Consumer Class Actions May Be the Next Wave of PFAS Litigation

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July 02, 2024 at 10:50 AM

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Litigation concerning PFAS—so-called “forever chemicals”—has been growing in intensity for more than 20 years now. So far, the litigation has mostly been based on either personal injury claims or claims concerning damage to natural resources, especially water. However, the past few years have seen a significant number of cases brought as consumer class actions based on a failure to disclose that a product contains PFAS as an ingredient or contaminant.

We cannot yet know how large this new wave of litigation may be, but there is at least the potential for a tsunami. Recent EPA regulations governing PFAS are contributing to the already significant public attention. In April 2024, the EPA finalized a regulation capping the levels of six types of PFAS compounds in drinking water. Under another recent EPA regulation, virtually everyone who manufactured or imported PFAS since 2011 must provide the EPA with a detailed PFAS report by April 2025. Some of these reports will likely provide fodder for additional lawsuits by the mass tort plaintiffs bar. PFAS claims brought as consumer class actions may be especially well-suited to take advantage of the rising tide of negative publicity, if they can gain traction in the courts.

The early targets of consumer class action PFAS claims have included companies that market their products as healthy or all-natural, although no industry appears exempt. Already, these complaints have been filed against companies making everything from cosmetics to pet food

to orange juice to clothing. The crux of these claims is that consumers would not have purchased the product, or would have paid less for it, if the manufacturer disclosed that it contained or was contaminated by PFAS.

Focusing on consumer fears sidesteps the burden of producing reliable scientific evidence showing any actual risk from a product containing PFAS. That burden is a significant one, given the lack of reliable science on the possible health impacts of most PFAS or the levels of exposure required to have an impact. Indeed, there is not even agreement on which synthetic chemicals are within the PFAS group—the National Institute of Environmental Health Sciences claims nearly 15,000, while the National Institute for Occupational Safety and Health states there are around 9,000.

PFAS consumer claims are also very attractive to the mass torts plaintiffs bar because they are more likely than personal injury claims to be certified as class actions. Under Federal Rule of Civil Procedure 23, proposed representatives in a class action must show their claims are typical of the proposed class (as well as meeting the rule's other requirements of numerosity, commonality, and adequacy). It is easier to meet the typicality requirement when the proposed class representative's claim is based on a uniform economic injury, rather than plaintiff-specific health issues. If they can meet the other requirements for a class action claim, plaintiffs lawyers may need only a few potential representatives who bought a product to have the chance to bring claims on behalf of a class of millions.

Given all these advantages, it is reasonable to ask why this emerging wave of PFAS litigation has yet to flood the courts. Many members of the mass tort plaintiffs bar are likely waiting to see how early cases fare before putting resources into bringing their own claims. Many of those early cases have faltered as a result of courts' diligent scrutiny of the complaints at the motion to dismiss stage. Three recent dismissals illustrate some common deficiencies in the PFAS consumer claims filed so far:

- In *Krakauer v. REI,* the U.S. District Court for the Western District of Washington dismissed a complaint alleging PFAS on a jacket both for lack of Article III standing and for failure to state a claim. Among its standing rulings, the court held that the plaintiff failed to plead an injury because allegations that tests showed heightened levels of organic fluorine on the jacket were insufficient to plausibly allege the presence of PFAS and the plaintiff did not plausibly allege that the jacket contained more PFAS than comparable products. The court went on to say that the complaint also failed to state a claim, including because it failed to identify the specific PFAS compound allegedly contained in the jacket and did not establish reasonable reliance by the plaintiff on the allegedly deceptive representations.
- The Northern District of California in *Lowe v. Edwell Personal Care* similarly rejected plaintiff's allegation that the presence of organic fluorine in tampons was an adequate proxy for the presence of PFAS. The ruling differed from Krakauer's in that the dismissal was for failure to state a claim, instead of failure to allege standing. The court in Lowe additionally held that the complaint failed to state a claim because it did not plausibly allege that testing of the tampons showed more than a negligible amount of organic fluorine.
- In *Garland v. The Children's Place*, a case about alleged PFAS on school uniforms, the Northern District of Illinois found that plaintiffs had standing based on their

alleged economic injury. The court nonetheless dismissed the complaint for failure to state a claim after holding that the defendant did not have an affirmative duty to disclose lawful use of PFAS and did not make any representations that would lead a consumer to believe they were 100% free of PFAS.

Early losses like these have so far stemmed the tide of PFAS consumer claims, but numerous cases are working their way through the courts. Federal courts in Massachusetts and California have already denied motions to dismiss PFAS class action consumer complaints, allowing those cases to proceed to discovery. And, in virtually every dismissed case we reviewed, plaintiffs have filed amended pleadings to try to evade the original grounds for dismissal.

The manufacturing and retail industries should position themselves now for what may come next in the evolving field of PFAS litigation. Looking forward, companies may want to proactively address potential grounds for PFAS consumer claims. At minimum, they should review their public-facing policies, labeling, and advertising to ensure compliance with their legal obligations and avoid any new basis for claims. To address potential PFAS contamination in a product's supply chain, companies should also consider including PFAS disclosure and indemnification provisions in contracts with vendors. For companies who are already likely targets for PFAS consumer class actions, they may want to retain counsel to develop a litigation risk mitigation strategy before lawsuits are filed. We will continue monitoring this emerging litigation trend closely, at least until we can tell what its impact will be.

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