



Plaintiffs Sue Over Nondisclosure of PFAS As Regulators Scrutinize Safety

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KEY TAKEAWAYS

- Federal government agencies' expanded review of the potential environmental impact and health risks associated with PFAS may be spurring private litigation.
- Despite the lack of research showing adverse health impacts from most PFAS-related substances and current government regulatory approvals, plaintiffs' lawyers are targeting the food and beverage industry's use of these chemicals in consumer products.
- Companies in the food and beverage and consumer product industries may consider an audit of PFAS-related chemical use. Such a review can assess the benefits and risks of continued use of PFAS-related substances with their products and services.

The alleged health risks of per- and poly-fluoroalkyl substances, or PFAS, are garnering increased attention from plaintiffs' lawyers. In the wake of recent efforts to update risk evaluations and risk assessments by agencies such as the Environmental Protection Agency, the Food & Drug Administration, and the Center for Disease Control, private plaintiffs are bringing products liability, mass tort, consumer protection, and consumer fraud claims using the health and safety findings (or inquiries) by the federal government as the lynchpin of their complaints.

PFAS are widely used, long lasting chemicals, components of which can break down very slowly over time. There are thousands of PFAS-related chemicals. They are found in many different consumer, commercial, and industrial products. Because of their potential persistence, certain PFAS are detectable in the blood of people and animals and can be present at low levels in a variety of food products and in the environment.^[1] In recent years, certain researchers have begun alleging links between PFAS and adverse health outcomes.^[2] The EPA has proposed a National Primary Drinking Water Regulation for publication in Fall 2022 to regulate levels found in public drinking water supplies.^[3]

The FDA has long authorized certain PFAS for use in specific food-contact applications.^[4] For example, PFAS are used in cookware, food packaging, and in food processing for their non-stick and grease-, oil-, and water-resistant

properties. To ensure food-contact substances are safe for their intended use, the FDA conducts a rigorous review of scientific data prior to authorizing market entry. The FDA's authorization of a food-contact substance requires that available data and information demonstrate that there is a reasonable certainty of no harm under the intended conditions of use.

Nevertheless, recent so-called "investigations" by certain groups have trumpeted purported "findings" that there are PFAS in different types of food packaging, including from both restaurants and grocery stores.^[5] Notwithstanding the FDA's approval of such uses, this has caused significant media attention. McDonalds and Chick-fil-A have already announced plans to phase out PFAS in their food packaging.^[6] Legislative reaction has also resulted, with multiple states enacting regulations addressing PFAS in food packaging. In November 2021, the Keep Food Containers Safe from PFAS Act of 2021 was introduced in Congress with bipartisan support.^[7]

Litigation has followed. In a case filed in 2018 in the Southern District of Ohio, the plaintiffs claim that multiple manufacturers and distributors of PFAS misled the public about the risks associated with PFAS. Because medical and scientific research showing actual health impacts from PFAS remains scant, rather than seeking monetary damages, the plaintiffs seek relief in the form of a medical monitoring program and the establishment of a science panel to study potential health risks associated with PFAS chemicals.^[8] On March 7, 2022, the District Court in that case certified a class that included any individual subject to the laws of Ohio with 0.05 parts per trillion (ppt) of any PFAS in their blood serum.^[9] This certified class potentially includes 11 million people.^[10] Defendants in the case have since filed a Petition for Permission to Appeal in the Sixth Circuit.

In March and April 2022, putative class-action plaintiffs filed several new lawsuits against fast-food chains. These target the lawful use of PFAS in their packaging. These lawsuits do not allege that actual physical harm or adverse health conditions have manifested. Instead, the lawsuits allege false advertising, consumer fraud, and breach of warranty claims centered on alleged failure to disclose the use of PFAS in food packaging. Given the prevalence of PFAS in household items and the rising public concern, depending on the development of these cases, this is an area that may result in more litigation in the future.

^[1] <https://www.epa.gov/pfas/pfas-explained>

^[2] *Id.*; *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, National Institute of Environmental Health Sciences, <https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm> and <https://www.nytimes.com/2022/04/12/us/pfas-chemicals-fast-food.html> (last visited May 3, 2022).

^[3] <https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas>

^[4] <https://www.fda.gov/food/chemical-contaminants-food/and-polyfluoroalkyl-substances-pfas>

^[5] Kevin Loria, *Dangerous PFAS Chemicals Are in Your Food Packaging*, Consumer Reports, March 24, 2022, <https://www.consumerreports.org/pfas-food-packaging/dangerous-pfas-chemicals-are-in-your-food-packaging-a3786252074/>.

^[6] Laura Reiley, *Major Restaurant Chains Commit to Eliminating 'Forever Chemicals'*, The Washington Post, March 24, 2022, <https://www.washingtonpost.com/business/2022/03/24/fast-food-pfas-forever-chemicals/>.

^[7] Thomas Lee et al., *PFAS in Food Packaging: Get Ready for New Regulations*, Bloomberg Law, April 29, 2022.

^[8] John Gardella, *PFAS Class Action Lawsuit Updates*, The National Law Review (April 4, 2022), <https://www.natlawreview.com/article/pfas-class-action-lawsuit-updates>.

^[9] *Hardwick v. 3M Co.*, No. 2:18-cv-1185, 2022 WL 668339 (S. D. Ohio 2022).

^[10] Maya Earls, *3M, Chemours Appeal Class of Millions of Ohioans Suing over PFAS*, Bloomberg Law, March 23, 2022.

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