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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Medical Monitoring Fair Game For PI Claims, 2nd Circ. Says

By **Morgan Conley**

Law360 (May 18, 2020, 9:22 PM EDT) -- The Second Circuit affirmed in published opinions Monday that residents suing Saint-Gobain Performance Plastics Corp. and Honeywell International Inc. for alleged groundwater contamination can pursue medical monitoring damages for their personal injury claim under New York law.

A three-judge panel handed down three unanimous opinions that mostly affirmed orders issued by U.S. District Judge Lawrence Kahn. The suits seek to hold Saint-Gobain and Honeywell financially accountable for allegedly contaminating an eastern New York town's groundwater with perfluorooctanoic acid, which harms the immune system and increases the risk of cancer, according to the opinion. The ruling provides some clarity to medical monitoring law in New York, according to an attorney for the residents.

"Medical monitoring has always been sort of a murky area of law in New York," Stephen G. Schwarz of Faraci Lange LLP, who argued the suit on behalf of the residents, told Law360 Monday. "So for a prestigious court like the [Second Circuit] to make a ruling saying, basically, that New York law is clear that if you have a toxic exposure injury, whether you're ill or not, it doesn't matter, you can still get medical monitoring is a big ruling."

Monday's ruling affirms Judge Kahn's 2017 decision to allow claims by residents of the Village of Hoosick Falls, New York, for damages related to medical monitoring **to advance**, as well as their personal injury, property damage, trespass and nuisance claims. The residents say they ingested PFOA-laced water as a result of contamination from one or more Saint-Gobain or Honeywell manufacturing facilities that operated at various times within the village. Several of the residents have elevated levels of PFOA in their blood, according to the suits.

On Monday the panel upheld Judge Kahn's ruling that previous case law had established that a plaintiff may show an injury sufficient to seek medical monitoring damages through the accumulation of a toxic substance within her body.

The lower court additionally said the same case law appears to allow medical monitoring damages even if the only tort with a present injury involves harm to property. The panel withheld ruling on that assertion, dismissing that portion of the appeal as "improvidently granted."

In a separate but related opinion, the panel found that the lower court improperly allowed a local business' negligence claims to continue.

Michael Bacon, a resident, owns the local construction business, R.M. Bacon LLC, as well as land in the area. In the opinion dealing only with Bacon and his business' claims, the panel partially vacated a February 2018 opinion by Judge Kahn, saying the lower court should not have allowed the business' negligence claim because it suffered no property damage. The business had said the news of contaminated groundwater caused a downturn in business, making its losses purely economic. The court affirmed that Bacon's negligence claim brought as an individual survives the dismissal bid.

Two of the three opinions issued Monday deal with residents' claims. One, led by Michele Baker, is a proposed class action, and the other is 16 temporarily consolidated suits.

Schwarz said that discovery in the resident's proposed class action had been proceeding during the appeal and that the next step would be certification, which he said he expected would be briefed sometime in the fall.

"The important thing is that medical monitoring damages are now in the case, in all these cases, as long as they can prove basically exposure to the chemical," Schwarz said.

The opinion "was well worth waiting for," he said. "It was well-reasoned, and I think it's an accurate statement of what New York law is and what the New York appeals court would have done in the same position and accordingly we're thrilled."

Victoria Streitfeld, a spokesperson for the company, told Law360 Monday that "The remediation in Hoosick Falls is a top priority for Honeywell. We will continue to work expeditiously under the supervision of state and federal agencies to conduct the environmental investigations, construct interim remedies, and implement final cleanup plans."

She additionally said both companies had installed a water treatment system in the area in March 2016.

"According to the New York State Department of Health, the 'public water supply continues to be non-detect for PFOA and acceptable for all uses," she said. "We will continue to defend this lawsuit and keep the public informed of our work."

Representatives for the remaining parties could not immediately be reached for comment Monday.

U.S. Circuit Judges Rosemary S. Pooler, Amalya L. Kearse and Susan L. Carney sat on the panel for the Second Circuit.

The residents are represented by Stephen G. Schwarz of Faraci Lange LLP; and Hunter J. Shkolnik of Napoli Shkolnik PLLC.

Bacon and his business are represented by Robin L. Greenwald, William A. Walsh and James J. Bilsborrow of Weitz & Luxenberg P.C.

Saint-Gobain is represented by Sheila L. Birnbaum, Mark S. Cheffo, Bert L. Wolff, Douglas E. Fleming III and Lincoln Davis Wilson of Dechert LLP.

Honeywell is represented by Michael D. Daneker, Elissa J. Preheim, R. Stanton Jones, William C. Perdue, and Jennifer R. Kwapisz of Arnold & Porter Kaye Scholer LLP.

The consolidated suits were Benoit v. Saint-Gobain Performance Plast, Baker v. Saint-Gobain Performance Plast and R.M. Bacon, LLC v. Saint-Gobain Performance Plast, case numbers 17-3941, 17-3942 and 18-2018 in the U.S. Court of Appeals for the Second Circuit.

--Editing by Peter Rozovsky.

Update: this story has been updated to include comment from Honeywell.