

PFAS in Food Packaging: Product Liability Concerns for Industry Manufacturers and Sellers

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PER- and poly-fluoroalkyl substances ("PFAS") are a group of manufactured synthetic chemicals which have been widely used in industry and consumer products since the 1940s to enhance consumer products' water, stain, and grease resistance.¹ PFAS are created by combining carbon and fluorine, which results in a powerful bond that is difficult to break down in the body or to

decompose in the environment. This characteristic has earned them the moniker "forever chemicals." It is also the reason why PFAS can be found in the blood of nearly all humans and many animals across the globe. Some reports suggest that those at risk of exposure may include individuals who consume food packaged in materials containing PFAS and workers involved in manufacturing or

¹ See Christopher Lau, "Perfluorinated Compounds: An Overview," in JAMIE DEWITT, ED. TOXICOLOGICAL EFFECTS OF PERFLUOROALKYL

AND POLYFLUOROALKYL SUBSTANCES, 1-2 (Springer, 2015): 1-21.

processing PFAS-containing materials. Evidence indicates that PFAS can taint food products throughout their handling and packaging processes.² When food preparation equipment contains materials that contain PFAS, these substances can migrate into the food. In recent years, evidence has shown that exposure, at certain levels, may have the potential to adversely impact human health.

When researchers discover that a product as pervasive as PFAS may be a source of human harm, the public response usually manifests in organized action designed to keep people safe. This action can look like legislation, government-sponsored studies, regulations, and reforms. And when specific products are the issue of concern, the public will also attempt to seek to hold companies accountable.

I. PFAS in Food Packaging

PFAS were first introduced into food packaging in the 1960's when the Food and Drug Administration (FDA) allowed the addition of PFAS in food containers. Takeout restaurant chains and supermarkets commonly utilize PFAS in grease-resistant packaging materials due to their excellent ability to repel oil, grease, and water. This helps to preserve the freshness of food and prevent leaks. Grease-resistant paper, fast food

containers, wrappers, microwave popcorn bags, pizza boxes, and candy wrappers also commonly contain PFAS. The cardboard takeout container is the most commonly used food container that could contain PFAS. While paper or cardboard packaging containing PFAS may appear economical and environmentally friendly, studies show that when food comes into contact with these materials, PFAS may actually leach into the food, leading to exposure through consumer consumption. A product may contain PFAS without the manufacturer or supplier's knowledge, as PFAS are often used as product additives, rather than primary ingredients, and may not be listed on product labels or in safety data sheets. In addition to being used in packaging materials, PFAS are also present in some raw materials utilized in manufacturing processes, such as certain chemicals, solvents, and surfactants, and can inadvertently be introduced into the final product without the manufacturer's knowledge. PFAS can also be present in recycled materials, such as recycled paper or plastic, which may contain residual levels of PFAS from their previous use.

Manufacturers, distributors and sellers should conduct comprehensive testing of their products, including raw materials

² See *infra* at 3-4, notes 5 and 6.

and finished products, to ensure that they are free³ of PFAS or contain only safe levels of these substances. Testing can go a long way in helping to safeguard both consumers' health and the manufacturer's brand reputation. By complying with an intentional and proactive approach to current state regulations and anticipated federal mandates, manufacturers and sellers demonstrate their commitment to environmental and public health protection, which can reduce the risk of exposure to civil litigation, including product liability actions.

II. Health Hazards of PFAS in Food Packaging

Paper and cardboard products, commonly used to serve fast foods like fried chicken, French fries, burritos, and donuts, incorporate PFAS to prevent grease from leaking. There is growing concern that the PFAS in these packaging materials can leach into the food, and subsequently, consumers can ingest them. Researchers have

linked this type of exposure to certain health risks, including alterations to liver enzymes, thyroid hormone disruption, increased cholesterol levels, high blood pressure and pre-eclampsia in pregnant women, developmental effects, decreases in immune response, changes in liver function and an increased risk of certain types of cancer, such as kidney or testicular cancer. The ensuing concern has risen to such a level that consumer news and reporting outlets have undertaken and published research to show elevated levels of PFAS have been found in many popular fast food chains' food packing. In March 2023, a study conducted by researchers at Notre Dame found PFAS in fluorinated high-density polyethylene (HDPE) plastic containers used for food packaging.⁴ This research was the first to highlight the ability of PFAS to leach from HDPE containers into food, as well as the effect of temperature on the leaching process.⁵ In May 2023, another study confirmed that PFAS can be

³ IRM India, *Risk Management in Pharmaceutical Microbiology*, (Jan. 9, 2023), available at <https://www.theirmindia.org/blog/risk-management-in-pharmaceutical-microbiology/>.

⁴ Heather D. Whitehead and Graham F. Peaslee, *Directly Fluorinated Containers as a Source of Perfluoroalkyl Carboxylic Acids*, 10 ENVIRON. SCI. TECHNOL. LETT. 350, 350-355 (2023).

⁵ See *Study Shows "Significant Risk of Exposure" to PFAS from Food, Pesticide Packaging*, FOOD SAFETY (Mar. 10, 2023), available at <https://www.food-safety.com/articles/8414-study-shows-significant-risk-of-exposure-to-pfas-from-food-pesticide-packaging>.

found in food containers.⁶ The researchers conducting the May 2023 study collected samples of food containers such as grinder bags, takeout containers, soup containers, hot cups, salad boxes, and potato chip bags from random local fast food establishments and tested for traces of PFAS. They found that most of the materials tested had various types of PFAS chemicals, some well-known and some varieties rarely discussed in the literature. Through its Agency for Toxic Substances and Disease Registry,⁷ the Centers for Disease Control and Prevention (CDC) established a publicly accessible website linking to studies which connect PFAS exposure to adverse

health effects. All of this points to a growing public concern about the safety of PFAS in food packaging and the potential liability for manufacturers and sellers.

A 2022 Consumer Reports investigation⁸ detected PFAS in bowls, bags, plates, and wrappers from well-known fast-food restaurants, fast-casual restaurants, and grocery store chains. This was noteworthy, since PFAS were detected in the products of some companies that had previously announced they had phased them out. Even health-focused chains had packaging that revealed PFAS. The results published in the Consumer Reports study mirrored the findings of 2018⁹ and 2020¹⁰

⁶ Noah B. Liguori-Bills, James D. Stuart, Sarah A. Ayers, Christopher R. Perkins, and Anthony A. Provatas, *Analysis of PFAS in Locally Acquired Food Containers*, 21 CURR. TRENDS IN MASS SPECTRO. 22, 22-31 (May 2023), available at <https://www.chromatographyonline.com/view/analysis-of-pfas-in-locally-acquired-food-containers>.

⁷ Available at <https://www.atsdr.cdc.gov>.

⁸ Kevin Loria, *Dangerous PFAS Chemicals Are In Your Food Packaging*, CONSUMER REPORTS (Mar. 24, 2022), available at <https://www.consumerreports.org/health/food-contaminants/dangerous-pfas-chemicals-are-in-your-food-packaging-a3786252074/>.

⁹ Erika Schreder and Jennifer Dickman, Research Report, *Take Out Toxics: PFAS Chemicals in Food Packaging*, TOXIC FREE FUTURE (2018), available at <https://toxicfreefuture.org/research/take-out-toxics-pfas-chemicals-in-food-packaging/>.

¹⁰ Jennifer Dickman, Erika Schreder and Nancy Uding, *Packaged in Pollution: Are food chains using PFAS in packaging?*, TOXIC FREE FUTURE (2020), available at <https://toxicfreefuture.org/research/packaged-in-pollution/introduction/>; see also Sandee LaMotte, *Toxic chemicals may be in fast food wrappers and take-out containers, report says*, CNN (Aug. 6, 2020), available at <https://www.cnn.com/2020/08/06/health>

reports published by the Toxic-Free Future and Safer Chemicals Healthy Families group. Those reports found “harmful” levels of PFAS in fast-food packaging and nearly two-thirds of takeout paper containers used at self-serve salad buffets and hot bars. Studies such as these have prompted official and grass roots movements to limit or ban PFAS use in food packaging.

III. Rules, Regulations, and Recalls

Over fifty PFAS-focused bills were introduced by Congress in the last session alone,¹¹ but there is currently no federal or nationwide legislation to restrict the use of PFAS in food packaging. Presently, the FDA authorizes certain short-chain PFAS for use as grease-proofing agents in food contact paper and paperboard packaging. At the state level, this is a rapidly developing area of the law; twelve states have enacted legislation to regulate PFAS in food packaging, and more are anticipated to follow.¹² Members of the food packaging industry should be closely monitoring regulations

about using PFAS, as tort litigation usually and logically follows any regulatory actions.

A. The Food and Drug Administration (FDA)

Since the 1960s, the FDA has approved specific PFAS for certain food contact applications. In 2016, however, the FDA revoked regulations that allowed some long-chain PFAS, such as PFOS and PFOA, in food contact applications. They then cautioned the food industry in 2021 that specific plastic production processes used in food containers might cause PFAS to leach into food.¹³ In 2022, the FDA affirmed that it permits PFAS as grease-proofing agents in fast-food wrappers, takeout paperboard containers, microwave popcorn bags, and pet food bags to prevent oil and grease from seeping through the packaging. The FDA emphasized that food packaging manufacturers and distributors must market fluorinated polyethylene containers that conform to FDA regulations. While the FDA has not yet established a threshold for PFAS in food

[h/toxic-food-wrappers-pfas-wellness/index.html](https://www.fda.gov/food/food-contact-applications/food-contact-applications).

¹¹ *Bills to regulate toxic ‘forever chemicals’ died in Congress – with Republican help*, THE GUARDIAN (Jan. 2023), available at <https://www.theguardian.com/environment/2023/jan/13/pfas-toxic-forever-chemicals-republican-house>.

¹² See *infra* at note 19 *et seq.* (listing statutes regulating PFAS in food packaging).

¹³ United States Food and Drug Administration (“FDA”), *Authorized Uses of PFAS in Food Contact Applications*, (Feb. 24, 2022), available at <https://www.fda.gov/food/process-contaminants-food/authorized-uses-pfas-food-contact-applications>.

packaging, it has indicated that these substances should not migrate into food in quantities exceeding fifteen parts per billion. The FDA collaborates with manufacturers looking to phase out specific short-chain PFAS and with industry members to resolve any safety issues that may arise concerning PFAS.¹⁴

B. The U.S. Environmental Protection Agency (EPA)

The EPA has taken several actions to address PFAS in food packaging. In 2022, it removed the last two remaining PFAS from its Safer Chemical Ingredients List (SCIL).¹⁵ They also released a draft guidance document in 2020 for companies that manufacture or distribute food packaging materials, recommending the reduction or elimination of PFAS in food packaging and providing information on testing methods and potential alternatives.¹⁶ The EPA has collaborated with other federal agencies, including the FDA, to coordinate efforts to address PFAS in food packaging.

C. State Law

As of May 2023, twelve states have enacted restrictions on different types of packaging, while other states are currently in the process of passing legislation. The most recent state to ban PFAS is Oregon, where on May 8, 2023 the Governor signed legislation banning (effective January 1, 2025) the production, sale, and distribution of polystyrene foam cups and takeout food containers — including coolers and packing peanuts.¹⁷ Penalties include the imposition of fines up to \$500 a day for people who sell or distribute polystyrene packing peanuts or foodware treated with PFAS after the effective date of the bill; the penalties will be somewhat more minor (\$100 a day) for food vendors caught distributing polystyrene foam food containers. Food packaging manufacturers and sellers should diligently monitor state laws that regulate their business to identify whether any PFAS laws establish limits on threshold concentrations that may require compliance obligations, as

¹⁴ *Id.*

¹⁵ United States Environmental Protection Agency (“EPA”), *Safer Choice Program EPA Adds Nine Chemicals and Removes One PFAS from the Safer Chemical Ingredients List*, (Jan. 12, 2023), available at <https://www.epa.gov/chemicals-under-tsca/safer-choice-program-epa-adds-nine-chemicals-and-removes-one-pfas-safer>.

¹⁶ EPA, *Risk Management for Per- and Polyfluoroalkyl Substances (PFAS) under TSCA*, (Jan. 26, 2023), available at <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-and-polyfluoroalkyl-substances-pfas>.

¹⁷ Ore. SB543 (2023).

noncompliance can result in legal action from consumers.

The following States have enacted laws or regulations targeting PFAS in food packaging:¹⁸

<u>Currently Enacted and Effective</u>	<u>Enacted - Pending Implementation</u>
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California: Prohibition ¹⁹	Vermont: Prohibition (July 1, 2023). ²⁰
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Maryland: Prohibition ²¹	Connecticut: Prohibition (December 31, 2023) ²²
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New York: Prohibition ²³	Colorado: Prohibition (January 1, 2024) ²⁴
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Washington: Prohibition ²⁵	Minnesota: Prohibition (January 1, 2024) ²⁶
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Rhode Island: Prohibition (January 1, 2024)²⁷

Hawaii: Prohibition (December 31, 2024)²⁸

Oregon: Prohibition (January 1, 2025)²⁹

D. Product Recalls

Occasionally, a company will initiate a product recall in response to evidence of a potential safety issue or defect associated with the product. In such instances, the company typically provides a remedy, such as a refund, repair, or replacement, to customers affected by the recall.

Recently, Kerrygold Butter, marketed as “Pure Irish Butter,” recalled its butter sticks after discovering PFAS in the grease-resistant foil wrapper, rendering it non-compliant with regulations in two states.³⁰ The company assured

¹⁸ See also Jenner & Block, *PFAS in Consumer Products*, (Feb. 20, 2023), available at <https://www.jdsupra.com/legalnews/pfas-in-consumer-products-8860075/>.

¹⁹ Cal. Assembly Bill No. 1200 (2021), chaptered as Chapter 503 of the California Health and Safety Code.

²⁰ Vt. Act No. 36 (S.20) (2021).

²¹ Md. Senate Bill 273 (2022).

²² Conn. Public Act No. 21-191 (2021).

²³ N.Y. Senate Bill S8817 (2022).

²⁴ Colo. House Bill 22-1345 (2022).

²⁵ REVISED CODE WASH. 70A.222.070 (2018).

²⁶ Minn. S.F. No. 20 (2021).

²⁷ R.I. S.2044/H.7438 (2022).

²⁸ Haw. Act 152 (House Bill 1644) (2022).

²⁹ Ore. Senate Bill 543 (2023).

³⁰ See Fionnuala Boyle, *Kerrygold Irish butter missing from US stores after chemical scare*, IRISH STAR (Mar. 1, 2023) available at

the public that “like other food producers, Ornuia Foods (Kerrygold) is complying with new regulations in certain U.S. states that require food packaging to be PFAS-free.”³¹ Despite Kerrygold Butter's recall and subsequent release of PFAS-free packaging, Carolyn Winans filed a class action lawsuit against parent company Ornuia Foods North America Inc. in New York federal court.³² The lawsuit alleges that the company falsely marketed its products as healthy and containing “pure Irish butter” despite the presence of harmful PFAS.

Bumble Bee Foods was recently forced by the FDA to issue a voluntary recall³³ of its canned smoked clams. FDA testing³⁴ data showed the clams were imported from China and packaged in cottonseed oil which tested for elevated levels of PFAS. According to the FDA, “PFAS levels in clams are likely a health concern.”³⁵ Bumble Bee Foods says it is “working with the third-party manufacturer in China to

investigate further to try to resolve the issues that led to the FDA findings.”³⁶

Crown Prince also issued a recall of its Natural Smoked Baby Clams in Olive Oil due to the presence of PFAS detected by FDA testing. Crown Prince products are packaged in 3 oz cans which were also imported from China. The item was sold nationwide in natural food stores, grocery stores, and online retailers. No illnesses have been reported in connection with these products. It is unclear if the clams were contaminated due to the packaging process or packaging materials or if they were exposed to the contaminated water in which they lived.

Whether or not a product recall leads to a product liability lawsuit depends on various factors, including the severity of the harm suffered by the consumer, the strength of the plaintiff's case, and the actions the company takes to address the safety issue. If consumers can demonstrate harm resulting from a defective product,

<https://www.irishstar.com/news/us-news/kerrygold-irish-butter-recalled-stores-29324955>.

³¹ *Id.*

³² Winans v. Ornuia Foods North America Inc., No. 2:23-cv-01198 (E.D.N.Y. Feb. 14, 2023).

³³ Bumblebee Foods, *Bumble Bee Foods, LLC Issues Voluntary Recall on 3.75 Oz Smoked Clams due to the Presence of Detectable Levels of PFAS Chemicals*, (July 6, 2022), <https://www.bumblebee.com/smokedclamrecall/>.

³⁴ *Id.*

³⁵ FDA, *FDA Shares Results on PFAS Testing in Seafood*, (July 15, 2022), available at <https://www.fda.gov/food/cfsan-constituent-updates/fda-shares-results-pfas-testing-seafood>.

³⁶ Trisha Calvo, *Bumble Bee Canned Smoked Clams Recalled Because of Dangerous PFAS Chemicals*, CONSUMER REPORTS (July 7, 2022), available at <https://www.consumerreports.org/health/food-recalls/bumble-bee-canned-smoked-clams-recalled-due-to-pfas-a8699617868/>.

product recalls may lead to product liability lawsuits against the responsible company.

IV. PFAS Product Liability Lawsuit and the Food Packaging Industry

Product liability lawsuits against manufacturers and distributors of PFAS-containing consumer goods like food packaging are rapidly evolving and being filed in courts throughout the country. Of the more than 6,400 PFAS-related lawsuits filed in federal court between July 2005 and March 2022, practically all suits targeted the makers or users of the synthetic chemicals. Whether somebody can sue a company for the presence of PFAS in its products depends on several factors, including jurisdiction, applicable laws and regulations, and the case's specific circumstances. These lawsuits can be brought in any state where the plaintiffs have allegedly been exposed to PFAS and suffered alleged harm. Lawsuits have been filed against various businesses, including those in the food packaging sector. When a new study is published, or a recall is announced related to PFAS in a

consumer product, plaintiffs will often use the company's marketing materials to support their allegations of false or misleading representation, especially if the product contains PFAS. These materials may include safety claims and claims of being "natural" or "sustainable." Plaintiffs have also alleged that companies failed to disclose the presence of PFAS in their products on their websites, ingredient lists, or product packaging.³⁷

Product liability lawsuits related to PFAS in food packaging often assert claims of negligence, strict liability, and breach of warranty and allege that manufacturers and sellers of these products knew or should have known of the possible harm that these chemicals could cause but did not provide sufficient warning to consumers or take the necessary steps to protect them. Additionally, these lawsuits may contend that the products were defectively designed or manufactured or that manufacturers did not perform enough testing or research to verify the safety of the products.

Historically, plaintiffs in product liability cases against manufacturers and retailers have

³⁷ J. Barton Seitz, Joshua Frank, and Samantha Olson, *Not Worried About PFAS Liability? You Should Be.*, WASH. LEGAL FOUNDATION, (June 3, 2022), available at <https://www.wlf.org/2022/06/03/publishing/not-worried-about-pfas-liability-you-should-be/>.

faced difficulties. Often, it is difficult to establish jurisdiction over the defendant companies. The more significant hurdle has been showing a direct link between Plaintiffs' alleged injuries and the Defendant's role in introducing PFAS into the market or the product. As more cases are being brought before the courts, we anticipate that there will be an evolution in the viability of causal connection theories. An increasing number of claims are surviving the dispositive motion stage, despite the presence of tenuous causal connection theories. These issues will likely become more contentious with ongoing scientific advancements and implementation of federal and local regulations.

The legal landscape surrounding PFAS remains complex and subject to constant change, with liability hinging on multiple factors, including: the scope of the alleged contamination; the level of exposure; and the manufacturer's level of knowledge and intent. Legal action against PFAS manufacturers and sellers is expected to persist as resourceful plaintiffs' attorneys seek to target other companies in related sectors. Any company involved in an industry with a history of using PFAS should be especially vigilant of any emerging regulatory concerns, as they may become the focus of litigation. It is crucial for companies to make themselves

aware of the risks associated with PFAS and take proactive measures to limit PFAS use and mitigate potential liability. To minimize the risk of litigation, companies should stay up-to-date and comply with the latest laws and regulations governing PFAS, conduct comprehensive testing and monitoring of their goods and production procedures, and allocate resources towards safer substitutes for PFAS. Companies may also consider seeking legal counsel from attorneys specializing in PFAS product liability to ensure compliance with the relevant regulations and minimize the risk of legal exposure.

V. Recent PFAS Food Packaging Lawsuits

Most product liability lawsuits concerning PFAS have targeted defendants who designed, marketed, developed, manufactured, and distributed aqueous film-forming foams (AFFF) used in firefighting foams. Cases aimed at the cosmetic/personal care industry, which target products ranging from mascara to toilet paper, are relatively new. Cases to watch, however, are the recent high-profile lawsuits filed against major fast-food chains and food packaging manufacturers and sellers, alleging that their use of PFAS in food packaging was fraudulent and caused harm to

consumers. Highlighted below are just a few examples.

A. Butter Wrappers

Plaintiff Carolyn Winans filed a class-action lawsuit³⁸ alleging that Defendant's Kerrygold Salted and Unsalted Butter Sticks were inaccurately marketed as "Pure Irish Butter" despite containing harmful PFAS synthetic chemicals. The plaintiff alleged that Defendant knowingly used false labeling to boost sales and profits without regard for the adverse effects of PFAS on human health and the environment. Moreover, Winans contended that Defendant specifically targeted health-conscious consumers with their misleading packaging while failing to disclose the presence of PFAS chemicals in the butter. She asserted that she and other class members were charged a premium for the product based on these false representations. As a result, Winans and the class are seeking monetary compensation, interest, a trial by jury, and any other appropriate relief. The case is currently pending.

³⁸ *Winans, supra* note 32.

B. Microwave Popcorn Products

In *Richburg v. Conagra Brands, Inc.*³⁹ and *Ruiz v. Conagra Brands Inc.*⁴⁰ The U.S. District Court for the Northern District of Illinois granted dismissal to two putative class-action cases. Both cases alleged that the marketing and labeling of Conagra brand Orville Redenbacher's® and Angie's BOOMCHICKAPOP® microwave popcorn were false or misleading. The plaintiffs argued that representations such as "natural" and "100% real ingredients" were deceptive because PFAS could transfer from the microwave bags to the popcorn. However, the court rejected the plaintiffs' claims, concluding that a reasonable consumer would not be misled by the labeling statements challenged. The court held that consumers understand "ingredients" to refer only to items listed in the ingredient list mandated by the U.S. Food and Drug Administration (FDA). The rulings placed much emphasis on the fact that the FDA exempts⁴¹ substances that transfer to foods from processing equipment or packaging from disclosure as an "ingredient."

³⁹ *Richburg v. Conagra Brands, Inc.*, No. 22-CV-2420 (N.D. Ill. Feb. 8, 2023).

⁴⁰ *Ruiz v. Conagra Brands, Inc.*, No. 22-CV-2421 (N.D. Ill. Feb. 8, 2023).

⁴¹ *Id.* at 14.

C. Fast Food Establishments

In *Clark v. McDonald's Corp.*,⁴² four named plaintiffs claimed that McDonald's misled customers for the past 30 years by failing to disclose in its advertising and marketing the presence of PFAS in its products. They asserted that this failure to warn caused harm to customers who relied on the company's assurances of product safety, and they would not have purchased these products had they known about the presence of PFAS. The case is pending.⁴³

In *McDowell v. McDonald's Corp.*,⁴⁴ plaintiff Ken McDowell sued on behalf of himself and anyone who purchased Defendant's Big Mac for personal, family, or household use. His complaint alleged that Big Macs are unfit for human consumption because the packaging in which it is contained—and is “essential and integral to delivering the product to the consuming public”—contains unsafe PFAS substances.⁴⁵ Specifically, plaintiff claimed that McDonald's falsely markets products as “safe” and “sustainable”

when the product packaging contains PFAS,⁴⁶ which makes them unsafe for humans and harmful to the environment. Defendant McDonald's has moved to dismiss the case citing *Seidl v. Artsana USA, Inc.*, which held that a car seat manufacturer was not liable for failing to warn about the chemicals used to treat the seat.⁴⁷ The case was transferred and consolidated with *Clark* due to the similarity of their subject matter and remains pending.⁴⁸

In *Hussain v. Burger King Corp.*,⁴⁹ plaintiff Hussain stated that he purchased Burger King's Whopper product from Defendant for several years, including as recently as March 2022 from a Burger King located in Fremont, California. Before his purchase, he claimed he reviewed the Whopper's labeling, packaging, and marketing materials, and concluded that the sandwich was safe and sustainable. Mr. Hussain understood, based on Defendant's claims, that the Whopper was safe for consumption and otherwise a sustainable product. He claimed he reasonably

⁴² *Clark v. McDonald's Corp.* No. 3:22-CV-00628, complaint filed (S.D. Ill. April 6, 2022), available at <https://www.classaction.org/media/clark-v-mcdonalds-corporation.pdf>.

⁴³ A March 28, 2023 order transferred the case from the Southern District of Illinois. It has now been opened in the Northern District of Illinois as case 1:23-cv-01939.

⁴⁴ 1:22-cv-01688, complaint filed (N.D. Ill. March 31, 2022) available at

<https://www.aboutlawsuits.com/wp-content/uploads/2022-03-31-McDonalds-Complaint.pdf>.

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 2.

⁴⁷ No. 5:22-cv-2586 (E.D. Pa. Nov. 30, 2022).

⁴⁸ *Clark*, *supra* note 42, at para. 22.

⁴⁹ No. 4:22-cv-02258, complaint filed (N.D. Cal. April 11, 2022).

relied on plaintiff's representations and warranties in deciding to purchase the Whopper, and but for these representations and warranties, he would not have bought the product. Due to Burger King's material misrepresentations and omissions, Mr. Hussain alleged that he suffered and continues to suffer economic injuries. He cites the Consumer Reports study, which first detected PFAS in the Whopper's packaging.⁵⁰ Hussain voluntarily dismissed his case soon after Burger King moved the court for judicial notice of various publicly available documents, all of which appear on the FDA's public website, which state that the FDA authorizes the use of PFAS in food contact applications, maintains a searchable Food Contact Database, and funds a review program.

In *Hamman v. Cava Group*,⁵¹ plaintiff Hamman alleged that the restaurant chain's grain and salad bowls were unfit for human consumption because their packaging contained unsafe levels of fluorine and PFAS. Plaintiff stated that due to Cava's failure to disclose that its products likely contained PFAS, he was harmed because he paid more than he would have for Cava's products but for Cava's alleged misrepresentations and omissions. Hamman claimed he was

confused by Cava's product marketing and entitled to relief under California's Fraudulent Advertising Law. Defendant Cava argued that the complaint should be dismissed because the plaintiffs lacked standing and failed to allege harmful PFAS levels adequately. The court ultimately denied Cava's motion to dismiss the lack of standing claim, finding that the plaintiffs had suffered economic injury by paying a premium for PFAS-free products that were not free of PFAS or that they would not have bought if they had known the truth. The court also held that Hamman had standing to seek injunctive relief, because they could not determine if Cava's products were safe to buy. The court granted Cava's motion to dismiss based on fraudulent omission, as the plaintiffs failed to show that Cava had a duty to disclose PFAS contents or that Cava concealed material facts from them. The court allowed Hamman to rely on evidence of elevated levels of organic fluorine in the product packaging, indicating that the products likely contained PFAS and that PFAS are dangerous even in small quantities, but court rejected Cava's arguments about the chemical contents of its products, stating that such arguments were

⁵⁰ See Dickman et al., *Packaged in Pollution*, *supra* note 10.

⁵¹ No. 3:22-cv-00593-MMA-MSB, complaint filed (S.D. Cal. Apr. 27, 2022), available at

<https://www.classaction.org/media/hamman-et-al-v-cava-group-inc.pdf>.

factual and inappropriate for review at the motion to dismiss stage.⁵²

In *Cooper v Burger King*,⁵³ plaintiff Rhonda Cooper filed suit against Burger King, alleging that its Whoppers were unfit for human consumption because they contained unsafe levels of PFAS. She alleged that Burger King advertised and marketed its products as safe, high quality, and free of harmful ingredients, yet failed to disclose the presence of PFAS. She stated that she relied on false marketing, and the absence of any warnings, which caused her economic injuries. She offered SEC filings showing that Burger King greatly emphasized the safety and quality of its food and packaging. She cited the findings published in Consumer Reports showing levels of PFAS in Burger King's products, among other studies, public and private. To support her exposure and damages claims, an entire section in her complaint included citations to studies evidencing PFAS in food packaging. She quoted Justin Boucher of The Food Packaging Forum, stating, "[w]e know that these substances migrate into food that you eat. It's clear, direct exposure."⁵⁴ Ultimately the case

was voluntarily dismissed for reasons not made public.

D. Serveware and Storage

In *DiGiacinto v. Albertsons Companies*,⁵⁵ the plaintiff took issue with marketing and advertising claims of Albertsons Companies, Inc., Safeway, Inc., and Lucerne Foods, Inc. that their disposable plates and bowls were compostable, when the definition of a compostable product is allegedly one that will entirely break down into usable compost. Plaintiff stated that the products even contained a certification by the Biodegradable Products Institute but in reality contained significant amounts of PFAS, which do not break down and never become part of usable compost. He sought to remedy Defendants' unlawful, unfair, and deceptive business practices concerning the advertising, marketing, and sales of the products as compostable when, in fact, they are not. He argued that had he known that the products contained PFAS chemicals and could not break down, he would never have purchased them. Plaintiff alleged that he paid a premium for the products, causing economic damages. Plaintiff

⁵² Hamman v. Cava Group, Inc., No. 3:22-cv-00593-MMA-MSB (Feb. 8, 2023) (granting in part and denying in part defendant's motion to dismiss).

⁵³ No. 1:22cv21150, complaint filed (S.D. Fla. Apr. 14, 2022).

⁵⁴ *Id.* See also Loria, *supra* note 8.

⁵⁵ No. 3:20-cv-03382, complaint filed (N.D. Cal. May 18, 2020), available at <https://truthinadvertising.org/wp-content/uploads/2020/05/DiGiacinto-v-Albertson-complaint.pdf>.

voluntarily dismissed his case in April 2022.

In *Little v. NatureStar North America, LLC and Target Corp.*,⁵⁶ class members alleged fraud and false advertising, accusing the defendants of marketing specific disposable single-use tableware and storage bags as compostable despite knowing the products were not compostable. Plaintiffs alleged that had they known the items were not compostable, they would not have purchased or paid as much. The lawsuit claims that NatureStar products were certified as compostable by a private organization called TÜV Austria. However, when plaintiff tested the NatureStar items, they reportedly found high levels of PFAS in bowls and plates. The case is still pending.

E. Pet Food

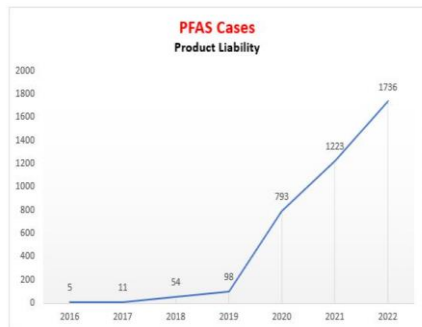
In *Humphrey v. The J.M. Smucker Company*,⁵⁷ Robin Humphrey alleged that Smuckers misleadingly labeled its 9-Lives, Kibbles 'n Bits, and Meow Mix cat foods as being healthy despite unsafe PFAS in their packaging. The complaint made a point to mention that Defendant employs food scientists, packaging engineers, scientists, and managers who focus on pet food products, including assessing suitability for direct food contact applications, yet sold pet food containing PFAS resulting in an abuse of the public's trust. Plaintiff stated that had she known that the Smucker cat food packaging contained PFAS, she would not have purchased the products or would have purchased them on different terms. The suit seeks compensatory, statutory, and punitive damages and reasonable attorney's fees.

These are just a few examples of PFAS litigation affecting the food packaging industry. Many plaintiffs have relied on recent studies showing PFAS in food containers. As more health studies are published, the claims against food industry members will expand from economic loss to claims for bodily injury. For now, plaintiffs' reliance on these studies puts the ball on the

⁵⁶ 1:2022-cv-00232, complaint filed (E.D. Cal. February 24, 2022), available at <https://www.classaction.org/media/little-v-naturestar-north-america-llc-et-al.pdf>.

⁵⁷ 1:22-cv-06913, complaint filed (N.D. Cal. November 4, 2022), available at <https://www.classaction.org/media/humphrey-v-the-jm-smucker-company.pdf>.

defense side of the court, as these lawsuits hinge on potential or hypothetical causation. Nonetheless, these lawsuits highlight the growing concern over the use of PFAS in food packaging and processing industries. As more research is conducted on the potential health effects of PFAS exposure, more lawsuits will likely be filed against product manufacturers, packing companies, restaurants, and other food-related businesses that knowingly or even unknowingly use these chemicals in their packaging.



Source: Lex Machina

VI. Product Liability Risk

Given the potential health risks associated with PFAS exposure, food packaging manufacturers and sellers may face product liability

claims if their products contain high levels of PFAS. In addition, product liability claims related to PFAS in food packaging may arise if PFAS migrates from food packaging into food and causes harm to consumers. At present, the three types of manufacturers with the most significant potential for PFAS liability are:⁵⁸

- PFAS chemical producers (greatest risk)
- Manufacturers who use PFAS chemicals to impart water, stain, or fire resistance to their products (moderate risk)
- Supply chain companies that assemble products utilizing components that have already been treated with PFAS (moderate to low risk)

VII. Limiting Risk and Liability

Companies should be concerned if their products contain PFAS. The issue of PFAS in food packaging can create potential risks for companies involved in manufacturing, distributing, or

⁵⁸ Courtney DuChene, *PFAS Legal Liability Exposures: What Thousands of Manufacturers Need to Know*, RISK & INSURANCE (Nov. 28, 2022), available at <https://riskandinsurance.com/pfas-legal-liability-exposures-what-thousands-of-manufacturers-need-to-know/>.

selling these products. Companies that manufacture or distribute food packaging materials that contain PFAS may face product liability claims if consumers are harmed by exposure to these substances.

To prevent product liability claims, food packaging manufacturers and sellers should take an aggressive proactive approach toward minimizing the risks associated with PFAS in their products. Risk-reducing steps companies might consider taking include:

- A. Inquire with Down Stream Suppliers:** Food packaging suppliers should collaborate with customers to ensure adherence to phase-out timelines and all relevant federal and state regulations. They should also determine whether their facilities utilize or come into contact with PFAS chemicals.
- B. Obtain Certificates of Compliance:** The term "food packaging" in many states encompasses many items, such as straws and eating utensils, in addition to disposable bowls, food wrappers, and takeout containers. To guarantee that food packaging meets your state's regulations,

request a certificate of compliance from your suppliers. If a supplier cannot provide such a statement, it may be best to explore other options, such as direct testing. In certain states, obtaining a certificate of compliance may give some level of protection against liability.

- C. Conduct Audits:** Businesses should conduct self-audits to examine their usage and impact. This could include reviewing material safety data sheets or product information provided by suppliers and conducting top-to-bottom reviews to determine if PFAS is an issue that requires attention. As the EPA further develops its PFAS rules and conducts further research, it will seek to regulate PFAS and their uses, resulting in enforcement actions against companies that fail to comply. Companies should carefully audit their supply chains to minimize the risk of PFAS ending up in their final products. They should also be aware of how various regulatory

structures governing the use of PFAS and trends in tort litigation can affect their business models. Businesses with unintentional PFAS presence in their products may still face litigation even if they are not violating any specific federal or state regulation.

D. Maintain a Policy of Public Transparency:

The food packaging industry must be transparent with the public regarding PFAS in their products. Transparency can help companies avoid potential legal and financial consequences by showing they are taking proactive steps to comply with current and future regulations.

E. Collaborate with State and Federal Environmental Health and Safety Agencies:

Risk managers for manufacturing companies should collaborate with their environmental health and safety departments. For example, they should determine where PFAS are

used in their products and how they are disposed of. Companies must comply with all relevant regulations and industry standards related to food packaging and PFAS, including adhering to guidelines set by regulatory agencies like the FDA and the EPA.

F. Monitor Applicable Legislative and Regulatory Landscape:

To reduce the risk of liability claims related to noncompliance with regulations, companies should collaborate with industry stakeholders to find solutions and stay current on legislative and regulatory affairs. It is also crucial to keep up to date with regulations related to PFAS and ensure that products comply with all relevant standards and guidelines.

G. Develop a Strong Product Safety and Compliance Program:

Companies should conduct comprehensive research and testing to identify and mitigate risks associated with their products. This

could involve testing food packaging materials for PFAS and creating alternative materials that do not contain these chemicals. Companies must provide adequate warnings to consumers about potential risks and safe handling and disposal of packaging materials containing PFAS. Manufacturers and downstream businesses must be prepared to comply with federal and state PFAS regulations and minimize litigation risks.

H. Maintain Appropriate Insurance Coverage:

Industries that may face lawsuits or government actions related to PFAS may have insurance policies to help cover their costs. Most companies have general commercial liability insurance that may protect them against personal injury or environmental damage claims related to PFAS. They should also work with their insurance providers to ensure they have enough coverage for any potential problems

associated with PFAS from the past and the future.

By taking one or more of these steps, companies may reduce the risk of lawsuits related to PFAS in food packaging, protect the health and safety of consumers, and maintain public trust and branding in their products.

VIII. Conclusion

Using PFAS in food packaging presents a potential significant product liability risk for manufacturers and sellers. As the science behind PFAS litigation continues to develop, this issue has the potential to become more contentious with resulting litigation likely to follow. To mitigate this risk, manufacturers and sellers should take measurable proactive action to reduce or eliminate PFAS in their products, comply with all applicable regulations, and provide appropriate consumer warnings. By doing so, manufacturers and sellers can protect against financial loss and damage to their reputation.