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Product Liability

Insurance strategy can aid victims, minimize financial pain

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From asbestos to Chinese drywall, there are as many potential product liability insurance claims as there are products. Policyholders facing claims arising from a defectively manufactured or installed product, however, benefit from a comprehensive strategy designed to maximize the amount of coverage available to satisfy claims while limiting out-of-pocket expenses. In this age of sophisticated asset protection, tort claimants and their counsel are similarly motivated, lest the judgment against the policyholder be worth no more than the paper it is written on.

In the world of insurance coverage, every word has meaning, and the availability of coverage often depends upon the practitioner's ability to appreciate nuance in policy language. But dissecting an insurance policy is only one part of the coverage equation; traps still abound for the uninitiated.

Don't Fall Prey

Most product liability claims start simply enough. A corporate policyholder is sued for damages caused by a defective product. The policyholder notifies its insurance carriers either directly or through a broker. The policyholder then receives a detailed letter in which the carrier reserves its rights to deny or limit coverage based upon a litany of policy provisions seemingly written in Chaucer's English. The carrier also simultaneously appoints defense counsel to represent the policyholder. Buried toward the end of the letter is often the following language: "The insurance company expressly reserves all rights under the policy and applicable law, including the right to seek reimbursement of defense costs and any amounts paid as indemnity under the policy."

With that, a familiar trap is set. Most liability policies do not contain language permitting carriers to seek reimbursement of costs associated with the policyholder's defense. That defense, after all, has been purchased in advance by the payment of premiums. Florida law, however, arguably entitles the carrier to reimbursement of defense costs if it asserts that intention in writing and the policyholder does not object. In a complex product liability case, defense costs can easily hit seven figures. If that pitfall is avoided, other industry jargon is likely to appear in the remainder of a 20-page, single-spaced reservation of rights letter.

What's the trigger?

In insurance coverage parlance, a trigger is simply a way to determine which policy or policies must respond to a claim. In many circumstances, the negligent act or event causing damage occurs simultaneously with the resulting harm. The issue is more complex in the product liability arena, however, where the negligent act generally occurs long before harm either results or is discovered. For example, a chemical company manufactures resin designed for use in high-impact glass windows. Years after the resin is produced and incorporated into the product, customers who purchased windows containing the resin begin to complain that the windows are delaminating and turning yellow. The chemical company's resin is alleged to be the culprit, resulting in a wave of litigation. Which of the company's insurance policies should provide coverage?

The answer is rarely simple. Courts in varying jurisdictions have adopted no fewer than five different trigger theories in cases involving analogous facts and identical policy language.

The “continuous trigger” approach,ν typically most beneficial to the policyholder, requires that all liability policies on the risk from the date of the negligent act through manifestation of resulting damage must respond.

Next is the “exposure theory,” which presumes coveredν damage occurs when exposure to the harm or event takes place and not when the symptoms of the exposure become evident.

Third, is the “actual injury” or “injury-in-fact theory,” whichν focuses not on when the negligent act occurred, but rather on when the claimant actually suffered the injury or damage, regardless of when that damage became apparent.

Fourth is theν “manifestation theory,” which requires only those policies in effect at the time the damage is discovered (or reasonably discoverable) to respond.

Last is the “double-triggerν theory,” which recognizes covered loss at exposure and manifestation, regardless of whether damage continued between those two events.

When multiple policies are potentially responsive, trigger is tremendously important. If several carriers are involved, each likely will advocate a trigger theory that shifts coverage elsewhere. The policyholder in a complex product liability case must examine not only the primary policies in effect during the various triggering events but any applicable excess or umbrella policies.

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