AKO PHARMACEUTICAL & HEALTHCARE INSURANCE

ALERT

ANDERSON KILL & OLICK, P.C.
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You Have a Major Products Loss—Will Your Insurance Help?

By William G. Passannante

Product liability claims are a tremendous source of potential liability for the pharmaceutical and healthcare industry. Product liability claims generally are covered by insurance, but can nonetheless have a devastating impact. Actively identifying important insurance coverage issues, as we do below, will arm policyholders to maximize the value of their insurance.

Insurance Coverage for Product Claims

Two common causes of action for recovery product liability suits are strict liability and negligence. The most common source of insurance recovery for such claims are primary and excess level liability insurance policies.

Primary-level CGL policies contain broad grants of coverage, and insure the policyholder against all risks of liability to third parties, unless specifically excluded in the policy. Both coverage "A" (bodily injury) and coverage "B" (property damage) cover liabilities resulting from products manufactured, sold, handled or distributed by the policyholder, whether the liabilities result from strict liability or from negligence.

"Every drug, whether prescription or over-the-counter, and every medical device has side effects."

Excess-level and umbrella liability insurance policies provide coverage in addition to primary-level liability insurance policies. Most pharmaceutical, chemical and oil and gas companies purchased significant excess and umbrella liability policies. Although the customary limits of these policies changed over the years, the policies usually have had high limits and relatively high attachment points. Excess and umbrella policies can provide crucial protection against devastating product liability losses.

Common Arguments Against Coverage

Insurance companies will often argue that the policies they sold contain exclusions which limit their broad grant of coverage. These exclusions include: (a) the "expected-or-intended" (or intentional acts) exclusion; (b) the "business-risk" (or failure to perform) exclusion; and (c) the "own-products" exclusion.

First, CGL insurance policies provide coverage for the unintended results of intentional acts. The distinction between the expected results of intentional acts and the unintended results of intentional acts raises serious issues for the pharmaceutical industry. Every drug, whether prescription or over-the-counter, and every medical device has side effects. Insurance companies improperly argue that such "expected" results are not covered.

Second, the business-risk exclusion, also known as the failure-to-perform

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who's who

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exclusion, is the means by which insurance companies seek to preclude coverage for products that do not work as they are designed to do.

Third, the "own-product" or "injury-to-products" exclusion is used by the insurance companies to argue that the policyholder cannot recover for first-party product-type losses under CGL policies. Insurance companies often attempt to improperly extend the reach of this clause to eliminate covered loss.

Other Issues Affecting Recovery Under CGL Policies

Even after all the issues regarding expected-and-intended, the business-risk exclusion and the own-products exclusion are resolved in favor of coverage, other issues will impact a pharmaceutical policyholder's ability to obtain coverage for its product liability claims.

"Occurrence-based" versus "Claims-made" Policies

First, are the policies "occurrence-based" policies or "claims-made" policies? Prior to 1986, standard-form CGL policies were occurrence forms. Since 1986, CGL policies have been offered in three versions: (1) occurrence; (2) claims-made; and (3) occurrence-reported. The policies differ principally with respect to the event which triggers coverage.

Second, trigger of coverage under "occurrence" policies will be an area of dispute. Courts addressing insurance coverage issues for historic claims used different approaches to determine which policies are triggered by the claims. This is a hotly-contested area.

Third, another hotly-contested issue potentially limiting a policyholder's recovery concerns the number of occurrences responsible for a given loss. The number of occurrences figures in arguments regarding the policy limits potentially available, as well as the number of deductibles.

Finally, many policies contain so-called "batch" clauses, which allow the policyholder to notify its insurance company of losses which arise out of multiple units of a single product as a "batch occurrence." Batch clauses allow a policyholder to combine its small product liability claims to reach the limits of these high level policies.

Policyholders aware of these issues will be better armed to maximize the value of their insurance. ■

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