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## 3M Fire Suppressant MDL Will Be Heard In South Carolina

By **Aaron Leibowitz**

Law360 (December 11, 2018, 3:07 PM EST) -- Seventy-five cases around the U.S. against 3M and others involving contamination from the firefighting foam AFFF have been consolidated and transferred to the District of South Carolina by the Judicial Panel on Multidistrict Litigation.

Although none of the 75 cases came out of South Carolina, the panel said the district has the capacity and the right person, U.S. District Judge Richard M. Gergel, to oversee the MDL.

"This district is not burdened by many MDLs and has the capacity and resources to successfully guide this litigation," the panel wrote Friday. "More importantly, the Honorable Richard M. Gergel, who sits in this district, is an experienced transferee judge who can prudently steer the litigation."

The cases are spread across eight districts, but more than half originated in Colorado. In arguments before the panel in late November, the manufacturers favored transferring the cases to Massachusetts, while other parties voiced preferences including basing the potential MDL in Colorado or Alabama.

Also on Friday, the panel defined the scope of the MDL, ruling against a proposal by 3M to broaden the included cases to those that did not involve AFFF. 3M had **argued last month** that in addition to consolidating the 75 suits over AFFF — a fire suppressant that allegedly contaminated groundwater and harmed humans — cases that feature the same underlying chemical group, known as PFAS, should be included too.

But the panel deemed those cases outside the realm of the current MDL.

"Such an MDL could quickly become unwieldy," the panel said. "As there are relatively few non-AFFF actions, which are being managed effectively in their current districts, expansion of this MDL to include non-AFFF actions is not warranted."

Those nine additional cases deal with a range of diverse issues, the panel added.

"These nine actions are quite different from the AFFF actions and, indeed, from each other," the ruling says. "They include discharges directly into the Tennessee River by various industrial concerns in Decatur, Alabama; contamination originating from a shoe manufacturer's industrial waste; and airborne PFAS discharges from factories in Hoosick Falls, New York."

The panel said Friday that it was aware of 16 other related actions across nine districts, 10 of which involve AFFF.

In oral arguments last month, the numerous parties took a range of positions on whether to limit the MDL to AFFF. Robert A. Bilott of Taft Stettinius & Hollister LLP, an attorney for plaintiffs suing manufacturers in the Southern District of Ohio, said the non-AFFF cases should be included because it's the chemical that matters, not the product that delivered it into the groundwater.

Other manufacturers, including Tyco Fire Products LP and Chemguard Inc., proposed an MDL for the AFFF cases and took no position on 3M's proposal for a broader MDL.

Some companies wanted the MDL defined more narrowly. DuPont, for example, argued that including non-AFFF cases would "explode the scope" of the potential MDL. All PFAS are not all the same and include a range of chemicals that are in a variety of products from inks to varnishes, DuPont said.

The AFFF-centered cases often include allegations that the fire suppressant contaminated groundwater at a military base or airport. They have been brought by individual plaintiffs, municipalities and local water authorities, according to court documents.

AFFF has been linked to a range of health problems, including high blood pressure and thyroid disease, to those exposed through drinking water, according to court records.

In October, a Massachusetts federal judge granted a stay request in a case brought by Cape Cod residents against several manufacturers. The defendants said the case should be put on hold while the suits are considered for multidistrict litigation.

The foam was used during exercises at the Barnstable Fire Training Academy and Barnstable Municipal Airport, according to filings in the Cape Cod case. 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 asserted.

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

Five of the MDL panel's seven judges took part in Friday's decision: acting Chair Lewis A. Kaplan of the Southern District of New York, R. David Proctor of the Northern District of Alabama, Karen K. Caldwell of the Eastern District of Kentucky, Catherine D. Perry of the Eastern District of Missouri and Nathaniel M. Gorton of the District of Massachusetts.

The firms representing the plaintiffs include Knauf Shaw LLP, Cole Law Firm LLC, Davis & Whitlock PC, Friedman Dazzio Zulasas & Bowling PC, Heninger Garrison Davis LLC, Mark E. Martin LLC, Matsikoudis & Fanciullo LLC, Paukert & Troppmann PLLC and McDivitt Law Firm PC.

The firms representing the defendants include Mayer Brown LLP, Williams & Connolly LLP, Greenberg Traurig LLP, Day Pitney LLP and Gray Layton Kersh Solomon Furr & Smith PA.

The case is In re: Aqueous Film-Forming Foams Products Liability Litigation, MDL number 2873, in the U.S. Judicial Panel on Multidistrict Litigation.

--Additional reporting by Michael Phillis. Editing by John Campbell.

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