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PROVIDING WATER:

RISK of a LITIGATION FLOOD ?

**EMERGING CONTAMINANTS
+ FEAR OF DISEASE =**

◀
THE PERFECT STORM

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When it matters

Introduction

- Two pressure systems are colliding to create the perfect storm for liability for drinking water suppliers
- Emerging contaminants and identified risks from disinfection byproducts and microbial pathogens =fuel for
- Mass toxic tort litigation claiming
 - Emotional distress caused by fear of developing a disease and
 - Future medical monitoring costs for increased risk of developing a disease.

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Traditional Tort Law Elements

- Liability for negligence =
 - ❑ Breach of Duty Owed
 - ❑ Breach Caused Harm to Plaintiff
 - ❑ Plaintiff suffered identifiable damages

- Duty owed by water providers =
 - ❑ To provide safe water supply
 - ❑ To comply with regulatory requirements
 - ❑ To warn of unsafe conditions

- Strict Liability =
 - ❑ Liability of a seller of a defective product to a consumer
 - ❑ Furnishing water supply = sale of goods

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Duty to Supply Safe Water

- Common law of tort negligence imposes duty to exercise reasonable care to furnish pure water
- "Reasonable care" transformed into higher level of duty due to potential impact on public health
- Duty of providing safe water rests
 - 1st with the public water supplier
 - 2nd, with the federal & state governments as regulators/enforcers of laws & regulations such as SDWA

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Compliance with Statutory Law

- Basic obligation to comply with laws and regulations
- Failure to comply = fines, civil, criminal penalties and per se negligence
 - No need to prove elements of negligence
 - Punitive damages applied as deterrent/ no relationship to harm suffered
- Failure to comply with any of EPA SDWA provisions = increased liability under common law.

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Sovereign Immunity

- Many public water suppliers are municipalities or quasi-governmental
- Sovereign immunity= immune from liability because performing governmental function
- Supplying water for a price has been held by courts to be proprietary/not governmental
- Municipalities /public water suppliers liable like any private corporate entity supplying water- No IMMUNITY

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Duty to Warn

- In either negligence or strict liability
- Failure to warn= liability
- Safe Drinking Water Act (SDWA) requires duty to warn of
 - Violation of National Primary Drinking Water Regulation (NPDWR)
 - Failure to monitor per SDWA 1445(a)
 - Noncompliance with the terms of a variance or exemption

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Duty to Warn (cont)

- Dependent on whether SDWA “intermittent” or “continuous” violation must warn consumers at different times during year
- If SDWA violation has high likelihood of serious health risk must:
 - Notice customers within 24 hours of violation of
 - the nature of the violation
 - possible health risks posed by the violation,
 - procedures taken to remedy violation, and
 - necessity to seek alternative water supplies until the violation is corrected

Don't matter



Duty to Warn

- Failure to meet regulatory duty to warn
 - Per se liability
 - Punitive damages

- Even if no regulatory duty to warn, liability for failure to warn if
 - Risk was either knowable or reasonably foreseeable

 - Injury could have been avoided by an adequate warning

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Duty to Warn

- Duty to Warn applied to Emerging Contaminants
 - ❑ USGS identified EDCs/ PACs/triclosan in influent, & supplied water & fish tissue
 - ❑ Community consumes water
 - ❑ Community has higher than average incidences of pathology associated with exposure to EDCs/PACs /triclosan
 - ❑ Water supplier attended EC Conference 9/19/05
 - ❑ Liability for failure to warn?

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Infliction of Emotional Distress

- Intentional and unreasonable subjection of another to emotional distress
- Which should be recognized as likely to result in illness or other bodily harm=
- Liability for illness or other bodily harm of which the distress is a legal cause
 - Although no intent of inflicting such harm, and
 - Irrespective of whether the act is directed against the other or a third person

When it matters

Medical Monitoring Claims

- Independent cause of action to recover future medical monitoring costs absent physical injury where it can be proven that
 - such expenses are necessary and
 - reasonably certain to be incurred
 - as a proximate result of defendant's tortious conduct
- *Bowers v. Westinghouse Electric Corp.*, July 1999, W.Va. Supreme Court

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Elements for Medical Monitoring Claim

- (1) Plaintiff has been significantly exposed;
- (2) To a proven hazardous substance
- (3) By the tortious conduct of the defendant
- (4) As a proximate result of the exposure, plaintiff has increased risk of contracting a serious, latent disease;
- (5) Increased risk of disease makes it reasonably necessary for plaintiff to undergo periodic medical examinations different from what would be prescribed in the absence of exposure; and
- (6) Monitoring procedures exist for early detection of disease .

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Elements for Medical Monitoring Claim

- 1. **Significant Exposure**
 - No specific level of quantification necessary to establish “significant exposure”
 - No requirement to show that exposure was greater than normal background exposure levels of the general population.
 - Bower unusual; most cases require need for significant exposure relative to the general population
 - Only requirement: plaintiff must first be exposed to a hazardous substance.

When it matters

Elements for Medical Monitoring Claim

■ 2. **Proven Hazardous Substance**

- Plaintiff must present “scientific evidence demonstrating probable link between exposure to a particular compound and human disease.”

■ 3. **Tortious Conduct**

- Plaintiff must show that the defendant is legally responsible for exposing the plaintiff to a particular hazardous substance.
- Legal liability is established through application of existing theories of tort liability such as negligence, strict liability

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Elements for Medical Monitoring Claim

- 4. **Increased Risk of Contracting a Serious, Latent Disease**
- Plaintiff does not need to show that a particular disease is certain or even likely to occur as a result of the exposure
- Plaintiff must only show is that he has “a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.”

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Elements for Medical Monitoring Claim

■ 5. Periodic Medical Exams

“Reasonably Necessary”:

- A qualified physician would prescribe such treatment based upon exposure to a particular toxic agent
- Plaintiff does not need to establish that a treatment currently exists for the disease that is the subject of medical monitoring
- Necessity may be shown in a situation “where such a determination is based, at least in part, upon the subjective desires of a plaintiff for information concerning his or her health.” Bower.

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Elements for Medical Monitoring Claim

- **6. Procedures Exist that Make Early Detection Possible**
- Medical monitoring must be available to be a necessary, compensable item of damages.
- No requirement that plaintiff show that a treatment currently exists for the disease that is the subject of medical monitoring.

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Public Policy Goals Favoring Medical Monitoring

- (1) Foster access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, based on the value of early diagnosis and treatment for many cancer patients.
- (2) Deterrence value for medical surveillance claims – “allowing plaintiffs to recover the costs of this care deters irresponsible discharge of toxic chemicals by defendants.”
- (3) Availability of remedy before the consequences of the plaintiffs’ exposure are manifest may have beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to responsible parties.
- (4) Societal notions of fairness and elemental justice are better served by allowing recovery of medical monitoring costs.

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Conclusions:

- Emerging Information on Emerging Contaminants &/or Known Information on Known Contaminants creates risk of:
- TOXIC TORT CLAIM BASED ON:
 - Pick several !!!:
 - Negligent failure to supply safe water supply
 - Per se Liability for failure to comply with regulatory requirements—leading to punitive damage awards
 - Strict Liability
 - Failure to Warn
 - Intentional infliction of emotional distress
 - Medical monitoring claims

When it matters