



In this Issue

- [The Chair's Corner: PowerPoint: Don't Make It an Afterthought](#)
- [More Of The Best. Advice. Ever.](#)
- [Super-Size My Litigation?](#)
- [Perfluorochemicals And Food Packaging](#)
- [Member Spotlight](#)
- [How To Change Unhealthy Habits And The Defense Wins](#)
- [Raising the Bar is Available on Facebook, Twitter and LinkedIn](#)
- [Raising the Bar Editors](#)

Super-Size My Litigation? Perfluorochemicals And Food Packaging

by *Julia M. Collison, John M. Kalas, and Jessica L. Kaplan*



For over a decade, major corporations have been embroiled in litigation involving the environmental release of perfluorochemicals (PFCs), which have been potentially linked to a number of diseases, including several cancers. PFCs are long-lived mostly

man-made chemical compounds. Because of their inherent properties, PFCs have been widely used as components of coatings (like Teflon® or Scotchgard®) to make everyday products more resistant to heat, stains, grease, and water. Litigation has focused on subclasses of man-made PFCs known as per- and polyfluoroalkyl substances, specifically perfluorooctanoic acid (PFOA) and perfluorooctyl sulfonate (PFOS). Both PFOA and PFOS can be released into the environment as byproducts when commercial products coated with PFCs are manufactured, used, or discarded. Most of the lawsuits surrounding these compounds involve groundwater contamination claims. See, e.g., *Emerald Coast Utils. Auth. v. 3M, et al.*, No. 3:09-cv-361, filed Nov. 30, 2009 (N.D. Fla.). Specifically, plaintiffs have alleged personal injury, medical monitoring, and diminution of property values. See, e.g., *Hazelton et al. v. Solvay Chems. Inc., et al.*, No. 1:14-cv-845, filed Feb. 10, 2014 (D.N.J.) (personal injury and medical monitoring); *West Morgan-East, et al. v. 3M, et al.*, No. 5:15-cv-01750, filed Oct. 5, 2015 (N.D. Ala.) (property damage). The EPA has set a federal health advisory limit of 70 ppt for PFOA and PFOS, though several states have set lower limits. See Drinking Water Health Advisories for PFOA and PFOS, U.S. EPA, <https://goo.gl/tefvtk>; Minnesota Drastically Tightens Safety Limits on 3M Chemicals in Groundwater, Minnesota Star-Tribune, <http://www.startribune.com/minnesota-dramatically-tightens-safety-limits-on-3m-chemicals-in-groundwater/423874423/> (setting limits in state of Minnesota at 35 ppt for PFOA and 27 ppt for PFOS).

Media coverage of the Flint, Michigan lead incident has undoubtedly made water contamination a hot topic. And PFC litigation has already proven to be profitable for some plaintiffs. Earlier this year, DuPont reached a \$671,000,000 settlement with over 3,000 plaintiffs for alleged personal injuries caused by the release of PFCs into the drinking water supply of Parkersburg, West Virginia. See DuPont, Chemours Agree to Settle Teflon Cases for \$671M, Law360, <https://www.law360.com/articles/891239/duPont-chemours-agree-to-settle-teflon-cases-for-671m>. The lead Plaintiff attorney was featured on the cover of the New York Times Magazine. See https://www.nytimes.com/2016/01/10/magazine/the-lawyer-who-became-duponts-worst-nightmare.html?_r=0. A panel of epidemiologists convened as part of this litigation associated exposure to PFOA with high cholesterol, ulcerative colitis, thyroid disease, testicular cancer, kidney cancer, and pregnancy-induced hypertension. See C8 Science Panel, <http://www.c8sciencepanel.org/>.

Recent Litigation Involving PFCs

Litigation involving alleged PFC contamination has increased in the past few years. Several of the suits most heavily covered in the media concern Hoosick Falls, New York. Multiple personal injury and property diminution suits have been brought by large plaintiff firms against Saint-Gobain Performance Plastics and Honeywell, successor corporations to a company that manufactured Teflon®-coated materials in the town. See, e.g., *Baker v. Saint-Gobain Performance*



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Upcoming Seminar



Plastics, et. al., 1:16-cv-220, filed Feb. 24, 2016 (N.D.N.Y.). Due to confirmed PFCs in the soil and groundwater, the state of New York declared the historic Hoosick Falls manufacturing locations to be state Superfund sites. See DEC Requires Companies to Fully Investigate and Clean Up Hoosick Falls PFOA Contamination, N.Y. Department of Environmental Conservation, <https://goo.gl/ggaWXh>. Similar litigation has been brought against the successor defendants in Vermont and New Hampshire. See, e.g., *Brown, et. al. v. Saint-Gobain Performance Plastics Corp., et. al.*, 1:16-cv-242 (D.N.H.), filed May 24, 2016; *Sullivan, et. al. v. Saint-Gobain Performance Plastics Corp., et. al.*, 5:16-cv-00125, filed May 6, 2016 (D. Vt.).

Multiple suits are also pending against Tyco, 3M, and others for alleged PFOS contamination from the use of firefighting foam on military bases and airports around the world. See, e.g., *Bates, et. al. v. The 3M Company, et. al.*, 2:16-cv-04961, filed Sept. 15, 2016 (E.D. Pa.). Municipal water suppliers in Alabama have brought suits against carpet manufacturers for alleged releases of PFCs into water supplies. See, e.g., *The Waterworks and Sewer Bd. of Gadsden v. 3M Co. et. al.*, No. 4:16-cv-01755, filed Sept. 22, 2016 (N.D. Ala.). The state of Minnesota has pressed a case for groundwater and other natural resource damages involving 3M's operations in that state. *State of Minn. v. 3M Company*, No. 27-CV-10-28862, filed Dec. 30, 2010 (Minn. Dist. Ct., Hennepin Cnty.). And in Wilmington, North Carolina, DuPont faces potential litigation involving the alleged release of GenX, a next generation PFOA-free PFC replacement, into the water supply there. See DuPont Chemours GenX Lawsuit, Levin Law, <https://www.levinlaw.com/dupont-chemours-genx-lawsuit>.

Consumer Products and Food Stuffs: The Next Frontier for PFC Litigation?

Up until now, there has been very little litigation involving the use of consumer products containing PFCs or the ingestion of food stuffs containing PFCs. The largest litigation thus far was a short-lived MDL against DuPont involving class action claims for purchasers of Teflon[®]-coated cookware. *In re Teflon Prods. Liab. Litig.*, No. 4-06-md-1733 (S.D. Iowa). That litigation fizzled after denial of class certification, see *Class Proposal Doesn't Stick in DuPont Teflon MDL*, Law360, <https://www.law360.com/articles/79387/class-proposal-doesn-t-stick-in-dupont-teflon-mdl>, but there are rumblings that the relative quiet on the consumer product front may be about to change.

Recently, Northeastern University hosted a conference on public health issues surrounding PFCs. Plaintiffs' attorneys—including the filers of some of the aforementioned lawsuits—attended, as well as public health academics and representatives of various environmental advocacy groups. The conference was sponsored by the "PFAS Project," a research team led by Dr. Phil Brown at Northeastern. The keynote speaker of the two-day seminar was Dr. Linda Birnbaum, Director of the National Institute for Environmental Health and Safety (NIEHS). See *Highly Fluorinated Compounds, Conference Schedule*, <https://pfasproject.com/tentative-conference-schedule/> ("Schedule").

NIEHS is one of the best-known of the 27 research centers funded by the National Institutes of Health, a division of the U.S. Department of Health and Human Services. The mission of NIEHS "is to discover how the environment affects people in order to promote healthier lives." See *About NIEHS*, <https://www.niehs.nih.gov/about/index.cfm>. NIEHS oversees the National Toxicology Program, which last year named PFOA and PFOS as immunotoxic compounds. See *NTP Monograph, Immunotoxicity Associated with Exposure to PFOA or PFOS*, https://ntp.niehs.nih.gov/ntp/ohat/pfoa_pfos/pfoa_pfosmonograph_508.pdf. John Bucher, the head of NTP and a direct report to Dr. Birnbaum recently opined that immunosuppression brought about by immunotoxicity is a "key characteristic" of cancer. See *Smith MT, et. al., Key Characteristics of Carcinogens as a Basis for Organizing Data on Mechanisms of Carcinogenesis*, *EHP* 2016 June, 124(6): 713-21.

At the PFAS Project meeting, Dr. Birnbaum presented on exposure pathways to PFOA and PFOS to the assembled listeners, including plaintiffs' attorneys. See *Schedule*. She posited that one mode of human ingestion was via leaching from food packaging, citing to an article by scientists from the Silent Spring Institute on this topic as an "important" route of exposure. See *PFAS Project Powerpoint Presentation, Slides 10-11*, <https://pfasproject.files.wordpress.com/2017/06/keynote-birnbaum.pdf>; PFAS



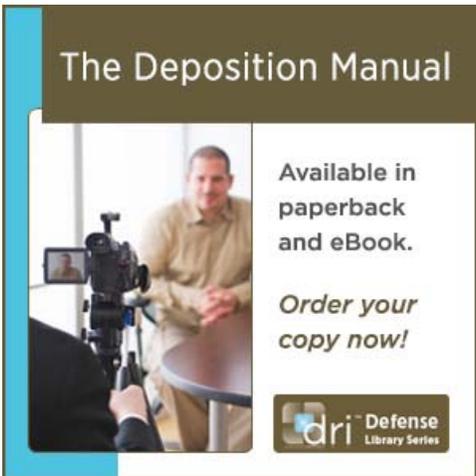
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Project Keynote Address, <https://www.youtube.com/watch?v=7W927HJ1leE>. <https://twitter.com/laurelschaider/status/874982421371990016> (ingestion via fast-food packaging as an important exposure source). She also questioned whether the presence of PFCs in fast-food packaging presented an “environmental justice” issue going forward. See PFAS Project Keynote Address, <https://www.youtube.com/watch?v=7W927HJ1leE>. . The presence of PFCs in fast-food packaging has previously been covered in the media, along with the allegation that the PFCs present in the packaging might “leach” into food. See CBS News, Are There Toxins in Your Fast Food Packaging?, <http://www.cbsnews.com/news/toxins-in-fast-food-packaging-pfoa-pfoa/>. Similar arguments have been made regarding other purportedly “dangerous” compounds like phthalates. See CBS News, Fast Food May Come with a Side of Phthalate Chemicals, <http://www.cbsnews.com/news/fast-food-may-come-with-a-side-of-phthalate-chemicals/>.

Food-packaging suits may be the next frontier in PFC litigation, as plaintiffs will see such cases as an opportunity to take their local personal injury litigations (thus far tied to specific manufacturing or product use sites) to a national stage. Already, corporations have faced suits concerning food supply contamination by another set of long-lived chemicals, PCBs. See, e.g., Monsanto Prevails in 15M PCB Cancer Trial, Law360, <https://www.law360.com/articles/780910/monsanto-prevails-in-15m-pcb-cancer-trial>. Food-packaging suits might be especially attractive because of the wide range of injuries allegedly associated with exposure to PFCs. There might also be an opportunity to bring consumer fraud class-actions, especially in regards to foods labeled “natural” or “organic” that use PFC coated packaging.

Major Scientific Hurdles Remain

Despite the ambitions of the plaintiff’s bar, there will be difficult obstacles to overcome in mounting a convincing scientific case that food-packaging poses a health risk giving rise to potential liability. First, no Court has yet found sufficient scientific evidence that PFC exposures caused plaintiffs’ alleged injuries.[1] Second, even if a court found the epidemiological evidence regarding PFCs to be reliable, much of that evidence likely involves higher-dose environmental exposures than one would expect from eating an occasional Big Mac. Thus, epidemiological and toxicological evidence from exposed communities might not support theories involving low-exposure plaintiffs. See, e.g., *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144, 118 S. Ct. 512, 518, 139 L. Ed. 2d 508 (1997) (affirming exclusion of an unreliable expert opinion based on extrapolation from a high-dose animal study to a low-dose human exposure).

Third, the fact that some PFCs have been “shown” to be immunotoxic by NTP does not necessarily mean they are carcinogenic. Courts have been wary to assign causality based solely upon findings of toxicity or extrapolations from animal studies. See, e.g. *Allen v. Penn. Eng’g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996) (finding evidence of a potential genotoxic effect “is the beginning, not the end of the scientific inquiry and proves nothing about causation without other scientific evidence”); *Siharath v. Sandoz Pharm. Corp.*, 131 F. Supp. 2d 1347, 1366 (N.D. Ga. 2001) (“Extrapolations from animal studies to human beings generally are not considered reliable . . .”), *aff’d sub nom.*, *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002); see also *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 991 (8th Cir. 2001); *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1209 (10th Cir. 2002).

Do You Want Fries With That?

PFCs are long-lived compounds and thus, as with PCBs, creative plaintiffs’ attorneys will continue to invent new ways to bring suits involving exposure to them. In the meantime, manufacturers who use PFCs in their food packaging, and all companies involved in the supply and sales chain of such products, would be wise to stay involved in research involving this issue and prepare to defend their products using sound science.

[1] The findings of the C8 Science Panel, <http://www.c8sciencepanel.org>, are based upon the particularized nature of the exposed population in Parkersburg, WV, and should not be extrapolated to other cohorts.

[Back](#)

