



Insurance Coverage for PFAS Under Historical CGL, Modern Environmental, and Other Insurance Policies

Navigating PFAS: Legal Perspectives



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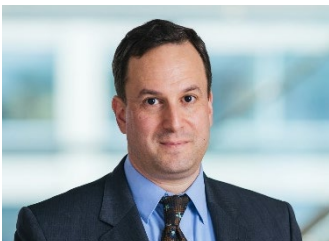
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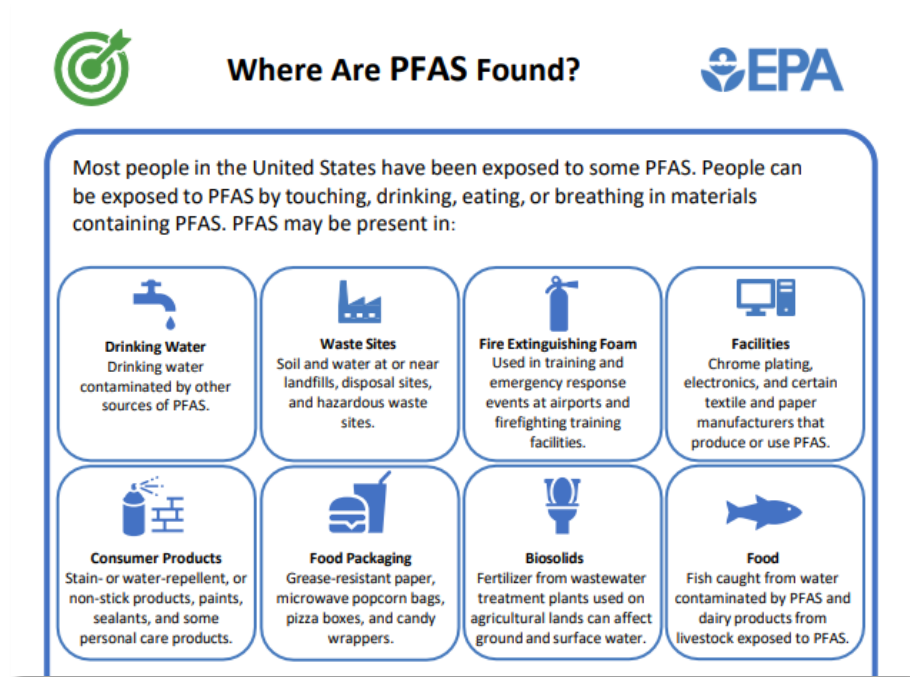
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What Are PFAS?

- “Per- and polyfluoroalkyl substances (PFAS) are a large, complex group of synthetic chemicals that have been used in consumer products around the world since about the 1950s. They are ingredients in various everyday products. For example, PFAS are used to keep food from sticking to packaging or cookware, make clothes and carpets resistant to stains, and create firefighting foam that is more effective. PFAS molecules have a chain of linked carbon and fluorine atoms. Because the carbon-fluorine bond is one of the strongest, these chemicals do not degrade easily in the environment.”
 - *National Institute of Environmental Health Sciences*



Source: <https://www.epa.gov/system/files/documents/2023-10/final-virtual-pfas-explainer-508.pdf>

What Types of Claims Are Being Filed?

- **Personal injury claims**
 - Class actions
 - Worker exposures (e.g., firefighters)
- **Government or private remediation claims**
 - State AG actions regarding violation of state statutes
 - New federal regulations (TSCA, drinking water standards)
 - PFOA and PFOS added to CERCLA “hazardous substances” list on April 19, 2024. This will increase government and private party remediation claims.
- **Advertising/False claims**
 - Packaging
 - Greenwashing
 - Labeling claims

Insurance Coverage for PFAS Claims

Historical CGL Policies

Historical CGL Coverage for Cleanup/Property Damage

- **Coverage provided for “bodily injury” and “property damage”**
 - “Bodily injury” generally includes physical injury or disease to any person
 - “Property damage” can include cleanup costs incurred in response to court or agency demand
- **CGL policies are typically “occurrence based”**
 - Covers injuries that “occurred” during policy period
 - Potential to access multiple policy limits for multi-year occurrences (i.e., “long tail claim”)
 - “Pro rata” vs. “All sums” allocation
 - Depends on policy language and applicable law
- **Carrier has “duty to defend” insured**
 - Defense costs are typically outside (in addition to) limits
 - Broader than duty to indemnify; triggered if there is a potential that the claim is covered

Historical CGL Policies: Common Issues

- **Pollution Exclusion**
 - 1970s – Qualified pollution exclusion applies unless release is “sudden and accidental”
 - Insurer burden to prove exclusion; insured burden to bring within “giveback”
 - State law differs on meaning of “sudden and accidental”
 - 1986: Absolute pollution exclusion
- **Owned Property Exclusion**
 - Depending on state law, may not apply to contamination that poses a risk to surrounding property or migrates off owned property
- **“Neither expected nor intended by the insured”**

How Is This Playing Out in Context of PFAS Claims?

- ***Wolverine World Wide, Inc. v. Am. Ins. Co.*, 2021 WL 4841167 (W.D. Mich. Oct. 18, 2021)**
 - Insurer could not rely on pollution exclusion to deny defense duty because allegations of underlying suit potentially fell within “sudden and accidental” exception to the exclusion
- ***Colony Ins. Co. v. Buckeye Fire Equip. Co.*, 2020 WL 6152381 (W.D.N.C. Oct. 20, 2020), aff’d, 2021 WL 5397595 (4th Cir. Nov. 18, 2021)**
 - Policy contained exclusion for damages “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 ‘hazardous materials’ at any time”
 - Insurer may not deny coverage based on “pollution exclusion, or any variation thereof, if the occurrence and the resulting [PI / PD] ... are ... not the prototypical environmental harms that a pollution exclusion clause is generally intended to protect against.”
- ***Tonoga, Inc. v. New Hampshire Ins. Co.*, 201 A.D.3d 1091 (N.Y. App. Div.)**
 - Insurer did not have a duty to defend the insured after determining that PFOA & PFOS fell within the insurance policy’s pollution exclusion and release was not “sudden and accidental.”

How Is This Playing Out in Context of PFAS Claims?

- ***Grange Ins. Co. v. Cycle-Tex, Inc.*, 2022 WL 18781187 (N.D. Ga. Dec. 5, 2022).**
 - District court held that the policy's total pollution exclusion unambiguously barred coverage in a pollution class action lawsuit alleging PFAS contamination
- ***James River Ins. Co. v. Dalton-Whitfield Regional Solid Waste Management Authority*, 2022 WL 18777374 (N.D. Ga. Nov. 7, 2022)**
 - Court ruled that insurer cannot deny defense duty based on “expected or intended” provision; application of this provision to duty to indemnify is not ripe until underlying lawsuit is resolved or the insured’s liability is established
- ***Fire-Dex, LLC v. Admiral Insurance Co.*, 2024 WL 3744573 (N.D. Oh. Aug. 9, 2024)**
 - Court ruled that scope of occupational exposure exclusion must be decided by state court; federal court can then take up the issues of breach of contract and bad faith
- **Multiple coverage cases are ongoing**

Tips for Securing Coverage Under CGL Policies

Liability policies in effect when the injury or damage occurred may provide coverage for liabilities imposed today

1. Find pre-1986 insurance policies

- Prior to ISO absolute pollution exclusions
- Your own insurance files (risk management/ comptroller/GC – storage)
- All brokers (current and past)
- Outside accountants
- Outside counsel (past defense costs)
- U.S. Navy / military
- Insurance archeologists

2. What is the current status of that coverage?

- Determine whether that coverage has been settled and released, or eroded, or exhausted
- Create a chart of available coverage

3. Notice and protect your rights

- Provide reasonable cooperation
- Provide updates and keep carrier informed
- Value the claim
- Discuss settlement

Insurance Coverage for PFAS Claims

Environmental Insurance

Coverage Under Modern Environmental Policies

Pollution Policy (Site-Specific Coverage)

- Claims Made and Reported Form
- Can provide coverage for cleanup, bodily injury, and property damage (including NRD)
- Can be triggered by discovery of a pollution condition, OR by receipt of a written demand (i.e., claim)
- Defense often will erode the Policy Limit
- Locations typically need to be scheduled on the Policy
- Can extend to transportation of goods/waste
- Can extend to non-owned disposal sites

Market For PFAS Insurance

- All risks are insurable for the right price—right?
 - For a risk to be insurable, its expected loss must be able to be statistically quantified using industry-accepted methodology
 - What happens when insurance carriers have no stable historical claims data to predict future liabilities ...

Let me introduce you to...

Be Aware of PFAS Exclusion

PER- AND POLYFLUOROALKYL SUBSTANCES EXCLUSION ENDORSEMENT

It is hereby agreed that:

1. The following exclusion shall apply to all coverages purchased under this Policy:

This insurance does not apply to **claims, suits or loss**:

Per- and Polyfluoroalkyl Substances

Arising, in whole or in part, from, due to or associated with **PFAS**.

2. **§VII. DEFINITIONS** is amended by the addition of the following:

PFAS means any perfluoroalkyl or polyfluoroalkyl substance, including but not limited to: 10:2 fluorotelomer sulfonic acid (10:2 FTS); 11-chloroeicosafluoro-3-oxaundecane-1-sulfonic acid (11CIPF3OUdS); 2H,2H,3H,3H-perfluorodecanoic acid (7:3 FTCA); 2H,2H,3H,3H-perfluorohexanoic acid (3:3 FTCA); 2H,2H,3H,3H-perfluorooctanoic acid (5:3 FTCA); 4,8- dioxo-3H-perfluorononanoic acid (ADONA); 4:2 fluorotelomer sulfonic acid (4:2 FTS); 6:2 fluorotelomer sulfonic acid (6:2 FTS); 8:2 fluorotelomer sulfonic acid (8:2 FTS); 9-chlorohexadecafluoro-3-oxanonane-1-sulfonic acid (9CIPF3ONS); n-ethyl perfluorooctane sulfonamido ethanol (NEtFOSE); hexafluoropropylene oxide dimer acid (HFPO-DA); n-methyl perfluorooctane sulfonamido ethanol (NMeFOSE); n-ethyl perfluorooctanesulfonamidoacetic acid (NEtFOSAA); n-ethyl perfluorooctane sulfonamide (NEtFOSA); n-methyl perfluorooctanesulfonamidoacetic acid (NMeFOSAA); n-methyl perfluorooctane sulfonamide (MeFOSA); nonafluoro-3,6-dioxaheptanoic acid (NFDHA); perfluoro(2-ethoxyethane) sulfonic acid (PFEESA); perfluoro-3-methoxypropanoic acid (PFMPA); perfluoro-4-methoxybutanoic acid (PFMBA); perfluorobutane sulfonic acid (PFBS); perfluorobutanoic acid (PFBA); perfluorodecane sulfonic acid (PFDS); perfluorodecanoic acid (PFDA); perfluorododecanoic acid (PFDoA); perfluoroheptane sulfonic acid (PFHpS); perfluoroheptanoic acid (PFHpA); perfluorohexadecanoic acid (PFHxDA); perfluorohexane sulfonic acid (PFHxS); perfluorohexanoic acid (PFHxA); perfluorononane sulfonic acid (PFNS); perfluorononanoic acid (PFNA); perfluorooctadecanoic acid (PFODA); perfluorooctane sulfonamide (PFOSA); perfluorooctane sulfonic acid (PFOS); perfluorooctanoic acid (PFOA); perfluoropentane sulfonic acid (PFPeS); perfluoropentanoic acid (PFPeA); perfluorotetradecanoic acid (PFTA); perfluorotridecanoic acid (PFTrDA); perfluoroundecanoic acid (PFUnA); perfluorododecanesulfonic acid (PFDoS);

polytetrafluoroethylene (PTFE); 8:2 fluorotelomer unsaturated carboxylic acid (8:2 FTUCA) or 8:2 polyfluoroalkyl phosphate diester (8:2 diPAP), or any precursor chemicals. **PFAS** shall include any anion forms of **PFAS** associated with their corresponding acid forms. Further, **PFAS** shall also include aqueous film forming foam (AFFF) containing **PFAS** or any additives or component materials contained therein or degradation byproducts thereof.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Insurance Market Response: Pollution Policies

- **Can we still get coverage under Pollution Policies?**
 - Operational exposures versus real estate transactions
 - Carrier applications include questions regarding PFAS
 - Short lease as respects Underwriting (red flags = Exclusions)
 - Industry – Airports/Aviation industry is “red flagged”
 - Location – for Airports, it doesn’t matter...
 - Environmental history of the Property – if you have recent testing that shows no PFAS contamination, let’s talk...
- **Help...my policy is renewing**
 - Review the application carefully for disclosures and PFAS questions
 - Considering marketing the renewal to see how narrow you can get the exclusions
 - Get creative on sublimits and retentions
 - These are Claims made and Reported policies – so check to see whether you’ve tested for PFAS or have received any written communication from any third parties/regulators regarding PFAS.
 - Report, report, report...
 - If there have been any PFAS issues reported to the carrier, even if you have competitive quotes – consider staying with the same carrier if that’s an option

Case Study #1

Pollution Liability and Owner-Controlled Contractors for Brownfield Redevelopment of Format Paper Mill

Scenario Overview:

- Redevelopment of a former paper mill site
- Historical PFAS contamination in soil and groundwater
- Potential liability and regulatory challenges
- Closure of landfills and WWTF lagoons
- Buyer to dismantle footprint of facility and get to closure with tate. Seller providing an escrow for closure post closure liability (may or may not be adequate)
- Prior Responsible Party with deep pockets providing an unlimited Indemnity for Pollution Conditions for most of the historical period. Indemnity does not extend to redevelopment.
- Various industrial operations for 300+ acre site

Key Challenges

1. PFAS or Other Emerging Contaminated Soil & Groundwater

- Risk of migration and exposure during redevelopment

2. Regulatory & Liability Risks

- Federal and state cleanup requirements
- Potential lawsuits from municipalities or neighbors

3. Environmental Insurance Challenges

- No historical GL policies for recovery and pollution marketplace does not cover known conditions
- Future lender requirements for liability protection likely
- Future buyers of parcels may need same protection to enable the deal

Environmental Insurance Including PFAS Coverage for the Paper Mill Redevelopment

- Negotiated Bespoke 10- Year PLL Policy
- Policy Excess Indemnity including PFAS
- Limits \$10 million / \$10 million
- Coverage for preexisting and new
- Redevelopment will be for multiple industrial uses
- Voluntary Investigation exclusion on the Policy due to no certain redevelopment plans, but that exclusion has and is being modified as redevelopment and buyer agreements crystallize
- Policy protecting Buyers and Future Buyers as Named Insureds for historical PFAS excess the indemnity
- A separate dedicated Controlled Contractors Policy placed for dismantling of Mills and its structures for operations and completed operations to follow statute of repose for 10 years

Insurance Coverage for PFAS Claims

Non-Environmental Claims

Coverage for Non-Environmental Claims

Growing Universe of Non-Environmental PFAS Claims:

- Packaging claims, especially food packaging
- Greenwashing claims, including supply chain
- Labeling/website claims
- Increasingly industry-agnostic

Deceptive Trade Laws – More Than 31 Flavors

- Variations on a theme → Mostly state law deceptive trade practice claims
- State laws in this space generally prohibit misleading conduct aimed at the public, but nuance between laws of different states
- Theories often based on price premiums/economic injury, but the verbiage is critical (money vs. bodily injury/health risk vs. blended theory, etc.)

Nationwide, but Beware the District

- Claims are brought everywhere, but most often in NY/MA/CA/DC
- Pay special attention to DC's CPPA
 - Broadest consumer protection statute in the country
 - No standing requirement for private attorneys general (Yes, really.)

Common Law Claims Too...

- Common law claims also pop up, typically:
 - Negligence
 - Negligent/fraudulent misrepresentation
 - Breach of express/implied warranty
 - Unjust enrichment

Drivers of Potential Non-Environmental Coverage

- Type of claim alleged
 - Deceptive trade practice statute vs. common law
- Type of injury alleged
 - Economic vs. Bodily Injury or Health Risks (or a mishmash)
- How clear is the complaint?
 - Plaintiffs' bar is varied in skill

Drivers of Potential Non-Environmental Coverage

- Specific Policy Language
 - How do the policy's "bodily injury" and "personal and advertising injury" definitions compare with the allegations in a complaint?
 - What do the exclusions cover, and do they have any "carve-outs from the carve-outs"?
 - What if there are multiple complaints?

Drivers of Potential Coverage

- How clear is your policy language?
 - Ambiguity may be your friend → Nearly all states resolve ambiguities in favor of coverage
 - Ambiguity in a complaint's pleading of the damages, harms, or other theories may create opportunities
 - Many states only require an allegation to arguably fall within coverage to provide for defense costs, if not indemnity

Mind Your P(FAS) and Qs

Hypo #1: Two complaints are filed against “Hot To Go” restaurant chain. Both allege PFAS is present in Hot To Go’s product packaging without consumers’ knowledge.

- Complaint A alleges this leads to consumers paying more for the products than they otherwise would, violating state deceptive trade practice laws.
- Complaint B alleges this leads to consumers being exposed to unknown health risks relating to PFAS (setting aside whether those have been substantiated) and **also** caused consumers to pay more for the products.
- Which is more likely to qualify for coverage?

Mind Your P(FAS) and Qs

Hypo #2: “Go Go Go” makes athleisure and advertises that, unlike those of its competitors, its products are PFAS free. Two suits are filed:

- Complaint A is brought by consumers alleging these ads mislead consumers because Go Go Go’s products do, in fact, contain PFAS.
- Complaint B is brought by a group of Go Go Go’s competitors, alleging that these ads simultaneously mislead consumers and disparage the competitors’ products, because Go Go Go’s products do contain PFAS, but the competitors’ products don’t.
- Which is more likely to qualify for coverage?

Mind Your P(FAS) and Qs

Hypo #3: “Greener than Hulk” states on its website that its brand is committed to sustainability and environmentally friendly practices. The website also states separately that this commitment extends to eliminating PFAS in their flagship “Smash” product. Two suits are filed:

- Complaint A is brought by a public interest organization in DC claiming the company doesn’t actually care about environmentally sound practices, seeking an injunction only.
- Complaint B is brought by the same organization in the same court, but alleges that “Smash” actually contains PFAS.
- Which is more likely to qualify for coverage?

Mind Your P(FAS) and Qs

Hypo #4: “Greener than Hulk” states on its website and on the product label for its “Smash” product that “Smash” is PFAS free. Two suits are filed:

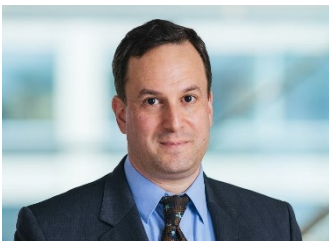
- Complaint A alleges the website claims are misleading because Smash contains PFAS.
- Complaint B alleges the labeling claims are misleading on the same grounds.
- What if the Policy has an exclusion to “personal and advertising injury” coverage for statements “arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your ‘advertisement’ or on your website,” **but** that Non-Conformance Exclusion ***explicitly excludes*** “information or images contained [on] the packaging or labeling” from the Policy’s definition of “advertisement.”

CLE Code

Questions?

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