

ANDERSON KILL POLICYHOLDER ADVISOR

The Policyholder Law Firm



Product Recalls: What Does Your Insurance Cover?

By Steven J. Pudell and Christina Yousef

Inherent in every purchase is a consumer's blind faith that the product is safe for consumption or use. With that said, there are two words that send shockwaves through the minds of consumers: product recall. A shock of this kind is now reverberating throughout the U.S. food supply chain. The Centers for Disease Control and Prevention announced on Wednesday, May 9, 2018, that a recent outbreak of E. coli linked to romaine lettuce had spread to 29 states.

With over half of the country affected, the financial consequences could be catastrophic for food suppliers and distributors. In the age of social media and instant connectivity, consumers have the ability to impose monetary loss more than ever before. As such, product recalls should serve as a reminder to the entire food and beverage industry to reevaluate their product contamination and recall insurance.

Consider whether your insurance covers the cost of:

1. Disposing of the contaminated product.
2. Notifying your customers.
3. Storage expenses for any products "on hold."
4. Other costs associated with the recall such as the costs of consultants and experts in the field.

Additionally, since recalls often trigger adverse publicity and a drop in sales, any evaluation of insurance should include a close look at whether third-party expenses are covered. Not only will a manufacturer/producer experience losses associated with recalls, but so will their direct customers. Consider, therefore, whether you are covered for losses suffered by third parties for which your company may be held responsible.

Analyze Your Policy Exclusions

Insurance companies often ask the court to issue a declaration that there is no coverage for the causes of action in the underlying lawsuit. But if the defendant has a motion to dismiss pending. Beyond these general categories, it's important to scrutinize any policies under consideration for coverages and exclusions specific to your business. Two recent coverage disputes involving liability stemming from alleged contamination illustrate how essential it is to read the fine print.

In Cheer Pack N. Am., LLC v. Valley Forge Ins. Co., the United States District Court for the District of Massachusetts considered whether a manufacturer of flexible pouches used to package and process various food products was

Steven J. Pudell is the managing shareholder in Anderson Kill's Newark office. Mr. Pudell regularly represents policyholders in insurance coverage matters and disputes. spudell@andersonkill.com | (973) 642-5877

Christina Yousef is an attorney in Anderson Kill's New Jersey office. Ms. Yousef's practice concentrates in insurance recovery, exclusively on behalf of policyholders, and in corporate and commercial litigation. cyousef@andersonkill.com | (973) 642-5007

entitled to coverage resulting from bacterial contamination.¹ The insurance company refused to defend its policyholder in the underlying litigation, arguing, among other things, that the policy excluded bodily injury or property damage arising out of “microbe” exposure. There was, however, an exception to the exclusion, providing that the exclusion did not apply if the policyholder’s “business is food processing.” The court found ambiguity on the issue and granted partial summary judgment to the policyholder.

In Trident Seafoods Corp. v. ACE Am. Ins. Co., a policyholder sought partial indemnification from one of its insurance carriers after settling complaints from one of its customers.² That customer claimed that the policyholder’s fish oil product rendered the customer’s farmed fish unusable, resulting in a recall. In order to avoid litigation, the policyholder ultimately settled with the customer. The insurance company denied coverage based on the “watercraft exclusion.” The United States District Court for the Western District of Washington granted summary judgment in favor of the insurance company and dismissed the policyholder’s breach of contract claim. The Ninth U.S. Circuit Court of Appeals affirmed, finding that the exclusion for “bodily injury” or “property damage” that was “arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, ‘auto’ or watercraft owned or operated by ... any insured” was unambiguous. The policyholder’s explanation of the damage invited a “but-for causation

analysis,” which was “inappropriate for interpreting ‘arising out of’ exclusions.”

Policyholders should be cautious and read their policies carefully, with a particular eye toward exclusions that may prevent them from receiving coverage for the very risks they seek to insure. Because policy interpretation can differ amongst jurisdictions, policyholders facing recalls should seek guidance from counsel in order to determine the applicability of their insurance. Moreover, policyholders should be aware that courts may be called upon to interpret even simple questions such as whether their line of business qualifies as “food processing.” While such determinations may seem simple on their face (and may not even have been debatable prior to the purchase of the insurance), the outcomes can lead to tremendous differences in coverage.

Ultimately, policyholders should expect the unexpected and be prepared for events that could change the industry in general, and their business in particular.▲

ENDNOTES

¹ *Cheer Pack N. Am., LLC v. Valley Forge Ins. Co.*, No. 15-14135 (FDS), 2017 U.S. Dist. LEXIS 65054 (D. Mass. Apr. 28, 2017).

² *Trident Seafoods Corp. v. ACE Am. Ins. Co.*, 668 F. App’x 793 (9th Cir. 2016).

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C., and Los Angeles, CA.

This was prepared by Anderson Kill PC to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the editor, Mark Garbowski at mgarbowski@andersonkill.com or (212) 278-1169, with any questions.

© 2018 Anderson Kill P.C.

New York, NY • Philadelphia, PA • Stamford, CT • Washington, DC • Newark, NJ • Los Angeles, CA