[Blogs]
September 21, 2015
Food Contamination Claims and Recalls: Is Your Business Covered? - Part I

Part I: Commercial General Liability Insurance Over the last few years, the number of recalls of food products for alleged contamination and undisclosed ingredients or other mislabeling issues has risen drastically. This is the first in a three-part series designed to help food product companies navigate the challenging insurance issues posed by food contamination losses and recalls under several types of insurance policies. We start by considering key insurance coverage questions under commercial general liability (CGL) policies. **Recalls and the Food Safety Modernization Act** Food companies have historically recalled their products at the first hint of possible contamination, rather than risk a public health crisis. These quick-trigger recalls are likely to continue, or even increase in frequency, with the advent of the Food Safety Modernization Act, which gives the U.S. Food and Drug Administration authority to order mandatory food recalls. When food recalls are necessary, the companies involved may incur mind-boggling costs, including the costs of having to do some, if not all, of the following:

- Pull a product from store shelves nationwide
- Retract it from direct or downstream customers
- Safely destroy the recalled product
- Stop in-process production lines
- Sanitize tainted equipment
- Compensate consumers, vendors and distributors for injuries or lost profits

Imagine the loss of direct profits to your company while production and sales are stopped, and the indirect losses to vendors, distributors or other companies. Imagine having to compensate people who claim that they got sick—or worse—from your product, or having to reimburse the customers whose product you took back. Then imagine conducting a crisis response to deal with all the negative media attention and the sudden loss in confidence in all of your products, even those that were not recalled. Finally, imagine the legal bills that could mount if even one of these problems lands your company in court. In light of these potentially disastrous consequences, every food company should review its existing insurance policies to see whether they adequately cover such recall-related risks and, if not, whether it makes sense to pursue other insurance products available in the marketplace. **Why CGL Policies Are So Valuable to Food Companies** CGL policies arguably are the single most valuable insurance product a food company can have, as they broadly protect the company from claims that its contaminated products caused bodily injury or property damage to others. CGL policies also are important because they often require the insurer to defend the company in the event of litigation. Even with respect to third-party claims that appear to fall within the scope of CGL policies, however, insurers may seek to deny or limit coverage based on policy exclusions or definitions. For example, insurers may assert exclusions for "pollution," "mold," "bacteria" and "fungus" in responding to food contamination claims. Insurers also may rely on "business risk" exclusions, which purport to bar coverage for damage to the company's "own work" or "own products." Food companies have strong arguments that CGL insurers may not deny or limit coverage. Historical evidence shows, for example, that the CGL insurance industry did not intend for the "pollution," "mold," "bacteria" and "fungus" exclusions to apply to food contamination liabilities. Nor did insurers intend for business risk exclusions to preclude coverage when others assert claims for injury. Similarly, courts nationwide have rejected insurers' attempts to bar coverage for food contamination claims simply because they relate to the policyholder's work or products. **Will CGL Insurance Cover Food Recall Expenses?** CGL insurers often try to avoid paying food recall expenses by arguing that the vast majority of food recall costs are the ordinary costs of doing business. As such, they may contend that the company either expected or intended the losses. Insurers also may rely on the so-called "sistership" exclusion, which purports to bar coverage for measures taken to recall products before they are proven to be contaminated. The name of this exclusion derives from the idea that when one airplane developed a defect, all "sisterships"—planes of the same type— would be returned for inspection. Given that many food product recalls actually take place before contamination is confirmed, insurers may try to use this exclusion to bar recall costs entirely. Even taken to this extreme, however, the exclusion does not bar coverage for actual damage that the product causes to third parties. The exclusion may be overcome in practice by showing that injured third parties actually ate, ingested or used the contaminated product or incorporated it into another product. **Benefits and Limits of CGL Coverage** Given the wide array of losses that can arise from a food contamination or recall event, food companies should be aware of the breadth of coverage provided by their CGL policies. Traditional CGL policies provide the greatest benefit to companies because they may cover the costs of defending against claims. At the same time, food companies should be aware that they may face hurdles to obtain this coverage. Policyholders also should be aware of other types of policies, which we explore in our next post, that may cover the costs to recall products or the loss of the product itself. **Next Post: Part II: Commercial Property and Business Insurance**

Explore more in

Food & Consumer Packaged Goods Litigation   Food & Beverage