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SPECIAL ADVERTISING SECTION

OUTSIDE PERSPECTIVES

INSURANCE

Buying The Right Insurance Coverage Is Only Half The Battle

Specialized insurance coverage, excluded from standard-form commercial general liability (CGL) policies, is available for risks specific to many industries. Common examples include policies for risks such as pollution, product

when five metric tons of raw flavoring materials it bought from the policyholder allegedly contained trace amounts of mercury. The customer further claimed that by the time it discovered the mercury, it already had incorporated the allegedly contaminated flavoring raw materials into its other products. The insurance company denied coverage for the entire claim and sued its policyholder, seeking a ruling from the Court that its policyholder was not covered for the customer's claims because the alleged claims did not constitute covered "property damage" or "bodily injury" within the meaning of the policy.

The Court disagreed with the insurance company and found that property damage did in fact occur and that the policy provided coverage. CGL policies generally define "property damage" as "[p]hysical injury to tangible property" as well as "[l]oss of use of tangible property that is not physically injured." The Court concluded that under the terms of the insurance policy, the customer's contamination allegations of damage to its property - finished food flavorings made from the allegedly contaminated raw flavoring materials, and its processing equipment -- fell squarely within the scope of the CGL policies.

In a second case, Taco Bell restaurant franchisees purchased a specialized Food Borne Illness/Trade Name Restoration Insurance Policy in order to cover potential business losses stemming not only from the

food borne illness outbreak itself, but also from any adverse publicity associated with the trade name of the policyholder stemming from the outbreak. In 2006, an E. coli outbreak occurred at some Taco Bell locations in the Northeastern U.S., causing widespread negative media attention. Even Taco Bell franchisees that did not experience the outbreak suffered a large drop in sales due to the publicity surrounding the event. Franchisees that purchased the Food Borne Illness/Trade Name Restoration policy looked to their insurance company, Lloyd's of London, to reimburse them for their losses. Lloyd's refused, asserting that a vaguely-worded "Aggregate Supplier Incident Sublimit" set at \$0 eliminated coverage. The Court again disagreed with the insurance company and concluded that the language that Lloyd's said eliminated coverage actually was unclear, and thus could not be used to vitiate the insurance coverage that the Franchisees thought would cover them.

The third case also involved alleged E. coli contamination. The policyholder, a seller of bagged, ready to eat spinach, made a claim for coverage for its losses under its "Total Recall, Brand Protection Food/Beverage Insurance Policy". This policy purported to provide coverage for business losses for accidental contamination of the insured's products, with "accidental" defined in the policy as caused by an "error by the assured" in the manufacture of its goods. The insur-



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recall, and food-borne illness. While such specialized policies can be indispensable to companies vulnerable to such risks, they are still subject to the overly broad coverage defenses that insurance companies use with CGL policies. No matter how comprehensive a company's insurance portfolio, corporate counsel still needs to be prepared to fight for coverage once a loss occurs. Three recent insurance coverage battles in the food and restaurant industries - one involving a CGL claim and two involving claims under more specialized policies - illustrate this core principle.

In the first case, involving a CGL insurance policy, a New Jersey-based importer of raw materials was sued by a customer, a manufacturer of finished food flavorings, to whom it had sold flavor materials. The customer alleged that it sustained damages to its property

ance company denied coverage, contending that there was no such “error” on the part of the policyholder. The policyholder argued that there was, in fact, such an “error” in that contamination of the spinach resulted from the policyholder’s own failure to conduct a food safety audit of the spinach growing field in compliance with its own corporate food safety practices. Further, certain of the contaminated spinach was found to have been purchased from a “prohibited” source, a lot placed on a list of the spinach company’s “prohibited fields” because of its proximity to a cattle feedlot, a known source of E. coli. The insurance company told the Court that these shortcomings were not “errors” for purposes of coverage, in that these acts and omissions were not “committed in the course of manufacture, production, processing, preparation, assembly, blending, mixing, compounding, packaging or labeling,” of the policyholder’s product, thus coverage could not apply. The insurance company also contended that the policyholder failed to give notice of the claim, and that various exclusions to coverage applied, such as an exclusion for a “governmental ban” on the insured’s products.

After trial, where the policyholder ironically had to put on evidence of its own shortcomings in the processing and manufacture of the bagged spinach, the Court found that the insurance company had breached its insurance policy contract by failing to provide insurance coverage for the E. coli outbreak pursuant to the policy, and found the cited exclusions inapplicable. The Court sided with the policyholder and found that the alleged

“errors” did involve “blending, mixing, and compounding” the spinach, which could have spread the contamination, thus satisfying the Policy’s “error” requirement for coverage. The Court further found there had been no “governmental ban” on the spinach, rendering the insurance company’s cited exclusions inapplicable, as the Court found an FDA advisory such as the one issued in the case is not akin to a ban on a product imposed by a government. Finally, the Court found that the insurance company failed to request information it later contended was essential to its coverage determination, rendering its other defenses to coverage unsuccessful as well.

Ultimately, the policyholders in these examples were covered for these occurrences, but not without expensive, drawn-out fights. What can businesses that have bought appropriate coverage, but have found their proper claims denied, do to protect themselves from this situation? While every insurance policy you purchase should spell out clearly what is and is not covered, it is important that you scrutinize the language of the policy offered for sale before purchasing it. Request from the insurance company or your broker the specific coverage you need in writing. Review the coverage you have purchased yearly with your broker or other insurance professional to be clear that it covers what you envision it to cover.

If you are faced with a denial of insurance coverage for precisely the kind of loss you purchased insurance to cover, do not take “no” for an answer. Analyze the exclusions to coverage relied upon by the insurance company as a basis

for the denial. Pursue all available options to potentially obtain coverage. Review your insurance policy carefully with your broker or other professional, such as an attorney specializing in policyholder insurance recovery, to determine the best approach to obtain the coverage you bought to protect your company.

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