Insurance Coverage for Products Liability Claims

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I. Introduction

In the past several decades, products liability lawsuits have increased exponentially. The most well-known example involves asbestos claims. While it is unlikely that any future products liability lawsuits will have the long-term financial and legal impact of asbestos claims, new products liability claims are being filed every day and comprehensive general liability (CGL) insurance policies have been marketed specifically to provide coverage for such claims.

CGL policies are very valuable assets to companies that face products liability lawsuits because these policies not only require the insurer to indemnify a company for damages arising out of products liability claims, but also require the insurance company to defend the company from these lawsuits, or reimburse the defense costs the policyholder incurs in connection with such lawsuits. Insurance companies, however, include many exclusions in the CGL policies they sell to insureds, which often result in complex coverage disputes. Policyholders should consider hiring coverage counsel to help navigate the often complicated process of making a claim to the insurer, responding to the insurer’s coverage defenses, negotiating with the insurer, and filing a coverage suit if the insurer refuses to provide a defense or liability coverage for a products liability claim.

This white paper discusses some of the issues that policyholders face in obtaining coverage for products liability lawsuits, including (i) the type of coverage available under CGL policies for products liability claims; (ii) factors that may affect a policyholder’s potential coverage for products liability claims; and (iii) coverage exclusions that insurers may assert to attempt to deny coverage for products liability claims.

II. Coverage Under Commercial General Liability Policies for Claims of “Bodily Injury” and “Property Damage”

A. An Insurer’s Duty to Indemnify

For businesses, the most common type of liability insurance is the CGL policy. In most instances, companies will seek coverage for product-related claims and liabilities under the

Because of the many variations in policy language, this white paper does not address all of the issues. It also does not replace, and should not be relied on instead of, legal advice based on the specific policy language involved and a policyholder’s particular situation. However, it does provide a starting point and is intended to be an aid in considering what is sometimes a maze of factual and legal issues regarding insurance. This white paper may be considered advertising in some states.

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“bodily injury liability” or “property damage liability” coverages of their CGL policies. CGL policies typically obligate an insurance carrier to:

pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies . . . .

Commercial General Liability Coverage Form, Form CG 00 01 12 07 § I, Coverage A, ¶ 1.a (ISO Properties, Inc. 2006) [hereinafter “CGL Form”].

“Bodily injury” is typically defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” Id., § V.3. Additionally, a number of cases have interpreted the term to include mental injury, especially when accompanied by physical injury.¹

“Property damage” often is defined as:

(a) Physical injury to tangible property, including all loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

(b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

Id., § V.17.

B. An Insurer’s Duty to Defend

In addition to the insurer’s duty to indemnify, CGL policies also typically impose on the insurer the separate obligation to defend and pay the expenses of defending lawsuits against the insured.² The defense provision of the standard form CGL policy typically states that the insurance carrier shall “have the right and duty to defend any ‘suit’ seeking . . . damages” for “bodily injury” or “property damage.” CGL Form, § I, Coverage A, ¶ 1.a. The standard CGL policy also typically obligates the insurance carrier to pay expenses and costs taxed against the insured in any such suit. Id., § I, Supplementary Payments, ¶ 1. While indemnity payments typically reduce or impair a primary policy’s coverage dollar limits, defense payments generally do not do so. For


² See Am. Cas. Co. of Reading, Pa. v. Howard, 187 F.2d 322, 327 (4th Cir. 1951) ("The obligation to defend suits is entirely independent of the obligation to pay for bodily injuries and property damage. The two obligations are assumed in different paragraphs of the contract and under distinctive sub-heads.").
example, the “Supplementary Payments” section typically provides that the expenses and costs taxed against the insured in defending a lawsuit “will not reduce the limits of insurance.” *Id.*, § I, Supplementary Payments, ¶ 1.

The duty to defend is one of the most important features of a CGL policy. It is widely recognized that the duty to defend exists for any lawsuit that potentially seeks damages within the coverage of the policy. The duty to defend applies even to lawsuits where the claims are groundless, false, or fraudulent. For this reason, the duty to defend in CGL policies is widely regarded as “litigation insurance.” For products liability lawsuits that are meritless, the policy’s duty to defend may be more important to the policyholder than the duty to indemnify.

Courts construe the allegations in the underlying complaints liberally. The duty to defend, therefore, does not depend on inartful drafting by the underlying claimant.³

Similarly, coverage is not governed by any label attached to allegations.⁴ Doubts regarding coverage are resolved in favor of the insured.⁵ As the Ninth Circuit has explained:

The CNA [Cas. of Cal. v. Seaboard Sur. Co.] court cited approvingly to *Ruder & Finn v. Seaboard Sur.*, 52 N.Y.2d 663, 439 N.Y.S.2d 858, 422 N.E.2d 518 (1981), wherein a New York court determined that an insurance company had a duty to defend its insured against an antitrust action that included an allegation of “false disparagement.” *See CNA*, 176 Cal. App. 3d at 611-12, 222 Cal. Rptr. 276. The court rejected the insurer’s argument that “two solitary, unsubstantiated words” buried within “completely unrelated federal antitrust cause of action, which was, itself, undisputedly not covered” could not trigger the duty to defend.⁶

³ *See, e.g.*, Pension Trust Fund for Operating Eng’rs v. Fed. Ins. Co., 307 F.3d 944, 951 (9th Cir. 2002) (“California courts have repeatedly found that remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty.”); U.S. Fid. & Guar. Co. v. Executive Ins. Co., 893 F.2d 517, 519 (2d Cir. 1990) (insurance “policy protects against poorly or incompletely pleaded cases as well as those artfully drafted” (citation omitted)); CNA Cas. of Cal. v. Seaboard Sur. Co., 176 Cal. App. 3d at 598, 222 Cal. Rptr. 276, 282 (1986) (“[I]t is not the form or title of a cause of action that determines the carrier’s duty to defend, but the potential liability suggested by the facts alleged or otherwise available to the insurer.”).

⁴ *See Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77, 419 P.2d 168, 176-77, 54 Cal. Rptr. 104, 112-13 (1966) (insurer’s duty not measured by technical words of a pleading, but rather by potential for coverage as revealed by facts alleged in complaint or otherwise known to insurer).

⁵ U.S. Fid., 893 F.2d at 519 (“‘If the allegations of the complaint are ambiguous or incomplete, the insurer is nevertheless obligated to defend if the case is potentially within the coverage of the policy.’” (citation omitted)).

Given these coverage provisions and applicable case law, insurers may have a duty to defend lawsuits involving alleged products liability losses, even if there is ultimately no coverage for the actual liability.

III. Factors That May Affect an Insured’s Potential Recovery

Insurers often raise arguments that could reduce or eliminate the amount of coverage afforded by their policies. Below is a summary of the most common defenses to coverage raised by insurers.

A. Notice

As a condition of coverage, CGL policies specify that an insured must provide the insurer with notice “as soon as practicable” of an “occurrence,” which is the accident that may result in the claim, and notice of the claim itself. As part of this notice (which should be in writing), the insured usually must identify itself and provide information about the time, place, and circumstances of the loss. This notice provision is intended to give an insurer a chance to investigate a loss or claim while the evidence is still fresh.

Notice provisions usually have been construed by courts to require that an insured provide notice within a reasonable time after an insured event occurs. If an insured fails to do so, the insurer may be excused from its obligations. The majority view is that if an insurer is not prejudiced by a delay in notice, then “late” notice will not be a defense to coverage. In most of these jurisdictions, “[t]he burden of proof is on the insurer.” There are a minority of jurisdictions, however, that do not require any showing of prejudice and allow an insurer to deny coverage based on late notice.

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9 See, e.g., Canron, 82 Wash. App. at 485, 918 P.2d at 940; see also Best, 270 S.W.3d at 405. As the court stated in Silicon Valley Bank v. New Hampshire Insurance Co.: Actual and substantial prejudice is “not shown simply by displaying end results.” Rather, “the probability that such results could or would have been avoided absent the claimed default or error must also be explored.” The burden of showing that a breach of the clause resulted in prejudice is on the insurer.

B. Allocation Involving Multiple Years of Injury

If a products liability claim involves an injury that takes place over a number of years, such as asbestos bodily injury claims, then there are two important coverage issues implicated: (i) how many policies are “triggered” by the claim; and (ii) how should the claim be allocated across the different policies that have been triggered.

A CGL policy is “triggered” by “bodily injury” that activates coverage. Most CGL policies sold until the mid-1980s were “occurrence policies.” Under an occurrence policy, bodily injury will “trigger” the policy if it took place during the policy period. Over the past twenty years, however, most insurance companies have begun selling “claims-made” policies in which the making of a claim during the policy period usually triggers coverage. Some insurance companies, however, still sell occurrence-based policies.

There are four theories regarding when an occurrence-based CGL policy is triggered. The first theory is “exposure.” Under the exposure theory, all CGL policies in effect during exposure to injurious or harmful conditions are triggered. The second theory is “manifestation,” in which the CGL policy in effect when the injury or damage is discovered or manifests itself is triggered. Under the “continuous trigger” theory, all CGL policies in effect from exposure to manifestation are triggered. The “injury-in-fact” theory holds that all CGL policies in effect during the time the injury or damage is shown to have actually taken place are triggered. Unlike the other three triggers, which are presumptions, the injury-in-fact trigger requires a showing of when actual damage happened.

If multiple insurance policies covering different periods are triggered by a claim, then the question is whether the claim must be allocated among those policies. There are two major approaches to this issue: “pro rata” and “all-sums.” Although there are different variations, generally under a pro rata allocation, each policy is responsible only for the pro rata share of the total damage that took place during the policy period. Under an all-sums approach, each policy is fully responsible, up to its limits, for the total amount of the damages, and the policyholder can choose which policy year should pay the claim. The insurer whose policy is chosen may be able to seek contribution from other triggered policies.

C. Number of Occurrences

The policy’s dollar limits of coverage are typically stated as being on a “per occurrence” basis—often subject to an aggregate dollar limit for products liability claims. The “number of occurrences” involved in the underlying litigation thus affects the amount of coverage than an insurance policy provides. In addition, many policies are subject to per-occurrence deductibles.

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or self-insured retentions (SIRs), which the policyholder must pay before getting coverage. The “number of occurrences” also determines whether the loss will be borne principally by the policyholder, with a deductible or SIR or by the primary layer of coverage (in the case of multiple occurrences), or shifted to the excess layers (in the case of one occurrence). Because the number-of-occurrences issue affects many aspects of how the policy works, and often affects how the loss is shared among multiple insurance companies, it is an issue on which insurance companies and policyholders take different positions, depending upon how their interests are affected by a particular case.

Although it is an intensely factual issue, most courts look to the cause (or causes) of the injury, while some look to the effect or resulting injury, to determine the number of occurrences. If a court finds that the injury results from a single proximate cause, then the court will likely find that there is one occurrence.11 New York uses an “unfortunate event” or proximate cause test. Under this test, whether a series of losses or injuries are a result of a single or multiple occurrences is determined by “whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum.”12 If a court finds that multiple injuries result from multiple causes, or from an intervening cause or causes, the court might find that each claim is a separate occurrence.13

D. Emotional Distress As Bodily Injury

There is a division among courts about whether “bodily injury” includes emotional distress. Some courts, finding that the term is ambiguous, have found that emotional injury alone constitutes bodily injury.14 Other courts have held that emotional distress constitutes bodily injury.


14 See Lavanant, 79 N.Y.2d at 630-31, 595 N.E.2d at 822-23, 584 N.Y.S.2d at 747-48 (holding that emotional distress, without an accompanying physical injury, constituted bodily injury); York Ins. Grp. of Me. v. Lambert, 740 A.2d 984, 986 (Me. 1999) (holding that a claim for emotional distress triggers an insurer’s duty to defend under bodily injury coverage unless explicitly excluded); Doyle v. Engelke, Wis. 1d 277,288,580 N.W.2d 245, 250-51 (Wis. 1998) (finding that a reasonable insured would understand mental, emotional, or psychological conditions to be included within the concepts of “sickness or disease” which the policy uses to define “bodily injury”).
injury if it is accompanied by some physical manifestation of the mental injuries. Another group of courts has rejected the notion that purely emotional injuries constitute bodily injury. Thus, whether claims based on emotional injury are covered by a CGL policy depends in large part upon the law applicable to the insurance policy.

E. Loss of Use

In property damage cases, if there has been no physical injury to tangible property, there still might be property damage because the definition of property damage also includes “loss of use” of property. One issue that has arisen is whether the loss of use must be complete and total. Nothing in the definition of property damage, however, defines the extent to which there must be loss of use. Partial loss of use should be sufficient to satisfy the definition of property damage. At a minimum, the definition is ambiguous and has been construed in favor of the policyholder by some courts.

F. Coverage Territory Issues

CGL policies contain coverage territory provisions that limit the territorial scope of coverage. Such provisions come into play when products are manufactured or sold in one country while

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15 See Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 177-78, 607 A.2d 1255, 1261 (1992) (“We conclude that the term ‘bodily injury’ is ambiguous as it relates to emotional distress accompanied by physical manifestations. That ambiguity should be resolved in favor of the insured.”).


18 See Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., 851 So. 2d 466, 494 (Ala. 2002) (“We conclude that the rationale of Sola Basic does not warrant engrafting a ‘uselessness’ requirement onto Gerling’s policies concerning property damage under the facts of this case.”).

19 See Ga. Farm Bureau Mut. Ins. Co. v. Meyers, 249 Ga. App. 322,324, 548 S.E.2d 67, 69 (2001) (“Where a term of a policy of insurance is susceptible to two or more constructions, even when such multiple constructions are all logical and reasonable, such term is ambiguous and will be strictly construed against the insurer as the drafter and in favor of the insured.”).
causing harm in another country. Domestic CGL policies require an occurrence to take place in the coverage territory, which typically includes the United States, and globally, “if the damage or injury arises out of . . . products made or sold in the United States.” A recent Seventh Circuit Court of Appeals case involved an Illinois company that designed and marketed toys and that sought coverage for class action lawsuits filed against it in the United States after certain toy trains and train set components were found to have been manufactured in China with lead paint. The Seventh Circuit held that an occurrence takes place when and where all of the factors that led to the injury come together to inflict injury, which in this case was the United States where consumers ultimately were exposed to the lead paint. Since the policyholder’s domestic coverage contained a lead paint exclusion, its coverage did not apply.

IV. Typical Insurer Defenses

CGL policies contain a broad grant of coverage. The broad scope of coverage, however, is limited specifically by enumerated exclusions. When presented with a substantial claim, insurers will not rush forward with their checkbooks in hand. There seems to be a direct relationship between the size of an insurance policyholder’s prospective liability and the number of grounds its insurer finds for refusing to provide coverage. Below are described common defenses that insurers often assert to products liability claims.

A. “Expected” or “Intended” Harm

CGL policies do not afford coverage in respect of liabilities arising out of third-party damage or injuries that were “expected or intended” by the policyholder. In raising this defense, insurers usually align themselves with the underlying claimants, who typically allege that the policyholder acted with knowledge of the harmful effects of its product.

When interpreting the word “expected,” two issues that frequently arise are: (i) whether the test regarding whether the policyholder expected the damage is subjective or objective; and (ii) the definition of “expected.” First, policyholders favor a subjective test, whereas insurers generally benefit from an objective test. Second, insurers usually argue that “expected” means “reasonably anticipated.” Policyholders, however, advocate for a more stringent definition, arguing that “expected” means “was substantially certain would occur.” Most courts have adopted a subjective test, using the more stringent definition of “expected,” holding that coverage is precluded if the policyholder intended to cause the injury or damage that led to the claim or was substantially certain that harm would occur. A minority of courts have held that if a policyholder could have reasonably anticipated that its actions would lead to the bodily injury or property damage, then the exclusion applies.

20 Ace Am. Ins. Co. v. RC2 Corp., 600 F.3d 763(7th Cir. 2010).
Insurers typically bear the burden of proving that exclusions apply to bar coverage. Although the “expected or intended” language typically does not arise in an exclusion in pre-1980s CGL policies, many courts interpreting those policies have treated the expected/intended language as an exclusion requiring the insurer to demonstrate that the injury was expected or intended from the policyholder’s subjective point of view.\(^{21}\)

In *Sherwin-Williams Co. v. Certain Underwriters at Lloyd’s London*, a case involving lead poisoning, the court held:

> Although Sherwin-Williams allegedly acted with a knowledge of the risks posed by lead-based paint, [the claimant] does not allege that the company acted with the intent of injuring consumers or their children. If knowledge of certain risks posed by a product were sufficient to infer intent by a manufacturer to injure consumers, then no manufacturer would ever be able to seek coverage from an insurer because every product has certain known dangers and risks.\(^{22}\)

In other words, CGL policies cover the unintended results of even intentional acts. Mere knowledge of a risk is not the same as knowledge of a loss. If it were, such knowledge of potential risks would undermine the entire rational for purchasing insurance.

### B. Contractual Liability Exclusion

In products liability matters involving multiple defendants, claims for indemnification and contribution can greatly complicate an insured’s access to insurance coverage. CGL policies typically contain an exclusion that precludes coverage for bodily injury and property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. Importantly, the contractual liability exclusion has a built-in exception for an “insured contract.” An insured contract provision is basically an indemnification provision in which the insured assumes the tort liability of another party.


\(^{22}\) 813 F. Supp. 576, 585 (N.D. Ohio 1993); see also *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 748, 15 Cal. Rptr. 2d 815, 836 (1993) (“The appropriate test for ‘expected’ damage is whether the insured knew or believed its conduct was substantially certain or highly likely to result in that kind of damage.”); accord *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 76, 52 Cal. Rptr. 2d 690, 723 (1996) (“[G]eneral knowledge of the hazards of asbestos is not equivalent to knowledge that asbestos bodily injuries [for which coverage is sought] were practically certain to occur.”).
Although an agreement might fall within the definition of an insured contract, issues have arisen about whether the insured is entitled to coverage for the indemnified parties’ defense costs.\(^{23}\) Moreover, cross-indemnities among parties can create an issue about which parties’ insurers are required to pay any liabilities first. In all events, it is important to take steps to preserve any indemnification or contribution rights to avoid impairing any subrogation rights the insurers might have.

C. **“Business Risk” Exclusions**

In products liability matters, insurers frequently raise a set of exclusions found in CGL policies known as the “business risk” exclusions. These include the “your product” exclusion, the “impaired property” exclusion, and the “sistership” exclusion. In cases involving injury to persons or physical damage to property, these exclusions, however, should have a limited impact, unless there is a product recall or claims among the defendants related to the removal of allegedly defective parts.

1. **“Your Product” Exclusion**

The “your product” exclusion bars coverage for “property damage” to “your product arising out of it or any part of it.” This exclusion has been interpreted narrowly to bar coverage for the repair and replacement of a defective product itself but not injury to persons or other property.\(^{24}\) In *Reliance National Insurance Co. v. Hatfield*, for instance, a court applied the your product exclusion to bar coverage for defective airplane engines.\(^{25}\) The court, however, acknowledged that this might not have been the result had the engines caused damage to third-party property.

2. **“Impaired Property” Exclusion**

The “impaired property” exclusion, which concerns defective products incorporated into another product, has been limited to situations that do not involve physical injury or property

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\(^{24}\) *Forest City Dillon, Inc. v. Aetna Cas. & Sur. Co.*, 852 F.2d 168 (6th Cir. 1988).

\(^{25}\) 228 F.3d 909 (8th Cir. 2000).
The impaired property exclusion states as follows:

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

This exclusion only applies to damage to “impaired property,” which is defined as:

tangible property, other than “your property” or “your work,” that cannot be used or is less useful because:

(a) it incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous . . .

if such property can be restored to use by the repair, replacement, adjustment or removal of “your product” or “your work” or your fulfilling the terms of the contract or agreement.

The impaired property exclusion seeks to limit coverage for certain types of liability when the policyholder’s product is incorporated into the property of others, making it less useful.  

The impaired property exclusion does not apply when a product causes damage to other property. Nor, by its terms, does it apply to bar coverage for bodily injury. Also, the impaired property exclusion contains a built-in exception, providing that it does not apply to damage arising out of “sudden and accidental physical injury to ‘your product’ or ‘your work’ after it has been put to its intended use.”

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28 See Prisco Serena Architects, 1995 WL 417531 at *5
3. “Sistership” Exclusion

The “sistership” exclusion bars coverage for the repair or replacement of a product when it has been withdrawn from the market. A typical sistership exclusion may exclude:

“Damages” claimed for any loss, cost or expense incurred by the insured or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) “your product”;

(2) “your work”; or

(3) “impaired property”;

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

The sistership exclusion should not apply unless there is a withdrawal of a policyholder’s products, and it does not exclude coverage for the actual damage caused by the product.29

D. Pollution Exclusion

The existence, specific terms, and construction of a CGL policy’s pollution exclusion are critical to determining whether insurance coverage may be available for certain types of products liability claims. In response to the disputes over the previous version of the pollution exclusion, insurers began in the mid-1980s to develop what has been called the “absolute” pollution exclusion, which purports to preclude coverage for environmental pollution. The exclusion provides:

This insurance does not apply to:

(1) Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants;

29 See Centillium Commc’ns, Inc. v. Atl. Mut. Ins. Co., 528 F. Supp. 2d 940, 950 (N.D. Cal. 2007) (“The ‘product recall’ or ‘sistership’ exclusion ‘operates to exclude coverage for the cost of ‘preventative or curative action’ when the insured withdraws a product in situations in which a danger is merely apprehended.’ ‘It does not, however, operate to exclude coverage for actual damage caused by the very product giving rise to such an apprehension.’” (citations omitted)).
(a) at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured . . . 30

In light of the broad language of the current pollution exclusion, insurers have argued for an expansive definition of “pollutant,” which would stretch the reach of the exclusion far beyond traditional environmental pollution. For example, insurers have argued that claims alleging bodily injury or property damage resulting from carbon monoxide fumes inside a residence, lead paint exposure, and worker exposure to chemicals in the workplace are excluded.

Policyholders, however, contend that the pollution exclusion applies only to traditional environmental pollution claims and does not bar coverage for products liability claims. Many courts agree, including the New Jersey Supreme Court, which has stated: “[W]e are confident that the history of the pollution-exclusion clause in its various forms demonstrates that its purpose was to have a broad exclusion for traditional environmentally related damages.”31

V. Conclusion

As the above demonstrates, businesses’ CGL policies may provide broad coverage for many products liability claims. This coverage should extend not only to defense costs, but also to settlements and judgments. Therefore, insureds should consider carefully the possibility that they may have insurance coverage for these claims and actively take steps to protect themselves. In analyzing available coverage, it is important to consider all potentially applicable insurance policies, and their coverages, conditions, and exclusions. Also, it is important to consider both domestic and international coverages in cases involving products manufactured and sold outside the United States or occurrences that take place outside the United States.

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