Win Some, Lose Some—MDL Litigation, PFAS, and the Pollution Exclusion

For years the insurance bar has debated whether "PFAS"—per- and polyfluoroalkyl substances—will be the "next asbestos." It might be too early to know the answer to that question, but PFAS cases are raising many of the same issues as other mass torts, including the application of the pollution exclusion. PFAS's alleged ubiquity and variety of exposure vectors also highlight the difficulty of resolving insurance coverage issues in mass tort claims and the limits of multi-district litigation.

National Foam is a defendant in the PFAS multidistrict litigation ("MDL") pending in federal court in South Carolina. Some of the MDL plaintiffs allege exposure to contaminated environments, like polluted water. Others allege exposure to PFAS allegedly used in National Foam's fire-extinguishing products. In *National Foam, Inc. v. Zurich American Insurance Co*., No. 23-cv-03873, 2025 WL 699361 (N.D. Cal. Feb. 26, 2025), the U.S. District Court for the Northern District of California addressed competing summary judgment motions: National Foam's seeking a defense from its commercial general liability insurers for at least 182 claims against it in the MDL; and the insurers' seeking a declaration they had no duty to defend three exemplar cases. The principal issue was application of the policies' pollution exclusion, which provide that "[t]he 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.' Pollutants means 'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.'" *Id*. at *1. California law applied, with the court explaining that "[a]n insurer's duty to defend is broader than its duty to indemnify. Even the potential of indemnity triggers the duty to defend. The inquiry begins by comparing the allegations of the complaint with the terms of the policy." *Id*. at *3.

The court denied National Foam's motion for a defense for all 182 complaints because National Foam failed to establish that each of those complaints alleged sufficient facts to require the insurers to defend. *Id*. at *3. National Foam attempted to salvage defense coverage by arguing that, because it demonstrated that at least *some* of the lawsuits in the MDL alleged a potentially covered loss and therefore required the insurers to defend those suits, it was entitled to a defense against *all* lawsuits that were included in the MDL, citing *Buss v. Superior Court*, 16 Cal. 4th 35 (1997), for the rule that an insurer must defend an entire lawsuit even if some claims are uncovered. The court rejected this argument as a misunderstanding of what an MDL is: the MDL did not create a single *uber*-lawsuit against National Foam; MDL "consolidation is for efficiency only and should not affect legal rights. . . . In an MDL, where individual cases are consolidated for pre-trial purposes but remain fundamentally separate actions, it appears that each case would need to be analyzed separately to determine the duty to defend." *Id*. at *4 (internal quotations omitted).

The court then turned to the three exemplar cases the insurers raised and application of the policy's pollution exclusion. Allen involved firefighters alleging exposure to PFAS from National Foam's products used during their employment. The court held that National Foam was entitled to a defense in this case. Following *MacKinnon v. Truck Insurance Exchange*, 31 Cal. 4th 635 (2003), the court explained that "'[c]overage will . . . be found unless the pollution exclusion conspicuously, plainly and clearly apprises the insured that certain acts of ordinary negligence,' namely, directly exposing users of its products to PFAS, 'will not be covered.'" *Id*. quoting (*MacKinnon*, 31 Cal. 4th at 649). "Here, the pollution exclusion does not conspicuously, plainly, and clearly apprise National Foam that the policy does not cover users harmed by chemicals in the product."

"The carriers argue that the source of the alleged harm — PFAS — are a chemical, and chemicals are specifically enumerated as a type of pollutant. But 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. . . .

[T]he harms did not arise from "pollution" in any recognizable sense. The Allen plaintiffs allege that they were exposed to PFAS through their ordinary use of National Foam's products, not via general environmental pollution (i.e., a contaminated water supply). Thus, 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."

Id. at *4-5. The court noted that the insurers' argument could lead to illusory coverage for product liability, explaining that National Foam is a "manufacturer and seller of chemical products. National Foam purchased insurance policies to cover claims arising from those chemical products. Now, the carriers effectively argue that all injuries caused by chemicals fall under the exception, raising the question of what, if anything, would be covered by the policy in the carriers' view." *Id*. at *5.

The court came to the opposite conclusion for the two other exemplar cases: one by the City of Newburg for damage to the city's water and

another by individual plaintiffs alleging exposure to PFAS through contaminated water. "Unlike the Allen case, the Newburgh and Bates plaintiffs allege indirect exposure to PFAS via contaminated water. This type of harm — contact with harmful materials via general environmental exposure — is generally understood as pollution, so the exception provides clear notice of a policy exclusion." *Id.* at *7.

The court rejected National Foam's rebuttals. First, the court explained that PFAS water contamination would be "commonly thought of as pollutants. . . . [T]he introduction of so-called forever chemicals into drinking water and the environment is known as pollution." *Id.* Second, the court declined to read *MacKinnon* to stand for the rule that "all harms arising from regular use of a product are not pollution." "[S]ome harms caused by chemicals are pollution while others are not; it depends on the mechanism of harm. . . . [T]he Newburgh and Bates plaintiffs allege indirect exposure via broadly dispersed, environmental pollution. That harm, while ultimately traceable to firefighter's use of National Foam's products, is still fairly characterized as pollution." *Id.*

This case is a fascinating example of the interaction between insurance law and the complexity of mass torts. Given *MacKinnon* and its progeny, it is not surprising that the court refused to apply the pollution exclusion to the product liability claims arising directly from the intended use of a product. But the court did not reflexively throw out the pollution exclusion, either: "[S]ome harms caused by chemicals are pollution while others are not; it depends on the mechanism of harm." The court also gave notice that coverage is going to be retail game. While an MDL may "consolidate" cases, it does not create a new lawsuit. Coverage for suits included in an MDL is on a case-by-case basis.

Considered together, the court's rulings create an interesting claims-handling problem for both the insurer and insured. National Foam appears to be getting sued in cases it should not be (alleging use of its products before it existed), and those cases are uninsured (at least for now). It is also getting sued in cases where it might be liable, either as a matter of direct product liability or indirect environmental pollution, and it has coverage for the former but not the later. Neither the parties nor the court addressed the question of allocation of costs between covered and uncovered claims. Given the nature of MDLs and consolidated discovery, the decision that the insurers were required to provide a defense to National Foam for only a subset of those suits within the MDL may raise additional issues. Much of the work relevant to the covered product liability claims may inure to the benefit of both the uncovered product liability claims and the uncovered environmental liability claims because of the common factual history concerning National Foam's use of PFAS. This might be a case where the issue of allocation of defense costs among covered and non-covered suits will be as important as the coverage decisions addressed by the court.

Click the link to read the decision: National Foam Inc v Zurich American Insurance Company