PFAS: Expected Litigation Trends

Authored by Sheila L. Birbaum, Mark S. Cheffo, Douglas E. Fleming III, Rachel Passaretti-Wu, Marina Schwarz, Nathan Williams and Michael A. Fazio

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Overview

- The PFAS litigation landscape – already involving PFAS manufacturers and purchasers of PFAS-containing fluoropolymers and firefighting films – is in the process of expanding, which is putting new companies and new industries in the spotlight, a process that may be accelerated by regulatory developments at the federal level.

- Public and regulatory attention to the ubiquitous PFAS is also growing in the United States, as reflected by the Biden Administration's avowed commitment to regulate and study these chemical substances.

- Companies whose operations and products use, or historically used, any PFAS would be well-advised to consider strategies to evaluate, address, and mitigate legal risks and potential litigation.

Per- and polyfluoroalkyl substances (PFAS) have historically been used by a wide range of industries for all kinds of applications across the aerospace, apparel, biotechnology, construction, electronics, and pharmaceutics fields.[1] For more than two decades, PFAS have also been subject to litigation and regulatory attention, arising from the ubiquity and persistence of certain PFAS compounds and allegations about exposure-based health impacts. Following on the heels of high-profile litigation against certain manufacturers of PFAS, enterprising plaintiffs' counsel have sought progressively to identify new potential categories of defendants and claims. While PFAS manufacturers will remain at the center of attention, claimants will also pursue new companies and products in new industries using existing and adapted legal theories.

Further, the arrival of a new presidential administration, which promised to focus on PFAS regulation and has appointed key government officials with experience in dealing with PFAS issues, is expected to coincide with and potentially enable an expansion in the volume and scope of both regulation and litigation. Any expansion of regulatory efforts by the Biden Administration can be expected to spur or accelerate litigation, both because of the protections by these new laws and the increased public attention and pressure his environmental initiatives will likely engender. Indeed, federal regulatory initiatives envisioned by the Biden Administration may generate additional legal liability for current and former owners and operators of facilities where PFAS have been handled. The renewed focus of the Biden administration on PFAS will likely also impact private litigation in additional ways, directly and indirectly.

This article discusses the expected direction of these emerging trends.

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[1] Gluge et al., An Overview of the uses of per- and polyfluoroalkyl substances (PFAS) (2020). Environ. Sci.: Processes, 22:2345, 2349.

Background on PFAS

PFAS comprise thousands of chemical compounds known for their water-resistant and stain-resistant properties, as well as their stability.[2] Perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) are among the more well-known PFAS compounds. For decades, PFAS have been utilized in a wide range of products, such as paper products, wire insulation, surface coatings, cleaning products, personal care products (like cosmetics, shampoos, and dental floss), and firefighting foam, among numerous others.[3] Given the ubiquity of these chemicals, the vast majority of Americans have had measurable exposure to PFAS, as demonstrated by data showing detectable levels of certain PFAS in the blood of most Americans.[4] And, though there have been efforts to phase out reliance on them and to identify replacements, regulators continue to investigate and evaluate historical use of and continued exposure to these legacy chemicals.

The Present and Future of PFAS Litigation

Litigation and regulatory focus related to PFAS generally began about two decades ago and has since grown. In litigation, certain PFAS – primarily PFOA and PFOS – have been alleged to be capable of causing a variety of health outcomes and to persist in the environment. In regions of the country where PFAS have been found in drinking water, groundwater, and soil, actions have been brought by exposed individuals, state attorneys general, and water utilities, asserting claims primarily against manufacturers of PFAS-containing materials, such as fluoropolymers (like TeflonTM) and firefighting foam, as well as in some instances local processors. The most common legal claims include medical monitoring and personal injury based on exposure to PFAS in drinking water, diminished property values due to the presence of PFAS in soil and water wells, and the costs of remediating water and soil where PFAS have been detected. There have also been, for example, shareholder actions, alleging failure to disclose material information about potential PFAS liability;[5] a proposed class action by rural water providers seeking injunctive relief for water testing and data collection;[6] a proposed nationwide class action seeking the establishment of a science panel to study PFAS;[7] and a citizen suit, under the Resource Conservation and Recovery Act, seeking to abate and enjoin disposal of PFAS-containing wastes.[8]

While many cases are still pending, several high-value verdicts and settlements have garnered considerable attention. Examples include an US$850 million settlement with a state attorney general in 2018;[9] a US$671 million

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[2] *Id*. at 2346.

[3] EPA, Drinking Water Health Advisory for Perfluorooctanoic Acid (PFOA) (May 2016), available at https://www.epa.gov/sites/production/files/2016-05/documents/pfoa_health_advisory_final_508.pdf.

[4] Kato et al., *Trends in Exposure to Polyfluoroalkyl Chemicals in the U.S. Population: 1999-2008* (2011). Environ. Sci. Technol. 45, 8037; see also NHANES, Fourth Report on Human Exposure to Environmental Chemicals, Updated Tables, Vol. 1 (Jan. 2019), https://www.cdc.gov/exposurereport/.

[5] *See, e.g.*, Consol. Am. Compl., In re 3M Co. Sec. Litig., No. 2:19-cv-15982 (D.N.J. Dec. 12, 2019), ECF No. 44.

[6] Am. Compl., *City of Millington v. 3M Co.*, No. 2:20-cv-01034 (D.S.C. 2020), ECF No. 40.

[7] Am. Compl., *Hardwick v. 3M Co*., No. 2:18-cv-1185 (S.D. Ohio 2019), ECF No. 96.

[8] Am. Compl., *Tenn. Riverkeeper, Inc. v. 3M Co*., No. 5:16-cv-01029 (N.D. Ala. 2017), ECF. No. 62.

[9] *See* Minnesota 3M PFC Settlement, https://3msettlement.state.mn.us/ (last accessed Feb. 18, 2021).

settlement to resolve 3,550 lawsuits in 2017;[10] and an US$83 million settlement this year to resolve nearly 100 personal injury claims, as well as agreeing to a cost-sharing arrangement to address up to US$4 billion in PFAS legacy liabilities.[11] As these outcomes suggest and recent filings indicate, litigation against PFAS manufacturers will undoubtedly endure.

Given the long and varied use of PFAS around the country, the plaintiffs' bar has increasingly sought to extend this precedent by targeting additional companies and industries. While early cases targeted manufacturers of PFAS, the same theories have been extended to pursue companies down the product supply chain, such as those who processed materials that contain PFAS or made firefighting foams with PFAS supplied by others. As a result of perceived litigation and settlement successes, as well as public and financial pressures on local governments and water utilities, PFAS litigation efforts have expanded in recent years, and likely will continue to expand, to include additional companies in the product supply chain or in different industries.[12] A recent example shows how the direction of PFAS litigation can entangle new companies for their current and historical operations: In Maine state court, a proposed class of property owners seeks damages and medical monitoring from the current and former owners of a paper mill for their alleged use and disposal of PFAS-containing materials over a 50-year period.[13]

Additionally, whereas initial cases typically involved claims seeking medical monitoring, personal injury damages, and diminution in property value, other cases have emerged under consumer protection statutes. At their core, these complaints have alleged false or misleading advertising, asserting, for example, that consumer products were marketed as "compostable," despite purportedly containing PFAS that take a significant amount of time to break down.[14] Another lawsuit, recently filed in California federal court, has targeted a feminine hygiene products company whose menstrual underwear was tested by a third party and reportedly contained PFAS.[15] The putative class action complaint alleges that product marketing claiming the underwear to be safe and without harmful chemicals was not true and thus misled consumers.[16]

Given the ubiquity of PFAS and their applications, details about the PFAS content of commercial and consumer products continue to emerge, such as newly available reporting about disclosures by cosmetics producers.[17] As recent examples show, litigation often follows these disclosures.

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[10] Arathy S. Nair, "DuPont settles lawsuits over leak of chemical used to make Teflon" (Feb. 13, 2017), https://www.reuters.com/article/us-du-pont-lawsuit-west-virginia/dupont-settles-lawsuits-over-leak-of-chemical-used-to-make-teflon-idUSKBN15S18U.

[11] DuPont, "DuPont, Corteva, and Chemours announce resolution of legacy PFAS claims" (Jan. 22, 2021), https://www.dupont.com/news/dupont-corteva-chemours-announce-resolution-legacy-pfas-claims.html.

[12] See, e.g., Compl., *Orange Cnty. Water Dist. v. 3M Co.*, No. 30-2020-01172419-CU-PL-CXC (Cal. Super., Orange Cnty. 2020) (naming Decra Roofing Systems, Inc. as a defendant).

[13] Compl., *Saunders v. Sappi N. Am.*, Inc. (Me. Sup. Ct. March 5, 2021).

[14] Compl., *Ambrose v. The Kroger Co.*, No. 3:20-cv-04009 (N.D. Cal. June 16, 2020), ECF No. 1.

[15] Am. Compl., *Kanan v. Thinx Inc.*, No. 2:20-cv-10341 (C.D. Cal. March 16, 2021), ECF No. 29.

[16] *Id.*

[17] FDA, "Per and Polyfluoroalkyl Substances (PFAS) in Cosmetics" (Feb. 19, 2021), https://www.fda.gov/cosmetics/cosmetic-ingredients/and-polyfluoroalkyl-substances-pfas-cosmetics.

Increased Focus under the Biden Administration

On the regulatory front, the federal Environmental Protection Agency ("EPA") and other federal agencies, such as the Agency for Toxic Substances and Disease Registry (ATSDR) and the Department of Defense, continue to investigate PFAS. Further, a number of states have adopted drinking water guidelines or limits for one or more PFAS,[18] while other states are also considering or have proposed standards.[19] Many of those standards are stricter than the EPA's current health advisory level for PFOA and PFOS, and some cover additional PFAS compounds, such as perfluorononanoic acid (PFNA) and perfluorohexanesulfonic acid (PFHxS).[20] State agencies also continue to investigate historic use and possible releases of PFAS and to negotiate consent agreements or commence legal actions to cover (or recover) alleged damages, such as investigation and remediation costs.

Yet President Biden's political appointments and campaign commitments, mounting public pressure, and regulatory mechanisms set in motion by the previous administration also portend increasing and enduring attention to PFAS in the coming years. This attention will have critical relevance to the shape and scope of PFAS litigation.

Notable figures in this new administration have substantial experience addressing PFAS-related topics, indicating the administration's intent and capability to pursue these issues at the federal level. For example, Michael Regan, Biden's new EPA Administrator, most recently led North Carolina's Department of Environmental Quality and oversaw controls on PFAS in the state, as well as a variety of remediation efforts there.[21] Gina McCarthy, who is serving as the White House National Climate Advisor, was the EPA Administrator during the Obama administration when PFOA was detected at several sites in the United States, leading to increased public pressure over PFAS. Prior to her appointment as Secretary of the Interior, then-Congresswoman Debra Haaland co-sponsored the PFAS Action Act of 2019 to "regulate PFAS chemicals, clean up contamination, and protect public health."[22] Brenda Mallory, who is leading the White House Council on Environmental Quality, will be arriving as the former director of regulatory policy at the Southern Environmental Law Center, which was critical of the Trump Administration's approach to PFAS management.[23] Further, Secretary of Defense Lloyd Austin has committed to take concrete steps and "pick up the pace" on efforts to address PFAS on military bases and neighboring communities.[24]

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[18] *See, e.g.*, Michigan PFAS Action Response Team, "PFAS MCLs and Drinking Water" (Jul. 22, 2020), https://www.michigan.gov/pfasresponse/0,9038,7-365-95571_99970---,00.html; Cal. State Water Resources Control Board, "Response Levels Lowered for Water Systems Statewide as PFAS Investigation Continues" (Feb. 6, 2020), https://www.waterboards.ca.gov/press_room/press_releases/2020/pr02062020_pfoa_pfos_response_levels.pdf.

[19] *See, e.g.*, Ohio EPA, "Ohio Per- and Polyfluoroalkyl Substances (PFAS) Action Plan for Drinking Water" (Dec. 2019), https://epa.ohio.gov/Portals/28/documents/pfas/PFASActionPlan.pdf.

[20] *See, e.g.*, Michigan PFAS Action Response Team, supra; New Jersey Dep't of Envtl. Protection, "Affirming National Leadership Role, New Jersey Publishes Formal Stringent Drinking Water Standards for PFOA and PFOS" (June 1, 2020), https://www.state.nj.us/dep/newsrel/2020/20_0025.htm.

[21] *See* North Carolina Department of Environmental Quality, "DEQ orders additional PFAS reductions by Chemours" (Aug. 13, 2020), https://deq.nc.gov/news/press-releases/2020/08/13/deq-orders-additional-pfas-reductions-chemours.

[22] Office of Rep. Debra Haaland, "Haaland: Bill Will Protect New Mexico's Water from Toxic Chemicals" (Jan. 10, 2020), https://bit.ly/3cPRa4E.

[23] S. Envtl. L. Ctr., "SELC Statement on EPA's Feckless PFAS Action Plan" (Aug. 25, 2020), https://www.southernenvironment.org/news-and-press/press-releases/selc-statement-on-epas-feckless-pfas-action-plan.

[24] "Senate Armed Services Committee Holds Hearing on the Nomination of Lloyd Austin to be Defense Secretary," *CQ Transcriptions*, at 27 (Jan. 19, 2021).

President Biden is expected to turn these experiences from key officials into increased regulation on multiple fronts.

First, President Biden appears to be committed to "designating PFAS as a hazardous substance."[25] That designation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) would broaden federal authority to act, including to ensure that releases are investigated and abated, that affected sites are remediated, and that response costs are reimbursed by potentially responsible parties (PRPs).[26] If the Biden Administration follows through with its pledge to designate PFAS as a hazardous substance under CERCLA, that would grant EPA broad authority to direct a host of potentially responsible parties to investigate and remediate sites where PFAS have been found.[27] EPA may take the position that it could recover CERCLA response costs from any party that may have released PFAS, as well as current and former owners and operators of affected sites – and be jointly and severally liable. Airports, hospitals, farms, sewage treatment utilities, recycling facilities, landfill operators, and even performance clothing manufacturers – that is, owners and operators of sites where PFAS-containing materials were used, discharged, or disposed – could fall within CERCLA's reach, and with it face an increased risk of private litigation.

Second, President Biden also appears to be committed to "setting enforceable limits on PFAS," which would be different from the EPA drinking water guidelines that currently exist.[28] In February, the EPA re-issued final regulatory determinations for PFOA and PFOS under the Safe Drinking Water Act, which will trigger promulgation of a national drinking water standard, as well as guidelines for water treatment techniques.[29] Under its new leadership, the EPA can be expected to press ahead with and possibly speed up that effort.

Third, President Biden appears to be committed to "accelerating toxicity studies and research on PFAS."[30] The CDC and ATSDR have been investigating potential associations between PFAS and health outcomes, and that work is thus expected to continue.[31]

More broadly, the new administration's policy goals and focus are expected to differ markedly from those of the Trump Administration, including with respect to PFAS policy. For example, the EPA has already withdrawn a toxicity assessment of perfluorobutanesulfonic acid (PFBS), which had been issued at the beginning of the year.[32] And President Biden can be expected to reverse course on other initiatives as well. Among other efforts, this may include re-examining the Trump EPA's decision to reject a petition requiring testing for 54 emerging PFAS manufactured at a

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[25] "The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity," *Biden for President*, https://joebiden.com/environmental-justice-plan/ (last accessed Feb. 18, 2021.)

[26] *See* 42 U.S.C. §§ 9604, 9606, 9607.

[27] *See* 42 U.S.C. § 9607.

[28] *See* "The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity," supra.

[29] *See* EPA, "Contaminant Candidate List (CCL) and Regulatory Determination, https://www.epa.gov/ccl/regulatory-determination-4 (last accessed Mar. 3, 2021); EPA, "EPA Takes Action to Address PFAS in Drinking Water" (Feb. 22, 2021), https://www.epa.gov/ccl/regulatory-determination-4.

[30] "The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity," *supra*.

[31] *See* ATSDR, "Toxicological Profile for Perfluoroalkyls, Draft for Public Comment (June 2018), https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf; Press Release, "CDC and ATSDR Award $7 Million to Begin Multi-Site PFAS Study" (Sept. 23, 2019), https://www.cdc.gov/media/releases/2019/p0923-cdc-atsdr-award-pfas-study.html.

[32] EPA, "EPA Takes Action to Protect Scientific Integrity" (Feb. 9, 2021), https://www.epa.gov/newsreleases/epa-takes-action-protect-scientific-integrity.

plant in North Carolina, as requested by environmental advocates.[33] President Biden may also seek to expand certain regulations that have already been set in motion, such as expanding the conditions on importing and manufacturing products with surface coatings that contain certain PFAS.[34]

Efforts by the Biden Administration may also be augmented by congressional action. Earlier this month, Senator Kirsten Gillibrand introduced legislation that would reportedly create a medical monitoring database for individuals allegedly exposed to PFAS from their drinking water supply.[35] This proposed PFAS Accountability Act reportedly would provide legal pathways for courts to award medical monitoring for "significant" exposure of chemicals in drinking water supplies. Individuals eligible to join the registry include those with pending litigation related to PFAS exposure, communities near military bases and airports, firefighters, workers who handle the chemicals, and others.[36]

In addition to the direct litigation risks posed by CERCLA liability, these regulatory efforts are likely to have implications for private litigation. For example, plaintiffs may utilize the potential designation of certain PFAS as "hazardous" substances to attempt to bolster allegations that their injuries were caused by PFAS exposure and that their remedies are therefore appropriate and necessary, despite the fact that regulatory designations are not based on scientific findings of causation and, instead, apply a lower, precautionary standard. Further, any new federal limits and standards for the presence of PFAS in drinking water may serve as a benchmark against which plaintiffs will charge that defendants should be measured. Moreover, guidelines for water treatment techniques promulgated by federal agencies may be seen as an industry standard, and plaintiffs may seek to rely on evidence that a company's water treatment fell below this standard or argue that any remedial action should meet or exceed that standard. Moreover, as federal action spurs public awareness and pressure, states and local governments may seek to restrict or prohibit those operations that involve the use or potential emission of any PFAS compound.

Conclusion

These developments reveal four likely litigation trends that will endure or accelerate in this new era.

First, PFAS manufacturers are likely to continue to be sued. Litigation against PFAS manufacturers is unlikely to halt in the near future, given the recent settlements and as reflected by the continued filing of claims.

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[33] TSCA Section 21 Petition for Rulemaking; Reasons for Agency Response; Denial of Requested Rulemaking, 86 Fed. Reg. 6602-01 (Jan. 22, 2021), https://www.federalregister.gov/documents/2021/01/22/2021-00456/tsca-section-21-petition-for-rulemaking-reasons-for-agency-response-denial-of-requested-rulemaking; Ctr. for Environ. Health, *NC Advocates Ask Biden EPA to Reverse Trump's Denial of PFAS Petition* (Mar. 4, 2021), https://ceh.org/latest/press-releases/nc-advocates-ask-biden-epa-to-reverse-trumps-denial-of-pfas-petition/.

[34] *See* EPA, Significant New Use Rule: Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances (July 27, 2020), https://www.regulations.gov/document/EPA-HQ-OPPT-2013-0225-0232; Rebecca Beitsch, "White House intervened to weaken EPA guidance on 'forever chemicals'" (Jan. 11, 2021), https://thehill.com/policy/energy-environment/533444-white-house-intervened-to-weaken-epa-guidance-on-forever-chemicals?rl=1.

[35] Press Release, Kirsten Gillibrand: U.S. Senator for New York, Following Years Of Advocacy, Gillibrand Joins Community In Hoosick Falls To Announce New Legislation To Create Access To Medical Monitoring For Victims Of Significant PFAS Exposure (Apr. 5, 2021), https://www.gillibrand.senate.gov/news/press/release/following-years-of-advocacy-gillibrand-joins-community-in-hoosick-falls-to-announce-new-legislation-to-create-access-to-medical-monitoring-for-victims-of-significant-pfas-exposure .

[36] *Id.*

Second, plaintiffs will pursue new companies and products in new industries using existing and adapted legal theories. The plaintiffs' bar will likely apply the litigation theories that have already been used against fluoropolymer manufacturers and processors to reach new categories of defendants.

Third, federal regulatory initiatives envisioned by the Biden Administration may generate additional legal liability for current and former owners and operators of facilities where PFAS have been handled. The increased regulatory activity by the Biden Administration may signal more robust actions under environmental laws and regulations. And those companies identified by EPA may also commence recovery and contribution actions and other private litigation against third parties they allege should help share in the remediation costs.[37]

Fourth, the renewed focus of the Biden Administration on PFAS will likely impact private litigation in additional ways, even if indirectly. As a general matter, private plaintiffs, as well as local and state governments, may rely on and leverage the attention to PFAS at the federal level to add momentum and justification to their claims. And any congressional action to establish a medical monitoring framework might affect the application of state law and impact legal options and strategies.

In sum, with the Biden Administration's greater attention to PFAS, the litigation trends that have developed over the past decade are expected to persist and likely spur new ones. With this focus, companies at all levels of the supply chain and in industries that use, rely on, or otherwise come into contact with PFAS-containing materials would be well advised to consider strategies to evaluate, address, and mitigate these legal challenges.

This update was authored by:

Sheila L. Birnbaum
Partner
New York
+1 212 698 3625
sheila.birnbaum@dechert.com

Mark S. Cheffo
Partner
New York
+1 212 698 3814
mark.cheffodechert.com

Douglas E. Fleming III
Partner
New York
+1 212 649 8703
douglas.fleming@dechert.com

Rachel Passaretti-Wu
Partner
New York
+1 212 698 3647
rachel.passaretti-wu@dechert.com

[37] 42 U.S.C. § 9607.

Marina Schwarz
Associate
New York
+1 212 698 3569
marina.schwarz@dechert.com

Nathan Williams
Associate
New York
+1 212 698 3603
nathan.williams@dechert.com

Michael A. Fazio
Associate
Philadelphia
+1 215 994 2704
michael.fazio@dechert.com