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The Expanding Legal Frontiers in Ethylene Oxide Litigation

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Environmental Protection Agency and state-level cancer risk assessments continue to prompt litigation in communities near facilities that use ethylene oxide, or EtO, to sterilize products, principally medical devices. There have been some significant plaintiff verdicts, but the sterilizers have also won several outright defense verdicts. Nevertheless, plaintiffs' counsel continue to bring suits against a widening target list of facilities and companies. Perhaps the Trump EPA's active reconsideration of National Emission Standards for Hazardous Air Pollutants (NESHAPs) for commercial sterilizers, which could result in revocation of the 2024 Final Rule, will shed light on flawed science used by plaintiffs in litigation, which we have already critiqued. Still, EtO litigation presents a dynamic landscape, with a growing body of literature about EtO's purported toxicity and an increasing number of filed cases.

Plaintiffs are creatively expanding and diversifying legal claims related to EtO exposure. Claims related to medical monitoring, property damage and civil conspiracy are becoming more common and we expect plaintiffs' counsel to attempt to expand litigation against defendants who maintain EtO storage facilities or warehouses.

Courtesy photos

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No-Injury Medical Monitoring Claims

Plaintiffs allege that EtO exposure necessitates ongoing medical monitoring, even in the absence of a present diagnosis with a disease allegedly capable of being caused by EtO. For example, plaintiffs in Philadelphia claim that "[m]onitoring procedures exist that make possible the early detection of cancer, the disease processes of cancer, and the progression of biomarker abnormalities [and] [t]hese monitoring procedures … are reasonably necessary due to [plaintiffs'] exposure to [EtO] emissions." *Abdelaziz v. B. Braun Medical*, Case No. 1550 EDA 2020 (Pa. Super. Ct.). While some jurisdictions recognize

no-injury medical monitoring as a legal cause of action, others do not. Compare *Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137 (Pa. 1997) with *Temple-Inland Forest Products v. Carter*, 993 S.W.2d 88 (Tex. 1999).

No-injury medical monitoring claims in this context should be difficult to prove and implement, even where recognized. Where claims are based on injuries that have not yet occurred, it becomes difficult to prove causation. Simply stated, a plaintiff cannot show, through expert opinions or otherwise, that a defendant caused an injury if no physical injury has been manifested. In cases where the lack of bodily injury may be overcome, legal tests used to determine the appropriateness of medical monitoring awards vary among jurisdictions and may be vague, leading to inconsistent awards. Even in cases where plaintiffs experience exposure to the same substance, medical examinations needed for diagnosis or monitoring must be individualized to consider each plaintiff's medical history and alternative risk factors. Without the necessary medical and scientific expertise, courts typically struggle to determine a proper across-the-board diagnostic scheme for a class of plaintiffs.

In practice, results of medical monitoring claims in the EtO context have been mixed. Despite West Virginia's recognition of no-injury medical monitoring claims, a West Virginia federal court was reluctant to apply state law and instead adopted defendant Union Carbide's Article III standing argument—requiring injury-in-fact that is concrete, particularized and actual or imminent (among other things)—leading to dismissal. In contrast, in Puerto Rico, a federal magistrate judge did not dismiss medical monitoring at the motion to dismiss stage, despite recognizing that "under Puerto Rico law, Plaintiffs are not entitled to compensation for potential or speculative injuries." Omnibus Report and Recommendation, *Perez-Maceira v. Customed*, No. 3:23-cv-01445 (D. P.R. May 23, 2025).

Plaintiffs likely will continue to include medical monitoring claims in their complaints, especially in state courts where there are no federal standing requirements, with the intent to play up damages.

Property Damage Claims

Plaintiffs have expanded the scope of their legal claims to property damage and devaluation. According to plaintiffs, EPA's classification of EtO as "carcinogenic to humans" when inhaled, along with EPA's highlighting of elevated cancer risks near EtO-emitting facilities, has created the public perception of increased health risks in affected communities. Plaintiffs argue that this alleged change in public perception results in a reduction in property value and makes it difficult for them to sell their homes and relocate. Plaintiff landowners pursue compensation for property devaluation, seeking financial recovery for the loss of home value.

Such stigma damage claims are not universally recoverable and come with challenges in proving causation. Despite the questionable merit of these claims, plaintiffs tack them on to complaints to boost settlement values. Legal precedent is still developing on these kinds of claims, and the outcome of ongoing litigation will continue to shape how courts address EtO-related property damage claims and whether plaintiffs will continue to bring them.

Storage Facilities

Storage facilities and warehouses where sterilized equipment is kept are a potential target

for EtO claims due to alleged emissions from EtO off-gassing following the sterilization process. While EPA has set strict emissions limits for sterilization facilities, it has not proposed standards for off-site warehouses yet. Georgia is currently the only state to require warehouse air permits and continuous monitoring. Activists have been encouraging other states and citizens to investigate storage facilities and warehouses to learn more about potential EtO emissions in an effort to prompt state regulation of EtO monitoring and emissions.

Plaintiffs have already started pursuing cases that transcend residential exposure from EtO sterilization facilities. For example, in May 2025, a jury awarded $20 million to a truck driver who claimed his exposure to EtO during stops at a sterilization facility, where he picked up boxes of sterilized equipment, caused his injury. It would be surprising if the plaintiffs' bar did not seize the opportunity to pursue warehouses as another litigation target.

Civil Conspiracy

For claims such as civil conspiracy, plaintiffs have begun to target companies other than sterilizers and storage facilities, including their parent companies, landlords and co-located businesses. Plaintiffs tie their civil conspiracy claims to other legal claims, like negligence or fraudulent concealment, and allege, among other things, that defendants conspired to conceal from plaintiffs and the public the health risks of EtO, as well as the amounts of EtO emitted from the sterilization facility.

Plaintiffs bringing civil conspiracy claims face numerous hurdles even in the context of EtO litigation: finding direct evidence of an agreement between defendants, establishing intent to commit a wrongful act and demonstrating proof of an overt act taken in furtherance of the conspiracy's objective, among others. While civil conspiracy claims are more difficult to prove, they serve as a legal tool for plaintiffs to keep multiple actors, and therefore multiple pockets, involved in the litigation. These claims are also often asserted against in-state defendants to defeat diversity jurisdiction and avoid federal court; in many instances, the defendants are fraudulently joined.

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The developments mentioned above are by no means exhaustive. Plaintiffs also have filed public and private nuisance claims related to EtO emissions, which on their face are a stretch, but that is a topic for another time. It is inevitable that plaintiffs will continue to expand their creative range of claims related to EtO emissions.

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