The Multifront Battle of Chemical Regulation and Litigation

Environment & Natural Resources

State governments and private environmental plaintiffs are playing a more prominent role in shaping the contours of what will be acceptable in the marketing and sale of products containing chemicals. As a result, the associated risk of litigation is expanding far beyond traditional enforcement actions.

State legislatures, attorneys general, regulators, and private litigants have been increasingly active in bringing litigation involving chemicals present in commercial products, including food items. At the same time, several state attorneys general have filed groundwater investigation and remediation lawsuits against potentially responsible parties for allegedly failing to comply with environmental regulations involving chemicals that have migrated into subterranean water sources. Some are working with plaintiffs' lawyers, sometimes hired on a contingency basis, seeking significant damages for environmental claims on behalf of citizens.

Legislators are weighing in, too. In 2019, Washington state enacted legislation that strictly regulates PCBs and other chemicals, and the New York state legislature passed a law requiring companies to report on various chemicals used in toys, car seats, and other children's products and will eventually ban certain chemicals, such as benzene and mercury, in those products. Local governments are getting in on the action. For example, Key West banned sunscreen containing oxybenzone and octinoxate, which may harm coral reefs, while San Francisco banned certain chemicals used in the food service plasticware sector.

This fragmented landscape, combined with increasing state, local, and private enforcement activity, significantly complicates a company's ability to forecast and manage compliance and avoid or minimize litigation. As a practical matter, rather than coming up with multiple compliance schemes for different markets, companies typically try to meet the requirements applicable in the most rigorous regimes. "California, which tends to have stricter environmental regulations than many other states, is also something like the world's fifth-largest economy," says Rick McNeil, a partner in Crowell & Moring's Environment & Natural Resources Group. "So it often just doesn't make commercial or practical sense not to do business in California if you have a national or international product."

The regulatory patchwork can also create a gray market in products, and that can spawn its own concerns. For example, the South Coast Air Quality Management District, which regulates air quality in Orange County and Los Angeles and elsewhere in Southern California, limits the concentration of volatile organic compounds in a variety of products, such as marine paints and solvents. However, says McNeil, "ship and boat maintenance is still a large part of the economy, so when the district limited the use and sale of these products, a lot of businesses selling them sprung up in the areas beyond the district's geographical jurisdiction." For companies using banned materials in boat repair operations—or for food packaging makers whose

Proposition 65: An Expanding Risk

Proposition 65, the California law that requires businesses to provide warnings about potentially harmful chemicals in their products, now covers 1,000 or more substances—and is proving to be fertile ground for plaintiffs alleging damages from exposure to chemicals.

Proposition 65 includes a private action "bounty hunter" provision, which makes the law attractive to plaintiffs' lawyers. From 2009 to 2018, the number of annual private actions against businesses under the law grew from 604 to 2,364, according to *The National Law Review*. "Those cases can be challenging to defend," says Crowell & Moring's Rick McNeil, in part because if a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to establish that exposure did not present a "significant risk," which often corresponds to very low concentrations. The difference in which party carries the burden could determine the outcome in some cases.

Plaintiffs have been focusing in particular on substances such as lead and phthalates. But with growing public awareness of the health risks that may be associated with other chemicals listed under Proposition 65, litigation is starting to increase in those areas.

The Proposition 65 list of harmful chemicals changes frequently, with some being added and some removed. But overall, says McNeil, "it tends to be growing."

"You're talking about orders of magnitude differences in damages, especially with class actions—and things are much more unpredictable." **Rick McNeil**

products end up in San Francisco—this kind of gray market "could lead to people bringing private attorney general types of complaints," says McNeil.

The growing activity at the state and local levels stems in part from a feeling among some that there is a need to compensate for a perceived EPA regulatory and enforcement rollback. But the trend has actually been going on for a while and is a reflection of deeper shifts in society's attitudes and culture, says McNeil. For example, polls show increasing public support for environmental protection, and state actions reflect that. State attorneys general are also charged with consumer protection, and many see environmental issues falling under that mandate.

McNeil also points to a growing expectation for companies in general to "not only do no harm, but to proactively be good corporate citizens." At the same time, he cites a growing sense that private citizens should or need to play a role in environmental enforcement. "There's a kind of 'individualization' in which people are starting to take ownership of these issues, and that manifests itself in their going to their state regulators and public interest groups—and to plaintiffs' lawyers," he says.

More and more people are doing just that, driving a trend that is closely related to increased state activity on the chemicals front. "With these environmental chemicals that historically have been regulated as hazardous substances, we are now seeing more private litigants asserting tort claims," says McNeil. "The wall between the traditional environmental regulatory enforcement lawsuits and the private tort lawsuits is breaking down."

That risk is underscored by several trials over the past year or so in which companies were sued for damages allegedly caused by chemicals or pesticides. "We've seen more lawsuits involving chemicals used for industrial purposes or even everyday consumer usage. We've also seen some pretty significant jury verdicts for exposure that were surprising to many observers—some in the tens of millions or even hundreds of millions of dollars," says McNeil. "And we are seeing early signs that the courts are not going to shut these types of claims down, at least in California." Often the science behind the claims of health risks from chemicals is far from settled. But, as always, scientific data is just one of many factors that go into the jury decision-making process. "If the class of plaintiffs is large, it can be hard to find a jury that's not going to be in some way sympathetic," McNeil says.

Indeed, more chemical class actions can be expected. "Plaintiffs' attorneys are advertising online and on television to find people who have used chemicals and may have associated health problems," McNeil says. What's more, there has been a fair amount of media coverage about relatively small concentrations of various chemicals being found in food products. While this has led to food-labeling lawsuits under California's Proposition 65 (see sidebar, page 16), McNeil says that it is not hard to imagine plaintiffs eventually considering trying to pursue class action personal injury claims stemming from the consumption of such foods.

Litigation: Faster and Less Predictable

In the past, there were relatively lengthy timelines associated with chemicals enforcement and litigation. Under the federal Superfund law, such lawsuits generally were put on hold until EPA action was complete—which in many cases meant a decade or even decades. But in 2018, a three-judge panel of the 3rd Circuit Court of Appeals ruled that a private lawsuit involving groundwater contamination could proceed without waiting for the completion of the EPA action, thus heralding a potential new type of litigation that may well shorten the timeline for companies facing such litigation.

"The timing of these things is changing, and so is the exposure," says McNeil. "It used to be a fairly straightforward exercise to determine your exposure in a lawsuit and plan your resources to match the expected exposure. But now you're talking about orders of magnitude differences in damages, especially with class actions—and things are much more unpredictable."

For companies, this "new normal" might well argue in favor of organizational shifts. "You may no longer have the luxury of parsing out work across your environmental lawyers, your government affairs group, and your litigation teams," says McNeil. "With the increasing speed and potential exposure associated with such litigation, it may take all three of these groups working together to manage risk exposure and litigation."

With states, regulators, and plaintiffs all focusing on chemicals across the stream of commerce, legal departments will want to stay alert to changes and evolving threats. "If I were a GC of a company that manufactures any sort of chemical that is used by consumers and could be linked to health conditions," says McNeil, "I would be planning now how to limit the company's liability as this litigation expands."