

AON

FEI Eastern Wisconsin: PFAS Discussion

Presenters:

Claire Juliana | Challenges,
Claims, and Coverage

Trish Blau | How To Protect Your
Company from PFAS Exposures

October 11, 2023



Challenges, Claims, and Coverage

Claire Juliana



PFAS

- Challenges
- Claims
- Coverage

PFAS

Toxic 'forever chemicals' found in toilet paper around the world

Research finds waste flushed down toilets and sent to sewage plants probably responsible for significant source of water pollution

Tom Perkins

Mon 13 Mar 2023 05:00 EDT



The study checked 21 major toilet paper brands around the world, but it did not name the brands. Photograph: Jeppe Gustafsson/Rex/Shutterstock

All toilet paper from across the globe checked for toxic PFAS “forever chemicals” contained the compounds, and the waste flushed down toilets and sent to sewage treatment plants probably creates a significant source of water pollution, new research has found.

Once in the wastewater plant, the chemicals can be packed in sewage sludge that is eventually spread on cropland as fertilizer, or spilt into waterways.

“Toilet paper should be considered as a potentially major source of PFAS entering wastewater treatment systems,” the study’s authors wrote.



Challenges

- “Forever” – Persistent in the environment
- “Ubiquitous” – exposure from numerous sources – and found in drinking water, soil, food, food packaging, furniture, clothing, cleaning products, sealants, paints, non-stick cookware, shampoo, dental floss and cosmetics (among others).
- “Emerging” – yet fully emerged in the media and plaintiffs’ bar
- Subject of federal, state, and local legislation
- Nuclear Verdicts

Claims & Litigation

- Ever-expanding scope of plaintiffs
- Ever-expanding scope of defendants
- Ever-expanding scope of causes of action
 - **CERCLA Litigation**
 - EPA Hazardous Substance designation
 - Public and private parties right to bring remediation claims/NRD claims
 - Joint and several/strict liability for PRPs (owners, generators, arrangers and transporters)
 - **Issues**
 - Allocation and contributions among PRPs
 - Environmental forensics
 - Potential for re-openers of old sites focusing on PFAS

Multi-District Litigation (MDL)

- Venued in U.S. District Court for South Carolina – a consolidated docket of cases
- >5,000 cases (and more added daily)
- The cases in the MDL are:
 - Personal injury plaintiffs claiming injury from exposure to PFAS (AFFF)
 - Actions filed by individual states by Attorneys Generals for NRD and other damages
 - Public water supplier plaintiffs seeking drinking water testing and remediation costs.
- The Bellwether case of City of Stuart v. 3M was scheduled for trial in June of 2023 but then two massive settlements by certain defendants (not all) were announced (next slide discussion). Over 80 manufacturer and supplier defendants remain in the AFFF MDL.
- The City of Stuart (FL) advanced theories based on strict product liability, negligence, and nuisance from the environmental hazards and toxic effects of PFAS in AFFF.
- As these cases proceed, there is a likelihood that the financial viability of PFAS –related product manufacturers may be threatened. Indeed – one such defendant (Kidde-Fenwal- a manufacturer of fire protection equipment) filed for Chapter 11 protection in May of this year stating its likely liability in the litigation exceeds its capacity to pay.

Very Recent Landmark Settlements (To Be Continued...)

- DuPont, Chemours and Corteva executed a “class” settlement of \$1.185 billion with *water companies* around the US to settle drinking water claims
- Following that settlement, 3M also agreed to pay \$10.3 billion (and likely \$12.5 billion) in a class settlement to resolve current and future claims by *municipal water authorities* – *settlement excludes personal injury or property damage claims*
- Both of these settlements are pending approval; however, since the settlements were announced, a coalition of Attorneys Generals from 22 states (*including Wisconsin*) – have opposed the settlements *because the settlement amount is not sufficient to address the estimates to cleanup the more than 155,000 public water suppliers in the US. Estimates suggest costs could exceed \$400 billion.*
- In June of 2023, Solvay Specialty Polymers USA, LLC announced a proposed \$393 million settlement with the NJ DEP that would ensure remediation of PFAS contamination near Solvay’s facility in New Jersey that manufactures plastic components for consumer products.

Coverages That Could Be Implicated

- Commercial General Liability – third party claims for bodily injury and property damage
- Pollution Legal Liability – third party claims for bodily injury, property damage (including NRD) and cleanup costs (including investigation and monitoring costs) due to pollution releases from a scheduled site or during performance of scheduled operations
- Professional liability
- Property insurance
- Products Pollution
- Directors & Officers

Coverage Challenges

- Long Tail claims – multiple insurance policies and years (starting in the 1930s...)
- Pollution Exclusions
- Claims made coverage vs. occurrence coverage
- Is there a pollution condition (discharge, dispersal release) for Pollution coverage
- Is there an “occurrence” (i.e., accident)
- Prior settlements and releases
- PFAS exclusions
- Known conditions
- Allocation and coordination of coverage
- PFAS Coverage Litigation (in its infancy) –
 - Wolverine Worldwide v. Am Ins. Co.- duty to defend (MI)
 - Tonaga Inc. v. New Hampshire Ins. Co –no duty to defend (NY)
 - Admiral Ins. v. Fire-Dex – Federal District Court punts to state court to decide (OH)

Coverage Challenges Continued: Bodily Injury

- C8 Panel – following Parkersburg, VA (“Dark Waters”) case, a study published in 2021 concluded a “probable link” existed between PFAS and high cholesterol, ulcerative colitis, thyroid disease, testicular cancer, kidney cancer, pre-eclampsia (pregnancy – induced hypertension)
- Causation – PFAS is purportedly in the blood of 97% of us! But have widespread use – including cookware, rugs, makeup, waterproof clothing – how did we get it?
- Is fear of future injury or mere exposure, without an actual physical injury, an “injury” to support a tort claim for medical monitoring?
- Jurisdictions are split in allowing this, but PFAS cases are in the pipeline
- Defense of these cases is going to be expert intensive and costly

Before You are TARGETED as a Defendant...

- Evaluate your exposure – identify PFAS in any products that you (or a predecessor) use, sell, manufacture or distribute
- Keep track of emerging regulations
- Monitor litigation trends
- Evaluate all potential insurance and indemnifications (from predecessor sellers, suppliers or other vendors)
 - Exposure may extend back many decades
 - Monitor litigation

If You are NAMED as a Defendant...

- Evaluate the claims to identify the earliest time period during which the alleged PFAS-related PD or BI exposure may have occurred – every policy period starting with that date may be implicated – insurance archaeologists can help
- Identify any potential third parties who may owe a duty to defend/indemnification and tender requests for indemnity to those entities and their insurers
- **Promptly and completely provide notice to every possible insurance (i.e., CGL, excess insurance, pollution insurance, property insurance, starting with the earliest exposure date above through to present**
- Press the carriers for coverage positions – evaluate closely and rebut where possible based upon case law developments (e.g., Wolverine)

Legacy Coverage Implications and Best Practices

- Build historic policy search into your strategy for both property damage and Bodily injury claims
- Review corporate history – predecessor firm may be the key to insurance recovery
- Identify limits and possible erosion of legacy policies and solvency status Research possible past agreements and/or settlements with legacy insurance Conduct due diligence for future acquisitions to understand exposures and potential claims
- Map the years of damage or exposure to the earliest available policies

How To Protect Your Company from PFAS Exposures

Trish Blau

AON



What is my PFAS Exposure?

PFAS Exposure Assessment – Desktop review that may include:

- Evaluation of current and historical products/processes
- Historical Acquisitions
- Suppliers
- Adjacent property exposures
- Litigation trends/suits
- Onsite events – large fires, chemical releases

Phase I Environmental Site Assessment - Desktop review conducted to satisfy “All Appropriate Inquiry” during a property transaction. Current ASTM standard does not require PFAS evaluation. Can be included in the report as part of an emerging contaminant discussion

Phase II Environmental Site Assessment – Invasive to include soil, air and/or groundwater sampling

*** Consult with counsel before voluntarily conducting any of the above***

Various Types of Environmental Insurance

Including:

- Pollution Legal Liability – coverage for a specific location or portfolio of locations
- Contractor Pollution Legal Liability – coverage for a contractor's operations at third-party sites. Can be project specific.
- Cost-Cap – 1st party cost overrun protection for remediation projects. No 3rd party liability coverage. Currently not available for PFAS remediation projects.
- Underground Storage Tank Pollution Liability – generally used for financial assurance requirements
- Combined forms that include general liability, products liability and/or professional liability

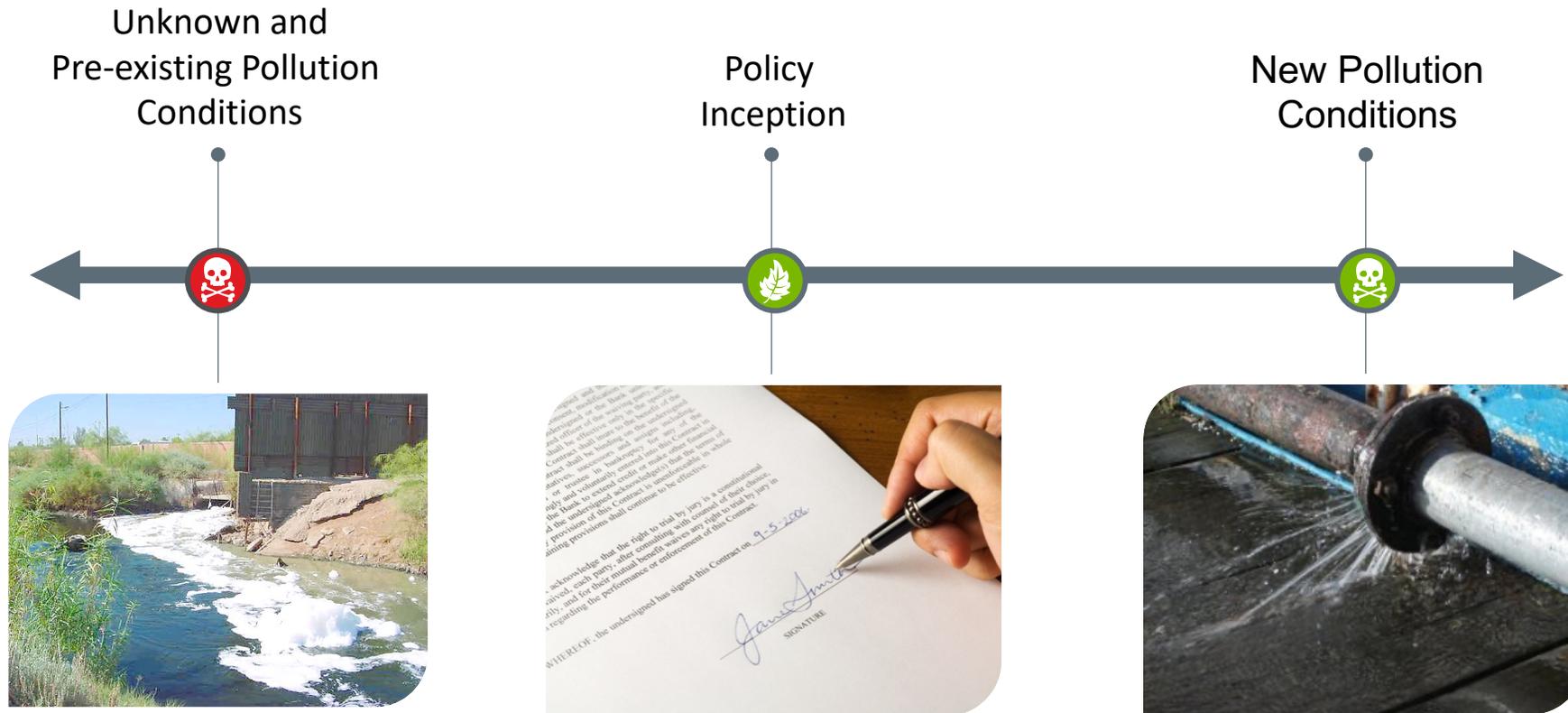
Pollution Legal Liability (PLL)

- Site-specific (most forms require locations to be listed)
- Used for property owners and tenants
- Always claims-made (divested locations should continue to be listed)
- Defense within the limits
- Covers 1st and 3rd party clean-up costs (both on-site and emanating from site)
- Covers 3rd party bodily injury/property damage (both on-site and emanating from site)
- Non-Owned Disposal Sites (NODS)
- Pollution Transportation Coverage

Pollution Legal Liability (continued)

- Crisis Management Coverage (public relations services)
- Fines and penalties
- Illicit abandonment
- Mold/Legionella
- 3rd party bodily injury/property damage for asbestos or lead-based paint
- Business Interruption/Extra Expense
- Bioterrorism
- Excess of indemnity coverage
- Available on multi-year policy term (limits are spread over entire policy term)

Timeline of Coverage



Typical Environmental Policy Terms

- **First Party Property Coverage**
 - **Remediation / Clean Up Costs***
 - Business Interruption*
**Loss must arise from unknown pre-existing contamination*
- **Third Party Legal Liability Coverage**
 - **Bodily Injury & Property Damage** – arising from known & unknown conditions
 - Diminution of Value
 - Loss of Use
 - Transportation
 - Non-Owned Disposal Site
- **Defense usually within the limit**
- **Policy Triggers**
 - First Party Discovery
 - Third Party
 - Governmental
- **Pay on Behalf of vs. Indemnity**
- **Claims Made vs. Occurrence is available on specific policy types**
- **Self Insured Retention vs. Deductible**
- **Limits of Liability & Aggregates**
- **Scheduled locations /specified operations**

Environmental Insurance Policies Do Not Have Blanket PFAS Exclusions

- Certain classes of operations can expect to see a PFAS exclusion: airports, landfills, oil terminals, many manufacturing exposures...
- Office, retail, residential, warehouse/distribution operations generally do not have a PFAS exclusion, unless historical environmental data identifies a potential exposure
- Depending on the specific data and contracts, insurers are willing to consider providing limited coverage or wraps around indemnities, where supported.
- What about products pollution liability? Very small market for products pollution. Must be able to demonstrate that product is PFAS-free. No coverage available for certain classes such as potable water.

What happens if PFAS is suspected or known?

- For all insurers, any detection from an onsite source will result in a full PFAS exclusion (indemnity as an exception). Some insurers will consider crafting coverage around exposure if PFAS originates from an offsite source.
- Is there a responsible party already on the hook? Underwriters can craft coverage around agreements/indemnities in place. This applies to onsite and offsite sources.
- Historical insurance archeology – Commercial general liability insurance without a pollution exclusion (pre-1985) may be a viable solution for industrial targets/responsible parties

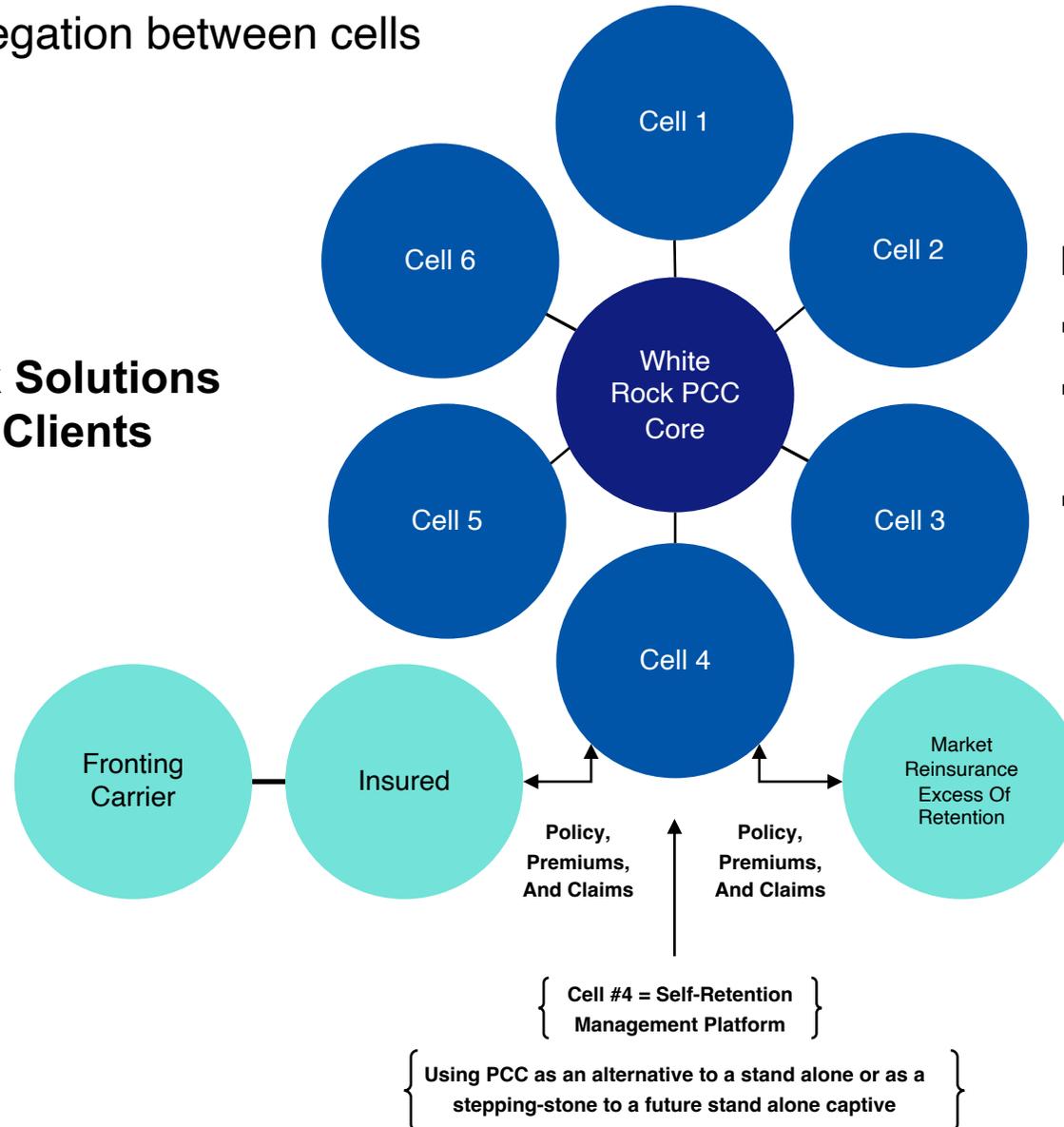
Alternative Options

- Captive and Cell Captives – Where PFAS cleanup or liability costs can be supported. May be able to be reinsured, depending on data.
 - Known cleanup liability
 - Mergers and Acquisitions

Formalized Retention Platform – Direct & Reinsurance Cells

Statutory segregation between cells

Commercial Risk Solutions
Colleagues & Clients



Descriptive

- PFAS Remediation and/or Litigation Reserves
- Set up and closure faster than traditional captive
- Minimal client Management & Governance time demands