Pollution Exclusion/PFAS: Federal Appellate Court Addresses Insurer Duty to Defend



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

07/15/2026

Co-Author Nayeli Ortiz

The United States Court of Appeals for the Second Circuit ("App. Court") addressed in a May 4, 2026, Opinion a question involving an insurance company's duty to defend. See Town of Harrietstown v. Westchester Fire Ins. Co., No. 25-2253-CV, 2026 WL 1210135 (2d Cir. May 4, 2026).

The issue involved a Combined Claims provision in an insurance policy's pollution exclusion.

The Town of Harrietstown ("Town"), owns and operates the Adirondack Regional Airport ("Airport") in Lake Clear, New York. Westchester Fire Insurance Company, ACE Property and Casualty Insurance Company (collectively, the "Insurers") issued to the Town a series of "Airport Owners and Operators General Liability" policies during June 1, 2000, to January 1, 2021 (the "Policies"). The Policies contain an identical pollution exclusion ("Pollution Exclusion"). It include a "crash, fire, explosion" exception.

The Pollution Exclusion provides that:

1. This policy does not cover claims directly or indirectly occasioned by, happening through or in consequence of:
    1. …
    2. pollution and contamination of any kind whatsoever,
    3. …

unless caused by or resulting in a crash fire explosion or collision or a recorded in-flight emergency causing abnormal aircraft operation.

2. With respect to any provision in the policy concerning our duty to investigate or defend claims, such provision shall not apply, and we shall not be required to defend:
    1. claims excluded by Paragraph 1; or
    2. a claim or claims covered by the policy when combined with any claims excluded by Paragraph 1 (referred to below as "Combined Claims").

3. In respect of any Combined Claims, we shall (subject to proof of loss and the LIMITS OF INSURANCE) reimburse you for that portion of the following items which may be allocated to the claims covered by the policy:

1. damages awarded against any insured; and
2. defense fees and expenses incurred by any insured

The New York State Department of Environmental Conservation ("NYSDEC") in March 2019 detected an elevated level of per- and polyfluoroalkyl substances ("PFAS") at the Airport. PFAS is a pollutant colloquially known as "forever chemicals," contained in aqueous film-forming foam ("AFFF") used for firefighting purposes.

The NYSDEC informed the Town through a letter in December 2020, that it may be responsible for environmental contamination at the Airport. If found responsible, the Town would be required to implement or finance a remediation program in connection with the contamination at or emanating from the site.

Upon receipt of the letter, the Town forwarded the NYSDEC correspondence to the Insurers and invoked its coverage under the Policies.

On May 7, 2021, the Town's attorney informed the Insurers that he intended to recommend that the Town enter into a consent order with the NYSDEC. The proposed consent order stated that the PFAS contamination at the Airport appeared to be due to multiple causes including AFFF "spilled or used for training, responding to plane crashes, and/or for other purposes at the site." On August 27, 2021, the Town entered into the consent order with the NYSDEC.

The Town subsequently hired an environmental consultant to prepare a "Remedial Investigation Workplan" to determine the nature and extent of the contamination at the site and evaluate cleanup options. The workplan was approved by the NYSDEC in July 2022.

On July 23, 2024, the Insurers informed the Town that they would no longer defend the Town for the NYSDEC claim because "it involved pollution or contamination" and triggered the Pollution Exclusion. The Insurers stated that they would only reimburse the Town for defense fees and expenses and damages, if properly allocable to the portion of the contamination that the Town could prove resulted from plane crashes.

On September 27, 2024, the Town filed an action in the United States District Court against the Insurers.

The App. Court focused on the "Combined Claims" provision in the Pollution Exclusion.

The Insurers argued that the letter received by the Town triggered the "Combined Claims" provision. They contended that the pollution at issue may have resulted from a combination of everyday and emergency use of contaminants. Therefore, the Insurers argued that they are, at most, responsible for reimbursing costs associated with pollution proven to arise from emergency usage.

The App. Court found that the phrase "Combined Claims" refers to "a covered claim combined with an uncovered claim."

The Insurers did not dispute that they were aware that at least one alleged source of contamination at the Airport was firefighting foam. This was deemed to raise a reasonable possibility that at least some of the contamination at the Airport resulted from a fire or another enumerated emergency in the exception to the Pollution Exclusion. Accordingly, the App. Court found that the Insurers have a duty to defend the Town under the terms of the Policies unless they can establish with certainty that the NYSDEC claim falls outside an exception to the Pollution Exclusion.

A copy of the Opinion can be found here.