Insurance Coverage Considerations: The Incoming Wave of PFAS Litigation

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About fifty years ago, asbestos became one of the world's first toxic torts. [1] Asbestos has had colossal, society-altering impacts: millions of victims, [2] scores of companies forced into bankruptcy, [3] and billions of dollars either spent or held in trust(s) for future claims. [4]

PFAS, a class of man-made per- and polyfluoroalkyl substances, may one day achieve the same dubious distinction. Commonly referred to as "forever chemicals," PFAS have been used for decades in everyday objects and have been alleged to cause serious health risks, including cancer. [5] Renowned for their durability, PFAS compounds do not break down quickly under normal conditions, and can persist in the environment – and in living organisms – for extended periods of time. Some legal observers believe that PFAS litigation could "dwarf anything related to asbestos" and exceed the number of tobacco, asbestos, and methyl tert-butyl related litigations combined. [6]

Already, PFAS claims have resulted in extraordinary recoveries in lawsuits seeking to remediate public water supply contamination. For example, in 2024, 3M received final approval to enter into a $10.3 billion (pre-tax) settlement with U.S. public water suppliers payable over thirteen years to address PFAS in drinking water. [7] In May of 2025, 3M also reached a proposed settlement of up to $450 million to be paid over twenty-five years with the New Jersey Department of Environmental Protection. [8]

However, the real threat of PFAS lies with the chemicals' alleged linkage to cancer. Plaintiffs' firms are preparing for the coming wave of PFAS litigation and are seeking to line up clients. For now, the main targets are the major manufacturers of PFAS, such as 3M, Solvay, and DuPont. Yet, the history of asbestos litigation demonstrates that claimants soon will be seeing secondary and tertiary actors as targets with respect to PFAS toxic tort litigation – for example, municipal utilities authorities, water companies, firefighting foam companies, cosmetics companies, clothing companies – the list goes on. PFAS have been used in everything from frying pans to furniture. [9] The slate of potential defendants is endless.

While it is becoming increasingly clear that PFAS litigation will stretch far into the future, it also is clear that, as with asbestos, defendant companies will seek to access their general liability policies to provide coverage for these suits, and the insurance industry will deny the claims. A tsunami of claimants asserting grievous bodily injury stemming from PFAS, such as cancer, will produce a corresponding tsunami of coverage litigation. Companies on the receiving end of PFAS claims will face many of the same coverage issues that asbestos defendants have faced for many years.

This article will touch on several insurance coverage considerations that, as has happened with asbestos, will permeate coverage litigation flowing from PFAS claims.

Trigger of Coverage

The question as to when exposure to asbestos actually produces a resultant injury is the subject of medical debate. With asbestos claims, many jurisdictions have adopted the "continuous trigger" principle, [10] pursuant to which an asbestos claim will trigger all policies in effect from the time of the claimant's first exposure to asbestos through death or diagnosis. [11]

Trigger issues will be compounded in the context of PFAS, particularly considering how prolific PFAS are in household objects. Causation will be a major issue. Everyone drinks water. Courts may determine that it is the policyholder's burden to show when he or she was first exposed to PFAS-contaminated water or other substances, and whether that caused their bodily injury.
Trigger issues are also salient for long-tail claims, as CGL policies commonly lacked pollution exclusions prior to 1973, and the so-called "absolute" pollution exclusion was not adopted until 1986.

The Duty to Defend

As a result of these "trigger" issues, it is likely that complaints alleging cancer caused by PFAS will be vague as to the first date on which the plaintiff was exposed to PFAS. In such cases (and if the complaint contains allegations that, if proven, would be covered under the subject policy), the insurance company likely will have a duty to defend its policyholder.[12] In most states, that duty will continue unless and until the insurance company can establish that there is no possibility of coverage. [13] This is a tremendous benefit for the policyholder. In almost all instances, a general liability insurance company's duty to defend will be unlimited in terms of the costs the insurance company must bear, not restricted by its policy limits.[14]

However, these unlimited defense limits may give rise to potential conflicts between policyholders and their insurance companies. The insurance company may argue that it has the right to control the defense of the case. That would mean the insurance company can make decisions on litigation and settlement strategy that may not align with the policyholder's interests or vision. [15] While an insurance company may prefer to settle toxic tort cases quickly – and thereby erode the policy limits – the policyholder may wish to defend each case aggressively to avoid paying settlements.

Allocation

With long-tail torts, when multiple consecutive policies cover a claim, issues may also arise as to how to allocate a loss among several insurance companies and, in some instances, the policyholder. In the asbestos context, two dominant theories arose: "all sums" and "pro rata."
Pursuant to the "all sums" approach, a policyholder can select any one policy or tower of policies from which to recover all of its damages. That insurance company may then potentially assert a right of contribution against the other triggered insurance companies – but not against the policyholder (for example, if the policyholder has missing policies or deductibles).[16]

Some courts have created a legal fiction of a "pro rata" approach, in which the damages – and in some states the defense costs – are spread horizontally across all of the triggered years with each insurance company being allocated a certain portion of the loss and the policyholder being responsible for those sums attributable to missing policies and deductibles.[17] This has no basis in the policy or contract.

"All sums" is the policyholder-preferred approach as it follows the "all sums" promise contained in the insurance policies and does not allocate portions of the loss to the policyholder themselves. These same allocation principles likely will apply equally to PFAS claims as they have with asbestos claims.

Missing Policies

Asbestos was one of the early "long tail" torts that triggered insurance policies issued as much as half a century ago. If a worker first was exposed to asbestos in 1965 and brought suit for cancer in 2015, all liability insurance policies sold back until 1965 may be triggered. Again, occurrence-based policies in effect before 1986 may be particularly valuable, as they may either have no pollution exclusion or the more limited exclusion in effect from circa 1973 to 1986.

In many cases, companies facing asbestos claims have not retained copies of these decades-old insurance policies. Policyholder counsel may be able to help. In addition, insurance archeologists are experts in locating old or missing policies. The need for old, missing policies in PFAS coverage litigation will depend on the etiology of the resultant diseases and the way that the injuries are pled. Claimants could allege that they had been drinking PFAS-contaminated water for the past 20 years, or for the past two years. If issues of missing insurance policies do arise, we advise policyholders to retain policyholder counsel or an insurance archaeologist to help locate or prove the contents of the missing policies.

In sum, despite being prevalent for approximately fifty years, toxic tort litigation still is in its infancy. We expect to see toxic tort claims, including an influx of PFAS litigation, for potentially centuries to come. Policyholders facing toxic tort claims should familiarize themselves with common insurance coverage issues arising out of toxic tort litigations. Policyholders should provide notice when facing a claim and pursue the benefits of the liability insurance coverage they purchased where appropriate.

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Endnotes

1 *See, e.g.,* Robert F. Blomquist, *American Toxic Tort Law: An Historical Background, 1979-87*, 10 Pace Envtl. L. Rev. 85, 120-39 (1992).
2 *See, e.g.,* World Health Organization, *Asbestos* (Sept. 27, 2024), https://www.who.int/news-room/fact-sheets/detail/asbestos#:~:text=Globally%2C%20more%20than%20200%20000,than%2050%20WHO%20Member%20States.
3 *See, e.g.,* Crowell, *Chart 1: Company Name and Year of Bankruptcy Filing (Chronologically)* (2024), https://www.crowell.com/a/web/tcit8JAMUkK1DmBVpG9sEK/chart-1-asbestos-bankruptcies-chronological.pdf.
4 *See* Daniel Wasserberg, *Average Mesothelioma Compensation Amounts*, The Mesothelioma Center, https://www.asbestos.com/mesothelioma-lawyer/compensation/ (last visited July 16, 2025).
5 *Id.*
6 *See* Hiroko Tabuchi, *Lawyers to Plastics Makers: Prepare for 'Astronomical' PFAS Lawsuits*, New York Times (May 28, 2024), https://www.nytimes.com/2024/05/28/climate/pfas-forever-chemicals-industry-lawsuits.html.
7 *3M Settlement with Public Water Suppliers to Address PFAS in Drinking Water Receives Final Court Approval*, 3M (Apr. 1, 2024), https://investors.3m.com/news-events/press-releases/detail/1836/3m-settlement-with-public-water-suppliers-to-address-pfas.
8 *See 3M PFAS Settlement,* Department of Environmental Protection, https://dep.nj.gov/3m/ (last visited July 16, 2025).
9 *See All the Stuff in Your Home That Might Contain PFAS 'Forever Chemicals'*, TIME (May 19, 2023 3:36PM EDT), https://time.com/6281242/pfas-forever-chemicals-home-beauty-body-products/ (citing Cousins IT, Johansson JH, Salter ME, Sha B, Scheringer M. *Outside the Safe Operating Space of a New Planetary Boundary for Per- and Polyfluoroalkyl Substances (PFAS)*, Environ Sci Technol (Aug. 16, 2022), https://pubmed.ncbi.nlm.nih.gov/35916421/).
10 *See § 14A:6. "Continuous injury" theory*, MTL § 14A:6 (2025); *see also Appendix 6A. Survey on the Trigger of Long-Tail Claims*, 1 Envtl. Ins. Litig.: L. and Prac. Appendix 6A (June 2025).
11 *See, e.g., § 58:47. Generally*, Am. L. Prod. Liab. 3d § 58:47 (May 2025).
12 *§ 200:1. Background and overview*, 14 Couch on Ins. § 200:1(June 2025).
13 *§ 58:5. Time when duty to defend arises and terminates*, Am. L. Prod. Liab. 3d § 58:5 (May 2025) ("The duty to defend continues until the underlying lawsuit is concluded or until the insurer establishes, by reference to undisputed facts, the absence of any potential for coverage.").
14 Jason C. McLaurin and David A. Kirby, *A Practitioners Guide to Long-Tail Liability Claims in Texas*, 13 J. Tex. Ins. L. 7, 13 (2015) ("In the context of a primary CGL policy, the payment of defense costs usually does not reduce policy limits, since many such policies obligate the insurer to defend the insured and explicitly provide that such defense-related payments are 'in addition to the stated limit of liability.").
15 *See generally § 58:16. Generally*, Am. L. Prod. Liab. 3d § 58:16 (May 2025).
16 *See, e.g., § 44:38. Scope and allocation issues—Policyholder arguments against allocation—"All sums"*, 4 Law and Prac. of Ins. Coverage Litig. § 44:38 (July 2025).
17 *§ 4:4. Allocation among equal-level insurers*, HANDINS§ 4:4 (November 2022).