Significant Ruling in PFAS Litigation Could Impact Insurance Coverage

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Insurance Coverage and Bad Faith Alert
9.20.22

Per- and poly-fluoroalkyl substances, commonly known as PFAS, have served as a key component in numerous industrial and consumer products for decades. These "forever chemicals," which have been associated with environmental contamination and adverse health outcomes, have garnered steadily-growing attention from regulatory authorities, the plaintiffs' bar, and, by extension, the insurance industry.

The current "case to watch" regarding PFAS is the multidistrict litigation ("MDL") in the United States District Court for the District of South Carolina, Judge Gergel presiding. The MDL is comprised of well over 2,000 cases brought by both individual plaintiffs and state and local governments arising out of the manufacturing and/or use of aqueous film forming foam, also known as AFFF. The use of AFFF, which was historically employed in firefighting operations, including those undertaken by the United States military, allegedly causes the release of two types of PFAS into the environment – PFOS and PFOA.

On September 16, 2022, Judge Gergel denied a motion for partial summary judgment filed by defendant 3M Company and other AFFF defendant manufacturers on the government contractor immunity defense. Although not an insurance coverage decision, the ruling is significant in the context of PFAS litigation and could have insurance coverage implications.

Government Contractor Immunity Defense

The government contractor immunity defense was developed to protect the federal government's interest in obtaining products it needs at reasonable prices, despite potential defects in those products. Under the defense, a government contractor can assert immunity with respect to an allegedly defective product if the following three criteria—or "prongs"—are met: (i) the government approved reasonably precise specifications for the product; (ii) the product conformed to those specifications; and (iii) the contractor warned the government about the dangers of the product that were known to the contractor but not to the government. A doctrine known as the "continuous use" doctrine allows a contractor to satisfy the defense—including the first prong—where the government continued to use the product after acquiring full knowledge of the product's risks.

In 1969, the Navy promulgated a military specification ("MilSpec") for AFFF. 3M initially supplied MilSpec-compliant AFFF that contained PFOS. In 2000, 3M discontinued manufacturing PFOS, and other contractors that used a different AFFF-manufacturing process known as telomerization stepped in to fill the void left by 3M's exit from the market. Although telomer-based AFFF does not contain PFOS, it can degrade into PFOA in the environment. The moving telomer-based AFFF manufacturers included Tyco Fire Products LP, Chemguard Inc., Kidde-Fenwal, Inc., National Foam, Inc., and Buckeye Fire Equipment Company.

Decision Denying Partial Summary Judgment

In its order denying partial summary judgment on the government contractor immunity defense, the MDL court ruled that: (i) the MilSpec did not constitute a reasonably precise specification under the first prong of the defense; and (ii) there are fact issues as to whether the AFFF manufacturers timely warned the government about the dangers of their AFFF products that were known to them but not to the government and whether the "continued use" doctrine applies.

The court held that the MilSpec was not a reasonably precise specification because it was only a "performance spec," which allowed "each manufacturer to come up with [its] own magic witch's brew" concocted from "at least hundreds of different types of [PFAS]," rather than a "design spec" that would have required the use of particular chemicals.

With respect to the third prong and the "continued use" doctrine, the court held that all of the AFFF manufacturers "had significantly greater knowledge than the government about the properties and risks associated with their products and knowingly withheld highly material information from the government." The court described a laundry list of evidence that 3M, in particular, not only failed to timely disclose critical information to the government, but also "actively sought to discredit" adverse information that was disclosed.

Similarly, the court identified evidence that the telomer-based AFFF manufacturers, primarily through the Fire Fighting Foam Coalition ("FFFC"), misled the government into believing that their AFFF products would not degrade into PFOA, even though they learned that their products could or would in fact do so. In addition, the court determined that the government's fevered regulatory activity immediately following 3M's allegedly belated disclosures, and the government's subsequent decision to restrict the use of telomer-based AFFF to only "mission critical activities," cast the applicability of the "continued use" doctrine into further doubt.

Potential Impact on Insurance Coverage

The court's order and opinion, although not made in the context of insurance coverage, could have major coverage consequences. General liability policies generally require any injury or damage for which an insured seeks liability coverage to arise out of an "occurrence," which policies generally define as an "accident." To the extent an insured knowingly or intentionally causes injury or damage or should have known that it would cause injury or damage, liability for such injury or damage may fall outside the scope of coverage. Courts usually place the burden on the insured to prove that injury or damage arose from an accidental "occurrence."

Additionally, most general liability policies contain an "expected or intended" exclusion that excludes coverage in connection with liability for injury or damage that an insured expects or intends. Accordingly, if an insured expects or intends injury or damage, coverage may not be available. Courts typically place the burden on the insurer to establish that an "expected or intended" exclusion applies.

The MDL court's decision cites to evidence proffered by the plaintiffs that 3M and the telomer-based AFFF manufacturers intentionally concealed information about known dangers of their products. Depending on how a court construes a policy's definition of an "occurrence" and/or "expected/intended" exclusion, the decision and the evidence to which it refers (if substantiated) could provide support for a coverage defense based on either or both of those policy provisions.

However, the law of the applicable jurisdiction may provide additional parameters. For example, whether there was an "occurrence" or whether injury or damage was "expected or intended" may depend on whether only the act that caused the injury or damage was anticipated or intended, or whether the injury or damage itself was anticipated or intended. Similarly, proof of the insured's actual subjective awareness or intent, as opposed to what the insured should have known objectively, may or may not be required.

In addition, the order and opinion could have implications with respect to which policies, if any, are triggered by allegations of PFOS and PFOA-related harm. Many general liability policies do not provide coverage in connection with injury or damage about which the insured knew prior to the policy period. Therefore, policies issued after an insured found out that PFOS or PFOA was causing harm may not provide coverage in connection with such harm. Similarly, insurers may argue that they should not be responsible for damages that an insured failed to mitigate by failing to disclose risks as soon as it became aware of those risks (even if the insured discovered the risks after the policy period). Again, the court's decision discusses in considerable detail what the AFFF manufacturers may have known about the dangers of PFOS and PFOA, and when they may have known it.

Of course, the court denied partial summary judgment only with respect to 3M and five other AFFF manufacturers. The evidence it cites may apply to other insureds to varying degrees, or not at all. Parties should evaluate whether and the extent to which the evidence in the MDL pertains to them and should consider other evidence that may bear on the types of coverage issues discussed above.

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