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'Tonoga' and the Applicability Of Pollution Exclusions to PFAS

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In recent years, increasing legal and regulatory spotlight has been directed toward the use of per- and polyfluoroalkyl substances, commonly referred to as PFAS. PFAS refer to a group of widely used chemicals that are long-lasting and contain components that break down extremely slowly; as a result of their widespread use and their ability to move and persist in the environment, PFAS can build up in people and animals, as well as in water, air and soil in the environment. See PFAS Explained, United States Environmental Protection Agency; see also Our Current Understanding of the Human Health and Environmental Risks of PFAS, United States Environmental Protection Agency (hereinafter *Our Current Understanding*). PFAS commonly are used in a wide variety of consumer, commercial, and industrial products, including, but not limited to: food packaging; fire extinguishing foam; carpets, upholstery, clothing and other fabrics processed with stain and water repellent; cleaning products; non-stick cookware; paints, varnishes and sealants; and many more. See *Our Current Understanding*, supra. According to the U.S. Environmental Protection Agency, multiple scientific studies have shown that exposure to some PFAS in the environment may be linked to harmful health effects in humans and animals, although the precise risk to human health and the environment remains difficult to assess. See *PFAS Explained*, supra.

A recent New York decision, *Tonoga v. New Hampshire Insurance Company*, addresses how pollution exclusions in liability policies affect an insurer's duty to defend the insured in connection with claims alleging damages due to exposure to PFAS.

Tonoga is the owner and operator of a manufacturing facility located in Petersburg, N.Y. that produces materials coated with polytetrafluoroethylene (PTFE), the manufacturing process of which involves the use of two chemicals within the PFAS family: ammonium perfluorooctanoate (PFOA) and perfluorooctane sulfonate (PFOS). See *Tonoga v. New Hampshire Ins. Co.*, 159 N.Y.S.3d 252, 254 (3d Dep't 2022). Tonoga was insured under a pol-

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icy issued by defendant Granite State Insurance Company from July 12, 1979 through July 12, 1982 (the Granite State policy) and a policy issued by defendant New Hampshire Insurance Company for the period from July 12, 1986 through July 12, 1987 (the New Hampshire policy). See id. Both policies excluded coverage for bodily injury and property damage caused by pollution, though the Granite State policy also included an exception to its pollution exclusion for "sudden and accidental" discharge, dispersal, release, or escape of pollutants. See id.

Even though Tonoga discontinued its use of PFOA and PFOS in its manufacturing activities in 2013, the Department of Environmental Conservation (DEC) discovered in early 2016 that excessive concentration levels of PFOA and PFOS existed in the municipal water supply and landfills in Petersburg, New York. See *Tonoga*, 159 N.Y.S.3d at 254. Subsequently, the DEC designated Tonoga's facility a state "Superfund site" and declared it to be a significant threat to public health; in response, Tonoga entered into a consent agreement with the DEC to assist with remedial measures. See id.

Plaintiff was later named in several lawsuits, each generally alleging that it negligently allowed PFOA and PFOS to pollute the local water supplies, air and soil, causing bodily injury and property damage to the plaintiffs in the underlying actions. Tonoga requested a defense and indemnification from its insurers for these various suits and dealings with the DEC. After the insurers declined coverage, citing the pollution exclusions in their respective policies, Tonoga commenced a declaratory judgment action, seeking a declaration that the insurers had a defense obligation under their respective policies. See id.

> The ruling likely will be helpful to demonstrate that both policies with absolute pollution exclusions and policies with the "sudden and accidental" exception to the exclusion both will apply, at least in New York, to liability arising out of the use of PFAS in manufacturing.

In ruling on the parties' respective motions for summary judgment, the trial court held that the pollution exclusions in both policies applied as a matter of law because "PFOA and PFOS were unambiguously pollutants within the meaning of the policies." Furthermore, as to the Granite State policy, the court concluded that "the alleged discharge was neither sudden nor accidental." As a result, "neither defendant was obligated to defend the plaintiff in the underlying suits." The Plaintiff thereafter appealed. See *Tonoga*, 159 N.Y.S.3d at 255.

The Third Department affirmed the trial court's ruling, finding it was "clear" that PFOA and PFOS were "pollutants" within the meaning of the exclusions. See *Tonoga*, 159 N.Y.S.3d at 256-57. The court determined that, based on the facts alleged in the underlying suits against the plaintiff, the damages resulting from the "sort of broadly dispersed environmental harm" allegedly caused by the plaintiff's use of PFOA and PFOS fell "squarely" within the pollution exclusions, *regardless* of "whether a particular substance is specifically named as a pollutant in an insurance policy," "whether a substance was understood to have a detrimental effect on the environment at the time the policy was entered into," or "whether pollution was an intended result." See *Tonoga*, 159 N.Y.S.3d at 256-57.

With respect to the "sudden and accidental" pollution exclusion in the Granite State policy, the court rejected Tonoga's

argument that allegations in the underlying complaints—namely its routine practice of "improper dumping" and "spilling" of the solutions into the drains at its facility—were proof sufficient to establish that at least some of the alleged pollution could have been sudden and accidental, holding instead that these allegations were not sufficient. See *Tonoga*, 159 N.Y.S.3d at 258. Rather, the court found that these "limited examples" of allegations "exemplify why the environmental pollution alleged here was *neither* abrupt *nor* unintentional" because (1) "allegations that a solution was dumped over a period of many years suggests 'the opposite of suddenness'" and (2) "as a matter of law, volitional, long-term discharge of a substance cannot be viewed as unintended or unexpected." See id.

The court also rejected as speculative Tonoga's argument that Granite State had a duty to defend under the "sudden and accidental" exception because discovery in the underlying actions would "likely" uncover "yet other ways" in which the plaintiff had discharged PFOA and/or PFOS into the environment. In conclusion, the Third Department held that Tonoga failed to satisfy its burden of demonstrating a reasonable interpretation of the underlying complaints to bring the suits within the "sudden and accidental" exception or providing sufficient evidence of any "sudden and accidental" discharge. See *Tonoga*, 159 N.Y.S.3d at 258-59.

In more modern comprehensive general liability policies that contain an absolute pollution exclusion (similar to the exclusion in the New Hampshire policy in *Tonoga*), an insured will most likely be barred from coverage for claims resulting from environmental contaminants like PFAS. See Matthew G. Jeweler, et al., An Update on Recent PFAS Regulation and Enforcement and the Resulting Insurance Implications, Policyholder Pulse (Dec. 10, 2021). Nevertheless, the applicability of absolute pollution exclusions to PFAS may depend on whether the particular PFAS chemical can be considered a substance within the scope of the pollution exclusion in the policy at issue. See, e.g., Claudia G. Catalano, *What Constitutes "Pollutant," "Contaminant," "Irritant," or "Waste" Within Meaning of Absolute or Total Pollution Exclusion in Liability Insurance Policy*, 98 A.L.R.5th 193 (2002).

In sum, given that PFAS have been manufactured and incorporated in both industrial and consumer products since the 1940s, litigations involving PFAS have a high likelihood of implicating historic policies that commonly contain "qualified" pollution exclusions (with exceptions for "sudden or accidental" discharge of pollutants) similar to the exclusion in the Granite State policy in *Tonoga*. See *Our Current Understanding*, supra; see also Jeweler, et al., supra. Thus, the ruling likely will be helpful to demonstrate that both policies with absolute pollution exclusions and policies with the "sudden and accidental" exception to the exclusion both will apply, at least in New York, to liability arising out of the use of PFAS in manufacturing.