Trend 6 | More businesses will take out product recall insurance

George Wray and Laura Day

Background. We predict product recall rates will climb thanks to complex global supply chains, adoption of automation, inconsistent regulation across jurisdictions and the COVID-19 pandemic. In addition, consumers are becoming more interested in product safety, health and ESG (environmental, social and governance) issues, with social media groups quickly spreading news of potential product deficiencies and recalls.

"Smart" and "connected" products, which allow product tracking and ongoing consumer contact through a manufacturer's app, website or subscription service, are leading to additional consumer demands and recall expectations. We're seeing regulators become more active, leading to greater scrutiny, tougher rules and more product recalls. Finally, class action lawyers are creatively seeding disputes.

Impact. A product recall can affect any company that manufactures or distributes a product. The costs can be catastrophic, including notification; shipping; repair or replacement; changes to design and manufacturing; brand damage; and defence costs. While many companies believe their commercial general liability policy will cover product recalls, others are being advised there's an insurance gap. We predict 2022 will see more businesses recognizing the benefit of product recall insurance, which can cover financial losses due to a recall and often offers pre- and post-event consulting services to reduce the risk of a recall and minimize the impact if one occurs.

Top tip. Your legal team is a valuable source of insight on legal exposure when it comes to product liability and regulatory compliance in general, and managing product recalls in particular. Include experts in products law when conducting insurance reviews and risk analyses, as well as when your business changes its processes, products and portfolio.

Trend 7 | Large companies and projects in Québec will see insurance costs drop

Gilbert Hourani and Sam Robichon

Background. On May 27, 2021, the Québec government amended article 2503 of the *Civil Code*, relaxing the requirement for insurance companies to assume the defence costs of the insured, even when costs go beyond the limits of the insurance policy. Once finalized, likely in fall 2021, there will be some flexibility to allow policies to exclude defence costs from coverage or include them only for certain "categories of insurance contracts" and "classes of insureds."

Impact. We expect this to decrease the cost of premiums for large corporations and make it easier to insure large commercial and institutional projects in the province, while preserving the original intent of article 2503 — to ensure that individuals, particularly third-party victims, aren't financially penalized by expensive legal battles that erode policy limits. It's a win for insurance companies, who will once again find Québec an attractive market, and large insured corporations and institutions, whose insurance costs should decrease in expensive, hard-to-insure industries such as construction.

Top tip. Large insured organizations should have their insurance program reviewed by their broker to determine where legal costs should be included in the policy and what lines of business can be carved out to save on premiums. Insurance companies need to ask their underwriters to rework policy wording to ensure compliance with the new law in both official languages, and have new wording reviewed by their internal or external legal team.

Trend 8 | Business interruption insurance will go under the microscope

Patrick Heinsen and Sarah Makson

Background. Business interruption insurance is typically included in a business insurance program. Our defence of the Lloyd's Market in the two primary class actions in Canada related to COVID-19 — Workman Optometry in Ontario and Wataga Properties in Alberta — highlights one widely held misunderstanding about business interruption insurance: that it provides coverage during a pandemic. In fact, the standard wording in most business interruption policies makes it clear that coverage applies only after a catastrophic event results in some kind of physical damage that prevents an insured from conducting business.

Impact. From the insured's perspective, the consequences of a fire or flood are the same as a government-mandated lockdown that shutters their business for months. The devil is in the details, but many businesses that lack internal risk management expertise may not understand what is covered and excluded in their policy. COVID-19 has led to some nasty surprises for these businesses. Because this is a global problem, the Lloyd's Market is proactively working with local governments to see if a more effective alternative to insurance exists for addressing future pandemics. We also expect insurers to make their policies more clear about communicable disease exclusions.

Top tip. No business owner wants a nasty surprise when they go to make a claim. Review your coverage annually with your insurance broker and don't shy away from tough conversations and what-if scenarios. Businesses can't assume that lost revenue from government-mandated restrictions will be covered by business interruption insurance, so discuss your options for separate coverage.

Trend 9 | Municipal governments will see an increase in class action litigation

Kevin McGivney and Natalie Kolos

Background. As providers of essential services such as water, sewer, transit, waste management, housing, long-term care and policing, municipalities have more influence on the day-to-day lives of Canadians than any other level of government.

The same issues that are making headlines on the news and social media, including climate change, COVID-19, homelessness, privacy, and racism, impact these services. At the same time, municipalities are vulnerable to unproven and sometimes inflammatory criticism that circulates on social media, where everyone has a voice regardless of credibility and algorithms create the impression that problems are larger and more common than they actually are.

Impact. A collapse in trust in government services appears to be fuelling an increase in often-tenuous claims against municipalities, including from self-represented and class action litigants. This includes an uptick in defamation and reputational claims against municipal politicians and staff. At the same time, insurance companies are finding it challenging to price the unpredictable impacts of forces such as climate change and civil unrest. As a result, municipalities are having a hard time placing insurance in the market at a reasonable price and more communities are considering self-insurance.

Top tip. While it may feel like a thankless distraction from the actual work of local government, municipalities would do well to maintain proactive communication with citizens, working hard to establish themselves as trusted sources of information. To remain credible over the long term, communities will require meaningful civic engagement opportunities, comprehensive risk mitigation and risk management plans, and effective crisis management when the unexpected inevitably occurs.

Trend 10 | Shippers and receivers of goods will add coverage for delays to insurance policies

Jean-Marie Fontaine and Nigah Awj

Background. The COVID-19-fuelled spending spree by locked-down consumers in North America and Europe, particularly on goods imported from Asia, revealed the fragility of the global supply chain. Shipping delays have become common, thanks to congestion at ports, shortages of shipping containers, labour shortages, and events like the grounding of one of the world's largest cargo ships in the Suez Canal. Unfortunately, for shippers and receivers, cargo insurance typically covers loss or damage to goods, not delay. The bills of lading issued by shipping lines also usually exclude liability for delay.

Impact. Delays reduce the value of goods and create problems for manufacturers and distributors, but without special insurance, shippers and exporters have to cover these losses themselves.

Top tip. If your goods are being imported or exported, take a close look at your cargo insurance to determine whether delays are covered. If they are not, obtain supplemental insurance. If you are a carrier or intermediary, review your contracts with exporters and importers to make sure you are not assuming the liability for delays yourself.

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