

AMERICAN SPICE TRADE ASSOCIATION 2013 ANNUAL MEETING

INSURANCE COVERAGE AS A PART OF RISK MANAGEMENT

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**Lowenstein
Sandler** LLP

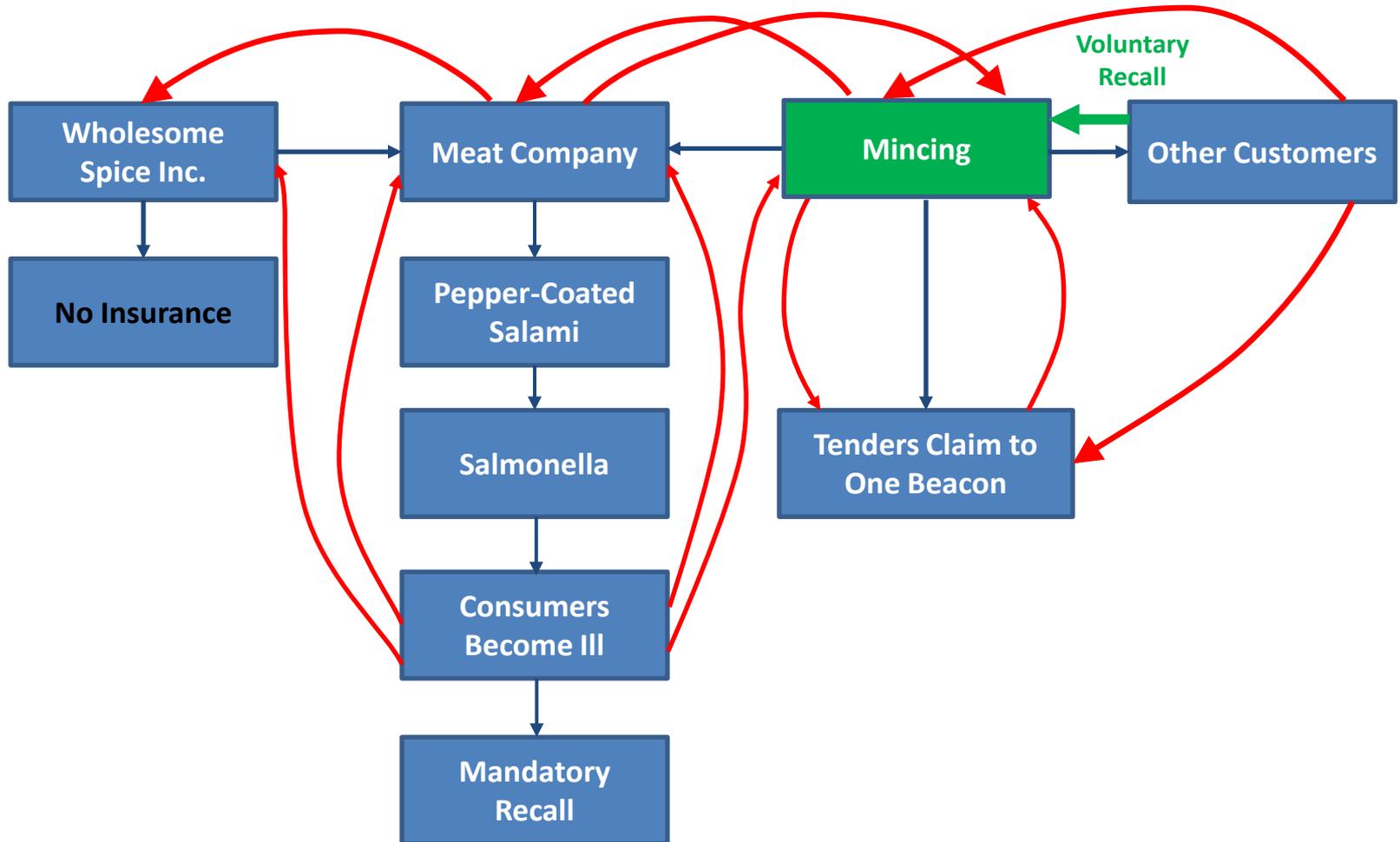
The Players

- Policyholder
- Carrier
- Broker
- Coverage Counsel

The Policies

- General Liability
- Property / “All Risk”
- Specialty Products
 - Recall
 - Accidental Product Contamination
 - Malicious Product Tampering

The Pitfalls: A Case Study



The Pitfalls: A Case Study

MINCING'S INSURANCE POLICY

- Advantage for Food Companies



The Camden Fire Insurance Association
1 Beacon Lane
Canton, MA 02021-1030

(781) 332-7000

@vantage
for Food Industries

Common Policy Declarations

Named Insured and Mailing Address

Policy Number 713-00-90-23-0002

MINCING TRADING CORP.
(See ASC 00 11 01 98, Schedule 1)
10 TOWER RD
DAYTON, NJ 08810-1571

In return for the payment of the premium, and subject to all terms of this policy, we agree with you to provide the insurance as stated in this policy.

Policy Period: from October 01, 2009 to October 01, 2010
at 12:01 A.M. Standard Time at your mailing address shown above.

The Named Insured is a(n): Corporation

Business Description: SPICE IMPORTING AND PROCESSING

**Lowenstein
Sandler** LLP

The Pitfalls: A Case Study

MINCING'S INSURANCE POLICY

- General Liability Policy – Primary and Excess
 - Two Separate Years
 - Aggregate Limits

The Pitfalls: A Case Study

MINCING'S INSURANCE POLICY

- “Communicable Disease” Exclusion

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – COMMUNICABLE DISEASE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

This insurance does not apply to "bodily injury", "property damage", "personal injury" or "advertising injury" arising out of the transmission or alleged transmission, by any insured, of any communicable disease, including, but not limited to, Acquired Immune Deficiency Disease (AIDS).

The Pitfalls: A Case Study

MINCING'S INSURANCE POLICY

- Fungi & Bacteria Exclusion

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:
2. Exclusions
- This insurance does not apply to:
- Fungi Or Bacteria**
- a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.
- This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.
- B. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:
2. Exclusions
- This insurance does not apply to:
- Fungi Or Bacteria**
- a. "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
- b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.
- C. The following definition is added to the Definitions Section:
- "Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

The Pitfalls: A Case Study

KEY PROVISIONS AND COVERAGE CONCEPTS

- One Beacon's Obligations
 - Duty to Defend
 - Duty to Indemnify

- Mincing's Rights
 - Reasonable Expectations of the Insured
 - Ambiguities Resolved in Favor of Coverage
 - Exclusions Read Very Narrowly
 - Tie Goes to the Policyholder

The Pitfalls: A Case Study

THE (LONG AND EXPENSIVE) PROCESS

- Litigation
 - Two Years Of Written Motions and Oral Argument
 - Two Separate Courts
 - Negotiation
 - Informal
 - Formal
 - Mediation – *TWICE*
 - Settlement
-

Recent Trends

[Ruiz Food Products, Inc. v. Catlin Underwriting U.S., Inc.](#)
(E.D. Cal., 2012)

- Mandatory Recall Related to Salmonella in Hydrolyzed Vegetable Protein “HVP”
 - Ruiz bought spice mix which contained HVP
 - HVP supplied by Basic
 - Basic discovered salmonella in some of its HVP -- FDA recall
 - Ruiz's lots were not contaminated, but were covered by the recall

Recent Trends (cont'd)

- Ruiz bought Product Contamination Policy from Catlin
- Policy provided coverage for an “Insured Event”
- “Insured Event” defined to include “accidental contamination” or “impairment” of an “Insured product” which resulted in “or would result in” injury, sickness, disease, or death
- In addition, the Policy covered contamination or impairment that resulted during the manufacture or production of an “Insured product,” which were defined as the insured's products and that were in production by the insured or manufactured, handled, or distributed by the insured.

Recent Trends (cont'd)

– Court held that:

- A Class One Recall, by itself, does not constitute “contamination.”
- The potential for contamination is not enough to constitute contamination. Instead, the policy requires contamination that either did or would result in bodily injury.
- The term “impairment” requires that the product itself is actually impaired. Neither potential contamination -- nor the belief that a product is potentially contaminated -- constitute impairment.
- No contamination occurred during the manufacture, production, preparation, or distribution of Ruiz's products, because the genesis of the contamination was another facility that supplied HVP.

Recent Trends (cont'd)

Hot Stuff Foods, LLC v. Houston Casualty Company (D.S.D. 2012)

- Voluntary Recall Related to MSG
 - Hot Stuff accidentally labeled MSG-containing product as “no MSG.”
 - Hot Stuff, working with the FDA, voluntarily recalled the product as part of a Class Three recall (no adverse health consequences).
 - Hot Stuff bought a “Malicious Product Tampering/Accidental Product Contamination Insurance” policy from HCC.
 - Like the Catlin policy (above), HCC’s policy required contamination that did, or “may likely,” result in bodily injury, disease, sickness, or death. The policy also required that the contamination be likely to result in harm to “any person.”

Recent Trends (cont'd)

- The question was whether a product mislabeled as not containing MSG “may likely result” in injury. “May” was defined as a possibility, and “likely” was defined as a probability.
- Taken together, the policy required “a chance that an illness or sickness will result.”
- Hot Stuff was placed in the uncomfortable position of having to prove that MSG can cause harm to some people. It presented scientific testimony to show that in rare cases, including instances where people have a particular sensitivity, MSG can cause harm.

Recent Trends (cont'd)

– Court held that:

- The medical testimony was sufficient to show that, in some instances, MSG can cause harm.
- The policy's requirement that harm may be likely to occur to “any person” was satisfied if harm could result to some.
- Alternatively, the policy was ambiguous regarding whether the harm had to affect a large group as opposed to only a select few with sensitivities.
- The Class Three recall was not an admission by Hot Stuff that its products were not capable of causing harm (which would defeat coverage). This was because: (i) Hot Stuff's voluntary classification has no bearing on the interpretation of the policy; and (ii) Hot Stuff was working under stress to respond to the issue.

Recent Trends (cont'd)

Caudill Seed & Warehouse Co. v. Houston Casualty Company (W.D. Ky. 2011)

- Mandatory Recall Related to Salmonella in Peanut Products
 - Caudill Seed produces agricultural products containing peanuts.
 - Caudill bought raw peanuts from Peanut Company of America (“PCA”)
 - FDA-mandated recall.
 - Caudill pulled its peanut products and worked with FDA on facility inspections.
 - Caudill bought an Accidental Product Contamination Policy from HCC.
 - The HCC policy insured against losses resulting from contamination or impairment of products. Like the policies above, Caudill's policy required contamination during its production, manufacture, processing, or distribution.
 - The policy did not insure against bodily injury claims themselves.
 - In addition, the policy provided coverage for loss associated with “publicity” of contamination, defined as the reporting of “actual or alleged” contamination in “local, regional or national media,” or in “governmental publication where the Named Insured's Products and the Named Insured are specifically named.”

Recent Trends (cont'd)

- Caudill received a letter from the Department of Health and Human Services indicating that the FDA considered the peanuts to pose an acute, life-threatening risk and approved of the recall.
- Caudill incurred substantial costs recalling its products.
- HCC denied coverage for Caudill's recall losses because there was no evidence of contamination to Caudill's peanut products and, if there were, it would not have occurred during Caudill's production.

Recent Trends (cont'd)

- Court held that:
 - There was no coverage because the contamination did not occur during Caudill's production -- it occurred prior to production, in the hands of a supplier.
 - There was no publicity coverage because the FDA's letters were not publicized and did not name Caudill specifically.

Welcome to:



PARKER STEVENS
AGENCY, L.L.C.

Food Processors' Specialty Insurance



Specialty Insurance

- ▶ Key Coverage Options
- ▶ The Cost of a Recall
- ▶ What to Look for

Product Recall – Key Coverages

- ▶ Voluntary or Involuntary
- ▶ Accidental Contamination
- ▶ Malicious Contamination
- ▶ Product Extortion
- ▶ Adverse Publicity



The Cost of a Recall

- ▶ Recall Expenses
- ▶ Shipping and Disposal
- ▶ Cost to Notify Customers
- ▶ Storage
- ▶ Overtime
- ▶ Temporary Employees



The Cost of a Recall *(continued)*

- ▶ Repair, Replace or Refund
- ▶ Loss of Sales Revenue
- ▶ Customer Loss of Gross Profit
- ▶ Consultation and Advisor Costs
- ▶ Rehabilitation Expenses



What to Look For

- ▶ Policy Specifics (no standard language)
- ▶ Accidental Contamination (how it responds)
- ▶ Adverse Publicity (how it responds)
- ▶ Lost Profits/Revenue



Collaborate

Questions and Discussion