# PFAS in Cosmetics and Personal Care Products – CGL Considerations

*By Difie Osborne and Maya Neski*

Commercial General Liability insurance policy forms were developed decades ago to address commonplace risks such as bodily injury and property damage. However, the broad language of CGL policies may be tested in the context of addressing novel claims and risks. One category of emerging claims is PFAS litigation. PFAS, a class of man-made per- and polyfluoroalkyl substances known as "forever chemicals" because they don't break down, have come under intense regulatory scrutiny in recent years and are subject to a rising tide of toxic tort litigation. Businesses across industries are accordingly preparing for a surge of costly legal battles.

Against this backdrop, policyholders in the cosmetics and personal care product industry (wherever they may fall in the supply chain) facing PFAS lawsuits should not overlook the protections of their traditional CGL policies to confront these potential liabilities.

## PFAS in Cosmetics and Personal Care Products

Certain qualities of PFAS – such as their ability to make a product more durable, water resistant, or smoother spreading – make their inclusion in cosmetics and personal care products desirable; however, exposure to PFAS may lead to health complications.

Due to state and federal oversight, as well as increased press, consumers have become increasingly aware of the potential harms associated with the use of PFAS in their favorite products. At this time, at least ten states, including California, Colorado, Connecticut, Maine, Maryland, Minnesota, Oregon, Rhode Island, Vermont, Washington, and Illinois have adopted restrictions on PFAS in cosmetics. Additionally, the U.S. Food & Drug Administration's authority to regulate cosmetics was significantly expanded with the adoption of The Modernization of Cosmetics Regulation Act of 2022.

Given the increased visibility of PFAS, the cosmetic and personal care product industry should expect a variety of lawsuits concerning the indeterminate health-related consequences of PFAS.

## PFAS Litigation

PFAS claims are typically long-tail in nature, meaning that they are characterized by a significant delay between exposure and manifestation of the resultant injury. As a result, defending delayed PFAS-related bodily injury claims can result in decades of costly litigation. We have seen such protracted liability and insurance conflict in the context of asbestos litigation, which is another type of long-tail claim. Companies in myriad industries, including cosmetics and personal care, have gone bankrupt defending against (and paying for) these types of claims. For example, in 2024, Avon Products, Inc., filed for Chapter 11 Bankruptcy amidst mounting costs of defending against hundreds of bodily injury related lawsuits for alleged asbestos exposure in personal care products.

## PFAS in Cosmetics and Personal Care Products – CGL Considerations

While cosmetics and personal care specific PFAS litigation has been primarily limited to false advertising and consumer protection claims thus far, we anticipate that bodily injury claims will soon follow. It is thus vital for policyholders in the cosmetics and personal care industry to understand the protections potentially available to them under the CGL insurance policies that they have purchased (whether the policies were purchased fifty years ago, or today).

### The Nature of CGL Coverages

CGL policies primarily provide occurrence-based coverage. This means that the policies cover occurrences that happen during the policy period – even if the resulting claims are not filed until years (or decades) later.

While courts in the United States are split as to what "triggers" coverage with respect to long-tail claims, many courts follow a "continuous trigger" principle, pursuant to which a toxic-exposure claim may trigger all policies in effect from the time of first exposure through death or diagnosis. However, given the infancy of PFAS toxic-tort litigation, only time will tell whether these courts will continue to apply continuous trigger principles in the context of PFAS claims.

While an insurance company's duty to indemnify its policyholder for liability is often not determined until the policyholder incurs some covered, legal obligation, the duty to defend is broader. If a complaint alleging PFAS injuries contains allegations that, if proven, would be covered under the subject CGL policy, then the liability insurance company will likely have a duty to defend its policyholder against such claims. Generally, an insurance company's duty to defend under a CGL policy will be unlimited – meaning that the payment of defense costs will not erode the policy's limits. This is a major benefit to policyholders.

### Conclusion

With cosmetics and personal care related PFAS bodily injury claims on the horizon, it is important that policyholders in the cosmetics and personal care products industry be familiar with the protections provided by their Commercial General Liability insurance policies. Policyholders should provide prompt notice when facing a claim and pursue the benefits of the liability insurance coverage they purchased where appropriate.

## Authors

**Difie Osborne** / *dosborne@andersonkill.com*
Difie is a shareholder in Anderson Kill's New York office and a member of the firm's Corporate and Commercial Litigation and Insurance Recovery practice groups. She is the co-chair of the Retail subgroup of the firm's Restaurant, Retail & Hospitality Industry Practice Group and serves as Chair of the firm's Pro Bono Committee.

**Maya Neski** / *mneski@andersonkill.com*
Maya is an attorney in Anderson Kill's New York office, where she concentrates her practice in insurance recovery, exclusively on behalf of policyholders. She is a member of the firm's Insurance Recovery Group and Restaurants, Retail, and Hospitality Group.

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