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PFAS: The issue that won’t go away

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What are PFAS or 'forever chemicals'?

Per- and polyfluoroalkyl substances (PFAS) chemicals are used in many consumer products such as cosmetics, nail polish, shampoos, clothes, cookware, food wrappers, microwave popcorn bags, construction material, fire suppression systems and laundry products.

Research suggests that they present risks to the environment and human health. PFAS may cause air contamination, pollute the ground and drinking water and impact wildlife. There are suggestions that they could cause health issues including various cancers, developmental abnormalities, hormone disruption and liver damage. PFAS remain in the environment and are extremely slow to degrade. They can withstand high temperatures and are very durable. They have been dubbed 'forever chemicals' as they take over a decade to degrade. As the exposures and potential impacts are uncertain, the scale of the problem is unknown.

PFAS have been used in products across many industries for almost 100 years. Their persistency in the environment and resistance to degradation means that PFAS can be detected in rainwater “almost anywhere on Earth”.

There is a significant amount of litigation in the USA regarding PFAS. PFAS litigation is an emerging trend in the EU and this may become the case in the United Kingdom.

Research is currently being conducted at the University of Surrey; looking at the breakdown of PFAS, and in particular whether ultrasound technology could enable their biological breakdown.

How are PFAS regulated?

Stopping the use of PFAS is not simple. In some instances, alternative chemicals to replace certain PFAS do not currently exist, or the safety and viability of potential replacements is not known. PFAS are used in some fire suppression systems, and the consequence of reduced fire safety, if alternatives do not perform well enough could be tragic.

The Stockholm Convention and the Aarhus Protocol are international treaties which aim to restrict the production and manufacture of certain PFAS. These treaties are implemented domestically in the EU and UK. In the UK those who produce, place on the market or use certain listed PFAS in contravention of the prohibition are guilty of a strict liability offence.

Germany, the Netherlands, Denmark, Sweden and Norway are seeking for a ban on using many PFAS (more than 10,000 PFAS) within the European Union. This would also impact products imported into the EU/European Economic Area (EEA). Their proposals are being evaluated by The European Chemicals Agency (the ECHA), with a focus on the various sectors that may be affected. Meetings in September 2024 focused on textiles, upholstery, leather, apparel, carpets, food contact materials and packaging, and petroleum and mining. Following its review, the ECHA will deliver its final opinions to the European Commission. If successful, the EU/EEA would have a restrictive regulatory regime regarding the use of PFAS in consumer products and materials used in many products will need to be changed.

REACH UK is the regulatory regime designed to manage the manufacture and import of chemical substances into the UK. It was introduced on the UK’s exit from the EU. However, it broadly mirrors the EU REACH Regulation. If the effective ban on PFAS in the EU/EEA is successful, the UK will need to consider whether to adopt a similar position. Regardless of the position the UK adopts, UK businesses supplying the EU/EEA will need to conform to any higher standards on PFAS implemented in the EU/ EEA to be able to supply that market.

The Health and Safety Executive is the statutory authority responsible for UK REACH. It undertook analysis in respect of PFAS and confirmed that PFAS will be a substance of focus under UK REACH from 2023 to 2025. A policy paper which was published under Sunak's Conservative government in February 2024 said: "We anticipate that much of HSE's capacity to develop restrictions over the next five years will be devoted to PFAS". Further restrictions have been put on PFAS use in recent years, for example the use of PFAS chemical, perfluoro-octanoic acid (PFOA). C8 PFOA containing fire-fighting foam has only been allowed on sites where all releases can be contained since 1 January 2023. From 4 July 2025 all uses of fire-fighting foam PFOA C8 and C6 will be prohibited.

What does this mean for insurers?

Manufacturers can be required to remediate pollution and environmental damage caused by PFAS. Class action lawsuits have already been brought in the EU alleging PFAS contamination of soil, air and water dating back to the 1960s.

If causal links can be established between exposure to PFAS and personal injury, then personal injury claims could be brought. High concentrations of PFAS can be found in human bloodstreams, however, more will need to be established for this to result in liability – an actual link between PFAS and personal injury.

Establishing causation is difficult in PFAS claims, which may assist insurers in defending them. PFAS pollution may not be traceable to source or may be attributable to various companies over an extended period of time.

Andrew Knight, a chemist at Sandia National Laboratories warns there are many unknowns regarding PFAS right now: "The toxicology of these chemicals is not yet fully understood so we don't really know which ones are the most toxic. We just know they're everywhere and they shouldn't be. It is well documented that insurers dislike unknowns and uncertainty".

It is clear that there is a general trend towards removing PFAS from the market and reducing their prevalence in consumer products generally. Some manufacturers of substances and products containing PFAS are considering appropriate replacements and are engaging in research and development activities to ensure that their supply chains and market access are not interrupted. Developments in this area are clearly relevant to product liability insurers.

Some product liability insurers now have specific exclusions in relation to PFAS. However, as they are 'occurrence' based policies – where cover is provided for events occurring within the policy period, even if the claim is made after the end of the policy period – these exclusions may not remove exposure. PFAS claims are based on events that often occur over multiple policy periods. This means that these claims are likely to trigger multiple policies, including those dating back a number of years. This has the potential to cause coverage issues, with disputes regarding which policy years the loss falls into, or how the loss is spread across multiple policy years.

Where policies have a pollution/contamination exclusion, the wording of the exclusion is key. 'Sudden and accidental' pollution and 'intentional acts' pollution exclusions may exclude some PFAS risk, but coverage will depend on the specific facts of the matter and the language used in the wording.

PFAS are used in some fire suppression systems. The removal of some PFAS used in firefighting from the market may be relevant to property insurers. Insurers will want to ensure that adequate fire suppression systems are in place at properties they insure and that fire safety is not reduced.

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