Schaap v. United States: PFAS Litigation Continues to Evolve with Novel Takings Clause Claim

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Per- and polyfluoroalkyl substances (PFAS) litigation is rapidly becoming one of the most dynamic and evolving areas of environmental law. With thousands of cases consolidated in the Aqueous Film-Forming Foams (AFFF) multidistrict litigation (MDL) in Federal Court in the District of South Carolina, plaintiffs—including municipalities, water utilities, property owners and individuals—are seeking recovery for contamination linked to PFAS-containing products, particularly firefighting foams. These foams have been used extensively by the military and at commercial airports.

As scientific understanding of PFAS toxicity and persistence grows, plaintiffs are increasingly exploring new legal avenues to secure relief. Traditionally, claims have relied on common law tort theories such as negligence, nuisance, trespass, and strict liability. Recently, statutory frameworks, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) have gained prominence, especially after the Environmental Protection Agency's 2024 designation of PFOA and PFOS as hazardous substances. However, with plaintiffs encountering procedural and substantive hurdles within these conventional frameworks, some have begun to test more creative legal theories.

A recent example of this is *Schaap v. United States* (No. 24-1300C, US Court of Federal Claims), a case in which plaintiffs sought $400 million in relief from the federal government through an innovative argument under the Fifth Amendment's Takings Clause. Though unsuccessful, *Schaap* illustrates the expansion of PFAS litigation beyond traditional statutory and common law claims and exemplifies the plaintiff's bar's willingness to experiment with novel constitutional arguments as they pursue compensation for PFAS contamination.

A Novel Takings Clause Theory

Schaap v. U.S. presents a significant moment in PFAS litigation as it introduced a Takings Clause argument to secure compensation for property owners affected by PFAS contamination. Plaintiffs in *Schaap* were landowners who alleged that their property had been contaminated by PFAS chemicals due to the US government's use of firefighting foam at a nearby Air Force base. They argued that the contamination, combined with government actions to regulate PFAS, had effectively devalued their property and deprived them of its full use and enjoyment, thereby constituting a "taking" under the Fifth Amendment. In essence, plaintiffs sought just compensation for the loss of property value caused by the alleged contamination.

While the court ultimately rejected these claims, the *Schaap* case is important because it reflects a growing trend of creative legal strategies in seeking compensation for PFAS-related damages. The decision highlights the ongoing struggle to navigate the complex relationship between environmental contamination, government action, and property rights.

Court's Ruling and Legal Precedents

The *Schaap* decision reflects an evolving application of Takings Clause arguments in PFAS litigation, building on principles established in *Arkansas Game & Fish Commission v. United States*. In *Arkansas Game & Fish Commission*, the Supreme Court explicitly rejected the idea of a categorical exemption for temporary government actions, asserting that temporary invasions could still meet the requirements for a compensable taking depending on their impact on the property. This case marked a shift toward a more flexible, fact-specific inquiry, opening the door

for novel takings claims involving diffuse or gradual harms.

However, the *Schaap* court distinguished between regulatory takings—where government regulations limit or impair property use—and physical takings, where government action directly invades or occupies property. In *Schaap*, the court found that plaintiffs had not demonstrated a direct physical invasion of their property by the government and ruled that the allegations were insufficient to meet the threshold for a compensable physical taking.

Implications for PFAS Litigation

Despite the court's dismissal of plaintiffs' claims, *Schaap* illustrates the increasing willingness of PFAS litigants to explore novel legal theories to seek compensation. While the decision sets a high bar for future Takings Clause claims, it does not rule out the possibility in similar cases. In particular, the case reinforces that claims based on government action leading to contamination can be framed as constitutional violations rather than mere tort-based liability, providing a potential alternative pathway for compensation.

For example, claims under CERCLA often face complicated causation issues, statutes of limitation, and disputes over liability, while common law claims must contend with proving harm and quantifying damages. A successful Takings Clause claim could streamline the process by framing the issue as a constitutional right to just compensation for the taking of property.

Schaap could also prompt government entities—particularly military installations and airports—to reevaluate their potential liability exposure. Even if future Takings Clause claims are unsuccessful, the legal theories advanced in cases like *Schaap* might require defendants to devote significant resources to defending these arguments. Additionally, the pursuit of Takings Clause claims could influence settlement negotiations within broader PFAS litigation contexts, such as the AFFF MDL, by highlighting the potential for constitutional challenges to existing liability frameworks.

Ultimately, although the *Schaap* case does not conclusively settle the issue of PFAS-related takings claims, it underscores the ongoing legal efforts to use the Takings Clause as a novel avenue for redress. This evolving legal landscape leaves the door open for future PFAS takings claims, even if they are ultimately subject to a rigorous legal standard and procedural hurdles.