

## INSURANCE RECOVERY FOR LOSSES FROM CONTAMINATED OR GENETICALLY MODIFIED FOODS

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*Reported losses from food contamination routinely appear in the headlines as do losses—or especially predictions of losses—from genetic engineering. Genetic modification of crops, livestock, and foodstuffs in general raises a plethora of concerns previously (indeed, in human history) unknown or considered including, inevitably, concerns over insurance coverage for losses incurred in connection with such modifications.*

*Coverage questions can and should be determined with an eye toward the case law of analogous perils, such as contamination of food by unwanted chemical agents, disease-bearing microorganisms, or the like. This article reviews that case law (including very recent additions thereto) and discusses requisites to coverage under general liability and first-party policies for contamination related losses. Recently developed specialized coverages, such as “rejection insurance” for organic growers whose crops are contaminated by “genetic drift” from nearby fields, will increase in popularity, and such specialized coverages are addressed as well. Different insurance coverage issues apply to manufacturers and sellers, suppliers and processors, and growers and seed producers, and that being true in the genetic modification context, too, those issues are discussed in detail.*

*Thus this article provides a useful guide to coverage questions for the food-related and genetic engineering industries.*

While the number of foodborne pathogens identified continues to increase,<sup>1</sup> the number of foodborne illnesses reported since 1996 has dra-

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1. See, e.g., Paul S. Mead et al., *Food-Related Illness and Death in the United States*, 5 EMERGING INFECTIOUS DISEASES 607 (1999), available at [www.cdc.gov/ncidod/eid/vol5no5/mead.htm](http://www.cdc.gov/ncidod/eid/vol5no5/mead.htm) (“More than 200 known diseases are transmitted through food . . . Many of the pathogens of greatest concern today . . . were not recognized as causes of foodborne illness just 20 years ago.”) (last accessed Apr. 21, 2004). C. Delinganis, *Death by Apple Juice: The Problem of Foodborne Illness, the Regulatory Response, and Further Suggestions for Reform*, 53 FOOD & DRUG L.J.

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matically declined.<sup>2</sup> Although these pathogens may be better controlled now than they were in the past (and thus liability claims may have decreased), other changes in foodstuffs, such as the increased proliferation of genetically modified organisms,<sup>3</sup> have produced new liability claims—for example, suits concerning genetically modified foods unapproved for human consumption, genetically engineered crops in proximity to organic fields, or biopharmaceutical crops, or “biopharming,” more generally.<sup>4</sup>

681, 695 (1998) (noting that “[a]t least twenty-five new microbes that can cause food poisoning have been ‘discovered’ since 1975”) (citation omitted). Noroviruses, named for a 1968 outbreak in an Ohio town and commonly dubbed the Norwalk virus, account for more than half the foodborne cases of gastroenteritis. See Centers for Disease Control, *Norovirus: Technical Fact Sheet*, available at <http://www.cdc.gov/ncidod/dvrd/revb/gastro/norovirus-factsheet.htm> (last accessed Dec. 14, 2003). In addition to microbes, compounds in foods or produced in their preparation such as acrylamides may be found or alleged to be harmful. See, e.g., L.A. Mucci, et al., *Dietary Acrylamide and Cancer of the Large Bowel, Kidney and Bladder: Absence of an Association in a Population-Based Study in Sweden*, 88 BRIT. J. CANCER 84 (2003).

2. According to the Centers for Disease Control and Prevention, there has been a 23 percent overall drop in bacterial foodborne illnesses since 1996. See <http://www.hhs.gov/news/press/2002pres/20020418a.html> (last accessed Dec. 19, 2003). Nevertheless, it is estimated that approximately one out of every four Americans suffers from some form of foodborne illness every year. See Patricia Vowinkel, *A Plateful of Headaches*, RISK & INS., Apr. 15, 2004, at 81–82. Even though the number of foodborne-illness cases has been reduced, mass outbreaks continue to occur, such as the hepatitis A outbreak, the largest of its kind to date, from a single location of a national restaurant chain, Chi-Chi’s, which led to more than 600 illnesses, including several deaths, from patrons eating green onions and which is expected to exhaust the reported \$51 million of liability insurance possessed by the company. See Joanne Wojcik, *Food Contamination Hazards Elude Risk Management Efforts*, BUS. INS. (Dec. 1, 2003) at 1; Anita Srikantharajan, *Chi-Chi’s Payments to Victims Approved* (Nov. 22, 2003), available at <http://www.post-gazette.com/pg/pp/03326/242715.stm> (last accessed Dec. 14, 2003). The overall adverse economic impact of the principal foodborne contaminants is estimated to be as much as \$6.9 billion annually. See Vowinkel, *supra*, at 82.

3. According to U.S. government figures, for the year 2003, 80 percent of U.S. soybean acreage, 70 percent of cotton acreage (down 1 percent from the prior year), and 34 percent of corn acreage were plants enhanced through biotechnology. See National Agricultural Statistics Service, Agricultural Statistics Board, U.S. Department of Agriculture, *Prospective Plantings* (Mar. 31, 2003), available at <http://www.usda.mannlib.cornell.edu/reports/nasr/field/pcp-bbp/pspl0303.pdf> (last accessed Dec. 19, 2003).

4. E.g., *Hoffman v. Monsanto Canada Inc.*, Q.B. 2002–67 (Queen’s Bench, Saskatoon, Saskatchewan) (suit by organic farmers against producers of RoundupReady® canola and LibertyLink® canola); *Ctr. for Food Safety v. Veneman*, Sec’y of Agric., No. 03–CV–621 (D. Hawaii Nov. 12, 2003) (biopharming); see Kristen Philipkosi, *Food Biotech Is Risky Business*, WIRED NEWS (Dec. 1, 2003), at [www.wired.com/news/medtech/0,1286,61096,00.html](http://www.wired.com/news/medtech/0,1286,61096,00.html) (last accessed Apr. 21, 2004) (“‘Genetically modified foods are among the riskiest of all possible insurance exposures that we have today,’ said Robert Hartwig, the chief economist for the Insurance Information Institute.”); Bill Freese, *Manufacturing Drugs and Chemicals in Crops* (Genetically Engineered Food Alert July 2002) (identifying loss scenarios); NATIONAL RESEARCH COUNCIL, *ANIMAL BIOTECHNOLOGY: SCIENCE-BASED CONCERNS* (2002) (discussing transgenic animals in agriculture, aquaculture, and biomedical industries); MARGARET MELLON & JANE RISSLER, *GONE TO SEED: TRANSGENIC CONTAMINANTS IN THE TRADITIONAL SEED SUPPLY* (Union of Concerned Scientists 2004), available at [www.ucsusa.org/documents/seedreport\\_fullreport.pdf](http://www.ucsusa.org/documents/seedreport_fullreport.pdf) (last accessed Apr. 21, 2004); Bruce Barcott, *Seeds of Discord*, LEGAL AFF. 59 (Jan.–Feb. 2003); cf. *Langan v. Valicopters*, 567 P.2d 218 (Wash. 1977) (contamination of organic products via pesticide overspray).

With a few notable exceptions, food-related claims have yet to spawn the scope and scale of liabilities that have arisen, for example, in the pharmaceutical-liability context.<sup>5</sup> Nevertheless, the centralization of food production, concomitant increased dispersion of distribution networks, and changes in consumers' eating patterns towards more unprocessed foods together are a recipe for potentially catastrophic losses; the prevalence of genetically modified ingredients and the risk of bioterrorism underscore the possible size of food- and crop-related losses.<sup>6</sup>

Both past losses and anticipated future loss scenarios in turn raise questions about the availability and application of insurance proceeds. The nature of the insurance claim and the applicable coverage often will depend on the segment of the food production and distribution chain in which a particular insured operates and the consequent nature of its loss. Sellers and manufacturers of finished food products are situated differently from their suppliers, which in turn have concerns and exposures different from food growers and seed producers. The review in the sections that follow of many of the pertinent insurance-coverage disputes to date should help purchasers of insurance policies tailor the language of the policies they buy to their risks of loss, whether those policies are standard for use in all industries or specially developed for the food-products industry.

#### I. ROLE OF INSURANCE IN LOSS SCENARIOS

Companies purchase insurance to defray the cost and associated expenses of their liabilities to others, which is a type of coverage known as third-party or public liability insurance, and to reimburse themselves for losses to their own assets, which is known as first-party insurance. Whether separately issued or included together as a package, most companies will purchase both liability and first-party coverages; in addition, specialized policies may be available to supplement the coverage provided by standard

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5. See generally J. Buzby et al., *Product Liability and Microbial Foodborne Illness*, Agricultural Economic Report No. 799 (Economic Research Service/USDA Apr. 2001).

6. See generally Delinganis, *supra* note 1, at 696–700; MUNICH RE GROUP, GENETIC ENGINEERING—A CHALLENGE FOR THE INSURANCE INDUSTRY (2003); Food and Drug Administration, *Risk Assessment for Food Terrorism and Other Food Safety Concerns* (Oct. 13, 2003) (“[S]abotage of food and water is the easiest means of biological or chemical attack. . . . [T]he relative centralization of food production in the U.S. and the global distribution of food products give food a ‘unique susceptibility.’”), available at <http://www.cfsan.fda.gov/dms/rabtact.html> (last accessed Dec. 14, 2003); see also PETER CHALK, HITTING AMERICA’S SOFT UNDERBELLY: THE POTENTIAL THREAT OF DELIBERATE BIOLOGICAL ATTACKS AGAINST THE U.S. AGRICULTURAL AND FOOD INDUSTRY (Rand 2004); S.F. Altekruze, M.L. Cohen, and D.L. Swerdlow, *Emerging Foodborne Diseases*, 3 EMERGING INFECTIOUS DISEASES 285–93 (1997), available at <ftp://ftp.cdc.gov/pub/EID/vol3no3/adobe/cohen.pdf> (last accessed Apr. 21, 2004) (tracing factors of changes in human demographics and behavior, technology and industry, international travel and commerce, microbial adaptation, economic development and land use, and the breakdown of public health measures).

policies by separately insuring, for example, extortion payments made to someone who threatens to contaminate a manufacturer's food products.

This section reviews briefly and generally the coverage afforded by typical insurance policies. The policy provisions and more specific issues will be explored in greater length in the sections that follow, which are focused on particular types of losses and coverages involved in different industry sectors (manufacturers and sellers; suppliers and processors; and growers and seed producers), though many points developed in one section apply equally to the different industry sectors addressed in the others. Finally, this section examines the important question whether the availability of insurance recovery affects a company's loss-prevention activities before claims have arisen.

#### *A. Liability Insurance*

Liability-insurance policies, the most common of which is Commercial General Liability<sup>7</sup> insurance, afford coverage for an insured's liability for bodily injury and for property damage, plus associated defense costs. Defense coverage ordinarily is offered by a provision that imposes on the insurer a duty to defend the insured against any suit that alleges injury or damage that potentially might be covered under the insurer's obligation to pay judgments or settlements (which is known as the insurer's "duty to indemnify" coverage).<sup>8</sup>

Under the typical policy's defense coverage, the insurer is required to defend against suits that merely are potentially covered by the policy's duty to indemnify, to assume its obligation to defend from the outset of the case, and to defend the suit in its entirety (rather than only that portion of the case that might result in a covered judgment); moreover, the policy terms ordinarily provide that the insurance company pays defense coverage separately from its duty to indemnify and with no fixed limit or aggregate dollar amount capping the monetary obligation to pay defense costs.<sup>9</sup> With regard to contaminated or genetically modified food claims, two aspects of standard defense coverage bear special mention: first, these cases typically involve significant scientific support in terms of expert witnesses, whose costs will be covered by the policy; and, second, large-dollar and mass-

7. Hereinafter CGL.

8. Policyholders need to take appropriate steps to involve their insurers in the underlying claims process so as to safeguard their right to coverage. See Marc S. Mayerson, *Perfecting and Pursuing Liability Insurance Coverage: A Primer for Policyholders on Complying with Notice Obligations*, 32 TORT & INS. L.J. 1003 (1997).

9. See Marc S. Mayerson, *Insurance Recovery of Litigation Costs: A Primer for Policyholders and Their Counsel*, 30 TORT & INS. L.J. 997 (1995); see also Donald R. McMinn, *The Duty to Defend Following Buss and Donnar: Restrictions on Insurance Carriers' Ability to Avoid Defense Costs Through Allocation*, 11 Mealey's Litig. Rep.: Ins. (Oct. 1, 1997).

liability cases often involve national or specialized counsel to protect the insured, whose costs likewise will be covered.<sup>10</sup>

An insurer's duty to indemnify applies to the insured's liability for damages because of bodily injury or property damage. In addition to claims of sickness or disease, an insured's liability for bodily injury in some states will extend not only to such present injury but also to the plaintiff's concern about the risk of future injury.<sup>11</sup> So long as the insured faces bona fide tort liability for claims for "fear of" damages or for medical monitoring, a liability policy's bodily injury coverage will apply.<sup>12</sup>

As to property damage, the typical liability insurance policy's coverage is bifurcated into categories that dovetail: first, "physical injury to tangible property including the loss of use thereof" (which will be referred to as prong 1 coverage) and, second, "loss of use of tangible property which has not been physically injured or destroyed" (prong 2 coverage). Actual contamination of foodstuffs, for example, by the introduction of foreign matter, bacteria, or allergens will be found to fall under prong 1 coverage.<sup>13</sup> In the food context, moreover, courts typically construe the physical damage or prong 1 coverage broadly, so as to find physical injury where there has been commingling of defective or contaminated goods with uncontaminated goods, so long as segregating the wheat from the chaff would be unreasonably costly or impracticable.<sup>14</sup>

Prong 2 (loss of use) property-damage coverage comes into play where property that itself is undamaged is not usable or, though still usable, has been rendered less productive.<sup>15</sup> Although economic losses will not themselves be considered to be prong 1 property damage that triggers a liability policy,<sup>16</sup> where a policy provides coverage for prong 2 property damage (as

10. See Mayerson, *supra* note 9, at 1005, 1010.

11. See *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003); *Penny v. United States*, 869 F. Supp. 122, 127 (E.D.N.Y. 1994); *Redland Soccer Club v. Dep't of the Army*, 55 F.3d 827 (3d Cir. 1995).

12. See, e.g., *Techalloy Co., Inc. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. Ct. 1984); *Glidden v. Lumbermens Mut.*, No. 409038, (Ohio Ct. Com. Pl. (Cuyahoga Cty.), May 8, 2002).

13. See *Nat'l Union Fire Ins. Co. v. Terra Indus., Inc.*, 346 F.3d 1160, 1165 (8th Cir. 2003) ("[T]he incorporation of contaminated carbon dioxide into consumer beverages constituted an 'occurrence' resulting in 'property damage' within the meaning of the policy."); *Liberty Mut. Ins. Co. v. Consol. Milk Producers' Ass'n*, 354 F. Supp. 879, 882 (D. N.H. 1973) (adding spoiled cream to coffee found to cause physical property damage to the coffee).

14. E.g., *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847 (Ct. App. 2000); see also *S. Wallace Edward & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 375 (4th Cir. 2003).

15. *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 815-16 (3d Cir. 1994) (holding that loss-of-use coverage includes lost "non-physical or economic use of property . . . [including] loss of customer acceptance of the product"); *Geurin Contractors, Inc. v. Bituminous Cas. Corp.*, 636 S.W.2d 638 (Ark. Ct. App. 1982) (coverage for liability for decrease in profits stemming from reduced access to plaintiff's store).

16. See *Giddings v. Indus. Indem. Co.*, 112 Cal. App. 3d 213, 219 (Ct. App. 1980)

most do), the policy's coverage will apply to cover the resulting claims of lost profits and other economic damages from the lost use of property.<sup>17</sup> Indeed, as one court recently put it: "The Court cannot conceive of damages for the loss of use of tangible property that is not physically injured being anything other than 'purely economic losses.'" <sup>18</sup>

Where there is either prong 1 or prong 2 property damage (or bodily injury), all related losses will be fully covered as a measure of the damages for the covered damage or injury.<sup>19</sup> As explained by one federal appellate court:

A number of courts have read the clause "because of property damage" to include consequential losses attributable to such property damage. . . . Since the term "because of property damage" can reasonably be interpreted to mean all liability arising from such damage, an insurance company wishing to exclude consequential damages should use specific language to that effect.<sup>20</sup>

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("[S]trictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy."); *Aetna Cas. and Sur. Co. v. First Sec. Bank of Bozeman*, 662 F. Supp. 1126, 1130 (D. Mont. 1987) (future income streams "constitute expectations, not entitlements").

17. As one court recently explained:

The policies in this case expressly state that "[l]oss of use of tangible property that is not physically injured" constitutes "property damage". . . . Contrary to [the insurer's] arguments, the alleged loss of profits or diminution in property value are not solely economic losses, but damages because of property damage, and therefore constituted alternative measures of any property damage allegedly sustained.

*Hendrickson v. Zurich Am. Ins. Co.*, 72 Cal. App. 4th 1084, 1091 (Ct. App. 1999); *see also* *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 304 (Colo. 2003) ("damages associated with loss of use of property . . . might normally be classified as economic damages"); *Liberty Mut. Ins. Co. v. Wheelwright Trucking Co.*, 851 So. 2d 466 (Ala. 2002) (finding coverage for lost profits from the inability to use property for a higher-return use, which qualified as prong 2 property damage).

18. *Hartzell Indus., Inc. v. Fed. Ins. Co.*, 168 F. Supp. 2d 789, 796 (S.D. Ohio 2001).

19. As one commentator in an influential article explained:

[I]t is intended that consequential damages such as loss of use, loss of good will, or diminution in market value will be covered if there is physical damage to tangible property other than the product . . . , but that such consequential damages alone, without physical damage to other property caused by the product . . . , will not be covered.

Roger Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 445 (1971); *see also* *Aetna Cas. & Sur. Co. v. Gen. Time Corp.*, 704 F.2d 80 (2d Cir. 1983).

20. *Am. Home Assurance Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22, 26 (1st Cir. 1986) (citations omitted); *see also* *Safeco Ins. Co. v. Munroe*, 527 P.2d 64 (Mont. 1974). Consequential losses from bodily injury similarly are covered, as explained in an early paper commenting on the standard form CGL policy:

For example, the insured sells a television set to, or repairs the set for, a tavern keeper. In the midst of a review of the Kentucky Derby by the patrons at the bar, the set catches fire briefly and then blackens out like a shot. Since this is another business risk of the insured

The breadth of indemnification afforded under the typical liability policy's insuring agreement, however, is limited by exclusions for injuries to the insured's products and for product-recall costs (to name two), whose applicability, as discussed in more detail later, will turn on the particular policy language and whether the insured is a producer, supplier, or grower of foodstuffs.<sup>21</sup>

### B. First-Party Policies

First-party insurance policies protect the insured from financial loss associated with damage to property it owns. First-party policies typically cover either specific causes of loss ("named peril" policies) or all risks of physical loss ("all risk" policies) that result in physical property damage.<sup>22</sup> As dis-

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[television seller or repairer because the loss is only physical injury to the insured's own product] . . . , the claimant's damages for loss of his bar business (use) are not covered. If, however, the smoke and flames caused *any* "bodily injury" to any person or any harm to the tavern keeper's other property, all such consequential damages (including loss of business in the commotion) are covered.

Allan P. Gowan, *Completed Operations and Products Liability Insurance Coverage of the New Comprehensive General-Automobile Policy*, American Bar Ass'n, Section of Insurance, Negligence & Compensation Law at 21-22 (Aug. 9, 1966). *But see* Vons Cos. v. Aetna Cas. & Sur. Co., 58 Fed. Appx. 689, 2003 WL 193588, at \*2 (9th Cir. 2003) (purporting to construe California law) (holding that franchisor's lost profits due to bodily injury claims from franchisee's serving hamburgers contaminated with *E. coli* were not covered "damages because of bodily injury" because they were not "a measure of damage to the personal injury suffered by its customers"); *cf.* Lincoln Ins. Co. v. Home Emergency Servs., Inc., 812 So. 2d 433, 438 (Fla. Dist. Ct. App. 2001) (en banc) (finding that claim for spoliation of physical evidence was liability "because of bodily injury").

21. The amount of money a policy pays for a particular loss will be determined by the number of "occurrences" involved for occurrence-based policies, *see* Mason v. Home Ins. Co., 532 N.E.2d 526 (Ill. App. 1998); Fireman's Fund Ins. Co. v. Scottsdale Ins. Co., 968 F. Supp. 444 (E.D. Ark. 1997); and the number of "claims" for claims-made policies, *see generally* Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263 (Cal. 1993).

22. For claims under named-peril policies, the policyholder bears the burden of showing that its loss was caused by a specified peril. *See* Cont'l Food Prods., Inc. v. Ins. Co. of N. Am., 544 F.2d 834 (5th Cir. 1977) (insured failed to establish that the cause of defrosting of frozen meat during shipping was "due to, or caused by, derangement, breakdown, or stoppage of refrigerating plan and/or insulation, provided such derangement, breakdown, or stoppage continues for not less than 24 consecutive hours"); Thomas Roberts & Co. v. Calmar S.S. Corp., 59 F. Supp. 203, 211 (E.D. Pa. 1945) (insured failed to show that "mould, rust and stain" on cases of canned beets was from wetting from external sources instead of from moisture inherent in the gum veneer of the wood packing boxes); *cf.* Henri's Food Prods. Co. v. Home Ins. Co., 474 F. Supp. 889, 893 (E.D. Wisc. 1979) (ruling that insured satisfied its burden of showing that its loss was from the covered peril "smoke" where chemical residues were deposited on insured's pourable salad dressings stored in a warehouse that were contaminated via vapors from volatile chemicals stored nearby); *compare* Jerry's Supermarkets, Inc. v. Rumford Prop. & Liab. Ins. Co., 586 A.2d 539 (R.I. 1991) (finding coverage for food contamination, notwithstanding a power-interruption exclusion, because the loss of power was due to a hurricane), *with* Fed. Ins. Co. v. Bock, 382 S.W.2d 305 (Tex. Ct. App. 1964) (finding that the direct cause of loss of meat in cold storage was from covered "windstorm, hurricane" perils that damaged electrical transmission lines five miles from insured's location).

cussed below, contamination of foodstuffs with unapproved pesticides or other material meets the requirement for physical damage.<sup>23</sup> Typically, these policies indemnify the insured for the actual cash value of the damaged materials, which is usually determined flexibly under what is known as the broad-evidence rule, which permits consideration of market price, replacement cost, and other factors.<sup>24</sup> First-party property policies also may provide for mandatory or optional appraisal proceedings, where relevant experts in an arbitration-like setting determine the value of the loss (but not coverage questions such as the applicability of an exclusion).<sup>25</sup>

Where there is covered physical damage, first-party policies often separately provide coverage also for business interruption or lost-profits coverage stemming from a physical inability to continue to operate and for the cost of extra expenses to return the business to operation.<sup>26</sup>

### *C. Specialized Insurance Policies*

Both as a result of gaps exposed through insurance-coverage claims and litigation and in an effort to tailor standard coverage to the unique needs of the food industry, specialty insurance policies have been developed for the risks of loss associated with food and beverages. As will be discussed more specifically, policies designed to cover the costs of product recalls, product tampering, product rehabilitation, and related expenses are available through a handful of markets. Although these policies are not standardized, contaminated-products policies typically will cover the costs of inspecting, withdrawing, destroying, and replacing suspect products, plus various other expenses for product rehabilitation, crisis management, and, for extortion claims, ransom payments; they also may cover a firm's lost profits, business-interruption losses, and extra expenses. Specialized policies covering business interruption and lost profits due to the actions of food inspectors and other civil authorities likewise may better protect food

23. *E.g.*, *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055 n.2 (2d Cir. 1980) ("The fumigation of beans with a substance not acceptable in this country would seem to fall within the term 'damage'. . . . [I]f the beans were fumigated improperly, the claim of physical damage to the beans would be more apparent, [but] we do not believe that the issue is determinative as to whether the alleged losses are recoverable. If only the wrong fumigant was employed, there would still be 'damage' to the beans in the sense that the FDA required reconditioning and, as may be found on remand, the condition of the beans required sale at a lower price.").

24. *See Interstate Gourmet Coffee Roasters, Inc. v. Seaco Ins. Co.*, 794 N.E.2d 607 (Mass. App. Ct. 2003) (where employee's fingers were caught in a coffee-roasting plant's grinding machine, necessitating the destruction of the contaminated coffee and extensive clean up and sanitization measures, actual cash value was determined by intended selling price less unincurred packaging and delivery costs and not by cost of goods plus processing expense).

25. *See Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142 (Tenn. Ct. App. 2001).

26. *See infra* notes 61–63 and accompanying text.



manufacturers than will off-the-shelf insurance policy language.<sup>27</sup> And by purchasing “rejection insurance,” growers of organic crops may protect themselves from reductions in the prices they obtain should genetically modified materials be found in their harvests; similarly, cattle producers in some states were able to purchase a form of price-guarantee insurance pursuant to a federal government program, Livestock Risk Protection Insurance, that was suspended after its first few months of operations once a cow with bovine spongiform encephalopathy (mad cow disease) was discovered in the United States.<sup>28</sup>

#### D. *Impact of Insurance on Loss Avoidance*

Since the introduction of liability insurance in the 1880s, courts and others have expressed the concern that liability insurance obviates or reduces the need of a company to invest in loss avoidance and thus *increases* the number of injuries; this theme certainly has been struck in connection with food-liability matters.<sup>29</sup> Insurance companies have responded to the concern that insurance itself produces more losses (an epiphenomenon called moral hazard) by (i) evaluating prospective insureds for their suitability through underwriting,<sup>30</sup> (ii) providing loss-control services to and on-going monitor-

27. See, e.g., *Rolling Pin Bakery, Inc. v. Northwestern Nat'l Cas. Co.*, No. CO-95-1539, 1995 WL 756841 (Minn. Ct. App. 1995) (a governmental request that a bakery shut down constituted an “order by governmental authority” triggering business-interruption coverage under coverage for Shutdown from Food Contamination endorsement). Some insurance markets were available to U.S. cattle farmers to indemnify them for loss associated with government-ordered destruction of their herds due to bovine spongiform encephalopathy (BSE), markets that dried up following discovery of a BSE case in Washington state in late 2003. See Chris Grier, *Farmers Looking for Mad Cow Protection Have Limited Options*, *Best Wire* (Dec. 30, 2003); see also generally Chris Crowder, *Mad Cow Disease—21st Century Underwriting Issues*, available at <http://www.facworld.com/FACworld.nsf/doc/21stcenturycj> (last accessed Jan. 5, 2004).

28. Kim Bower-Spence, *Mad Cow: Last Minute Insurance Stampede*, *RISK & INS.*, Mar. 2004, at 4, available at [http://www.findarticles.com/cf\\_dls/m0BJK/3\\_15/114004896/p1/article.jhtml](http://www.findarticles.com/cf_dls/m0BJK/3_15/114004896/p1/article.jhtml) (last accessed Apr. 21, 2004); Chris Clayton, *Ranchers Scramble for Insurance* (Dec. 30, 2003), available at [http://www.omaha.com/toolbox/story\\_printer.php?u\\_id=96007&U\\_brow=Internet+Explorer&U\\_ver=5](http://www.omaha.com/toolbox/story_printer.php?u_id=96007&U_brow=Internet+Explorer&U_ver=5) (last accessed Jan. 5, 2004).

29. E.g., Buzby, et al., *supra* note 5, at 11 (“liability insurance distorts incentives to produce safer foods”). Liability insurance policies were initially challenged as being unlawful for this reason, but the courts by the early 1900s affirmed their validity. See *Breeden v. Frankford Marine Plate Accident & Glass Ins. Co.*, 119 S.W. 576 (Mo. 1909); Mary McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941); Gary Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

30. See REED DICKERSON, *PRODUCTS LIABILITY AND THE FOOD CONSUMER* 257 (1951) (“Before obtaining coverage [companies] are normally required to submit samples of products to be chemically analyzed, together with advertising claims and lists of ingredients. Inspectors [from insurance companies] are sent into plants to make a careful checkup of operating conditions and housekeeping methods. If the significant deficiencies are not corrected, the application is rejected.”).

ing of their insureds,<sup>31</sup> and (iii) imposing exclusions in their policies that bar coverage for intentional injuries, knowing violations of law, or other loss-producing (mis)conduct.<sup>32</sup> Additional tools for providing the insured with an incentive to avoid loss include premium pricing and co-insurance provisions, such as deductibles.<sup>33</sup>

No one has proven that the existence of liability insurance causes firms to invest less in avoiding losses than otherwise would be the case.<sup>34</sup> While theoretical models abound, most do not take into account the reality (particularly with regard to larger organizations) that the loss-causers usually are separate from the insurance purchasers, such that the individuals with the power to avoid loss cannot realistically figure in the availability of insurance on their safety and loss-avoidance decisions.<sup>35</sup> There is at best a split in the economics and the law-and-economics literature on the moral-hazard effect of liability insurance in particular.<sup>36</sup>

In the context of food-related claims, a company's interest in its reputation alone provides a substantial incentive to avoid losses, even if the costs of losses are transferred to some degree through insurance mechanisms.<sup>37</sup> As one study notes:

31. See CAROL A. HEIMER, *REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS* 13 (1985) ("In those cases in which insurers know some of the main causes of loss and have developed effective loss-prevention programs, coverage and rates are made contingent on use of loss-prevention equipment or techniques."); DICKERSON, *supra* note 30, at 258 (stating, "[E]ven after premiums are fixed or adjusted, most [insurance] companies police their larger risks with a view to discovering and removing conditions that may be the source of claims. They conduct periodic inspections and sometimes provide technical assistance. By education and persuasion, this too encourages care by the seller. . . . [T]his is truer of the larger risks than it is of the smaller.").

32. See McNeely, *supra* note 29, at 11:

[I]t is apparent that the technique of drafting specific clauses restricting the scope of coverage in cases involving illegal conduct has been improved. Such clauses, when well drafted and reasonable in the restrictions which they impose, have been permitted by the courts to be effective. When so effective they not only serve the insurer's purposes of minimizing his losses, but they serve the public end, of providing an auxiliary sanction causing insureds to behave more carefully, to conform more exactly to the applicable statutes and ordinances.

33. See DICKERSON, *supra* note 30, at 257–58 ("current methods of figuring premiums offer a real incentive, at least to many of the larger sellers"); Buzby et al., *supra* note 5, at 25, n.19 (recognizing this effect to a limited extent); HEIMER, *supra* note 31, at 13, 20 (noting that "co-insurance arrangements, deductibles and experience rating all force the policyholder to bear some of the financial burden of losses," "[s]uch arrangements . . . alter the incentive structure for the policyholders by forcing them to share all losses that they fail to prevent").

34. See Isaac Ehrlich & Gary Becker, *Market Insurance, Self-Insurance and Self-Protection*, J. POL. ECON. 623, 641 (1972) ("[N]o one has shown rigorously why, or under what conditions, market insurance reduces self-protection.").

35. See HEIMER, *supra* note 31, at 12.

36. E.g., John C. Moorehouse, *Pricing Insurance with Costly Information*, 19 ATLANTIC ECON. J. 41, 41 (1991) ("It is well known that a risk averse individual, who purchases actuarially fair insurance, will choose full coverage and exercise optimal care."); Schwartz, *supra* note 29, at 315 ("The efficiency of much of liability insurance is currently indeterminate.").

37. E.g., DICKERSON, *supra* note 30, at 253 ("Word-of-mouth notoriety is far more devas-

It is primarily the business disruption and negative publicity of the catastrophic foodborne illness or outbreaks that cost firms money, so it is these extraordinary, nonrecurrent illnesses or outbreaks that have the potential to substantively shape corporate behavior. In the rare instances where foodborne disease outbreaks are linked to particular firms, the impact on those firms can be large.<sup>38</sup>

Indeed, a recent study undertaken through Lloyd's emphasized that the "most valuable asset to a [food and beverage] organization's corporate image is the brand" and that "[p]roduct contamination, whether deemed accidental or malicious, is considered to be the most serious risk to corporate reputation."<sup>39</sup> Insurance company literature similarly has long emphasized the natural tendency of companies to avoid causing bodily injury claims because of reputational and, indeed, ethical concerns, contra to moral-hazard worries.<sup>40</sup>

There is no basis for a court reviewing a claim for coverage to import moral-hazard concerns so as to restrict coverage via interpretation if the insurance contract otherwise applies to the loss.<sup>41</sup> Similarly, although insurance companies properly may enforce intentional-injury and other exclusions in their policies, an insurance company's denial of coverage on the basis of moral hazard would be wholly improper.<sup>42</sup>

## II. INSURANCE RECOVERY FOR MANUFACTURERS AND SELLERS OF FOOD PRODUCTS

Manufacturers and direct sellers of food products obviously face the risk of consumer claims of foodborne illness, allergy, and other maladies. In most instances, these policyholders should find that the liabilities they face are covered under the liability-coverage provisions of their insurance pol-

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tating in its cumulative effect that the fleeting shadow of a single publicized judgment awarded an unknown plaintiff.").

38. Buzby et al., *supra* note 5, at 26 (internal footnote omitted).

39. *Corporate Image in the Food and Drink Industry* (Lloyd's 2000); see also Vowinkel, *supra* note 2, at 82 ("[T]he greatest threat to food companies is the loss of confidence in the quality of the products.") (quoting Robert Hartwig, chief economist of the Insurance Information Institute); *Corporate Reputation: Not Worth Risking* (Aon 2002) (taking into account recent corporate-credibility crises).

40. E.g., Gilbert L. Bean, *The Accident versus the Occurrence Concept*, 1959 INS. L.J. 550, 553 (recognizing the natural tendency to avoid bodily injury claims); ELMER SAWYER, *COMPREHENSIVE LIABILITY INSURANCE* 138 (1943) ("An accident from products . . . is no less likely to occur if there is insurance against it, and is no more likely to occur if insurance against it is excluded."); BARUCH BERLINER, *LIMITS OF INSURABILITY OF RISKS* 72-74 (1982) (in liability policies, there is little, if any, moral hazard created).

41. See *Edward Stern & Co. v. Liberty Mut. Ins. Co.*, 112 A. 865, 867 (Pa. 1921) ("Nor did the existence of the policy lead to aid or encourage an infringement of the law. . . . To refuse to sustain the contract would be to read into it an exception not contained therein nor thought of at its inception.").

42. See Marc S. Mayerson, "First Party" Insurance Bad Faith Claims: Mooring Procedure to Substance, 38 TORT TRIAL & INS. PRAC. L.J. 863 (2003).

icies. As one publication recently observed, "Most food firms are insured, and insurers pay the losses and costs of any litigation and damages."<sup>43</sup>

To date, there have been few reported coverage disputes regarding payment of liabilities for consumer claims arising from food-product contamination.<sup>44</sup> One area that has produced a handful of coverage disputes has been *E. coli* contamination. Surprisingly, some insurers have cited pollution exclusions to argue that coverage should be denied on grounds the introduction of *E. coli* 0157:H7 bacteria was a polluting event excluded from coverage. The courts have rejected this argument. For example, a vendor at a state fair allegedly used contaminated well water to make ice that was included in drinks served at the fair. The policy included an absolute pollution exclusion that barred coverage for liability resulting from pollutants, defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." As the court said, the "decisive issue is whether *E. coli* contamination, whatever the source, falls unambiguously within the pollution exclusion clause."<sup>45</sup> The court concluded that the policy provision was not so clear,<sup>46</sup> particularly in the light of the availability of policy language used by other insurers that defined contaminant or waste to include "biological and etiological agents or materials."<sup>47</sup> Another court addressing the same issue stressed that bacteria as living organisms were not similar to the inorganic wastes otherwise excluded under the pollution-exclusion clause.<sup>48</sup> The

43. Buzby et al., *supra* note 5, at 9. Some companies may not have insurance and instead pay claims out of operating income and reserves. See also DICKERSON, *supra* note 30, at 258, 267.

44. Associated Press, *Report: '98 Salmonella Outbreak Rarer Than Believed*, Nov. 15, 1999, at [www.intelihealth.com/IH/ihtPrint/EMHC000/333/7228/252568.html](http://www.intelihealth.com/IH/ihtPrint/EMHC000/333/7228/252568.html)? (last accessed Apr. 22, 2004) (insurance company paid more than \$1 million in settling claims from customers at a barbeque restaurant for *Salmonella bredeney*, the first such incident to be reported in sixteen years). In this regard, it is worth noting that many policies include medical-payments coverage, which essentially provides a limited dollar amount of coverage (e.g., \$15,000) for claims for medical expenses of consumers and is payable without any detailed showing by the insured of wrongdoing or causation.

45. *Eastern Mut. Ins. Co. v. Kleinke*, No. 2123-00, slip op. at 8 (N.Y. Supr. Ct., Jan. 19, 2001), *reprinted in* 16 Mealey's Litig. Rep.: Ins. at A-4 (Apr. 16, 2002).

46. The court also found that the allegations against the insured held open the possibility that the vector for *E. coli* contamination was not well water but instead was unsafe food-handling practices at the fair; this alternative theory of causation was sufficient to require the insurer to defend the insured under the broader duty-to-defend standard, because this vector of contamination could not plausibly be thought of as a pollution or contamination event within the contemplation of the absolute pollution exclusion. *Id.*

47. *Id.*, *citing* *East Quincy v. Cont'l Ins. Co.*, 864 F. Supp. 976 (N.D. Cal. 1994); *see also* *Watters v. Dep't of Soc. Servs.*, No. 2001-1775 (La. Dist. Orleans Parish June 16, 2003) (construing exclusion for "organic pathogen"), *reported in* 17 Mealey's Litig. Rep.: Ins., No. 32 (June 24, 2003). *See* *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1118-19 (S.D.N.Y. 1973) (availability of other policy language can indicate ambiguity of a different form that does not use that language), *aff'd*, 505 F.2d 959, 1000-02 (2d Cir. 1974).

48. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 790 (Ariz. Ct. App. 2000).

court emphasized that construing the pollution exclusion to apply to claims of bacterial contamination would be inconsistent with the purpose of the clause, the insurance contract as a whole, and public policy.<sup>49</sup>

Separate from claims under liability insurance policies for consumer bodily injuries, insureds have made claims under first-party property policies where they have destroyed their own contaminated inventories. The courts uniformly have recognized that adulteration of food products qualifies as covered physical damage to property owned by the insured.

For example, in one case, the policy provided coverage for “all risks of physical loss or damage,” and the policyholder sought recovery with respect to destroyed cans of cream-style corn that were underprocessed and consequently were susceptible to spoilage and unfit for consumption.<sup>50</sup> The cans had two different kinds of ends, one of which allegedly caused the cans to underrotate during processing. The insurance company argued that the policyholder all along unknowingly produced underprocessed cans and that only a change in testing methods detected the problem; accordingly, the insurer argued that the loss was not fortuitous (an essential requirement for insurance recovery) or was due to inherent defects or vice in the product (which was excluded). The court rejected these arguments, finding that “the risk that the [production] process would fail is one covered by the policy.”<sup>51</sup>

In addition to such intrinsic contamination claims, food producers and purveyors face the risk that foreign material may be introduced into their products, rendering them unfit; this will typically result in the destruction of the exposed products and sometimes its impoundment by governmental authorities. In one recent case, the insurer sought to deny coverage because the insured had not tested each item for the contaminant but instead had destroyed all possibly exposed product. The court refused to limit coverage or find the insured had failed to prove the property (ham products) had been physically injured from accidental exposure to anhydrous ammonia gas, which discolored some products in part and caused others to smell of ammonia but most of which when tested did not indicate harmful concentrations. As the court explained:

[E]ven if the insured destroyed too much of the ham rather than examining it piece by piece to see which was discolored and which smelled of ammonia, . . . no duty of minimizing damages would require [the insured] to so segregate the thousands of pieces of ham involved when there was a very real chance of risk to human health in selling the product for human consumption.<sup>52</sup>

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49. *Id.*

50. *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396 (D. Minn. 1989).

51. *Id.* at 1401.

52. *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 375 (4th Cir. 2003); *see also generally Allianz Ins. Co. v. RJR Nabisco Holdings Corp.*, 96 F. Supp. 2d 253 (S.D.N.Y. 2000) (trimethyl benzene causing displeasing taste and odor).

Courts tend to find covered causes of loss for the destruction of food products due to public-health concerns and adverse market consequences. In one case, a confectionery shop discovered that a worker had been exposed to hepatitis A, notified authorities, and, like the insured in the ham case, destroyed its entire inventory. The Montana Supreme Court ruled in favor of coverage, holding that a contamination exclusion did not apply because there was only possible, not proved, contamination of the inventory and that a governmental-action exclusion did not apply because, though the exposed products were embargoed by the government, the confectioner had destroyed the inventory on its own, which was the dominant cause of the actual loss.<sup>53</sup> In another case, where government authorities condemned pourable salad dressing that had been contaminated from chemical vapors, the noxious vapors were held to be the dominant—and covered—cause of the insured's loss rather than the consequent uncovered "act of civil authority" condemning the inventory.<sup>54</sup>

One fact pattern that has produced several cases has been the exposure of foodstuffs to a chemical agent that is not approved for human consumption or is not approved for the particular food. Against the backdrop of the food-regulatory regime in this country, the courts have not hesitated to find that physical damage had occurred, even where the chemical in question posed no actual human health threat. In one case, beans were fumigated by a chemical not approved for use in the United States, though it was approved in the country where the fumigation occurred, yet the court concluded that covered physical damage to the beans had occurred. As the court explained:

The fumigation of beans with a substance not acceptable in this country would seem to fall within the term "damage". . . . [I]f the beans were fumigated improperly, the claim of physical damage to the beans would be more apparent, [but] we do not believe that the issue is determinative as to whether the alleged losses are recoverable. If only the wrong fumigant was employed, there would still be "damage" to the beans in the sense that the FDA required reconditioning and, as may be found on remand, the condition of the beans required sale at a lower price.<sup>55</sup>

As a result, the court recognized that the first-party policy coverage applied to the loss the insured suffered from physical damage to its property.

Similar facts were presented in a recent case involving a major food manufacturer where an independent contractor treated grain stocks with a

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53. *Duensing v. Travelers' Cos.*, 849 P.2d 203 (Mont. 1993).

54. *Henri's Food Prods. Co. v. Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wisc. 1979).

55. *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055 n.2 (2d Cir. 1980).

pesticide unapproved for application to the grain in question (oats), but approved for other foods and not itself dangerous for human consumption.<sup>56</sup> The court found the requisite property damage triggering coverage, reasoning: "The business of manufacturing food products requires conforming to the appropriate FDA regulations. Whether or not the oats could be safely consumed, they legally could not be used. . . . The district court did not err in finding this to be an impairment of function and value sufficient to support a finding of physical damage."<sup>57</sup>

That court also addressed a contamination exclusion, which excepted from its scope (and thus permitted coverage for) risks of loss not enumerated in the exclusion; because the risk of third-party negligence was not expressly excluded (unlike vice, latent defect, and others), the court held that the exception preserving coverage was satisfied.<sup>58</sup> On the other hand, exclusions without such exceptions have been found to apply to chemical exposures, such as the leakage of ammonia from refrigeration units.<sup>59</sup> One recent case refused to confine excluded contaminants to chemicals or the like and held that a contamination exclusion applied to loss from the destruction of prepared foods and sanitization of equipment after the discovery of *Listeria monocytogenes* bacteria; the court reached this conclusion, however, without considering the uniform case law finding coverage for other bacterial outbreaks under such exclusions (so the insured had no reason to believe that a core risk of loss for its business of preparing sandwiches and other foods would be left uninsured), or recent appellate case law in the same state (Wisconsin) that adopted a considerably more liberal construction of coverage even for true environmental-contamination claims, or prior food-contamination cases in Wisconsin, where the carrier

56. *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001).

57. *Id.* at 152; *see also* *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (9th Cir. 1986) ("loss in value of Hampton's inventory necessitated by the sudden evacuation" constituted "loss"). *Compare* *Zurich Am. Ins. Co. v. Cutrale Citrus Juices USA Inc.*, 2002 WL 1433728 (M.D. Fla. Feb. 11, 2002) (introduction of glycol inconsistent with product's labeling constituted third-party property damage even though product could have been safely and lawfully sold with different labeling).

58. *Gen. Mills*, 622 N.W. 2d at 153; *accord* *Allianz Ins. Co. v. RJR Nabisco Holdings Corp.*, 96 F. Supp. 2d 253 (S.D.N.Y. 2000) (holding that contamination exclusion did not apply to contamination of food products exposed to trimethyl benzene from the warehouse where they had been stored, which, though posing no health risk, resulted in a displeasing odor and taste, prompting the recovery and destruction of over a million cases of food); *see also* *Raybestos-Manhattan, Inc. v. Indus. Risk Insurers*, 433 A.2d 906 (Pa. Super. Ct. 1981) (fuel oil negligently introduced into heptane tank by third party); *cf.* *Bruce Oakley Inc. v. Farmland Mut. Ins. Co.*, 245 F.3d 1027 (8th Cir. 2001) (holding that damage to soybeans stored in a bin that auto-oxidized from a mold were damaged by heat, a covered risk, generated from the fungus or, alternatively, under an ensuing-fire exception to a mold exclusion). The *General Mills* court also rejected application of a faulty workmanship/materials exclusion because it did not reasonably refer to grain-stock contamination. *Gen. Mills*, 622 N.W.2d at 153–54.

59. *See* *Am. Produce & Vegetable v. Phoenix Assurance Co.*, 408 S.W.2d 954 (Tex. Ct. App. 1966); *Am. Cas. of Reading, PA v. Myrick*, 304 F.2d 179 (5th Cir. 1962).

did not assert a (presumably present) contamination exclusion, all of which suggests that excluded pollution or contamination does not extend to increased levels of common bacteria.<sup>60</sup> Courts more typically have required insurers of food producers that wish to exclude bacteriological contamination to do so expressly and by name, rather than to back-door such exclusions through generic pollution exclusions or their equivalent.

Where there is a covered loss, first-party property policies also may provide coverage for loss of business income arising from the damaged property, plus indemnification for any extra expenses the insured incurs to maintain its operations (and thus its business income) stemming from damage to its property.<sup>61</sup> One business-interruption case in the food-contamination context arose in Australia when a processor of peanuts was closed down following discovery in its production line of *Salmonella* contamination, which had led to bodily injury claims.<sup>62</sup> Regional authorities suspended operations of the roasted-peanut plant, and after a few weeks the company was operational again, subject to its complying with new manufacturing requirements imposed by the authorities. The court found in favor of coverage for the costs associated with the initial outbreak, but ruled the insurer was not obliged to pay for the additional expenses associated with operating the plant in a manner that would avoid such contamination in the future.<sup>63</sup>

In addition to destroying or rectifying existing inventory of foodstuffs that may have been contaminated, policyholders also may recall and re-

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60. *Landshire Fast Foods v. Employers Mut. Cas. Co.*, 676 N.W.2d 528 (Wis. Ct. App. 2004); as to environmental-contamination coverage, see *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257 (Wis. 2003), and as to prior food-contamination coverage cases, see *U.S. Fire Ins. Co. v. Good Humor Corp.*, 496 N.W.2d 730 (Wis. Ct. App. 1993) (*listeria*); *Holsum Foods Division v. Home Ins. Co.*, 469 N.W.2d 918 (Wis. Ct. App. 1991) (*glass*).

61. Extra-expense coverage will reimburse the insured (subject to the policy's terms) for a variety of additional costs the insured incurs in setting up alternative facilities and the like. See *Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 693 (3d Cir. 1991) (increased payroll for overtime, additional utility expense, alternative office space); *Charles Dowd Box Co. v. Fireman's Fund Ins. Co.*, 218 N.E.2d 64, 71 (Mass. 1996) (overtime, utility, and telephone costs); *Travelers Indem. Co. v. Pillar Friendly Ford Co.*, 512 S.W.2d 375, 377 (Tex. Ct. App. 1974) (overtime, rent for alternative office space, temporary property, cleanup expenses); *A. Miller & Co. v. Cincinnati Ins. Co.*, 577 N.E.2d 885, 887 (Ill. 1991) (overtime, additional storage and transportation costs, replacement of inventory and raw materials used to reduce the overall loss); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531, 533 (8th Cir. 1966) (replacement of inventory and raw materials to reduce the loss).

62. *PMB Australia Ltd. v. MMI Gen. Ins. Ltd.*, 12 ANZ Ins. Cases 61-537, 2002 WL 31089682 (Court of Appeal of Sup. Ct. of Queensland, Sept. 20, 2002).

63. *Id.* at ¶ 19 ("[I]t was for the [insured] to establish what loss directly resulted from interruption to the business in consequence of the contamination, being the loss referable to the specific instance of contamination, not extending to the broad 'new awareness' [of the risk of salmonella] aspect.").



move unsold product from distributors' and retailers' stocks and from end-users who have purchased the product.<sup>64</sup> Nearly a decade ago, when batches of pasteurized ice cream from a manufacturer were discovered to be contaminated with *Salmonella*, the company initiated a recall—and, as reported by the press, the millions in dollars in costs were not covered by any insurance.<sup>65</sup> (As will be discussed in the next section, processors and suppliers of a component of a food product have fared better in recovering at least some recall-related costs.<sup>66</sup>) Recalls also are common for mislabeling, that is, selling a product that includes an ingredient not disclosed on the label, though microbiological contamination appears to be the most frequent cause of food-related recalls.<sup>67</sup>

The expense of conducting product recalls and the attendant losses suffered by companies spurred insurers to develop stand-alone contaminated-products policies. The core protection afforded by these policies relates to expenses for issuing warnings and notices of the recall, transportation costs,

64. Once contamination is discovered, the FDA does not itself order a recall; instead, if a manufacturer does not comply after the FDA suggests one, the FDA can seek a court order authorizing the federal government to seize the product. See JAMES O'REILLY, *FOOD CRISIS MANAGEMENT MANUAL* (2002). Not every retrieval of product already in the stream of commerce constitutes a recall for FDA purposes. The Johnson & Johnson recall of 31 million bottles of Tylenol did not constitute a recall under the FDA's technical requirements, but rather was a market withdrawal, because the contamination in that case resulted from product tampering without evidence of manufacturing or distribution problems. A recall in FDA parlance indicates some legal or regulatory violation and the risk (if not the actuality) that the product in question could be hazardous. *Id.*

65. Dave Lenckus, *Ice Cream Company Uninsured for Recall of Tainted Products*, BUS. INS. (Oct. 24, 1994) (Schwan's Sales Enterprises). One of the largest recalls was the 2002 recall by Pilgrim's Pride Corporation of some 27.5 million pounds of poultry lunch meats for possible *Listeria monocytogenes* contamination after a July 2002 listeriosis outbreak in New York. See Congressional Research Service, Report #IB10082, *Meat and Poultry Inspection Issues* at 9 (Aug. 1, 2003).

66. Typically, commercial liability-insurance policies contain a products-recall (or "sister-ship") exclusion whose purpose is to exclude from coverage the costs of a recall; this exclusion's scope has been limited to the costs of recalling products that have yet to fail or be damaged, that is, it applies when products are recalled as a prophylactic measure; the exclusion typically does not apply to costs associated with particular products that have been damaged or injured at the time of the recall. See *infra* notes 87–102 and accompanying text. Coverage under liability policies has not hinged on the "voluntariness" of a recall spurred by action of (and threatened impoundment by) the FDA or the Food Safety and Inspection Service (FSIS) of the Department of Agriculture, though the fact that it is the insured's self-directed action that most immediately results in physical losses has enabled some policyholders under first-party policies to sidestep "civil authority" exclusions. See *supra* notes 53–54 and accompanying text.

67. Employers Reinsurance Company maintains a list of food-related recalls on its website. See [http://www.ercgroup.com/gpc/resource\\_center/product\\_recalls/cat3.html](http://www.ercgroup.com/gpc/resource_center/product_recalls/cat3.html) (last accessed Dec. 14, 2003). A study of European Union countries showed that "microbiological contamination is clearly the most common cause" of food-related recalls. See General Cologne Re, *Recall of Food and Beverage*, Loss & Litig. Rep. 3 (Jan. 2003). One reinsurer's study indicated that more than half of food and beverage recalls were due to some form of contamination or product tampering. *Id.* at 4.

checking the recalled products, and disposing of defective or contaminated components or entire irreparable products.<sup>68</sup> Additional costs that may be covered include the costs of repairing, reprocessing, and replacing defective products as well as product refunds. Lost profits and expenses to rehabilitate the product's reputation likewise may be covered.<sup>69</sup>

In these specialized policies, contamination coverage often is divided between (i) accidental-contamination claims and (ii) malicious-contamination claims. Accidental-contamination coverage may be limited to substances that likely will result in actual bodily injury or sickness, whereas malicious-contamination coverage includes substances that merely are unfit for consumption (but which may not be injurious). In one case, recovery under malicious-contamination coverage was denied where a vendor substituted a cheaper, unapproved pesticide to treat grain stocks, and the insured needed to destroy the lot, even though no human health risk was posed. Because the individual that introduced the unapproved substance did not do so for the purpose of harming the insured, the court found that the policy, which covered "intentional, malicious and wrongful" tampering, did not apply because the tampering there involved only ordinary malice as opposed to actual malice.<sup>70</sup>

Product-contamination policies also may include coverage for product extortion, an extension of coverage growing out of corporate kidnapping-and-ransom policies. Where such coverage is afforded, the insured ordinarily commits to keep its existence a secret, and a professional-consulting firm identified by the insurer typically is required to be involved. Extortion coverage also will indemnify the insured for ransom money and incidental travel and related expenses.

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68. See SWISS RE, *PRODUCT RECALL AND PRODUCT TAMPERING INSURANCE* at 40–41 (1998). In 2001 a standard endorsement was introduced by the Insurance Services Office entitled the "Limited Product Withdrawal Expense" endorsement, which reimburses the insured for product withdrawals based on concerns of anticipated bodily injury or property damage or of product-tampering, but this limited coverage does not cover the costs of defending suits against the insured.

69. These policies may require that the recall be responsive to government requests or undertaken with the approval of the insurer; the rationale for such requirements is to preclude product upgrades from being camouflaged as otherwise-covered product recalls.

70. *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 154–55 (Minn. Ct. App. 2001). Another case involving a product-contamination policy in the food context is *Nat'l Union Fire Ins. Co. v. Stroh Cos.*, 265 F.3d 97 (2d Cir. 2001) (involving accidental contamination of glass shards, largely concerning questions of nondisclosure and known loss rather than the terms of the coverage). Several incidents of intentional contamination of food have occurred, the best known being the deliberate introduction of *Salmonella typhimurium* onto foodstuffs on salad bars in restaurants in The Dalles, Oregon, by members of a religious cult in an act of bioterrorism in 1984; more recently, in May 2003 a supermarket employee pleaded guilty to having intentionally added an insecticide to ground beef sold in one store. See Vowinkel, *supra* note 2, at 81.

### III. INSURANCE RECOVERY FOR SUPPLIERS AND PROCESSORS OF FOOD-PRODUCT COMPONENTS

Companies engaged in supplying or mixing foodstuffs face different risks from those of finished food-product manufacturers and sellers. Though product-liability principles expose suppliers to claims directly from consumers, more often suppliers and processors face claims from the finished-food product manufacturers and sellers after they have been sued by consumers (or after the manufacturer or seller discovers a potential problem and seeks to recover its own loss-avoidance costs).

The supplier's or processor's provision of a contaminated product may breach standards of performance under its contract. But that the liability arises (at least in part) *ex contractu* does not end the inquiry vis-à-vis insurance coverage, because standard policies unquestionably apply to contract-related liabilities, so long as claims of bodily injury or property damage are involved.<sup>71</sup>

In the food context, the courts tend to construe the meaning of prong 1 property damage, that is, "physical injury to tangible property," expansively and practically, recognizing the nature of food regulation and consumer expectations. A classic case in this area is *Ritchie v. Anchor Casualty Co.*,<sup>72</sup> which involved a nut company that supplied rancid peanut oil for use in manufacturing corn chips. Rejecting the insurer's argument that the insured's liability was contractual and not covered, the *Ritchie* court ruled that the policy afforded coverage for the property damage from the rancid oil:

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71. See *Am. Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 77 (Wis. 2004) ("[T]here is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage."); *Vandenberg v. Sup. Ct.*, 982 P.2d 229 (Cal. 1999); *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294 (Colo. 2003); *Vigna v. Allstate Ins. Co.*, 686 A.2d 598 (Me. 1996). See also *Zurich Am. Ins. Co. v. Cutrale Citrus Juices USA, Inc.*, No. 5:00-CV-149-OC-10GRJ, 2002 WL 1433728, at \*3 (M.D. Fla. Feb. 11, 2002) (inadvertent addition of glycol to supplied juice, which posed no human health threat but which was unlabeled, resulted in property damage to finished juice product with which it was mixed; consequently, the juice-supplier/insured's liability was not solely for breach of the standard for performing under the juice contract); *Chubb Ins. Co. v. Hartford Fire Ins. Co.*, 229 F.3d 1135 (2d Cir. 2000) (in an action for coverage concerning alleged failure to supply 100 percent pure apple juice concentrate per contract specifications, court "reject[s] Hartford's argument that a breach of contract or warranty can never constitute an 'occurrence'" where "property sold by the insured to a third party, which was then incorporated into other property belonging to the third party, caused damage to this other property"); *Sethness-Greenleaf, Inc. v. CIGNA Prop. & Cas. Co.*, No. 94 C 6002, 1995 WL 571866, at \*5 (N.D. Ill. Sept. 22, 1995) ("In this instance, although Cosco has chosen to seek recovery on the basis of its contractual relationship with Sethness, the damages it seeks to recover represent injury to other property [the fruit drink product recalled and destroyed] caused by the defective concentrate.").

72. 135 Cal. App. 2d 245 (Ct. App. 1955).

When American Nut Company bought a property damage endorsement to protect against accidents growing out of the handling or use of its products or any condition in products manufactured, sold, handled or distributed by it, a reasonable expectation would be protection against the type of liability which would ordinarily grow out of its kind of business. . . . The insurer is presumed to have known of the nature of applicant's business and that it was one in which accidents might occur, not through explosion or violence of any kind but through an unwholesome condition in a food product such as peanut oil. Naturally sales are not conducted wholly through written contracts. And every sale of foodstuffs carries an implied warranty of fitness for consumption. Normally a businessman who takes "comprehensive" insurance with express coverage of "products property damage" would expect his ordinary transactions to be covered. If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear and unmistakable language.<sup>73</sup>

Moreover, in finding physical damage, the courts have not required insureds to separate out possibly undamaged foodstuffs that are part of the same lot (though costs associated with undamaged foodstuffs in any event would fall within prong 2, loss-of-use property-damage coverage, if the policy provides it).<sup>74</sup> In the more recent *Shade Foods* case,<sup>75</sup> the insured supplied nut clusters to a breakfast-cereal manufacturer, some of which were found to contain wood slivers; the manufacturer destroyed the entire lot of cereal that potentially contained the foreign material, and the court found coverage for the manufacturer's entire claim against the insured (including the product the manufacturer prophylactically destroyed).<sup>76</sup> Another recent case involved a supplier of carbon dioxide gas for use in soft-drink manufacturing whose product was discovered to include benzene, albeit in amounts that did not pose a risk of injury to people. Nevertheless, the court found that the soft drinks with the tainted carbon dioxide were physically injured: "The carbon dioxide adulterated with a known carcinogen, benzene, rendered the beverages useless for its [*sic*] intended purpose, human consumption, [and] . . . like the wood-laced nut clusters in *Shade*

73. *Id.* at 257-58 (footnotes omitted).

74. One case involved a company that leased a deboning machine to a meat packer, and the machine did not debone the meat sufficiently to permit it to be sold. The court held that the failure to remove the requisite amount of bone did not constitute "physical injury to tangible property" (prong 1), *Kartridg Pak Co. v. Travelers Indem. Co.*, 425 N.W.2d 687 (Iowa Ct. App. 1988), though a later court strongly suggested that coverage would have applied had the *Kartridg Pak* policy included coverage for "loss of use of tangible property which has not been physically injured or destroyed" (prong 2). See *Nat'l Union Fire Ins. Co. v. Terra Indus.*, 216 F. Supp. 2d 899, 912-13, n.5 (N.D. Iowa 2002), *aff'd*, 346 F.3d 1160 (8th Cir. 2003).

75. *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847 (Ct. App. 2000).

76. *Id.* at 865-66. *Accord* *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 375 (4th Cir. 2003).

*Foods* . . . the beverages were damaged by the introduction of potentially injurious material, the carbon dioxide containing a known carcinogen.”<sup>77</sup>

The coverage afforded by general-liability policies may be limited, however, by application of a number of different exclusions often lumped together as the so-called business-risk exclusions. The essential purpose of the various business-risk exclusions is to demarcate warranty and nonconformity-to-specification claims (which may not be covered) from claims for damage to the property of a third party, which unquestionably are covered.<sup>78</sup> Put differently, these exclusions help police the boundary between insurance policies, on the one hand, and warranties and performance bonds, on the other.<sup>79</sup>

One of these exclusions, the injury-to-products or own-products exclusion, has been at issue in a number of food-contamination cases. For example, in *Holsum Foods Division v. Home Insurance Co.*,<sup>80</sup> the policy barred coverage for “property damage to the named insured’s products arising out of such products or any part of such products.” Under license, Holsum had manufactured and packaged barbecue sauce; the ingredients, jar, label, and cap were supplied by the licensor, and Holsum mixed the ingredients, added a sweetener it supplied, cooked the mix, and put it into jars (which were then packed into cases and stored until shipment). Glass chips were

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77. *Terra Indus.*, 216 F. Supp. 2d at 917–18. A similar case involved a fruit-juice supplier whose equipment inadvertently leaked food-grade propylene glycol into its not-from-concentrate orange juice that it in turn sold to a finished juice-product manufacturer, which sought damages even though the juice still was fit for human consumption if different labeling were applied. As the court held:

Fruit juice is tangible property, and the accidental introduction of an adulterant is a physical event that causes injury or damage just as surely as the damage resulting from the collision of two automobiles. [Footnote omitted] Further, the fact that the adulteration does not make the resulting blend totally unfit for human consumption (so that the blended juice might still be marketed under different labeling), does not alter the conclusion that damage has occurred.

*Zurich Am. Ins. Co. v. Cutrale Citrus Juices USA Inc.*, 2002 WL 1433728, at \*3 (M.D. Fla. Feb. 11, 2002).

78. See generally *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004).

79. “Business risk” often is invoked as a shibboleth by insurance companies in seeking to deny coverage, but it is established that theoretical constructs like business risk are not themselves sufficient to deny coverage that the policy language otherwise provides. As the South Carolina Court of Appeal observed in a similar context:

The [insurance] industry has now taken to arguing that whenever a claim of defective construction is alleged against an insured, the claim is automatically barred from coverage as not constituting an “occurrence.” This position is nothing more than a rehash of the “business risk” doctrine, whose success depends entirely on courts ignoring the actual language of the CGL policy.

*L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 567 S.E.2d 489, 492 n.8 (S.C. Ct. App. 2002) (citation omitted); accord *Erie Ins. Exch. v. Colony Dev. Corp.*, 736 N.E.2d 941, 947 (Ohio Ct. App. 1999).

80. 469 N.W.2d 918 (Wis. Ct. App. 1991).

discovered in 2 to 3 percent of the jars, which had been caused during bottling when the filler tube struck the inside of the jars. The entire lot was destroyed because there was no way to assess which jars contained glass shards.

The question in *Holsum* turned on whether the barbecue sauce was Holsum's product or whether Holsum had provided a service that damaged the product owned by the licensor. Because Holsum provided one ingredient and cooked and mixed all the ingredients together, the court found that the barbecue sauce was Holsum's product, notwithstanding that the recipe and packaging (including the glass jars) belonged to the licensor.<sup>81</sup> And although the exclusion required that damage "arise[e] out of such products," the court, without much analysis, rejected Holsum's argument that the exclusion should not apply because the glass shards were injury *to* the product and not *from* the product.<sup>82</sup> In contrast, the Supreme Court of Washington found the injury-to-products exclusion inapplicable where the insured warehousemer merely affixed packer-supplied labels to cans of salmon and boxed the cans using its own casing equipment; the casing machine inadvertently crimped and broke the seal of a small number of the cans, thus posing the risk of botulism contamination. The Washington court found the exclusion did not apply because the warehousemer

did not manufacture anything: it affixed the packers' labels to the packers' cans and placed them in the packers' boxes. . . . We hold that an "insured's product" refers to goods or products in which the insured trades or deals, including goods created or manufactured by the insured. [The insured] did not trade or deal in, manufacture or create the packers' canned salmon.<sup>83</sup>

Another contamination case applied the injury-to-products exclusion in part, but afforded indemnification to the insured, a milk cooperative, for some of the damages claimed against it. In that case, a dead mouse was found in the hose leading from a milk truck to a storage silo; the court

81. *Id.* at 921.

82. *Id.* at 922. An appeals court in Minnesota relied on the *Holsum* decision in barring coverage under a broader injury-to-products exclusion, when a dairy processor sought coverage stemming from *Salmonella* contamination (and the subsequent recall of its products) for claims brought by its customers for "manufacturing and consultant costs, recall costs, replacement and procurement costs, removal and disposal costs, storage and inventory costs, transportation costs, lost sales, lost profits, loss of customers, loss of opportunity, and loss of goodwill." *Maple Island, Inc. v. St. Paul Mercury Ins. Co.*, No. C8-96-2352, 1997 WL 406647 (Minn. Ct. App. July 22, 1997). *See also* *Nu-Pak, Inc. v. Wine Specialties Int'l Ltd.*, 643 N.W.2d 848 (Wis. Ct. App. 2002) (company that mixed and packaged a frozen wine product that was unmerchantable because of quality-control problems was not entitled to coverage because the wine pouches were its product because it manufactured and handled them pursuant to the processing and packaging agreement).

83. *Olympic S.S. Co. v. Centennial Ins. Co.*, 811 P.2d 673, 679-80 (Wash. 1991). On the products/nonproducts distinction in insurance more generally, *see* Eric G. Lasker, *Product Liability Claims: A Litigator's Guide*, 31 THE BRIEF 26 (2002).

found that the cost of the milk itself (the insureds' product) was excluded, but that the cost of cleaning the silo was covered because the silo was the property of a third party that was injured (in that it was rendered unclean) from the contaminated product.<sup>84</sup> A nuanced application of the injury-to-products exclusion is *L.D. Schreiber Cheese Co. v. Standard Milk Co.*,<sup>85</sup> where, after a number of bodily injury claims were made on a retail grocery store chain, a wholesaler of cheese was required to test for the presence of staphylococci bacteria in its entire inventory, which had been impounded; ultimately, roughly 3 percent of the cheese supplied by the dairy producer was found to be contaminated, and the remainder was then sold. The court found that the commingling of good cheese with the contaminated cheese was an accident separate from the initial contamination and refused to find that the good cheese should be considered to be part of the same lot as the contaminated cheese (and thus to be the same excluded "product" out of which the accident arose).<sup>86</sup>

Another exclusion typically at issue in insurance-coverage disputes for food-related liability is the products-recall or sistership exclusion. The terms of this standard exclusion vary,<sup>87</sup> but generally speaking it is designed to bar coverage for the costs of withdrawing unsold and undamaged goods from inventory when a potential product defect has been discovered.

One limitation on some versions of the sistership exclusion adopted by most courts is that it does not apply where recall costs are claimed against the insured as an element of third-party damages. For example, in the well-known *Thomas J. Lipton* case,<sup>88</sup> New York's highest court affirmed coverage for a manufacturer of noodles that had been sold to a soup-mix manufacturer for use in its dry-soup mixes.<sup>89</sup> After it was discovered that some of

84. *Lowville Producer's Dairy Coop., Inc. v. Am. Motorists Ins. Co.*, 604 N.Y.S.2d 421 (App. Div. 1993). See also *Liberty Mut. Ins. Co. v. Consol. Milk Producers' Ass'n*, 354 F. Supp. 879, 884 (D.N.H. 1973) (holding the injury-to-products exclusion barred coverage for the replacement and recovery expenses claimed against a producer of coffee creamers that were "sour, spoiled, [or] unpalatable.>").

85. 457 F.2d 962 (8th Cir. 1972).

86. *Id.* at 967-68. During the period of testing, the loss of use of the uncontaminated products also may constitute "prong 2" loss-of-use property damage. See *Wagner v. Milwaukee Mut. Ins. Co.*, 427 N.W.2d 854, 856-57 (Wis. Ct. App. 1988) (where gasoline from a ruptured pipe had leaked into a neighboring sewer, there was prong 2 property damage: "Loss of use does not require abandonment of the property for any use, nor total and complete loss of use. The presence of gasoline fumes and liquid in the sewer created a dangerous condition, susceptible to either fire or explosion. This condition affected the use and safety of the sewer line and could not be ignored. Because the sewer lines could not be used without returning them to an uncontaminated state, the contamination constitutes loss of use under the policy.>").

87. E.g., *Sethness-Greenleaf, Inc. v. CIGNA Prop. & Cas. Co.*, No. 94 C 6002, 1995 WL 571866, at \*6 (N.D. Ill. Sept. 22, 1995). The term "sistership" reflects the aviation origin of the term whereby once an airplane was discovered to have a problem, the cost of testing and altering its sister airships was excluded.

88. *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 357 N.Y.S.2d 705 (1974).

89. The exclusion at issue (a second policy used a slightly different version) stated:

the noodles were contaminated, the soup-mix manufacturer recalled and destroyed its inventory of finished mixes and noodles and sued the noodle maker for reimbursement and other damages. The court recognized that the elements of damages sought by the mix manufacturer<sup>90</sup> “would usually be some of the largest foreseeable elements” of damages that would be claimed “in consequence of defects in [the noodle maker’s] products.”<sup>91</sup> Consequently, New York’s high court held that the sistership exclusion did not clearly and unambiguously apply to bar coverage for damages in the form of the costs of conducting the recall incurred by the mix manufacturer, a third party.<sup>92</sup>

This third-party exception to the sistership exclusion was adopted by the Supreme Court of Washington in the case, mentioned above, of the warehouse whose packing machinery damaged cans of salmon. There, the casing machine had been in use for six months before it was discovered that the machine was breaking the seams of a small percentage of the cans of salmon. The risk of botulism was reported to the Food and Drug Administration, and a product recall was initiated. The FDA required that the packers and their association retrieve and inspect the cans and destroy any tainted ones. The warehouse company did not participate in the recall or inspections, and it in turn received claims from the packers and the association for their costs in uncasing, inspecting, and recasing the cans of salmon and for the loss of use (sales) of the undamaged cans during the recall. In finding in favor of coverage, the court held that

[A] review of state authority reveals that a majority of the jurisdictions . . . conclude that a sistership clause does not exclude coverage if a third party

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This insurance does not apply . . . to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured’s products or work completed by or for the named insured or of any property of which such products or work forms a part if such products, work or property are withdrawn from the market or from use because of any known or suspect defect or deficiency therein.

*Id.* at 706–07.

90. The damages sought were (i) property damage to soup mix incorporating the noodles; (ii) property damage to the stocks of noodles that should have been free of contamination; (iii) the internal costs of employees involved in the withdrawal, recall, and destruction of contaminated soup mix; (iv) the costs of public notification of the recall; (v) loss of good will; and (vi) lost profits. *Id.* at 706.

91. *Id.* at 708. As the court elaborated:

We cannot think that, given the economic and factual setting in which these policies were written, an ordinary business man in applying for insurance and reading the language of these policies when submitted, would not have thought himself covered against precisely the damage claims now asserted by Lipton.

*Id.*

92. The *Thomas J. Lipton* court stated that, had the insured (the noodle maker) conducted the recall, the exclusion would have precluded coverage. *Id.* at 707–08. The court found that the exclusion would have barred coverage for third-party claims that might have arisen from the noodle maker’s recall efforts. *Id.*



withdraws the insured's product from the market. We believe that this rule is sound, and it fairly balances the interests of the parties. The rule does not impose on the insurer the cost of an insured's preventative measures, but provides the insured with protection against a foreseeable element of claims that commonly arise in economic and factual settings similar to [those here]. We therefore hold that a sistership clause, phrased as is the clause [here] does not preclude coverage when a third party withdraws the insured's product from the market.<sup>93</sup>

As hinted at by the Washington court's qualification—"phrased as is the clause [here]"—other versions of the sistership exclusion use different language to preclude the third-party recall exception. In 1986, the Insurance Services Office, which promulgates standard-form liability-policy language, introduced a revised sistership exclusion that bars coverage for "damages claimed for any loss, cost or expense *incurred by you or others*."<sup>94</sup> Use of the 1986 language by insurance companies is not mandatory, so coverage for third-party claims for recall expenses will turn on the particular language used in the policy at issue.<sup>95</sup>

A second well-established limitation on the application of the sistership exclusion is the principle that it is directed toward excluding the costs of preventive measures and does not itself bar coverage for damages for actual injury or damage caused by the defect in the product (*viz.*, the contami-

93. *Olympic S.S. Co. v. Centennial Ins. Co.*, 811 P.2d 673, 678–79 (Wash. 1991); *see, e.g.*, *U.S. Fire Ins. Co. v. Good Humor Corp.*, 496 N.W. 2d 730, 738 (Wis. Ct. App. 1993) (sistership exclusion did not apply when producer of ice cream product contaminated with *Listeria monocytogenes* was sued by the product seller for its recall costs); *Int'l Hormones, Inc. v. Safeco Ins. Co.*, 394 N.Y.S.2d 260 (1977) (holding that the sistership exclusion did not apply to claims by an injection-medium manufacturer that sued its product supplier because of unsterile hormone suspensions it had sold). *But see* *Commercial Union Assurance Co. v. Glass Lined Pipe Co.*, 372 So. 2d 1305, 1309 (Ala. 1979); *Hamilton Die Cast, Inc. v. U.S. Fid. & Guar. Co.*, 508 F.2d 417, 420 (7th Cir. 1975) (not recognizing third-party exception).

94. The 1986 language bars coverage also for recalls with respect to the defined term "impaired property," which, generally speaking, means other property that has not been itself damaged but that incorporates the insured's defective component; the "impaired property" concept should not be applicable in the food-contamination context. *See* *Sethness-Greenleaf, Inc. v. CIGNA Prop. & Cas. Co.*, No. 94 C 6002, 1995 WL 571866, at \*6 (N.D. Ill. Sept. 22, 1995) ("It is unclear whether this definition would include the damages claimed in the Cosco action, given that contaminated ingredients in a beverage are probably incapable of being 'restored to use' as the definition requires."); *see also* *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 866–67 (Ct. App. 2000) (the ability to realize some salvage value by selling product at a reduced value for some other use is not the equivalent of "restoring" it to use by the repair or replacement of a defective component). The unreasonable difficulty one encounters in trying to apply the impaired-property exclusion has been held to be a basis for limiting its application. *See* *Computer Corner, Inc. v. Fireman's Fund Ins. Co.*, 43 P.2d 1264, 1270 (N.M. Ct. App. 2002) ("[T]his exclusion is unintelligible from the standpoint of a hypothetical reasonable insured [and is] too vague and indefinite to be enforceable.").

95. *E.g.*, *Mass. Bay Ins. Co. v. La Hispamex Corp.*, No. 00 C 3008, 2002 WL 31133100 (N.D. Ill. Sept. 11, 2002) (barring coverage under 1986 version of sistership exclusion for product-recall expenses incurred by a third party).

nation).<sup>96</sup> Put differently, only a withdrawal of a product triggers the exclusion, and courts uniformly hold that paying damages or incurring other costs for actual property damage is not the same as withdrawing the product.<sup>97</sup>

For example, in the Texas Supreme Court case of *Gulf Insurance Co. v. Parker Products, Inc.*,<sup>98</sup> the insured manufactured food flavorings that were to be used in making ice cream; paper was discovered in the flavoring mix after it had been added to the ice cream, rendering the ice cream product “unfit for consumption and worthless.”<sup>99</sup> The court rejected application of the sistership exclusion and the insurer’s argument that the “ice cream was property of which Parker’s defective mix formed a part and that, therefore, the damages for the replacement of that ice cream are excluded.”<sup>100</sup> As the Texas court held:

The exclusion of damages for replacement of the property during the withdrawal is not an exclusion for destruction of the property. When a third party sues the insured for property damage, he sues for the value of what is lost or destroyed, irrespective of whether it is replaced or not. . . . Parker’s liability to its customer was not for the use of replacement ice cream. The claim was for the loss of the ingredients of the ice cream which were destroyed and not merely withdrawn.<sup>101</sup>

Even where the insured’s product is not as commingled as is flavoring for ice cream, so long as the insured’s product renders the whole batch practically worthless for its intended use, then the sistership exclusion should be found not to apply.<sup>102</sup>

96. The sistership exclusion applies where “an insured learns that certain of its products have a common defect” and “for its own benefit [the insured] recall[s] those products to prevent any additional accidents from occurring or other damage from arising.” *Arcos Corp. v. Am. Mut. Liab. Ins. Co.*, 350 F. Supp. 380, 385 (E.D. Pa. 1972), *aff’d in part and dismissed in part on other grounds without opinion*, 485 F.2d 678 (3d Cir. 1973); *see also* *Newark Ins. Co. v. Acupac Packaging, Inc.*, 746 A.2d 47, 56 (N.J. Super. Ct. App. Div. 2000) (“The ‘sistership’ exclusion only applies in those cases where because of the actual failure of the insured’s product, similar or ‘sister’ 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.”).

97. *See Atlantic Mut. Ins. Co. v. Judd Co.*, 380 N.W. 2d 122, 125 (Minn. 1986) (“[R]epair and replacement of just those products that actually failed in use, with no attempt to prevent future failures by removal of other similar suspect products, does not constitute withdrawal.”).

98. 498 S.W.2d 676 (Tex. 1973).

99. *Id.* at 676.

100. *Id.*

101. *Id.* at 679.

102. In the context of contamination claims, the likelihood of a contaminant’s presence in a batch of product is sufficient to find that the entire batch has been damaged (under either prong 1 or prong 2 coverage), and thus the costs of recalling the damaged products should not be excluded from coverage. *Cf. Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 862–66 (Ct. App. 2000) (coverage existed for property damage for both destroyed cereal and unsellable nut clusters notwithstanding that in all likelihood they contained no wood splinters previously found prior to sale to consumers in unfit clusters).

A final products-related or business-risk exclusion is the failure-to-perform exclusion, which applies only to loss-of-use property damage (prong 2) claims and does not apply either to physical injury property damage (prong 1) claims or to bodily injury claims.<sup>103</sup> Subject to an important exception discussed below, this exclusion would appear to bar coverage for loss of use from the failure of the insured's product to meet quality levels as warranted or agreed; however, the failure-to-perform exclusion usually does not come into play because of the breadth with which courts have found physical damage in the food context (even with regard to noninjured material in the same lot).

One court that addressed and rejected application of this exclusion was the Wisconsin Court of Appeals in *U.S. Fire Insurance Co. v. Good Humor Corp.*<sup>104</sup> A company manufactured ice cream product using machinery and related equipment from the product licensor/seller, which also supplied all packaging materials. Some batches were discovered to have been contaminated with *Listeria monocytogenes*, and the seller instituted a recall and sued the manufacturer for, inter alia, the lost use of its vehicles and storage space that were diverted to help conduct the recall. The failure-to-perform exclusion contains an exception for the loss of use of other tangible property "resulting from the sudden and accidental physical injury to . . . the named insured's products."<sup>105</sup> The *Good Humor* court found that the exception was satisfied (and the exclusion did not apply) because the ice-cream products "were suddenly and accidentally physically injured and destroyed when they were contaminated by the bacteria."<sup>106</sup>

The *Good Humor* court also addressed the further requirement of the (coverage-preserving) exception to the failure-to-perform exclusion that

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and would have been safe for consumption); *Newark Ins. Co. v. Acupac Packaging, Inc.*, 746 A.2d 47, 57 (N.J. Super. Ct. App. Div. 2000) (coverage available where expected failure rate sufficiently high to mark the product as defective and induce a rational owner to replace it before it fails).

103. An early version of the failure-to-perform exclusion applied to bodily injury claims and prong 1 property damage claims, too, but this version was dropped from the standard policy form language in the early 1970s, in part because the courts were unable to make heads or tails of it. See *Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 371 N.Y.S.2d 444, 448–49 (1975) ("Effort to make sense of this clause seems doomed to failure, since the language is self-contradictory. . . . If underwriters know what this so-called standard form clause means, the average insured probably does not, and this court most certainly does not."). This form of exclusion contained an exception for active malfunctioning, which no doubt would be satisfied in the food-contamination context. See *generally* *Am. Employers' Ins. Co. v. Maryland Cas. Co.*, 509 F.2d 128, 130 (1st Cir. 1975) ("Design errors resulting in mere 'passive' failure to discharge an intended function are regarded as the insured's normal business risk and are excluded from coverage, while design errors themselves that cause some positive or 'active' harm deemed extraordinary in the insured's business are covered.") (footnote omitted).

104. 496 N.W.2d 730 (Wis. Ct. App. 1993).

105. *Id.* at 739.

106. *Id.* See also *Hartzell Indus. v. Fed. Ins. Co.*, 168 F. Supp. 2d 789, 798 (S.D. Ohio 2001).

refers to the insured's product being "put to use." More specifically, the court considered whether it is the injury to the insured's product that must occur after the product is put to use or whether it is the third party's loss of use of other property. Finding the exclusion to be at best ambiguous on this point, the court construed the exclusion in favor of coverage, thus ruling that it was the third party's loss of use of other property (the lost use of the vehicles and storage space) that must take place after the insured's product is put to use.<sup>107</sup> However, one later unpublished decision disagreed and held that the exception preserving coverage requires that the injury to the insured's product (that is, the contamination) occur *after* the product is put to use, a result difficult to reconcile with the fact that the insured would not be liable in the first place if its food product were contaminated only after it had been put to use by others.<sup>108</sup>

#### IV. INSURANCE RECOVERY FOR GROWERS AND SEED PRODUCERS

Growers and the suppliers and producers of seeds face increasing risks of liability from the widespread introduction of genetically modified plants, as do producers of genetically altered livestock, such as aquaculturists raising transgenic fish.<sup>109</sup> These liabilities may be in the form of claims by neighboring farms for "genetic drift," that is, the migration of the pollen of a genetically modified plant to other crops, especially receiving crops intended to be certified as organic (which also may produce losses from organic food product makers incorporating these tainted materials); the best-known case of genetic drift and commingling of genetically modified crops involved Starlink® corn, which had been engineered to produce a protein that acted as an insecticide, whose growers failed to confine it to approved areas and uses.<sup>110</sup> Alternatively, these liability claims may result from consumers' suffering an allergic reaction to transgenic material, the

107. *Id.*

108. *Vons Cos. v. Aetna Cas. & Sur. Co.*, 58 Fed. Appx. 689, 2003 WL 193588, at \*3 (9th Cir. 2003).

109. See SWISS RE, AGRICULTURAL INSURANCE IN TRANSITION (1997); SWISS RE, GENETIC ENGINEERING AND LIABILITY INSURANCE: THE POWER OF PUBLIC PERCEPTION (1998); MUNICH RE GROUP, *supra* note 6; see also Thomas P. Redick, *Engineering Legal Risk Management into Agricultural Biotechnology*, 19:2 LEGAL BACKGROUNDER (Wash. Legal Found. Jan. 16, 2004).

110. See MELLON & RISSLER, *supra* note 4, at 51 ("The most urgent concern . . . [relates to] future products, in particular pharm and industrial crops . . . [T]he current seed production process is porous to contaminants [and] offers a wide conduit through which genes for pharm and industrial products may find their way into our food and feed systems or environment."); BOARD OF AGRICULTURE AND NATURAL RESOURCES, BIOLOGICAL CONFINEMENT OF GENETICALLY ENGINEERED ORGANISMS 18-19, 45-46 (2004); Michael R. Taylor & Jody S. Tick, POST-MARKET OVERSIGHT OF BIOTECH FOODS 84-99 (Pew Initiative on Food and Biotechnology 2003) (chronology of Starlink® matter); Andrew Harris, *Danger Uncertain, but Suits Multiply*, NAT'L L.J. (Sept. 9, 2002); *In re Starlink Corn Products Liability Litigation*, 212 F. Supp. 2d 828 (N.D. Ill. 2002).

paradigm case (avoided through a preemptive recall) being the use of a Brazil nut gene in soybeans that transmitted the allergen 2S albumin.

Generally speaking, new risks of loss need not be specified in order to be covered under liability policies,<sup>111</sup> so, unless expressly excluded, insurance policies will apply to losses from genetically modified organisms.<sup>112</sup> As one leading reinsurer observed in a recently published volume, “[we do] not see any general trend to exclude losses attributable to genetically modified organisms from public liability, product liability and environmental impairment liability covers in general, nor to impose any [separate monetary] limits on them.”<sup>113</sup>

Under standard policy language, allergic reactions from ingesting a product using a genetically modified material will be covered as bodily injury. Similarly, claims from genetic drift will be covered straightforwardly under the property-damage coverage, under either prong 1 (physical injury) or prong 2 (loss of use without physical injury) or both, as shown by the existing case law regarding seed- and plant-germination liabilities.

For example, in one leading case, the Montana Supreme Court found coverage for a claim that a grower received a less-productive type of seed wheat than had been intended. The court found both covered physical injury and covered loss of use:

[T]he land in which the seed wheat was planted would have been damaged in that said land would have lost a portion of its retained moisture, would have lost a portion of its retained fertilizer, weeds would have grown thereon where no crop had grown, erosion would have occurred, said land would have to have been recultivated in order to render it suitable for the planting of another crop of the same or similar nature, and that if little or no crop grew, the claimants would have received little or no compensation by virtue of having lost a crop, and would have suffered loss of use of their lands.<sup>114</sup>

The same result has been reached by courts considering the sale of the

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111. See Marc S. Mayerson, *Affording Coverage for Gradual Property Damage under Standard Liability Insurance Policies: A History*, 8 COVERAGE 3 (Sept./Oct. 1998); *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990).

112. See, e.g., *Insurers Wary on Gene-Engineered Products* (Dec. 9, 1998), available at <http://www.sunsonline.org/trade/process/lookup/1998/12110398.htm> (last accessed Dec. 14, 2003) (reporting on meeting with Swiss Reinsurance Group) (“insurance companies in most markets are covering these unknown risks under existing liability policies.”); see also GE FRANKONA RE, *LIABILITY RISK—GENETIC ENGINEERING* (Aug. 2000) (discussing coverage in Germany, Austria, and Switzerland).

113. MUNICH RE GROUP, *supra* note 6, at 99. see also Philipkosi, *supra* note 4 (“Some insurers view [genetically modified foods] as potentially one of the biggest long-term problems [the insurance] industry must face,” said the Insurance Information Institute’s [chief economist].”).

114. *Safeco Ins. Co. v. Munroe*, 527 P.2d 64, 68 (Mont. 1974). *Accord* *St. Paul Fire & Marine Ins. Co. v. N. Grain Co.*, 365 F.2d 361 (8th Cir. 1966).

wrong type of barley<sup>115</sup> and of seed beans for cranberries not appropriate for the particular climate.<sup>116</sup>

More recently, the Idaho Supreme Court held that, where the nonapplication or insufficient application of pesticide chemicals resulted in potatoes whose quality was diminished and that were not marketable (because they were “slimmer, rougher, blemished and hooked on the ends”), both prong 1 and prong 2 property damage resulted; as the court explained:

[P]aragraph one of the property damage definition refers to potatoes as tangible property. Paragraph two . . . makes reference to loss of use of property which has not been physically injured. We find this relates to the loss of use of the soil. The evidence at trial established both the actual plants and the soil were affected by the misapplication of chemicals. The potato plants suffered throughout the growing season because of lack of nutrients and weed control. The plants were yellowed and had poor root systems and, when harvested, the few potatoes produced were [defective]. The soil also suffered injury, as it lacked nutrients and weed prevention, even though such damage may have only been temporary.<sup>117</sup>

Similarly, a commercial nursery was entitled to coverage where it sold strawberry nursery stocks that previously had been exposed to herbicide drifting onto its fields and that, consequently, did not grow to full height though they produced near normal yields; in that case, the court found that the plant-purchasers'/growers' loss of strawberry production constituted a loss of use of the growers' land and that “the alleged loss of profits or diminution in property value are . . . damages because of property damage.”<sup>118</sup>

These authorities, considered with the decisions finding covered damage where unapproved (though unharmed) fumigants were applied to food-stuffs,<sup>119</sup> confirm that cases of genetic drift and of commingling of genet-

115. Gen. Ins. Co. v. Gauger, 538 P.2d 563 (Wash. Ct. App. 1975).

116. Econ. Mills of Elwell, Inc. v. Motorists Mut. Ins. Co., 154 N.W.2d 659 (Mich. Ct. App. 1967); *but see* Krueger Seed Farms, Inc. v. Szlarczyk, Nos. 200249, 200250, 1999 WL 33453867 (Mich. Ct. App. 1999) (per curiam) (without citing *Elwell*, divided court found that, for purposes of construing an exclusion to coverage for property damage, potatoes infected with bacterial ring rot that were sold as table stock and usable for consumption but that were not suitable, as intended, for seed potatoes and that therefore produced less revenue than anticipated did not fall within an exclusion for prong 1 physical property damage); Ranger Ins. Co. v. Globe Seed & Feed Co., 865 P.2d 451 (Or. Ct. App. 1994) (construing seedsmen's errors and omissions policy and finding that property-damage exclusion did not apply).

117. W. Heritage Ins. Co. v. Green, 54 P.3d 948, 952 (Idaho 2002).

118. Hendrickson v. Zurich Am. Ins. Co., 72 Cal. App. 4th 1084, 1092 (Ct. App. 1999); *see also* Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., Inc., 851 So. 2d 466 (Ala. 2002) (finding coverage because “the loss of the use of its tractors for hauling the most profitable loads” constituted prong 2 property damage even though the tractor trailers were not rendered entirely useless); Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 815–16 (3d Cir. 1994) (holding that reduced economic use of property, evidenced by a lower price, constituted covered “loss of use” within the meaning and purpose of liability insurance policies).

119. *E.g.*, Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147 (Minn. Ct. App. 2001); Blaine Richards & Co. v. Marine Indem. Ins. Co., 635 F.2d 1051, 1055 n.2 (2d Cir. 1980).

ically modified with ordinary grains (or, e.g., fish) will be found to involve either prong 1 or prong 2 property damage or both.<sup>120</sup> Consequently, some insurers, in the United Kingdom, Latin America, and New Zealand, for example, have introduced exclusions to bar coverage for liability from growing genetically modified crops (though at present there is no trend to bar coverage either in the United States or worldwide).<sup>121</sup>

Carriers without specific exclusions may try to argue that genetic drift and commingling constitute pollution barred under pollution exclusions, but as has been the case in the *E. coli* context the courts seem unlikely to bend such exclusions to find that the natural drift of pollen from a biopharmaceutical crop (for example) is a pollution event.<sup>122</sup> Pollen from plant

120. Some policies additionally provide coverage for personal-injury liability, which is a separate form of coverage that typically provides coverage for, *inter alia*, wrongful entry. In this context, the drift of pollen can be found to be a trespass or nuisance covered under wrongful-entry coverage. See *Hoery v. USA*, 64 P.3d 214 (Colo. 2003); *Estate of Patout v. City of New Iberia*, 849 So. 2d 535 (La. Ct. App. 2002); *Martin v. Reynolds Metals Co.*, 135 F. Supp. 379 (D. Or. 1952); see also *Kitsap County v. Allstate Ins. Co.*, 964 P.2d 1173, 1180 (Wash. 1998) (holding that a claim may be covered by both personal injury liability coverage and property damage coverage in a single insurance policy).

121. The National Farmers Union insurance policy in the UK apparently includes the following exclusion for genetically modified crops:

NFU Mutual will not indemnify the Insured in respect of any liability arising from the production, supply of or presence on the premises of any genetically modified crop, where liability may be attributed directly or indirectly to the genetic characteristics of such crop. In particular no indemnity will be provided in respect of liability arising from the spread or the threat of spread of genetically modified organism characteristics into the environment or any change to the environment arising from research into, testing of or production of genetically modified organisms.

See *NFU Mutual Won't Insure GM Crop Trial Risks*, NLP WESSEX (Mar. 13, 2001), available at <http://www.mindfully.org/GE/NFU-Mutual-Wont-Insure.htm> (last accessed Dec. 14, 2003). See also *Insurers "Would Not Cover" GM Farmers*, GUARDIAN UNLIMITED (Oct. 7, 2003), available at <http://www.guardian.co.uk/gmdebate/Story/0,2763,1057974,00.html> (last accessed Dec. 14, 2003) (re survey of five main British farm insurance underwriters); *Insurers Wary*, *supra* note 112 ("A number of Latin American insurers . . . have already established exclusions for genetically engineered crops in basic insurance policies, with special premiums for their coverage."); *Big Insurer Refuses GE Cover*, NEW ZEALAND HERALD (Sept. 27, 2003), available at <http://www.nzherald.co.nz/storyprint.cfm?storyID=3525771> (last accessed Dec. 14, 2003). The exclusion introduced in New Zealand is reported to exclude personal injury and property damage directly or indirectly caused by

"The presence on any premises of, or the production of or supply of any GMO or any other material that has been genetically modified where liability may be directly or indirectly attributed to the genetic characteristics of such organism or material."

"The spread of or the threat of spread of any GMO characteristics into the environment or any change to the environment arising from research into, testing of or production of GMOs or other material."

*Id.* Compare Press Release, New South Wales Farmers Ass'n, *Insurance Available for GM Canola in New South Wales* (Mar. 29, 2004), available at [www.seedquest.com/News/releases/2004/march/8191.htm](http://www.seedquest.com/News/releases/2004/march/8191.htm) (last accessed Apr. 22, 2004).

122. See *Eastern Mut. Ins. Co. v. Kleinke*, No. 2123-00, slip op. at 8 (N.Y. Supr. Ct., Jan. 19, 2001), reprinted in 16 Mealey's Litig. Rep.: Ins. at A-4 (Apr. 16, 2002); *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 790 (Ariz. Ct. App. 2000); cf. *Weber v. IMT Ins.*

anthers is not “smoke, vapor, soot, fumes, acids, alkalis, chemicals [or] waste,” which bring to mind conventional environmental pollution.<sup>123</sup>

#### V. CONCLUSION

Companies facing losses from contaminated or genetically modified foods have been involved in coverage disputes and litigation in the past, and one can reasonably expect more coverage litigation in the future, particularly for large losses.<sup>124</sup> Nevertheless, the insurance policies these firms buy are meant to provide indemnification for such losses, and the courts typically construe the coverage to ensure that the policyholder obtains the benefit of all the coverage it has purchased. But it behooves companies to understand the panoply of disputes to date and ensure that the policies they procure are well suited to their risks of loss, so as to avoid the prospect of delayed payment, less than full indemnification, or coverage litigation when they need their insurance most.<sup>125</sup>

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Co., 462 N.W.2d 283 (Iowa 1990) (applying pollution exclusion to animal manure that was disposed of as waste).

123. See *Mackinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 653 (2003).

124. See Richard E. Stewart & Barbara D. Stewart, *The Loss of the Certainty Effect*, 4 RISK MGMT. & INS. REV. 29, 33 (2001) (“From an insurer’s point of view, resisting large claims has become an effective, perhaps even necessary, competitive strategy.”).

125. See *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 79 (W. Va. 1986) (“[W]hen an insured purchases a contract of insurance, he buys insurance—not a lot of vexatious, time consuming, expensive litigation with his insurer.”).