LAW360®

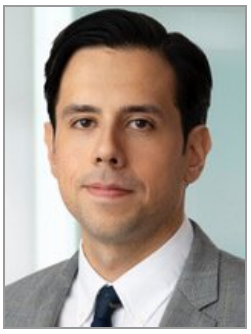
Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How Courts' Differing Views On Standing Affect PFAS Claims

By **Matthew Malinowski, Gary Feldon and Sebastian Ovalle** (August 8, 2024, 5:19 PM EDT)

Matthew Malinowski

Gary Feldon



Sebastian Ovalle

The increased attention paid to per- and polyfluoroalkyl substances in recent years has resulted in an uptick in PFAS-related lawsuits — including claims based on defendants' alleged failures to disclose PFAS in consumer products.

PFAS consumer claims allege that, if a manufacturer had disclosed the presence of PFAS in the product, consumers would either have paid less for it or not purchased it at all.

By focusing on consumer expectations, these lawsuits may be able to sidestep the need for reliable scientific evidence showing any actual risk from a product containing PFAS. PFAS consumer claims are therefore very attractive to the mass torts plaintiffs bar.

However, many of the PFAS consumer claims filed so far have faltered at the motion-to-dismiss stage. Standing under Article III of the U.S. Constitution, in particular, has emerged as a critical hurdle that many PFAS consumer claims have been unable to clear.

Standing is a constitutional requirement for a federal court to hear a case that obligates a plaintiff to establish an injury-in-fact that was caused by the defendant's alleged wrongful conduct, and that could be redressed by a favorable decision.[1] Notably, courts are not bound to accept the facts of the complaint as true when considering whether to dismiss for lack of standing.

In the context of PFAS consumer claims, the standing question has frequently turned on whether the court finds that plaintiffs have adequately alleged that the product they purchased actually contained PFAS. How courts ultimately decide the evolving issue will have a tremendous effect on the future of PFAS consumer claims.

Two recent opinions illustrate how pivotal courts' views on standing will be for product liability litigation involving PFAS — particularly consumer claims.

In Lurenz v. Coca-Cola Co., the U.S. District Court for the Southern District of New York dismissed a putative PFAS consumer class action in June for failure to adequately allege standing. In Winans v. Ornua Foods North America Inc., the U.S. District Court for the Eastern District of New York reached the opposite outcome in April, based on functionally equivalent allegations.

Both courts are bound to apply the U.S. Court of Appeals for the Second Circuit's case law, so the different outcomes did not result from differences in the applicable precedent. Rather, the differences in the courts' opinions seem to reflect inconsistent views of this still-evolving area of law.

In Lurenz, the plaintiff brought a putative class action alleging that he purchased the defendant's orange juice because it was advertised as "All Natural" with "all-natural ingredients," but contained PFAS. The plaintiff alleged that he would not have paid a premium for the defendant's juice if he had known it had PFAS in it.

Although the Second Circuit recognizes the price-premium theory on which the plaintiff relied, the Lurenz court held that plaintiffs failed to allege an injury-in-fact sufficient for Article III standing. The court found that the plaintiff's allegations did not give rise to a plausible inference that the orange juice he purchased contained PFAS.

The allegation that the juice contained PFAS was based on a positive test of samples of the defendant's orange juice bought within a month of the plaintiff's purchase. PFAS testing of the defendant's orange juice around the time of purchase was not enough to plausibly allege that the particular juice the plaintiff purchased contained PFAS.

The court likewise found it inadequate for the plaintiff to allege, without reliable scientific evidence, that PFAS is so widespread in orange juice that it was probable the juice the plaintiff purchased also contained PFAS. Based on these failures to meet the injury-in-fact threshold for standing, the court dismissed all claims for lack of jurisdiction under Article III.

The operative facts of Winans are similar, but the court found that the allegations in the complaint gave rise to a plausible inference that the purchased product contained PFAS. The plaintiff in Winans purchased butter marketed as "Pure Irish Butter," which was later recalled when New York banned PFAS in food packaging.

Notably, the Winans defendant does not appear to have disputed that its product packaging contained PFAS. The plaintiff alleged that PFAS in the butter's packaging had migrated into the butter, and that she would not have paid as much if the defendant had disclosed the PFAS.

Unlike in Lurenz, the Winans plaintiff did not allege that any tests supported her allegation that the butter or its packaging contained PFAS. Instead, she relied on the defendant's recall as evidence that the packaging contained PFAS, and cited scientific studies about PFAS migration into food generally.

The Winans court ruled that the plaintiff had plausibly alleged standing. In doing so, the court explicitly rejected the principle that plaintiffs must allege that they have conducted tests showing the presence of PFAS in the defendant's product.

Although many other courts have held testing to be mandatory, the court distinguished Winans on its facts, reasoning that testing was required in those cases because of the absence of other plausible allegations supporting the presence of PFAS in a product. The court held that the recall based on PFAS in the packaging, coupled with evidence to support a migration theory, was enough to adequately allege an injury-in-fact for standing.

It is possible to reconcile the rulings in these two cases at a superficial level — there was a recall in Winans, and no recall in Lurenz — but deeper analysis yields a different conclusion. The ultimate question in these cases was whether the plaintiffs plausibly alleged there was PFAS in the specific products they purchased.

The Lurenz court found that, without evidence PFAS was present in every bottle, positive tests of samples purchased around the same time as the orange juice bought by the plaintiff did not establish an injury-in-fact.

If it is plausible that only some bottles of a particular orange juice contained PFAS, then it would also seem plausible that only some of the particular butter recalled contained PFAS. Indeed, the possibility of PFAS migrating from the packaging into a particular stick of butter adds an additional element of uncertainty to the causal theory in Winans.

How rigorously federal courts enforce the Article III standing requirement will play a major role in how many PFAS consumer claims the mass torts plaintiffs bar files. If courts do not diligently screen complaints for allegations that support standing, there will likely be a flood of PFAS consumer claims of questionable merit.

Given the importance of this issue, defendants should be aggressively advancing standing arguments to promote a body of case law that requires plaintiffs to have an adequate basis to allege that a

product contains PFAS.

Matthew J. Malinowski and Gary Feldon are partners, and Sebastian Ovalle is an associate, at Hollingsworth LLP.

[1] See Lujan v. Defenders of Wildlife , 504 U.S. 555, 560-61 (1992).
