Feature: How are PFAS liability risks in the US expanding for downstream users?

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Emily M Lamond and Jullee Kim of the environmental department of US law firm Cole Schotz review recent PFAS litigation in the country – and consider what the implications might be for downstream users

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Readers of Chemical Watch will be aware that in the US the large group of chemicals known as PFAS is the subject of not only multiple high-profile lawsuits but also fast-evolving, and often times inconsistent, state and federal regulatory actions – not to mention legislation.

Per- and polyfluoroalkyl substances are uniquely engineered to be highly effective for an impressive set of characteristics – they both repel and attract water, they repel oils, they are incredibly efficient surfactants and fire and vapour suppressors, and more. They are also persistent, meaning they do not break down in the environment. Hence their nickname, "forever chemicals".

Given their beneficial characteristics, by the 1940s their use was proliferating on a global scale. Manufacturers developed thousands of different forms of the chemicals in the coming decades. The two most notorious and most studied forms are perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS).

The potential toxicity of PFAS began to become public as a result of a 1999 lawsuit. A West Virginian farmer sued DuPont alleging the company's local plant contaminated a stream on his farm with PFOA, causing health issues and the death of his cattle. The discovery process uncovered decades' worth of internal company studies suggesting PFAS may be toxic. Since then, an increasing number of studies have suggested that exposure to certain PFAS at certain levels may be associated with increased risks of adverse health effects such as reproductive or developmental effects, increased cancer risks and reduced immune systems, increased cholesterol levels and/or risk of obesity, interference with hormone systems, and more.

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Both regulators and the plaintiff bar have taken notice and action. We are seeing the contours of which actors will be held responsible across the country quickly taking shape. While federal and state legislative activity is increasing, this article focuses on activity within litigation and regulatory spheres, and its potential impact on downstream users.

"Downstream users" broadly captures essentially any non-manufacturers that use any of the thousands of PFAS chemicals in a multitude of industries and products such as aqueous firefighting foam (AFFF), textiles, cosmetics, pharmaceuticals, oil refinery, food packaging, biosolids, metal plating and ski waxing.

PFAS liability can attach at many points of the lifecycle of products and operations including as an additive, in pure form, operational air emissions or wastewater discharges, spills or releases occurring during operations, storage, transportation, onsite or offsite disposal, etc.

Recent litigation developments

Case 1: Ohio district court recognises "increased risk of illness" as an injury and "medical monitoring" as a relief in Hardwick v 3M Company

Hardwick v 3M Company is a national class action lawsuit in the US District Court for the Southern District of Ohio brought by Kevin D Hardwick against manufacturers of PFAS. The suit is based on common law claims for negligence, battery, declaratory judgment and conspiracy. Hardwick alleges the defendants contaminated his and other class members' blood and/or bodies with PFAS, including, but not limited to, PFOA and PFOS, seeking equitable relief in the form of medical monitoring and the establishment of a science panel to study the health effects of PFAS.

In March 2022, the district court granted certification for the following limited class: "individuals subject to the laws of Ohio, who have 0.05 parts per trillion (ppt) of PFOA (C-8) and at least 0.05ppt of any other PFAS in their blood serum." Significantly, the district court granted certification to a class without physical injury, holding that Ohio law recognises "increased risk of illness" as an injury for a claim to request "medical monitoring" relief. The district court left open for future briefing as to whether this is recognised under other states' law.

Stay tuned, though, because a few months later the US Court of Appeals for the Sixth Circuit called into doubt the ruling that medical monitoring claims are permitted without proof of physical injury under Ohio law, and granted further review of the class certification. The Sixth Circuit also pointed to the extraordinary nature of the class, at present comprising nearly 11.8 million residents of Ohio.

Case 2: South Carolina district court defeats defendants' summary judgment motion on the government contractor defence in Re: AFFF Products Liability Litigation

Plaintiffs alleged that AFFF products manufactured by the defendants and used at airports, military bases and industrial facilities, contaminated local groundwater and drinking water supplies with PFOA and PFOS. The defendants sought to use the government contractor immunity defence to shield themselves from liability.

In 1969, the US Navy promulgated a military specification (MilSpec) for AFFF and has administered the MilSpec since then on behalf of the Department of Defense (DoD). Until its 2019 revision, the MilSpec required contractors to use "fluorocarbon surfactants" in their products.

Finding that the defendants failed to disclose material information about the risks and defects of the AFFF product to the government and general scientific community, and misled the public and the regulators, the court held the defendants' behaviour was "obviously inconsistent with the type of conduct required of a contractor seeking government contractor immunity".

Concealment was not the only fatal flaw here. The court held MilSpec did not provide specification as to the formula or use of C8 chemistry, and that there was insufficient collaboration between the government in designing each MilSpec AFFF to constitute genuine government participation for the government contractor immunity.

Insight for downstream PFAS users' litigation liability

At this point, these cases provide some limited insight about litigation liability risks for downstream users.

Hardwick does suggest the scope of plaintiffs in future litigation, especially class actions, could be broad. The district court certified a class comprising more than ten million individuals. The fate of that class certification is, however, dependent on the outcome of the Sixth Circuit's closer look at the "increased risk of illness" injury and "medical monitoring" damages, especially whether demonstrating actual physical injury is required.

Further, Hardwick indicates courts may be forgiving to plaintiffs that participated in the flow of commerce with some or limited knowledge about the existence of PFAS. Hardwick is a firefighter who used and sold PFAS-containing AFFF to other firefighters. Defendants pointed to this in an attempt to defeat class certification, alleging there is a conflict and different type of claim between Hardwick and the other class members. According to the district court, the only relevant inquiry is whether the defendants' conduct contaminated his and the potential class members' blood and bodies without their consent; Hardwick's occupation and what he might have known about AFFF are irrelevant to that inquiry.

As for insights into how courts will treat downstream users as defendants, we see more questions than answers. The defendants in these two cases are manufacturers of PFAS that are alleged to have knowingly concealed and misled the public and regulators about the potential toxicity of PFAS. These defendants are differently positioned from downstream users because of the manufacturers' unique knowledge of, as well as control and handling of data about, the risks of PFAS, which were likely unavailable to many downstream users until the information became publicly available.

It will be interesting to see how courts interpret common law duties for defendants that did not allegedly actively conceal and mislead, and the extent to which such defendants should have known about potential exposure risks arising from their operations, products or properties. For example, to what extent can knowledge about exposure risks be imputed to downstream users now that the information is widely known and publicly available?

PFAS liability will continue to play out in the courts for the coming years, and increased litigation is widely expected. As discussed below, this is especially the case as near-term federal regulatory actions, plus the myriad of state regulations and legislation, create causes of action beyond common law claims and enforcement authorities.

Rapid uptick in regulatory actions increasing liability risks

Practically speaking, downstream users face more immediate risks complying with the rapidly evolving patchwork of federal and state regulatory actions, which will drive enforcement and contribution actions under various environmental laws. Here are some highlights on the wide regulatory net being cast through the EPA's PFAS Roadmap, as well as state actions, and associated litigation risks for downstream PFAS users.

Action 1: Hazardous substances designation under CERCLA

The EPA's final rule designating PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is expected to be published by this summer. Given the retroactive, strict, joint and several liability scheme of CERCLA, companies responsible for PFOA or PFOS contamination under CERCLA will be liable, regardless of whether they knew about or concealed the potential toxicity of the chemicals. The CERCLA designation opens the door to EPA cleanup orders, investigations and enforcement authority, potentially extensive litigation among potentially responsible parties (PRPs) in contribution actions, and more. There is also the ripple effect of the chemicals becoming regulated under other federal statutes such as the Clean Air Act, the Clean Water Act, etc, once designated as a CERCLA hazardous substance.

Action 2: Federally enforceable drinking water standards proposed under Safe Drinking Water Act

In March 2023, the EPA proposed maximum contaminant levels (MCLs) for several PFAS chemicals at extremely low concentrations. If finalised as proposed, drinking water suppliers will need to find funding to meet the strict federal standards. This is largely expected to be very expensive and challenging given the infancy of remediation technologies and the very low standards, likely leading to significant litigation across the country.

Action 3: Rulemakings initiated under the RCRA

In October 2021, the EPA initiated two rulemakings under the Resource Conservation and Recovery Act (RCRA). The first is to start the process to propose adding certain PFAS as hazardous constituents, subjecting them to corrective action requirements and possible listings as hazardous waste. The second is to clarify that emerging contaminants such as PFAS can be cleaned up through the RCRA corrective action process.

Action 4: Blizzard of state activity

States across the country are, in some cases, way ahead of the EPA when it comes to addressing PFAS. For example, New Jersey has enforceable groundwater and soil remediation standards. New York has enforceable drinking water standards for PFOA and PFOS, and proposed standards for four additional PFAS. California and several other states have banned the use of PFAS in food packaging. California is also taking the lead on banning PFAS in textiles and cosmetics.

Be PFAS smart

PFAS liability is a serious issue with a lot of moving pieces. Being PFAS smart essentially boils down to dealing with real facts and not speculation, monitoring fast-paced legal and technological developments, engaging in industry association advocacy, and staying laser-focused on both short- and long-term business goals by creatively using the tools already available to decision-makers and their counsel.

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Each company, operation and property has its own unique PFAS risk profile. Gather your team and get your arms around that risk profile. Look for both challenges and opportunities with a 360 view – past and current substances used in operations, permitted and unpermitted emissions and discharges, waste manifests for offsite disposal, onsite storage and disposal practices, etc. Evaluate your insurance programme and potential opportunities for renewals or claims, predecessor liabilities, upcoming acquisitions and divestments, and related diligence and liability allocation strategies, closed and ongoing remediation projects, tenant operations and leases, negotiations with regulators regarding diligence defences, permitting, audits, closures, etc. Ensure your team includes legal and technical professionals with sophisticated and thoughtful knowledge about and appreciation for the nuance and extent of PFAS liabilities and mitigation strategies.

The views expressed in this article are those of the author and are not necessarily shared by Chemical Watch. The author transparency statement can be seen here.

FURTHER INFORMATION

U.S. Env't Prot. Agency, Our Current Understanding of the Human Health and Environmental Risks of PFAS →

Department of Defense Office of Prepublication and Security Review, Fluorine-Free Foam (F3) Military Specification FAQS →

Flurry of PFAS Actions in the First 100 Days of the Biden Administration →

EPA PFAS Strategic Roadmap →