# Recent Sixth Circuit Decision May Define the Landscape of PFAS Litigation

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On November 27, 2023, the Sixth Circuit Court of Appeals issued an important decision reversing class certification that could significantly impact the future of PFAS litigation, particularly where plaintiffs have attempted to rely on medical monitoring claims in lieu of attempting to prove that exposure to PFAS chemicals actually caused bodily injury. By way of background, in 2018, Plaintiff Kevin D. Hardwick (Mr. Hardwick or plaintiff) served as a firefighter for over 40 years and, in that role, used firefighting foams containing per- and polyfluoroalkyl substances (PFAS). While Mr. Hardwick did not suffer from any medical condition allegedly caused by exposure to PFAS chemicals, he sought injunctive relief through the establishment of a science panel to study the adverse impact of PFAS on human health, as well as medical monitoring for its affected class members. Mr. Hardwick brought his claims against ten defendants and alleged that those defendants were responsible for causing five different PFAS compounds to be found in his blood. Based on these allegations, Mr. Hardwick moved to certify a class of every person "residing within the United States at the time of class certification for one year or more since 1977 with 0.05 parts per trillion (ppt) or more of PFOA [Perfluorooctanoic Acid, a type of PFAS] and at least 0.05 ppt or more of any other PFAS in their blood serum." The Sixth Circuit aptly noted that such a class would comprise nearly every individual in the United States. While the lower court did not go so far as to certify a class of all Americans, it did certify a class comprising every person "subject to the law of Ohio" who had 0.05 ppt of PFOA and at least 0.05 of any other PFAS in their blood serum.

The Sixth Circuit granted interlocutory review and reversed with instructions to dismiss the case. The court made clear from the outset what it thought about this class action when it began its opinion with the statement: "[s]eldom is so ambitious a case filed on so slight a basis." Ultimately, the Sixth Circuit held that Mr. Hardwick did not have standing to bring the claims. Focusing on "traceability," the court held that Mr. Hardwick was required to show that each of the ten defendants likely caused Mr. Hardwick's injury—the presence of PFAS compounds in his blood. The Sixth Circuit ruled that Mr. Hardwick failed to carry this burden for two reasons. First, Mr. Hardwick treated all defendants as a collective, failing to assert specific factual allegations against each defendant. The court emphasized that "a plaintiff cannot sue ten defendants—by lumping them all together in his allegations—when the more particular facts would allow him to proceed against only one. (Much less none)." Absent a showing that Mr. Hardwick could tie his alleged injury to each defendant, his claims failed. The Sixth Circuit also dismissed Mr. Hardwick's claims on the grounds that the allegations were conclusory. Mr. Hardwick failed to show that the Defendants caused the particular compounds to be present in Mr. Hardwick's blood. Based on the above reasoning, the Sixth Circuit remanded with instructions to dismiss the case for lack of jurisdiction.

As sister courts across the country assess similar class certification questions involving PFAS claims, this decision seems to indicate that courts will not allow plaintiffs to extend Rule 23 beyond its legal limits to accommodate PFAS claims. That may make PFAS class actions more difficult, particularly given the ubiquity of PFAS in the environment. It certainly has the potential to shape future decisions.