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Justin Prochnow: Hello and welcome to Legal Food Talk. [00:00:30] I'm your host, Justin Prochnow, a shareholder in the Denver office of the international law firm of Greenberg Traurig. This is a podcast brought to you by our food, beverage, and agribusiness practice to give you some insights and knowledge about the world of food, beverage, and agribusiness. Welcome to another edition of Legal Food Talk. This is your host, Justin Prochnow. Hope [00:01:00] you enjoyed last month's episode with Maxine and Alan Henderson right during March Madness. We had a great talk about things, and today I have a special roundtable group with three other guests on the show. First, I'll introduce you to my new colleague, Stacy Carpenter. And again, not to bury the lead here, also my wife, who has joined me here at Greenberg Traurig. Welcome, [00:01:30] Stacy.

Stacy Carpenter: Thank you. Happy to be here.

Justin Prochnow: My goal is to make my way through the family. We have my father on several of the podcasts before. Now we've got Stacy. Next up, maybe my daughter, and then our cat if it gets to-

Stacy Carpenter: Sydney would love to participate.

Justin Prochnow: That's right. So thanks for joining us today and today we're doing a little bit different. We've got a roundtable discussion here with two of the leaders in the insurance industry side of things [00:02:00] for food, beverage, and supplement companies. And we'll announce this at the beginning. We've got two Chris's. We've got Chris Morey and Chris Strachan. Is that right?

Chris Strachan: That's right, yeah.

Justin Prochnow: Chris Morey as Christopher or Morey. And we'll go Chris Strachan as either Strachan as his friends like to say, or Chris. But welcome, Christopher and Chris.

Christopher Mor...: Thank you. It's a pleasure to be here.

Chris Strachan: Thank you.

Justin Prochnow: [00:02:30] So before we go too far around, let's do a little introductions. So since I started with her and people haven't heard from her before, Stacy, just give us a little brief background on how you ended up here at the podcast. I know that could go a number of different ways, so I'm just going to leave that open-ended for you.

Stacy Carpenter: So I will not suggest that I'm here because I'm your wife. I will suggest that I'm here because I am your colleague who is a commercial litigator. I happen to have a long history and doing representation out of the [00:03:00] insurance industry, whether it's coverage or actually representing insurance professionals. I've done that for many years.

Justin Prochnow: Excellent. Well, I'm glad you could join. Chris Strachan. Give us a little background of where you are and what you're doing these days.

Chris Strachan: Sure. So I started in the insurance world I think about 15 years ago now. I had no background in insurance at the time. My dad was a attorney. [00:03:30] He worked in the exciting world of security law and mutual funds. And when I looked at what I was going to do for my career at that point in time, I didn't want to be a lawyer. And somehow, I ended up at a, I think it was like a baby shower and a good father of a friend took me aside and he was like, "Hey, you look stressed out. What are you thinking about? What's your future? [00:04:00] What's your plans for your career?" And he was such a cool guy, such a successful entrepreneur, and he had a brother who was in the insurance brokerage business. So he initially told me, "This is what I think you'd be really good at this."

So I went against all my instincts and decided to get into insurance brokerage. Started off with a firm named Barney & Barney, which was one of the fastest privately held [00:04:30] growing firms in California and was there for several years before they joined Marsh & McLennan. So I started off actually in the healthcare world and I still have some clients in that space from the first couple years in the business, but quickly found that my passion was food and beverage. And from there, built a practice over the next 12, 13 years and we now have 16 people based out of San Diego, all focused [00:05:00] on food and beverage insurance brokerage.

Justin Prochnow: Left, decided against the boring world of securities to the nonstop fast-paced world of insurance.

Chris Strachan: Kind of ironic, right?

Justin Prochnow: That's right. Christopher Morey, tell us a little bit about your background.

Christopher Mor...: Sure. So I'm going to go back 12 years ago, just prior to entering the insurance industry where I was selling sports nutrition supplements at a retail store, doing men's [00:05:30] physique competitions and practicing what I preached behind the counter in the gym. I quickly realized that wasn't a long-term career for me, but I truly loved it as a personal hobby and found a transitionary role into the insurance brokerage world. Formerly Bolton & Company out of Pasadena, California. I was mentored by Greg Doherty, who you knew very well for probably decades before myself. And [00:06:00] we together built a practice solely in the dietary supplement industry with my personal passion and his insurance intellect, that's how we fortified our presence within the industry and continue to grow it today. So it's been about 10 years of myself working in the insurance industry, like I said, specialized in dietary supplements, but on the broader category, health, nutrition, lifestyle products.

Justin Prochnow: Well, we thought it would [00:06:30] be really good to hear from both of you today because insurance is such an important part of the industry and one that often gets overlooked. We talked about labeling claims and we talk about all sorts of different facets, but insurance, a lot of times, gets overlooked until a company is looking to see if their insurance covers a particular claim and then realize, oh, they didn't have that type of insurance, or they don't have the coverage that they thought they did. [00:07:00] We're going to get to that in a little bit, but we want to start from the beginning because I also think there's just some misconceptions about people even knowing the difference between an insurance broker and an insurance company, and what does an insurance broker do as opposed to an insurance company? Do you place with any companies or do you have certain companies that do that? So maybe we could start with Christopher. Tell us a little bit about what does an insurance broker do?

Christopher Mor...: So as a broker, [00:07:30] especially one that specializes in the space, what we aim to do is act in an advisory role to the businesses, whether that be brands and or manufacturers, and analyze and bring to light a lot of the exposures the business has when it comes to certain financial losses. That could be property related, product liability related, you name it. So there's the advisory rule, but ultimately we assist with procuring various insurance policies to create an insurance program. [00:08:00] And it's important to note that we're not the insurance company in which we deliver you the policy with our own pricing on it. Rather we collect the data from you and your business and represent your business to the insurance marketplace, ultimately delivering quotes and policies for your business.

Justin Prochnow: How does a insurance broker, I mean, I know this is the same question I have when we have our financial advisor, one of those positions, how do you get paid because the companies [00:08:30] aren't paying you directly, I assume, so how are you guys getting paid for your services?

Christopher Mor...: So the primary way is through commission from the insurance company. So the insured, the business owner will pay the premiums for the policies at hand, and generally speaking, the commission back from the insurance company will be roughly 10, 12, 15% based off of that. So the business owner isn't paying the broker any fee directly, rather it comes back from the insurance company.

Chris Strachan: [00:09:00] And there's a lot of back and forth throughout the year. It's not just the placement of the policy at the renewal date. I think that's an important thing to remember is you're advising your client on risk management, on how to properly position and frame the company when they're getting ready to present information to the insurance markets and you're guiding them through claims [00:09:30] throughout the year. So it's not as simple as a transaction, like a real estate transaction where once you sell the house, you wipe your hands, you walk away. There is a lot of service throughout the year.

One thing I would add is commission is the primary basis. The industry was built on a standard approach of, like Chris said, 10 to 15% commission. And the reason that's important to understand is a lot of the resources that brokers build [00:10:00] into their model of customer service are really geared around the assumption of the standard markets commissions that they set. As you become a much larger company and you're now getting into the realm of spending over $1 million in premiums, then a lot of brokers will have conversations. We don't want our compensation to be something that's awkward or not mutually agreed [00:10:30] upon. So there are opportunities with larger clients, larger programs to talk about a fee instead of commission. But I would agree with Chris, the general approach is it's an industry standard.

Justin Prochnow: I like what you said to follow up on that when you talked about it's not just a one time transaction, but you're talking throughout the year. So are both of you, when you see trends or things happening in the industry, are those the types of things you're reaching [00:11:00] out to your clients and saying, "Hey, this is something people are doing now?" I mean, what types of things are you reaching out to them about?

Christopher Mor...: In the supplement side of things, states have various legislature that goes through like New York and selling sports nutrition products, needing to check ID verification for people under the age of 18, I believe. And then, California had, I think it was AB 899 for children's dietary supplements where they had to disclose certain [00:11:30] heavy metal testings on the label. And if not, there's fines and penalties associated with that. So for my specific industry is staying on top of those nuances that can arise relatively quickly, but impact how businesses run in various states. And business owners have to either pivot quickly or endorse, see if things are insurable and which are not. But that's part of my day-to-day industry advocacy for my clients.

Chris Strachan: [00:12:00] Even in the time of COVID, where we were seeing severe inflation with values, trying to remind your clients like, "Hey, we have your stock insured on a stock throughput policy. You had $10 million of stock declared at this location, your largest one." Is that still sufficient with the inflation that we're all experiencing through COVID? And then, [00:12:30] it comes to a million other myriad of things connected to the Food Safety Modernization Act, trying to make sure your clients are staying abreast of some of the changes there and how that impacts their traceability and recall program, all kinds of stuff, all kinds of exciting risk-related things throughout the year.

Justin Prochnow: So Chris Strachan, I send an email [00:13:00] to both of you on probably a regular basis like, "Hey..." Well, first I send it to the client saying, "Here's a couple guys to talk to about insurance." Depending on if it's supplement or food and beverage. You get this call from the company. How do you go about determining what insurance is good for a company and how does them coming to you make a difference as opposed to them just trying to go and shop it themselves?

Chris Strachan: I [00:13:30] think you asked me to answer that one first. I think what I try and do is talk them through, here's the key risks. The obvious one that everyone identifies, even if you're not a food and beverage or nutraceutical expert would be product liability. Because the core of your business is you're either manufacturing a product yourself or you're paying a third-party co-manufacturer to manufacture your product under your label. And so, I think everybody [00:14:00] understands that critical piece. You can't even transact business without a general liability policy. So typically, that's the bare bones approach is we have a general liability including products as the number and policy that most companies buy. But I try to use that opportunity to talk them through some of the other risks like recall that are the ones [00:14:30] that we look at. I'm sure Christopher would agree. We look at a recall as the nuclear sort of flame that puts you out of business if you don't have insurance very quickly. So I usually talk them through that.

A lot of times when people are starting up, they don't have the budget to spend on a lot of these things, but if I have my way, I would like them to be, if they're well-financed and they have an advisory [00:15:00] board and they're set up to have a budget for insurance, they're usually going to be out of the gates purchasing contamination recall standalone at $1 million limit, probably a stock throughput policy as well. They probably have a loan from a bank, an ABL loan or something. So that stock throughput policy is really important to cover that inventory in the stock that's being shipped all over the world. And then, obviously [00:15:30] the GL and the products liability are huge.

And then, as they scale and grow, we're checking in with them constantly like, "Hey, the next thing you should be thinking about is X, Y, or Z. Maybe build that into your budget for next year if you can convince the board." And then, what I try and do is even just get them a quote for additional coverage, whether it's D&O. I mean D&O, obviously [00:16:00] if I was starting business, I always tell companies I would get D&O from day one, but a lot of them, again, just don't want to spend the money. So we'll quote it, they can put it into a budget for maybe the next year, talk about it with their board of directors and make a decision.

Stacy Carpenter: So let's break that down a little bit because you just mentioned a lot of policies there and I think some of the people listening will know what policies you're talking about and some of them won't. So that's probably a good entree into discussing some of those [00:16:30] particular policies. And I understand some of them are general business policies that no matter what industry you're in, you're going to have or you should have. And some of them are more specialized. So why don't we start with the more general ones that I would say most industries anyone in industry would have. Christopher, could you start by, I think we heard a bit of a mention of a commercial property policy. Could you start by telling us what that is and why somebody would need that?

Christopher Mor...: Absolutely. I will start with, [00:17:00] it varies based off of business model. In today's world, we have a lot of virtual businesses in which everybody works remote and all over the country, in fact, all over the world. There might not be a physical HQ office location, but to start with that scenario, specifically an office location, perhaps a warehouse as well. All the tangible assets that a business owns, the furniture, fixtures, the equipment, the stock, and the business interruption [00:17:30] component, if there were a fire at the warehouse, if there were an earthquake, a flood, some type of physical damage to those owned assets, that's where commercial property insurance comes into play. When we look at brands specifically that hold a lot of stock or inventory in a warehouse or third-party locations and that inventory might be moving around quite frequently, that's when [00:18:00] we want to look more at a stock throughput policy. I know we'll get to that in a second, but generally speaking, the commercial property is for the owned physical assets within your control.

Stacy Carpenter: And you mentioned business interruption and I'm not sure everyone will know what that is. What is a business interruption and what are you getting if you have one?

Christopher Mor...: Yeah, so if there were a physical loss at the premises in which you're occupying and you are unable to do business, you can't [00:18:30] get in and ship out the inventory that you've been racking up POs on for the last six months, and that causes an interruption to the business, you're losing sales or perhaps you can't get the product out in a timely manner. So the business interruption kicks in to pay for that as well as some of the continuing operating expenses, including the rent that you might still contractually owe to the landlord despite not being able to occupy the premises, payroll costs and wages and insurance costs [00:19:00] and some of the administrative items that go on with the business.

Stacy Carpenter: Great. And then... Oh, go ahead.

Chris Strachan: I was just going to add that one of the things that I'm sure Chris, one of the first questions Chris is probably asking his clients just like I am is if you're doing your own manufacturing, it's what we call business interruption or business interruption extra expense coverage. If you have a third party co manufacturer, we need to make sure we're [00:19:30] properly covering it as a contingent business interruption loss, which is it's no longer your first party owned or leased location, it's a third party location that you're doing business through.

And it's one of the top things we probably both bump into when we look at a program, we audit it as food experts is you find out a lot of times that the business [00:20:00] has a property policy, but they use a co-manufacturer. And the co-manufacturer either is improperly called out or just isn't mentioned at all on the policy. So if it did have a fire at their co-manufacturer, which they completely rely on to do business, they might think they have business interruption coverage, but at the end of the day, they have a house with no roof, and they find out when they have a loss, which is sad.

Justin Prochnow: [00:20:30] It seems like you say that because I remember back at the beginning when I was first starting, there was a big recall, the peanut butter recall, you might remember from a number of years ago and similar but with recall coverage, companies had recall coverage, but it was for things that happen on their own premises instead of at the contract manufacturer's premises. And so, a lot of their recall coverage also didn't cover sounds like the same type of scenario where they didn't have it covered [00:21:00] with some of their other partners where it's actually more likely to create the issues than their own warehouse where you're just holding property.

Chris Strachan: Yeah, exactly. I think that's why those conversations are walk us through your operations from start to finish and you're taking notes and creating follow-ups to build the program. And the programs, they're all custom. I mean, some companies, they don't have any exposure [00:21:30] for stock and transit. All of their product is manufactured by a third party and somebody else takes risk of loss when they pick up the product at the loading dock. And then other companies are completely vertically integrated and have tons of supply chain risk and multiple co-manufacturers. So we see everything.

Stacy Carpenter: Go ahead, Christopher.

Christopher Mor...: I was just going to say little thing to add on the co-man side when these brands are utilizing a lot of co-mans or maybe [00:22:00] even just one primarily, it opens the discussion I think for business continuity plans and at least triggering the owners to begin thinking about it. If your co-man goes down, you only have one. Who do you have lined up to start making your product ASAP to minimize that downtime? And I think that's something that most business owners don't think about, especially when starting that they find that trusted co-man partnership and they just run with it and scale the business. But I do think it's important to take a step back and think, okay, [00:22:30] if something happens, who else can we call and who do we have lined up that can also make our product for us?

Stacy Carpenter: So Christopher, why don't you walk us right into the stock throughput policy because it seems to go a little bit hand in glove, say, with the commercial property we've talked about?

Christopher Mor...: Yeah, so I like stock throughput policies for all the finished product. Like I said earlier, that's moving around a lot. So a lot of brands will use freight companies to ship large values of inventory from co-man [00:23:00] to warehouse and from warehouse to wholesale customer like Costco, Walmart, you name it. So stock throughput in simple terms ensures the finished product while it's in transportation, while it's in storage at third party locations or your own leased warehouse. The key to this policy is it ensures or the valuation is selling price for the finished product. So if there is a loss truck of inventory, if there is a loss at the warehouse, a fire, flood, [00:23:30] earthquake, you name it, it will pay you back at the selling price versus the cost of goods or replacement costs.

Stacy Carpenter: Is that the difference-

Chris Strachan: I tell my clients, we call that the fire sale. So if they have a warehouse of $10 million of finished product burn, unfortunate situation, it's a fire sale, they just protected their margin on that $10 million of inventory rather than think about how long it would take them [00:24:00] to produce all that inventory all over again, the cost of the goods sold can be huge. So can't agree enough with that.

Stacy Carpenter: Is that the difference between property policy and the stock throughput policy? Because the property policy has some coverage, I believe, for in transit, but it's probably going to be at the raw material price and not at the finished good price?

Christopher Mor...: Standard valuation is replacement costs on the property [00:24:30] policy. There are some carriers that will do selling price valuation, but they have caps in terms of property and transit, they won't offer high limits or they're usually hesitant to ensure third party locations on those policies. So if your inventories and the care custody control of third parties, I think stock throughput is the way to go and it's pretty good policy as well in terms of catastrophic coverages like earthquake, wind, and flood, coverages that standard markets [00:25:00] sometimes will shy away from in some of the high-risk states.

Chris Strachan: Yeah, I'll add an element of humility. So when I first started working with food companies, probably my first year in, experienced relying on a property policy to protect you for losses in transit. And while I did have coverage that was a sufficient enough limit in transit, I learned that there's just so many different provisions in a standard [00:25:30] property policy that are going to restrict coverage. The main one I see a lot of is the spoilage related losses. So if there's a spoilage related loss, most carriers are going to limit that to 25 to 50 to maybe up to $200,000 in transit for spoilage related losses. And then even further on top of the sub limit that they'll use, it's some of the different conditions that they place on that claim. [00:26:00] So it's like if you didn't properly keep maintenance logs of the reefer that broke down that caused the spoilage loss, there's just so many what we call gotcha clauses on a property policy.

So for that reason, we almost 100% of the time recommend property underwriters. What I always tell clients is [00:26:30] they're trained to underwrite property risk at fixed locations that are scheduled on a policy and a moving target of stock that's potentially traveling all over the globe is properly underwritten by a marine cargo or stock throughput underwriter. And they can do it not only much more cost-effectively, just so much more comprehensively, and you can typically get cat perils [00:27:00] of earthquake, named windstorm and flood included as well at almost no cost for $1 million and then you can tack on top of that.

Stacy Carpenter: Let's move into general liability here, and then switch policy types a little bit. So Chris Strachan, if you would lead us off and talk about general liability, what it generally covers, and why you want to have that policy.

Chris Strachan: Sure. So I won't spend a ton of time on this [00:27:30] one, but just because it's pretty straightforward, the main things you're covering are bodily injury liability claims, and property damage liability claims. So those are the two main things you're covering with the commercial general liability policy. There's some little throw-ins for if you cause damage to the premises rented to you, there's the personal injury and advertising injury component of coverage, which I think has been exhausted [00:28:00] in the food space in the sense of trying to use that to trigger false advertising or false or misleading advertising types of claims.

In the past, the language that was on there for the PIAI was a lot broader and I think good attorneys would regularly be able to prevail there. And I think still once in a while you'll run into that, but I think most of the insurance companies that are really writing the most business [00:28:30] now in the food and beverage space, which has shrunk down quite a bit, they've paid a really close attention to those types of claim scenarios and they've done a good job of restricting the language to very specific things over the years. And we will get into that more later. I think there are some other avenues to properly cover that type of exposure, but the general liability, I always tell clients bodily injury [00:29:00] claims where you're liable or you're alleged to be liable and it's property damage liability.

Stacy Carpenter: And I want to emphasize that point you just made because I think that's one that people get caught up in because it literally has the word advertising in the policy if you bother to read it. And yet with the exclusions and any general liability policy, you're going to be hard-pressed to push any advertising claim into that coverage.

Chris Strachan: Yeah, it's unfortunate that the term general liability [00:29:30] has become, I think, widely falsely understood to be a catch-all for any type of liability claim and you could see why. It's like the term that we have for most property policies, we call them all risk, "all risk property," which it's really not all risk. A property policy, the way it works is you have specific exclusions in the policy, [00:30:00] and then if it's not excluded, it's deemed to be understood as covered. But it's not all risks because there's several risks that are specifically excluded on a property policy. And so, general liability has many, many, many different standard exclusions which you can't get around no matter what carrier you're working with. They're pretty much always going to be there.

Stacy Carpenter: Christopher, what about from a product liability perspective? Are you still looking at your general liability [00:30:30] policy?

Christopher Mor...: Yeah, so most general liability policies will include product liability. In the supplement space, we have carriers that will do an all-in-one policy. There are some instances where you'll have commercial general liability separate and product liability on its own as well. But product liability, same case. If I had to narrow that down to one sentence and what is this policy for, it's for the lawsuits in which the allegation is somebody's been [00:31:00] sick or hurt, bodily injury, caused by your products. There's a lot of exclusions about what is not covered. But the one thing that I can confidently say will trigger the coverage is that bodily injury allegation.

Justin Prochnow: The person drinking the energy drink who then says they went to the hospital and it caused some issue or the dietary supplement that says now they have some condition that was caused by consuming the products.

Christopher Mor...: Correct.

Chris Strachan: And [00:31:30] the nice thing about the policy is there's usually a duty to defend or a defense that's rendered, deemed to be covered as part of it. So like Chris said, even if it's, we see all... I mean, my gosh, in my world with a lot of the food products, if I could have a dollar for every cracked or chipped tooth claim that I see, the joke is we call those the [00:32:00] unfunded dental insurance policy. So people that don't have dental insurance or they can't afford to get their teeth fixed, they break a crown, it goes to the food company that they most recently purchased something from. But the nice thing again is that they will have a defense provided by the policy.

Justin Prochnow: Does emotional distress count as bodily injury under the product liability policy? Like you [00:32:30] open up your package and there's a severed finger in there and it caused me so much emotional distress. Does that cover your products under products liability?

Chris Strachan: I would say most of the time there's going to be specific language that's going to exclude that. Once in a while though, I mean you can get that negotiated. I think, and we'll get into this more later, but one of the tough things about being an insurance broker, you're never going to get every single ask that you're focused on. So [00:33:00] we really have to prioritize the core coverages that you know are most probable to happen and then work within the confines of what's available in the market, negotiate on those core items. Obviously, there's always nice to have things, but what we're dealing with most of the time is these policy forms, they're filed with the state and even the non-admitted policy forms, they can have reinsurance treaties. [00:33:30] So it's not necessarily always available to have these one-off manuscript endorsements. We always do try, but a lot of times it's like you just got to focus on prioritizing.

Stacy Carpenter: So Christopher, walk us through, we heard a couple of mentions of D&O, of course, that's directors and officers coverage. Walk us through that. Who might want to have that coverage?

Christopher Mor...: Well, as Chris mentioned earlier, [00:34:00] really any business at startup level should highly consider purchasing this coverage. The simple way that I've always talked about it, whether it be absolutely right or wrong, I consider it a malpractice for some of the decision makers of the company, because they don't protect the directors and officers for any bad decisions they make in their roles running the business. And lawsuits can arise from shareholders or third parties, from lenders [00:34:30] for causing financial harm to a business as a director and officer. But to go with that, D&O, directors and officers is often written inclusive of employment practices liability or management liability when looking at it together. So I have a lot of sports nutrition brands and to go along with the D&O piece, the employment practices piece, we see a lot of sexual harassment, discrimination, workplace violence claims that trigger this [00:35:00] management liability program in addition to the D&O.

Justin Prochnow: Well, we've assumed the D&O, it's not just bad decisions, but it's also I guess the at least allegations of bad decisions. Because you might be someone saying, "I don't make bad decisions, I don't need that," but someone might accuse you of doing it and that coverage is going to cover it even if it ends up being that you didn't make a bad decision. That's what the coverage is there for.

Christopher Mor...: Correct, the defense costs.

Chris Strachan: Yeah, [00:35:30] I would say, I always tell my clients that I feel better sleeping at night as your broker knowing that you have D&O coverage. And the reason why is some of the different areas like the insuring agreement are fairly broad and like an all risk "property policy" unless it's specifically excluded and you can try and fit it under one of the components of the insuring agreement. Knowing that they have that policy in place, there's [00:36:00] much higher probability that if there's a very one-off unique claim scenario that they're going to have defense coverage and or indemnity coverage for that claim.

And one more thing I'll throw on there is you mentioned earlier the false labeling, false or misleading advertising or labeling, that's been something that's been really tough for attorneys and brokers over the past, I [00:36:30] don't know, 15 years to find coverage. And I would say that the general liability and products liability policies, pretty hard-pressed to find anything there. The D&O, as the market starts to soften for D&O, and that's the key, I wanted to point that part out because we have market cycles. And as the broker in a hard market cycle, you're basically [00:37:00] making best friends with your underwriters and begging them just to write the risk because they can just increase rates on their whole book of business and their boss will be happy if they write no new business because they're making money in a hard market, or at least their directive is that they don't need to take on new clients and they can pretty much dictate coverage terms that are more restrictive in a hard market.

[00:37:30] As you move into a soft market cycle, our role as brokers is to constantly take the capacity, the increased capacity in the marketplace. So we call it capacity. It's really just interest for writing new business. When you have that increased capacity, there's more of an opportunity to leverage that interest and get the insurance companies to start offering coverage for things that [00:38:00] they might not have been comfortable with in a harder market cycle. And I would say the false advertising, false labeling topic is one that we're starting to see become something that can be negotiated. Obviously, there's certain categories of products that are probably never going to be able to get that coverage, but there's others that we're starting to see the ability to get that done, which is really a great thing because such a frustrating thing when [00:38:30] your client has one of those claims and you can see that it's based on something that's very frivolous and they have to defend it nonetheless. And sometimes, the settlements can be costly.

Stacy Carpenter: So Christopher, walk us through what is probably a coverage that is going to be of most interest to people listening to this podcast and that would be your product contamination and recall coverage.

Christopher Mor...: Yeah, lots of financial loss and damage from a product recall. We've [00:39:00] seen it just about in every consumer goods industry, from health foods to dietary supplements. With product recall insurance, I tend to focus a lot on the business's quality control, quality management systems in addition to the policy itself. If we're looking at the brand side of things and they have millions of dollars that they're selling to Costco, Sam's Club, Walmart even, we want to look at [00:39:30] their relationship with the contract manufacturers to make sure they're doing their job as a brand to enforce good and safe products for consumption.

So we'll look at quality control processes, but also work on placing a policy and presenting that to the insurance companies appropriately. The product recall and contamination policy will really kick in the event they've sold product and contract manufacturer says, "Hey, we found out that [00:40:00] this batch that we distributed to you or these five batches were contaminated with, for example, Staph. We need you to get the product back off the shelves." So the product recall insurance policy will kick in and help pay for the expenses associated with getting the product back, but also the lost profits associated with the, I guess, hindrance to the business relationship with, for example, Costco. There's lots of expenses and loss of income and result of a recall that recall policy [00:40:30] tends to capture.

Justin Prochnow: Actually, this is rare, a caller calling in with a question about, actually not a caller, but someone had sent me an email last night exactly on this topic, so I said I would ask it and especially in the context of recalls, how do you decide what limits are appropriate for, let's say, a recall policy? Is that based on sales? Is that based on potential damages? [00:41:00] How do you determine what a good limit is for recall insurance?

Christopher Mor...: I'd say that there's a balancing act between a few different things. There's the typical benchmarking, others in the industry your size are buying this amount of limit, but also we got to look at the exposure of product out in the public. So if there's a larger exposure on that side versus the limit that the industry tends to buy, then there's consideration for more limit. But also, we got to be respectful [00:41:30] of budget. Insurance don't have an unlimited expense for product recall insurance specifically. So if we could get a 5 million limit or a 10 million limit depending on, again, what the exposure is with the consumers out there, we'll go with that. But generally, we'll leave with benchmarking and then start to tinker towards the cost analysis of the policy.

Justin Prochnow: Is that the same in the food side of things, Chris Strachan?

Chris Strachan: Yeah, and I have clients on both [00:42:00] sides, food and beverage and supplements. And I would say that same answer, it's risk tolerance decision-making. I always say, "Have a conversation at the board level. Look at the retailers or wholesalers that you're selling to. Are they more notorious for taking advantage of a recall?" We've found that there's certain, I won't name them here, but there's certain retailers that when there's a recall, it's almost like they look at it as a profit [00:42:30] center and they try and I've seen some crazy stuff. I've lived through helping clients through a lot of recall claims over the years, and it's pretty embarrassing for the retailers sometimes when you see that they're trying to charge $300,000 to destroy a few lots that are not that big just because they don't have... What happens is those [00:43:00] contracts are so one-sided, and this is something I try and spend a lot of time with my clients on is understanding your risk that is already there in your contract.

I always tell my clients, "Look, you're already self-insuring for recall. Just read your contracts with your customers. You've already agreed that you will fully indemnify them to the full extent of whatever. There's no limit of liability. And if you don't have a policy, that's fine, but they'll bankrupt your company collecting [00:43:30] every last penny if they can." And then, we've seen it. So it does make sense to look at what's the reputation of your customers when they have a recall? What have you heard from some of your peers who have experienced recalls?

And then, the other thing is if it's in the news, it's typically going to be a much bigger impact on your business income loss. And so, that's important as well. When you have something [00:44:00] that makes the news and it's in the headlines, it's hard to quantify what that could mean to your income in terms of a loss. And then, your customer is going to come after you for their lost income and all of their expenses. So it's such a tough question. Most clients, like Chris said, most clients you're happy if they're going to spend the money to get $1 million policy. That's where we always start. I would never recommend anything less. And then, I try to [00:44:30] each renewal at least give them a quote option for high limits so that they can think it through, consider it, budget it. We just go from that angle.

Christopher Mor...: And also, I agree with everything you just said there. Looking back at the co-man relationship, in addition to the recall insurance, it comes back to risk management practices of these brands and business owners, because again, too often they get into the routine of trusting the contract manufacturer and the COAs they're getting. [00:45:00] But as a brand, they do have a duty to go above and beyond when it comes to quality control and quality assurance. And so, I always encourage, "Oh, hey, trust, but verify. What are you doing to do onsite audits with your co-mans? Make sure they are still operating in compliance to deliver you clean safe products." Because if you can be as proactive as possible on that front, I think there's a good chance of mitigating some catastrophic recalls earlier than later.

Stacy Carpenter: So you both mentioned it that [00:45:30] insurance is built around, obviously there is a coverage grant, but then there are many exclusions that take away from that coverage grant. And so, I want to ask each of you, if you would just give us your top one or two exclusions that you think people ought to look out with. So starting with Chris Strachan.

Chris Strachan: Sure. I'd say on the stock and the property side of things, the limitations [00:46:00] of if you have a co-manufacturer business model, you're probably not properly covered if you're not working with a food industry broker specialist. The coverage territory for your stock, raw materials, it could even be packaging. Let's say you have a really unique package for your food product and you import it from Asia directly, and the coverage territory on your property policy is probably US, [00:46:30] Puerto Rico, Canada. So coverage territory.

And then, I would say for recall, one of the big ones that I see people not pay enough attention to is new product categories. It's a pretty standard exclusion. I've tried getting it removed whenever I can, I rarely can. So it's one of those things that the recall underwriter or recall insurer really want to understand. If you're moving into [00:47:00] a new category of products, there's a pretty hard exclusion on almost every single policy in the marketplace if you don't explain what that change to your product mix is to the underwriter. Obviously, it doesn't get as nitty-gritty as like we're adding a new variety of the same product line. It's like a new line of products. So I had a client that they do actually nutraceuticals and then they started getting into [00:47:30] personal care products for children, which was totally outside of what they were doing previously. So I think that's a really big one for me. I'll let Chris share his.

Christopher Mor...: Yeah, if I had to narrow it down to, I should say two exclusions, one of the main ones we talk about on the product liability policies is the ingredient exclusion form. Every product liability policy will have an iteration of this form that excludes a lot of [00:48:00] gray or potentially red flag ingredients that you've seen throughout the history of the self [inaudible 00:48:06].

Justin Prochnow: What's Strachan doing these days on the exclusion list?

Christopher Mor...: Yeah, so coverage is there. I will say that. It's just very, very costly.

Justin Prochnow: I mean, I'm sure that was in a few exclusions over the last couple of years.

Christopher Mor...: You'll see marijuana exclusions on all product liability policies, but then you can get CBD [00:48:30] or hemp exceptions, and there's coverage available for certain ingredients. And so, the typical ingredient exclusion list will have DMAA, Ephedra, and you'll see yohimbine, bitter orange, synephrine, things like that. And some of these ingredients can indeed be negotiated off of that exclusion list. You can get an exception to the exclusion. So having a specialist broker in your corner when it comes to reviewing this form specifically will help you hopefully buy a policy without [00:49:00] an exclusion to yohimbine, for example, if you have that in your products.

Justin Prochnow: Like the market for tickets these days. Going to a game, people always say, "How'd you get tickets?" I'm like, "You can always get tickets. It just depends on how much you want to pay for."

Stacy Carpenter: But I also think it's part of the point of what you guys were saying in the big beginning about using a specialist broker because obviously, one, you're able to identify easier than your average person what's going to be the exclusion, that might be the gotcha. But two, your average person [00:49:30] is not going to go to a carrier and by themselves negotiate a change in the form. It's just not going to happen. And you guys might be able to, and you might not be able to, but the only chance of getting it done, I think, is with you guys.

Chris Strachan: Yeah, the ingredient exclusions are one that you have flexibility. They usually have multiple versions available or they have the flexibility already pre-filed to make those changes. But what we try and do with the ingredients is if it is a nutraceutical, and we're not 100% sure [00:50:00] all of their ingredients, we always send the ingredient list with the proposal so that the client has to sign off that they don't have any of those specific ingredients included in their product mix. And then, once in a while, they will point one out. And like Chris said, at that point, you can usually get it removed if it's agreed.

Justin Prochnow: Well, where we wind up here is we're zooming in on an hour here, which is [00:50:30] a long podcast when you can only do the Peloton for so long while listening to lawyers and insurance brokers. But the last area we wanted to just get out there a little bit for people who are listening is really the area of limits, sub-limits, and deductibles. So maybe Christopher Morey, maybe start with this. What's a deductible or I don't even know what this is, an SIR?

Christopher Mor...: [00:51:00] To really simplify the deductible is what everybody should and probably is aware of in which in order for, well the insurance company will pay out your claim, and this could be your homeowner's claim, auto claim, property claim on the business side. And then, you're responsible for paying the deductible. The self-insured retention is where, you, the business owner are responsible, for example, the [00:51:30] first $50,000 of a claim before the insurance company begins to pay anything on your behalf.

Stacy Carpenter: And I think people generally understand because as you say, they have to do it with their home and their auto, the deductible. And if you're a business and you have an SIR, a self-insured retention, you probably know it. But I think the thing that a lot of people miss is the sub-limit sometimes. So Chris Strachan, talk to us about that.

Chris Strachan: I mean, it's frustrating I'm sure as an attorney because [00:52:00] you guys care about details just like we do. But I guess the best way to explain it would be take a property policy. You have your primary total insured value with all your buildings. You're going to have a limit. You're going to have a business interruption. It might be on a blanket basis, it might be on a specific basis. Those are other nuances. You can have agreed value, you can have co-insurance. You can have sub-limits buried [00:52:30] in that policy, which every property policy probably has, I don't know, what do you think, Chris? Maybe 100 or 75 different sub-limits of coverage based on the carrier.

Christopher Mor...: Yep.

Chris Strachan: So the thing that's tough is I always tell my clients there's only so much we can put into a proposal document. We try and focus on the key items. If we put everything in there, it's going to end up being the same length as the policy, which is 200 pages long. So [00:53:00] I do encourage clients to actually read the policy, even though they're paying us to do it, we do do it, we do read them, but they should also take some responsibility and understanding what their coverage is so that if they do see something, "Oh, fine arts, there's a sub-limit of $100,000 for fine arts. Well, I didn't tell my insurance broker that I just bought a Van Gogh painting and put it in my headquarters." Those kinds of things. If you're [00:53:30] a good policyholder, a good insured, you do take a little more vested interest in understanding the sub-limits.

And then, to your point on the retention versus deductible, the way I like to explain it is with a self-insured retention, it's usually a larger amount and they're forcing skin into the game for the insured. So they want to see that the insured has more skin in the game in the outcome [00:54:00] of that claim. And the other difference is with a deductible, they take the loss, they deduct the deductible, and they pay the claim. With the self-insured retention, they're actually, like Chris said, you have to pay that out of your pocket. You have to prove that you've paid that self-insured retention before the insurance company pays. But one of the differences is whatever that limit is, once you've satisfied your self-insured retention, you get that full limit. [00:54:30] It's not having the retention deducted from it, which is a lot of people get that confused.

Stacy Carpenter: It's a million on top of the 50,000 SIR.

Chris Strachan: Yeah, if it's $1 million limit and there's a 50,000 SIR, you could potentially get $1 million paid by the insurance company after you satisfy your 50,000. Whereas if it was a deductible, you're going to get 950,000.

Stacy Carpenter: Well, the same conversation comes in with your legal fees too. Are your legal fees, your defense costs, [00:55:00] are they going to subtract from your limit or do you get your defense costs plus your limit, which is another consideration that you want to look at when you're looking at your policies.

Chris Strachan: Yeah, it is. And the other thing, big topic, this is a good one because we have two attorneys, but a big topic especially it comes up with EPL, employment practice liability, is you typically have to get approval from your insurance company on not only who is defending their claim, [00:55:30] but what the rate of the hourly rate is for the attorney. And I can't tell you how often large law firms that know better, they don't do their fiduciary responsibility to the insured by explaining to them, A, if I get too far along in my defense strategy helping you defend this claim, I could prejudice the claim and it could be denied by the insurance company. And B, if my rate's $750 an hour, [00:56:00] the insurance company might have a pre-negotiated panel rate with that policy. So you need to have those things worked out and approved by the insurance company. And it's pretty often that that doesn't get done. So I think insureds need to understand that better, so are attorneys sometimes.

Justin Prochnow: We've talked about an awful lot today. So winding up, I guess I would kick it to [00:56:30] both Chris's, any, let's say, either parting words of wisdom or something we haven't covered, something that you want to leave people with about the exciting and fast-paced world of insurance brokerage?

Chris Strachan: Chris, you go first.

Christopher Mor...: The exciting world of the insurance brokerage. I truly believe that the insurance broker or the insurance transaction is more than just a transaction, especially in the quickly evolving [00:57:00] dietary supplement sector. There's so much regulation and different things that are popping up just all the time. And insurance companies are a little slow to react sometimes, but once they do, not every broker will understand the changes to each respective policy. So I do just want to reinforce the importance of working with hopefully somebody in your sector as well as don't be afraid to interview your broker. [00:57:30] It's not just a transaction. You can ask the tough questions about the industry if need be. It doesn't always have to be insurance, because again a specialist should be able to have a little more resource than just an insurance policy.

Chris Strachan: My parting words would be there's going to be a lot of new entrants, I think, in the insure tech space as technology integrates more into insurance. And from personal experience, I've quickly learned [00:58:00] that yes, it might be easier. You might not have to fill out an application. You can get a quote, they can bind it, it might be cheap, but you typically are going to get what you pay for. If something's cheaper, there's usually a reason. If your broker is always recommending the cheapest option, he's probably not a specialist. You'll probably figure out why it was cheaper at some point if you have a claim, and I can't stress enough, having an [00:58:30] attorney that specializes in food guiding you through tough topics that are not necessarily commercially available with insurance because then you can take precautions to risk manage those items, and then, just making sure that you're spending time looking at your contracts, both with your attorney and with your insurance broker so you can understand where you're assuming risk, where you have risk, where you've transferred it with insurance.

Justin Prochnow: [00:59:00] Read that statement exactly as I wrote it for you about having a good food and beverage attorney. Thank you. Obviously, we agree the same way. That's why we send things to both of you all the time. It's really important that you have the right people working here. And so, many companies just they don't know these things, and so it's important to have someone who can shepherd them through. [00:59:30] Ms. Carpenter, any final words?

Stacy Carpenter: I think that's right. I would just do another plug for these guys. I think that so many people think that insurance can be purchased easily and through anyone, sometimes even calling directly to companies type of thing. So I do think that there are particular industries where you do have to pay attention to the industry focus. And so, I think you two both fit the bill and people would be well advised to talk to you about their insurance.

Justin Prochnow: Well, thanks everyone for joining us today. For those of you listening, if you [01:00:00] enjoyed it, please like it or otherwise acknowledge on the platform that you're on. And if you didn't care for it, do as my mom used to say, if you don't have something nice to say, don't say anything at all. All right, thanks everyone.