

Looking to 2020: Will PFAS Be the Next Wave of Consumer Products and Coverage Litigation?



As businesses gear up for the busy holiday shopping season and prepare product lines for the new year, manufacturers and distributors of consumer products must be ready to manage new risks that are likely to appear in the new year. One major concern that should be on every business's holiday shopping list is the regulatory, litigation and insurance coverage risk for manufacturers and distributors of consumer products that have historically contained or may now contain per- and polyfluoroalkyl substances (PFAS). PFAS is an umbrella term that refers to a family of more than 5,000 man-made chemicals that have been widely used in consumer and industrial products for more than 70 years. Also known as "forever chemicals," PFAS may be linked to a variety of health risks in humans according to scientific studies. The federal government has announced regulatory and legislative efforts to combat the use of PFAS compounds in consumer products, and several state governments have already adopted laws doing the same. Businesses in the consumer products industry should take concrete steps to understand whether they have any potential PFAS-related risks and mitigate those risks, including through insurance.

The Rise of PFAS-Related Risk

Earlier this year, nonprofit news organization *The New Food Economy* touched off a media firestorm when it released a study concluding that the compostable, "molded fiber" bowls which are a staple of many fast-casual restaurants were "contributing to a growing environmental crisis" because the bowls contain certain PFAS compounds. According to the Centers for Disease Control and Prevention, PFAS compounds can be found in "non-stick cookware, water-repellent clothing, stain resistant fabrics and carpets, some cosmetics, some firefighting foams, and products that resist grease, water, and oil." PFAS compounds also have been found in food packaging, including "[s]ome grease-resistant paper, fast food containers/wrappers, microwave popcorn bags, pizza boxes, and candy wrappers." Certain PFAS compounds have faced increased public and governmental scrutiny because the compounds are not biodegradable, meaning that they will persist in the environment or in the human body and accumulate over time. This has led many to refer to PFAS compounds colloquially as "forever chemicals."

Although there is no scientific consensus on the effects of exposure to high levels of certain PFAS compounds, studies have linked high levels of exposure to certain PFAS compounds in humans to a variety of negative health effects, including increased cholesterol levels, increased risk of cancer, negative impacts on the immune system and the reduced ability for women to become pregnant. As more information has become known about the potential health effects of long-term exposure to certain PFAS compounds, government regulators in the United States and abroad have sprung into action. In February 2019, the U.S. Environmental Protection Agency announced a formal PFAS Action Plan to address the challenges posted by PFAS compounds and has plans to introduce PFAS limits for drinking water by year-end. The U.S. House of Representatives passed an amendment in July 2019 to the 2020 National Defense Authorization Act (NDAA) that would deem all PFAS as hazardous, toxic and waste under

several statutes, and the U.S. Senate is currently considering an even more stringent amendment. Additionally, 18 states have current PFAS-related regulations, and many others are investigating the issue. Several states, including Connecticut, Iowa, Massachusetts, Minnesota, New York and Rhode Island, are considering legislation prohibiting the manufacture and sale of food packaging containing PFAS compounds. Maine and Washington have already adopted such restrictions. Internationally, Denmark announced earlier this year its intent to ban the use of PFAS compounds in food package by July 2020.

Next Steps

As more information comes to light about sources of PFAS compounds and their impact on human health, manufacturers and distributors of consumer products must be diligent to understand their potential sources of PFAS-related liability and take the proper precautions to manage and mitigate any PFAS-related risk, including through insurance. Several manufacturers of products that historically contained certain PFAS compounds have faced class action lawsuits, legally imposed environmental action and government investigations related to their manufacture, distribution, use and disposal of such products. For example, the makers of Aqueous Film-Forming Foam (AFFF), a product used to extinguish fires that allegedly contained certain PFAS compounds, are currently facing a multi-district litigation (MDL) proceeding involving more than 80 actions brought by a wide variety of plaintiffs alleging damages related to exposure to PFAS compounds. Though the AFFF MDL remains pending, the recent government efforts to regulate exposure levels for PFAS compounds discussed above and enhanced media spotlight on PFAS compounds suggest that a new wave of consumer produce litigation is coming soon.

When facing any new litigation risk, a manufacturer or distributor of consumer products should begin studying its past use of PFAS and assemble a team to understand such PFAS-related risks. Additionally, potential PFAS targets in the consumer products space should take the necessary steps to ensure that their insurance programs will respond to any PFAS-related risks, whether they be government investigations or litigation, to avoid any potential gaps in coverage.

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