CLIENT ALERTS & INSIGHTS

“Forever Chemicals:” PFAS Litigation Expands In the Consumer Class Action Space

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There’s no doubt that waterproof and oil-proof materials serve a wide range of valuable purposes-for everything from raincoats and yoga pants, to fast food wrappers, to cosmetics and dental floss. The issue coming increasingly to light, however, is that some of the class of materials used in these products-perfluoroalkyl and polyfluoroalkyl substances (“PFAS”)-have been associated with negative health and environmental effects.

That’s not to say that every form of PFAS is dangerous. In fact, only a handful of these 12,000+ chemicals have been studied in depth or tied to the risks above (while others are actually approved by the FDA for food contact purposes). Nevertheless, concerns about these broader pool of so-called “forever chemicals” has spurred a panoply of new state and federal regulations, along with a new wave of opportunistic consumer class actions alleging that retailers and product manufacturers tricked consumers into believing their products are PFAS free.

These new cases allege that the presence of PFAS harmed consumers by either leading them to buy products they otherwise would not have purchased, or by creating a potential health risk. Crucially, however, many of these new complaints omit any actual injury suffered by the plaintiffs, and often do not even claim that PFAS were detected (rather than organic fluorine, which is often used as a proxy for PFAS), much less at a high enough level to create a risk of physical harm.

Plaintiffs have also struggled to identify alleged misrepresentations that a given product is PFAS free. For example, in a case against Cover Girl Cosmetics, Noxell Corporation, and Coty, Inc., the Superior Court of the District of Columbia held that statements that the companies “intend to keep sustainability at the heart of product innovations” and that their “products have an important role to play in building a sustainable future” were mere puffery rather than representations that their products were PFAS-free.[1]

However, Courts have allowed some of these cases to proceed, and we expect new filings to continue to pour in as more PFAS-related regulations, including reporting requirements, take effect.

For example, on May 14, 2024, the United States District Court for the Central District of California denied a motion to dismiss in *Endres v. Newell Brands, Inc., et al.*[2] There, the plaintiff alleged that Yankee Candle and Chesapeake Bay Candle deceived consumers by advertising their candles as “high-quality wellness” products, and by failing to disclose that the products contained PFAS.[3] In denying the motion to dismiss in *Endres*, the Court relied on prior California case law for the proposition that health and wellness statements cannot be dismissed as mere puffery, because consumers rely on such statements when making purchasing decisions.[4]

The Court further held that the plaintiff had plausibly alleged that a reasonable consumer would interpret the wellness representations as meaning that the candles did not contain PFAS.[5]

Although the *Endres* complaint was typical of those in earlier-filed PFAS cases-short on facts and lacking any specific representations concerning PFAS-we are also beginning to see the plaintiffs' bar become more sophisticated. For example, a new strategy involves serving public records requests on the Maine Department of Environmental Protection, to learn what products a given company reported to the Maine government (as required by Maine law) as containing PFAS.

As the number of new PFAS suits increase, it is more important than ever that companies ensure they are protected. Benesch has been active in the PFAS space since this wave of consumer class actions began and has won some of the most favorable rulings. We look forward to guiding companies in the face of the PFAS litigation trends in order to mitigate risk and to avoid future threats.

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[1] *GMO Free USA v. Cover Girl Cosmetics, et al.*, No. 2021 CA 004786 B, at 6 (D.C. Sup. June 1, 2022).

[2] *Endres v. Newell Brands, Inc., et al.*, Case No. CV 24-00952-MWF (DFMx) (C.D. Ca.)

[3] *Id.* at 3-4.

[4] *Id.* at 10.

[5] *Id.* at 12.