

PRODUCT LIABILITY AND RECALL TWO SIDES OF THE SAME COIN



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When food products pose a threat to public health, management of the recall requires an immediate response and close management of the ensuing recall and liability claims. Thomas Pasley, Specialist Food & Beverage Loss Adjuster, Integra Technical Services offers useful tips.

7 REASONS RECALLS ARE RISING:

- ✓ INCREASING PRODUCT SAFETY REGULATION
- ✓ COMPLEX AND CONSOLIDATED SUPPLY CHAINS
- ✓ TECHNOLOGICAL ADVANCES IN TESTING
- ✓ IDENTIFICATION OF NEW PATHOGENS
- ✓ ECONOMIC PRESSURES/COST-CUTTING
- ✓ RISE IN CONSUMER AWARENESS/USE OF SOCIAL MEDIA
- ✓ RETAILER/ORIGINAL EQUIPMENT MANUFACTURER (OEM) PRESSURE

An Allianz Global Corporate and Specialty research study published in December 2017 suggested that large product recall claims in food and beverage averaged EUR7.92 million in period 2011-2016, and they're becoming ever larger. It's not just that claims costs are increasing, claims are also becoming more complex as defective ingredients cascade through the supply chain. And the number of reported product recall incidents around the world is going up year on year, driven by regulation, complex supply chains and new recall triggers that can include mis-labelling and undeclared allergens, for example nut contamination.

Firms are increasingly seeking insurance to cover recall expenses, loss of profit and brand rehabilitation costs, with major food companies frequently imposing this requirement on their ingredient suppliers or contract manufacturers.

GETTING THE BASICS RIGHT

Product Liability and Product Recall Insurance are inextricably connected, but this can create tensions due to the differences that need to be taken into account when thinking about the claims management strategy. For example, product recalls require an immediate response and ownership of the problem, the antithesis of how you would traditionally approach a Product Liability Insurance claim.

A cohesive Crisis Management, Business Continuity and Claims Management Plan covering both the recall and product liability and early involvement of key experts, including the Loss Adjuster, can be decisive. These experts bring their experience of managing tens (or even hundreds) of similar incidents to the Project Control Team helping avoid pitfalls, unnecessary cost, or complication. They, particularly, contribute to the management of affected retail or wholesale customer and supplier relationships, which can help the recovery and brand rehabilitation.

Choosing different Insurers for Product Recall and Product Liability Insurance can make sense in terms of cost or coverage, but it will complicate the claims management process. A single Insurer is preferable; one set of experts working to the same agenda with singular objectives. They can balance needs of both 'sides of the coin', avoiding arguments about which policy meets specific parts of a claim and effectively managing the competing requirements of each policy. The most obvious of these is how to take ownership of a product recall while not 'admitting liability'. This is always complicated where the recall has been caused by a close third party, such as an ingredient supplier, and the immediate parties affected are your valued customers. Commercial and legal imperatives compete at each step.

Source 'Product Recall, Managing the Impact of the New Risk Landscape' Allianz Global Corporate & Specialty, December 2017

CLAIMS MANAGEMENT TIPS

When facing a product recall incident time is of the essence and important decisions will need to be made quickly. A rehearsed and practiced Crisis Management Plan will certainly help to contain costs and mitigate the financial and reputational impact but what else can help firms successfully navigate the claims management process?

1. BE REALISTIC, ASSUME THE WORST

Immediately a food manufacturer receives a complaint that one of their products has caused a health issue they must identify the cause and size of the problem. This is probably the key moment in any recall and involves: 1) testing and analysis to isolate the ingredient or process that has caused the issue and whether it relates to a single batch or multiple products over a number of days; and 2) understanding how much product is in the supply chain and its whereabouts.

Testing takes time and a decision whether to put the product on hold or recall it will need to be taken before the results are received. It's human nature to downplay the issue but that could add to the problem. The most sensible step is to take the product off the shelves until the full picture has been established.

Stopping supply and removing products requires extensive work and may damage the firm's image. But that needs to be weighed against the reputational and brand damage if the product remains in the market and more people become affected. How a company responds to a recall, whether it communicates clearly and effectively and is seen to do the right things, will affect its ability to recover its reputation.

2. DON'T DELAY

Firms may delay the implementation of the Crisis Management Plan as the magnitude or severity overwhelms key resources, or the firm is in denial, even over-confident. Enacting the Crisis Management Plan at the pre-crisis stage allows the team to convene and begin to manage the incident, importantly taking early control of the communications.

Customers have to be informed and firms will want to manage key relationships, but these customers are also potentially Product Liability claimants. Transparent and open communication can be counter intuitive with Product Liability claims. Insurers will insist that firms do not admit responsibility, however it is necessary to

Product liability, including recall, is one of the biggest risks facing the food manufacturing sector. Mislabelled and contaminated products can pose a serious public health risk, invite regulatory scrutiny and have significant financial and reputational consequences for the firms concerned. These incidents can cause production to be stopped for extended periods, for example where a pathogen has contaminated a processing environment. Firms that implement robust Crisis Management Plans quickly and take advantage of the supporting resources offered by Insurers can mitigate the effects of such claims.

acknowledge the problem and that it is being addressed. With public health issues this is now legally mandated in many territories. Crisis management experts, the firm's lawyers and the Loss Adjuster can be key advisers through this process, leveraging past experiences with similar incidents.

3. UNDERSTAND THE IMPACT OF YOUR COMMUNICATIONS

Before releasing any communication firms should carefully consider their message and evaluate how it will be interpreted. Ensuring that the firm and key retail and wholesale customers stay 'on message' can be critical and the Crisis Management plan needs to take account of the viral effects of social media.

Keeping key customers up to date and closely managing relationships during these stressful moments can build longer term trust that can actually improve the food manufacturer's image and reputation and help to contain the impact of the recall.

4. INVOLVE POTENTIALLY CULPABLE THIRD PARTIES

In food manufacturing it is highly likely that the firm recalling the product has an opportunity to subrogate their recall costs and liability exposures to a third party ingredient supplier or contract manufacturer. Raising early awareness of the incident with the third party supplier is inevitable, but of particular value is engaging them in the recall process. While not allowing a third party to influence how the recall is managed, being transparent about costs and options can eliminate conflict further along in the subrogation process. A high level of engagement essentially seeks to restrict any debate to liability rather than quantum. When subrogation is left until after the claim is resolved it can become a very lengthy process with the opportunity for the third party to challenge every decision made throughout the recall process.