

Insurance Coverage for Product Recalls, Property Damage and Injuries

by Joshua Gold

Product recalls can be enormously expensive. So too can liabilities to claimants who assert that they have either been injured or suffered property damage from using or handling tainted goods: whether toys, construction materials, beverages, food products, etc. An event giving rise to a product recall often presents a double edged sword for policyholders: the huge costs of pulling a product from the marketplace; and potential liability to those claiming injury or damage as a consequence of using or handling the offending product.

Product recall insurance policies may protect against losses suffered by policyholders where their product or component parts of a product have the potential to injure, contaminate or damage property. Such insurance coverage may also cover situations where the contamination or damage is deliberately undertaken, such as scenarios involving product tampering claims and product extortion claims. Other insurance policies may apply to such claims too. For example, some kidnap and ransom insurance policies may provide coverage for instances of extortion by a threat to cause damage or loss to property through the alteration or contamination of raw materials, goods or stock.

In the context of product recall insurance coverage, some insurance companies may attempt to avoid coverage for a product recall losses by arguing that there is no evidence that the product in question did or would cause bodily injuries or damage. Specifically, the insurance company may argue that to trigger coverage, the use or consumption of the product must have resulted or would result in identifiable bodily injury, sickness, disease or death. Such insurance company arguments place the policyholder in an awkward position: namely, in an effort to establish coverage, the policyholder is being urged by the insurance company to evidence just how toxic its product was or could potentially be. These types of insurance company arguments can also be problematic where the policyholder is proactive in quickly removing a product from the marketplace before injury or damage can result. Often times this will be done on a voluntary basis without federal or state regulators formally requiring a recall.

To guard against these arguments, policyholders should carefully gather and record all information and documents that refer to allegations of bodily injury,

contamination, damage, etc. Additionally, policyholders should check their product recall policies to see if they cover losses involving adverse publicity of a contamination or product recall-related event. This coverage can be very valuable, but policyholders should check to make sure that the limits (or sub-limits) are in an amount to cover the risk of a serious claim. Some product recall policies promise to also cover the policyholder's business income losses and costs to restore the product to its intended levels of quality or to re-establish the product's market share to the level existing before the contamination, tampering or extortion took place.

Additionally, when policyholders are taking immediate and proactive measures to mitigate and avert losses, it may be helpful under appropriate circumstances to discuss with the insurance company the policyholder's plans for dealing with the situation. Holding discussions early on can help stem miscommunications and undermine subsequent insurance company efforts to second-guess the policyholder's approach to dealing with a potential or actual product recall loss or related claim.

Policyholders who are in the restaurant, hospitality or gaming businesses may also have insurance coverage under their all-risk property insurance policies where coverage is promised for outbreaks of food-borne illness, viruses, and disease that lead to business income losses. Some policyholders also purchase stand-alone food borne illness policies that may provide valuable insurance coverage if food products or food ingredients are contaminated or cause injury. Obviously, general liability insurance policies cannot be over-looked where there are allegations from claimants that they have been injured or had their property damaged from contaminated or tainted food, toxic toys, or defective construction materials.

Another thing to be on the look-out for are time sensitive provisions. Almost all insurance policies contain a time-sensitive notice provision which insurance companies are notorious for exploiting to argue against insurance coverage—even where there is no prejudice as a result of the allegedly “late” notice. Product recall policies often contain two extra time-sensitive provisions: a statement (or proof) of loss; and a suit limitation clause, requiring any litigation over insurance coverage under the policy to be commenced within a certain time frame.

Some insurance companies may seek to shorten this time period to as little as one year. While such a short statute of limitation may be unenforceable in some states, these clauses need to be treated seriously.

Policyholders purchasing product recall insurance should also consider risks associated with insurance company subrogation rights and negotiate a waiver of subrogation where appropriate. Subrogation may complicate the ability of the policyholder to: resolve claims on a “global” basis; and get back to business where a subrogation suit jeopardizes key business relationships. Even when an insurance company pays a claim under a policy, the insurance company may commence litigation against the policyholder’s business partners including joint-venturers, distributors, licensors, licensees, and others who may have some liability in connection with the loss covered under the policy. These parties may then involve the policyholder in those suits, seeking evidence, contribution or indemnification, leading to even further litigation. Policyholders obviously are seeking to put such activities behind them so that they can get back to business after a product recall episode. Some smart planning for and handling of these incidents can help achieve that. ■

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