

Food Recall Plans: Insurance against the Inevitable

By Robert D. Chesler, Ph.D.

TCantaloupes. Sprouts. Bagged spinach. Beef. Peanuts. And now, Wegmans has added pine nuts to the growing list of product recalls in the food industry. Moreover, these well-publicized recalls are only the proverbial tip of the iceberg. The Food Institute Report of October 24 listed 13 recent recalls, with reasons ranging from “The products were recalled due to the potential of being contaminated with *Listeria monocytogenes*” to “The products may contain peanuts not listed on the label.”

Food recalls are here to stay. The Food Modernization and Safety Act has vastly increased the power of the U.S. Food and Drug Administration to order recalls. Moreover, no company wants the bad publicity and potential liability arising from putting a product in the marketplace that causes illness or death. Food recalls are very expensive. Customers may need to destroy their own products because they contain a recalled ingredient. Squads of workers need to go shelf to shelf in supermarkets, removing recalled products, which then need to be transported to a disposal facility. A company may need to destroy whatever product is still in its possession and will incur costs responding to the demands of regulators, including costs of investigation and testing.

“No company welcomes a recall, but being prepared can help ease the pain. Having a recall plan in place before an incident can hopefully alleviate the impact

of a recall, both financially and emotionally,” said Brian Todd, president and CEO of the Upper Saddle River, NJ-based Food Institute. Insurance must be part of such a plan.

A company’s most important question may be whether it has insurance coverage to cover these losses. Insurers are refusing to pay for most recall-related costs under traditional liability and property policies. Indeed, in two recent cases, insurers successfully used hyper-technical arguments to avoid coverage for product recall costs under product recall policies!

Food companies must react quickly to product recalls by placing their insurers on notice immediately. They need to work with their insurance coverage attorney and broker or consultant to prepare a strategy for pursuing coverage in this highly specialized field. They must analyze the insurer’s denial of coverage and determine if coverage litigation is a necessary response.

Often when a company faces a calamity, no one thinks of insurance before it is too late. Insurance must be a high priority. Once a recall is set in motion, there is no way to avoid substantial loss. The issue then becomes who pays for it—the food company or its insurer?

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