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## PRACTICE GROUP: FOOD RESOURCES & MANUFACTURING

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### CO-PACKING AND PRIVATE LABELING LIABILITY PART 1: IT'S OUR BRAND, BUT NOT OUR PRODUCT

Marie Gallanar | Account Executive

Josh Hedrick | Account Executive

Because of the increased risk of lawsuits and recalls, more and more companies are looking to co-packers and private labeling as a way to transfer liability and keep the cost of manufacturing products down. Outsourcing the production of an item can save on capital costs and avoid tying up an organization's cash in the expense of equipment, according to Jim Konsmo, vice president of operations and quality control for Essentia Water. **The question arises, if it's our label and brand but someone else manufactures the product, who takes on the liability?**

#### QUALITY CONTROL

It is helpful to know what percentage of the business your organization represents for that co-packer/private labeler (CP/PL). If you are large enough, you can receive preferential treatment. As CP/PLs are spread out all over the country, there may be logistical challenges with performing regular walkthroughs of the facility to ensure your brand and quality standards are being met. **It is critical to regularly request updated third party audits of the facility to make sure your partner is meeting federal standards as well.** The co-packer should be held to your requested levels of certifications, product quality, packaging, and safety.

#### CONTRACTS

If proactive quality control is the first step to take in avoiding a recall, contracts and agreements is the second. Be sure to review the roles and responsibilities of each party when analyzing your exposure. Michelle Bomberger of Equinox Business Law Group recommends reviewing the life cycle of the product and asking how much control you have: full, partial, or none. **It is essential that your contract with each CP/PL spell out in the warranties section each party's responsibilities during each stage of the product life-cycle or contract.** Review indemnification clauses and dispute resolution procedures to set a framework in case the relationship goes sideways or finger pointing occurs.

#### INSURANCE

The third and final way to protect your balance sheet from a catastrophic event is a **product recall and contamination insurance policy**. Recall policies can protect you as a first party for retailer slotting fees, defense costs, lost business income for up to 12 months, brand rehabilitation, and government-mandated recall coverage. These policies also protect third party organizations such as retailers, wholesalers, and

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distributors for their lost profits and brand rehabilitation. Many of these policies include a percentage of the annual premium to be used on pre-incident costs, such as a mock recall or a food safety audit.

There is no definitive answer for all organizations on the best way to handle the risk associated with using a third party to manufacture their product. First, make sure the CP/PL utilizes your testing standards and regularly scheduled audits are performed. In your contractual agreement, clearly define the responsibilities of each party and the indemnification language.

The unfortunate reality is, even with the best quality control, contracts that indemnify your organization, and a robust recall policy; **it is your brand and reputation on the line for a defective product, regardless of who**

**is at fault.** You may need to beef up your staff for receiving customer complaints and track them closely.

**There could be fines from retailers for pulling product from shelves.** Some retailers will require multiple audits before carrying your goods again. Finally, the end consumer will quickly turn their allegiance elsewhere, as we've seen with the large recalls at Chipotle and Samsung. Parker, Smith & Feek can help you take the steps necessary to protect your business from a potential recall event; call us today to learn more.

*Stay tuned for Part 2 - It's Our Product, But Not Our Brand to delve into the exposures from the CP/PL perspective.*