THE BEST OF TIMES, THE WORST OF TIMES AT CAMP LEJEUNE

By Howard L. Nations

As we emerge mercifully from the chaos and quagmire of filing administrative claims, we find that our track 1 trial cases are advancing towards trials beginning in the Summer of 2025. We also carefully observe the progress of the Camp Lejeune Justice Act of 2024 in the House of Representatives, which involves the possibility of obtaining jury trials at the expense of the loss of a substantial portion of our fees. Some will regard recapturing the right to trial by jury as the best of times, while many will regard capping of our fees as the worst of times. And so it goes at Camp Lejeune.

The Camp Lejeune litigation is progressing simultaneously in multiple phases, including extensive discovery in preparation for trials in the Track 1 Trial Plaintiff cases; closure of claim filing in the Department of Navy Claims Administration; and game-changing legislation, the Camp Lejeune Justice Act of 2024, pending in the United States House of Representatives.

Discovery- In the 25 Track 1 Trial Plaintiff cases, discovery by both parties proceeds apace. Fact discovery ended on August 11, 2004, during which the United States completed 100 depositions of plaintiffs plus 271 discovery depositions of fact witnesses, including physicians. The United States also produced almost 2 million files, consisting of more than 22.6 million pages of records.

Plaintiffs are pursuing scientific discovery through the National Academy Of Sciences, through which the Navy sponsored a 2009 study of associations between adverse health effects and the contaminated water at Camp Lejeune, known as the NRC 2009 Report.

Plaintiffs also seek discovery from the Agency for Toxic Substance and Disease Registry (ATSDR) pertaining to the Cancer Incidence Study. Dr. Frank Bove will be deposed on this important topic.

In addition to these specific scientific studies, the court has issued a scheduling order related to discovery and briefing deadlines for expert discovery on toxic chemical exposure over time by the water at Camp Lejeune, general causation, specific causation, and damages. The docket control Order runs through July 18, 2025, to complete expert discovery. This indicates that we cannot anticipate trials of Track 1 cases until August 2025 at the earliest.

Administrative Claims- By 11:59 P.M. on August 10, 2024, the Department of Navy had received more than 546,500 filed Administrative Claims. This number is inflated by a substantial number of duplicates filed by attorneys who could not locate their original filings in the portal. There were neither settlements nor settlement negotiations of these portal cases other than the Elective Option for hand-picked Plaintiffs.

This is significant because Congress included the Administrative Claim process in the original CLJA, which was to give Navy JAG the opportunity to settle

a substantial percentage of cases to reduce the workload on the judges. However, from its inception, Navy Jag indicated that it did not have the workforce, the technology, or the budget to undertake settlement negotiations, so there would be none. At our initial meeting with the Court in April 2023, the Judge was upset to learn that not a single settlement offer had been made to a Plaintiff in the eight months since the bill was passed, and there was no plan for settlement negotiations by either Navy JAG or the Department of Justice.

To allay the Court's anger, the DOJ and DON devised the Elective Option grid as a means of opening settlement negotiations. On even cursory examination, the Elective Option turned out to be a system through which the government could hand pick veterans whom they thought were financially desperate enough to accept pennies on the dollar for their valuable Tier 1 cases, e.g., $100,000 for a Parkinson' Disease case; $150,000 for leukemia; or kidney cancer for $150,000.

The Elective Option experiment has not been as successful as the DOJ/ DON hoped. Of the first 323,135 claims filed, DON identified only 137 claimants that may be eligible for an Elective Option settlement offer. DON extended 109 settlement offers, which resulted in 64 settlements. Recently, DOJ has paid $23,400,000 for 98 settled cases, averaging $243,750 per case. To date, 46% of the offers made for cases in litigation and 61% of the offers made for the claims at the Administrative level have been accepted.

Despite the nominal number of successful settlements, the E/O campaign has been successful from the viewpoint of trial scientists in that the values listed in the E/O criteria have now become embedded in the minds of the factfinders as reference points for the value of the Tier 1 E/O cases. For example, when the Judges see the nine tier 1 E/O cases: kidney cancer, liver cancer, Non-Hodgkin lymphoma, leukemias, bladder cancer, multiple myeloma, Parkinson's disease, kidney disease (ESRD), systemic sclerosis, or systemic/ scleroderma, their unconscious mind will automatically associate the diseases with the E/O case values: $100,000, $150,000, $250,000, $300,000, $400,000 or $450,000. This extremely low dollar range of recovery will unconsciously become their starting point in assessing damages in the absence of Plaintiff's more sensible, much higher values.

Our judges are exposed to these diseases and their low-dollar reference points constantly as additional cases settle. These case values are cited by the Magistrate and written up in each Status Report. You are in trouble when the Court begins citing the Defense's low reference point values in official Court documents.

Many lenders and vendors have adopted these low values as the projected settlement values in the cases because these are the only numbers they see published in a grid and distributed by the DOJ as a Court document.

As Plaintiffs in a jury case, we always work our reference point case value into the juror questionnaire, voir dire examination, and opening so when each juror begins forming their own trial story about the case; ours is generally the first value that they consider.

With Judges sitting as factfinders, I suggest that we point out the FSIA verdicts being issued out of the District Courts of the District of Columbia to Wounded Warriors and Gold Star families who are wounded and killed by terrorist organizations. Since 2016, when FSIA was enacted, numerous federal judges sitting as factfinders have awarded millions of dollars to clients whose lives, like our present clients, have been destroyed by the egregious conduct of the defendant. Significantly, every judge who handles these cases awards verdicts in the range of ten million dollars to these young soldiers and their families. We should offer a Damages Brief to our Judges with detailed citations to the District of Columbia Courts' adopted methodologies of calculating and awarding damages. That is a powerful reference point. Additionally, there are striking similarities between the dockets: Plaintiffs are veterans who were injured or killed by the egregious conduct of the defendant; verdicts are paid by the United States government; Camp LeJeune directly and Wounded Warriors out of the USVSST fund, which is funded by the U.S. Government.

Finally, in the Elective Option grid, the Department of Justice is offering a clear guide to the cases that they intend to negotiate for settlement: those that are supported by adequate science, acknowledged in the ATSDR as Tier 1, and those diseases that are supported by expert testimony that can clear Daubert. Why should the DOJ pay a claim not supported by expert testimony that qualifies under Daubert.

One cautionary tale: ATSDR is not the final authority, nor is their Tier 1 list of diseases the only cases that may qualify with an expert under Daubert. The fact that a disease was not identified as Tier 1 in the ATSDR may be because they chose not to test that particular disease. It may also be that there were insufficient studies to judge the disease.

The solution to qualifying additional diseases for settlement or trial is to hire an epidemiologist who will update the ATSDR data with respect to your selected disease to determine if new studies have been completed that produced new scientific support to qualify the disease through your expert under Daubert. Since the 2018 ATSDR, there have been multitudes of additional disease studies, particularly since many of the studies cited in the 2018 ATSDR were conducted in 2011 or 2012. These could easily be updated with the fresh scientific studies needed to qualify other diseases for compensation.

Camp Lejeune Act of 2024 The most substantial factor in determining the future of Camp Lejeune litigation is the legislation pending in the House of Representatives, known as the Camp Lejeune Justice Act of 2024. In this proposed legislation, Ed Bell, lead counsel of the CLJ litigation, joined forces with friendly Republicans in the House of Representatives to attempt a technical correction of

the Camp Lejeune Justice Act of 2022.

If passed in Congress and signed into law, this legislation would achieve several high-impact policy changes to the benefit of our deserving clients. The topics that would be favorably affected include 1) jurisdiction and venue, 2) general and specific causation, 3) trial by jury, 4) right to a speedy trial, 5) inclusion of late diagnosis cases, 6) Attorney's Fees capped at 20-25%, and 7) a new fee-splitting rule between counsel.

Jurisdiction and Venue: Currently, the exclusive jurisdiction of the Camp Lejeune litigation is in the four District courts of the Eastern District of North Carolina, where it will remain for coordinated or consolidated pretrial procedures and resolution over any action filed. The proposed bill provides that after completion of the pretrial procedures, the party filing the action may transfer the case for trial to any of the other 52 federal district courts located within the United States Court of Appeals for the Fourth Circuit, which includes North Carolina, South Carolina, Virginia, West Virginia, and Maryland.

General and Specific Causation: Changes have been made in the language of the statute to ease or eliminate the burden of proving specific causation. By changing the burden of proof from "showing that the relationship between exposure to the water at Camp Lejeune and the harm" to "the water at Camp Lejeune and the type of harm suffered" changes the burden from specific causation to the much easier burden of general causation. The latent disease would also be changed to latent harm.

Trial by Jury: At the request of any party, the case shall be tried by the Court with a jury. This is the major goal of this new legislation because most trial lawyers believe that they will receive substantially larger awards from jurors than from Judges. Having done dozens of focus groups in this litigation and seen the very substantial jury awards, I wholeheartedly agree that our clients deserve their day in Court, being judged by a jury of their peers. I also believe that jury verdicts will bring the DOJ to the table for resolution much faster than judge-only verdicts.

Speedy Trial: The Court shall advance an action and expedite the disposition of such action to the greatest extent possible. With 52 additional District Courts to choose from for a jury trial, combined with this legislative order to grant a speedy trial, this is exactly what is needed to relieve much of the burden from our North Carolina Judges and move these cases expeditiously toward resolution.

Inclusion of Late Diagnosis Cases: The new statute will amend the Applicability Clause to recite: this section shall apply only to an action accruing before, on, or after the date of enactment of this Act. The current bill allows only actions that accrued before the date of enactment of this Act. Numerous cases are blocked by the present law due to the difficulty of diagnosis. For example, in Parkinson's disease, it is often difficult to pinpoint a diagnosis because there are so many symptoms that develop over time before the Parkinson's diagnosis is recognized. This will open the litigation to many of those clients.

Attorney's Fees Capped: The total amount of attorney's fees shall be the amount that is equal to 20% of any settlement entered into before a civil action is commenced or 25% of any judgment rendered or settlement entered into after a civil action is commenced.

On this issue, the record should reflect that the trial lawyers are entering into this substantial fee reduction of our own accord because it is in the best interest of our clients and not due to any pressure from those who would reduce our fees for political purposes. We passed this legislation bi-partisanly and will continue to operate on that basis while protecting our client's best interests.

There are currently more than 400,000 private contracts between attorneys and their Camp Lejeune clients, most of which provide for larger fees, which are the standard in the industry for such complex litigation. Voluntarily abrogating those higher fees, which we will earn and richly deserve, is no simple matter or decision.

This fee provision will be the subject of substantial debate among those it affects. The question is whether it is wise to waive the millions of dollars in fees that this provision will extinguish to achieve trial by jury and the other advantages that will substantially benefit our clients. Both sides of the debate have valid arguments to support their position, and neither side is wrong.

Division of Fees: A division of a fee between attorneys who are not in the same firm may be made only if the division is in proportion to the services performed by each attorney.

This provision is self-explanatory, but I do not understand any necessity for its inclusion.

CONCLUSION:

As the leadership of this complex litigation continues to advance the Track 1 cases toward trial in the Summer of 2025, we have to continue to look back and attempt to rectify unfortunate outcomes during the first two years of diligently prosecuting these cases. Since August 2022, we have had to fight those who would reduce our fees for political purposes, but we have successfully held them off.

The big blow occurred when we lost the right to trial by jury. These two elements of caps on fees and the right to trial resulted in the new proposed legislation, the Camp Lejeune Justice Act of 2024, in which we voluntarily accept a cap on our fees so that our clients may get their right to a trial before a jury of their peers. We will all follow the progress of this legislative effort to do the right thing for our clients without regard to our costs.