

Food Contamination Claims and Recalls: Is Your Business Covered? - Part II

Food Contamination Coverage Blog Post Part II When tainted peanuts were discovered in a peanut butter processor's plant, the raw peanut stock had to be destroyed and the manufacturing equipment sanitized before processing could resume. The food processor and its exclusive distributor suddenly had no peanut butter to sell, and they had lost their primary profit source. Both companies turned to the processor's commercial property insurance to recoup the costs of their lost property and profits from the processing plant shutdown. In this second installment of our three-part series on insurance coverage for food product recalls and contamination claims, we look at the coverage potentially available to food companies under first-party property insurance policies, which are commonly known as commercial property or business property policies. Food companies typically procure property coverage in addition to commercial general liability policies, which we examined in Part I of the series.

Commercial Property Insurance Covers a Company's Own Property Loss Commercial property insurance covers against physical loss or damage to the insured's real and personal property. Further, commercial property insurance may cover an insured's lost business income resulting from the suspension or interruption of its operations due to property damage. The first element of a claim for coverage under a commercial property policy in the food recall context is the loss of or damage to food products. Actual or threatened contamination of an insured's product should be sufficient to satisfy the requirement of direct physical loss to property under most commercial property policies. Indeed, from the insured's perspective, any product that it cannot market as intended constitutes lost or damaged property.

Insurers Often Challenge Coverage Insurers routinely seek to avoid coverage by arguing that contamination is not direct physical damage to property if (1) the insured's product is not actually contaminated, even though the insured mistakenly believes that it is; or (2) the insured's product is contaminated, but is not harmful. In one recent case, for example, a court adopted an insurer's argument that a food manufacturer could not establish coverage where the U.S. Department of Agriculture had embargoed the manufacturer's beef products based on the mistaken belief that they were contaminated. In that case, the court determined that the insurer owed the manufacturer no coverage because the beef was not actually contaminated. In another case, however, the court rejected the insurer's argument that it could avoid coverage to a cereal producer whose oats were treated with a pesticide that, although not harmful, violated U.S. Food and Drug Administration regulations. The court found coverage under the commercial property policies because the cereal producer was unable to sell its products or use the contaminated oats due to the regulations. Insurers also may invoke policy exclusions for contamination arising out of "bacteria," "mold" or other agents, or for contamination arising out of "pollution." The application of these policy exclusions depends on the facts in the individual case and the specific policy wording. Moreover, some courts have concluded that these exclusions operate to bar coverage only if the damage resulted solely from the excluded cause. Given these uncertainties, the fact that a policy contains such exclusions should not dissuade a food company from pursuing coverage for a contamination claim.

Business Interruption Coverage for Costs Following Property Damage A valuable aspect of commercial property insurance is that it covers both the physical damage to property and the loss of business income associated with that damage. Thus, if a food company cannot operate its business because of a contamination incident, its business interruption coverage should pay for lost business income while the company is unable to operate normally. Business interruption coverage is triggered by physical loss or damage to property that results in a suspension of operations. Because courts generally recognize that the loss or contamination of the insured's product constitutes property damage, the insured should be able to obtain business interruption coverage if its operations are suspended or interrupted after a contamination incident. An insured also may be able to recover business interruption losses if its operations are suspended due to the contamination

of the product of a supplier on which that the insured depends for its business. This coverage—known as contingent business interruption coverage—is often included in a commercial property policy or can usually be procured to supplement existing coverage. **Commercial Property Policies: First Line of Defense** Given the types of losses that can arise from a food contamination or recall event, commercial property policies are often a food company's first line of defense. As such, food companies should be aware of the breadth and limitations of their commercial property policies. These policies cover the direct physical loss or destruction of products, and they may provide valuable protection against business interruption losses that result. Insurer arguments against coverage are fact intensive, but they should not dissuade an insured from pursuing a claim for coverage under its commercial property policies to the fullest extent. **Next Post: [Part III: Product Contamination and Product Recall Insurance](#)**

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