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Tyco, 3M, Others Want Out Of Foam-Contaminated Water Suit

By **Michael Phillis**

Law360 (September 11, 2018, 2:37 PM EDT) -- Tyco Fire Products LP, 3M Co. and other companies that produced a fire suppressant foam have told a Massachusetts federal court that a suit filed by a group of Cape Cod residents claiming the product caused illnesses should be tossed, arguing the allegations couldn't properly be connected to specific manufacturers.

The motion to dismiss filed Monday accuses those who brought the suit of making general allegations that lack enough facts to connect the use of aqueous film forming foam, or AFFF, to the companies ensnared in the suit.

The Cape Cod residents allege the fire-suppression foam included two chemicals — perfluorooctanesulfonic acid and perfluorooctanoic acid — that the companies knew caused a range of health problems including high blood pressure and thyroid disease. But because residents' claims cannot link chemicals released into the environment to a specific company, the court shouldn't allow the suit to move forward, the companies said.

"Plaintiffs do not plead any basis to identify which defendant or defendants, if any, are responsible for their alleged injuries," the motion said. "As this court has recognized, the failure to 'draw a connection between each specific defendant's products' and plaintiffs' alleged injuries requires dismissal of plaintiffs' claims."

The foam was used during exercises at the Barnstable Fire Training Academy and Barnstable Municipal Airport, the complaint said.

The complaint asserts that AFFF was used "from the 1960s onward" but doesn't actually connect that use with specific manufacturers — a requirement for the case to survive, the companies said.

"Not only do plaintiffs offer no basis to connect specific defendants to plaintiffs' purported injuries (as they must to state a claim), but they affirmatively allege that it is 'impossible' to identify 'the specific manufacturer of any given AFFF that was the source' of the [chemicals] that allegedly harmed them," the filing said. "All of their claims thus fail as a matter of law for lack of the requisite causation."

The motion also said several theories the complaint asserted to apply liability to the group of manufacturers shouldn't be allowed. The companies shouldn't be liable "in proportion to their share of the 'market'" because it was likely to "impose liability on innocent defendants as well."

Plus, there's no "signature disease" from the chemical exposure — instead plaintiffs claim a range, according to the motion. And without a signature disease, courts have been skeptical of market share theories, according to the filing. Several other theories of liability asserted in the complaint should also fail, according to the companies.

In addition to arguments that the complaint should fail on jurisdictional grounds, the motion asserted that "plaintiffs' design defect claim" should be tossed because there wasn't a realistic alternative design that could have been used. Generic assertions aren't enough, the motion said.

"A plaintiff must plead facts, not mere legal conclusions, to state a claim," the motion said.

The **complaint** filed in April said the foam contaminated three wells, two of which had to be taken offline in order to treat the water. It asserts negligence, failure to warn, defective design and other claims.

The chemicals at issue were phased out in the early 2000s amid pressure from the U.S. Environmental Protection Agency. The complaint said residents regularly drank, bathed in, washed and cooked with the contaminated water.

Paul Napoli of Napoli Shkolnik PLLC, which is representing the residents, said it was absurd for the companies that had contracts to supply the foam to suggest that there wasn't a sufficient link to sustain the suit.

"It just goes to show you that these manufacturers that have polluted hundreds of communities around our country ... will come up with any excuse to avoid their responsibility for contaminating America's water supply," Napoli told Law360 on Tuesday.

The motion notes that there are three other AFFF-related cases that have been filed in the same court.

In previous Cape Cod cases, Barnstable County sued 3M and Tyco in 2017, and the companies won a partial dismissal in December after arguing the contamination allegations **were too vague**. An amended complaint in that case was filed in January. Barnstable County **agreed** in June 2017 to pay nearly \$3 million to end a suit brought by the town with the same name to cover the costs of cleaning up water contamination that came from the chemicals.

A representative with 3M declined to comment beyond what was in the filing.

The manufacturers are collectively represented by John D. Stuebing of Tarlow Reed Hart & Rodgers PC, Laura R. Hammargren and Tyler D. Alfermann of Mayer Brown LLP, Jonathan I. Handler and Keith H. Bensten of Day Pitney LLP, Christopher A. Kenney and Lindsay M. Burke of Kenney & Sams PC, Liam J. Montgomery and J. Liat Rome of Williams & Connolly LLP, Sheila L. Birnbaum, Mark S. Cheffo, Douglas E. Fleming and David Weinraub of Dechert LLP, Peter Alley, Keith E. Smith and Emily H. Bryan of Greenberg Traurig LLP and Christopher M. Reilly of Sloane & Walsh LLP.

The Hyannis residents are represented by Brian Cuhna of Brian Cuhna & Associates and Louise R. Caro of Napoli Shkolnik PLLC.

The case is Christine Civitarese et al. v. The 3M Co. et al., case number 1:18-cv-10747, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Chris Villani. Editing by Orlando Lorenzo.

Update: This story has been updated with a statement from plaintiffs' counsel.