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Not Worried About PFAS Liability? You Should Be.

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Businesses across the United States should brace themselves for the next wave of PFAS litigation. Per- and polyfluoroalkyl substances, commonly referred to as PFAS, are chemicals known for their water-, grease-, and stain-repellent properties that have been in use for decades. In recent years, however, PFAS have been the subject of an ever-growing wave of regulation and litigation.

While litigation in the past has mostly been confined to the manufacturers of PFAS, and producers and users of PFAS-containing firefighting foam, plaintiffs are now targeting companies much farther down the supply chain. Spurred by newly released studies and reports of PFAS found in cosmetics and food packaging, consumers and their opportunistic lawyers are turning to the courts and consumer protection laws for relief from what they allege are years of misrepresentation and fraud by companies marketing "safe" and "natural" products containing PFAS.

Why PFAS?

"PFAS" is an umbrella term for an expansive class of substances, typified by their extremely strong fluorine-carbon bonds. PFAS, which have been manufactured since the 1940s, have water-repellent, heat-resistant, and non-stick properties which make them desirable for use in a wide-range of commercial products. PFAS have been used in firefighting foams, as coatings on clothes and furniture, in electronics, and in the manufacturing of other chemicals and products. Of particular interest recently, PFAS are also used in common consumer products like cosmetics and food packaging.

The same chemistry that makes PFAS so useful, however, makes them particularly long-lasting in the environment and human body. That characteristic earned PFAS the moniker of "forever chemicals." Some studies have identified possible connections between exposure to certain PFAS, such as perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS), and hexafluoropropylene oxide dimer acid (HFPO, also known as "GenX"), and adverse impacts on human health.

In recent years, states and advocacy organizations have raised alarms about the presence of PFAS in consumer products. The presence of PFAS in products like makeup and food packaging raises concerns that PFAS are potentially leaching from the products and entering the body through dermal contact or consumption. As a result, some states have begun regulating PFAS in consumer products like food packaging, cosmetics and personal care products, and carpets. Consumer protection organizations, environmental groups, and state and federal agencies are now also actively testing food and consumer products for PFAS. The U.S. Food & Drug Administration, for example, tests for certain PFAS as a part of its Total Diet Study. Out of the over 500 samples analyzed, only ten have shown detectable PFAS levels. Other studies, however, have

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found PFAS to be much more prevalent and raised concerns about the extent of PFAS in consumer products.

In 2017, researchers tested approximately 400 samples of food-contact packaging and found that many of them contained detectable fluorine. More recently, *Consumer Reports* also tested 118 packaging products from restaurant and grocery chains, including major brand names like McDonald's, Burger King, and Trader Joe's, and found that more than half of the tested packaging contained fluorine. University of Notre Dame researchers likewise screened over two hundred cosmetic products for total fluorine and found that many, particularly those marketed as "wear-resistant" or "long-lasting," contained high levels of fluorine. Yet another study tested for PFAS in anti-fogging sprays.

Citing these studies, plaintiffs have filed class actions against major cosmetic brands, such as Shiseido,[1] CoverGirl,[2] L'Oreal,[3] and Burt's Bees[4]; restaurant chains, including McDonald's,[5] Burger King,[6] and Cava[7]; and a gaming company selling anti-fogging spray.[8] The class actions allege fraud-related claims, breach of warranty, and failure to warn. Plaintiffs have also targeted other retailers, including Amazon,[9] Kroger,[10] Target,[11] and Albertsons,[12] for selling paper products marketed as "compostable" but containing PFAS. Because PFAS do not break down in the environment and do not become part of usable compost, plaintiffs allege that the companies misled consumers and asserted claims for breach of express warranty, unjust enrichment, and violation of state unfair business practices law.

Consumer Product Litigation

In part due to the decades-long use of PFAS and the variety of their applications, PFAS litigation continues to grow with attorneys looking for new avenues of relief as more information about these substances becomes available. Following new studies on the extent of PFAS in common products, this newest iteration of PFAS litigation allege violations of consumer protection laws, including state "little FTC Acts."

The Federal Trade Commission Act (FTC Act) prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). However, the Act lacks a private right of action and, as a result, cannot be used by individual claimants. Many states have enacted their own consumer protection acts to bridge this gap. These little FTC Acts codify common-law concepts, like fraud and misrepresentation, but generally with less rigorous requirements.

Relying on these little FTC Acts and common-law claims, plaintiffs are bringing state- and nationwide class actions, on behalf of themselves and all others who have purchased the alleged PFAS- containing products. Generally, the plaintiffs assert (1) the companies represented that their products were safe, natural, or sustainable or failed to disclose the presence of PFAS; (2) the products contain fluorine (as a presumed surrogate for PFAS) and/or some or certain PFAS; and (3) the companies' false advertising misled

[1] Class Action Complaint, *Onaka v. Shiseido Americas Corp.*, No. 1:21-cv-10665 (S.D.N.Y. Dec. 14, 2021).

[2] Class Action Complaint, *Solis v. CoverGirl Cosmetics*, No. 3:22-cv-00400-BEN-NLS (S.D. Cal. Mar. 25, 2022).

[3] Complaint for Damages, *Davenport v. L'Oreal USA, Inc.,* No. 2:22-cv-01195 (C.D. Cal. Feb. 22, 2022).

[4] Class Action Complaint, *Gruen v. Clorox Co.*, No. 3:22-cv-00935 (N.D. Cal. Feb. 15, 2022).

[5] Class Action Complaint, *Clark v. McDonald's Corp.*, No. 3:22-cv-628 (S.D. Ill. Mar. 28, 2022).

[6] Class Action Complaint, *Hussain v. Burger King Corp.*, No. 4:22-cv-02258 (N.D. Cal. Apr. 11, 2022).

[7] Class Action Complaint, *Hamman v. Cava Group, Inc*, No. 3:22-cv-00593-MMA-MSB (S.D. Cal. Apr. 27, 2022).

[8] Class Action Complaint, *Dawood v. Gamer Advantage LLC*, No. 2:22-cv-00562-WBS-KJN (E.D. Cal. Mar. 28, 2022).

[9] Class Action Complaint, *Nguyen v. Amazon*, No. 3:20-cv-04042-LB (N.D. Cal. June 17, 2020).

[10] Class Action Complaint, *Ambrose v. Kroger Co.*, No. 4:20-cv-04009-DMR (N.D. Cal. June 16, 2020).

[11] Class Action Complaint, *Little v. NatureStar North*, No. No. 1:22-cv-00232-JLT-EPG (E.D. Cal. Feb. 24, 2022).

[12] Class Action Complaint, *DiGiacinto v. Albertsons Companies, Inc.*, No. 3:20-cv-03382 (N.D. Cal. May 18, 2020).

consumers into purchasing the product. Had the plaintiffs known that the product contained PFAS, they would not have purchased it or would have paid a lesser price.

These cases are part of a growing trend of "greenwashing" suits, alleging that companies are misrepresenting the environmental qualities of their products. Some retailers, for example, have faced both private lawsuits and FTC actions over the sale of allegedly environmentally friendly products.

In the PFAS-related complaints, plaintiffs have largely focused on statements made in a company's marketing materials, particularly references to the product's safety or claims that the product is "natural" or "sustainable," and allege that such representations are false or misleading because the products contain PFAS. Plaintiffs have also flagged that companies failed to disclose on their websites, in the ingredients lists, or otherwise on the product packaging that their product contains PFAS. Plaintiffs, in *Gruen v. Clorox Co.*, for example, raised both of these issues, asserting that defendant misled consumers with claims that its cosmetics are "KIND TO SKIN & PLANET" and formulated "without . . . other chemicals of concern" and by failing to disclose that they contain PFAS.[13] Another lawsuit, *Clark v. McDonald's Corp.*, targets McDonald's for statements made in its shareholder meetings and on its website that "safe food" is a top priority for the company.[14]

Plaintiffs claim that companies have profited from these deceptive practices and should disgorge the profits that they have made as a result of consumers' unwitting purchases. Some of these cases reach back in time for years and seek to include all individuals that purchased the PFAS-containing product. For products like McDonald's Big Mac and Burger King's Whopper, the class could include hundreds of millions of individuals. Some plaintiffs also seek injunctive relief to stop companies from selling the "misbranded" products and, like in earlier PFAS cases, medical monitoring for class members.

Plaintiffs' increasing reliance on this consumer protection approach offers one obvious advantage over earlier PFAS suits. To have standing to bring these claims, a plaintiff must typically show that they have suffered an actual, concrete, and particularized injury that is fairly traceable to the challenged action and redressable by a favorable decision. Here, however, plaintiffs do not have to show that the PFAS in the products actually caused harm. Instead, plaintiffs must only show that they suffered economic injury, *i.e.*, they purchased products that they otherwise would not have.

Obstacles to Success

In addition to the obstacles facing standard class actions, namely class certification, plaintiffs face challenges with the information or, more specifically, the lack of information on many types of PFAS. While many of these consumer cases are still in their early stages, two Central District of California cases—*Andrews v. Procter & Gamble Co.* and *Kanan v. Thinx Inc.*—offer insight into how courts view these cases and how companies can defend against such claims.

The main issue in both these cases was Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for allegations of fraud. Such pleadings must "state with particularity the circumstances constituting fraud." In considering motions to dismiss, the courts in *Andrews* and *Kanan* both evaluated whether class plaintiffs met this higher standard and came to differing conclusions.[15]

[13] Class Action Complaint at ¶¶ 6, 8, 23, 28, *supra* note 4.

[14] Class Action Complaint at ¶¶ 35, 45, *supra* note 5.

[15] Order Regarding Motion to Dismiss, *Andrews v. Procter & Gamble Co.*, No. 5:19-CV-00075-AG-SHK (C.D. Cal. June 3, 2019), Doc. 20; Order Regarding Motion to Dismiss, *Kanan v. Thinx Inc.*, No. 2:20-cv-10341-JVS-JPR (C.D. Cal. June 23. 2021), Doc. 46.

The *Andrews* court granted the motion to dismiss plaintiffs' claims for failing to identify which PFAS were found in the defendant's dental floss—if any at all—and at what level. Two years later, the same court (albeit a different judge) in *Kanan*, however, found that the complaint, alleging that Thinx underwear contained PFAS, met the heightened standard.

These decisions highlight a key distinction between the two complaints of which companies should note—the specificity of the allegations and studies cited. In *Kanan*, the plaintiffs used third-party testing that identified short-chain PFAS in the Thinx material. Although plaintiffs did not reveal the exact PFAS or the level at which they were found, the plaintiffs were able to affirmatively state in their complaint that PFAS were found. In contrast, the plaintiffs in *Andrews* relied on a study screening for fluorine content, not PFAS, in the defendant's dental floss. In its order granting the defendant's motion to dismiss, the court specifically noted that "the floss was never tested for PFAS."

As the pending cosmetics and food-packaging cases proceed, a key element to their success may be plaintiffs' reliance on studies testing for PFAS versus those testing for fluorine. While plaintiffs have alleged that total organic fluorine functions as a "surrogate for PFAS," *Gruen v. Clorox Co.* at ¶ 58, *Andrews* shows that such a claim, without additional information showing actual PFAS in the product, may not be sufficient to meet the heightened pleading standard under Rule 9(b). A recent notice of filing a motion to dismiss the *Shiseido* lawsuit echoes this same concept.[16] According to the notice, Shiseido cosmetics were only tested for total fluorine content, not PFAS. Defendants intend to argue that the plaintiffs failed to meet the Rule 9(b) standard by failing to identify the "what" of the action, *i.e.*, which PFAS are at issue.

However, the *Kanan* court appears to have placed less emphasis on the testing cited by plaintiffs and focused more on the misrepresentations that the plaintiffs identified in their complaint. The court observed that the complaint only has to be "specific enough to put the defendant on notice of the representations on which Plaintiffs allegedly relied." Because the plaintiffs alleged that they saw and relied on the defendant's advertising, packaging, and website, and the plaintiffs reproduced portions of these items, the court found the allegations "specific enough to put Thinx on notice of the advertisements and representations at issue upon which Plaintiffs allege to have relied."

As shown in *Andrews* and *Kanan*, whether courts allow future cases to proceed through initial motions to dismiss may depend on how they view the specificity standard and whether plaintiffs must show that the products at issue contain PFAS. While the *Kanan* court found that plaintiffs met the Rule 9(b) standard and other courts may as well, the presence of PFAS in the products will have to be revisited at later stages of litigation as courts consider whether or not a defendant misrepresented their product.

Relatedly, plaintiffs will have to grapple with the lack of information connecting many types of PFAS with adverse health effects. Although some studies have linked certain PFAS, such as PFOA, PFAS, and GenX, to adverse health effects, PFAS are a family of thousands of chemicals, the vast majority of which are not fully understood or studied, and have not been shown to cause harm to human health or the environment. Plaintiffs are not alleging personal injury in these cases but use the alleged health risks of PFAS exposure generically as both the basis for failure-to-warn claims and to bolster their misrepresentation claims. Without additional evidence that a product or its packaging exposed individuals to one or more PFAS and at levels that pose a risk of injury, plaintiffs may have difficulty showing that the product was not in fact safe.

Other issues that companies should be aware of and that are likely to arise should these cases proceed are the companies' intent, the materiality of the alleged misrepresentation, and consumers' reliance on the

[16] Letter Addressed to Judge Paul A. Crotty re: Motion to Dismiss, *Onaka v. Shiseido Americas Corp.*, No. 1:21-cv-10665-PAC (S.D.N.Y. Apr. 12, 2022), Doc. 15.

alleged misrepresentations. To prove fraudulent misrepresentation, plaintiffs must show, not only that the defendant made false representations, but that the defendant also knew they were false and intended for the plaintiffs to rely on the representation. Plaintiffs' focus on alleged misrepresentation from general corporate statements and advertising campaigns renders the success of any of these claim elements questionable. Many of the statements plaintiffs point to are part of broader corporate sustainability efforts and are not related to PFAS or to a particular product.

Courts will have to consider whether such broad statements can be connected to plaintiffs' specific allegations about PFAS and are sufficient grounds for plaintiffs' claims. Furthermore, to succeed on their fraud claims, plaintiffs must also show the misrepresentation was material and that they actually and reasonably relied on the misrepresentation. Similar to the forthcoming motion to dismiss in *Shiseido*, companies targeted by consumer protection complaints may contend that plaintiffs have failed to allege any particular level of any particular PFAS in most of the products at issue. Without doing so, the plaintiffs fail to plausibly allege that the defendants' alleged misrepresentations were material. Whether any plaintiffs can prove that a company's general marketing or label statements caused them to purchase the product, and whether courts will agree that their alleged reliance on general statements was reasonable, are uncertain at best.

Conclusion

Businesses can expect to see a continued interest in consumer protection-based lawsuits as more data on PFAS are released and as the Biden Administration and states continue to move forward with PFAS legislation and regulations. With every new study that is released, greater numbers of companies will come under scrutiny and be susceptible to lawsuits. While plaintiffs face an uphill battle to class certification and to success on the merits, companies should, nonetheless, keep a close eye on how these cases are progressing.

