
JOURNAL OF EMERGING ISSUES IN LITIGATION

Tom Hagy
Editor-in-Chief

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PFAS Litigation—A Historical Overview and the Growing Trend in Consumer Fraud Lawsuits: What Are the Legal and Business Risks to Companies?

John P. Gardella*

Abstract: Per- and polyfluoroalkyl substances (PFAS) are a class of over 12,000 man-made compounds. Most people would recognize the brand names Teflon, produced by DuPont, and Scotchgard, produced by 3M. They also go by the nickname “forever chemicals” because they are highly persistent and mobile in the environment and the human body. In addition to bodily injury and environmental pollution litigation, plaintiffs are also bringing suits against companies for claiming their products and the making of their products are safe and green. This article explains why PFAS are of concern to citizens, media, and legislators; what legal risks they pose to corporations; and the recent surge in consumer fraud litigation. The article examines the legal theories at issue in the PFAS consumer fraud cases, as well as the potential damages that can stem from the cases to corporations.

On August 26, 2022, a PFAS (per- and polyfluoroalkyl substances) consumer fraud class action lawsuit (*Dalewitz v. Proctor & Gamble*) was filed in New York against Proctor & Gamble over alleged PFAS content in the Oral B brand of dental floss.¹ The lawsuit is but the latest in a growing trend of PFAS lawsuits that allege that certain consumer goods contain PFAS; that the products were marketed as safe for use, healthy, or environmentally friendly;

and that consumers would not have purchased the products if they knew that the products contained PFAS. The lawsuits are not limited to oral hygiene products, though. Cosmetics, apparel, and food packaging companies are just a few industries grappling with similar lawsuits in the United States. The lawsuits all seek millions of dollars in damages and legal fees from the companies targeted.

Many companies believe that because they currently do not use the two original types of PFAS—PFOA and PFOS—that receive significant media and legislative attention, that they are not at risk for PFAS lawsuits. Such a conclusion ignores legacy uses of these two PFAS, plus legacy or current uses of any of the over 12,000 PFAS that have been created and used in various consumer goods, industrial, and manufacturing processes. It also ignores the potential for contamination in consumer goods that the manufacturer may not be aware of, yet may nevertheless open them up to lawsuits similar to the *Dalewitz* case.

This article provides an explanation of PFAS; why they are of concern to citizens, media, and legislators; what legal risks they pose to corporations; and an examination of the recent surge in PFAS consumer fraud lawsuits. The article examines the legal theories at issue in the PFAS consumer fraud cases, as well as the potential damages that can stem from the cases to corporations.

What Are PFAS?

PFAS are a class of over 12,000 man-made compounds.² Chemists at DuPont developed the initial PFAS chemical (polytetrafluoroethylene, or PTFE) by accident in 1938 when researching carbon-based chemical reactions.³ During one such experiment, an unusual coating remained in the testing chamber, which upon further examination was completely resistant to any methods designed to break apart the atoms within the chemical.⁴ The material also had the incredible ability to repel oil and water.⁵ After World War II, DuPont commercialized PTFE into the revolutionary product that the company branded “Teflon.”⁶

A short while later, 3M invented its own PFAS chemical—perfluorooctane sulfonate (PFOS), which the company also commercialized and branded “Scotchgard.”⁷ Within a short period of time,

various PFAS chemicals were used in hundreds of products. Today it numbers in the thousands.

The same physical characteristics that make PFAS useful in a plethora of commercial applications, though, also make them highly persistent and mobile in the environment and the human body—hence their nickname, “forever chemicals.”⁸

Early PFAS Litigation

The origins of PFAS litigation focused both on environmental pollution claims and personal injury claims. These cases still form the majority of PFAS lawsuits that are litigated today.

Environmental Lawsuits

On the environmental pollution side of PFAS litigation, thus far the PFAS litigation has centered on lawsuits filed against PFAS manufacturers (primarily, DuPont and 3M) for environmental cleanup and remediation. The settlements and damages awarded in these cases have been eye-opening to many.

In 2010, Minnesota brought the first PFAS pollution claim against 3M for negligently discharging PFAS used in the manufacture of Scotchgard into sources of drinking water. The lawsuit resolved in 2018 for \$850 million, which the state used to fund drinking water and water sustainability projects in the areas affected by contamination.⁹ Fifteen states have since followed suit, including Alaska,¹⁰ Massachusetts,¹¹ Michigan,¹² and Wisconsin.¹³

The following chart shows the settlement amounts of several reported environmental pollution cases related to PFAS.

Settlement Year	Amount	State
2018	\$850 million	MN
2018	\$4 million	AL
2019	\$2.7 million	MN
2019	\$35 million	AL
2020	\$55 million	MI
2020	\$113 million	MI

When environmental PFAS lawsuits started over 10 years ago, few considered that similar lawsuits with similarly high damages or settlements would impact downstream companies utilizing PFAS. Yet, more and more, this is precisely the course that the litigation is following, with increasing numbers of lawsuits being brought against downstream commerce users of PFAS for environmental pollution claims. The claims for liability in these lawsuits allege a wide variety of legal counts against the defendants, including nuisance (public and private), trespass, negligence, breach of warranty, strict liability, and statutory counts that trigger punitive damages.

State-Level EPA Enforcement Actions

Currently, the U.S. Environmental Protection Agency (EPA) has no enforceable drinking water standard for PFAS; the existing 70 parts per trillion (ppt) limit for PFOA and PFOS is an advisory level, meaning that states and regulatory agencies can look to the advisory level for guidance in enacting their own regulations or policies.¹⁴ The EPA used its regulatory authority under the Safe Drinking Water Act to set the current advisory level. Numerous states have used the 70 ppt advisory level as a guidepost to create their own enforceable drinking water pollution standards for a host of PFAS. There is a lack of uniformity among regulating states, though, as the states are creating different enforceable limits and regulating different subsets of PFAS, all of which causes confusion for corporations attempting to comply and adjust corporate practices for compliance. Further, while there is no final rule (yet) by the EPA designating certain PFAS as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which triggers the EPA’s ability to force potentially responsible parties (PRPs) to pay for the remediation costs associated with PFAS pollution,¹⁵ several states have designated certain PFAS as “hazardous substances” at the state level. This allows state regulatory agencies to pursue companies deemed to be PRPs for cleanup costs. Litigation often follows in these situations, either among the named PRPs for contribution claims or by the PRPs against third parties that they believe also contributed to the pollution.

The state-level activity with respect to PFAS is driving significant enforcement action issues for companies of all sizes and industry types that states claim in some way contributed to PFAS pollution. Even companies with no historic or current use of PFAS at all are finding themselves embroiled in these time-consuming and costly actions; for example, companies that merely had fires on site that were extinguished utilizing PFAS-containing aqueous film-forming foam (AFFF) are being held responsible for cleanup costs. Many states have strict liability standards in their regulations for identified PRPs,¹⁶ which can again lead to contribution civil litigation or third-party litigation that increases costs to the companies involved.

Personal Injury Lawsuits

On the personal injury front, the most well-known personal injury PFAS lawsuit (featured in the film *Dark Waters*) was brought by Attorney Rob Bilott against DuPont on behalf of citizens in Parkersburg, West Virginia. Ultimately, the case settled for \$670 million in 2017.¹⁷ What is most notable about the lawsuit, however, is the precedent it set when the court permitted (and the parties agreed to) the convening of a three-person independent science panel (the so-called C8 Science Panel, C8 being another name for PFOA) to investigate the potential links between PFOA exposure and the effects on human health.

The C8 Science Panel Concluded that there were “probable links” between PFOA exposure and the development of kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol.¹⁸ The science panel and resulting medical monitoring agreement for the 70,000 citizens that participated in the lawsuit cost DuPont over \$100 million in this case.

Shortly after the C8 Science Panel findings, Attorney Bilott and DuPont began litigating individual PFAS injury cases in West Virginia. Three cases went to verdict, each resulting in a plaintiffs’ verdict: (1) \$1.6 million compensatory reward for a kidney cancer plaintiff, (2) \$5.1 million compensatory and \$500,000 punitive award to a testicular cancer plaintiff, and (3) \$2.1 million

compensatory and \$10.5 million punitive reward for a testicular cancer plaintiff.¹⁹ It was shortly after the third verdict that DuPont settled all of the pending claims in the class action for the \$670 million sum.

In addition, a Multi District Litigation (MDL) was set up several years ago in South Carolina for claims of environmental pollution and personal injury related specifically to AFFF.²⁰ While the MDL does involve both DuPont and 3M, it also involves several manufacturers of AFFF that used PFAS as a component of their AFFF. The first bellwether case for trial was recently selected, which is a water utility pollution case out of Stuart, Florida.²¹ The case is likely to begin trial in April or May of 2023. The judge overseeing the MDL also recently ordered the parties to begin discovery on the personal injury cases on the MDL. Expert discovery in these personal injury cases will touch on many litigation-changing issues, including many unresolved issues such as the PFAS dose necessary to cause disease, scope of diseases that non-PFOA PFAS can cause, and the validity of epidemiology and other science supporting the various positions on causation. The findings and court rulings that come from this phase of the MDL will have enormous impacts on national PFAS personal injury litigation.

Current PFAS Litigation—Increasing Focus on Consumer Fraud Cases

PFAS personal injury cases are largely relegated to the AFFF MDL and has not spread to the thousands of other consumer products that contained PFAS due to the fact that scientific consensus on injury causing issues is not quite at the point where it needs to be in order for plaintiffs to prevail on a nationwide basis. As such, to date, the environmental pollution and state-level EPA enforcement actions have dominated the litigation landscape.

The trend that is growing exponentially, though, are PFAS consumer fraud lawsuits, and they pose significant risks to companies from legal and financial standpoints. The lawsuits all follow similar patterns: allegations that a company manufactured a product for years and that recent testing shows that the product contains some level of PFAS. Plaintiffs then argue that the products were

deceptively marketed and advertised to consumers as safe for use, “green” or environmentally friendly, or that the company undertook rigorous safety and investigative processes prior to selling the product to ensure that the ingredients in the products were appropriate. Some of the lawsuits are more tenuous in drawing connections between a company’s marketing statements and the allegations of consumer fraud. In the *Dalewitz* case, for example, plaintiffs allege that the dental floss in question was marketed as a “pro health” product and that the company as a whole markets itself as dedicated to “helping ensure a healthy planet.” It is these statements, the lawsuit alleges, that were false and misleading, and that the presence of PFAS in the company’s dental floss was fraudulently concealed from consumers.

PFAS consumer fraud lawsuits to date also largely follow similar counts pled—primarily, violations of various state or federal consumer protection statutes, fraud and deceit or fraudulent concealment, state statutes that trigger punitive damages, and a request for certification of a class of plaintiffs for the lawsuit. The damages sought are typically a request for the total amount of revenue generated from sale of the product within the specific state for a specific span of years, as well as monetary damages for violations of consumer protection statutes or regulations. The violation of consumer protection laws can lead to damages awarded on a per violation basis, which plaintiffs argue means per unit sold of the consumer good in question. The sale of a \$2 consumer good could therefore have several hundred or thousand dollars in statutory penalties associated with each item sold if plaintiffs prevail in their arguments to the court, meaning that the overall damages in the lawsuit would be in the millions of dollars.

There are an increasing number of PFAS consumer fraud cases being filed, with some of the below as representative of recent trends.

Cosmetics Industry

These cases generally allege that cosmetics companies knew or should have known of the presence of PFAS in their products, yet the products were marketed to consumers as environmentally

friendly or safe for use. Plaintiffs allege that they would never have purchased the products if the presence of PFAS had been disclosed.

- *Brown v. Cover Girl*, No. 1:22-cv-02696, S.D.N.Y. (April 1, 2022)
- *Anderson v. Almay*, No. 1:22-cv-02696, S.D.N.Y. (April 1, 2022)
- *Rebecca Vega v. L’Oreal*, No. 2:22-cv-02049, USDC-NJ (April 8, 2022)
- *Spindel v. Burt’s Bees*, No. 4:22-cv-01928, USDC-CA (N.D.) (March 25, 2022)
- *Solis v. Covergirl Cosmetics*, No. 3:22-cv-00400, USDC-CA (S.D.) (March 25, 2022)
- *Hicks and Vargas v. L’Oreal*, No. 1:22-cv-01989, S.D.N.Y. (March 9, 2022)
- *Davenport v. L’Oreal*, No. 2:22-cv-01195, USDC-CA (C.D.) (February 22, 2022)

Food Packaging Industry

These lawsuits allege that food packaging products advertise to be compostable, recyclable, safe for the environment, or non-toxic, yet the presence of PFAS in the products renders those statements false. Consumers were therefore fraudulently induced to purchase or use those products.

- *Richburg v. Conagra Brands*, 1:2022-cv-02420, USDC-IL (N.D.) (May 6, 2022)
- *Ruiz v. Conagra Brands*, No. 1:22-cv-2421, USDC-IL (N.D.) (May 6, 2022)
- *Hamman v. Cava Group*, No. 3:22-cv-00593, USDC-CA (S.D.) (April 27, 2022)
- *Azman Hussain v. Burger King*, No. 4:22-cv-02258, USDC-CA (N.D.) (April 11, 2022)
- *Little v. NatureStar*, No. 1:22-cv-00232, USDC-CA (E.D.) (February 22, 2022)
- *Larry Clark v. McDonald’s*, No. 3:22-cv-00628, USDC-IL (S.D.) (March 28, 2022)

Feminine Hygiene Products

These lawsuits allege that feminine hygiene products were marketed as safe, non-toxic, and free from harmful chemicals (in some instances, even “free from PFAS”), yet the products tested contained PFAS, which directly contradicts the company statements to consumers.

- *Gemma Rivera v. Knix Wear Inc.*, No. 5:22-cv-02137, USDC-CA (N.D.) (April 4, 2022)
- *Blenis v. Thinx, Inc.*, No. 1:21-cv-11019, USDC-MA (June 18, 2021)
- *Destini Kanan v. Thinx Inc.*, No 2:20-cv-10341, USDC-CA (C.D.) (November 12, 2020)

* * *

It is not surprising that the consumer fraud cases are seeing the biggest uptick in litigation activity from a PFAS standpoint. The lack of scientific consensus on whether certain PFAS can cause injury, lack of dose response studies to support personal injury litigation, and the time and costs associated with litigating environmental pollution cases means that consumer fraud lawsuits are a very plaintiff-friendly avenue of pursuit for PFAS litigation. Causation issues are not be at issue, as the typical burden of proof in consumer fraud cases focuses on the alleged acts of deceit and misrepresentation rather than the actual harms to the plaintiffs’ class. Plaintiffs have a much lower burden of proof, relatively speaking, in consumer fraud cases than they do in PFAS personal injury cases. Much of the legal argument in consumer fraud cases focuses on the proper calculation of damages should plaintiffs prevail.

Key Takeaways for Companies

With studies underway, legislation pending that target consumer goods, and increasing media reporting on PFAS in consumer goods and concerns over human health, product manufacturers should be increasingly wary of consumer fraud lawsuits being filed against them. Several major companies now find themselves

embroiled in litigation focused on PFAS false advertising, consumer protection violations, and deceptive statements made in marketing and environmental, social, and governance (ESG) reports. The lawsuits may well serve as test cases for plaintiffs' bar to determine whether similar lawsuits will be successful in any (or all) 50 states in this country. Companies must consider the possibility of needing to defend lawsuits involving plaintiffs in all 50 states for products that contain PFAS. It should be noted that these lawsuits would only touch on the marketing, advertising, ESG reporting, and consumer protection type of issues. Separate products lawsuits could follow that take direct aim at obtaining damages for personal injury for plaintiffs from consumer products. In addition, environmental pollution lawsuits could seek damage for diminution of property value, cleanup costs, and PFAS filtration systems if drinking water cleanup is required.

It is of the utmost importance that businesses along the whole supply chain in the consumer goods sector evaluate their PFAS risk and fully understand the legal arguments that plaintiffs could make against companies in litigation. Public health and environmental groups urge legislators to regulate PFAS at an ever-increasing pace. Similarly, state-level EPA enforcement action is increasing at a several-fold rate every year. Now, the first wave of lawsuits takes direct aim at the consumer products industry. Companies that did not manufacture PFAS, but merely utilized PFAS in their manufacturing processes, are therefore becoming targets of costly enforcement actions at rates that continue to multiply year over year. Lawsuits are also filed monthly by citizens or municipalities against companies that are increasingly not PFAS chemical manufacturers. Legal risk analysis steps can be taken now that can mitigate future risks and future business disruption due to PFAS lawsuits, but proactive steps must be taken now to take full advantage of early action.

Notes

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PFAS, Environmental, Risk Management and Consulting and ESG practice groups.

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