



THE 2020 OUTLOOK FOR “PFAS” CHEMICAL LITIGATION: AN EXPANDING TARGET ZONE

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Per- and polyfluorinated alkyl substances (“PFAS”) are a group of 3,000 to 5,000 chemical compounds invented in the 1940s and long valued for water, grease, and heat resistant properties that proved highly useful in a large number of consumer products.¹ Those products include nonstick cookware, water-repellent outerwear, food containers, carpets and textiles, fire-fighting foam, cleaning solutions, paints and coatings, and many others. In recent years, concern over potential human-health impacts of PFAS chemicals has grown, thanks in large part to their persistence and widespread dispersion in the environment. Scientists have conducted assessments for some PFAS compounds, most notably perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonate (“PFOS”), but only a few compounds have received extensive study and little scientific consensus exists as to specific health effects.² As 2020 begins, vigorous action to address PFAS contamination is underway on multiple fronts: proposed legislation, federal and state regulation, and expansive litigation.³ This LEGAL BACKGROUNDER focuses on the widening scope of PFAS litigation, which initially targeted PFOA and PFOS chemical producers, but increasingly is targeting downstream manufacturers, processors, and users of PFAS compounds, alleging liability for far-reaching groundwater and legacy contamination.

Early PFAS Litigation

Initial PFAS litigation took the form of individual complaints and class actions against DuPont de Nemours & Company (“DuPont”) and 3M Corporation (“3M”), which manufactured and processed PFOA and PFOS chemicals in the early days of their introduction into commerce. In the first case filed, several individuals brought state common-law tort claims in 2001 against DuPont and the Lubeck Public Service District of West Virginia, alleging injuries from contaminated drinking water from the company’s Parkersburg, West Virginia

¹ See Environmental Protection Agency, *Basic Information on PFAS*, <https://www.epa.gov/pfas/basic-information-pfas>.

² See, e.g., Hearing on “The Federal Role in the Toxic PFAS Chemical Crisis,” testimony before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Federal Spending Oversight and Emergency Management, Linda S. Birnbaum, Ph.D., D.A.B.T., A.T.S., Director, National Institute of Environmental Health Sciences and National Toxicology Program National Institutes of Health, at 5 (Sept. 26, 2018), <https://www.hsgac.senate.gov/imo/media/doc/Birnbaum%20Testimony.pdf>. A number of regulatory agencies have noted limitations in the existing scientific evidence, particularly with respect to causation. See, e.g., Health Canada, *Guidelines for Canadian Drinking Water Quality Guideline Technical Document Perfluorooctanoic Acid (PFOA)*, at 66-67, 80 (Dec. 7, 2018), <https://www.canada.ca/en/health-canada/services/publications/healthy-living/guidelines-canadian-drinking-water-quality-technical-document-perfluorooctanoic-acid/document.html>; Centers for Disease Control, *Biomonitoring, Perfluorochemicals* (last updated Oct. 12 2017), at 97-98, https://www.cdc.gov/biomonitoring/PFAS_BiomonitoringSummary.html; ATSDR, *Toxicological Profile for Perfluoroalkyls*, at 5, 10, 186 (June 2018), <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf>.

³ For a recent update, see K. Bennett, J. Luxton, A. Tharpe, W. Walsh, *Continued PFAS Action Likely in 2020* (Jan. 3, 2020), <https://lewisbrisois.com/newsroom/legal-alerts/continued-pfas-action-likely-in-2020>.

PFOA plant.⁴ The plaintiffs sought damages for medical monitoring and diminution of property value, along with punitive damages and injunctive relief against further PFOA releases.⁵ In 2002, a court certified the case as a class action, and in 2004 the parties settled. The settlement included an agreement to establish a scientific panel to evaluate potential links between PFOA exposure and adverse health effects.⁶ In 2013, the Judicial Panel on Multidistrict Litigation centralized subsequent claims in multidistrict litigation (“MDL”) in federal court in Ohio.⁷ Ultimately, the parties settled the MDL cases in 2017. DuPont and the Chemours Company (“Chemours”), without conceding liability, agreed to pay \$670.7 million, and to make specified additional amounts available to fund potential future payments.⁸ Similar federal class action litigation against the two companies is pending in North Carolina, involving another PFAS compound known as GenX.⁹

Litigation against 3M followed a different track, with the Minnesota attorney general filing natural resource damages claims in 2010.¹⁰ The state sought \$5 billion in damages for harm to drinking water and the environment. The parties settled the case without admissions or findings of liability in 2018 for \$850 million.¹¹

Subsequent Litigation: Downstream Users Are Increasingly Attracting Attention

In contrast to the initial wave of cases, which focused specifically on PFAS chemical manufacturers, more recent litigation has widened the target zone to numerous companies that used these chemicals in production processes and products. Examples include production of cookware, fiberglass, plastic, paper, footwear, and carpeting products, and fire-fighting foam production and use. The discussion below summarizes principal pending litigation involving downstream users.

Hoosick Falls and Petersburg, NY cases

Starting in 2016, residents of Hoosick Falls filed lawsuits seeking damages for remediating contaminated property, diminution of property value, punitive damages, and medical monitoring against Saint-Gobain Performance Plastics Corp. (“Saint-Gobain”) and Honeywell International (“Honeywell”) for use of PFOA in a variety of coatings applications.¹² A subsequent case filed in 2019 includes DuPont and 3M in addition to the original two defendants.¹³ A separate series of actions involve Tonoga, Inc., which operates the Taconic Plastics facility in Petersburg, New York. Plaintiffs allege soil and groundwater contamination

⁴ *Leach v. E.I. DuPont de Nemours and Co.*, Case No. 01-C-698 (Wood County W.V. Cir. Ct.), filed Aug. 31, 2001.

⁵ DuPont, SEC filing, June 30, 2011, at 3, <https://www.sec.gov/Archives/edgar/data/30554/000003055411000004/R16.htm>.

⁶ *In re E.I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 337 F. Supp. 3d 728, 731-32 (S.D. Ohio 2015). While listing six probable links, the panel concluded in its published, peer-reviewed paper that “[e]pidemiologic evidence remains limited, and to date data are insufficient to draw firm conclusions regarding the role of PFOA for any of the diseases of concern.” K. Steenland, T. Fletcher, and D.A. Savitz, *Epidemiologic Evidence on the Health Effects of Perfluorooctanoic Acid (PFAO)*, Environmental Health Perspectives, 118(8), at 1100-08 (2010).

⁷ *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, Civ. Action 2:13-md-2433 (S.D. Ohio, July 6, 2015), <https://casetext.com/case/in-re-e-i-du-pont-de-nemours-co-3>.

⁸ “DuPont Reaches Global Settlement of Multi-District PFOA Litigation,” DuPont press release (Feb. 13, 2017), <https://www.dupont.com/news/dupont-reaches-global-settlement-of-multi-district-pfoa-litigation.html>. Chemours was created in 2013 as a spin-off of the fluoroproducts businesses within DuPont. See “Chemours: About the Chemours Company,” <https://www.chemours.com/en/about-chemours/history>.

⁹ *What’s on the Agenda in 2020*, WilmingtonBiz (Jan. 3, 2020), http://www.wilmingtonbiz.com/2020_in_biz/2020/01/03/whats_on_the_agenda_in_2020/19809.

¹⁰ *Minnesota v. 3M Co.*, No. 27-CV-10-28862 (Minn. Dist. Ct. Dec. 30, 2010).

¹¹ The settlement agreement and order can be found at the state’s website: “Minnesota 3M PFC Settlement,” <https://3msettlement.state.mn.us/>.

¹² *Baker v. Saint-Gobain Performance Plastics Corp.*, Civ. No. 1:16-CV-0220 (N.D.N.Y. filed Feb. 24, 2016). Additional complaints are consolidated as *In re Hoosick Falls PFOA Cases*, Civ. No. 1:19-CV-219 (N.D.N.Y.).

¹³ *Schneider v. Saint-Gobain et al.*, Civ. No. 1:190CV-83 (N.D.N.Y., filed Jan. 23, 2019).

from processes that coated fabrics with PFOA-based Teflon; a state court certified the case as a class action in 2018.¹⁴ Both sites have been designated as Superfund sites under federal or state law.¹⁵

The Wolverine cases

Wolverine Worldwide is a defendant in private class action and state litigation tied to its use of PFOA and PFOS as waterproofing chemicals in shoes made at its Michigan facility. In addition to Wolverine, the class action complaint names 3M, Waste Management, Inc., and Waste Management of Michigan, Inc.¹⁶ The state case sought recovery of costs and fees for cleanup of tannery waste and replacement of PFAS-affected drinking water supplies.¹⁷ Wolverine notably added 3M as a defendant through a third-party complaint.¹⁸ In December 2019, Michigan's Attorney General announced a \$69.5 million settlement of the state case.¹⁹

The fire-fighting foam cases

PFAS chemicals have been widely used in aqueous film-forming foam ("AFFF") as a fire-fighting agent since the 1960s. As an example of the far-reaching dimension of this application, the Department of Defense has identified 401 sites with a known or suspected release of PFAS to groundwater.²⁰ AFFF litigation has spread to many states, and an MDL panel in Charleston, South Carolina is considering approximately 100 cases involving military and civilian air bases; the plaintiffs are governmental water districts and individuals who allege personal injury, need for medical monitoring, property damage, or other economic loss.²¹ A class action in federal court in Ohio names nine defendant companies and claims to represent all residents of the United States who have detectable levels of PFAS in their blood, seeking establishment of a PFAS science panel. The case survived a motion to dismiss in September 2019.²²

In other actions, numerous states are seeking relief on behalf of their citizens or for recovery of costs. These include New York and New Hampshire,²³ which have each brought two suits against multiple fire-fighting foam producers and distributors as well as PFAS chemical manufacturers (New Hampshire is the first case to allege statewide contamination), Vermont, New Mexico (which sued the U.S. Air Force for groundwater contamination from two bases), and Washington. The Judicial Panel on Multidistrict Litigation has consolidated many of these cases into the MDL in South Carolina.

Other cases

Other litigation involves paper mills and carpet manufacturers, including a class action complaint alleging a paper mill's responsibility for PFAS chemicals in a landfill in Michigan that EPA previously designated a federal Superfund site.²⁴ Michigan regulators added PFAS chemicals to the list of contaminants already

¹⁴ *Burdick v. Tonoga, Inc.*, 60 Misc.3d 1212(A) (N.Y. Sup. Ct. 2018).

¹⁵ EPA, *Superfund Site: Saint-Gobain Performance Plastics, Village of Hoosick Falls, NY*, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0202702>; NY State Dep't of Env. Conservation, *Petersburgh: Information for Communities Impacted by Perfluorinated Compounds (PFCs)*, <https://www.dec.ny.gov/chemical/108820.html>.

¹⁶ *Zimmerman v. 3M, et al.*, Case 1:17-cv-01062 (W.D. Mich., filed Dec. 2, 2017).

¹⁷ *Michigan Dep't of Env. Quality v. Wolverine World Wide, Inc.*, Case 1:18-cv-0039 (W.D. Mich., filed Jan. 20, 2018).

¹⁸ *Id.*, Wolverine World Wide Inc.'s Third-Party Complaint and Demand for Jury Trial, (W.D. Mich., filed Dec. 18, 2018), <https://wearewolverine.com/wp-content/uploads/2018/12/3d-party-complaint-against-3M.pdf>.

¹⁹ "MI AG Nessel Outlines PFAS Settlement Framework for State, Plainfield & Algoma Townships, and Wolverine Worldwide" (Dec. 10, 2019), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-514315--,00.html.

²⁰ "DOD Moving Forward With Task Force to Address PFAS," press release (Aug. 9, 2019), <https://www.defense.gov/explore/story/Article/1930618/dod-moving-forward-with-task-force-to-address-pfas/>.

²¹ *Aqueous Film-Forming Foams (AFFF) Products Liability Litigation*, MDL No. 2:18-mn-2873-RMG (D. S.C., Dec. 7, 2018), <https://www.scd.uscourts.gov/mdl-2873/>.

²² *Hardwick v. 3M Co.*, 2019 U.S. Dist. LEXIS 169322, 2019 WL 4757134 (S.D. Ohio 2019).

²³ *State of New Hampshire v. 3M Co. et al.*, Case No. 216-2019-cv-445 (N.H. Super. Ct., filed May 29, 2019).

²⁴ *Dykehouse v. 3M Co., Georgia-Pacific LLC*, Case 1:18-cv-01225 (W.D. Mich., filed Nov. 1, 2018).

being sampled at the site.²⁵ Alabama municipal water and sewer authorities have filed several lawsuits against more than 30 rug mills in Georgia and Alabama.²⁶

Indications of What is To Come

The sheer number of PFAS uses, the already widening circle of PFAS litigation, and plaintiffs' successful settlements in several high-profile cases send clear signals that more litigation can be expected against an increasing array of downstream users of these chemicals. PFAS litigation is already being compared to high-dollar damages awards for groundwater contamination attributed to the gasoline additive MTBE. In those cases, New Hampshire and New York won jury verdicts for \$236 million and \$105 million, respectively. The U.S. Supreme Court rejected the MTBE defendants' petitions for certiorari in those cases.²⁷ The Court's cert denials opened the courtroom doors wider to plaintiffs' use of a market-share theory of liability under state tort law. Market-share theory allows allocation of liability to multiple chemical producers where specific contributions to injury cannot be shown.²⁸ Further, the Sixth Circuit recently affirmed a district court's willingness to entertain a substantive due process "right of bodily integrity" against exposure to environmental toxins, in another case in which the Supreme Court denied certiorari.²⁹ All of these factors suggest current and former users of PFAS chemicals have reason for concern, potentially extending beyond PFOA and PFOS to encompass other perfluorinated compounds as well.

PFAS is different from many other chemicals, given the still unsettled nature of the science and the lack of a "signature" illness associated with PFAS exposure. Litigation issues will include questions not only of causation but also what knowledge users had at various points and times in the manufacturing supply chain process. With respect to what companies can do to prepare for litigation, measures include a careful assessment of potential liability and appropriate remediation efforts, engagement in the regulatory process at the state and federal level, and proactive steps to minimize liability.

²⁵ Mich. Dep't of Environment, Great Lakes, and Energy, "Nolichucky Industrial Corp., Kalamazoo, Kalamazoo County," https://www.michigan.gov/pfasresponse/0,9038,7-365-86511_95645-498496--,00.html.

²⁶ E.g., *The Water Works and Sewer Board of the Town of Centre v. 3M Co. et al.*, 13-CV-2017-900049.00 (Circ. Ct. of Cherokee County, Ala., filed May 15, 2017), <https://www.courthousenews.com/wp-content/uploads/2017/05/Alabama-water-pollution.pdf>.

²⁷ *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013); cert. denied, *Exxon Mobil Corp. v. New York*, 572 U.S. 1080 (2014).

²⁸ See *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 377-79 (S.D.N.Y. 2005).

²⁹ *Guertin v. Michigan*, 912 F.3d 907, 921 (6th Cir. 2019), cert. denied, *City of Flint v. Guertin*, No. 19-205, 2020 LEXIS 603 (Jan. 21, 2020).