

Navigating a New Wave of Product Liability Claims

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The spinach *E. coli* outbreak and recall of 2006 cost five lives and between \$175 million and \$350 million. In 2008, manufacturers, distributors and consumers faced the contamination and recall of peanut butter and associated food products. The early part of 2009 saw the emergence of claims arising from gas emissions associated with Chinese drywall. Most recently, Americans have been alerted to the potential threats to the nation's water supply in the form of pesticides, herbicides and even coal by-products. The media is quick to report on these emerging claim types. The public is hungry for accountability. What does this all mean to the companies that insure the manufacturers and distributors of these products? Both federal and state legislatures have fought, and failed, to keep pace with the threats posed by the multitude of products placed in the stream of commerce. As a result, Americans are turning to the judicial system. In fact, the volume and variety of U.S. product liability claims is ever-increasing as Americans become more conscious of environmental issues and their rights as consumers. The latter part of this decade has seen a dramatic increase in lawsuits regarding food-borne contamination, Chinese drywall, and pesticide and herbicide contamination. While these lawsuits present traditional liability and coverage questions that have arisen in historic product liability cases, they also present many unique issues.

For example, the breadth of liability – from manufacturers down to distributors – is not yet known. Also, many of these lawsuits involve foreign entities that may not be easily subjected to U.S. jurisdiction. Moreover, in some instances, the science underpinning the plaintiffs' allegations against manufacturers, distributors and sellers of contaminated products is undeveloped. Finally, the legislative backdrop surrounding the regulation of products is evolving in light of the Obama administration's renewed focus on environmental and consumer issues.

Given the foregoing liability uncertainties, the coverage scheme for this new wave of product liability claims is also unclear. Whether the insureds who will seek coverage for these product liability claims expected or intended these damages is highly fact sensitive. Even if the damages were not expected or intended, coverage may be precluded by pollution exclusions and/or business risk exclusions. However, whether these exclusions will apply is dependent not only on the facts, but also the state laws interpreting these traditional insurance law principles.

In short, while the impact of this new wave of product liability claims is uncertain, the liability and insurance implications could be staggering. As a result, insurance companies need to understand the nature of emerging product liability claims and be prepared to answer inevitable demands for insurance coverage.

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