

An Insurance Coverage Checklist For PFAS Defendants

By **Joseph Saka, Willis Hon and Andrew Reidy** (June 6, 2024)

Per- and polyfluoroalkyl substances, known as PFAS, are the emerging contaminant of concern for both regulators and the regulated community. For example, in a May 28 article in The New York Times, titled "Lawyers to Plastics Makers: Prepare for 'Astronomical' PFAS Lawsuits," one defense attorney warned that PFAS liability exposures could "dwarf anything related to asbestos."^[1]

Given the potential significance, understanding the insurance issues surrounding PFAS facilitates the ability of the regulated community to deal with the challenges that lie ahead. This article explores crucial considerations for policyholders in navigating insurance claims for PFAS-related liabilities.

Where to Look for Coverage

A threshold question in assessing insurance as a risk management tool for PFAS claims is identifying which insurance policies apply or may apply to such a claim. Policyholders facing liability exposure should broadly consider various types of insurance policies, because more than one policy may apply to the same claim or loss. However, there are some specific types of insurance policies that are the most likely source of coverage.

Commercial General Liability Insurance

Commercial general liability policies are designed to protect businesses against claims of bodily injury, property damage, and personal and advertising injury. CGL policies are often the first line of defense for companies facing liability claims, as they provide broad coverage for many common types of losses.

CGL policies have historically responded to a wide range of environmental claims, including high-profile cases such as cases alleging lead contamination in drinking water and cases involving the cleanup of hazardous waste sites under the Comprehensive Environmental Response, Compensation, and Liability Act.

In the context of PFAS liability, CGL policies can be a valuable source of coverage for claims alleging bodily injury or property damage caused by exposure to PFAS-containing products or environmental contamination.

For instance, if a company faces a lawsuit from individuals claiming that their health has been adversely affected by exposure to PFAS in the insured's products or by environmental contamination caused by the insured's operations, CGL policies may provide coverage for fees defending the claim and any resulting damages or settlements.

Likewise, CGL policies extend to claims alleging property damage, such as a lawsuit seeking remediation of PFAS contamination of soil or groundwater.



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One critical point in evaluating coverage is that CGL policies generally are written as "occurrence" policies, meaning that they provide coverage for accidents or damages that occur during the policy period, regardless of when the claim is made.

Given the long-tail nature of PFAS claims and the potential for significant liabilities, old occurrence-based CGL policies may be incredibly valuable for companies seeking insurance coverage for PFAS-related claims, which may involve claims alleging that the damage did not manifest until decades after the initial exposure.

Environmental Pollution Liability Policies

Environmental or pollution liability policies are specialized insurance products designed to cover liabilities arising from environmental contamination and pollution events. These policies commonly provide coverage both for a company's own cleanup costs and for a company's losses in defending or resolving third-party bodily injury or property damage claims.

They are particularly relevant for companies with significant environmental exposure, such as those in industries like manufacturing, energy and waste management.

Environmental policies often distinguish between gradual and sudden pollution events, which can significantly affect the scope of coverage provided.

Many pollution liability policies only provide coverage for sudden and accidental pollution events, excluding claims arising from gradual pollution. Gradual pollution commonly refers to the slow, continuous release of contaminants over an extended period — pollution resulting from ongoing, routine operations that may not be immediately apparent.

Thus, to the extent a claim alleges that PFAS contamination occurred gradually over time, environmental policies that only cover sudden and accidental events may not respond. However, some pollution liability policies may offer coverage for both gradual and sudden pollution events. These policies tend to be more comprehensive and expensive, as they cover a broader range of environmental liabilities.

Companies should carefully review their environmental policies to understand the scope of coverage and any limitations or exclusions that may apply to PFAS-related claims.

Directors and Officers Insurance

Directors and officers insurance policies provide coverage for companies and their directors and officers against claims alleging wrongful acts, such as breach of fiduciary duty, misrepresentation or negligence, in their corporate capacity. In the context of PFAS liability, this coverage could extend to claims alleging failure to disclose material information about PFAS-related risks, misrepresentations about the company's PFAS exposures or failure to take precautionary steps to mitigate PFAS exposures.

While the protection for the organization's directors and officers is quite broad, the scope of coverage for the entity itself often turns on whether the company is a private or publicly traded company. Public company D&O policies typically limit coverage to securities claims. Private company D&O policies, on the other hand, often provide broader coverage that extends beyond securities claims.

Regardless of whether they are for public or private companies, it is important to note that D&O policies are typically written on a claims-made basis, meaning that they will only cover claims first made during the policy period.

Preparing for Likely Sources of Disputes

In securing insurance coverage for PFAS-related claims, policyholders should be prepared to navigate potential obstacles and coverage disputes. There are several common issues that policyholders should anticipate to maximize their chances of securing coverage.

Timely Notification to Insurers

Policyholders should promptly notify their insurers of any PFAS-related claims, potential claims or incidents that could give rise to a claim. Most insurance policies require policyholders to provide notice of claims or potential claims as soon as practicable or within a specified time frame.

When notifying insurers, policyholders should also communicate their expectations for coverage and request a timely response from the insurer regarding its coverage position. Policyholders should also carefully document their notice efforts and prepare to navigate any insurer challenges based on late notice.

Failure to provide timely notice can jeopardize coverage, as insurers may argue that late notice prejudices their ability to investigate and defend the claim. However, late notice is not an automatic bar to coverage, and policyholders have several potentially strong arguments to counter insurer attempts to deny coverage on this basis.

First, many states have adopted a notice-prejudice rule, which requires the insurer to demonstrate that it has been materially prejudiced by the late notice to deny coverage. Second, policyholders may argue that the duty to provide notice was not triggered until they had actual knowledge of the claim or loss, which may be much later than the initial exposure to PFAS, particularly given that the potential dangers of PFAS have only been recognized in recent years.

Proving Missing Policies

In analyzing insurance coverage for PFAS-related claims, policyholders may face the challenge of missing or lost historical insurance policies. This issue is particularly likely to arise in the context of PFAS claims due to the long-tail nature of the liabilities and the fact that many of the relevant policies may have been issued decades ago.

The unfortunate reality is that some of these policies may have been lost, misplaced or destroyed, leaving policyholders with the difficult task of proving the existence and terms of coverage without complete documentation.

While the absence of complete policy documents can create obstacles and result in insurers arguing that insureds cannot meet their burden of proving the policy terms, policyholders should employ a multifaceted approach to locate missing insurance policies.

These efforts may encompass internal searches, conducting interviews of current or former employees, seeking information from third-parties such as insurance brokers and outside counsel, or retaining insurance archeology experts who specialize in locating and reconstructing historical insurance policies.

In some instances, it may not be possible to locate physical copies of insurance policies. If that is the case, policyholders still may be able to use secondary evidence to demonstrate the existence and terms of the missing policies.

One key category of such evidence is secondary documents, which may include coverage schedules, premium payment records, certificates of insurance and binders. These financial documents can serve as valuable references to the missing policies, helping to establish not only their existence, but also critical terms such as policy periods, limits and deductibles. Internal communications, memoranda, meeting minutes or other written exchanges that discuss insurance policies may also provide valuable insights into the specific coverage purchased and support the final policy terms.

By obtaining various forms of secondary evidence, policyholders can build a strong case for the existence and terms of missing policies, improving the likelihood of securing coverage for PFAS-related claims.

Disputing Pollution Exclusions

One of the main expected sources of coverage disputes for PFAS claims is the pollution exclusion. However, there are various forms of pollution exclusions, and these differences may significantly affect the availability of coverage for PFAS-related claims.

Pollution exclusions in CGL policies have evolved over time, and understanding the history and variations of these exclusions, as well as the applicable state law, is critical for policyholders.

Before 1970, CGL policies did not contain specific pollution exclusions. As a result, policies from this era may provide the broadest potential for coverage of PFAS-related claims.

In the early 1970s, insurers began incorporating the "sudden and accidental" pollution exclusion into CGL policies. This exclusion typically barred coverage for pollution-related damages unless the discharge of pollutants was both sudden and accidental. Policyholders have had success arguing that this exclusion does not preclude coverage for gradual pollution events, as long as the resulting damage was unintended and unexpected.

Finally, in 1985 and 1986, the insurance industry introduced the "total" pollution exclusion, which excludes coverage for pollution-related claims, regardless of whether the discharge was sudden or accidental. Even these total pollution exclusions, however, may not be insurmountable if, for example, the claim alleges injury from exposure to a product rather than from traditional pollution.

Moreover, in assessing the impact of exclusions, policyholders should take note of several common insurance law principles: (1) the insurer bears the burden of proving exclusions; (2) exclusions must clearly and conspicuously bar coverage; and (3) ambiguities in policy language will be resolved in the policyholder's favor.

Trigger of Coverage and Allocation of Long-Tail Claims

The trigger of coverage refers to the event or circumstances that activate an insurer's obligation to defend and indemnify the policyholder. For CGL policies, this may be the date the accident, bodily injury or property damage took place, and more than one policy may be triggered.

Policyholders and insurers may disagree on the appropriate trigger theory to apply in PFAS cases. Under the manifestation theory, coverage is triggered when the damage or injury becomes apparent or is discovered. On the other hand, under the exposure theory, coverage is triggered when the property (in the case of property damage) or person (in the case of bodily injury) is first exposed to the harmful substance.

Finally, the injury-in-fact theory asserts that coverage is triggered when the actual injury or damage occurs, and the injury or damage may be found to have occurred over multiple years thereby triggering multiple years of policies. Policyholders should advocate for the trigger theory that maximizes coverage based on the specific facts of their case and the language of their policies.

Because PFAS-related claims often involve alleged harm occurring over an extended period, they may implicate multiple insurance policy periods and a key issue expected to arise for PFAS claims is the proper allocation of damages among these policy periods. Apportioning damages in long-tail claims can be complex and contentious, particularly when the exact timing and extent of exposure are uncertain.

The two main allocation methods for long-tail claims are pro rata allocation and all sums allocation.

Under pro rata allocation, damages are, as the name suggests, allocated or spread among the triggered policy periods based on various factors, such as the relative duration and the limit of the policy during each period. This approach may leave policyholders responsible for a portion of the damages, particularly for periods when they were uninsured or where the insurance policies do not provide coverage for the claim.

Conversely, the all sums allocation method allows the policyholder to seek full indemnification from any triggered policy period, up to the policy limits. This approach is generally more favorable to policyholders, as it enables them to maximize their coverage by selecting the policy period with the most advantageous terms.

States have reached different conclusions regarding the appropriate allocation method, so insured organizations should understand which state's law, and thus allocation method, may apply and how that may affect the coverage analysis. Given the required analysis of multiple policies, the variation of state law on how policies are triggered and the allocation among triggered policies, policyholders should closely analyze these issues and develop effective strategies for resolving any disputes.

Conclusion and Best Practices

As companies navigate the complex landscape of PFAS-related liabilities and insurance coverage, there are several key strategies insured organizations can implement to maximize their ability to secure coverage for PFAS claims.

1. Develop a strong understanding of the legal and regulatory landscape.

Stay informed about the evolving legal and regulatory framework surrounding PFAS, including state and federal laws, court decisions and regulatory actions.

2. Perform environmental audits.

Conduct thorough environmental audits and risk assessments to identify potential PFAS contamination sources. Understanding the extent and source of any contamination can inform mitigation strategies and can facilitate communications with regulators and stakeholders.

3. Identify other responsible parties.

Diligently investigate the origins of any PFAS contamination to determine if other parties, such as previous property owners, suppliers or neighboring businesses, might share responsibility.

4. Scrutinize your supply chain.

Examine your supply chain for PFAS usage and seek alternatives where possible. For industries where PFAS are essential, ensure suppliers have robust environmental and safety standards to minimize potential liability from upstream sources.

5. Conduct a thorough review of historical insurance policies.

Undertake a comprehensive examination of all historical insurance policies, including primary, excess and umbrella policies.

6. Provide timely notice to insurers.

Promptly notify all potentially applicable insurance carriers of any PFAS-related claims, lawsuits or losses. Be mindful of any notice requirements or deadlines specified in the policies.

7. Proactively address potential coverage disputes.

Anticipate and prepare for potential coverage disputes, and develop strong, policyholder-focused arguments to maximize coverage. Given the potentially complex issues for PFAS, policyholders should not be shaken if they do not receive an immediate confirmation of coverage.

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[1] <https://www.nytimes.com/2024/05/28/climate/pfas-forever-chemicals-industry-lawsuits.html>.