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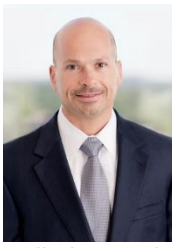
Lawyer Insights

CGL policies and coverage for 'forever chemical' product liabilities (part 2)

In part two of this series, we review the history of pollution exclusions and some potential defense strategies to circumvent it.

By Michael Levine, Lorelie Masters, and Charlotte Leszinske
Published in PropertyCasualty360 | August 31, 2023



Policyholders should not take no for an answer even if they face denials of coverage by their insurers based on pollution exclusions. As the drafting and regulatory history of standard-form CGL policies show, policyholders have strong arguments that pollution exclusions should not be applied to preclude coverage for per- and polyfluoroalkyl substances (PFAS) claims.

Pollution exclusions first emerged with the advent of government enforcement of environmental liability standards in the late 1960s and early 1970s (the so-called "qualified pollution exclusion"). After the enactment of the Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA) or Superfund in 1980, businesses expanded, strict liability for disposal of allegedly hazardous waste. Businesses and their insurers then began facing hundreds of millions or billions of dollars of liability for years of disposing or storing industrial wastes into the environment. Insurers sought to avoid paying for these cleanup costs by excluding environmental pollution-related activities from coverage under a new pollution exclusion approved for use starting in 1986 (the so-called absolute pollution exclusion).

From 1973 (when regulators first approved the qualified pollution exclusion for use in CGL policies) to 1986, pollution exclusions were narrow: They precluded coverage only for environmental pollution that was not deemed "sudden and accidental." In drafting the qualified exclusion, the insurance-industry drafters equated "sudden and accidental" with the policyholder's subjective expectation or intent of damage. In response to regulators' questions, and to avoid a required reduction in premiums, the insurance industry represented to regulators that the standard-form "sudden and accidental" pollution exclusion merely clarified the original intent and terms of standard-form CGL coverage: To bar coverage for activities that the insurer was able to prove were expected and intended by the insured. In other words, the 1973 sudden and accidental pollution exclusion was intended, and received regulatory approval, to preclude coverage for companies that were proven to have intentionally polluted the environment; it was not intended to preclude coverage for unexpected damage or injury.

After the passage of CERCLA, the insurance industry sought to tighten the reins on coverage for environmental liabilities. Industry drafters thus developed and sought regulatory approval for an "absolute" pollution exclusion. As shown by the drafting and regulatory history, the insurance industry intended this exclusion to ban true "industrial" or environmental pollution. It specifically did not ban coverage for liabilities for products, even for products like pesticides and chemicals. When the insurance

industry sought approval for the "absolute pollution exclusion," regulators and policyholders raised the alarm that the insurance industry would try to use the proposed exclusion, as the title suggested, as an "absolute" exclusion for any liability associated with a noxious substance (for example, a "spill of Clorox" in a grocery store aisle). In response, insurers promised that the exclusion was "overdrafted" and would be used only to exclude those activities encompassed by CERCLA: intentional environmental pollution.

The insurance industry specifically told regulators that the exclusion would not preclude coverage for the foundational protections promised by CGL insurance: liability for products. When the total pollution exclusion was approved, it was approved without any reduction in premiums, further showing that insurers and regulators understood that the exclusion caused a reduction in coverage only for true industrial pollution or environmental waste disposal.

Despite these representations, insurers have persistently tried to expand the scope and effect of pollution exclusions. For instance, insurers have contended that standard-form environmental-focused pollution exclusions should preclude coverage for claims from lead paint, fumes from consumer products, carbon monoxide, gasoline products and, yes, spills of bleach. Unsurprisingly, ignoring the history they created, insurers now argue that PFAS also is barred by this exclusion.

Companies seeking coverage for PFAS-related claims have at least three arguments against pollution exclusions. First, claims may allege exposure to PFAS during time periods when the relevant policies did not contain any pollution exclusion at all. If so, arguments for coverage are strong. The insurers' own drafting history shows that CGL coverage (whether "comprehensive" or "commercial") is broad enough to cover environmental liabilities. Second, insurers bear the burden to show that exclusions apply. Many states impose heavy burdens on insurers to bar coverage under sudden and accidental pollution exclusions, for example, requiring insurers to show that the insured subjectively expected or intended the injury or damages. Other states find coverage if the alleged pollutants were released "suddenly" (interpreted as "instantaneously"), as might occur in the use of firefighting foam to extinguish a fire. Third, drafting history for both "sudden and accidental" and "absolute" pollution exclusions shows that pollution exclusions were not meant to apply at all to products-related claims, such as those involving PFAS products.

Past should be prologue with regard to pollution exclusions and PFAS products

The flurry of recent PFAS litigation has put the pollution exclusion squarely before courts, some of which have expressed skepticism that these exclusions will bar coverage for PFAS claims. For example, in *Colony Ins. Co. v. Buckeye Fire Equip. Co.*, No. 3:19-cv-00534, 2020 WL 6152381, at *3-4 (W.D. N.C. Oct. 20, 2020), ***aff'd***, No. 20-2208, 2021 WL 5397595 (4th Cir. Nov. 18, 2021), the Court held that despite a total pollution exclusion, PFAS claims alleging exposure through firefighting foam were covered. According to the Court, North Carolina limits pollution exclusions to their original purpose — "traditional environmental pollution" — which did not include PFAS claims. The Northern District of Georgia came out the other way, because Georgia law "emphasize[s] the 'broad' reach of the term 'pollutants.'" *Grange Ins. Co. v. Cycle-Tex, Inc.*, 4:21-cv-147-AT, 2022 WL 18781187, at *6 (N.D. Ga. Dec. 5, 2022). However, *Grange* was decided on a motion for default: the insured did not appear or argue contrary to the insurer's position. *See id.* at *1, 3-4.

Recent decisions in Michigan and New York have split over whether sudden and accidental pollution exclusions bar coverage for PFAS claims. The Michigan court focused on whether the company's dumping of PFAS was "accidental," whereas the New York court focused on whether it was

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"sudden." *See Wolverine World Wide, Inc. v. Am. Ins. Co*., No. 1:19-cv-00010, 2021 WL 4841167, at *11 (W.D. Mich. Oct. 18, 2021) (PFAS claims covered); *Tonoga, Inc. v. N.H. Ins. Co.*, 159 N.Y.S.3d 252, 258 (2022) (PFAS claims not covered).

Contrast these courts' approaches to the Sixth Circuit's June 2023 decision, where the court declined to determine whether a total pollution exclusion applied to preclude coverage for PFAS claims. *See Admiral Ins. Co. v. Fire-Dex, LLC*, No. 22-3992, 2023 WL 3963623 (6th Cir. June 13, 2023). The district court had declined jurisdiction under the Sixth Circuit's "*Grand Trunk* factors," which govern in-circuit courts' discretion under the Declaratory Judgment Act. The *Fire-Dex* dispute concerned coverage for a series of PFAS-related lawsuits against Fire-Dex under Admiral's insurance policy. Admiral sued, claiming that occupational disease and pollution exclusions barred coverage.

The district court held that federalism concerns compelled declining jurisdiction. Neither the court, nor either party, identified "a single case . . . in which an Ohio state court (or any court) . . . concluded that an occupational-disease and/or pollution exclusion either does or does not obligate an insurer to defend and/or indemnify an insured for PFAS exposure-related claims." *Admiral Ins. Co. v. Fire-Dex, LLC*, No. 1:22-cv-1087, 2022 WL 16552973, at *6-9 (N.D. Ohio Oct. 31, 2022). While the parties had identified Ohio cases analyzing these exclusions, the court found that no case had addressed PFAS nor exposure to PFAS by end-users of Fire-Dex's products. The district court concluded that there was insufficient Ohio state case law to allow the district court (a lower federal court) to predict how Ohio courts would resolve these issues.

Admiral appealed, focusing on the history of Ohio courts interpreting occupational-disease exclusions, and hiding its pollution exclusion argument in a footnote (citing inapposite Ohio decisions). *Fire-Dex*, No. 22-3992, 2023 WL 1552021, at *25 n. 14 (Jan. 25, 2023). The Sixth Circuit affirmed, holding that application of the occupational-disease exclusion to the PFAS claims involved a "novel issue of Ohio insurance law" and the district court had properly declined jurisdiction. The Sixth Circuit's opinion does not mention the pollution exclusion.

The Sixth Circuit's *Fire-Dex* opinion has two key implications. First, at least some federal courts may decline jurisdiction over PFAS coverage disputes (unlike COVID-19 business interruption claims). For good reason: there is a rich history of state supreme courts rejecting federal predictions of state law on insurance-coverage issues. *See*, *e.g.*, *Farmland Indus., Inc. v. Repub. Ins. Co.*, 941 S.W.2d 505 (Mo. 1997) (rejecting *Cont'l Ins. Co. v. N.E. Pharm. Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 8221 (1988), as misinterpreting Missouri law on the definition of "damages"); *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758 (1993) (rejecting *Md. Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) as misinterpreting Maryland law on the definition of "damages;" many courts in other states also have since rejected *Armco*: *see*, *e.g.*, *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 264 Wis.2d 60, 106-07 (2003)); *Hartford Cnty. v. Hartford Mut. Ins. Co.*, 327 Md. 418 (1992) (rejecting *Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325 (4th Cir. 1986) as misinterpreting Maryland law on trigger in environmental cases). Second, insurers may be less confident in their pollution-exclusion arguments than they appear.

Whether policyholders can enforce their coverage for the growing tide of nine- and 10-figure PFAS claims may depend on the type of pollution exclusion in their policies, the facts alleged, and the case law found to be applicable. Successful businesses may have both defense costs (attorneys' fees) and indemnity (judgments, settlements) covered by their insurers. With the extreme risks caused by PFAS lawsuits, companies should track down lost policies; consider all other potentially available lines of coverage,

including coverage that may be available from vendors, suppliers, and other third parties (a/k/a “other people’s insurance”); and prepare to litigate whether PFAS claims are covered.

Even companies that ultimately escape liability for PFAS claims may face crippling defense costs. CGL insurance was intended to apply to protect policyholders from the potentially crippling costs posed by products claims like these, and policyholders should therefore refuse to take no for an answer.

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