The Contours of the Cosmetic PFAS Litigation: Highlights and Shadows of Forever Chemicals

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On Oct. 18, 2021, the administrator of the U.S. Environmental Protection Agency (EPA) announced the agency's "PFAS Strategic Roadmap," setting out timelines by which the EPA plans to take action and commit to addressing contamination from per- and polyfluoroalkyl substances—known as "PFAS"—throughout the country.[1] The strategic plan includes: (1) considering the lifecycle of PFAS; (2) getting upstream of the problem; (3) holding polluters accountable; (4) ensuring science-based decision-making; and (5) prioritizing protection of disadvantaged communities.[2] President Biden's fiscal year 2023 budget, submitted to Congress on March 28, 2022, would allocate approximately $126 million for EPA's Strategic Roadmap to safeguard communities from PFAS contamination.[3] The increased attention on PFAS, and allocation of funding by the federal government for PFAS mitigation, has been accompanied by a corresponding rise in litigation relating to PFAS in the environment and consumer products.

PFAS are a group of chemicals that have been used in a variety of industries, including, auto, aerospace, apparel, biotechnology, construction, electronics, and pharmaceuticals, among others.[4] The greatest benefit of PFAS, while also the source of concern, is the potential for the chemical combinations to withstand natural degradation, causing the chemicals to break down very slowly over time.[5] Because of this feature, PFAS are used in products such as food packaging, nonstick cooking surfaces, electrical wiring, and firefighting foam. Recently, PFAS have even been identified in ski wax.[6]

Many concerns emerge from the uses of these chemicals due to their resilient nature. PFAS have been shown to move through soils and contaminate drinking water and accumulate in wildlife.[7] As research into PFAS and their effects continue, new litigations regarding these chemicals are starting to develop. One field of emerging litigation is against consumer cosmetic companies for using PFAS in their products. Cosmetic PFAS litigation faces several challenges, which suggests this litigation may not last, unlike the chemicals on which it is based.

Litigation Primer

To date, the majority of PFAS litigation has been centered on environmental cleanup and remediation by PFAS manufacturers.[8] The first PFAS pollution claim arose in Minnesota in 2010 against 3M Corporation for contamination of groundwater.[9] This lawsuit resulted in a settlement of $850 million, setting aside approximately $720 million for environmental rehabilitation.[10] Other states, such as Michigan, have followed suit in bringing claims against PFAS manufacturers for alleged environmental harms.[11] In 2020, the Michigan attorney general sued 17 PFAS manufacturing companies, alleging violations under the Natural Resources and Environmental Protection Act; the Michigan Fraudulent Transfer Act; and Michigan common law claims of negligence, trespass, public nuisance, and unjust enrichment.[12]

More recently, personal injury cases alleging damages from PFAS exposure have been on the rise. As depicted in the 2019 film *Dark Waters*, PFAS were found in the drinking water of Parkersburg, W. Va., which led to a class-action suit against DuPont and resulted in a $670 million settlement in 2017.[13] Following this case, and as part of the class-action settlement, a three-member independent science panel was formed to conduct a population study that would gather data on class members to evaluate PFAS levels and allow future epidemiologic investigations.[14] This panel evaluated over 68,000 participants over a 13-month period and concluded that PFAS exposure could lead to several health issues, including kidney cancer, testicular cancer, ulcerative colitis, thyroid disease, and high cholesterol.[15]

In 2018, to manage more than 500 claims alleging exposure to PFAS from firefighting foam, the Judicial Panel on Multidistrict Litigation created MDL No. 2873[16] in the U.S. District Court for the District of

South Carolina.[17] Plaintiffs in these cases all share common questions of law regarding harms from PFAS exposure and allege personal injury, need for medical monitoring, and property damage, in addition to other economic losses.[18] To date, over 2,500 cases have been consolidated in MDL No. 2873.[19]

Even the fast food industry is facing litigation relating to PFAS, as McDonald's and Burger King were both sued this year for using PFAS in their packaging.[20] These lawsuits came after a report from *Consumer Reports* that PFAS in fast food packaging can migrate into the packaged food and be ingested, contaminate water and soil after being disposed at landfills, and spread through the air if the packaging is burned.[21] McDonald's and Burger King face claims of false advertising for using PFAS-containing packaging while claiming to sell safe products.[22]

Thus far, PFAS claims have espoused a variety of theories of liability, from environmental contamination to false advertising. The establishment of a solid scientific basis for finding a causative connection between PFAS and multiple disease types posits an expansion of PFAS litigation. The future litigation landscape threatens to ensnare not only manufacturers of PFAS, but also companies that incorporate PFAS, knowingly or unknowingly, within their products. But while general causation may be scientifically demonstrated, establishing the presence of PFAS in a product, and the method of absorption from a PFAS exposure, may not be that simple.

Highlights and Shadows: Cosmetics and PFAS

PFAS are used in cosmetics due to manufacturers' efforts to increase cosmetic products' durability and resistance to water, in addition to providing the aesthetic benefit of making skin appear smoother.[23] In 2021, researchers from the University of Notre Dame tested 231 common makeup products and found that more than half contained "high levels of PFAS."[24] Testing included products such as liquid foundation, concealer, mascara, and lipsticks.[25] These are all products that are commonly used on or around the eyes and lips, which allows chemicals to be easily consumed, as these areas are close to mucus membranes.[26] This study did not specifically test for PFAS, however, but rather fluorine, because high levels of fluorine are a marker for PFAS presence.[27] From the tested samples, 82 percent of waterproof mascaras, 63 percent of foundations, and 62 percent of liquid lipsticks were found to contain at least 0.384 micrograms of fluorine per square centimeter of the product.[28]

Meanwhile, Congress has begun exploring regulating the use of PFAS within consumer cosmetic products. On June 14, 2021, the "No PFAS in Cosmetics Act" was introduced in the U.S. Senate.[29] This legislation, if passed, will ban the use of intentionally added PFAS substances in cosmetics.[30] It states that no later than 270 days after the date of the enactment of the act, the Secretary of Health and Human Services shall issue a proposed rule to ban the use of intentionally added PFAS in cosmetics.[31] Notably, the act only concerns "intentionally" added PFAS and does not account for PFAS inadvertently present in or contaminating products.

As more scientific studies and legislative actions are undertaken, it is likely that allegations of PFAS-related injuries from cosmetics, and corresponding litigation, will increase. The focus of plaintiffs' attorneys on PFAS in consumer cosmetic products has already begun. In December 2021, five plaintiffs filed a class action against Shiseido Americas Corporation on behalf of "all consumers who purchased bareMinerals brand products."[32] The plaintiffs in *Onaka v. Shiseido Americas Corp.* claim breach of warranty, negligent misrepresentation, fraud, and violation of various state consumer protection laws.[33] They also allege that Shiseido's bareMinerals products are falsely advertised as clean and free of harsh chemicals.[34] The plaintiffs allege that these statements are false because bareMinerals contains PFAS, which plaintiffs assert are not clean or natural.[35]

Also in December 2021, GMO Free USA d/b/a Toxin Free USA filed a lawsuit against Cover Girl Cosmetics and Coty, Inc., alleging that the Cover Girl brand TruBlend Pressed Powder is falsely and deceptively marketed.[36] In that case, the plaintiff alleges that the characterization of the product as sustainable is false and misleading because the product contains PFAS, which is a "forever chemical" that does not degrade in the environment.[37] The complaint references a growing consumer advocacy movement to eliminate PFAS from products.[38]

More recently, on April 7, 2022, a class-action lawsuit was filed in Oakland, Calif., against Clorox, in which plaintiffs aver that Burt's Bees Lip Products contain PFAS.[39] The claimants allege that while Burt's Bees advertised the product as 100% natural, such a statement is not true because the product contains PFAS.[40] The plaintiffs allege that a reasonable consumer would fairly and reasonably understand that Burt's Bees products, which are marketed as clean, conscious, and 100% natural, are free from chemicals, particularly human-made chemicals such as PFAS.[41]

Similarly, on April 8, 2022, a class-action lawsuit was filed in New Jersey federal court against L'Oreal, alleging fraud, breach of both express and implied warranty, unjust enrichment, and violation of the New Jersey Consumer Fraud Act.[42] The complaint includes examples of L'Oreal's products alleged to contain PFAS to support the plaintiffs' claims that L'Oreal's marketing is fraudulent and misleading.[43]

Blemishes to Conceal

None of the current cosmetics PFAS lawsuits detailed above include claims of personal injury, such as those made in the environmental cases. Rather, the cosmetic cases allege false advertising and violations of consumer protection statutes. Plaintiffs will face several challenges in prosecuting any personal injury claims from exposure to PFAS in cosmetics.

A significant issue plaintiffs may face in the course of this litigation is the hurdle of testing for PFAS. As the Notre Dame study has shown, PFAS detection has only been *assumed* based on the finding of high levels of fluorine.[44] Following the release of the Notre Dame study, a consumer wellness blog, *Mamavation*, tested dozens of makeup products for organic fluorine as opposed to individual PFAS "because that testing would be significantly more expensive, and tests only exist for a limited number of the [PFAS] compounds."[45]

Additionally, plaintiffs in cosmetic PFAS cases will have difficulty proving exposure. The U.S. Food and Drug Administration (FDA) has previously reported that there is a limited amount of research regarding PFAS absorption through the skin.[46] Denmark's Environmental Protection Agency conducted the only known risk assessment that evaluated PFAS in cosmetics and ultimately concluded that the levels of PFAS in the products sampled were unlikely to pose a health risk for consumers.[47] The FDA has stated that additional research is needed in order to ascertain the full impact of PFAS exposure from cosmetic sources. This would require looking into the toxicological profiles for PFAS in cosmetics, determining the extent to which various PFAS in cosmetics can be absorbed through the skin, and identifying any potential human health risks from this type of exposure.[48]

Further, plaintiffs will have difficulty proving causation in these cosmetics cases. To prove general causation, plaintiffs will be required to show that PFAS exposure is capable of causing the injury or injuries at issue.[49] Although some studies suggest that exposure to some types of PFAS at certain intensities may cause a number of health effects, not all studies measured the same type of exposures or even the same PFAS compounds.[50] The lack of scientific studies linking specific types of PFAS exposure to particular injuries will make establishing general causation difficult. For example, unlike other common toxic torts, PFAS exposure has no one "signature" disease. In addition, there is a myriad of potential causes for many of the health effects associated with PFAS. Additionally, plaintiffs will be required to prove specific causation, which raises additional challenges in a cosmetic PFAS case. Plaintiffs will find it difficult to prove specific causation as to any particular cosmetic product where they will be required to evidence both the presence of PFAS in that product and sufficient exposure to cause the alleged disease.

Forever Litigation?

Notwithstanding the challenges that plaintiffs will face in prosecuting personal injury PFAS cases relating to consumer products like cosmetics, the chemicals and their health effects will face increased attention due to the Biden administration's commitment to studying and regulating them.[51] President Biden has pledged to designate PFAS as a hazardous substance in his Plan to Secure Environmental Justice and Equitable Economic Opportunity.[52] If successful, this would lead to broadened federal authority to act on PFAS regulation under the Comprehensive Environmental Response, Compensation, and Liability Act.[53]

Like the chemicals themselves, PFAS litigation has spread beyond environmental litigation to consumer products. As more products are studied and tested, and as governmental entities release further guidance on PFAS and their associated health effects, it is likely that such consumer product litigation will expand to other areas. Manufacturers who utilize PFAS in their products or packaging should take action now in anticipation of the inevitable litigation to come.

First, companies should determine whether they are using PFAS in their manufacturing process or packaging. The Green Science Policy Institute, a group of scientists and policy experts that develops and distributes peer-reviewed research about chemicals of concern, recommends that brands test their makeup for organic fluorine and conduct targeted PFAS testing.[54] However, testing for PFAS has proven to be difficult, as there are an estimated 8,000-9,000 individual PFAS compounds, and many formulas are industry secrets.[55] The challenge of specifically testing for PFAS is reflected in the cost of such testing, which can range from $100-$300 to test a batch of makeup for organic fluorine and about $10 per compound to test for targeted PFAS.[56] Manufacturers (and plaintiffs' attorneys) seeking product testing may face long wait times since there are few labs that currently perform this type of analysis.[57]

In addition to independent testing, manufacturers should ask suppliers and vendors to certify that their ingredients or other materials are PFAS-free. Not only will this data be critical to proving the purity of their product in litigation, but it will also be useful in demonstrating that manufacturers acted reasonably in response to the potential health risks of PFAS.

Next, companies that are using PFAS should determine whether a commercially reasonable alternative exists that could replace the use of PFAS in their product or process. By shifting to a non-PFAS-containing alternative, they could avoid potential litigation associated with alleged exposure. This will also support their defense that they valued consumer safety over profits, countering a familiar refrain of the plaintiffs' bar.

Additionally, companies that are using PFAS in their products, manufacturing processes, or packaging should be proactive about warning about the existence of the chemicals. By making disclosures on their own accord, even with no regulatory obligation to do so, companies can anticipate a potential failure-to-warn claim and also protect against allegations of fraudulent or misleading marketing or claims made under consumer protection laws.

Finally, all companies should stay abreast of the rapidly changing legislative and regulatory landscape to be sure their use of PFAS is consistent with both federal and state law. Whether in the form of the recently introduced No PFAS in Cosmetics Act or ongoing EPA activity associated with its PFAS Strategic Roadmap, changes to the law affecting PFAS are coming. Companies need to be prepared to adapt their businesses accordingly.

We are witnessing the nascent stages of PFAS litigation. As research into these chemicals continues, we can expect litigation to expand to new products and legal theories, including alleged personal injuries from cosmetic products. As this litigation expands, plaintiffs will face significant challenges, particularly in proving exposure and causation. These obstacles notwithstanding, prospective defendants should take decisive action now to eliminate risks associated with forever chemicals and to avoid what could otherwise become forever litigation. ⊙

Endnotes

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[27]*Id.*

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[31]*Id.*

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

[33]*Id.*

[34]*Id.*

[35]*Id.*

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[57]*Id.*