Practical Guidance

Insurance Coverage for PFAS Claims: Lawsuits, Government Investigations, and Nonparty Discovery

A Practical Guidance® Practice Note by William C. Wagner, Taft Stettinius & Hollister LLP

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This practice note provides a brief explanation of PFAS, outlines the coverages afforded by the standard insurance policies identified below, and provides practitioners guidance on how the insurance policies may provide coverage in response to lawsuits, government investigations, and subpoenas for nonparty discovery. Also included are practical pointers on how companies, government entities, and plaintiffs can research whether old insurance policies exist that can be accessed for coverage.

Companies and government entities that used, discharged, or released PFAS may be entitled to insurance coverage in response to lawsuits, government investigations, and subpoenas for nonparty discovery. Some companies and government entities that are being investigated and sued for their past use, discharge, or release of PFAS never knowingly used those substances. They are just as surprised as their customers to learn of PFAS in their goods or products. Others may have used the substances but did not know or appreciate PFAS's harmful effects. Either way, those companies and government entities may be entitled to insurance coverage under their commercial general liability policies, and either their commercial excess liability or commercial umbrella liability policies, or their directors and officers liability insurance policies. This topic is just as important to the people filing lawsuits because the insurance policies' liability limits may end up being used to pay their claims.

For additional information on PFAS in the insurance context, see Insurance Coverage for PFAS Liability, Practical Steps For Companies Facing PFAS Risks, A Road Map To Insurance For PFAS Claims And Suits (Sept. 7, 2022), and Transfer and Purchase of Property, Liability, and Environmental Insurance.

What Are PFAS?

"PFAS" refers to perfluoroalkyl and polyfluoroalkyl substances. These are a group of manufactured chemical substances with strong fluorine-carbon bonds that have been used in industry and consumer products since the 1940s. PFAS are known to resist heat, oil, stains, grease, and water. There are more than 12,000 different PFAS, and the number is growing as new substances are being developed. See Systemic Evidence Map for Over One Hundred and Fifty Per-and-Polyfluoroalkyl Substances (PFAS) (last visited March 6, 2023. (last visited Feb. 6, 2023).

PFAS are often referred to as "forever chemicals." This is because PFAS can readily move through soils and groundwater and they are bio persistent, meaning they break down very slowly and can persist in the environment for decades. PFAS are also bio accumulative, meaning the quantities of PFAS absorbed into the organs and tissues of people and animals can build up over time. See *State v. E.I du Pont de Nemours & Co.*, No. 436A21, 382 N.C. 549, 2022 N.C. LEXIS 972 (D.N.C. Nov. 4, 2022).

Two of the most widely used and studied PFAS chemicals are perfluorooctanoic acid (PFOA) and perfluoro octane sulfonate (PFOS). These PFAS are present in the blood of most Americans. Based on epidemiological evidence gathered from extensive independent scientific studies, including data from over to 69,000 people exposed to PFAS, PFOA and PFOS are known to cause kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol, and pregnancy-induced hypertension and preeclampsia. See *In*

re: E.I. du Pont de Nemours & Co. C-8 Personal Injury Litig., 54 F.4th 912, 919 (6th Cir. 2022).

That said, the total potential health effects of the entire family of PFAS have not yet been fully confirmed. This is in part because the original manufacturers of PFAS, such as the 3M Company (3M) and E.I. du Pont de Nemours & Co. (DuPont), did not timely disclose relevant studies and data to the Environmental Protection Agency (EPA) as they were required to under Section 8(e) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2607(e). In 2005, EPA fined DuPont $10.5 million and required it to perform $6 million in Supplemental Environmental Projects for having violated TSCA. DuPont had been using PFOA since the 1950s and failed to provide EPA reports it possessed confirming PFOA crossed the human placenta and was present in drinking water supplies and impacted residents' blood. See United States Environmental Protection Agency Enforcement – E.I. DuPont de Nemours and Company PFOA Settlements – TSCA/RCRA settlement. In 2006, EPA fined 3M $1.5 million dollars for its failure to disclose from the 1970s forward over a thousand studies related to the potential properties and effects of PFOS and related products on human health and the environment. EPA is presently spending more than $10 million per year on research to confirm the full extent of the health effects of PFAS. *In re: Aqueous Film-Forming Foams Prod. Liab. Litig.*, MDL No. 2:18-mn-2873-RMG, 2022 U.S. Dist. LEXIS 168634, at *35 (D.S.C. Sept. 16, 2022).

Some companies knowingly purchased products containing PFAS because they were told it was "required" by government and military purchase orders, such as with certain aqueous film-forming foam (AFFF). The AFFF was purchased and used to extinguish liquid fuel fires and in firefighting training.

Other companies bought supplies that contained a vague list of "proprietary ingredients," which did not disclose that the ingredients included PFAS. These companies unknowingly used PFAS in their products and now face the consequences.

Likewise, government entities that own or operate facilities that produce drinking water, process wastewater, maintain landfills, or distribute biosolids are also finding themselves in the crosshairs of lawsuits and federal and state government investigations. Drinking water facilities have discovered that the water coming into their processing plants may be contaminated with PFAS. EPA is presently engaged in rulemaking to set maximum contaminant levels for PFOA and PFOS in drinking water. This means the drinking water facilities may need to remove the PFAS contamination from the processed drinking water to meet regulatory standards. The drinking water facilities may look to the polluters who discharged or released PFAS into the environment to offset the added cost of treatment.

Wastewater facilities and landfills are also discovering that they may have PFAS. EPA is engaged in rulemaking to designate PFOA and PFOS as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) and the Resource Conservation and Recovery Act of 1976 (RCRA). This will lead to the development of discharge levels and cleanup standards for soil, air, and groundwater for these substances. The rulemaking will also result in establishing joint and several liability for responsible parties who used, discharged, or released PFAS to pay for the cleanups. Again, wastewater facilities and landfills may look to the polluters who discharged and released PFAS into the environment to offset the added cost of treatment.

What Do Standard Commercial Liability Insurance Policies Cover?

This practical guidance focuses on the standard commercial liability insurance policies that most companies and many government entities purchase, including commercial general liability (CGL), commercial excess or umbrella liability, and directors and officers liability (D&O) insurance policies. There are many more types of liability insurance policies in the market that could be purchased and used to respond to PFAS claims, like pollution liability, product recall, and other types of insurance policies.

CGL policies have various coverage parts. Coverage A covers claims for bodily injury and property damage. Coverage B covers claims for personal and advertising injury, including claims for the unintentional disparagement of a competitor's product. Coverage C includes coverage for products and completed operations, which covers products liability claims. CGL policies often have liability limits in the range of one to five million dollars. The CGL policy's broad coverage grants are limited through the policy's definitions, terms and conditions, exclusions, and limitations.

For more information on CGL policies, see Commercial General Liability (CGL) Insurance.

Commercial excess liability insurance ("excess") policies incorporate the same insuring agreement, definitions, terms and conditions, exclusions, and limitations of the primary CGL policy. Excess policies have liability limits above the CGL policy's liability limits. The liability limits are in the range of one to 25 million dollars.

Commercial umbrella liability insurance ("umbrella") policies typically offer broader coverage than the primary CGL policy. For instance, the author has had cases when the primary

CGL policy contained an enforceable pollution exclusion, but the umbrella policy did not have an enforceable exclusion. In those instances, the umbrella policy dropped down to provide coverage as if it had been the policyholder's primary liability insurance policy.

For more information on excess and umbrella policies, see Umbrella and Excess Insurance Coverage. CGL policies generally impose an obligation on the insurance company to defend the policyholder. Excess and umbrella policies may or may not include a duty to defend, allowing the policyholder to rely on counsel appointed by the CGL insurer or to use their own choice of counsel, who is reimbursed by the excess or umbrella insurer.

For additional 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.

Another distinction exists between "claims made" policies and "occurrence" policies. "Claims made" policies provide coverage for claims made only during the policy period. In contrast, "occurrence" policies provide coverage for claims whenever the claims are asserted. In other words, a company or government entity may have many years of occurrence-based CGL and excess/umbrella policies to respond to claims for bodily injury and property damage that occur over multiple years. Depending on the facts, if a triggering event like an environmental contaminant release occurred over multiple years, the policyholder could look to the liability limits of multiple occurrence policies to respond to the claim. For instance, if PFAS contamination leaked from buried drums over 10 years, then there could be 10 years of coverage available to respond to the claim. If each policy had liability limits of $1 million per year, the policyholder could end up with $10 million of indemnity coverage to pay for a cleanup and other damages.

For additional guidance on these kinds of policies, see Occurrence or Claims-Made Policies.

Pollution exclusions became common in CGL and excess/umbrella liability insurance policies after 1973. Before that time, the Insurance Services Office (ISO) had not adopted a standard pollution exclusion. This means discharges or releases of PFAS that occurred between the 1940s and 1973 may be covered by the companies' or government entities' CGL and excess/umbrella policies and not be subject to a pollution exclusion.

In 1973, in response to the Love Canal incident, the ISO adopted what became known as the "qualified pollution exclusion." The qualified pollution exclusion states that the liability insurance does not apply to "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquides, or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere, or any other water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." So under the qualified pollution exclusion as written, coverage was reinstated if the discharge or release of a pollutant was "sudden and accidental."

A majority of courts have decided that the phrase "sudden and accidental" includes a temporal element of a sudden or abrupt discharge or release, in addition to an accidental release. Many courts have interpreted an "accidental" release as one that is unexpected and unintended from the standpoint of the policyholder. Other courts have held that the phrase "sudden and accidental" is ambiguous and means simply unexpected and unintended from the perspective of the policyholder. When courts determine that policy terms are ambiguous, the terms are construed against the drafter (i.e., the insurance company), which results in coverage for the policyholder.

For a review of laws on the qualified pollution exclusion across the 50 states, see Qualified Pollution Exclusion State Law Survey.

In 1986, the ISO adopted the "absolute pollution exclusion." This exclusion eliminated the reinstatement of coverage for sudden and accidental releases. The exclusion states that the liability insurance does not apply to "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquides, or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere, or any other water course or body of water, whether or not such discharge, dispersal, release or escape is sudden and accidental."

For a review of laws on the absolute pollution exclusion in the 50 states, see Absolute Pollution Exclusion State Law Survey.

The ISO pollution exclusions defined the term "pollutant" as any "solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste," where "waste includes materials to be recycled, reconditioned or reclaimed." Some courts have decided that this definition of "pollutant" is ambiguous and unenforceable. For instance, under Indiana law, in a case involving contamination from a dry cleaners business, the pollution exclusion must identify the excluded contaminant at issue explicitly (e.g., tetrachloroethylene or perchloroethylene (commonly known as "Perc"), and its degradation products trichloroethylene; cis-1, 2 dichloroethylene; and vinyl chloride). Indiana courts have instructed insurers for decades that they can eliminate any ambiguity by specifically naming the excluded substances.

Courts have adopted three approaches for pollution exclusions. Under the majority approach, courts construe the pollution exclusion broadly and exclude any claims for bodily injury or property damage resulting from or related to anything that could possibly fall within the policy's definition of "pollutant." Under the minority approach, courts decide whether the pollutant at issue is something that would have historically been considered a pollutant as discharged or released into the environment. If the substance at issue is not something that would have historically been considered a pollutant, coverage will exist. And under the third approach, adopted in Indiana, courts look to whether the pollutant at issue has been excluded specifically by name under the policy. The third approach eliminates any argument over whether a substance is or is not a "pollutant" or has been historically treated as such.

In 2020, the ISO adopted an amendment to the pollution exclusion for Class B Firefighting Foam, under Form VVGL213 (03–21), which specifically identified the excluded pollutants by name. The term "emergency operations" was amended to "not include the use of a Class B firefighting foam containing any 'PFAS' unless such use meets all standards of any statute, ordinance, regulation or license requirement of any federal, state or local government having application to those." "PFAS" was defined as

> any product containing per- and poly fluoroalkyl substances (PFAS) or other per fluorinated compounds (PFC) including but not limited to, perfluorooctanoic acid (PFOA), perfluoro octane sulfonic acid (PFOS), perfluoro nonanoic acid (PFNA), perfluoro butyric acid (PFBA), perfluoro butane sulfonic acid (PFBS), perfluropentanoic acid (PFPeA), perfluoro hexane sulfonic acid (PFHxS), perfluorohexonoic acid (PFDA), perfluorodecane sulfonate (PFDS), perfluroundecanoic acid (PFUnA), perflurododecanoic acid (PFDoA), perflurotridecanoic acid (PFTrDA), perflurotetradecanoic acid (PFTeDA), or 6:2 Fluorotelomer sulfonate (6:2 FTS).

This type of endorsement eliminates much of the argument over whether the specifically identified PFAS are or are not excluded.

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What Do D&O Liability Insurance Policies Cover?

D&O liability insurance policies cover certain claims against directors and officers, and securities and shareholder derivative claims against the company. The insurance covers "claims" for "wrongful acts." A "claim" can be as narrowly defined as a civil lawsuit or broadly defined as a written demand for monetary or nonmonetary or injunctive relief; a civil, criminal, or administrative proceeding commenced by service of a complaint or indictment; or a civil, criminal, administrative, or regulatory investigation commenced by service of a written notice, target letter, or subpoena. A "wrongful act" is usually broadly defined as any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed or attempted by any "insured person" in their capacity as such.

For further guidance on D&O liability insurance, see Director and Officer (D&O) Insurance, COVID-19 Directors and Officers (D&O) Coverage Litigation, COVID-19 Directors and Officers (D&O) Insurance Claims Pre-Litigation, COVID-19 Directors and Officers (D&O) Insurance Claims Pre-Litigation Checklist, COVID-19 Directors and Officers (D&O) Coverage Litigation, and Directors and Officers (D&O) Liability Insurance Selection Checklist.

See also New Appleman on Insurance Law Library Edition § 26.01 for more information about D&O insurance.

D&O liability policies are "claims made" policies, meaning the policies cover claims made only during the policy period. When a policyholder suspects that a future claim may arise out of an act or omission that occurred during the policy period, the policyholder can provide the insurer a "notice of circumstances." If a claim is later filed against the policyholder for the matter described in the notice of circumstances, the claim will be covered under the policy in place when the notice was given. D&O policies usually have an "interrelated wrongful acts" clause that states that all interrelated wrongful acts that arose out of the same facts, circumstances, or events are deemed to have occurred at the time of the first wrongful act for which the policyholder was put on notice. D&O policies have multiple exclusions, including exclusions for bodily injury and property damage and antitrust violations.

There is no harm in notifying all your liability insurers of a claim. But if you fail to promptly notify an insurer of a claim

when that insurer was supposed to be notified, you may be barred from coverage forever.

For example, when government entities sued opioid pill manufacturers and distributors to recover costs spent to treat people addicted to the medication, the manufacturers and distributors sought coverage under their CGL and excess liability insurance policies. The manufacturers and distributors asserted that the claims sought damages resulting from "bodily injury," meaning the harm inflicted on the people who sought government services. The Seventh Circuit Court of Appeals agreed with this reasoning in *Cincinnati Insurance Company v. H.D. Smith*, 829 F.3d 771 (7th Cir. 2016), but the Sixth Circuit Court of Appeals rejected the argument in *Westfield National Insurance Company v. Quest Pharmaceuticals, Inc.*, 57 F.4th 558 (6th Cir. 2023) (holding that the lawsuits are not because of bodily injury). Had Quest Pharmaceuticals promptly filed a D&O claim notifying its D&O insurer of the government entity lawsuit, the claim may have been covered by the D&O policy because the policy's exclusion for bodily injury was determined to be inapplicable.

The lesson learned from these cases is to make sure you notify all your liability insurers (CGL, excess/umbrella, and D&O) of any government entity claim because coverage may exist under at least one of the liability insurance policies.

Bodily Injury and Property Damage Claims

Setting aside product liability claims which are described below, bodily injury and property damage claims are increasingly being brought either as individual or class action lawsuits against polluters for their past use, discharge, or release of PFAS. For instance, both class action and thousands of individual claims were brought against DuPont after it discharged and released PFAS into the environment for decades from its Washington Works plant near Parkersburg, West Virginia, by air through smoke stack emissions, by water through wastewater discharges into the Ohio River, and by soil and groundwater through releases from sludge and other waste in unlined pits that allowed PFAS to seep into the soil and groundwater.

Companies and government entities that are being sued for having discharged or released PFAS into the environment may have coverage under their CGL and excess or umbrella policies. Coverage may exist for any discharge or release that occurred before 1973, which is when the qualified pollution exclusion was adopted. Coverage may exist between 1973 and 1986 for any "sudden and accidental" discharge or release. And coverage may exist after 1986, when the absolute pollution exclusion was adopted, depending on how your state courts interpret these exclusions and the policy definition of "pollutant." As explained above, a majority of states enforce the pollution exclusions in favor of insurance companies. A minority of states hold that the pollution exclusions and/or the term "pollutant" is ambiguous and unenforceable. In those states, courts may find that coverage readily exists under the standard commercial liability insurance policies.

If coverage does exist, it is important to assert that the insurer's "duty to defend" includes the fees and costs incurred to identify other potentially responsible parties, who may share in the cost of any resulting damages. Some insurers take the position that counterclaims and third-party claims aimed at assigning blame to other potential responsible parties is not a cost to defend the policyholder and is therefore not covered by the policies. However, several cases hold that any actions taken to lessen the policyholder's ultimate liability and costs must be considered "defense costs," which are to be reimbursed under the policies. See, e.g., *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909 (Cal. 1998). And the attorneys' and expert witness's fees and costs incurred do not erode the liability limits of policies but are instead subsumed as defense costs.

Product Liability Claims

The standard CGL, excess, and umbrella policies provide coverage for "products and completed operations." The insuring agreement covers claims for bodily injury and property damage resulting from the use of a company's product. The coverage does not cover the cost of the damaged product itself or the cost to recall the product if it is determined to be defective. However, many companies that manufacture goods or products, including food and drinks, often decide to purchase "Recall Insurance." This insurance is designed to pay for the cost to recall a good or product from the market. And some companies choose to buy separate product liability insurance, which may offer broader coverage and benefits than that provided under standard CGL policies.

A CGL policy's products and completed operations coverage is also subject to the policy's pollution exclusion. Again, some courts interpret the pollution exclusion rigidly in favor of the insurance companies. However, some courts that might otherwise rigorously apply the pollution exclusion in favor of the insurance companies chose not to do so in response to product liability lawsuits when application of the exclusion would frustrate the purpose of buying the insurance.

This happens frequently when the product that incorporates the pollutant is being used in an approved manner and

in a fashion that has not historically been considered pollution. For example, in *Great Lakes Chemical Corporation v. International Surplus Lines Insurance Company*, 638 N.E.2d 847 (Ind. Ct. App. 1994), the product at issue was a pesticide product that was injected into the ground. The court held that the policy's pollution exclusions did not apply to the policyholder's pesticide product where the pollutant in the product (ethylene dibromide) was not banned at the time of its use; the chemical was not a by-product of the insured, but end product intended to applied directly to land; and the product was used at the time of its application exactly in the manner intended by the manufacturer and as approved by state and federal governments. Great Lakes Chemical Corporation, 638 N.E.2d 847 at 851 ("To hold that the pollution exclusion clauses bar coverage . . . would render the insurance coverage . . . illusory.").

This same argument could be asserted with PFAS product liability lawsuits seeking damages for bodily injury, medical monitoring, and property damage. The number of goods and products that are the subject of PFAS product liability lawsuits is growing and presently includes personal care products (e.g., shampoo, dental floss, cosmetics, and feminine hygiene products), food packaging (e.g., grease-resistant paper, fast food containers and wrappers, microwave popcorn bags, pizza boxes, and candy wrappers), apparel products (e.g., water-repellant clothing, exercise wear, leggings), and household products (e.g., stain and water-repellant used on carpets, upholstery, fabrics; cleaning products; non-stick cookware; and paints, varnishes, and sealants).

For additional guidance on product liability, see Product Liability Claims, Defenses, and Remedies, Product Liability Claims Preemption and Mitigation, Products Liability State Law Survey, and Product Liability Legislation & Regulation To Watch In 2023.

Deceptive Trade Practices and Consumer Fraud Claims

Many states have enacted unfair deceptive trade practices laws, which prohibit businesses from engaging in deceptive business practices in the sale of goods and services. Many states have also enacted consumer fraud laws, which prohibit businesses from engaging in deceptive business practices in relation to consumers. Both laws allow plaintiffs to recover their actual damages and attorney's fees. Many unfair deceptive trade practices lawsuits are brought by competitors alleging that the policyholder's advertising disparages their goods or products. Those claims would be covered under the CGL, excess, and umbrella policies. Specifically, the CGL policy's Coverage B covers claims for personal and advertising injuries, including claims for actual or alleged slander and disparagement of a competitor's goods or products.

One of the nuances to this coverage involves instances where the policyholder does not refer to a competitor or a competitor's product by name but disparages the competitor or competitor's product through a backhanded claim. This coverage often comes into play when the policyholder boasts about their own product, suggesting no other manufacturer in the market has a product having the same qualities as the policyholder's product. For instance, suppose a nutritional goods manufacturer claimed to have the only PFAS-free juice available in the market, when another company actually has its own brand of PFAS-free juice. The competitor could sue the policyholder for disparagement even though the policyholder's advertisement never mentions the competitor or its product by name.

While unfair trade practices laws focus on fair competition between businesses, consumer fraud laws focus on deceptive advertising between businesses and consumers. Many of the consumer fraud cases do not allege any claims for bodily injury or property damage. Instead, the plaintiffs allege that they bought a product because of certain qualities the product was supposed to have (e.g., the product was PFAS-free) or they overpaid for the cost of the product because the product as delivered was worth less than the product as advertised. Because these cases do not contain any allegations for bodily injury or property damage, there is typically no coverage under the standard CGL, excess, or umbrella policies. However, several courts have determined that coverage exists for consumer fraud claims under D&O policies.

D&O policies cover claims asserted against companies for misstatements and omissions. D&O insurers often argue that the policy's pollution exclusion applies to preclude coverage. However, given the absence of a bodily injury or property damage claim, many courts hold that the exclusion is inapplicable. Insurers then fall back on the D&O policies' antitrust exclusion, which sometimes specifically excludes unfair trade practices. Several courts have held that the antitrust exclusion does not preclude coverage unless it specifically excludes actual or alleged consumer fraud violations. See, e.g., *James River Ins. Co. v. Rawlings Sporting Goods Co., Inc.*, No. CV 19–6658-GW-MAAx, U.S. Dist. LEXIS 20970 (C.D. Cal. Jan. 25, 2021); *G-New, Inc. v. Endurance Am. Ins. Co.*, C.A. No. N21C-10–100 MMJ CCLD, 2022 Del. Super. LEXIS 371 (Super. Ct. Del. Sept. 12, 2022).

Securities and Shareholder Derivative Claims

Companies are increasingly being targeted for securities and shareholder derivative lawsuits for their use, discharge, or release of PFAS. The securities claims often allege that the shareholders were deceived into paying a premium for the company's stock because the company failed to disclose its use, discharge, or release of PFAS. They claim that the failure to disclose this information led to the price of the stock being inflated in comparison to what the price would have been had the information been disclosed. The shareholder derivative claims, often brought by activist investors, frequently allege that the company's directors and officers breached their fiduciary duties by intentionally or carelessly using, discharging, or releasing PFAS. They claim that the fiduciary breaches led to the company's liability for lawsuits seeking damages for bodily injuries, medical monitoring, property damage, and cleanup claims.

D&O policies should respond to both securities and shareholder derivative claims. However, some D&O insurers have argued that, because the allegedly deceptive act results from the company's use, discharge, or release of PFAS, the claims are excluded from coverage under the policy's pollution exclusion. The securities and shareholder derivative lawsuits, however, typically do not seek to recover the cost to clean up the PFAS pollution. Instead, they seek to recover the difference in the company's share price between what was paid and what the plaintiffs think they should have paid (i.e., a much lower price), if they would have bought the shares at all, given the company's use, discharge, or release of PFAS.

As more and more companies discover that they have unknowingly used, discharged, or released PFAS into the environment or incorporated PFAS into their goods or products, one can expect an increase in the number of securities and shareholder derivative lawsuits, especially in those instances when the company or its directors and officers failed to adequately investigate the sourcing and ingredients of PFAS used in their goods or products.

Nonparty Discovery Requests

Manufacturers and distributors of goods or products containing PFAS are receiving subpoenas from government investigations and nonparty discovery demanding that they produce documents and electronically stored information related to the PFAS in their goods or products. The cost to comply can potentially be quite large because the company may have to hire attorneys to interview witnesses and gather the information, and vendors to produce the information to be provided. For example, in *Shambaugh & Son, Limited Partnership v. Steadfast Insurance Company*, No. 1:22-CV-135-LY, 2022 U.S. Dist. LEXIS 229777 (W.D. Tex. Oct. 17, 2022), Steadfast claimed to have incurred $1.7 million to comply with a subpoena it received with the Aqueous Film-Forming Foams multidistrict litigation pending in the U.S. District Court for the District of South Carolina.

Notwithstanding a company's ability to seek cost-shifting for reimbursement of an undue and overly burdensome discovery request under Rule 45 of the Federal Rules of Civil Procedure, companies may have coverage for the cost to comply with the subpoenas under their D&O policies. Many D&O policies define a "claim" broadly to include a written demand for nonmonetary relief. Some courts have determined that a subpoena from a government entity or in response to a nonparty discovery request can result in a covered claim entitling the policyholder to reimbursement. Other courts have only allowed reimbursement when the subpoena is accompanied by an allegation that the policyholder may have engaged in a "wrongful act." For example, with a government investigation, those courts often reason that complying with a government investigation in the absence of an allegation of wrongdoing is simply a cost of doing business in regulated industry.

Practice Pointers for Locating Old Insurance Policies

Companies and government entities that are caught in the crosshairs of lawsuits, government investigations, and nonparty discovery requests relating to their use, discharge, or release of PFAS should consider the following steps:

- Immediately notify all the company's current standard commercial liability insurers, including the CGL, commercial excess/umbrella liability, and directors and officers liability insurers, of the receipt of the lawsuit, investigation demand, or subpoena. There will be time after notice is given to sort out which insurer owes coverage. Because D&O policies are "claims made" policies, notice must be given during the policy period, or the company will forfeit coverage. Many state courts also hold that an insurance company's duty to defend is not triggered until the insurer receives notice. You will not want to incur attorney's fees to respond to the claim only to find out that none of the attorney's fees are covered before the insurer is notified and/or that the insurer has the right to appoint panel counsel of its choosing to defend the claim.
- Pull all historical records on PFAS use to determine what was purchased, when it was purchased, how it was used,

where it was used, how it was disposed of, and who may have knowledge of these facts.

- Once you have an idea of when PFAS were purchased, used, discharged, or released, pull all the company's insurance policies for the time period to determine the available insurance coverages and any definitions, terms and conditions, exclusions, or limitations that could impact the coverage analysis. Promptly notify these insurers of the claim.
- For years in which the company is missing insurance policies, review the next in line policy to determine if it is a new policy or a renewal of an existing policy. A renewal means the next in line insurer issued the prior policy and may have records related to its existence.
- For years in which the company is missing insurance policies, ask the insurer for the next in line policy to pull the insurance policy application documents. The application usually identifies the existing insurer and the policy's liability limits that are being replaced.
- For missing policies, look for secondary evidence to prove that the company bought insurance. Sources for such information include check ledgers, cancelled checks, accounting records showing premium payments for a policy, board minutes or regular business records discussing policies, and insurance agents or brokers who may have sold the company polices. Sometimes the existence and terms of insurance will be included in a certificate of insurance that has to be produced to a third party under a contract, like a lease agreement requiring that the company name the landlord as an additional insured or other contracts with suppliers and distributors. There have been cases where secondary evidence to prove the existence of insurance coverage included declarations from the company's insurance agent who remembered selling CGL and excess policies to the company, calendars displaying the insurer's logo that were given to customers, and a 25-year old lawsuit where the company and its insurer were named as defendants in a small claims court lawsuit. Agents and brokers may also have records of the company's purchases of insurance policies and liability limits.
- Consider hiring an insurance archeologist, who can assist the company to locate old policies and provide exemplars of the types of coverages and liability limits offered by a particular insurance company during a particular time period.

Related Content

Resource Kits

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- Insurance Coverage Resource Kit
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State Law Surveys

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

Law360 Articles

- Product Liability Legislation & Regulation To Watch In 2023 (Jan. 19, 2023)
- 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)
- A Road Map To Insurance For PFAS Claims And Suits (Sept. 7, 2022)

Templates

- Director's and Officer's (D&O) Liability Insurance Policy
- Notice of Claim (Occurrence Policy)

Checklists

- Duty to Defend and Duty to Indemnify Checklist
- Directors and Officers (D&O) Liability Insurance Selection Checklist
- COVID-19 Directors and Officers (D&O) Insurance Claims Pre-Litigation Checklist

William C. Wagner, Partner, Taft Stettinius & Hollister LLP

Bill is widely recognized as an accomplished and successful trial attorney. He has extensive experience trying and winning cases involving complex, scientific issues in civil and criminal trials in federal and state courts, administrative hearings, and arbitrations throughout the country. In an era when approximately 95% of cases settle, he has tried more than 50 cases to verdict. His courtroom successes include defeating a nine-figure breach of contract claim, obtaining preliminary and permanent injunctions to protect a client's trade secrets from misappropriation for technology representing billions of dollars in sales, and representing a world-leading manufacturer of nuclear material handling and lifting equipment pursuing breach of contract and delay damages against the U.S. Navy.

He has substantial experience handling a wide variety of matters, including complex business disputes, theft of trade secrets, government contracts, False Claims Act, cyberattacks, securities, and ERISA litigation. Bill also has substantial experience with matters involving environmental law, mass torts, class actions, defense of enforcement actions by federal and state agencies, and insurance coverage and cost recovery actions. He has skillfully guided clients through multi-faceted and sensitive internal investigations and high-profile, parallel administrative, civil, and criminal investigations and prosecutions, with some of his greatest successes never being publicized. Bill has represented companies and their management in virtually every industry, including defense, energy, financial, manufacturing, professional services, technology, and utility services. His clients' cases have been featured in *The Wall Street Journal*, *ABA Journal*, *BNA Reporters*, and major news outlets.

Bill has been regularly recognized by *Best Lawyers in America*® in multiple categories and has been named a Fellow of the American Bar Foundation, the Indiana Bar Foundation, Litigation Counsel of America, and The Trial Lawyer Honorary Society. He has served on multiple committees for the American Bar Association, DRI, and Sedona Conference. He has also received the highest professional rating for general ethical standards and legal ability from Martindale Hubbell.

Bill grew up in the steel mill city of Gary, Ind. He worked his way through college and law school receiving his undergraduate and law degree (*cum laude*) from Valparaiso University. He began his legal career trying cases and examining expert witnesses, first as a deputy prosecutor, then as an in-house trial attorney for State Farm Insurance, before entering into private practice. For over 15 years, the National Institute of Trial Advocacy (NITA) has invited Bill to teach trial skills to lawyers from across the country and across the world.

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