Wave of Deceptive Marketing PFAS Claims Raises "Personal and Advertising Injury" Coverage Issues

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Companies in various consumer products industries are increasingly facing claims alleging that they have deceptively marketed their products as safe and sustainable when, in reality, those products allegedly contain unsafe and unsustainable levels of chemicals known as per- and poly-fluoroalkyl substances, or "PFAS." Since the beginning of 2022, plaintiffs have filed class-action lawsuits against several cosmetics companies, fast food restaurants, an anti-fogging spray business and a big box department store alleging that the defendants misrepresented the safety and sustainability of PFAS-containing cosmetics, food packaging, anti-fogging spray, and disposable tableware and food storage bags. Companies in other industries, such as athleticwear, could be next.

Copying the playbook of claims asserted against manufacturers of talcum powder alleged to contain asbestos, these deceptive marketing claims assert that PFAS are harmful to human health and the environment, but do not allege that specific individuals sustained specific bodily injuries or that specific property was damaged. Instead, they claim that consumers would not have purchased PFAS-containing products at the prices at which they paid had they not been misled as to the nature of those products.

Because deceptive marketing claims do not require consumers to prove that they actually sustained bodily injuries or experienced property damage, or that PFAS from specific products caused specific injuries or damage—only that deceptive marketing led consumers to purchase products at prices they would not have paid—these claims avoid the types of science-intensive causation issues that bodily injury and property damage claims often raise. Further, because scientific understanding of PFAS is still developing, such causation issues can present a serious challenge for PFAS plaintiffs. Accordingly, although consumers who are now asserting deceptive marketing claims might ultimately assert bodily injury and/or property damage claims as well, deceptive marketing claims may represent the most significant wave of PFAS litigation in the consumer products context in the short term.

Key Coverage Issues

"Personal and Advertising Injury"

For commercial general liability insurers whose policyholders face deceptive marketing claims, rather than or in addition to bodily injury or property damage claims (which could give rise to separate coverage issues), one key coverage issue is whether those claims allege personal and/or advertising injury within the meaning of CGL policies.

Of the several categories of offenses that typically fall within the definition of "personal and advertising injury," the most critical one with respect to deceptive marketing claims is typically "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

Insurers have argued that deceptive marketing that simply lauds policyholders' own goods, products, or services—such as marketing that advertises PFAS-containing products as safe and sustainable—does not constitute disparagement within the meaning of "personal and advertising injury" because it does not actually denigrate anyone's goods, products, or services. Policyholders, however, have argued that such marketing implicitly disparages competitor goods, products and services because it puts those goods, products and

services at a competitive disadvantage.

Courts have adopted varying attitudes toward these arguments. Most courts have rejected the policyholders' position and, instead, required an express or at least implied reference to someone else's good, product or service. For example, in *Dollar Phone Corporation v. St. Paul Fire & Marine Insurance Company*, the Eastern District of New York held that "the unambiguous meaning of 'disparage' in the advertising injury portion of [a CGL policy] requires either an allegation that the advertisement specifically referred to the competitor's products or touted one's own products as superior to those of its competitors." 2012 U.S. Dist. LEXIS 45591, at *26 (E.D.N.Y. Mar. 9, 2012), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 45652 (E.D.N.Y. Mar. 30, 2012), *aff'd*, 514 F. App'x 21 (2d Cir. 2013); *see also, e.g., Total Call International, Inc. v. Peerless Insurance Company*, 181 Cal. App. 4th 161, 171 (Cal. App. 2d Dist. 2010) (requiring "specific reference" to another good, product or service). Under this approach, a court should never treat a policyholder's misrepresentation of its own PFAS-containing product as safe and sustainable as disparagement under a CGL policy's definition of "personal and advertising injury."

At least one court, however, has interpreted "personal and advertising injury" as encompassing injuries caused by deceptive marketing even where that marketing did not refer to someone else's good, product or service or at least imply that someone else's good, product or service was inferior. In *Safety Dynamics, Inc. v. General Star Indemnity Company*, the Ninth Circuit held the underlying complaint alleged personal and advertising injury because it asserted that the insured's product "made [the insured's] product look better versus [a competitor's]." 475 F. App'x 213, 214 (9th Cir. 2012).

Importantly, however, the underlying lawsuit in *Safety Dynamics* was brought against the policyholder by a competitor for what the court called "a competitive injury", not by a consumer who alleged that he or she was misled into purchasing the policyholder's good, product or service. *Id.* at 213–14. Thus, even courts that read disparagement broadly may not read it so broadly as to apply to claims brought by consumers, such as the claims that consumers have recently brought against sellers of PFAS-containing products.

Therefore, notwithstanding the *Safety Dynamics* decision, in most—and arguably all—instances, a consumer deceptive marketing PFAS claim will not involve any of the enumerated personal and advertising injury offenses listed in a CGL policy.

The "Failure-to-Conform" Exclusion

Even if a court were to find that a consumer claim did allege "personal or advertising injury," another important coverage issue is whether the "failure-to-conform" exclusion applies. The failure-to-conform exclusion typically excludes coverage for "personal and advertising injury" that "aris[es] out of the failure of goods, products, or services to conform with any statement of quality or performance." As with how courts have interpreted "personal and advertising injury," courts have applied this exclusion in differing ways.

The majority of courts have held that the exclusion fully excludes coverage for deceptive marketing about policyholders' own goods, products or services, even if such marketing may have incidentally put competitors' goods, products or services at a competitive disadvantage. For instance, in *General Star Indemnity Company v. Driven Sports, Inc.*, the court applied the failure-to-conform exclusion to a competitor's claims because those claims could not be "be proven without proving that [the good, product or service] failed to conform with [the insured's] advertisements about its quality." 80 F. Supp. 3d 442, 454 (E.D.N.Y. 2015); *see also, e.g., Harleysville Mutual Insurance Company v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 28 (N.C. 2010) (similar).

But the majority approach is not ubiquitous. In *Safety Dynamics*, the same court that held that marketing that does not expressly or impliedly refer to a good, product or service can nonetheless disparage a good, product or service also refused to apply the failure-to-conform exclusion to such marketing. *Safety Dynamics*, 475 F. App'x at 214. Again, however, it did so in the context of a claim brought by a competitor, **not** with respect to a claim brought by a consumer. *Id.* In reaching its decision, the court reasoned that "[the] injury

claimed in the underlying action does not *arise out of* the failure of [the insured's] product to conform to its advertisements. Rather, it is a competitive injury." *Id.* Thus, even a court like the *Safety Dynamics* court could apply the exclusion to consumer claims like the recent deceptive marketing PFAS claims, which do *arise out of* the failure of policyholders' goods, products or services to conform to their advertisements. Indeed, at least one insured has contrasted competitor claims and consumer claims, admitting that the failure-to-conform exclusion "can be reasonably understood as operating to bar coverage for claims by consumers," just "not claims by competitors." *Total Call*, 181 Cal. App. 4th at 172.

Of course, whether a claim alleges "personal and advertising injury" or is excluded by the "failure-to-conform" exclusion are only two of many potential issues to which deceptive marketing PFAS claims may give rise. Some policies may contain divergent language. For instance, some policies may omit "disparage[ment] [of] a person's or organization's goods, products or services" from the definition of "personal and advertising injury." Other policies may not cover "personal and advertising injury" at all. And claims may assert different or additional facts, such as "competitive injuries," that could alter the coverage analysis. In addition, there could be issues as respect potential "bodily injury" or "property damage" claims (*e.g.*, to the extent a claim for medical monitoring is alleged). In any case, insurers who face a coverage claim in connection with an underlying PFAS claim should carefully evaluate the policy language in light of the alleged facts and relevant case law and consider retaining coverage counsel to assist.

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