

Practice Update

Is PFAS the New Asbestos?

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Perfluoroalkyl and polyfluoroalkyl substances (PFAS) refer to a family of thousands of man-made chemicals — the most common being PFOA, PFOS, and GenX — that are heat-, water-, grease-, and oil-resistant. Because of these qualities, manufacturers have used PFAS since the 1940s in a wide-range of industrial and commercial products, including everyday household items such as non-stick cookware and stain-resistant carpeting.

Many dub PFAS “forever chemicals” since they don’t break down and can accumulate over time. Because they possess a durable chemical makeup, the chemicals persist in the environment and in the human body.

The continued utility of the chemicals has been called into question by recent studies, however, showing that PFAS exposures can in some instances lead to adverse human health effects, including: kidney cancer, testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol.

Additionally, regulatory agencies are increasingly requiring companies to implement costly remediation projects to address PFAS contamination in soil and groundwater, including in municipal and private drinking water supplies. Emerging litigation surrounding PFAS’s adverse impacts has been so

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rapid — and the exposures so significant — that some see PFAS as the new asbestos.

Why are PFAS now a focus of litigation and regulation?

Because of the wide array of household and industrial uses of PFAS, these chemicals are ubiquitous. According to the EPA, PFAS can be found in such everyday things as:

- Drinking water (though typically localized and associated with a specific facility such as a manufacturer or wastewater treatment plant).
- Foods packaged in PFAS-containing materials, processed with equipment that used PFAS, or grown in PFAS-contaminated soil or water.
- Commercial household products, including stain- and water-repellent fabrics, nonstick products (e.g., Teflon), polishes, waxes, paints, and cleaning products.
- Aqueous Fire-Fighting Foams (AFFF) are a major source of groundwater contamination at airports and military bases where firefighting training occurs.
- Workplaces, including production facilities or certain industries that use PFAS (e.g., chrome plating, electronics manufacturing, or oil recovery).
- Consumer products such as pizza boxes, cookware, and stain-repellant products (e.g., Scotchgard carpet).

Emerging PFAS Litigation

The same long-lasting, “forever” qualities that make PFAS prized ingredients in so many industries are the same qualities that are now causing public concern and driving significant litigation and regulatory actions.

For instance, in *Leach v. E.I. Du Pont de Nemours & Co.*, Case No. 2:14-cv-23755, roughly 80,000 class

members contended that PFAS from a manufacturing facility near the mid-Ohio River Valley contaminated the water supply for at least six public water systems in West Virginia and Ohio. DuPont and Chemours settled this one class action lawsuit relating to one site for approximately \$1 billion.

Recent studies have found that PFAS-containing water supplies have affected as many as 110 million people in the United States. Consequently, numerous governmental entities and private property owners have commenced lawsuits against the polluting manufacturers to seek cleanup and remediation costs. In *Minnesota v. 3M Company*, for example, the state of Minnesota sued 3M Company for \$5 billion, alleging damage to the state's natural resources, including to its drinking water supply and wildlife. 3M settled the lawsuit for \$850 million. Other states, cities, and municipalities across the country are instituting litigation against 3M and other manufacturers for similar claims.

State and federal agencies, as well as private plaintiffs, are continuing to file lawsuits around the country seeking redress for PFAS contamination. For example, more than 80 lawsuits involving AFFF (aqueous film-forming foam concentrates) fire-fighting foam were recently consolidated into a multi-district litigation proceeding in South Carolina. Of those 80 lawsuits, more than 60 are class actions.

Emerging PFAS Regulation

Estimates put some level of PFAS contamination in nearly all 50 states. Due to their heavy usage and known adverse health effects, many states that have grown impatient with federal inaction are now regulating PFAS. These regulations from states such as Minnesota, Michigan, California, and New York include setting the maximum contaminant levels for certain perfluorinated chemicals in drinking water, limiting which PFAS chemicals can be used in food

packaging, and requiring fire departments to report the use of firefighting foam containing PFAS.

What does PFAS mean to you?

For most, the answer is likely nothing at this point—but maybe it should. PFAS's pervasiveness and the public's (and more importantly, the plaintiffs' bar's) heightened awareness of the chemicals' potential dangers have made companies litigation and regulation targets. Some estimate liabilities for PFAS contamination to be in the billions, if not hundreds of billions.

And the implications of PFAS reach outside of the litigation and regulatory arenas, including into conducting real estate and other transactional due diligence, acquiring appropriate insurance to address any PFAS fallout, and implementing best practices to avoid exposures to employees and the environment.

Akerman's experience in analyzing and evaluating PFAS liabilities and exposures make us uniquely qualified to assist you and your company in the myriad way PFAS may present an issue to you—whether preventative or mitigating existing liabilities. We already have begun counseling clients on the risks and exposure that may lie ahead for them as PFAS issues continue to develop and evolve. Let us know if you have questions or concerns that we can address for you.

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