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Firefighting Foam Claims & the Pollution Exclusion

By Joseph P. Lang and Alida Pecanin

DOES A RECENT \$17,500,000 SETTLEMENT between residents of the Town of Peshtigo, Wisconsin, and manufacturers of aqueous film-forming foam (AFFF) foreshadow an impending claim boom?

While this January 2021 settlement resolved claims of drinking water contamination at one location, over 600 lawsuits alleging bodily injury and environmental contamination due to per- and polyfluoroalkyl substances (PFAS) — chemical components of AFFF — are consolidated and beginning the discovery phase in a multi-district litigation (MDL) pending in the U.S. District Court for South Carolina.

PFAS are a group of man-made chemicals that include perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). PFAS are designed to be resistant to heat, grease and water.

Given these traits, PFAS are used in Teflon nonstick products, stain and

water repellants, paints, cleaning products and food packaging. Used in AFFF, PFAS function to suppress class B petroleum fuel fires by cooling and coating the underlying fuel to prevent further combustion. Known as “forever chemicals,” PFAS do not break down in the environment and can move through soil and drinking water sources. Studies link PFAS to health issues in humans, including thyroid disease, testicular and kidney cancer, ulcerative colitis and high cholesterol.

The MDL lawsuits can be largely categorized into three types of claims: (1) damage to soil, groundwater, and/or drinking water supply and water systems due to PFAS; (2) bodily injury, including claims of cancer or other impaired health, due to exposure to PFAS in water supply; and, (3) bodily injury claims, typically made by firefighters, who were routinely exposed to AFFF.

POLLUTION EXCLUSIONS

Insurers confronting PFAS contamination claims face decades of potentially implicated policies and may evaluate pollution exclusions as a basis for limiting or precluding coverage. The typical pollution exclusion in a commercial general liability (CGL) policy precludes coverage for bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants. The specific terms of pollution exclusions and nationwide variations in their interpretation present significant issues regarding whether pollution exclusions may apply to preclude coverage for PFAS claims.

For example, certain pollution exclusions limit their application to a discharge or release of pollutants “into or upon land, the atmosphere or any course or body of water.” Courts interpreting this language generally find that it requires dispersal into the external environment and that a release of pollutants within a confined space, such as a building, does not satisfy the exclusionary language. Claims alleging the release of PFAS into the environment (e.g., the use of AFFF to suppress a fuel fire) will likely satisfy this language to invoke the exclusion’s application. However, claims like those of firefighters or property owners that allege injury or damage from the storage of AFFF within indoor locations may not give rise to a release into “land, the atmosphere or water.”

Another issue impacting the application of pollution exclusions, even without the foregoing language, is the view held by many jurisdictions that pollution exclusions only apply to so-called “traditional” environmental pollution. In one of the first cases to address insurance coverage for claims in the MDL, the Western District of North Carolina held that a hazardous materials exclusion, which is similar to a pollution exclusion, did not bar coverage. The court focused on precedent in the jurisdiction and found that some of the underlying allegations involved direct dermal exposure to AFFF rather than the “prototypical”

release into the environment contemplated to be excluded from coverage under pollution exclusions.

Finally, older pollution exclusions include the “sudden and accidental” exception, which provides that the pollution exclusion does not apply if the discharge, dispersal, release or escape of pollutants is “sudden and accidental.” Courts interpreting this language find that the term “sudden” incorporates a temporal element requiring that the polluting event be abrupt or immediate, while the term “accidental” requires an unforeseen or unintended event. The claims in the MDL typically allege that PFAS was gradually released over time and/or through the intentional use of AFFF. Gradual releases and intended releases of PFAS should not qualify as “sudden and accidental” and, as a result, the exception should not apply.

Parties in the MDL are currently selecting 10 bellwether cases involving public

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and privately owned water providers to undergo in-depth discovery, including depositions, from March through August 2021. Insurers should continue to monitor developments in the MDL to understand the extent and nature of damages sought and to best evaluate whether particular pollution exclusions and/or other coverage limitations apply. Critically, underwriters may also assess future exclusions for PFAS-related liability.

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