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PFAS Coverage Litigation Strategy Lessons For Policyholders

By **Benedict Lenhart and Alexis Dyschkant** (May 16, 2023, 5:38 PM EDT)


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Since being identified as a "forever chemical" used in everything from everyday home goods to industrial materials, per- and polyfluoroalkyl substances, or PFAS, have garnered increased scrutiny by the government, health organizations, scientists and the media.

Due to allegations that exposure to PFAS can affect human health, companies that manufacture, use or distribute PFAS — or goods that contain or degrade into PFAS — have been the target of increased civil and environmental litigation, and government regulation.

In recent months, the U.S. Environmental Protection Agency has made PFAS-related research and regulation a priority.

For example, in March, the EPA proposed to establish legally enforceable levels of certain PFAS chemicals in drinking water.[1] Further, City of Stuart, Florida v. 3M Co. in the U.S. District Court for the District of South Carolina, is the first bellwether trial in the aqueous film-forming foam, or AFFF, multidistrict litigation in South Carolina — where thousands of PFAS-related lawsuits are pending — and is set to commence in a matter of weeks.[2]

As PFAS-related litigation ramps up, so too do policyholders' efforts to recover insurance proceeds from their liability insurers for PFAS-related defense costs and any resulting liability.

But coverage for these PFAS-related costs is a developing area with many core coverage issues yet to be resolved by courts. As a result, while some insurers have accepted coverage on a limited basis, others have been reluctant to acknowledge coverage, and some have filed complaints seeking a no-coverage judgment against their insureds.

To date, approximately 14 PFAS-related coverage litigations have been initiated across 10 states. Even at this early stage, it appears that substantial coverage should be available for PFAS-related liabilities, including both defense costs and indemnity payments in connection with those liabilities.

This article reflects on the lessons learned from the early stages of PFAS-related coverage litigation so far and offers suggestions to policyholders that are considering pursuing PFAS-related coverage in litigation.

Even a total or absolute pollution exclusion may not bar coverage for direct exposure claims.

Insurers have attempted to evade PFAS coverage obligations by citing to variations of an exclusion typically called the pollution exclusion.

In general, a pollution exclusion can exclude coverage resulting from the discharge, dispersal, release or escape of pollutants under certain circumstances. The language of a pollution exclusion can vary significantly from policy to policy, and these differences can be important to the question of coverage for PFAS.

Policyholders that are facing PFAS liability on the basis of harm allegedly caused by their manufactured products should not be dissuaded from pursuing coverage due to a pollution exclusion in their policies, even the so-called absolute or total pollution exclusion.

For example, Buckeye Fire Equipment Co. was named as a defendant in hundreds of civil lawsuits alleging that Buckeye's fire protective equipment contains AFFF, which is alleged to contain PFAS. In the AFFF cases, plaintiffs generally allege that they were directly exposed to PFAS through regular contact with AFFF, or to contact with materials or products allegedly containing PFAS or substances that degrade into PFAS.

Buckeye's insurer attempted to avoid coverage by invoking a pollution exclusion. The U.S. District Court for the Western District of North Carolina rejected this argument in Colony Insurance Co. v. Buckeye Fire Equipment Co., holding that direct AFFF exposure does not constitute "discharge, dispersal, seepage, migration, release or escape" of a contaminant because direct exposure to AFFF is not the "traditional environmental pollution" that the pollution exclusion was designed to address.[3]

Other courts have refused to apply pollution exclusions to losses caused by a product used for its intended purpose, although there has yet to be such a ruling in the PFAS context.

For example, in 1994, the Indiana Court of Appeals for the Fourth District held in Great Lakes Chemical Corp. v. International Surplus Lines Insurance Co. that products coverage for a pesticides producer would be illusory if the pollution exclusion applied to underlying claims that "are not in the nature of intentional or negligent environmental pollution; they are essentially product liability claims."[4]

This doctrine may be particularly important in the PFAS context, as a significant portion of PFAS claims allege injuries or damage arising out of exposure to products allegedly containing PFAS, or to products which degrade into materials containing PFAS.

Moving forward, policyholders in coverage litigation should further develop arguments as to why the pollution exclusion is not a silver bullet for insurers.

The Buckeye decision provides a template for one such argument: Alleged exposure to PFAS through use of an insured's products is not the kind of traditional environmental pollution contemplated by pollution exclusions.

Other arguments rely on the inapplicability of the exclusion to product claims, and still other arguments assert that the exclusion does not apply to PFAS because the exclusion is ambiguous and must be construed against the drafter.

These arguments can be — and should be — further developed through effective use of the insurance industry's custom and practice regarding the pollution exclusion, such as drafting history of the pollution exclusion, statements to regulators regarding the intent of the pollution exclusion, and when the pollution exclusion has been previously applied or not.

The sudden and accidental pollution exclusion's applicability to groundwater contamination claims is more uncertain — and may depend on forum.

But what about those insureds facing more traditional claims of groundwater contamination, namely allegations that a plaintiff suffered injury from drinking groundwater contaminated by PFAS chemicals?

Here, courts may disagree — setting up a potential jurisdictional split.

For example, two courts considering the application of the so-called sudden and accidental pollution exclusion recently reached opposite conclusions.[5]

In Tonoga Inc. v. New Hampshire Insurance Co., the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, found in 2022 that allegations of PFAS groundwater contamination implicate the sudden and accidental pollution exclusion if "the gravamen of [the allegations] is decidedly plaintiff's knowing discharge of PFOA and/or PFOS as part of its routine manufacturing processes."[6]

However, in Wolverine World Wide Inc. v. American Insurance Co., the U.S. District Court for the Western District of Michigan found in 2021 that similar allegations of PFAS groundwater contamination triggered the duty to defend under the "sudden and accidental" exception to the qualified pollution exclusion, and granted summary judgment for the policyholder.

Policyholders facing contamination claims should also pay close attention to the exceptions provided in any pollution exclusion, whether it be the sudden and accidental exception addressed by the Tonoga and Wolverine courts, the "hostile fire" exception, or exceptions for contamination occurring away from owned premises, or still other exceptions — all of which may be apt for PFAS-related claims involving groundwater contamination depending on the circumstances.

Courts may enforce the duty to defend while staying (or dismissing) the duty to indemnify.

PFAS-related litigation can be drawn out with ultimate liability established or not, years in the future, making resolution of indemnity coverage seem far into the future.

But in the meantime policyholders may incur millions of dollars in defense costs.

Some courts have resolved this issue by ruling on the duty to defend claims brought by insurers or insureds, while staying claims related to the duty to indemnify.[7]

For example, in Crum & Forster Specialty Insurance Co. v. Chemicals Inc., the insurer initially sought a declaratory judgment that it had no obligation to defend or indemnify Chemicals Inc. in the AFFF MDL.

But this plan backfired: The U.S. District Court for the Southern District of Texas ruled in 2021 that the insurer did have a duty to defend Chemicals Inc. because the PFAS claims alleged exposure to PFAS and injury during the relevant policy period and stayed the insurer's duty to indemnify claim pending

resolution of the MDL.[8]

In another insurer-filed action, James River Insurance Co. v. Dalton-Whitfield Regional Solid Waste Management Authority, the U.S. District Court for the Northern District of Georgia granted a policyholder's motion for judgment on the pleadings in November 2022 for the duty to defend and dismissed the insurer's declaratory judgment counts for the duty to indemnify without prejudice.[9]

Establishing rights to historical policies is critical.

Many plaintiffs in PFAS litigation allege that they were exposed to PFAS years — or decades — ago.

To maximize coverage, policyholders should undertake a comprehensive effort to locate copies of historical policies dating back to the time of first alleged exposure. But this is not always easy, especially if the insured has gone through multiple rounds of corporate transactions wherein the entity allegedly responsible for the PFAS liability has changed hands many times over.

For example, in the Massachusetts Superior Court in Suffolk County's 2021 Precision Coating Co. Inc. v. Travelers Indemnity Co., which ultimately settled, Precision Coating alleged that Travelers refused to provide copies of policies issued to a predecessor, instead asserting that Precision Coating had not established rights to the policies under the relevant asset purchase agreement.[10]

To avoid a dispute about successor rights — or to prepare to litigate such a dispute — policyholders facing decadeslong claims should take care to reconstruct the relevant corporate history evidencing their rights under legacy liability policies.

Doing so early on will help prepare for future coverage litigation or avoid the necessity of litigation altogether if a policyholder can satisfy its insurer that it is entitled to coverage benefits.

Conclusion

While we are still in early days, coverage litigation to date has plotted some clear paths to PFAS-related coverage and created room for creative policyholders to forge new ones.

It has also highlighted the challenges policyholders will face in the coming years as PFAS-coverage litigation no doubt intensifies. Policyholders facing liability from allegations involving PFAS should learn from these experiences in developing their coverage litigation strategy.

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[1] See, e.g., Proposed Rule 88 F.R. 18638 (March 29, 2023).

[2] City of Stuart, Florida v. 3M Co., et al., (2:18-cv-03487).

[3] Colony Ins. Co. v. Buckeye Fire Equip. Co., No. 3:19-cv-00534, 2020 WL 6152381, at *3 (W.D.N.C. Oct. 20, 2020), aff'd, 2021 WL 5397595 (4th Cir. Nov. 18, 2021).

[4] Great Lakes Chem. Corp. v. Int'l Surplus Lines Ins. Co., 638 N.E.2d 847, 849 (Ind. Ct. App. 1994).

[5] See Tonoga Inc. v. New Hampshire Ins. Co., 159 N.Y.S.3d 252 (2022); Wolverine World Wide Inc. v. Am. Ins. Co., No. 1:19-cv-10, 2021 WL 4841167 (W.D. Mich. Oct. 18, 2021).

[6] Tonoga, 159 N.Y.S.3d at 258.

[7] See, e.g., Crum & Forster Specialty Ins. Co. v. Chemicals Inc., No. 4:20-03493, 2021 WL 3423111, at *3 (S.D. Tex. Aug. 5, 2021).

[8] Chemicals Inc., 2021 WL 3423111, at *3.

[9] See James River Ins. Co. v. Dalton-Whitfield Reg'l Solid Waste Mgmt. Auth., No. 4:22-cv-41, 2022 WL 18777374, at *6 (N.D. Ga. Nov. 7, 2022).

[10] Precision Coating Company Inc. v. Travelers Indem. Co., 2021 WL 2940416 (Mass. Super. Ct. July 8, 2021).