

# Sounding The Alarm

Emerging liabilities are an ongoing concern for insurers. *Best's Review* highlights four that could result in large losses.

by Lori Chordas

In January a class-action lawsuit was filed against fast-food restaurant chain Chipotle Mexican Grill for allegedly covering up signs of a foodborne illness outbreak in its Simi Valley, Calif., store. Six high school students and one parent claimed they were sickened after the restaurant's kitchen manager was allowed to work and handle food for at least two days despite having a norovirus infection.

A foodborne illness outbreak is not uncommon today and represents just one emerging liability facing insurers, who can't help but wonder, "What's the next asbestos?"

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During the 1990s, insurers shelled out billions of dollars in asbestos-related claims, nearly collapsing several of their organizations in the process. Today, endocrine receptors, crude oil transport and nutraceuticals—and of course, foodborne illness—have the potential for massive payouts.

Experts speculate newer threats won't likely reach the magnitude of asbestos, but accumulations of liability risk certainly have the potential to "send shockwaves through the insurance industry and are one of the most complex exposure management challenges faced by insurers," according to a 2015 report *Emerging Liability Risks: Harnessing Big Data Analytics*, produced by Lloyd's and liability catastrophe modeling firm Praedicat.

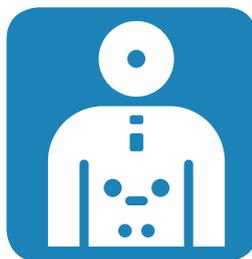
Over the past several years, personal injury and wrongful death claims, "although not large in number," resulted in more than 40% of claims costs, according to Allianz Global Corporate and Specialty's 2014 *Global Claims Review* report. Claims from product defects were "high in volume, and automobile recall cases are becoming more frequent and more expensive."

### So Far, So Good

U.S. insurers, however, are breathing a collective sigh of relief from "today's relatively benign litigation environment," said Robert Reville, president and CEO of Praedicat, whose casualty liability model provides analytics for casualty risks to the global financial services industry. "But it's unclear how long that trend will be sustained."

Still, sales of liability products aren't suffering under the current environment. "In fact, there are increased opportunities in those coverages now," Reville said. "Risks aren't going away; insurance lines show no sign of fading either. There's a greater amount of exposures those lines will likely cover in the future."

*Best's Review* took a closer look at four specific liability risks—endocrine disruptors, crude oil transport, foodborne illness and nutraceuticals—and their potential impact on the industry.



### Endocrine Disruptors

In 2012, the U.S. Food and Drug Administration banned the use of Bisphenol A, or BPA, in baby bottles and sippy cups. The chemical, commonly used in the production of plastics and resins for water bottles, the lining of cans, thermal cash

register tapes and compact discs, has been subject to years of scientific scrutiny.

BPA is one of a number of endocrine disruptors that experts fear are wreaking havoc on humans' health. The disruptors are synthetic chemicals and certain naturally-occurring substances that, when absorbed into the body, either mimic or block hormones and disrupt the body's normal functions, according to the National Resources Defense Council,

### Key Points

**A Closer Look:** Liability risks have the potential for great impact on the insurance industry.

**The Gang of Four:** Some highlighted risks include endocrine disruptors, crude oil transport, foodborne illness and nutraceuticals.

**Finding a Solution:** Carriers are taking steps such as limiting exposures and increasing awareness to help mitigate risks.

## Liability Contents

Bracing for Aftershocks	40
Liability Time Bombs	46
Flight Risk	52
The Next Big Thing In Food Packaging	56
Long-Term Effects	59
Insight: D&O on the Cheap	60
Changing Trends	61
Litigation Matters	62
A Global Conversation About Emerging Liability	63
Protection from Geopolitical Distress	64
What A.M. Best Has Said About Asbestos & Environmental Losses	67
Senate Panel Reviews Asbestos Legislation	68

a nonprofit environmental advocacy group.

But BPA isn't alone. There are more than 800 chemicals in plastics, pesticides, preservatives, pharmaceuticals and other commercial products "that never got the media attention that BPA received but are endocrine disrupting too," said Peter Dion, business director-liability for Zurich North America.

Endocrine disruptors have been linked to breast tumors, delayed puberty, thyroid disease, prostate cancer, decreased sperm quality, low birth weight and kidney disease—to name a few. And experts peg health costs from those exposures at anywhere from \$170 billion to \$293 billion.

"Also concerning is that many effects may not show up until decades later, and it only requires a minute dose of chemicals to potentially cause a profound effect," Dion said. "These potentially harmful chemicals are found in 20,000 products. Insurers' concern isn't just about those 20,000 products; it's the risk of class-action lawsuits stemming from chemical exposure."

So far, there's only been a smattering of those cases, Reville said. "But there's a good chance that could change."

Widespread use, chemical stability and accumulation "over the food chain and life-span could make endocrine disruptors prone to cause serial and cumulative losses," according to a Hannover Re report.

BPA alone could have a profound impact. While the high-production chemical hasn't yet resulted in bodily injury mass litigation, "a prospective analysis of the risk based on the current body of science could conclude that there is cause for caution by insurers, particularly when writing on the occurrence form," according to the Lloyd's report. "If this fear is realized, BPA could expose many industries to potential future litigation."

"Until now, science has been deemed 'immature,' therefore causing the dismissal of most cases," Reville said. "We've seen a few restrictions and product rollbacks over the years, such as phthalates in toys. The question now is whether science will continue to evolve in a way that supports future litigation."

Carriers are preparing for what may soon come. "Something we often do is insure a company or product but not the defense costs, which can be much costlier than actual financial loss from bodily injury claims," Dion said.

"Also, awareness is key," he added. "Our strategy for underwriters is to improve awareness of the risk and for companies to understand their potential exposures from a portfolio accumulation perspective. We identify which industries use these chemicals and then search our portfolio to see what our accumulations are to those exposures."



### Crude Oil Transport

More than 45 people died in 2013 after a runaway oil tanker train exploded in Lac-Mégantic, Quebec. That same year, a train hauling 2.7 million gallons of crude oil derailed and exploded in Alabama.

Those incidents aren't isolated. There were a dozen significant oil train derailments in the United States and Canada between March 2013 and May 2014, according to the Natural Resources Defense Council.

That's giving insurers pause about potential liabilities they may face in the wake of such events.

Stakes are high. Each year a growing amount of crude oil—the majority of which comes from the Bakken shale patch of North Dakota and Montana—is transported by rail in North America.

"Each tank car of crude holds the energy equivalent of 2 million sticks of dynamite or the fuel in a widebody jetliner," according to a *Wall Street Journal* article.

Insurers are also concerned about climbing spill rates. In 2013, railroads spilled more than 1.15 million gallons, according to the Pipeline and Hazardous Materials Safety Administration.

Adding fuel to the fire is that safeguards implemented by federal regulators to protect communities and the environment from accidents and spills caused by rail transport of crude oil have been focused on tank car selection and shipping documentation rather than the true cause of recent derailments—track maintenance and speed issues, said David M. McCullough, a partner in the New York office of Sutherland Asbill & Brennan LLP.

"The good news is that no one in the U.S. has been injured, and litigation so far has been minimal because accidents have occurred in rural areas," he said. "But growing use of crude-by-rail is bringing more trains through metropolitan areas."

Carriers also are troubled by the volatility of fuel being extracted from the Bakken oil deposits, Praedicat's Reville said. "It's more dangerous than regular oil, so there is greater risk of explosion with derailment."

Another potential liability stems from "federal environmental and safety laws that place responsibility on owner/operators of physical assets (a railroad) rather than the owners of materials being shipped," McCullough said. "Incidents without loss of life won't have lawsuits against an individual company, so it is more likely that targets like the railroad will be pursued."

"The short of it is that we end up needing to draw more corollaries to litigation in other contexts, like vessel



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**David McCullough**  
Sutherland Asbill &  
Brennan LLP

or spill liability, in order to assess clients' ultimate liability exposure," he said. "The real assessment is that accident risk is fairly low; however, ultimate exposure, if there is one, is potentially fairly high."

Today, some companies are unable to obtain the full coverage they feel they need and are opting to either self-insure the remaining amount or seek alternative means to ensure they're properly indemnified and managing risks as much as possible, McCullough said. "As for insurers, some have reduced their liabilities," he said. "It's been a challenge to get the requisite amount of insurance companies need to cover themselves. However, some of that has been mitigated with the recent drop in oil prices. However, the price of crude doesn't dictate if there's an injury or loss of life."

Praedicat is closely monitoring the crude oil transport liability risk. "We have a model that looks at where oil is shipped around the country, along with property values, population densities of the areas through which it's shipped and historical risks of derailment," Reville said.

"While we saw the tragic Lac-Megantic incident in 2013, at some point it is increasingly possible that a major event with significant loss of life in the U.S. will occur, and that will change everything, similar to what we saw with major oil spills like the Exxon Valdez," McCullough said. "We could see the same thing with massive trains coming through cities like Albany and Chicago. That will dramatically change the risk profile to the point that dramatically exacerbates the already difficult situation in becoming fully insured."



### Foodborne Illness

Each year, one in six Americans becomes sick and thousands are hospitalized or die from foodborne illness, according to the Centers for Disease Control and Prevention.

Improper holding and cooking temperatures, contaminated utensils and equipment, poor employee health and hygiene, and food from unsafe sources are the causes of many of those incidents, the CDC reports.

Over the years, a spotlight shined on a number of high-profile cases, including the 2003 incident in which four people died and more than 650 were sickened with hepatitis A after eating Mexican green onions served at Chi-Chi's restaurants in Pennsylvania. The price tag of that event: a \$50 million total compensation payout by the restaurant.

In addition, nearly 320 other publicly recorded foodborne illness settlements and verdicts were handed down in the United States between 2000 and 2011, according to the Public Health Law Center at Mitchell Hamline School of Law.

Insurers are working to understand what exposures they could face from foodborne-related suits.

"There could be anything from bodily injury claims

and loss of profits to crisis management and product recall expenses and inoculation costs if consumers and workers are exposed to a disease," said Greg Benefield, managing director and national food and beverage segment leader at Marsh. "Often, many of these exposures can be controlled with proper controls and most companies have protocols in place."

The effects of a foodborne illness could be felt by several coverage lines, including product liability, business interruption, product recall, supply chain and commercial general liability, he said.

"The challenge with these types of risks are evolving strains like E. coli and salmonella," Dion said. "So the severity of claims becomes greater, especially if you get widespread outbreaks of food contamination involving some new antibiotic-resistant strain."

Certain food products, such as ground beef, also are giving carriers something to chew on, he said. "Because ground beef is processed through machines, the risk of contamination increases."

In addition, food from foreign suppliers and "breach and implied warranty concerns, especially around genetically-modified organisms introduced into the supply chain," open up other potential exposures, Benefield said.

"The good news is that food safety and security have increased over the past 10 to 15 years, and they'll continue to become even more tightly-controlled," he said. "Funding levels and settlements will continue to climb."

Carriers are taking cover in different ways. Zurich North America, for instance, is the only carrier authorized by the International Hazard Analysis and Critical Control Point Alliance to certify food and beverage industry employees to HACCP standards, Dion said.

Also, insurers are continuing to refine their terms, policies and conditions, "and typically we see those tracking with awards granted through the courts," Benefield said. "Several carriers have a presence in this sector and provide a real benefit to the food and beverage industry, and that's helped private and public companies address balance sheet protection and volatility."

Benefield doesn't expect foodborne illness-related litigation to slow down anytime soon. "The public is more educated about these risks, so that's a double-edged sword of sorts," he said.



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**Greg Benefield**  
Marsh



## Nutraceuticals

Nutraceuticals—food or fortified food products that supplement the diet and assist in treating or preventing disease, apart from anemia—are responsible for more than 23,000 emergency room

visits each year, according to a *New England Journal of Medicine* study.

Those dietary supplements, everything from weight-loss products to vitamins, minerals and amino acids, comprise a \$30-billion industry in the United States. And nearly two-thirds of Americans currently take some type of nutraceutical health care product, according to Nutriforce Nutrition.

Limited regulation, however, opens the door for potential liability exposures, said Douglas Carey, managing director and U.S. life sciences practice leader for Marsh. So far, the majority of class-action suits have stemmed from false and deceptive advertising claims, he said.

“Also, there have been suits alleging that products were marketed and distributed as natural dietary supplements when in fact they contained synthetic ingredients,” added Bob Weireter, senior treaty underwriter at Swiss Re. “These typically manifest as false advertising lawsuits but often also include allegations of bodily injury.”

Perhaps the biggest case to hit the market came in the early 2000s when the use of herbal ephedra sparked several court cases against manufacturers and distributors. In 2004, the FDA banned supplements containing ephedra, which had been linked to safety risks including heart attack and stroke.

“Problems arise because many supplements aren’t regulated or tested like prescription and nonprescription drugs,” Weireter said. “The actual composition of the product can vary from the labelling and also from batch to batch. Thus, there is a lack of consistency and quality control that presents concern from a liability perspective. There is also the possibility that these products inadvertently contain toxic substances.”

Also, unknown adverse health effects of product misuse or mixing supplements with prescription medications are hard pills to swallow from a liability standpoint.

Weireter suggests underwriters “obtain current and accurate information about the safety of these products. Only a very small percentage of the supplements on the market today have been studied closely enough to determine their common side effects. It’s a positive that the FDA has incorporated mandatory adverse event reporting into its existing data system for compiling, tracking and

reviewing these events,” he said. “Since these reporting requirements went into effect, there has been a significant increase in the number of reported adverse events. However, the challenge is that there is no clear, concise format for reporting these events to the public.”

Underwriters also need to consider that some dietary supplements contain prescription drugs and controlled substances, Weireter said. “The most common ones we see are steroids, hormones and other substances.”

The biggest concern comes from severe bodily injury, including death, Weireter added. “There have been several wrongful death suits filed against manufacturers and distributors of body-building supplements and energy drinks. Allegations generally include design defect, disregard for the danger of the product, marketing the product as safe and effective while not warning of potential health risks, fraudulent concealment and breach of implied warranties.”

Over the years, insurers had reduced their willingness to write products liability for the nutraceutical industry, said Jim Walters, managing director of Aon’s U.S. life sciences and chemical industry practice. “But that has turned around, and we’re now seeing more carriers willing to underwrite the risk. The industry suffered a black eye when smaller companies made false or exaggerated claims about their supplements doing fantastic things. Organizations, such as the Council for Responsible Nutrition, now are working hard to increase the safety profile of the industry.

“The fact that more carriers are willing to underwrite coverage is a testimony to what they’re seeing as improvement in quality, advertising and the nature of the industry in general,” he added. “Nutraceuticals is a very challenging class of business but not one that underwriters can ignore,” Weireter said. “It’s big and getting bigger, and it’s here to stay. With careful risk selection and diligent teamwork between underwriting, risk engineering and claims, the insurance industry can meet these challenges.”



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Aon

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