

# ENVIRONMENTAL RISK & PFAS LITIGATION CONFERENCE

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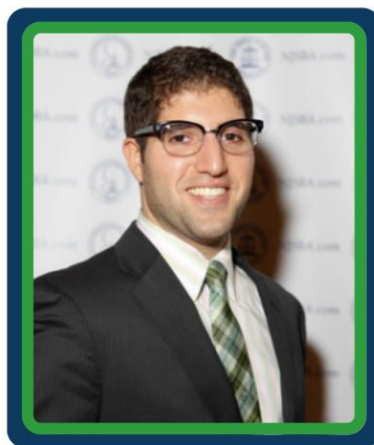
From PFAS to Other Toxic Torts, Insurance Coverage Challenges Persist



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# The PFAS Litigation Landscape



- ▶ More than 13,000 lawsuits have been filed in the Aqueous Film-Forming Foam (AFFF) MDL since 2018
- ▶ Plaintiffs: individuals, water providers, property owners, states
- ▶ Defendants: PFAS manufacturers, downstream companies (airports, landfills, etc.)
- ▶ Consequent Insurance Litigation – BASF, Tyco, et al.



# Landmark PFAS Settlements

- ▶ DuPont: \$1.185 billion (2024)
- ▶ 3M: \$10.5 billion - \$12.5 billion (2024-2036)
- ▶ Tyco: \$750 million
- ▶ BASF: \$316.5 million
- ▶ Resolving lawsuits filed by public water systems alleging damage from PFAS contamination in drinking water
- ▶ Excludes: States and federal government



# TYPES OF POLICIES AT PLAY



## Commercial General Liability

- Pre-1980 pollution exclusion policies may be at play given period of exposure/ historic contamination
- Package CGL, combined with other coverages, including pollution coverages

## Monoline Hazard – Site Pollution, Contractors Pollution

- Monoline hazard policies are the most likely triggered policies for PFAS related exposures
- Contractors pollution – occupational risks
- Site Pollution – premises liability risks

## Employers Liability – D&O?

- Obvious considerations for a workers comp/employers liability exposure
- Potential director and officer exposure for known hazards which are ongoing

# LEGACY INSURANCE IMPLICATIONS

- Build historical policy search into your strategy
- Whose insurance is it...understand the “corporate history” of acquisitions and predecessor companies
- Map the years of damage to the earliest available policies
- Identify policy limits, solvency status and conduct erosion analysis to determine viable coverage
- Inquire about past agreements
- Coverage issues to consider
  - Timely noticing
  - Duty to defend/investigation costs
  - Pollution exclusions
- Be proactive
  - Conduct due diligence for future acquisitions
  - Review and organize legacy coverages

**Insurance is an Asset**





## Key PFAS Coverage Battlegrounds - CGL

Choice of  
Law

Trigger of  
Coverage

Number of  
Occurrences

Exhaustion  
and  
Allocation

Exclusions  
and other  
issues

Scope of  
damages  
and relief

# RINSE AND REPEAT?

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- PFAS related claims and Silica related claims - plaintiffs bar using the asbestos litigation style playbook
- Pursuing manufacturers as well as distributors, down to contractors
- Types of Causes of Action:
  - 1) negligence,
  - 2) strict product liability – failure to warn,
  - 3) strict product liability – design defect,
  - 4) fraudulent concealment,
  - 5) breach of implied warranties, etc.
- Occurrence v. Claims-Made coverage issues





## Sudden and Accidental

“bodily injury or property damage arising out of the discharge . . . of . . . pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is **sudden and accidental.**”

## Absolute

- “at or from any . . . location . . . owned or occupied by . . . any insured”
- “at or from any . . . location . . . used . . . for the handling . . . of wastes”
- “transported, handled, stored, treated, disposed of, or processed as waste . . .”
- “at or from any . . . location on which any insured . . . [is] performing operations . . .”

## Total

- “bodily injury or property damage which would not have occurred . . . but for the . . . discharge . . . of pollutants at any time”
- “any loss . . . arising out of any request . . . that any insured or others test for . . . clean up, remove . . . or in any way respond to, or assess the effects of pollutants.”

# PFAS EXCLUSIONS



As regulations and litigation regarding Per- and Polyfluoroalkyl Substances (PFAS) intensify, insurers have begun to implement more specific PFAS exclusions in their policies. This trend includes the development of endorsements and policy forms that explicitly exclude coverage for bodily injury, property damage, and other liabilities related to PFAS exposure.

## ➤ **Initial Broad Exclusions:**

Many insurance policies, especially CGL policies, traditionally included broad pollution exclusions limiting coverage for environmental contamination. Between approximately 1973 and 1985, most insurers included a “qualified” pollution exclusion allowing coverage for pollution that is “sudden and accidental.” After approx. 1985, most policies included “absolute” and later or “total pollution exclusions containing language that arguably was broad enough to exclude coverage for PFAS-related BI and PD.

## ➤ **Development of Specific Exclusions:**

The increasing awareness of PFAS contamination, particularly in water sources and products, has led to a surge in litigation against companies that used or manufactured PFAS. Regulatory agencies like USEPA and state agencies are implementing regulations and standards related to PFAS.

In response to these evolving risks, insurers have begun to develop specific PFAS exclusions for their policies. These exclusions may be in the form of endorsements or policy forms that explicitly exclude coverage for claims arising from PFAS exposure.

## ➤ **Scope of Exclusions:**

These PFAS exclusions generally specify that the insurance does not cover any:

- 1) Bodily injury, 2) Property damage, 3) Personal and advertising injury related to PFAS exposure, 4) Design, manufacturing, sale, or disposal of PFAS products, 5) Costs associated with testing, monitoring, cleaning up, or responding to PFC/PFAS

# Examples of Specific Exclusions:



The Insurance Services Office (ISO) has issued several PFAS-specific exclusions for use in CGL policies effective 5/1/23, designed to “broadly exclude bodily injury, property damage and personal and advertising injury related exposures associated with PFAS definition,” including the following:

- CG 34 95 Exclusion – PFAS, to use with products/completed operations liability coverage part or Owners and Contractors protective liability coverage part.
- CG 34 96 Exclusion – PFAS, to use with the railroad protective liability coverage part
- CG 40 32 Exclusion – PFAS, to use with the commercial liability coverage part.

In the commercial liability umbrella and excess liability coverage parts, ISO rolled out the following endorsements, again designed to “broadly exclude bodily injury, property damage and personal and advertising injury related exposures associated with PFAS definition”:

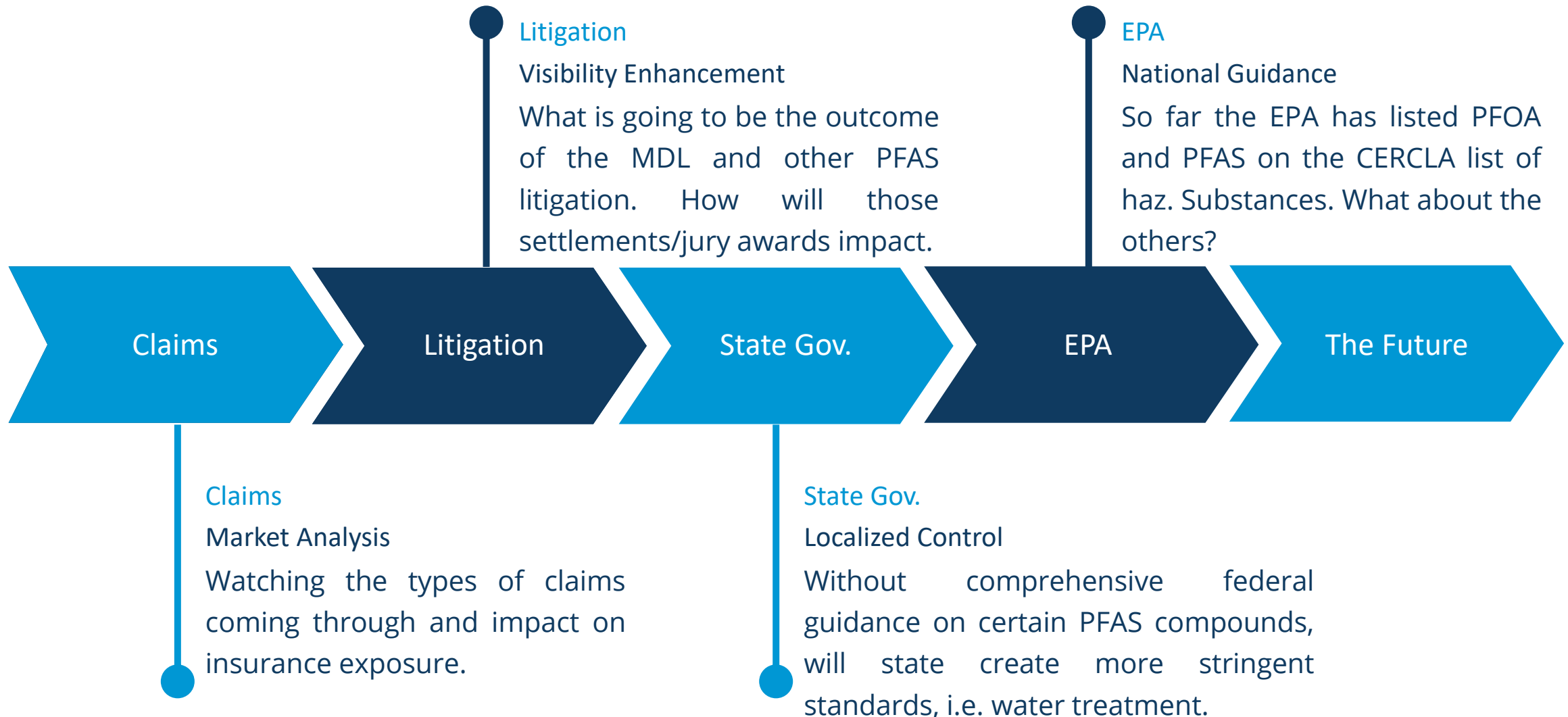
- CU 34 54 Exclusion – PFAS, to use with the commercial liability umbrella coverage part.
- CX 21 97 Exclusion – PFAS, to use with the commercial excess liability coverage part.

With the businessowners form, ISO rolled out this form to exclude PFAS coverage:

- BP 15 91, Exclusion – PFAS, to use with businessowners liability coverage part; modifies cyber liability, data privacy, electronic data liability, cyber, and other electronic data coverages.

ISO also released form CA 27 19, Exclusion – PFAS, for use with CGL coverages for auto dealer coverage form. This form has an effective date of 01/24.

# Where are we going?





THANK YOU