



PFOA LITIGATION: MORE TO COME?

A Scientific Advisory Board (“SAB”) to EPA recently voted to recommend that PFOA¹ be considered a “likely” carcinogen to humans.² EPA is now revisiting PFOA-related science. Environmental activists and at least one major labor union are condemning PFOA and calling for PFOA warnings to be placed on consumer products.

Where environmental activists and regulators tread, plaintiffs’ lawyers are never far behind. Although lawsuits involving PFOA have been somewhat limited to date, and have focused on PFOA manufacturers, recent high-profile developments and activity by plaintiffs’ attorneys suggest that PFOA litigation may spread to downstream manufacturers and sellers of products made with PFOA.

PFOA-RELATED PRODUCTS ARE EVERYWHERE

PFOA is a polymeric chemical used as a processing aid in making innumerable consumer products, the most common of which is Teflon®. Once heralded as a breakthrough of modern science, PFOA and similar chemicals are now under attack, based on claims of carcinogenicity, bioaccumulation, and fetal transmission.

Products containing trace amounts of residual PFOA or similar perfluorochemicals are ubiquitous. PFOA is used in making a large variety of consumer and commercial products, including cookware, stain-resistant textiles, grease-resistant food wrappings, water-

1. Perfluorooctanoic acid.

2. “SAB Review of EPA’s Draft Risk Assessment of Potential Human Health Effects Associated with PFOA and Its Salts,” January 20, 2006, at pp. 3-4, available at www.epa.gov. EPA and other agencies, such as OSHA, regulate chemicals based on risk-assessment approaches, rather than “cause-effect” determinations, both at the population level and at the individual level. It is critically important, for successful litigation defense, to distinguish these approaches.

repellent garments, microwave popcorn bags, and many other nonstick or water- or stain-resistant products. There are probably few, if any, Americans who have not used products made with or containing PFOA or similar perfluorochemicals.

EPA'S POSITION ON PFOA

For years, EPA took the position that there was insufficient scientific evidence to recommend that consumers stop using products made with PFOA.³ As new claims have emerged, however, EPA has reconsidered its position. In early March 2006, EPA announced that, based on recent information, it "can no longer conclude that these polymers will not present an unreasonable risk to human health or the environment."⁴ At the same time, EPA proposed to mandate testing of new products that use or contain PFOA or similar chemicals.⁵ One advocacy group has already made the claim that EPA's proposal to mandate testing of new products "indicates that products are reaching consumers without adequate study of potential health hazards."⁶ Plaintiffs' lawyers and experts may use EPA's proposed new testing requirements to argue that previous testing was inadequate.

What is the new information that allegedly has caused EPA to shift its position? First, in the late 1990s, a chemical called PFOS⁷ was reported to be present at low levels in the blood of the general population, and concerns were raised of biopersistence and bioaccumulation in the body and the environment. Some now claim PFOA has the same charac-

teristics. Second, in a recent study on umbilical-cord blood samples collected over a five-month period in 2004, Johns Hopkins Hospital researchers reportedly found that 298 out of 300 samples tested positive for trace levels of PFOA. The Johns Hopkins researchers are said to be investigating whether PFOA in infants' blood damages their thyroid glands or affects hormone levels.⁸ Third, on February 15, 2006, the SAB voted to recommend that EPA consider PFOA to be a "likely" carcinogen to humans.⁹

EPA has also taken administrative and regulatory action against DuPont. In December 2005, DuPont agreed to pay \$16.5 million in civil penalties (and costs for testing and environmental projects) for alleged violations of reporting provisions of the Toxic Substances Control Act and the Resource Conservation and Recovery Act. The settlement resolved allegations that DuPont failed to report PFOA drinking-water contamination and other information about PFOA since 1981.

TOXIC TORT CLASS ACTION LITIGATION

Consumer Class Actions. Potential problems for PFOA do not end with EPA. Since July 2005, some 14 class action lawsuits have been filed in 13 different states, encompassing as many as 10 million class members.¹⁰ These cases involve cookware made with Teflon®. Among the claims alleged are violations of state consumer protection statutes, fraud (alleging that DuPont misrepresented that Teflon® was safe), and fraudulent concealment (alleging that DuPont deceived

3. OPPT Fact Sheet, "PFOA Q's & A's" and "Basic Information on PFOA," available at www.epa.gov.

4. Amendment of Polymer Exemption Rule to Exclude Certain Perfluorinated Polymers, 71 Fed. Reg. 11484 (Mar. 7, 2006) (to be codified at 40 C.F.R. § 723).

5. These developments follow preliminary research findings by EPA that PFOA is present at very low levels in blood samples of the general population and in the environment. Furthermore, EPA has stated that animal studies on PFOA indicate potential systemic toxicity, carcinogenicity, reproductive toxicity, and immunotoxicity.

6. Jeff Montgomery, "EPA Admits C8 May Be Unsafe for Humans," *Wilmington News Journal*, March 9, 2006 (citing Environmental Working Group scientist), available at www.ewg.org/news/story.php?id=5146.

7. Perfluorooctyl sulfonate.

8. "Suspected Carcinogen Found in Cord Blood," Assoc. Press Online, Feb. 6, 2006, available at LEXIS, News Library, Assoc. Press File.

9. *Supra* at n.1. Of course, EPA may either accept or reject the SAB's recommendation. DuPont and 3M submitted comments in response to the SAB draft report, stating that the weight of evidence in the published, peer-reviewed literature indicates that PFOA probably is not a cancer risk to humans.

10. These cases have been consolidated in an MDL proceeding in the Southern District of Iowa. See *In re Teflon Products Liability Litigation*, S.D. Iowa, MDL No. 1733, 2/21/06.

consumers by failing to disclose the risk of injury from PFOA). Plaintiffs seek medical monitoring funds, funds for independent scientific studies, PFOA warning labels for Teflon® products, money damages, disgorgement of profits, and an injunction requiring DuPont to cease further production, sale, and distribution of PFOA-containing products.

In addition, a growing number of plaintiffs' lawyers' web sites offer potential plaintiffs, whether consumers or others, such as employees, the opportunity to "register" claims for PFOA exposure or to have their PFOA claims evaluated. This web-based opportunity to connect lawyers with large numbers of potential plaintiffs may result in PFOA-related claims being asserted in significant numbers against downstream product manufacturers, retailers, and wholesalers, in addition to PFOA manufacturers. Significantly, the United Steelworkers recently sent more than 40,000 letters and circulars to clothing, cookware, microwave popcorn, food, cosmetic, outerwear, and carpet manufacturers and retailers, urging them to provide warnings to customers of potential PFOA-related dangers.¹¹

Environmental Contamination Litigation. In 2005, DuPont settled a lawsuit brought by West Virginia and Ohio residents over the alleged release of PFOA into the water supply at the Washington Works plant in West Virginia. Reportedly, approximately 70,000 residents of the mid-Ohio Valley covered by the settlement have signed up for blood screenings pursuant to the settlement. It also was reported recently that low levels of PFOA are present in a well supplying public tap water in Pennsville Township, New Jersey, near DuPont's Chambers Works site.

California Proposition 65 Petition. In February 2006, the United Steelworkers and a coalition of activist groups petitioned California's Office of Environmental Health Hazard Assessment to list PFOA as a cancer-causing substance under Proposition 65. If that effort is successful, Proposition 65 could form the basis for additional PFOA lawsuits.

WHERE IS THIS HEADED?

It seems increasingly likely that the plaintiffs' bar is considering PFOA and other perfluorochemicals as potential targets for further litigation. But what will be their approach?

Following tactics honed in other litigation, they will attempt to lay blame on companies manufacturing or using PFOA. They will try to leverage EPA's statements about PFOA risks into proof of individual causation and fault companies for not testing for what were then unknown and likely unknowable issues of toxicity. They will attack chemical and toxicological assessment programs and any perceived failures regarding the possibility of biopersistence and bioaccumulation. They will telescope newly discovered scientific evidence into decades long past. They will cull mountains of documents and e-mails to cherry-pick those excerpts that can be taken out of context and woven into whole cloth. They will focus on the state of warnings given, the absence of warnings, and any concern that warnings might erode sales. Undoubtedly, the plaintiffs' bar also will seek to capitalize on the possibility of transfer of PFOA-type chemicals across placental membranes to the fetus, as this raises a host of potential issues. Indeed, few litigation topics are more sensitive than harm to the unborn, infants, and children.

EMERGING TRENDS

With respect to litigation risk, it is important to recognize a couple of emerging trends. First, plaintiffs' counsel are bringing, and some courts are allowing, litigation on behalf of those with no physical injury. Indeed, some cases are brought as putative class actions seeking medical monitoring. Second, and more recently, some plaintiffs' lawyers are asserting claims for economic loss, rather than for personal injuries, claiming that consumers are entitled to recover the difference in value between what they thought they were buying (*e.g.*, safe Teflon®) and what they actually received (*e.g.*,

11. See www.steelworkers-usw.org/usw/program/content/2810.php.

allegedly unsafe Teflon®). These cases have been brought against pharmaceutical companies, computer manufacturers, makers of MP3 players, insurance companies (in the non-OEM parts litigation), and now against DuPont related to Teflon® cookware.

It is conceivable that such lawsuits could be brought against downstream manufacturers and retailers. Typically, these types of claims are brought as class actions under state consumer protection statutes, in part because plaintiffs' lawyers seek to avoid individual reliance issues en route to class certification. Some states (*e.g.*, Massachusetts and Missouri) appear to present significant risks, while others (*e.g.*, California, Illinois, and New Jersey) have rejected efforts to end-run traditional elements of pleading, proof, and class certification.

JONES DAY'S DEFENSE EXPERIENCE IN ENVIRONMENTAL AND TOXIC TORT LITIGATION

Jones Day has been privileged to defend many clients in a wide variety of product liability and toxic tort litigation. We have been on the cutting edge of many modern legal developments in multijurisdictional litigation, industrywide litigation attacks, and other lawsuits that pose a significant threat to our clients. We are grateful for those opportunities, which in January 2004 resulted in Jones Day's selection by *The American Lawyer* as Product Liability Department of the Year. In January 2006, Jones Day was selected as one of two finalists in that same competition.

Jones Day has extensive experience in guiding companies through the legislative and regulatory processes, dealing with NIOSH and other governmental organizations and agencies, risk assessment, the toxicology of numerous chemical compounds, and exposure assessment (including modeling).

Jones Day's toxic tort experience encompasses a wide range of substances and products, including vinyl chloride monomer, methanol, dioxins, beryllium, glycol ethers, PCBs, TCE, PCE, DBCP, Agent Orange, dyes, pesticides, carbon monoxide, nickel oxide, diesel exhaust, benzene, mercury, lead, cadmium, arsenic, silica, diatomaceous earth, lead-based paint and pigments, industrial solvents, phthalates, stain-resistant finishes, wood preservatives (chromated copper arsenate), and coal tar products.

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