Products Liability Claims: A Litigator's Guide

By Eric G. Lasker

In an era when products liability litigation is increasingly threatening the financial stability of companies and even whole industries, defense attorneys can provide an invaluable service to clients before answering a complaint by making certain that the client has fully explored his or her rights to insurance coverage. Some courts even have suggested that an attorney who fails to ask about a client's potential insurance coverage may be in breach of professional obligations.[1] Good defense lawyers remind clients of insurance issues at the outset because a company is generally obligated to provide its insurance company with written notice of an "occurrence, claim, or suit,"[2] and because the company risks recovery of defense costs incurred before notice was given.[3]

In the past few decades, disputes between insurers and policyholders over the scope of insurance coverage have led to the development of an entire new area of legal expertise. Courts and insurers themselves are sharply divided on the meaning of many standard insurance industry policy provisions. Currently, a number of national and regional insurance coverage litigation wars are being waged concerning DES, asbestos, CERCLA, plastic pipes, breast implants, heart valves, EIFS, blood, lead paint, and a host of other matters. With the enormous financial stakes in mass torts liabilities and the many coverage outcomes depending on choice of forum and choice of law, it is imperative that a company be able to move quickly to recognize and to protect its full rights to insurance coverage.

This article reviews the availability of insurance coverage for tort liabilities associated with a product under CGL policies that expressly limit or exclude "products liability" coverage. Policyholders might assume—and insurance companies may be all too willing to suggest—that CGL policies with a "products liability" exclusion do not provide coverage for tort products liability claims. But in many cases, a policyholder might be entitled to significant coverage for such liabilities, as well as for defense costs,[4] because the definition of "products liability" (sometimes called "products hazard") in CGL policies can differ significantly from the definition under tort law.

Differences in definition

Products definition in standard insurance contracts has undergone a number of minor changes over the years, but the definition in the 1966 standard form CGL policy is still representative and is the source of the governing insurance paradigm over the past 40 years. The 1986 policy defines several hazards (types of risk exposure) covered under a CGL policy, except where expressly excluded and subject to the imposition of a separate limit of liability on the amount of coverage provided. The "product hazard" is defined as

> bodily injury and property damage arising out of a named insured's products or reliance upon a representation or warranty made at any time with respect thereto . . . but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

"Named insured's products" is defined as "goods or products manufactured, sold, handled, or distributed by the insured or others trading under his name."

Determining whether a particular tort products liability claim is subject to an insurance products liability exclusion or limitation can be a matter of enormous

financial consequences. Many companies that previously were not the targets of products liability claims—and accordingly might have obtained insurance policies that included products exclusions—are now in the line of fire. One notable example is in the area of asbestos litigation, where aggressive plaintiffs' firms have driven many traditional asbestos defendants into bankruptcy and are now setting their sights on alternative nonmanufacturing defendants, including employers and insurance companies.[5] Even traditional products liability targets that secured CGL coverage without absolute products exclusions were generally required to accept aggregate limits on the coverage available for products claims—limits that are often inadequate in the face of growing products liability verdicts.

In contrast, most CGL policies do not contain exclusions or limits to coverage for claims falling outside the products hazard, so a policyholder precluded from insurance recovery for products claims often is entitled to no-aggregate coverage for "nonproducts" claims under the same policy, subject only to the policy's per-occurrence limit.

As one court explained, the insurance "products" definition "governs only one subset of [tort] products liability claims."[6] Although the tort concept of products liability loosely encompasses any claim of injury caused by a defective product, the standard insurance "products" definition does not encompass tort product-related claims that (1) involve a product that does not meet the policy definition of "named insured's product"; (2) "arise out of" the insured's alleged misconduct, particularly if the misconduct is independent of any alleged product defect; or (3) involve injury that occurred before the policyholder relinquished physical possession of the product or on the insured's premises.

The following sections of this article explore the implications of each of these three distinguishing factors on a policyholder's right to insurance coverage for "nonproducts" torts products liability claims.

• Named insured's product

For insurance purposes, a named insured's product is limited in scope to "goods or products manufactured, sold, handled, or distributed by the insured or others trading under his name." This defined term raises at least two questions with respect to the scope of a products exclusion or limit in a CGL policy: Does the exclusion bar coverage where injury is caused by component parts of the insured's finished product or by products not intended for sale; and does the exclusion bar coverage if the insured is not a manufacturer or seller of the product?

Courts generally have held that insurance "products" encompass goods that "the insured deals with in his stock or trade" and that, accordingly, if a liability does not arise from a finished product intended for sale, a products exclusion may not apply. The most common example occurs where a policyholder is held liable for injuries arising from wastes generated during its manufacturing process; because waste materials are not products to be sold, liabilities arising from exposure to such materials generally are not subject to products exclusions.[7] An insurance products exclusion also might not apply where an insured is held liable based on its manufacture of a finished product but the injury allegedly is due to a defect in another company's component part (or vice versa).[8]

Courts also have found insurance coverage, notwithstanding a products exclusion, where a policyholder's tort products liability arises from providing a service rather than selling a product. Examples include where a policyholder sells a service that could be characterized as a product—constructing a building[9] or providing blood products for transfusion[10]—or a policyholder is a service provider that works with a product manufactured and sold by a third party.[11] However, these types of cases may implicate a parallel insurance policy exclusion, the "completed operations exclusion," that eliminates coverage for liabilities arising out of an insured's completed service operations.[12] In these circumstances, coverage may not be available even if the products exclusion is not applicable.

• Allegations of product-related misconduct

Even if a claim involves a company's product, the insurance products definition applies only if the liability claim "aris[es] out of" the product or out of "reliance upon a representation or warranty made at any time

with respect thereto." The key coverage question is whether this language encompasses (and, if so, to what extent) allegations arising out of an insured's conduct where that conduct relates to a product. Do claims of failure to warn of a product's risks or conspiracy to hide information regarding a product arise out of the product or out of the insured's independent misconduct in dealing with its customers?

This distinction can be an important one for insurance underwriters because an insured arguably has more control over its conduct than it does over a latent defect in its product. But regardless of underlying underwriting considerations, the plain language of the products definition should obligate an insurer to provide defense costs and liability coverage despite a products exclusion or limit in many circumstances where an insured is sued in a tort products liability action because of its conduct.

The case law addressing the extent of an insurer's coverage obligation in these circumstances is sharply divided.[13] However, most courts have recognized that certain types of product-related misconduct are sufficiently independent of the product that they cannot be said to "arise out of" it. In attempting to define the degree to which product-related misconduct falls within the products definition, courts have focused on (1) whether the specific identification of warranty and misrepresentation claims in the insurance products definition excludes other conduct-related claims, and (2) the meaning of "arising out of."

Reliance upon representation or warranty. The plain language of the insurance products definition presents a strong argument that the only types of product-related conduct encompassed in the definition are misrepresentations and breach of warranty. As noted above, the products definition expressly includes "reliance upon a representation or warranty with respect to [the insured's product]." The products definition does not include any other types of product-related misconduct. One court explained, in holding that a negligent failure to warn claim fell outside an insurance policy's products exclusion,

> The definition of products hazard and completed operations hazard do not mention omissions or failure to warn when there is no affirmative duty to do so. The definitions . . . do include injuries arising out of representations and warranties. But the converse, the failure to represent is not included in those definitions. If the parties intended to limit the liability of the insurer by excluding coverage for omissions and failure to warn when there is no affirmative duty to warn, the insurer would have so provided.[14]

Under this plain meaning analysis, the only conduct-based claims covered by a products exclusion are fraudulent or negligent misrepresentation and breach of warranty. Accordingly, in jurisdictions that have followed this approach, policyholders should be entitled to coverage outside a products exclusion for claims of failure to warn, concealment, conspiracy, and myriad other products-related allegations of misconduct.

"Arising out of" defined. In most jurisdictions, however, courts have overlooked (or ignored) the "representation or warranty" language and focused instead on the products definition's requirement that injury "aris[e] out of the named insured's product." The somewhat metaphysical question of what "aris[e] out of" a product means has led courts to make broad pronouncements about the inclusion of conduct-related claims in the products definition that often appear diametrically opposed. The Idaho Supreme Court, for example, suggested that any claim of negligence would necessarily move a liability outside a products hazard exclusion: "[T]he 'products hazard' definition is defined as injury 'arising out of the named insured's products. . . .' Nowhere does it purport to exclude injuries arising out of negligent conduct, and we decline to so expand the definition."[15] In contrast, a California appellate court suggested that insured misconduct necessarily falls within the products hazard definition so long as it can be said that the conduct has any "connection with" the insured's product.[16]

Although courts generally have recognized that some types of product-related conduct fall outside an insurance products exclusion, they have been reluctant to hold that the mere allegation of misconduct will make a products exclusion inapplicable. Instead, most courts have engaged in fact-specific analyses to determine the degree to which an insured's potential liability arises from the alleged misconduct and to which the misconduct is tied to the insured's product.[17] Where the conduct can be shown to be an independent cause of potential liability, the insurance products definition is not applicable.

This fact-specific approach has led to a hodgepodge of judicial decisions that often are difficult to reconcile[18] and places a premium on quick action by a company to secure an advantageous forum. Defense counsel must be conscious that their framing of issues in an underlying claim as tied to the company's conduct or product could affect the availability of coverage or payment of defense costs outside the products definition.

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• Time and place requirements

The third distinction between the tort and insurance definitions of products liability arises from the insurance definition's requirement that the event giving rise to the liability occur "away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others." An insurance products exclusion will not bar coverage for a tort products liability claim if the injury-causing event arises either before relinquishment of the product by the insured or on the insured's premises.

These time and place requirements emerged as a result of insurance underwriting considerations wholly irrelevant to tort concepts of products liability. By including these time and place requirements, the insurance industry sought to distinguish hazards arising when the insured still had control of the product from those arising after the product had left the insured's control. Insurers drafted exclusions or imposed limits to protect themselves from postcontrol claims; but they decided, for marketing purposes, to offer unlimited insurance coverage for hazards that were potentially within the insured's control and thus subject to insurance company loss-prevention efforts.[19] As the scope and magnitude of torts products liability have expanded, the categories of on-premises and prerelinquishment products hazards have resulted in significant liabilities.

Again, the ever-rising flood of asbestos liabilities provides a notable example. Asbestos bodily injury for insurance purposes is generally recognized as commencing at the moment of first exposure, when asbestos dust is inhaled by workers or bystanders during asbestos installation activities. Any liability incurred by the company installing that asbestos falls outside the insurance products definition, because the asbestos plaintiff suffered injury while the product containing asbestos was still in that company's possession (prerelinquishment) and, often, at job sites under the insured's control (on premises).

The insurance industry has long been aware of its significant and uncapped exposure to asbestos contractors for claims falling outside insurance products exclusions or limits (often called "nonproducts" claims). One reporter in 1996 identified "[n]on-products exposures stemming from installation activities associated with traditional products defendants" as one of the "main components . . . of the insurance industry's $16 billion of unfunded liabilities."[20]

During the early 1990s, insurers were emboldened by a series of insurance actions brought by asbestos manufacturers in which courts rejected arguments that those policyholders were entitled to coverage outside the products definition because of conduct-related allegations against those defendants. Those coverage disputes focused solely on the "arising out of" language (i.e., failure to warn and conspiracy claims) and did not involve companies engaged in installation activities or any other activities that would bring them outside the insurance products definition's separate time and place requirements. The insurance industry, however, sought to parlay these "arising out of" cases into a general holding that all asbestos tort products liabilities were subject either to products exclusions or to limitations on coverage imposed by the products definition.[21]

This effort was defeated in two 1997 appellate court opinions that correctly decided that liabilities incurred by asbestos contractors arose from asbestos exposures occurring prior to the insureds' relinquishment of the asbestos product.[22] In the wake of these opinions, insurance companies have paid out many hundreds of millions of dollars for asbestos "nonproducts" claims to policyholders engaging in asbestos contracting activities.[23]

Other circumstances exist in which tort product liability defendants may face liabilities that do not satisfy the time and place requirements of the insurance products definition. These include, inter alia, product-related injuries arising: (1) during the manufacture or transportation of the product, (2) through the release of hazardous materials into the atmosphere or groundwater during the manufacturing process, (3) on the insured's premises, and (4) during service operations. In such situations, a policyholder is entitled to full coverage for tort products liabilities regardless of any products exclusion or limitation in its policy.

Conclusion

The magnitude and scope of tort products liability claims is steadily increasing. As a result, a defendant's ability to secure the full insurance coverage to which it is entitled can often be crucial to its financial success and even its corporate survival. By understanding the differences between insurance and tort concepts of products liability discussed above, defense counsel can direct clients to a potentially significant pool of additional insurance coverage that might have been overlooked, and can help secure the client's financial future even if underlying tort litigation is unsuccessful. ■

Notes

1. *See* Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 958 Cal. 1062, 76 Cal. Rptr. 2d 749 (1998); Larochelle v. Cyr, 707 A.2d 799 (Me. 1998); Ross v. Briggs & Morgan, 540 N.W.2d 843 (Minn. 1995).

2. *See generally* Marc S. Mayerson, *Perfecting and Pursuing Insur-*

ance Coverage, 32 TORT & INS. L.J. 1003 (1997).

3. *See* Stephen A. Klein, *Insurance Recovery of Pre-Notice Defense Costs*, 34 TORT & INS. L. J. 1103 (1999).

4. *See* Marc S. Mayerson, *Insurance Recovery of Litigation Costs: A Primer for Policyholders and Their Counsel*, 30 TORT & INS. L.J. 997 (1995).

5. *See* Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1.

6. Frontier Insulations Contractors, Inc. v. Merchants Mutual Ins. Co., 91 N.Y.2d 169, 690 N.E.2d 866, 869, 667 N.Y. Supp. 2d 982, 985 (1997).

7. Hydro Sys., Inc. v. Cont'l Ins. Co., 929 F.2d 472, 475 (9th Cir. 1991).

8. *See* Gulf Miss. Marine Corp. v. George Engine Co., 697 F.2d 668, 672-73 (5th Cir. 1983) (manufacturer of finished product had not manufactured component part alleged to have caused injury). *But cf*. Steadfast Ins. Co. v. Eon Labs. Mfg., Inc., 756 A.2d 889, 894 (Del. 2000) (manufacturer's liabilities in fen-phen litigation subject to products exclusion notwithstanding phentermine alone not alleged defective because "had not Eon manufactured, promoted and sold phentermine it would not have been sued").

9. *See* Fejes v. Alaska Ins. Co., 984 P.2d 519, 526 (Alaska 1999) (courts divided whether completed building is product or service; citing examples of both).

10. *See* Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 832 F. Supp. 114, 116-17 (E.D. Pa. 1993) (blood and blood products services not subject to products exclusion); Am. Red Cross v. Travelers Indem. Co., 816 F. Supp. 755, 759 (D.D.C. 1993) (same).

11. *See* Frontier Insulations Contractors, Inc. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 667 N.E.2d 982, 985-86 (N.Y. 1997) (products exclusion applies only to products insured trades or sells as a manufacturer, seller, or distributor); Prosser Comm'n Co. v. Guar. Nat'l Ins. Co., 700 P.2d 1188, 1191 (Wash. App. 1985) (livestock auction business is service).

12. *See generally* OWEN L. SHEAN & DOUGLAS L. PATIN, CONSTRUCTION INSURANCE: COVERAGES AND DISPUTES 199-211 (1994).

13. Injury arising from product-related conduct is outside insurance products definition: Devich v. Commercial Union Ins. Co., 867 F. Supp. 1230, 1235 (W.D. Pa. 1994), *aff'd mem.*, 66 F.3d 310 (3d Cir. 1995); Ald Concrete & Grading Co. v. Chem-Masters Corp., 677 N.E.2d 362, 368 (Ohio App. 1996); Keystone Spray Equip., Inc. v. Regis Ins. Co., 767 A.2d 572, 574 (Pa. Super. 2001). Injury arising from product-related conduct is encompassed within insurance products definition; Baretta, U.S.A., Corp. v. Fed. Ins. Co., _ F.3d_, 2001 WL 1019745 (4th Cir. Sept. 6, 2001); Steadfast Ins. Co. v. Eon Labs Mfg., Inc., 756 A.2d 889, 893 n.21 (Del. 2000); Laidlow Envtl. Servs., Inc. v. Aetna Cas. & Sur. Co., 1999 WL 1063169 (S.C. App. 1999).

14. Cooling v. U.S. Fidel. & Guar. Co., 269 So. 2d 294, 297 (La. App. 1972); *accord* Hartford Mut. Ins. Co. v. Moorhead, 578 A.2d 492, 503 (Pa. Super. 1990) (insurance companies can avoid "failure to warn negligence" liability by unequivocally including claims within redrafted "Products Hazard" exclusion; policy did not unequivocally indicate claim would not be covered).

15. Chancler v. Am. Hardware Mut. Ins. Co., 712 P.2d 548 (1985); *accord* Devich v. Commercial Union Ins. Co., 867 F. Supp. 1230, 1234 (M.D. Pa. 1994) (failure to warn claim under negligence theory is improper conduct not defective product).

16. Fibreboard Corp. v. Hartford Accident & Indem. Co., 20 Cal. Rptr. 2d 376, 382 (Cal. App. 1993).

17. *See, e.g.*, Ald Concrete & Grading Co. v. Chem-Masters Corp., 677 N.E.2d 362, 368 (Ohio App. 1996).

18. *E.g.*, Am. Trailor Serv. v. Home Ins. Co., 361 N.W.2d 918 (Minn. App. 1985) (negligently failing to provide assembly instructions did not arise out of product, not subject to products hazard exclusion); *but see* Brewer v. Home Ins. Co., 710 P.2d 1082 (Ariz. App. 1985) (failure to provide installation instructions did arise out of product, subject to products hazard exclusion). Under contra proferentum, such inconsistent judicial interpretations should require a finding against the insurer that drafted the policy language. *See* Ann., *Division of Opinion Among Judges …* , 4 A.L.R. 4th 1253 (1981 & Supp. 1999).

19. *See* Theodore A. Howard, *Products/Completed Operations Coverage 1997*, 7:6 COVERAGE 33, 39 (Nov./Dec. 1997).

20. Eric M. Simpson, *Insurers Chip Away at E&A Liabilities*, BEST'S REV., Prop.-Cas. Ins. ed., 38, 41 (Apr. 1996).

21. Howard, *supra* note 19, at 39.

22. *See* Frontier Insulations Contractors, Inc. v. Merchs. Mut. Ins. Co., 91 N.Y.2d 169, 690 N.E.2d 866, 667 N.Y. Supp. 2d 982 (N.Y. 1997); Commercial Union Ins. Co. v. Porter Hayden Co., 698 A.2d 1167 (Md. App.), *cert. denied*, 703 A.2d 147 (Md. 1997).

23. *See, e.g.*, Press Release, Owens Corning Second Quarter Earnings Outlook (June 26, 2000). For a more complete discussion of the *Frontier* and *Porter Hayden* opinions and their implications, *see* Mitchell Dolin & Eric Lasker, *The New Frontier: Non-Products Coverage for Asbestos Claims*, 12 MEALEY'S LITIG. REP., INS., No. 16 (Feb. 24, 1998).