

PFAS-EMERGING LEGAL ISSUES

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PFAS

FAST FACTS

Perfluoroalkyl and Polyfluoroalkyl Substances

Describes a group of over 5,000 different synthetic chemicals that are used to repel water and oil, to combat high temperatures, and to reduce friction.

While PFAS have been used since the 1940's, they are considered “emerging contaminants” because only recently has technology become available to measure and detect PFAS. Such contaminants are characterized by three elements:

- 1) a real or perceived threat to health;
- 2) an incomplete toxicological understanding; and
- 3) lack of federal regulation.

TYPES OF PFAS



TYPES OF PFAS

- Textiles treated with Scotchguard
- Teflon/non-stick cookware
- Stain-resistant coatings
- Food packaging
- Also, AFFF (aqueous film-forming foam)
- Ability to Repel Water and Oil/Combat High Temps/Reduce Friction=Popularity in Auto/Aerospace/Aviation/Manufacturing

EXPOSURE ROUTES - *Let's Get Wonky for A Minute*



EXPOSURE ROUTES

- PFAS-Composed of carbon and fluorine atoms; the bond is so strong that they are known as FOREVER CHEMICALS.
- **Good:** durability and resistance
- **Bad:** Break down very slowly and can build up in people, animals, and the environment.
- Oral, dermal, and inhalation exposure and not easily metabolized.
- Highest concentrations in the liver, kidneys, and blood.

EXPOSURE ROUTES

May Cause:

- Liver Damage
- Asthma
- Thyroid Disease
- Mental Disabilities in Children
- Testicular Cancer
- Kidney Cancer
- Decreased Fertility
- Hormonal Changes

EXPOSURE ROUTES: GROUNDWATER AND DRINKING SUPPLIES

- LEACHATE: Liquid formed from the percolation of groundwater through landfilled waste.
 - Generated by all landfills and may contain PFAS.
 - More than ½ of US landfills has PFAS present in landfill leachate.
 - Eye on: Wastewater treatment facilities.
 - Dispose of Leachate without removing PFAS.
 - Concentrations build up over time.
 - When PFAS-contaminated leachate passes through a wastewater treatment plant, the plant will emit a portion of these pollutants flowing to surface waters.

EXPOSURE ROUTES: GROUNDWATER AND DRINKING SUPPLIES

FARMING:

- Absence of enforceable federal regs=largely unrestricted disposal of PFAS waste.
- So that current disposal methods can spread PFAS through the environment.
- Use of treated wastewater sludge (biosolids) as an agricultural fertilizer can inadvertently disperse PFAS.
- Can leach out of biosolids and contaminate groundwater used for drinking water supply.

EXPOSURE ROUTES: GROUNDWATER AND DRINKING SUPPLIES

1

MANUFACTURING EMISSIONS

- Facilities that produce and use PFAS can emit into the atmosphere, precipitate and then contaminate groundwater.

2

RUNOFF

- Runoff from foam at military bases, airports and fire dept. training sites
- Again depositing PFAS runoff into drinking water
- Hoosick River case

EXPOSURE ROUTES:

INGESTION

- Food packaging with grease proof coatings
- Whole Foods-pulled PFAS containers in 2018
- McDonald's- will pull in 2025
- Wendy's-will pull in 2022





EXPOSURE ROUTES: DERMAL CONTACT

PFAS FOUND:

82% Waterproof mascara

63% Foundations

62% Liquid Lipsticks



DERMAL CONTACT

- AFFF-AQUEOUS FILM-FORMING FOAM
- DRILLS ON MILITARY BASES AND SHIPS
- AIRPORTS
- 2018-CONGRESS DIRECTED THE FAA TO ALLOW AIRPORTS TO USE PFAS-FREE FOAMS
- 2019-CONGRESS PASSED LEGISLATION PHASING OUT PFAS IN MILITARY FOAMS BY 2024

LIKELY DEFENDANTS



**MANUFACTURERS LIKE 3M
(SCOTCHGUARD) AND DUPONT
(TEFLON)**



INDUSTRIES AT RISK

TEXTILES AND LEATHERS

PAPER PRODUCTS

METAL PLATING AND ETCHING

CLASS-B FIREFIGHTING FOAMS

WIRE MANUFACTURING

INDUSTRIAL RESINS/MOLDS/PLASTICS

PHOTOLITHOGRAPHY AND SEMICONDUCTOR INDUSTRIES

MILITARY/FARMERS/SEWAGE PLANTS/DISTRIBUTORS

CASE STUDY:

WOLVERINE WORLD WIDE, INC.

KENT COUNTY, MI V. WOLVERINE WORLD WIDE INC. AND 3M

- Treated leather with 3M Scotchguard and discharged PFAS-tainted waste into the community.
- Damages sought: compensatory and exemplary damages; injunctive relief; medical monitoring.
- Western District of Michigan Court: Because plaintiffs were foreseeable victims of PFAS contamination, a relationship existed between plaintiffs and 3M sufficient to impose a duty.
- SETTLED IN EARLY 2020 FOR \$70M

CASE STUDY: L'OREAL

APRIL 2022-CLASS ACTION USDC NJ

PFAS PRESENT IN WATERPROOF MASCARAS

- FAILURE TO WARN
 - BREACH OF EXPRESS WARRANTY (MASCARA WOULD CONFORM TO THE REPRESENTATIONS OF BEING SAFE)
 - BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
 - L'OREAL UNJUSTLY ENRICHED BECAUSE THEY ACCEPTED PROFITS.
-
- WATCHING CLOSELY. NO ACTION AT THIS TIME.

PFAS-ENEMY OF THE STATE

- NH, NJ, NY, SC AND VT FILED SUIT AGAINST PFAS MANUFACTURERS
- NM WON A LAWSUIT AGAINST THE USAF: \$1.7M FINE FOR FAILING TO COMPLY WITH RULES RELATED TO GROUNDWATER
- SOUTH CAROLINA MDL: 200 SUITS FOR AFFF



THEORIES OF LIABILITY- CHALLENGES

- DIFFICULT TO PROVE THAT A DEFENDANT BREACHED A DUTY BY FAILING TO ADHERE TO THE REASONABLE PERSON STANDARD.
 - HARD BECAUSE TOXICITY OF PFAS IS RELATIVELY UNCLEAR
 - PFAS HAS A LEGITIMATE PURPOSE
- SCIENTIFIC DATA LINKING PFAS TO HUMAN AILMENTS IS RELATIVELY WEAK
- STRICT PRODUCTS LIABILITY; BREACH OF IMPLIED WARRANTY; NUISANCE; TRESPASS



CAUSATION PROOF ISSUES

GENERAL CAUSATION:

- MUST SHOW THE TOXICANT IN QUESTION CAN CAUSE THE COMPLAINED-OF INJURY
- SPECIFIC CAUSATION REQUIRES THAT THE PLAINTIFF PROVE THAT THE TOXICANT DID IN FACT CAUSE THE INJURY
- MORE DIFFICULT FOR INDIVIDUALS THAN GOVERNMENTAL ENTITIES BECAUSE OF THE DAMAGES ALLEGED

DAMAGES



COMPENSATORY

PUNITIVE

MEDICAL
MONITORING
COSTS

NATURAL
RESOURCES
DAMAGES

LITIGATION ISSUES



INDIVIDUAL PLAINTIFFS
AND GOVERNMENT
PLAINTIFFS

GOVERNMENT:
REMEDATION OF PFAS-
CONTAMINATED LANDS

INDIVIDUALS: CLASS
ACTIONS FOR WATER
WELLS, OR AFFF

CAUSATION DISCOVERY:
LOOK AT ATSDR STUDY-
CONFLICTING RESULTS
REGARDING LINK BETWEEN
PFAS AND DEVELOPMENT
OF DISEASE.

MASS TORT ISSUES: DE, PA,
MI, NJ: INCREASED TESTING
AND NEWS ARTICLES WILL
LEAD TO MORE CASE
FILINGS

ADR: OUT-OF-COURT
SETTLEMENTS

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BEST PRACTICES FOR INSURERS

ASBESTOS/MASS TORT LESSONS: STATE-OF-THE-ART ARGUMENTS

- GOVERNMENT CONTRACTOR DEFENSE

DAMAGES MATRIX:

- LEVELS OF PERSONAL INJURY/MEDICAL MONITORING/PROPERTY DAMAGE.
- SIGNIFICANCE OF EXPOSURE/TOXICITY LEVEL/INCREASED CHANCE OF DISEASE/SERIOUSNESS OF DISEASE/VALUE OF EARLY DETECTION AND DIAGNOSIS



IN THE NEWS

- *TODAY SHOW:* AIR DATE-7/8/22:
 - HARMFUL CHEMICAL FOUND IN CONSUMER PRODUCTS- RISING RATES OF LIVER DISEASE IN CHILDREN
 - MOUNT SINAI: PRENATAL EXPOSURE TO CHEMICALS- LEADS TO NON-ALCHOLIC FATTY LIVER DISEASE.
 - COOKWARE, FOOD PACKAGING, FURNTIURE, INFANT PRODUCTS, PESTICIDES
 - 45 ENDOCRINE-DISRUPTING CHEMICALS, INCLUDING PFAS, IN THE BLOOD/URINE OF 1108 PREGNANT WOMEN 2004-2010. WHEN KIDS WERE 6-11 YEARS OLD, BIOMARKERS CHECKED.
 - HIGHER LEVELS OF EXPOSURE TO THE CHEMICALS IN UTERO WAS ASSOCIATED WITH ELEVATED BIOMARKERS.



IN THE NEWS

- *TODAY SHOW*: AIR DATE-7/8/22:
- Doctor: We are exposed through the food we eat, the water we drink and the use of consumer products.
- Early exposure (in the womb) increases risk.
- Never before have we seen this much liver disease in children.
- Avoid plastic containers, bottles, canned foods.
- **HOWEVER, the biggest contributor to pediatric liver disease remains the epidemic of childhood obesity.**

QUESTIONS? COMMENTS?



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