



## **American Tort Reform Association**

1101 Connecticut Ave, NW ■ Suite 400 ■ Washington, DC 20036  
(202) 682-1163 ■ Fax: (202) 682-1022 ■ [www.atra.org](http://www.atra.org)

**SHERMAN JOYCE** is President of the American Tort Reform Association (ATRA), a national coalition of more than 300 non-profit organizations, professional societies, trade associations and corporations working through in-state coalitions to bring fairness and efficiency to the civil justice system. As President of ATRA, Mr. Joyce is the Association's Chief Executive Officer and a member of its Board of Directors. Mr. Joyce assumed his current position in 1994.

Upon graduation from Princeton University, Mr. Joyce served as a legislative assistant to U.S. Senator John C. Danforth (R - MO) until 1984. Following graduation from Catholic University Law School, he served as minority counsel to the Subcommittee on Science, Technology, and Space of the Senate Committee on Commerce, Science, and Transportation from 1987 to 1989.

Mr. Joyce then moved within the Commerce Committee staff to become minority counsel to the Subcommittee on the Consumer. In that capacity, he was the lead Republican staff member on legislation to establish uniform rules for product liability law. In addition, he advised Senators on issues pertaining to product safety, antitrust law, advertising, and consumer and telemarketing fraud.

Mr. Joyce has appeared on numerous television and radio programs to discuss civil justice issues and he has been quoted extensively in newspapers across the country.

In late 2005, Mr. Joyce was elected to the Board of Directors of the Texas Civil Justice League and in 2006, he was appointed to the Board of Trustees of the Landon School in Bethesda, Maryland, and served as its Chairman from 2011 to 2014.

*The American Tort Reform Association (ATRA) is the only national organization dedicated exclusively to tort and liability reform through public education and the enactment of legislation. ATRA's membership includes non profits, small and large companies, as well as state and national trade, business, and professional associations.*

[www.atra.org](http://www.atra.org)

**Prepared Testimony of Sherman Joyce  
President, American Tort Reform Association**

**Before the House Committee on Oversight and Reform  
Subcommittee on Environment**

**Hearing on  
“Toxic, Forever Chemicals: A Call for Immediate Federal Action on PFAS”**

**November 19, 2019**

Mr. Chairman, Ranking Member Comer, and Members of the Subcommittee, thank you for inviting me to speak today on behalf of the American Tort Reform Association (ATRA).

ATRA is a Washington, DC-based membership association of large and small businesses, physician groups, nonprofits, and trade and professional associations having as its mission the establishment of a predictable, fair, and efficient civil justice system through the enactment of legislation and through public education.

Every day we are exposed to contaminants in the air we breathe, the water we drink, and the food we eat. We rely on experts in federal agencies, with authority granted by Congress, to make science-based decisions on the levels of a substance that can cause harm and to take action to address health and environmental concerns. Problems arise when these decisions are not made by experts based on reliable science and the public interest, but are driven by self-interested plaintiffs’ lawyers through fearmongering. As testing technology emerges that is able to detect increasingly minute levels of substances, it becomes even more critical to ensure that policy and liability is based on sound science, not the mere presence of a chemical or other substance at a microscopic level. It is also troubling when the civil justice system is used today to punish businesses for making products decades ago that had substantial public benefits and, in some cases, were developed or demanded by the government itself.

Per- and polyfluoroalkyl substances (PFAS) are an example of this phenomenon. As you know, PFAS is a large group of chemicals that were developed in the 1940s and have been used since the 1950s. They are valued for their ability to resist heat, repel water, and protect surfaces, their low-friction properties, and other benefits. These chemicals have been incorporated into a broad array of consumer products, such as nonstick cookware, stain-resistant carpet, and

electronics.<sup>1</sup> Surgical gowns and drapes incorporate PFAS to guard against fluid-borne pathogens, protecting patients and health care workers. PFAS are also incorporated into the uniforms and gear of chemical workers, firefighters, and military personnel. Because they help reduce friction, PFAS have been used in the aerospace, automotive, and building and construction industries. PFAS has also been a key component of firefighting foams (or aqueous film forming foam, AFFF). These foams extinguish aircraft and oilfield fires faster and provide more protection from re-ignition than the alternatives. They extinguish fuel fires on ships and airplanes. These products have saved the lives of first responders, military personnel, and others, while also protecting property. That is why the U.S. Navy, working with 3M, developed firefighting foams containing PFAS in the 1960s and patented the technology.<sup>2</sup> In a report to Congress just last year, the Department of Defense indicated that it continues to view firefighting foams as “mission critical” because they quickly extinguish petroleum-based fires.<sup>3</sup> The products are standard use at military installations and airports throughout the country.

Over time, as testing technology improved, traces of the substances, particularly PFOA and PFOS, were detected at low levels in groundwater as a result of disposal of products containing PFAS, firefighting foam use, or other discharge. As a result, companies began voluntarily phasing out production of PFOA and PFOS in 2000 and they are no longer made in the United States. About 99% of us have traces of PFAS in our blood.<sup>4</sup> This understandably raises concern, however, scientific evidence has not established that these minuscule levels of PFAS pose a risk to human health. As the U.S. Department of Health’s Agency for Toxic Substances and Disease Registry recognized just last year, “The available human studies have identified some potential targets of toxicity; however, cause-and-effect relationships have not been established for any of the effects, and the effects have not been consistently found in all studies.”<sup>5</sup> The Centers for Disease Control & Prevention has similarly emphasized that “[f]inding a measurable amount of PFAS in serum

---

<sup>1</sup> See U.S. EPA, Basic Information on PFAS, <https://www.epa.gov/pfas/basic-information-pfas>.

<sup>2</sup> See 3M, PFAS History, [https://www.3m.com/3M/en\\_US/pfas-stewardship-us/pfas-history/](https://www.3m.com/3M/en_US/pfas-stewardship-us/pfas-history/).

<sup>3</sup> Dep’t of Defense, Alternatives to Aqueous Film Forming Foam, Report to Congress, at 1 (June 2018), <https://www.denix.osd.mil/derp/home/documents/alternatives-to-aqueous-film-forming-foam-report-to-congress/>. The military is in the process of transitioning away from firefighting foams that incorporate PFOS or PFOA to products with “shorter chain” fluorosurfactants that are viewed as less harmful. See *id.* at 3-4.

<sup>4</sup> U.S. EPA, EPA’s Per- and Polyfluoroalkyl Substances (PFAS) Action Plan, at 9, Feb. 2019, [https://www.epa.gov/sites/production/files/2019-02/documents/pfas\\_action\\_plan\\_021319\\_508compliant\\_1.pdf](https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf).

<sup>5</sup> U.S. Dep’t of Health & Human Servs., Agency for Toxic Substances and Disease Registry, Toxicological Profile for Perfluoroalkyls: Draft for Public Comment, at 635-36 (2018), <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf>.

does not imply that the levels of PFAS cause an adverse health effect.”<sup>6</sup> The CDC cautions that “more research is needed to assess the human health effects” of PFAS.<sup>7</sup>

For plaintiffs’ lawyers, however, widespread exposure to PFAS, regardless of the science, means an unlimited population of potential clients. In fact, there is now a class action lawsuit brought on behalf of everyone in the United States who has a detectable level of PFAS in their blood. Just six weeks ago, a federal court denied a motion to dismiss this case, allowing it to move forward.<sup>8</sup> If certified, that would mean just about all of us in this room are a part of the lawsuit.

Other class action lawsuits seek medical monitoring on behalf of people who are “symptom-free and exhibit no indications of disease related to PFOA exposure.”<sup>9</sup> In addition, individual personal injury lawsuits blame a wide range of common health conditions on exposure to PFAS, such as ulcerative colitis, high cholesterol, high blood pressure, thyroid disease, and kidney and testicular cancer.

Earlier this year, ATRA released a report, “For Profit or for the Public Interest,” which documents how local government entities are increasingly accepting invitations from private plaintiffs’ law firms to bring lawsuits.<sup>10</sup> PFAS is one such burgeoning area. Plaintiffs’ lawyers are approaching states, towns, cities, and water districts to sue companies that made PFAS or firefighting foams, alleging they are responsible for traces of the substances in the drinking water supply and seeking costs ranging from cleaning wells to building new water treatment plants. There are now 125 lawsuits pending in federal multidistrict litigation related to firefighting foam, many of which have been brought by local government entities.<sup>11</sup> States are also continuing to file similar lawsuits through contingency-fee lawyers.<sup>12</sup> Observers say “we may be seeing just the tip

---

<sup>6</sup> Centers for Disease Control & Prevention, Per- and Polyfluorinated Substances (PFAS) Factsheet, [https://www.cdc.gov/biomonitoring/PFAS\\_FactSheet.html](https://www.cdc.gov/biomonitoring/PFAS_FactSheet.html).

<sup>7</sup> *Id.*

<sup>8</sup> Opinion and Order, *Hardwick v. 3M Co.*, No. 2:18-cv-1185 (S.D. Ohio Sept. 30, 2019).

<sup>9</sup> *Burdick v. Tonoga, Inc.*, 2018 NY Slip Op 51075(U) (N.Y. Sup. Ct., Rensselaer County, July 3, 2018) (granting certification of four classes stemming from alleged PFAS in drinking water of the Town of Petersburg, New York).

<sup>10</sup> Am. Tort Reform Ass’n, For Profit or for the Public? The Rise in Contingency-Fee Lawsuits by Local Governments, at 5 (2019), <https://agsunshine.com/for-profit-or-for-the-public-the-rise-in-contingency-fee-lawsuits-by-local-governments/>.

<sup>11</sup> U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending, Oct. 15, 2019 (*In re: Aqueous Film-Forming Foams Products Liab. Litig.*, MDL-2873, D. S.C.).

<sup>12</sup> See, e.g., John O’Brien, *Michigan Hires Private Lawyers also Pushing Opioid Cases for PFAS Lawsuit*, Legal Newsline, Oct. 23, 2019; Dave Solomon, *Six Law Firms to Represent State in Lawsuit Over PFAS*, N.H. Union Leader,

of the PFAS litigation iceberg” given that there are hundreds of PFAS compounds and technology may emerge to detect them at low levels.<sup>13</sup>

What led to this sudden gush of PFAS litigation, particularly when these chemicals have been present in the environment for many years? Toxic tort lawyers, scientists, and environmental consultants observe that “there appears to be little new scientific support that justifies newfound concern regarding this class of chemicals. Indeed, some of the new data appear to indicate that PFAS pose a lower risk to human health and the environment than previously believed.”<sup>14</sup>

The amount of litigation seems to have picked up after 3M settled a claim with Minnesota for \$850 million (the state had sought \$5 billion) in February 2018.<sup>15</sup> As that lawsuit headed to trial, the State of Minnesota’s own Department of Health found no apparent health effects from PFAs exposure, reaffirming conclusions it reached in 2007 and 2015.<sup>16</sup> After reexamining 25 years of data comparing cancer incidence rates in communities allegedly tainted by PFAS with other areas of the state, the agency found the overall cancer rate “virtually identical” to the statewide average.<sup>17</sup> According to Alan Bender, an associate professor at the University of Minnesota and Health Department official, the agency’s analysis relied on data that was “far superior” to the expert testimony the state planned to rely upon at trial.<sup>18</sup> The February 2018 settlement ended eight years of litigation with a fund that is supposed to be used to finance projects that involve drinking water and water sustainability, but may also be used to build new fishing piers and trails in the state.<sup>19</sup> In the aftermath of the settlement, the state’s attorney general, Lori Swanson, came under fire because she had hired outside lawyers to bring the lawsuit rather than use the

---

June 23, 2019; Karen Kidd, *New Jersey Using Contingency Fee Lawyers to Take Lead In PFAS Litigation*, Legal Newsline, Apr. 9, 2019.

<sup>13</sup> James P. Ray, *PFAS Litigation: Just Getting Started?*, ABA J., Mar. 1, 2019.

<sup>14</sup> Matthew Thurlow, Russ Abell & Stephen Zemba, *PFAS Contamination Remains a Hot-Button Issue: Overview of Recent Regulatory, Litigation, and Technical Developments*, ABA J., Dec. 15, 2017, [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/eltt/20171215-pfas-contamination/](https://www.americanbar.org/groups/environment_energy_resources/publications/eltt/20171215-pfas-contamination/).

<sup>15</sup> Tiffany Kary, *3M Settles Minnesota Lawsuit for \$850 Million*, Bloomberg, Feb. 20, 2018.

<sup>16</sup> Bob Shaw, *Minnesota vs. Minnesota: Agency Pushes Back in \$5 Billion 3M Suit*, St. Paul Pioneer Press, Feb. 19, 2018.

<sup>17</sup> See Minn. Dep’t of Health, *Brief Update on Cancer Occurrence in East Metro Communities* (Feb. 2018), <https://www.health.state.mn.us/data/mcrs/docs/rpteastmetro.pdf>.

<sup>18</sup> Shaw, *supra*.

<sup>19</sup> Mark Reilly, *GOP Legislators Want a Say in \$850M 3M Settlement*, Minneapolis / St. Paul Bus. J., Mar. 6, 2018.

government's own publicly-paid attorneys.<sup>20</sup> As a result, \$125 million of the \$850 million settlement will go to pay the contingency fees of private lawyers.<sup>21</sup> That amount, according to a Minnesota legislator, was the equivalent of earning \$47,000 per day for seven years.<sup>22</sup>

Congress should also be cautious as it considers any proposal to broadly designate PFAS compounds as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund. CERCLA is intended promote prompt cleanup of contaminated sites based on sound science.<sup>23</sup> It is beyond dispute that CERCLA is anything but efficient. Under CERCLA, litigation can drag on for years, which is good for lawyers, but not necessarily the public, the environment, or the economy. As EPA Administrator Carol Browner observed back in 1994, under CERCLA, “a lot of time and money is taken up with companies suing each other over how much they owe to clean up a particular site.”<sup>24</sup> That remains true today. Before taking any action on whether to designate PFAS as hazardous under CERCLA, there needs to be a better understanding of which, if any, substances in this class of thousands of chemicals actually pose a threat to the environment and human health and at what levels. CERCLA's problems should not be compounded by Congress jumping ahead of the EPA to effectively ban all PFAS—triggering the potential for numerous new brownfield sites and massive liability exposure—unless that action is backed by reliable science.

Even after a business has agreed to fund a cleanup under CERCLA, it still may be subject to lawsuits. That is precisely what occurred in a case set for oral argument in two weeks before the U.S. Supreme Court, *Atlantic Richfield Co. v. Christian*, No. 17-1498. That case involves an old industrial site at which arsenic and other hazardous substances are present as a result of a century of copper smelting. The EPA designated the area affected by the Anaconda Smelter a Superfund site in 1983 and, with public participation, developed a comprehensive remediation plan detailing Atlantic Richfield's cleanup responsibilities. During the implementation of that plan, a group of property owners filed a lawsuit in state court, seeking money for restoration beyond the EPA

---

<sup>20</sup> Kirsti Marohn, *Fees for Outside Law Firms Irk Minnesota Legislators*, Minn. Public Radio, May 4, 2018, <https://www.mprnews.org/story/2018/05/04/fees-for-outside-law-firms-irk-minnesota-legislators>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (quoting Rep. Sarah Anderson, R-Plymouth).

<sup>23</sup> *See, e.g.*, S. 1790, National Defense Authorization Act for Fiscal Year 2020.

<sup>24</sup> Remarks to U.S. Chamber of Commerce Policy Insiders Breakfast, Feb. 16, 1994.

plan—even including actions that the EPA specifically considered and rejected. The Montana Supreme Court permitted these claims to move forward,<sup>25</sup> allowing anyone to second-guess the EPA’s superfund remediation decisions through state tort law. Throwing lawsuits on top of a federal superfund plan creates uncertainty and imposes conflicting obligations on companies that are attempting to cleanup a site. The Supreme Court is expected to decide whether federal law preempts state law claims that interfere with CERCLA. It seems that a fairer and more efficient system is needed to expedite clean ups.

I am not here as an expert on PFAS, the science examining how PFAS may affect human health, or environmental remediation. I am here as an advocate for a balanced, fair, and predictable civil justice system. Experience shows that lawsuits can get ahead of science. When that happens, extraordinary liability may be placed on employers for making products that the public wanted, that the government demanded, and that had significant—even lifesaving—benefits. Companies may stop making beneficial products, or hesitate to innovate and bring new products to market, due to the fear of liability. If certain types of PFAS cause harm, then the EPA should identify them, set scientifically-supported standards, and require cleanup of sites found to have unsafe levels. What is inappropriate, however, is for a barrage of lawsuits to retroactively set standards that vary from case-to-case and to be based more on fear than science.

In addition, ATRA has long been concerned with class action lawsuits seeking medical monitoring on behalf of people who have been exposed to a potentially hazardous substance, but who are not sick, as we are now seeing in PFAS litigation. These types of lawsuits are antithetical to the tort system, which exists to make injured people whole, not to award money for speculative risks of future harm.<sup>26</sup> As the U.S. Supreme Court aptly observed, allowing medical monitoring claims absent actual physical injury could permit literally “tens of millions of individuals” to “justify some form of substance-exposure-related medical monitoring.”<sup>27</sup>

In sum, Mr. Chairman and members of the subcommittee, lawsuits and liability should not get out front of science. My understanding is that the EPA is implementing an action plan for addressing PFAS and protecting public health. This plan includes setting a maximum contaminant

---

<sup>25</sup> *Atlantic Richfield Co. v. Mont. Second Jud. Dist. Ct.*, 408 P.3d 515 (Mont. 2017).

<sup>26</sup> See Victor E. Schwartz et al., *Medical Monitoring: The Right Way and The Wrong Way*, 70 Mo. L. Rev. 349 (2005).

<sup>27</sup> *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997) (rejecting medical monitoring claims brought by asymptomatic pipefitters who alleged exposure to asbestos);

level (MCL) for PFOA and PFOS, developing groundwater cleanup strategies, and supporting research on toxicity of PFAS, and water treatment and remediation where found, among other actions.<sup>28</sup> That science-based process should continue. What we should not embrace is a civil justice system in which detection of any microscopic level of a substance in the air, water, or our bodies leads to massive environmental and tort liability for any company associated with that substance—unless science indicates that the level of exposure causes harm.<sup>29</sup> It is counterproductive to impose liability on manufacturers that develop products providing substantial public benefits based on fear and understandable, but not scientifically-substantiated, concerns.

Thank you again for the opportunity to testify before you today. I welcome your questions.

---

<sup>28</sup> See U.S. EPA, EPA's PFAS Action Plan (Feb. 2019), <https://www.epa.gov/pfas/epas-pfas-action-plan>.

<sup>29</sup> Indeed, plaintiffs' lawyers have attempted to use the theory that "any exposure" to a potentially hazardous substance gives rise to a tort claim in a wide range of litigation. In addition to PFAS litigation, examples include asbestos claims, fluoride in denture cream, diesel fumes, diacetyl (popcorn) lung litigation, and groundwater cases involving MTBE and atrazine. William L. Anderson et al., *The "Any Exposure" Theory Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J.L. & Pub. Pol'y 1, 15-16 (2012). Critics observe that "[t]he theory allows cases to be brought that would otherwise have no merit because of the minimal exposure involved" and that "[c]ourts that engage in the proper level of review have repeatedly found that the any exposure theory is not supported by published, peer-reviewed articles and is at best litigation-driven speculation." *Id.* at 5, 16.