Published on *The National Law Review* https://natlawreview.com

Amid Rise in Forever Chemicals Cases, Courts Dismiss PFAS Claims Which Rely on Inadequate Product Testing

Article By:

Baldassare Vinti

Jessica M. Griffith

Nicole Sockett

Michael R. Beckwith

As chemicals of concern litigation continues to surge across the nation, companies increasingly find their products under scrutiny for alleged contamination of these "forever chemicals." These "forever chemicals" have become a focal point for environmental and consumer protection lawsuits, as plaintiffs' attorneys increasingly target companies to leverage the frequent media attention surrounding per- and polyfluoroalkyl substances ("PFAS") chemicals. However, a closer examination of these allegations often reveals that they hinge on speculative claims or flawed testing methodologies. Indeed, plaintiffs frequently rely on inconclusive or misinterpreted data, leading to cases built more on sensationalism than on solid scientific evidence. Courts have dismissed such cases in recent months on grounds that such claims are inadequately supported.

For example, in *Brown v. Coty*, Judge Analisa Torres of the Southern District of New York dismissed a proposed class action alleging Coty, Inc. failed to disclose the presence of PFAS in two of their CoverGirl waterproof mascara products, Lash Blast and Clump Crusher. *Brown v. Coty, Inc.*, No. 22-cv-2696 (S.D.N.Y. Mar. 1, 2024). The plaintiffs argued Coty misled consumers by failing to disclose the alleged presence of PFAS in light of Coty's self-professed use of "strict quality control measures" and "rigorous testing."

The plaintiffs relied on two studies to support their allegations. The "Notre Dame Study," published by two Notre Dame scientists in 2021, found that certain beauty products from a variety of brands contain high proportions of fluorine, to which the plaintiffs pointed as a "scientifically valid, widely used method to investigate whether PFAS are present" in cosmetics. The plaintiffs also commissioned their own study, which found that Lash Blast and Clump Crusher each contained up to five different types of PFAS.

The Court found the cited studies did not support plaintiffs' claims that the challenged products contained PFAS. As to the Notre Dame study, the Court found the plaintiffs did not allege the total

number of mascara products tested, whether the presence of fluorine in those products necessarily indicated the presence of PFAS, or whether Lash Blast or Clump Crusher were even among the products tested. The Court similarly found the plaintiffs' study did not establish that the PFAS found in the tested tubes of Lash Blast and Clump Crusher—which were *not* those purchased by the plaintiffs—supported an inference that PFAS contamination was so "systemic" in the products that the tubes purchased by the plaintiffs must also have contained PFAS.

In *Onaka v. Shiseido Americas Corporation*, Judge Loretta Preska of the Southern District of New York likewise dismissed a putative class action alleging Shiseido deceptively labeled its bareMinerals beauty products as "clean" and "natural" when the products allegedly contained PFAS. *Onaka v. Shiseido Americas Corporation*, No. 1:21?cv?10665?PAC (S.D.N.Y. Mar. 19, 2024). In dismissing the suit, the Court found plaintiffs lacked standing because they failed to plausibly allege that any of the products they purchased did, in fact, contain PFAS.

To support their allegations, plaintiffs tested two samples of five products within the same product line as the items they bought (rather than testing their own items) for the presence of PFAS. The Court found plaintiffs failed to "meaningfully link the results of their independent test to Plaintiffs' actual Purchased Products" because plaintiffs did not allege they tested the products near in time to their purchases of those products. The plaintiffs alleged the testing was conducted in September and October 2021, but did not allege that they purchased any of the tested products reasonably near that time period.

Moreover, the Court found it could not extrapolate plaintiffs' isolated testing broadly to Shiseido's products. Plaintiffs' reliance on the same Notre Dame study as the *Brown* plaintiffs was insufficient because it did not specify which line of products were tested, and only tested products purchased well before any of plaintiffs' alleged purchases. The Court noted that other courts considering the same study in relation to similar claims found it to be unhelpful for standing purposes—for reasons including that the plaintiffs in those cases failed to allege whether the Notre Dame study detected the same type of PFAS as detected in plaintiffs' own testing, as well as how many of the products tested in the Notre Dame study were found to have high fluorine levels.

Most recently, Judge Margo Brodie of the Eastern District of New York dismissed claims that Keurig Dr. Pepper's Nantucket Nectars and Snapple product lines were misbranded as "all natural" because they allegedly contained PFAS. *Walker v. Keurig Dr. Pepper, Inc.*, No. 22-cv-5557 (E.D.N.Y. July 16, 2024). Citing to *Brown* and *Onaka* (among other decisions), the Court found the plaintiff failed to allege he suffered an injury in fact because his allegations detailing his independent testing of the products was too vague to conclude he purchased and consumed products containing PFAS. Among other things, the plaintiff did not allege that he tested the actual products he purchased, nor did he claim the testing was performed reasonably close in time to his own actual purchase of the tested products.

The Court also rejected the plaintiff's assertion that the products were "systematically contaminated." Though the plaintiff claimed his independent testing revealed "the Products all contain PFAS in amounts that dramatically exceed" the EPA recommended limit for PFAS in drinking water, the plaintiff's allegations did not confirm "how many of each type of Product was tested, when they were tested, or which Products are within the bucket of the 'some Products'" the plaintiff claimed contained PFAS in excess of the EPA's recommended limit for drinking water. The plaintiff also failed to specify which types or flavors of the products he had purchased. The Court found that without more information regarding the testing performed or the actual products the plaintiff purchased, it could not conclude it was plausible the plaintiff had purchased a contaminated product.

These decisions demonstrate that courts will reject allegations of deception that rely on inadequate testing and speculative inferences regarding alleged product contamination. Companies faced with such lawsuits should demand that plaintiffs perform a reasonable pre-suit investigation and meet their pleading burden by providing specific facts which support a plausible inference that the products at issue contain the alleged chemical of concern. It is crucial to hire defense counsel with strong scientific backgrounds capable of scrutinizing and contesting the methodologies, data interpretation, and statistical analyses presented by plaintiffs. This approach ensures that only well-substantiated claims proceed, protecting companies from speculative litigation. At Proskauer, we routinely advise clients on PFAS-related matters, ensuring they are well-prepared to challenge and defend against such claims with the necessary scientific and legal expertise.

National Law Review, Volume XIV, Number 215