INSURANCE COVERAGE
SECTION OF LITIGATION
Summer 2017, Vol. 27 No. 3

That Consumer Class Action Suit You're Defending May Be Covered by Insurance

Finley Harckham[1] and Luma Al-Shibib[2] – September 5, 2017

Every day, class actions are commenced on behalf of consumers against manufacturers, retailers, financial institutions, and service providers. Those actions raise a wide range of allegations including, to name just a few, breach of warranty for product defects, deceptive practices in the marketing of products or services, undisclosed or improper fees or other charges, and invasion of privacy through the electronic collection of personal data.[3] Some companies assume that such cases are not covered by their insurance because in order to be certified, class actions must be crafted so that issues common to all of the plaintiffs predominate over individual issues and therefore tend not to seek monetary damages that are covered by liability insurance.[4] That skepticism is understandable because many, or even most, consumer class actions seek only relief that is not covered under standard form policies, such as damages for products failing to perform as intended,[5] or an injunction against deceptive practices barred by consumer protection statutes.[6]

However, all class action complaints should be read carefully for any potentially covered claims, bearing in mind that most companies have broad coverage under a variety of insurance policies. For example, commercial general liability (CGL) policies cover damages because of third-party property damage and bodily injury, and they also typically insure for personal and advertising injury offenses. Companies may also have coverage for a variety of "wrongful acts" under directors' and officers' (D&O), errors and omissions (E&O), and employment practices liability (EPL) policies. Further, invasion of privacy claims may be covered under cyber policies or under cyber coverage parts found in other policies, as well as under CGL policies' advertising injury and personal injury coverage parts.

Most importantly, even if a class action complaint does not clearly contain incontrovertible covered allegations, it may assert claims that are *potentially* covered, and that is all that is needed to trigger valuable defense coverage.[7] Defense coverage can provide two benefits: (1) the payment of litigation fees and costs, and (2) giving the insurance company an incentive to contribute to settlements even if it has asserted defenses to coverage.

This article discusses types of class action complaints that may be covered, in whole or in part, by corporate insurance policies.

Product Defect Claims that Allege Bodily Injury or Third-Party Property Damage, May Be Covered under a CGL Policy

As a general rule, claims alleging product defects are covered by CGL insurance if they seek damages because of bodily injury or damage to third-party property. Standard CGL policies, promulgated by the Insurance Services Office (ISO) and generally adopted by insurance companies,[8] typically provide coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'. . . ."[9] However, coverage generally has been found to have been excluded for claims based solely on purely economic loss resulting from a product that does not function as expected or damage that the product causes to itself.[10] Indeed, typical product defect exclusions in CGL policies exclude coverage for "'Property damage' to 'your product' arising out of it or any part of it . . . [and] 'Property damage' to 'your work; arising out of it or any part of it. . . ."[11] The term "Your product" is defined, in pertinent part, as "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by . . . You."[12]"Your work" is defined as "(1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work operations . . . [including] (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work'; and (2) The providing of or failure to provide warnings or instructions."[13] As a general proposition, however, policy exclusions are construed strictly and narrowly against the insurance company, which has the burden of proving an exclusion's applicability.[14]

Many class action complaints allege that products are dangerous due to a design or manufacturing defect.[15] Notably, in an effort to demonstrate a defect, such complaints often provide examples of alleged bodily injuries or damage to third-party property caused by the product. These complaints often use vague and general terms to describe the relief sought, including undefined "damages," and should be read carefully to determine whether they leave open the possibility that the plaintiffs are alleging covered harm. The answer can often be found in two places in the complaint.

First, most complaints contain a section describing the putative class members, which may or may not specifically exclude individuals who have suffered damage or injury. The absence of such a limitation to the class may be an indication that the class is intended to include people whose losses include bodily injury or property damage that may be covered by CGL policies.[16]

Second, the statutory basis for certain claims, such as the Uniform Commercial Code (UCC)[17] and some warranty and consumer protection acts, not only address the repair, replacement, or sale of defective products, but may also allow recovery of direct or consequential damages (or both) resulting from a breach of warranty.[18]

By way of example, Article 2 of the UCC, which has been codified in many states, explicitly allows the recovery of consequential damages for a seller's breach of

warranty.[19] Such consequential damages include "(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty."[20] Thus, consequential damages that are based on alleged bodily injury or third-party property damage could be covered under typical CGL policies. For example, in *Nokia, Inc. v. Zurich American Insurance Co.*,[21] the court held that the cost of telephone accessories can be a measure of damages sought "because of bodily injury," and thereby triggered the insurance companies' duty to defend the cell phone manufacturer against the underlying class action complaints.[22] In so holding, the court expressly rejected the insurance companies' argument that they were relieved of their duty to defend because several "business risk" exclusions applied to preclude coverage.[23] The "business risk" exclusions preclude coverage for "property damage to your product," "property damage to impaired property" (defined as "tangible property, other than your property or your work"), and damages for the recall of the product (also known as the "sistership" exclusion).[24]None of these exclusions applied because the underlying class actions did not contain allegations of property damage, either to the cell phones themselves or to "impaired property," or damages for recall of the cell phones.[25] Accordingly, the business risk exclusions were not triggered and did not relieve the insurers of their duty to defend the underlying class actions alleging bodily injury.[26]

Similarly, claims alleging product defect may be covered under CGL policies if the product has affected the functionality of third-party property, other than property into which it has been incorporated.[27]

Insurers in such cases may raise the sistership exclusion as a bar to coverage. Generally, that exclusion precludes coverage for the following:

> Damages claimed for any loss, costs or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> (1) "Your product"
>
> (2) "Your work"; or
>
> (3) "Impaired property";
>
> if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.[28]

The sistership exclusion, however, does not bar coverage in the absence of a product recall and applies only in connection with "the cost of 'preventative or curative action' when the insured withdraws a product in situations in which a danger is

merely apprehended."[29] It does not exclude coverage for the "actual damage caused by the very product giving rise to such an apprehension."[30] Moreover, it does not apply to the recall of a third-party product of which the insured's product is a component.[31] Thus, in the absence of a recall of the insured's product and in connection with claims that seek recovery for actual damage caused by the product, in the form of diminished functionality to third-party property, the sistership exclusion will not bar coverage, as is demonstrated in the cases below.

In *American Motorists Insurance Co. v. The Trane Co.*,[32] a federal court held that a faulty heat exchanger, a component part used in a natural liquid gas plant's cooling processor, that caused the plant's processor to function at 25 percent below its production capacity, constituted a "loss of use" of tangible property. The court in *Trane* recognized that "the term 'property damage' does not require physical damage to the property; injury to tangible property may take the form of diminished value or loss of use."[33] Accordingly, the CGL insurer for Trane, the manufacturer of the faulty component part, was ordered to defend Trane against the claims asserted by the plant owner.[34]

A number of other cases also have interpreted "loss of use" coverage to include damages for diminished functionality. For instance, an Ohio federal court held that decreased worker productivity arising from defective roof fans in a boiler house constituted a "loss of use of tangible property that is not physically injured";[35] a Wisconsin district court held that loss of production in milk, offspring, and beef constituted "property damage" in the form of "loss of use";[36] the Michigan Court of Appeals found "loss of use" of land where a grower's crop did not mature because seeds were unsuitable for growth;[37] and a California appellate court held that "loss of use of tangible property that is not physically injured" occurred when defective strawberry plants resulted in a loss of strawberry production and loss of use of the growers' land.[38]

Further, even though the costs of remedying damage to the defective product itself generally might be excluded,[39] coverage may exist for defect claims if replacing the product would cause damage to other property.[40] For example, allegations that a plumbing system installed in homes is defective would not ordinarily be covered if the plaintiffs sought only to recover the cost of the product, but damage caused to other property, such as walls, in order to remove and replace the product might be covered. In fact, in *Eljer Manufacturing v. Liberty Mutual Insurance Co.*,[41] the Court of Appeals for the Seventh Circuit held that for purposes of assessing coverage under a CGL policy, a defective plumbing system installed in a building caused tangible injury or property damage to the building at the time of its installation. Such property damage was inflicted even if the plumbing system had not yet leaked because the defective plumbing was the equivalent of a "ticking time bomb" waiting to explode.[42] Other courts have reached similar conclusions under a CGL policy, holding that

· "the presence of wood splinters in . . . diced roasted almonds caused property damage to the nut clusters and cereal products in which the almonds were incorporated";[43]and

· property damage to a building occurred upon installation of products containing asbestos.[44]

Policy Exclusions for Claims Alleging Improper Fees or Other Charges by Financial Institutions Often Do Not Apply

Numerous class actions have alleged that banks and other financial institutions charge hidden fees or otherwise improperly handle transactions or accounts.[45] Such claims seek the recovery of improper charges, which generally fall within the coverage grant of D&O and E&O policies.[46] However, insurance companies often deny coverage for these claims based on exclusions that apply to causes of action seeking to recoup "ill-gotten gains." Those exclusions often do not apply, though, primarily because of one of two reasons.

First, exclusions for "ill-gotten gains" typically are limited to instances where there has been a judicial determination that the policyholder was not entitled to the money generated by the challenged practice, and the exclusions therefore are not triggered by mere allegations of illicit profit in the absence of an explicit judicial finding of such.[47] Thus, "[w]hen an underlying action alleging ill-gotten gains and seeking disgorgement of those gains settles before trial, there is no final adjudication in that action determining that the gains were ill-gotten and ordering the return of those gains."[48] Therefore, in instances of settlement, the ill-gotten gains exclusion is not triggered and does not bar coverage for the claim.[49]

Second, such exclusions commonly do not apply where the enrichment of the policyholder is not a necessary element of the claim but merely incidental thereto. In other words, such an exclusion

by its terms, requires a profit or gain that is illegal; not an illegal act that produces a profit or gain to the insured as a by-product. This exclusion, therefore, would be applicable in cases of theft, such as insider trading, but is inapplicable to illegalities such as securities misrepresentation to which a private gain might be incidental.[50]

Thus, although these types of exclusions are often raised as a basis to deny coverage, a court ultimately may conclude that the exclusions are not triggered and do not bar coverage.

Invasion of Privacy Claims

Many class actions assert invasion of privacy by employers or by a wide array of players in the computer, Internet, and telecommunications industries.[51] Such claims may be covered under a variety of insurance policies, including CGL (personal injury), EPL, cyber, D&O, and E&O.

For example, in *Owners Insurance Co. v. European Auto Works, Inc.*,[52] the Eight Circuit Court of Appeals held that a class action lawsuit asserting violations of the Telephone Consumer Protection Act (TCPA) constituted a claim for advertising injury, based on invasion of privacy, and thus was covered under the CGL policy at issue. The policy there contained a fairly typical coverage provision for "damages because of . . . 'advertising injury,'" defined as, among other things, "oral or written material that violates a person's right of privacy."[53] The court of appeals affirmed the lower federal court decision that the sending of unsolicited advertisements by facsimile in violation of the TCPA constituted an "oral or written publication of material that violate[d] a person's right of privacy" and therefore consituted an advertising injury.[54]

On the other hand, some policies exclude claims under certain statutes that prohibit the transmission of personal information, but those laws do not necessarily address simply gathering such information.[55] In *LensCrafters, Inc. v. Liberty Mutual Fire Insurance Co.*,[56] a California federal court held that allegations that LensCrafters was granted improper access to confidential patient medical information obtained during eye exams and then loaded onto an integrated computer system constituted a claim alleging personal injury for violation of a person's right to privacy under an E&O policy. In so holding, the *LensCrafters* court stated that "publication" of material that violates a person's right to privacy does not require widespread dissemination or disclosure to the public at large.[57]

The Value of Defense Coverage

Policyholders should not give up if a covered claim does not jump off the page of a class action (or any) complaint, or if the main thrust of the action is an excluded claim. Under most liability policies, the insurance company's defense obligation is triggered as long as *any* claim in the complaint is *potentially* covered.[58] The obligation to provide defense coverage arises if the allegations contained in the complaint suggest a possibility of coverage when compared against the insurance policy's scope of coverage.[59] So all that must be shown in order to secure defense coverage is that the plaintiffs might be able to prove that some allegation is not excluded.[60] In that regard, most courts look to the factual allegations of the complaint rather than the causes of action asserted.[61] The standard is to be liberally applied by the courts, and in most jurisdictions, the duty to provide defense coverage is an issue of law that is typically decided on summary judgment based only on a comparison of the complaint and the insurance policy, without discovery or consideration of any other extrinsic evidence.[62] Therefore, the defense obligation often can be determined quickly and inexpensively—at least compared with litigating other issues.

However, establishing a defense obligation may not be the end of the dispute over defense coverage. Whether the insurance company must pay all defense costs or only those necessary for potentially covered claims, and whether the insurance company may later be able to recoup defense costs depending on the outcome of the case, varies from policy to policy and under different states' laws.[63]

For example, the California Supreme Court has held that in the absence of a reimbursement provision in the policy to the contrary, an insurer has the right to recoup defense costs expended on claims for which no potential for coverage exists under the policy.[64] Other issues may arise over the defense counsel rates that must be paid or reimbursed by the insurance company.[65] For instance, such rates must be "reasonable and necessary" to the defense of the claim—an issue for which the burden of proof rests with the policyholder.[66] D&O and E&O policies often refer to lists of panel counsel from which the policyholder may choose. Most insurers also require counsel to abide by often onerous published billing guidelines to which defense counsel must adhere.[67]

As to the panel counsel lists, oftentimes they include highly qualified counsel with whom the insurance company has reached agreement over the rates to be charged. On the other hand, many other policies, particularly CGL policies, do not include panel counsel lists or billing guidelines, so the rates to be paid by the insurance company can be the subject of a dispute when, as is often the case, the insurance company reserves its rights to deny coverage and the policyholder selects counsel to protect its interests.[68]

Nonetheless, defense coverage is valuable not only for the payment, or at least advancing, of litigation costs, which are often the greatest expense of a class action. It also can incentivize an insurance company that is incurring defense costs to pay, or at least contribute to, the settlement of a class action to bring finality to its obligation.

Conclusion

While at first blush a corporate insurance policy may not appear to cover a class action lawsuit, an analysis of available coverage may prove otherwise. Policyholders should not assume that class actions against them by consumers will not be covered. Instead, they should review the complaints and their insurance policies carefully and consider the potential for coverage under all available policies. Indeed, all hope for coverage is not lost simply because a complaint is styled as a class action. A savvy policyholder and its coverage counsel should closely scrutinize all available insurance in an effort to find coverage. Many times, it might well be there. The policyholder and its counsel simply must find it.

Finley Harckham and Luma Al-Shibib are with Anderson Kill P.C. in the firm's New York office.

[1] Finley Harckham is a shareholder in the New York office of the law firm of Anderson Kill P.C. He regularly represents corporate and government entity policyholders in insurance recovery matters, including arbitrations and litigations.
[2] Luma Al-Shibib is a shareholder in the New York office of the law firm Anderson Kill P.C. She regularly represents policyholders in insurance recovery

matters involving commercial general liability and professional liability policy claims.

[3] *See, e.g.*, *McLeod v. CenturyLink, Inc.*, No. 2:17-cv-04504-SJO-PLA (C.D. Cal.) ($12 billion class action alleging overbilling, billing of undisclosed fees, and other fraudulent practices by Internet service provider); *Estrada v. Johnson & Johnson*, No. 2:14-cvb-01051-TLN-KJN (E.D. Cal.) (class action lawsuit alleging that manufacturer of unsafe talcum powder knowingly marketed its defective product as safe and breached its warranty of merchantability by placing cancer-causing product into the stream of commerce); *Opperman v. Path, Inc.*, No. 1:12-cv-00219-JST (W.D. Tex.) (class action against several large technology and social networking companies, including Facebook, Twitter, and Apple, alleging improper electronic collection and dissemination of personal data).

[4] Under the Federal Rules of Civil Procedure, a class action cannot be maintained unless "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 623 (1997). Predominance is established by showing "that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." Rutstein v. Avis Rent-a-Car Sys. Inc., 211 F.3d 1228, 1233 (11th Cir. 2000).

[5] For example, commercial general liability policies contain standard exclusions for product defects, excluding coverage for "'Property damage' to 'your product' arising out of it or any part of it." Insurance Services Office, Inc., Commercial General Liability Coverage Form No. CG 00 01 04 13 (2012) [hereinafter ISO CGL Form], § I.A.2.k-l.

[6] Occurrence-based commercial general liability policies typically provide coverage for "those sums that the insured becomes legally obligated to pay as damages. . . ." ISO CGL Form, § I.A.1. Declaratory relief and injunctive relief do not constitute "damages" as that term is used in such policies. *See* Sch. Dist. of Shorewood v. Wausau Ins. Cos., 488 N.W.2d 82, 92 (Wis. 1992).

[7] Gray v. Zurich Ins. Co., 419 P.2d 168, 177 (Cal. 1966) ("An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.").

[8] Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co., 623 A.2d 1128, 1129 & n.1 (Del. Super. Ct. 1992) ("most if not all insurers use ISO standard-form language in their policies . . . nearly or completely verbatim").

[9] ISO CGL Form, § I.A.1.a.

[10] Reliance Nat'l Ins. Co. v. Hatfield, 228 F.3d 909, 913 (8th Cir. 2000) (CGL policy's product defect exclusion for "property damage to the named insured's products" excluded coverage for insured's defective airplane engines); F & H Constr. v. ITT Hartford Ins. Co., 12 Cal. Rptr. 3d 896, 902 (Cal. Ct. App. 2004) (damages alleged by insured-subcontractor for costs of modifying defective pile caps it supplied to the contractor and contractor's lost early completion bonus

were not recoverable as property damage because they constituted "intangible economic damages rather than damages 'to tangible property.'").
[11] ISO CGL Form, § I.A.2.k-l.
[12] ISO CGL Form, § V.21.
[13] ISO CGL Form, § V.22.
[14] *See, e.g.*, Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995)(applying New York law); Cont'l Cas. Co. v. City of Richmond, 763 F.2d 1076 (9th Cir. 1985)(applying California law); 2-6 *Appleman on Insurance Law & Practice Archive* § 6.5 (2d ed. 2011)(collecting cases).
[15] *Morrison v. Ferrari N. Am. Inc.*, No. 2:16-cv-02360 (D.N.J.) (alleging car engine defect); *Estrada v. Johnson & Johnson*, No. 2:14-cvb-01051-TLN-KJN (E.D. Cal.) (alleging product defect in talc-based baby powder leading to increased risk of cancer among users).
[16] *See* Hartford Fire Ins. Co. v. Thermos L.L.C., 146 F. Supp. 3d 1005, 1014 (N.D. Ill. 2015) (in class action against Thermos alleging that its baby bottles leaked and were defective, court held that putative class could include those who had suffered third-party property damage, stating that "while their proposed class definition excluded those who suffered bodily injury, it did not include a similar exclusion for those who suffered property damage, meaning that damage to third party property and loss of use of milk, juice, and other liquids remained in play").
[17] *See, e.g.*, Tex. Bus. & Com. Code §§ 2.714, 2.715; Fla. Stat. §§ 672.714, 672.715; Mass. Gen. Laws ch. 106, §§ 2-714, 2-715.
[18] *See* In re GM LLC Ignition Switch Litig., No. 14-MD-2543 (JMF), 2017 U.S. Dist. LEXIS 103106, at *355–56 (S.D.N.Y. June 30, 2017) (in class action against vehicle manufacturer for defective ignition switch asserting, inter alia, violations of various state consumer protection laws and breach of warranty, court recognized that "most state courts construe their consumer protection statutes to permit recovery beyond actual damages, including incidental and consequential damages").
[19] U.C.C. § 2-714(3).
[20] U.C.C. § 2-715(2)(a)–(b).
[21] Nokia, Inc. v. Zurich Am. Ins. Co., 202 S.W.3d 384, 392 (Tex. App. 2006), aff'd on other grounds, Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.2d 487 (Tex. 2008).
[22] *See also* Voicestream Wireless Corp. v. Fed Ins. Co., 112 F. App'x 553 (9th Cir. 2004); N. Ins. Co. of New York v. Balt. Bus. Commc'ns, Inc., 638 F. App'x 414 (4th Cir. 2003); Motorola, Inc. v. Associated Indem. Corp., 878 So. 2d 824 (La. Ct. App. 2004).
[23] Nokia, 202 S.W.3d at 392.
[24] Nokia, 202 S.W.3d at 392.
[25] Nokia, 202 S.W.3d at 392.
[26] Nokia, 202 S.W.3d at 392.
[27] Standard form CGL policies define "Property damage" as "Physical injury to tangible property, including all resulting loss of use of that property . . . ; or . . . Loss of use of tangible property that is not physically injured." ISO CGL Form, § V.17.
[28] ISO CGL Form, § I.2.n.

[29] Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690, 747 (Cal. Ct. App. 1996) (citations omitted); Centillium Commc'ns, Inc. v. Atl. Mut. Ins. Co., 528 F. Supp. 2d 940, 950 (N.D. Cal. 2007).
[30] *Armstrong World Industries*, 52 Cal. Rptr. 2d at 747 (citations omitted).
[31] Thruway Produce, Inc. v. Mass. Bay Ins. Co., 114 F. Supp. 3d 81, 96 (W.D.N.Y. 2015) (sistership exclusion did not apply because the product that was recalled was not the insured's apples but the jars of baby food into which the apples were incorporated).
[32] American Motorists Ins. Co. v. Trane Co., 544 F. Supp. 669, 683 (W.D. Wis. 1982), aff'd, 718 F.2d 842 (7th Cir. 1983).
[33] Trane, 544 F. Supp. at 682.
[34] Trane, 544 F. Supp. at 686.
[35] Hartzell Indus., Inc. v. Fed. Ins. Co., 168 F. Supp. 2d 789, 795 (S.D. Ohio 2001).
[36] Anderson v. Federated Mut. Ins. Co., No. 00-C-312-C, 2000 U.S. Dist. LEXIS 23465, at *25 (W.D. Wis. Oct. 27, 2000).
[37] Economy Mills of Elwell, Inc. v. Motorists Mut. Ins. Co., 154 N.W.2d 659, 664 (Mich. Ct. App. 1967).
[38] Hendrickson v. Zurich Am. Ins. Co., 85 Cal. Rptr. 2d 622, 626 (Cal. Ct. App. 1999).
[39] *See* Fritz Indus., Inc. v. Wausau Underwriters Ins. Co., No. Civ. A. 3:02-CV-894-L, 2004 U.S. Dist. LEXIS 2638, 2004 WL 396258, at *5 (N.D. Tex. Jan. 26, 2004) (holding that damages sought in an underlying lawsuit for labor and material costs to replace the insured's allegedly defective floor tile were not covered under CGL policy because the "your product" exclusion applied).
[40] Fritz Industries, 2004 WL 396258, at *5 (recognizing that coverage could exist if underlying lawsuit alleged damage to the subfloor in connection with defective tiles and/or the repair and replacement of the tiles); *see also* Eljer Mfg. v. Liberty Mut. Ins. Co., 972 F.2d 805 (7th Cir. 1992).
[41] Eljer Mfg. v. Liberty Mut. Ins. Co., 972 F.2d 805, 814 (7th Cir. 1992).
[42] *Eljer Manufacturing*, 972 F.2d at 809.
[43] Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc., 93 Cal. Rptr. 2d 364, 377 (Cal. Ct. App. 2000).
[44] Md. Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 627 (2d Cir. 1993).
[45] *See, e.g.*, *Gober v. Wells Fargo & Co.*, No. 2-15-cv-07120 (C.D. Cal.) (class action alleging hidden fees in commercial real estate loans); *Barlow v. Zions Bancorp*, No. 2:12-cv-00929 (D. Utah) (class action alleging that bank processed customer transactions in a deliberate manner to maximize amount of overdraft fees charged).
[46] *See* U.S. Bank Nat'l Ass'n v. Indian Harbor Ins. Co., No. 12-cv-3175 (PAM/JSM), 2014 U.S. Dist. LEXIS 91335, at *13 (D. Minn. July 3, 2014) (analyzing coverage for underlying class action lawsuit alleging improper fees under bank's professional liability policies and holding that coverage was not precluded as matter of law).
[47] U.S. Bank N.A. v. Indian Harbor Ins. Co., 68 F. Supp. 3d 1044, 1050 (D. Minn. 2014).

[48] U.S. Bank, 68 F. Supp. 3d at 1050.
[49] Burks v. XL Specialty Ins. Co., No 14-14-740-CV, 2015 Tex. App. LEXIS 11610, at *19 (Tex. App. Nov. 10, 2015) (settlement of underlying action not a "final determination"; therefore, ill-gotten gains exclusion not triggered); Gallup, Inc. v. Greenwich Ins. Co., C.A. No. N14C-02-136FWW, 2015 Del. Super. LEXIS 129, at *26–31 (Del. Super. Ct. Feb. 25, 2015) (settlement of underlying claims was covered under professional liability policies, and exclusions for ill-gotten gains, requiring a final adjudication, did not bar coverage where the claims were settled).
[50] Alstrin v. St. Paul Mercury Ins. Co., 179 F. Supp. 2d 376, 400 (D. Del. 2002); *see also* Onebeacon Am. Ins. Co. v. City of Zion, 119. F. Supp. 3d 821, 831, 835 (N.D. Ill. 2015) (holding that E&O exclusion for "[a]ny 'claim' arising directly or indirectly out of, or in any way related to any insured gaining any profit, advantage or remuneration to which that insured is not legally entitled" did not bar coverage for fraud and civil conspiracy claims because "[n]owhere is profit, advantage, or remuneration a requisite element of either cause of action").
[51] *E.g.*, *Campbell v. Facebook Inc.*, No. 4:13-cv-05996 (N.D. Cal.) (class action alleging that Facebook violated federal and state privacy laws by using data from its users' private emails to generate targeted advertisements); *Bennett v. Lenovo (U.S.) Inc.*, No. 3:15-cv-00368 ((C.D. Cal.) (class action alleging that computer manufacturer installed malicious software on its computer products allowing it to remotely monitor its consumers' Internet activity in violation of state and federal privacy laws).
[52] Owners Ins. Co. v. European Auto Works, Inc., 695 F.3d 814, 822 (8th Cir. 2012).
[53] *Owners Insurance* Co., 695 F.3d at 817.
[54] *Owners Insurance* Co., 695 F.3d at 817; *see also* Nat'l Union Fire Ins. Co. v. Papa John's Int'l, Inc., 29 F. Supp. 3d 961, 968 (W.D. Ky. 2014) (class action lawsuit alleging that defendant sent unsolicited text messages to the class plaintiffs' cell phones constituted a violation of a person's right of privacy and therefore was covered under insured's CGL policy as a personal or advertising injury).
[55] For example, typical CGL personal and advertising injury liability covers "damages because of 'personal and advertising injury' . . . caused by an offense arising out of your business. . . ." ISO CGL Form, § I.B.1.a–b. "'Personal and advertising injury' means injury, including consequential 'bodily injury', arising out of . . . Oral or written publication, in any manner, of material that violates a person's right of privacy. . . ." ISO CGL Form, § V.14.e.
[56] LensCrafters, Inc. v. Liberty Mut. Fire Ins. Co., No. C 04-1001 SBA, 2005 U.S. Dist. LEXIS 47185, at *31 (N.D. Cal. Jan. 20, 2005).
[57] LensCrafters, 2005 U.S. Dist. LEXIS 47185, at *31.
[58] Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 295, 24 Cal. Rptr. 2d 467, 471, 861 P.2d 1153, 1157 (1993).
[59] Hartford Accident & Indem. Co. v. Beaver, 466 F.3d 1289, 1292 (11th Cir. 2006); IBM v. Liberty Mut. Ins. Co., 363 F.3d 137, 144 (2d Cir. 2004); Montrose Chem. Corp., 6 Cal. 4th at 295; 3-17 *New Appleman on Insurance Law Library Edition* § 17.01 (2016).

[60] 1-16A *New Appleman on Insurance Law Library Edition* § 16A.03 (2016) (under the "four corners" rule, the duty to defend is "determined solely by examining the complaint against the insured in light of the insurance policy's coverage provisions").
[61] Nokia, Inc. v. Zurich Am. Ins. Co., 202 S.W.3d 384, 388 (Tex. App. 2006) ("The duty to defend is determin . . . we give the allegations a liberal interpretation in favor of the insured."), aff'd on other grounds, Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.2d 487 (Tex. 2008).
[62] Nokia, Inc., 202 S.W.3d at 388 ("We do not read facts into the pleadings, look outside the pleadings, or 'imagine factual scenarios which might trigger coverage.'") (citation omitted)).
[63] For instance, New Jersey recognizes an insurance company's right to recoup defense costs—even when the insurance contract does not expressly authorize recoupment—for claims that are ultimately adjudicated not covered under the policy. Hebela v. Healthcare Ins. Co., 851 A.2d 75, 86 (N.J. Super. Ct. App. Div. 2004) ("[T]he right of reimbursement exists because the insured would be unjustly enriched in benefiting by, without paying for, the defense of a non-covered claim."). Massachusetts, on the other hand, holds that in the absence of an express policy provision authorizing recoupment, an insurer has no right to recoup defense costs for uncovered claims, absent fraud or other inequity. Holyoke Mut. Ins. Co. v. Vibram USA, Inc., 34 Mass. L. Rep. 185, 2017 Mass. Super. LEXIS 12, at *20–21 (Mass. Super. Ct. Mar. 21, 2017) ("[A] good faith demand for a defense under a liability policy, which the insurer decides is likely enough to be valid that it will tender a defense under a reservation of rights, does not make retention of those defense costs unjust. Claims of unjust enrichment ought not be used to imply rights that the parties have not included in the written contract that defines their relationship and covers the subject matter in dispute.").
[64] Buss v. Superior Court, 16 Cal. 4th 35, 53 (Cal. 1997).
[65] *See, e.g.*, Pepsi-Cola Metro. Bottling Co. v. Ins. Co. of N. Am., Inc., No. CV 10-2696 SVW (MANx), 2010 U.S. Dist. LEXIS 144401, at *1 (C.D. Cal. Dec. 28, 2010) (insurer unreasonably delayed payments to policyholder's defense counsel and capped payments at a fixed percentage of the total defense costs, based on expected contribution from other insurers; court held insurer's actions breached its duty to defend).
[66] *See* Emp'rs Ins. v. Recitel Foam Corp., 716 N.E.2d 1015, 1027 (Ind. Ct. App. 1999).
[67] *See, e.g.*, AIG Executive Edge Public Company Directors & Officers Liability Policy Forms, 115485 (6/13), § 9.B, Pre-Authorized Securities Defense Attorneys ("list of approved panel counsel law firms . . . is accessible through the online directory at http://www.aig.com/us/panelcounseldirectory").
[68] PhotoMedex, Inc. v. St. Paul Fire & Marine Ins. Co., No. 07-0025, 2008 U.S. Dist. LEXIS 8526, at *69–70 (E.D. Pa. Feb. 6, 2008) (where insurer did not dispute its obligation to pay defense costs to independent counsel, dispute as to what fee rate insurer was obligated to pay policyholder's independent counsel could not be adjudicated as a matter of law and had to await determination at trial).