PFAS: FOREVER CHEMICALS-FOREVER LITIGATION

The genesis of PFAS chemicals is with the Manhattan Project. Little did anyone know the explosive impact PFAS chemicals would have on litigation in the twenty-first century. To develop an understanding of the chain reaction that has resulted in numerous cases, multi-district litigation and still yet unknown impacts on water utilities throughout the country, one needs to have a basic understanding of the chemistry, the caselaw and the coverage available to insureds.

THE CHEMISTRY

PFAS Regulation and State Actions: A consolidated summary with litigation background.

Introduction and Federal Regulatory Context

PFAS are a large group of synthetic chemicals used in a wide range of industrial and consumer products due to their resistance to heat, water, and oil. Their persistence in the environment and *potential* health risks—including cancer, liver disease, immune effects, and developmental impacts—have led to increasing regulatory scrutiny. The U.S. Environmental Protection Agency (EPA) has finalized the first-ever National Primary Drinking Water Regulation (NPDWR) for PFAS, setting enforceable Maximum Contaminant Levels (MCLs) for six PFAS compounds and a Hazard Index (HI) for mixtures, although recent court action has limited the impact of the original regulatory efforts. According to EPA, the rule is expected to reduce PFAS exposure for approximately 100 million Americans, prevent thousands of deaths, and reduce tens of thousands of serious illnesses.

Key Federal Standards:

- **Individual MCLs:**
  - PFOA: 4 ppt
  - PFOS: 4 ppt
  - PFNA, PFHxS, HFPO-DA (GenX): 10 ppt each
- **Mixture MCL:**
  - Hazard Index (HI) of 1 for any combination of PFNA, PFHxS, HFPO-DA, and PFBS.

The Hazard Index approach accounts for additive health effects from PFAS mixtures, reflecting the latest science that even low levels of multiple PFAS can pose health risks when combined. This statement is highly disputed, although it serves as the basis for EPA's actions.

Implementation Timeline and Compliance

Public water systems must:

- Complete initial monitoring for regulated PFAS by 2027.
- Begin ongoing compliance monitoring and public notification for violations by 2027.
- Achieve full compliance with MCLs by 2029, including public notification for any exceedances.

Monitoring requirements are based on system size and water source, with quarterly or biannual sampling, and reduced monitoring allowed for systems consistently below trigger levels. Compliance is determined by running annual averages at each sampling point, with specific protocols for handling results below the Practical Quantitation Level (PQL).

State Leadership and Variation

States play a critical role in PFAS response, both in implementing federal rules and enacting their own legislation, policies, and directives. There are a wide range of state actions, including:

- **Regulatory standards:** 30 states have guidance for PFAS in drinking water; 18 have enforceable standards (MCLs), and 10 have advisory levels.
- **Groundwater and surface water:** 30 states have groundwater guidance; 18 have surface water guidance.
- **Soil, air, fish, and biosolids:** Many states have developed screening levels or advisories for PFAS in these media, though approaches and stringency vary widely.

State Action Plans and Task Forces

- 22 states have formal PFAS action plans; 9 are developing one.
- 44 states have a PFAS task force or workgroup, often multi-agency, to coordinate response efforts.

Regulatory and Technical Approaches

Definitions and Scope

- Only 12 states have a formal PFAS definition; most reference a broad, structure-based definition (e.g., any fluorinated organic chemical with at least one fully fluorinated carbon atom).
- Definitions affect the scope of regulation and the number of compounds covered.

Analytical Methods

- Most states use EPA Methods 533 and 537.1 for drinking water; Method 1633 is emerging for non-drinking water media.

- States are expanding laboratory capacity and certification programs to meet new monitoring requirements.

Remediation and Treatment

- Proven technologies for PFAS removal from drinking water include granular activated carbon (GAC), reverse osmosis (RO), and ion exchange.
- Destruction and disposal methods (incineration, supercritical water oxidation, landfilling) are evolving, with states seeking federal guidance on best practices.

Funding and Cost-Benefit

- The Bipartisan Infrastructure Law provides $9 billion for PFAS and emerging contaminant response, with additional funds for general water infrastructure.
- States are leveraging federal grants, state appropriations, and legal settlements to fund monitoring, treatment, and remediation.
- Estimated compliance costs are approximately $1.5 billion annually nationwide, but health benefits are projected to exceed costs, with quantifiable benefits of at least $1.5 billion per year.

State Regulatory Landscape and Trends

Drinking Water

- Most states are aligning with or planning to adopt the EPA's NPDWR for PFAS.
- Some states (e.g., Massachusetts, Michigan, New Jersey, New York, Vermont, Wisconsin) had MCLs in place prior to the federal rule and are updating standards as needed.

Groundwater, Surface Water, Soil, and Air

- Regulatory and advisory levels for PFAS in groundwater, surface water, and soil are increasingly common, though numeric limits and covered compounds differ.
- Air emission standards are rare but under consideration in several states.

Biosolids and Waste Management

- States are developing or updating policies for PFAS in biosolids, with some (e.g., Maine, Connecticut) banning land application.
- Landfills are recognized as significant PFAS sources; monitoring and management practices are evolving.

Consumer Products and Firefighting Foams

- Many states have enacted bans or phase-outs of PFAS in food packaging, textiles, and firefighting foams (AFFF).
- Takeback programs for AFFF are active or planned in over 20 states.

Challenges and Priorities

Key Challenges

- Inconsistent definitions and regulatory approaches across states.
- Limited analytical and treatment capacity, especially for small and disadvantaged communities.
- Uncertainties in PFAS toxicity, fate, and transport, especially for newer or less-studied compounds.
- Managing PFAS in biosolids, landfills, and air emissions.

State Priorities for 2025–2026

- Implementing the NPDWR and expanding monitoring.
- Addressing PFAS in private wells and small water systems.
- Developing and funding remediation strategies for contaminated sites.
- Enhancing risk communication and public outreach.
- Advocating for additional federal guidance on destruction, disposal, and source control.

Federal PFAS Regulations and Major Court Challenges

National Primary Drinking Water Regulation (NPDWR)

- **Background:** In April 2024, the EPA finalized the first-ever enforceable Maximum Contaminant Levels (MCLs) for six PFAS in drinking water.
- **Immediate Legal Challenges:**
    - **Industry and Utility Lawsuits:** Multiple industry groups, including the American Water Works Association (AWWA), Association of Metropolitan Water Agencies (AMWA), and the National Association of Manufacturers, filed petitions for review in the D.C. Circuit Court.
    - **Key Arguments:**
        - EPA allegedly failed to use the best available science.
        - The cost-benefit analysis was insufficient under the Administrative Procedure Act (APA).
        - The rule imposes significant liability and cleanup costs on water systems and businesses.
        - EPA exceeded its statutory authority under the Safe Drinking Water Act by finalizing regulatory determinations and regulations simultaneously.

- **Recent Developments:**
  - **Stays and Abeyances:** The D.C. Circuit granted several stays (abeyances) in 2025 at the EPA's request, allowing the new administration to review the rules.
  - **Partial Vacatur Motion:** In September 2025, the EPA itself filed a motion to vacate the MCLs for PFNA, PFHxS, HFPO-DA, and the Hazard Index, agreeing with petitioners that parts of the rulemaking process were unlawful. The EPA intends to keep and defend the MCLs for PFOA and PFOS.
  - **Ongoing Litigation:** The court has lifted the stay and is proceeding with briefing on the remaining issues. Environmental groups have intervened to defend the rule.

CERCLA (Superfund) Hazardous Substance Listing

- **Background:** EPA designated PFOA and PFOS as hazardous substances under CERCLA in 2024.
- **Industry Challenge:**
  - The U.S. Chamber of Commerce and other industry groups filed suit, arguing that EPA's interpretation of the "substantial danger" standard is overly broad and inconsistent with CERCLA's intent, and that the cost-benefit analysis is deficient.
  - The D.C. Circuit granted a stay in early 2025 to allow the new administration to review the rule.

State and Local Litigation

- **States Suing EPA:**
  - Some states and environmental groups have sued the EPA for not acting quickly enough to regulate PFAS in biosolids (sewage sludge) and other media. For example, Texas farmers and advocacy groups sued to compel EPA to regulate PFAS in biosolids, but the case was dismissed on jurisdictional grounds and is now on appeal.
- **States Suing Manufacturers:**
  - Over 30 state attorneys general have filed lawsuits against PFAS manufacturers (e.g., 3M, DuPont, Chemours) for environmental contamination and public health impacts. These cases are separate from challenges to EPA regulations but are part of the broader legal landscape.

Industry Lawsuits Against Regulation

- **Industry groups and manufacturers** have consistently challenged EPA's PFAS regulations, arguing:
  - The science is unsettled, especially for less-studied PFAS.
  - The rules are too costly and burdensome for water systems and businesses.
  - EPA exceeded its statutory authority or failed to follow proper rulemaking procedures.

- **EPA's Response:**
    - In some cases, the EPA has agreed with petitioners and sought to vacate or revise parts of its own rules, as with the recent motion to vacate portions of the NPDWR.

Key Takeaways and Current Status

- Litigation is ongoing in the D.C. Circuit over both the NPDWR and CERCLA hazardous substance listings.
- ***EPA has taken the unusual step of seeking court action to vacate parts of its own rule, aiming for a faster rollback than the standard administrative process.***
- State-level regulation and litigation continue to expand, with states both suing manufacturers and, in some cases, pushing EPA for stronger action.
- Multidistrict litigation (MDL) involving thousands of personal injury and municipal claims against PFAS manufacturers is ongoing in federal court.

THE CASELAW

PFAS claims have quickly become the focus of litigation throughout the country. However, in an effort to quickly move cases through the judicial system, issues such as legal causation and medical causation have been leveraged by plaintiff attorneys in order to bundle cases and claims like someone's home and auto coverage. That being said, as these cases work through the system, we are beginning to see how courts, both trial and appellate, are dealing with this onslaught. There are certain issues such as jurisdiction, and causation which surface time and again in the litigation. All of these issues are wrapped into and influenced by multi-district litigation that is slowly working its way through the MDL process.

JURISDICTION

Personal jurisdiction has been a fact specific analysis that has been successful for certain types of defendants in certain types of cases. In the wake of the Unites States Supreme Court decision in *Ford Motor Co. vs. Montana Eighth Judicial Dist. Ct.,* 592 U.S. 351 (2021), the traditional strict stream of commerce basis for personal jurisdiction has been curtailed. This has opened the door for certain PFAS defendants to seek dismissal of suits based upon lack of personal jurisdiction. In *Ex Parte Dupont De Nemours, Inc.,* 2025 WL 1009062 (Ala. 2025), the Alabama Supreme Court dealt with a case where the Gadsden, Alabama Water and Sewer Board sued a bevy of defendants alleging PFAS related injury and damages. One of the defendants was INV Performance Surfaces, LLC. The complaint alleged that INV had manufactured and supplied PFAS containing substances to carpet mills in Dalton, Georgia, a city just on the other side of the Alabama-Georgia border. The theory against INV was there actions resulted in PFAS being released into the river in Dalton, Georgia which ultimately flowed to Gadsden, Alabama. While the lengthy opinion dealt with a number of issues concerning other defendants, as it concerned

INV, the question was simple. Did the court have personal jurisdiction over INV. In analyzing the issue, the Alabama Supreme Court relied upon the US Supreme Court decision in *Ford* in ultimately concluding there was no personal jurisdiction. In a lengthy discussion, the court concluded that any alleged minimum contacts must come as a result of INV's activity it purposefully directed to Alabama and cannot be based upon the activity of another person or party. *Ex Parte Dupont De Nemours, Inc.,* at 19.

The issue of personal jurisdiction at the motion to dismiss stage is still a creature of pleading and response, which sometimes at least temporarily holds a defendant in PFAS litigation. In *Rougeau v Ahlstrom Rhinelander, LLC,* 785 F. Supp.3d 438 (W.D. Wis), the federal district court addressed a motion to dismiss for lack of personal jurisdiction filed by defendant Ahlstrom Holdings. Ahlstrom attempted to argue they were a holding company which had as a subsidiary, a company which owned and operated a paper mill which caused PFAS contamination. The district court noted the complaint included allegations that Ahlstrom owned and operated the plant, and when addressing the argument that a company is not generally subject to personal jurisdiction solely based upon contacts of a subsidiary, the court noted Ahlstrom provided nothing in support of their motion as evidence to contradict the naked allegations of the complaint and as a result it had no choice but to deny the motion. *Id.* at 446-47.

When defending a defendant swept into PFAS litigation amongst a dozen other defendants, a careful analysis of personal jurisdiction is important in protecting the client from being hailed into a forum which is notoriously bad for defendants. While the chances of winning may not be the best, there have been some success.

In addition to personal jurisdiction, the matter of federal jurisdiction and removal of state actions to federal court has been the focus of a number of cases with differing success. In many of the cases brought, plaintiffs make claims under federal statutes which more often than not result in proper removal to federal court. However, in certain instances, plaintiffs have steered clear of federal statutory basis for claims and sought damages pursuant to various state law theories in order to stay in perceived friendlier state courts. Not surprisingly, defendants have sought other reasons for removal.

In many PFAS cases, some of the defendants are large national and international companies who manufacture PFAS for several different applications. Some of these applications being used by the military and other arms of the federal government. In cases where the damages claimed are equally possible as a result of private entity PFAS use or federal officer use, 28 U.S.C. 1442(a)(1) may serve as the basis for removal. *See, Maine v 3M Company, Inc.,* 2025 WL 3228256 (1st Cir. November 19, 2025). That statute provides that the US government, or any agency or officer thereof may remove a matter to federal court if they are being sued for an act relating to their office. A contractor who works for the federal government can utilize the companion federal contractor defense. *Id.* at 7. In an effort to avoid removal, plaintiffs have been creative in trying to avoid this avenue for removal.

In *New Hampshire v. 3M Company*, 665 F.Supp.3d 215 (D. N.H. 2023), the state of New Hampshire sued 3M Company for PFAS contamination and damages. After three years of

litigation, 3M moved to remove the suit based upon the "discovery" that some of the claimed contamination was alleged as a result of the use of Aqueous Film-Forming Foams (AFFF), which 3M claimed was developed by them based upon specifications they used to provide the AFFF to the military. *Id at* 219. The state countered with an argument that they specifically disclaimed any damages as a result of AFFF and that since they made the disclaimer, removal was inappropriate pursuant to the federal contractor defense. The court ultimately concluded that the disclaimer was sufficient to defeat the basis for removal. *Id at* 229. As important as that conclusion, the court also ruled that 3M had notice of removability well before the date of removal and as such it was not removed with 30 days of discovery. *Id* at 235. Thus, there were two independent reasons for the determination of wrongful removal.

The *New Hampshire v 3M Company* decision was just the beginning of the federal contractor defense applicability to cases where the plaintiff creatively carved out claims which could serve as the basis for removal. In *People ex rel. Raoul v 3M Company*, 111 F.4th 846 (7th Cir. 2024), the Seventh Circuit Court of Appeals dealt with a case where the State of Illinois filed suit against 3M for damages under state law causes of action for PFAS contamination. Similar to the *New Hampshire* case, Illinois also expressly excluded PFAS contamination caused by AFFF. In that relatively short decision, the court determined the exclusion contained in the complaint was sufficient to defeat the defense and thus the propriety of removal. The court noted that Illinois expressly agreed that where there was mixed contamination from an AFFF source and a non-AFFF source, they would not make claim for damage. *Id.* at 849. The court noted there may be an issue with determining where if at all there was mixed contamination, but this question of "difficult causation" was nothing new for federal courts.

This same approach of carving out AFFF claims was used by Maryland in *Maryland v. 3M Company*, 130 F.4th 380 (4th Cir. 2025). In *Maryland*, the state sued 3M in two separate lawsuits. The first claimed damages directly against 3M for the manufacture of AFFF. The second suit sought damages against 3M for all other PFAS related injuries not related to AFFF. *Id. at* 385. While the strategy and approach were generally the same as that used by Illinois in the *People ex rel. Raoul* case, the Fourth Circuit came to a different conclusion. A conclusion based on the reality that what the Seventh Circuit deemed was a question of "difficult causation" was in fact an instance where causation caused by non-AFFF PFAS and AFFF PFAS was not reasonable. The *Maryland* court noted that the federal officer removal statute was an exception to the "well pled complaint rule". *Id.* at 388. That being the case, the court went through the analysis to determine if removal was appropriate. The court ultimately concluded 3M's AFFF production was "inextricably related" to the states allegations of PFAS contamination and as such the district court's reasoning for remand was incorrect. *Id.* at 393.

MULTI DISTRICT LITIGATION

In an effort to corral PSAS claims and litigation, stakeholders in PFAS litigation concerning Aqueous Film-Forming Foam (AFFF) have utilized the MDL process. AFFF is a firefighting agent developed in the 1960s, widely used by military bases, airports, and fire

departments to suppress fuel fires. AFFF contains PFAS and plaintiffs allege AFFF is linked to groundwater contamination, harm to public water supplies, and health issues including kidney cancer, testicular cancer, thyroid disease, and ulcerative colitis.

By 2018, numerous federal lawsuits had been filed across multiple federal districts. In that same year, the U.S. Judicial Panel on Multidistrict Litigation created MDL No. 2873 in the U.S. District Court for the District of South Carolina, under Judge Richard M. Gergel.

A bellwether trial for a public water claim (City of Stuart v. 3M) was postponed in June 2023 amid settlement talks. Personal injury discovery began, with 25 plaintiffs selected for a pool in December 2023, narrowed to 11 for trials focusing on cancers like kidney and testicular.

Focus shifted to resolving water contamination claims. By late 2024, nearly $15 billion in settlements received final approval, including $750 million from Tyco and $316.5 million from BASF for public drinking water systems. These settlement resolved most of the public drinking water claims

While the settlement of the public drinking water claims helped the process, the MDL still includes over 10,000 associated cases, involving thousands of plaintiffs from categories like firefighters, military veterans, and water utilities.

The first personal injury bellwether, focusing on kidney cancer was originally set for October 2025 However it was postponed. This is most likely due to the court wanting a settlement to be reached in lieu of court proceedings which would be arduous at best with appeals certain to follow.

CAUSATION

While the MDL works its way through the process, it is far from clear what PFAS causes. While plaintiffs contend a litany of cancers result from PFAS exposure, the science isn't as clear. The World Health Organization's International Agency for Research on Cancer (IARC) recently classified PFOA as carcinogenic in humans. This was based upon their determination that there was sufficient evidence based upon testing in animals and "strong mechanistic" evidence based upon human exposure. While the IARC concluded PFOA is carcinogenic in humans, they concluded PFOS was "possibly carcinogenic to humans." This different conclusion was based in part on "limited evidence for cancer" based on animal testing and "inadequate evidence" for cancer in humans.

In addition to medical causation, the courts have required some degree of specificity concerning specific defendants being the cause in fact for PFAS being present in plaintiffs. In *In re E. I. du Pont de Nemours and Company C-8 Personal Injury Litigation*, 87 F.4th 315 (6th Cir. 2023), the Sixth Circuit reversed a decision to certify a class action where the putative class representative alleged he has PFAS in his bloodstream, but failed to allege how the ten company defendants who manufactured PFAS were involved in his specific PFAS finding. *Id.* at 320.

FALSE ADVERTISING CLAIMS

Another area where PFAS exposure claims have steadily increased is in the rise of class action lawsuits alleging a company's marketing is false or misleading due to the presence of PFAS in its products. These claims are typically based on state consumer protection statutes, breach of warranty, negligence, and/or fraud. The suits have been filed broadly in several industries including food and beverage, beauty and cosmetics, personal care and hygiene, dental products, household goods, and baby and infant products. Plaintiffs making these claims are seizing on marketing that can generally be described as "safe product" advertising. The defendants in these claims have largely been successful in arguing lack of standing, failure to state claims, and by poking holes in the testing processes.

The companies most vulnerable to consumer protection-based lawsuits are using buzzword marketing, safety statement marketing, or innocuous marketing statements. The buzzword marketing claims involve companies advertising products made with "all natural ingredients" or similar statements about the ingredients. The allegations in buzzword marketing cases are that the advertising deceives the consumer because the products contained PFAS, i.e., PFAS are not all natural ingredients. Safety statement marketing claims include companies advertising their products as "free from harmful chemicals". Companies using such statements might be vulnerable to lawsuits on the tenuous theory that the prevalence of PFAS in all products makes it impossible for any product to be "free from harmful chemicals".

Perhaps the more perplexing group of defendants are the innocuous marketers. A recent case involving Yankee Candle, *Endres v. Newell Brands, Inc. et al.,* No. 2:24-CV-952 (C.D. Cal. 2024), illustrates the scope of these claims. The basis of the suit was statements such as, "We take great pride in making them [the candles] using only the finest quality ingredients and materials." Plaintiffs in that case alleged deception based on the presence of organic fluorine in the candles which plaintiffs argued was a suitable proxy for the broad class of PFAS chemicals. The claim ultimately failed.

The *Richburg* Case

In *Richburg v. ConAgra Brands, Inc.*, No. 22-CV-2420, 2023 U.S. Dist. Lexis 21137 (N.D. Ill. Feb 8, 2023), Plaintiffs sued Orville Redenbacher under fraud and deceptive trade practice statutes in Illinois, New York, Florida, and made consumer protection class and nationwide class claims. Plaintiffs alleged that manufacturers use PFAS to treat food contact materials, such as wrappers and packaging, because it increases their water and grease resistance, in addition to enhancing their non-stick properties. They cited studies that "have confirmed that PFAS [in food contact materials] migrates to food, where it is then ingested by consumers." Plaintiffs based their factual conclusions on third-party testing and claimed Plaintiffs claimed that defendant's products contain a "significant level of PFAS," because the testing detected the presence of organic fluorine in the microwave popping bags. Plaintiffs alleged Redenbacher's marketing and labeling strategies were deceitful because it utilized misleading representations to aggressively and strategically "convince consumers that the Products are free of unnatural or artificial ingredients." For example,

defendant labels its Redenbacher products as containing "only real ingredients" and "100% ingredients from natural sources," when instead they allegedly contain harmful PFAS levels.

Redenbacher countered these statements by arguing lack of standing, and more notably, they put forward an FDA document authority the use of specific PFAS in specific food applications including microwave popcorn bags like the ones at issue. Redenbacher also attacked the testing of their bags, and the fact that Plaintiffs only alleged a vague economic injury in the form of a "worthless product" argument.

The Court granted Redenbacher's motion to dismiss and found it implausible that reasonable consumers would consider migratory PFAS to be ingredients in the popcorns specifically citing the FDA exemption. They did not address the issue of standing.

THE COVERAGE

A central issue that has emerged in PFAS litigation is whether general liability (CGL) insurers must defend or indemnify insureds under policies that contain pollution exclusions. These exclusions typically bar coverage for claims arising from the "discharge, dispersal, release or escape" of pollutants. The application of these exclusions in the PFAS context has produced a mixed body of case law.

In the past, many courts applied pollution exclusions narrowly, finding that the exclusion only encompassed traditional environmental pollution. These courts treated exclusionary terms like "discharge," "dispersal," "seepage," "migration," and "escape" as environmental "terms of art." Under this view, the exclusion typically did not apply to indoor exposures (e.g., carbon monoxide or fumes inside a building) or to direct product exposures unconnected to an environmental release.

When PFAS litigation began to arise, many insurers relied on this backdrop to argue that PFAS were paradigmatic pollutants and thus squarely barred by the pollution exclusion. This view was highlighted in *Colony Ins. Co. v. Buckeye Fire Equip. Co*., 2020 U.S. Dist. LEXIS 194709, where the court considered a "hazardous materials" exclusion similar to a pollution exclusion, and held that the exclusion did not bar coverage for claims alleging direct exposure to PFAS-containing AFFF. These cases involved firefighter exposure to AFFF contained in fire fighting equipment and fire retardants. The court emphasized that the operative exclusionary terms, "discharge, dispersal, release, or escape," were environmental terms of art that conveyed large-scale or unintended environmental pollution events, not bodily injury arising from contact with a product being used exactly as intended.

However, early PFAS cases exposed a tension not present in traditional environmental contamination disputes: PFAS injuries often arose not only from environmental exposure (e.g., drinking water contamination) but also from direct exposure during the intended use of AFFF-containing products.

As a result of this tension, courts are increasingly drawing a distinction between PFAS claims based on direct exposure, such as exposure through AFFF or products, and indirect environmental contamination, such as exposure through contaminated drinking water. A recent California decision highlighted this distinction in *Nat'l Foam, Inc. v. Zurich Am. Ins. Co.,* 768 F. Supp. 3d 1009 (N.D. Cal 2025), providing guidance for insurers in distinguishing between covered and excluded claims in states that draw this distinction.

The pollution exclusion at issue in *National Foam* stated that the policies do not apply where the alleged injuries "would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." *Id*. at 1013. The policy further provided that "Pollutants" means "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." The court interpreted this pollution exclusion in light of both claims of direct exposure and claims of indirect exposure. The court ultimately found that the pollution exclusion unambiguously applies to bar coverage for claims of indirect exposure; however, for claims of direct exposure, the court declined to adopt a categorical rule, leaving this area of coverage litigation considerably less certain.

DIRECT EXPOSURE

In *National Foam*, bodily injury claims were brought against a manufacturer of AFFF for the alleged release of PFAS from AFFF into the bloodstream of various first responders, purportedly causing them to develop a variety of illnesses, including cancers. The insured moved for summary judgment against the carriers, arguing that the plaintiffs' claims alleged direct exposure, so the pollution exclusion would not apply to preclude coverage. The court rejected the carriers' argument in response that the exclusion applied because PFAS are a chemical, which is specifically enumerated as a type of pollutant, stating that "it does not follow that all harms caused by PFAS are therefore a type of pollution. Instead, courts recognize that "pollution" is not just a class of substances (i.e., "smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste"), but also a mechanism of harm." *Id*. at 1016. Because the plaintiffs alleged that they were exposed to PFAS through their ordinary use of the products, not general environmental pollution, such as through a contaminated water supply, "the pollution provision, which is strictly construed to injuries resulting from 'discharge, dispersal, seepage, migration, release or escape of "pollutants"' does not clearly remove coverage for the alleged injuries."

The court followed the reasoning of *Colony Ins. Co. v. Buckeye Fire Equip. Co*., 2020 U.S. Dist. LEXIS 194709, 2020 WL 6152381 (W.D.N.C. 2020), the currently only other known reported case to directly address this question, which concluded that a customer's ordinary use of products that contain a chemical that is deemed a "pollutant" does not unequivocally amount to "pollution."

The *National Foam* decision reinforces a significant analytical boundary in PFAS coverage law: the presence of a chemical classified as a "pollutant" does not automatically render every claim involving that chemical a "pollution" claim. Thus far, courts have been

reluctant to treat all PFAS-related harms as falling within the pollution exclusion, simply by virtue of PFAS' chemical properties.

INDIRECT EXPOSURE

The court in *National Foam* also addressed claims of indirect exposure concerning allegations of discharges, releases, spills, and/or disposals of PFAS into the city water system. The plaintiffs alleged indirect exposure to PFAS via the contaminated drinking water. The court held that the pollution exclusion unambiguously applies in these cases of indirect exposure. *Id.* at 1018.

However, even in cases involving indirect exposure, it is imperative to examine the policy language closely, as carve-outs and exceptions may preserve coverage even where a broad pollution exclusion is present. *Town of Harrietstown v. Westchester Fire Ins. Co*. illustrates this point. 2025 U.S. Dist. LEXIS 159853. In *Harrietstown,* the U.S. District Court for the Northern District of New York considered a policy that contained a pollution exclusion with an important exception when the occurrence was "caused by or resulting in a crash, fire, explosion or collision or a recorded in-flight emergency causing abnormal aircraft operation." *Id*. at *3-4. The complaint alleged that AFFF was deployed during emergency responses to aircraft incidents, resulting in elevated levels of PFAS in the water systems near the airport. *Id*. at *7.

The court held that the insurer owed a duty to defend the PFAS claim because the cause of the contamination fell within the exception to the pollution exclusion. Further, the court rejected the insurer's attempt to invoke a combined claims provision to avoid a defense, reasoning that even if the crash, fire, explosion or collision were only one among several possible causes of contamination, it was sufficient to trigger the exception and give rise to a duty to defend. *Id*. at *18, 44-45. The *Harrietstown* decision shows that policy carve-outs and exceptions can significantly alter the operation of pollution exclusions in PFAS litigation.

OCCURRENCE

Another recurring source of coverage disputes in PFAS litigation is whether alleged exposure to PFAS qualifies as an "occurrence" under the applicable insurance policy. Insurers may claim that PFAS-related injuries, particularly those stemming from long-term product use, cannot constitute an occurrence if the insured allegedly knew or should have known that its products posed substantial risks.

In *National Foam*, the carriers advanced precisely this argument, asserting that any duty to defend was foreclosed because the insured purportedly understood the dangers associated with the products and nonetheless continued to manufacture and sell the product. The insurers argued that because the insured was aware of the risks associated with the products, the harm was not accidental. The policies at issue defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same generally harmful condition." *Id*. at 1018. Applying this definition, the court rejected the carriers' argument, finding that the plaintiffs' claims of negligence, specifically that the insured breached a duty of care in the design, manufacturing, and distribution of its products when it should have realized the risks posed by its conduct,

amounted to a potential "accident" giving rise to potential coverage. *Id.* Negligence, the court noted, inherently contemplates unintentional conduct, and thus the allegations created at least a possibility of coverage, which is all that is required to trigger the duty to defend. This same reasoning could be applied to any PFAS litigation regarding exposure due to product use if the Plaintiff's complaint alleges negligence on behalf of the insured. If the evidence establishes the requisite knowledge, however, the possibility of no occurrence occurring that would require a duty to indemnify could still be litigated.

GUIDING PRINCIPLES

The PFAS-insurance coverage landscape remains unsettled, but the few opinions thus far offer meaningful and so far consistent guidance for carriers evaluating potential coverage obligations. The decisions show the importance of distinguishing carefully between direct-exposure and indirect-exposure claims, as the applicability of the pollution exclusion, and thus the duty to defend, may turn on the precise mechanism of alleged harm.

In light of the court's analysis, an insurer has a much stronger coverage position in many states in indirect-exposure claims involving environmental contamination, as many courts are likely to conclude that such allegations fall squarely within the pollution exclusion and therefore eliminate any duty to defend. By contrast, for claims involving direct exposure to PFAS through the intended use of AFFF or other PFAS-containing products, the law remains far less settled. Courts in states that limit pollution exclusion to traditional "release" types of exposure, including as discussed in the *National Foam* holding, have shown reluctance to adopt a categorical rule that all direct exposure PFAS claims constitute pollution events that fall within the policy exclusion. Accordingly, insurers face considerable more risk in these cases. Defending under a reservation of rights while simultaneously developing a factual record that may clarify whether the alleged harm falls within the scope of coverage is often the best strategy. As PFAS litigation continues to expand, and courts increasingly confront nuanced exposure pathways and evolving policy language, this careful, claim-specific approach will be critical for mitigating risk and navigating an area of coverage law that remains in flux.