

Lawyer Insights

CGL policies and coverage for 'forever chemical' product liabilities (part 1)

'Forever chemical' claims have exploded in recent years, with plaintiffs alleging hundreds of millions and even billions of dollars in damages.

By Michael Levine, Lorelie Masters, and Charlotte Leszinske
Published in PropertyCasualty360 | August 30, 2023



Per- and polyfluoroalkyl substances (PFAS), also known as forever chemicals, are increasingly at the center of the news cycle and, now, litigation. While PFAS liability may be an emerging issue, the availability of insurance coverage for these and similar liability claims is not. Commercial general liability (CGL) insurance was developed specifically to protect companies from products liability: claims made by a company's customers, or customers of customers, for harms arising out of the company's products.

For decades, CGL insurance was known as "comprehensive general liability" insurance until in the mid-1980s, the insurance industry sought to walk back the broad sweep of CGL coverage by renaming it. But despite its change in name, CGL insurance — as insurance companies recognized in drafting standard CGL forms — continues to protect companies from all liabilities unless expressly excluded.

Traditionally, exclusions in CGL policies have been narrow. Even "pollution exclusions," developed to exclude claims arising out of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), are limited in scope. Depending on their formulation, pollution exclusions apply only to expected or intended injuries — "sudden and accidental" pollution exclusions used from the early 1970s to 1986; or to "active polluters" or true industrial (waste disposal) claims; "absolute" pollution exclusions used from 1986 on. The insurance industry never intended for pollution exclusions to preclude coverage for the core protection promised by CGL insurance: liability for one's products and premises operations.

At a minimum, CGL policies should cover defense costs for PFAS claims, given that coverage for defense costs is triggered when there is merely a potential for coverage. But there may also be coverage for PFAS claims under other kinds of insurance in a company's insurance program (like pollution legal liability policies) and policies protecting the company as an additional insured. If liability rises to executive-level decision-making, management liability and directors and officers (D&O) coverage may also be implicated.

PFAS are, and are part of, products

PFAS are specifically designed and manufactured chemicals used in many kinds of consumer and industrial products. They are neither simple wastes nor byproducts. PFAS have been around since the

CGL policies and coverage for 'forever chemical' product liabilities (part 1)

By Michael Levine, Lorelie Masters, and Charlotte Leszinske

Published in PropertyCasualty360 | August 30, 2023

1940s and are integral across many product lines because they resist heat, oil and moisture. PFAS made possible time- and life-saving innovations like nonstick cookware, stain-repellant clothing and firefighting tools. Today, PFAS are integral to products ranging from personal care supplies and fertilizer to electronics. And whether sold in chemical form, or incorporated into other products as component parts, PFAS are products not unlike any other.

But as modern science changed our understanding of the risks of tobacco and a glass of red wine per night, so too have we learned that PFAS's benefits are not without risks. PFAS have been linked to increased risks of cancer, developmental delays and reproductive irregularities. Previously thought to be stable and safe, recent studies suggest that PFAS may shed and migrate into food, air, soil, and water. One study found that more than 200 million Americans drink tap water containing PFAS. Other studies suggest that PFAS live up to their "forever chemical" nickname, resisting degradation and thus lasting for decades once shed from their original source.

PFAS claims threaten huge liabilities and defense costs

In the past few years, PFAS-related claims and lawsuits have exploded, with plaintiffs alleging hundreds of millions and even billions of dollars in damages. The spectrum of target defendants is broad. For example, a lawsuit filed recently by the State of Washington names 20 different manufacturers. Government agencies and attorneys general have also begun investigating corporations for PFAS use. Defense costs for PFAS liabilities will be significant, often eclipsing any ultimate liability. As a recent Bloomberg article noted, "[i]f PFAS went into a company's finished product, odds are it's being sued."

Consistent with the extended period during which PFAS products were made, sold and used, and what we now know to be the lasting character of PFAS itself, the scope and potential impact of these lawsuits is tremendous. As one federal judge recently observed, "[i]t does not take a genius to figure out that if certain motions don't go their way, the defendants are in an existential threat to their survival."

Indeed, PFAS claims have already led to staggering liabilities and associated costs. For instance, 3M recently settled with several cities and towns over PFAS claims for \$10 billion. In June, three companies agreed to set up a \$1.19 billion fund to settle a wave of PFAS claims. On the other side of the equation, last year an individual claimant walked away with more than \$40 million for PFAS-related injuries. And none of these estimates include the cost of defending against these claims, which will add millions to the totals.

Given the ubiquity of PFAS products and regulators' increasing scrutiny, it is hard to imagine these cases will slow down any time soon. As the plaintiffs' bar continues to learn more about the widespread use and effects of PFAS and sharpen their knowledge of the specific injuries suffered, product identification, and medical science, manufacturers, retailers, and others in the product distribution chain will be drawn into these disputes. It is no wonder, therefore, that beleaguered companies have turned to their insurers to offset losses. And it is no surprise that insurers have been quick to challenge coverage, including because of pollution exclusions that exist in many modern-day liability insurance policies.

Years or even decades of CGL insurance may apply

CGL and excess liability insurance policies are a staple of most risk management programs. A key feature of these policies is that they continue to afford value long after they expire, so long as the alleged bodily injury or property damage happened during the effective policy period. Even more broadly, CGL

CGL policies and coverage for 'forever chemical' product liabilities (part 1)

By Michael Levine, Lorelie Masters, and Charlotte Leszinske

Published in PropertyCasualty360 | August 30, 2023

policies entitle the policyholder to a defense when just one allegation against it raises a potential for coverage. And unlike the obligation to pay for settlements or judgments, the duty to defend is typically not subject to any aggregate limits.

Yes, CGL coverage should apply to PFAS claims

Legally speaking, CGL policies are triggered by “occurrences,” that is, “bodily injury” or “property damage” arising out of the policyholder’s products or premises operations that takes place within the relevant policy period. Most PFAS claims will fit this description because claimants typically allege bodily injury or property damage caused by their or their property’s exposure to PFAS over a period of years.

In rebuttal, insurers will no doubt raise a panoply of defenses to coverage. Perhaps foremost among them will be that pollution exclusions preclude coverage. Not so.

First, many triggered policies do not include such exclusions. As shown by landmark coverage cases across the country, mostly recently in 2021 at the Montana Supreme Court, if bodily injury or property damage takes place over a long time, all policies during that time will be triggered (“continuous trigger”). The continuous trigger has been applied in other long-tail claims, including various kinds of products claims as well as asbestos and environmental claims. It should also apply to PFAS claims, which resemble other long-tail claims in that claimants allege exposure to PFAS over many years with bodily injury manifesting later in life.

Under a continuous trigger, decades’ worth of insurance coverage may be available. As pollution exclusions were first approved for widespread use in the early 1970s, older insurance policies may not contain a pollution exclusion; enforcing coverage for PFAS claims under such policies will be more straightforward. Because of the value such “legacy policies” may provide, policyholders should search for such “lost policies.” If a policyholder cannot locate historic insurance policies, insurance brokers and special consultants called “insurance archeologists” may be able to help. Secondary evidence, including expert testimony, may be used to prove the existence and terms of insurance policies.

CGL policies and coverage for 'forever chemical' product liabilities (part 1)

By Michael Levine, Lorelie Masters, and Charlotte Leszinske

Published in PropertyCasualty360 | August 30, 2023

Michael Levine is a partner in the firm's Insurance Coverage group in the firm's Washington D.C. office. Mike is a Legal 500 and Chambers USA-ranked lawyer with more than 25 years of experience litigating insurance disputes and advising clients on insurance coverage matters. He can be reached at +1 (202) 955-1857 or mlevine@HuntonAK.com.

Lorelie Masters is a partner in the firm's Insurance Coverage group in the firm's Washington D.C. office. A nationally recognized insurance coverage litigator, Lorie handles all aspects of complex, commercial litigation and arbitration. She can be reached at +1 (202) 955-1851 or lmasters@HuntonAK.com.

Charlotte Leszinske is an associate in the firm's Insurance Coverage group in the firm's Washington D.C. office. Charlotte represents policyholders in insurance coverage actions in federal and state courts across the country, with matters involving environmental liability, mass torts, products liability, and bad faith. She can be reached at +1 (202) 594-9751 or cleszinske@HuntonAK.com.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.