Managing PFAS Chemicals: A Challenge for Courts and Agencies

by Kenneth J. Warren / *The Legal Intelligencer*

Media reports on the dangers of per- and polyfluoroalkyl substances (PFAS) have catapulted these compounds into the public discourse. Even people unfamiliar with the technical names for PFAS have purchased products in which they are contained. Teflon nonstick cookware, stain resistant carpeting, food packaging, cosmetics, firefighting foams, and water repellant clothing constitute a sampling of the goods containing this family of chemicals.

Until recently, PFAS were considered "emerging contaminants" not subject to state or federal regulation. The EPA now calls PFAS an urgent threat to public health and the environment. It is well-established that exposure to PFAS causes various types of cancers and other injuries such as impaired kidney functioning, elevated cholesterol levels and hormonal disruption.

PFAS, sometimes referred to as "forever chemicals," are persistent in the environment when discharged to waterbodies, emitted to the air or placed in waste disposal facilities. They also are easily transported by surface water, groundwater and air. Because PFAS are ubiquitous, evidence suggests that PFAS are present in the blood of 97% of Americans.

Managing ongoing PFAS use, remediating contamination from past PFAS releases and disposal practices, and compensating injured parties are formidable tasks. Although resolutions of claims arising from exposures to tobacco products, asbestos-containing materials, and toxic chemicals such as PCBs provide guideposts, the exposure of the entire American population to

PFAS presents unique challenges. A multifaceted, coordinated approach involving litigation, scientific investigation, and regulation is necessary to address past injuries and avoid future ones.

PFAS litigation and its resulting publicity preceded regulatory action. In one class action suit against DuPont encompassing approximately 70,000 people exposed to drinking water contaminated with one PFAS, PFOA, discharged from DuPont's manufacturing facility in Parkersburg, West Virginia (the *Leach* litigation), the parties agreed to the formation of a panel of scientific experts to evaluate the diseases and injuries caused by exposure to PFOA. Based in part upon their review of health data from members of the plaintiff class, the panel determined that exposure to PFOA can cause specific diseases. Thereafter, following five bellwether trials, DuPont settled approximately 3,500 personal injury cases.

Thousands of cases against PFAS manufacturers followed the *Leach* settlement. The federal multidistrict panel consolidated over 6,000 cases involving the use of PFAS in firefighting foam in the multidistrict aqueous film-forming foam (AFFF) litigation before Judge Richard Gergel in the U.S. District Court for the District of South Carolina. Before trial, DuPont and 3M agreed to settlements of 1.185 billion and $10.3 billion, respectively, with water purveyors whose drinking water sources were allegedly contaminated with PFAS compounds. Claims of other plaintiffs are moving forward. Other pending federal class actions involve tort claims against St. Gobain for PFAS contamination in groundwater caused by releases from its manufacturing facility in Merrimack, New Hampshire, and similar claims against DuPont for discharges of a PFAS, GenX, from its manufacturing facility in Fayette, North Carolina.

As media reports of litigation brought the dangers of PFAS to public attention, regulatory agencies took action. The EPA issued a PFAS Strategic Roadmap setting forth plans designed to restrict PFAS emissions, remediate PFAS released to the environment, and encourage research into PFAS risks and technologies. The EPA's proposed PFAS National Primary Drinking Water Regulation covering six PFAS, when finalized, will require public water suppliers to meet stringent standards. In the interim, certain states have recently established maximum contaminant levels for specific PFAS in drinking water at concentrations in the parts per trillion.

The EPA also proposed designating two widely-used PFAS, PFOA and PFOS, as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act. A final rule is expected this spring. Listing these chemicals as hazardous substances will provide the EPA with a powerful tool to require potentially responsible parties to cleanup or pay cleanup costs at Superfund sites, including remediating PFAS at sites with ongoing remediations and those subject to five-year reviews. It will also expand the parties subject to cost recovery and contribution claims in government or private party litigation.

The EPA has funded research into PFAS, developed PFAS testing methodologies, and collected data to support scientific studies. To assist in data gathering, manufacturers must report information concerning PFAS under the Toxic Substances Control Act and as part of their toxic release inventory filings. The EPA has likewise proposed to collect additional PFAS emissions data from point sources.

If regulation and litigation are to function well in tandem, the robust regulatory developments should reduce the likelihood that courts will create PFAS science panels or otherwise grant injunctive relief duplicating government efforts to identify the underlying toxicology and health effects of exposure to PFAS. In *Hardwick v. 3M*, 87 F.4th 315 (6th Cir. 2023), rehearing en banc denied, No. 22-3765 (January 18, 2024), a firefighter with detectable levels of five PFAS in his blood serum filed a class action lawsuit in the C-8 Personal Injury Litigation in the U.S. District Court for the Southern District of Ohio against ten manufacturers of PFAS chemicals. The complaint sought formation of a science panel to further study the health effects of PFAS, and establishment of a medical monitoring nationwide class of individuals with blood levels of at least .05 parts per trillion (ppt) of PFOA (C-8) and at least 0.05 ppt of any other PFAS in their blood serum. The district court initially certified the class restricted to Ohio residents and left for further briefing the question of whether residents of states that did not recognize a medical monitoring claim should be excluded from the class. The defendants appealed.

The U.S. Court of Appeals for the Sixth Circuit issued a scathing decision vacating the district court's certification order and remanding the case with instructions to dismiss the case for lack of jurisdiction. The opinion commences, "Seldom is so ambitious a case filed on so slight a basis." The court then identified the types of information it found lacking. Hardwick did not know what companies manufactured the chemicals in his bloodstream. He exhibited no present symptoms, nor did he allege that the concentrations of the five PFAS in his blood serum would make him sick. The court noted that the "trace" amounts of PFAS in blood serum used to define the class are present in the blood of every person residing in the United States and, according to one of defendants' experts, are "orders of m court concluded that Hardwick failed to satisfy the "traceability" requirement necessary to

establish standing because he had not alleged facts "plausibly supporting an inference that each defendant 'likely caused' at least one of the PFAS compounds to end up in his blood."

The Sixth Circuit opinion signifies a reluctance to create a judicially created science panel that may duplicate the ongoing work of expert administrative agencies. To invoke federal jurisdiction, the plaintiff must allege specific facts tying cognizable injuries to the actions of each named defendant. This requires knowing what chemicals are in the plaintiff's bloodstream, what chemicals each defendant manufactured, and the plausible route by which the plaintiff was exposed to the identified PFAS compounds from the defendant. Use of legal theories such as enterprise liability to impose potentially massive liability on a group of manufacturers where plaintiff cannot identify the specific manufacturer of the materials to which he was exposed did not establish standing. Likewise, allegations of a conspiracy among defendants to hide the harmful effects of PFAS exposures did not eliminate the need to demonstrate each defendant's role in causing plaintiff's alleged injuries.

Because regulatory agencies have made scientific research into PFAS a priority, and are restricting the use and mandating the cleanup of these compounds, it is reasonable for courts to leave these actions to the expert administrative agency. Yet courts should remain the venue for compensating injured parties. How regulatory agencies and courts can best work in tandem is a main challenge that managing PFAS presents.

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