

TSCA Litigation in the Biden Era

December 8, 2021

Herb Estreicher



- ◆ Herbert (Herb) Estreicher is a prominent environmental lawyer who is listed in Who's Who Legal: Environment and in Marquis Who's Who in America. Herb holds a PhD in Chemistry from Harvard University (1980) in addition to his U.S. law degree (1988). He is also listed as a foreign lawyer (B List) with the Brussels legal bar. Herb is recognized as a leading expert on the Toxic Substances Control Act (TSCA) and is frequently quoted in Inside EPA, Chemical Watch, and BNA Environmental Law Reporter. He is one of the few U.S.-based lawyers that is expert on the EU REACH regulation and has successfully argued a number of cases before the European Chemicals Agency (ECHA) Board of Appeal and has briefed cases before the EU General Court and the European Court of Justice.
- ◆ Herb represents leading manufacturers of chemicals, pesticides, and consumer products. His broad practice in international environmental regulatory law allows him to take an interdisciplinary approach with his clients and their needs. His extensive background in organic chemistry, risk assessment, and bioengineering is valued highly by his clients in the chemical, nanotechnology, and biotechnology industries.
- ◆ Herb provides advice on product liability risk control and assists his clients with crisis management for embattled products, including wood preservatives and persistent, bioaccumulative, and toxic (PBT) chemicals. He helps his clients secure and maintain chemical approvals and pesticide registrations in Canada and Europe, advises clients on matters involving the Canadian Environmental Protection Act and on European chemical directives such as the EU Registration, Evaluation and Authorization of Chemicals (REACH) regulation, the Classification, Labelling and Packaging (CLP) regulation, and the Biocidal Products Regulation. Herb also represents clients in matters involving the Stockholm Convention on persistent organic pollutants (POPs) and has participated in the Canadian Strategic Options Process (SOP). He counsels clients on matters concerning sustainability and the circular economy.

Eric Gotting



- ◆ Eric Gotting represents Keller and Heckman's clients in litigation and related matters, specializing in complex civil and appellate matters, internal investigations, and regulatory compliance. With an extensive background in environmental law, he has expanded his practice over the years to cover many of Keller and Heckman's industry sectors and regulatory areas. Eric is a former Am Law 50 litigation partner and U.S. Department of Justice, Civil Division, Trial Attorney.
- ◆ Eric's practice spans a broad range of legal issues, including administrative and constitutional law, agency enforcement actions, toxic torts, product liability, general business litigation, and regulatory advice. He works with a diverse set of industries, including chemicals, plastics, pesticides, fuels and pipelines, food and packaging, consumer goods, telecommunications, and e-cigarettes.
- ◆ As a litigator, Eric has tried cases to verdict and argued appeals before federal and state courts across the country. His experience includes class actions, mass tort litigation, AAA arbitrations, and agency proceedings. Eric has also litigated challenges to federal and state statutes, regulations, and orders. He has particular expertise involving the Administrative Procedure Act (APA), the Dormant Commerce Clause, the First Amendment, the Due Process Clause, and federal preemption. He has also filed amicus briefs in litigation involving regulatory issues facing a variety of industry sectors.
- ◆ For his toxic tort clients, Eric has defended claims involving all environmental media, including drinking water, soil, groundwater, and air. He has worked with, and defended against, experts in numerous scientific and business-related fields, including toxicology, geochemistry, hydrogeology, structural engineering, neuropsychology, health physics, survey techniques, statistics, real estate appraisal, and environmental remediation. He has extensive experience litigating toxic tort cases involving claims of personal injury and property damage from alleged exposures to volatile and semi-volatile compounds, specialty chemicals, pesticides, gasoline, radioactive waste, and heavy metals.

Major On-Going TSCA Litigation

◆ Risk Evaluations

- ◆ Methylene Chloride
- ◆ HBCD
- ◆ 1,4-dioxane

◆ Risk Management Rule

- ◆ decaBDE

◆ Asbestos Risk Evaluation

- ◆ Parts 1 and 2

Risk Evaluations – Three Proceedings



◆ Methylene Chloride

- ◆ Neighbors for Environmental Justice, et al. v. EPA (20-72091)
- ◆ State of New York, et al. v. EPA (20-73276)

◆ HBCD

- ◆ Alaska Cmty. Action on Toxics v. EPA (20-73099)
- ◆ California Prof. Firefighters, et al. v. EPA (20-73578)
- ◆ UAW v. EPA (21-70009)

◆ 1,4-dioxane

- ◆ Environmental Defense Fund, et al. v. EPA (21-70162)
- ◆ State of New York, et al. v. EPA (21-70684)
- ◆ Center for Environmental Health, et al. v. EPA (21-70194)
- ◆ UAW v. EPA (21-70930)
- ◆ Labor Council for Latin American Advancement v. EPA (21-70727)

Risk Evaluations – Consistent Themes



◆ EPA Policy Choices or Approaches

- ◆ Personal Protective Equipment (PPE)
- ◆ Susceptible subpopulations
- ◆ Exposure pathways (air, drinking water, soil)
- ◆ Use-by-Use vs. “Whole” chemical approach

◆ Case-by-Case Issues

- ◆ Health and safety information
- ◆ Combined exposures
- ◆ Disease endpoints

Risk Evaluations – Remand Request

- ◆ **EPA request for remand without vacatur**
 - ◇ Executive Order 13,990
 - ◇ Eliminate or narrow issues being litigated
 - ◇ Reconsider Trump policy choices and approaches
 - ◇ Allow for additional public comment
- ◆ **Petitioners' Opposition**
 - ◇ No EPA commitment to make changes or meet re-evaluation deadline
 - ◇ Continued exposures to chemical substances
 - ◇ Clarify outstanding questions for future risk evaluations
 - ◇ Preemption concerns
 - ◇ Request vacatur, deadlines, status reports

Risk Evaluations – 9th Cir. Remand



- ◆ **9th Cir. Grants EPA Remand Requests**
 - ◆ Remand without vacatur
 - ◆ Reconsideration on remand limited to findings of no unreasonable risk
 - ◆ Status reports to court due every 90 days
 - ◆ Hold case in abeyance pending outcome of reconsideration or otherwise ordered by the court

Risk Management Rule - PBT

- ◆ **decaBDE (flame retardant)**
 - ◇ Alaska Cmty. Action on Toxics v. EPA (21-70168)
 - ◇ Yurok Tribe, et al. v. EPA (21-70670)

- ◆ **Joint motion to complete briefing**
 - ◇ Briefing would be finished by end of June 2022

Risk Evaluation - Asbestos

◆ Two related proceedings

- ◆ Asbestos Disease Awareness Org. v. EPA (4:21-cv-03716) (ND Cal.)
- ◆ Asbestos Disease Awareness Org. v. EPA (21-70160) (9th Cir.)

◆ Lawsuits Challenge “Part 1” Risk Evaluation

- ◆ ND Cal. proceeding seeks order to complete “Part 2”
- ◆ 9th Cir. proceeding challenges limited consideration under “Part 1”

◆ Settlement

- ◆ ND Cal. Consent Decree requires “Part 2” by December 2024
- ◆ 9th Cir. Order holding case in abeyance until “Part 2” completed

TSCA SECTION 21 PETITIONS POST-TRUMP ERA

Chemical Mixtures in Cosmetics



- ◆ On August 16, 2021, EPA received a petition under section 21 of TSCA from an individual.
- ◆ The petition requests EPA determine “that the chemical mixtures contained within cosmetics present an unreasonable risk of injury to public health and the environment.”
- ◆ The petition also seeks issuance of a rule or order to “eliminate the hazardous chemicals used in mixtures” for cosmetic products.
- ◆ EPA denied the request to initiate a rule under TSCA section 6(a) because a cosmetic is not a product that can be regulated under TSCA section 6(a) and
- ◆ Because the petition did not demonstrate facts that could support an EPA determination of unreasonable risk to the environment from cosmetic disposal.

Chemical Mixtures in Cigarettes



- ◆ On August 2, 2021, EPA received a petition under section 21 of TSCA from an individual.
- ◆ The petition requests EPA determine “that the chemical mixtures contained within cigarettes present an unreasonable risk of injury to health and the environment.”
- ◆ The petition also seeks issuance of a rule or order to “eliminate the hazardous chemicals used in a mixture with tobacco” and to “develop material techniques of biodegradation to counter or reduce” environmental risk from current disposal methods of cigarettes.
- ◆ EPA denied the petition because cigarettes are not a product that can be regulated under TSCA section 6(a).

Phosphogypsum and Process Wastewater



- ◆ On February 8, 2021, EPA received a petition under section 21 of TSCA from various NGOs.
- ◆ The petition requests EPA initiate the prioritization process for a phosphogypsum and process wastewater risk evaluation under TSCA section 6, issue a TSCA section 4 testing rule for disposed phosphogypsum, and issue a TSCA Significant New Use Rule under TSCA section 5 for phosphogypsum used in road construction.
- ◆ EPA found that the petitioners did not, as required by the law, provide facts to demonstrate that there is insufficient information on the effects of phosphogypsum and process wastewater on health or the environment and did not show that the testing requested under the petition is necessary to develop that information.
- ◆ As a result, EPA denied the petitioners' request for EPA to issue a TSCA section 4 testing rule.

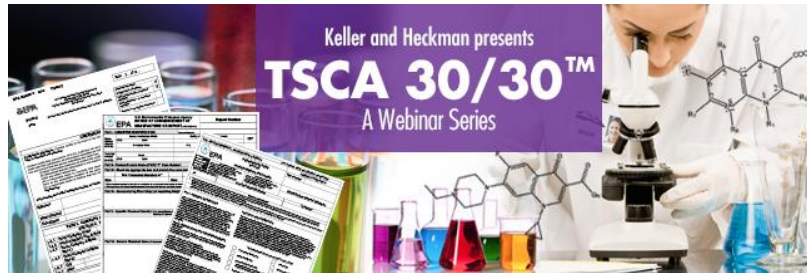
54 Per- and Polyfluoroalkyl substances (PFAS)



- ◆ On October 14, 2020, EPA received a petition under section 21 of the Toxic Substances Control Act (TSCA) from NGOs requesting EPA require health and environmental effects testing on 54 Per- and Polyfluoroalkyl Substances (PFAS).
- ◆ The petition also seeks issuance of a rule or order under Section 4 of TSCA compelling the manufacturer of the PFAS to fund and carry out this testing under the direction of a panel of independent scientists.
- ◆ EPA has determined that the petition has not provided the facts necessary for the agency to determine for each of the 54 PFAS that existing information and experience are insufficient and testing is necessary to develop such information.
- ◆ As a result, EPA denied the petition on January 7, 2021.



Please join us at 1:35 PM Eastern U.S.
Wed. February 9, 2022
www.khlaw.com/REACH-3030



Please join us at 1:00 PM Eastern U.S.
Wednesday, January 12, 2022
www.khlaw.com/TSCA-3030



Please join us at 1:00 PM Eastern U.S.
Wednesday, December 15, 2021
www.khlaw.com/OSHA3030



Please join us at 3:00 PM Eastern U.S.
Thursday, December 9, 2021
www.khlaw.com/events/ada-website-accessibility-lawsuits-current-legal-landscape-and-risk-mitigation-strategies



Thank You

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