THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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March 20, 2018

FILE COPY

Case Name: **John Hermens, et al v Textiles Coated Incorporated d/b/a Textiles Coated International**
Case Number: **216-2017-CV-00524** ***216-2017-CV-00525***

You are hereby notified that on March 16, 2018, the following order was entered:

RE: MOTION TO STAY AND MOTION TO DISMISS:

See copy of Order attached. (Brown, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Paul Mario DeCarolis, ESQ; Kevin Scott Hannon, Esq.; Daniel E. Will, ESQ; Joshua M. Wyatt, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

John Hermens and Brenda Hermens

v.

Textiles Coated Incorporated d/b/a Textiles Coated International

Docket No. 216-2017-CV-524, -525

ORDER

Plaintiff brought these class action suits against defendant alleging trespass, nuisance, negligence, negligent failure to warn, and unjust enrichment.[1] The claims arise out of the alleged contamination of soil and groundwater by defendant. Presently before the Court are: (1) defendant's motions to temporarily stay proceedings; and (2) defendant's motions to dismiss. The Court held a hearing on January 31, 2018. Upon consideration of the pleadings, arguments, and the applicable law, the Court finds and rules as follows.

Factual Background

From approximately 1985 to 2006, defendant operated a manufacturing facility at 105 Route 101 in Amherst, New Hampshire. In the ordinary course of its business, defendant used chemicals containing ammonium perfluorooctanoate, which is a derivative of perfluorooctanoic acid (hereinafter collectively referred to as "PFOA"). PFOA is water soluble and resistant to environmental degradation, making it readily capable of groundwater contamination.

[1] The claim for unjust enrichment is only raised in 216-2017-CV-524.

Throughout its operation of the Amherst site, defendant failed to take appropriate measures to limit its release of PFOA into the area around its plant. As a result, defendant allowed PFOAs to contaminate the surrounding air, soil, and ground and surface water. Defendant also failed to warn residents in the affected area of the contamination.

On or about April 15, 2016, the New Hampshire Department of Environmental Services ("DES") performed testing on water wells in the vicinity of defendant's Amherst site and discovered PFOA contamination. On May 11, 2016, DES began recommending that certain residents in the area begin using bottled water for all household purposes, cease drinking or cooking with well water, and avoid eating vegetables grown in their gardens. While DES's investigation remains ongoing, plaintiffs initiated these actions.

Analysis

I. Motion to Stay

Defendant has moved to stay these proceedings pending the results of DES's investigation into the PFOA contamination in Amherst. In support, defendant argues the investigation could have the effect of narrowing the issues before the Court, specifically with respect to damages and liability. Defendant maintains there is a possibility that the investigation will show that it was not the sole contributor to PFOA contamination in the area. In addition, defendant argues it has already undertaken voluntary remediation measures for houses within a half-mile radius around its Amherst site in the form of installing point-of-entry water filtration systems. Finally, defendant has agreed to fund the connection of certain homes in that same radius to Amherst's public water system.

"The decision to stay or hold in abeyance a particular action is within the sound discretion of the trial court." Johns-Manville Sales Corp. v. Barton, 118 N.H. 195, 198 (1978). "A stay is not a matter of right, even if irreparable injury might otherwise result," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." Nken v. Holder, 556 U.S. 418, 433–34 (2009). "Stays cannot be cavalierly dispensed: there must be good cause for their issuance; they must be reasonable in duration; and the court must ensure that competing equities are weighed and balanced." Marquis v. F.D.I.C., 965 F.2d 1148, 1155 (1st Cir. 1992).

Defendant argues the doctrine of primary jurisdiction provides good cause for a stay. "The doctrine of primary jurisdiction provides that a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." Frost v. Comm'r, New Hampshire Banking Dep't, 163 N.H. 365, 371 (2012).

> [The doctrine] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.

Id. "Where, however, the issue or issues involve purely questions of law, the matter will not be referred to an agency." Id. The decision to not exercise jurisdiction on a particular matter is a matter of discretion for the trial court. Id. Here, defendant raises three factors in support of the application of the doctrine: (1) DES's level of expertise in the relevant issues; (2) the need for uniformity of decisions in light of DES's

investigation already being underway; and (3) judicial action by this Court may have an adverse impact on DES's investigation.

Here, plaintiffs bring common law claims alleging trespass, nuisance, negligence, negligent failure to warn, and unjust enrichment. These are actions involving questions of law that do not necessarily conflict with the DES investigation. See Sullivan v. Saint-Gobain Performance Plastics Corp., 226 F. Supp. 3d 288, 295 (D. Vt. 2016) ("No ruling on issues of negligence, nuisance, trespass, or Plaintiffs' other common-law theories, will necessarily conflict with Vermont's regulatory scheme or process regarding PFOA."). Plaintiffs seek compensatory damages for the injuries they sustained as a result of defendant's alleged negligence, and their claims do not touch on remediation measures that may be underway as part of defendant's cooperation with DES. Cf. Collins v. Olin Corp., 418 F. Supp. 2d 34, 46 (D. Conn. 2006) (dismissing only counts seeking injunctive relief requiring defendant to undertake remediation efforts already taken up by regulatory agency). Further, as the United States District Court of Connecticut noted:

> Although the resolution of the issues in this case undoubtedly will require some technical analysis, the claims—for example, whether Shell breached a duty to the plaintiffs, whether Shell trespassed or created a nuisance on the plaintiffs' property, whether Shell defrauded the plaintiffs, or whether Shell was willful, wanton or reckless in its actions toward the plaintiffs—are all of a type commonly adjudicated by the courts. They do not require extensive interpretation of agency regulations. Although the CTDEP undoubtedly possesses expertise in the area of environmental pollution, the defendant has not persuaded this court that the CTDEP's expertise is essential in adjudicating the matters at hand.

Martin v. Shell Oil Co., 198 F.R.D. 580, 585–86 (D. Conn. 2000).

With respect to uniformity, defendant argues there is significant overlap in the substantive issues before both DES and this Court. Specifically, defendant cautions that there is a significant risk of the Court issuing an order that would conflict with one from DES. As noted above, however, an award of damages will not conflict with the remediation efforts undertaken by DES.

With respect to the potential for adverse impact, defendant argues that DES regulations contain a provision that requires a financial assurance plan for any remediation efforts that will be ongoing for ten or more years. See N.H. Code Admin. Rules Env-Or 606.20(a). Defendant essentially argues an award of damages in this action may impact its ability to comply with this regulation. However, defendant also notes that it is too early to determine whether that regulation is even applicable. Therefore, as plaintiffs argue, this claim is entirely speculative and cannot serve as a basis to stay the case. For the foregoing reasons, the Court finds the doctrine of primary jurisdiction is not applicable to this case and does not provide good cause for a stay.

At the hearing, defendant also noted that in a recently issued opinion, the United States District Court for the District of New Hampshire indicated the possibility that it would certify a question to the New Hampshire Supreme Court on the availability of a claim for medical monitoring damages, one of the claims brought by plaintiff in this case. See Brown v. Saint-Gobain Performance Plastics Corp., No. 16-cv-242-JL, 2017 WL 6043956, at *7 (D.N.H. Dec. 6, 2017.) However, the federal court provided no timeline for this decision, and the Court is not inclined to grant a stay on such a nebulous basis. Accordingly, defendant's motion for a temporary stay is DENIED.

II. Motions to Dismiss

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

1. Property Damage

Defendant first argues plaintiffs have no right to bring an action seeking damages for contamination of their groundwater as the State of New Hampshire holds all water in the state in the public trust. See RSA 481:1; 485-C:1, II. "The right to use water does not carry with it ownership of the water lying under the land." In re Town of Nottingham, 153 N.H. 539, 548 (2006) (quoting Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 668 (Fla. 1979)). "The loss of the use of ground water is not a loss of the use or enjoyment of the overlying land. In this case, plaintiffs' complaint, alleging only a deprivation of the flow of groundwater, did not state a claim for compensation." Id. at 549 (quoting Smith v. Summit County, 721 N.E.2d 482, 488 (Ohio Ct. App. 1998)). In Nottingham, the New Hampshire Supreme Court found that plaintiff did not demonstrate

a protected property interest in the groundwater under their land, and thus could not establish the grant of a groundwater withdrawal permit amounted to a constitutional taking. Id. at 548–49.

Here, plaintiffs do not merely allege the deprivation of the flow of groundwater. Rather, they allege contamination of the "air, soil, structures, trees, groundwater wells, household piping, and other property owned and used by plaintiffs." (Compl. ¶ 22.) None of the cases cited by defendant preclude claims alleging such contamination. In Ivory v. International Business Machines Corp., while the court did state that plaintiffs could not bring trespass claims based on contaminated groundwater because they lacked an ownership interest in it, it explicitly permitted trespass claims for contaminated soil that resulted from said groundwater contamination. 983 N.Y.S.2d 110, 116 (N.Y. App. Div. 2014). In Baker v. Saint-Gobain Performance Plastics Corp., the court recognized the availability of a trespass action to remedy the contamination of a private well, noting that "it is the possessory interest in the well itself that is invaded" and that "the groundwater . . . was simply the medium through which [the plaintiff's] property was invaded." 232 F. Supp. 3d 233, 247 (N.D.N.Y. 2017). The Court finds these cases persuasive. While plaintiffs may not have an ownership interest in the groundwater that flows under their land, this does not preclude recovery for contamination of property they do own.

Accordingly, defendant's motion to dismiss with respect to plaintiff's claims for trespass, nuisance, negligence, and negligent failure to warn is DENIED.

Defendant next argues the plaintiffs cannot maintain a claim for unjust enrichment. "Unjust enrichment is an equitable remedy that is available when an

individual receives 'a benefit which would be *unconscionable* for him to retain.'" Axenics, Inc. v. Turner Const. Co., 164 N.H. 659, 669 (2013) (quoting Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 210 (2009)). "The party seeking restitution must establish not only unjust enrichment, but that the person sought to be charged had wrongfully secured a benefit or passively received one which it would be unconscionable to retain . . . ." General Insulation Co. v .Eckman Const., 159 N.H. 601, 611 (2010).

In their complaint, plaintiffs allege defendant has benefited from failing to make expenditures on proper containment and disposal procedures at its manufacturing site. In Brown, a case involving virtually identical facts, the United States District Court rejected such a claim, characterizing it as one for "negative unjust enrichment" not recognized in New Hampshire. Brown v. Saint-Gobain Performance Plastics Corp., No. 16-cv-242-JL, 2017 WL 6043956, at *9–10 (D.N.H. Dec. 6, 2017). In addressing unjust enrichment in the area of toxic torts, the United States District Court for the District of Nevada has stated:

> It is possible that a toxic tort plaintiff could allege a claim under an unjust enrichment theory. For example, a plaintiff could allege that a defendant stored barrels of toxic materials or heaps of waste materials on the plaintiff's land without payment, making the defendant liable for the value of the storage under an unjust enrichment theory. But Plaintiffs here only appear to allege storage of materials on Defendants' own land, with the resulting toxic seepage better characterized as trespass, negligence, nuisance, or battery. Particularly, because Plaintiffs do not allege ever to have permitted or acquiesced in the "storage" of anything directly on their own land with the expectation of payment, the unjust enrichment claim does not lie here.

Roeder v. Atlantic Richfield Co., No. 3:11-cv-105-RCJ-RAM, 2011 WL 4048515, *1 at *8 (D. Nev. Sept. 8, 2011).

The Court is persuaded by these cases that no action for unjust enrichment lies here. Plaintiffs' claims are appropriately and adequately addressed by their counts for trespass, nuisance, negligence, and negligent failure to warn. Accordingly, defendant's motion to dismiss with respect to plaintiff's claim for unjust enrichment is GRANTED.

2. Medical Monitoring

In their second action, plaintiffs allege many of the same causes of action as in the first—nuisance, negligence, and negligent failure to warn—but seek a specific remedy: the cost of a medical monitoring program for the purpose of detecting diseases caused by their exposure to PFOA. Defendant argues this relief is unavailable under New Hampshire law, and the action must therefore be dismissed. In support of its claim, defendant raises four arguments: (1) plaintiffs lack a present injury required to bring a claim; (2) plaintiffs' action is prohibited due to the speculative nature of their damages; (3) plaintiffs' action is barred by the economic loss doctrine; and (4) there already exists a sufficient administrative remedy. The Court will address each argument in turn.

a. Present Injury

Defendant argues that plaintiffs' medical monitoring claim ought to be dismissed because they fail to establish the existence of a present injury. Plaintiffs object, arguing their claim does not require a showing of a present physical injury. This issue appears to be one of first impression in New Hampshire, but both parties cite a number of cases from outside jurisdictions in favor of their respective positions.

On the one hand, some courts reject claims for medical monitoring on the simple basis that plaintiffs have not yet suffered a present physical injury, and their claims of

injury are therefore merely speculative. See Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 3 (Miss. 2007); Henry v. Dow Chemical Co., 701 N.W.2d 684, 688 (Mich. 2005); Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849, 852 (Ky. 2002).

On the other hand, some courts take a less restrictive view of what constitutes an injury. In Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984), the court held that "an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury." Id. at 826. The Court created the following hypothetical to simplify the issue:

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

Id. at 825. The Court stated that from this example, "it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action." Id. Looking to the Restatement (Second) of Torts § 7, which defines injury as "the invasion of any legally protected interest of another," the Court concluded that "[w]hen a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations." Id.

The Supreme Court of California later followed this reasoning, allowing recovery of "expenditures for prospective medical testing and evaluation, which would be unnecessary if the particular plaintiff had not been wrongfully exposed to pollutants."

Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 822 (Cal. 1993). The Court stated that "[i]t bears emphasizing that allowing compensation for medical monitoring costs does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate." Id. at 824. "[I]t would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary." Id.

A number of other courts have also "reject[ed] the contention that a claim for future medical expenses must rest upon the existence of present physical harm." Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 430 (W.Va. 1999); see also Sadler v. PacifiCare of Nev., 340 P.3d 1264, 1269 (Nev. 2014) (listing cases both for and against); Exxon Mobil Corp. v. Albright, 71 A.3d 30, 75–76 (Md. Ct. App. 2013) (finding "exposure itself and the concomitant need for medical testing is the compensable injury for which recovery of damages for medical monitoring is permitted because such exposure constitutes an invasion of a legally protected interest"). The key distinction between the cases that accept or reject claims for medical monitoring is the definition of injury, with those permitting such claims placing emphasis on the Restatement's definition, which is broader than mere physical injury. The Court finds this approach to be the more persuasive and equitable course. The Court therefore finds the plaintiffs' complaint alleging exposure to PFOA as a result of the negligent acts of defendant adequately establishes the existence of an injury.

In recognizing a claim for medical monitoring, the Court further adopts the standard set forth in Bower, which found that in order to sustain such a claim, plaintiff must prove that:

> (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

522 S.E.2d at 432–33.

b. Speculative Cost

Defendant argues damages for medical monitoring are by their nature speculative, as actual physical injury may never manifest. Moreover, defendant argues the issue is even more pronounced here given that PFOA is known to cause a wide range of medical complications. (See Compl. ¶ 21.) However, as the Court noted above in order to prevail on their claim, plaintiffs will need to establish reasonable necessity of medical testing as determined by a medical professional. Therefore, the Court agrees with plaintiffs that this is not an appropriate argument to make at the motion to dismiss stage, where plaintiffs lack the benefit of discovery, expert testimony, and the submission of evidence. Moreover, plaintiffs' class is defined by geographic area, levels of PFOA contamination, and length of exposure. Further, the damages sought are confined to periodic testing as will be determined by medical professionals.

The Court notes that the method used to compute damages "need not be more than an approximation." Boynton v. Figueroa, 154 N.H. 592, 606 (2006). In addition,

relief should not be barred just because PFOA causes more types of physical illnesses than other substances, such as asbestos.

c. The Economic Loss Doctrine

"The economic loss doctrine is a common law rule that emerged with the advent of products liability." Plourde Sand & Gravel v. JGI Eastern, Inc., 154 N.H. 791, 794 (2007). It is a "judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." Id. Courts have "expanded the economic loss doctrine to bar economic recovery in tort cases where there is no contract and thus no privity." Id. at 795. "The policy behind this principle is to prevent potentially limitless liability for economic losses . . . ." Id. "In New Hampshire, the general rule is that persons must refrain from causing personal injury and property damage to third parties, but no corresponding tort duty exists with respect to economic loss." Id.

Again, there is case law supporting both parties' positions. For example, the Oregon Supreme Court has held that that cost of medical monitoring "is not sufficient to give rise to a negligence claim" under the economic loss doctrine. Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 186 (Or. 2008). While the New York Court of Appeals acknowledged "an important public health interest in fostering access to medical testing," it could not ignore "the potential system effects of creating a new, full-blown, tort law cause of action." Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 17–18 (N.Y. Ct. App. 2013). The Court noted the risk of "tens of millions" of potential plaintiffs

"flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage." Id.

Courts that find the economic loss doctrine bars actions for medical monitoring tend to do so on the basis that "plaintiffs attempt to blur the lines between 'damages' and 'injury'" and their "economic losses are whole derivative of a *possible, future* injury rather than an *actual, present* injury." Henry, 701 N.W.2d at 691. In other words, these cases also tend to not recognize claims for medical monitoring generally. Because this Court has recognized such a claim, it finds the reasoning of these cases unpersuasive with respect to the economic loss doctrine.

On the other hand, in Sadler, the Court determined that the economic loss doctrine did not bar the plaintiffs' medical monitoring claim on the basis that the plaintiffs' injury—exposure to unsafe injection practices that put them at increased risk for contracting blood-borne diseases—"are noneconomic detrimental changes in circumstances that the [plaintiffs] would not have experienced but for the negligence of [the defendant]." 340 P.3d at 1268. The Court in Potter also noted the fear of opening "the floodgates of litigation" is addressed by the "substantial evidentiary burdens for toxic exposure plaintiffs." 863 P.2d at 825. "[T]oxic exposure plaintiffs may recover only if the evidence establishes the necessity, as a direct consequence of the exposure in issue, for specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight." Id. The Court again finds this reasoning compelling and finds that the economic loss doctrine does not bar plaintiffs' claim.

d. Administrative Remedy

Defendant finally argues current New Hampshire administrative regulations provide for an adequate administrative remedy. Defendant relies on regulations in Env-Or 600 that establish "[p]rocedures and requirements for the investigation, management, and remediation of contamination from the discharge of regulated contaminants that adversely affect human health or the environment resulting from human operations or activities." NH Admin. Rule Env-Or 601.01(a). Rule Env-Or 606.10(d)(1) establishes a remedial action plan that, among other things, "[p]rovide[s] for protection of human health."

Plaintiffs argue this remedial action plan does not address the harm to plaintiffs individually, but focuses on cleaning up soil and water and ensuring no further contamination. Plaintiff further notes that defendant fails to cite any actual instance in which the regulations have been applied to address claims like those raised in this case. The Court agrees with plaintiff. Defendant has provided no support for its position that the rule authorizes DES to provide specific damages for plaintiffs' injuries in this case.

Accordingly, for the foregoing reasons, defendant's motion to dismiss plaintiff's claim for medical monitoring is DENIED.

SO ORDERED.

3/16/18
Date

K.C. Brown
Kenneth C. Brown
Presiding Justice