



An Executive Seminar Series

Recall Insurance: Why Its Likely Not Covered In Your Current Policy

Leavitt Food Safety Solutions



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- Berrian Insurance Group – Denver, Colorado
- National Program Manager, Leavitt Food Safety Solutions
- Lloyds of London Coverholder



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Today's Overview

1. The Practical, Financial and Legal Implications of a Recall
2. Is a Recall Covered by Insurance?
3. Claims Mitigation and Enterprise
4. Exposure Analysis
5. Differences in PCI Insurance Policies



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2016 Recalls – Supply Chains Hit Hard

1. Nestlé Spinach Recall
2. CRF Frozen Foods
3. Grain Craft flour
4. SunOpta Sunflower Seeds
5. General Mills
6. National Frozen Food



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The FDA has notified you . . .

The FDA/CDC are investigating the **possibility** that you **may** be part of a supply chain, which **may** be involved with an outbreak involving a **potentially** adulterated product.



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Recall, Practical Considerations

- **24/7 Media**: How will you respond?
- **Customers** are calling, emailing . . .
- Your **suppliers** have questions.
- What is your **risk transfer strategy**?
- Your **Bank / Investors** need answers.



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What is the cost of **YOUR** recall?



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Impact of Adverse Publicity

Menu Foods

Westland/Hallmark

Jensen Farms

Yum! Brands

OSI

Nestlé

Kraft

Blue Bell Creameries

Chipotle

Sunland

AFA Foods

Topps Meat

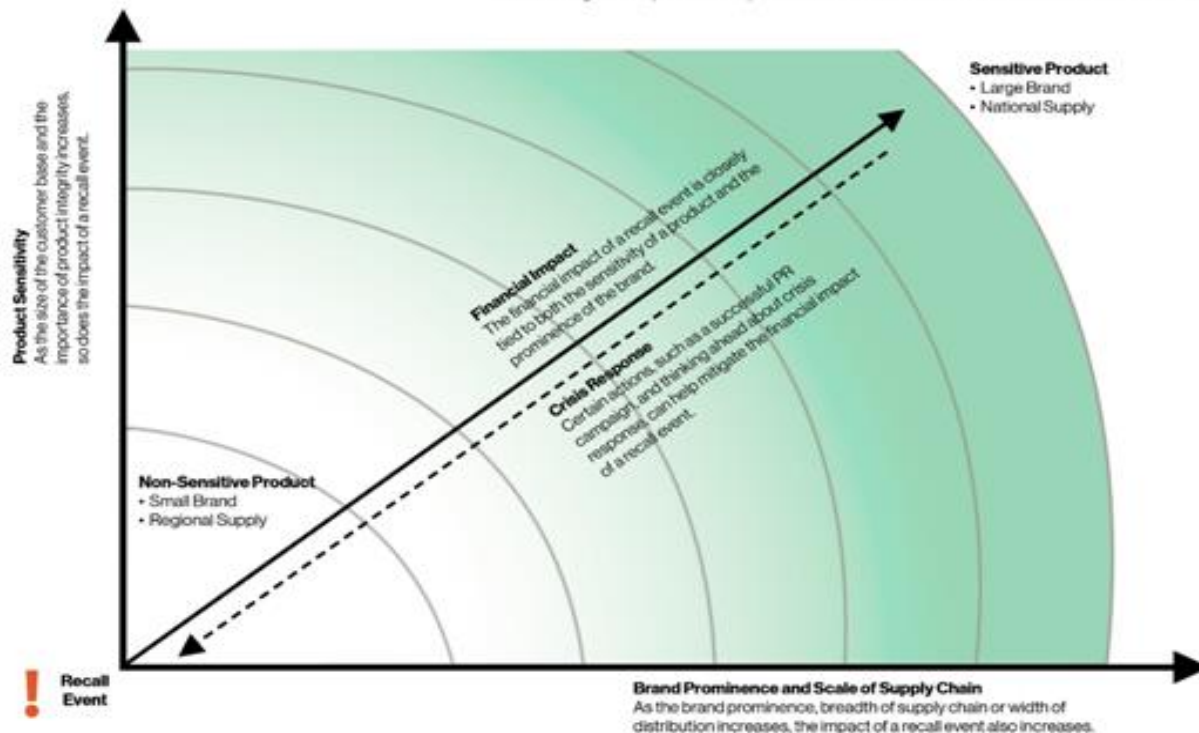


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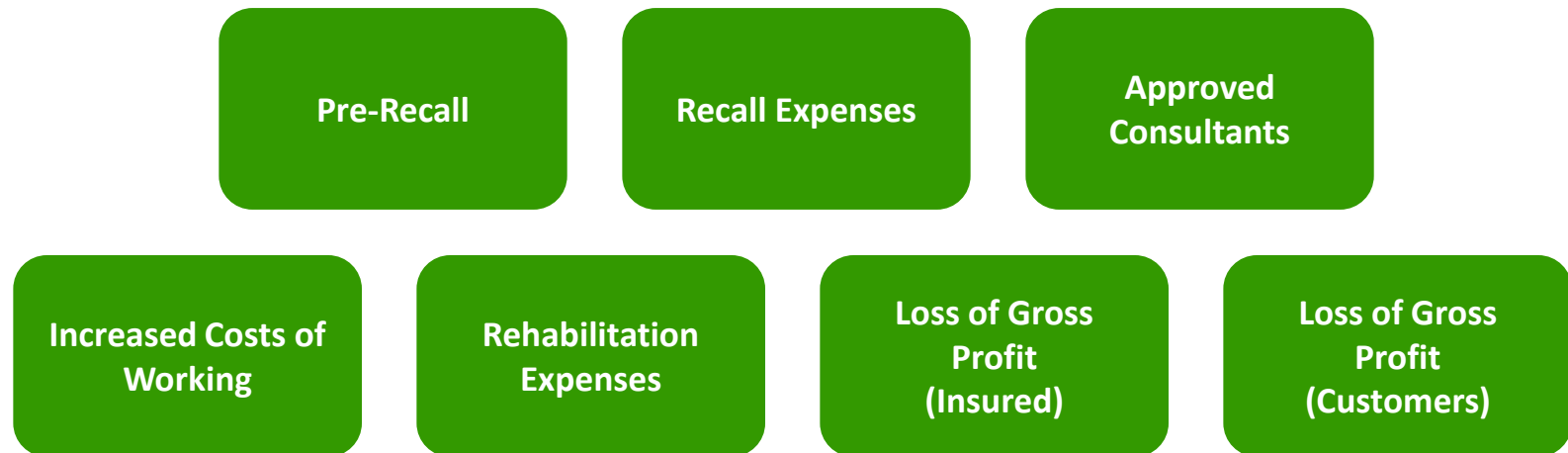
Product Recall Risk Matrix

In a product recall situation, the overall impact depends on a number of factors. Determining the sensitivity of a company's products and the prominence of their brand can help gauge whether the event will be large or small from an insurance perspective. Loss mitigation options and plans should also be considered before a recall event occurs.

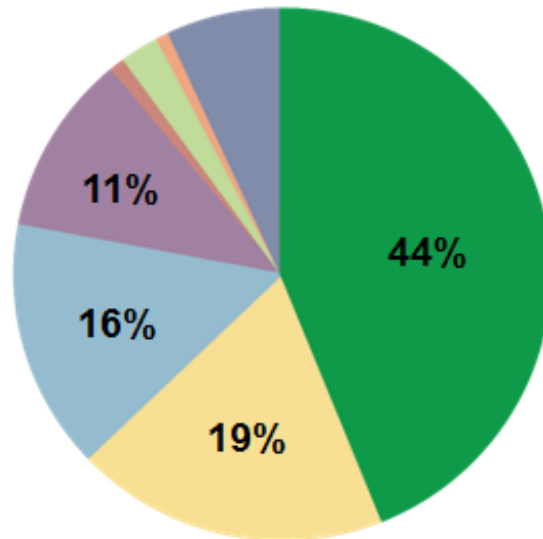


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Measuring the Loss



Business Income Losses in Recall Events



All Losses

Less than 10% not indicated.

Key

- Business Income Loss
- Inventory Loss
- Cost of Refunds
- Recall Expenses
- Destruction Costs
- Other Costs / Clean Up
- Recall / Legal Consultant
- Third Party Claimed Expenses

Lost Profits: Will Your Customers Stay?

| Customer | 2016 Projected Sales % |
|----------------|------------------------|
| Walledmart | 46% |
| CostingCo | 21% |
| TradingJane | 17% |
| Targeted | 9% |
| GoingGoingGone | 7% |



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Criminal “Individual” Liability

Under the Federal Food, Drug and Cosmetic Act (FDCA), **individuals** (owners, executives, managers, supervisors) can be criminally prosecuted.

The FDCA allows the government to pursue criminal misdemeanor liability and felony prosecution.

Prosecution of any individual if she/he personally committed a **prohibited act**; caused another to commit a prohibited act; or had a “**responsible relation**” to the commission of such prohibited act. *United States v. Park*

Strict Liability: by reason of individual’s position in the company, responsibility, or authority to prevent or promptly correct a violation and fails to do so. Critical issue is **accountability** not title.

Generally prosecution of individuals if prior warning or repeat violation. If no warning, prosecution for gross, flagrant, or intentional acts; fraud; **danger to health**.



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Fines, Jail, Lifetime Bans

- Michelle Myrter, **president**, Castle Cheese Co. (2016)
- William Aossey, Jr., **founder**, Midamar Corp. (2016)
- David Romero, **principal**, Global Nutrients, Stella Labs, Nutraceuticals (2016)
- Jesse “Babe” Amaral Jr. and Robert Singleton, **co-owners**; Felix Cabrera, **foreman**; Eugene Corda, **yardman**, Rancho Feed Corporation (2016)
- Soo C. Park, **owner** and **president**, Henry’s Farm, Inc. (2016)
- Austin “Jack” DeCoster and Peter DeCoster, **owners**, Quality Egg, LLC (2015)
- Stewart Parnell, **owner** and **president**; Michael Parnell, **broker**; Daniel Kilgore and Samuel Lightsey, **plant managers**; Mary Wilkerson, **QA manager**, PCA (2015)
- Eric Jensen and Ryan Jensen, **principals**, Jensen Farms (2013)



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Congresswoman Wants FDA to Shut Down Dole's Dixie Dew Salad Processing Plant



“It is an outrage that people had to die in order for Dole to temporarily close this plant... Dole must be held accountable.”

—Rosa DeLauro



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FSMA's Magnificent Seven

- Final Rule for Preventive Controls for Human Food, **August 30, 2015**
- Final Rule for Preventive Controls for Animal Food, **August 30, 2015**
- Final Rule on Produce Safety, **November 13, 2015**
- Final Rule on Foreign Supplier Verification Programs for Importers of Food for Humans and Animals, **November 13, 2015**
- Final Rule on Accredited Third-Party Certification, **November 13, 2015**
- Final Rule on Sanitary Transportation, **March 31, 2016**
- Final Rule on Intentional Adulteration, **May 27, 2016**



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FSMA - are you & your suppliers compliant?

- A written food safety plan
- Hazard analysis
- Preventive controls
- Monitoring
- Corrective actions and corrections
- Verification
- Supply chain program
- Recall plan
- Associated records

“Preventive Controls Qualified Individual”



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FSMA Investigation Standard

- If the FDA believes that there is a **reasonable probability** that the use of or exposure to an article of food and, any other article of food that the FDA **reasonably believes** is affected in the same manner, will cause serious adverse health consequences or death to humans **or animals**.
- Each person (excluding farms and restaurants) who **manufactures, processes, packs, distributes, receives, holds, or imports** such food article shall, at the request of a FDA officer or employee and, upon receipt of written notice, **must provide access to and a copy of all records relating to such food articles**.



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FSMA Records

Record Keeping/Response to FDA Record Requests

- The Proposed Rule will require facilities to submit or produce documents “promptly.” As provided in the rule, **“promptly” means 24 hours.**
- Because facilities will be required to maintain and update the necessary documentation at all times and as a matter of routine practice, any response that will require more than 24 hours will be a red flag.



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Food Safety Enforcement Tools

- Warning letters
- Recall
- Restraining order or injunction
- Notice of suspension
- Seizure
- Administrative detention
- Suspension of registration
- Criminal Prosecution



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Will Your Insurance Cover a Recall?



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Product Contamination Insurance

- Includes pre- and post-crisis consultants' costs
- Insured Event:
 - Accidental contamination
 - Malicious tampering
 - Product extortion
 - Governmental recall
 - Adverse publicity



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Product Contamination Insurance

Loss includes the reasonable and necessary expenses or costs listed and incurred by the Insured directly or solely in connection with a covered Insured Event:

- Pre-recall expenses
- Recall costs (incl. redistribution costs, replacement costs, third party recall)
- Business interruption (loss of gross revenue and extra expense)
- Rehabilitation expense
- Extortion costs
- Consultants' costs
- Third party loss (incl. cust. bus. interrup.)



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Gaps in Your Insurance Program

What is the cost of **YOUR** recall?

\$ _____

Can you afford this amount
without proper protection?



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Berrian's Strategic Partner Network

- Industry Associations
- Banks
- Accounting Firms
- Specialized Insurance Solutions
- Industry-Specific Law Firms
 - Supply contracts
 - Policy interpretation
 - Litigation
- Quality Control Consultants
- Facility Sanitation Expertise
- Supply Chain Track & Trace
- Crisis Response Consultants
- Forensic Accountants



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ReposiTrak

- Vendor compliance management – ins certificates, QC reports
- Track and trace - reduces risk by creating supply chain visibility
- Enables us to offer premium credits
- <http://repositrak.com/services/food-safety-insurance-services/>



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Starting Point: Perform Risk Analysis

- Understand exposures to loss
- Review your customer vendor supply agreements
- Review your suppliers and the supply contracts
- Review private label agreements
- Quantify probable loss & understand your biz objectives
- Review current insurance structure
- Offer recommendations with associated costs



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Vendor Supply Agreements: Risk Transfer From Customers to You

Insurance Paragraph:

Seller must certify to having general / product liability with limits of \$1m/\$2m and umbrella liability with limits of \$5m.

Indemnification Paragraph:

Seller shall reimburse buyer for **any and all costs and expenses** incurred by buyer.



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14. Insurance

A. If Supplier's products include any of the following:

(i) supplements;

(ii) raw or cooked, fresh and/or frozen meats (including beef, poultry, pork, lamb and deli meats);

(iii) raw or cooked, fresh and/or frozen seafood; then the following shall apply:

Supplier will maintain, in any combination of primary and excess policy(ies), commercial/comprehensive general liability insurance (including but not limited to product/completed operations, independent contractors and contractual liability insurance) from a carrier or carriers reasonably satisfactory to XYZ, in a minimum amount of five million dollars (\$5,000,000) combined single limit for bodily injury and property damage per occurrence; five million dollars (\$5,000,000) for products/completed operations aggregate; and five million dollars (\$5,000,000) general aggregate.

B. Supplier will also maintain the following insurance coverages:

Worker's Compensation:

Statutory as required by states

Employers' Liability:

\$100,000 per accident for Bodily Injury or Disease

\$500,000 in the Aggregate for Disease

Commercial Automobile Liability:

\$1,000,000 Combined Single Limit covering, Bodily Injury and Property Damage arising out of the use of any Owned, Non-Owned, Leased and Hired Autos.

C. The policy/policies will designate XYZ and its affiliates as additional insureds on a primary non-contributory basis, and will be endorsed to provide contractual liability insurance in the amount specified above, specifically covering Supplier's obligations to defend and indemnify XYZ as set forth in this Agreement and specifying that such coverage is primary and not contributory. The policy(ies) will also contain a waiver of subrogation in favor of XYZ and its affiliates.

D. Supplier will provide a certificate of insurance for such coverage, provided by a carrier or carriers with an A.M. Best rating of at least A-, Financial Size category 7, and stating that "XYZ and its affiliates" are additional insureds. Supplier will deliver the certificate(s) to Supplier's XYZ Buyer or Category Manager no later than the Effective Date, and annually thereafter. The policy and certificate will also specify that XYZ will be given at least thirty (30) days' prior written notice by the insurer in the event of any material modification, cancellation or termination of coverage.



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

4/25/2016

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

| | | | | |
|--|--|---|--|-----------------------------------|
| PRODUCER Leavitt Southern California Insurance Services #0F13098 1820 E. First Street, Ste 500 Santa Ana CA 92705 | | CONTACT NAME: PHONE (A/C, No, Ext): E-MAIL: ADDRESS: INSURER(S) AFFORDING COVERAGE INSURER A: Your Insurance Company INSURER B: INSURER C: INSURER D: INSURER E: INSURER F: | | FAX (A/C, No): NAIC # 12345 |
| INSURED Your Name Your Address City/State ZIP CODE | | | | |

COVERAGES

CERTIFICATE NUMBER: SAMPLE

REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

| INSR LTR | TYPE OF INSURANCE | ADOL SUBR INSD WVD | POLICY NUMBER | POLICY EFF (MM/DD/YYYY) | POLICY EXP (MM/DD/YYYY) | LIMITS |
|----------|--|--|---------------|-------------------------|-------------------------|--|
| A | <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY | | POLICY NUMBER | 3/6/2015 | 3/6/2016 | EACH OCCURRENCE |
| | <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR | | | | | DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 1,000,000 |
| | | | | | | \$ 50,000 |
| | | | | | | MED EXP (Any one person) \$ 5,000 |
| | | | | | | PERSONAL & ADV INJURY \$ 1,000,000 |
| | GEN'L AGGREGATE LIMIT APPLIES PER: | | | | | GENERAL AGGREGATE \$ 2,000,000 |
| | <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC | | | | | PRODUCTS - COMPOP AGG \$ 2,000,000 |
| | OTHER: | | | | | \$ |
| | AUTOMOBILE LIABILITY | | | | | COMBINED SINGLE LIMIT (Ea accident) \$ |
| | <input type="checkbox"/> ANY AUTO | | | | | BODILY INJURY (Per person) \$ |
| | <input type="checkbox"/> ALL OWNED AUTOS | <input type="checkbox"/> SCHEDULED AUTOS | | | | BODILY INJURY (Per accident) \$ |
| | <input type="checkbox"/> HIRED AUTOS | <input type="checkbox"/> NON-OWNED AUTOS | | | | PROPERTY DAMAGE (Per accident) \$ |
| | | | | | | \$ |
| | UMBRELLA LIAB | <input type="checkbox"/> OCCUR | | | | EACH OCCURRENCE \$ |
| | EXCESS LIAB | <input type="checkbox"/> CLAIMS-MADE | | | | AGGREGATE \$ |
| | DED <input type="checkbox"/> RETENTION \$ | | | | | \$ |

8. Quality Assurance

- A. Supplier shall adopt and operate in accordance with good manufacturing practices (GMPs). Annually Supplier shall provide XYZ with a copy of Supplier's most recent food safety audit as performed by an independent third party.
- B. Upon request by XYZ, with respect to consumable/food Products, Supplier will provide to XYZ the results of any sanitation or food safety audits made by or for Supplier during the term of this Agreement related to any Facility. Supplier will notify XYZ immediately of any third party food safety or sanitation audits or analyses that indicate the presence of *Listeria monocytogenes*, *Salmonella*, *E. coli*, *E. coli* 0157:H7 or other harmful or pathogenic bacteriological, viral or fungal presence in the Facilities or the Products or any of Supplier's other products manufactured at the Facilities during the term of this Agreement. Supplier will also inform XYZ immediately of any non-routine inquiry, investigation or inspection by any federal, state or local governmental agency in connection with the Facilities or the Products that reveal a food safety or sanitation deficiency or a possible recall, labeling or allergen alert and will provide XYZ with a copy of any reports related thereto. Supplier specifically agrees to inform XYZ immediately upon receipt, and to provide a copy, of any FDA Form 483 involving a Facility; of any entry Supplier makes to the Reportable Food Registry involving the Products; and of any "Warning Letter" or "Dear Manufacturer" letter received by Supplier related in any way to the Facilities or the Products. Notwithstanding Section 8, XYZ may share any information provided by Supplier pursuant to this Section 9 with Customer upon request.
- C. This section shall survive for one year following the expiration or termination of this Agreement.

9. Transparency in Supplier's Supply Chain

- A. Upon request from XYZ, Supplier shall identify the country of origin, and the specific region of such country, where each of the ingredients, components or parts of Supplier's Products are grown, produced and/or manufactured. In the event of an actual or contemplated product recall, withdrawal or other similar circumstances affecting Supplier's Product or other products that are of the same sort or similar to Supplier's Product and upon request from XYZ, Supplier shall promptly identify the direct supplier or source of any of the ingredients, components or parts of Supplier's Product. Notwithstanding Section 8, XYZ may share any information provided by Supplier pursuant to this Section 10 with Customer upon request.
- B. In order to allow both Supplier and XYZ to be able to definitively trace the source of Products as well as the place and time of their processing, all Products shall bear a unique lot or batch number that isolates the processing of Products between sanitation efforts. Products produced in a facility or through a process that does not undergo sanitation must be designated by field and harvest date.

- 8) Neither Supplier nor its principals (owners/senior officials) are debarred or suspended from U.S. Government procurement programs under the rules prescribed at Title 48 of the Code of Federal Regulations, Subpart 9.4 (48 C.F.R. §§ 9.400-9.409), and Supplier will promptly (and in no event in more than 15 days) notify XYZ of any change in this status, including Supplier's receipt of any notice proposing Supplier for debarment or suspension from U.S. Government procurement programs; and
 - 9) Supplier has obtained any and all licenses, permits, and authority necessary or required to perform its obligations under this Agreement and has paid all fees and charges with reference thereto; it is in good standing with all governmental bodies or agencies; it will take such steps and perform such acts as may be necessary to retain such good standing; and it will promptly notify XYZ if it fails to retain such good standing.
 - 10) Supplier is free, and has full right and authority, to enter into this Agreement and to perform all of its obligations hereunder; and it has performed all acts and taken all steps necessary to authorize the execution of this Agreement.
- B. XYZ. XYZ represents and warrants that it is free, and has full right and authority, to enter into this Agreement and to perform all of its obligations hereunder; and that it has performed all acts and taken all steps necessary to authorize the execution of this Agreement.

11. Unacceptable Products; Returns; Recalls

- A. Supplier agrees to fully reimburse XYZ for all damaged, short code, out of code, recalled, withdrawn, mislabeled, returned or poor quality Products, provided that in the case of poor quality Products, XYZ will consult with Customer to determine the disposition of such Products and if Customer elects to purchase such poor quality Products from XYZ, then Supplier shall not be required to fully reimburse XYZ for such Products.
- B. **Recall and Market Withdrawal.** Supplier agrees to cooperate with XYZ on all recalls and market withdrawals, promptly provide information requested by XYZ as needed for XYZ to administer a recall or market withdrawal, and comply with all applicable requirements, including but not limited to XYZ's Recall Policy for Suppliers, as may be amended from time to time, as well as the Recall Notification set forth herein. In the event of a recall or market withdrawal, XYZ will charge Supplier back for all fees related to the recall or market withdrawal. Supplier shall indemnify and hold XYZ harmless for any costs and fees (including attorney's fees), associated with a recall or market withdrawal, including any and all fees, assessments, costs and/or expenses including but not limited to product retrieval costs from retail stores, storage, shipping, disposal related costs and all communication related expenses (such as charges for Customer contact via Recall Info Link, as described in the XYZ Supplier Policies & Guidelines). Furthermore, XYZ reserves the right to charge back to Supplier any costs and/or fees assessed to or imposed upon XYZ by Customer resulting from or relating to a press release, government advisory or warning letter relating to the Product.

12. Recall and Market Withdrawal Notification

- A. Recall means a firm's removal or correction of Product that the FDA or USDA considers to be in violation of the laws it administers and against which an agency may initiate legal action, e.g., seizure. Recall does not include a market withdrawal or a stock recovery. Market Withdrawal means a firm's removal or correction of Product which does not pose a potential threat to consumer health or safety, is not materially misleading, and is not

General/Product Liability & Umbrella Policy Exclusions

- No coverage for contaminated product / product recalls
- Large gap in many insurance programs throughout supply chain
- Supply chain vendors' balance sheets inadequate to survive most product recall losses
- Other members in the supply chain are exposed to losses if the responsible party is unable to pay



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The Need for Product Contamination Coverage

- Insure risk transfer accepted in vendor supply agreements
- Balance sheet protection and business continuity
- Satisfy bank loan covenants
- Crisis response consulting services when desperately needed
- Increasing product recall frequency and severity
- Global supply chains
- Just-in-time manufacturing



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Caution

There can be considerable differences in the scope of product contamination / product recall coverage offered by competing insurance companies.



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Private Label Advertising Liability

- Risk transfer – unlimited liability
- Any promotional materials
- Excluded by general and umbrella liability
- Proper handling vital to customer relations



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Private Label Advertising Liability Claim Example

Class action lawsuit against several top retail grocery stores challenging advertising and sale of dairy products.

Grocery stores tendered defense and indemnification to their supplier. Supplier filed claims with their general liability and umbrella insurers. Claims denied based on policy exclusions.

No coverage for \$17 million spent in legal defense and settlement.



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Program Dovetails With Other Policies

- Global property and transit
- General and umbrella liability
- Fleet auto
- Workers compensation/employers liability
- Management liability, EPLI & cyber



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Questions?



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