

# Litigation Minute: Defending Consumer Class Action Claims Involving PFAS

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## WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Defending consumer class action claims alleging false and misleading product labeling based on the presence of per- and polyfluoroalkyl substances (PFAS) is similar to the defense of other food and beverage labeling class actions, but there are nuances the food and beverage industry should consider.

### What Are PFAS?

As noted in last week's edition, PFAS are per- and polyfluoroalkyl substances used for their flame-retardant and water-resistant properties. They are used in clothing, cosmetics, and food packaging. PFAS can also be found in municipal water supplies.

### How Do PFAS Relate to Consumer Class Actions?

Plaintiffs' counsel have brought consumer class actions against the makers and sellers of food and beverages alleging that the presence of PFAS in the labeled product renders the labeling false and misleading. Consumer class actions involving PFAS typically allege that the presence of PFAS renders affirmative representations on the product labeling false or misleading, or that the presence of PFAS must be disclosed on the label.

For example, both of these theories are at play in the case of *Davenport v. L'Oreal USA, Inc.* The complaint asserts that (1) the representations that L'Oreal's waterproof mascaras are safe, effective, high quality, and appropriate for use on consumers' eyelashes are false or misleading due to the presence of PFAS; and (2) L'Oreal failed to disclose to consumers that PFAS are present in detectable amounts in its waterproof mascaras.<sup>1</sup>

### How is the Defense of PFAS Consumer Class Actions *Similar* to the Defense of Other Consumer Class Actions?

In most instances, the defense of consumer class actions involving PFAS allegations does not differ substantially from the defense of other types of consumer class actions. In the case of an alleged

affirmative misrepresentation, the inquiry is the same on a pleadings challenge – whether the labeling is likely to mislead a reasonable person given the presence of PFAS in the product.

Moreover, plaintiffs typically assert a “premium price” theory, meaning the plaintiff claims he or she would not have purchased the item, or would have paid less, had the PFAS been properly disclosed. These allegations provide the defense with an opportunity to attack the damages model on class certification, similar to other types of consumer class actions.

## **How is the Defense of PFAS Consumer Class Actions *Different* From the Defense of Other Consumer Class Actions?**

The defense of consumer class actions involving PFAS will differ from other consumer class actions in two key ways, depending on the allegations.

First, given the current lack of regulations governing the presence of PFAS in food and beverage products, the food and beverage industry should be aware that there is generally no duty to disclose the presence of PFAS in the absence of a relevant false or misleading statement on the product labeling. This lack of regulations provides an additional avenue for a pleadings challenge that may not otherwise succeed.

Second, scientific testing will be critical to determining whether there are any, or a uniform quantity of, PFAS present across the entire product line. PFAS variations between product exemplars may provide an additional avenue to defeat class certification.

## **Takeaway**

Unfortunately, it appears that the food and beverage industry will see a new wave of class action litigation focused on the presence of PFAS in products. However, it also appears that many tried and true defense strategies will be applicable to such claims, and the unique nature of PFAS litigation will provide class defendants with additional strategies.

## **FOOTNOTES**

<sup>1</sup>*Davenport v. L’Oreal USA, Inc.*, No. 2:22-cv-01195 (C.D. Cal.).