and named many of the same manufacturers as defendants, thereby raising many of the same factual questions for the discovery process.³⁷ It also found that the interest in efficiently resolving so many analogous cases outweighed any potential hindrances posed by location-specific factual differences among the individual lawsuits or variations in the asserted causes of action.³⁸

Additionally, and perhaps surprisingly to some, the Panel decided that the District of South Carolina would be the best district for the MDL.³⁹ The Panel explained that “this MDL undoubtedly will be a complex litigation from a judicial management perspective,” and ensuring that the designated court had sufficient judicial resources to handle it seemed to be the main priority.⁴⁰ The District of South Carolina was the ideal candidate—despite not being the source

³⁰ *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 357 F. Supp. 3d 1392, 1397 (J.P.M.L. 2018) [hereinafter *In re AFFF*].

³¹ *Id.* at 1392.

³² *Id.*

³³ *Id.* at 1395.

³⁴ *Id.* at 1392.

³⁵ *Id.* at 1393.

³⁶ *Id.* at 1394.

³⁷ *Id.*

³⁸ *Id.* at 1394–95.

³⁹ *Id.* at 1396.

⁴⁰ *Id.*

of any related, pending lawsuits—because it was not actively managing many MDLs, it had the capacity and resources to take on the litigation, and the district’s judge, the Honorable Richard M. Gergel, was experienced and knowledgeable.⁴¹ After the case was transferred, Judge Gergel designated lead counsel for the parties in the MDL on March 20, 2019, and since then pre-trial proceedings have been in progress.⁴²

Development of the AFFF MDL

As of July 2, 2024, the AFFF MDL has expanded to include over 9,000 active cases.⁴³ To ensure that the cases in the MDL are factually consistent and will facilitate efficient discovery, the Panel generally only admits lawsuits involving allegations that AFFFs “used at airports, military bases, or other locations to extinguish liquid fuel fires caused the release of . . . PFAS . . . into local groundwater and contaminated drinking water supplies.”⁴⁴ However, not all AFFF-related cases are automatically eligible to join the MDL—the Panel has made it clear that only cases against defendants “involved in the manufacture, marketing, supply, use, or disposal of AFFFs” fall within the scope of this particular MDL.⁴⁵

Furthermore, the Panel has also specified that the MDL includes only cases involving AFFFs in particular; it does not extend to other sources of PFAS.⁴⁶ On the other hand, even if a case’s original complaint strategically avoids any reference to or involvement of AFFFs, the Panel may decide that it belongs in the MDL if the presence of AFFF contamination is revealed at any point during discovery.⁴⁷ For example, when transferring a case by Michigan’s Attorney General into the MDL, the Panel explained that a plaintiff’s attempt “to split its claims into AFFF and non-AFFF complaints and thereby maintain an action outside the MDL” will be rejected if the two suits may involve the same allegedly contaminated sites because such an approach would result in inefficient, duplicative discovery.⁴⁸

The active cases in the MDL repeatedly name many of the same AFFF manufacturers as defendants, including The 3M Co., DuPont de Nemours, Inc., The Chemours Co., Tyco Fire

⁴¹ *Id.*

⁴² Case Management Order No. 2, *In re: Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-2873-RMG (D.S.C. Mar. 20, 2019).

⁴³ Matthew Dolman, *AFFF Lawsuits | July 2024 Update*, LAWSUIT LEGAL NEWS (July 2, 2024), <https://lawsuitlegalnews.com/aqueous-film-forming-foam-caff-lawsuits/#h-firefighting-foam-cancer-lawsuits-updates>.

⁴⁴ Notice of JPML’s Denial of Defendant Connecticut Water Co.’s Motion to Transfer this Action to MDL No. 2873 at 1, *Hoffnagle v. Conn. Water Co.*, No. 3:23-cv-01489-OAW (D. Conn. Jan. 31, 2024).

⁴⁵ *Id.* at 2 (holding that a class action lawsuit against a water utility for providing AFFF-contaminated water was not suitable for the MDL because the defendant was “not alleged to have manufactured, used, or disposed of AFFFs,” and transferring the case “would significantly and unnecessarily broaden the scope of the MDL”).

⁴⁶ *In re AFFF*, 357 F. Supp. 3d at 1396.

⁴⁷ Transfer Order at 3–4, *Nessel v. Chemguard, Inc.*, No. 1:20-01080 (J.P.M.L. Feb. 4, 2021) (available at <https://www.jpml.uscourts.gov/sites/jpml/files/MDL-2873-Tag-Along-Transfer-01-21.pdf>).

⁴⁸ *Id.* at 4.

Products, BASF Corp., and many more.⁴⁹ The claims made throughout the AFFF MDL cases can generally be divided into four common categories: (1) claims by states seeking compensation for harm to their natural resources; (2) property damage claims made by public water systems seeking remediation costs and water testing efforts; (3) similar property damage claims made by individual parties; (4) personal injury claims associated with the harmful health effects of PFAS.⁵⁰

State Natural Resources Claims

Several states have filed lawsuits against PFAS manufacturers, and many of them have become a part of the AFFF MDL.⁵¹ One of the earliest cases to be transferred into the MDL was brought by Mississippi’s Attorney General against the usual cast of defendants at the end of 2020, alleging “contamination of the natural resources of the State, including lands, waters, biota, and wildlife, as a result of . . . the handling, use, disposal, and storage of products containing PFAS.”⁵² The complaint alleged eight causes of action: negligence, defective product design, failure to warn, trespass, public nuisance, fraudulent business transfer, and punitive damages.⁵³

Alleged negligence on the part of the defendants was a theme throughout the entirety of Mississippi’s complaint, playing a role in most of the aforementioned causes of action. The Attorney General specifically argued that the manufacturers owed a duty of care to the State, and to anyone who their products might have foreseeably harmed, “to exercise due care in the instructing, labeling, and warning of the handling, control, use, and disposal” of PFAS-containing products.⁵⁴

Regarding its products liability claim, Mississippi alleged that the defendants knew, or should have known, that use of their AFFFs would foreseeably cause PFAS contamination and environmental harm, but nevertheless failed to warn the public of the potential hazards.⁵⁵ The

⁴⁹ Tor Hoerman, *FAQ: Which AFFF Manufacturers Are Named in the AFFF Lawsuits?*, TORHOERMAN L., LLC, <https://www.torhoermanlaw.com/aff-lawsuit-firefighting-foam-lawsuit/which-aff-manufacturers-are-named-in-the-aff-lawsuits/> (June 26, 2024); *In re Aqueous Film-Forming Foams Prod. Liab. Litig. MDL 2873*, LAW360, <https://www.law360.com/cases/5c0b021db0223c449b229a52> (last visited July 4, 2024).

⁵⁰ *Types of Damage Claims Filed in the AFFF Firefighting Foam MDL*, STAG LIUZZA, <https://stagliuzza.com/news/types-of-damage-claims-filed-in-the-aff-firefighting-foam-mdl/#:~:text=Individuals%20exposed%20to%20AFFF%20allege,Public%20Water%20System%20Claims> (last visited July 4, 2024).

⁵¹ *More Than Half of US State Attorneys General Have Taken Action Against PFAS Manufacturers and Key Users*, SAFER STATES, <https://www.saferstates.org/press-room/more-than-half-of-us-state-attorneys-general-have-taken-action-against-pfas-manufacturers-and-key-users/> (April 16, 2024).

⁵² Direct Filed Complaint and Jury Demand Pursuant to Case Management Order No. 3 at 3, *Miss. ex rel. Fitch v. 3M Co.*, No. 2:18-mn-2873 (D.S.C. Dec. 17, 2020) (available at <https://www.law.nyu.edu/sites/default/files/miss-ag-pfas-lawsuit.pdf>).

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 27.

⁵⁵ *Id.* at 23–25.

trespass claim stemmed from the manufacturers' nonconsensual contamination of state property such as public water systems, fire departments, and airports with AFFFs that they knew to be harmful.⁵⁶ Under the public nuisance claim, the Attorney General alleged that the defendants created a harmful condition which unreasonably interfered "with the health, safety, peace, comfort, and convenience of the general public . . . and/or . . . produced permanent or long-lasting deleterious effects" on the environment.⁵⁷

Associated with these causes of action, Mississippi sought to recover all costs associated with "the investigation, monitoring, treatment, testing, remediation, removal, and/or disposal of the contamination, operating, maintenance and consulting costs, legal fees, diminution of property value, and all other equitable and applicable damages."⁵⁸ Furthermore, under its final cause of action, the state specifically requested the addition of punitive damages "to punish Defendants for their egregious conduct and to deter similar conduct in the future."⁵⁹

Many of the other states' complaints have outlined similar claims against AFFF manufacturing companies, eventually becoming a part of the MDL.⁶⁰ More recently, the Environmental Protection Agency's April 2024 rule designating two common PFAS varieties as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act, often called CERCLA or Superfund, has added another potential pathway for states to receive compensation for damage to their natural resources.⁶¹

Water System Property Damage Claims

Similarly to the lawsuits brought by states, municipalities and water providers also allege damage to their property.⁶² For example, in November 2022, the Birmingham Water Works Board (Board) filed suit against several manufacturers, with the case later being added to the MDL.⁶³ The plaintiff utility authority, which provides drinking water and sewer facilities to the people of Birmingham, Alabama, alleged that its water system was contaminated by PFAS as the city's fire departments utilized the defendants' AFFF products.⁶⁴ The complaint raised several related causes of action: negligence, public and private nuisance, trespass, defective design, failure to warn, fraudulent concealment, and wantonness.⁶⁵

⁵⁶ *Id.* at 26.

⁵⁷ *Id.* at 29–30.

⁵⁸ *Id.* at 24–28, 30.

⁵⁹ *Id.* at 33.

⁶⁰ *See, e.g.,* Complaint for Abatement, Equitable Relief, and Damages, *Cal. ex rel. L.A. City Att'y v. 3M Co.*, No. 24ST-CV-09939 (Cal. Super. Ct. Apr. 19, 2024).

⁶¹ *See* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39,124 (May 8, 2024) (to be codified at 40 C.F.R. pt. 302).

⁶² STAG LIUZZA, *supra* note 50.

⁶³ Complaint and Jury Demand, *Birmingham Water Works Bd. v. 3M Co.*, No. 2:22-cv-4298-RMG (D.S.C. Nov. 29, 2022).

⁶⁴ *Id.* at 2.

⁶⁵ *Id.* at 30–47.

Like Mississippi, the Board’s complaint was largely centered around various manifestations of negligence—it alleged that, despite their knowledge of the potential environmental and health risks associated with PFAS, the defendants negligently: (1) designed, manufactured, and sold AFFFs, (2) instructed the public on the use and disposal of those products, and (3) failed to warn about the associated dangers.⁶⁶ The Board also argued that the defendants’ conduct created an unreasonable danger to public health and common resources, as well as to the Board’s own property rights, by causing widespread PFAS contamination.⁶⁷ Multiple times the Board stressed that the defendants should be held strictly liable for the damage caused, since they are commercial entities with “a strict duty not to place into the stream of commerce a product that is defective or unreasonably dangerous.”⁶⁸

As compensation for the defendants’ misconduct, the Board sought recovery of all costs and expenses related to any past, present, and future investigation of PFAS contamination in its water supplies, remediation of that contamination, and development of monitoring mechanisms.⁶⁹ Finally, the Board alleged that the defendants’ polluting behavior was “willful and wanton and exhibited a reckless disregard for the property and safety of the Plaintiff.”⁷⁰ As a result, the Board also requested punitive damages “in an amount sufficient to punish Defendants and deter future similar conduct.”⁷¹

In March 2023, after repeatedly assuring its customers that the drinking water was still safe to consume and that its PFAS levels did not exceed federal or state standards, the Board decided to voluntarily withdraw its lawsuit.⁷² But many other public water systems and municipalities have filed similar complaints—with promising results. Perhaps most notable among them are the class action suits against the major manufacturers, initiated by a group of representative municipalities—including the Cities of Delray Beach, Florida; Pineville, Louisiana; and Iuka, Mississippi—filed on behalf of all public water systems that have been contaminated by AFFFs containing PFAS.⁷³ These class actions have been filed separately against defendants such as

⁶⁶ *Id.* at 30–32, 37–45.

⁶⁷ *Id.* at 32–35.

⁶⁸ *Id.* at 39.

⁶⁹ *Id.* at 48.

⁷⁰ *Id.* at 46.

⁷¹ *Id.* at 49.

⁷² Heather Gann, *Birmingham Water Works Board Files Lawsuit Against Chemical Manufacturers for PFAS Water Contamination*, ALA. MEDIA GRP. (Mar. 13, 2023), <https://www.al.com/news/birmingham/2023/03/birmingham-water-works-board-files-lawsuit-against-chemical-manufacturers-for-pfa-water-contamination.html>; Notice of Dismissal Without Prejudice Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), *Birmingham Water Works Bd. v. 3M Co.*, No. 2:22-cv-4298-RMG (D.S.C. Mar. 20, 2023).

⁷³ Class Action Complaint at 2, *City of Camden v. 3M Co.*, No. 2:23-cv-03147-RMG (D.S.C. July 12, 2023) [hereinafter 3M Class Action]; Class Action Complaint at 2, *City of Camden v. E.I. DuPont de Nemours & Co.*, No. 2:23-cv-03230-RMG (D.S.C. July 12, 2023) [hereinafter DuPont Class Action]; Class Action Complaint at 2, *City of Camden v. Tyco Fire Products LP*, No. 2:24-cv-02321-RMG (D.S.C. Apr. 22, 2024) [hereinafter Tyco Class Action].

3M, DuPont,⁷⁴ Chemours,⁷⁵ and Tyco, each alleging causes of action such as public and private nuisance, defective design, failure to warn and recall, trespass, and civil conspiracy, and seeking nearly identical damages to those previously sought by the Board.⁷⁶

These public water system claims make up a minority of lawsuits within the AFFF MDL, but they have been prioritized in its early stages because: (1) Judge Gergel finds them to have relatively simple questions of causation, providing a potential indicator of the trajectory of the remaining MDL lawsuits, and (2) their resolution will likely have the most significant impact on public health.⁷⁷ Accordingly, Judge Gergel has recently approved several settlements providing compensation for the aforementioned class actions, making this category of cases the most commonly resolved at this point in the MDL.⁷⁸

In February 2024, Judge Gergel granted final approval of a nearly \$1.2 billion settlement between municipal water providers and defendants DuPont de Nemours, Inc., E.I. DuPont de Nemours & Co., The Chemours Co., The Chemours Co. FC, LLC, and Corteva, Inc.⁷⁹ A few plaintiffs objected to the deal, arguing that the proposed amount was excessively low compared to the amount that could potentially be obtained through trial and compared to the amount of actual damage caused by the defendants nationwide, but Judge Gergel found that the proposal was adequate under the relevant legal standards.⁸⁰ The settlement applies to “all public water systems in the country that draw or otherwise collect water from any water source that was tested or analyzed for PFAS and found to contain PFAS at any level, on or before the settlement [date]” along with “all public water systems in the U.S. subject to monitoring rules or required under state or federal law to test any of their water sources for PFAS.”⁸¹ However, if any individual plaintiffs within the class explicitly decide to opt out of the settlement award, those cases may proceed through litigation in the federal district court they came from.⁸² The settlement funds are

⁷⁴ Here, “DuPont” refers collectively to DuPont de Nemours, Inc. and E.I. DuPont de Nemours & Co.

⁷⁵ Here, “Chemours” refers collectively to The Chemours Co. and The Chemours Co. FC, LLC.

⁷⁶ 3M Class Action, *supra* note 73, at 44–62; DuPont Class Action, *supra* note 73, at 63–81, 86; Tyco Class Action, *supra* note 73, at 23–39.

⁷⁷ Gregory S. Capps & Lynndon K. Groff, *MDL for Claims Against Manufacturers and Distributors of PFAS-Containing AFFFs Focuses Attention on Key Issues*, WHITE & WILLIAMS LLP (June 3, 2021), <https://www.whiteandwilliams.com/resources-alerts-MDL-for-Claims-Against-Manufacturers-and-Distributors-of-PFAS-Containing-AFFFs-Focuses-Attention-on-Key-Issues>.

⁷⁸ Jessica K. Ferrell, Jeff B. Kray, & Aidan R. Freeman, *Tyco Reaches Nationwide PFAS Settlement with Water Providers*, MARTEN L. (Apr. 29, 2024), <https://martenlaw.com/news/tyco-reaches-nationwide-pfas-settlement-with-water-providers>.

⁷⁹ Order and Opinion, *City of Camden v. E.I. DuPont de Nemours & Co.*, No. 2:23-cv-3230-RMG (D.S.C. Feb. 8, 2024).

⁸⁰ Madeline Lyskawa, *\$1B DuPont Deal Gets Final OK in Firefighting Foam MDL*, LAW360 (Feb. 8, 2024), <https://www.law360.com/articles/1795800>.

⁸¹ *Id.*

⁸² *Global Settlements in Multidistrict Litigation*, STAG LIUZZA, <https://stagliuzza.com/news/global-settlements-in-multidistrict-litigation/> (last visited July 9, 2024).

designated for ongoing PFAS testing and the remediation of contaminated public water systems.⁸³

Soon after, in March 2024, Judge Gergel approved another settlement between the same class of water providers and The 3M Co., providing additional funds up to \$12.5 million for monitoring and remediation.⁸⁴ He explained that his decision came in the interest of efficiency, as preparing the related cases for separate trials would take years and hundreds of thousands of dollars, delaying water providers' ability to address or correct PFAS contamination until the culmination of each lawsuit.⁸⁵ Furthermore, 3M provided a reliable means of compensation, while several other manufacturers have already filed for bankruptcy as a result of ongoing litigation.⁸⁶ 3M has also independently committed itself to phasing out all of its PFAS manufacturing by the end of 2025, marking another notable advancement in the fight against PFAS contamination.⁸⁷

Recently, on June 13, 2024, Judge Gergel granted preliminary approval for another settlement between public water systems and defendant Tyco Fire Products LP.⁸⁸ After a court grants preliminary approval, class members are informed about the planned settlement and have an opportunity to raise objections, which the court will consider at the final approval hearing.⁸⁹ Tyco has agreed to pay \$750 million to fund remediation efforts for public water systems nationwide “that draw or collect from any water source that, on or before May 15, 2024, was tested or analyzed for PFAS and found to contain PFAS at any level.”⁹⁰ Additionally, as with each prior settlement agreement, several groups are excluded from the settlement class, including any public water systems owned and operated by the federal or a state government and privately owned wells that only serve an individual household.⁹¹ Similarly, on July 3, 2024, Judge Gergel also preliminary approved a \$316.5 million settlement between the same settlement class and

⁸³ Lyskawa, *supra* note 80.

⁸⁴ Order and Opinion, *City of Camden v. 3M Co.*, No. 2:23-cv-3147-RMG (D.S.C. Mar. 29, 2024) (available at <https://www.pfaswatersettlement.com/wp-content/uploads/2024/04/3M-Final-Approval-Order.pdf>); Emily Field, *3M Gets Final OK on PFAS Deal Worth Up to \$12.5B*, LAW360 (Apr. 1, 2024), <https://www.law360.com/articles/1819762>.

⁸⁵ Field, *supra* note 84.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Order Granting Preliminary Approval of Settlement Agreement at 2, *City of Camden v. Tyco Fire Prods. LP*, No. 2:24-cv-02321-RMG (D.S.C. June 13, 2024).

⁸⁹ Erin Shaak, *From Talks to Checks: The Stages of a Class Action Settlement*, CLASSACTION.ORG, <https://www.classaction.org/blog/from-talks-to-checks-the-stages-of-a-class-action-settlement> (Apr. 3, 2024).

⁹⁰ Press Release, Motley Rice LLC, AFFF MDL Co-Leadership Reaches Settlement with Tyco Fire Products in PFAS-Related Multidistrict Litigation (Apr. 12, 2024).

⁹¹ Order Granting Preliminary Approval of Settlement Agreement, *supra* note 88, at 3; Order and Opinion, *supra* note 79, at 6; Order and Opinion, *supra* note 84, at 11.

BASF Corp.⁹² Still, BASF maintains that it is not responsible for any liability or wrongdoing, and that it is prepared for litigation if the settlement is rejected.⁹³

Individual Property Damage Claims

Another category of lawsuits in the AFFF MDL includes property damage claims by individual property owners whose private wells have been contaminated with PFAS.⁹⁴ One early and notable case transferred into the AFFF MDL was brought by plaintiffs Joan and Richard Campbell of Marinette, Wisconsin against defendants Tyco Fire Products LP, Chemguard, Inc., and Chemdesign, Inc. in 2019.⁹⁵ The Campbells brought this class action suit on behalf of all Wisconsin residents who, like the Campbells, “own real property in Marinette County whose private water wells have been contaminated with PFAS” as a result of the defendants’ AFFF manufacturing.⁹⁶ Joan was diagnosed with thyroid disease and thyroid cancer as a result of drinking their water as well, so the suit also incorporated a medical monitoring class on behalf of all similarly-situated Wisconsin residents who suffered bodily PFAS accumulation from contaminated drinking water.⁹⁷

Similarly to the public water system suits, the Campbells’ class action suit alleged multiple causes of action: negligence, trespass, abnormally dangerous activity, private nuisance, and failure to warn.⁹⁸ Centrally, the Campbells alleged that the defendants negligently, recklessly, and/or intentionally “allowed or caused these ultra-hazardous and abnormally dangerous substances to leach into the land and ground water surrounding the Facility, including the potable water supply relied upon by Plaintiffs,” creating an unreasonable risk of harm.⁹⁹ Accordingly, the class of plaintiffs sought relief in the form of compensatory and punitive damages corresponding to their injuries, along with a medical monitoring protocol.¹⁰⁰

The Campbells’ class action lawsuit resulted in the MDL’s first major settlement—a relatively small outlier preceding the more recent outpouring of public water system

⁹² Order Granting Preliminary Approval of Settlement Agreement at 2–3, *City of Camden v. BASF Corp.*, No. 2:24-cv-03174-RMG (D.S.C. July 3, 2024).

⁹³ Mike Curley, *BASF Agrees to \$316.5M Settlement in PFAS Foam MDL*, LAW360 (May 21, 2024), <https://www.law360.com/articles/1839415/basf-agrees-to-316-5m-settlement-in-pfas-foam-mdl>.

⁹⁴ STAG LIUZZA, *supra* note 50.

⁹⁵ Complaint, *Campbell v. Tyco Fire Products L.P.*, No. 2:19-cv-00422-RMG (Wis. Cir. Ct. Jan. 31, 2019) (available at <https://storage.courtlistener.com/recap/gov.uscourts.scd.248444/gov.uscourts.scd.248444.1.1.pdf>); Conditional Transfer Order (CTO-4), *Campbell v. Tyco Fire Products LP*, 2:19-cv-00422-RMG (J.P.M.L. Feb. 13, 2019).

⁹⁶ Complaint, *supra* note 95.

⁹⁷ *Id.* at 8, 27.

⁹⁸ *Id.* at 31–41.

⁹⁹ *Id.* at 36.

¹⁰⁰ *Id.* at 42.

settlements.¹⁰¹ In August 2021, Judge Gergel approved a \$17.5 million settlement between the class of about 300 Wisconsin homeowners and the manufacturer defendants.¹⁰² The majority of the settlement funds, \$15 million, was allocated to compensation and remediation in response to the plaintiffs' property damage claims, while the remaining \$2.5 million was designated for individuals in the class suffering from PFAS-related illnesses.¹⁰³ Tyco has taken significant steps toward addressing PFAS contamination in the Marinette area, such as providing bottled water and treatment systems, working to pinpoint the most contaminated areas, and even proposing to fund a new water line for the residents.¹⁰⁴

Personal Injury Claims

Finally, numerous individuals have brought personal injury claims against AFFF manufacturers for damages suffered as a result of PFAS-related health afflictions.¹⁰⁵ These claims have most commonly been brought by consumers who drank PFAS-contaminated water resulting from AFFF use nearby and firefighters who were directly exposed to AFFFs containing PFAS, with a variety of over 200 subsequent injuries being alleged among them.¹⁰⁶

Recently, in June 2024, the Panel transferred four similar cases from the Northern District of Alabama into the AFFF MDL.¹⁰⁷ Each of these lawsuits were brought against 3M, Toray Fluorofibers (America), Inc., and Daikin America, Inc., alleging that PFAS from their AFFF-producing manufacturing facility in Decatur, Alabama contaminated the Tennessee River, and, ultimately, the plaintiffs' drinking water sources.¹⁰⁸ The injuries suffered by the plaintiffs in these cases included pancreatic cancer, kidney cancer, prostate cancer, breast cancer, ulcerative colitis, thyroid disease, and hypothyroidism.¹⁰⁹ The plaintiffs sought all available damages related to their injuries, "including, but not limited to medical bills, pain and suffering, loss of

¹⁰¹ Michael Phillis, *Firefighting Foam Maker Pays \$17.5M in First MDL Settlement*, LAW360 (Jan. 7, 2021), <https://www.law360.com/articles/1342453/firefighting-foam-maker-pays-17-5m-in-first-mdl-settlement>.

¹⁰² *Id.*; Ferrell, Kray & Freeman, *supra* note 78.

¹⁰³ Phillis, *supra* note 101.

¹⁰⁴ *Id.*

¹⁰⁵ STAG LIUZZA, *supra* note 50.

¹⁰⁶ *Id.*; Abbie Eliasberg Fuchs, Daniel R. Strecker & Laura W. Smalley, *AFFF MDL Bellwether Process Extended to Claims for Thyroid and Liver Cancer Caused by PFAS*, HARRIS BEACH PLLC (May 2, 2024), <https://www.harrisbeach.com/insights/aff-mdl-bellwether-process-extends-to-cancer-caused-by-pfas/>.

¹⁰⁷ Transfer Order, *Cowart v. 3M Co.*, No. 5:24-00060 (J.P.M.L. June 7, 2024) (available at https://www.jpml.uscourts.gov/sites/jpml/files/MDL-2873-Transfer_Order-5-24.pdf).

¹⁰⁸ *Id.* at 1–2.

¹⁰⁹ Complaint at 4–5, *Cowart v. 3M Co., Inc.*, No. 2:24-cv-03455-RMG (N.D. Ala. Jan. 19, 2024) [hereinafter *Cowart Complaint*]; Complaint at 4–5, *Butler v. 3M Co., Inc.*, No. 2:24-cv-03454-RMG (N.D. Ala. Jan. 23, 2024) [hereinafter *Butler Complaint*]; Complaint at 4–5, *Carter v. 3M Co., Inc.*, No. 2:24-cv-03453-RMG (N.D. Ala. Jan. 23, 2024) [hereinafter *Carter Complaint*]; Complaint at 4–5, *Whitaker v. 3M Co., Inc.*, No. 2:24-cv-03452-RMG (N.D. Ala. Jan. 23, 2024) [hereinafter *Whitaker Complaint*].

enjoyment of life, mental anguish, shortened life expectancy, as well as punitive damages, costs, and attorneys' fees.”¹¹⁰

There were many common claims throughout the four complaints: negligence, wantonness, private nuisance, battery, and fraudulent concealment.¹¹¹ As with the previous categories of lawsuits, these plaintiffs alleged that the defendants “failed to act reasonably in producing, using, or handling . . . and further . . . in disposing of or storing” PFAS chemicals at their industrial plants, causing the plaintiffs’ injuries.¹¹² The plaintiffs took these allegations further with their wantonness and fraudulent concealment claims, alleging that the defendants knew of the dangers PFAS would have on people and the environment if mistreated or undisclosed, as suggested by 3M’s “fail[ure] to disclose hundreds of research studies it had conducted on [PFAS], as it was required to do under the Toxic Substances Control Act, resulting in a \$1.5 million fine.”¹¹³

The plaintiffs also brought battery claims—a unique addition to the list of claims against AFFF manufacturers—alleging that the defendants knowingly or recklessly made unpermitted and harmful contact with their persons by releasing PFAS into their water supply.¹¹⁴ One of the four cases even alleged that the companies caused the wrongful death of Terry Cowart, who passed away from pancreatic cancer after consuming PFAS-contaminated water.¹¹⁵

Although the original cases underlying the formation of the MDL involved only PFAS contamination of groundwater and drinking water supplies through the release of AFFFs, the Panel has since decided to include cases involving injuries to firefighters who were directly exposed to AFFFs as well. The Panel has explained that these cases “will involve many of the same common questions of fact,” including the effects of PFAS on human health, the manufacturers’ knowledge of those dangers, and whether they were adequately warned against or improperly concealed.¹¹⁶ One such case that has been transferred into the MDL came from plaintiff John Mauldin, who served as a firefighter in Kentucky and developed kidney cancer after regularly being exposed to AFFFs.¹¹⁷ He brought suit against a list of common AFFF manufacturers, alleging defective design, failure to warn, negligence, fraudulent concealment, battery, and infliction of emotional distress.¹¹⁸ Mauldin sought many of the same damages as the Alabama plaintiffs with the addition of medical monitoring costs and punitive damages.¹¹⁹

¹¹⁰ Butler Complaint, *supra* note 110, at 21.

¹¹¹ Cowart Complaint, *supra* note 110, at 17–21; Butler Complaint, *supra* note 110, at 17–20; Carter Complaint, *supra* note 110, at 16–19; Whitaker Complaint, *supra* note 110, at 17–20.

¹¹² *E.g.*, Cowart Complaint, *supra* note 110, at 17.

¹¹³ *E.g.*, *id.* at 18, 21.

¹¹⁴ *E.g.*, *id.* at 19.

¹¹⁵ *Id.* at 20.

¹¹⁶ Transfer Order at 4, 2, *Mauldin v. 3M Co.*, No. 5:20-07212 (J.P.M.L. Feb. 4, 2021) (available at <https://www.jpml.uscourts.gov/sites/jpml/files/MDL-2873-Tag-Along-Transfer-01-21.pdf>).

¹¹⁷ Complaint at 4, *Mauldin v. 3M Co.*, 2:24-cv-03844-RMG (D.S.C. July 3, 2024).

¹¹⁸ *Id.* at 22–38.

¹¹⁹ *Id.* at 38–41.

Judge Gergel has approved two bellwether trials—test cases that provide an example of how a real trial might turn out—to address some of the most common injuries suffered by plaintiffs in the MDL.¹²⁰ The first ongoing bellwether trials include cases where plaintiffs allege that their drinking water was contaminated by AFFFs used at specific military bases in Colorado and Pennsylvania, leading to kidney cancer, testicular cancer, thyroid disease, and/or ulcerative colitis.¹²¹ The next one will cover cases where plaintiffs allege that AFFF contamination caused their liver or thyroid cancer.¹²² The parties are now investigating peer-reviewed studies on the potential link between AFFFs and these illnesses in preparation for a “Science Day,” where expert testimony on causation will be presented to the court.¹²³ Settlements, like those resulting in the public water system cases, likely will not arise until at least one of these personal injury test trials are completed.¹²⁴

¹²⁰ Fuchs, Strecker & Smalley, *supra* note 106.

¹²¹ *Id.*; Rhon Jones & David Diab, *AFFF Litigation Pending, Science Day Approaches*, BEASLEY ALLEN L. FIRM (Apr. 19, 2024), <https://www.beasleyallen.com/article/aff-litigation-pending-science-day-approaches/>.

¹²² Fuchs, Strecker & Smalley, *supra* note 106.

¹²³ *Id.*

¹²⁴ *AFFF Firefighting Foam Settlements – What to Expect and When*, MILLER & ZOIS, <https://www.millerandzois.com/products-liability/firefighter-foam-cancer-lawsuit/aff-firefighting-foam-settlements-what-to-expect-and-when/> (last visited July 10, 2024).