

Your Company May Have Insurance Coverage: Government Lawsuits Target Manufacturers and Distributors



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The enormous recoveries obtained by state attorneys general from cigarette makers have emboldened states, municipalities and unions to pursue lawsuits against manufacturers and distributors of other potentially hazardous products. A number of cities have gun manufacturers in their sights in lawsuits seeking to recover millions of dollars spent treating victims of gunfire and investigating gun-related crimes. It is just a matter of time before other products become the focus of similar lawsuits. These suits are of such great concern that companies are lobbying Congress and state legislatures to bar them.

Do manufacturers and distributors of these products have liability insurance coverage for these new types of claims? The answer depends on the liability coverage and exclusions found in their policies and the specific nature of each claim. Policyholders who simply assume that coverage is barred under product exclusions, or that these suits present a type of liability that general liability insurance policies were not intended to cover, may be making a big mistake.

One issue that will often arise is whether coverage is barred under long-standing exclusions for liabilities relating to the products at issue. Once the hazardous nature of a product becomes known, or the frequency or severity of claims involving the product increases, liability coverage for the product becomes extremely expensive, and is often eliminated by special exclusions, as in the case of cigarettes. Insurance companies will argue that the new government and union suits are precisely the type of liability they refused to insure when they

added such exclusions to their policies. However, those exclusions might not prevent insurance recoveries, because (1) they may not be found in older policies in force when injuries occurred, and (2) they may not have been written with government or union claims in mind.

There May be Insurance Coverage Under Old Policies With No Product Exclusions

First, coverage may be provided under policies which predate the introduction of product exclusions. Those earlier policies are potentially an extremely valuable reservoir of coverage.

Occurrence-based comprehensive general liability policies, which have been sold for decades, provide coverage for liability resulting from bodily injury or property damage during the policy period. This coverage is provided even if the suit against the policyholder is not instituted until decades later. In cases involving long-term ingestion or inhalation of hazardous materials, courts generally find that the harm begins with the first injurious exposure, and continues through the manifestation of symptoms. Health problems relating to the long-term use of tobacco or alcohol, or exposure to lead paint, should be viewed in the same way. Therefore, older liability policies with no product exclusions may provide coverage for the new government and union suits.

Courts typically allocate liability for long-term exposures among each policy period in which injury or damage took place, until a claim was asserted against the policyholder or coverage was no longer available. Some courts allow policyholders to select a policy period or periods to cover the entire liability. Under either approach, the policyholder may have coverage for all, or substantially

all, of its liability despite the presence of product exclusions in more recent policies.

Insurance companies may argue that older policies do not provide coverage because, as a result of statutes of limitations, the government suits cannot relate to damage or injury which occurred decades ago. However, statutes of limitation begin to run when a claim may first be asserted, not when injury first takes place. In the case of progressive illness, injury may occur for many years before it is detected, or before it reaches a stage that requires treatment. Therefore, the expenses which governments can pursue without running afoul of statutes of limitation may relate to injuries which began decades ago, and may be covered under older insurance policies.

How Can There Be Coverage If The Government Suffered No Bodily Injury or Property Damage?

At first blush, the new types of suits may not appear to fall within liability coverage for bodily injury or property damage. After all, the government or union was not physically injured by the product, and the focus of the suits to date does not appear to be upon property damage. Rather, they seek damages for the costs incurred (1) providing medical or other care to those who were supposedly injured by the product, or (2) responding to a dangerous situation blamed on the product. Nonetheless, a strong argument can be made that these suits fall within bodily injury coverage, and possibly property damage and personal injury coverage as well.

Bodily Injury Coverage

Typically, comprehensive general liability policies provide coverage for “all sums” which the policyholder is legally obligated to pay “as damages *because of* bodily injury or property damage. . . .” Some standard forms deviate slightly from this language, substituting “on account of” for “because of.” This coverage grant does not only apply to liability for bodily injury or property damage. It also provides broader coverage, for liability “because of” bodily injury or property damage.

Government efforts to recover the costs of treating victims of hazardous products fit within this coverage. The government’s expenses were incurred “because of” bodily injury in the sense

that they would not have been incurred but for bodily injury to the patients they treated. There is no requirement in the policies that the liability incurred by the policyholder be owed to the individual who suffered the bodily injury. Indeed, such a limitation would make no sense given the purpose of comprehensive general liability insurance, which is to provide broad coverage for all liabilities not specifically excluded.

Property Damage Coverage

Although the focus of the government tort suits filed to date does not appear to be upon property damage, the complaint in any action of this type should be carefully reviewed for the possibility that property damage is even a small component of the damages claimed. In the event that product exclusions only relate to bodily injury, or a court rejects the argument that damages “because of” bodily injury includes government expenditures relating to injuries, a claim which encompasses property damage may trigger valuable defense coverage. For example, nuisance claims concerning the use of firearms might involve damage to police property.

Personal Injury Coverage

Many comprehensive general liability policies provide coverage for liability arising from personal injuries. The “Broad Form Endorsement” to the comprehensive general liability (CGL) insurance policy offered in the past provided insurance coverage for “personal injury,” including the offense of “wrongful entry or other invasion of the right of privacy occupancy.” Some courts have held that acts which fall within the common law doctrine of nuisance are included in this offense.

Government nuisance claims relating to potentially hazardous products, such as those asserted against gun manufacturers, should fit within this personal injury offense. The allegedly dangerous influx of weapons onto a city’s streets could certainly interfere with the use and enjoyment of property, which constitutes a nuisance.

Product Exclusions May Not Bar Coverage

Insurance coverage for government suits might exist even under policies which contain product exclusions. Those exclusions may not have been drafted with government liabilities in mind, and their language may limit their application to claims

by people who are injured by the product. Moreover, hazardous product exclusions may not apply to personal injury coverage. The law requires that any uncertainty about the application of such exclusions be resolved in favor of coverage. Therefore, unless an exclusion clearly applies to government claims, it should not be considered a bar to coverage.

The Non-Existent Intentional Acts Exclusion

Insurance companies have reserved their rights to deny coverage for suits against gun manufacturers and distributors on the ground that the alleged conduct at issue in those cases constitutes “intentional acts.” Standard form liability insurance policies, however, provide coverage unless the harm is intentional, regardless of whether the act which causes the harm was intentional.

The more serious, related argument is that no coverage is provided when the claimants allege that the product manufacturer intentionally caused injury. Claims of intentionally inflicted harm may be barred for coverage, but not under all circumstances, and alternative claims of negligent conduct may trigger the duty to defend, and ultimately coverage itself.

Conclusion

In sum, the stakes in government tort actions are so high that policyholders cannot afford to quickly dismiss the possibility of insurance coverage. Policyholders faced with these actions should give notice to all their insurance companies immediately. Careful policy analysis and an aggressive pursuit of insurance coverage may yield substantial rewards. ■

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