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***Navigating a New Wave
of Product Liability Claims***

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I. INTRODUCTION

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.

II. CHINESE DRYWALL LITIGATION

A. The Rotten Problem of Chinese Drywall

United States' builders traditionally use domestically produced drywall – boards erected as interior walls in houses and other structures.¹ To meet the housing demands resulting from destruction caused by Hurricanes Katrina and Rita between 2004 and 2007, builders in the United States, particularly southern states, were forced to import drywall manufactured in China.² As much as 600 million pounds of drywall was imported from China to the United States during this time period.³ Chinese-manufactured drywall is alleged to emit sulfur-based gases that corrode metal surfaces, create electrical problems and produce foul odors described as a “rotten egg” smell.⁴ The litigation arising from problems associated with Chinese drywall

involves claims for property damage and personal injuries that allegedly arise out of the incorporation of drywall manufactured by Chinese companies into homes in the United States.⁵

To date, thousands of uncertified class action lawsuits regarding Chinese drywall have been filed and over 1,500 complaints have been lodged in 27 states with the Consumer Product Safety Commission.⁶ Because high temperatures and humidity trigger the problems with Chinese drywall, most of the lawsuits filed thus far have been restricted to the southern United States.⁷ Nonetheless, based on the amount of potentially damaging drywall and the temperature-based delay in indications of damage in the northern United States, experts estimate that Chinese drywall may have been used in more than 100,000 homes across the United States during this time period.⁸ Given the widespread dissemination of information about this problem by activists and the plaintiffs' bar through the mainstream media and internet blogs,⁹ the potential impact of this litigation across the U.S. is significant.

Plaintiffs in Chinese drywall lawsuits have reported property damage to heating, ventilation and air conditioning systems, electrical wiring and metal plumbing components as well as personal injuries, including headaches, nose bleeds, and respiratory problems.¹⁰ Still, the ultimate cost of these claims cannot be quantified.¹¹ Chinese drywall plaintiffs will likely seek replacement of the drywall, along with replacement of other parts of homes allegedly damaged by the drywall's off-gassing.¹² Given that the science behind this claim type is "literally brand new," the scope and extent of potential replacement costs is uncertain.¹³ Moreover, such claims will most likely raise evidential questions, including significant Daubert v. Merrell Dow Pharmaceuticals¹⁴ challenges questioning the reliability of the science underpinning the plaintiffs' claims.¹⁵

Further, because the nature and severity of the health threat posed by Chinese drywall is uncertain, plaintiffs will likely seek medical monitoring costs – the costs incurred to monitor the medical conditions of those exposed to Chinese drywall for an extended period.¹⁶ Such costs have been sought in other lawsuits such as asbestos litigation and the litigation arising from the September 11, 2001 terrorist attacks. These costs can greatly increase the potential exposure for defendants and their insurers.

In addition to evidentiary challenges, there are also complex procedural hurdles to be overcome. In response to the complex yet common factual predicate of the Chinese drywall lawsuits pending in federal court, the United States Judicial Panel on Multidistrict Litigation has consolidated actions in the United States District Court for the Eastern District of Louisiana and placed the consolidated actions under the supervision of the Honorable Eldon E. Fallon.¹⁷ As noted in the Consolidation Order, the actions were consolidated to avoid duplicative discovery and inconsistent rulings on common questions of fact and law.¹⁸ Louisiana was chosen as the venue for these cases because of Judge Fallon’s sensitivity to the impact of this litigation on Katrina victims, his prior experience handling multidistrict cases such as the Vioxx cases, and his ability “to steer this complex litigation on a steady and expeditious course.”¹⁹

The consolidation of the claims and selection of Judge Fallon to preside over them has, in fact, resulted in the expeditious handling of this litigation thus far. Following his creation of a Threshold Inspection Program for property inspection and case management, Judge Fallon made known his intention to try “bellwether” cases beginning in January 2010.²⁰ A “bellwether” trial is a trial of a portion of cases selected out of the consolidated litigation for the purpose of providing insight into the likely treatment of the consolidated lawsuits.²¹ Here, in the Chinese drywall litigation, Judge Fallon plans to schedule 6 of the approximately 600 consolidated

lawsuits for trial.²² Significantly, much like his approach in the Vioxx litigation, Judge Fallon will likely apply the substantive law of the forum in which a transferred action was first filed or, to the extent an action was filed directly into the multi-district litigation, the plaintiff's home state.²³ Despite the potential impact of differing substantive law, the outcome of these "bellwether" trials will be critical to both liability and coverage issues.

Not only do these Chinese drywall lawsuits name as defendants the China-based companies that allegedly manufactured the drywall, including Taian Taishan and Knauf Plasterboard Tianjin Co., but also drywall builders, installers, distributors, and manufacturers located in the United States and Germany.²⁴ Importantly, Knauf Plasterboard Tianjin Co., an alleged affiliate of the German construction-material company Knauf Gips KG, is "the only Chinese company that's recognized the lawsuits so far."²⁵ In fact, market intelligence indicates that the Chinese manufacturers are ignoring the suits, likely to challenge the jurisdiction of the U.S. courts, or preparing to assert cost and enforcement challenges to U.S. lawsuits and judgments in China.²⁶ In the face of these procedural challenges, plaintiffs' attorneys are forced to explore the use of creative tactics to circumvent the defendants' efforts. News reports have suggested that plaintiffs' lawyers are considering "suits against U.S. investment bankers who financed the Chinese companies, and seizing ships that brought the drywall to the United States."²⁷ While these tactics are extreme and of questionable merit, they suggest a strong desire within the plaintiffs' bar to pursue this litigation to its fullest.

It is also important to note the ongoing legislative efforts with respect to Chinese drywall. The United States Congress has introduced various bills in an effort to combat the aforementioned challenges and costs of Chinese drywall.²⁸ In fact, the Drywall Safety Act of 2009, introduced in the United States Senate in early 2009 seeks a recall and temporary ban of

Chinese-made drywall.²⁹ However, these legislative efforts have yet to come to fruition.³⁰ Thus, at least for the time being, the courts are where this battle must be waged.

B. Coverage Issues for Chinese Drywall Litigation

Unlike traditional product liability claims, the coverage issues for Chinese drywall claims are undeveloped. Science purporting to support liability allegations is new and there are no reported cases analyzing coverage questions arising from this liability. Still, given the potential impact of this litigation, there is a great deal of legal commentary on the issue. Coverage claims relating to Chinese drywall will most likely be made against general liability, umbrella and professional liability policies. We, therefore, anticipate that coverage issues will include whether there is an occurrence causing property damage and/or personal injuries and whether coverage is precluded by the business risk and/or total pollution exclusions.³¹ As demonstrated below, although the principles of coverage may be familiar, their application to the Chinese drywall claims is anything but clear.

Whether the Chinese drywall claims qualify as an occurrence arising out of property damage and/or personal injuries will turn on how state substantive law interprets these traditional insurance terms. Significantly, in order to qualify as an “occurrence,” a claim must neither be expected nor intended from the standpoint of the insured. Hence, the critical question is whether the insured should have expected or intended the damage. This coverage question is highly fact sensitive and will depend on the insured’s knowledge as to the problems arising from installation of the drywall.

A determination that an act involves an “occurrence” resulting in property damage is also dependent on the applicable state law with respect to faulty workmanship. To the extent claims have been made against drywall builders and installers, the underlying liability lawsuits allege

that the plaintiffs' damages arise out of the defendant insured's faulty work. While some states hold that faulty workmanship does not qualify as an occurrence,³² others have found that faulty work constitutes an "occurrence" under a traditional commercial general liability policy.³³

Assuming an insured can demonstrate that it sustained damage caused by an occurrence during the policy period, the next inquiry involves what event triggers coverage. Based on the factual predicate, the trigger could be when the drywall was installed, when the sulfur-based gases emitted, when the homeowner first discovered a connection between the problems and the drywall or some other time. This issue will also depend on state laws regarding trigger of coverage.

The analysis does not end, however, with satisfaction of the insuring agreement, as there are several potentially applicable exclusions that must be considered. To the extent a state's substantive law regards faulty workmanship as an "occurrence," coverage may still only extend to property damage to third party property, and not the Chinese drywall itself. Business risk exclusions for "your work" or "your product" are commonly interpreted to preclude coverage for the cost to repair, remove and/or replace faulty work or faulty products. Thus, policies containing business risk exclusions may provide coverage for the damage sustained to third party property (i.e. electric problems etc.), but will not cover the cost to remove or replace the Chinese drywall.³⁴ Given that drywall is fully incorporated into a home, and its removal is burdensome and costly, the applicability of business risk exclusions could greatly decrease an insurer's exposure in relation to Chinese drywall claims. Moreover, as discussed more fully in connection with the food-borne contamination claims,³⁵ Chinese drywall claims may also be precluded by the "sistership" exclusion, which bars coverage for damages associated with the recall of a product.

Lastly, and perhaps most importantly, the potential exists for CGL insurers to invoke the pollution exclusion to deny coverage for Chinese drywall claims. Standard general liability policies define pollutants as “any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.”³⁶ Given this broad definition, insurers may argue that the gases released from Chinese drywall causing damage qualify as a pollutant such that there is no coverage for the property damage.³⁷ To the extent the subject policy contains a qualified, as opposed to an absolute pollution exclusion, insureds may respond by invoking the exception to the exclusion.³⁸ Notably, most contractors’ policies contain the absolute pollution exclusion, thereby giving the insurers the upper-hand in asserting this coverage defense.

Given the different approaches taken by courts across the United States with respect to the aforementioned policy provisions and exclusions, it is difficult to predict whether the cost to remove Chinese drywall, repair damage to third party property, and grant relief for personal injuries will be covered. To this end, we note that at least two declaratory judgment actions have been filed with respect to Chinese drywall, each of which involves many of the aforementioned coverage questions.

In Builders Mutual Insurance Company v. Dragas Management Corporation,³⁹ filed in the United States District Court for the Eastern District of Virginia, the insurer, Builders Mutual Insurance Company (“Builders Mutual”), issued a commercial package policy to Dragas Management Corporation (“Dragas”) and contends that its policy does not provide coverage for damages arising out of the installation of Chinese drywall.⁴⁰ Builders Mutual claims that the exclusion for “your work” applies because the insureds’ damages arise out of Dragas’ work.⁴¹ Moreover, Builders Mutual argues that the emission of sulfur-based gases from the Chinese

drywall constitutes the release of a pollutant, which is not covered due to the absolute pollution exclusion in its policy.⁴² In Baker v. American Home Assurance Company, Inc.,⁴³ filed in United States District Court for the Middle District of Florida, a homeowners policy insurer, American Home Assurance Company, Inc., argues that damages arising from Chinese drywall are not covered because of the pollution exclusion contained in the subject policy.

Because the liability claims are in their infancy, the coverage landscape has yet to be defined. Nevertheless, the coverage actions instituted to date demonstrate that insurers have strong defenses to these claims and are likely to assert these coverage positions in various U.S. jurisdictions.

III. PESTICIDE AND HERBICIDE CONTAMINATION

A. The Hidden Threat to the United States' Drinking Water Supply

An emerging issue that has recently gained the attention of the media and activists in the United States is the contamination of the United States' drinking water supply with pesticides and herbicides. A pesticide is any substance used to prevent, destroy, repel, or mitigate pests.⁴⁴ Herbicides, a specific type of pesticide, are used to kill weeds and other plants in unwanted areas.⁴⁵ Under the authority of the Clean Water Act,⁴⁶ the United States Environmental Protection Agency ("USEPA") is charged with the task of monitoring pollution in the nation's water supplies and imposing fines and penalties when water standards are not met. However, the USEPA has come under attack in recent years as high levels of pesticides and herbicides such as atrazine, a herbicide widely used by farmers to control broadleaf weeds and grasses,⁴⁷ have been found in the nation's water supply. Although the potential contamination threat presented by pesticides and herbicides is of heightened importance in the Midwestern and Southern regions of the United States, the threat to the drinking water supply is nationwide.

Enacted in 1972, the Clean Water Act aims to ensure the restoration and balance of “navigable waters” in the United States.⁴⁸ More specifically, this Act requires “polluters to disclose the toxins they dump into waterways and to give regulators the power to fine or jail offenders.”⁴⁹ Based on the terms and conditions of the Clean Water Act, the USEPA must monitor the use of chemicals and ensure that same are not polluting the water supply, including pesticides and herbicides.⁵⁰ Notably, this legislative scheme developed as a result of the use and ultimate ban of certain historically-used, and harmful, pesticides such as arsenic, lead, and dichlorodiphenyltrichloroethane (“DDT”).⁵¹ Hence, to further achieve the goals of the Clean Water Act and other environmental laws, the USEPA, and its state counterparts, operate a permit and registration system for pesticide use in the United States.⁵² Still, there are growing concerns that the USEPA has failed to protect the nation’s water supply from chemical contamination that can lead to cancer, birth defects and neurological disorders.⁵³

One of the harmful substances allegedly causing contamination to the water supply is coal. A recent *New York Times* article discussed the fact that coal companies in West Virginia routinely dump chemicals into the ground that cause health problems ranging from rashes to infertility.⁵⁴ Although these dumping activities are disclosed to regulators, to date, the coal companies have not been fined or punished under pollution laws.⁵⁵ Moreover, the potential impact of this unchecked chemical contamination to the nation’s water supply presents a significant concern to the American public.

Atrazine, a herbicide allegedly contaminating the drinking water supply, is also receiving a great deal of attention in the United States. According to recent news report and a nationwide survey, more than 50% of facilities regulated throughout the United States violate the Clean

Water Act, yet enforcement actions by the USEPA are infrequent.⁵⁶ In fact, fewer than 3% of these violations resulted in fines.⁵⁷

In light of these apparent regulation deficiencies, there is a growing call for reform to the federal government's treatment of chemicals. The installation of a new administration under President Barack Obama may answer this call. The new administration has made clear that environmental issues are an important part of its platform. Specifically, the new administrator of the USEPA, Lisa P. Jackson, has taken a proactive stance on environmental issues since her appointment. Not only does the USEPA website demonstrate its commitment to reassess the risks of pesticides and herbicides,⁵⁸ but also Ms. Jackson has indicated that she is concerned about chemicals such as atrazine and plans to closely examine its use and regulation.⁵⁹ Noting that "the nation's water does not meet public health goals, and enforcement of water pollution laws is unacceptably low," Ms. Jackson considers the strengthening of water protections in the United States as a top priority.⁶⁰ Because the USEPA recently announced a new comprehensive evaluation of atrazine to determine its effects on humans, the USEPA appears committed to fulfilling its promise to reevaluate the risks posed by pesticides and herbicides.⁶¹

Notably, a class action lawsuit pending in state court in Madison County, Illinois, Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc.,⁶² may foreshadow a shift in water pollution regulation and enforcement in the United States. The plaintiffs in the lawsuit, Illinois water districts, seek damages from Syngenta Crop Protection, Inc. and Growmark, Inc., manufacturers and distributors of atrazine, for the costs to remediate the Illinois water supply and rid it of atrazine contamination.⁶³ Specifically, the plaintiffs seek reimbursement for the costs associated with installing and operating a filtration system as long as and until the property damage is remediated and the water supply is free of atrazine.⁶⁴

While the Holiday Shores case is in its infancy, there are signs that the litigation may develop in a number of significant ways. First, the plaintiff class may be expanded nationally, which would necessarily increase liability and insurance exposures. Second, although this lawsuit names the primary manufacturer of the herbicide atrazine as a defendant, liability claims may also be waged against other members within the chain of commerce. Like the evolving Chinese drywall litigation, these plaintiffs may seek relief from distributors and farmers. Third, the demand for relief is currently limited to property damage claims. However, the plaintiffs may eventually seek personal injury damages as there are allegations that exposure to atrazine causes bodily injury. Thus, there is not only a large pool of potential plaintiffs and defendants in cases involving pesticide and herbicide contamination, beyond those who are currently party to the Holiday Shores action, but also the potential for property damage and personal injury claims. Thus, this action will serve as a test case for future, potential lawsuits regarding pesticide and herbicide contamination.

In short, given the ever-increasing attention paid to pesticides and herbicides by the federal government, the age of unchecked chemical pollution into the nation's water supply has likely ended – but at what cost to insurers?

B. Coverage Issues for Pesticide and Herbicide Contamination Litigation

Like food-borne contamination and Chinese drywall, coverage for pesticide and herbicide contamination will implicate the expected and intended provision of a general liability policy, as well as the pollution exclusion. Application of these provisions to pesticide and herbicide contamination will again depend on both the factual predicate (i.e. can the insurer prove the insured expected or intended the damage) and the state laws interpreting these provisions.

More significantly, pesticide and herbicide contamination claims present an interesting question as to whether they are to be considered “environmental claims” or “product liability claims.” While the pesticides and herbicides may be products that are put to their intended use and spread throughout the United States to combat pests, the degradant chemical compounds left behind after these products are used may actually be the cause of the damage. Put another way, if the product itself causes the damage, then these claims may qualify as product liability claims and may be subject to the terms, provisions and limits of liability assigned to such claims. On the other hand, if the degradant chemical compounds are responsible for the contamination, the claim may be characterized as an environmental claim. Because different policy limits may apply to environmental claims and product liability claims and the settlement of prior lawsuits involving such claims may preclude future actions, this question is critical to the potential policy exposures.

Traditionally, an environmental claim is a claim caused by environmental pollution arising out of alleged acts or omissions of a generator, disposer, owner, operator, or transporter of alleged hazardous substances. The terms “generators, disposers, owners, operators or transporters” are commonly used and relied upon with respect to actions under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), which provides the federal statutory structure whereby such “covered persons” can be liable for environmental contamination.⁶⁵ Hence, to the extent that the personal injuries or property damage alleged by the underlying plaintiffs arises out of the insureds’ acts or omissions as manufacturers or distributors of pesticides and herbicides, the subject claims may be environmental claims.

On the other hand, the case law seems to indicate that these claims qualify as product liability claims. In Prudential Ins. Co. of Amer. v. United States Gypsum Co.,⁶⁶ the United States District Court for the District of New Jersey was asked to consider the validity of CERCLA-based environmental claims asserted against designers, manufacturers and suppliers of asbestos-containing products. The court concluded that CERCLA liability

attaches to a party who has taken an affirmative act to dispose of a hazardous substance, that is, “in some manner the defendant must have dumped his waste on the site at issue,” as opposed to convey a useful substance for a useful purpose.⁶⁷

Accordingly, the Prudential court held that the mere sale of a product does not constitute disposal of a hazardous substance establishing a claim for environmental contamination.⁶⁸

In United States v. Ciba-Geigy Corp.,⁶⁹ the United States District Court for the Southern District of Alabama addressed whether the liability of Ciba-Geigy Corp., a manufacturer of the atrazine-containing herbicide product Atrazine, resulted from its manufacture of the herbicide at its plant in McIntosh, Alabama. The claims asserted against Ciba-Geigy Corp. allegedly arose out of environmental contamination under CERCLA and dealt with the actual production of Atrazine and Ciba-Geigy Corp.’s disposal of the wastes associated with this production.⁷⁰ Because it did not deal with the liability arising out of the marketplace use of Atrazine, the claim sounded in environmental contamination liability rather than product liability.⁷¹

Similarly, in The People v. Agpro, Inc.,⁷² the State of Illinois sued Agpro, Inc. (“Agpro”), a company that applied and distributed pesticides and fertilizers, for alleged contamination of the soil and groundwater in and around Agpro’s operating facilities. The claims arose from Agpro’s operations as a distributor of hazardous substances, not the use of pesticides or fertilizers. Again, therefore, the claims dealt with the improper disposal of hazardous substances, which qualify as environmental claims.

Based upon this case law, while environmental claims deal with spills or the improper disposal of hazardous substances and products, product liability claims arise from putting the product to use in the marketplace in a manner that causes damage. Where a product is put to its intended use and causes damage to persons or property, that claim may sound in product, not environmental liability.⁷³ However, whether the water contamination claims constitute environmental claims or product damage claims will clearly turn on policy interpretation and applicable law.

Another coverage defense that may be utilized by insurers with respect to pesticide and herbicide contamination claims is the “known loss” doctrine. This doctrine, which is based on the nature of insurance as a protection against contingent risks, precludes coverage for losses known to the insured prior to purchasing insurance. As with other policy provisions and exclusions, state laws vary as to the interpretation of the “known loss” doctrine. While some jurisdictions find that coverage is precluded only when a legal obligation to pay third party claims has been established at the time the insured purchased its insurance,⁷⁴ other jurisdictions find that coverage is barred when the occurrence is “substantially certain to occur.”⁷⁵ Still other jurisdictions find that an insured is not entitled to coverage if the insured knew or had reason to know of the substantial probability of the loss at issue when it purchased insurance.⁷⁶ Regardless of which interpretation is employed, however, it is clear that the “known loss” doctrine requires a fact-sensitive inquiry such that its applicability cannot be certain.

IV. FOOD-BORNE CONTAMINATION

A. The Growing Problem of Food-Borne Contamination

In the last several years, there has been an increase in the incidents of food-borne contamination in the United States.⁷⁷ The contamination has involved everything from peanuts

and spinach to tomatoes and dog food.⁷⁸ The impact of food-borne contamination on the public health and the economy cannot be overstated. In the United States, an estimated 5,000 deaths and 325,000 hospitalizations each year are related to food-borne contamination.⁷⁹ The 2006 spinach *E. coli* outbreak that was traced to Dole products resulted in five deaths, cost the spinach industry between \$175 million and \$350 million, and greatly decreased brand strength.⁸⁰ While some have attributed the increased number of food-borne contamination outbreaks to the increased consumption of fresh produce as part of a healthy diet, the increase is more likely related to regulatory failures.⁸¹ In fact, the United States Congress has become a fertile battleground for the war against food-borne contamination.

Prompted by the Obama administration's commitment to improve food safety within the first 100 days in office, a goal not attained, Congress has paid a great deal of attention to this issue in 2009.⁸² Several bills were introduced by Congress during 2009 to address food-borne contamination through better "regulatory oversight and accountability, safety standards for imported foods, and mandatory recall authority."⁸³ According to a Congressional website, however, these bills remain in committee or have not yet been approved by both the United States' House of Representatives and the Senate.⁸⁴

A bill that has received the most attention in the legislative arena and the court of public opinion is the Food Safety Enhancement Act of 2009.⁸⁵ This bill seeks to broaden food protection by requiring inspections of food processing plants, enactment of food safety plans at each plant, registration by foreign companies that import food into the United States, and granting recall power to the Food and Drug Administration, the United States government agency in charge of food regulation.⁸⁶ In an unusual showing of bipartisanship, the House Energy and Commerce Committee voted to send the bill to the House floor for a vote.⁸⁷ The bill

was passed on July 30, 2009 by House resolution and sent to the Senate for consideration.⁸⁸ The Food Safety Enhancement Act of 2009 remains under consideration by the Senate's Health, Education, Labor and Pensions Committee.⁸⁹ While not all of the legislative efforts have been successful, they do signal a call for accountability with respect to food-borne contamination.

B. Coverage Issues for Food-Borne Contamination Litigation

Several claim types are typically asserted by or against insureds in connection with food-borne contamination lawsuits, including bodily injury claims, claims for costs related to an insured's own recall of product (i.e. first-party recall costs) and claims for costs related to a third party's recall of an insured's product (i.e. secondary recall costs). General liability, excess and umbrella policies issued under the standard Insurance Services Office ("ISO") form contain various provisions of particular relevance, including the insuring agreement and exclusions for damages to your product or your work.⁹⁰ Several other policy terms, conditions and endorsements that will likely impact claims asserted by and against insureds include choice of law, known loss, trigger and number of occurrence, specified product recall coverage and/or exclusions, batch/lot provisions and even the pollution exclusion.⁹¹ Although food-borne contamination claims conjure up many conventional coverage issues, the staggering costs associated with modern-day recalls makes the claims anything but routine.

A threshold issue to be determined in considering each of the potential claim types referenced above is whether the injury and/or damage allegedly sustained by the underlying plaintiffs was caused or contributed to by the insured's own "product" or "work." As discussed below, U.S. case law in regard to food product recall claims demonstrates the highly fact sensitive nature of the exercise, requiring an examination of the production and distribution methods and processes employed by the insured that gave rise to the claim. Once the "product"

or “work” has been defined in a given case, attention typically turns to the applicability of the business risk exclusions, namely, “Your Work,” “Your Product,” “Impaired Property” and/or the “sistership” exclusion.⁹²

Courts in California, Florida and Iowa have ruled favorably for insureds presenting claims for damages associated with the recall of products under a general liability policy,⁹³ while jurisdictions such as Illinois, Minnesota, New Jersey and Wisconsin have invoked the “business risk” exclusions to deny various claims for recall coverage.⁹⁴ In each case, one of the critical factors to the coverage determination was whether there was an incorporation of the insured’s product into another product.

In National Union Fire Insurance Co. v. Terra Industries, Inc.,⁹⁵ Terra Industries, Inc. (“Terra”) produced carbon dioxide and sold same to re-sellers. The re-sellers, thereafter, sold the carbon dioxide to beverage manufacturers who incorporated it into carbonated beverages during the manufacturers’ bottling and canning processes.⁹⁶ Terra did not produce, carbonate or bottle the beverages, but rather supplied contaminated material to others, which contaminated material was then incorporated into another product. The United States Court of Appeals for the Eighth Circuit noted the critical distinction between an insured’s product and the incorporation of that product to form another by stating:

We agree with the District Court that Kartridg Pak Co. v. Travelers Indem. Co., 425 N.W.2d 687 (Iowa Ct. App. 1988), does not control in this instance. Kartridg Pak involved damage to an insured’s own meat product caused by a defective deboner, id. at 689, as distinguished from this case which involves damages to third-party consumer beverages caused by incorporation of benzene contaminated carbon dioxide.⁹⁷

Thus, it was not the manufacture of the contaminated product that constituted “property damage” resulting from an “occurrence” but rather the incorporation of that contaminated product into another product that prompted the court’s decision.

Similarly, in the unreported decision of Zurich American Insurance Co. v. Cutrale Citrus Juices USA, Inc.,⁹⁸ the United States District Court for the Middle District of Florida considered whether insurance coverage existed for Cutrale Citrus Juices USA, Inc. when it supplied contaminated juice to Tropicana for blending into an entirely different juice product. Like the Terra court, the Cutrale court recognized the “key distinction” between cases where the product harms something else and cases where the harm is the product itself.⁹⁹ While coverage under a general liability policy may exist for the former, it does not exist for the latter. Simply put, “property damage . . . [resulted] when and to the extent that the adulterated juice was blended by Tropicana in the regular course of business with Tropicana’s other juice products.”¹⁰⁰

The determination of “property damage,” however, does not end the coverage analysis. If “property damage” was only sustained to the insured’s own product or work, courts have generally invoked the “business risk” exclusions to deny coverage. The Court of Appeals of Wisconsin in Nu-Pak, Inc. v. Wine Specialties International, Ltd.,¹⁰¹ for example, relied on the “your product” exclusion to find that no coverage existed for a company that negligently mixed and packaged a product, even though the ingredients for the product were supplied by other sources. In so holding, the Nu-Pak court recognized that “[u]nder the ‘your product’ exclusion, there is no coverage for property damage to goods or products ‘manufactured’ or ‘handled’ by the insured.”¹⁰² The Nu-Pak court further noted that “[u]nlike the ‘your work’ exclusion, which arguably refers to the cause of the property damage, the scope of the ‘your product’ exclusion is defined solely by the type of property damage at issue.”¹⁰³

Courts have, likewise, relied on the “sistership” exclusion to deny coverage for damages associated with the recall of a product. One of the leading cases applying the “sistership” exclusion is McNeilab, Inc. v. North River Insurance Co.¹⁰⁴ McNeilab dealt with the recall of

Tylenol in 1982 and McNeilab, Inc.'s demand for coverage under its general liability policy for expenses incurred in connection with this recall. The United States District Court for the District of New Jersey noted that general liability insurance only applies to third-party damage, not damages incurred directly by the insured.¹⁰⁵ Thus, the McNeilab court found that “coverage for recall and recall-related expenses is outside the scope of coverage of liability insurance and, therefore, not cognizable in the instant policy”¹⁰⁶ In support of this finding, the District Court quoted at length from a statement issued by the Insurance Services Office, “which remains the position of the insurance industry today:”

If the named insured's product causes injury or damage and identical products are withdrawn from the market or from use because of a known or suspected defect (one airplane crashes and others are withdrawn from use), the cost of withdrawing or replacing products or completed work may be either a direct expense to the insured or liability to others. Such cost, whether damages or expenses, are not intended to be covered. Sistership liability or products recall insurance is the subject of a special form of coverage.¹⁰⁷

Additionally, the events that transpired with respect to the contaminated products (i.e. peanuts, spinach, tomatoes etc.), and the relative knowledge, or basis for knowledge, by any insured is particularly relevant to identifying the timing of the onset of illness and subsequent recall. For example, under the “known loss” doctrine, “an insured may not obtain insurance to cover a loss that is known before the policy takes effect.”¹⁰⁸ Thus, to the extent there is a basis for knowledge of a problem at the time insurance was procured, the “known loss” doctrine could be invoked.

Furthermore, the relevant events can span a considerable period of time, and may implicate multiple policy periods. Accordingly, questions concerning number of occurrences and trigger of coverage for allocation purposes will need to be addressed on a case by case basis, as dictated by governing law. Allocation among the insurers participating during those

respective years will likewise be a consideration going forward and, again, will be dependant on the jurisdiction governing any dispute among the insured and its insurers.

V. CONCLUSION

The growing trend of new product liability claims poses a significant risk to insurers. Although liability is not yet known, the potential class of defendants is large and, therefore, the potential insurance exposures great. While there are many coverage defenses that can be relied upon in response to these product liability claims, many of these defenses are highly fact sensitive. Moreover, these claims are currently pending in various jurisdictions throughout the United States, meaning that state laws will likely play a large role in shaping the litigation results. As a result, insurers must become educated regarding these potential liabilities and remain mindful of their coverage defenses and probable challenges to same. Furthermore, insurers should consider these new liability risks when crafting policies and endorsements issued in the United States as this trend in product liability claims is likely to continue.

APPENDIX I

1. **INSURING AGREEMENT**

- a. We will 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.
- b. This insurance applies to “bodily injury” and “property damage” only if:
 - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
 - (2) The “bodily injury” or “property damage” occurs during the policy period; and
 - (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” of claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

2. **EXCLUSIONS**

This insurance does not apply to:

f. Pollution Exclusion

to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

k. Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage to Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage to Impaired Property or Property Not Physically Injured

“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 or accidental physical injury to “your product” or “your work” after it has been put to its intended use.

n. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you 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 to it.

SECTION V - DEFINITIONS

“**Bodily injury**” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

“**Occurrence**” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

“**Pollutants**” means any solid, liquid, gaseous or thermal irritant or containment, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

“**Products-completed operations hazard**”:

a. Includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:

- (1) Products that are still in your physical possession, or
- (2) Work that has not yet been completed or abandoned. However, “your work” will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site;
 - (c) When that part of the work at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include “bodily injury” or “property damage” arising out of:

- (1) The transportation of property, unless the injury or damage

arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the “loading and unloading” of that vehicle by any insured;

- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

“Property damage” means:

- a. Physical injury to tangible property, including all resulting 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.

“Impaired property” means tangible property, other than “your product” 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; or
- b. You have failed to fulfill the terms of a contract or agreement;

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.

“Your product”:

- a. Means:
 - (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) You;
 - (b) Others trading under your name; or
 - (c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quantity, durability, performance or use of “your product”; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

“Your work”:

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”; and

(2) the providing of or failure to provide warnings or instructions.

¹ See Michael Corkery, “Chinese Drywall Cited in Building Woes,” *Wall Street Journal*, Jan. 12, 2009, available at <http://online.wsj.com/article/SB123171862994672097.html>.

² See *Id.*

³ See Cain Burdeau, “Lawyers: Chinese Drywall Makers May Ignore Suits,” *Associated Press*, Sept. 28, 2009, at <http://www.nytimes.com/aponline/2009/09/28/business/AP-US-Chinese-Drywall.html>; M.P. McQueen, “The Prisoners of Drywall,” *Wall Street Journal*, Aug. 7, 2009, available at <http://online.wsj.com/article/SB10001424052970203674704574332264031026476.html>.

⁴ See Corkery, *supra*, note 1.

⁵ See Corkery, *supra*, note 1.

⁶ McQueen, *supra*, note 3; “Chinese Drywall Lawsuit Filed by Florida Lt. Governor,” *Newsinferno.com*, Sept. 2, 2009, at <http://www.newsinferno.com/archives/12103>; Chinese Drywall Answers, “Chinese Drywall Complaints Top 1,500,” Oct. 1, 2009, at <http://www.chinese-drywall-fiasco.com/>.

⁷ Nancy Sher Cohen, Joshua J. Pollack, and Ronald A. Valenzuela, “Client Alert: Chinese Drywall Litigation Heating Up,” Proskauer Rose LLP, Jul. 2009, at http://www.proskauer.com/news_publications/client_alerts/content/2009_07_02/_res/id=sa_PDF/18156-Chinese%20Drywall%20Litigation%20Heating%20Up.pdf.

⁸ *Id.*; McQueen, *supra*, note 3.

⁹ See e.g. Chinese Drywall Answers, at <http://www.chinese-drywall-fiasco.com/>; Wolfe Law Group, “Chinese Drywall Blog,” at <http://chinesedrywallblog.com/>; AmericasWatchdog.com, “Chinese Drywall Complaint Center,” at <http://chinesedrywallcomplaintcenter.com/>; Steinberg Law Firm P.C., “Nationwide Chinese Drywall Lawsuit,” at <http://www.chinese-drywall-claims.com/>.

¹⁰ “Chinese Drywall Lawsuit Filed by Florida Lt. Governor,” *supra*, note 6; Brenda Craig, “Chinese Drywall Cases Fast-Tracked,” *LawyersandSettlements.com*, Aug. 20, 2009, at <http://www.lawyersandsettlements.com/articles/12653/lawyer-interview-Bruno.html>.

¹¹ “Chinese Drywall Lawsuit Filed by Florida Lt. Governor,” *supra*, note 6; Craig, *supra*, note 10.

¹² Tom Hagy, “Chinese-Made Drywall: A Multi-Defendant, Multi-Claim, Multi-District Litigation Has Litigators Multi-Tasking,” *HB Litigation Conferences*, Jun. 29, 2009, at <http://litigationconferences.com/?p=6811>.

¹³ *Id.*

¹⁴ 509 U.S. 579 (1993).

¹⁵ Hagy, *supra*, note 12.

¹⁶ Hagy, *supra*, note 12.

¹⁷ *In re Chinese-Manufactured Drywall Products Liability Litigation*, 626 F. Supp. 2d 1346 (Jud. Pan. Multi. Lit. Jun. 15, 2009).

¹⁸ *Id.* at 1347.

¹⁹ *Id.* at 1347. See Craig, *supra*, note 10.

²⁰ “Chinese Drywall Lawsuit Filed by Florida Lt. Governor,” *supra*, note 6.

²¹ See Edward F. Sherman, “Segmented Aggregated Litigation: Initiatives and Impediments for Reshaping the Trial Process,” *Review of Litigation*, Vol. 25, p. 651, 2006, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928479.

²² “Chinese Drywall Lawsuit Filed by Florida Lt. Governor,” *supra*, note 6. See Alison Frankel, “Vioxx Judge Puts Chinese Drywall MDL Cases on Fast Track,” *The AmLaw Litigation Daily*, Aug. 11, 2009, at <http://www.law.com/jsp/tal/digestTAL.jsp?id=1202432948298>.

²³ See *In re Vioxx Products Liability Litigation*, Docket No. MDL 1657 (E.D.La. Mar. 22, 2007).

²⁴ See Burdeau, *supra*, note 3; Cohen, *supra*, note 7.

²⁵ See Burdeau, *supra*, note 3; Corkery, *supra*, note 1.

²⁶ See Burdeau, *supra*, note 3.

²⁷ Burdeau, *supra*, note 3. See Keitha Nelson, “Attorneys in drywall suit consider seizing ships,” *WAFB.com*, Sept. 29, 2009, at <http://www.wafb.com/Global/story.asp?S=11214884>.

²⁸ See e.g. H.R. 1977; H.R. 2155; S. Res. 91; S. 739.

²⁹ See S. 739. See also H.R. 1977 for the equivalent bill introduced in the United States House of Representatives.

³⁰ See The Library of Congress, at <http://thomas.loc.gov/>.

³¹ See Appendix I for select policy provisions from general liability and umbrella ISO policy forms.

³² See e.g. Weedo v. Stone-E-Brick, 81 N.J. 233, 249 (1979); Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317 (2006).

³³ See e.g. United States Fire Insurance Company v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007); Lamar Homes, Inc. v. Mid-Continent Cas. Co., 239 S.W.3d 236 (Tex. 2007); Federated Mutual. Ins. Co. v. Grapevine Excavation, Inc., 197 F.3d 720, 724-25 (5th Cir. 1999).

³⁴ See e.g. Alton Ochsner Medical Foundation v. Allendale Mutual Insurance Company, 219 F.3d 501 (5th Cir. 2000); Laquila Construction, Inc. v. Travelers Indemnity Company, 66 F. Supp. 2d 543 (S.D.N.Y. 1999).

³⁵ See infra Section IV.B.

³⁶ See Appendix I.

³⁷ See John Sadler, “Chinese Drywall: Builders and Subs Face Uninsured Losses,” *Insurance Journal*, Jul. 27, 2009, at <http://www.insurancejournal.com/news/national/2009/07/27/102525.htm?print=1>.

³⁸ See Id.

³⁹ Docket No. 2:09-cv-185 (E.D. Va.).

⁴⁰ See Cohen, supra, note 7.

⁴¹ See Id.

⁴² See Id.

⁴³ Docket No. 09-cv-188 (Mid. Dist. Fla.). See Cohen, supra, note 7.

⁴⁴ USEPA, “About Pesticides: What is a Pesticide?,” at http://www.epa.gov/opp00001/about/#what_pesticide.

⁴⁵ USEPA, “About Pesticides: Types of Pesticides,” at <http://www.epa.gov/opp00001/about/types.htm>.

⁴⁶ See 33 U.S.C. § 1251 et seq

⁴⁷ USEPA, “Pesticides: Reregistration: Atrazine Updates,” at http://www.epa.gov/pesticides/reregistration/atrazine/atrazine_update.htm.

⁴⁸ See 33 U.S.C. § 1251 et seq.

⁴⁹ Charles Duhigg, “Clean Water Laws are Neglected, at a Cost in Suffering,” *New York Times*, Sept. 13, 2009, available at <http://www.nytimes.com/2009/09/13/us/13water.html>. See Id.

⁵⁰ See 33 U.S.C. § 1251 et seq.

⁵¹ Janelle C. Snyder and Laura A. Brinkerhoff, “Background and Investigation of Historic Pesticides in New Jersey: New Jersey Conference of Mayors Newsletter,” Brinkerhoff Environmental Services, Inc., at http://www.brinkenv.com/pesticides_article.html.

⁵² USEPA, “Pesticides: Regulating Pesticides,” at <http://www.epa.gov/pesticides/regulating/>.

⁵³ See Charles Duhigg, “Clean Water Laws are Neglected,” supra, note 49.

⁵⁴ See Id.

⁵⁵ See Id.

⁵⁶ See Id.; “Clean Water Act Violations: The Enforcement Record,” *New York Times*, Sept. 13, 2009, available at <http://www.nytimes.com/interactive/2009/09/13/us/0913-water.html>.

⁵⁷ See Duhigg, “Clean Water Laws are Neglected,” supra note 49.

⁵⁸ USEPA, “Pesticides: Regulating Pesticides: Statement from Steve Owens, Assistant Administrator for the Office of Prevention, Pesticides, and Toxic Substances (OPPTS),” at <http://www.epa.gov/pesticides/regulating/statement-owens.html> (“Administrator Jackson has made it a priority to examine how we manage and assess the risk of chemicals, including pesticides, and the Obama EPA will take a hard look at atrazine and other substances.”).

⁵⁹ Charles Duhigg, “Debating How Much Weed Killer Is Safe in Your Water Glass,” *New York Times*, Aug. 22, 2009, available at <http://www.nytimes.com/2009/08/23/us/23water.html>.

⁶⁰ Duhigg, “Clean Water Laws are Neglected,” supra note 49.

⁶¹ USEPA, “EPA Begins New Scientific Evaluation of Atrazine,” News Releases by Date, Oct. 7, 2009, at <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/554b6abea9d0672f85257648004a88c1!OpenDocument>.

⁶² See Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc. et al, Docket No. 2004-L-710 (3d Jud. Cir., Ill.).

⁶³ See First Amended Class Action Complaint filed in Holiday Shores action at <http://documents.nytimes.com/atrazine-lawsuit#p=1>.

⁶⁴ Id.

⁶⁵ See 42 U.S.C. § 9607.

⁶⁶ 711 F. Supp. 1244 (D.N.J. 1989).

⁶⁷ Prudential, *supra*, 711 F. Supp. at 1253 (citing Jersey City Redevelopment Auth. v. PPG Industries, 655 F. Supp. 1257, 1260 (D.N.J. 1987), *aff'd* 866 F.2d 1411 (3d Cir. 1988), superseded by statute on other grounds Bahrle v. Exxon Corp., 279 N.J. Super. 5 (App. Div. 1995)).

⁶⁸ See Prudential, 711 F. Supp. at 1253-54. See also Kelley v. Michigan Natural Resources Commission, 1990 U.S. Dist. LEXIS 10217 (W.D. MI Jul. 31, 1990) (the plaintiff sued suppliers of neoprene for contribution and indemnity under CERCLA, product liability and negligence; however, the court dismissed the CERCLA claim because, as set forth in Prudential, the mere sale of a product with potentially hazardous substances does not constitute disposal of hazardous substances).

⁶⁹ 1996 U.S. Dist. LEXIS 15986 (S.D. Ala. Oct. 11, 1996).

⁷⁰ See Ciba-Geigy, *supra*, 1996 U.S. Dist. LEXIS 15986, at *124-25.

⁷¹ See Id.; Iberville Parish Public Waterworks District No. 3 v. Novartis Crop Protection, Inc., 45 F. Supp. 2d 934 (S.D. Ala. 1999) (lawsuit filed against Novartis, as successor in interest to Ciba-Geigy, for costs incurred to remove Atrazine from drinking water dismissed for lack of standing; however, the plaintiffs allegations sounded in environmental contamination liability, not product liability, because the claims allegedly arose out of the manufacture of Atrazine rather than its use).

⁷² 345 Ill. App. 3d 1011 (Ill. App. Ct. 2004).

⁷³ See Prudential, *supra*, 711 F. Supp. at 1253-54; East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 868, 866-71 (1986) (a product action is appropriate where there is damage to other property as opposed to damage to the product itself).

⁷⁴ CPC International, Inc. v. Hartford Accident & Indemnity Co., 316 N.J. Super. 351, 386 (App. Div. 1998).

⁷⁵ Wal-Mart Stores, Inc. v. U.S. Fidelity & Guarantee Co., 816 N.Y.S.2d 17, 18 (1st Dept. 2006).

⁷⁶ Outboard Marine Corp. v. Liberty Mutual Ins. Co., 154 Ill.2d 90, 104 (1992).

⁷⁷ See “Foodborne Illness Victims Mark President Obama’s First 100 Days By Calling for Permanent Fix to Food Safety System,” *Reuters*, Apr. 29, 2009, *available at* <http://www.reuters.com/article/pressRelease/idUS151976+29-Apr-2009+PRN20090429>.

⁷⁸ See Michael Weisskopf, “Congress Finally Gets Tough on Food Safety,” *Time*, June. 12, 2009, *available at* <http://www.time.com/time/printout/0,8816,1904278,00.html>; Andrea Ford, “The Holes in America’s Food-Safety Net,” *Time*, Sept. 30, 2008, *available at* <http://www.time.com/time/printout/0,8816,1845618,00.html>.

⁷⁹ See Weisskopf, *supra*, note 78; “Foodborne Illness Victims,” *supra* note 77.

⁸⁰ See “Foodborne Illness Victims,” *supra* note 77; Drew Falkenstein, “2006 Spinach E. coli Outbreak Revisited,” *Food Poison Journal*, Sept. 13, 2009, *available at* <http://www.foodpoisonjournal.com/2009/09/articles/food-poisoning-information/2006-spinach-e-coli-outbreak-revisited/>.

⁸¹ See Ford, *supra* note 78.

⁸² See “Foodborne Illness Victims,” *supra* note 77.

⁸³ Id. See e.g. S. 425; S. 510; H.R. 814; H.R. 815; H.R. 759; H.R. 875; H.R. 1332; H.R. 1977; H.R. 2749.

⁸⁴ See The Library of Congress, *at* <http://thomas.loc.gov/>.

⁸⁵ See H.R. 2749.

⁸⁶ See Id.

⁸⁷ See Weisskopf, *supra* note 78.

⁸⁸ See H. Res. 691; The Library of Congress, *at* <http://thomas.loc.gov/>.

⁸⁹ See The Library of Congress, *at* <http://thomas.loc.gov/>.

⁹⁰ See Appendix I for select policy provisions from general liability, excess and umbrella ISO policy forms.

⁹¹ See *ibid.*

⁹² “Historically the so-called sistership doctrine required a manufacturer discovering damage to part of one airplane (referred to as an airship) would automatically initiate a recall of all other similarly equipped airplanes, referred to as the “sister ships,” as a precaution to search for the same defect for obvious reasons of public safety.” Atlantic Mutual Insurance Company v. Hillside Bottling, 387 N.J. Super. 224 (App. Div.), *cert. denied* 189 N.J. 104 (2006). The exclusion “was devised to make it plain that in such circumstances, ‘while [the insurers] intended to pay for damages caused by a product that failed, they did not intend to pay for the costs of recalling products containing a similar defect that had not yet failed.’” Id. (citing Forest City Dillon, inc. v. Aetna Cas. & Sur. Co., 852 F.2d 168, 173 (6th Cir.1988)).

⁹³ See e.g. Armstrong World Industries v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1 (Cal. Ct. App., 1st Dist. 1996); Zurich American Insurance Co. v. Cutrale Citrus Juices USA, Inc., 2002 U.S. Dist. LEXIS 26829 (M.D. Fla.

2002); National Union Fire Insurance Co. v. Terra Industries, Inc., 216 F. Supp. 2d 899 (N.D. Iowa 2002), aff'd, 346 F.3d 1160 (8th Cir. 2003), cert. denied, 541 U.S. 939 (2004).

⁹⁴ See e.g. Sokol & Co. v. Atlantic Mut. Ins. Co., 430 F.3d 417 (7th Cir. 2005); St. Paul Fire & Marine Ins. Co. v. Amsoil, Inc., 51 Fed. Appx. 602 (8th Cir. 2002); McNeilab, Inc. v. North River Insurance Co., 645 F. Supp. 525 (D.N.J. 1986), aff'd 831 F.2d 287 (3d Cir. 1997); Nu-Pak, Inc. v. Wine Specialties International, Ltd., 643 N.W.2d 848 (Wis. Ct. App. 2002).

⁹⁵ 216 F. Supp. 2d at 899.

⁹⁶ Terra Industries, supra, 346 F.3d at 1162.

⁹⁷ Id. at 1164.

⁹⁸ 2002 U.S. Dist. LEXIS 26829.

⁹⁹ Cutrale, supra, 2002 U.S. Dist. LEXIS 26829, at * 8.

¹⁰⁰ Id. at 9-10.

¹⁰¹ 643 N.W.2d at 848.

¹⁰² Nu-Pak, supra, 643 N.W.2d at 854.

¹⁰³ Id. at 854-55.

¹⁰⁴ 645 F. Supp. at 525.

¹⁰⁵ McNeilab, supra, 645 F. Supp. at 537-39 (“It is clear . . . that ‘liability insurance,’ as it is traditionally understood, does not cover first party expenses.”).

¹⁰⁶ Id. at 539.

¹⁰⁷ Ibid.

¹⁰⁸ National Union Fire Insurance Co. of Pittsburgh, PA v. Stroh Cos., 265 F.3d 97, 106 (2d Cir. 2001).