REMEDIATING, INSURING AND LITIGATING PFAS CLAIMS

James Fenstermacher
Jaana Pietarei
Michael Bock
PFAS

Robert D. Chesler
Nicholas M. Insua
Anderson Kill

Sheila Mulrennan
Insurance Archaeology Group

Robin Kelliher
WillisTowersWatson

Jason Waters
Wilson, Elser, Moskowitz, Edelman & Dicker

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Jim Fenstermacher, Jaana Pietarei, Michael Bock*

Dating PFA Releases

A central element of insurance claims that aim to recover costs for investigation and remediation of environmental contamination relates to the date of a chemical release. This question—when chemicals were released to groundwater, soils, and sediments—may determine whether an insurance policy was in effect when the release occurred and therefore whether costs associated with investigation and cleanup are covered by that policy. Dating a PFAS release requires a "weight of evidence approach," whereby findings from multiple scientific and independent lines of inquiry are considered together to establish or bracket when a release occurred. These lines of evidence require understanding the detailed operational history relative to PFAS use at the site in question, as well as the chemical signature for that site's operations and the fate, transport and transformation of the particular PFAS compounds in that signature.

PFAS Timeline

The foundation for dating PFAS releases depends on the timeline of discovery, development and commercial availability of PFAS-containing materials and products, and changes in manufacturing methods, production and phase-outs. As a first step in understanding if a release from a facility could have occurred (and if so, when), it is necessary to consider historical changes in PFAS manufacturing and commercialization of products. Key related events are shown in Table 1. Such events can be considered together with the timeline of facility operations to roughly bracket for when such a release could have occurred.

Operational Timeline

The reconstruction of historical facility operations and characterization of current operations are necessary to determine whether and when PFAS-containing materials were used, whether processes that used PFAS were employed, and whether releases occurred that could have introduced PFAS into the environment. Historical reconstruction of facility operations involves describing processes, types of products manufactured, nature and quantities of wastes generated, and how and where wastes were disposed over time. Critical evidence can be derived from spill records, disposal records, process records, historical fire insurance maps, aerial photographs, and company annual reports. Dated purchase inventories and safety data sheets may also provide information on PFAS usage and the time periods of use. Because such records may withhold the identity, or even the presence, of PFAS as confidential business information, or may generally refer to fluorosurfactants, expert knowledge and/or chemical analysis of products may be needed to determine if materials used likely contained PFAS.

PFAS releases may be associated with manufacturing operations and/or as part of fire suppression or training and testing activities using aqueous film forming foams (AFFF). Fire department records or other safety related records can identify locations and timing of releases of AFFF or other potentially PFAS-containing fire suppressants.

Table 1. Simplified History of PFAS

Year	Event
1938	Polytetrafluoroethylene (PTFE) accidentally discovered
1946	PTFE introduced to the market and beginning of development and commercialization of variety of fluoropolymers
1949	Production of perfluorochemicals using the electrochemical fluorination (ECF) process
1951	PFOA use as a fluoropolymer manufacturing aid
1952	Accidental discovery of the original Scotchgard formula
1954	Wetting agent/fume suppressant with a fluorinated or perfluorinated carbon compounds for chrome plating
1960s	PFAS-containing firefighting foams developed, including synthetic aqueous film forming firefighting foam (AFFF), based on C8-compounds, and fluoroprotein foam
1960s	The use of PFAS in food contact applications authorized
1969	AFFF widely used in Department of Defense installations; AFFF predominantly based on PFAS manufactured using ECF
2000-2002	Phase-out of PFOS manufactured by ECF; PFOA and AFFF based on PFAS manufactured predominantly by fluorotelomerization process
2001	Global distribution of PFOS in wildlife reported
2003	Introduction of C4-based PFBS chemistry as a replacement for C8 PFOS
2006-2015	Voluntary PFOA Stewardship Program to eliminate PFOA and related PFAS by eight major manufacturers
2009	Provisional Health Advisories for PFOA (400 ng/L) and PFOS (200 ng/L); analytical method to measure 14 PFAS in drinking water (Method 537) developed
2012	USEPA Third Unregulated Contaminant Monitoring Rule (UCMR3) published, requiring public water supplies serving more than 10,000 people to sample for six individual PFAS compounds by 2016
2013	GenX introduced as an alternative to PFOA for use as a fluoropolymer manufacturing aid
2016	Health Advisories for PFOA and PFOS set at 70 ng/L, individually or combined
2016	Transition from C8-based firefighting foam products to C6-based products; military specification for AFFF sets 800 ppb maximum for PFOS and PFOA
2019	USEPA publishes first PFAS Action Plan

Fate and Transport Evaluation of PFAS

The fate, transport, and transformation of PFAS in the environment differs from and is generally more complex than that of other contaminants. That complexity stems from the very large number of PFAS compounds, their varied chemical and physical characteristics, and their transformation with time and distance from a release location.

Releases to groundwater (or originally to soil followed by leaching to groundwater) are often a central focus of PFAS contamination, due to direct impacts on public and private drinking water sources. If hydrogeological information is available, groundwater flow velocity combined with contaminant transport modeling can be used to estimate when release occurred. Groundwater flow velocity informs how fast contaminants in groundwater could move absent any retardation, for example, from release a location to a receptor such as a public supply well. Chemical properties of individual PFAS compounds, such as how "sticky" they are, combined with the groundwater velocity can be used to estimate how fast PFAS move in the subsurface. The release date can be estimated by back-calculating how long PFAS would have needed to travel from a release site to a receptor, given the hydrogeological conditions and the individual PFAS properties.

The spatial distribution of varied PFAS concentrations may be illustrated as a groundwater plume morphology or a map of soil impacts. Related maps can also reveal important aspects of the nature of the release. Similar to chlorinated volatile organic compounds, the transformation of parent **poly**fluoroalkyl compounds (so called "precursor") to end product (so called "terminal") **per**fluoroalkyl compounds, as well as the separation of faster moving PFAS from slower PFAS with time and distance from a source can provide additional clues as to when and where a release originated.

Chemical Evidence

The PFAS profiles (i.e., chemical signatures or fingerprints) measured in environmental samples oftentimes can also provide information important to estimating the timing of a release. As illustrated in Table 1, different PFAS

compounds appeared in the marketplace at different times. Detailed information on the presence or absence of certain PFAS compounds can then be used to bound the date of release. The increasing number of PFAS compounds reported by analytical laboratories provides expanded information that, combined with detailed information of the manufacture of these additional compounds and facility information, may provide additional lines of evidence. For example, the prominent manufacturing methods for PFAS—ECF and fluorotelomerization—have particular chemical signatures. Consequently, it may be possible to date releases based on the ratio of branched to linear isomers as related to the switch from ECF to fluorotelomerization as the dominant manufacturing process. Dating of releases can also be enhanced based on evaluating evidence from chemical tracers that are compounds that may be unique to the manufacturing process but that are not PFAS and whose fate and transport characteristics are known.

Putting the puzzle pieces together

The multiple lines of evidence discussed above, combined with other relevant information, can be integrated to develop a comprehensive conceptual model of PFAS releases and timing. This type of weight-of-evidence evaluation provides a framework to evaluate to strength of each of these lines of evidence, identify consistencies and inconsistencies, and develop a robust analysis for dating releases.

REMEDIATING PFAS RELEASES

Remediation of PFAS presents considerably greater challenges than legacy contaminants like chlorinated volatile organic compounds. As the name “forever chemicals” suggests, PFAS are extremely persistent and mobile in the environment, and that combination of persistence and mobility renders them difficult to treat. Increasing and varying numbers of PFAS compounds are regulated, currently only at state level, and the evolving toxicological information and cleanup criteria in the part-per-trillion levels pose a further challenge in determining how clean is clean – i.e., when cleanup is complete. Yet, the ongoing study of the behavior of PFAS in the environment and elucidation of their varied physical and chemical properties provides further complications.

Current remediation technologies largely focus on separating PFAS from the impacted environmental media, such as through sorption, ion exchange, or membrane filtration, rather than destruction. Given the persistence, mobility and diversity of PFAS properties, effective treatment will likely require treatment trains that combine multiple technologies. Fundamental to any remediation effort is a comprehensive characterization of sites and releases and development of conceptual site model that incorporates all potential sources, migration and transformation pathways, receptors, and exposure pathways.

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Sorption technologies, like granular activated carbon and ion exchange resins, concentrate, but do not destroy PFAS, and treatment media must be either disposed, by landfilling or incineration, or replenished or regenerated. Filtration technologies, like reverse osmosis and nano-filtration remove and concentrate PFAS from a waste stream, requiring a second treatment technology, such as incineration, for PFAS to ultimately be destroyed. Fractionation technologies take advantage of the surfactant properties of PFAS and use air to create a floating foam for PFAS concentration and removal. Like the other technologies that rely on concentrating PFAS from a waste stream, fractionation requires follow-on technologies if PFAS destruction is required. These technologies all serve to reduce PFAS disposal or destruction costs by concentrating PFAS into a smaller waste volume.

Aqueous media like groundwater, surface water, or landfill leachate can be treated directly sorptive or filtration technologies; non-aqueous media like soil or sediment are excavated and thermally treated to remove PFAS or are disposed in landfills. However, landfill disposal options will depend on whether classification of PFAS (PFOA and PFOS, or more PFAS compounds) as hazardous substances, which would limit landfill disposal to those that are permitted for hazardous wastes and may be limited over concerns for landfill’s own long-term environmental liabilities.

A major focus area for future remediation of PFAS is the development of destructive technologies. These technologies, such as electrochemical oxidation, plasma destruction, reductive defluorination, and sonication, are all currently in the early stages of testing at laboratory or field pilot scales and appear to hold promise of being practical solutions at a functional field scale. Figure 1 summarizes potential groundwater treatment technologies based on their feasibility and maturity to treat PFAS. Figure 1. Groundwater treatment technologies, their feasibility and maturity for PFAS treatment.

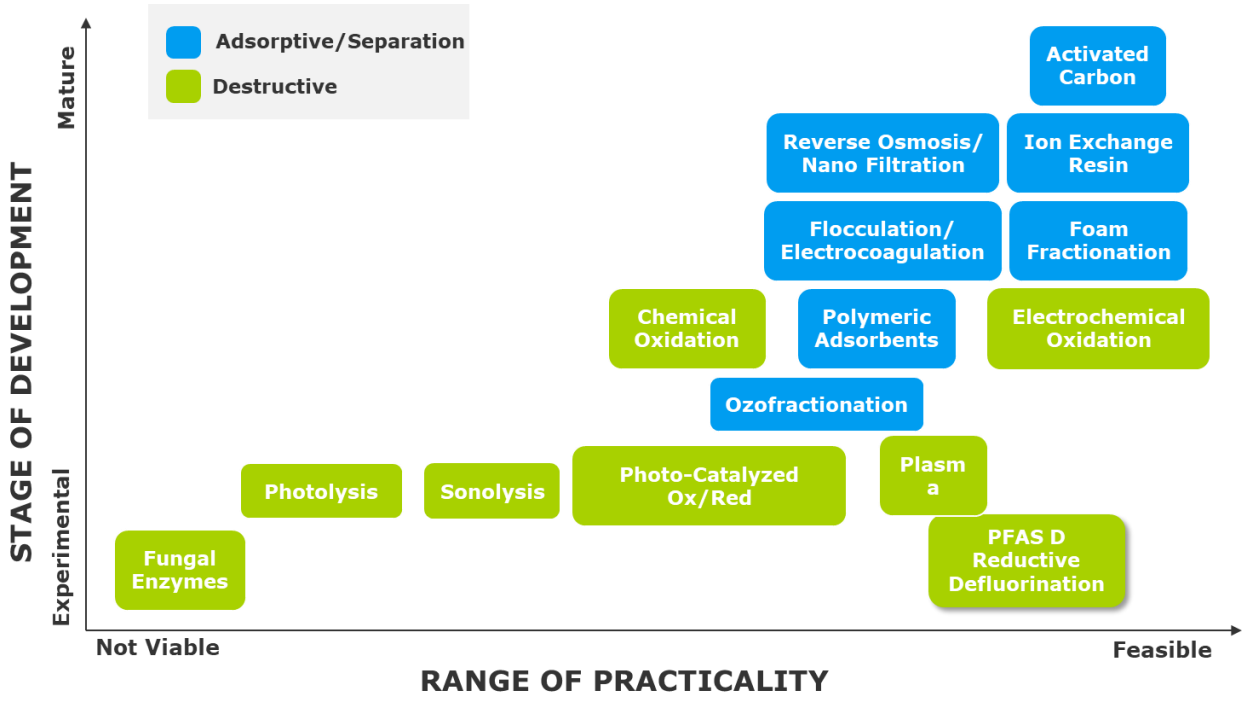


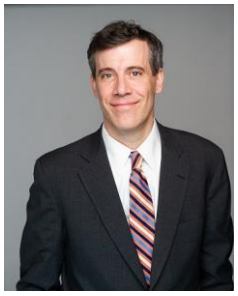
Figure 1. Groundwater treatment technologies, their feasibility and maturity for PFAS treatment.

In closing, PFAS present a far more complex challenge to environmental experts, regulators, industry, and the general community than most legacy contaminants, due to their unique properties, ubiquitous use, presence throughout the environment, uncertain health effects, and technological limitations and uncertainties. Most remediation technologies for PFAS-impacted groundwater and soil rely on capturing and concentrating PFAS, rather than destroying PFAS, however numerous innovative treatment technologies are being investigated. In addition to these technical solutions, strategic management of PFAS, including adaptive management or alternative approaches like technical impracticability waivers may warrant consideration due to the potential cost of remediating widespread PFAS impacts. Instead of remediation of PFAS impacted groundwater plumes or soils, an alternative is to consider mitigation approaches, such as treatment of drinking water, to protect potential receptors as a remedial approach.

* Jim Fenstermacher is a Subject Matter Expert on PFAS environmental fate, transport and regularly interfaces with academia, provides branding and supports business development efforts regarding PFAS issues.

* Dr. Jaana Pietari has more than 20 years of professional and academic experience in the fate and transport of contaminants, the reconstruction of environmental releases to groundwater and sediments, and environmental forensics.

* Dr. Michael has more than 25 years of experience in environment consulting with a specialization in the investigation and assessment of contaminated soils, groundwater, and marine and freshwater sediments.

TEN STEPS TO INSURANCE COVERAGE FOR PFAS LIABILITY

By: Robert D. Chesler and Nicholas M. Insua*

1. **What insurance policies may apply to PFAS groundwater contamination?**

   Historic commercial general liability (CGL) policies may apply to PFAS groundwater contamination. CGL policies provide insurance coverage for liability stemming from property damage. In every state, groundwater contamination constitutes covered property damage. In almost all states, if groundwater contamination began prior to 1986, policies in effect prior to that date have a duty to respond.

2. **What about pollution exclusions in general liability policies?**

   In about 1986, the insurance industry added an absolute pollution exclusion to general liability insurance policies. That exclusion forecloses coverage for PFAS contamination under post-1986 policies.

   In about 1973, the insurance industry added the so-called 'sudden and accidental' pollution exclusion to general liability policies. In some states, this is a bar to coverage under post-1973 policies, unless the groundwater contamination is the result of, for example, a tank rupture or other 'boom' event. It is possible that a court would consider the use of PFAS foam to put out a fire as a covered 'sudden and accidental' event.

   Other states essentially ignore the sudden and accidental pollution exclusion. In those states, coverage will exist under pre-1986 general liability insurance policies.

3. **How do I know when the groundwater contamination commenced?**

   It is the policyholder's burden to show that contamination commenced prior to 1986 or 1973. Sometimes, the answer can come from the site's operational history. A fire may have occurred on a certain date, and fire-fighting foam containing PFAS may have been used to put out the fire. Records may indicate when products containing PFAS were purchased.

   For many chemicals, dating can occur based on the degradation of the chemical into breakdown products. However, PFAS barely degrades in groundwater. It may be possible to date the contamination on the basis of how far the plume of contaminants has traveled. In some cases, dating can be more of an art than a science.

4. **How do I know which state's law applies?**

   If a company is headquartered in the same state where the contamination exists, that state's law normally will apply.

   However, if a company is headquartered in a state different from the one where the contamination exists, choice of law questions will arise. Some states apply the law of the state where the contamination takes place. Other states will apply the law of the state where the company is headquartered or where the insurance policy was entered into.

   As an example, in one case, a Texas company was responsible for pollution in New Jersey. Texas applies the law of the state where the company is headquartered and where the insurance policy is entered into. Under Texas law, coverage for pollution would not exist. New Jersey applies the law of the state where the hazardous waste site is located, and coverage would exist under New Jersey law. The insurance company sued its policyholder in Texas, and the company lost coverage. A sophisticated choice of law analysis is often essential to coverage.

5. **Whose insurance policies apply?**

   The policies of the company that owned or operated the site prior to 1986 or 1973 will apply. If a company owned or operated the site prior to 1986/1973, its policies will apply. If a company acquired the property after 1986, it will need to look to the policies of the prior owner/operator. Frequently, rights to the insurance policies are transferred at the time of merger or acquisition, so that the responsible party will be able to proceed under the predecessor's policies. If the rights to the policies were not transferred, then the responsible company can ask the predecessor for an assignment of the policy rights. If that does not work, a responsible company may need to sue the

predecessor to obtain access to the insurance policies.

6. How do I find my old insurance policies?

Many companies will not have evidence of their pre-1986 policies on hand. It is important to note that actual copies of the policies are not necessary. A company can prove the existence of its policies through secondary evidence. Companies should review their files to see if they contain evidence of historic insurance coverage. A company's insurance broker or risk consultant is another important source of insurance policy information.

Many companies employ an outside insurance archaeologist – that is, a firm specializing in locating old insurance policies. Good insurance archeologists are often successful.

7. When should I give notice of the claim to my insurance companies?

Companies must provide notice of the claim to their insurance companies at the earliest opportunity. In a minority of states, late notice of a claim can foreclose coverage. In the majority of states, late notice will only foreclose coverage if the insurance company can demonstrate actual prejudice. In some states, this is an almost impossible hurdle for insurance companies to meet.

8. Do I need to be sued to have coverage?

No, except possibly in California. Most companies know that if they receive a complaint, they should forward it to their insurance company. However, many companies do not realize that insurance will cover long term administrative actions and directives, and even so-called 'voluntary cleanups,' as long as the company is strictly liable for cleanup costs. A lawsuit is not necessary to trigger coverage. Upon receiving notice from any source of potential liability for cleanup costs, companies should provide notice to their insurance companies.

9. How do I allocate?

A company must analyze whether the applicable jurisdiction has adopted an 'all sums' or 'pro rata' method of allocation. Under an 'all sums' approach, the policyholder can seek full recovery from any policy year. The insurance company in that year can then seek contribution from other insurance companies that are on the risk, but not from the insured pursuant to self-insured periods. This approach is much more favorable to policyholders.

Under a 'pro rata' approach, each insurance company pays an equal annual share based on its years on the risk. If the trigger period is ten years, each year is responsible for 10%. The insured is responsible for any periods of self-insurance, such as deductibles, or years in which the insurance company is insolvent.

New Jersey has adopted a unique hybrid approach, allocating on the basis of both years on the risk and policy limits in each year.

The second allocation issue arises in the pro rata context only and is known as the unavailability rule. Pollution insurance coverage was unavailable in the marketplace after 1986. If the trigger period in a case is 1980, for first exposure, to 2020, for manifestation, is the insured or the insurance company responsible for the years from 1986 to 2020?

Courts are split on this issue. In New Jersey and Connecticut, the insured in not responsible for years in which there is no insurance coverage because of unavailability in the market place. Thus, in those states, the insured's 1980-1986 policies are responsible for all of the insured's damages.

In New York, though, the insured is responsible for years without insurance coverage. On a trigger of 1980 to 2020, the insured only receives 6/40 of coverage, and is responsible itself for the remaining 34/40.
Most states have not yet reached this issue.

10. Why use Anderson Kill?

Anderson Kill is an insurance law firm that represents policyholders only in insurance coverage disputes and has never represented an insurance company. The firm's major focus has been on insurance recovery since at least 1980. It has represented dozens of companies in environmental insurance litigation over the past forty years, ranging from Fortune 50 companies to gas stations and dry cleaners. The firm has unparalleled experience and resources in insurance coverage generally and environmental insurance in particular.

* Robert D. Chesler is a shareholder in Anderson Kill's Newark office. Bob represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs. Bob is also a member of Anderson Kill's Cyber Insurance Recovery group.

* Nicholas M. Insua is a shareholder in the New Jersey and Philadelphia offices of Anderson Kill who focuses his practice on insurance recovery litigation and counseling. Nick also represents clients in business disputes outside the insurance coverage context. He is also a member of the firm's COVID Task Group.

INSURANCE ARCHEOLOGY: A STRATEGIC APPROACH TO MAXIMIZING RECOVERIES FOR PFAS LIABILITIES

By: Sheila Mulrennan*

Insurance archaeology originally developed in response to the great waves of corporate liability imposed first by asbestos related lawsuits beginning in the 1970s, and then by Superfund-mandated environmental cleanup enforcement beginning in the 1980s. Maximizing insurance recoveries for the ensuing waves of toxic tort and environmental liabilities has been a best practice ever since.

The onslaught of asbestos and environmental litigation over the past several decades has exhausted many companies' policy limits and driven scores of insurers into insolvency and runoff. This erosion of insurance assets has heightened the importance of documenting every policy that could potentially provide coverage for PFAS claims.

Why Insurance Archaeology?

The value of older liability policies often increases with age, as older policies have broader coverage and fewer exclusions. Old policies may now be worth millions of dollars, especially since historic general liability policies typically provide unlimited defense coverage in addition to the policy limits. The defense cost provisions alone make a search for every lost policy worth the painstaking research described below.

Even when the actual insurance policies no longer exist, courts have regularly upheld the validity of secondary evidence in proving the terms and conditions of historic insurance policies. Secondary evidence can consist of one or more documents, other than policies themselves, that provide evidence regarding the insured's coverage such as: invoices for premium payments, certificates of insurance, correspondence, policy applications, board minutes, renewal numbers and schedules of underlying insurance from excess policies.

Since environmental liabilities often emerge decades after the period of exposure, companies facing environmental litigation have long recognized that old liability policies are easy to lose track of and that efforts to recover such policies often pay rich dividends.

Finding Evidence of Missing Policies

A search for missing policies is not a pro forma exercise. For any company that is considering insurance archaeology research, current business conditions have heightened the difficulty of reconstructing lost policies. Records disappear with every merger, downsizing and relocation. Information is also lost in the transition of legacy computer systems, as well as through the inevitable layoffs attending every merger.

Even companies relatively unaffected by consolidation themselves, are subject to the effects of consolidation within the industries of its natural partners in the search: insurance carriers, brokers, records storage companies, accounting firms and law firms—all have been transformed by mergers up and down the food chain.

Researching the Corporate History

The first step is to confirm the history of the company including the corporate names, location(s) and owners from the dates of first exposure through the present. Since corporate names change over time, it is critical to identify the correct names in specific time periods to locate pertinent information in public records. This is especially important when the company has had one or more former owners as it is possible that multiple insurance programs may be involved.

If the research involves predecessor companies, the closing documents will often identify numerous leads to outside sources, including names of outside counsel, major contracts, customers and details of civil litigation that may have involved insurance. If this information cannot be located in internal files, it can often be tracked down in the records of outside counsel for both the buyer and the seller.

Conducting a Search – Corporate Records

Today, the investigation of corporate records often begins at the computer screen. Storage vendors now maintain electronic indices detailing the contents of corporate records retained offsite. While access may be instantaneous, it is often incomplete – thanks in large part to consolidation within the storage industry itself.

Critical information on coding, dates, locations and even description fields has often been lost in the transfer of legacy systems in this industry. Identifying the relevant boxes can be a byzantine research project which often requires keyword searches, cross referencing codes with department names and comparing descriptions from various indices prepared at different points in time.

Tapping Institutional Memory

Much of the detective work in insurance archaeology research involves tapping into the institutional memory of a company's past key employees, outside counsel and brokers. Corporate officers can often be identified in online government filings, as well as on numerous websites preserving various other forms of historic corporate information. Once the names of key people have been identified, they can often be located through online searches. Interviews with these people in turn often identify carriers, brokers, companies that received certificates of insurance and information on past claims and litigation.

Conducting a Search - External Sources

Insurance Carriers

Requests to carriers should be submitted to any primary, excess or workers compensation carriers identified in years where policies are missing. Carriers should be requested to search all of their records including applications and underwriting files that may help to identify prior or subsequent coverage. These requests should also include the records of all affiliated and legacy carriers as other policies could have been issued by these carriers.

Even insolvent carriers should be contacted as their records may contain secondary evidence of missing policies. In addition, reviewing the insolvent policies can help to identify leads to potential outside sources such as brokers or additional insureds.

Former Brokers

Consolidation among insurance brokers has been so extensive that identifying the successors often requires painstaking research. State insurance regulators, historic phone books, Secretary of State filings and even obituaries can provide details to help unravel these complex histories. Records requests should also be sent to the successors of each broker.

The brokers that handled the account can also be critical to identifying carriers, contracts that required evidence of insurance, past claims and litigation. Social media, including Facebook and LinkedIn profiles, can help to locate these people.

Additional Insureds and Certificate Holders

Since many commercial contracts contain hold harmless and indemnification provisions, it has been a routine requirement for companies to arrange to have customers, lessors, vendors, railroads and financial institutions added as additional insureds onto their primary policies. Any of these parties may have retained copies of certificates and, in some instances, copies of actual policies.

Government Entities

Government contracts have historically been the most onerous in terms of insurance requirements and documentation. State regulatory agencies also require evidence of insurance for certain industries or operations and FOIL requests can be used to request these filings.

Court Research

Policies and secondary evidence of insurance can be found in court records in civil liability cases ranging from trip and falls to products liability cases. Pertinent cases in both state and Federal courts can be identified in Westlaw and LEXIS searches. Since many courts maintain indices that can be searched by the name of the defendant, requests can be made directly to the courts for cases where the company or its subsidiaries was a party in the pertinent years. The records for any cases will identify defense counsel which can also be a key source of information.

Law Firms

Law firms often retain records for decades or more and are a key source of historic insurance information. A firm that acted as general counsel can have a wide range of records that contain information on insurance coverage including correspondence, litigation, real estate, mortgages, contracts, etc. Records of defense counsel are particularly important as they often contain pertinent information from prior searches for insurance, correspondence with carriers and even copies of policies.

Map the Results

The return on investment of time and resources to locate and organize the records will be greatly enhanced if the complex and detailed coverage information is illustrated on a coverage chart. The charts can be used to illustrate several complex issues at a glance.

Time is of the Essence

Given the enormous costs of defending and settling PFAS lawsuits, documenting lost policies has often made the difference between bankruptcy and survival. The erosion of insurance assets via insolvencies and run-offs combined with the exhaustion of aggregate limits in environmental litigation has heightened the urgency of locating and pursuing solvent coverage while it is still available.

* Sheila Mulrennan is the President of Insurance Archaeology Group (IAG) which she founded in 1985. Featured in a survey of "l00 Leading Women" in Business Insurance, Sheila is one of the nation's foremost specialists in historic insurance reconstruction. Under her direction, IAG has pioneered the methods to research missing policies.

EVALUATING INSURANCE COVERAGE FOR PFAS LIABILITY – CURRENT POLLUTION POLICIES

By: Robin Kelliher*

Today there are approximately 10 different types of environmental insurance policies available, and more than 30 different insurance carriers offering coverage. Unlike standard property and casualty products – each pollution carrier issues its own form, with its own approach to coverage. Some pollution carriers have an appetite to underwrite, other carriers have no interest in those industries. Some pollution carriers will offer coverage for 10-year policy terms, others will only write annual or three-year policy terms. While there are differences in carrier forms and appetites, the one commonality between all carriers is a concern about trends in claims. This article will focus on one type of pollution policy, Site Pollution Liability, and what we are seeing in the marketplace regarding the pollution carriers underwriting response to PFAS related claims.

When considering the different types of pollution policies, there are primarily two "families" of Pollution policies – 1) those policies that address fixed-site pollution exposures (those exposure either on, at, or migrating from a fixed-site – and associated waste and transportation exposures); and 2) those policies that address pollution exposures caused by, or arising out of, contracting operations. The first category of pollution policies is generally referred to as "Site Pollution" policies; the second category is referred to as "Contractors Pollution Liability" policies. For purposes of a PFAS claim discussion, "Site Pollution" policies will most likely be implicated – and will be the focus of our discussion.

As noted earlier, carriers that Site Pollution policies have their own unique policy form, which means that no "one" carriers' form is like another's. With that said, there are some common characteristics between all the carriers' forms:

Site Pollution

- Provides coverage for pollution conditions on, at, or migrating from covered locations
- Insuring agreements differ between the carriers – but typically include (either in the base form, or via endorsement) the following types of coverage grants:
    - Cleanup costs – first party/discovery trigger (where the insured discovers the pollution condition and incurs cleanup costs directly), as well as cleanup costs as a result of a third-claim claim. The standard for cleanup is generally "as required by environmental laws", or in the absence of environmental laws – as recommended by an environmental professional
    - Third party claims for bodily injury and property damage (include loss of use/NRD) – including legal defense expense
    - Business Interruption and Extra Expense solely resulting from a pollution condition
    - Transportation of the Insured's products, goods, material, waste – typically to and from the covered location
    - Waste Disposal Activities at Non-Owned Disposal Sites – where the waste is from a covered location
    - Crisis management response coverage
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- Coverage is written on a claims-made and reported basis
    - CMR policies provide coverage subject to a retroactive date – which limits coverage for pollution conditions that commence after an identified retroactive date '
    -
    - All claims must first be made, or the pollution condition must first be discovered, during the Policy period. In both instances, the pollution condition/claim must be reported during the current policy period
- Forms usually heavily underwritten, with many endorsements that modify the coverage
- Coverage is often negotiated on a multi-year basis

Generally, the definition of Pollution Condition will always include the following:

> ***Pollutants*** *- any solid, liquid, gaseous or thermal irritant, or contaminant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, including medical, infectious and pathological wastes, at levels in excess of those naturally occurring.*
>
> ***Pollution Condition*** *– the discharge, dispersal, release, escape, migration of seepage of a Pollutant on, in, into, or upon land, the atmosphere, any watercourse or body of water including surface water or groundwater*

While it certainly clear that PFAS would be considered a "pollutant" under a Pollution Policy, and the PFAS impact to groundwater meets the Policy requirement of a "pollution

condition", whether or not a Pollution policy responds to a PFAS claim is dependent upon on many other factors.

As noted above – Site Pollution policies provide coverage for pollution conditions at, under or migrating from a covered location. In addition, coverage can also extend to the Insured's waste disposal activities at non-owned waste disposal facilities. In the event an Insured receives a claim involving PFAS – the scope of potential coverage is implicated by the following:

- Is PFAS at, under, or migrating from a covered location?
- Is there a retroactive date applicable to the covered location? Or to waste disposal activities at a non-owned disposal site?
- As PFAS claims may implicate predecessor entities – are those entities included as Insureds under the Policy?
- Coverage for cleanup costs is subject to what is "required by environmental law" - is there applicable "environmental law" regarding PFAS cleanup standards?
- Is the remedy requested covered by an insuring agreement? Claims for injunctive relief, or fines and penalties, may/may not fall within the Pollution Policy's insuring agreements
- Is there an exclusion added for PFAS, or PFAS related chemicals?
- As these policies are written on a claims-made and reported basis – was PFAS discovered during the Policy Period? Did the Insured receive a claim during the Policy period? Was the carrier provided proper notice?
- Notwithstanding the Insuring Agreements and exclusions – has the Insured complied with the additional Pollution Policy provisions regarding the need to obtain the carriers' prior consent to retain counsel, or to perform cleanup?

To date, we've seen PFAS related claims from manufacturers, property owners/tenants, airports, landfills, municipalities – these claims range from regulatory action, NRD, class action lawsuits alleging bodily injury, diminution in value, loss of use, and environmental damage to third party property. We've even seen regulators requiring PFAS sampling prior to issuance of NFA on non-PFAS related cleanups. If an Insured receives a claim for PFAS, it's imperative to report the matter to the insurance carrier immediately, to protect whatever coverage may be available.

While there may be coverage under current Pollution policies for PFAS claims – due to the increased claim activity, pollution carriers are very focused on evaluating their PFAS exposures, understanding the science behind it, and modifying their underwriting processes and risk appetite accordingly. For the Policyholder, this translates in policy limitations – or full out exclusions – for PFAS. Policy applications now include questions regarding whether PFAS has been manufactured, stored, or used at a covered location; and also whether the Insured has had any firefighting training/drills, or fires, at covered locations – which would implicate the use of aqueous firefighting foam at a covered property. Carriers are not only looking at applications, they are also focused on past, and current, operations. We are seeing entire "industries" now subject to PFAS exclusions – airports, metal plating, Petro-chemical facilities, wastewater treatment plants, landfills, and certain manufacturing operations are just several of the industries impacted by the additional underwriting scrutiny.

At this point in time (mid-2021), carriers are still providing coverage for PFAS but only for those accounts that have a very low risk profile – where there has been no history of fire loss at the covered location; or where the Insured can confirm no history of operations involving the use PFAS as a raw material, or otherwise produced PFAS. While the insurance industry is all about transfer of risk, until pollution carriers can better get their arms around the total risk exposure (or that of their Insureds), we can expect continued underwriting scrutiny and limitations of coverage for PFAS for the foreseeable future.

* Robin Kelliher is the National Director for Environmental Claims with the Environmental Practice. As National Director of the Environmental Claims Practice, Robin leads a team of claim professionals responsible for delivery of technical and strategic consulting services designed to assist clients in managing environmental loss and claims.

PFAS LITIGATION

By: Jason Waters*

Many legal, insurance, and scientific commentators expect perfluorooctanoic acid (PFOA) and polyfluoroalkyl substances (PFAS) litigation to increase considerably in the near future. Various states have obtained large settlements from PFAS manufacturing defendants in cleanup and remediation cases arising from the disposal of PFAS in various water sources. Corporate and government actors also have filed cases seeking remediation costs and other damages. Individuals claiming actual or potential personal injuries from exposure to PFAS have pursued novel scientific and legal approaches, achieved significant settlements, and have won several jury verdicts.

Wilbur Tennant was a farmer in Parkersburg, West Virginia, who filed suit against DuPont in 1999, claiming that DuPont's PFOA was contaminating his farm and harming his livestock. After Mr. Tennant's case settled, his attorney filed litigation against DuPont on behalf of a class of individuals allegedly harmed by PFOA from the company's plant in Parkersburg.

Notably, the settlement included the creation of a "C8 Science Panel," which consisted of three independent scientists who would study the potential causal relationship between PFOA and various human diseases. Several years later, the C8 Science Panel released a report indicating a probable link between PFOA and kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, high cholesterol, and pregnancy-induced hypertension/preeclampsia.

The settlement also preserved the personal injury claims of any class member alleging that he or she suffered from a disease that the C8 Science Panel determined to have a probable link to PFOA exposure. DuPont tried three such cases to plaintiffs' verdicts ranging from $1.6 million to $12.5 million. Ultimately, DuPont agreed to settle the remaining claims in 2017 for a total of $670 million.

The same attorney filed a nationwide class action suit in 2019 against DuPont and various other manufacturers and distributors of PFAS in the Southern District of Ohio. This case sought to certify a national class "for injuries … in connection with contamination of the blood and/or bodies … with synthetic, toxic [PFAS] substances…." The lead plaintiff, Kevin Hardwick, was a firefighter in Ohio for more than 40 years, during which time he worked with fire suppression materials containing PFAS. He claimed to have some level of PFAS contamination in his blood. Again, plaintiffs' counsel sought to create a "science panel" to study the link between PFAS and human disease. Defendants moved to dismiss the Hardwick class action on several grounds. They argued that Mr. Hardwick had failed to allege an actionable injury because "the mere presence of a substance, even if allegedly toxic, in a plaintiff's blood or body does not constitute 'injury' under Ohio law." The court disagreed, citing authority for the proposition that medical monitoring is an available remedy in Ohio. Defendants also argued that the court lacked subject-matter jurisdiction because the request for a science panel was beyond the court's power to award. Again, the court disagreed, finding the request to establish a science panel was merely part of plaintiffs' allowed claim for medical monitoring.

The Hardwick case reflects an attempt to recreate the terms of the Parkersburg settlement through judicial imprimatur. Ostensibly, the class action sought injunctive relief in the form of the creation of a science panel. However, the science panel's findings could have the potentially preclusive effect of establishing general causation in future class members' separate personal injury claims. By recognizing the constitutional viability of a claim by an individual who claims only some detectible level of PFAS material in his or her blood serum and the sufficiency of seeking a science panel as part of a medical monitoring program, the Hardwick case creates the potential to generate thousands of personal injury claims with a predetermined finding of general causation. Although, the court expressly limited its decision to Mr. Hardwick's individual claims and reserved decision on the broader question of whether they are appropriate for class certification. This issue remains pending and should be watched closely.

Simultaneously, multidistrict litigation, consisting of more than 500 claims of exposure to aqueous film-forming foams (AFFFs), which include variants of PFAS, is pending in the District of South Carolina. In those cases, plaintiffs allege that AFFFs contaminated groundwater near various military bases, airports, and industrial sites. They claim that AFFFs were used to extinguish liquid fuel fires, and they seek recovery for personal injury, a need for medical monitoring, property damage, and other losses. The cases are proceeding under coordinated discovery according to a January 2, 2019, case management order.

Meanwhile, numerous states have obtained settlements against PFAS manufacturers in various environmental

remediation claims. Minnesota filed suit in 2010 for PFAS discharged into the state's drinking water. Eight years later, the state obtained an $850 million settlement. Several other attorneys general have filed suit since then, asserting claims under various environmental protection statutes and common-law theories of liability. So far, reported settlements with government claimants have exceeded $1 billion.

In addition to state remediation actions and personal injury claims, municipal water authorities have filed claims against PFAS manufacturers and distributors. For example, the Northern District of West Virginia denied the manufacturing defendants' motions to dismiss in a public nuisance claim brought by the Weirton Area Water Board in 2020. The manufacturing defendants argued that plaintiffs failed to allege a sufficient nexus between their activities and the alleged injuries. They argued that plaintiffs could not establish that their specific product infiltrated the Weirton Water System and that it would be impossible to do so. Defendants also argued that the water authority could not base their claims against the manufacturers on the disposal activities of third parties.

The court disagreed and denied defendants' motion. Citing the complaint, the court found it sufficient to allege that the PFAS chemicals or products were "not reasonably safe for [their] intended use," that manufacturing defendants proximately caused the contamination, and that the water system sustained an injury as a result of the contamination. The court's opinion did not analyze the defendants' argument that it was impossible to connect the alleged contamination to any particular defendant's specific product. The court also concluded that the manufacturing defendants could be liable on a negligence per se theory under various West Virginia environmental protection statutes, even though they were not the actual party disposing chemicals into the water system. Based solely on a broad definition of the term "person," the court concluded that the manufacturing defendants could be liable under statutes prohibiting the release of contaminants and the disposal of solid waste. In this way, and despite a dearth of substantive analysis, the court's decision is notable because it recognizes the possibility that manufacturers of products may be liable for a downstream user's pollution activities, regardless of whether it is possible to identify the manufacturer's specific product as the actual pollutant.

These cases show that the PFAS litigation landscape is likely to expand over the foreseeable future. Plaintiffs' attorneys will undoubtedly continue to seek judicially sanctioned science panels under the auspices of medical monitoring. Meanwhile, the question of class certification over individuals alleging only some detectable trace of PFAS in their blood serum presents a considerable litigation and indemnity risk. The apparent strategy in these cases will be to establish preclusive rulings on general causation and potentially even fault for future personal injury claims.

PFAS cases are a growing liability and insurance risk, as the legal landscape has become more active and inextricably more dangerous. Manufacturers, distributors, end-users of these chemicals, and their insurers would be wise to monitor this litigation and the nuanced litigations strategies carefully. Aligning with experienced and capable defense counsel would be advisable for those involved in this industry.

* Jason Waters is the Regional Managing Partner of Wilson Elser's McLean, Virginia office. He also co-chairs the firm's national Toxic Tort & Environmental Practice Team. Jason has more than 20 years of experience litigating complex claims involving a wide variety of alleged exposures

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