



# Into the Unknown?

## Liability and insurance law aspects of PFAS

BHSI – SIRM Connect  
PFAS “FOREVER CHEMICALS”

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5 December 2024

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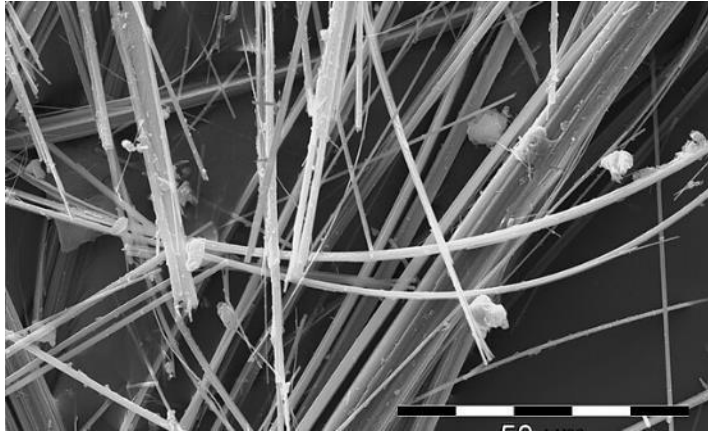
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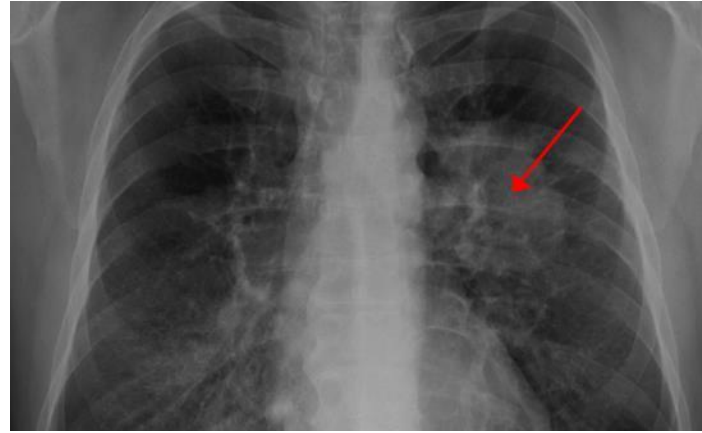
# PFAS – The new asbestos?



# Asbestos: From miracle material to health hazard



Asbestos was once described as a „miracle fibre“.  
Even low concentrations of asbestos dust in the air can promote the development of lung cancer.



The law and jurisdiction were not prepared for asbestos.  
Claims for long-term asbestos-related injuries became time-barred before these injuries could be identified.  
This has led to very disruptive results.

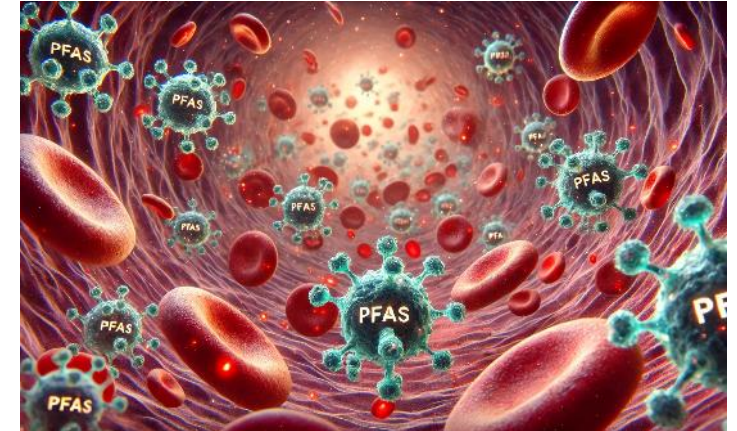


“Coverage Carnage”  
Asbestos claims ultimately cost the insurance industry USD 100 billion worldwide, and claims are still being added today.

# PFAS – The new asbestos?



# PFAS: Worse for insurers than asbestos?



The use of PFAS dates back almost 100 years.

Due to their longevity and persistence, PFAS are detectable everywhere: in human blood, in breast milk and in large parts of the environment, including water, soil and air.

Scientific findings, increasing public awareness and a general rise in environmental awareness are increasing the pressure for liability claims against potentially responsible manufacturers and distributors.

As soon as studies can establish a firm link between PFAS and damage to human health (“smoking gun” or “signatory disease”), this will inevitably lead to lawsuits.



In a legal dispute in the USA, the technology group 3M has to pay USD 11 billion for environmental damage because it is held responsible for water pollution.

3M paid EUR 571 million to the Belgian region of Flanders after chemicals were released into the environment from a factory.

# Effect of social inflation (esp. USA)

- Publicised convictions and high damage payments are used by specialised lawyers as the basis for further lawsuits.
- Social media, TV advertising and easy access to relevant information via the internet motivate and influence plaintiffs and jurors alike.
- European insurers are probably not sufficiently protected against PFAS exposure. Reinsurers in particular may be highly exposed through US business.





# Liability law aspects



# PFAS contamination as environmental damage?

- Environmental damage is considered to be personal injury, property damage or financial loss caused by harmful emissions, e.g. by substances, radiation or gases, in the air, water and soil.
- Liability for environmental damage is governed by the relevant environmental liability regulations.
- Example: Liability in accordance with Art. 59a of the Environmental Protection Act: The owner of a business or plant that poses a particular risk to the environment is liable for damage resulting from the realisation of this risk..
- The problem of the passage of time:  
Does the polluter still exist?



# PFAS as the cause of a faulty product?

- A product is defective if it does not offer the safety that one is entitled to expect taking all circumstances into account (Art. 4 Product Liability Act).
- The prerequisite for liability under the PLA is damage caused by a product defect, whereby the injured party must prove the defect, the damage and an adequate causal link between the defect and the damage.
- Problem of causality:  
Which one of many possible manufacturers is liable to whom?



# Production, distribution, use etc. of PFAS as an unauthorised act?

- Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation. (Art. 41 Code of Obligations).
- The threshold for liability in tort is high: the plaintiff must prove the existence of damage, an adequate causal link between the damage and the harmful act, unlawful behaviour on the part of the injuring party and fault on the part of the injuring party.
- Problem of the statute of limitations:  
Even under the new statute of limitations (up to 20 years), damages may be time-barred.



# Insurance law aspects



# Environmental impairments

- As a rule, claims in connection with environmental damage are only insured if they are demonstrably attributable to an incident (“sudden and accidental pollution”).
- In most cases, however, continuous emissions into the environment are involved, which lead to an accumulation in the environment over time.
- PFAS may well have been permitted (as was asbestos).
- The retroactive classification of certain substances as PFAS can be problematic.



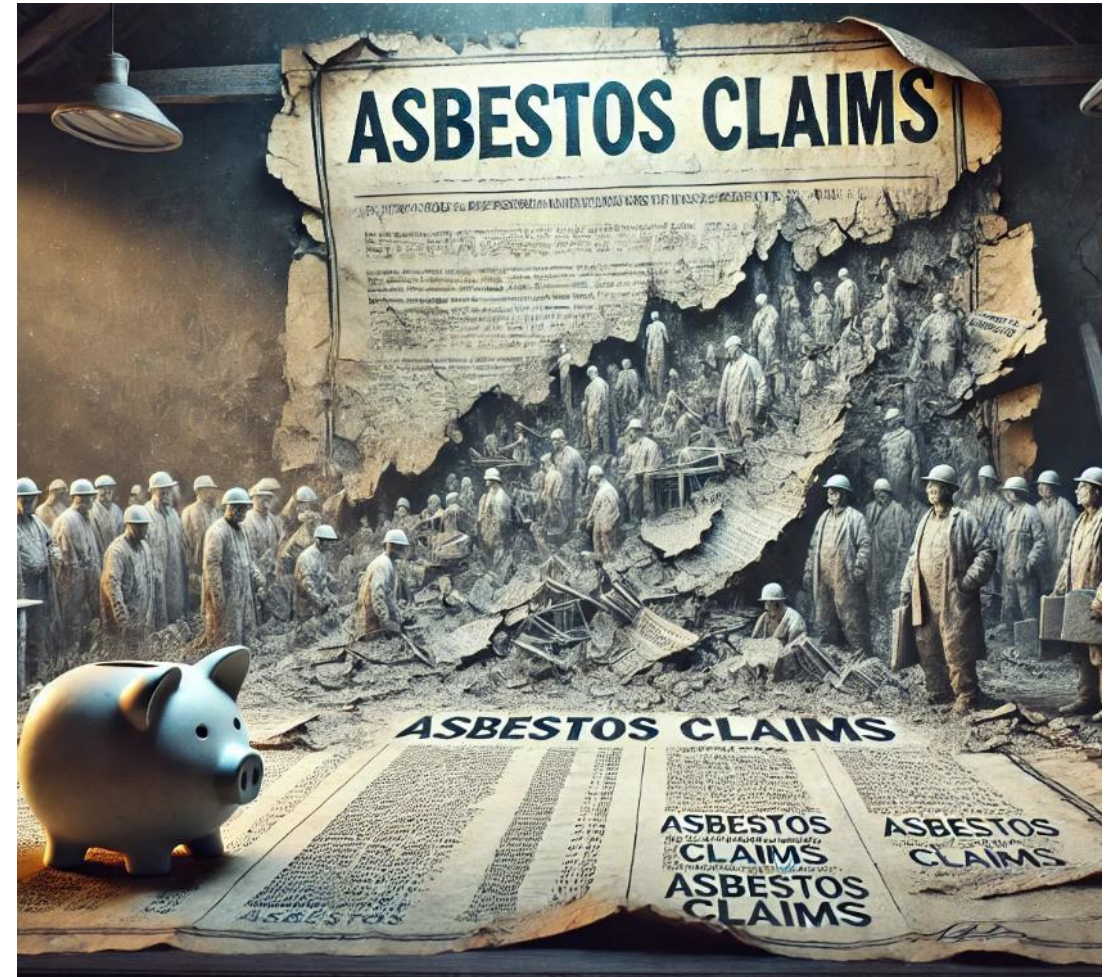
# Product liability and tort

- Pollution exclusions became more restrictive after the experience with asbestos, and awareness in underwriting was significantly heightened.
- Problematic triggers:
  - Bodily injury “first occurring during the policy period”?
  - Several insurance years may be affected.
- Do PFAS in the bloodstream cause any damage to the body at all?



# Legal after-effects of asbestos on PFAS

- Many coverages were exhausted by asbestos claims, further claims can be excluded by settlement and release.
- Because PFAS have been in use for nearly 100 years, many claims may involve both legacy and current insurance policies. Accordingly, many policyholders search for legacy policies and hire “insurance archaeologists” to identify potential coverages.
- In some cases, policyholders may not be able to prove that the purported insurance policies were actually issued, or they may not be able to provide sufficient evidence of the terms of the purported insurance policies.





# Liability of D&O for PFAS

- Liability lawsuits: This type of lawsuit typically alleges that a company's D&O knew (or should have known) about the PFAS contamination and failed to act despite this knowledge.
- Current cases in the USA: D&O liability for allegedly inadequate risk management in the form of "shareholder derivative suits" (actio pro socio).
- These claims are usually brought in US courts by US law firms on behalf of shareholders following a loss by the company (or even just a fall in the share price) in the knowledge that listed companies have multi-level D&O insurance programmes.



# The present and outlook



# PFAS: Worse for insurers than asbestos?



PFAS exclusions are not possible in health insurance policies.

Caution: Corporate health policies can also be severely affected!



Exclusions in D&O and public liability policies are increasingly being enforced.

Caution: There is uncertainty as to whether certain substances belong to PFAS.



As soon as the EU or Switzerland ban certain PFAS substances without restriction, specific exclusions will increase.

Caution: Prohibition probably only if use of PFAS does not qualify as "essential use".

# Lloyd's Model Wordings (LMA5595 und LMA5596)

This POLICY does not cover [...] in connection with any PFAS, such as any perfluoroalkyl or polyfluoroalkyl substances for example.

PFAS means any organic molecule, salt, free radical or ion, the composition of which includes at least one: perfluorinated methyl group ( $-CF_3$ ) or perfluorinated methylene group ( $-CF_2-$ ).



Even if the PFAS claims burden for private insurers can be considerable: The main burden for PFAS will be borne by social insurers (first and foremost health insurers) and not by private insurers.



# Thank you.

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