PFAS: A GROWING WAVE OF LITIGATION

In the legal thriller Dark Waters, an erstwhile corporate defense attorney battles a company accused of dumping a then-obscure chemical called PFOA in a small town, where it kills scores of livestock and causes cancer and other disease in residents. The film's David and Goliath story ends when, after years of litigation, the company settles the cases for an eye-popping $671 million.

But PFOA (perfluorooctanoic acid) is not just the stuff of Hollywood. It is a real substance belonging to a class of thousands of chemicals known as PFAS (per- and polyfluoroalkyl substances), used in the United States and around the world for decades in countless products ranging from outdoor gear and electronics to food packaging and cosmetics. Litigation over PFAS has exploded in recent years as the potential health risks of certain PFAS are more closely scrutinized, testing methods improve, and regulatory interest grows.[1] *Bloomberg Law* has reported that at least 50 lawsuits concerning PFAS have been filed in, transferred into, or transferred within U.S. federal courts since March 1.[2] Commentators now estimate that PFAS liability for some businesses may be in the billions of dollars.[3] Although manufacturers of PFAS have been the predominant litigation targets thus far, businesses at every stage of commerce now face exposure and cannot afford to ignore the issue

I. What Are PFAS?

Nicknamed "forever chemicals," PFAS have an astonishing range of consumer and industrial applications. Resistant to water, oil, heat, and time, PFAS owe their great utility to their incredible durability, attributable to their carbon-fluorine bonds, among the strongest bonds known in chemistry.[4]

But these same bonds are also proving to be a source of liability. In particular, certain PFAS analytes are reported to be highly resistant to breakdown, and are claimed to bioaccumulate in the human body and in animals, where, depending upon factors like chemical structure, dose, and type of exposure, some PFAS have reportedly been linked to conditions like cancer, altered immune and thyroid function, kidney disease, and reproductive and developmental harms.[5]

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[1] Nicole M. Brennan, *et al.*, *Trends in the Regulation of Per- and Polyfluoroalkyl Substances (PFAS): A Scoping Review*, INT'L J. ENV'T. RES. PUB. HEALTH (2021), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8536021/#B44-ijerph-18-10900. Beyond the United States, the European Chemicals Agency (ECHA) proposed restricting the manufacture, marketing, and use of PFAS in the European Union. ECHA has called the proposal, which was published on February 7, 2023, "one of the broadest in the EU's history." Eur. Chem. Agency, *ECHA receives PFASs restriction proposal from five national authorities* (Jan. 13, 2023), available at https://echa.europa.eu/-/echa-receives-pfass-restriction-proposal-from-five-national-authorities; *see also* Eur. Chem. Agency, *Annex XV Restriction Report: Proposal for a Restriction* (Feb. 7, 2023), available at https://echa.europa.eu/documents/10162/4e564987-9902-9d7e-3fab-2d7f73753053.

[2] https://news-emails.bindg.com/v1/newsletter/00000186-c30f-d819-adbf-fb2fcaa20000?product=BLNW&utm_source=newsletter&item=web-version&region=header

[3] Ed Hammond, *et al.*, *3M to Stop Producing PFAS 'Forever Chemicals' by End of 2025*, BLOOMBERG NEWS (Dec. 20, 2022), available at https://news.bloomberglaw.com/environment-and-energy/3m-will-stop-producing-forever-chemical-pfas-by-end-of-2025.

[4] Nat'l Institute of Env't Health Sci., *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, available at https://www.niehs.nih.gov/health/materials/perfluoroalkyl_and_polyfluoroalkyl_substances_508.pdf.

[5] Suzanne E. Fenton, *et al.*, *Per- and Polyfluoroalkyl Substance Toxicity and Human Health Review: Current State of Knowledge and Strategies for Informing Future Research*, Env't Toxicology and Chem. (2020), available at

Early on, PFAS litigation focused on alleged contamination of water supplies by certain manufacturers through the use of PFOA and its chemical cousin PFOS, among the most widely used and studied PFAS.[6] The first cluster of such cases—begun more than twenty years ago, and the inspiration for *Dark Waters*—has only recently begun to be resolved, but not before laying the groundwork for thousands of PFAS suits that followed.

The cases began in 1999 with a lawsuit initiated by a West Virginia farmer and his family who claimed their cattle were dying from water contamination linked to the use and disposal of PFOA. During the litigation, the farmer's counsel, Robert Bilott, sent a whistleblower letter to the EPA and other government regulators. The letter summarized documents suggesting that the defendant, DuPont, had known for years that PFOA was linked to cancer but had declined to switch to a potentially safer alternative and concealed PFOA water contamination.[7]

Bilott then filed a class action against DuPont on behalf of tens of thousands of people in West Virginia and Ohio, claiming injuries from drinking water contaminated by a plant that used PFOA.[8] In 2004, the parties settled, with the defendant agreeing to pay cash and fund a medical monitoring program if an independent group of epidemiologists, the "C8 Science Panel," found links between PFOA and human health[9]—which the C8 Science Panel eventually did for several conditions, such as high cholesterol, ulcerative colitis, thyroid disease, testicular and kidney cancer, and pregnancy-induced hypertension.[10] The findings of the C8 Science Panel continue to be used in PFAS-related litigation today.

In 2013, follow-on claims were centralized in an MDL in the Southern District of Ohio.[11] Following verdicts against the defendant in several bellwether trials, the parties settled the cases in 2017. Without conceding liability, DuPont and a spin-off agreed to pay approximately $671 million, and to make additional

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https://setac.onlinelibrary.wiley.com/doi/full/10.1002/etc.4890; *see also* Nat'l Cancer Institute, *PFAS Exposure and Risk of Cancer*, available at https://dceg.cancer.gov/research/what-we-study/pfas.

[6] EPA, *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, available at https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas.

[7] Robert Bilott, *Letter Dated March 6, 2001*, available at https://www.hpcbd.com/wp-content/uploads/migrations/2061991/dupont/Dupont-C8-Violations-Reported-to-EPA.pdf.

[8] Complaint, *Leach v. E.I. du Pont de Nemours & Co.*, No. 01-c-608 (W. Va. Cir. Ct. Aug. 31, 2002).

[9] Transcript of Hearing, *Leach v. E.I. du Pont de Nemours & Co.*, No. 01-c-608 (W. Va. Cir. Ct. Feb. 28, 2005); C8 Science Panel, *The Science Panel Website*, available at http://www.c8sciencepanel.org/index.html.

[10] *See, e.g.*, C8 Science Panel, *Probable Link Evaluation for Heart Disease*, Oct. 29, 2012, available at http://www.c8sciencepanel.org/pdfs/Probable_Link_C8_Heart_Disease_29Oct2012.pdf; C8 Science Panel, *Probable Link Evaluation of Autoimmune Disease*, Jul. 30, 2012, available at http://www.c8sciencepanel.org/pdfs/Probable_Link_C8_Autoimmune_Disease_30Jul2012.pdf; C8 Science Panel, Probable Link Evaluation of Thyroid Disease, Jul. 30, 2012, available at http://www.c8sciencepanel.org/pdfs/Probable_Link_C8_Thyroid_30Jul2012.pdf; C8 Science Panel, Probable Link Evaluation of Cancer, Apr. 16, 2012, available at http://www.c8sciencepanel.org/pdfs/Probable_Link_C8_Cancer_16April2012_v2.pdf; C8 Science Panel, Probable Link Evaluation of Pregnancy-Induced Hypertension, Dec. 5, 2011, available at http://www.c8sciencepanel.org/pdfs/Probable_Link_C8_PIH_5Dec2011.pdf.

[11] Transfer Order, *In Re: E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 13-md-2433 (S.D. Ohio Apr. 9, 2013), available at https://www.ohsd.uscourts.gov/sites/ohsd/files//MDL%20-%20Transfer%20Order.pdf; *see also* Al Greenwood, *US jury awards more damages in DuPont Teflon case*, INDEP. COMMODITY INTEL. SERVS. (July 8, 2016), available at https://www.icis.com/explore/resources/news/2016/07/08/10015003/us-jury-awards-more-damages-in-dupont-teflon-case/.

amounts available for potential future payments.[12] Subsequent cases were resolved for an additional $83 million.[13]

II. Current Litigation Landscape

In recent years, PFAS litigation has ballooned to target a dizzying array of new defendants, including paper companies,[14] refineries,[15] cosmetics businesses,[16] packaging producers,[17] retailers,[18] and fast food chains.[19] Cases span a broad range of plaintiffs and claims, including "traditional" litigation in which private parties seek injunctive relief like remediation and damages for alleged land and water contamination, along with government enforcement actions, claims for supposed false advertising of products containing PFAS, and challenges to agency rulemakings.

Contamination Cases. Similar to the first wave of PFAS litigation, private litigants continue to seek damages in connection with alleged PFAS contamination. Claims include negligence, trespass, nuisance, and products liability, along with actions under state and federal statutes. These cases present substantial financial risks to defendants. As just one example, late last year, the Court of Appeals for the Sixth Circuit upheld an Ohio jury's $40 million verdict for an individual cancer survivor, who claimed PFAS-contaminated water caused his illness.[20]

As with other so-called toxic tort litigation, establishing or refuting a causal link between human harm and PFAS exposure is a central issue for contamination claims, where plaintiffs seek compensation for alleged health problems. In the Ohio case referenced above, the plaintiff relied extensively on the epidemiological findings of the C8 Science Panel to prove that PFAS caused his cancer.[21] Related issues are also being litigated in the aqueous film-forming foam (AFFF) products liability litigation, an MDL pending in the District of South Carolina in which some 15,000 plaintiffs allege harms from alleged PFAS exposure linked to fluorinated

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[12] Case Management Order, *In Re: E.I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 13-md-2433 (S.D. Ohio Apr. 12, 2017), available at https://www.ohsd.uscourts.gov/sites/ohsd/files//casemanorder22.pdf; Arathy Nair, *DuPont settles lawsuits over leak of chemical used to make Teflon*, REUTERS (Feb. 13, 2017), available at https://www.reuters.com/article/us-du-pont-lawsuit-west-virginia/dupont-settles-lawsuits-over-leak-of-chemical-used-to-make-teflon-idUSKBN15S18U.

[13] Jef Feeley, *et al.*, *DuPont, Chemours in $4 Billion 'Forever Chemicals' Cost Pact (2)*, BLOOMBERG LAW (Jan. 22, 2021), available at https://news.bloomberglaw.com/environment-and-energy/dupont-and-chemours-in-4-billion-forever-chemicals-cost-pact.

[14] Complaint, *Saunders v. Sappi N. Am., Inc.*, No. 21-cv-00245 (D. Me. Aug. 25, 2021); Complaint, *Higgins v. Huhtamaki, Inc.*, No. 21-cv-00369 (D. Me. Dec. 21, 2021); Complaint, *Dykehouse, et al. v. The 3M Co.*, No. 18-cv-01225 (W.D. Mich. Nov. 1, 2018).

[15] Complaint, *State v. Williams Alaska Petroleum, Inc.*, No. 4FA-14-01544 (Alaska Sup. Ct. 2014).

[16] Complaint, *Brown v. CoverGirl Cosmetics & Coty, Inc.*, No. 1:22-cv-02696 (S.D.N.Y. Apr. 1, 2022); Complaint, *Solis v. CoverGirl Cosmetics & Coty, Inc.*, No. 3:22-cv-00400-BAS (S.D. Cal. Mar. 25, 2022); Complaint, *GMO Free USA d/b/a Toxin Free USA v. Cover Girl Cosmetics*, No. 2021-CA-004786 B (D.C Sup. Ct. Dec. 20, 2021).

[17] Complaint, *Ctr. for Env't Health v. Inhance Tech. USA,* No. 22-cv-03819 (D.D.C. Dec. 27, 2022); Complaint, *United States v. Inhance Tech, LLC*, No. 22-cv-05055 (E.D. Pa. Dec. 19, 2022).

[18] Complaint, *Lupia v. Recreational Equip., Inc.*, No. 3:22-cv-02510 (N.D. Cal. Apr. 25, 2022).

[19] Complaint, *Hussain v. Burger King Corp.*, No. 4:22-cv-02258 (N.D. Cal. Apr. 11, 2022); Complaint, *McDowell v. McDonald's Corp.,* No. 1:22-cv-01688 (N.D. Ill. Mar. 31, 2022).

[20] *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912 (6th Cir. 2022).

[21] *Id.*

firefighting foams.[22] There, similar to the Ohio matter, the court has urged the parties to use the C8 Science Panel's findings as a starting point for discovery about the potential links between PFAS and human health.[23]

Causal issues also arise in cases in which property owners seek remediation for alleged PFAS contamination. There, the causation element requires litigants to show the defendants were responsible, at least in part, for the alleged discharge. Litigants have had mixed success in doing so, particularly given the complex causal chain between potentially responsible parties. For example, in one recent case, the Southern District of New York granted in part a motion to dismiss claims brought by a corporation that owned and operated five water systems in New York. The court ruled that the plaintiff failed to allege facts showing it was the defendants that had caused the alleged contamination.[24] While the plaintiff claimed that the defendants "continuously sold raw PFAS, including PFOA, to other industrial manufacturers . . . within . . . source watersheds," it failed to allege that the manufacturers actually discharged those substances into the surrounding areas.[25] In other words, the plaintiff did not show a complete causal chain from the defendant to the manufacturer to the alleged contamination.[26]

Government Enforcement Actions. Government regulators have filed dozens of suits seeking compensation and remediation for alleged PFAS contamination. Minnesota's Attorney General filed one of the earliest such cases against chemical manufacturers, seeking $5 billion from 3M for harm to drinking water and the environment in the Twin Cities metropolitan area.[27] In 2018, 3M settled the case for $850 million without conceding liability.[28] Late last year, California Attorney General Rob Bonta announced that California was suing eighteen companies for "staggering" damage caused by PFAS, as well as the fraudulent transfer by some defendants alleged to have attempted to shield assets from potential financial liabilities.[29] Meanwhile, the EPA recently announced claims against Inhance Technologies for allegedly violating the Toxic Substances Control Act by releasing PFAS into plastic containers that later contaminated pesticides.[30]

Enforcement actions like these are likely to increase in the coming years, especially given they often do not require the same showing of causation as private injury litigation. In particular, rather than proving general and specific causation of specific occurrences of disease, such actions often cite government health advisories as evidence of risk and harm.[31]

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[22] *Aqueous Film-Forming Foams (AFFF) Prod. Liab. Litig.*, 18-mn-2873 (D.S.C. Dec. 7, 2018).

[23] John Gardella, *PFAS Personal Injury Set to Begin on MDL?*, NAT'L LAW REV. (Oct. 10, 2022), available at https://www.natlawreview.com/article/pfas-personal-injury-set-to-begin-mdl.

[24] *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511, 541 (S.D.N.Y. 2022).

[25] *Id.* at 542.

[26] *Id.* at 541.

[27] Complaint, *Minnesota v. 3M Company*, Case No. 10-28862 (Minn. Dist. Ct. Dec. 30, 2010), available at https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CV-10-28862/Complaint-123010.pdf; S. Goldberg & Patrick Veasy, *Will the Wave of PFAS Litigation Sweep Through California?*, DAILY JOURNAL (July 26, 2019), available at https://www.jdsupra.com/legalnews/will-the-wave-of-pfas-litigation-sweep-84759/.

[28] *See Minnesota 3M PFC Settlement*, available at https://3msettlement.state.mn.us/.

[29] Complaint, *California v. 3M Co. et al.*, No. 3:2022-cv-01013 (Alameda Sup. Ct. Nov. 10, 2022).

[30] *United States v. Inhance Tech, LLC*, No. 22-cv-05055 (E.D. Pa. Dec. 19, 2022); E.A. Crunden & Ariel Wittenberg, *EPA Targets Plastics Company in PFAS Probe*, GREENWIRE (Jan. 5, 2023), available at https://www.eenews.net/articles/epa-targets-plastics-company-in-pfas-probe/.

[31] Jeffrey Karp, *et al.*, *PFAS Update: Evolving Science and Liability*, JD SUPRA (July 10, 2019), available at https://www.jdsupra.com/legalnews/pfas-update-evolving-science-and-99878/.

Consumer Protection and False Advertising. Businesses are also facing a wave of lawsuits alleging they misled consumers by promoting their products as "sustainable" or "natural" despite containing PFAS.[32] Although the damages sought in such cases tend to be substantially lower than in personal injury or remediation actions, they typically do not require a showing that PFAS caused physical injury, and thus may be more susceptible to class-action treatment due to the lack of individualized issues. Such cases may also receive a boost this year through anticipated updates to the Federal Trade Commission (FTC)'s "Green Guides," which admonish those who market products to "ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis."[33]

Although most consumer protection lawsuits relating to PFAS are still in their early stages, a few have recently been resolved. In one of the earliest suits to be filed, the company Thinx, which marketed the underwear it sold as "safe, healthy and sustainable," recently agreed to pay up to $5 million to settle a class action brought by consumers who alleged the company's products contained PFAS.[34] In contrast, in another action, the District of Columbia Superior Court recently dismissed a case against cosmetics manufacturer Cover Girl, ruling that statements about the companies' "philosophy and aspirations," such as commitments to being "responsible," could not plausibly be interpreted as representations that none of their products contained PFAS.[35]

Administrative Law Challenges. In yet another type of PFAS case, litigants are challenging agency rulemakings. At the federal level, final rules relating to PFAS have been scarce so far, and in turn, challenges to rules have not fully materialized. A few lawsuits to date show what is to come, however. Recently, the Court of Appeals for the D.C. Circuit dismissed a petition for review filed by an industry group composed of chemical manufacturers, challenging the EPA's lifetime health advisories for four PFAS in drinking water.[36] Because these nonbinding health advisories are "not regulations and should not be construed as legally enforceable Federal standards,"[37] the court held that the industry group had not alleged an injury establishing standing.[38] At the state level, a PFAS manufacturer challenged Michigan's promulgation of drinking water standards for seven PFAS.[39] In Michigan, drinking water standards are tied (in some circumstances) to groundwater cleanup criteria;[40] but in issuing the PFAS rules for drinking water, Michigan did not consider the costs to businesses

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[32] *See, e.g.*, Complaint, *Krakauer v. Recreational Equip., Inc.*, No. 3:22-cv-05830 (W.D. Wash Oct. 28, 2022); Complaint, *Lupia v. Recreational Equip., Inc.*, No. 3:22-cv-02510 (N.D. Cal. Apr. 25, 2022); Complaint, *Hussain v. Burger King Corp.*, No. 4:22-cv-02258 (N.D. Cal. Apr. 11, 2022); Complaint, *McDowell v. McDonald's Corp.,* No. 1:22-cv-01688 (N.D. Ill. Mar. 31, 2022).

[33] 16 C.F.R. § 260.2 (2012), available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf; *see also* FTC, Press Release: *FTC Seeks Public Comment on Potential Updates to its "Green Guides" for the Use of Environmental Marketing Claims*, (Dec. 14, 2022) available at https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims.

[34] Complaint, *Dickens v. Thinx Inc.*, No. 22-cv-4286 (S.D.N.Y. May 25, 2022); Settlement Webpage, *Dickens v. Thinx Inc.*, *FAQ: What Does the Settlement Provide?*, available at https://www.thinxunderwearsettlement.com/Home/FAQ.

[35] *GMO Free USA v. Cover Girl Cosmetics*, No. 2021 CA 004786 B (D.C. Sup. Ct. June 1, 2022).

[36] Order, *Am. Chemistry Council v. EPA*, No. 22-1177 (D.C. Cir. Jan. 23, 2023); EPA, *Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances*, 87 Fed. Reg. 36848 (June 21, 2022).

[37] EPA, *Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances*, 87 Fed. Reg. 36848, 36849 (June 21, 2022).

[38] Order, *Am. Chemistry Council v. EPA*, No. 22-1177 (D.C. Cir. Jan. 23, 2023).

[39] Opinion and Order, *3M Company v. Mich. Dep't of Env't, Great Lakes, & Energy*, No. 21-78 (Mich. Ct. Claims Nov. 15, 2022), available at https://aboutblaw.com/5YQ; Mich. Dep't of Env't, Great Lakes, & Energy, News Release, *Michigan adopts strict PFAS in drinking water standards* (July 22, 2020), https://content.govdelivery.com/accounts/MIDEQ/bulletins/296ee62.

[40] Mich. Comp. Laws § 324.20120a(5).

and other entities that would be impacted by the associated groundwater cleanup criteria.[41] Thus, the court ruled in favor of the plaintiff manufacturer. Interestingly, though, the court stayed its decision *sua sponte*, leaving the drinking water rule in place pending appeal in recognition of "ample" evidence that, "for the benefit of public health, the seven PFAS chemical substances need to be subject to maximum contaminant levels."[42] The Michigan case thus illustrates the substantial challenges litigants may face in challenging rules that are viewed as protecting the public health.

III. Regulatory Flux Has Set the Stage for Additional Litigation

Growing regulatory scrutiny is likely to drive additional enforcement actions and litigation related to PFAS in 2023 and the years ahead. Tellingly, the EPA recently signaled that a top enforcement priority of the agency from 2024 to 2027 will be "identifying the extent of PFAS exposures that pose a threat to human health and the environment and pursuing responsible parties for those exposures," in collaboration with state regulators.[43]

More specifically, at least three key developments will produce additional claims in the coming year and beyond: (1) federal rulemakings designating PFOA and PFOS as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), (2) direct regulation of products, and (3) new reporting obligations.

CERCLA. The EPA has announced it will designate PFOA and PFOS as "hazardous substances" under CERCLA, a move that is likely to substantially increase litigation risks for potentially responsible parties in site-remediation cases.[44] Because CERCLA has been interpreted to provide that multiple parties may be held jointly and severally liable for cleanup costs at designated sites,[45] the designation makes it much more likely that defendants will be held responsible even if their releases contributed only minimally to alleged contamination. The EPA rule could have a significant effect, for example, in the AFFF MDL currently being litigated in South Carolina—it will allow plaintiffs to pursue potentially responsible parties, such as dischargers of AFFF that contaminated adjacent land and water, for cost recovery.[46]

Direct Regulation of Products. States have taken the lead here, with a growing number issuing flat bans on certain products containing PFAS. California will prohibit (1) the sale and distribution of "juvenile products"

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[41] Opinion and Order at 17–20, *3M Company v. Mich. Dep't of Env't, Great Lakes, & Energy*, No. 21-78 (Mich. Ct. Claims Nov. 15, 2022), available at https://aboutblaw.com/5YQ.

[42] Opinion and Order at 19–20, *3M Company v. Mich. Dep't of Env't, Great Lakes, & Energy*, No. 21-78 (Mich. Ct. Claims Nov. 15, 2022), available at https://aboutblaw.com/5YQ.

[43] Public Comment on EPA's National Enforcement and Compliance Initiatives for Fiscal Years 2024–2027, 88 Fed. Reg. 2093, 2096 (Jan. 12, 2023).

[44] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415 (Sept. 6, 2022).

[45] Section 107 of CERCLA makes certain categories of parties liable for costs and damages resulting from a release of a hazardous substance and the remediation or removal thereof. Although CERCLA does not specify the liability standard in cost recovery cases under Section 107, most courts have accepted the application of strict and joint and several liability for potentially responsible parties who cannot prove divisibility of the harm. *See Von Duprin LLC v. Major Holdings, LLC*, 12 F.4th 751, 758 (7th Cir. 2021) ("Joint and several liability is the norm" for potentially responsible parties; the "exception is divisible liability"); *O'Neil v. Picillo*, 883 F.2d 176, 178–79 (1st Cir. 1989) ("The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts: damages should be apportioned only if the defendant can demonstrate that the harm is divisible."); *see also* EPA, *Superfund Liability* (July 25, 2022), available at https://www.epa.gov/enforcement/superfund-liability.

[46] *See* 42 U.S.C. § 9613(f).

containing intentionally added PFAS, starting on July 1, 2023;[47] (2) the manufacture, distribution, or sale of textiles—including apparel, accessories, bags, bedding, and upholstery—containing intentionally added PFAS, starting on January 1, 2025;[48] and (3) the manufacture, sale, delivery, or offer for sale of cosmetics with intentionally added PFAS, starting on January 1, 2025.[49] Washington State has proposed rules to ban the manufacture, sale, and distribution of intentionally added PFAS in after-market stain and water-resistant treatments and carpets and rugs by January 1, 2025, and intentionally added PFAS in leather and textile furniture and furnishings intended for indoor use by January 1, 2026.[50] Colorado will prohibit the sale of juvenile products, carpets or rugs, fabric treatments, food packaging, oil and gas products, cosmetics, and indoor and outdoor furnishings and furniture with intentionally added PFAS, starting on January 1, 2024.[51] Minnesota and New York currently prohibit intentionally added PFAS in food packaging.[52] And Vermont currently bans food packaging, rugs, carpets and ski wax with intentionally added PFAS.[53]

The above is only a sampling, and more states will undoubtedly pass additional laws in the coming year. Alleged violations of these direct bans could result in enforcement actions by states, or tort and false marketing suits by consumers. Notably, when flat bans on PFAS in certain products become effective, claims of negligence per se—with an associated presumption of negligence—could become available to certain plaintiffs in some states.

Reporting Requirements. The third expected driver of PFAS litigation is a host of federal and state reporting requirements that will reveal product information to both consumers and regulatory bodies. At the forefront of these requirements in the United States is the EPA's upcoming PFAS data call under Section 8(a) of the Toxic Substances Control Act (TSCA), a rule expected to cost $876 million industry-wide. The rule will require U.S. manufacturers or importers of any product containing PFAS to investigate and certify to the EPA the amount of PFAS that they have manufactured or imported for the past twelve years (since January 1, 2011).[54] The EPA typically publishes data gathered under section 8(a) of TSCA on its website.[55] The EPA is in the final stages of promulgating this rule.

Another upcoming regulatory development is an update to the Toxics Release Inventory (TRI) program, which requires owners and operators of covered facilities that manufacture, process, or otherwise use certain listed chemicals to meet reporting obligations regarding listed chemicals. Many PFAS have been listed on the TRI, including pursuant to the National Defense Authorization Act for Fiscal Year 2020,[56] but covered facilities have not yet widely reported their use of PFAS, taking advantage of a concentration-based *de minimis* exemption.[57] A rule proposed at the end of 2022, likely to be finalized this year, would designate PFAS currently

[47] Cal. Health & Safety Code §§ 108945–46.

[48] Cal. Health & Safety Code § 108970.

[49] Cal. Health & Safety Code § 108981.

[50] Wash. Admin. Code ch. 173-337 (proposed).

[51] An Act Concerning Measures to Increase Protections from Perfluoroalkyl and Polyfluoroalkyl Chemicals, Colo. Rev. Stat. Ann. § 25-15-601 *et seq*.

[52] Minn. Stat. Ann. § 325F.075; N.Y. Env't Conserv. Law § 37-0209.

[53] Act No. 36 of 2021, 2021 Vt. Acts & Resolves No 36.

[54] Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, 86 Fed. Reg. 33926 (proposed June 28, 2021) (to be codified at 40 C.F.R. pt. 705); EPA, Initial Regulatory Flexibility Analysis and Updated Economic Analysis for TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances at 1 (2022).

[55] EPA, *Access CDR Data* (May 16, 2022), available at https://www.epa.gov/chemical-data-reporting/access-cdr-data.

[56] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116, § 7321.

[57] *See* 40 C.F.R. § 372.38(a).

listed on the TRI as Chemicals of Special Concern and eliminate the availability of the *de minimis* exemption.[58] When this rule issues, it will produce a trove of information on the uses and releases of PFAS in the United States. Like the TSCA data, TRI data are published on the EPA's website.[59]

The states have also created reporting requirements, both generally applicable rules and rules for certain product categories. One of the most sweeping rules is in Maine, which enacted a PFAS reporting law requiring that, starting January 1, 2023, any "manufacturer of a product for sale in Maine that contains intentionally added PFAS shall submit to the [Maine Department of Environmental Protection] a written notification" containing (1) a brief description of the product; (2) the purpose for including PFAS in the product; (3) the amount of each PFAS in the product; (4) the name and address of the manufacturer; and (5) any additional information established by rule.[60] If a manufacturer fails to provide this information, the product cannot be sold or distributed in Maine.[61] California is expected to enact a similar law this year, which will require any manufacturer of PFAS or a PFAS-containing product to register the PFAS produced or the product containing it in a "publicly accessible data collection interface."[62] Many other states have reporting regimes for certain products. Washington State, for instance, will require reporting on the use of PFAS in leather and textile furniture and furnishings intended for outdoor use by January 1, 2024.[63] And Colorado will require disclosures for cookware with intentionally added PFAS, starting on January 1, 2024.[64]

The unique qualities of PFAS have made the chemicals useful in a breathtaking variety of industries, and the exact scope of PFAS use across and within industries is still being determined. Datasets on PFAS-containing products generated through new reporting obligations will provide states and plaintiffs' attorneys a rich source of information for identifying new litigation targets and exposure pathways.

IV. Conclusion

Dark Waters was only a preview. The wave of PFAS litigation it foreshadowed has arrived, propelled by growing public attention—from regulators, consumer watchdogs, and the media—and new sources of data on industries and products in which PFAS might be found. While the use of PFAS has benefitted society in many ways, companies in a variety of industries can no longer afford to ignore attendant regulatory and litigation risks and must take stock of their potential exposure.

For assistance in investigating your potential liability concerning PFAS, handling PFAS-related litigation, and navigating the rapidly evolving sphere of PFAS regulation, please do not hesitate to reach out to Quinn Emanuel and Marten Law.

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[58] Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting (Dec. 5, 2022).

[59] EPA, *TRI Data and Tools* (Jan. 25, 2023), available at https://www.epa.gov/toxics-release-inventory-tri-program/tri-data-and-tools#tridata-facilities.

[60] Me. Rev. Stat. Ann. tit. 38, § 1612(2).

[61] *Id.* § 1612(7).

[62] A.B. 2247, 2021–2022 Reg. Sess. (Cal. 2022).

[63] Wash. Admin. Code ch. 173-337 (proposed).

[64] Colo. Rev. Stat. Ann. § 25-15-604(2).

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Quinn Emanuel

John B. Quinn
Email: johnquinn@quinnemanuel.com
Phone: 213-443-3200

Joseph M. Paunovich
Email: joepaunovich@quinnemanuel.com
Phone: 213-443-3257

Anthony P. Alden
Email: anthonyalden@quinnemanuel.com
Phone: 213-443-3159

Danielle Shrader-Frechette
Email: daniellefrechette@quinnemanuel.com
Phone: 213-443-3710

Marten Law

Bradley Marten
Email: bmarten@martenlaw.com
Phone: 206-292-2604

Jessica Farrell
Email: jferrell@martenlaw.com
Phone: 206-292-2636

James Pollack
Email: jpollack@martenlaw.com
Phone: 617-335-7902

Victor Xu
Email: vxu@martenlaw.com
Phone: 503-241-2641

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