

# Getting the Most Out of Product Recall Insurance

by Joshua Gold and Steven J. Pudell

Product recall insurance policies, like a lot of insurance products through the years, have seen their ups and downs. Businesses that could benefit from this particular insurance product the most, such as pharmaceutical companies and toy makers, are often hard-pressed to purchase product recall policies on favorable terms, for a number of reasons. As with any type of insurance, moreover, the most sizeable claims are often contested. To minimize that possibility—or to strengthen one’s hand if a coverage dispute does arise—policyholders should be aware of certain issues both at point of sale and at point of claim.

Generally speaking, product recall insurance policies purport to protect against recall-related losses suffered by policyholders when 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 deliberate, such as scenarios involving product tampering claims and product extortion claims. Other insurance policies may apply to such claims as well. 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. Policyholders should also be aware that their general liability policies may provide coverage even in a recall situation. This is particularly so when the offending product has been combined with or integrated into another’s product and is damaged. If property damage has affected another’s property, general liability policies should provide coverage. Policyholders should also be aware that they may be entitled to coverage under other business’ insurance policies as additional named-insureds or pursuant to vendors’ endorsements that are commonly found in general liability policies.

Some insurance companies may attempt to avoid coverage for product recall losses by arguing that there is no evidence that the product in question did cause or would cause bodily injuries or damage—asserting in essence that the product can just remain in the marketplace and any pre-injury recall is “voluntary” in nature. This argument places the policyholder in the odd position of being pressured to prove just how toxic its product is.

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 stemming from a contamination or product recall-related event. It also may be helpful under appropriate circumstances to discuss with the insurance company the policyholder’s plans for dealing with a loss situation. Holding discussions early can help forestall miscommunication 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.

Additionally, many policies also provide “publicity coverage” to respond to adverse PR, but require policyholders to use the insurance companies’ in-house public relations department or consultant to minimize any damage to the policyholder’s reputation. This coverage is commonly found in policies sold to restaurants and other food establishments. This type of coverage may not require actual “contamination” or “damage” but merely reports of such damage, true or untrue, in the media or on the internet. This risk is particularly important to recognize in a social media world, where rumors can spread quickly and unchecked.

Those in the restaurant, hospitality or gaming businesses may also have insurance coverage under their all-risk property insurance policies for outbreaks of food-borne illness, viruses and diseases that lead to business income losses. Some may 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.

Policyholders should also be on the look-out for time-sensitive provisions. Almost all insurance policies contain a time-sensitive notice provision and insurance companies are notorious for exploiting such provisions 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 additional 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.

As with all insurance products, policyholders need to be careful at point of purchase and at point of claim, and pay attention to the details in order to improve their insurance coverage position—especially where the insurance company might be looking for a possible way out of paying a valid claim.

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