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LITIGATION UPDATE

KEY TEFLON CHEMICAL: CENTER OF LAWSUITS AND DEBATES

by Mary Ashby Brown*

INTRODUCTION

Perfluorooctanoic acid (“PFOA”) is everywhere – and in more ways than one would probably think. PFOA is an essential processing aid in the production of fluoropolymers, or high-density plastics, which are used to create computer chips and aerospace parts as well as everyday consumer products such as paints, food wrappers, stain-resistant furniture, carpets, paper products, weatherproof clothing, and Dupont’s Teflon® non-stick cookware.¹

PFOA is also disturbingly ubiquitous in the blood of the general population in the United States, and pervasive throughout the environment, even appearing in Arctic animals.² In February 2006, researchers at Johns Hopkins University found PFOA present in the umbilical cord blood of 99 percent of 300 newborn infants.³ The chemical is bioaccumulative, meaning it remains in human bodies and in the environment for an extended period of time.⁴

Despite its widespread prevalence in the environment and in blood, there is no scientific consensus on how PFOA enters the system, or on its toxicity in humans. In addition, although it is known that the chemical has been deliberately released through factory emissions, it is not clear how consumer products might degrade to release PFOA.⁵ Studies to understand the chemical, its pathways, and human toxicity are underway, but the production and release of PFOA is currently unregulated by the government.

THE EPA’S INVESTIGATION OF PFOA

Concern over the prevalence of PFOA in human blood and in the environment, the lack of understanding concerning the chemical’s pathways, as well as studies linking PFOA to cancer in lab animals, prompted the U.S. Environmental Protection Agency (“EPA”) to begin formal investigation of the chemical in 2003.⁶ During the investigation, evidence released in a separate lawsuit revealed that DuPont – the largest North American producer of PFOA – failed to report data to the EPA regarding the presence of the chemical in human fetal cord blood and local tap water for more than

twenty years.⁷ The EPA charged DuPont with two violations of the Toxic Substances Control Act (“TSCA”) section 8(e), legislation which requires companies to report within fifteen days any evidence that a chemical may pose a substantial health risk.⁸

Most seriously, DuPont withheld information that PFOA could be transferred from a woman to her fetus via the placenta, the rate of this transfer, and levels of PFOA in newborns and two-year olds.⁹ In 1981, DuPont scientists at a West Virginia Teflon® plant found PFOA in blood samples taken from pregnant Teflon® plant workers as well as in local drinking water.¹⁰

In addition, DuPont failed to report serious birth defects in two infants who were monitored by company medical staff.¹¹

The EPA settled its case against DuPont in December 2005 for \$10.25 million in administrative fines, the largest environmental penalty ever won by the EPA.¹² DuPont pledged another \$6.25 million to environmental programs.¹³ The company main-

tains that it did not intentionally withhold information from the EPA, and thus did not admit legal liability.¹⁴

RECENT DEVELOPMENTS BETWEEN THE EPA AND DUPONT

In January 2006, the EPA launched a landmark voluntary stewardship program, enlisting DuPont and seven other companies to reduce their emissions of PFOA and its presence in consumer products by 95 percent of year 2000 levels by 2010, and aiming toward 2015 for its elimination.¹⁵ Although DuPont continues to hold that PFOA is non-toxic and undetectable in its Teflon products when used normally, the company agreed to the EPA program citing that “the presence of PFOA in people’s blood raises questions that should be addressed.”¹⁶

DuPont’s cooperative response proved timely – only two days later, after reviewing the EPA’s draft risk assessment of PFOA, the agency’s Science Advisory Board (“SAB”) deter-

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mined that the EPA should classify PFOA as a likely carcinogen; a recommendation that exceeds the EPA's assessment that there is only suggestive evidence that PFOA is carcinogenic.¹⁷ The SAB recommended that, in order to provide a more scientifically rigorous risk assessment of PFOA, the EPA should conduct a heightened investigation of the links between PFOA and liver, testicular, pancreatic, and breast cancers, as well as the chemical's effects on the nervous and immune systems.¹⁸

CONCLUSION: IS THE REAL DANGER IN TSCA?

Should the public be made to wait for increased information on PFOA through the EPA's PFOA risk analysis, until the chemical, omnipresent in the environment and in the bloodstream, is (or is not) determined to be toxic to humans? Critics like the Environmental Working Group ("EWG") argue that such a delay is unacceptable, and that the TSCA is to blame for this dangerous lag.¹⁹ Under TSCA, the EPA has few options to gain information on potentially harmful chemicals other than initiating largely voluntary consultations with

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chemical companies.²⁰ These options render TSCA a largely toothless statute,²¹ according to the EWG.

The EPA is, however, moving to add PFOA to the list of Toxic Release Inventory, which would give the EPA regulatory authority to track the release of PFOA in the environment by requiring companies to report emissions of the chemical.²² The EPA will likely classify PFOA as a persistent, bioaccumulative, and toxic ("PBT") chemical, which requires reporting of the chemical in smaller releases than non-PBT chemicals.²³

Nevertheless, the EPA is still a long way away from limiting production and/or banning the chemical. Currently, only five chemicals out of 80,000 chemicals in commercial use are regulated by the government: PCBs, halogenated chlorofluoroalkanes, dioxin, asbestos, and hexavalent chromium.²⁴ For PFOA to take a place among this list, the EPA will likely require much more research on the dangers and toxicity of PFOA, an effort which is only newly underway in the year 2006 – more than 50 years after the chemical was first produced.



ENDNOTES: LITIGATION UPDATE

¹ Environmental Protection Agency ("EPA"), *Perfluorooctanoic Acid (PFOA), Fluorinated Telomers; Request for Comment, Solicitation of Interested Parties for Enforceable Consent Agreement Development*, Meeting Notice, 68 Fed. Reg. 18626 (April 16, 2003) available at <http://www.epa.gov/fedrgstr/EPA-TOX/2003/April/Day-16/t9418.htm> (last visited Mar. 29, 2006); see also Environmental Working Group, *PFCs: A Family of Chemicals that Contaminate the Environment, PFOA and other PFCs Come from Common Products in Every Home*, <http://www.ewg.org/reports/pfcworld/part1.php> (last visited March 27, 2006).

² David Kestenbaum, *DuPont Settles EPA Case on Teflon Chemical*, NATIONAL PUBLIC RADIO'S MORNING EDITION (Dec. 15, 2005), available at http://www.ewg.org/news/story.php?print_version=1&id=4862 (last visited Mar. 29, 2006).

³ Tom Pelton, *Teflon Chemical Found in Infants*, BALTIMORE SUN, Feb. 6, 2006, at 1A.

⁴ EPA, *supra* note 1.

⁵ EPA, *supra* note 1.

⁶ EPA, *supra* note 1.

⁷ Environmental Working Group ("EWG"), *EPA Finds DuPont Guilty of Withholding Teflon Blood and Water Pollution Studies* (July 15, 2004), available at http://www.ewg.org/issues/pfcs/tscas8e_teflon/index.php (last visited Mar. 29, 2006).

⁸ Press Release, EPA, *EPA Takes Enforcement Action Against DuPont for Toxic Substances Reporting Violations* (July 8, 2004), available at <http://www.epa.gov/newsroom/newsreleases.htm>, follow link to "pesticides and toxic chemicals" (last visited Mar. 13, 2006); Toxic Substances Control Act (TSCA), 15 USCS §2601- 2692 (2003).

⁹ Kestenbaum, *supra* note 2.

¹⁰ Press Release, *supra* note 8.

¹¹ EWG, *DuPont Has Withheld Company Study From EPA for 22 Years* (April 11, 2003) available at <http://www.ewg.org/issues/pfcs/20030411/index.php> (last visited Mar. 20, 2006).

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14, 2005) available at <http://www.epa.gov/newsroom/newsreleases.htm>; follow link to "pesticides and toxic chemicals." (last visited Mar. 29, 2006).

¹³ Juliet Eilperin, *DuPont, EPA Settle Chemical Complaint*, WASH. POST, Dec. 15, 2005, at D03.

¹⁴ Eilperin, *id.*

¹⁵ EPA, 2010/15 PFOA Stewardship Program, <http://www.epa.gov/oppt-intr/pfoa/pfoastewardship.htm> (last visited Mar. 29, 2006) [hereinafter PFOA Stewardship Program].

¹⁶ Letter from Susan M. Stalneck, Vice President of DuPont, to Stephen L. Johnson, EPA Administrator (Jan. 25, 2006), available at <http://www.epa.gov/oppt/pfoa/commitments.htm> (last visited Mar. 13, 2006).

¹⁷ Marian Burros, *As Teflon Troubles Pile Up, DuPont Responds with Ads*, NEW YORK TIMES, Feb. 8, 2006, at F6; Randall Chase, *Review Panel: Teflon Chemical a Likely Carcinogen*, ASSOCIATED PRESS, (Jan. 31, 2006) available at www.ewg.org/news/story.php?print_version=1&id=4999 (last visited Mar. 29, 2006) [hereinafter Chase].

¹⁸ Chase, *id.*

¹⁹ Ken Cook, *Nonstick Chemicals Raise Sticky Questions*, SCRIPPS HOWARD NEWS SERVICE (Feb. 3, 2006) available at www.ewg.org/news/story.php?print_version=1&id=5027 (last visited Mar. 29, 2005).

²⁰ Cook, *id.*

²¹ Cook, *id.*

²² PFOA Stewardship Program, *supra* note 15.

²³ Pat Phibbs, *EPA asks Eight Firms to Reduce Releases of PFOA*, ENVIROWIRE NEWS FEATURE, AIR AND WASTE MANAGEMENT ASSOCIATION, available at <http://www.awma.org/pubs/envirowire/article.asp?id=1045> (last visited Mar. 29, 2006).

²⁴ Amy Cortese, *Will Environmental Fear Stick to DuPont's Teflon?* N.Y. TIMES (July 24, 2005) available at <http://www.ewg.org/news/story.php?id=4283> (last visited Mar. 29, 2006).