LITIGATION MINUTE: INSURANCE DEFENSE COVERAGE FOR PFAS LITIGATION

PFAS SERIES: PART FOUR OF FOUR

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

For many companies, per- and polyfluoroalkyl substances (PFAS) have become an increasingly challenging issue. Companies may face a barrage of claims from individuals, governments, other companies, and even putative classes alleging that PFAS have caused bodily injury, property damage, and economic losses. Many defendant companies look to their general liability insurance policies to provide a defense, although companies sometimes have other third-party liability policies that may apply.

An insurer's defense duty is broader than the duty to indemnify and typically applies if any allegation in the complaint even potentially or arguably falls within coverage. For some types of claims—such as individual claims seeking damages for injury or damage allegedly resulting from a company's products—coverage can be relatively straightforward, as general liability policies typically cover damages “because of” bodily injury or property damage.

For other types of claims, such as lawsuits alleging that PFAS reduced the value of a purchased product, an insurer may argue that coverage is less straightforward. In seeking coverage for PFAS-related cases, defendant companies should carefully parse the plaintiff's allegations, which may bring the claim within the scope of the policy—despite an insurer's objections.

In seeking defense coverage, companies should keep three key strategic points in mind.

Early Actions Can Affect Insurance Recoveries

Companies should act promptly after receiving service of a complaint or notice of a potential claim against them. Some policies may have strict notice requirements or other time-sensitive conditions. In addition to notifying the relevant primary insurer(s), companies may also need to notify excess insurers. Depending on when the bodily injuries and property damage allegedly occurred, multiple years of coverage might be potentially implicated, and companies should notify all insurers that sold occurrence-based liability policies in any year that might overlap the alleged injury period or other types of policies—such as those issued on a claims-made basis—that could cover the plaintiffs' alleged injuries. In putative class actions, the relevant years of coverage may depend on the applicable statute of limitations for the class allegations, as the class complaint may not specify any date restriction in the proposed class definition.

Companies should—along with complying with any other time-related conditions—notify insurers that sold any type of policy with any possibility of coverage, which can include not only general liability policies, but other lines

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of coverage (such as directors and officers liability policies containing coverage for the alleged wrongful acts of the company or its officers and directors). Ultimately, companies may be well advised to provide notice under multiple lines of coverage and over multiple policy years.

Other early decisions may also significantly affect a company's defense of a PFAS claim. Insurers sometimes seek to direct which defense counsel the company retains, but the policy may give them no right to do so. An insurer may also purport to reserve the right to deny coverage, on grounds that might obligate the insurer to pay for companies to retain independent counsel at the insurer's expense.

Although an insurer may dispute the rates it must pay defense counsel, companies should understand that many policies obligate the insurer to pay the full, reasonable rate of competent counsel in the relevant jurisdiction—which may be considerably higher than the rate an insurer offers to pay. In such circumstances, an insurer sometimes resolves rate disputes by negotiating a higher billing rate than the insurer was initially willing to pay.

These and other issues may arise in the early days of a claim, and companies should be prepared to respond to an insurer's arguments without delay.

Anticipating and Addressing Defenses to Coverage

Companies should recognize that insurers sometimes raise numerous defenses to coverage by denying coverage outright or by asserting broad reservations of rights. An insurer may assert exclusions, such as pollution or contamination exclusions or exclusions based on what the insurer contends the company knew—or should have known—about PFAS prior to obtaining its policies. An insurer may also contest that the policies apply at all, sometimes arguing that the damages sought are too attenuated from any allegation of bodily injury or property damage to trigger coverage or that the company expected or intended the damages.

Companies should recognize that they often have strong responses to these and other coverage defenses that an insurer can raise. That is particularly true under the relatively broad standard applicable to an insurer's defense duties. A quick and forceful response is often an important method to ensure that a company receives the defense to which it is entitled.

Coordinating Insurance and Defense Strategies

Companies should carefully coordinate their insurance and defense approaches. Sometimes, tensions can arise between a company's defense strategy and its insurance strategy. For example, in defending a claim, companies may need to emphasize the many holes in a plaintiff's allegations that PFAS in a company's products cause injury. In seeking coverage, however, the defendant company may want to emphasize the plaintiff's allegations that the PFAS did cause those injuries without admitting that there actually was PFAS contained in the product or that PFAS caused any alleged harms. These positions are not in conflict, because an insurer's defense duty often applies even if the claims against the company are false, frivolous, or even fraudulent. The strategic emphasis that a company gives in pursuing its defense and coverage can alleviate any potential tensions. Consequently, it is often important for defense counsel and insurance counsel to coordinate, ensuring that the approaches of each compliment those of the company when addressing PFAS-related claims.

Companies should act quickly to notify insurers, satisfy other time-related coverage conditions, identify and address potential areas of dispute, and strategically coordinate their defense and insurance recovery strategies. Companies may have considerable insurance available to pay for the defense of PFAS-related claims asserted

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against them. By taking early and well-considered steps, defendant companies subject to PFAS-related claims can maximize their abilities to receive the full insurance benefits owed by their insurers.

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