

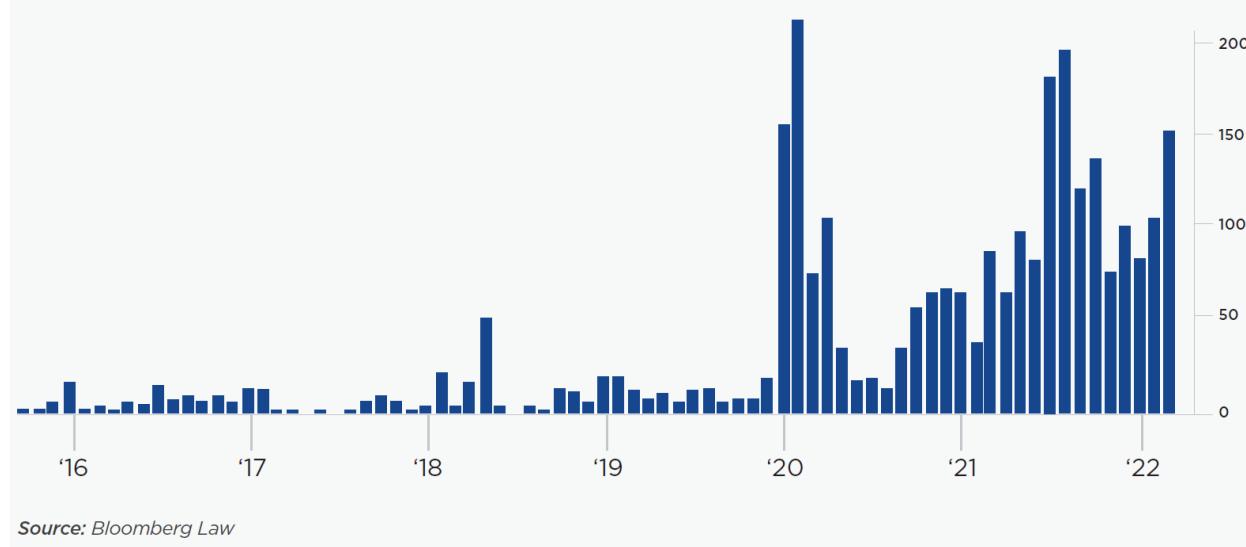
PFAS: Product Liability's New Frontier

By Jackson Otto

Since the first lawsuit was filed in 1999, plaintiff's attorneys have brought thousands of environmental and personal injury cases involving per- and polyfluoroalkyl substances, or PFAS, colloquially referred to as "forever chemicals." While this was once a niche practice area involving claims against a small group of chemical manufacturers, PFAS litigation has exploded to encompass manufacturers, distributors, and retailers across nearly every industry. Recent court and regulatory activity have pulled PFAS even further into the limelight, promising an exponential rise in both the quantity of these lawsuits and the number of companies they will be brought against.

Monthly PFAS Lawsuits Filed

October 2015 - March 2022



What are PFAS?

PFAS are a class of several thousands of synthetic chemicals first invented in the 1940s. The chemicals were prized for their durability and ability to form a film that repels both oil and water. PFAS were utilized in a broad array of industrial and consumer products, including textiles, furniture, cookware, food packaging, cosmetics, medical devices, and even in coatings used by the Apollo space program. In short, most products and equipment that required resistance to moisture, grease, oil, stains, or wrinkles are likely to have at one time used PFAS.

The same properties that make PFAS so useful—their insolubility in oil and water—also make these chemicals extremely slow to break down. It is from this resistance to natural degradation that PFAS derive the name “forever chemicals.” Due to their widespread use over many decades, some studies have found traces of these chemicals in soil, water systems, and livestock. According to a [CDC study](#), the majority of people tested over the last 20 years have some level of PFAS in their system. The health effects of PFAS exposure are still being studied, but plaintiffs contend that increased PFAS levels can interfere with hormones and the immune system, negatively impact fertility and physical development, and increase the risk of certain cancers.

PFAS Litigation and the AFFF MDL

The majority of the litigation surrounding PFAS to date revolves around its use in Aqueous Film-Forming Foams (AFFFs, for short). AFFFs were created in the 1960s in conjunction with the U.S. military to fight fires caused by oil, gasoline, and jet fuel that water cannot extinguish. These firefighting foams work by forming a film over ignited liquid fuel that smothers it and prevents reignition. AFFFs are routinely used by military bases and airports for both training and emergency response.

Plaintiffs in this litigation include individuals, property owners, utility companies, and state and local governments and allege that either after use, or due to improper storage and disposal, AFFFs would run off into local water tables causing personal injuries, property damage, and necessitating costly remediation projects. While some of these claims have settled individually, the bulk of recent cases have been consolidated into a multidistrict litigation (MDL) in the U.S. District Court for South Carolina. The MDL currently contains over 2,700 separate cases and thus far none have gone to trial; however, on October 24, 2022, *Stuart v. 3M Company, et al.* was selected as the bellwether trial to be heard by a jury. The case is being brought on behalf of the municipality of Stuart, Florida, and will be tried in front of Judge Richard Gergel on June 5, 2023.¹ The outcome of this case will greatly shape the MDL, as well as the future of AFFF litigation generally.

The EPA Widens the Field

The Environmental Protection Agency (EPA) has recently made news for increasing its regulation and tracking of PFAS other than just AFFF. Last year, the EPA issued UCMR 5, a rule which added 29 PFAS to the list of substances that community water systems must monitor under the Safe Drinking Water Act. More recently, the EPA proposed amendments to the Toxic

¹ The case is *City of Stuart v. 3M Company, et al.*, Case No. 2:18CV3487RMG. The MDL is *In re: Aqueous Film-Forming Foams Prods. Litig.*, MDL No. 2:18CV2873RMG.

Control Substances Act (TSCA) which would require companies of all sizes to retroactively report information regarding PFAS in their products.

The proposed TSCA Section 8(A)(7) would require any company that imported, produced, or manufactured PFAS, or a product containing PFAS, since January 1, 2011 to report to the EPA the specific types and quantities of the chemicals used, the manner in which the product and any byproducts were disposed of, the number of individuals exposed to these products and the duration of any such exposure, and information regarding each chemical's impact to the environment and human health. The bulk of this information, aside from certain trade secrets, will be made publicly available.

Aside from the staggering volume of information demanded (much of which will be difficult if not impossible for many companies to obtain), the proposed rule is also notable because in its current iteration there is no definite threshold triggering the reporting—that is, any company that imported or manufactured a single product over the last 12 years that contained any one of the thousands of PFAS chemicals would be subject to these requirements. There is no doubt that the publishing of these reports will spark a firestorm of new filings by plaintiff's attorneys. The proposed rule is expected to be finalized and published this year following the conclusion of the public comment period in December 2022.

The Future of PFAS Litigation

State regulators have taken the lead in expanding PFAS scrutiny beyond chemical manufacturers and firefighting foam. On September 29, 2022, Governor Newsom of California signed Assembly Bill Nos. 1917 and 2771 into law. These statutes prohibit the manufacture, distribution, or sale of PFAS-containing textiles and cosmetic products respectively, effective January 1, 2025. In 2021, Maine passed a more sweeping law banning PFAS in all new products, but it does not come into effect until 2030. Other states such as Hawaii and Colorado have also passed laws banning the use of PFAS in specific product categories.

Plaintiff's attorneys have wasted no time in bringing novel PFAS lawsuits against companies operating in all of these sectors. Cosmetic companies such as Coty, L'Oreal, Shiseido, and Burt's Bees are facing suits in California and New York over alleged PFAS in certain waterproof makeup lines. McDonald's and Burger King have been sued in multiple states after a [Consumer Reports report](#) indicated the presence of PFAS in their food packaging. Class action lawsuits have been filed to go after grocery stores for alleged PFAS in packages on their shelves, cookware companies for PFAS in nonstick pans, and apparel companies for PFAS in their coats and boots.

As PFAS litigation continues to expand, companies are examining their own risk and seeking to minimize it before these new requirements come into effect and their businesses are the

subject of a class or regulatory action. As the scope of products implicated in PFAS claims grows by the week, it is no longer a question of if an industry will be impacted but only a question of when. It is certain that 2023 will be a pivotal year in PFAS litigation, and the sooner businesses begin planning their response the better.

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