

Potential Impact of Science and Policy Decisions on the Scope of Tort Claims

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Alliance for Risk Assessment (ARA) workshop
October 18, 2023

Agenda

- PFAS litigation history
- Mass torts
 - Law & Economics literature
 - Advertising
- PFAS as a mass tort

PFAS litigation history

PFAS Litigation - 2004 DuPont settlement

- PFOA used in DuPont's Washington Works plastics facility in Parkersburg, WV
 - 1.7 million pounds of C-8 released between 1951 and 2003
 - Remediation decreased PFOA in drinking water from 1–20 ppb to less than 0.003 ppb
 - PFOA blood serum levels declined markedly over 20 years
- DuPont settled Leach class action for ~\$340 million
 - Per the settlement agreement, DuPont established a C-8 Science Panel to study “probable link” between PFOA and medical conditions
 - Panel found “probable link” and estimated relative risk for six medical conditions
 - DuPont subsequently settled ~3,500 PI claims for more than \$670 million

DuPont C-8 Science Panel study results

Disease	National incidence rate	C-8 relative risk
High cholesterol	11.80%	1.2
Ulcerative colitis	0.01%	2.2
Thyroid disease	0.50%	1.2
Kidney cancer	0.02%	1.3
Testicular cancer	0.01%	1.7
Pregnancy-induced hypertension	4.00%	2.6

Source: [CDC](#), [American Family Physician](#), [Endocrinology and Metabolism](#), [SEER](#), [SEER](#), [CDC](#), [C8 Probable Link Reports](#)

Public PFAS settlements

State	Settlement	Total settlement amount
MI	Zimmerman	\$54,000,000
NY	Baker	\$65,300,000
	Burdick	\$23,500,000
OH/WV	C8 MDL/Leach	\$1,013,000,000
VT	Sullivan	\$34,200,000
WI	AFFF TYCO	\$17,500,000

Recent public water system settlements in billions

- Aqueous Film Forming Foams (AFFF) multidistrict litigation (MDL)
 - 3M agreed to pay \$10.5–\$12.5 billion into a Qualified Settlement Fund
 - DuPont, Chemours, and Corteva settled for a collective ~\$1.2 billion
- Both settlements resolve lawsuits involving PWS that
 - Have detectable PFAS levels, or
 - Have PFAS contamination monitoring requirements by the EPA, or
 - Serve more than 3,300 people

Consumer protection litigation

- Consumer protection lawsuits
 - McDonalds: Alleged failure to warn of the use of forever chemicals in the fast-food chain's food packaging that resulted in injury to consumers (filed on **March 28, 2022**)
 - Thinx: Alleged that its underwear products, marketed as safe and sustainable, contained PFAS (filed **on May 25, 2022**)
 - REI: Alleged PFAS content in various waterproof clothing items, at odds with marketing as environmentally friendly and sustainable (filed on **October 28, 2022**)
 - Simply Juice (Coca-Cola): Alleged that Simply Tropical/Simply Orange was labeled and marketed as "All Natural" but contained PFAS (filed on **December 28, 2022**)
- Said lawsuits generally allege false and/or misleading marketing in violation of various consumer protection laws

Bankruptcy

- In May 2023, Kidde-Fenwal filed for Chapter 11 protection
- Anticipate that other companies will follow suit as litigation ramps up
- *“It does not take a genius to figure out that if certain motions don’t go their way, the defendants are in an existential threat to their survival.”* —Judge Richard Gergel in a July 2019 AFFF MDL proceeding

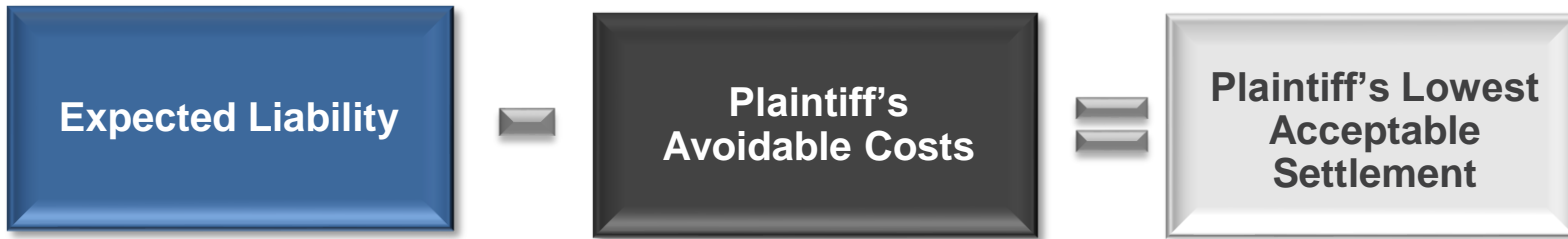
Mass torts

Law & Economics: Settlement model

Defendant



Plaintiff



2022 mass torts advertising exceeded \$200 million

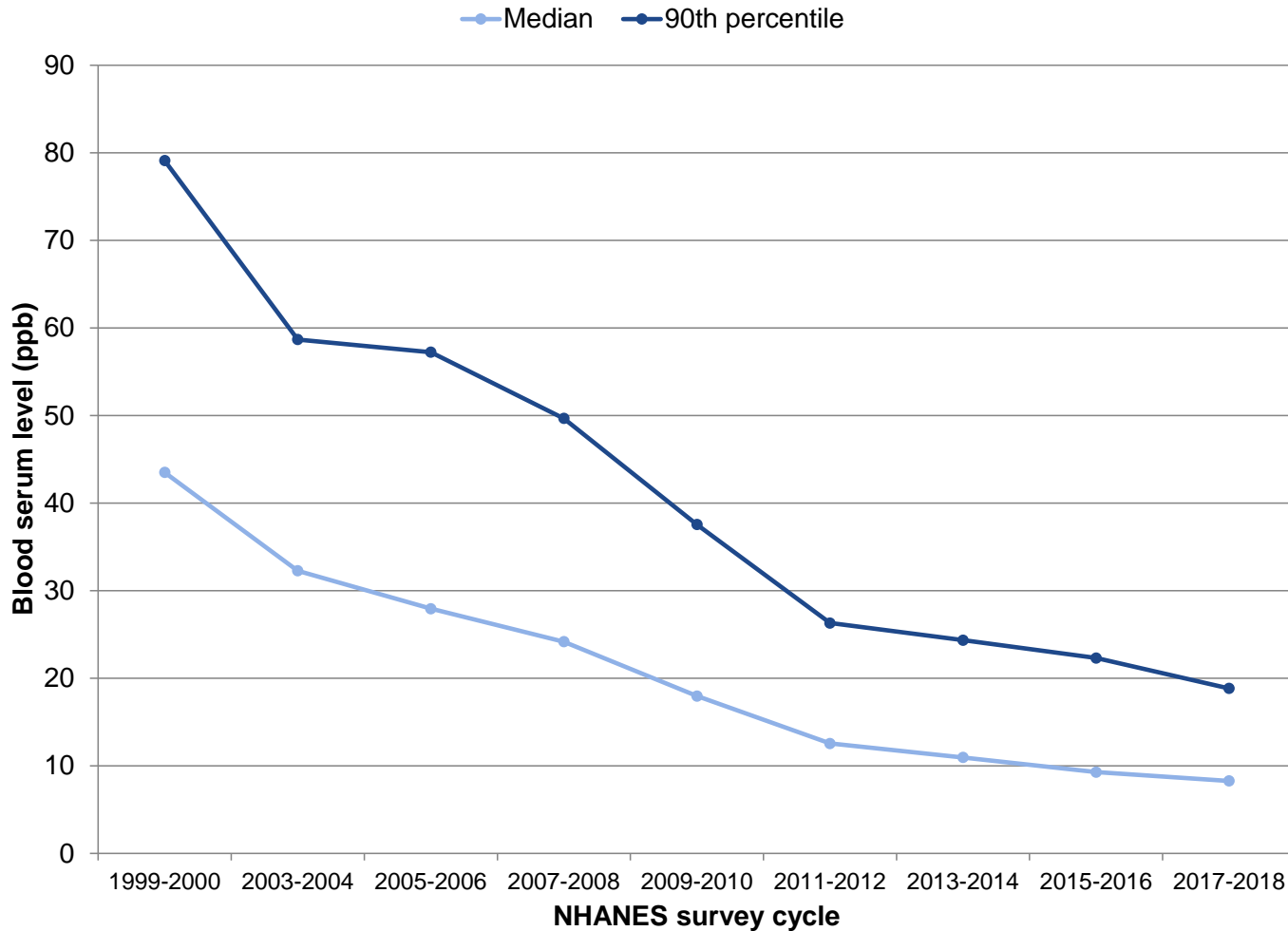
- PFAS: Contaminated water at Camp Lejeune
 - Estimated \$145 million spent on web and TV ads
 - Surpassed only by asbestos, weedkiller Roundup, and Xarelto
- Asbestos (mesothelioma)
 - Ad spending of more than \$500 million over the past decade
- Zantac (various cancers)
 - 45,000 television ads purchased from Jan–Apr 2021
 - Estimated cost of over \$7 million
 - Decreased after MDL Daubert ruling

PFAS as a mass tort

Blood serum levels for historical PFAS settlements

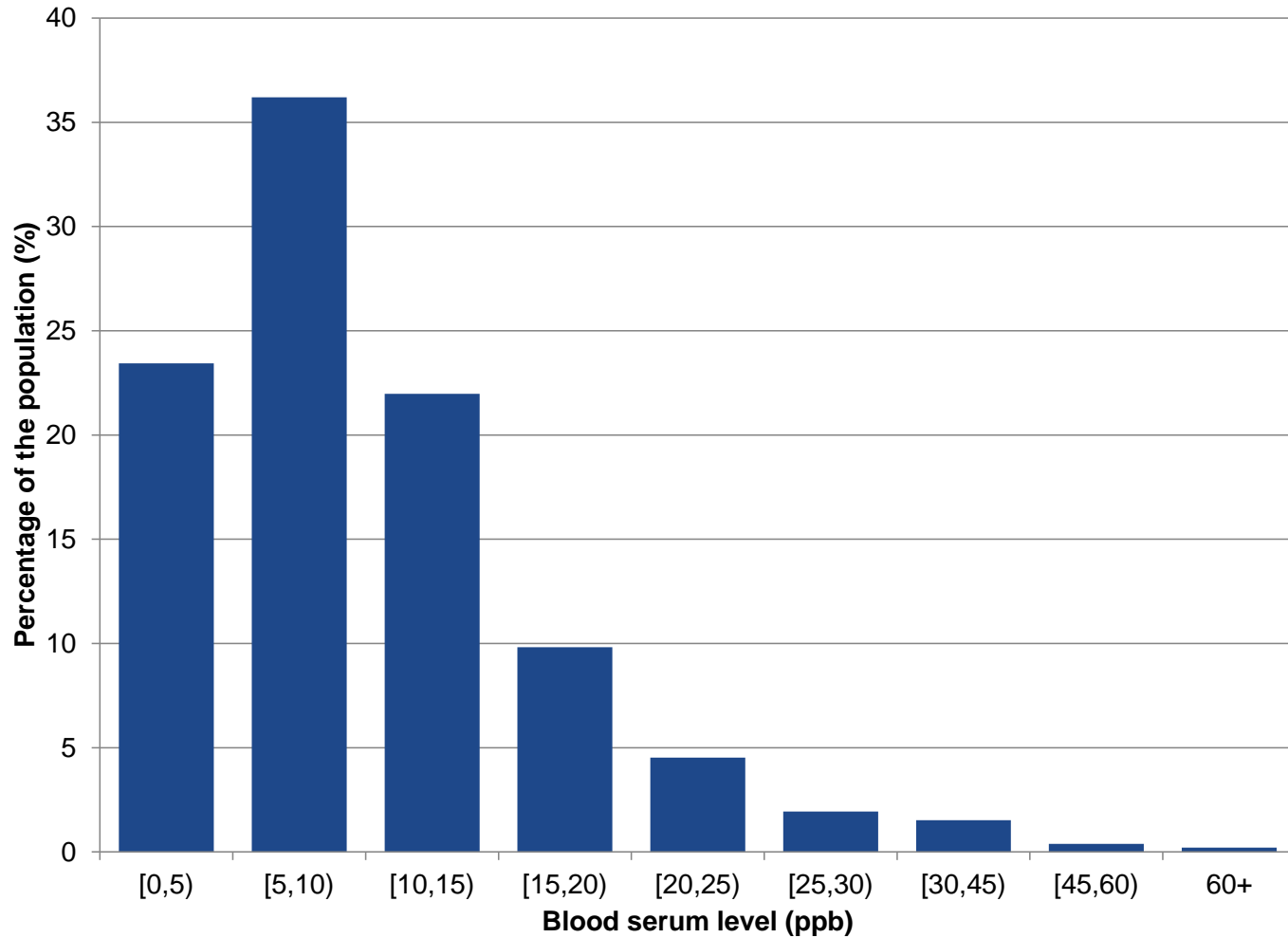
State	Settlement	Year blood serum collected	PFOA + PFOS geometric mean (ppb)	PFOA + PFOS median (ppb)
OH/WV	C8 MDL/Leach	2005–2006	102.7	46.2
AL	Billings	2010	56.1	
MN	State of Minnesota vs. 3M	2008	51.3	
NY	Baker	2016	43.5	48.5

PFAS levels declined about 80% from 2000 to 2018



Source: 1999–2018 National Health and Nutrition Examination Survey (NHANES)

2017–2018 PFAS blood serum levels in US population



Source: 2017–2018 National Health and Nutrition Examination Survey (NHANES)

Expected future litigation trends

- Remediation will be the focus
 - Third Unregulated Contaminant Monitoring Rule (UCMR 3; 2013–2015)
 - Tested public water systems that serve at least 10,000 people
 - About 130 areas (serving 11 million people) with consistent evidence average PFAS levels ranging from 10 to 850 ppt
 - Fifth Unregulated Contaminant Monitoring Rule (UCMR 5; 2023–2025)
 - Testing public water systems that serve at least 3,300 people
- PFAS-related PI claims lack many factors conducive to recruitment
 - No signature disease
 - Blood test typically required
 - Confounding factors
 - Harder to recruit claims and prove causation with declining blood levels

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