

Litigation forecast for PFAS-containing consumer products

By Alexandra Cunningham, Esq., and Merideth Daly, Esq., *Hunton Andrews Kurth LLP**

FEBRUARY 18, 2021

In recent years, we have seen a substantial uptick in regulation and litigation involving per- and polyfluoroalkyl substances (PFAS), a group of over 500 man-made compounds commonly referred to as “forever chemicals” due to their biological and environmental persistence.

PFAS continue to garner significant national and international attention, which will undoubtedly drive litigation risk for retailers in the year ahead and beyond.

The frenzy of activity has only heightened during the COVID-19 pandemic, spurred in part by the United States Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry’s June 2020 call for research into whether the posited immunosuppressive effect of elevated PFAS exposure may impact COVID-19 outcomes.¹

To be clear, scientific literature has not established a definitive causal link between PFAS exposure and any immune system impact, let alone an increased risk of contracting COVID-19 or experiencing worsened outcomes. Regardless, PFAS continue to garner significant national and international attention, which will undoubtedly drive litigation risk for retailers in the year ahead and beyond.

Importantly, PFAS litigation to date has largely not centered on consumer products. Instead, it has arisen primarily in the context of drinking water source contamination allegedly caused by PFAS use in various industrial settings.

Lawsuits have been filed by individuals, public and private water authorities, and states and municipalities against PFAS and PFAS-containing product manufacturers, site owners and others to recover for property damage and environmental clean-up damages — and in some instances, to institute medical monitoring regimes for exposed individuals.

Although the industrial uses at issue have been diverse, a significant driver of the litigation has been historical use of aqueous film-forming foam (AFFF) as a fire-fighting agent at military establishments, airports and other locations where

flammable liquid hazards are present. A multi-district litigation docket has been established in the United States District Court for the District of South Carolina to handle the large volume of AFFF-related filings.

Likewise, PFAS regulation to date has primarily targeted permissible PFAS levels in drinking water. Although the United States Environmental Protection Agency has set only “health advisory” levels (i.e., non-enforceable and non-regulatory levels) for two specific PFAS in drinking water (PFOA and PFOS), a number of states have more aggressively regulated broader categories of PFAS in this context.

States have also reached beyond drinking water into other arenas, including consumer products. For example, California passed legislation banning certain PFAS from use in cosmetics and personal care products, effective January 2025. Washington, Maine and New York have passed bans on PFAS in food packaging. Maine and Oregon have legislated strict reporting requirements for certain PFAS-containing children’s items (e.g., clothing, toys, craft supplies and others) sold within each state.

The current litigation and regulatory environment, and the associated and widespread media attention, may be setting the stage for a wave of consumer products litigation in the foreseeable future — one that, in fact, may have already begun.

Washington, Maine and New York have passed bans on PFAS in food packaging.

In January 2019, a putative class action was filed against Procter & Gamble on the allegation that the company failed to inform consumers that its Oral-B dental floss contained a level of PFAS that allegedly could be detrimental to human health, and thus, violated the California False Advertising Act and Unfair Competition Law.²

Although the case was voluntarily dismissed after a motion to dismiss briefing, it provides an example of a relatively ubiquitous consumer product that enterprising plaintiffs’ attorneys could target, regardless of whether they have a basis to do so, as a means of capitalizing on current PFAS hysteria.

Two consumer product cases filed in June 2020 provide additional examples.³ Plaintiffs in both assert violations of the California False Advertising Act and Unfair Competition Law, breach of express warranty and unjust enrichment based on allegations that the defendant retailers at issue advertised, marketed and sold disposable plates and bowls as “compostable,” although in reality, the PFAS contained in the products purportedly do not break down over time.

Although we have not seen any litigation in which plaintiffs seek recovery for purported health effects allegedly resulting from PFAS-containing consumer products, we expect those claims may be next up. Even absent an established dose-response (causative) relationship between any PFAS and any particular health endpoint, entrepreneurial plaintiffs’ law firms may nonetheless attempt to leverage current regulatory activity and the still-developing science into novel legal claims.

Medical monitoring claims, for example, have the potential to be lucrative in the PFAS context because, unlike personal injury, such claims typically have a lower causation hurdle and may be brought either as class actions or as individual claims that could potentially be consolidated for trial in certain jurisdictions.

Even absent an established dose-response (causative) relationship between any PFAS and any particular health endpoint, entrepreneurial plaintiffs’ law firms may nonetheless attempt to leverage current regulatory activity and the still-developing science into novel legal claims.

Given this landscape, retailers should stay apprised of applicable PFAS legislation and regulation and implement measures to ensure compliance. Retailers should also recognize the increased risk of litigation in this arena, even in the absence of regulatory noncompliance. To the extent

further consumer product claims are filed, aggressive defense grounded in sound science will be necessary to prevent similar claims from becoming the next tort litigation wave.

Notes

¹ See CDC/ATSDR, *Per- and Polyfluoroalkyl Substances (PFAS) and Your Health*, <http://bit.ly/3ddpgjE> (last visited Jan. 19, 2021).

² See *Andrews v. Procter & Gamble Co.*, No. 19-cv-75 (C.D. Cal.).

³ See *Ambrose v. Kroger Co.*, No. 20-cv-4009 (N.D. Cal.) and *Nguyen v. Amazon.com Inc.*, No. 20-cv-4042 (N.D. Cal.).

This article was published on Westlaw Today on February 18, 2021.

* © 2021 Alexandra Cunningham, Esq., and Merideth Daly, Esq., Hunton Andrews Kurth LLP

ABOUT THE AUTHORS



Alexandra Cunningham (L) is a partner and co-head of the product liability and mass tort litigation practice in **Hunton Andrews Kurth’s** Richmond, Virginia, office. She can be reached at acunningham@huntonak.com. **Merideth Daly** (R) is an associate in the product liability and mass tort litigation practice in Richmond. She can be reached at mdaly@huntonak.com. This article was originally published in January 2021 in the firm’s *Retail Industry in Review 2020* report. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world’s most trusted news organization.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.