

PLAN RESPONSE TO FOOD CRISIS

Jonathan M. Cohen and Kami E. Quinn

California Farmer

April 9, 2007

The recent nationwide recall of fresh-spinach products due to alleged E. coli contamination highlights the need for potentially affected companies to develop a comprehensive strategy to manage business and financial risks.

The recent recall does not stand alone. Since 1995, spinach or lettuce has been implicated in at least 20 E. coli outbreaks. The past year has seen food contamination in lettuce, carrot juice, beef and unpasteurized milk. Food-borne risks have resulted from potentially harmful substances, such as unlabeled allergens, unapproved genetically engineered products, trans fats, benzene and others.

Juries have awarded millions of dollars to plaintiffs who have contracted food-related diseases. Food contamination also may result in lawsuits among affected companies as those companies seek to ameliorate their own losses. A company's risk planning should include an evaluation both of its crisis response plan and its insurance portfolio. A response should include not only a strategy to minimize potential losses and liability, but also a strategy to secure available insurance coverage and public relations concerns.

Important pointers

First, a company should put into place a response plan that enables it to react to a food contamination crisis quickly and proactively. In the first instance, such a plan should include a team of its internal executives and employees that is familiar with all aspects of the company's business. In addition, identify outside professionals to address aspects of a food-contamination crisis and potentially include those professionals in developing the response plan.

Start with a set of steps to follow. Generally, these steps might include recalling or destroying affected or potentially affected product, managing dissemination of information, addressing potential liability, and financing the company's response. A critical component of a risk management plan is careful review of the insurance portfolio. That review should focus on whether a company has insurance that adequately protects it in light of its business risks, financial position and the changing legal terrain. Recognize that your defense, insurance, and damage control strategies by how a company characterizes in its public statements and legal filings whether a food-contamination incident constitutes a single, continuing event or whether each exposure constitutes a separate incident.

In many food-contamination cases, insurance companies have relied on a wide range of policy provisions to minimize or eliminate coverage obligations. In these types of cases, policyholders generally have strong responses to the insurers' coverage defenses.

Exclusion examples

In the spinach cases, insurance-company lawyers have stated they expect to argue that the E. coli contamination resulted from manure, which they claim is a "pollutant" that triggers a "pollution exclusion." Some courts, however, have held that E. coli itself does not constitute a pollutant. Moreover, insurers generally bear the burden of proving the applicability of coverage exclusions, and insurers may be hard-pressed to meet this burden where government officials have not yet traced the contamination to a specific cause, as is the case with the recent spinach recall.

Similarly, insurers have asserted that damages from contamination to or a recall of a food product are not covered under property policies. Insurers have argued that at least some contaminated products did not suffer the "physical" damage covered by property policies, but instead sustained only a "diminution of value" that they assert is not covered. Some courts have found, however, that food that no longer complies with Food and Drug Administration regulations has been physically damaged.

PLAN RESPONSE TO FOOD CRISIS (CONTINUED)

Some insurers point to provisions in general liability policies that exclude claims for the recall of the policyholder's products, sometimes called "sistership" exclusions. These exclusions, however, might not apply where the claim against the policyholder arises from damage to another company's product from the incorporation of a contaminated or recalled product. In addition, insurers might argue that general liability policies do not cover the costs incurred to mitigate or avoid covered third-party claims. However, policyholders may have strong counter arguments, particularly where a third party, and not the policyholder, withdraws the policyholder's product from use.

Because insurers' interests often diverge from their policyholders, policyholders should recognize that insurance companies might attempt to use any technical argument to avoid their obligations. Therefore, it is critical from the start for companies to prepare to respond to the insurers' arguments.

Jonathan M. Cohen is a partner and Kami Quinn is an associate in the Washington, DC law firm of Gilbert Randolph LLP . They can be reached at cohenj@gilbertrandolph.com or quinne@gilbertrandolph.com.