

More Ga. PFAS Suits Are Coming. Here's How Attys Prepare

By **Kelcey Caulder**

Law360 (October 11, 2024, 2:39 PM EDT) -- Leading attorneys in PFAS litigation say new regulations and ever-increasing lawsuits require attorneys to think carefully about proactive measures clients can take to limit PFAS use, and about the latest scientific research into how the so-called forever chemicals impact humans and the environment.

Litigation over alleged contamination from per- and polyfluoroalkyl substances has increased rapidly in recent years, including in Georgia. **Hundreds of north Georgia residents gathered** in September to hear from paralegal-turned-environmental advocate Erin Brockovich about claims of local water and environmental contamination allegedly caused by chemical giant 3M Co.

Taft Stettinius & Hollister LLP partner Robert Bilott represented more than 60,000 West Virginia and Ohio residents whose drinking water was allegedly contaminated by forever chemicals DuPont dumped into their water supply. His work was chronicled in a New York Times profile and a 2019 film, "Dark Waters," starring Mark Ruffalo.

Bilott said the rapidly increasing rate of PFAS litigation requires attorneys to pay close attention to both the scientific and legal history of the chemicals.

Per- and polyfluoroalkyl substances, or PFAS, are a family of chemicals that have thousands of uses, including making nonstick cookware, stain-resistant furniture and water-resistant consumer products. The compounds are frequently referred to as "forever chemicals" because of how persistently they remain in the human body and environment.

New studies are being conducted every day that analyze PFAS' impact on things like the immune system and vaccine response, Bilott said, and it is vital that attorneys involved in PFAS litigation monitor that emerging science closely if they hope to be successful.

Legal practitioners looking for a good place to start researching the science behind the compounds could first look to the work of the **C8 Science Panel**, Bilott said. That three-member panel, created under a settlement agreement between West Virginia communities and DuPont, linked exposure to PFOA — one kind of forever chemical — to many health risks, including high cholesterol, ulcerative colitis, thyroid disease, testicular cancer, kidney cancer and pregnancy-induced hypertension.

"It's critically important to understand exactly what has or hasn't been developed, and to work with experts who actually understand the science," Bilott said.

Other attorneys echoed Bilott's sentiment, saying that having that knowledge is vital at every stage of litigation and, in some cases, for preventing litigation.

Proactive Measures

Even before litigation begins, it is vital for attorneys to stay on top of emerging research, science and regulation as it relates to PFAS, said two defendant-side attorneys, Adam Sowatzka of McGuire Woods LLP and Lindsay Brown of Duane Morris LLP.

Though PFAS are often thought of in public discourse as a group, Brown explained that thousands of chemicals are in the PFAS family, with different properties and different toxicological impacts. Rather than "lumping all of them together," Brown said, it is vital that attorneys have an understanding of the science as it applies to each chemical and that they be prepared to discuss those nuances with clients.

Those discussions should be happening whether a lawsuit exists or not, Brown said, particularly with company clients. Attorneys should talk with them about assessing existing risk and mitigating any future risk, she said, so that clients are well informed and taking steps to address any PFAS-related issues that may arise.

"Ask whether it makes sense to do their own product testing or whether it makes sense to revise a label or warning, and ask whether they have identified all the potential sources of PFAS into their product," Brown said. "There are ways PFAS could be unintentionally added, for example, through process water or packaging. To the extent that you identify something like that, explore ways to reduce the reliance on PFAS-containing materials, if that's an option."

Sowatzka agreed, saying that attorneys should be proactively assisting clients in coming up with strategies for identifying whether their products contain PFAS or whether PFAS are being unintentionally introduced into their products at any point in the manufacturing process.

Discovering where and whether PFAS may be unintentionally making their way into products can be difficult, both attorneys agreed, but Sowatzka said that is where testing becomes important.

"You can break down the parts of the process for manufacturing and work closely with a technical expert to find an efficient way to test in phases or iterations to find out where unintentional PFAS might be introduced," Sowatzka said.

Evidence Gathering and Testing

The initiation of any lawsuit hinges on the systematic collection of evidence, and that is particularly true in PFAS cases, attorney Ben Finley told Law360. Finley is a part of the legal team PFAS Georgia, which does community outreach and offers legal services to people who may have been exposed to PFAS.

He said that the pre-suit investigation phase is extremely important in setting the trajectory of a lawsuit. A plaintiff's legal team will need to gather evidence pointing toward exposure and subsequent harm, and analyze potential legal theories during this phase, he said. This means they must have an understanding of not only the science related to PFAS, but also the environmental factors at play in the community where their client resides.

In personal injury cases, for example, Finley said it is vital to understand how people may be exposed to PFAS, where and how those PFAS entered the environment, and what links the specific chemicals at hand may have to a plaintiff's illness.

Matthew F. Pawa of Seeger Weiss LLP agreed, saying it is important for attorneys to understand the science that links certain illnesses to PFAS if they are representing a personal injury client. The C8 Science Panel has identified some of those links already, Pawa said, which helps establish general causation, but showing specific causation for an individual client is more difficult.

"You need medical doctors ready to say they believe the causation was exposure to PFAS," Pawa said. "You want to look at the particular level of PFAS exposure, and you'll need a toxicologist to talk about the level of exposure in a particular household based on the PFAS level in the water, for example. With any disease, you need to get your medical evidence in order and get those opinions early so that you can pursue your case."

Bilott, Finley and Pawa all agreed that the pre-suit investigation and evidence-gathering phase is also particularly important when it comes to selecting the right defendant to name in a case.

In some cases, Pawa said, it may be that a company in a community purchased PFAS from a chemical manufacturer like 3M Co. or DuPont, and then it becomes a question of which entity a plaintiff wants to try to hold responsible for alleged injuries.

Finding the answer to that question can involve looking at the knowledge the companies involved may have had about PFAS at the time the alleged harm occurred, he said.

"If you're suing the company who put PFAS in their product, is it because they knew about the toxic properties of the chemicals and that they would be absorbed into the human body, stay there and not break down?" Pawa said.

Bilott echoed Pawa's sentiment, saying that the defendant-selection process is where understanding the history of PFAS litigation can be key.

"It's critical that you're dealing with folks who really understand the history of not only what's been known about the health effects of these chemicals, but who knew it, and at what points in time, so that you are targeting the right folks to be held responsible," Bilott said.

Experts

Selecting the right experts to present information to a jury or court is another key component of litigating a PFAS case, legal experts agreed. These experts must not only have a deep understanding of the science behind PFAS, the attorneys said, but they must also be able to translate and explain those things to a jury and court effectively.

Both Brown and Sowatzka said it is important to find an expert who can speak not only about PFAS as a family of chemicals but also about each individual chemical in that family, in a way that makes sense to jurors. The expert needs to be able to speak well about the "speciation of PFAS," Sowatzka said, explaining that as "which PFAS are more or less toxic than others."

Brown agreed, noting again that much of the public discussion surrounding PFAS does not go into depth about which chemicals may be linked to which problems and instead refers to the entire family as a "general group."

"Especially if you have a jury case, educating them on that piece is important," Brown said. "You want to make sure they have an understanding that PFAS is a class of thousands of chemicals, and that you are retraining and reteaching them from whatever the public discourse might be, so that they are focused only on the specific chemicals that are at issue in the case you're working on."

Sowatzka noted that even before a case reaches a judge or jury, having the right experts on hand is critically important.

In some cases, he said plaintiffs have conducted PFAS testing without consulting the right expert, only to find that there was some kind of cross-contamination or that the wrong methods were used to conduct the analysis. That, he said, has led some suits to be filed based on "results that aren't grounded in good science."

"So, having the right expert who can help you get testing done using an accredited lab that uses approved methods is important, and then having an expert who can explain those results to a jury is a challenge we have as PFAS practitioners," Sowatzka said.

Finley and Pawa echoed the importance of choosing an expert, saying attorneys should look for experts who have great credentials and the ability to explain complex ideas in plain terms.

While personal injury claims are often discussed first in conversations about PFAS, Finley said litigation surrounding the chemicals can include cases brought by property owners who have seen the value of their land diminish because of the presence of PFAS, cases brought by organic farmers who have lost their organic farmer designation because they unknowingly spread PFAS-containing biosolids on their land, or even cases brought by municipalities alleging public drinking water has been contaminated.

Because the cases can vary so wildly, Finley said the same must be true of the experts brought in to work on the cases. They need to have knowledge specific to what is being tested, how that testing must be conducted, and the history of PFAS contamination in whatever is being tested, he said, be that drinking water or biosolids.

"Every case is different," Finley said. "Lawyers have to look at the evidence and choose their experts carefully. Part of that means, on the front end, doing a lot of work and investigation."

Regulatory Issues

Whether attorneys are actively involved in litigation or not, legal experts said they should be keeping a close eye on the ever-increasing regulation surrounding PFAS.

In January, the Environmental Protection Agency finalized a rule preventing companies from starting or resuming the manufacture or processing of 329 PFAS. Then, in April, the federal government said for the first time that several types of PFAS must be **removed from the drinking water** of hundreds of millions of Americans. That same month, the EPA announced it was **designating two types of PFAS** — perfluorooctanoic acid and perfluorooctanesulfonic acid — as hazardous substances under CERCLA, the Superfund law.

Regulation continues to pour in day after day, Brown said, and attorneys not only must be paying attention to those new rules, but trying to predict "what's on the horizon" as well.

"I think it's really important to think beyond what the impact of the law that was just enacted is, and to think about the impact of the laws that may be coming a few years down the line," Brown said.

Sowatzka agreed, saying new regulation seems to be appearing "every week."

"We have to keep one eye on all of that because you could be going down a particular path to defend a client and then a new regulation comes out that impacts your case," Sowatzka said. "You really have to keep looking

ahead at what's coming next."

--Additional reporting by Juan-Carlos Rodriguez and Emily Field. Editing by Robert Rudinger.