



## **Protecting Companies and Consumers from Contaminated Food Claims**

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By Nathan Lee, Esq.

*Just as consumers closely examine the quality of the ingredients in their food products, food companies should closely analyze their insurance policies and their insurance coverage to confirm that they are properly insured against future claims.*

Recently, there have been heaps and gobs of litigation related to food products. It appears that no food product is safe from the proverbial boiling cauldron of litigation.

In just the past few months, there have been no less than 86 separate lawsuits filed regarding alleged heavy metals found in baby food. One was a class action lawsuit asserted against Plum, PBC, makers of organic baby food. This class action lawsuit alleged that Plum's baby food products are tainted with the presence of heavy metals such as arsenic, cadmium, lead, and mercury.

These food claims are not just related to baby food. Recently, a multi-national salmonella outbreak linked to fresh red onions allegedly sickened more than 500 individuals. The U.S. Food and Drug Administration (FDA) announced that it concluded its traceback investigation which showed that the onions came from one particular California company. Litigation has ensued. The company has announced recalls regarding its red onions but also its white, yellow, and sweet yellow onions.

On April 24, 2021, More Than Gourmet, Inc., recalled almost 7,000 pounds of ready-to-eat beef and veal broth and stock products which may be contaminated with extraneous materials, including hydraulic oil. On May 4, 2021, Bellisio Foods, Inc. recalled almost 4,000 pounds of spaghetti with meat sauce products due to an undeclared allergen.

Consumers should closely examine the quality of the ingredients in their food products. However, food companies should closely analyze their insurance policies and their insurance coverage to confirm that they are properly insured against future claims.

### **Property Damage when Potentially Injurious Material in a Product Causes Loss**

Generally, a commercial general liability policy covers damages the insured becomes legally obligated to pay because of bodily injury or property damage.

Regarding property damage claims, courts have held that property damage, as defined in an insuring agreement, may occur when a defective part causes injury to other property. The presence of a potentially injurious material inside of a food product (e.g., wood splinters found inside of roasted almonds which were part of a cereal product) could create a cornucopia of insurance-related issues.

This leads us to analyze the above in the context of an insurance policy. If the food product itself is determined to be contaminated, the food product would likely be considered the insured manufacturer's product, and the policy's damage to "your product" exclusion would apply. However, if the supplier of a particular ingredient provides an ingredient that is contaminated, which is then incorporated into the food product, the analysis of the ingredient supplier's insurance is different. The ingredient product itself would be excluded. If the ingredient is incorporated into the larger food item, however, this would contaminate the larger food item. Some courts follow an incorporation theory, and some do not. Some courts follow that theory in certain situations but not others. If that theory were to apply, then incorporating the ingredient could result in property damage to the food item.

Some courts have noted that the above may constitute "property damage" within the meaning of the insuring agreement. Some courts have held that the term "property damage" includes loss that results from physical contact or physical linkage, as when a potentially dangerous product is incorporated into another and must be removed, at some cost, to prevent the danger from materializing.

Next, we turn our focus to the language in the insuring agreement. Depending on the language therein, the insuring clause may obligate the insurer to pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies. For example, the definition of the term "property damage" may be defined as physical injury to tangible property, including all resulting loss of use of that property. As such, this insuring clause language must be carefully analyzed by qualified counsel.

As food litigation heats up, food product companies and their counsel should carefully review their subject insuring agreements to determine whether potential claims regarding food products will be covered or not.

### **Policy Business-Risk Exclusions as Related to Contaminated Food Claims**

Food product companies should assess their policy coverage to protect against potential contaminated food claims. Companies should review business-risk exclusions located within the commercial general liability policy containing policy language similar to: "if such property can be restored to use." Some courts have held that the risk of replacing or repairing a defective product is considered a commercial risk that is not passed on to a liability insurer.

In the context of food contamination cases, some courts will look for evidence that the contaminated food product manufactured could be "restored to use" to a reasonable and equivalent

value. However, rarely are contaminated food products able to be restored to use at their reasonable and equivalent value. For example, there could be significant physical and financial challenges with removing a contaminated ingredient found inside of a food product to restore the food product to use and to a reasonable and equivalent value.

Further, if an insured food supplier is responsible for damaging someone else's property, all costs that are imposed on the food supplier as a consequence of covered property damage may not be covered. Such damages or costs may be excluded from the food supplier's coverage by the "Recall of Product, Work or Impaired Property" exclusion. However, food suppliers can further protect themselves by purchasing a contaminated products insurance (CPI) policy with third-party recall liability coverage in addition to a commercial general liability (CGL) policy.

Generally, a CPI policy indemnifies the insured food supplier for losses resulting from an "accidental product contamination." The standard CPI policy will cover reasonable and necessary first-party expenses incurred by the insured food supplier as a result of a covered insured contamination event, including but not limited to, recall costs, business interruption costs, rehabilitation costs, and consultant and advisor costs.

## **Conclusion**

In sum, companies in the food production industry, as well as their insurers, should consider the potential claims and risks that they are likely to encounter and put plans in place to mitigate their potential exposure. Advance planning should include timely conducting a thorough analysis of one's insurance coverage agreements which could be critical to saving a business from the significant expense associated with food product claims as well as a potential food product recall. Also, a complete insurance coverage policy analysis and review could be the difference between having insurance coverage available.

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*Nathan Lee is an Associate in the Encino office of Gray•Duffy, LLP. He focuses his practice on civil litigation matters, including insurance coverage, personal injury and business-related disputes, and has particular expertise pertaining to asbestos issues. Mr. Lee may be contacted at 818-907-4017 and [nlee@grayduffylaw.com](mailto:nlee@grayduffylaw.com).*

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