

'Forever Chemicals' Coverage Suits Likely To Echo PCB Disputes

By **Shane Dilworth**

Law360 (September 24, 2021, 2:06 PM EDT) -- The rising number of lawsuits and legislation concerning so-called forever chemicals has legal experts forecasting that related coverage disputes between product makers and their insurers could follow the same path as those involving another ubiquitous chemical: polychlorinated biphenyls, or PCBs.

Much like PCBs, which were banned in 1977, per- and polyfluoroalkyl substances, or PFAS, were used in a cornucopia of industrial and commercial products. Additionally, PCBs and PFAS are both hazardous to humans and can linger in soil and groundwater for decades, thus leaving the potential for coverage disputes for occurrences that happened decades ago, experts say. That PFAS don't break down under normal environmental conditions gave rise to the "forever chemicals" nickname.

"For the insurance coverage implications, it's deja vu all over again, just a different acronym," Hunton Andrews Kurth's Michael Levine told Law360.

Levine, who represents policyholders, said PFAS could follow in the legal footsteps of PCBs because of the substances' ubiquity as well as their ability to cause similar damages to human health and the environment.

Indeed, one of the "many challenges and attendant risks from PFAS is the extent to which various PFAS chemicals have been used in so many industries for over 85 years," said Joel Eagle of Thompson Hine LLP, who represents insurers.

Matthew Jeweler of Pillsbury Winthrop Shaw Pittman LLP told Law360 that he agrees that coverage disputes over bodily injuries and property damage have the potential to be the "next big thing," but he also pointed out that there will be differences over litigation involving forever chemicals.

Jeweler noted that some differences can be seen in the types of suits pending in a multidistrict litigation in South Carolina federal court, which is currently housing more than 1,200 PFAS cases. The suits seek a variety of remedies including medical monitoring and compensation for property damage or bodily injuries.

The use of PFAS in a variety of products made by a number of different companies will lead to a wide variety of suits and claims, said Jeweler, who represents policyholders.

Some suits in the multidistrict litigation have been brought by firefighters for bodily injuries from

exposure to PFAS in aqueous film-forming foam. Those chemicals are predominantly found in products used to extinguish fires, but PFAS have also been used in the making of nonstick cookware, stain- and water-resistant products, paints, lubricants, architectural resins and food packaging.

Furthermore, Eagle of Thompson Hine pointed out that PFAS have been detected at landfills, U.S. Department of Defense installations, public and private airports and manufacturing facilities. Remedial action could be required, he said, if the chemicals are detected at high enough levels.

Such a finding, Eagle said, could trigger disputes between the companies thought to be responsible for PFAS contamination and their insurers. In fact, Eagle thinks environmental remediation claims may give rise to the most coverage disputes.

Although coverage battles have just started to arise between insurers and makers of products containing PFAS, one court has already taken a stand on an insurer's duty to defend.

In August, a Texas federal judge said Crum & Forster Specialty Insurance Co. was required to defend chemical company Chemicals Inc. in a suit brought by firefighters who allege they were exposed to firefighting foam. U.S. District Judge Lee H. Rosenthal found that the firefighters' failure to include the dates of their injuries in the complaint did not relieve the insurer of its duty to defend.

Levine said the ruling was not extraordinary because the duty to defend is broad and further, that the so-called default rule followed in Texas says that when precise dates of injury are not alleged, they may be determined in future proceedings. He told Law360 that Judge Rosenthal "correctly applied that rule, recognizing that the injuries occurred at some point, and evidence may show that point to have been during the policy period."

"This rule, and Judge Rosenthal's ruling, are consistent with the broad duty to defend typically afforded under general liability insurance policies," Levine stated.

A pair of policyholder-friendly federal court decisions in PCB coverage disputes could also offer a taste of what's to come in fights over coverage for injuries or property damage due to forever chemicals.

In 2015, an Indiana federal judge said Old Republic Insurance Co. had to pay costs that Gary-Chicago International Airport Authority incurred defending a suit brought by the Indiana Department of Environmental Management over PCB contamination. The judge held that pollution exclusion in the airport's policy didn't bar coverage because it didn't specify which pollutants or contaminants it applied to.

And an Illinois federal judge in 2019 ruled that Travelers Indemnity Co. had to defend Magnetek Inc. in actions brought over PCBs by Monsanto Co. Magnetek convinced the judge it was entitled to coverage because of a decades-old PCB purchase contract that a predecessor company entered into with Monsanto.

Jeweler pointed out that the timing of the alleged injury or damage will be important in PFAS coverage disputes. In addition, insurers will likely contend pollution exclusions bar coverage and raise other policy defenses, he added.

"Since the 1970s, insurance companies have introduced multiple versions of so-called pollution exclusions, each time purporting to clarify their scope and effect," Levine said. "When exposure

occurred will determine which policies and which exclusionary wording potentially apply to a claim."

Levine also opined that jurisdiction will play a role in how successful a coverage dispute may be because "insurance disputes are matters of state law, and states look at issues like exposure and the breadth of exclusionary provisions differently. Some states are more policyholder-friendly than others."

Laura Foggan of Crowell & Moring LLP agrees that the timing of the harm will be a "key question" in the assessing of coverage for PFAS liability.

"To the extent coverage for PFAS liability is sought under historical policies, there may be questions of expected or intended harm and known loss. In other words: What did the insured know about the dangers of PFAS and when?" said Foggan, who is also a fellow and member of the Board of Regents of the American College of Coverage Counsel, an organization of insurance lawyers.

Foggan, who represents insurers, went on to say that other individualized coverage issues may or may not overlap with questions that courts addressed when determining coverage for PCBs.

One notable difference between PCBs and PFAS that may soon change is that PCBs are officially classified as a hazardous substance while PFAS are not. PCBs were banned by the federal government in 1977, and President Joe Biden's administration is currently scrutinizing forever chemicals.

Over the past year, the U.S. Environmental Protection Agency created a council to examine if PFAS should be designated as a hazardous substance under certain environmental statutes. The agency also added PFAS to a draft list of water contaminants that can be found in drinking water.

Congress has also started taking action concerning PFAS as well, with lawmakers proposing the PFAS Action Act of 2021 in April.

That bill, if passed, would force the EPA to create a drinking water standard for two types of PFAS: perfluorooctanoic acid and perfluorooctane sulfonic acid. The measure would also require the agency to designate these two chemicals as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act.

Some states are following suit. California recently proposed establishing allowable limits for the same two PFAS in drinking water, added PFAS to the list of chemicals that incur a state-mandated warning of cancer risk and banned makers of aqueous film-forming foam from selling their products beginning in January 2022.

Eagle asserts that if these regulations are passed, "the writing is on the wall" that more sites will require remediation, thus raising liability questions and coverage issues.

"Given the pace of regulatory and legislative actions at the state and federal levels, the possibility of extensive environmental cleanup and resulting costs continues to become more 'real,' and therefore insurance claims and coverage disputes will almost certainly grow in tandem," Eagle told Law360.

Labeling PFAS as hazardous substances could also spur more litigation against policyholders.

"If regulation continues to increase, I think it can have an impact," Jeweler said.

Jeweler explained that the more notoriety and attention PFAS draw in the news media, the more the public and plaintiffs' attorneys will focus on the chemicals. In addition, if the EPA, state environmental regulators and Congress take action against makers of products containing forever chemicals, Jeweler says that there "is an increased likelihood that private parties will ultimately piggyback with their own claims."

However, Foggan noted that such a designation could work in insurers' favor by reinforcing grounds for the application of pollution exclusions.

--Editing by Vincent Sherry.

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