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"New Critical Coverage Issues in Product Liability Claims"

I. Coverage Issues for New Products

Drones

With the introduction of any new technology, there is a learning curve on how to use and implement the technology. There is also a learning curve for the insurance industry on how to insure new technology and how to handle coverage issues for a product without a history. With the introduction of drones or unmanned aerial vehicles into commercial and personal use, these coverage issues will need to be addressed. One issue is the assignment of liability to responsible parties after a claim. In most aviation events, the airline is held to strict liability and then has to turn to contributing parties such as manufacturers, airports, traffic control or other aviation parties during the settlement of the claim. This may be similar for drones although there may be a systemic risk associated with manufacturing of drones, production of software to operate drones, leasing to irresponsible parties, etc. Another concern with the use of drones is their ability to capture massive amounts of data including personal images. There could be civil repercussions involved with taking personal images using a drone without permission. Finally, always an issue when large amounts of personal data are concerned is the risk of the hacking of drones to steal the data. Heavy reliance on digital capabilities make drones particularly vulnerable to cyber risks.

3-D Printers

Another product area that has undergone rapid development is additive manufacturing – also known as 3D printing. This technology has shifted from the production of prototypes to producing end-user parts and products. As the technology gets less expensive, small portable printers will be available to the general public. However, this will introduce uncertainty in determining the responsible party in product liability law because the printing process is not perfectly repeatable and lacks traceability. Imagine this scenario, Individual purchases a 3D printer and scans an existing product manufactured by Company which Individual purchased at Store. Individual then manufactures the product and sells to Customer who is injured due to a design defect in the product. Who is liable? Individual, the manufacturer of the 3D printer, Company, Store? Under a traditional product liability theory, all of the above could face liability. As expressed in the hypothetical, an obvious concern with 3-D printers is the ability to easily replicate copyrighted products and determining liability when the product fails. Additionally, as new techniques and ink technologies are introduced, latent defects will appear in products that were previously unimaginable and many will not emerge for years, if not decades, and this could lead to insurers being left with potentially long-tail liabilities arising from flaws in

3D printing. This will require insurers to perform careful research and analysis and perhaps include new questions on product liability application forms.

Autonomous Vehicles

An obvious question when it comes to self-driving cars or autonomous vehicles is who is at fault if the vehicle is involved in a collision? Will liability shift from driver to manufacturer as vehicle control shifts from human operator to autonomous system? Where most accidents today are caused by driver error, the responsibility for accidents involving autonomous vehicles will mostly likely fall on the car manufacturer. When cars and trucks are all self-driving and fully autonomous, the car manufacturers will have a much bigger piece of the potential liability pie. The issue of trying to determine who is at fault for a claim involving an autonomous vehicle may lead to strict liability instead of liability based on negligence. Strict liability does not require any showing of negligence, unreasonableness, or any kind of fault on the part of the defendant. Strict product liability means that manufacturers insure users against all harms that come from their product, regardless of fault. Proponents of strict liability argue that manufacturers can easily pass on the addition costs of tort judgments to consumers by raising the prices of their products.

Another twist regarding responsibility for collisions involving autonomous vehicles is that current uncovered or undercompensated claims could turn into covered products liability claims. Consider the following scenarios:

- Parent drives a car into a tree, injuring parent and child. Injury claims are not covered.
- Car drives parent and child into tree results in a products liability claim against the manufacturer.
- Trucker drives truck into tree. Workers' compensation is the only remedy.
- Truck drives trucker into tree. Tort claim against manufacturer.
- Serious injury, but minimal $15,000 in insurance coverage. If a products liability claim, the manufacturer's insurance and assets are available to pay the claim.

II. New developments on "number of occurrences" affecting Product Liability claims

Existing law as framework

There are three different rules for determining the number of occurrences affecting product liability claims. The majority rule is the "cause test". "Under the cause test, the number of occurrences is determined by reference to the cause or causes of the damage or injury, rather than by the number of individual claims." Westfield Ins. Co. v. Cont'l Ins. Co., No. 1:13CV02367, 2015 WL 1549277, at *6 (N.D. Ohio Apr. 7, 2015)(citation omitted). "The minority view, on the other hand, focuses on the effect of the insured's action and considers each event or each injury a separate occurrence." *Owners Ins. Co. v. Salmonsen*, 366 S.C. 336, 338, 622 S.E.2d 525, 526 (2005). After reviewing the majority and minority rules, the South Carolina Supreme Court held that the single act of placing a defective product into distribution was a single occurrence.

New cases specific to Products Liability

In *Westfield Ins. Co. v. Cont'l Ins. Co.*, No. 1:13CV02367, 2015 WL 1549277 (N.D. Ohio Apr. 7, 2015), the Northern District Court of Ohio held that "per occurrence" limit under an asbestos distributor's insurance policy had not been exhausted. In reaching this conclusion, the court explained that while the claims were related to the defendant's role as a distributor, the claims were caused by "exposure to the asbestos fibers within different products with different distributions to different customers and sites at different times over many years. There is simply no way to logically conclude that a single decision to distribute asbestos containing products is the cause of claimants' injuries under these facts. Rather, claimants' injuries were proximately caused by exposure to asbestos fibers under unique conditions and circumstances." *Id.* at *7 Therefore, the Court found that the claimants' claims arose from multiple occurrences.

In September 2015, the District Court of Puerto Rico in the case of *Gonzalez Caban v. JR Seafood*, No. CIV. 14-1507 GAG, 2015 WL 5315942, at *10 (D.P.R. Sept. 11, 2015) certified the following two questions to the Puerto Rico Supreme Court:

1) Under the principles of product liability, is a supplier/seller strictly liable for the damages caused by human consumption of an extremely poisonous natural toxin found in a shrimp, even if said food product (and its "defect") are not a result of manufacturing or fabrication process?

2) If the previous question is answered in the affirmative, would it make a difference if the "defect" of the food product is readily discoverable scientifically or otherwise?

III. Recovery from Third Parties: Challenges and Solutions

"Additional Insured" coverage

A New Jersey District Court recently decided that a vendor was not entitled to additional insured status on the manufacturer's insurance policy relating to a products liability action because there was no written or signed manifestation of a commitment by the manufacturer to include the vendor on its policy. Geraczynski v. Nat'l R.R. Passenger Corp., No. CIV.A. 11-6385 SRC, 2015 WL 4623466, at *6 (D.N.J. July 31, 2015).

An Ohio District Court also found a vendor was not included as an additional insured for a products liability claim because the vendor was not on file with the insurer as an additional insured under the Vendors Endorsement to the policy. *Westfield Ins. Co. v. First Cont'l Servs. Co.*, No. 1:14CV522, 2015 WL 5657282, at *8 (N.D. Ohio Sept. 24, 2015)

Additional insured status under a tire manufacturer's policy was also declined to a vendor in *Costco Wholesale Corp. v. Tokio Marine & Nichido Fire Ins. Co. Ltd.*, No. B250794, 2015 WL 6470956, at *5 (Cal. Ct. App. Oct. 27, 2015) because the agreement containing the requirement for the manufacturer to include the vendor as an additional insured had terminated.

Subrogation

Subrogation is the right one party has against a third party following payment, in whole or in part, of a legal obligation that ought to have been met by the third party. The doctrine of equitable subrogation allows insurers to "stand in the shoes" of their insured to seek indemnification by pursuing any claims that the insured may have had against third parties legally responsible for the loss. However, an insurer's subrogation claim can be subject to the same statute of limitations applicable to the original underlying claim (such as a breach of contract claim) that gave rise to the derivative subrogation claim. In *SOCAR (Societe Cameroonaise d'Assurance et de Reassurance) v. Boeing Co.*, No. 14-CV-5130 SJF ARL, 2015 WL 7012962, at *2 (E.D.N.Y. Nov. 12, 2015) an insurer brought a products liability action against Boeing arising from an aircraft fire. Unfortunately, the insurer brought the action after the running of the three year statute of limitations for products liability claims under New York law, and the action was dismissed.

Contribution

Where two or more persons become jointly or severally liable in tort for the same injury to person or property, there is a right of contribution among them even though judgment has not been recovered against all or any of them. However, there is no right to contribution from one who is not a joint tortfeasor. In *WILLIAM LEONARD & KAREN LEONARD, Plaintiffs, v. BED, BATH & BEYOND, INC., Defendant/Third-Party Plaintiff, v. NAPA HOME & GARDEN, INC., et al. Third-Party Defendants*, No. 5:15-CV-00284-F, 2015 WL 9582425, at *4 (E.D.N.C. Dec. 30, 2015) the denied a motion to dismiss Bed, Bath & Beyond's ("BBB") contribution claim finding that BBB had alleged facts sufficient to state a claim for contribution, including the existence of joint tortfeasorship. BBB were sued for injuries sustained by the plaintiff from the use of a product purchased at BBB. BBB then filed a third party complaint against the manufacturer of the product seeking contribution among other claims.

IV. New forms applicable to product liability claims

A. Drones
   1. ISO forms
   2. non-ISO forms

B. 3-D Printers
   1. ISO forms
   2. non-ISO forms

C. Autonomous Vehicles
   1. ISO forms
   2. non-ISO forms