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ALERT

The Forever Chemical and the Duty to Defend

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Pervasive in their presence, ubiquitous in the environment, and carcinogenic to humans, per- and polyfluoroalkyl ("PFAS"), or as they are colloquially known, 'Forever Chemicals', are synthetic chemicals. They are found in a wide variety of everyday products such as firefighting foam, shoes, carpets and clothing. In the past several years, PFAS have spawned a surge in lawsuits alleging, among other actions, bodily injury. The largest – Aqueous Film-Forming Foams (AFFF) Products Liability Litigation MDL No.2873 - is a multidistrict litigation with over 10,000 cases. As recently as September 2, 2025, 37,446 new claims were filed in that lawsuit. Currently, primary chemical manufacturers of PFAS chemicals are facing the brunt of these lawsuits, but experts suggest that soon the reckoning will arrive for companies which incorporate PFAS into their products.

The cost of defending these lawsuits is astronomical. For instance, in *Wolverine World Wide, Inc. v. American Insurance Company*, Case No. 1:19-cv-00010-JTN-ESC, 2001 WL 5548103 (W. D. Mich. June 15, 2021), the policyholder submitted invoices for defense costs of PFAS actions totaling more than $80 million. Settlements and verdicts in these PFAS actions have also been high. In V*igneron v. E. I. du Pont de Nemours and Company*, Case No.: 2:13-CV-00136 (S.D. Ohio) a jury awarded a plaintiff $2 million in compensatory damages and $10.5 million in punitive damages for the plaintiff's PFAS exposure and allegedly resulting testicular cancer.

Insurance companies see the writing on the wall and are seeking to shirk their contractual obligations to their policyholders by denying their duty to defend. Reflexively, insurance companies are seeking to hide behind their so-called "absolute" pollution exclusion. But in the personal injury context, toxic exposure plaintiffs allege they are injured – not polluted. Recently, several decisions have re-affirmed that the pollution exclusion does not apply to plaintiffs who allege direct exposure to PFAS. This duty to defend may apply regardless of whether the insurance policies contain a so-called "absolute" pollution exclusion or a so-called "qualified" pollution exclusion.

In *Century Indemnity Company v. Tyco Fire Products*, Case No. 2022-CV-000283 (Wis. Cir. Ct. Marinette Cnty. July 7, 2025) Tyco Fire Products filed a cross motion for partial summary judgment seeking a declaration that the absolute pollution exclusions contained in post-2010 insurance policies do not bar coverage for liability arising from the underlying firefighter plaintiffs' alleged direct exposure to AFFF. The Court upheld Tyco's motion, holding that under Wisconsin law, pollution exclusions apply only when a contaminant has been "discharged, dispersed, released or escaped" into the environment – not when plaintiffs allege harm from personal contact with a product containing the allegedly harmful substance. Therefore, the court held, "the Post-2010 Pollution Exclusions do not apply to firefighter claims where the alleged mechanism of injury arises from direct contact with AFFF resulting from exposures caused by the handling of AFFF concentrate,

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mixing AFFF into solution and/or preparing AFFF for use; or for the actual use of the AFFF-containing solution for firefighting efforts."

In *National Foam, Inc. v. Zurich American Insurance Company,* 768 F.Supp.3d 1009 (N. D. Cal. Feb. 26, 2025), the District Court considered, among two other issues, whether the pollution exclusion contained within National Foam's purchased policies applies to the claims of nineteen current or former firefighters who alleged injuries resulting from their exposure to National Foam's products during their employment. The court held that the exclusion did not apply, reasoning, as in *Tyco*, that the harms alleged by the firefighters did not arise from pollution in any recognizable sense. Rather, the firefighters were exposed to PFAS through their ordinary use of National Foam's products, not via general environmental pollution. Thus, the pollution exclusion did not apply, and the insurance company had a duty to defend these claims.

In *Colony Insurance Company v. Buckeye Fire Equipment Co.*, DOCKET NO. 3:19-CV-00534-FDW-DSC, 2020 WL 6152381 (W.D. N.C. Oct. 20, 2020), Buckeye Fire Equipment Co. ("Buckeye") was sued in hundreds of underlying cases, relating to its manufacture of fire equipment containing AFFF. The insurance company sought to exclude coverage for Buckeye's claims under the so-called "absolute" pollution exclusion contained in its policies. Here too, the court held that, because the underlying complainants allege injury caused by something other than traditional environmental pollution, the insurance company could not deny coverage to Buckeye with respect to the underlying claims alleging direct exposure.

Under historic insurance policies containing the pre-1985 so-called "qualified" pollution exclusion, which contained an exception for "sudden and accidental" discharges, the result has been the same, though for a different reason. In *Wolverine World Wide, Inc. v. American Ins. Co*., Case No. 1:19-cv-00010-JTN-ESC, 2021 WL 5548103 (W.D. Mich. June 15, 2021), Wolverine, a footwear manufacturer, was named as a defendant in hundreds of individual tort actions, three consolidated class actions, an individual landowner action, and two governmental enforcement actions, which in part, arose from Wolverine's historic use in manufacturing of various chemicals, including PFAS, beginning in 1958. Unlike the cases discussed above, this was a case of alleged environmental pollution, with chemicals including PFAS appearing in groundwater.

Wolverine's insurance companies denied coverage, citing the pollution exclusion. Wolverine sued, alleging that the insurance companies breached their duty to defend. The Court agreed, holding that certain insurance companies breached their duty to defend Wolverine. The court noted that, because the factual record was open at this time, it was unclear whether any of the alleged polluting events were "sudden or accidental" or "unexpected or unintended."

Policyholders who believe they may have potential PFAS exposure should immediately search for their current and historic insurance policies. They should also be aware of the potential disputes with their insurance company regarding the duty to defend and inevitable indemnity issues. Most importantly, policyholders must be willing to push back and fight against insurance companies' attempts to invoke pollution exclusions in cases where they do not apply.

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