North Carolina Federal Court Holds "Hazardous Materials" Exclusion Does Not Bar Duty to Defend Under CGL Policy for Bodily Injury Claims Arising Out of Direct Exposure to PFAs

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On October 19, 2020, the U.S. District Court for the Western District of North Carolina held that a "hazardous materials" exclusion contained in a CGL policy did not preclude a duty to defend the insured against claims alleging bodily injury resulting from direct exposure to perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA), which are man-made chemicals within the group of per- and polyfluoroalkyl substances (PFAs).[1]

In *Colony Insurance Company v. Buckeye Fire Equipment Company*, the insured was named a defendant in hundreds of underlying suits relating to its manufacture of fire equipment containing aqueous film-forming foam (AFFF), a fire suppressant.[2] The underlying plaintiffs alleged that: (a) the AFFF contained PFOS and PFOA; (b) PFOA and PFOS are highly carcinogenic; and (c) exposure to AFFF contained in the defendants' products caused bodily injury or property damage. Around a third of the underlying complaints alleged harm from both direct exposure to the foam and exposure through the environment. Representative language from those complaints was: "[d]uring [underlying plaintiff's] employment as a firefighter and firefighter instructor, he was significantly exposed to elevated levels of PFOS and PFOA in their concentrated form as a result of regular contact with [d]efendant's AFFF products and through PFOS and PFOA having contaminated the FireCollege well system."

The insured sought coverage under a single CGL policy for the claims alleging direct exposure. The insurer brought a declaratory judgment action, seeking a ruling that it had no duty to defend the claims alleging direct and environmental exposure because they fell within the policy's "hazardous materials" exclusion, which barred coverage for bodily injury or property damage that "would not have occurred in whole or in part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'hazardous materials' at any time." The policy defined "hazardous materials" to include "'pollutants' . . . and materials containing them." Because the insured conceded that the insurer had no duty to defend with respect to the claims alleging solely environmental exposure, the court's analysis was limited to the claims alleging direct exposure.

The court denied the insurer's motion for summary judgment, holding that the exclusion did not bar a duty to defend as to the direct exposure claims. The court concluded that its analysis should be guided by *West American Insurance Company v. Tufco Flooring East, Inc.*, 409 S.E.2d 692 (1991), in which the North Carolina Court of Appeals concluded that the terms "discharge, dispersal, release or escape of pollutants" contained in a CGL policy's pollution exclusion were "environmental terms of art" and, therefore, "any 'discharge, dispersal, release, or escape' of a pollutant must be into the environment to trigger the pollution exclusion clause and deny coverage to the insured.'" *Id.* at 700. Under the *Tufco* decision, the *Buckeye* court explained, "an insurer may not deny coverage to an insured based on a pollution exclusion, or any variation thereof, if 'the occurrence and the resulting personal injury and property damage allegedly suffered by [underlying plaintiffs] are . . . not the prototypical environmental harms that a pollution exclusion clause is generally intended to protect against.'"[3]

Turning to the facts before it, the *Buckeye* court determined that, because the "hazardous materials" exclusion referred to the "discharge, dispersal, seepage, migration, release or escape of 'hazardous materials,'" it did not bar a duty to defend with regard to the claims alleging bodily injury allegedly caused, at least in part, by direct contact with or exposure to AFFF. The court noted the parties'

agreement that "the issue of indemnification is not yet ripe."[4]. Thus, the decision does not necessarily foreclose a ruling that the "hazardous waste" exclusion bars a duty to indemnify.

To our knowledge, this is the first reported case addressing coverage for PFA-related injuries under an exclusion analogous to a pollution exclusion. More such decisions will likely follow.

If you have questions or would like more information, please contact Paul A. Briganti (brigantip@whiteandwilliams.com; 215.864.6238) or another member of the Insurance Coverage and Bad Faith group.

[1] *See Colony Ins. Co. v. Buckeye Fire Equip. Co.*, No. 3:19-cv-00534-FDW-D, 2020 U.S. Dist. LEXIS 194709 (W.D.N.C. Oct. 19, 2020).

[2] The underlying cases have been consolidated into Multi-District Litigation in the United States District Court for the District of South Carolina. *Aqueous Film-Forming Foams (AFFF) Products Liability Litigation*, MDL No. 2873 (U.S. Dist. Ct., Dist. of S.C.), https://www.scd.uscourts.gov/mdl-2873/.

[3] *Buckeye*, 2020 U.S. Dist. LEXIS 194709, at *7-8 (quoting *Auto-Owners, Ins. Co. v. Potter*, 105 F. App'x 484, 496 (4th Cir. 2004)).

[4] *Id.* at *5