

Duty To Defend PFAS MDL Lawsuits: Texas Federal Court Weighs In

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Few courts have yet decided insurance coverage issues in litigation involving per- and poly-fluoroalkyl substances (PFAS). But yesterday, in *Crum & Forster Specialty Insurance Company v. Chemicals, Inc.*, No. H-20-3493, 2021 U.S. Dist. LEXIS 146702 (S.D. Tex. Aug. 5, 2021), the United States District Court for the Southern District of Texas found Crum & Forster Specialty Insurance Company (Crum & Forster) had a duty to defend Chemicals, Inc. against firefighters' allegations that they were injured by PFAS contained in aqueous film-forming foam (AFFF). The AFFF claims are consolidated in the multi-district litigation (MDL) in South Carolina, and you can read more about that here.

Turning to the decision from August 5, 2021, Crum & Forster issued commercial general liability insurance policies to Chemicals, Inc. for liability arising from bodily injury, to the extent that injury "first occur[ed] during the 'policy period[.]'" Further, a "Continuous or Progressive Damage or Injury" condition in the policies stated, "If the date cannot be determined upon which such 'bodily injury' ... first occurred[.] then, ... such 'bodily injury' ... will be deemed to have occurred or existed, ... before the 'policy period'." The Crum & Forster policies were issued between 2011 and 2019. The complaints in the MDL do not specify when the firefighters were allegedly exposed to PFAS-containing AFFF or when the firefighters first allegedly manifested symptoms of such exposure.

In a motion for summary judgment, Crum & Forster argued that, because the complaints do not indicate when the firefighters' alleged injuries first happened, the policies' "Continuous or Progressive Damage or Injury" condition deem those injuries as occurring before the policy periods and, therefore, the policies do not provide coverage. The court rejected this argument because it found that the condition does not unambiguously apply where, despite vague allegations as to timing of injury, evidence could ultimately show that injury first occurred during the policy periods. Instead, the court looked to Texas' "default rule," which holds that "the duty to defend is triggered when the dates of loss are not alleged but could be determined in future proceedings." The court held that the firefighters' complaints triggered Crum & Forster's duty to defend under the "default rule" because Chemicals, Inc. might later be able to demonstrate that the firefighters were in fact first injured within the policy periods.

This decision is sure to be one of the first of many decisions arising out of PFAS litigation and, likely, the pending MDL. We will continue to monitor the MDL and PFAS coverage decisions and provide updates through our alerts.

If you have any questions or would like further information, please contact Gregory S. Capps (cappsg@whiteandwilliams.com; 215.864.7182) or Lynndon K. Groff (groffl@whiteandwilliams.com; 215.864.7033).

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