Anderson Kill & Olick, P.C.

POLICYHOLDER ADVISOR

The Policyholder Law Firm

Volume 18 Number 5 www.andersonkill.com September/October 2009

Buying the Right Insurance Coverage is Only Half the Battle

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Specialized insurance coverage, excluded from standard-form commercial general liability (CGL) policies, is available for risks specific to many industries. Common examples include policies for risks such as pollution, product recall, and food-borne illness. While such specialized policies can be indispensable to companies vulnerable to such risks, they are still subject to the overly broad coverage defenses that insurance companies use with CGL policies. No matter how comprehensive a company's insurance portfolio, corporate counsel still needs to be prepared to fight for coverage once a loss occurs. Three recent insurance coverage battles in the food and restaurant industries — one involving a CGL claim and two involving claims under more specialized policies —illustrate this core principle.

Contamination Allegations of Damage to Property Falls Within Scope of CGL Insurance Policy

In the first case, involving a CGL insurance policy, a New Jersey-based importer of raw materials was sued by a customer, a manufacturer of finished food flavorings, to whom it had sold flavor materials. The customer alleged that it sustained damages to its property when five metric tons of raw flavoring materials it bought from the policyholder allegedly contained trace amounts of mercury. The customer further claimed that by the time it discovered the mercury, it already had incorporated the allegedly contaminated flavoring raw materials into its other products. The insurance company denied coverage for the entire claim and sued its policyholder, seeking a ruling from the Court that its policyholder was not covered for the customer's claims because the alleged claims did not constitute covered "property damage" or "bodily injury" within the meaning of the policy.

The Court disagreed with the insurance company and found that property damage did in fact occur and that the policy provided coverage. CGL policies generally define "property damage" as "[p]hysical injury to tangible property" as well as "[l]oss of use of tangible property that is not physically injured." The Court concluded that under the terms of the insurance policy, the customer's contamination allegations of damage to its property — finished food flavorings made from the allegedly contaminated raw flavoring materials, and its processing equipment — fell squarely within the scope of the CGL policies.

> ***"While every insurance policy you purchase should spell out clearly what is and is not covered, it is important that you scrutinize the language of the policy offered for sale before purchasing it.."***

Beware of Aggregate Supplier Incident Sublimits in Food Borne Illness/Trade Name Restoration Insurance Policies

In a second case, Taco Bell restaurant franchisees purchased a specialized Food Borne Illness/Trade Name Restoration Insurance Policy in order to cover potential business losses stemming not only from the food borne illness outbreak

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itself, but also from any adverse publicity associated with the trade name of the policyholder stemming from the outbreak. In 2006, an E. coli outbreak occurred at some Taco Bell locations in the Northeastern United States, causing widespread negative media attention. Even Taco Bell franchisees that did not experience the outbreak suffered a large drop in sales due to the publicity surrounding the event. Franchisees that purchased the Food Borne Illness/Trade Name Restoration policy looked to their insurance company, Lloyd's of London, to reimburse them for their losses. Lloyd's refused, asserting that a vaguely-worded "Aggregate Supplier Incident Sublimit" set at $0 eliminated coverage. The Court again disagreed with the insurance company and concluded that the language that Lloyd's said eliminated coverage actually was unclear, and thus could not be used to vitiate the insurance coverage that the Franchisees thought would cover them.

Determining the Definition of 'Accidental' in Total Recall, Brand Protection Food/Beverage Insurance

The third case also involved alleged E. coli contamination. The policyholder, a seller of bagged, ready to eat spinach, made a claim for coverage for its losses under its "Total Recall, Brand Protection Food/Beverage Insurance Policy." This policy purported to provide coverage for business losses for accidental contamination of the insured's products, with "accidental" defined in the policy as caused by an "error by the assured" in the manufacture of its goods. The insurance company denied coverage, contending that there was no such "error" on the part of the policyholder. The policyholder argued that there was, in fact, such an "error" in that contamination of the spinach resulted from the policyholder's own failure to conduct a food safety audit of the spinach growing field in compliance with its own corporate food safety practices. Further, certain of the contaminated spinach was found to have been purchased from a "prohibited" source, a lot placed on a list of the spinach company's "prohibited fields" because of its proximity to a cattle feedlot, a known source of E. coli. The insurance company told the Court that these shortcomings were not "errors" for purposes of coverage, in that these acts and omissions were not "committed in the course of manufacture, production, processing, preparation, assembly, blending, mixing, compounding, packaging or labeling," of the policyholder's product, thus coverage could not apply. The insurance company also contended that the policyholder failed to give notice of the claim, and that various exclusions to coverage applied, such as an exclusion for a "governmental ban" on the insured's products.

After trial, where the policyholder ironically had to put on evidence of its own shortcomings in the processing and manufacture of the bagged spinach, the Court found that the insurance company had breached its insurance policy contract by failing to provide insurance coverage for the E. coli outbreak pursuant to the policy, and found the cited exclusions inapplicable. The Court sided with the policyholder and found that the alleged "errors" did involve "blending, mixing, and compounding" the spinach, which could have spread the contamination, thus satisfying the Policy's "error" requirement for coverage. The Court further found there had been no "governmental ban" on the spinach, rendering the insurance company's cited exclusions inapplicable, as the Court found an FDA advisory such as the one issued in the case is not akin to a ban on a product imposed by a government. Finally, the Court found that the insurance company failed to request information it later contended was essential to its coverage determination, rendering its other defenses to coverage unsuccessful as well.

Conclusion

Ultimately, the policyholders in these examples were covered for these occurrences, but not without expensive, drawn-out fights. What can businesses that have bought appropriate coverage, but have found their proper claims denied, do to protect themselves from this situation? While every insurance policy you purchase should spell out clearly what is and is not covered, it is important that you scrutinize the language of the policy offered for sale before purchasing it. Request from the insurance company or your broker the specific coverage you need in writing. Review the coverage you have purchased yearly with your broker or other insurance professional to be clear that it covers what you envision it to cover.

If you are faced with a denial of insurance coverage for precisely the kind of loss you purchased insurance to cover, do not take "no" for an answer. Analyze the exclusions to coverage relied upon by the insurance company as a basis for the denial. Pursue all available options to potentially obtain coverage. Review your insurance policy carefully with your broker or other professional, such as an attorney specializing in policyholder insurance recovery, to determine the best approach to obtain the coverage you bought to protect your company.

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Global Warming, An Evolving Liability Your Company Can Survive

By John G. Nevius Esq., P.E.

The previous issue of the *Policyholder Advisor* addressed the increase in companies' employment practices liability likely to result from the Lilly Ledbetter Fair Pay Act of 2009, as well as the insurance strategies that could help cover those risks. In this space, we want to briefly highlight another emerging legal challenge that can increase your company's liability risks — lawsuits for the nuisance caused by a corporation's greenhouse gas emissions (GHG's).

State of Connecticut v. American Electric Power Co., Inc. and Its Insurance Implications

The United States Court of Appeals for the Second Circuit recently reinstated a 2004 lawsuit by eight states and the city of New York against five of the largest U.S. coal-burning electric utilities. These government entities brought suit because of defendants' documented CO_2 emissions and the alleged impact on climate change. A two-judge panel of the Second Circuit, vacating and remanding a District Court judgment, held "that the district court erred in dismissing the complaints on political question grounds; that all of the Plaintiffs have standing; that the federal common law of nuisance governs their claims" and that such claims are not preempted by existing environmental law.

This decision effectively gives states and other plaintiffs the green light to sue companies from other states alleging nuisance from CO_2 emissions. Until now, industry largely has been protected under the "political question" doctrine and by lack of plaintiffs' standing, both of which knocked out similar prior suits. The Court of Appeals rejected those protections in this case. In fact, this decision potentially enables

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every state and municipality in the country to bring nuisance suits against an almost limitless range of CO_2 emitters.

It is generally accepted that the biggest hurdle for plaintiffs to clear in litigation over climate change is establishing causation. In this case, the Second Circuit held that plaintiffs had pleaded a sufficiently close connection between CO_2 emissions from burning coal and evidence of rising global temperatures. One might say that the Second Circuit found the missing causal link.

However, there is no humor in this decision for companies involved with significant CO_2 emissions or facing lawsuits similar to this case, particularly those companies looking to their liability insurance policies for a defense and indemnity. Insurance companies can be expected to contest GHG-related coverage based upon pollution exclusions in many policies, setting the stage for high stakes coverage battles involving survival of the fittest.

To the extent there is a silver lining, it may be that the long-term and evolving nature of greenhouse gas emissions and global warming damages should trigger decades of historic insurance coverage. For many companies, detailed insurance archaeology and reconstruction of corporate insurance coverage history by experienced professionals may uncover millions of dollars in hidden coverage assets.

Older commercial general liability (CGL) insurance policies are generally occurrence-based, meaning that they are triggered by events that occurred during the policy period regardless of when the event is discovered or becomes a cause of action. They therefore effectively never expire — and they often prove especially valuable because of the absence of exclusionary language involving pollution. Moreover, the global nature of the alleged damages may enable some policyholders to pursue coverage in alternative states with progressive coverage law supporting policyholder/consumer rights.

While many companies may think of "nuisance" suits alleging harm from their GHG emissions as unlikely to survive, the cost of defending such suits can dwarf the costs of indemnification. Insurance companies' duty to defend is broader than their duty to indemnify and companies facing such suits should move quickly to obtain coverage for defense costs.

In many claims stemming from GHG lawsuits, insurance companies are likely to invoke the so-called pollution exclusions that were added to standard-form CGL policies in the 1970s and became more restrictive in the 1980s. Historically, however, typical releases of GHGs have often not been regulated or otherwise treated as pollution by the government.

Accordingly if a company's normal operations involved the release of GHGs, that company should have a reasonable expectation of coverage relating to those activities regardless of any pollution exclusion.

Until an asteroid strikes the earth and raises a cooling dust cloud, global warming will be very much with us as a focal point of legislation and litigation. Policyholders facing potential liability from GHGs would do well to understand their coverage rights before litigation sea levels start to rise.

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