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By Keshia Clukey

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N.Y. Sues Chemours, DuPont, 3M Over PFAS Contamination (2)

By Keshia Clukey 2019-11-05T15:47:05000-05:00

State alleges manufacturers knew the health, environmental risk of chemicals in firefighting foam

Lawsuit calls for creation of fund to pay for future damages

New York state's attorney general is suing The Chemours Co., 3M Co., DuPont de Nemours Inc. and other companies for their alleged role in making and selling persistent chemicals that are environmental contaminants.

The lawsuit, filed in state Supreme Court in Albany by the office of Attorney General Letitia James, claims toxic substances in the manufacturers' products, specifically foam used for firefighting, threatened public health and damaged the state's natural resources.

The aqueous film-forming foam, known as AFFF, contains per- and polyfluoroalkyl substances, or PFAS, including PFOS, a type of PFAS commonly found in contamination from the use of firefighting foam.

PFAS chemicals have caused contamination problems in drinking water supplies in cities and towns across the nation and are now the subject of numerous lawsuits.

### **Getting 'More Aggressive'**

This is New York's most significant legal action to address contamination from makers of "forever chemicals." The substances are increasingly becoming a state-level issue in the absence of comprehensive federal action.

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New York's new lawsuit appears similar to previous legal action, Matthew J. Schroeder, a Dallas-based commercial litigator with Akerman LLP who represents industry clients that could face PFAS liability, said, adding that the volume of new litigation is notable.

"It appears to me the State of New York is getting more aggressive in its pursuit of AFFF manufacturers and distributors, as are many other states that have already brought similar claims," he said in an email.

Ralph A. DeMeo, who represents businesses in other PFAS legal action, said the state's case could prompt more litigation elsewhere.

"If they're successful there, I think that's probably going to be what more and more states do," said DeMeo, a shareholder at Baker, Donelson, Bearman, Caldwell & Berkowitz PC.

In its most recent lawsuit, the state is looking to recover costs incurred in investigating, monitoring, remediating, and responding to injuries and threats to the health and environment caused by the AFFF products, according to the complaint.

The state also calls for relief in the form of a monetary fund to pay for expected future damages related to the contamination.

#### **Also Named in Complaint**

New York state's Nov. 4 complaint also names Tyco Fire Products LP, Chemguard Inc., Buckeye Fire Equipment Co., National Foam Inc., Kidde-Fenwal Inc., Amerex Corp., and Fire Service Plus Inc.

"3M acted responsibly in connection with its manufacture and sale of AFFF (aqueous film-forming foam) and will vigorously defend its record of environmental stewardship," the company said in an emailed statement.

Chemours hasn't yet reviewed the lawsuit, but it "has never manufactured, formulated or sold firefighting foam," the company said in a statement. "We have never manufactured or used PFOS at any of our sites. Furthermore, Chemours has never made or sold PFOA as a commercial product, or used PFOA as a processing aid."

Chemours in a third quarter earnings presentation Nov. 5 said it is a "minor player" in lawsuits involving PFOS, and its contribution to the chemical in the environment through firefighting foams is "negligible, if at all."

Fraser Engerman, a spokesman for Tyco and Chemguard, said the two companies "acted appropriately and responsibly at all times in producing our firefighting foams. We make our foams to exacting military standards, and the U.S. military and civilian firefighters have depended for decades on these foams to

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The products played a role in contaminated water, and identifies 18 sites across the state, according to the lawsuit.

The complaint alleges that DuPont, Chemours, and the manufacturers should have known that AFFF products and PFAS would “very likely injure and/or threaten public health and the environment.”

The companies also should have known that the products dissolve easily in water, have long shelf lives, and tend to bioaccumulate in the blood, meaning they can build up and stay in the blood of the general population, according to the complaint.

“On information and belief, Manufacturers’ and DuPont/Chemours’ conduct involved actual malice or wanton, willful, and reckless disregard for the health, safety, and rights of others. The Court should award the State punitive damages in an amount sufficient to deter and punish such conduct,” the complaint says.

New York in June 2018 filed a similar lawsuit against manufacturers over firefighting foam. That lawsuit named 3M, Tyco Fire Products, National Foam, Buckeye Fire Equipment, Kidde-Fenwal, and Chemguard. The state in that suit is seeking at least \$39 million for the cost of cleaning up toxic chemical residues.

State lawmakers in June of this year passed a measure (A.445/S.439) that would prohibit the use of PFAS in firefighting foam and equipment. The bill is still being reviewed by the governor’s office, according to a spokesman.

The state case is *New York v. 3M Co.*, N.Y. Sup. Ct., docket number unavailable, 11/4/19 .

—With assistance from David Schultz and Ellen M. Gilmer.

(Adds statement from Tyco, Chemguard in 17th paragraph.)

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