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FOOD SUPPLIERS: UNDERSTAND WHAT YOUR CONTAMINATION AND RECALL INSURANCE POLICIES COVER -- THEN PLAN ACCORDINGLY

Sep 11, 2019

Last year saw a massive *E. coli* outbreak linked to romaine lettuce which left growers, packers and retailers struggling to identify root causes and assign liability – all while trying to protect end users from illness and injury. To address the costs of contamination and recalls, food producers and manufacturers commonly obtain contamination insurance. However, typical contamination policies cover only those losses incurred due to *actual* contamination, while arguably providing no coverage for recalls due to *potential* contamination. A company that recalled its salads due to a *risk* that its romaine was contaminated with *E. coli* faces the likelihood that its insurer will claim the recall costs are not covered under the standard food contamination insurance policies – even though the recall was in the public's best interest. Food suppliers should evaluate whether there is a gap in their insurance coverage created by the limited language in certain contamination policies and how best to close that gap, including through specialized recall insurance or contractual protections with their supply chain partners.

Several courts have held that product contamination insurance policies do not cover the costs of recalls issued due to *potential* contamination. For example, a California District Court held in the *Ruiz Food Products* case that a policy that covered "any accidental or unintentional contamination … provided that the use or consumption of the Insured product(s) … [h]as resulted in or would result in [bodily injury]" did not cover a recall issued due to potentially contaminated products.[1] In *Ruiz*, an upstream manufacturer of hydrolyzed vegetable protein ("HVP") issued a recall after a finished lot of HVP tested positive for salmonella.[2] A different lot of HVP subject to the recall was sent to a company that used it to produce a beef spice mix, which the plaintiff incorporated into its food products.[3] All three companies tested samples of the HVP that were sent to the plaintiff's supplier and the results were all negative for salmonella.[4] Nevertheless, the U.S. Department of Agriculture's Food Safety Inspection Service required the plaintiff to recall its product due to the potential risk of contamination from the recalled HVP.[5] The court held that the plaintiff could not recover under its contamination insurance policy because the policy required "objectively verifiable evidence" of actual contamination in the plaintiff's own product.[6]

A similar result was reached by an Ohio District Court in the *Wornick* case.[7] The plaintiff, a supply-chain integrator of meals-ready-to-eat (MREs) for the U.S. Government, complied with the Government's demand to recall and replace 700,000 cases of MREs after the supplier of dairy shake packets, which the plaintiff had incorporated into the MREs, found salmonella in a finished lot of its packets.[8] Later, it was determined that the tainted lot had not been sent to the plaintiff and none of the plaintiff's MREs contained salmonella.[9] The court held that a policy covering "[a]ny accidental or unintentional contamination … provided always that the consumption or use of the Named Insured's CONTAMINATED PRODUCT(S) has … either resulted, or may likely result in [bodily injury]" did not cover the recall issued due to the risk of contamination when no contamination was actually present.[10] Similarly, a California appellate court held in the *Windsor Food* case that a food contamination insurance policy did not cover the nearly $3 million a beef product producer spent to comply with a voluntary class II recall of its supplier's beef due to the potential risk from the use of the supplier's downer cattle,[11] and another federal court held in *Little Lady Foods* that an accidental product contamination policy did not cover the plaintiff's holding and retesting of its products, which were believed to be potentially contaminated with harmful bacteria, where it was later determined that the harmful bacteria was not present in any of the products.[12]

To avoid being stuck with the costs of a recall issued due to potential contamination, food suppliers may obtain dedicated recall insurance, and/or use their relative bargaining power to force upstream suppliers to indemnify them against such losses. While each of these solutions is helpful in certain situations, beneficial indemnity provisions are not readily available to all industry players, and there are additional factors to look out for when considering recall insurance. For example, geographical limitations on coverage can be detrimental to sellers who have global exposure. In short, all suppliers in the food chain should be aware of and account for what their contamination and recall insurance policies cover – and do not cover – in order to properly understand how the costs and risks they are undertaking will be allocated, and evaluate how they can improve that allocation of risk before a recall ever happens.

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1. *Ruiz Food Prod., Inc. v. Catlin Underwriting U.S., Inc.*, 2012 WL 4050001 (E.D. Cal. Sept. 13, 2012), aff'd sub nom. *Ruiz Food Prod., Inc. v. Catlin Syndicate Ltd.*, 588 F. App'x 704 (9th Cir. 2014).

2. *Id.* at *1.

3. *Id.* at *2.

4. *Id.* at *2.

5. *Id.*

6. *Id.* at *6.

7. *Wornick Co. v. Houston Cas. Co.*, 2013 WL 1832671 (S.D. Ohio May 1, 2013).
8. *Id.* at *2.
9. *Id.*
10. *Id.* at *4-6.
11. *Windsor Food Quality Co. v. Underwriters of Lloyds of London*, 234 Cal. App. 4th 1178 (2015).
12. *Little Lady Foods, Inc. v. Houston Cas. Co.*, 819 F. Supp. 2d 759 (N.D. Ill. 2011)

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