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Five steps to maximize insurance coverage for food contamination events

By Steven Pudell

A general counsel for a large food manufacturer recently told me that he's busy all day dealing with corporate governance issues, negotiating mergers and acquisitions, and making sure that all financial reporting requirements are satisfied. But, he added, it's food contamination and product recall worries that keep him up all night.

No wonder. An outbreak of foodborne illness, linked to a product — even mistakenly, even for a short time — can have devastating, if not fatal, effects on a company or its brand.

At Anderson Kill and Olick we've talked to dozens of managers and general counsels at food/beverage manufacturers and retailers about their liability concerns in relation to an outbreak or recall. Usually, by the time we're called in, we don't have to work too hard to convince anyone about the importance of a solid insurance program. Many who have hired us already are embroiled in a dispute with a supplier or an insurer resistant to paying claims, or they have some reason to believe they're about to be drawn in to such a conflict.

Regardless of whether a company is taking precautions against a future contamination event, or the event already has happened, here are five recommendations we commonly share with our clients:

1. Work with an insurance broker that has expertise with food insurance

The "ins" and "outs" of food insurance are treacherous. Companies whose main liability exposures were foodborne illness risks have been shocked to learn that after such events that they were all but un-insured.

It is crucial to consult with an insurance broker that is intimately involved with the food insurance market. Your broker should know which new food-related insurance products are available, which insurance companies are selling them and, most important, once a large loss occurs, what is the insurance company's attitude toward claims handling. There are many good insurance brokers, but only a few have the expertise in protecting food and beverage companies from food contamination risks.

2. Read and understand your insurance policy BEFORE disaster strikes

Discussing with your insurance broker the available options of insurance coverage is not enough. In fact, after you meet with your broker and risk manager, your "due diligence" is far from done. While every insurance policy you purchase should spell out clearly what is and is not covered, you must scrutinize the language of the policy offered for sale before purchasing it. If you do not understand the insurance policy language now — it will not become any clearer after a claim occurs.

Request the specific coverage you need for food contamination or foodborne illnesses in writing. Review the coverage you have purchased yearly

with your expert broker or other insurance professional to be clear that it covers what you envision it to cover. One of our clients bought an insurance policy from "ABC Insurance Co." not knowing that another company already was suing ABC under the same policy. ABC still was selling the policy — even though it knew that its policy language wasn't clear. Of course, two years later, our client sued ABC after a denial of coverage for the same exact reason ABC had used to deny coverage to its other policyholder.

3. *Let your insurance company know immediately at your first inkling that a food borne illness event or recall situation is possible*

Almost every article dealing with insurance coverage of any type includes an exhortation to policyholders to "give notice" as soon as possible. Despite these endless warnings, I recently identified more than 60 reported court decisions that addressed an insurance company's late notice defense in the last two years.

Businesses worry that providing "too early" notice of an insurance claim will cause adverse media attention, raise future insurance premiums or sound an unnecessary alarm within the company. Of course, even if these negative consequences do occur (and anecdotally, for the most part, I do not believe that they usually do), they are far outweighed by the advantages of receiving the benefits of the insurance coverage you purchased. Providing notice of a claim – or even informing an insurance company of events or circumstances that might form the basis for a claim in the future — is the first step in protecting your company from potential financial ruin.

4. Cooperate with your insurance company, but protect your interests

Every insurance policy requires policyholders to "cooperate" with their insurance company. This makes sense, of course. If the insurance company is going to do its job, and provide coverage, it needs access to information, access to employees and access to the site.

Often the insurance company will offer its help in "damage control" and "public relations." When the insurance company honors its insurance policy – and looks out for its policyholder's interest ahead of its own pecuniary interests, the "cooperation clause" presents no problems.

Insurance companies, however, often use the policyholder's obligation to "cooperate" as a way to build its case AGAINST providing insurance coverage. When that happens, the "cooperation clause" is used as a way to allow the fox into the henhouse. Not only that, but insurance companies often ask their policyholders to provide unnecessary information and unfettered access. When the policyholders balk at allowing such a large intrusion, the insurance companies will deny coverage based on a "breach of cooperation."

Recently, one of my clients, frustrated with the fact that its insurance company would neither pay the insurance claim nor render a coverage determination, sued the insurance company. The insurance company responded in court by arguing that its policyholder had breached the "cooperation clause" by suing the insurance company. An expert in insurance claims or insurance

coverage law should guide a policyholder's cooperation with an insurance company in order to safely navigate what may be a minefield.

5. Do not take "no" for an answer

A staggering percentage of policyholders give up after receiving a denial from their insurance company. That means, despite having paid premiums year after year, policyholders forfeit that money rather than pursue the insurance coverage in court. A policyholder's expectations of what its insurance policy covers are important, and when an insurance company tries to change the understanding after a loss, policyholders should consider fighting back.

Not all policyholders capitulate. In 2006, an E. coli outbreak occurred at some Taco Bell locations in the northeastern United States, causing widespread negative media attention focused on the brand itself. Taco Bell franchisees that did not experience the outbreak nevertheless experienced a large drop in sales due to the publicity surrounding the event. As a result, the franchisees that purchased the "Food Borne Illness/Trade Name Restoration" insurance policy looked to their insurance company, Lloyd's of London, to provide them with reimbursement for their losses. Lloyd's refused, asserting that a vaguely-worded "Aggregate Supplier Incident Sublimit" set at $0 precluded insurance coverage for contamination traceable to any entity that could be construed as remotely related to a "supplier" of the policyholder.

In the court case, the Judge sided with the franchisees and said that the language of the sublimit was unclear because it did not define the term "supplier," "supplier incident," or other key terms that might inform an "average

policyholder" as to the scope of coverage. The court agreed that the policyholders were entitled to the insurance coverage they thought they were purchasing.

About the Author.

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