Companies targeted by product liability suits -- whether in the food or the pharmaceutical industry -- often assume that they will need to pay only a single insurance deductible even if their product injured thousands of consumers.

This assumption, however, is fatally flawed. Indeed, if a company has the wrong policy language, it might see its insurance coverage devoured by deductibles because, in many states, each consumer's claim arising out of the same product lot is deemed a separate “occurrence” for insurance purposes.

This intersection between policy deductibles and the number of claims or occurrences results in a significant impact on insurance coverage, and on how, whether and when insurance dollars will be available to cover liabilities arising out of products.

Most policies have a deductible, which can be written on a “per claim” or “per occurrence” basis. A “per claim” deductible means that the deductible applies separately to each individual that brings a claim against the company, and is usually very disadvantageous for the insured. As a result, most insurance brokers will seek a “per occurrence” deductible, assuming that all similar claims arising out of a single product will be deemed one occurrence.

In many states, however, a per occurrence deductible is essentially the same as a per claim deductible, because the law of many jurisdictions does not treat multiple claims as a single occurrence. For example, assume that a product injures 10,000 people, and that each person's injury claim amounts to $30,000. If the policy at issue has a per occurrence deductible of $50,000, each claim would fall within the deductible, and the insured would have no coverage.

One way to avoid this predicament is to have an aggregate on the deductible, sometimes called “annual aggregate deductible,” to designate the maximum amount an insured can pay as deductibles over a specified period of time, typically one year. Aggregate deductibles protect an insured from a high frequency of losses. For example, using the prior example, assume that the policy has an aggregate deductible of $300,000 -- the insured would then have coverage after paying the first six claims. Most insurance policies do not have aggregate deductibles.

Another way insurance professionals deal with this issue is through a “batch clause” or “aggregation clause.” Generally speaking, a batch clause is an insurance condition that provides an aggregation of loss. An aggregation clause is a more sophisticated batch clause designed to clarify that a single deductible applies to all claims arising out of a single product defect. In the context of product liability, a batch clause essentially means that all claims arising out of defective products produced in a single manufacturing lot will be treated as a single claim, and that only one deductible will be applied regardless of the number of claims resulting from that lot. For example, suppose that a manufacturer makes a batch of 10,000 defective cupcakes that injures 500 children. If a batch clause applied, there would be only one limit of liability available to pay claims, but only a single deductible would apply.

The typical “batch clause,” however, may not provide sufficient protection, because the policy deductible applies to each “batch,” and this can easily lead to litigation over what constitutes a “batch.” For example, an insurer is likely to argue that each day's production is a separate “batch” to which a separate deductible applies. Insurance professionals have to carefully craft a policy’s batch clause to avoid this problem.
What constitutes a “batch,” however, is not always clear. For example, in ConAgra Foods Inc. v. Lexington Insurance Co., a majority of the Delaware Supreme Court determined that an insurance policy’s batch provision was susceptible to two reasonable interpretations, and remedied for a determination on the ambiguous policy language. The ConAgra coverage case arose from the alleged contamination in 2007 of peanut butter products that ConAgra Foods manufactured at a Georgia plant. The Center for Disease Control (CDC) informed ConAgra that it suspected a link between a certain strain of salmonella and those peanut butter products, and thereafter ConAgra announced a voluntary, nationwide recall of all its peanut butter products. But, some of the peanut butter products reached consumers, and many of those consumers sued ConAgra.

ConAgra pursued coverage under a policy issued by Lexington Insurance Co. that covered personal injury claims arising from contamination of its products. Lexington denied coverage. The policy at issue defined “occurrence” for general liability purposes as follows: “as respects bodily injury or property damage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one occurrence.”

The policy also contained a batch clause endorsement that essentially provided another definition of “occurrence,” as follows: “All bodily injury or property damage arising out of one lot or batch of products prepared or acquired by you, shall be considered one occurrence. Such occurrence shall be deemed to occur when the bodily injury or property damage occurs for the first claim of the claim of that lot or batch.”

The endorsement also stated: “[f]or the purposes of this endorsement, Lot of Batch is defined as a single production run at a single facility not to exceed a 7 day period.” The court found that there were two reasonable and competing interpretations of the batch clause. One interpretation limited coverage and one that expanded it, and the court concluded that the batch provision was ambiguous, and remedied the case to the lower court.

Additionally, American Insurance Company v. St. Jude Medical Inc., involved clinical trials for Silzone-coated artificial heart valves conducted by St. Jude’s. After a number of trial participants exhibited adverse results, St. Jude’s ended the trial and recalled all of its Silzone-coated products. American Insurance Company, St. Jude’s excess insurer, argued that only claims for a particular product defect would be covered under its policy. The policy’s batch clause defined a batch as all products with “the same known or suspected defect,” and American Insurance Co. asserted that since the definition used the defect to identify the products included, only claims arising out of the specific defect should be covered. St. Jude’s, however, argued that the batch clause covered all Silzone-coated products, not just its artificial heart valves. Ultimately, the court agreed with St. Jude’s.

In Allianz Ins. Co. v. Guidant Corp., the insured sought coverage from various excess insurers for bodily injury claims made during multiple periods arising out of an implantable graft manufactured by the insured. The insured tried to aggregate all claims made in later years under the batch clause in the first policy period to exhaust its retention in that policy.

In the ensuing litigation, the insurers argued that the claims could not be “batched” because the products did not have the same known or suspected defect or deficiency, as the batch clause required. The insured asserted that so long as multiple losses involved a particular product with any defect, the losses could be aggregated. The trial court rejected the insured’s position. The appellate court affirmed, holding that the insured could not simply batch claims involving the same product, but rather had to show that the underlying claims involved both the same product and the same defect.

Batch clauses are designed to group losses arising from related incidents into a single claim covered by one policy period and one policy limit, for which the insured pays one deductible. But batch clause language varies from one policy to the next.

One policy might limit a batch to products that “can be distinguished by the specific date of production or by a batch number, lot number or control number.” Another might more broadly define a batch as claims arising from “two or more persons, that are attributable directly, indirectly or allegedly to the same event, defect, hazard, condition, cause, decision or advice in the design, formulation, manufacturing, distribution, sale, use, testing, handling, repair, replacement, maintenance or disposal of your product.”

Maximizing coverage under batch clauses depends on the facts particular to each circumstance — particularly the number and type of claims at issue and the language in each applicable insuring agreement.

It is therefore critical to read the proverbial “small print” of a batch clause in a product liability policy to know what language is incorporated. This will significantly impact the coverage available, may dictate how an insured provides notice of a claim, and could determine how to maximize coverage.

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