Battle Over PFAS: Michigan Supreme Court Takes on Regulatory Challenge

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On Friday, April 26, 2024, Michigan Supreme Court Justices accepted a briefing from the Homebuilders Association of Michigan in support of a manufacturer's challenge to the State's maximum containment levels for certain per- and polyfluoroalkyl substances (PFAS).

After Michigan State regulators finalized new PFAS drinking water limits in 2020, which implemented new drinking water limits for seven PFAS and created testing rules for public agencies and private businesses, the rulemaking was challenged by a manufacturer. The manufacturer argued Michigan's Department of Environment, Great Lakes and Energy (EGLE) never calculated costs businesses would incur via compliance with updated groundwater cleanup standards and stated these costs were affected by the newly imposed PFAS limits. In November 2022, the Michigan Court of Claims ruled that EGLE failed to conduct a cost analysis to determine how businesses would be affected by the cost of groundwater cleanup under the new standards. According to the Court of Claims, this violated the State's Administrative Procedure Act, which requires a regulatory impact statement to include projections of "statewide compliance costs of the proposed rule on businesses and other groups." The state subsequently appealed this ruling.

In August 2023, a divided appellate panel invalidated the PFAS drinking water limits, citing EGLE's failure to perform the requisite business cost analysis required under Michigan law. Per the court's ruling, EGLE identified estimated actual statewide compliance costs of the proposed rule with regard to businesses and groups but did *not* estimate costs that legislation changes would automatically impose as a result of groundwater cleanup. Michigan regulators claimed it would be too complicated to estimate these compliance costs and any estimation would likely be inaccurate, considering EGLE did not know the exact number of PFAS contaminated in the State, or what exactly was required to clean up each site. Because Michigan law requires cost estimates be included, and the court did not grant an exception simply because EGLE deemed it was "impossible."

Considering the case outcome will impact the promulgation of new state agency regulations, the Homebuilders Association supported the manufacturer's position on the issue, as it is concerned with how new regulations could potentially affect building codes set by the State's Department of Licensing and Regulatory Affairs. Thus, given the new and evolving regulatory landscape, it is critical for all businesses—even those who may not directly work with PFAS—to keep abreast of new regulations and guidelines in this ever-changing landscape.

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