Client Alert

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New York Federal Court Finds CGL Insurer Must Defend Third-Party Product Recall Claims

A federal court in New York recently found that litigation concerning damages related to a third party's product recall required a defense under a commercial general liability policy. *Thruway Produce, Inc. v. Mass. Bay Ins. Co.*, 2015 U.S. Dist. LEXIS 94846 (S.D.N.Y. July 20, 2015).

Background

Thruway Produce sold apples to Milnot Holding Company for use in baby food. The parties' contract required the apples to be free of certain rodenticides (used to kill rats and mice). After discovering that certain apples were contaminated with rodenticide, Milnot was forced to recall its baby food. Milnot then sued Thruway, alleging that Thruway breached the supply contract and breached express and implied warranties. The baby-food maker sought roughly $1.5 million in damages for "among other items of loss, produce recall and disposal."

Thruway tendered the suit to its general liability insurer, Massachusetts Bay Insurance Company, under a primary and an excess commercial general liability policy. Massachusetts Bay denied Thruway's request for a defense and Thruway filed suit against Massachusetts Bay seeking a ruling that Massachusetts Bay was obligated to defend Thruway against Milnot's claims.

The Court's Decision

The court rejected the insurer's arguments that there was no coverage and ruled in Thruway's favor, finding that Massachusetts Bay was obligated to provide a defense. The court specifically found the exclusions that Massachusetts Bay relied upon were inapplicable.

In particular, the court rejected Massachusetts Bay's reliance on exclusions for product recall damages and for damages to "your work," "your product" and "impaired property." The product recall exclusion turned on whether the damage was incurred for the recall of "your product." But Thruway's apples were not recalled. Rather, only Milnot's baby food was recalled. Because Thruway's product (the apples) was not the subject of the recall, the product recall exclusion did not apply.

The other exclusions cited by Massachusetts Bay applied to damage to "your work," "your product" and "impaired property." Yet again, the "your work" and "your product" exclusions did not apply because the baby food, not the policyholder's apples, was recalled. And, the "impaired property" exclusion applied only if the property could be "restored to use by repair, removal or replacement of the work or product." That was not the case here since Massachusetts Bay made no argument that the tainted baby food could be restored to use. Accordingly, none of the insurer's exclusions applied.

The court also found the damages sought by Milnot to be caused by an "occurrence." The policies defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Relying on New York law, the court focused on whether the contamination of the apples, which resulted in damage to the baby food, was "unexpected and unintended." The court determined that it was, noting that there was no evidence, much less any

argument, that Thruway "intended or knew that the apples supplied to Milnot were contaminated or would contaminate the baby-food product." The court also distinguished the insurer's case authority, finding each of the insurer's cases to concern "only damages [] to the defective product supplied by the insured." Here, on the other hand, there was damage to property (the baby food) other than the insured's defective product (the apples).

Finally, the court rejected Massachusetts Bay's assertion that Milnot's losses did not constitute "property damage." The policies defined "property damage" as "[p]hysical damage to tangible property, including all resulting loss of use of that property. . . ." Here, the contaminated apples caused damage to the baby food. The court therefore found that the apples caused "property damage."

Insurance Implications

The *Thruway Produce* decision highlights the importance of carefully examining exclusionary policy language and not relying on the exclusion's title or general description. Here, the policies had an exclusion that nominally applied to product recalls. But, upon a closer analysis, the exclusions barred only coverage for the recall of the *policyholder's* product, not products of third parties that incorporated or contained the policyholder's product. Nor did they apply where the recall involved the product of a company other than the policyholder's. The decision, therefore, underscores the importance of carefully reviewing all potentially applicable policy provisions and, in particular, those to which an insurer cites as the basis for its coverage denial.

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