

PFAS Mislabeling Consumer Class Actions on the Rise in 2023

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Key Takeaway

- There will likely be increased attention on the presence of per- and polyfluorinated substances (PFAS) in consumer goods in 2023, and companies claiming that their products are safe, natural, or sustainable may be at risk for litigation.

Readers of Winston & Strawn blogs know that PFAS are not new (see our [Law Glossary definition](#) for further background). According to Bloomberg Law, more than 6,400 PFAS-related lawsuits have been filed since 2005. ^[1] Lately, however, PFAS have increasingly captured headlines, and there has been a marked increase in consumer protection litigation related to PFAS across the United States.

Trends indicate that litigation in this space is only just heating up, and that manufacturers and retailers of everyday household products and consumer goods could face a PFAS class action lawsuit in the near future.

TRENDING PFAS CONSUMER CLASS ACTIONS

PFAS litigation is on the rise. Increasingly, these lawsuits are based on allegations that the presence of PFAS in consumer products causes advertising statements that a product is, for example, “natural,” “environmentally friendly,” or “healthy” to be false or misleading. Typically, claims are styled as violations of various states’ consumer protection acts, breaches of express and implied warranties, fraudulent inducement, fraudulent omission or concealment, fraudulent and negligent misrepresentation, unjust enrichment, and/or negligent failure to warn.

By way of recent example, on October 28, 2022, a PFAS consumer fraud class action lawsuit was filed in the United States District Court for the Western District of Washington against outdoor company REI based on the alleged PFAS content in various articles of waterproof clothing sold by the company.^[2] The plaintiffs point to the alleged presence of PFAS to attack REI’s various “sustainability” representations and a statement on its website that it has “eliminated long-chain PFAS” from its raincoats.

The REI case is not unique. Earlier this year, cosmetic companies, such as Cover Girl, Almay, L'Oréal, and Burt's Bees were hit with PFAS consumer class action lawsuits.^[3] The plaintiffs contend, for example, that Burt's Bees' representation that its products are "100% Natural" is allegedly deceptive due to the presence of PFAS. Fast-food giants, Burger King and McDonald's, also face consumer class actions based on allegations that their packaging and wrappers contain PFAS.^[4] Specifically, the plaintiffs targeted Burger King's "safe" and "sustainable" representations. Similarly, underwear manufacturers Thinx, Inc. and Knix Wear, Inc. face PFAS consumer class actions, targeting their representations that their underwear is "safe and effective" and "safe, comfortable, and sustainable."^[5]

The variety of these cases shows that no industry is safe from the far reach of PFAS litigation. The attention on PFAS in consumer goods litigation will likely continue throughout 2023, and companies whose products contain PFAS but that advertise that their products are safe, natural, or sustainable may be at an increased risk of litigation.

[1] Andrew Wallender, *Companies Face Billions in Damages as PFAS Lawsuits Flood Courts*, Bloomberg Law (May 23, 2022), <https://news.bloomberglaw.com/environment-and-energy/companies-face-billions-in-damages-as-pfas-lawsuits-flood-courts?context=article-related> (last visited Dec. 7, 2022).

[2] *Krakauer v. Recreational Equip., Inc.*, No. 3:22-cv-05830-BHS (W.D. Wash.).

[3] See, e.g., *Brown v. Cover Girl*, No. 2022-cv-02696 (S.D.N.Y.); *Anderson v. Almay*, No. 2022-cv-02722 (S.D.N.Y.); *Davenport v. L'Oréal*, No. 2:22-cv-01195 (C.D. Cal.); *Spindel v. Burt's Bees, Inc.*, No. 3:22-cv-01928 (N.D. Cal.).

[4] *Hussain v. Burger King*, No. 4:22-cv-02258 (N.D. Cal.); *Clark v. McDonald's Corp.*, No. 3:22-cv-628 (S.D. Ill.).

[5] *Blenis v. Thinx, Inc.*, No. 21-cv-11019 (D. Mass.); *Rivera v. Knix Wear, Inc.*, No. 22-cv-2137 (N.D. Cal.).

Key takeaway

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