Insurance Coverage Issues Arising from Large Exposure Contaminated Food Claims

Complex issues of fact and insurance law come into play when food goes bad, and claims for contamination and recall arise on several fronts

By Charles W. Browning

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TRY THESE cases on for insurance coverage:

● 15 million pounds of processed chicken breasts shipped to various food processors and allegedly contaminated with Listeria.

● Two million pounds of ground beef allegedly contaminated with E-coli bacteria shipped and sitting on the shelves of supermarkets.

● Thousands of cases of bottled iced tea distributed and ready for sale but allegedly contaminated with glass particles.

● Wood splinters discovered in thousands of boxes of cereal.

Insurance coverage issues arising from these high-exposure contaminated food claims differ markedly depending on the role of the policyholder involved, the type of insurance policy under which coverage is sought and, of course, the specific terms and exclusions of the policies at issue. Sorting out the covered aspects of claims, if any, and then ascertaining their value, as opposed to the non-covered aspects, is a complex and time-consuming process. As a further complication, there is surprisingly little guidance from appellate case law on coverage issues in the context of contaminated food claims. Reference to insurance case law in general is necessary.

Let's focus on the coverage issues that may arise from contaminated food claims by third parties under commercial liability policies, with specific reference to the ISO form CGL 00 01 01 96, and highlight the insurance products in the marketplace that are specifically related to contaminated food claims.

COVERAGE ISSUES

The insuring agreement in the ISO standard CGL policy provides that the carrier "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policy defines property damage as:

> (1) Physical injury to tangible property including all resulting loss of use of that property; or
>
> (2) Loss of use of tangible property that is not physically injured.

A. Property Damage

American courts have adopted the argument that food products have suffered "physical injury" when they are in technical violation of U.S. Food and Dug Administration (FDA) regulations, but are still fit for human consumption.[1] Thus, it is likely (and logical) that in most situations the specific contaminated food item has sustained some form of "physical injury."

That usually is not material, however, because a claim for damage to a policyholder's own product, standing alone, is excluded from coverage under third-party liability policies.

More important, contaminated food claims often are alleged against the original food processor or food company by entities further down the product chain that incurred economic loss because of the contaminated food. Those entities include others that further processed the allegedly contaminated food, packagers of the contaminated food, and the retailers that purchased and perhaps sold the contaminated food.

When those types of entities make a claim for damages against the policyholder who was the original food processor, one should determine whether the claim was "because of property damage" as required by the policy. This is especially so because pure economic loss--a loss of value--generally is not physical injury to tangible property or loss of use.[2]

An interesting coverage case involving a contaminated food claim addressed this point. In *United States Fire Insurance Co. v. Good Humor Corp.*,[3] the policyholder recalled ice cream pursuant to a recommendation of the FDA. The recall caused significant expense to the policyholder's customers, who brought suit for reimbursement. The carrier contested coverage, asserting that no property damage resulted.

By only the thinnest of threads, the Wisconsin Court of Appeals concluded that there was property damage sustained by the customers. Under a duty to defend standard, the court determined that the "loss of use of storage space" from storing the recalled ice cream was a loss of use of tangible property and not an economic loss. Thus a defense was owed. It is unclear how this issue would have been decided by the court in the context of the duty to indemnify.

At least one California Court of Appeal, in a well-known decision, *Armstrong World Industries Inc. v. Aetna Casualty & Surety Co.*,[4] has concluded that "physical injury" exists in a building without the release of any asbestos fibers. The broader conclusion drawn from *Armstrong*--that the simple incorporation of a defective product into another constitutes property damage to the integrated product--has been adopted by the California Court of Appeal in a contaminated food case, *Shade Foods Inc. v. Innovative Products Sales & Marketing Inc.*[5]

In *Shade Foods*, the policyholder processed and then supplied nut clusters to General Mills to be added to breakfast cereals. Wood splinters were discovered in the diced almonds supplied, causing General Mills to shut down production, destroy the boxes of cereal in its possession, and ship the unused clusters back to Shade.

The *Shade* court had "no difficulty" finding property damage in that situation, rejecting the carrier's argument that General Mills's claim against Shade was for diminution of a product's value because of a defective part or faulty workmanship. The court concluded that the presence of wood splinters in the almonds caused property damage to the nut clusters and cereals in which the almonds were incorporated.

To some extent, the *Shade* and *Armstrong* decisions butt heads with the long line of cases holding that the definition of "property damage" does not extend to the diminution of value of products that have merely incorporated a defective product or defective work. As stated by the Indiana Court of Appeals in *Aetna Life and Casualty Co. v. Patrick Industries Inc.*, "The concept of incorporation should not be extended so that physical injury will be deemed to occur every time a defective component is integrated into another's tangible property."[6]

Defense counsel should be alert to the issue of whether property damage occurred when addressing a contaminated food claim.

B. Bodily Injury

Although exposure to contaminated foods may cause "bodily injury, sickness or disease," there likely will be situations--especially in the mass tort context--in which many claimants have not suffered bodily injury; they merely may have suffered emotional distress or fear that they will develop bodily injury from exposure to such foods. Most courts have held that such claims do not satisfy the definition of bodily injury.[7]

C. Occurrence

The 1996 ISO CGL form defines an occurrence as "an accident, including repeated exposure to substantially the same general harmful conditions."

An accident, according to decisions, is merely an unanticipated event, an undesigned contingency.[8] Courts also have held that the failure of the policyholder to provide an adequate product or adequate work does not constitute an accident.[9] It also has been held that a pure economic loss is not an accident.[10] any courts, however, have concluded that when an insured's defective work or product has injured some other property, there is an occurrence.[11]

The seminal case reflecting the view that a faulty product or workmanship is not an accident is *Weedo v. Stone-E-Brick Inc.*[12] There the New Jersey Supreme Court was confronted with a common situation--a dissatisfied property owner complaining of the unworkmanlike performance of a construction contract. Quite succinctly, the court laid down the rule that a CGL policy "does not cover an accident of faulty workmanship, but rather faulty workmanship which causes an accident."

Distinguishing between coverage that is excluded for business risks and included for accidents, the *Weedo* court offered an example in which a craftsman applies stucco to an exterior wall of a home in a faulty manner, with discoloration, peeling and chipping resulting. In that situation, it concluded, the poorly performed work will have to be replaced or repaired by the tradesman or by his surety. On the other hand, if the stucco peeled and fell from the wall, thereby causing injury to the homeowner or his neighbor standing below, an occurrence arises which is the proper subject of a general liability policy.

Weedo concluded that there is a moral hazard in providing liability insurance coverage for the repair or replacement of faulty workmanship or a faulty product, as the policyholder will have little or no incentive to perform or produce in a workmanlike manner. To the extent that a policyholder seeks coverage for a contaminated food claim by a party asserting damage simply because the product or work contracted for was faulty, in most jurisdictions, there would be no occurrence as there would be no accident.

D. Potential Exclusions

1. Intentional Acts

Absent the intentional contamination of food by the policyholder or its employees, the CGL exclusion for expected or intended bodily injury or property damage generally does not lend itself to the typical contaminated food claims. The exception, however, is to the extent that such claims also include allegations of fraud, misrepresentation and/or violation of consumer and trade practices acts. Coverage for those allegations may be precluded by this exclusion to the extent that the policyholder has liability for such allegations.

2. Property Damage to "Your Work" or "Your Product"

The 1996 ISO CGL policy form excludes coverage for property damage to “your work” or “your product.” These exclusions generally preclude coverage for so-called business risks, which are risks arising from the normal, frequent and predictable consequences of doing business, and which business management can and should control and manage.[13] Courts frequently express the view that excluding such business risks from coverage is in the public interest because doing so motivates management to better operate the business.

The your work and your product exclusions draw the line between covered and uncovered claims according to the nature of the harm caused, not according to the nature of the conduct that caused the harm. Nevertheless, the rationale for these exclusions has ties to that behind whether a particular claim constitutes an accident. The Wisconsin Court of Appeals stated that a "CGL policy’s sole purpose is to cover the risk that the insured’s goods, products, or work will cause bodily injury or damage to property other than the product or the completed work of the insured.”[14]

An oft-cited law review article further supports this:

> The risk intended to be insured is a possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury of damage to property other than to the product or completed work itself, and for which the insured may be found liable. . . . The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because of product or completed work is not that for which the damaged person bargained.[15]

Damage to the contaminated food itself clearly would be barred by these exclusions. The difficulty arises when the contaminated food is incorporated into another product or when the contaminated food contaminates another product, in both cases causing damage to that other product. Must the carrier pay for damage to the policyholder’s own product in that situation? At least one court in a well-known case--the *Armstrong World Industries* case--has concluded, albeit in the context of an asbestos coverage case, that the your product exclusion does not bar coverage for the cost of damage to the policyholder’s product where third-party property damage also exists.[16] Other courts have held that damages from the policyholder’s defective product and any consequential damages from that product are precluded by the your product exclusion, including damage to another product.

For example, a federal district court in Pennsylvania in *American International Underwriters Corp. v. Zurn Industries* explained:

> We must draw the line somewhere between the insured’s product’s failure *causing damage* to another product, and its *being* damage to a part of a new larger product. In the former, because there is no coverage for the insured’s product, there is no coverage for the consequential damages flowing therefrom. In the latter, since the damaged property is not the insured’s product, the damage is compensable.[17]

The Wisconsin Court of Appeals applied the your product exclusion to preclude coverage for a contaminated food claim in *Nu-Pak Inc. v. Wine Specialties International Ltd.*[18] Wine Specialties developed a freezable alcoholic beverage to be packaged and sold to consumers.

Under the terms of a written contract, Nu-Pak was to mix and package the product with ingredients provided by Wine Specialties. Nu-Pak sued when Wine Specialties did not pay Nu-Pak's bill. Wine Specialties counterclaimed against Nu-Pak, asserting that quality control problems at Nu-Pak lead to improper formulation of the product, which made it unfit for human consumption. Wine Specialties also third partied Nu-Pak's insurance carrier, alleging that the action by Wine Specialties was covered under Nu-Pak's general liability policy. The trial court granted the carrier's motion for summary judgment, and Wine Specialties appealed.

The appellate court concluded that under the your product exclusion, there was no coverage for damage to goods or products manufactured or handled by Nu-Pak. The court, in fact, extended that exclusion to preclude coverage for the cost of removing the contaminated product, the value of lost future sales and profits, and the damage to Wine Specialties reputation, concluding that such damages were incidental to excluded property damage and did not constitute damage to other property.

The outcome of this issue in a contaminated food coverage dispute likely depends on the law of the jurisdiction involved.

3. Damage to Impaired Property or Property Not Physically Injured

The so-called impaired property exclusion is another business risk exclusion in the standard ISO CGL form that could be applicable to a contaminated foods claim. This exclusion precludes coverage for:

> "Property damage" to "impaired property" or property that has not been physically injured arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

The policy defines "impaired property" as:

> tangible property, other than "your product" or "your work," that cannot be used or is less useful because:
>
> a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> b. You have failed to fulfill the terms of a contact or agreement;
>
> if such property can be restored to use by:
>
> a. The repair, replacement, adjustment or removal of "your product" or "your work", or
>
> b. Your fulfilling the terms of the contract or agreement.

While other business risk exclusions focus on the cost of repair or replacement of the insured's own work or product, the general focus of this exclusion is on situations in which the insured's product causes non-physical damage to other property. For example, similarly worded exclusions have been held to preclude coverage for lost profits claimed by a business owner against an insured contractor whose work blocked ingress and egress to the claimant's business,[19] and for lost rental income claimed by a building owner who alleged that the insured's installation of a defective air condition system rendered portions of his building uninhabitable.[20]

By its terms, the impaired property exclusion applies not only to property damage to "impaired property," as defined by the policy, but also to "property that has not been physically injured." This distinction permits the exclusion to preclude coverage even if the property damages arises from "your product," which would otherwise be excepted from the exclusion because of the definition of "impaired property."[21] However, in that instance the property still must not have been "physically injured." Instead, it must satisfy the "loss of use" section of the definition of "property damage."

As with the other business risk exclusions, the impaired property exclusion may have application to contaminated food claims, but that application would be only in instances in which there was no physical injury to a third party's tangible property. Instead, a defective condition in the policyholder's "product" must have caused a loss of use of that third party's property or made it less useful, but that property still must be restorable to use by removal of the policyholder's product or work. Of course, this is a fact-specific inquiry. For example, the court in *Shade Foods* concluded that the impaired property exclusion did not apply to preclude coverage because the wood splinters could not be removed from the nut clusters in the cereal. Thus, the property could not be restored to use.

4. Product Recall Exclusion

Virtually every high-exposure contaminated food claim results in a recall in some form. Thus, given the importance of the product recall or so-called sistership exclusion to these claims, it is valuable to look at the exclusion's historical background and the primary issues raised.

a. Background

First appearing in 1966 "as part of the new Standard Provisions for General Liability Insurance formulated by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau,"[22] this clause was commonly known as the sistership exclusion because it:

> derives from an occurrence in the aircraft industry where all airplanes of a certain make and type were grounded by an order of the Civil Aeronautics Administration because one crashed and others were suspected of having a common structural defect. The damages arising out of the loss of use of all the sister ships were enormous.
>
> The recall of equipment or parts discovered to have a common fault involves expenses incurred to prevent accidents which have not occurred. While the insurance covers damages for bodily injuries and property damage caused by the product that failed, it was never intended that the insurer would be saddled with the cost of preventing other failures, any more than it was intended that the insurer would pay the cost of preventing the first failure if the product had been discovered to be in a dangerous condition before the occurrence.[23]

The reasoning behind the exclusion is confirmed in a statement made by the ISO accompanying the 1966 introduction of this exclusion:

> If the named insured's product causes injury or damage and identical products are withdrawn from the market or from use because of a known or suspected defect (one airplane crashes and others are withdrawn from use), the cost of withdrawing or replacing products or completed work may be either a direct expense to the insured or liability to others. Such cost,

> whether damages or expenses, are not intended to be covered. Sistership liability or products recall insurance is the subject of a special form of coverage.

b. "Withdrawal" by Insured versus by Third Party

The original sistership clause limited application of the exclusion to instances in which the insured's "products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein." Several courts, in order to limit the exclusion to situations in which the insured and only the insured was the instigator of the recall or withdrawal, have interpreted this clause.[24] Courts generally have recognized this as the majority rule.[25]

The reasoning articulated by courts for this interpretation is generally threefold. First, because the language is in the passive voice, it is allegedly ambiguous as to whom must do the recalling, and ambiguities in insurance contracts are resolved in favor of the insured. Second, the "etymology and genesis of the replacing products or completed work may be either a direct expense to the insured or liability to others. Such cost, whether damages or expenses, are not intended to be covered. Sistership liability or products recall insurance is the subject of a special form of coverage."[26] Third, the rule

> balances the interests of the parties. The rule does not impose on the insurer the costs of an insured's curative or preventative measures, but provides the insured with protection against a foreseeable element of claims that commonly arise in economic and factual settings.[27]

ISO sought to change these results by amending the recall exclusion to specify that it applies regardless of who initiates the withdrawal or recall. The modern version, exemplified in the 1996 ISO general liability form, excludes coverage for:

> Damages claimed for any loss, cost or expense incurred by [the insured] or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> (1) "Your product";
> (2) "Your work"; or
> (3) "Impaired property"
>
> if such product, work or property is withdrawn or recalled from the market or from use *by any person or organization* because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." [Emphasis added]

By clarifying that the exclusion applies when the withdrawal is initiated by anyone, rather than just the insured, ISO eliminated the perceived ambiguity from the prior version. Indeed, in a case involving the amended version of the recall exclusion, a panel of the Wisconsin Court of Appeals, albeit in an unpublished opinion, specifically distinguished the holding of *Good Humor* and stated, "The policy in this case unambiguously excludes claims arising out of recalls by others, including" the third-party claimant in the case before it.[28]

c. Market-wide Recall of Product Causing Damages

A case from the Minnesota Supreme Court, *Atlantic Mutual Insurance Co. v. Judd Co.,* addresses the issue of whether the term "withdrawal" is applied only to situations in which more than just the defective unit is removed and replaced or repaired:

> A majority of courts that have considered the question have adopted the view that repair and replacement of just those products that actually failed in use, with no attempt to prevent future failures by the removal of other similar suspect products, does not constitute withdrawal.[29]

A similar view was expressed by the Court of Appeals of Tennessee in a case in which the insured, a subcontractor hired to handle the installation of the mechanical systems in a university music school building, was sued by the university when the duct work was found to be wholly inadequate, necessitating the university to remove and replace the entire heating and air conditioning system. Even though the plain language of the amended version of the recall exclusion could have been read to exclude such coverage, the court in *Standard Fire Insurance Co. v. Chester-O'Donley & Associates* found that the clause did not exclude coverage because there had been no withdrawal of a product from the general marketplace, but rather there had been a removal of the single defective product from the consumer's building.

The court wrote:

> The exclusion is designed to shield insurers from liability for the costs associated with unanticipated product recalls. It does not apply to claims involving losses resulting from the failure of the insured's product or work, or to claims that are not based on the withdrawal or recall of the insured's own product or work.
>
> The removal of defective products that failed after their installation does not come within the sistership exclusion of the insured's general liability policy because there has been no general withdrawal of similar products from the general marketplace.[30]

Numerous other courts have adopted this reasoning, which they have found stems from the history and original purpose of the sistership exclusion.[31]

d. Requirement of "Sister Products"

On a related note, several courts have stated that there must be "sister products" for the exclusion to apply. While articulated differently, this requirement is essentially a repackaged version of the "general withdrawal from the market" requirement, attempting to limit and prevent the clause from excluding coverage for damages arising from the product that caused the damages, but instead only to damages from the withdrawal of similar "sister" products yet to have caused damages.[32]

At least one court has carved out an exception to this reasoning, finding the exclusion to apply, although the product has no "sisters" and had not been generally recalled from the market, when the product was withdrawn prior to an actual failure while in use. In *Charles E. Brohawn & Bros. Inc. v. Employers Commercial Union Insurance Co.*, the Delaware Supreme Court stated:

> Brohawn argues that the sistership exclusions quoted above operate only to exclude damages resulting from the withdrawal of similar products other than the one in which the defect was discovered. Employers argues that the clause excludes coverage for damages resulting from the withdrawal or repair of any defect product, where the defect has been discovered and the

> product withdrawn or repaired prior to the product actually failing while in use. We agree with Employers' interpretation.[33]

Alabama also has enforced the exclusion where there was neither a general market-wide withdrawal or sister products.[34]

e. Damages Not Excluded

If none of the limitations discussed above applies, courts will apply the sistership clause to exclude from coverage the costs associated with the withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of "sister" products.[35] However, the majority rule holds that the recall exclusion will not be interpreted to apply to damages caused by the defective product itself.[36]

But this is not always the case. In *Hamilton Die Cast Inc. v. United States Fidelity & Guaranty Co.*,[37] the insured, a manufacturer of tennis rackets and other items, was sued for failing to honor a contract to make a certain number of rackets to a certain specification for a sporting goods marketer. Because of the failure of the rackets to meet the necessary specifications, the insured withdrew its rackets from the market, thus breaching its contract with the marketer. The Seventh Circuit held that the insurer had no duty to indemnify the insured for damages to the marketer caused by the insured's breach of contract, because these were a cost associated with the insured's withdrawal of its product from the market. This would be a minority view, however, and it deserves notice that it is a 27-year-old decision.

An issue also arises as to whether the sistership exclusion applies to damages for loss of good will arising from the recall. There appears to be one case each from a federal district court in Wisconsin and a state court in Minnesota addressing this issue.

In *American Motorists Insurance Co. v. Trane Co.*,[38] the Wisconsin federal district court held that damages for a loss of business reputation were not excluded because those damages did not "represent" the costs of recalling the products. Had the policy language excluded damages "resulting from" the recall, held the court, loss of reputation damages might be excluded.

In *Maple Island Inc. v. St. Paul Mercury Insurance Co.*,[39] the policy language excluded coverage for "damages that result from the: loss of use; recall, withdrawal" of the product. The Minnesota Court of Appeals held that, because the language was broad, excluding not only the actual costs of the recall, but damages that result therefrom, all damages asserted against the insured in that case were excluded, including loss of customers and loss of good will.

f. Number of Occurrences

To the extent that contaminated food claims involve several claimants, there is an issue about the number of occurrences. The majority of jurisdictions employ the "cause" test, as opposed to the "effect" test, to determine the number of occurrences.[40] The cause test looks to the cause of the alleged damage or injury and not to the effects of the negligent or wrongful action of the insured or to the individual claimants or items of property that have sustained damage. Consequently, when a single, continuous uninterrupted cause results in damage or injury to more than one property or person, there is held to be a single occurrence within the meaning of the policy.[41]

There has been a recent trend, however, in the context of exposure to asbestos, in which courts have concluded that each such exposure constitutes a separate occurrence.[42] It remains to been seen whether this trend will expand to contaminated food claims.

In an insurance coverage case arising from the ingestion of tainted food, the Illinois Appellate Court concluded that each instance in which a customer was presented with the contaminated food over a multi-day period constituted a separate occurrence under the applicable policy.[43] On the other hand, based on Arkansas law, a federal district court concluded that "multiple sales of contaminated food at a restaurant to several customers would nevertheless be one occurrence under the policy."[44]

It is likely that the number of occurrences issue is dependent both on the facts of the particular claim and the applicable law.

INSURANCE FOR CONTAMINATED FOOD CLAIMS

Many high-exposure contaminated food claims involve global corporations with complex and often manuscripted insurance programs. Depending on the economic factors in the marketplace, the underwriting issues pertaining to a particular policyholder and certain intangible factors, it is probable that an insured will have obtained an expansive insurance program that generally provides coverage for many aspects of contaminated food claims. For insureds with significant bargaining power, it is more likely that a series of endorsements to their liability policies that specifically provide for third-party recall coverage may provide coverage that otherwise may not exist. The applicability of these types of endorsements is heavily dependent on the facts of the particular claim and the specific language of the endorsement involved.

To the extent that there is additional coverage by way of endorsement for recall expenses involving contaminated food claims, these endorsements often limit insurance coverage to specific recall expenses incurred by third parties, such as for the cost of notification of the recall through the media, the cost of returned shipments of contaminated food to the policyholder, the cost of destruction of the contaminated food, and the internal costs incurred by the third party for hiring additional employees to facilitate the recall or destruction.

In addition, several carriers have marketed first-party contaminated products insurance, Underwriters at Lloyds and AIG, for example, reimburse insureds for expenses or costs incurred from specific insured events, such as accidental contamination or malicious tampering of products, including food products.

Both the product recall expense endorsements and the first-party contaminated products insurance have very specifically defined coverages. For a particular contaminated food claim to satisfy either of those coverages, detailed claim investigations often are required.

The insurance marketplace also dictates that certain entities will not be issued liability insurance policy unless that policy contains some form of an exclusion for claims arising from contaminated foods. Such an exclusion was addressed in *Halliburton v. Diesi.*[45] In that case, a restaurant was insured under a liability policy that contained a food consumption exclusion endorsement, which precluded coverage for "bodily injury, sickness or disease . . . caused by the consumption or use of any article or product, manufactured or distributed by the insured." This exclusion was upheld as precluding coverage for the consumption of allegedly deleterious food at the restaurant, the federal district court in Louisiana concluding that the exclusion was unambiguous.

In *Allianz Insurance Co. v. RJR Nabisco Holdings Corp.,*[46] a New York federal district court refused to apply an exclusion in an all-risk policy precluding coverage for "loss or damage caused by or resulting from contamination unless such loss or damage results from a peril not otherwise excluded." Nabisco received numerous complaints about a chemical odor and flavor in its food products. After investigating, Nabisco determined that its food products had been stored at a particular warehouse, which exposed the products to a chemical that posed no health risk but caused a strong odor to remain with the products. Nabisco recovered and destroyed more than a million cases of food that had been stored at that warehouse.

Criticizing the language as "awkward wording," the court concluded that the exclusion did not apply factually, and, as a result, the loss was from a non-excluded peril.

These cases reconfirm that policy provisions specifically tailored to address claims arising from contaminated food must be carefully analyzed and applied to the facts of the particular claim.

CONCLUSION

Large-exposure contaminated food claims almost always are complex. They normally give rise to recall issues, which bring into play recall and impaired property policy provisions. Often they involve large and sophisticated insureds with manuscripted policies that give rise to numerous and unique issue, even in those situations where part of the contaminated food claim is covered by the policy. These claims must be reviewed both through an exhaustive investigation of the facts and a careful analysis of the applicable policy provisions.

END NOTES

1. Gen. Mills Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 152 (Minn. 2001). *See also* Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co., 98 N.W.2d 280 (Minn. 1959).

2. *See generally* Wausau Tile Inc. v. County Concrete Corp., 593 N.W.2d 445 (Wis. 1999) (economic loss not bodily injury or property damage under plain language of policy); McLaughlin v. Nat'l Union Fire Ins. Co., 29 Cal.Rptr.2d 559, 569 (Cal.App. 1994) (damage for lost profits, loss of investment or other harm to one's economic interest constitutes injuries to *intangible* property, which by definition fall outside scope of policy); State Farm Lloyds v. Kessler, 932 S.W.2d 732, 757 (Tex.App.--Fort Worth 1996) (economic damages not property damage).

3. 496 N.W.2d 730 (Wis.App. 1993).

4. 52 Cal.Rptr.2d 690 (Cal.App. 1996).

5. 93 Cal.Rptr.2d 364 (2000).

6. 645 N.E.2d 656, 662 (Ind.App. 1995). *See also* Diamond State Ins. Co. v. Chester-Jensen Co., 611 N.E.2d 1083 (Ill. App. 1993) (mere allegations of repair and modification without allegations of physical injury insufficient to invoke coverage under physical injury prong of property damage provision); Milgard Mfg. Inc. v. Continental Ins. Co., 759 P.2d 1111 (Or.App. 1988) (no coverage for claim that windows manufactured by insured were improperly tempered, requiring alterations to exterior design of building and reducing the building's value; New Hampshire Ins. Co. v. Vieira, 930 F.2d 696 (9th Cir. 1991) (diminution in value of housing project from installation of defective drywall not physical injury to tangible property); Seagate

Technology Inc. v. St. Paul Fire and Marine Ins. Co., 11 F.Supp. 2d 1150 (N.D. Cal. 1998) (physical incorporation of defective product into another does not constitute property damage unless there is physical harm to whole); Hamilton Die Cast Inc. v. United States F. & G. Co., 508 F.2d 417 (7th Cir. 1975) (same).

7. *See*, *e.g.,* Allstate Ins. Co. v. Diamant*,* 518 N.E.2d 154, 1156 (Mass. 1988) ("bodily injury" is narrow term and encompasses only physical injuries to body and the consequences thereof); Aim Ins. Co. v. Culcasi*,* 280 Cal.Rptr.2d 766, 774 (Cal.App. 1991) ("overwhelming majority" of courts have held that emotional distress claims do not constitute bodily injury under insurance policy); Nat'l Ben Franklin Ins. Co. v. Harris, 409 N.W.2d 733, 735 (1987) (term "bodily injury" is unambiguous and does not include humiliation or mental suffering from racial discrimination); Union Mut. Ins. Co. v. Statts, 837 F.Supp. 814, 817 (N.D. Tex. 1993) (absent physical injury, claims of humiliation, embarrassment and mental anguish do not constitute bodily injury).

8. *See* Arco Indus. Corp. v. Am. Motorists Ins. Co., 531 N.W.2d 168, 173 (1995) (accident is "undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected"); High Country Assoc. v. New Hampshire Ins. Co*.,* 648 A.2d 474, 478 (N.H. 1994) (same).

9. Jakobson Shipyard Inc. v. Aetna Cas. and Sur. Co., 961 F.2d 387, 389 (2d Cir. 1992) (New York law) (faulty steering on tugboats was result of faulty workmanship and there was no chance occurrence, no unknown or remote cause and no unexpected external force); Hawkeye-Security Ins. Co. v. Vector Constr. Co., 460 N.W.2d 329, 334 (Mich.App. 1990) (defective workmanship standing alone, not result of occurrence); U.S. Fid. & Guar. Corp. v. Advance Roofing & Supply Co., 788 P.2d 1227, 1233 (Ariz.App. 1989) (insurer is not guarantor of insured's performance of contract).

10. First Investors Corp. v. Liberty Mut. Ins. Co., 152 F.3d 162, 166 (2d Cir. 1998) (New York law).

11. Calvert Ins. Co. v. Herbert Roofing and Insulation Co., 807 F.Supp. 435, 438 (E.D. Mich. 1992) (when insured's defective workmanship results in damage to property of others, accident occurs within meaning of standard comprehensive liability policy); Baugh Constr. Co. v. Mission Ins. Co., 836 F.2d 1164, 1169 (11th Cir. 1988) (occurrence existed as to claim for improper construction because the insured did not "purposefully design and/or construct a defective building").

12. 405 A.2d 788 (N.J. 1979).

FN13. Hendrick & Weizel, *The New Commercial General Liability Forms--An Introduction and Critique,* 36 FICC Q., 319, 322 (Summer 1986).

14. Jacob v. Russo Builders, 592 N.W.2d 271 (Wis.App. 1999).

15. Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations--What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971); Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims under Commercial General Liability Policies*, 30 TORT & INS. L.J. 785 (Spring 1995).

16. 52 Cal.Rptr.2d 690. *See also* Dayton Indep. Sch. Dist. v. Nat'l Gypsum Co., 662 F.Supp. 1403 (E.D. Tex 1988), *rev'd on other grounds*, 896 F.2d 865 (5th Cir 1990).

17. 771 F.Supp 690, 699 (W.D. Pa. 1991) (emphasis in original). *See also* United Capitol Ins. Co. v. Special Trucks, 918 F.Supp. 1250 (N.D. Ind. 1996); Hartford Cas. Co. v. Cruse, 938 F.2d 601 (5th Cir 1991) (Texas law); St. Paul Fire and Marine Ins. Co. v. Sears, Roebuck & Co., 603 F.2d 780 (9th Cir 1979).

18. 643 N.W.2d 848 (Wis.App. 2002).

19. Willets Paint Contracting v. Hartford Ins. Group*,* 429 N.Y.S.2d 230 (App. Div. 2d Dep't 1980), a*ff'd,* 423 N.E.2d 42 (N.Y. 1981).

20. Commercial Ins. Co. v. R.H. Varto Co., 440 So.2d 383 (Fla.App. 1983). *See also* Aetna Cas. and Sur. Co. of Am. v. Deluxe Systems Inc. of Florida, 711 So.2d 1293, 1297 (Fla.App. 1998) (claim of loss of use of storage facility pending repair and remediation of shelving system excluded from coverage under impaired property exclusion).

21. Janesec v. American States Ins. Co.*,* 1991 WL 319138 (Wis.App.

22. Paper Mach. Corp. v. Nelson Foundry Co., 323 N.W.2d 160, 163-64 (Wis.App. 1982).

23. Fitness Equip. Co. v. Pennsylvania Gen. Ins. Co., 493 So.2d 1337, 1342 (Ala. 1986), *quoting* 3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 15 (1981).

24. United States Fire Ins. Co. v. Good Humor Corp., 496 N.W.2d 730, 737-38 (Wis.App. 1993); Arcos Corp. v. Am. Mut. Liab. Ins. Co., 350 F.Supp. 380, 384-85 (E.D. Pa. 1972); Elco Indus. Inc. v. Liberty Mut. Ins. Co., 414 N.E.2d 41, 45 (Ill.App. 1980); Thomas J. Lipton Inc. v. Liberty Mut. Ins, Co., 314 N.E.2d 37,38-39 (N.Y. 1974); Int'l Hormones Inc. V. Safeco Ins. Co. of Am., 394 N.Y.S.2d 260, 261 (App.Div. 2d Dep't 1977); Olympic Steamship Co. v. Centennial Ins. Co., 811 P.2d 673, 676-79 (Wash. 1991) (en banc).

25. Elco, 414 N.E.2d at 45; Olympic Steamship, 811 P.2d at 676-78.

26. Good Humor, 496 N.W.2d at 738 (looking at history of exclusion: one downed aircraft leading to recall of others).

27. Olympic Steamship, 811 P.2d at 679.

28. R.L. Hess Co. v. U.S. Paper Converters, 532 N.W.2d 145 (Wis.App. 1995) (table) (unpublished per curiam opinion).

29. 380 N.W.2d 122, 125-26 (Minn. 1986).

30. 972 S.W.2d 1, 11 (Tenn.App. 1998).

31. *See, e.g*., Imperial Cas. & Indem. Co. v. High Concrete Structures Inc., 858 F.2d 128, 136-37 (3d Cir. 1988); Forest City Dillon Inc. v. Aetna Cas. & Sur. Co., 852 F.2d 168, 173-74 (6th Cir. 1988); Fitness Equip. Co. v. Pennsylvania Gen. Ins. Co., 493 So.2d 1337, 1342-43 (Ala. 1986) (finding coverage where insured, rather than recalling its defective treadmills from customer, simply repaired and replaced those found defective until customer finally canceled treadmill contract; court stated that "[w]ithout such a withdrawal from the marketplace the exclusion does not apply"); Truax & Hovey Ltd. v. Aetna Cas. & Sur. Co., 504 N.Y.S.2d 934 (N.Y. 1986) (finding exclusion inapplicable in action against plaintiff for damages to house caused by urea formaldehyde which plaintiff had to remove and replace); Paper Mach. Corp. v. Nelson Foundry Co., 323 N.W.2d 160, 163-64 (Wis.App. 1982) (no recall when manufacturer replaced defective mandrels but did not withdraw mandrels from market).

32. *See, e.g*., High Concrete Structures, 858 F.2d at 136-37, n.9. ("Sistership provisions are not intended to exclude from coverage damages arising from the withdrawal of that product that raised suspicions. A fortiori, they do not exclude coverage of damages arising from a defective product when no sister products are involved."); *Todd Shipyards Corp. v. Turbine Serv. Inc.*, 674 F.2d 401, 419 (5th Cir. 1982) ("It is not, however, intended to exclude from coverage damages caused by the very product whose failure to perform properly aroused apprehension about the quality of 'sister' products. Still less is it intended to exclude from coverage damages arising from the malfunctioning of a product where no 'sister' products are involved." (citations omitted)); Lafarge Corp. v. Nat'l Union Fire Ins. Co., 935 F.Supp. 675, 685 (D. Md. 1996) (Texas law); Honeycomb Sys. Inc. v. Admiral Ins. Co., 567 F.Supp. 1400, 1406-07 (D. Maine

1983) (exclusion "designed to limit the insurer's exposure in cases where, because of the actual failure of the insured's product, similar products are withdrawn from use to prevent the failure of these other products, which have not yet failed but are suspected of containing the same defect"; exclusion does not apply to product that failed, only to "sister" product).

33. 409 A.2d 1055, 1057 (Del. 1979).

34. United States Fid. & Guar. Co. v. Andalusia Ready Mix Inc., 436 So.2d 868 (Ala. 1983).

35. *See, e.g., Paper Mach. Corp.*, 323 N.W.2d at 164 (Wis. Ct. App. 1982) (sistership exclusion "denies coverage for claims based on the cost of withdrawing a product from the market, replacing a product or the loss of use of a product which is temporarily or permanently withdrawn from the market because of occurrences involving the same or a similar product").

36. *See, e.g.,* High Concrete Structures, 858 F.2d at 136, n. 9; United States Fid. & Guar. Co. v. Willkin Insulation Co., 578 N.E.2d 926, 934 (Ill. 1991) (exclusion does not apply to product that already has failed while in use and caused damage to property of third party); Continental Cas. Co. v. Gilbane Bldg. Co., 461 N.E.2d 209, 217 (Mass. 1984) (exclusion not intended to exclude from coverage damages caused by very product whose failure to perform properly aroused apprehension about quality of "sister" products), quoting *Todd Shipyards*, 674 F.2d at 419.

37. 508 F.2d 417 (7th Cir. 1975).

38. 544 F.Supp. 669 (W.D. Wis. 1982).

39. 1997 WL 406647 (Minn.App.).

40. Michigan Chem. Corp. v. Am. Home Assurance Co., 728 F.2d 374 (6th Cir. 1984); Uniroyal Inc. v. Home Ins. Co., 707 F.Supp 1368 (E.D. N.Y. 1988); Greaves v. State Farm Ins. Co., 984 F.Supp 12 (D. D.C. 1997), *aff'd*, 1998 WL 720657 (D.C. Cir.).

41. *See, e.g.,* Associated Indem. Co. v. Dow Chemical Co., 814 F.Supp. 613, 622-23 (E.D. Mich. 1993).

42. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 765 A.2d 891 (Conn. 2001); Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co., 53 F.3d 762 (6th Cir. 1995), *cert. denied,* 516 U.S. 1140 (1996); Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178 (2d Cir. 1995), *modified on other grounds and rehearing denied,* 85 F.3d 49 (2d Cir. 1996).

43. Mason v. Home Ins. Co., 532 N.E.2d 526 (Ill.App. 1988).

44. Fireman's Fund Ins. Co. v. Scottsdale Ins. Co., 968 F.Supp. 444, 448 (E.D. Ark. 1997).

45. 209 F.Supp 358 (W.D. La. 1962).

46. 96 F.Supp.2d 253 (S.D. N.Y. 2000).

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