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Class Action Litigation Insurance Coverage: Avoiding Exclusions and Denials of Coverage

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Today's faculty features:

Finley T. Harckham, Shareholder, **Anderson Kill**, New York

Courtney C.T. Horrigan, Partner, **Reed Smith**, Pittsburgh

Seth D. Lamden, Partner, **Neal Gerber & Eisenberg**, Chicago

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COMMERCIAL GENERAL LIABILITY INSURANCE FOR CONSUMER CLASS ACTIONS

Seth D. Lamden

Neal Gerber & Eisenberg

slamden@nge.com

Seth D. Lamden
Neal, Gerber & Eisenberg LLP
Two N. LaSalle St.
Chicago, IL 60602
(312) 269-8052
slamden@nge.com

Seth D. Lamden is a partner in Neal, Gerber & Eisenberg LLP's Insurance Policyholder Practice Group. He concentrates his legal practice on assisting policyholders understand and enforce their rights to insurance coverage and has helped policyholders recover hundreds of millions of dollars in insurance proceeds from a broad array of industries, including construction, utilities, manufacturing, professional services, financial services, and managed care.

Seth is a Fellow of the American College of Coverage Counsel. He also serves as a member of the Illinois Association of Defense Trial Counsel's Board of Directors and is an Executive Editor of the International Risk Management Institute, Inc.'s CGL Reporter. He is a past chair of the American Bar Association's Self-Insurance and Risk Management Committee of the Tort Trial & Insurance Practice Section (TIPS) and serves as a Vice Chair of TIPS' Insurance Coverage Litigation Committee. He has written more than 70 articles and nine book chapters on topics relating to insurance coverage, including: Duty to Defend, 3 New Appleman on Insurance Law Library Edition § 17; Product Liability Insurance, 3 New Appleman Law of Liability Insurance § 16; and Discovery, 12 New Appleman on Insurance Law Library Edition § 152. He maintains a Martindale-Hubbell AV Preeminent™ rating and is listed in the area of insurance coverage in The Best Lawyers in America, Illinois Super Lawyers, and Leading Lawyers Network.

What does a CGL Policy cover? (Coverage A)

- "[T]hose sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies . . . ."

- Insurance applies to "bodily injury" or "property damage" that:

  (1) is caused by an "occurrence" that takes place in the "coverage territory; and

  (2) occurs during the policy period.

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Triggering the CGL Insurer's Duty to Defend

"We will have the right and duty to defend the insured against any 'suit' seeking those damages."

CG 00 01 04 13

Triggering the CGL Insurer's Duty to Defend

A four-step process:

1. Does the complaint allege an "occurrence"?
2. Does the complaint allege that the "occurrence" caused "bodily injury" or "property damage" during the policy period?
3. Does the complaint seek damages "because of" (for?)
4. Does a policy exclusion completely eliminate coverage?

Triggering the CGL Insurer's Duty to Defend

- Broad potential-for-coverage duty to defend standard
- Based on factual allegations.
- Likelihood of liability is irrelevant.
- Legal theories and alleged causes of action are irrelevant.

Triggering the CGL Insurer's Duty to Defend

- CGL policies do not distinguish between class actions and other types of product liability lawsuits.
- Key differences from a liability perspective:
  - Class actions typically do not expressly seek damages for individualized bodily injury or property damage due to commonality and typicality class certification requirement.
  - Class actions often do not allege specific dates or locations of bodily injury or property damage.
  - Class actions may not expressly seek compensatory damages because of bodily injury or property damage.

Distinguishing Liability Defenses from Coverage Defenses

- "The likelihood that a plaintiff will prevail in its covered claims or that a class will be certified does not enter into the [duty to defend] calculus." There is nothing to "even remotely suggest [] that the potential for coverage created by a class action is qualitatively different from the potential for coverage created by an individual action." *Hartford Acc. & Indem. Co. v. Beaver* , 466 F.3d 1289, 1290 (11th Cir. 2006).

- "[W]e do not believe that an insured must demonstrate that the plaintiffs will satisfy rule 23 in order to receive a defense from its insurer. Just as in any other type of action, the insurer's duty to defend is determined by looking to the face of the complaint .... In the context of a class action complaint, we understand that principle to mean that we should avoid anticipating the possible outcome of the certification process." *Omega Flex, Inc. v. Pacific Emp'rs Ins. Co.* 78 Mass. App. Ct. 262, 268 (2010).

- Expired statute of limitations in underlying action does not extinguish potential for covered property damage during policy period.

Factual Allegations Necessary to Trigger Duty to Defend

- Express allegations of bodily injury or property damage often included to illustrate problems with the product.
- Pleading threshold to trigger duty to defend is low.
- Consider how putative class is defined.
- For property damage claims, law/policy requires damage to something other than product itself.

Example 1 (*Hartford Fire Insurance v. Thermos LLC*)

- Putative class action brought by purchasers of "leak proof" sippy cups that actually leaked. Purchasers primarily sought economic benefit of the bargain damages under various consumer fraud statutes. (Duty to defend)

45. Ms. Milman also noticed that the Bottles would leak if placed in a diaper bag. The button on the "push-button lid" is easily triggered, and the Bottles' lids would pop open, exposing the leak between the straw and the lid and the leaking straw, and thus soaking the other items in the diaper bag with liquid. In fact, at times the Bottles would leak so much from the gap between the straw and the lid that liquid would escape even when the "push-button lid" was closed.

46. Thus, like the other members of the Class, Ms. Milman suffered an ascertainable loss as a result of Defendant's material deceptive claims regarding the supposed "leak-proof" quality of the Bottles.

Example 2 (*Liberty Mutual v. Dometic*)

- Putative class action brought by purchasers of RVs and boats containing gas absorption refrigerators that allegedly caused fires. Purchasers primarly sought economic benefit of the bargain damages under various consumer fraud statutes. (Duty to defend)

> 179. The inherent and latent defect in Dometic's Defective Cooling Unit poses an ongoing dangerous safety risk to the public and, in particular, RV owners. Hundreds, if not thousands, of fires have resulted from leaks in these Defective Cooling Units. The fires ignited by the leaking gas spread very fast and can turn into raging infernos, causing millions of dollars of property damage and personal injury to those unfortunate enough to be inside the RV when a fire ignites.

Duty to Indemnify

- Actual facts v. potential for coverage standard
- Costs for class notification, claims administration process, etc.: defense or indemnity?
- Class counsel fee award: defense or indemnity?
- Primary focus of settlement?

Class Action Litigation Insurance Coverage

Courtney C.T. Horrigan

Reed Smith

chorrigan@reedsmith.com

Courtney C. T. Horrigan

Partner, Reed Smith
Pittsburgh
+1 412 288 4246
chorrigan@reedsmith.com

Courtney is the former vice chair of our Insurance Recovery Group and the former Hiring Partner for the Pittsburgh office. Courtney handles jury, non-jury and arbitrations on behalf of policyholders under a broad range of insurance policies, including directors and officers liability, professional liability, cyber liability, commercial general liability, products liability, employment practices liability, fidelity and surety bond, crime, and fiduciary liability. She litigates in state and federal courts throughout the U.S., and in domestic and international arbitrations. Representative clients that Courtney has represented in litigation include PNC Bank, N.A., Santander Holdings, U.S.A., AmerisourceBergen Drug Corporation, Wabtec Corporation, Cassady Pierce, and Federated Investors, Inc.

Courtney regularly counsels clients on insurance coverage and corporate indemnification. She works with clients to manuscript insurance policies and perform insurance policy audits. She performs corporate due diligence on insurance and litigation matters, and advises on transactional risk protection, including representations and warranty insurance.

Courtney frequently speaks on insurance coverage publicly and for in-house corporate legal departments.

She is a graduate of Harvard Law School and Bryn Mawr College.

Are the claims "because of" or "for" bodily injury?

Yes, if:

- **The facts or causes of action alleged in the complaint relate to claims for bodily injury**
  - *See Zurich Am. Ins. Co. v. Nokia*, 268 S.W.3d 487 (Tex. 2008)

Maybe, if:

- **The complaint pleads merely the possibility of a future injury**
  - *See MedMarc Cas. Ins. Co. v. Avent Am., Inc.*, 612 F.3d 607 (7th Cir. 2011)
- **The complaint alleges physical manifestations of mental or emotional harm without a bodily injury.**
  - *Legion Indem. Co. v. CareStat Ambulance, Inc.*, 152 F. Supp. 2d 707 (E.D. Pa. 2001).

Class actions and bodily injury: unique issues

Zurich American Insurance Co. v. Nokia, Inc., 268 S.W.3d 487 (Tex. 2008)

"Biological injury on a cellular level"

No damages for physical injury

Nokia case, cont'd

Zurich argued no coverage because:

- Prospective purchasers
- Plaintiffs' briefings
- Remedy requested
- Intentional conduct

But the court found in favor of *Nokia*, noting that the duty to defend is broad and is triggered if any of the class claims could plausibly be covered, basing its decision solely on the four (or eight) corners of the complaint.

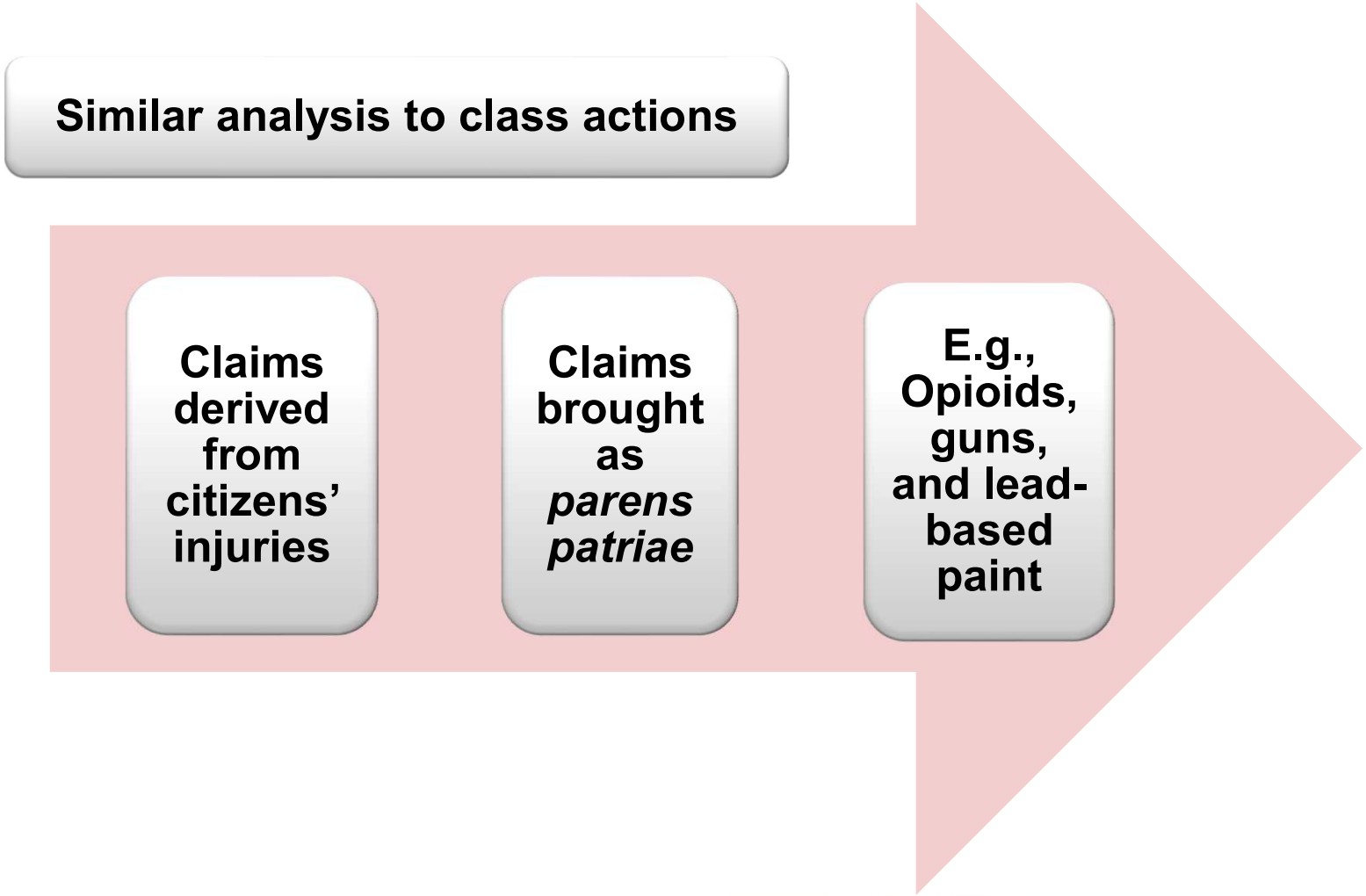
Other similar cases

Motorola, Inc. v. Associated Indem. Corp., 878 So. 2d 824 (La. Ct. App. 2004)

Ericsson, Inc. v. St. Paul Fire & Marine Ins. Co., 423 F. Supp. 2d 527 (N.D. Tex. 2006).

Adolph Coors Co. v. Truck Ins. Exch., 960 A.2d 617 (D.C. Ct. App. 2008).

Coverage for MDLs and claims brought by government entities



Opioid Cases

***Cincinnati Ins. Co. v. H.D. Smith*, 829 F.3d 771 (7th Cir. 2016).**

***Travelers Prop. & Cas. Co. v. Anda, Inc.*, 658 Fed. Appx. 955 (11th Cir. 2016)**

***Liberty Mut. Ins. Co. v. JM Smith Corp.*, 602 Fed. Appx. 115 (4th Cir. 2015)**

***Travelers Prop. & Cas. Co. v. Actavis*, 225 Cal. Rptr. 3d 5 (Cal. Ct. App. 2017)**

Other government cases

***NAACP v. Acusport, Corp.*, 253 F. Supp. 2d 459 (E.D.N.Y. 2003)**

***Sherwin Williams Co. v. Certain Underwriters at Lloyd's, London*, 813 F. Supp. 576 (N.D. Oh. 1993)**

Key Takeaways

- Broad duty to defend
- Damages need not relate to injury
- Plaintiffs' characterization is not dispositive
- Covered and non-covered claims included
- All class claims considered

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Finley T. Harckham

Anderson Kill

fharckham@andersonkill.com

SPEAKER:

Finley T. Harckham, Esq.
Shareholder – New York
Anderson Kill P.C.
(212) 278-1543
fharckham@andersonkill.com

Finley Harckham is a senior litigation shareholder in the New York office of Anderson Kill and serves on the firm's Executive Committee.

Finley regularly represents and advises corporate policyholders and other entities in insurance coverage matters. He has successfully litigated, arbitrated and settled hundreds of complex coverage claims. His areas of particular focus include property loss, environmental, business interruption, directors and officers liability, construction, professional liability, aviation liability, cyber and general liability claims.

Finley also founded two Anderson Kill non-legal subsidiaries: Anderson Kill Insurance Services, LLC, and Anderson Kill Loss Advisors, LLC. Those companies provide insurance consulting and property and business interruption loss quantification and settlement services.

Finley also has extensive experience in the field of international arbitration. His arbitration clients include government contractors, consumer products companies and manufacturers which Anderson Kill has represented in a wide range of disputes involving, among other things, service contracts, the purchase and sale of components, raw materials and products, and licensing agreements. He has successfully prosecuted and defended arbitrations in European countries and the United States under the London Arbitration Act, and the AAA, ICC and UNCITRAL arbitration rules.

Since 2009, Finley has been recognized by Super Lawyers for Insurance Coverage. In addition, since 2012, he has been recognized by Chambers USA for policyholder insurance dispute resolution in New York and has been described as "*a tenacious litigator and a real gentleman"* and "*reasonable, confident and as adept at taking a hard line as he is at finding workable compromises.*" Legal 500 USA also recognized Finley for insurance advice to policyholders and has described him as being a "leading practitioner in the field of insurance and reinsurance for natural disasters.“

Finley is a member of the firm's Hospitality Industry Practice Group.

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CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Two general categories:

1. Directors And Officers Liability – "D&O" coverage covers thecompany and its directors and officers for a variety of allegations that may lead to class actions, typically arising out of the management of the enterprise and its stock valuations.

For example:

- Securities laws violations which result in losses in stock value
- Mismanagement of shareholder voting procedures

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Coverage is provided for claims alleging "Wrongful Acts", which can be defined broadly but subject to many exclusions

- A common definition of "Wrongful Act is "any actual or alleged error, misstatement, misleading statement, act, omission neglect or breach of duty"

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

D&O policies typically provide 3 coverages:

A. Insured person coverage for directors and officers

B. Coverage for Indemnification of directors and officers

C. Coverage for the corporation or entity

- Coverage for multiple directors and officers can lead to conflicts of interest which require multiple sets of defense counsel and result in high defense costs
- Coverage limits may be shared by all defendants, which can also lead to conflicts
- Though many policies prioritize the coverage in favor of individual defendants over the entity

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

2. Professional liability, or "errors and commissions", coverage covers the company or entity and its personnel against a variety of allegations involving "professional services" provided by the company.

- "Professional services" can be defined very broadly. E.g. "Any service requiring specialized skill or training"
- Covered claims can be based upon " an actual or alleged act or omission including personal injury, in the performance of professional services."
- Like D&O coverage, these broad definitions are limited by numerous exclusions
- Professional liability coverage may cover class actions for alleged widespread improper practices by, among others:

Financial advisors
Stock brokers
Banks or other lenders
Loan servicers

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

- Management liability policies provide both defense and indemnity coverage.
- Defense coverage typically erodes the limits of coverage
- Defense costs are often the biggest risk exposure to the insurer, so “cost of litigation” settlements may be possible to allow the policyholder to eliminate or reduce its contribution to a settlement based upon non-covered claims.

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

The policies typically require allocation of indemnity, and often defense, among covered and non-covered claims. The allocation requirement often leads to disputes

- Most cases settle so there is no judicial determination of liability for covered v. non-covered claims
- Just court approval of the settlement
- Policyholders should attempt to structure a settlement so that all or most of the costs fall within covered claims
- Insurers will look for collusive settlements intended to maximize coverage

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Courts addressing allocation disputes will often look to the record of the case to determine:

- How much time and effort was devoted to covered v. non-covered issues
- Whether a noncovered claim, such as a RICO claim, was more than window dressing

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

These policies are very different than occurrence based policies:

"Claims made and reported policies"

- Only cover claims that are both made and reported during the policy period, or reported during an extended reporting period
- Coverage is based on date of claim, not when a "wrongful act" is committed
- This can lead to a number of issues for class actions and other claims

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Issues involving "related claims"

- All claims that are "related" to a first filed claim are deemed filed at the time of the first claim
- If a related claim is filed in a later policy period, it is considered for coverage under the policy in place at the time of the first claim
- This often provides powerful incentives for insurers and policyholders to argue that claims are or are not related depending upon:
  - -Whether coverage is placed with the same insurers each year
  - -Whether there are sufficient limits to cover both claims under one year's insurance
  - -The possible impact of multiple deductibles or retentions

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

The "related claim" question is often important to class action coverage because class actions often follow other claims that are arguably "related". For example:

- An SEC investigation might lead to a drop in stock value
- That might be followed by a shareholder class action involving the drop in stock value
- The class action might be in a later policy period than the SEC investigation

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Under this scenario, whether the class action should be considered a related claim could depend upon whether the SEC investigation is considered a "claim" which is often defined in the policy to require an allegation of a Wrongful Act by an insured:

- Whether an investigation by the SEC or other government body rises to the level of a "claim" or a "claim alleging a wrongful act by an insured" depends upon the policy language and the nature of the Investigation.
- This is a hotly litigated issue and there is no consensus among the courts on how it should be resolved.

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Another hotly litigated issue is the degree of similarity which must exist for a claim to be considered "related"- for example, a company and its management may face a myriad of claims, including in class actions, based upon their overall disappointing performance. There may be both similarities and differences in say the allegations of a shareholder class action and a derivative suit.

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Typically, policies define "related claim" very broadly, such as:

- "a claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were .. alleged in another claim against an insured" - note that under this definition the claims can be asserted against different insureds;
- Despite the breath of this common definition, some uncertainty has been created by Delaware Courts which Interpret it as requiring a "common course of conduct" or that the two case be "fundamentally identical." See, Pfizer Inc. v. Arch Ins. Co., 2019 Del. Super. LEXIS 345 (July 23, 2109) and cases cited therein;
- The Delaware decisions are not out of line with those of other states in applying the definition of "related", but the way they characterize the requirement is a focus of dispute.

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

Time does not permit discussion of the myriad exclusions in management liability policies that could apply to class actions. However, one generic issue which arises with increasing frequency is the applicability of warranties given at the time a management liability policy is underwritten.

- Some insurers no longer use insurance applications, and instead require warranties from policyholders that they are not aware of any circumstances that a reasonable insured would expect to result in a claim.
- Any subsequent claim which is based upon or arises out of such a circumstance is excluded.
- If a class action is reported under a policy that was underwritten in this way, expect the insurer to engage in very aggressive post loss underwriting to try to find a connection between a pre policy 'circumstance" known to the policyholder, and the class action allegations.

CLASS ACTION COVERAGE UNDER MANAGEMENT LIABILITY POLICIES

TIPS:

1. Read your management liability policies carefully whenever a claim is asserted that does not clearly fall within other policies. The scope of coverage might be broader than you expect.
2. Give notice promptly. The requirement to report claims within the policy period in which they are asserted (or extended reporting period) is strictly enforced.
3. Get a full understanding of the context in which the claim arose to determine whether a "related claim" or warranty may come into play; and
4. Give notice under multiple years of coverage if there is any possibility that a "related claim" provision may deem a claim asserted in an earlier period.