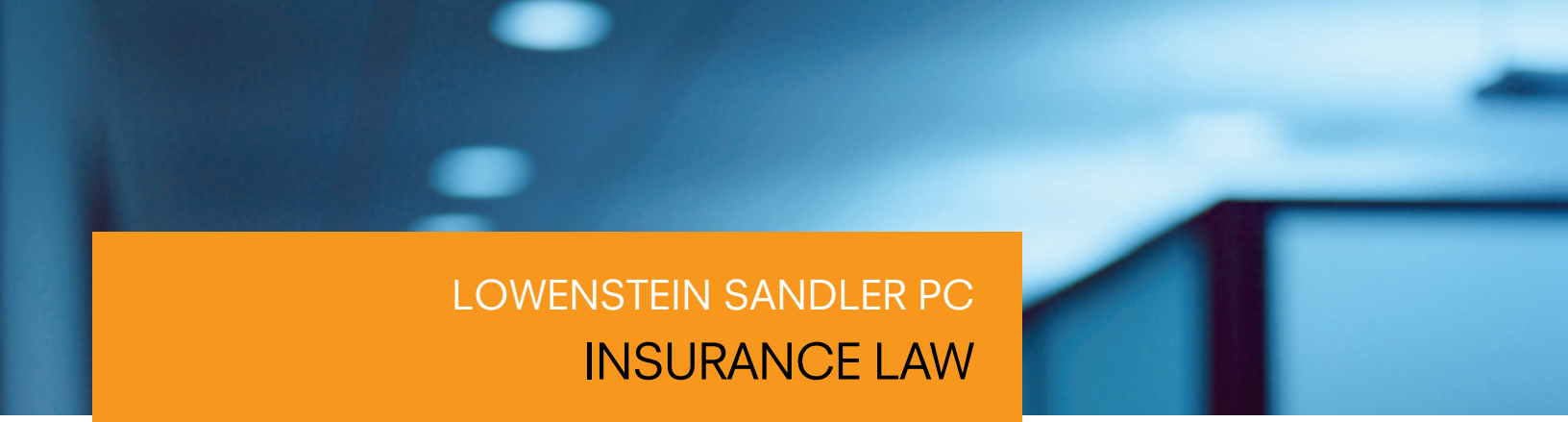

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FOOD INSURANCE AND RISK MANAGEMENT NEWSLETTER

By Robert D. Chesler, Esq. December 2011

THE SPREADING WEB OF FOOD RECALL LIABILITY

Suits against Jensen Farms arising from its sale of listeria-tainted cantaloupes are expected to seek more than $100,000,000. These damages are estimated to be more than Jensen Farms' available insurance coverage. Perhaps as a result, plaintiffs are naming a variety of other companies as defendants, including (1) distributors, (2) supermarkets, including both Wal-Mart and a wholly-owned subsidiary of Kroger, and (3) the food safety auditing company that Jensen used. If experience from other product liability and toxic tort trends is a guide, all of these numbers will soon increase – the food industry will see more plaintiffs, seeking more damages, from more types of companies.

This heightens the issue of the availability of food recall insurance for the food industry. The Food Modernization and Safety Act tremendously increases the FDA's power to order a recall, while increased public sensitivity will undoubtedly result in more lawsuits and the potential for awards of greater damages. The increasing exposure of food companies to recall could make product recall insurance policies even more expensive. Companies may need to wait to see how many insurance companies decide to sell this coverage before they know whether pricing will be competitive.

Further, more companies will need to purchase this insurance – and with higher limits. If you are a food producer and you use a consultant to audit your procedures, you will require that company to purchase recall insurance. If you are a supermarket, you will want the wholesalers from which you buy product to have such insurance and you will probably want proof that those wholesalers in turn insist that their suppliers have such insurance.

Moreover, with potential exposures in the hundreds of millions of dollars, companies that purchase food will demand that their suppliers have not only primary insurance but also substantial amounts of excess coverage. A wholesaler or a supermarket will not be satisfied to learn that its supplier has only $1,000,000 in primary coverage.

There are no easy answers for this situation. Smaller food companies will feel increasing pressure to buy more recall insurance – probably at higher rates. Such companies may find it necessary to consider such alternatives as risk-retention groups and captive insurance companies. Everyone will need to monitor developments affecting the availability and cost of food recall insurance.

FOOD INSURANCE COVERAGE DEVELOPMENTS

In Little Lady Foods, Inc. v. Houston Casualty Company, No. 10 C 8280 (N.D. Ill. 2011), the court denied coverage for product recall costs under a product recall policy. For a full discussion of this case, see the **alert** on our web site.

Little Lady Foods is the second recent case in which the insurer successfully denied coverage for a product recall under a product recall policy. For a description of the first case, **Fresh Express v. Beazley**, see the article on our web site.

Under a general liability policy, the insured has the burden to demonstrate that the claimant suffered property damage and bodily injury. In Silgan, the insured failed to meet this burden.

In Silgan Containers Corp. v. National Union Fire Ins. Co., No. 10-12869 (10th

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Cir. May 27, 2011), Silgan provided pull tab containers to Del Monte for the sale of canned fruit. The pull tabs did not work, and Del Monte sued Silgan for damages. Silgan sought coverage. The district court denied coverage, and the Tenth Circuit affirmed.

The court examined the two prongs of property damage coverage. First, the court found that the defective lids did not physically harm the fruit inside, stating "There was no alteration in the appearance, shape, or color of the fruit and the fruit remained edible."

The court next examined the "loss of use" prong of property damage. The court found that Silgan had not met its burden of demonstrating that the fruit inside the cups was completely unusable. The court noted that, for example, Silgan did not show that the fruit could not be sold on the secondary market.

Hopefully, the case simply concerned Silgan's failure to produce sufficient evidence of loss of use and was not a broader statement on the unavailability of coverage in similar situations.

Most cases settle. The following case demonstrates that insureds need expert advice on the value of their claims, when to litigate and when to settle.

In HoneyBaked Foods v. Affiliated FM Insurance Co., the federal district court of Ohio held that the contamination exclusion in a first-party property policy barred coverage for ham and turkey contaminated by listeria as a result of bacteria in a hollow tube used in the production process. However, the court noted that this type of coverage was precisely what the insured thought it was buying. As a result, the court certified the case to the Ohio Supreme Court for a determination of whether the doctrine of reasonable expectations applied to provide coverage for HoneyBaked regardless of the actual wording of the policy.

The case has now settled. The settlement confirms that the doctrine of reasonable expectations remains a potent tool for policyholders and that insurers will sometimes settle rather than take the risk of creating bad law for themselves.

Watch out for broad exclusions. The trial court decision in Welch Foods Inc. v. National Union Fire Insurance Co. was discussed in our previous article, "**Courts Squeeze Coverage For False Labeling Claims.**" On October 5, the appeal was argued before the First Circuit. Interestingly, of the three insurers who had denied coverage, two settled while the case was on appeal.

The remaining insurer in the suit, National Union, argued that a broadly worded antitrust exclusion foreclosed coverage for claims of unfair competition against Welch.

While the exclusion in the insurance policy was labeled "antitrust," it was broadly worded to include, for example, "unfair competition" and "deceptive trade practices." The underlying claims against Welch Foods were for false advertising and were pled as unfair competition and deceptive trade practices. The insured argued that the words of the exclusion had to be read in context and were meant only to exclude unfair competition and deceptive trade practice claims in antitrust suits. The court disagreed and denied coverage.

ARE RESTAURANT ODORS POLLUTANTS?

In Barney Greengrass, Inc. v. Lumbermens Mutual Casualty Company, No. 10-3467-cv (2nd Cir. Nov. 4, 2011), a neighbor claimed that odors from the exhaust of a well-known Upper West Side New York City delicatessen made his living room unlivable. Lumbermens denied coverage under the pollution exclusion. The district court found that the insurer had to defend and ruled that "to read 'pollution' as encompassing 'restaurant odors'… would contradict 'common speech' and the 'reasonable expectations of a businessperson,' who has come to understand pollution exclusions as addressing environmental-type harms." The Second Circuit affirmed.

However, Maxine Foods, Inc. v. Auto-Owners Insurance Company, No. 2:09-cv-01524-RDP (11th Cir. March 21, 2011) reached the opposite conclusion. That case concerned an Indian restaurant that shared an air conditioning duct with its neighbor, a fur company, whose furs began to smell like curry. The pollution exclusion applied to "contaminants," which Webster's defined as something that "soil[s], stain[s], corrupt[s] or infect[s] by contact or association." The court found that the curry aroma had soiled the furs and was a contaminant, stating "We do not think that a reasonable person could conclude otherwise." Two lessons emerge.

- State law differs dramatically on the scope of the pollution exclusion.
- Insurance companies can fight tenaciously over even relatively small claims.

FOOD NEWS

- The FDA ordered Del Monte Fresh Produce to halt imports of Guatemalan cantaloupes because of concerns over salmonella contamination. Del Monte responded by suing the FDA.

- A woman died of a lethal dose of carbon dioxide in a restroom at a McDonald's in Georgia. The line connecting the carbon dioxide line for carbonated beverages became disconnected within a wall cavity, resulting in a carbon dioxide buildup in the restroom. In some states, courts would bar coverage for the death because of the absolute pollution exclusion.
- Sara Lee, which makes Ball Park Franks, and Kraft, which makes Oscar Meyer, are involved in a "weiner war" in a Chicago court over dueling claims of false advertising. The allegations include both false advertising and product defamation, which creates an interesting insurance issue. While insurers usually deny coverage for false advertising claims, product defamation is usually covered.
- Panera Bread paid $5,000,000 to settle class action claims in California that it failed to pay employees overtime and provide them with breaks. Such suits are increasingly common. Companies should review their employment practices liability insurance policies to determine if they have coverage for such claims.
- At the behest of the FDA, U.S. marshals seized food stored at a warehouse in Chicago because of evidence of rodent infestation. This is another example of increased enforcement action in the food industry. If the warehouse owner was aware of the infestation and failed to take action, its insurer may deny coverage, asserting that the damage was intentional.

SPEAKING ENGAGEMENTS

- Lowenstein Sandler will exhibit at the New Jersey Food Processors Association Annual Meeting, January 30, 2012, at The Westin Mount Laurel, in Mount Laurel, NJ.
- Bob Chesler will moderate a panel on food insurance issues at the Annual Meeting of the Insurance Committee of the ABA, which will be held February 29 - March 3, 2012, in Tucson, AZ.
- Lowenstein will lead a seminar on insurance issues and crisis management for the NJFPA on March 9, 2012.
- Bob Chesler will co-chair the New Jersey State Bar Association Continuing Legal Education seminar "Bringing Home the Bacon: Emerging Issues in Food Insurance Coverage," on March 22, 2012, in New Brunswick, NJ.

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For more information related to these cases or other food insurance coverage issues, please contact:

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