



Insurance Flash December_2024

ETERNAL POLLUTANTS (PFAS), A CHALLENGE FOR THE INSURANCE INDUSTRY IN EUROPE

Eternal pollutants, known as PFASs, suppose a threat to the environment and to health. According to the European Environment Agency, PFAS cause serious health risks related to: thyroid disease, elevated cholesterol levels, liver damage, cancer, reduced response to vaccines, low birth weight, etc.

This situation has an impact on insurers because litigation for PFAS contamination is increasing, as we are seeing in countries such as Belgium, the Netherlands, Italy, France and Sweden. PFAS claims constitute a high risk of liability and involve high decontamination costs.

Although at first sight it seems difficult to prove the causal link between the PFAS contamination and a medical condition allegedly contracted as a result of it, with the new presumptions of the recently published Product Liability Directive the chances of proving the causal link are likely to increase. This Directive establishes that the causal link is presumed precisely when proving the causal link presents high difficulties, or when the damage (or medical condition) is compatible with the defect.

I. Regulatory framework: varied and still incomplete policies in Europe

The European regulatory framework for PFASs mainly consists of the following legislation: the REACH Regulation (acronym for Registration, Evaluation, Authorisation and Restriction of Chemicals (EC) No 1907/2006) and the POPs Regulation (acronym for Persistent Organic Pollutants (EU) 2019/1021), in connection with the Stockholm Convention, which aims to restrict or eliminate certain chemicals.

In 2006, Directive 2006/122/EC restricted the use of PFOS (perfluorooctane sulfonic acid), which has been included in the POPs regulation since 2019. Similarly, PFOA (perfluorooctanoic acid) has been banned since 2020, following several German and international initiatives to regulate its use.

And within this European legislative framework, Member States have adopted a number of rules: In France, the 2023-2027 plan on PFAS imposes discharge limits for certain classified industrial sites (ICPE). In Spain, although legislation remains limited, Royal Decree 202023 introduced water quality standards in line with the European Directive 2020/2184, imposing strict controls on PFASs in drinking water by January 2026. In Italy, despite the absence of specific legislation, Legislative Decree 18/2023 imposes limit values for PFASs in drinking water, based on Legislative Decree 152/2016, allowing restrictions to be adapted according to contaminated areas. In Germany, the framework is mainly based on the European regulation although the country remains strongly committed to initiatives for a gradual ban of PFASs.

II. Litigation and growing responsibilities

PFAS-related litigation, already widespread in the US, is also increasing in Europe. In Belgium, the "3M" factory has paid 571 million euros to clean up the soil in Flanders following massive environmental contamination. In France, Arkema and Daikin are involved in several water pollution lawsuits in the Lyon region.

In Italy, the Miteni plant, formerly under the control of groups such as ENI and Mitsubishi, has caused a serious environmental crisis in the Veneto region. Proceedings for this "ecological catastrophe" are underway at an estimated cost of 136 million euros, according to Ispra (Istituto Superiore di Protezione e Ricerca Medioambientale).

In Germany, the Court of Baden Baden convicted a contractor for contaminating farmland and groundwater with PFCs from compost enriched with paper mill sludge, forcing the authorities to close drinking water wells in Hügelsheim. This could lead to claims running into millions of dollars.

III. Exclusions, sub-limits and prevention in insurance contracts

In the European insurance industry, liability, environmental and product liability policies are the most suitable policies to cover PFAS-related risks. To limit their exposure, several insurers are introducing exclusion clauses. The Lloyd's Market Association (LMA) offers model clauses, one of which states:

"This policy does not cover any claim for actual or alleged loss, liability, damage, compensation, injury, sickness, disease, death, medical payment, defence costs, cost, expense or other amounts, directly or indirectly, arising out of, contributed to by, resulting from or otherwise in connection with any PFAS [...]"

These exclusions pose a number of challenges, not least because of the complexity of defining precisely what PFASs are in insurance policies, due to the great diversity of their chemical components.

Moreover, in some jurisdictions such as France, an overly broad exclusion, encompassing all PFASs, could be considered excessive from the point of view of insurance law, which requires "formal and limited" exclusions to ensure its legal validity.

Equally for the purposes of environmental liability insurance, PFAS exclusions that are too broad could be risky if it is considered that they could defeat the purpose of the cover. In several European countries, insurers are also introducing sub-limits in environmental policies to limit indemnities for PFAS claims, while maintaining coverage for other claims.

IV. Challenges for the future: risk management

Insurers are increasingly focusing on prevention: in Spain and Italy, for example, environmental audits are required for at-risk clients. In Germany, alternative measures are being introduced, such as the replacement of fire fighting foams containing PFASs, and precise risk mapping is required. These measures allow fine-tuning of premiums and coverages according to the specific exposure level of each company.

On the other hand, the creation of a state compensation scheme is already under consideration in the United States. This fund would ease the burden on the insurance industry while providing assistance to areas affected by widespread pollution that is costly to treat.

Authors:



Olivia Delagrange

Partner

Dispute Resolution – Insurance

T +34 91 426 28 85

E olivia.delagrange@simmons-simmons.com



Francisco de Leon

Partner

Corporate & Commercial

T +34 91 426 61 03

E francisco.deleon@simmons-simmons.com



Quentin Charluteau

Partner

Dispute Resolution

T +331 5329 1707

E quentin.charluteau@simmons-simmons.com



Udo Pickartz

Managing Associate

Dispute Resolution

T +49 211 47053 46

E udo.pickartz@simmons-simmons.com



Francesco Nicora

Partner

Dispute Resolution

T +3902 7250 5517

E francesco.nicora@simmons-simmons.com



Jonathan Thorpe

Partner

Insurance & Construction

T +44 20 7825

E jonathan.thorpe@simmons-simmons.com