PFAS AND OTHER EMERGING ALLEGED CONTAMINANTS LITIGATION: MITIGATING RISK THROUGH INSURANCE

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EU/UK Litigation and Dispute Resolution Alert

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The United States (US) has seen an explosion of litigation in recent years relating to perfluoroalkyl and polyfluoroalkyl substances (PFAS), referred to by some as “forever chemicals” because they are slow to degrade and can stay in the environment for many years. PFAS are a large group of synthetic chemicals, which are used in a wide range of product types, such as water and stain repellents, lubricants, packaging, electronics and fire-fighting foams, due in large part to their resistance and low chemical reactivity.

In recent years, questions have been raised about whether PFAS represent a cause for concern from an environmental perspective, and whether there may be human health risks from PFAS exposure. In the US, high-profile lawsuits have prompted many states to pass laws restricting certain PFAS uses. States like Minnesota, for example, have given state agencies authority to ban PFAS in a wide range of products, have enacted phase-outs of PFAS in food packaging, and adopted restrictions on PFAS in a range of consumer products, including carpets, rugs, cosmetics, and food packaging. More recently, the US Environmental Protection Agency announced legally enforceable drinking water limits for a group of PFAS compounds alleged to be the most hazardous.

Outside the US, greater activity by consumer groups and regulators may be expected, resulting in more widespread PFAS-related litigation in the United Kingdom (UK) and beyond against manufacturers, retailers, and others in the supply chain. This will necessitate a range of responses from businesses in the UK and the European Union (EU), including a focus on how insurance policies may respond to these new and developing risks.

RECENT ACTION BY UK AND EU REGULATORS

A report published by the UK's Health and Safety Executive (HSE) in April 2023 commented in detail on the extent to which PFAS are used in the UK and made a number of recommendations, including to limit use of PFAS in foams, textiles, furniture, and cleaning products.[1] From a regulatory standpoint, the UK REACH (registration, evaluation, authorisation and restriction of chemicals) regulations apply to the majority of chemical substances that are manufactured in or imported into Britain. Currently, there are only two UK REACH restrictions of PFAS in force, relating to PFOA (perfluorooctanoic acid) and its salts and perfluorinated silane substances. These chemical compounds are commonly used to make coatings that resist heat, oil, stains, grease and water. However, following the HSE's report, the HSE has added PFAS as a category of chemicals to the Rolling Action Plan as substances prioritised for evaluation under UK REACH[2], so it is possible that further restrictions will come into force relatively soon.

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As part of its retained EU law, the UK has regulations governing persistent organic pollutants (POPs) resulting in the ban of PFHxS (perfluorohexanesulfonic acid). Further, these regulations provide that a person who produces, places on the market, or uses a designated POP, such as PFOS (perfluorooctanoic acid) or PFOA, in contravention of the manufacture, sale, or use prohibition is guilty of a strict liability offence. Both corporates and responsible individuals (such as directors) can be found guilty and would be liable to pay a fine, to serve a term of imprisonment, or both.

The EU's current PFAS legislation includes restrictions on PFOS, PFOA, and PFHxS. Further restrictions are expected after Denmark, Germany, Norway, Sweden, and the Netherlands jointly submitted the EU PFAS Restriction Proposal (the Proposal) in 2023 aiming for a blanket ban on all (about 15,000) PFAS chemicals. The Proposal is currently in the consultation stage, and a final decision can be expected from the European Commission in 2025. The Proposal does include some exclusions, for example, for PFAS used in plant protection products, biocides, and medicines. If the ban were to go ahead, companies operating in the EU would have between a year-and-a-half and 12 years to introduce alternatives. This could result in EU companies halting use and production of PFAS altogether.

THE SPREAD OF LITIGATION

The volume of PFAS-related litigations has accelerated significantly in the US within the last decade. In addition, US courts have seen a growing number of consumer class action lawsuits against manufacturers that produce dental floss, feminine hygiene products, cosmetics, and waterproof fabrics that contain PFAS. Such litigation centred on alleged contaminants in consumer products but is not confined to the alleged presence of PFAS and extends to other emerging alleged contaminants: benzene in dry shampoo, aerosols, and acne products; titanium dioxide in cosmetics; chlormequat or other pesticides in oat products; formaldehyde and other chemicals in hair relaxers; and microplastics in water bottles and other consumer products. Of these alleged contaminants, all are currently restricted or banned in the EU, while the UK has only prohibited the use of benzene in consumer products and formaldehyde in cosmetic products.

In the UK and Europe, PFAS-related litigation is expected to increase. To cite but a single example, a recent claim in Belgium culminated in a €571 million settlement between the government and the operator of a manufacturing plant, after it was found that the manufacturer had contaminated surrounding land, resulting in high levels of PFAS in the bloodstreams of local residents.[3] Another claim was brought by a number of Dutch municipalities against a chemical manufacturer to recover damages resulting from alleged soil contamination containing PFAS.[4]

In the UK, it is only a matter of time before we start to see a steady through-put of claims and group actions related to PFAS and other emerging alleged contaminants. Such claims could, in theory, be brought on a number of different grounds ranging from personal injury, where claimants allege that exposure to PFAS has caused health issues, to product liability, where the presence of PFAS is alleged to make the product in question unsafe. There might also be claims of property damage where there are allegations of contamination, for example of land or ground water, or statutory nuisance. Even in cases where the discharge of industrial effluent may be permitted under licence, those discharges might still face legal challenge on the basis of alleged risks to human health and the environment.

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IDENTIFYING POTENTIALLY RESPONSIVE INSURANCE POLICIES

Companies should be looking to their insurance policies for coverage in respect of the costs of defending PFAS related claims and liabilities. The following policies may be relevant depending on the nature of the claim:

Public Liability or Commercial Liability Insurance

Public liability or commercial liability insurance typically provides coverage against liability to third parties for property damage or bodily injury arising from the conduct of the business. Such policies usually operate on an "events occurring" or "losses occurring" basis. A "losses occurring" policy provides cover in respect of liability for damage or injury suffered during the policy period. In the case of bodily injury caused by exposure to a harmful substance, liability is usually triggered not at the time of the original exposure but when the illness manifests itself.[5]

Employers' Liability Insurance

Any employer conducting business in the UK must obtain employers' liability insurance to provide coverage against liability for bodily injury or disease sustained by any employees in the course of their employment. The coverage applies in respect of illness or disease caused during the policy period, even if the symptoms manifest at a later date.[6] This means that historic employers' liability policies may be implicated in the event of alleged workplace exposures.

Product Liability Insurance

Product liability insurance provides cover against liability to third parties for property damage or personal injury caused by the product itself. This may include where there is alleged property damage through a contaminating effect on the product of the third party as a result of the introduction or intermixing of the product supplied by the insured.

Environmental Liability Insurance

Environmental liability insurance provides coverage against liability for certain environmental or pollution risks, including pollution or contamination arising from an industrial or manufacturing facility.

PRACTICAL TIPS TO ENHANCE COVERAGE

There are a number of steps that corporate policyholders should consider when faced with any PFAS or other alleged contaminant related claims or potential claims, in particular:

Prompt Notification to Insurers

Most liability policies provide for written notice to be given as soon as practicable, or within a given time period, of any accident or occurrence likely to give rise to a claim against the insured and of any claims or legal proceedings which may be brought. Prompt notification is important and may facilitate access to any coverage for costs incurred prior to proceedings being issued.

Early Coverage Assessment

Consultation with experienced coverage lawyers will assist in identifying and analysing responsive policies and in anticipating any coverage issues insurers might raise. If insurers impose reservations of rights, or rely on

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coverage defences or policy exclusions, coverage counsel can often assist in combatting these arguments at an early stage.

Collate and Preserve Relevant Documents

Insurers (as well as third party claimants) may request production of extensive documentation, and it is important to take steps early on to ensure potentially relevant documents are located and preserved.

Defence of Claims

Some liability policies provide that the insurer has the right to defend third party claims but such a clause does not compel the insured to accept the services of the insurers' chosen lawyers. Insureds should seek to negotiate with Insurers to ensure that lawyers with adequate experience and undivided loyalty to the policyholder are appointed.

Negotiate Policy Terms

Even if such claims have not yet materialised, policyholders should adopt a proactive approach to their liability insurance and take steps at renewal to ensure that their coverage is extensive enough to respond to potential claims. Policyholders should seek to negotiate policy terms, particularly if insurers impose pollution exclusions or specific exclusions for claims involving PFAS or other alleged contaminants. The Lloyd's Market Association has already produced model PFAS exclusions for use in liability insurance policies, but such exclusions are broadly worded and proactive policyholders may be able to negotiate better terms.

Our lawyers can assist businesses in devising appropriate strategies to prepare for and defend third party claims, while also pursuing claims against insurers to cover defence costs and any additional losses or liabilities. This is particularly important in the context of claims arising from emerging alleged contaminants as it is an area which is constantly evolving and changing in scope.

FOOTNOTES

1 hse.gov.uk/REACH/assets/docs/pfas-rmoa.pdf

2 UK REACH: Rolling Action Plan (RAP) for UK REACH 2023-2025- REACH - HSE

3 3M Belgian Settlement Signals Increased Risk of 'Toxic Torts' in Europe (insurancejournal.com)

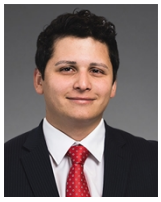
4 Chemours liable for damage caused by PFAS in Dordrecht and surrounds, court rules | NL Times

5 *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2007] Lloyd's Rep IR 173

6 *BAI (Run-Off) Ltd v Durham [2012] Lloyd's Rep IR 371*

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