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KD Alert: Adding Insurance Coverage Flavor to the Recent Consumer-Popcorn Verdict

By Michael L. Zigelman and Eric B. Stern
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On Wednesday, September 19, 2012, in Watson v. Dillon Co., et. al., No. 08-cv-00091 (D. Colo. 2008) a federal jury in Denver awarded $7.3 million in damages to Wayne Watson, who was diagnosed with bronchiolitis obliterans ("Popcorn Lung"), the scarring of airways caused by fumes from diacetyl, an ingredient in artificial flavorings used in microwave popcorn. According to reports, Watson's attorney stated that this lawsuit was the first Popcorn Lung case in which a consumer successfully obtained a verdict in its favor. While at least two additional consumer-commenced Popcorn Lung lawsuits went to trial in 2010, neither action resulted in a verdict for the consumer. In both such lawsuits, the fact-finders rejected the proposed expert testimony connecting Popcorn Lung to the consumption of popcorn. We note that there is at least one consumer Popcorn Lung lawsuit currently pending in New York state court, Mercado v. ConAgra Foods, Inc., No. 011069/2010 (N.Y. Sup. Ct. Queens Cnty. 2010).

In light of the fact that the door has now swung open for claims by microwave popcorn consumers, the potential for Popcorn Lung claims can only be described as explosive. From a coverage perspective, like asbestos, lead paint, and silica cases, Popcorn Lung cases involve potentially long triggers of coverage based on the exposure over several years and potentially involve many defendants and classes of insured risk. Prior to the recent verdict, these Popcorn Lung claims have been limited to employees of manufacturers. This limited claimants to a defined class of employees, limited potential defendants to definable companies, and limited dates of exposure to dates of employment. As a result, an insurer writing policies to manufacturers of popcorn or popcorn-related flavoring could properly rate this risk.

Now, potential claimants have been expanded to also include those who consume microwave popcorn and suffer from Popcorn Lung. The potential defendants involve all makers of diacetyl, manufacturers of popcorn, and the sellers of popcorn. To wit, the market where Mr. Watson actually bought his popcorn was held 20% liable for his injuries. As a result, supermarkets, movie-theatres, convenience stores, vending machine operators, and other popcorn retailers are at risk. Finally, the years of exposure, if definable at all, could reach as far back as the first time the consumer ate microwave popcorn.

For insurers, receipt of a Popcorn Lung claim requires analysis of many factors that may vary based on state-law. The factors an insurer must determine early after the receipt of a Popcorn Lung claim are the years of exposure, the applicable theories of trigger and allocation, the number of occurrences, whether there are other involved insurers, whether other policies are triggered, state stacking laws, the applicable SIR(s), and whether there is potential to use the Pollution Exclusion or other exclusions in the policy. Based on all the issues these claims present, coupled with the potential for large losses, insurers should consider consulting outside coverage counsel to analyze these claims and potential coverage defenses.

For more information on this matter, please contact Michael L. Zigelman or one of the attorneys in KD's Insurance Coverage & Monitoring practice group.