# PFOA/PFOS Litigation - Insurance Coverage: New York Appellate Court Addresses Whether Policies Provide a Duty to Defend

**Walter Wright, Jr.**
wwright@mwlaw.com
(501) 688.8839

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The New York Supreme Court, Appellate Division ("Court"), addressed in a January 6th decision whether two insurance companies had a duty to defend an insured for damages related to the release of certain chemicals. See *Tonoga, Inc. v. New Hampshire Insurance Company, et al*., 2022 WL 52903.

The relevant insurance policies had pollution exclusion provisions.

Tonoga, Inc. ("TI") and/or its corporate predecessors are stated to have owned and operated since 1961 a manufacturing facility ("Facility") in Petersburg, New York. Their manufacturing process is stated to have historically involved the use of perfluorooctanoic acid and ammonium perfluorooctanoate (collectively "PFOA") and perfluorooctanesulfonic acid and perfluorooctane sulfonate (collectively "PFOS").

Use was discontinued by TI in 2013. In 2016 the New York Department of environmental Conservation ("DEC") added PFOA to its list of regulated hazardous substances.

PFOA and/or PFOS concentrations were subsequently discovered in Petersburg's municipal water supply exceeding advisory levels. PFOA and/or PFOS were also identified in leachates from a municipal landfill. DEC designated the TI Facility as a state Superfund site.

TI entered into a Consent Agreement with DEC that required the company to assist in certain remedial measures. Further, a number of lawsuits were filed against TI alleging it negligently allowed PFOA and/or PFOS to pollute local water supplies, air and soil. The Plaintiffs in the actions alleged bodily injury and property damage.

TI notified Granite State Insurance Company ("Granite State") and New Hampshire Insurance Company ("New Hampshire") of various claims. Granite State had provided policies to TI from July 12, 1979, through July 12, 1982. New Hampshire provided policies from July 12, 1986, through July 12, 1987.

The insurance policies excluded coverage for bodily injury and property damage caused by pollution. However, the Granite State policy included an exception to its pollution exclusion if an occurrence was "subsequent and accidental."

Both insurance companies disclaimed coverage due to the pollution exclusions.

A lower court concluded that the exclusions applied as a matter of law as PFOA and PFOS were deemed "unambiguously pollutants within the meaning of the policies." Further, as to the Granite State policy, the

alleged discharge was held to be neither sudden nor accidental. TI, however, argued on appeal that both insurance companies were obligated to defend it in the underlying suits.

The Court notes that an insurance company's duty to defend is "exceedingly broad." In other words, the duty to defend is broader than a duty to indemnify. An insurer is stated to have a duty to defend if the allegations against the insured "state a cause of action that gives rise to the reasonable possibility of recovery under the policy." To avoid this duty the insurer has a burden to:

. . . establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation and applies in the particular case . . .

The Court analyzes the Granite State policy and notes it employs the standard "qualified pollution exclusion" clause (i.e., it includes "sudden and accidental" language).

The New Hampshire policy is described as containing an "absolute" or "total" pollution exclusion.

The Court concludes that whether a substance is unambiguously an irritant, contaminant or pollutant within the meaning of pollution exclusion is situational. It holds that under the TI situational facts that PFOA and PFOS are pollutants within the meaning of the exclusions. Some of the facts cited in support of this proposition include:

- Byproducts and waste materials were discharged into the environment as part of TI's routine processes
- Fabrics were soaked in solutions containing PFOA and/or PFOS
- Ovens discharged vapor through Facility smokestacks
- TI employees are alleged to have poured the PFOA and/or PFOS down floor drains and sinks
- TI employees are alleged to have routinely transported waste containing PFOA and/or PFOS to the municipal landfield

As to the sudden and accidental provision, the Court rejects TI's argument that the dumping or spilling indicate some of the pollution was sudden and accidental. It states that such allegations suggest the "opposite of suddenness".

The Court also rejects the argument that the lawsuit's referencing potentially other ways in which TI discharged PFOA and/or PFOS are adequate to require a defense. The rationale for this position is its belief that:

. . . gravamen of each suit is decidedly plaintiff's knowing discharge of PFOA and/or PFOS as part of its routine manufacturing processes.

The Court concludes that neither insurance company is obligated to defend Plaintiff in the underlying suits.

A copy of the Opinion can be downloaded here.