

## Greater PFAS Scrutiny Has Manufacturers, Insurers Worried

By **Angela Childers**

*Law360 (February 27, 2022, 9:31 PM EST)* -- State regulators and lawmakers are paying increasing attention to pollution from per- and polyfluoroalkyl substances, also known as PFAS, which is a concern for manufacturers that may have been contributing to PFAS pollution for years and the carriers who insure them.

PFAS, commonly referred to as "forever chemicals" because they don't break down in the body, are man-made chemicals found in a variety of products, including carpets, leather, paints, cleaners and firefighting foams. According to the U.S. Environmental Protection Agency, these chemicals build up in the human body, adversely impacting health, and also can quickly disperse and pollute groundwater.

Because these chemicals have been used in manufacturing since the 1950s, companies that have received citations or cleanup orders related to PFAS pollution will be looking to legacy general liability policies for coverage, and carriers will be looking to policyholders to prove they had insurance for that risk.

Over the last 20 years, the EPA has been evaluating the environmental and health cost of PFAS and issuing directives to companies to phase out the use of the most dangerous pollutants in that category. In 2020, the agency announced significant new use rules related to PFAS and in 2021 created a PFAS strategic road map, which includes finalizing PFAS maximum contamination limits in drinking water by 2023, among other policies.

Litigation regarding PFAS is "all over the place now," said Robert Chesler, shareholder in the Newark, New Jersey-office of Anderson Kill PC, who represents policyholders. Lawsuits have been brought by water districts and localities against large manufacturers such as 3M and DuPont over PFAS groundwater contamination and PFAS exposure in firefighting foam. There have also been a flood of private-party lawsuits against companies and water systems over PFAS pollution, and suits by those companies and systems against their suppliers.

It's just a matter of time before the insurance industry sees waves of PFAS litigation too, said John Fischer, partner in the Indianapolis office of Barnes & Thornburg LLP, who represents policyholders. Few suits over PFAS coverage have been litigated between policyholders and insurers. But in January, a New York state appellate court held that two AIG units had no duty to defend a manufacturer of synthetic materials accused of discharging PFAS into local water supplies.

"Certainly over the last two or three years there has been growing concern among the regulatory and

the regulated communities of the potential for substantial PFAS liability, and certainly one of the avenues that those who may potentially be responsible for PFAS contamination are looking [at] to help offset those potential responsibilities is their legacy general liability insurance programs," said Fischer, who noted that airports are among the biggest regulatory targets because of the PFAS-containing aqueous firefighting foam that has been used to extinguish fires on their premises for years.

"The first obstacle is finding those legacy policies," he said. "With the pollution exclusion being modified over time, as a rule of thumb, the earlier the policies that can be found, the greater there is a potential for coverage."

Since 1986, general liability policies have contained an absolute pollution exclusion, though carriers began including sudden and accidental pollution exclusions in 1973.

In general, states such as California and New York have interpreted the "sudden and accidental" exclusion as having a "temporal" component — meaning that any accidental discharge was viewed as an act of polluting — and have generally found no coverage after 1973, Chesler said. States such as New Jersey, Washington and Wisconsin that focus on intentionality in these cases generally find coverage up to 1986.

"Certainly for those policies in the early '70s or later that contain pollution exclusions of some form, not only will issues about whether the exclusion applies in the first place be in serious contention, but also whether exceptions that may be part of those exclusions restore coverage that might otherwise be excluded," Fischer said. "That's the challenge with any of these legacy contamination matters — proving that a particular policy from decades ago was triggered by the existence of contamination or property damage during that policy period."

### **Hunting for Policies Indiana Jones-Style**

Finding those insurance policies is no small feat, Fischer said, noting that his practice has dug for policies in attics, searched in storage areas of old courthouses, and explored "Raiders of the Lost Ark"-type warehouses in pursuit of policies, which can be a "gold mine ... well worth the effort."

Richard Janisch, mass tort claims and insurance recovery consultant for Aon Global Risk Consulting, said one of the biggest challenges in locating coverage is that many companies over the years have been bought and sold.

"You have to make sure when the events of the exposure occurred and that you're looking for the coverage related to that entity," he said. "Sometimes you have to go through the corporate genealogy to make sure you identify the appropriate legacy insurance to apply to the claim."

In many cases, the actual policy is lost and secondary evidence must be used to establish coverage.

Many companies use an insurance archeologist to locate policies or secondary evidence, which can prove the existence of a policy without a copy of the actual document, Chesler said.

Sarah Lintecum, counsel in the Kansas City, Missouri, office of Lathrop GPM LLP, who represents policyholders, said she advises clients to look outside their risk management files and take a look at accounting records, proof of payment of premiums, board meeting notes and broker information — "anything that might have information about policy numbers and years. If there were previous claims

under those policies and if defense counsel was in place to defend them, those attorneys might have insurance-related information in their files too."

Larry Mason, partner in the Chicago office of Goldberg Segalla LLP, who represents insurers, said just as policyholders must prove the existence of coverage, carriers also need to see if coverage exists.

"For some carriers, this search is more complicated than for others, especially when successor company interests are involved," he said in an email. "When secondary evidence is provided, it may present challenges for certain insurers simply due to the nature of the ... evidence. For example, if [it] is simply a policy number, that provides a little part of the story, but it does not necessarily provide the terms and the conditions of the policy from which an insurer is able to make a coverage decision. For many claims, the search for legacy GL coverage is frequently met with unfulfilled expectations."

For policyholders with environmental coverage such as pollution liability insurance post-1986, some coverage may be available, Chesler said.

"Many companies today buy pollution insurance as part of their general portfolio, and those policies historically did not exclude PFAS," he said. "The insurance industry is aware of PFAS and cutting back dramatically on the availability of PFAS coverage under those policies. In the future, it will be very difficult to get PFAS coverage. I think you will see a lot of coverage litigation over this issue."

### **Choose Your State Carefully**

Another big issue for both policyholders and insurers involved in PFAS litigation is choosing which state to file a complaint in.

"Choice of law is critical," Chesler said. "State law differs enormously, and once an insured receives a claim against it on PFAS, you may need to do a study as to the choice of forum."

States have big differences in how they allocate responsibility among insurance companies. California and Pennsylvania apply all sums coverage, whereby one insurance policy may be liable for the entirety of the cost, while New York applies the pro-rata rule, where the insurers under the covered period each pay a portion, he said.

Lintecum of Lathrop agreed that finding a jurisdiction that is going to interpret the insurance policy language favorably for her clients is key.

"To the extent that you can get out ahead of it as a policyholder and be strategic and even preemptively file suit [in one of those jurisdictions] that is an excellent thing to do. Carriers are going to do the same thing."

Choice of forum may be particularly important if some of the carriers on those legacy GL policies are insolvent.

"Some of these insurance companies of the past are no longer in business," Janisch said. "If you're trying to just do some proactive steps, if you think you're susceptible to some PFAS-related, historical environmental initiative by either the EPA or state government, you might want to look at the solvency of the insurance as well. In these long-tail liability situations, you may be looking at multiple years of

coverage, multiple years of insurance. Maybe one carrier is insolvent, but there could be other coverages."

### **Keeping Abreast of Ever-Changing Regulations**

While the EPA has yet to enact PFAS regulations announced in its strategic road map, the agency is getting closer to initiating regulation of PFAS under the Resource Conservation and Recovery Act. And states have been busy regulating the minimum PFAS compounds in drinking water. About 15 states have adopted some sort of standard to date.

Lawmakers, too, are taking action against PFAS contamination and use. In the past year, bills have been introduced in Oklahoma, North Carolina and Wisconsin addressing PFAS contamination, while California, Maryland, New Hampshire, New York, Rhode Island and Hawaii lawmakers are considering bills prohibiting the use of PFAS in certain materials.

Also this year, Maine and Vermont passed acts to stop PFAS pollution, and Illinois passed legislation prohibiting firefighters from using foam containing PFAS for training purposes. A handful of other states have introduced bills requiring PFAS disclosure notices and warning labels and suspending the use of PFAS firefighting foams.

Keeping up with the "ever-changing regulations" at both the state and federal level is a big concern for clients, said Lintecum, who expects insurance companies to fight these increasing numbers of PFAS claims.

"I think we can speculate that they're going to continue to deny [coverage] on the basis of a pollution exclusion," Lintecum said. "Then I think litigation itself will end up looking a lot like previous asbestos litigation where we're fighting over the terms of the pollution exclusion."

But these court battles between insurers and policyholders are in the early stages, Fischer said.

"I've not gotten to the point of litigation of PFAS coverage with carriers at this point," he said. "All of the matters I'm involved in are still in the defense/investigation phase."

--Additional reporting by Ganesh Setty and Emily Field. Editing by Bruce Goldman.