Products Liability Consumer Class Action Claims: When Are They Covered by Insurance?

Finding Insurance Coverage for Consumer Products Class Action Complaints

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FINDING INSURANCE COVERAGE FOR CONSUMER PRODUCTS CLASS ACTION COMPLAINTS

Consumer class action claims are a familiar tool for addressing dissatisfaction with a defective product. Given that one of the goals of a consumer class action claim is to recover damages for the claimants, triggering insurance coverage for the defendant can be critical to a successful result. Likewise, defendants are eager to have an insurance company fund their defense, contribute to settlements or pay judgments. From the insurer perspective, due to the high potential damages, insurance companies take an aggressive stand to avoid coverage. Given these strong conflicting interests, the courts have issued a multitude of decisions with varying results. Similar to the developed body of law relating to coverage in

defective construction cases, consumer products class actions have triggered disputes regarding: whether the complaint's allegations meet the definition of an occurrence, property damage or bodily injury; when did the damage or injury occur; is anything more than economic loss or injury alleged; is there advertising injury or product disparagement, loss or injury alleged; and which product exclusions apply. This paper will focus on the elements necessary to trigger a duty to defend and the hurdles to be overcome to secure some funding for settlement or judgments.

General Principles Regarding Pleading

Courts have not created any bright-line test as to what facts must be alleged to trigger coverage. One must consider not only factual allegations, but the entire complaint, including the damages suffered and the requested relief, to determine whether any potentially provable loss falls within the policy's coverage. However, jurisdictions have ruled differently regarding whether courts should speculate on the facts necessary to support potential coverage. The Seventh Circuit held in *Amerisure Mutual Insurance Co. v. Microplastics, Inc.*, 622 F.3d 806, 812 (7th Cir. (Ill.) 2010), that "the duty to defend applies only to facts that are *explicitly alleged*," as "it is the actual complaint, not some hypothetical version, that must be considered."[1] Thus, the potentiality standard must be balanced against speculative theories of liability and hypothetical damages.

Where There's Smoke, There's Fire

Starting with the most basic elements of the insuring agreement in a CGL policy, an insured products liability case must allege an occurrence that results in property damage or bodily injury.[2] Property damage is defined in CGL policies as "physical injury to tangible property," or "loss of use of tangible property that is not physically injured." The "possibility" standard for triggering a duty to defend plays a considerable role here, as potential property damage may be alleged by references to individual class members' experiences. For example, in *Omega Flex, Inc. v. Pacific Employers Insurance Co.*, 78 Mass. App. Ct. 262, 937 N.E.2d 5265-66 (2010), which involved a consumer class action alleging that defective stainless steel tubing was prone to combusting when lightning struck nearby, the lower court held that the insured's CGL carrier had no duty to defend because the complaint contained no specific allegation of fire damage. The appellate court reversed, citing potential recovery for fire damage to some class members' property as a result of the product combusting. The court based the reversal on the amended complaint, which sought relief for some class members who had already suffered actual damage to their premises. It was not necessary for the complaint to allege that specific damages had been suffered, as long as it was within the realm of possibility that even one class member incurred property damage, to trigger the duty to defend.

The tension between the goal of certifying the class versus triggering the elements of insurance coverage is clear. On the one hand, certification requires common facts and injuries among the class members. Once individual damages are alleged, it becomes more difficult to overcome objections to class certification. (*See Low v. Golden Eagle Insurance Co.*, 99 Cal.App.4th 109, 113-14, 120 Cal. Rptr. 2d 827 (2002) (no duty to defend where "the ... complaint is ... couched overwhelmingly in class action terms, but the named plaintiff expressly disclaims any interest in seeking recovery of damages for [the type of damages] ... required to trigger coverage and a related duty to defend under the policy"); *see also The Upper Deck Co. v. Federal Insurance Co.*, 358 F.3d 608, 616 (9th Cir. 2004) ("Upper Deck asked us to remember that the underlying suit is a class action and that, even if the named plaintiffs did not suffer

[1] For other cases dealing with unclear allegations that may trigger the duty to defend, s*ee also* Van Etten, Alan. "Triggering the Duty to Defend for Inartful Pleadings," *CGL Reporter*, Fall 2012, Section 135, http://www.irmi.com/online/cgl/sc000050/triggering-the-duty-to-defend-for-inartful-pleadings.aspx.

[2] Personal and Advertising Injury Liability is dealt with in the subsequent section below.

bodily injury, members of the class could have suffered bodily injury. This argument contradicts the complaint itself, which states [that the named class plaintiffs are typical of the class as a whole.]").

Another issue for triggering insurance encountered in class actions was raised in *Hartford Accident and Indemnity Co. v. Beaver*, 466 F.3d 1289 (11th Cir. 2006). Hartford's insured operated numerous nursing home facilities and was sued in a class action by residents for failure to provide adequate care and services. Hartford argued, and the district court agreed, that there was no duty to defend until such time as the class was certified. On appeal, the Eleventh Circuit reversed, finding that the duty to defend "was not defeated by some uncertainty as to the merits of a class certification." *Hartford*, 466 F.3d at 1295. It held that there were sufficient "allegations of personal injury against putative class members to trigger the duty to defend, notwithstanding that the class had not been certified. *See Lenscrafters, Inc. v. Liberty Mutual Fire Insurance Co.*, 2005 U.S. Dist. LEXIS 22709, 2005 WL 146896 (N.D. Cal. 2005)." *Id*. at 1294.

Whether or not there is an occurrence is a common threshold question in consumer class action product liability suits. In *Liberty Mutual Insurance Co. v. Pella Corp.*, 631 F.Supp.2d 1125, (S.D. Iowa 2009), aff'g in pt, rev'g in pt, 650 F.3d 161 (8th Cir. 2011), two underlying class action lawsuits were filed against Pella Corporation and Pella Windows and Doors, Inc. (collectively, "Pella"), a window manufacturer, alleging that Pella's windows were defective. Pella tendered both class actions to its insurers.

Pella had several commercial general liability policies with Liberty Mutual effective from September 1, 2000, through September 1, 2006. Liberty Mutual brought a declaratory relief action seeking a declaration that it owed no coverage to Pella under the policies for the class actions. Pella counterclaimed, seeking a declaration that Liberty Mutual owed coverage for those suits. Both parties filed dispositive motions.

Liberty Mutual contended that its duty to reimburse Pella for defense costs was conditioned on the establishment – not the mere allegation – of an "occurrence." Liberty Mutual argued that it had no duty to reimburse the defense expenses because the property damage was not caused by an "occurrence" since Pella allegedly knew, concealed or omitted a latent defect in the windows.

The district court ruled in favor of Pella and held that Liberty Mutual had a duty to reimburse Pella for its defense costs in the underlying action. In so holding, the district court rejected Liberty Mutual's argument that its duty to reimburse Pella's defense costs required Pella to establish that an actual "occurrence" took place.

On holding that the class actions alleged that the property damage was caused by an "occurrence," the court found that although the class actions alleged that Pella knowingly concealed or omitted a latent defect in its windows, it was not clear that Pella knew or should have known that there was a substantial probability that certain consequences would result from its actions.

On appeal, the court of appeals agreed with the district court's ruling that Liberty Mutual's duty to reimburse Pella's defense costs should be determined by looking at the allegations in the complaint. The court found that an "occurrence" only needed to be alleged rather than established to trigger Liberty Mutual's duty to defend.

However, the court of appeals disagreed with the district court's finding that the class actions alleged property damage resulting from an "occurrence." Because the complaints alleged that Pella knew that its windows had a defect that allowed water to leak through the window frame, the court concluded that, under Iowa law, such defective workmanship could not be considered an "occurrence."

The court of appeals reversed the judgment of the district court and remanded with instructions to enter a declaratory judgment in favor of the insurer.

In *Indalex v. National Union Fire Insurance Co*., No. 126 WAL 2014 (9/18/14), 2014 Pa. LEXIS 2411, the Pennsylvania Supreme Court refused to review the Superior Court ruling in 83 A.3d 418 (Pa. Super. Ct. 2013), in which the court found the door and window manufacturer insured was entitled to insurance coverage for a series of lawsuits claiming defective windows and doors caused water leaks, mold, cracked walls and injuries. The reviewing appellate court panel found that the claims could be considered occurrences because the insured's products had allegedly damaged other property, as well as causing personal injuries.

If one can overcome the hurdle of establishing an occurrence, the insured must establish that property damage has resulted. One prong of the definition of property damage focuses on the "loss of use" of property other than the named insured's product. As an example, in a recent class action involving alleged defects in glass bottles, the insured was able to argue that the class members' damages for having to destroy the contents of the bottles constituted property damage. Thus, damage caused by the loss of use of the contents, which were not the insured's product, was covered.

In *Silgan Containers, LLC v. National Union Fire Insurance Co.*, No. C09-5971 RS, U.S. Dist. Ct. N.D. Cal. (7/30/14), the Ninth Circuit, in an unpublished order (No. 11-17637, 9th Cir. Ct. App., 10/22/13), reversed the district court ruling which had granted National Union summary judgment based on its conclusion that there had been no property damage. On remand, the district court denied both parties' motions for summary judgment. Silgan manufactures cans for commercial producers of canned food goods. Del Monte, one of Silgan's clients, discovered an abnormally high number of tomato cans that were experiencing premature failure. Del Monte destroyed its remaining inventory and presented Silgan with a multimillion dollar claim. National Union denied coverage for approximately $4 million. The issue was whether Silgan was entitled to coverage based on a risk of future damage to the cans that were destroyed. The court found that the existence of physical injury to the tomato product in some cans arguably supported an inference, and therefore a triable issue of fact, that there was similar existing physical injury in the cans that were destroyed. The court noted that the Ninth Circuit explicitly held there was a genuine issue of material fact as to whether Del Monte suffered a "loss of use" of the tomato product. That holding convinced the district court to deny the motions for summary judgment.

In *Sony Computer Entertainment America, Inc. v. American Home Assurance Co.*, 532 F.3d 1007 (9th Cir. 2008), Sony was sued in two class actions in which plaintiffs alleged that PlayStation 2s suffered from defects that rendered them unable to play DVDs and certain game discs. In determining whether there was coverage for the claims under Sony's CGL policies, the court rejected Sony's argument that the suits alleged both "loss of use of tangible property" and "physical injury to property." Although the complaints alleged PlayStation 2 was unable to read or play CDs, DVDs or other games and that discs skipped and froze, accompanied by banging or clicking noises, the court noted that the plaintiffs did not allege any recognized measure of loss of use of discs, such as rental value.

Coverage for cases in which the named insured's products have been incorporated into another product have received inconsistent treatment. In *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, (2000) 78 Cal.App.4th 847, 865-866, 93 Cal. Rptr. 2d 364, the court recognized the existence of coverage where roasted diced almonds containing splinters were packaged into nut clusters that were incorporated into cereals. The court found that the costs of repackaging the cereal qualified as property damage because "potentially injurious material in a product cause[d] loss to other products with which it is incorporated."

In *Titanium Products, Inc. v. Federal Insurance Co.*, 2014 NJ Super. Unpub. LEXIS 2208 (NJ Sup. Ct. App. 9/10/14), the court held that the insured's product, raw titanium that was used to make screws, which were then used in orthopedic implants and devices, was not sufficiently integrated to constitute property damage. The screws suffered from alloy segregation, *i.e.*, the failure of alloys in the metal to completely melt causing the alloy to separate and undermine the strength of the product. The court focused on the distinction between coverage for tort liability for physical damages to other persons or property versus the protection from contractual liability of the insured for economic loss caused by defective products. Because the insured's product, raw titanium, was fashioned into screws, it was otherwise unaltered and not appended to other property that was, itself, damaged.

The court distinguished the titanium defect from the facts of *Newark Insurance Co. v. Acupac Packaging Inc.*, 328 N.J. Super. 385 (App. Div. 2000), in which the insured manufactured foil laminated pacquettes containing cosmetic lotion, which were attached to advertising cards and bound in magazines. The court found coverage because the pacquettes leaked, rendering the cards unusable.

In *Netherlands Insurance Co. v. Main Street Ingredients, LLC*, 745 F.3d 909 (8th Cir. 2014), the court found that damage to a third party's property caused by the incorporation of the insured's defective product triggered coverage. Plainview sold dried milk to Main Street, which in turn sold the dried milk to Malt-O-Meal. In 2009, the FDA found Salmonella bacteria on food-contact surfaces used to manufacture dried milk products in Plainview's plant. Plainview issued a product recall notice. Main Street, the insured under Netherland's CGL policy, forwarded the notice to Malt-O-Meal, which then recalled its instant oatmeal that contained the recalled dried milk. Malt-O-Meal sued Main Street and Plainview. Although Netherlands defended Main Street under a reservation of rights, it refused to contribute to a settlement with Malt-O-Meal for $1.4 million. In the subsequent coverage action, the district court found property damage existed because the oatmeal was physically affected by the incorporation of the instant milk manufactured in unsanitary conditions and that the oatmeal was legally unusable. The court of appeals affirmed.

In *National Union Fire Insurance Co. v. Terra Industries, Inc.*, 346 F.3d 1160 (8th Cir. 2003), the insured operated a chemical plant that produced fertilizer, but created carbon dioxide as a by-product. It sold the carbon dioxide to beverage manufacturers. In 1998, Terra discovered a leak in its processor that allowed benzene to permeate the carbon dioxide. It sold substantial quantities of contaminated carbon dioxide that were incorporated into third party manufacturers' products. The court found that the incorporation of contaminated carbon dioxide into consumer beverages constituted an "occurrence" resulting in "property damage."

In *Watts Industries, Inc. v. Zurich American Insurance Co.*, 121 Cal. App. 4th 1029 (2004), the insureds were manufacturers of parts used in municipal water systems. They were sued by various municipalities alleging injury to their water systems due to lead contamination of water flowing through the systems, resulting from substandard parts sold by the insureds. The court held that the plaintiffs' allegations of injury to their water and the claim that substandard parts containing hazardous materials were incorporated into their water systems raised a possibility of covered property damage. However, where products or work containing hazardous materials have been incorporated into other products or structures, courts have found immediate harm and physical injury to other property at the moment the incorporation occurred. (*Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, (1996) 45 Cal.App.4th 1, 107-108, 52 Cal. Rptr. 2d 690; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 865-866, 93 Cal. Rptr. 2d 364.) In *Armstrong*, the court held that incorporation of asbestos-containing building material (ACBM) in a building caused immediate physical injury to that building, regardless of whether the ACBM had begun to release asbestos fibers. The court reasoned, "because the potentially hazardous material is physically touching and linked with the building, and not merely contained within it, the injury is physical even without a release of toxic substances into the

building's air supply." *See also USF&G v. Wilkin Insulation Co.*, 144 Ill.2d 64, 578 N.E.2d 926 (1991) (incorporation of ACBM constitutes property damage).

Is There Property Damage Before The Defective Product Causes Damage?

It would be difficult to begin any discussion of what determines whether property damage has occurred without starting with the Seventh Circuit's 1992 decision of *Eljer Manufacturing v. Liberty Mutual Insurance Co.*, 972 F.2d 805 (7th Cir. (Ill.) 1992). Eljer brought a declaratory judgment to establish that the physical injury to the buyer of a Qest plumbing system occurs when the system is installed in the buyer's house or apartment, not when it begins to leak or is replaced or is recognized to have reduced the value of the buyer's property. The Seventh Circuit held that the incorporation of a defective product into another product constitutes property damage, as physical injury to tangible property, at the moment of incorporation. The court based its decision on Illinois cases which it read as holding that the absence of physical injury in the ordinary sense was immaterial, as long as the insured's defective product reduced the value of the finished product.

It took almost 10 years for the Illinois Supreme Court to consider whether the Seventh circuit was correct in predicting Illinois law. Not unsurprisingly, the Illinois Supreme Court in *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 757 N.E. 2d 481 (Ill. 2001), disagreed with the Seventh Circuit and held that the homeowners whose systems did not leak suffered no "physical injury to tangible property." The court also held that the post-1981 policies were not triggered if a home was physically damaged by a homeowner replacing a nonleaking system; this did not constitute physical injury to tangible property arising from a covered occurrence under the policies.

In *Amtrol Inc. v. Tudor Insurance Co.*, No. 01-1-461, 2002 U.S. Dist. LEXIS 18691 (D. Mass. Sept. 10, 2002), the court faced an "*Eljer*-like" situation, in which Amtrol, a manufacturer of residential water heaters, faced a class action suit seeking costs of defense, as well as the costs of repair and replacement of defective products, that experienced leaks. In granting Tudor's motion for summary judgment, the court held that in order to meet the physical damage requirement, Amtrol must show that the water had somehow exacted a physical harm upon tangible property that required remediation or otherwise diminished the value of the property. "A leak that results in no damage beyond the mere presence of water that can be removed or evaporated without harm does not constitute property damage." *Amtrol* at *20.

The decision in *Wausau Underwriters Insurance Co. v. United Plastics Group, Inc.*, 512 F.3d 953 (7th Cir. 2008), is an example of when water leaking can constitute property damage. In that case, United Plastics Group (UPG) sold Microtherm, a manufacturer of tankless water heaters, the plastic chamber component in which the water was to be heated. UPG molded the plastic chambers at a significantly lower temperature than recommended by the plastic manufacturer. As a result, the water chambers made and sold to Microtherm were defective and caused many of the water heaters that contained them to fail. Of 3,900 water heaters sold, 600 of the water chambers ruptured. Microtherm filed suit against UPG.

At trial, the jury awarded $26.5 million to Microtherm – $1.1 million for the cost of repairing or replacing the water heaters, and most of the balance for lost profits resulting from customers' anger at Microtherm.

Wausau Underwriters Insurance Company, UPG's primary liability insurer, brought an action against UPG, seeking a declaration that its policy did not cover the underlying judgment. UPG and Wausau ultimately settled. In interim, however, Ohio Casualty Insurance, UPG's excess liability insurer, had intervened in the suit against UPG, seeking a similar declaration.

Of the 600 water chambers that ruptured, only 65-75 ruptured while Ohio Casualty's policy was in force. After a bench trial, the trial court ruled that Ohio Casualty was liable for the damages assessed in the underlying action up to the $25 million policy limit.

On appeal, the Seventh Circuit recognized that the test for coverage was whether the damaged property was the property of UPG when the defect on which UPG's liability was based came into being. The Seventh Circuit ruled that there was property damage as a result of the defective manufacture of the water chambers. Circuit boards belonging to Microtherm were damaged, and some of the water heater's owners suffered damage to their property due to leaking. Because UPG manufactured only the water chamber, the rest of the heater constituted a third party's property. Once there is damage to such property, the victim can recover its losses, including business losses resulting from that damage and not just the diminution in the value of the property.

The Seventh Circuit also acknowledged that *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 831 N.E.2d 1 (Ill. App. Ct. 2005), precluded UPG from obtaining insurance coverage for the cost to Microtherm of repairing or replacing any of the defective water chambers.

The Seventh Circuit nonetheless reversed the trial court's decision because less than 2% of the 3,900 heaters failed during the Ohio Casualty policy period. The Seventh Circuit observed that the business losses resulting from those failures were unlikely to have amounted to $25 million. The court also observed that only 80% of the water-chamber ruptures shorted the circuit board. The other 20% just caused the water heater to stop working, which did not constitute covered property damage.

Although arising in a construction setting, the court in *Kaufman & Broad Monterey Bay v. Travelers Property Casualty Co. of America*, 2012 U.S. Dist. LEXIS 100005, 2012 WL 2945932 (N.D. Cal. 7/18/12), addressed the issue of property damage caused by the installation of defective cabinets in certain homes in a housing development. The complaints alleged damage and wearing to the base, door, drawers and finish of the cabinets, and resulting damage of gouging of drywall and interior painting and cracking and separation of drywall and caulking. The court noted that the complaint did allege damage to the homes and their component parts, for which plaintiffs would incur expenses for the restoration and repair of the property to cure the damage. Thus, the court held that the complaint alleged a claim that potentially could subject the builder to liability for physical injury to property other than the cabinets, covered by the cabinet maker's general liability policy.

Is There Tangible Property That Is Damaged?

In *America Online, Inc. v. St. Paul Mercury Insurance Co.*, 207 F.Supp. 459 (E.D. Va. 2002), aff'd by 347 F.3d 89 (4th Cir. 2003), the Fourth Circuit Court of Appeals embarked on an involved and somewhat philosophical discussion about the nature of tangible property in the aftermath of a series of consumer class actions against AOL following release of its Version 5.0 Access software, alleging that the software had substantial "bugs" in it and was incompatible with their computers' other applications, software and operating systems, causing the computers to be damaged.

AOL tendered the defense of these actions to its primary insurer, St. Paul Mercury Insurance. St. Paul denied coverage on two grounds: (1) that the plaintiffs' claims did not alleged damage to tangible property and were not, therefore, property damage as defined by the St. Paul commercial general liability (CGL) insurance policy; and (2) that its "impaired property" exclusion would deny coverage for loss of use of tangible property that was not physically damaged.

The district court denied AOL's motions and granted St. Paul's motion, drawing a distinction between computer software and computer hardware, concluding that the underlying suits alleged damage to computer data and systems but did not allege "physical damage to tangible property." Although the court

recognized that "property damage" under the policy also included "loss of use of tangible property," and that the plaintiffs alleged loss of use of their computers, it concluded that coverage for such loss of use was excluded by the impaired property exclusion.

On appeal, the court held that the word "tangible" is unambiguous and simply means (according to Webster's *Third New International Dictionary*) "having physical substance apparent to the senses." Employing what the court characterized as "these ordinary meanings," it concluded that the physical magnetic material on the hard drive that retained data, information and instructions is tangible property. However, it noted that the conclusion that physical magnetic material on the hard drive is tangible property is separate from the question of whether the data, information and instructions, which are codified in a binary language for storage on the hard drive, are tangible property.

In essence, the court distinguished between the hard drive as a medium in which data, information and instructions are stored and the data itself. The court concluded that, with this distinction in mind, loss of software or damage to software is not damage to the hardware, but to the idea, its logic, and its consistency with other ideas and logic. The court analogized to a situation where a combination to a combination lock is forgotten or changed. The lock becomes useless, but the lock is not physically damaged. With the retrieval or resetting of the combination – the idea – the lock can be used again.

In contrast to the *AOL* decision, in *Eyeblaster, Inc. v. Federal Insurance Co.*, 613 F.3d 797 (8th Cir. 2010), the Eighth Circuit Court of Appeals found that tangible property damage had occurred where a consumer alleged his computer was infected with a spyware program from Eyeblaster's website, which caused his computer to immediately freeze up, that he lost all data on a tax return on which he was working, and that he incurred many thousands of dollars of loss. He hired a computer technician to repair the damage and alleged that no repair was possible. Eyeblaster tendered the defense of the lawsuit to Federal, seeking coverage under its general liability policy.

On appeal, the court, applying Minnesota law, found that the allegations of the complaint were covered. Although Federal did not include a definition of "tangible property" in the GL policy, the plain meaning of tangible property included computers, and the underlying complaint alleged repeatedly the "loss of use" of the plaintiff's computer. Thus, the court held there was both coverage and a duty to defend under the GL policy.

Damages Are Not Restricted To Legal Claims For Money
And Can Extend To Forms Of Equitable Relief

In the context of CGL coverage in products liability cases, "damages" covered by the policy are related to relief for the class. Insurers often argue that "damages" should be restricted to payments of legal claims for money. *See, e.g., Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir. Mo. 1988). However, the vast majority of jurisdictions have ruled in the opposite direction, reasoning that while the term "damages" may be ambiguous, "[a] standard policy of insurance being the crafty product of insurers who made the policy … should be interpreted most strongly against the insurer." *School Union No. 37 v. United National Insurance Co.*, 617 F.3d 554, 563 (1st Cir. (Me.) 2010). In *Omega Flex, Inc. v. Pacific Employers Insurance Co., supra*, the class complaint requested equitable relief, requiring Omega to notify class members of their right to seek recovery for property damage related to a defective steel tubing product. The court ruled that "injunctive relief that requires the insured to incur costs to remedy covered losses is 'damages' within the scope of the policy." This approach is in line with the view that insurance policy language should be interpreted according to how an ordinary policyholder, rather than a lawyer, would understand it.

At the other end of the spectrum, a narrow interpretation limiting "damages" to payments of money ordered by a court has appeared in California. *See Aerojet-General Corp. v. Commercial Union*

Insurance Co., 155 Cal. App. 4th 132 (Cal. App. 3d Dist. 2007) (insurer did not owe a duty to indemnify the policyholder for a settlement that it negotiated with underlying claimant and executed without judicial supervision); *Columbia Casualty Co. v. Gordon Trucking, Inc.*, 758 F. Supp. 2d 909 (N.D. Cal. 2010) (same). While a minority view, policyholders should be aware that settlements should address the damages issue.

In *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 607 N.E.2d 1204 (1992), the court ruled that equitable relief could constitute damages. The court found coverage for injunctive claims brought by government agencies related to the insured's water pollution. The court rejected the insurers' argument that this was equitable rather than compensatory relief because "the technical difference between equity and law was outdated." *Outboard*, 154 Ill.2d at 100. Since the policy did not define damages, the court adopted the dictionary definition which did not distinguish between compensatory damages and the costs of complying with an injunction.

The appellate court gave "damages" its ordinary and popular meaning since the policy could have but did not define the term. The court noted that Webster's Dictionary defined "damages" as "the estimated reparation in money for detriment or injury sustained; compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right" and that Black's Law Dictionary defined damages as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury."

In *Zurich American Insurance Co. v. Nokia, Inc.*, 268 S.W.3d 487 (Tex. 2008), discussed below, the insurers argued that because the plaintiffs were seeking headsets, and not damages, their claims were not covered. They argued that because a headset would be inadequate relief for such injury, the prayer for relief for the cost of a headset is not "damages because of bodily injury." The court was unpersuaded. It found that some of the damages claimed sought compensatory damages, including but not limited to, amounts necessary to purchase headsets. It also held that because the policies do not define the term "damages," damages in the form of a headset neither clearly fall within a policy provision, nor were clearly excluded by the policy, therefore the term was ambiguous.

Where Bodily Injury Is Alleged

In *Plantronics, Inc. v. American Home Assur. Co.*, __ F.Supp.2d ___, 2014 U.S. Dist. LEXIS 75557 (N.D. Cal. 2014), the court granted the insured's motion for summary judgment, finding that the allegations of noise-induced hearing loss and the packaging's lack of adequate warnings for the insured's Bluetooth headsets alleged damages because of bodily injury. The underlying class actions went to great lengths to describe the noise-induced hearing loss risk engendered through extensive use, and therefore, the bodily injury was not speculative. The court acknowledged that the proof of suffering bodily injury might affect indemnity coverage, but the insurer was "not permitted to duck coverage simply because the complainants sought the tactical advantage of bringing their claims through a class action." *Plantronics*, fn. 39.

In *HPF, L.L.C. v. General Star Indemnity Co.*, 338 Ill. App. 3d 912, 788 N.E.2d 753, 273 Ill. Dec. 162 (2003), HPF sold a product line, including a product called Herbal Phen-Fen. Suit was filed against HPF under a California statute wherein the plaintiff alleged that HPF violated various California statutes through the unlawful labeling, distribution and promotion of Herbal Phen-Fen.

HPF tendered the defense of the complaint to General Star, its CGL insurer, which denied that it had the duty to defend or indemnify HPF in the action because the complaint did not seek damages for bodily injury. HPF settled the claim and filed a declaratory judgment action against General Star. The trial court granted summary judgment in favor of HPF.

On appeal, General Star contended that the summary judgment should not have been granted because the underlying action did not allege and did not seek damages for bodily injury as required by the General Star policy. HPF argued that the underlying complaint did seek damages of bodily injury because it was seeking to establish a fund for medical monitoring of all persons who used HPF's Herbal Phen-Fen products.

The appellate court reviewed the allegations in the underlying complaint and found that the essence of the complaint was that HPF misrepresented that its herbal products were proven safe and effective. The court went on to find that the underlying complaint did not make a single allegation that HPF's herbal products caused bodily injury or even that they might cause bodily injury. The court noted that the nature of the underlying complaint alleged a violation of a statute and was not seeking recovery for bodily injury resulting from exposure to toxins.

In *Medmarc Casualty Insurance Co. v. Avent America*, 612 F.3d 607 (7th Cir. 2010), Avent America sold various products to the public for use by toddlers and infants. Unfortunately, those products contained small amounts of bisphenol A (BPA), which, according to a significant amount of research, was shown to be harmful to humans, especially children. Even though Avent America was aware of this research, it still marketed the products both as superior to other similar items and as safe for infants and toddlers.

When the information regarding BPA's harmful effects came to light, a certified class of plaintiffs, in two consolidated actions, sued Avent America, alleging they had suffered economic damages by having to throw away the products once the presence of BPA came to light. These plaintiffs had purchased many of Avent America's baby products based on their belief the products were safe for their children. The plaintiffs also asserted claims for various state unfair trade practices violations, breaches of contract and unjust enrichment.

Avent America tendered the defense of the underlying class litigation to the insurers. Ultimately, all of the insurance companies filed declaratory judgment actions against Advent America seeking a no-coverage determination. The cases were consolidated, and the insurers moved for either judgment on the pleadings or for summary judgment. All of the parties to the consolidated declaratory judgment action agreed that the plaintiffs' claims did not contain any allegations of physical illness, the cost of future medical monitoring, fear of future injury or emotional distress. In short, the plaintiffs' claims against Avent America – that they had to throw away various products containing BPA – amounted simply to a "no-injury product liability claim." The insurers argued that the policies only provided coverage for claims arising out of "bodily injury," and there was no bodily injury in this case. The district court granted judgment for the insurers.

On appeal to the Seventh Circuit Court of Appeals, the court held that, even if every factual allegation in the plaintiffs' underlying complaint had been proven to be true, the plaintiffs could not recover for any "bodily injury." Avent America argued that BPA, even in low levels, must "create" or "cause" some level of bodily harm for the plaintiffs to have reasonably thrown away the products in question and, in turn, this caused them to suffer economic damages. The Seventh Circuit rejected that argument because the plaintiffs only alleged economic damages – not any bodily injuries. Consequently, even if BPA was ultimately proven to cause bodily injury in general, the plaintiffs had not suffered, nor alleged, any specific bodily injury.

Avent also claimed that the omission of any allegations of "bodily injury" from the plaintiffs' complaint in the underlying litigation was merely a drafting error or whim on the part of the plaintiffs' attorney. In response, the Seventh Circuit concluded the "omission" was not an error, but instead a strategic decision made because only a very small number of the individual class plaintiffs could potentially have alleged

bodily harm. To achieve class certification, the plaintiffs – as a whole – could only allege common harm, and the only common harm at issue was economic.

Interestingly, the Seventh Circuit noted that the insurers' counsel conceded at oral argument that had the complaint stated a claim for "bodily injury," the insurers would have had a duty to defend. Furthermore, the court of appeals stated that if the plaintiffs eventually amended their complaints to allege "bodily injury," then the insurers' counsel's duty-to-defend concession would obligate the insurers to defend Avent America under that situation. Nevertheless, the plaintiffs' present complaint and the underlying factual allegations failed to allege or state a cause of action related to "bodily injury," and the Seventh Circuit concluded that the district court properly found that a duty to defend had not arisen.

In *Zurich American Insurance Co. v. Nokia, Inc.*, 268 S.W.3d 487 (Tex. 2008), Nokia was sued in a number of class actions alleging that radiation emitted by their phones caused biological injury. Although none of the complaints used the term "bodily injury," the court held that allegations of injury at the cellular level, much like the subclinical injuries alleged by plaintiffs who have been exposed to asbestos, were sufficient to allege bodily injury.

Coverage Under Advertising Injury Or Personal Injury Liability Provisions

In *Battery Solutions, Inc. v. Auto-Owners Insurance Co.*, No. 311168 (Mich. App. 3/18/14) (unpub.), the claimant brought suit against the insured, with whom it had subcontracted for the disposal of waste materials, including lithium batteries, alleging that the insured had improperly disposed of the batteries in China, which damaged its goodwill and reputation. The CGL insurer argued that the disparagement did not arise out of the insured's business and was excluded by the breach of contract exclusion. The trial court agreed with the insurer. On appeal, the court noted that the underlying complaint contained no allegation of libel, slander or disparagement. The Chinese advertisement of the claimant's goods did not meet the definition of a disparagement, "a false and injurious statement that discredits or detracts from the reputation of another's character, property, product or business." The court rejected plaintiff's characterization of the advertisement as disparaging as "wholly based on a hypothetical consumer reaction."

In *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277, 913 N.E.2d 43 (2009), Binney & Smith settled a class action lawsuit claiming consumer fraud and trade practices violations in the packaging of its Crayola brand crayons, along with breach of express and implied warranties. The putative class consistent of all individual purchasers of Crayola crayons, and their complaint alleged that Crayola packaging falsely stated from 1969 to 1986 that the product was "nontoxic and safe for children," while crayons actually contained asbestos fibers. Although the U.S. Consumer Products Safety Commission (CPSC) reported that there was an "extremely low" risk of exposure to children using the crayons, Binney agreed with the CPSC to reformulate its crayons, and it quickly settled the class action. The class action settlement also addressed reformulation of the crayons and further required payment of the plaintiffs' attorney fees and publication of certain notices and advertisements.

Federal issued a series of commercial general liability (CGL) insurance policies to Binney between 1969 and 1996, three of which (in periods commencing 1980, 1983 and 1985) included coverage for "advertising injury claims." Federal filed a coverage action in Illinois state court, seeking declaratory judgment that it had no duty to defend or indemnify the class action. Federal asserted that Binney had not established the reasonableness of the settlement; that the settlement must be allocated between the covered consumer fraud claims and the noncovered warranty claims; and that if Binney could not show what portion of the settlement related to offenses committed during the effective periods of its advertising injury coverage, then the entire loss should be allocated pro rata according to each insurer's time on the risk.

Binney disagreed and, following a bench trial, it prevailed on each of these issues. The Appellate Court of Illinois affirmed that the settlement was reasonable. The appellate court noted that the allegations of false labeling came within Federal's advertising injury risk.

The appellate court rejected Federal's contention that the class action settlement had to be allocated between the covered consumer fraud claim and the noncovered warranty claim. The court reiterated its observation in *Commonwealth Edison Co. v. National Union Fire Insurance Co.*, 752 N.E.2d 555 (Ill. App. Ct. 2001), that requiring such allocations would "act[ ] as a chilling effect on the settlement of [the underlying] case," and followed *Commonwealth Edison's* holding that allocation between covered and noncovered claims was unnecessary where the plaintiff demonstrates that the primary focus of the underlying litigation was a covered loss and it settled in reasonable anticipation of that litigation. Because there was no way to decipher how much, if any, of the class action settlement was attributable to the warranty claims, and doing so would require a mini-trial, the appellate court found sufficient evidence that Binney had settled the class action in reasonable anticipation of liability under the covered consumer fraud count.

The court noted that the coverage was restricted to offenses "committed during the policy period in the course of the named insured's advertising activities." The court noted that such a policy period limitation is exactly what was missing from the insurance contracts at issue in prior Illinois cases that supported imposing joint and several liability on the insurer under the "all sums" rule in that case.

Accordingly, on remand, Binney was required to show an injury arising out of an offense committed during the policy period in the course of its advertising activities, *i.e.*, to delineate which portions of the class action settlement related to class members who had purchased Crayola crayons during the three relevant policy periods when Federal was on the advertising injury risk. If Binney could not make such a showing, the court directed a pro rata, time-on-the-risk allocation covering the entire 30-year period when Binney advertised its crayons as non-toxic, such that Federal would bear only one-tenth of the settlement liability based on its three years on the risk.

The Impact Of Exclusions

While it seems indisputably established that damage merely to the insured's "own product" is excluded from coverage,[3] the "your product" exclusion does not eliminate coverage for consequential damage to third-party property caused by defects in the insured's work or product. *See Wausau Underwriters Insurance Co. v. United Plastics Group, Inc., supra.* There are courts, however, which hold that consequential damages that flow exclusively from excluded property damage are not covered. *See Wisconsin Label Corp. v. Northbrook P&C Ins.*, 607 N.W.2d 276 (Wis. 2000) (economic loss did not result from either of the types of damages covered under the policy; therefore, there was no coverage) and *Trio's, Inc. v. Jones Sign Co.*, 444 N.W.2d 443 (Wis. App. 1989) (concluding that lost profits attributable to loss of use of the insured's product were not recoverable because "the insurance policy unambiguously excludes from coverage damage to the insured's product").

There is a split among courts, however, as to whether the "your product" exclusion eliminated coverage for damage to other property caused by the repair and replacement of the faulty work or product. (*See New Appleman 3-16 Law of Liability Insurance*, section 16.06 (Lamden)); *Bright Wood Corporation v. Bankers Standard Insurance Company*, 665 N.W.2d 544 (Minn. App. 2003) (damage to other property caused by repairs to insured's product is excluded).

[3] *See* 49 A.L.R.6th 169.

As an example of how the "insured product" exclusion was applied, in *B&D Contractors, Inc. v. Arwin Window Systems, Inc.*, 718 N.W.2d 256 (Wis. 2006), the court found the defect was the only damage alleged. B&D Contractors installed windows as part of a building renovation project. After installation was complete, the windows began breaking. It was determined that the window frames could not support the weight of the glass window panes. The frames bent under the weight of the glass panes, causing the windows to break. B&D removed and replaced all of the windows, including those windows that had not yet broken. B&D then sued the window manufacturer (Arwin Window Systems), the window frame manufacturer (Graham Architectural Products) and the window frame manufacturer's insurer (Transcontinental Insurance Company) for the replacement cost of the windows.

In the lawsuit, B&D alleged Arwin and Graham provided defective windows. B&D further alleged the Transcontinental policy covered the replacement cost of the windows. Transcontinental moved for summary judgment based on the policy's "your product" exclusion. The Wisconsin Court of Appeals affirmed judgment in favor of Transcontinental.

On appeal, B&D argued the "your product" exclusion did not apply because the damage to the windows was caused by or resulted from a "collapse" of the window frames. The court determined a "collapse" would render the "your product" exclusion inapplicable only if the damage to the window frames was either: (1) caused by a collapse or (2) the result of a collapse. First, the window frame damage was not caused by a collapse, because the collapse was caused by the defective window frames. Second, the damage to the window frames resulted in, and not from, the collapse. In other words, the window frames were defective before they were installed; the defects were neither caused by nor resulted from the collapse.

With regard to the "impaired property" exclusion (Exclusion (m)), the purpose is to eliminate coverage for purely economic losses caused when property cannot be used or has been rendered less useful by the incorporation of an insured's product. Obviously, it does not apply when the insured's product has damaged other tangible property or cannot be removed or replaced without damaging other property. The impaired property exclusion is also subject to a "sudden and accidental" exception.

In *Sony Computer Entertainment America, Inc. v. American Home Assurance Co., supra*, the court examined the scope of Exclusion (m) for "loss of use" property damage arising out of a "defect, deficiency, inadequacy or dangerous condition." Because the loss of use was the result of a defect in Sony's product, it was excluded. The court also rejected Sony's argument that the "sudden and accidental" physical injury exception to the exclusion applied. It found that the allegations provided more support for the theory that the devices deteriorated over time rather than that each class member's device experienced a sudden and accidental physical injury.

In *AOL v St. Paul*, *supra*, the court held that coverage for damages caused by the loss of use of the class members' computers was eliminated by the "impaired property" exclusion because the computers were "impaired property." The only defect was in the insured's software product, and once the product was uninstalled, the computers' functionality was restored.

In *Eyeblaster, Inc. v. Federal Insurance Co., supra*, the court rejected Federal's reliance on the "damage to impaired property or property not physically injured" exclusion because Federal did not meet its burden of proving that the exclusion applied. First, the court held that plaintiff's computer could not be considered "impaired property" within the meaning of the exclusion because no evidence existed that the computer could be restored to use by removing Eyeblaster's product or work from it. Second, the plaintiff alleged that he unsuccessfully attempted to have the damage to his computer repaired, and thus Federal could not demonstrate that the computer could be restored by the removal of Eyeblaster's product or work.

In *Watts Industries, Inc. v. Zurich American Insurance Co.*, *supra*, the parties agreed that defect in the substandard parts themselves was not covered due to the "your product" exclusion. In focusing on the "impaired property" exclusion, however, Zurich argued that since the water systems could be fully restored to use by the replacement of the defective parts, there was no coverage for any replacement costs. Watts argued that the impaired property exclusion "does not apply where the other property [which incorporates the allegedly faulty work or product] has been physically injured." (*Croskey, et al.*, Cal. Practice Guide: Insurance Litigation (The Rutter Group 2003) ¶7:1484.3, p. 7E-35; *see also, e.g., Gaylord Chemical Corp. v. ProPump, Inc.*, (La. Ct. App. 2000) 753 So. 2d 349, 355; *Standard Fire Ins. Co. v. Chester O'Donley* (Tenn. Ct. App. 1998) 972 S.W.3d 1, 10; *Imperial Cas. & Indem. v. High Concrete Structures* (3d Cir. 1988) 858 F.2d 128, 136; *Lang Tendons, Inc. v. Northern Ins. Co. of New York* (E.D.Pa. 2001) 2001 WL 228920 at p. 9; *McKinney Builders II, Ltd. v. Nationwide Mut. Ins. Co.* (N.D.Tex. 1999) 1999 WL 608851 at p. 9; *Transcontinental Ins. v. Ice Systems of America* (M.D.Fla. 1994) 847 F. Supp. 947, 950.) Under the reasoning in *Armstrong*, *supra*, the municipalities alleged physical injury to their water systems through the incorporation of the defective parts, and Zurich did not prove the absence of such injury. Thus, the impaired property exclusion did not apply.

Although Zurich assumed that replacement of the defective parts would cure all problems with the water systems, the allegations of the underlying complaints did not. In addition to seeking replacement of the parts, the municipalities also claimed costs for lead monitoring and abatement. As such, the court found they implicitly alleged that mere replacement of the parts would not fully restore the water systems. As with contamination of the water, Zurich offered no evidence to prove the impossibility of containing contamination of the water systems even after the replacement of the defective parts. Thus, since Zurich could not negate the possibility of physical injury to the municipal water systems by incorporation of the substandard parts, the court affirmed coverage in favor of Watts.

In *U.S. Metals, Inc. v. Liberty Mutual Group, Inc*., __ F.3d __, 2014 U.S. App. LEXIS 17966 (5th Cir. 9/19/14), the Fifth Circuit certified two questions of law to the Supreme Court of Texas relating to the interpretation of two product liability exclusions which will have an important effect on future product liability class actions. Although the case does not involve a class action, but rather a commercial dispute between Exxon and US Metals, it deals with the issue of whether defects arising from the incorporation of US Metals' weld neck flanges into Exxon's nonroad diesel facilities constituted property damage.

Exxon discovered a leak in one of the installed flanges. It claimed the only way to mitigate its damages was to replace all the flanges. The replacement would require portions of the refineries to be shut down for several weeks, resulting in the loss of use of the refineries.

Liberty Mutual denied coverage to US Metals based on the "your product" and "impaired property" exclusions. Because there is no controlling Texas authority determining whether "physical injury" or "replacement" as used in the two exclusions is ambiguous, the court looked to the Supreme Court of Texas for answers.

CONCLUSION

There is no limit to the number of cases dealing with coverage for consumer class action products liability actions. Finding coverage for these cases is usually in the detail of what plaintiffs allege in their pleadings, the damages they claim, and the remedies they seek. Coverage can also be affected by how settlements are structured and negotiated. Many of the above cases that do not find coverage contain the clues for how to change the outcome, if counsel for the class and the insured are considering insurance in the pleading and settlement stages.

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CASE LIST OF CLASS ACTION CONSUMER PRODUCTS COVERAGE CASES

- *America Online, Inc. v. St. Paul Mercury Insurance Co.*, 207 F.Supp. 459 (E.D. Va., 2002), aff'd by 347 F.3d 89 (4th Cir. 2003)
- *Amerisure Mutual Insurance Co. v. Microplastics, Inc.*, 622 F.3d 806 (7th Cir. (Ill.) 2010)
- *Amtrol Inc. v. Tudor Insurance Co.*, No. 01-1-461, 2002 U.S. Dist. LEXIS 18691 (D. Mass. Sept. 10, 2002)
- *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, (1996) 45 Cal.App.4th 1, 52 Cal. Rptr. 2d 690
- *B&D Contractors, Inc. v. Arwin Window Systems, Inc.*, 718 N.W.2d 256 (Wis. 2006)
- *Battery Solutions, Inc. v. Auto-Owners Insurance Co.*, No. 311168 (Mich. App. 3/18/14) (unpub.)
- *Eljer Manufacturing v. Liberty Mutual Insurance Co.*, 972 F.2d 805 (7th Cir. (Ill.) 1992)
- *Eyeblaster, Inc. v. Federal Insurance Co.*, 613 F.3d 797 (8th Cir. 2010)
- *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277, 913 N.E.2d 43 (2009)
- *Hartford Accident and Indemnity Co. v. Beaver*, 466 F.3d 1289 (11th Cir. 2006)
- *HPF, L.L.C. v. General Star Indemnity Co.*, 338 Ill. App. 3d 912, 788 N.E.2d 753, 273 Ill. Dec. 162 (2003)
- *Indalex v. National Union Fire Insurance Co.*, No. 126 WAL 2014 (9/18/14), 2014 Pa. LEXIS 2411
- *Kaufman & Broad Monterey Bay v. Travelers Property Casualty Co. of America*, 2012 U.S. Dist. LEXIS 100005, 2012 WL 2945932 (N.D. Cal. 7/18/12)
- *Liberty Mutual Insurance Co. v. Pella Corp.*, 631 F.Supp.2d 1125 (S.D. Iowa 2009), aff'g in pt, rev'g in pt, 650 F.3d 161 (8th Cir. 2011)
- *Medmarc Casualty Insurance Co. v. Avent America*, 612 F.3d 607 (7th Cir. 2010)
- *National Union Fire Insurance Co. v. Terra Industries, Inc.*, 346 F.3d 1160 (8th Cir. 2003)
- *Netherlands Insurance Co. v. Main Street Ingredients, LLC*, 745 F.3d 909 (8th Cir. 2014)
- *Omega Flex, Inc. v. Pacific Employers Insurance Co.*, 78 Mass. App. Ct. 262, 937 N.E.2d 5265 (2010)
- *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 607 N.E.2d 1204 (1992)
- *Plantronics, Inc. v. American Home Assur. Co.*, __ F.Supp.2d ___, 2014 U.S. Dist. LEXIS 75557 (N.D. Cal. 2014)

- *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, (2000) 78 Cal.App.4th 847, 865-866, 93 Cal. Rptr. 2d 364
- *Silgan Containers, LLC v. National Union Fire Insurance Co.*, No. C09-5971 RS, U.S. Dist. Ct. N.D. Cal. (7/30/14)
- *Sony Computer Entertainment America, Inc. v. American Home Assurance Co*., 532 F.3d 1007 (9th Cir. 2008)
- *Titanium Products, Inc. v. Federal Insurance Co.*, 2014 NJ Super. Unpub. LEXIS 2208 (NJ Sup. Ct. App. 9/10/14)
- *Travelers Insurance Co. v. Eljer Manufacturing, Inc*., 757 N.E. 2d 481 (Ill. 2001)
- *U.S. Metals, Inc. v. Liberty Mutual Group, Inc*., __ F.3d __, 2014 U.S. App. LEXIS 17966 (5th Cir. 9/19/14)
- *Watts Industries, Inc. v. Zurich American Insurance Co.*, (2004) 121 Cal. App. 4th 1029
- *Wausau Underwriters Insurance Co. v. United Plastics Group, Inc.*, 512 F.3d 953 (7th Cir. 2008)
- *Zurich American Insurance Co. v. Nokia, Inc.*, 268 S.W.3d 487 (Tex. 2008)