Insurance Coverage for PFAS Liability

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This practice note addresses potential insurance coverage for tort and environmental liability arising from per- and polyfluoroalkyl compounds, commonly known as PFAS. There are thousands of specific chemicals falling under this category—more than 12,000 substances have been included in the *EPA's National PFAS Datasets*—and the definition continues to be debated in scientific and regulatory communities. For purposes of this practice note, all such chemical compounds are referred to individually or collectively as "PFAS."

PFAS are synthetic chemicals that were first patented in the late 1940s, commercialized in the 1950s, and used in a wide array of consumer and industrial products. PFAS have strong surfactant properties, meaning they reduce the surface tension between a liquid and another liquid or solid, so they are effective in resisting fire and repelling water, oil, and grease. PFAS are found in materials such as firefighting foam, nonstick cooking pots and pans, paints, coatings for cables and wires, lubricants, food packaging, and textiles. PFAS are water soluble and appear to move through soil. Certain PFAS bioaccumulate in the human body.

For additional information, see *Transfer and Purchase of Property, Liability, and Environmental Insurance* and *Practical Steps For Companies Facing PFAS Risks*.

PFAS Liability Threats

PFAS increasingly have become the subject of actual or potential liability for a widening group of companies. Potential liability for PFAS arises from both private tort lawsuits and governmental enforcement of environmental laws and regulations.

Regulatory and Statutory Liability Threats

Despite having been manufactured for decades, it was not until the late 1990s that the EPA first identified this family of chemicals as a potential regulatory concern. While chronicling the regulatory history of PFAS is beyond the scope of this discussion, some highlights are as follows:

- In 2006, the EPA entered into voluntary agreement with prominent PFAS manufacturers to generate studies on certain PFAS and to implement a phase-out/stewardship program.
- In 2009, following a determination that a common PFAS was a likely carcinogen, the EPA implemented an action plan for that chemical.
- In 2016, the Department of Environmental Conservation added certain PFAS to the list of regulated hazardous substances by emergency regulation and issued a non-enforceable health advisory establishing a maximum recommended concentration of PFAS in drinking water.
- In 2021, the Biden administration issued a "PFAS Strategic Roadmap" establishing deadlines for federal regulatory action and expanding regulation to include additional PFAS compounds. The Bipartisan Infrastructure Law of 2021 authorized $5 billion in grants to states and localities for PFAS-related technical assistance and water quality improvement.

Regulatory efforts related to PFAS continue to develop, including importantly a pending proposed rule for the listing of two common PFAS chemicals as CERCLA hazardous substances, which if finalized and after any legal challenges, appears likely to result in additional investigation and cleanup liability for potentially responsible parties.

As of the currency date of this practice note, there are more than 45 bills pending before the U.S. Congress relating to PFAS.

At the state level, several states including California, New York, and New Jersey have issued mandates for investigation and/or remediation of PFAS. In addition, a number of states have drafted legislation to eliminate PFAS usage. For example, in 2021, the Florida State Senate approved a bill that mandates the examination of alternatives by which the state can eliminate PFAS and related chemicals in state commerce. The bill also would create a PFAS Task Force within Florida's Department of Environmental Protection. State action continues to proliferate as the scrutiny of PFAS intensifies.

Tort Liability Threats

Studies on PFAS exposure are by no means conclusive, but allegedly PFAS has been connected to cancer, pregnancy-induced hypertension, and thyroid disease. Beginning in 1998, several lawsuits were filed against DuPont by employees at its Parkersburg plant in West Virginia and local residents claiming they suffered illnesses linked to PFAS used in the production of Teflon. DuPont settled one class action in 2005 by agreeing to pay up to $235 million for medical monitoring of over 70,000 people.

Other, similar lawsuits have followed. More than 6,400 PFAS-related lawsuits have been filed in federal court since 2005, including more than 1,000 filed in 2021 in connection with multidistrict litigation concerning firefighting foam. See In re Aqueous Film-Forming Foams Prods. Liab. Litig., No. MDL No. 2:18-mn-2873-*RMG, 2021 U.S. Dist. LEXIS 16470 (D.S.C. Jan. 25, 2021)*. Targets of such lawsuits to date mostly have been primary producers of PFAS, such as chemical companies and manufacturers of fire-suppressant foams. But this may be changing. Recent litigation also has targeted secondary manufacturers, textile manufacturers, cosmetics manufacturers, fashion and fast food companies, among others. Causes of action include toxic tort, products liability, negligence, and intentional torts.

The plaintiffs in these cases include individuals (including in class actions and multidistrict litigation), water utilities, and state governments. At least 15 state attorneys general have sued chemical companies that designed, manufactured, sold, used, or disposed of PFAS for alleged natural resource damage and expenses to remediate and monitor PFAS in the environment. See, e.g., Alaska v. 3M Co., Case No. 4:21-cv-00020, Fourth Judicial District, Fairbanks (filed April 6, 2021); California v. 3M Co., Case No. 3:22-cv-01013, U.S. District Court for the Southern District of California (filed July 13, 2022); and Wisconsin v. 3 M Co., Case No. 2022-cv-01795, Circuit Court of Wayne County, WI (filed July 20, 2022). Minnesota settled with 3M Company, which produced nonstick chemicals that entered into groundwater in the Twin Cities area, for $850 million in 2018. Delaware also reached a settlement, but the other lawsuits are ongoing.

Individual plaintiffs allege bodily liability from both direct and indirect (i.e., environmental) exposure to PFAS. Some examples of direct exposure are contact with PFAS-containing firefighting foam by firefighters or contact with PFAS by factory workers in manufacturing processes. Allegations of indirect exposure, by contrast, are based on drinking the water from public water supplies containing elevated levels of PFAS or proximity to locations, such as factories, with heavy concentrations of PFAS in the environment. Damages sought include those for personal injury and property value diminution.

Insurance Coverage for PFAS-Related Liability

For organizations facing lawsuits or regulatory action from PFAS, there may be insurance coverage available to protect against those losses, including for the immediate defraying of costs defending against such matters.

Commercial General Liability Insurance Policies

Most companies and other organizations maintain (and often have long maintained) commercial general liability (CGL) insurance policies, formerly titled comprehensive general liability policies. These policies have several

characteristics that make them attractive as a potential bulwark against personal injury or environmental damage claims from PFAS-related actions.

For additional guidance about CGL coverage, see *Commercial General Liability (CGL) Insurance*.

First, CGL policies typically have broad insuring agreements that cover amounts an insured "becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage,'" with both those terms broadly defined. If based on an "occurrence" form (the standard before 1986 and still sometimes in use today), CGL policies cover "bodily injury" or "property damage" that occurred during the policy period, even if the liability giving rise to a claim does not arise until decades later. Further, all of the policies in effect during the time frame when such injury "occurred" may provide coverage (i.e., are "triggered").

For more information on triggers of coverage, see *Occurrence or Claims-Made Policies*.

Second, primary-level CGL policies typically obligate the insurer to provide a legal defense once its insured is sued or receives the equivalent of a suit (e.g., a regulatory directive requiring monies to be spent). Each triggered policy separately imposes on the insurer the "right and duty to defend the insured against any 'suit' seeking [covered] damages." Depending on the applicable state law, a single policy may obligate the insurer to shoulder the entire defense. Further, depending on the policy wording, the costs of such a defense may not reduce the policy's limit (e.g., are "non-eroding" or "outside limits"), so that the primary insurer must provide a defense until its indemnity limit is fully exhausted.

For more guidance on the duty to defend, see *Duty to Defend and Duty to Indemnify*, *Duty to Defend and Duty to Indemnify Checklist*, and *Insurer Duty-to-Defend Standard State Law Survey*.

A drawback to modern-day CGL policies is that they almost always contain some form of pollution exclusion that insurers will invoke to deny coverage for PFAS-related actions. While there have been only a few reported court opinions on coverage for PFAS-related liability (discussed further below), those decisions show that CGL coverage for actions alleging liability from PFAS will be highly dependent on the relevant state's interpretation of such pollution exclusion language. Between approximately 1973 and through 1985, most insurers included a pollution exclusion that provide coverage for pollution that is "sudden and accidental." After approximately 1985, most insurers inserted "absolute" or "total" pollution exclusions. In nearly half the states, policies containing this form of pollution exclusion have been held to be ambiguous and to provide coverage for pollution that was not expected or intended. Accordingly, the available coverage, the applicable law, and the facts all will dictate the outcome under CGL policies.

For additional guidance about pollution exclusions, see *Absolute Pollution Exclusion State Law Survey* and *Qualified Pollution Exclusion State Law Survey*.

Notably, the "duty to defend" is broader than the duty to indemnify and is applicable when there is a "potential" for coverage. It is the insurer's burden to prove there is no potential for coverage to avoid its duty to defend.

Pre-pollution Exclusion CGL Coverage

Before about 1973, CGL insurance policies did not contain any pollution exclusion. As a result, if (1) a claim alleged injury or damage from PFAS contamination or exposure occurring prior to 1973 and (2) the defendant organization had CGL insurance in effect at the time that remains available, then there is an excellent chance that such CGL policies will be required to respond to the claim.

CGL coverage may be unavailable because it has been released in connection with settlements for prior claims, as discussed further below, because the insurers who issued those policies are out of business, or because the policyholder cannot locate sufficient evidence of decades-old policies.

"Qualified" Pollution Exclusions

Starting in 1970 to about 1985, CGL insurers added a "qualified" pollution exclusion in most general liability insurance policies stating that coverage did not apply:

> To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental*.

Coverage for PFAS-related actions may be available under CGL policies that include this exclusionary language. In one of the few existing decisions on liability coverage for PFAS, a Michigan federal court held that CGL insurers had a duty to defend despite the policies' pollution exclusion, due to the "sudden and accidental" exception. *Wolverine World Wide, Inc. v. The American Insurance Co., 2021 U.S. Dist. LEXIS 199675 (W.D. Mich. Oct. 18, 2021)* (Wolverine).

The insured in the *Wolverine* case was a footwear manufacturer of prominent brands that historically operated a tannery to process hides and leathers for use in its operations. From 1971 to 1986, Wolverine purchased CGL insurance policies covering its operations. Most of the policies contained a qualified pollution exclusion, with an exception to the exclusion where the "discharge, dispersal, release or escape is sudden and accidental." Several other policies had a similar pollution exclusion with an alternative exception for pollution incidents that were "unexpected or unintended" (often found in Travelers' company policies).

In 2018, the Michigan Department of Environmental Quality filed a complaint against Wolverine alleging it was legally responsible for PFAS found in surface and groundwater at various sites due to the use and disposal of Scotchgard in its operations from 1958 through at least the 1970s. The EPA then issued a Unilateral Administrative Order against Wolverine under CERCLA for operations as far back as 1908. Finally, Wolverine was sued in three class action lawsuits alleging injury and damage to the plaintiffs' property caused by Wolverine's use of PFAS beginning in 1958 which thereafter migrated.

The CGL insurers argued that both versions of the policies' pollution exclusions applied to preclude coverage, but the Court disagreed. Michigan courts view duty to defend policies—like most CGL policies and those at issue in the case—to be "litigation insurance," in other words, as protection against the costs of litigation whenever an action could fall within coverage. Under Michigan law, an insurer owes a duty to defend "until the claims against the policyholder are confined to those theories outside the scope of coverage under the policy." *Wolverine, 2021 U.S. Dist. LEXIS 199675, at *6*.

The court concluded that the allegations against Wolverine in the regulatory and class actions were "silent, uncertain and/or unclear as to whether any of the alleged polluting events were 'sudden and accidental' or 'unexpected or unintended,'" and thus "arguably include[d] damage from intentional and unintentional or accidental contamination." The court therefore held that the CGL insurers were required to defend Wolverine in the underlying actions until there was "sufficient factual development" in those actions that PFAS was intentionally discharged by *Wolverine. Wolverine, 2021 U.S. Dist. LEXIS 199675, at *18, *28–29*.

In contrast, a New York state appellate court held that a CGL policy's pollution exclusion with a "sudden and accidental" exception applied to preclude coverage for similar underlying claims. *Tonoga, Inc. v. New Hampshire Insurance Co., 201 A.D.3d 1091 (3d Dep't 2022)* (Tonoga).

The insured in the *Tonoga* case manufactured coated textiles at a facility it had owned and operated since 1961. In its production process, Tonoga soaked fabrics in solution containing PFAS and then heated them in ovens, which vaporized some of the solution. PFAS from the vapor were deposited in the soil around the facility and subsequently entered the groundwater. In 2016, the Department of Environmental Conservation designated Tonoga's facility as a Superfund site and then entered into a consent agreement under which Tonoga agreed to take remedial measures. Over the next few years, multiple lawsuits were filed against Tonoga alleging it negligently

caused the plaintiffs' injury and damaged their property as a result of PFAS entering local water supplies, air, and soil.

Tonoga had obtained CGL insurance policies for periods between 1979 to 1982 and 1986 to 1987, periods during which the underlying plaintiffs alleged injury and damage. The earlier policies contained pollution exclusions with the "sudden and accidental" exception. While the underlying allegations were similar to those against Wolverine, the New York court found the insurers did not have a duty to defend. Rather than reading allegations broadly to fall within the exception where unclear, New York law puts the burden on the insured to "demonstrate a reasonable interpretation" of the claims as affirmatively alleging sudden and accidental pollution, or to come forward with extrinsic evidence demonstrating that the discharge was "in fact" sudden and accidental. Tonoga, 201 A.D.3d at 1096. According to the court, as a matter of New York law, voluntary long-term discharge of a substance cannot be viewed as unintended or unexpected, and the court found the allegations of years of dumping "suggest the opposite of suddenness." The court thus held that the exception to the pollution exclusion was inapplicable, and as a result the CGL insurers were not required to defend the policyholder. Tonoga, 201 A.D.3d at 1097.

As these starkly opposing decisions demonstrate, whether CGL insurance provides a defense to PFAS-related suits will turn on state law (which varies greatly by state) and the facts of each particular case.

Further, as noted above, many large U.S. companies have made significant claims under their pre-1986 policies with respect to liability for asbestos bodily injury claims, environmental contamination, or otherwise. Those large claims sometimes resulted in settlements with broad releases in which some or all rights under pre-1986 policies may have been released. Any such settlement agreements need to be reviewed closely to determine whether coverage remains available. Note that "insurance archeologists" can be retained to help locate missing historical insurance.

For guidance on the qualified pollution exclusion across the 50 states, see *Qualified Pollution Exclusion State Law Survey*.

"Total" Pollution Exclusions

From about 1986 on, insurers added so-called "absolute" or "total" pollution exclusions to CGL liability insurance policies. Language in these provisions can differ, but an example is the following:

> This insurance does not apply to:
>
> f. Pollution
>
> (1) "Bodily 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.

The later policies at issue in the *Tonoga* case included a version of a "total" pollution exclusion. The New York court also held that this exclusion precluded coverage for the underlying PFAS-related lawsuits, concluding:

> The damages resulting from this sort of broadly dispersed environmental harm fall squarely within pollution exclusions such as these—regardless of whether a particular substance is specifically named as a pollutant in an insurance policy, whether a substance was understood to have a detrimental effect on the environment at the time the policy was entered into or whether pollution was an intended result.
>
> *Tonoga, 201 A.D.3d at 1096*.

However, defense coverage may be available for certain PFAS-related claims even under a CGL policy with a "total" pollution exclusion. A North Carolina federal district court recently found a duty to defend certain PFAS tort cases under a CGL policy despite the inclusion of a "total" pollution exclusion like the one quoted above. *Colony Ins. Co. v. Buckeye Fire Equipment Co., 2020 U.S. Dist. LEXIS 194709 (W.D.N.C. Oct. 20, 2020)* (Colony).

This coverage case arose out of hundreds of toxic tort claims relating to fire equipment containing fire suppressing foam that included PFAS, which the insured manufactured, that were consolidated into multidistrict litigation. Most of the cases alleged injury and damage solely from environmental exposure to PFAS. However, about a third of the cases also alleged harm from direct exposure (i.e., from regular contact with the insured's products).

The CGL insurer denied coverage for all the cases based on a "total" pollution exclusion. However, under North Carolina law, terms in the exclusion such as "discharge, dispersal, seepage, migration, release or escape" are considered "environmental terms of art," so that policy exclusions using such language require claims of "traditional environmental pollution" in order to apply. *Colony, 2020 U.S. Dist. LEXIS 194709, at *8*. The court held that the claims of direct exposure to PFAS from the insured's products were not "traditional environmental pollution" claims, and thus they did not fall within the pollution exclusion; accordingly, the insurer was required to provide a defense for those claims.

The specific policy language and applicable state law therefore must be evaluated carefully with respect to claims for PFAS-related actions, even under CGL policies with "total" pollution exclusions. This was further highlighted recently by an Ohio federal court which dismissed an insurer's action seeking a declaration on such a claim, not based on the merits but on a refusal to exercise jurisdiction where such issues have not yet been decided by an Ohio state court. *Admiral Ins. Co. v. Fire-Dex, LLC, 2022 U.S. Dist. LEXIS 198034 (N.D. Ohio Oct. 31, 2022)*.

For additional guidance on the total pollution exclusion across the 50 states, see *Absolute Pollution Exclusion State Law Survey*.

Note that CGL policies issued after 1986 also may be written on a "claims-made"—as opposed to "occurrence"—basis. Coverage under such policies applies only to claims made during the policy period, and such policies usually have strict notice requirements.

For more information on claims made and occurrence policies, see *Occurrence or Claims-Made Policies*.

Pollution Legal Liability Insurance Coverage

While less common, organizations—particularly in industries such as energy, mining, or chemical manufacture—where the risk of environmental damage is higher, sometimes purchase pollution legal liability (PLL) insurance, which usually covers cleanup costs to remediate pollutants on the insured company's own property or that have spread to another's property, as well as liability for bodily injury or property damage resulting from such pollution. PLL coverage may also be referred to as environmental liability, environmental impairment liability, or pollution incident coverage. PLL insurance may be standalone or also may be added to other policies such as CGL or professional liability policies by endorsement.

PLL policies often are purchased to cover a particular site or group of sites and/or to provide coverage for a particular type of environmental damage. These policies also may have retroactive dates and/or exclusions for property damage that commenced before the policy period or for bodily injury claims. These policies also will have a specific policy period, which may be a number of years (e.g., 10 years). PLL policies also typically include conditions to making a claim that insureds should take care to understand. In particular, PLL insurance typically requires prompt notice of a "discovery" of a pollution condition or a claim arising out of a pollution condition. The timing varies between policies, but they often require notice "as soon as practicable" or within a set and limited period of time (e.g., 90 days). The only way to know the specific terms for certain is to review the policies.

There does not yet appear to have been any litigation on PLL coverage for defense or indemnity of PFAS-related actions. Such coverage, when present, is likely to respond to PFAS-related actions, as it was designed to cover the specific types of claims and liability that CGL pollution exclusions purport to exclude.

In short, organizations facing PFAS-related actions should promptly identify and evaluate all potentially relevant species of policies and inform the insurers of the actions as soon as possible.

Other Potential Avenues of Recovery

While an organization's own policies are the first place to look for coverage, insurance may also be available through insurance policies issued to vendors or other contractual counterparties through "additional insured" provisions. Additional insured provisions commonly extend liability coverage to third parties where the insured was required to do so by contract, usually for liability arising from work performed by the insured. Organizations facing PFAS liability claims should consider whether any of their contracts with third parties require potentially applicable CGL or PLL coverage and should request copies of those policies.

Depending on the organization's business and the basis of any PFAS-related claims, there may also be applicable contractual indemnity provisions. Such risk-shifting may be available even in the absence of recoverable insurance.

For more information, see *Additional Insurance and Additional Insureds*.

PFAS-Specific Exclusions on the Horizon

The insurance industry reacts to regulatory and enforcement trends, and given the increased scrutiny, regulation, and enforcement regarding PFAS, it is safe to expect that insurers will increase their use of PFAS-specific exclusions in policies. As of this practice note's publication, the Insurance Services Office (ISO) has not published a PFAS-specific exclusion for commercial liability policies. However, ISO is reportedly working on a draft exclusion that could be published at any time. See *Insurance Information Institute, PFAS-Related Litigation May Signal an Emerging Liability for Insurers* (September 15, 2022).

Further, some insurers already have prepared PFAS-related exclusions, either as a modification of existing pollution exclusions to explicitly encompass PFAS or as a standalone PFAS-specific exclusion. For example, in August 2022, Lloyd's Market Association *issued* two (largely similar) model clauses to exclude liability for PFAS, with the following language:

1 This POLICY does not cover any claim for actual or alleged loss, liability, damage, compensation, injury, sickness, disease, death, medical payment, defence cost, cost, expense or any other amount, directly or indirectly and regardless of any other cause contributing concurrently or in any sequence, originating from, caused by, arising out of, contributed to by, resulting from, or otherwise in connection with any PFAS.

2 For the purposes of this Exclusion, loss, liability, damage, compensation, injury, sickness, disease, death, medical payment, defense cost, expense or any other amount, includes, but is not limited to, any cost to cleanup, detoxify, remove, monitor, contain, test for or in any way respond to or assess the effect of any PFAS.

3 PFAS means any organic molecule, salt, free radical or ion, the composition of which includes at least one:

a. perfluorinated methyl group (-CF3); or

b. perfluorinated methylene group (-CF2-).

Given the increasing regulatory attention to PFAS and broadening of companies targeted for lawsuits or regulatory actions, insurers are likely to start including PFAS-specific exclusions in many commercial liability insurance policies. Policyholders should take care to identify when such exclusions are being added to any of their liability policies and consider whether their circumstances warrant providing notice to their insurers of potential PFAS-related liability before such exclusions take effect.

Related Content

Practice Notes

- *Transfer and Purchase of Property, Liability, and Environmental Insurance*
- *Environmental Insurance as M&A Risk Management Tool*
- *ASTM Issues New Phase I Environmental Standard*
- *Commercial General Liability (CGL) Insurance*
- *Occurrence or Claims-Made Policies*
- *Duty to Defend and Duty to Indemnify*
- *Additional Insurance and Additional Insureds*

Checklists

- *Duty to Defend and Duty to Indemnify Checklist*

Law360 Articles

- *EPA's 2023 Plans For PFAS: High Costs, Uncertain Rewards*(Jan. 3, 2023)
- *Practical Steps For Companies Facing PFAS Risks*(Dec. 16, 2022)
- *What EPA Designation Of PFAS As Hazardous Means For Cos.*(Dec. 9, 2022)

State Law Surveys

- *Absolute Pollution Exclusion State Law Survey*
- *Qualified Pollution Exclusion State Law Survey*
- *Insurer Duty-to-Defend Standard State Law Survey*

Resource Kits

- *Environmental Protection Resource Kit*
- *Environmental Considerations in Real Estate Transactions Resource Kit*

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- *Notice of Claim (Occurrence Policy)*

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