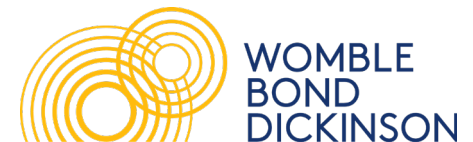


Sustaining a Bold
COMPLIANCE
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2023 AHFA SUMMIT

Summer Road Trip:
A PFAS Tour of the States
(a/k/a Regulators Abhor a Vacuum)

Michael Sullivan
August 10, 2023



PFAS as the New Asbestos?

- Forever chemical
- Ubiquitous
- Harmful?



Science has not concluded there is a causal connection to disease

- West Virginia study
 - Inconclusive as to disease causation
 - Bioaccumulation



The bioaccumulation concept is important to pay attention to

- Similar to asbestos
- No study to differentiate among multiple PFAS exposures
- If disease connection made, everyone gets to participate

There is no agreement on a definition: *What is PFAS?*

- Voluntary Standard Committee has been formed to address definitions, testing protocol, disclosure issues
 - ASTM F15.81
 - If you are concerned about PFAS, participating on this committee is a great way to stay informed



Litigation Risk:

- Most of the cases reported deal with water pollution issues
- Georgia/Alabama cases as an example
- Personal injury cases not fully developed
 - Waiting for the science to establish a causation link to disease



Uncertainty and absence of direct causal relationship to disease has never deterred a regulator

- If we perceive harm, we will regulate
- Each state may evaluate the perceived harm differently
- Result is a potpourri of regulations

Into the void march state regulators

- Alabama, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin



Overview of PFAS Compliance

- Many states are more advanced in their PFAS regulatory schemes than federal government
 - Air, Water (wastewater, stormwater, groundwater), Land (biosolids)
 - Each category of environmental media is implicated by PFAS use
- Evolving analytical methods
 - Limited EPA-validated analytical methods available
- Recordkeeping & Report
- Several states have authorized additional research and published Advisories or Guidance



State by State Regulation & Guidance

- Every state is different
- Enforceable regulations vs. advisory/guidance
- PFOA/PFOS vs. broader group (PFAS6, 20, Gen-X)
- What's being regulated?
 - Drinking water (public & private wells)
 - Groundwater (source of drinking water?)
 - Soil (Exposure & Protection of GW & DW)
 - Release notification
 - Remediation
- ITRC has an up-to-date database (updated July 2022)
- ASTM PFAS Committee



Not all the current or pending regulations address PFAS in textiles or even use in any consumer product

- Some relate to health advisories regarding drinking water and food consumption
- Some relate to air emissions
- These states rely on data showing PFAS accumulation in the body through Air, Water and Food



Specific Consumer Product Regulations

- States have taken many different approaches to regulating consumer products containing PFAS
- State regulations of PFAS in consumer products have principally focused on the following product sectors thus far, but these categories are not exclusive:
 - Food Packaging;
 - Personal Care Products;
 - Children's Products;
 - Use and Manufacturing;
 - Textiles, Fabrics, Carpets or Rugs, and Upholstery; and
 - The Consumption of Fish Tissue and Deer Meat

For this Presentation --

- We are going to focus on those states which have enacted regulation regarding textiles and furniture
 - But watch this space. This story is still developing

California – Legislation Enacted

- Prop 65 warning
 - PFOA, PFOS chemicals in textiles
- There has been some activity to enforce with several Prop 65 notices issued
- Ban on PFAS in textiles – January 1, 2025
- Treatments exempt from Ban since they are covered elsewhere



California – Legislation Enacted

- California Department of Toxic Substances Control (DTSC), April 2022
 - Treatment for converted textiles must submit a Priority Product Notification (PPN)
 - “Converted Textiles” – textiles used in consumer products like furniture



Colorado – Legislation Enacted

- PFAS Consumer Protection Act
 - Intentionally added PFAS prohibited
 - after January 1, 2025 for indoor furniture
 - January 1, 2027 for outdoor furniture



Maine – Enacted Legislation

- Prohibits PFAS in consumer products by 2030
- Reporting requirement January 2025



Massachusetts – Proposed Legislation

- Prohibit PFAS in consumer products by 2030
 - Various products included in this ban are upholstered furniture



Michigan – Proposed Legislation

- Proposal to require labeling of consumer products containing PFAS substances



Minnesota – Enacted Legislation

- Ban PFAS in any product by January 1, 2032
 - Includes upholstered furniture
- Proposed – written notice of PFAS in any product



Nevada – Proposed Legislation

- Restricts the use, manufacture, distribution and sale of children's products, residential upholstered furniture, residential textiles, business textiles or mattresses containing any organohalogenated flame retardant chemical in any product component at amounts greater than 1,000 parts per million



New York – Approved Legislation

- Ban on sale of consumer products containing PFAS on January 1, 2030



North Carolina

New N.C. Regulatory Proposal Puts Burden of PFAS Clean-Up Costs on Polluters, Not Ratepayers



<https://www.wombledonddickinson.com/us/insights/alerts/new-nc-regulatory-proposal-puts-burden-pfas-clean-costs-polluters-not-ratepayers>

Vermont – Enacted Legislation

- Ban on PFAS in all consumer products starting January 1, 2030



Many states have no PFAS consumer product regulatory framework

- No PFAS Consumer Regulations: Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming
- While several states do not currently have any adopted laws or regulations with respect to PFAS in consumer products, many are considering ways to address these chemicals
- Additional regulations likely based on regulation at a national level

Enforcement Trends

- EPA has initiated enforcement actions related to PFAS
- Some states are already beginning to require active and closed Superfund and Brownfield sites to sample for PFAS, which increases enforcement and remediation risks
 - New York and New Jersey require all active remediation sites to sample for certain PFAS
 - New York requires owners or operators of sites that have already received regulatory closure to sample for PFAS
 - New Jersey has expressed willingness to reopen closed sites to sample for PFAS
 - California is requiring a phased investigation of PFAS at sites that are potential users of PFAS
 - Massachusetts requires investigation of sites with potential PFAS contamination under its Massachusetts Contingency Plan



Emerging Theories of Liability In State Courts

- Causes of Action (from filed PFAS lawsuits):
 - Products liability (failure to warn, warranty of merchantability, fraudulent concealment, defective design)
- Greenwashing and marketing claims
- Strict liability for abnormally dangerous/ultra hazardous activities
- Public/private nuisance
- Trespass
- Negligence
- Medical monitoring
- Class Actions and Citizens' suits (CERCLA, CWA, RCRA, and State statutory counter parts)



State PFAS and Beyond

Final Thoughts

- The PFAS state regulatory framework is very fragmented
 - States even vary on how PFAS is defined
- Recordkeeping burdens will increase & will provide a road map to liability
- Regulatory liability will increase as states continue to restrict and prohibit PFAS in certain consumer products
- Litigation theories are just as emerging as the contaminants themselves
 - Class actions will likely increase
 - Greenwashing claims, false representation, and similar “marketing” claims will increase due to public perception of harm and ESG initiatives

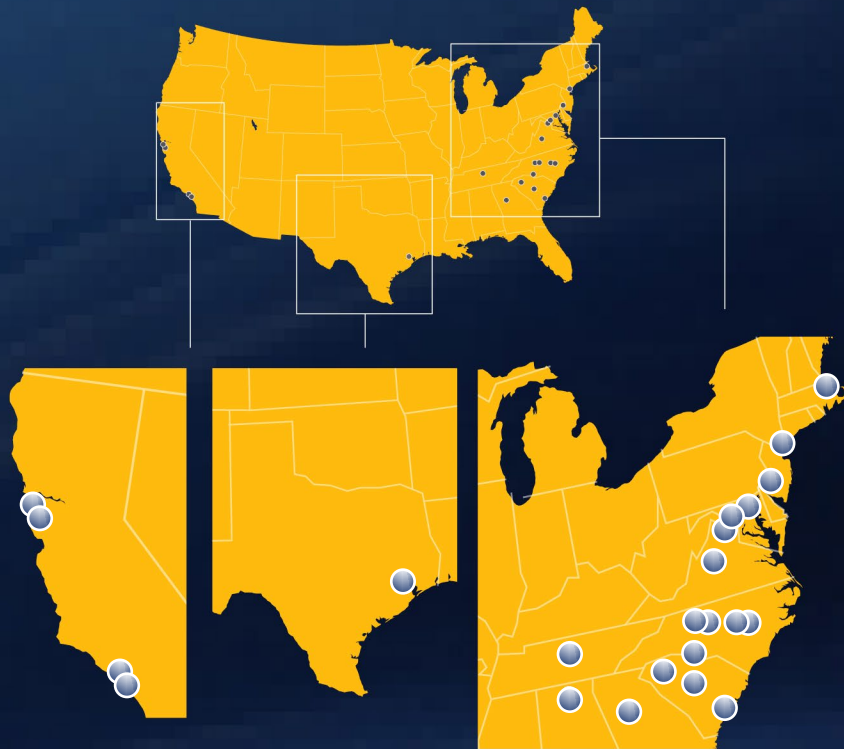


Michael Sullivan



- Clients turn to Michael Sullivan for senior-level strategic guidance in mass tort product liability litigation and other large-scale commercial litigation
- Michael brings nearly three decades of experience in “bet-the-company” cases
 - National Mass Tort Litigation
 - Federal and State Regulatory Strategies
 - Product Defect Disputes
 - Environmental Contamination
 - Trade Secrets
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