

## When Faced with a Lawsuit, Insurance May Ease Your Pain



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**O**n July 9, 2002, a major clinical trial of the risks and benefits of hormone replacement therapy (“HRT”) for menopausal women was cut short. The trial, which involved 16,660 women, was

halted because the data revealed that women undergoing HRT using the drug Prempro, a combination pill of estrogen and progestin, allegedly had a higher risk of breast cancer, coronary heart disease, stroke and pulmonary embolisms.

Less than one week later, the lawyers were on the move. A nationwide class action lawsuit was filed against Prempro’s manufacturers and suppliers – *Lewers v. Wyeth, Inc., et al.*, No. 02-CV-4970, (N.D. Ill. filed July 15, 2002). The lawsuit identifies three allegedly affected classes: (1) Prempro takers with manifested injury; (2) Prempro takers with no manifested injury; and (3) Prempro purchasers seeking a refund. The Plaintiffs allege, among other things, failure to warn, manufacturing/design defect, negligence, breach of warranties and loss of consortium.

More lawsuits are bound to follow. There are an estimated 50 million post-menopausal women in the United States, with approximately 6 million taking Prempro and many others undergoing HRT therapy with similar drugs. And that’s just in the United States.

It goes without saying that litigation will be expensive. Fortunately, liability insurance should be able to help Prempro’s manufacturers and suppliers, as well as other pharmaceutical companies similarly targeted.

### *Defense Costs—The First Question*

Most comprehensive or commercial general liability insurance (“CGL”) policies, which provide broad protection against bodily and personal injury claims, contain a duty to defend. This duty is one of the most valuable features of CGL policies. In general, it means that the insurance company either will hire lawyers to defend you or pay your defense costs in any action against you alleging injury or damage potentially within the policy’s coverage.

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**“The ‘duty to defend’ is one of the most valuable features of CGL policies.”**  
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Many different types of insurance policies contain some defense-related obligations. In addition to CGL policies, specialized policies, such as errors and omissions policies, clinical trials product liability policies, or other product liability insurance policies may obligate the insurance company to defend or to pay defense expenses.

Other types of liability policies, such as directors and officers liability policies, may provide defense coverage under the “loss” provisions. Under these policies, the policyholder gets to choose their own counsel and to maintain control over their own defense, while the insurance companies pay the bills.

### *Settlements And Judgments—The Next Question*

Once a defense is secured, the next question no doubt will be whether the insurance company will pay any settlements or judgments. The answer lies in a number of arcane legal issues, like whether there was an “occurrence” and, where injury occurs over multiple policy years, which policies respond?

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## RECENT DEVELOPMENTS

### Texas District Court Says Carrier Must Defend Construction Suit.

*Mt. Hawley Insurance Co. v. Steve Roberts Custom Builders, Inc.* Mount Hawley Insurance Company (“Mt. Hawley”) commenced a declaratory relief action against its policyholder, Steve Roberts Custom Builders, Inc. (“SRCB”), to obtain a declaration that it did not have a duty to defend or indemnify in a suit resulting from SRCB’s construction of a driveway that encroached on neighboring property. The underlying suit against SRCB alleged that SRCB was negligent in failing to ensure that an easement for the driveway was obtained or in building the driveway so that it encroached upon the adjacent property. This was sufficient to trigger the duty to defend, U.S. District Judge Paul Brown said. The court ruled that the “mistaken belief that a use-easement existed is analogous to McKinney Builder’s reliance on an inaccurate survey, referring to *McKinney Builders II, Ltd. v. Nationwide Mutual Insurance Co.* “In both instances the builders did not believe they were encroaching on the neighboring property; thus, the encroachment and resulting damage were not an intended or expected result.” The court also ruled that Mt. Hawley’s contention that the underlying suit did not allege physical injury to tangible property was without merit. The court ruled that the allegation that the driveway encroached on adjacent property was sufficient physical injury. The judge dismissed the notion that since the offending portion of the driveway had been

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### *Injury Unexpected And Unintended By The Policyholder Is An “Occurrence”*

Liability policies usually obligate insurance companies to indemnify policyholders for liability for bodily injury resulting from an “occurrence.” A typical CGL policy defines an “occurrence” as “an accident, including a continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury . . . neither expected nor intended from the standpoint of the insured.” This means that unexpected injury and damage is covered. Coverage exists so long as the policyholder did not expect or intend the damage resulting from its actions.

Thus, even if a policyholder intentionally fails to warn a customer about a product and the product causes an injury, coverage generally will be available so long as the policyholder did not expect or intend the injury to occur. In addition, it is the policyholder’s subjective intent or expectation that typically governs — whether the policyholder had a preconceived design to cause the specific injury or damage that took place.

### *Injury Over Multiple Years May Trigger Multiple Policies*

**Occurrence-Based Policies.** Occurrence-based policies typically provide coverage whenever a claim alleges that bodily injury occurred, or could have occurred, during the policy period. When the injury spans a number of years – as some have alleged with HRT drugs – a number of insurance policies can be “triggered” at the same time.

Many courts have held that, when this happens, all of the triggered policies may be required to pay. This issue, however, is hotly contested and a number of trigger theories have emerged: continuous; exposure; injury-in-fact; and manifestation.

Under the “continuous injury” theory, the happening of any part of the injury process during the policy period, from the first exposure through the policyholder’s knowledge of the loss, i.e., “manifestation,” triggers coverage.

Under the “exposure” theory, the trigger of coverage is the initial contact with the cause of the alleged injury.

Under the “injury-in-fact” theory, policies are triggered when the injury or damage “actually” has happened. In a seminal “injury-in fact” case involving DES, the insurance company had to pay all sums its policyholder became liable for damages arising from use of its products insofar as there was injury, sickness, or disease during the policy period. The determination of when injury occurred was to be

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“In general the object and purpose of insurance is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated.”

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made according to the facts of each case, based on medical evidence as to which drug was used and what type of injury was claimed.

Under the “manifestation” theory, an insurance policy typically is triggered when either the injury or damage is detected or is reasonably capable of being detected or when an action is brought against the policyholder.

**Claims-Made Policies.** Many present-day liability policies are written on a claims-made basis. Under this type of policy, the insurance company agrees to provide coverage only for those claims made against a policyholder during the policy period. Some policies also require that the claim also be “reported” to the insurance company during the policy period.

Because it is the time the claim is made – and not the event that gives rise to the underlying claim – that triggers this type of policy, claims-made policies do not present the same issues regarding trigger as do occurrence or accident based policies.

### *The Importance of Giving Notice*

While occurrence based policies differ from claims-made policies, there is at least one thing that all insurance policies have in common: Policyholders must give notice to get coverage. In some instances, waiting just a week or two can have disastrous consequences.

The failure to provide timely notice is the easiest way for the insurance company to deny coverage. But it also is the easiest hurdle to coverage for policyholders to avoid.

### *What To Do If You Think You May Be Sued*

**Locate and Read Your All of Your Policies.** The first step to getting coverage is knowing your coverage. There are many different types of insurance policies that may contain provisions that may provide defense and, if necessary, indemnity coverage. Know your coverage and know who sold it to you.

**Give Notice As Soon As Possible.** As noted above, timely notice is a requirement under most insurance policies. Too frequently, policyholders get caught up in their situation and forget to notify inform their insurance companies. If you think you may be sued or have been sued, notify your insurance agent or broker and your insurance company as soon as possible.

**When You Make A Claim, Don't Accept “No” for An Answer.** Insurance companies routinely deny claims, even if they ultimately have no basis for doing so. Be persistent — the difference between coverage and non-coverage often is directly related to the determination and persistence of the policyholder. ■

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## RECENT DEVELOPMENTS

removed, there was no property damage.

**N.Y. Appellate Panel Says Reasonableness of Late Notice Question of Fact.** *Generali-U.S. Branch v. Justin Rothschild, et. al., Jordan Eromosele, et. al.* Generali-U.S. Branch (“Generali”) brought a declaratory judgment action in New York County Supreme Court against policyholder Justin Rothschild and related people (the “Rothschilds”), claiming that Generali did not have a duty to defend or indemnify an action for lead poisoning of tenants in a Bronx apartment building owned by the Rothschilds. The New York County Supreme Court granted summary judgment in favor of the insurance company, finding that it did not have a duty to defend or indemnify. The Rothschilds appealed, claiming that the Rothschilds were not obligated to give Generali notice of the lead content of the building until late 1997, when they were served with the underlying suit. The appellate panel found that a question of fact existed as to whether the Rothschilds were

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**WHO SAID WHAT?**

**The Travelers Insurance Co.,** Plaintiff’s Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment, dated Jan. 31, 1969, *The Travelers Insurance Co. v. Industrial Indemnity Co.*, No.133759 (Cal. Super. Ct.).

required to give notice to Generali of the lead poisoning issue in 1992 when they were first informed of it. At that time, the Rothschilds were asked only to repaint the building, which they did. The panel found that belief in non-liability can in certain cases excuse failure to give timely notice, and that such a determination is a question of fact.

—David Solomon

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