

Food Contamination Claims and Recalls: Is Your Business Covered? - Part III

Part III: Product Contamination and Product Recall Insurance As the actual or threatened contamination of food and other consumable products has become more commonplace, insurance companies have developed and marketed specialized insurance policies to cover food manufacturers against the costs they incur as a result of this contamination. In this final installment of our three-part series on insurance coverage for the various costs involved in food product recalls and contamination claims, we discuss specialized insurance policies designed to cover those costs. **The Basics of Product Contamination and Product Recall Insurance** Broadly speaking, product contamination and recall policies may cover the reasonable costs that the insured must incur to:

- examine its products for contamination
- announce a product recall
- pull contaminated products from store shelves and the stream of commerce
- destroy contaminated products safely
- reimburse distributors and retailers for their recall costs.

In addition, these policies often include crisis management coverage to mitigate negative media exposure and loss of confidence in the food company's products. Because product contamination and recall policies generally do not follow an industrywide standardized "form," with different insurers offering varying types of coverage, companies contemplating the purchase of a product contamination or recall policy, or pursuing coverage under an existing policy, must consider closely the language of the policy to understand the scope and limitations of the coverage provided. **Product Contamination Versus Product Recall Coverage** Product contamination policies generally are triggered by malicious or inadvertent contamination of the insured's product during the production of that product. As such, these policies do not require the food company to initiate a product recall to obtain coverage. Rather, the policies respond to product contamination that has caused or may lead to bodily injury or property damage to others from the consumption or use of the product. Product recall policies, in contrast to product contamination policies, are triggered by the recall of a product that has caused, or is reasonably likely to cause, bodily injury or property damage. Here, the mere identification of contaminated products is not enough to trigger coverage—the contaminated product must be recalled from the marketplace. Even so, however, the recall must result from actual product contamination in most instances. **Policy Conditions and Exclusions May Restrict Coverage** Food contamination and recall policies contain unique conditions and exclusions that insurers may try to use to narrow drastically the available coverage. Most notably, these policies may require that the insured notify the insurer of potential contamination within mere days of discovering the problem. A number of decisions under these policies have centered on whether the insured's product was actually contaminated to the extent that it posed a risk to human health or other property so as to trigger coverage. In one instance, for example, a California court denied coverage to a salad company for the business losses it suffered due to a nationwide U.S. Food and Drug Administration advisory regarding *E. coli* contamination of fresh spinach products. Testing eventually confirmed that the company's spinach products were not actually contaminated. The court found that the nationwide *E. coli* advisory did not satisfy the condition requiring the policy to respond to accidental contamination of the insured's product, and the policy therefore did not apply. Contamination that is not likely to cause injury to consumers also may be found not to trigger coverage. For example, in a case litigated in federal court in Illinois, the court denied coverage when the insured's product was contaminated but not deemed harmful to consumers. Finally, a court may find that the incorporation of contaminated ingredients from a supplier into the insured's products does not trigger coverage.

In one such case, a California court ruled that a food contamination policy did not apply to a frozen food manufacturer's recall of products that had incorporated recalled beef that may have been contaminated with mad cow disease. The court held that the policy did not cover contamination of the insured's product caused by ingredients obtained from third-party suppliers that were contaminated before being incorporated in the insured's product. **Benefits of Specialty Insurance** Given the potential for catastrophic losses from contamination claims or product recalls, food companies may want to consider specialty insurance products. Because food contamination and recall policies are not standardized, it is crucial for companies to identify their primary risks and then to negotiate broad coverage terms aimed at covering those risks. Policyholders should be aware that these specialty policies contain non-standard exclusions and provisions as well as specific notice requirements. As discussed in Part I of this series, with the advent of the Food Safety Modernization Act, food recalls are sure to become even more commonplace. Now is the time for food companies to thoroughly analyze their risks and coverage needs—before a recall or contamination takes place.

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