LITIGATION MINUTE: THE COMING WAVE OF PFAS LITIGATION

FOOD AND BEVERAGE SERIES: PART THREE OF FOUR

Date: 26 April 2022

WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Makers and sellers of retail food and beverage products may face a wave of class action litigation over so-called "forever chemicals" (or PFAS) in the coming years.

What are PFAS?

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.

Why PFAS Litigation May Increase in the Coming Years

Makers and sellers of food and beverages may see increased PFAS litigation due to recent research allegedly linking PFAS to health conditions such as cancer, developmental delays, and in vitro impacts on fetuses. Moreover, the U.S. Environmental Protection Agency will likely finalize a rule in 2023 setting maximum contaminant levels for PFAS in drinking water.

The Types of PFAS Claims the Food and Beverage Industry Might Face

PFAS litigation has, in the past, focused on groundwater contamination and medical monitoring theories. Now, it is apparent that the plaintiffs' consumer class action bar is beginning to focus on PFAS as well. One strain of litigation focuses on affirmative representations on a product's labeling, asserting that the presence of PFAS in the product renders the product's affirmative labeling false or misleading. Another asserts that defendants have an affirmative obligation to disclose the presence of PFAS on the product's labeling, and the failure to do so renders the product's labeling false or misleading.[1]

Takeaway

Makers and sellers of food and beverage products already face a significant number of consumer class actions challenging product labeling claims as false and misleading. The emergence of PFAS theories in this space will increase the class action risk and exposure faced by the industry.

FOOTNOTES

[1] *Davenport v. L'Oreal USA, Inc.*, No. 2:22-cv-01195 (C.D. Cal.) (Complaint, Dkt. No. 1).

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