LOEB & LOEB LLP

Litigation


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# Insurance Coverage May Pay for PFAS-Related Environmental Investigations

Over the past few years, PFAS (per- and polyfluoroalkyl substances) have come under increased scrutiny by a variety of regulatory agencies.

In March 2019, the California State Water Board (Water Board) initiated a statewide effort to assess the scope of contamination by PFAS in water systems and groundwater. It issued nearly 14,000 investigatory orders to various entities, including public water systems within two miles of airports and one mile of landfills. The Water Board also issued orders to hundreds of chrome-plating operations throughout the state, requiring them to conduct investigations to determine the presence of PFAS.

California also enacted AB 756, which authorizes the State Water Pollution Control Board to order public water systems to monitor for PFAS and to take specified actions in the event certain identified levels of PFAS are detected. As a result, additional water systems and purveyors are likely to receive orders requiring them to investigate for PFAS.

Most of the discussion about covering the cost of investigations and damages associated with PFAS has focused on bringing litigation against companies that are potentially responsible for introducing PFAS into the environment in the first place. While this is a potentially valuable approach, entities that currently have environmental or pollution coverage may be entitled to coverage in response to regulatory orders. These policies often have very short notification time frames that require policyholders to act quickly after receiving notice of an issue. Companies should review any current environmental or pollution policies to determine the potential for coverage and what policyholders need to do to obtain coverage related to PFAS.

In addition, under commercial general liability (CGL) insurance policies written before about 1986, insurance carriers may be required to defend PFAS-related claims brought against insureds, including Water Board orders. As part of that defense obligation, insurers are likely to be required to pay the costs of investigation as well as the insured's attorneys' fees. Policies issued before the mid-1970s are even more likely to have to respond, and depending on the specific policy language and the facts of the particular case, carriers may also be required to pay for the cleanup.

Therefore, it's in the interest of water purveyors and chrome platers to conduct an exhaustive search for these policies, have them evaluated to determine the nature of the coverage and develop a strategy to maximize their ability to obtain coverage.

## Background

A brief discussion of the applicability of general liability policies to environmental claims will highlight the importance of this effort. CGL policies generally provide coverage for, among other things, claims for property damage. Most courts have held that property damage includes damage to the environment. Absent exclusions, CGL carriers are generally required to pay for environmental damages.

Most CGL policies require carriers to defend the insured against any suit seeking those damages. Once again, absent exclusions, carriers are required to defend policyholders sued for environmental damages. Some policies also require carriers to defend claims seeking these damages. In those cases, carriers would also be required to defend claims against the insured, such as orders issued by the Water Board.

Under California law, any policy that has been in effect from the time of the initial release of PFAS through the present can be triggered. For example, if a release occurred in 1970, every policy issued from 1970 to the present could provide coverage.

Exclusions can significantly affect coverage. Most CGL policies issued after the mid-1980s contain absolute pollution exclusions that bar coverage for most environmental claims. "Most" is the applicable term, however, because some policies issued after the mid-1980s did not contain absolute pollution exclusions and may afford the policyholder coverage. A review of all policies is critical to determining whether any coverage might exist.

Most policies issued prior to the early 1970s did not have pollution exclusions and are likely to cover environmental damages. Most policies issued between the mid-1970s and the mid-1980s had "sudden and accidental" pollution exclusions, which limit coverage to sudden and accidental releases. There is dispute about the meaning of the term "sudden and accidental." Insureds argue that the term means "unexpected and unintended" so that, if chemicals were released but the policyholder did not expect or intend the damage, there is coverage. Carriers assert that the term means an event that came on quickly and unexpectedly, so that only something such as an explosion or accidental discharge is covered. Other policies limit the exclusion to "unexpected and unintended" releases. The variations in coverage highlight the importance of carefully reviewing all policies.

Nevertheless, even under a policy with a sudden and accidental exclusion, a policyholder might be entitled to a defense against the claims, even if it cannot prove that such an event occurred. In California, a carrier is required to defend as long as there is any possibility of coverage. Therefore, if there is a possibility of a sudden and accidental release, the carrier is required to defend.

The duty to defend is significant because in California a carrier must pay the cost of investigation as part of its defense obligation if the investigation cost is incurred to reduce or eliminate the liability of the insured. Therefore, if a policy requires a carrier to defend, the carrier will likely be required to pay for the site investigation—including the costs of investigating in response to a Water Board demand. It is therefore important to seek carrier involvement at the earliest stage of a site investigation.

In sum, companies that have CGL policies, primarily for the period prior to 1986, may well be entitled to coverage for environmental claims.

## What should water purveyors and chrome platers do?

1. Collect all the insurance policies available, dating back as far as possible.

2. Absent policies, look for evidence of policies such as receipts, old checks or ledgers. Contact insurance brokers that might have records of policies.

3. Contact tenants, landlords and/or lenders for evidence of insurance coverage.

4. Have the policies and evidence analyzed by someone with the requisite experience to determine whether coverage might exist and to help develop a strategy to maximize coverage.

5. Place the carriers on notice of any claims. The sooner the better.

## Related Professionals

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