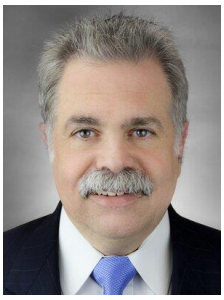
Insurers, Prepare For Large Exposures From PFAS Claims

By **Scott Seaman and Jennifer Arnold** (August 23, 2023)



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Per- and polyfluoroalkyl substances present major exposures to insurers and their policyholders.[1] Thousands of lawsuits concerning PFAS are pending across the country, and several large settlements already have been reached.

Insurers are facing claims, tenders and coverage actions from policyholders seeking defense and indemnity for PFAS-related claims. The plaintiffs bar is focusing on PFAS, and views these "forever chemicals" as being a fertile source for lawsuits and large recoveries.

Though late to the game, federal and state regulators are now locked and loaded on regulating these substances in significant ways. Whether or not PFAS-related liabilities present losses to the insurance industry that will rival asbestos-related liabilities remains to be seen.

Nonetheless, insurers are preparing for numerous claims — and large losses. In this article, we provide a brief background on PFAS-related exposures, and identify some of the many coverage issues that may be presented in litigation over PFAS-related coverage.

Background on PFAS Litigation

Despite their widespread use, PFAS only recently emerged as one of the most fervent areas for civil litigation. But the litigation floodgates have now opened, and there are thousands of cases pending across the U.S.

More than 6,400 PFAS-related lawsuits were filed in federal court between July 2005 and March 2022. These cases have resulted in some eye-opening settlements, including:

- An $850 million settlement in State of Minnesota v. 3M Co., in Minnesota's Fourth Judicial District, reached in 2018;[2]
- A $69.5 million settlement in Wolverine World Wide v. American Insurance Co., in the U.S. District Court for the Western District of Michigan, reached in 2020;[3]
- A $23.5 million settlement in Burdick v. Tonoga Inc., in the New York Appellate Division, reached in 2021;[4] and
- A $17 million settlement in Campbell v. Tyco Fire Products, in the U.S. District Court for the District of South Carolina, reached in 2021.[5]

In 2021, Dupont de Nemours Inc., its affiliate Corteva Inc., and a spin-off entity, Chemours Co., agreed to set aside $4 billion for future PFAS liabilities.[6] Among other claims, these companies settled In Re: E.I. Du Pont de Nemours and C. C-8 Personal Injury Litigation, a multidistrict litigation in Ohio alleging personal injury, for $83 million in 2021.[7]

And in June of this year, the companies agreed to pay $1.18 billion to settle City of Camden v. DuPont in the District of South Carolina, a class action involving public water systems serving large portions of the U.S. population.[8]

Suits have been brought by private citizens, state attorneys general, municipalities and activist groups for cleanup of soil and water contamination and natural resource damages. Traditional PFAS claims assert property damage and bodily injury resulting from soil and water contamination in connection with PFAS manufacturing processes.

Aqueous fire-fighting foam claims represent the largest products exposure so far, and have been consolidated in In re: Aqueous Fire-fighting Foams Products Liability Litigation, a multidistrict litigation pending in the U.S. District Court for the District of South Carolina.[9] PFAS are active ingredients in these foams, which are used to extinguish flammable liquid fires such as fuel fires.

Primary manufacturers frequently are named in PFAS lawsuits. The second tier of manufactures with exposure to PFAS liabilities includes companies that used PFAS chemicals to treat the products they produce.

The third tier encompasses companies that have supply chain exposures. These companies often assemble products out of components that have been treated with PFAS, but do not use the chemical.

The number and types of defendants may continue to expand potentially — implicating sellers of the chemicals, businesses using PFAS, professionals calling for or recommending the use or PFAS-containing materials, and others. Several manufactures have stopped producing PFAS-containing products, and several large retailers have decided to stop selling PFAS-containing products to mitigate future liability.

More than a dozen states are suing manufacturers and others for contaminating drinking water and damaging natural resources. Litigation is also likely to increase as a result of the recent flurry of regulatory activity at the federal and state levels.[10]

PFAS-Related Coverage Actions and Potential Coverage Issues

At least 14 PFAS-related coverage actions already have been instituted in 10 states. Numerous additional demands for coverage and tenders have and will be made, and numerous additional coverage actions will be filed.

Depending upon the facts, parties and claims, coverage may be sought under general liability, property, environmental, professional liability, directors and officers, and other policies. Although insurance coverage may be widely sought, insurance recovery will not be secured in many instances. Parties involved in PFAS-related coverage actions should consider several potential issues.

Forum Selection

With a fairly well-developed body of insurance coverage law in the context of toxic and mass tort claims generally, and asbestos and environmental claims in particular, insurers and policyholder representatives, who generally institute most coverage actions, often will have preferences concerning the forum in which to litigate, and notions about which state's substantive law is the most favorable to their positions.

Threshold issues concerning jurisdiction and venue may arise. In June, in an unpublished decision, the U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal of an insurer's coverage action involving firefighters' personal injury claims in Admiral Insurance Co. v. Fire-Dex LLC.[11]

Fire-Dex, a manufacturer of clothing worn by firefighters, was sued by the firefighters and their spouses, alleging they had incurred injury from the PFAS in clothing worn while fighting fires. Admiral denied coverage based on the occupational disease exclusion in its policy, and sought a declaratory judgment that it had no duty to defend Fire-Dex against the suits.

The district declined jurisdiction over the declaratory judgment action, concluding its acceptance of the case would encroach on state jurisdiction because Ohio state courts had yet to address the question of insurance liability for PFAS manufacturing. The Sixth Circuit affirmed the district court's abstention, noting novel issues of state law are best decided by state courts.

This decision is contrary to lessons learned from the COVID-19 business interruption insurance coverage litigation, where federal courts regularly and properly decided state law coverage issues in the context of a unique pandemic.[12]

Long Tail Claims Potentially Implicating Multiple Insurance Policies

Inasmuch as PFAS have been produced and used dating back to the 1930s and 1940s, legacy as well as current insurance policies could be potentially implicated by many claims. Accordingly, many policyholders are looking for legacy insurance policies, and engaging insurance archeologists.

Prior Settlements, Releases and Dismissals

Insurers are well served by identifying settlement agreements and dismissal orders involving companies presenting PFAS claims, to see whether such claims have been released or are barred in whole or in part.

It is not uncommon for releases resulting from settlements in prior environmental or long-tail matters to include full policy, full environmental, full products or full site releases. Also, prior payments may have exhausted or impaired applicable limits of liability.

Trigger of Coverage

Trigger of coverage may present issues in some PFAS-related coverage cases. For example, in Crum & Forster Specialty Insurance Co. v. Chemicals Inc.,[13] in the U.S. District Court for the Southern District of Texas, the insurer sought a declaration with respect to the duty to defend in connection with several hundred personal injury lawsuits consolidated in the aqueous fire-fighting foams multidistrict litigation.

The complaints in the underlying cases do not allege either dates when the firefighters were first exposed to the products, or dates when they first manifested symptoms of injury from the products. The subject policies require that bodily injury "first occurs during the 'policy period.'"

The policies contain another provision stating that, if the date of an injury could not be determined, then the injury would be deemed to have occurred before the policy period.

The district court denied the insurer's motion for summary judgment, noting that the insurer had the burden to demonstrate the dates of injury could not be determined, or that the claims were otherwise outside the scope of coverage provided by the policies. So long as the date of injury could potentially be determined in future proceedings, and could potentially fall within the terms of the policies' coverage, the insurer was obligated to defend.

As plaintiffs in the underlying cases alleged dates of employment during the periods of the insurance policies at issue, the district court ruled a defense was owed.

Allocation and Coordination of Coverage Issues

Depending upon the types of policies involved in a coverage action, and the claim-related facts, several allocation-related issues may be presented.

There may be issues concerning which, if any, lines of coverage respond to a claim, and coordination or priority of coverage issues may be presented. Allocation of loss issues may also be significant in many cases.

In addition to allocation methodology, other issues may be presented that could limit or increase the insurance contracts affected and the extent of potential coverage — including the treatment of multiyear policies, stub policies, policy extensions, exhaustion, the impact of insurance unavailability and the number of occurrences.

Noncovered Items

PFAS-related claims may also seek damages or other relief not covered under the particular policy at issue. For example, claims involving matters such as regulatory compliance costs, punitive damages or medical monitoring may not be covered under liability policies.

Pollution Exclusions

Various forms of pollution exclusions have been included in insurance policies, going back to the 1970s and earlier. Many PFAS-related claims — depending upon the facts and controlling law — may be barred in whole or in part by the sudden and accidental pollution exclusion, the absolute pollution exclusion, the total pollution exclusion or other forms of pollution exclusions.

Issues concerning application of pollution exclusions will be familiar to veterans of the environmental coverage wars. These may include whether PFAS are pollutants, whether there was a discharge or release, whether the discharge was sudden and accidental, whether the matter involves traditional environmental pollution, and whether a hostile fire exception applies.

Some early decisions have held that PFAS claims are barred by pollution exclusions. Courts have differed in their application of such exclusions in the context of PFAS-related claims, as they have in the broader context of environmental coverage claims.

In Tonoga Inc. v. New Hampshire Insurance Co., in 2022, the New York Appellate Division, Third Department, addressed application of both the sudden and accidental and the total pollution exclusions.[14] Tonoga settled an action with the New York Department of Environmental Conservation, which accused Tonoga of polluting soil, air and water in Petersburgh, New York.

Multiple lawsuits were filed against Tonga subsequently, for which it also sought defense and indemnity. The policyholder's manufacturing process from 1961 to 2013 generated perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS, byproducts and waste materials, which were, in turn, discharged into the environment as part of the plaintiff's routine processes.

The appellate court affirmed the trial court's ruling that the insurers had no duty to defend or indemnify, concluding coverage was barred by sudden and accidental and total pollution exclusions. The court found that allegations in the complaint that PFAS were improperly dumped and spilled over a period of many years prohibited the conclusion that the pollution was abrupt or unintentional.

The court rejected Tonoga's argument that the suggestion that there might be other ways the PFAS were discharged into the environment was sufficient to raise the possibility the sudden and accidental exception applied, "given that the gravamen of each suit [was] decidedly plaintiff's knowing discharge of PFOA and/or PFOS as part of its routine manufacturing processes."

By contrast, in Wolverine World Wide Inc. v. The American Insurance Co., the U.S. District Court for the Western District of Michigan found in 2021 that the sudden and accidental pollution exclusion did not preclude the insurer from being required to provide a defense.[15]

Wolverine, a footwear manufacturer, was the subject of hundreds of individual tort actions, three consolidated class actions, an individual landowner suit and two governmental enforcement actions alleging it was responsible for PFAS in the groundwater as a result of its use of the product Scotchgard in its manufacture of footwear from 1958 through 2002.

The court ruled that the insurers were required to defend Wolverine in these matters until "every claim in the lawsuit involving pollution is conclusively determined to be intentionally discharged by Wolverine."

In Colony Insurance Co. v. Buckeye Fire Equipment Co., the U.S. District Court for the Western District of North Carolina held in 2020 that the insurer did not have a duty to defend the majority of toxic tort claims relating to fire equipment containing fire suppressing foam that included PFAS.[16] The court concluded that the total pollution exclusion barred the majority of cases that alleged injury or damage solely from environmental exposure to PFAS.

However, some cases — approximately one-third — also alleged harm from direct exposure to the products. The court ruled that the insurer had a duty to defend the direct exposure cases, because those cases did not involve traditional environmental pollution and were not within the gambit of the total pollution exclusion under North Carolina law.[17]

Finally, in Grange Insurance Co. v. Cycle-Tex Inc., the U.S. District Court for the Northern District of Georgia issued a declaratory judgment in December 2022 in favor of the insurer, concluding that the underlying lawsuit fell squarely within the policy's total pollution exclusion.[18]

The total pollution exclusion excluded coverage for (1) "'[b]odily injury' or 'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time," and (2) any loss arising out of a "[r]equest, demand, order or statutory or regulatory

requirement that any insured or others test for, monitor, clean up, remove, contain treat, detoxify or neutralize or in any way respond to, or assess the effects of 'pollutants.'"

Cycle-Tex operated a thermoplastics recycling facility, and was sued for allegedly discharging harmful PFAS into the North Georgia waterways. The plaintiffs alleged they suffered damages to their health by virtue of ingesting contaminated water, property damage resulting from contamination of the water supply, and the payment of surcharges and heightened water rates as a result of the contamination.

Grange agreed to defend Cycle-Tex in the litigation under a full reservation of rights, and sought a declaratory judgment that it had no duty to indemnify or defend based on the policy's total pollution exclusion.

The court easily found PFAS were pollutants under the policy, both because the definition of "pollutant" included chemicals and because Georgia courts have emphasized the broad reach of the term "pollutant." The court concluded claims that the plaintiffs suffered bodily injury and property damage plainly fell within the first clause of the exclusions.

Although the plaintiffs' claim for increase in water costs did not fit within the first clause of the pollution exclusion, the court concluded it was reasonable to infer the increased water costs resulted from the city's compliance with environmental laws and its response to a demand or request that the city protect its citizens from a dangerous nuisance. Accordingly, the court held the claims for water costs were barred by the second clause in the pollution exclusion.

PFAS Exclusions

There are various forms of specific PFAS exclusions that may be included in policies of more recent vintage. These exclusions are likely to become more common going forward.

Lloyd's Market Association unrolled a couple of model exclusions last year, and an ISO exclusion is in the works.[19]

Other Exclusions

Other exclusions — such as owned property, intentional act and occupational disease exclusions — may bar or limit coverage for particular claims.

Knowledge-Based Defenses

Some coverage actions may implicate knowledge-based defenses, such as the absence of an accident or occurrence, expected or intended damages, known loss, lack of fortuity, or improper disclosure in connection with obtaining or renewing coverage.

Noncompliance With Policy Terms and Conditions

Noncompliance with notice, cooperation, and other policy terms, definitions, and conditions may bar or limit coverage in some instances. Past voluntary payments or defense fees incurred prior to proper notice or tender may not be covered.

Environmental impairment or pollution policies often have additional requirements that must be satisfied as well. Many of these policies, and some general liability policies, are written on a claims-made basis. The policyholder must satisfy any claims-made-and-reported

requirements.

In Illinois Union Insurance Co. v. Medline Industries Inc. — a case involving ethylene oxide emissions from Medline Industries' medical instruments sterilization facility in Waukegan, Illinois — the Illinois appellate court ruled in 2022 that there was no coverage under a pollution liability policy, because the discharges had been occurring since 1994, long before the policy's September 2018 retroactive date.[20] These types of issues may be presented with PFAS claims.

Issues Arising From Policyholder Bankruptcies

In view of PFAS-related and other liabilities, or for other reasons, some policyholders with PFAS-related liabilities may be embroiled in bankruptcy proceedings, or attempt to use bankruptcy law to limit or shed their liabilities.

In such cases, some of the bankruptcy issues insurers have addressed in asbestos, talc and sexual molestation claims may be presented in connection with PFAS-related claims.

PFAS: The Next Asbestos?

Commentators have offered predictions about the extent of losses insurers may sustain from PFAS-related claims. Some predict that PFAS-related losses could rival or exceed insurer asbestos-related losses.

Praedicat Inc., for example, estimated in 2021 that the cleanup costs in the U.S. for PFAS-contaminated water alone could exceed $400 billion for insurers.[21] Such amount does not include potential losses in product liability, personal injury and directors and officers lawsuits.

If that prediction turns out to be close to accurate, losses may be beyond the financial resources of the property and casualty insurance industry. Forecasts of PFAS-related exposures, however, likely will vary considerably, and will evolve and be incurred over time.

The ultimate cost to the insurance industry will depend upon a variety of factors — many of which remain unknown. In reality, PFAS litigation and exposures will follow their own course.

On one hand, factors such as social inflation, the whole-of-government approach to environmental, social and governance issues, the devotion of substantial resources by the plaintiffs bar, and the use of reptilian tactics — which were not present at the beginning of the asbestos litigation explosion, at least to the same extent as they are now — will fuel PFAS litigation.

On the other hand, the science and proofs of PFAS-related bodily injuries and damages still are developing, substantial causation issues continue to exist, and no serious, specific disease tied exclusively to PFAS has yet emerged that is similar to mesothelioma from exposure to asbestos.

The insurance dynamics are different as well. Many legacy policies are lost, settled, released, exhausted or impaired. Coverage under more recent policies is likely to be more restrictive, contain applicable exclusions, be written on a claims-made basis, and present coverage defenses not available to the same extent with respect to asbestos-related liabilities.

Many insurers are employing sound underwriting practices, loss control services, education of staff and policyholders, and outstanding claims professionals and attorneys to contain PFAS-related exposures.

Policyholders and insurers will draw upon their experiences with asbestos and other environmental coverage litigation. Some of the lessons learned will prove to be instructive. Some case law will be instructive or even controlling.

Nonetheless, the parties and their counsel should keep in mind that the science associated with PFAS chemicals is developing, and different arguments may be presented in the context of particular PFAS-related coverage claims. An insurer's approach likely will take into account the policies at issue, the particular policyholder and its coverage program, claim-specific facts, application of controlling law, and factors related to the insurer's portfolio interests.

The PFAS-related coverage wars remain in their infancy and will play out over the course of several years.

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[1] PFAS is an umbrella term encompassing approximately 12,000 substances identified in the United States Environmental Protection Agency's PFAS Datasets. EPA, PFAS/EPA: Cross-Agency Research List, https://comptox.epa.gov/dashboard/chemical-lists/EPAPFASRL (last visited Aug. 1, 2023). PFAS have been used in so many products and in so many contexts that they are described by many as being ubiquitous — even more so that asbestos. See e.g., Yale School of Med., PFAS and Health: Troublesome, Ubiquitous Chemicals to be Examined at YSPH Symposium, https://medicine.yale.edu/news-article/pfas-and-health-troublesome-ubiquitous-chemicals-to-be-examined-at-ysph-symposium/ (last visited Aug. 1, 2023).

[2] State of Minn. v. 3M Co., No. 27-CV-10-28862 (4th Judicial Dist., Hennepin County, Minn.) (settled Feb. 20, 2018).

[3] Wolverine World Wide v. Am. Ins. Co., No. 1:19-cv-10 (W.D. Mich.) (settled 2020).

[4] Burdick v. Tonoga Inc., N.Y. Appellate Division, Third Department (settled October 2021).

[5] Campbell v. Tyco Fire Products, Case No. 2:19-cv-00422, part of In Re: Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2:18-mn-2873 (D.S.C.) (settled January 2021).

[6] E.g., Dupont, DuPont, Corteva, and Chemours announce resolution of legacy PFAS

claims (2021), www.dupont.com/news/dupont-corteva-chemours-announce-resolution-legacy-pfas-claims.html#:~:text=In%20addition%2C%20DuPont%2C%20Corteva%20and%20Chemours%20have%20agreed,Chemours%20will%20contribute%20%2429%20million%20to%20the%20settlement.

[7] In Re: E.I. Du Pont de Nemours and C. C-8 Personal Injury Litig., Civil Action 2:13-md-2433 (D. Ohio) (settled 2021).

[8] E.g., Dupont, Chemours, Dupont, and Corteva Reach Comprehensive PFAS Settlement with U.S. Water Systems (2023), http://www.investors.dupont.com/news-and-media/press-release-details/2023/Chemours-DuPont-and-Corteva-Reach-Comprehensive-PFAS-Settlement-with-U.S.-Water-Systems/default.aspx.

[9] In re: Aqueous Fire-fighting Foams Prods. Liability Litigation, in the U.S. District Court for the District of South Carolina (No. 2:18-mn-02873).

[10] For example, in March, the EPA announced a proposed rule that would establish legally enforceable levels for six PFAS in drinking water.(For more information on the proposed rule see https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas.) On the state level, effective July 1, Vermont banned the use of all PFAS in food packaging (18 V.S.A. § 1672). Also, effective July 1, California prohibited the distribution and sale of juvenile products containing regulated PFAS chemicals (Cal. Health & Saf. Code § 108946).

[11] Admiral Insurance Co. v. Fire-Dex LLC, No. 22-3992, 2023 U.S. App. LEXIS 14822 (6th Cir. June 13, 2023).

[12] See, e.g., Dianoia's Eatery LLC v. Motorists Mut. Ins. Co., 10 F.4th 192, 208-211 (3d Cir. 2021).

[13] Crum & Forster Specialty Insurance Co. v. Chemicals Inc., Civil Action No. H-20-3493, 2021 U.S. Dist. LEXIS 146702 (S.D. Tex., Aug. 5, 2021).

[14] Tonoga Inc. v. New Hampshire Insurance Co., 201 A.D.3d 1091 (N.Y. App 3rd Dept. 2022).

[15] Wolverine World Wide Inc. v. The American Insurance Co., No. 1:19-cv-10, 2021 U.S. Dist. LEXIS 199675 (W.D. Mich. Oct. 18, 2021).

[16] Colony Insurance Co. v. Buckeye Fire Equipment Co., No. 3:19-cv-00534, 2020 U.S. Dist. Lexis 194709 (W.D.N.C. Oct. 20. 2020).

[17] In Colony, the court determined it was bound by West American Insurance Co. v. Tufco, 409 S.E.2d 692 (N.C. Ct. App. 1991), which found a pollution exclusion was ambiguous and therefore required that "any 'discharge, dispersal, release, or escape' of a pollutant must be into the environment to trigger the pollution exclusion clause and deny coverage to the insured." 2020 U.S. Dist. LEXIS 194709 at *8.

[18] Grange Ins. Co. v. Cycle-Tex Inc., Civil Action No. 4:21-cv-147, 2022 WL 18781187 (N.D. Ga. Dec. 5, 2022). Cycle-Tex did not appear in the declaratory judgment action so the case was decided on a motion to default. 2022 WL 18781187 at *3-4.

[19] The model exclusions drafted by Lloyd's Market Association may be found

at https://www.lmalloyds.com/LMA/News/LMA_bulletins/LMA_Bulletins/LMA22-024-CM.aspx (last visited Aug. 2, 2023).

[20] Ill. Union Ins. v. Medline Indus., 2022 IL App (2d) 210175, ¶¶ 37-40.

[21] See Gary Booth, PFAS — the mother of all toxic torts? (2021), https://www.insiderengage.com/article/28tq7id3b65wxgwiao4qo/legal-and-regulatory/pfas-the-mother-of-all-toxic-torts#:~:text=Put%20together%20with%20the%20more,to%20be%20the%20next%20asbestos.