

The Proliferation of Plastics Litigation and Insurance Coverage

Client Alerts

September 23, 2024

By: Brian S. Scarbrough, Arie T. Feltman-Frank

Concerns surrounding plastic, particularly microplastics and synthetic microfiber, pollution are growing. As federal and state governments continue to focus on this issue, lawsuits seeking to hold companies accountable for their alleged contributions to plastic pollution continue to proliferate. Given this litigation trend and the real prospect of plastics-related liability, companies should consider the role that insurance can play in offsetting defense costs and potential losses. In this client alert, we provide a brief update on governmental efforts to address plastic pollution. We then discuss the state of plastics litigation and close by analyzing the types of insurance coverage that may protect policyholders in this evolving space.

1. Governmental Efforts to Address Plastic Pollution

The Microbead-Free Water Act, enacted in 2015, banned the manufacture and introduction or delivery for introduction into interstate commerce of rinse-off cosmetics containing intentionally added plastic microbeads. While this legislation just targets rinse-off cosmetics, the Plastic Pellet Free Water Act, introduced in the Senate in July 2023, would prohibit the discharge of plastic pellets or other pre-production plastic materials from facilities generally.

In addition to existing regulations that target chemicals used by, and emissions resulting from, plastic producers, federal efforts have taken the form of plans and priorities to better understand and address microplastics pollution generally, with some discussion of policies and regulatory tools that may be used to reduce same.

For example, in 2020, Congress passed the Save Our Seas 2.0 Act, which required the Interagency Marine Debris Coordinating Committee to submit to Congress a report on microfiber pollution that includes, among other things, recommendations for reducing microfiber pollution and a plan for how federal agencies can lead the reduction effort. The US Environmental Protection Agency's (EPA) Trash Free Water Program and National Oceanic and Atmospheric Administration's (NOAA) Marine Debris Program coordinated the development of this report, submitted to Congress in 2022. Further, in April 2023, the EPA issued its Draft National Strategy to Prevent Plastic Pollution, which provides voluntary actions that can be implemented in the United States aimed at eliminating the release of plastic waste from land-based sources by 2040. Most recently, on July 19, 2024, the

Biden-Harris Administration released its new government-wide strategy to target plastic pollution. Of note, the strategy identifies several ways that the Administration aims to evaluate and address plastic pollution under existing federal laws.

While a complete review of state efforts to address plastic pollution is beyond the scope of this client alert, California is taking a lead when it comes to microplastics with its Statewide Microplastics Strategy, approved by the Ocean Protection Council in 2022. Generally, state efforts have sought to prohibit microbeads in personal care products, ban or restrict the use of certain single-use plastics, and hold producers responsible for the end-of-life management of their products. State efforts targeting synthetic microfiber pollution have sought to require labeling on synthetic clothing and the installation of microfiber filtration systems on washing machines.

2. Plastics Litigation

So far, lawsuits have targeted the direct handling and discharging of microplastics, the design and sale of products that indirectly result in plastic pollution, and statements concerning product recyclability or similar, and have taken the form of citizen suits, consumer protection and greenwashing claims, public nuisance claims, and securities claims.

Citizen Suits

Citizen suits have targeted both the direct handling and discharge of microplastics, as well as microplastics releases allegedly resulting from product design. For example, in June 2019, a plastic producer was found liable under the Clean Water Act for unlawful discharges of plastic pellets (also known as nurdles) and polyvinyl chloride powder, a widely produced synthetic plastic polymer, from one of its plants.^[1] The case resulted in a settlement that required the company to take corrective measures and invest \$50 million to promote environmental sustainability in the region. Further, in March 2020, a company was sued^[2] in the District of South Carolina under the Clean Water Act and Resource Conservation and Recovery Act for its alleged handling and discharging of plastic pellets at its packaging and distribution facility. This case, too, resulted in a settlement that required the company to take corrective measures and pay \$1 million for beneficial environmental projects.

Additionally, in November 2023, tire manufacturers were sued^[3] in the Northern District of California for their alleged unlawful “take” of Endangered Species Act-protected species of coho salmon, steelhead trout, and Chinook salmon caused by the manufacturers’ inclusion of N-(1,3-dimethylbutyl)-N’-phenyl-p-phenylenediamine (6PPD) in the tires they manufacture and distribute. 6PPD makes tires more durable. The complaint alleges that 6PPD transforms into 6PPD-quinone (6PPD-q), a substance that is toxic to aquatic species, at the surface of the tire or when released into the environment. It further alleges that, because of the manufacturers’ products, 6PPD-q is now found in toxic concentrations in watersheds across the West Coast.

Consumer Protection and Greenwashing Claims

Other lawsuits have asserted consumer protection or greenwashing claims based on alleged misrepresentations concerning product recyclability or similar. For example, in September 2018, Keurig Green Mountain was sued^[4] for allegedly misrepresenting its plastic single-serve coffee pods as recyclable. The case settled in July 2022.

Lawsuits have even targeted the apparel industry. For example, in March 2023, H&M filed a motion to dismiss *Sally v. H&M Hennes & Mauritz LP*,^[5] a class action complaint filed against it late last year in the Eastern District of Missouri for allegedly misrepresenting that certain of its clothing products are made with recycled and organic materials. The plaintiffs argue that the products are not made with recycled or organic materials, but rather with virgin plastic-based, conventionally grown, and nonorganic materials. The complaint notes that synthetic materials like polyester shed microplastics with wash and wear, a prime source of microplastics pollution.

Most recently, consumer protection lawsuits have been filed against manufacturers of baby bottles and sippy cups, as well as bottled water companies, based on alleged misrepresentations about product safety (i.e., baby bottles and sippy cups being Bisphenol A free) or contents (i.e., bottled water being natural or 100% spring water) when the products allegedly leach or contain microplastics.

Public Nuisance Claims

In February 2020, major food, beverage, and consumer products businesses were sued^[6] in California state court based on their alleged contributions to the plastic pollution in California's waterways and coasts. The first amended complaint asserts, *inter alia*, a public nuisance claim based on the defendants' alleged false advertising of the recyclability of their products. On July 11, 2024, the court denied the defendants' motion to dismiss the public nuisance claim, finding that causation was adequately pled. Further, in November 2023 and June 2024, respectively, New York and Baltimore City sued PepsiCo and others asserting various claims, including public nuisance, for the defendants' alleged contributions to plastic waste.

Securities Claims

In May 2021, Danimer Scientific, a biopolymer manufacturer, was sued under Section 10(b) of the Securities Exchange Act of 1934 based on alleged misrepresentations concerning the biodegradability of the polyhydroxyalkanoates that it sells. While the court found that certain statements were materially misleading, the court concluded that the plaintiffs failed to allege that the defendants acted with scienter. The case was dismissed in September 2023.^[7]

As concerns surrounding plastic pollution continue to take center stage, we are likely to see more lawsuits styled as public nuisance or citizen suit claims that target plastic pollution allegedly resulting from false advertising or product design. Further, consumer protection and greenwashing claims are likely to continue given significant settlements in this space.

Companies should be carefully evaluating the litigation risk associated with downstream impacts of their product ingredients and product representations concerning recyclability and product safety.

3. Insurance Coverage

Given the real prospect of plastics-related liability, evidenced by the continued focus by federal and state governments on this issue and the continued proliferation of plastics litigation and significant settlements, now is a good time for companies to consider the role that insurance coverage can play in offsetting defense costs and potential losses arising from plastics litigation or government investigations. There are several types of potentially relevant insurance coverage for companies to consider.

If the alleged liability is for polluting the environment or toxic tort liability for exposure to pollutants, a modern pollution liability policy may offer protection for plastic pollution. This could include coverage for site cleanup costs, damage to natural resources, and third party claims for bodily injury or property damage.

Potential plastics-related liability to third parties for property damage or bodily injury also may be covered by current or historic commercial general liability insurance (“CGL,” and formerly known as comprehensive general liability insurance), including product liability insurance. These policies usually are occurrence based, meaning the policy or policies in place when the alleged event or the alleged property damage or bodily injury took place, rather than when a claim for liability is made, respond. If the alleged exposure or liability is due to long term activity, this can trigger CGL policies spanning multiple years or even decades. These CGL policies often contain product liability coverage for claims of injury or damage resulting from products manufactured by the policyholder.

Policyholders should keep in mind several key issues that often come up in determining coverage for long term liabilities under CGL policies. Three examples follow:

- Occurrence – For CGL policies that require an occurrence, this may be defined as an accident, event, or happening, including continuous or repeated exposure to conditions, which unexpectedly causes bodily injury or property damage. Coverage issues that may arise include what constitutes an occurrence, which may hinge on whether the harm was expected or intended by the policyholder, and the number of occurrences if bodily injury or property damage spans multiple years or decades.
- Trigger of Coverage – Does the policy require both an occurrence and bodily injury/property damage during the policy period or only one of those items? And for long term injuries or damages, courts employ varying doctrines as to trigger. The triggering incident for coverage for plastics liability could be (i) exposure to plastics, (ii) actual injury or damage from plastics, (iii) when injury or damage was discoverable or manifested, or (iv) a continuous trigger running from the date of exposure to the date of discovery or manifestation of injury or damage.

- Allocation – If multiple consecutive insurance policies are triggered, courts often fall within two frameworks for how to allocate loss or damage amongst those policies. One framework known as joint and several liability or all sums allocation permits a policyholder to place all of its loss or damage in any triggered policy period and recover up to the amount of available policy limits during that period. Another framework known as pro rata allocation requires loss or damage to be allocated over a certain time period, with each triggered policy only responsible for the loss or damage that took place during its policy period.

In addition, policyholders may have to confront pollution exclusions in their insurance policies. While modern CGL policies likely have some form of pollution exclusions, older policies may not or may have more limited exclusions. For example, the first pollution exclusion, known as the Qualified or Partial Pollution Exclusion, was added to CGL policies in the early 1970s and excluded coverage for pollution events except those that were “sudden and accidental,” an undefined term. Courts adopted varying interpretations of the types of pollution events that were sudden and accidental – some courts required the event be both abrupt in timing and unexpected, while other courts required only that the event be unexpected.^[8] This ultimately led to the advent of the so-called Absolute Pollution Exclusion or Total Pollution Exclusion in 1985/1986 that removed the sudden and accidental exception to the exclusion. Even then, some courts have continued to limit the scope of the pollution exclusion to what is traditionally thought of as a pollutant and contamination of the environment rather than extending the exclusion to substances not traditionally thought of as pollutants or to different situations.

For example, the District of Hawaii recently considered whether insurers had a duty to defend the insured against climate change lawsuits.^[9] The case hinged in part on whether greenhouse gasses are “pollutants” as that term is used in the pollution exclusion. The court noted the lack of authority on this question and explained that there are reasonable arguments on both sides. The court explained that one reasonable argument against greenhouse gasses being “pollutants” is that they “are emitted around us daily and yet are relatively harmless to our immediate health, particularly in limited amounts.” The court ultimately certified the question for the Hawai’i Supreme Court. We highlight the implications of climate change lawsuits that are proceeding in state courts across the country here.

Additionally, directors and officers liability insurance may cover consumer protection, greenwashing, and securities and derivative claims made against directors and officers (or the company) alleging misrepresentations concerning product recyclability or similar allegations. For example, a New Jersey court has held that a directors and officers policy covered costs arising from a securities claim alleging that the insured made false and misleading statements concerning pollution liability.^[10] The court rejected the insurer’s argument that there was no coverage under the policy’s pollution exclusion (an exclusion which may not be present in current directors and officers liability insurance policies), reasoning that the complaint in the underlying litigation had its root in securities fraud and misrepresentation, not pollution. Such insurance also may apply to government agency

formal or informal investigations and inquiries of a company or its directors and officers, including responding to governmental subpoenas.

This list of types of relevant insurance is not comprehensive. Other types of insurance that could come into play include (i) commercial property insurance if a policyholder is dealing with damages to its own property, or (ii) errors and omission/professional liability insurance if a policyholder is facing liability for the use of plastics in its provision of professional services to others. It's best to think broadly about what insurance could respond based on the liability or loss at issue.

At bottom, companies should be carefully evaluating how they can offset defense costs and potential losses associated with plastics-related liabilities and governmental investigations or actions through insurance.

Footnotes

[1] See *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.*, 2019 U.S. Dist. LEXIS 108082, No. 6:17-CV-0047 (S.D. Tex. June 27, 2019).

[2] *Charleston Waterkeeper v. Frontier Logistics, L.P.*, No. 2:20-cv-01089 (D.S.C. compl. filed Mar. 18, 2020).

[3] *Institute for Fisheries Resources v. Bridgestone Americas, Inc.*, No. 3:23-cv-05748 (N.D. Cal. compl. filed Nov. 8, 2023).

[4] *Smith v. Keurig Green Mountain, Inc.*, No. RG18922722 (Cal. Super. Ct. compl. filed Sept. 28, 2018).

[5] No. 4:23-cv-01451 (E.D. Mo. filed Mar. 27, 2024).

[6] *Earth Island Inst. v. Crystal Geyser Water Co.*, No. 20-CIV-01213 (Cal. Super. Ct. 1st am. compl. filed Oct. 2, 2023).

[7] *In re Danimer Sci., Inc. Sec. Litig.*, No. 21-CV-02708, 2023 U.S. Dist. LEXIS 176529 (E.D.N.Y. Sept. 30, 2023).

[8] See, e.g., *Tonoga, Inc. v. N.H. Ins. Co.*, 2022 NY Slip Op 00094, 201 A.D.3d 1091, 159 N.Y.S.3d 252 (App. Div. 3rd Dept.) (applying pollution exclusions in the context of PFAS liability).

[9] *Aloha Petro., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 690 F. Supp. 3d 1168 (D. Haw. 2023).

[10] See *Sealed Air Corp. v. Royal Indem. Co.*, 404 N.J. Super. 363 (Super. Ct. App. Div. 2008).

Related Attorneys



Brian S. Scarbrough

Partner

bscarbrough@jenner.com

+1 202 637 6306



Arie T. Feltman-Frank

Associate

afeltmanfrank@jenner.com

+1 312 923 2898

Related Capabilities

Environmental and Workplace Health and Safety

Insurance Recovery and Counseling

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed

