

No. 66815-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

OBERTO SAUSAGE COMPANY, a Washington corporation

Respondent,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, identifiable  
under Contract No. 071083 and subscribing to Certificate No. MPT-  
0027300

Appellant.

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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. ISSUES ON APPEAL .....	2
III. STATEMENT OF THE CASE .....	5
A. Oberto Purchases Insurance from Underwriters.....	5
B. Oberto Buys and Uses Contaminated Beef That Is Recalled .....	6
C. Underwriters Denies Coverage for Oberto's Loss .....	8
D. Oberto Files Suit to Enforce the Policy .....	10
E. The Superior Court Finds Underwriters Liable for Damages Equal to 1.75 Times Oberto's Loss .....	10
IV. SUMMARY OF ARGUMENT.....	12
V. STANDARD OF REVIEW.....	14
VI. ARGUMENT.....	16
A. The Superior Court Correctly Ruled That Section 1 of the Policy Provides Coverage for Oberto's Loss.....	16
1. Oberto's product was contaminated.....	17
2. The contamination was malicious .....	23
B. The Superior Court Correctly Ruled That Section 2 of the Policy Provides Coverage for Oberto's Loss.....	28
1. Oberto's product, and many ingredients that went into it, were accidentally contaminated and/or impaired .....	29
2. Oberto's use of accidentally contaminated and impaired ingredients resulted in destruction of tangible property .....	30
3. Use of Oberto's contaminated product "may likely" have resulted in adverse health effects.....	32
C. The Superior Court Correctly Determined that Underwriters Breached the Insurance Contract.....	36

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
D. The Superior Court Correctly Determined that Underwriters' Denial of Coverage Under Section 1 Was Unreasonable .....	36
1. Underwriters' denial of coverage was unreasonable .....	37
2. Underwriters' unreasonable denial of coverage harmed Oberto .....	42
3. Underwriters' explanations for denying coverage do not absolve them of bad faith .....	42
E. The Superior Court Properly Exercised Its Discretion to Award Oberto Increased Damages .....	44
VII. ATTORNEYS' FEES AND COSTS ON APPEAL .....	49
VIII. CONCLUSION.....	49
APPENDICES A and B	

## TABLE OF AUTHORITIES

	Page
<b>FEDERAL CASES</b>	
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).....	14
<u>In re Feature Realty Litig.</u> , 468 F. Supp. 2d 1287 (E.D. Wash. 2006).....	31
<u>Ltd., Inc. v. Cigna Ins. Co.</u> , 228 F. Supp. 2d 574 (E.D. Pa. 2001).....	33
<b>STATE CASES</b>	
<u>Bowers v. Farmers Ins. Exch.</u> , 99 Wn. App. 41, 991 P.2d 734 (2000).....	24, 26
<u>Bushnell v. Medico Ins. Co.</u> , 159 Wn. App. 874, 246 P.3d 856 (2011).....	15, 38
<u>Caroff v. Farmers Ins. Co. of Wash.</u> , 155 Wn. App. 724, 989 P.2d 1233 (1999).....	35
<u>Daley v. Allstate Ins. Co.</u> , 135 Wn.2d 777, 958 P.2d 990 (1998).....	15, 43
<u>Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd's</u> , No. M88545, slip op. (Cal. Super. Ct. Aug. 18, 2009).....	32
<u>Gen. Mills, Inc. v. Gold Medal Ins. Co.</u> , 622 N.W.2d 147 (Minn. Ct. App. 2001).....	25, 29, 42
<u>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</u> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	37
<u>In re Juarez</u> , 143 Wn.2d 840, 24 P.3d 1040 (2001).....	25
<u>Int'l Fid. Ins. Co. v. Wilson</u> , 387 Mass. 841, 443 N.E.2d 1308 (1983).....	45
<u>Keyes v. Bollinger</u> , 31 Wn. App. 286, 640 P.2d 1077 (1982).....	44

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<u>Kitsap Cnty. v. Allstate Ins. Co.</u> , 136 Wn.2d 567, 964 P.2d 1173 (1998).....	passim
<u>Koch v. Mut. of Enumclaw Ins. Co.</u> , 108 Wn. App. 500, 31 P.3d 698 (2001).....	24
<u>Lynott v. Nat'l Union Fire Ins. Co. of Pitt., Pa.</u> , 123 Wn.2d 678, 871 P.2d 146 (1994).....	31
<u>McDonald v. State Farm Fire &amp; Cas. Co.</u> , 119 Wn.2d 724, 837 P.2d 1000 (1992).....	35, 41
<u>Oberto Sausage Co. v. Certain Underwriters at Lloyd's</u> , No. 66093-4-I (Wash. Ct. App. Nov. 19, 2010).....	11
<u>Olympic S.S. Co. v. Centennial Ins. Co.</u> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	49
<u>Panorama Vill. Condo. Owners' Ass'n Bd. of Dirs. v. Allstate Ins. Co.</u> , 144 Wn.2d 130, 26 P.3d 910 (2001).....	49
<u>People v. Hagedorn</u> , 127 Cal. App. 4th 734, 25 Cal. Rptr. 3d 879 (2005).....	26
<u>Port of Seattle v. Pollution Control Hearings Bd.</u> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	17
<u>Sears v. Int'l Bhd. of Teamsters, Local No. 524</u> , 8 Wn.2d 447, 112 P.2d 850 (1941).....	24
<u>Sheehan v. Cent. Puget Sound Reg'l Transit Auth.</u> , 155 Wn.2d 790, 123 P.3d 88 (2005).....	14
<u>Smith v. Safeco Ins. Co.</u> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	36, 37, 41, 44
<u>St. Paul Fire &amp; Marine Ins. Co. v. Onvia, Inc.</u> , 165 Wn.2d 122, 196 P.3d 664 (2008).....	41, 43

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<u>St. Paul Fire &amp; Marine Ins. Co. v. Updegrave,</u> 33 Wn. App. 653, 656 P.2d 1130 (1983).....	45
<u>State v. Goodman,</u> 150 Wn.2d 774, 83 P.3d 410 (2004).....	26
<u>State v. Williams,</u> 158 Wn.2d 904, 148 P.3d 893 (2006).....	26
<u>Stevens v. Brink's Home Sec., Inc.,</u> 162 Wn.2d 42, 169 P.3d 473 (2007).....	14
<u>Van Noy v. State Farm Mut. Auto. Ins. Co.,</u> 142 Wn.2d 784, 16 P.3d 574 (2001).....	41, 43
<u>Wagner v. Wagner,</u> 95 Wn.2d 94, 621 P.2d 1279 (1980).....	38
<u>Weyerhaeuser Co. v. Com. Union Ins. Co.,</u> 142 Wn.2d 654, 15 P.3d 115 (2000).....	38
<u>White v. State,</u> 131 Wn.2d 1, 929 P.2d 396 (1997).....	14, 28
<u>Woo v. Fireman's Fund Ins. Co.,</u> 161 Wn.2d 43, 164 P.3d 454 (2007).....	14
 <b>FEDERAL STATUTES</b>	
21 U.S.C. § 601(m)(3).....	17, 18
 <b>STATE STATUTES</b>	
Cal. Penal Code §§ 597(a)-(b).....	25
Cal. Penal Code § 599f(b)-(c).....	25
RCW 19.86.020 .....	37, 46
RCW 19.86.090 .....	10, 44, 46, 49

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
RCW 19.122.070 .....	48
RCW 19.215.020(4)(b).....	48
RCW 42.17.400(5).....	48
RCW 48.01.030 .....	37
RCW 48.30.010(1).....	36
RCW 48.30.010-.015 .....	10, 36
RCW 48.30.015(1).....	37, 49
RCW 48.30.015(2).....	44, 48
RCW 48.30.015(3).....	49
RCW 48.30.015(8)(a) .....	10
RCW 64.12.020 .....	48
RCW 81.28.220 .....	48
 <b>RULES</b>	
RAP 10.3(g).....	22
RAP 18.1.....	49
 <b>REGULATIONS</b>	
9 C.F.R. § 309.3(e) (2007).....	21
9 C.F.R. § 309.3(e) (2008).....	7, 25
9 C.F.R. § 309.3(e) (2010).....	21
9 C.F.R. § 313.2 (2008) .....	25

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
72 Fed. Reg. 38,700 (2007) .....	7, 20, 21, 22
WAC 284-30-330(1).....	40, 46
WAC 284-30-350(1).....	42
 <b>LEGISLATIVE MATERIALS</b>	
1 House J., 60th Leg., 2007 Reg. Sess. 1136 (Apr. 5, 2007) (amendment 541) .....	48
H.B.R. ESSB 5726, 60th Leg., Reg. Sess. (Wash. 2007) .....	44, 45
 <b>OTHER AUTHORITIES</b>	
<u>American Heritage Dictionary of the English Language</u> (3d ed. 1992).....	18, 19, 33, 39
Humane Society of United States Video, <a href="http://www.youtube.com/watch?v=kaM7Hpu47FY">http://www.youtube.com/watch?v=kaM7Hpu47FY</a> .....	7
Brian J. Linn and Gretchen Newman, Comment, <u>Reasonable Attorneys' Fees and Treble Damages – Balancing the Scales of Consumer Justice</u> , 10 Gonz. L. Rev. 593 (1975).....	45
<u>Roget's International Thesaurus</u> (1977).....	18
<u>Webster's Third New International Dictionary of the English Language</u> (2002).....	18, 39
<u>Webster's Unabridged Dictionary of the English Language</u> (2001)...passim	

## I. INTRODUCTION

Respondent Oberto Sausage Company ("Oberto"), a family-owned manufacturer of cured meats, purchased an insurance policy (the "Policy") from Certain Underwriters at Lloyd's, London ("Underwriters") to protect against loss in the event that its products, or ingredients used in its products, became contaminated. During the term of the Policy, the federal Food Safety and Inspection Service ("FSIS") issued a recall—the largest in history—of beef sold by one of Oberto's suppliers, Hallmark/Westland Meat Packing Company ("Hallmark"), based on its determination that Hallmark's beef was "unfit for human food" and "adulterated" because Hallmark had slaughtered downer cattle without submitting them for legally mandated inspections designed to insure that their meat was safe to eat. Oberto complied with the federal recall requirements at great expense and notified Underwriters of a claim under the Policy. Underwriters refused coverage.

Oberto wrote several detailed letters to Underwriters contesting the denial, but Underwriters continued to refuse coverage. Oberto filed suit, and the parties eventually filed cross-motions for summary judgment. The Superior Court granted summary judgment for Oberto and denied summary judgment for Underwriters on the issue of liability, concluded that Underwriters had acted unreasonably in denying coverage, and

awarded Oberto all its actual damages multiplied, pursuant to statute, by a factor of 1.75. Oberto asks this Court to affirm the Superior Court's judgment, and grant Oberto its fees and costs on appeal, because Oberto's loss is covered by two separate sections of the Policy and Underwriters acted unreasonably and in bad faith in denying coverage.

## **II. ISSUES ON APPEAL**

1. Whether, in granting summary judgment to Oberto on the issue of coverage under Section 1 of the Policy, the Superior Court correctly determined that there was actual or threatened contamination of the Hallmark beef, where the undisputed evidence showed that, over a two-year period, Hallmark employees used extraordinary means to force to slaughter cattle that had fallen and were incapable of walking ("downer cattle"), and did not alert FSIS inspectors that cattle had become non-ambulatory so that they could conduct additional inspections required by law for downer cattle, and that FSIS determined that all beef sold by Hallmark during this time period was unfit for human food and adulterated as a matter of law.

2. Whether, in granting summary judgment to Oberto on the issue of coverage under Section 1, the Superior Court correctly determined that the contamination of the Hallmark beef was malicious, where the undisputed evidence showed that, over a two-year period, Hallmark

employees used extraordinary means to force downer cattle to slaughter, did not alert FSIS inspectors that cattle had become non-ambulatory so that they could conduct additional inspections required by law for downer cattle, and acted with reckless and/or wanton disregard for whether the downer cattle were diseased, whether persons who ate food containing meat from the downer cattle would suffer bodily harm, and whether Hallmark's customers would be subjected to adverse financial consequences from selling products that contained the Hallmark beef.

3. Whether, in granting summary judgment to Oberto on the issue of coverage under Section 2, the Superior Court correctly determined that non-Hallmark ingredients that came in contact with the Hallmark beef during the production of Oberto's products were accidentally contaminated or impaired, and that such contamination or impairment resulted in the destruction of "tangible property" when Oberto was required to destroy all products that had contact with the Hallmark beef.

4. Whether, in granting summary judgment to Oberto on the issue of coverage under Section 2, the Superior Court correctly determined that non-Hallmark ingredients that came in contact with the Hallmark beef during the production of Oberto's product were accidentally contaminated or impaired, and that such contamination or impairment may likely have resulted in bodily injury or disease or death of any person.

5. Whether the Superior Court correctly determined that there was no genuine issue as to any material fact and that, under Washington law governing construction of insurance policies, as a matter of law Underwriters breached the Policy by denying coverage.

6. Whether the Superior Court correctly granted summary judgment to Oberto on its claims that Underwriters denied coverage under Section 1 unreasonably, in bad faith, and in violation of the Insurance Fair Conduct Act ("IFCA") and the Consumer Protection Act ("CPA"), where Underwriters (1) contended that there was no contamination of the Hallmark beef; (2) contended that Hallmark's actions that allowed downer cattle to be slaughtered and introduced into the food supply were not malicious; (3) ignored Oberto's reasonable interpretations of undefined terms in the Policy; (4) interpreted the Policy as if it included prerequisites to coverage that are not in the Policy; and (5) disregarded settled principles of law regarding the construction of insurance policies.

7. Whether, based on its finding that Underwriters denied coverage under Section 1 unreasonably, in bad faith, and in violation of IFCA and the CPA, the Superior Court properly exercised its discretion under IFCA to award damages to Oberto in the amount of 1.75 times Oberto's actual damages?

### III. STATEMENT OF THE CASE

#### A. Oberto Purchases Insurance from Underwriters

Oberto, located in the Seattle area for almost a century, makes and sells cured meat products, such as jerky and sausage. To protect its operations, Oberto purchased insurance from Underwriters that would compensate it for certain losses in the event it bought or sold contaminated products; the policy is entitled Malicious Product Tampering & Accidental Product Contamination Policy, No. MPT-00270300, effective March 1, 2007 to May 1, 2008 (the "Policy"). CP 309, 328-46.

Section 1 of the Policy provides coverage for loss resulting from "PRODUCT TAMPERING", which the Policy defines as:

Any actual or threatened, intentional, malicious and illegal alteration or contamination of the Named Insured's PRODUCT(S) so as to render such PRODUCT(S) unfit or dangerous for the use intended by the Named Insured, or create such an impression with the public.

CP 333. Section 2 covers loss resulting from "ACCIDENTAL PRODUCT CONTAMINATION", which the Policy defines as:

(1) any accidental or unintentional contamination, impairment or mislabeling (including mislabeling of instructions for use) during the manufacture, blending, mixing, compounding, packaging, labeling, preparation, production or processing of the Named Insured's PRODUCTS (including their ingredients or components) . . .

provided always that the consumption or use of the Named Insured's CONTAMINATED PRODUCT(S) has, within 120 days of such consumption or use, either resulted, or may likely result, in: (1) physical symptoms of bodily injury, sickness or disease or death of any person(s) and/or (2) physical damage to (or destruction of) tangible property, including animals and/or livestock.

CP 336. In both cases, "PRODUCT(S)" are defined as

All goods or products (finished or in process), including all ingredients or components thereof, manufactured, distributed, handled by the Named Insured . . . and which are (or will be) available for sale by the Named Insured.

CP 333, 336.

**B. Oberto Buys and Uses Contaminated Beef That Is Recalled**

While the Policy was in effect, Oberto purchased beef from Hallmark that it used as an ingredient in its food products. CP 307. But in February 2008, the Food Safety and Inspection Service ("FSIS"), a branch of the U.S. Department of Agriculture, determined that over 143 million pounds of Hallmark beef, including beef purchased by Oberto, was "unfit for human food," which meant as a matter of law that it was "adulterated." CP 307, 314. The FSIS made this determination because undisputed evidence showed that, over a two-year period, Hallmark had forced to slaughter cattle that had fallen and become non-ambulatory (commonly called "downer cattle") after passing an initial inspection, and did not

inform FSIS public health veterinarians so that they could reinspect the downer cattle, as required by law,<sup>1</sup> before they were slaughtered and their meat placed into the food supply. CP 314. Indeed, undercover video shot by the Humane Society of the United States ("HSUS") showed Hallmark employees forcing downer cattle to slaughter by means that included kicking, prodding with sticks, administering electric shocks, pushing with forklifts, and spraying water down their noses to simulate drowning. See HSUS Video, <http://www.youtube.com/watch?v=kaM7Hpu47FY>; see also CP 300-01 (HSUS press release).<sup>2</sup>

The FSIS procedure applicable to a potential recall required a Recall Committee to investigate a possible contamination and then issue a recall, if warranted. CP 282-83. There are three potential classifications of recall: Class I (a reasonable probability that use of the product will cause serious adverse health consequences or death), Class II (a remote

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<sup>1</sup> Federal regulations at the time mandated a second ante-mortem inspection to ensure that downer cattle had not become non-ambulatory due to disease such as bovine spongiform encephalopathy ("BSE", commonly known as "mad-cow disease"). See 9 C.F.R. § 309.3(e) (2008); see also 72 Fed. Reg. 38,700, 38,703 (2007) (mandating condemnation of downer cattle if FSIS inspectors could not verify that they became non-ambulatory due to acute injury).

<sup>2</sup> Oberto provided to the Superior Court a CD-ROM containing a copy of the HSUS video, attached as an exhibit to the Declaration of Elva Gonzalez filed on August 30, 2010. Although Underwriters requested that the Gonzalez Declaration be included in the Clerk's Papers, the Clerk submitted a Notice re Unscannable Document to advise that this declaration was not scannable because of the CD-ROM. CP 443. We are attaching a copy of the full Gonzalez Declaration, including a copy of the CD-ROM, as Appendix A.

probability of adverse health consequences from use of the product), or Class III (no adverse health consequences from use of the product). CP 283. After deciding whether to issue a recall and the appropriate level, FSIS issues a press release and contacts the firm responsible for the contamination to request that it recall the contaminated product. CP 283. If the firm does not do so voluntarily, FSIS can detain any product in commerce that was subject to recall. CP 283.

FSIS did not issue a Class III recall—which would indicate no adverse health consequences from use of the product—but instead classified the Hallmark recall as a Class II recall, reflecting a "remote probability that the beef being recalled would cause adverse health effects if consumed" and a "negligible" risk—but a risk nonetheless—that the Hallmark beef contained "mad-cow disease." CP 200, 314.

Oberto received notice of the recall from Hallmark and complied with the FSIS directive. Oberto notified its customers who had received Oberto products containing the Hallmark ingredient and coordinated the return and destruction of the contaminated product. CP 307-08. The recall of the contaminated product cost Oberto \$400,093. CP 489-94.

**C. Underwriters Denies Coverage for Oberto's Loss**

Within a week of receiving the FSIS directive, Oberto gave written notice to Underwriters of a potential loss, resulting from its purchase of

the tainted Hallmark beef, which might give rise to claims under the Policy. CP 307, 309, 348. By letter dated May 22, 2008, counsel representing Underwriters advised that there was no coverage under the Policy. CP 350-54. On July 1, 2008, counsel representing Oberto wrote to Underwriters' counsel to explain why Oberto believed that coverage existed under Section 1 of the Policy. CP 356-62.<sup>3</sup> By letter dated August 14, 2008, counsel for Underwriters reaffirmed Underwriters' position that there was no coverage under the Policy. CP 366-69.

In response to Underwriters' August 14 letter, Oberto's counsel provided further support for Oberto's position that coverage existed under Section 1 and also asserted bases for coverage under Section 2. CP 371-75. The response to this letter did not even address certain points made by Oberto concerning coverage under Section 1, and again denied coverage. CP 377-79. Although Oberto's insurance broker later contacted Underwriters in a further effort to show why coverage should be found to exist, CP 381-86, Underwriters did not budge from their position that the losses Oberto sustained were not covered by the Policy, CP 388-89.

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<sup>3</sup> Oberto's counsel reserved the right to challenge Underwriters' denial of coverage under Section 2 at a later time (which it subsequently did). CP 356.

**D. Oberto Files Suit to Enforce the Policy**

After timely notice to Underwriters and the Office of the Insurance Commissioner in accord with RCW 48.30.015(8)(a), CP 7, 133-34, 475-84, Oberto filed suit on July 20, 2009. CP 1-137.

On July 15, 2010, Underwriters filed a motion for summary judgment, seeking dismissal of Oberto's claims. CP 146-65. In opposition, Oberto argued that it—not Underwriters—was entitled to summary judgment on the issue of liability for coverage under both Section 1 and Section 2 of the Policy, and on its claims under the Insurance Fair Conduct Act, RCW 48.30.010-.015 ("IFCA"), and the Consumer Protection Act, RCW 19.86.090 ("CPA"). CP 248-77.

**E. The Superior Court Finds Underwriters Liable for Damages Equal to 1.75 Times Oberto's Loss**

On September 9, 2010, the Superior Court issued its Order Denying Defendants' Motion for Summary Judgment and Granting Summary Judgment in Favor of Plaintiff Except as to the Bad Faith Claims Under § 2 of the Policy. CP 444-46. The Court entered an amended order on September 15, 2010. CP 447-50. In the amended order, the Court explained that, after reviewing the evidence and arguments, it found that there was no genuine issue of material fact in dispute related to the existence of coverage under either Section 1 or Section 2, and that Oberto was entitled to judgment as a matter of law with

respect to coverage and breach of contract by Underwriters under both sections of the Policy. CP 449. The Court concluded that Oberto also was entitled to summary judgment on its claim that Underwriters had "breached their duty of good faith and engaged in bad faith, and . . . denied coverage unreasonably and in bad faith . . . ." CP 449.<sup>4</sup>

Oberto filed a Motion for Summary Judgment with Respect to Damages on November 12, 2010. CP 451-70. Underwriters opposed the motion but did not challenge Oberto's claim that it incurred a loss of \$400,093 as a result of the contamination. CP 495-508. On February 11, 2011, the Superior Court issued a detailed order granting in substantial part Oberto's motion. CP 814-31. The Superior Court reiterated its earlier ruling that Oberto was entitled to judgment as a matter of law on its claims for coverage and breach of contract with respect to both Section 1 and Section 2, CP 820, 822, and specifically held that Oberto's interpretations of "contamination" and "malicious" under Section 1 and "tangible property" and "may likely" under Section 2 were reasonable. CP 820-23. The Court also explained why it found Underwriters' denial of coverage under Section 1 to be unreasonable and in bad faith, CP 823-25, and

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<sup>4</sup> Underwriters sought discretionary review of the Superior Court's September 9 and September 15 orders, which this Court declined to grant. See Notation Ruling, Oberto Sausage Co. v. Certain Underwriters at Lloyd's, No. 66093-4-I (Wash. Ct. App. Nov. 19, 2010).

exercised its discretion under IFCA to award Oberto 1.75 times its actual damages, CP 828-29.<sup>5</sup> Judgment thus was entered in the amount of \$481,412.75, plus \$97,405.33 in prejudgment interest, with attorneys' fees and costs to be determined following appeal. CP 815.

#### IV. SUMMARY OF ARGUMENT

Underwriters agreed to indemnify Oberto for loss (including recall-related expenses) resulting from "product tampering" and "accidental product contamination." But when Oberto sought coverage for losses arising out of a product tampering and/or accidental product contamination, Underwriters denied Oberto's claim, repeatedly ignoring reasonable interpretations offered by Oberto of terms in the Policy that Underwriters chose not to define and raising any and every possible reason—no matter how weak or unreasonable—to deny coverage in violation of its quasi-fiduciary duties to Oberto. As the Superior Court correctly concluded, Oberto is entitled to coverage under the Policy for its loss and increased damages because of Underwriters' bad faith.

Underwriters claimed that there was no coverage under Section 1 of the Policy because (1) there was no "contamination" of the recalled beef and Oberto's product and (2) the contamination was not "malicious." They

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<sup>5</sup> After applying the Policy's \$125,000 deductible, actual damages totaled \$275,093. CP 825.

claimed that there was no coverage under Section 2 because (1) there was no accidental "contamination" or "impairment" of Oberto's product, (2) "tangible property" did not include Oberto's product (and, in any event, damage to that product was not caused by "accidental" contamination), and (3) "may likely" means "probably" rather than "possibly." The Policy defined none of these terms, but for each at least one reasonable interpretation, derived from standard dictionaries and supported by the common law, supported Oberto's claim for coverage. The Superior Court, therefore, correctly determined that there was no dispute of material fact as to coverage, that Oberto was entitled to judgment as a matter of law that Sections 1 and 2 both provide coverage for its loss, and that Underwriters breached the Policy by denying coverage.

Furthermore, because Underwriters repeatedly ignored reasonable interpretations of undefined terms that support coverage, refused to comply with established rules governing insurance contract interpretation, and violated certain insurance regulations, the Superior Court was justified in concluding that Underwriters' denial of coverage was unreasonable and in exercising its discretion to award to Oberto 1.75 times its actual damages pursuant to IFCA.

## V. STANDARD OF REVIEW

When reviewing a summary judgment, the appellate court engages "in the same inquiry as the trial court." Stevens v. Brink's Home Sec., Inc., 162 Wn.2d 42, 46, 169 P.3d 473 (2007). Summary judgment is appropriate "if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." Sheehan v. Cent. Puget Sound Reg'l Transit Auth., 155 Wn.2d 790, 797, 123 P.3d 88 (2005). Once the moving party demonstrates entitlement to summary judgment, the opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). The opposing party may not rely on speculation or argumentative assertions that unresolved factual issues remain. Id., 131 Wn.2d at 9. If the opposing party's evidence is merely colorable or is not significantly probative, summary judgment should be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In addition, "[i]nterpretation of an insurance contract is a question of law reviewed de novo." Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007). When determining the meaning of an insurance contract, Washington courts follow a well-established course of

interpretation. First, an insurance contract "should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." Kitsap Cnty. v. Allstate Ins. Co., 136 Wn.2d 567, 575, 964 P.2d 1173 (1998) (internal quotation marks and citation omitted). Second, policy terms are subject to definitions found in the Policy, but undefined terms are given their "plain, ordinary, and popular" meaning. Id., 136 Wn.2d at 576. Third, "[t]o determine the ordinary meaning of undefined terms, courts may look to standard English dictionaries." Id. Fourth, when words "have both a legal technical meaning and a plain, ordinary meaning, the ordinary meaning will prevail unless it is clear that both parties intended the legal, technical meaning to apply." Id. Fifth, when a policy provision is susceptible to two or more reasonable interpretations, and the ambiguity cannot be resolved by review of extrinsic evidence of the parties' mutual intent, then the "ambiguity is construed against the insurer." Id.; accord Daley v. Allstate Ins. Co., 135 Wn.2d 777, 784, 958 P.2d 990 (1998) ("If a policy provision is ambiguous, the interpretation most favorable to the insured applies."). Finally, "[i]nsurance policies are liberally construed to provide coverage wherever possible." Bushnell v. Medico Ins. Co., 159 Wn. App. 874, 881-82, 246 P.3d 856 (2011).

When addressing the standard of review in their Brief ("App. Br."), Underwriters fail to acknowledge that ambiguities in the Policy must be construed in favor of coverage. App. Br. at 17-19. The omission, although glaring, is consistent with Underwriters' approach to Oberto's request for coverage from the start.

## **VI. ARGUMENT**

### **A. The Superior Court Correctly Ruled That Section 1 of the Policy Provides Coverage for Oberto's Loss**

As the Superior Court found, the undisputed facts establish all elements needed to find coverage under Section 1: (1) actual or threatened, (2) intentional, malicious and illegal (3) alteration or contamination (4) of Oberto's product (including its ingredients) (5) so as to render that product (or its ingredients) unfit or dangerous for its intended use. CP 333. Underwriters challenge this determination, arguing that (1) the Hallmark beef was not contaminated—despite the largest beef recall ever and an authoritative determination by the federal agency responsible for safeguarding the country's food supply that Hallmark's beef was both "adulterated" and "unfit for human food"—and (2) Hallmark did not act with "malice" despite a two-year history of

viciously and unlawfully forcing downer cattle to slaughter while evading legally mandated inspections. Underwriters' argument is untenable.<sup>6</sup>

**1. Oberto's product was contaminated.**

Underwriters cannot credibly assert that the Superior Court committed error in concluding that there was contamination. Here, FSIS determined that the meat sold to Oberto by Hallmark was "unfit for human food," CP 314, which by definition made that meat "adulterated" under the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601(m)(3). That regulatory determination is entitled to substantial deference. See Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 593, 90 P.3d 659 (2004) ("We should overturn an agency's factual findings only if they are clearly erroneous, and we are 'definitely and firmly convinced that a mistake has been made.' We do not weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to findings of fact." (citations omitted)).

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<sup>6</sup> Underwriters did not dispute below that the contamination at Hallmark was intentional and illegal, nor did it contest that Oberto's product was rendered unfit for its intended use. See CP 153-56. Underwriters later claimed that it made a "tactical decision" not to challenge these elements of coverage, CP 418, but it is notable that Underwriters never disputed these other elements—including intent and illegality—even though Oberto addressed them several times, including as early as its counsel's July 1, 2008 letter. See CP 358, 359-61, 366-69, 372, 377-79. Moreover, Oberto raised these elements in its Cross-Motion, CP 269-70, so Underwriters could not cavalierly ignore them. The evidence in the record makes clear that Hallmark employees intentionally forced downer cattle to slaughter in violation of both federal and California laws, and that the Hallmark ingredient was rendered "unfit for human food" as a result.

Under FMIA, meat is "adulterated" if it is for any reason "unsound, unhealthful, unwholesome, or otherwise unfit for human food." 21 U.S.C. § 601(m)(3). This definition is in substance identical to a definition of "contamination" on which Underwriters rely, viz., "render[ing] unfit for use by the introduction of unwholesome or undesirable elements." App. Br. at 20-21 (quoting Webster's Third New International Dictionary of the English Language 491 (2002) ("Third New Int'l")); cf. Webster's Unabridged Dictionary of the English Language 28 (2001) ("Webster's") (defining "adulterate" as "to debase or make impure by adding inferior materials or elements"); American Heritage Dictionary of the English Language 24-25 (3d ed. 1992) ("American Heritage") (defining "adulterate" as "[t]o make impure by adding extraneous, improper, or inferior ingredients"); see also Roget's International Thesaurus § 44.13 (1977) ("adulterate" and "contaminate" listed as synonyms).

Here, the undisputed evidence shows that meat from downer cattle was introduced into the food supply because Hallmark forced downer cattle to slaughter without segregating them for legally mandated second inspections by FSIS veterinarians. That meat was undesirable, unwholesome and unfit for its intended use (human food) because of the enhanced risk that downer cattle (as opposed to other cattle) will be infected with mad cow disease or E. coli bacteria and the inability, absent

a second inspection, to confirm that these cattle are disease-free and their meat safe to eat. CP 285-86. Because meat from downer cattle that did not receive a clean bill of health through a second inspection was commingled with meat from other Hallmark cattle, FSIS determined that "all beef product" produced by Hallmark during the relevant time period was "unfit for human food." CP 314.

Underwriters' primary basis for asking the Court to ignore FSIS's determination of adulteration and unfitness for human food is that the FMIA definition of "adulterated" does not include a requirement to mix two or more substances, whereas (Underwriters contends) standard dictionary definitions of "contamination" do. App. Br. at 20-21, 23. Underwriters are wrong. Dictionary definitions show that contamination can occur without "mixing"; it is sufficient for there to be "contact" with unclean materials. See Webster's at 438 (defining "contaminate" as "to make impure or unsuitable by contact or mixture with something unclean, bad, etc."); American Heritage at 406 (defining "contaminate" as "[t]o make impure or unclean by contact or mixture"). Any alleged requirement for "mixing" is thus a false distinction between "adulteration" and "contamination". Indeed, under the dictionary definitions of "contaminate," it would have been reasonable to conclude that contact with meat from un-reinspected downer cattle caused contamination of the

entire batch of beef that Hallmark was selling even if FSIS had not made a determination of unfitness for human food and adulteration.

Other arguments advanced by Underwriters are equally unavailing. First, Underwriters contend that "[t]he fact that cattle might be non-ambulatory does not mean that their meat is unwholesome or undesirable." App. Br. at 21. But that is precisely what it means—at least where, as here, downer cattle did not receive the mandated second inspection. Meat from those cattle was "undesirable" because there was no determination that the cattle became non-ambulatory for reasons other than disease. See CP 286. Underwriters themselves have acknowledged the undesirability of meat from downer cattle: "[T]here is evidence that 'downer' cattle are at greater risk of contamination by E.coli, salmonella or mad cow disease as they have weaker immune systems and greater contact with feces . . . ." CP 367. Moreover, under FSIS regulations in effect at the time, downer cattle for which there was not conclusive evidence that they had become non-ambulatory for reasons other than disease were presumed to be diseased and mandated to be condemned and destroyed. CP 286-87; 72 Fed. Reg. at 38,703. Thus, not only was the Hallmark beef "undesirable," but it was also "unwholesome" as a matter of law—not having been

approved as safe by FSIS veterinarians, it was "suggestive of disease."

See Webster's at 2090 (second definition of "unwholesome").<sup>7</sup>

Furthermore, Underwriters' suggestion that Oberto must present "direct evidence" of "infection and/or adverse public health impacts" in order to establish contamination, App. Br. at 22, would impose a limitation on coverage that does not exist in Section 1. Indeed, the Policy contains no reference to infection or pathogens whatsoever, and the only reference to health impacts from contamination is found in Section 2. CP 336. Underwriters are bound by the Policy as they wrote it; they may not selectively import language from other portions of the Policy into Section 1 in order to deny coverage under Section 1. Moreover, as Section 2 shows, Underwriters knew how to impose a health impact requirement; that it did so in Section 2 but not in Section 1 makes clear that there is no such requirement for Section 1 coverage. Underwriters

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<sup>7</sup> Underwriters argue that "[t]here are numerous reasons why cattle might become non-ambulatory" and "[t]hat is why the regulations do not require condemnation of meat from non-ambulatory cattle and instead provide that such meat can enter the food supply upon further inspection." App. Br. at 21-22. But Underwriters' logic is undermined not only by the fact that there was no "further inspection," but also by the fact that federal regulations in place both currently and at the time the Policy was issued require automatic condemnation of all non-ambulatory cattle, and even regulations in effect in late 2007 and early 2008 (when the second inspection option was available) required condemnation if the cattle's non-ambulatory condition could not be conclusively tied to a cause other than disease. See 9 C.F.R. § 309.3(e) (2010); 9 C.F.R. § 309.3(e) (2007); 72 Fed. Reg. at 38,703; CP 286-87.

may not read into the Policy after-the-fact requirements for coverage that are not found in the Policy.<sup>8</sup>

Finally, it is not even necessary to establish "actual contamination" because Section 1 also covers "threatened contamination."<sup>9</sup> The Policy does not define "threatened." One common definition of "threaten" is "to give an ominous indication of." Webster's at 1975 (providing as an example, "the clouds threaten rain"). Here, even Underwriters acknowledge the evidence that downer cattle, because they have weakened immune systems and wallow in feces, pose a greater risk (or threat) than

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<sup>8</sup> To the extent Underwriters contend that direct evidence of contamination is required, they seek evidence beyond what is obtainable—and to this extent may be offering illusory coverage. Indeed, in issuing the regulations in effect at the time of the contamination, FSIS refused to rely on BSE (mad cow disease) tests to determine whether downer cattle should be condemned, noting that tests available at the time were "not appropriate for use as a food safety device" because "certain tissues of cattle infected with BSE may contain the BSE agent even though the diagnostic test does not indicate that the animal has the disease." 72 Fed. Reg. at 38,704. This policy reflected the fact that clinical signs of BSE are "often subtle" and "can only be observed in an animal that is able to rise from a recumbent position and walk." Id. at 38,702-03.

<sup>9</sup> The "threatened" argument does not appear in Oberto's briefs to the Superior Court, but was made at oral argument. Verbatim Report of Proceedings at 27-28 (Sept. 3, 2010) ("Sept. 3 Verbatim Report"). Contrary to their contention, see App. Br. at 14, Underwriters' counsel had the opportunity to respond at oral argument, but chose to address the "threatened" language only with respect to the issue of bad faith, not coverage. Sept. 3 Verbatim Report at 48. Underwriters also could have moved for reconsideration, but did not do so. And, although the Superior Court made an express finding as part of the final judgment that there was threatened contamination, CP 820, Underwriters did not object to inclusion of that finding in the final order and judgment, see Verbatim Report of Proceedings at 2-22 (Feb. 11, 2011), nor have they objected to that finding here, see RAP 10.3(g) (requiring "[a] separate assignment of error for each finding of fact a party contends was improperly made.")

non-downer cattle of transmitting mad-cow disease, E.coli bacteria, and other pathogens. CP 367. Consequently, when downer cattle are slaughtered without undergoing all legally mandated inspections, there is a threat (or ominous indication) that the meat from those cattle—and anything that meat comes in contact with—will be contaminated.

Thus, the Hallmark beef and Oberto's product were subject to "contamination," both actual and threatened. At the very least, Oberto's interpretation of "contamination" is reasonable. Therefore, even if Underwriters' interpretation were also reasonable, the ambiguity of "contamination" would still favor coverage. Kitsap Cnty., 136 Wn. 2d at 576. Accordingly, the Superior Court correctly found that "[t]he beef that Oberto purchased from Hallmark was actually contaminated and/or subject to a threat of contamination." CP 820.

**2. The contamination was malicious.**

Like "contamination," "malicious" is not defined in the Policy. Webster's defines "malicious" as "vicious, wanton, or mischievous in motivation or purpose." Webster's at 1164.<sup>10</sup> The most applicable of these alternatives is "wanton," which (among other things) means "done,

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<sup>10</sup> Although Webster's labels this definition of "malicious" as legal in nature, its definition of "wanton"—which includes malicious activity—does not reference a legal connotation. Webster's at 2141.

shown, used, etc. maliciously or unjustifiably" and "without regard for what is right, just, humane, etc.; careless; reckless." Id. at 2141.

Washington courts have reached a similar understanding of "malicious" in varied settings, including the insurance context. See, e.g., Bowers v. Farmers Ins. Exch., 99 Wn. App. 41, 46, 991 P.2d 734 (2000) (rejecting insurance company's argument that tenant's conduct was not malicious because it was not motivated by ill will or malice towards the owner: "In this context, malice does not require ill will, hatred, or vindictiveness of purpose. Malice may be inferred from the act of destruction. It is sufficient if the actor is guilty of wanton or intentional disregard for the rights of others."); Koch v. Mut. of Enumclaw Ins. Co., 108 Wn. App. 500, 508, 31 P.3d 698 (2001) (equating "malice" with "reckless disregard"); cf. Sears v. Int'l Bhd. of Teamsters, Local No. 524, 8 Wn.2d 447, 453, 112 P.2d 850 (1941) (holding that "malicious" "does not necessarily mean ill-will or actual malice, but does mean an intentional interference with a right without lawful justification").

Contrary to Underwriters' claim, see App. Br. at 25-26, there is no tension between Oberto's definition of "malicious" and the Policy's use of "intentional." The Policy provides that the act causing contamination must be "intentional, malicious, and illegal." These are three separate requirements. Thus, while "malicious" characterizes the requisite attitude

toward the consequences of an action, "intentional" defines the requisite attitude toward taking the action. The two terms create different requirements, and Oberto's reasonable interpretation of "malicious" does not write "intentional" out of the Policy.<sup>11</sup>

Underwriters also rely on inapposite case law to argue that Oberto's dictionary-derived interpretation of "malicious" is not reasonable. See App. Br. at 24-25. The first case, In re Juarez, 143 Wn.2d 840, 24 P.3d 1040 (2001), does not even mention the word "malicious" or any derivation thereof, let alone address its meaning. The second, Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147 (Minn. Ct. App. 2001), applied New York law, under which "'malicious mischief' requires actual, not ordinary, malice." Id. at 154. From these decisions and a few carefully selected dictionary definitions, Underwriters insist that this Court must apply an actual malice standard involving "an intention or desire to harm another." App. Br. at 24-25. Washington courts, however, have

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<sup>11</sup> Underwriters did not contend in the Superior Court that the "intentional" and "illegal" coverage prerequisites were not satisfied. See supra note 6. Indeed, it would be difficult for Underwriters to do so, given the video shot by the HSUS. See supra p. 7. The actions reflected in the video demonstrate the intent to drive potentially diseased cattle to slaughter. The illegality of Hallmark's activities is reflected both in its evasion of FSIS inspection requirements, see 9 C.F.R. § 309.3(e) (2008), and its violations of federal and state laws concerning methods of humane slaughter and prohibition of animal cruelty. See, e.g., 9 C.F.R. § 313.2(a)-(c), (d)(2) (2008); Cal. Penal Code §§ 597(a)-(b), 599f(b)-(c). Indeed, Hallmark employees were charged and convicted of felony and misdemeanor counts of animal cruelty. See CP 304.

rejected the "actual malice" approach taken in General Mills, holding that "malicious mischief" "does not require ill will, hatred, or vindictiveness of purpose." Bowers, 99 Wn. App. at 46. In short, both dictionary definitions and Washington case law support Oberto's interpretation.

Underwriters also assert that summary judgment was improper because "there is absolutely no evidence in the record regarding the Hallmark employees' mental state or their knowledge." App. Br. at 26. But can there be any genuine question that this evidence is contained in the HSUS video? See State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) ("Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court."). In any event, the Hallmark employees are presumed—both here and in California, where the actions occurred—to know the law that they so callously ignored. State v. Williams, 158 Wn.2d 904, 906, 148 P.3d 893 (2006); People v. Hagedorn, 127 Cal. App. 4th 734, 748, 25 Cal. Rptr. 3d 879, 891 (2005). Underwriters presented no evidence to overcome this presumption.<sup>12</sup>

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<sup>12</sup> Even if the Hallmark stockyard workers truly could be deemed not to have known that it was wrong and unlawful to violently force downer cattle to slaughter without presenting them for a legally mandated second inspection, then it necessarily follows that Hallmark's management acted in a reckless and wanton manner by failing to inculcate in their workers knowledge of these legal requirements and the absolute need to comply with them.

Here, the undisputed evidence shows that Hallmark employees ignored federal inspection requirements and state and federal laws prohibiting the inhumane treatment of animals, and knowingly and intentionally used extraordinary means—including electric prods, forklifts, even simulated drowning—over a 2-year period to try to force downer cattle to their feet and to the slaughterhouse, from where their meat would enter the food supply. The only reasonable inference from their actions is that the Hallmark employees had only one goal—to get the cattle to slaughter and to avoid a "condemnation" tag—and completely disregarded the potential consequences of slaughtering downer cattle. They did not concern themselves with whether those cattle might harbor a disease, such as mad cow disease or E. coli bacteria, that would make their meat unsafe for people to eat, ignoring

- that the second ante-mortem inspection is a government-mandated safety measure specifically designed to avoid the slaughter of cattle that might be suffering from illness and harbor disease; and
- the well known fact that downer cattle are more likely than non-downers to be diseased.

The Hallmark employees also wantonly disregarded potential financial consequences to Hallmark's customers, including costs related to a

recall—almost certain to occur if FSIS learned about what was going on at Hallmark—or claims brought against them by their own customers.

This egregious and repeated violation of food safety standards is nothing less than a wanton and malicious disregard for these foreseeable harms.<sup>13</sup> Underwriters presented no evidence to dispute the facts or to support any other reasonable inference, as it must to create a genuine dispute. See White, 131 Wn.2d at 9. The Superior Court therefore properly concluded as a matter of law that the Hallmark employees acted with malice and that no reasonable jury could conclude differently.

**B. The Superior Court Correctly Ruled That Section 2 of the Policy Provides Coverage for Oberto's Loss**

The Superior Court found Section 2 coverage to exist on either (or both) of two grounds: (1) physical damage to and destruction of tangible property, and/or (2) adverse health effects that "may likely" have resulted from use of the tainted beef products. CP 822-23. Either way, the Superior Court's coverage determination was based on a reasonable interpretation of the policy language and did not constitute error.

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<sup>13</sup> In addition, Hallmark's treatment of downer cattle reflected a depraved indifference to the suffering of the animals. See supra p.7. Nothing in the Policy precludes consideration of inhumane actions taken with respect to the cattle in considering whether contamination occurred maliciously. See CP 332-34.

**1. Oberto's product, and many ingredients that went into it, were accidentally contaminated and/or impaired**

Underwriters assert that there could be no accidental contamination of Oberto's product because there was no contamination of the Hallmark beef that went into it. App. Br. at 28. For the same reasons that this argument fails in connection with the issue of coverage under Section 1, it fails here as well.

In making this argument, moreover, Underwriters ignore that Section 2 provides coverage not only for accidental contamination but also for accidental impairment of Oberto's product. CP 336. Thus, whether or not the Hallmark beef or products into which it was introduced were "contaminated", it can hardly be disputed that the other ingredients (water, seasonings, spices, meat from sources other than Hallmark) used in Oberto's product—which, during the manufacturing process, came into contact with Hallmark beef that FSIS had labeled as "unfit for human food" and "adulterated"—as well as the final Oberto product itself, were diminished in value, quality and function as human food through that contact, and therefore impaired. See Webster's at 958 (defining "impair" as "to make or cause to become worse; diminish in ability, value, excellence, etc.; weaken or damage"); cf. Gen. Mills, 622 N.W.2d at 152 (finding coverage for "direct physical loss or damage" where there was an

"impairment of function and value" of a food product that could not be sold because of legal regulations).

Furthermore, because Oberto had no reason to know at the time of production (prior to the recall) that Hallmark was selling meat from downer cattle, the contamination and impairment of the non-Hallmark ingredients—and the final Oberto product—necessarily was accidental.

**2. Oberto's use of accidentally contaminated and impaired ingredients resulted in destruction of tangible property**

Use of the accidentally contaminated and impaired non-Hallmark ingredients, in tandem with the Hallmark ingredient, caused the contamination and impairment of the final Oberto product, which made necessary the recall and destruction of that product. Because Section 2 does not require that an accidentally contaminated ingredient be the sole cause of damage to tangible property, and does not exclude coverage based on a preceding intentional contamination, see CP 334-37, the Superior Court properly concluded that the contamination and impairment of Oberto's final product, which necessitated its destruction, was caused at least in part by the accidentally contaminated and impaired non-Hallmark ingredients, and that this is sufficient to find coverage under Section 2.

Nevertheless, Underwriters assert that "destruction of Oberto's product cannot serve as the basis for coverage under the Policy." App. Br.

at 30. But the Policy requires only "physical damage to (or destruction of) tangible property." It does not define this term, nor does it exclude the insured's own product (or its ingredients) from the definition of "tangible property." See CP 334-37. Courts are not to "read an exclusion into the policy which does not exist." In re Feature Realty Litig., 468 F. Supp. 2d 1287, 1304 (E.D. Wash. 2006) (applying Washington law).

Underwriters also contend that construing the Policy in accord with its plain language—which does not include an exclusion for damage to or destruction of the insured's product—would contradict the parties' intent because it would lead to coverage any time FSIS directed the recall of an insured's product. App. Br. at 30-31.<sup>14</sup> This objection is meritless. First, there is no evidence of Oberto's intent whatsoever. See Lynott v. Nat'l Union Fire Ins. Co. of Pitt., Pa., 123 Wn.2d 678, 684, 871 P.2d 146 (1994) ("Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions."). Second, Underwriters' intent is evident from the language

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<sup>14</sup> Underwriters' suggestion that the Court consider the parties' alleged intent in interpreting the Policy essentially concedes ambiguity. See Kitsap Cnty., 136 Wn.2d at 576 ("If there is an ambiguity, extrinsic evidence, if any, of the parties' intent may normally be considered. If a policy remains ambiguous even after resort to extrinsic evidence, then the ambiguity is construed against the insurer." (citations omitted)). Despite their assertion that the parties intended a specific exclusion that does not exist in the Policy itself, Underwriters have offered no extrinsic evidence for the Court to consider, and the Policy must therefore be construed on this point in favor of coverage.

they selected in drafting the Policy; if Underwriters intended the type of exclusion they call for now, they knew how to write one and could have included language in the Policy to require that result—as they did in other situations. See Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd's, No. M88545, slip op. at 2 (Cal. Super. Ct. Aug. 18, 2009) (construing a similar Lloyd's policy whose definition of "accidental contamination" included a requirement that there be "physical damage to or destruction of tangible property (other than the Insured Products themselves)" (emphasis added)) (copy attached as Appendix B). Third, contrary to Underwriters' contention, the policy language does not implicate coverage upon every recall. Not every recall involves damage to or destruction of the insured's product. For example, if a recall were issued due to "mislabeling" (a covered event under Section 2), the product itself need not be damaged or destroyed as a result and therefore coverage might not exist. Thus, Underwriters' suggestion that the parties intended to exclude damage to the insured's product does not withstand scrutiny.

**3. Use of Oberto's contaminated product "may likely" have resulted in adverse health effects.**

Because tangible property was destroyed, there is coverage under Section 2 regardless of whether there may have been adverse health

effects. Nevertheless, coverage exists based on potential adverse health effects as well.

The Policy does not define "may likely". The word "may" indicates a "certain measure of likelihood or possibility." American Heritage at 1112; accord Webster's at 1189 (defining "may" as "used to express possibility"). When modifying "likely" (which means "[p]ossessing or displaying the qualities or characteristics that make something probable," American Heritage at 1042), "may" tempers the probability inherent in "likely," causing the combined phrase "may likely" to be read as reflecting a possibility that something is probable—or perhaps not probable.<sup>15</sup>

Because "may likely" means something less than "likely" or "probable," it reasonably can be considered the equivalent of "might" or "could." Therefore, it is reasonable to interpret "may likely" to be the equivalent of FSIS's determination, inherent in a Class II recall, that there was a remote probability of adverse health consequences.<sup>16</sup>

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<sup>15</sup> The very nature of "possibility" conveys that the opposite may equally be true. Just as the statement "it is possible that the traffic light was green" conveys the possibility that the light was not green, so also "may likely" conveys the possibility that something is not probable. "May likely," therefore, is so flexible that it can be interpreted to mean "may not be likely" as well as "may be likely."

<sup>16</sup> When Underwriters opted to use vague and ambiguous language like "may likely," even though clearer language was available to it, see, e.g., Ltd., Inc.

In fact, the undisputed evidence shows that Hallmark beef "might" or "could" have caused injury or sickness. As former FSIS Administrator Barbara J. Masters concludes, a Class II recall reflects a determination that the Hallmark product "could present a health risk to the general public." CP 285. Indeed, FSIS's decision to issue a Class II recall is consistent with the fact that even a "remote probability" of sickness in the context of the largest beef recall in U.S. history, see CP 300, could mean that at least some people "may likely" have gotten sick from the product even if they did not report their illness or tie it to the Hallmark beef. Moreover, if there had been no likelihood of adverse health consequences, FSIS presumably would have issued a Class III recall. CP 283.<sup>17</sup>

FSIS's determination that there was a "remote probability" of adverse health effects is therefore consistent with stating that products containing the Hallmark ingredient "may likely," or could, result in

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v. Cigna Ins. Co., 228 F. Supp. 2d 574, 576 (E.D. Pa. 2001) (policy providing coverage if bodily injury "has resulted or would result" from use or consumption of accidentally contaminated product), they subjected themselves to the consequences of that choice, including that the phrase they chose would be construed against them.

<sup>17</sup> In their Statement of the Case, Underwriters emphasize an FSIS official's statement that there was a "very, very remote probability" of adverse health consequences. App. Br. at 9. But "very, very remote" is not the standard for a Class II recall. The only reasonable inference from the facts is that the FSIS official's statement was motivated by the duty to stave off panic in the wake of the largest beef recall in U.S. history rather than a desire to disavow the very basis for and definition of his agency's Class II recall. See CP 288, 300.

sickness or disease. Had Underwriters intended "may likely" to mean nothing less than a "reasonable probability" of sickness, they could have drafted the Policy to state that coverage is available only for a Class I recall. They did not.<sup>18</sup>

Underwriters, however, argue that "may" and "likely" are synonyms and that "may likely" therefore means "more likely than not." App. Br. at 29-30. This interpretation, however, relies solely on the definition of "likely", App. Br. at 29, rendering the word "may" superfluous. It therefore violates established rules of contract construction, including in the insurance context. See McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 734, 837 P.2d 1000 (1992) ("An agreement should be interpreted in a way that gives effect to each provision."); Caroff v. Farmers Ins. Co. of Wash., 155 Wn. App. 724, 731, 989 P.2d 1233 (1999) ("[T]his interpretation makes the words 'an' and 'any' in the policy superfluous. Our rules of construction do not permit us to read an insurance policy that way . . . ."). It ignores the fact that neither of these words is used by itself, and that "may" modifies "likely", so that

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<sup>18</sup> Even if "may likely" were materially different from "remote probability", the phrase is still incredibly ambiguous as to where it falls on the continuum between "possible" and "probable." Underwriters themselves acknowledge that "'may likely' is difficult to quantify," CP 158, but are wrong in asserting that this difficulty is "irrelevant." App. Br. at 30. To the extent "may likely" is difficult to quantify, that ambiguity favors coverage.

the combination of the two words reflects a lesser probability than either signifies when standing alone.

**C. The Superior Court Correctly Determined that Underwriters Breached the Insurance Contract**

For the reasons discussed above, coverage exists as a matter of law under both Sections 1 and 2 of the Policy. Therefore, Underwriters had a contractual duty to pay Oberto's covered loss, including expenses related to the recall. CP 332-36. After applying the Policy's deductible, that loss is \$275,093. CP 825. Because Underwriters did not reimburse Oberto for its loss as required by the Policy, the Superior Court correctly granted summary judgment to Oberto on its claim for breach of contract.

**D. The Superior Court Correctly Determined that Underwriters' Denial of Coverage Under Section 1 Was Unreasonable**

Underwriters owed Oberto a duty of good faith that required them not to engage in unfair or deceptive conduct and not to deny coverage unreasonably. See, e.g., RCW 48.30.010(1). Nonetheless, as the Superior Court found, the undisputed facts demonstrate that Underwriters "denied coverage unreasonably and in bad faith." CP 449. Indeed, by itself Underwriters' unreasonable denial of coverage constitutes (1) bad faith under the common law, Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003), (2) a violation of IFCA, RCW 48.30.010-.015, and

(3) an unfair and deceptive act in violation of the CPA, RCW 19.86.020.<sup>19</sup>

Underwriters are therefore liable for the harm caused to Oberto by their bad faith denial of coverage.<sup>20</sup>

**1. Underwriters' denial of coverage was unreasonable.**

As the Superior Court found, Underwriters' denial of coverage under Section 1 was unreasonable and made in bad faith because:

a. It was unreasonable for Underwriters to contend that there was no actual contamination in the face of a determination by FSIS that the Hallmark ingredient and all products containing that ingredient were "unfit for human food" and therefore "adulterated." Ignoring this FSIS determination makes a mockery of the food safety regulatory system. It also disregards the fact that statutes affecting the subject matter of a

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<sup>19</sup> "To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded." Smith, 150 Wn.2d at 484. Similarly, IFCA provides that "[a]ny first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state." RCW 48.30.015(1). The CPA provides a cause of action for unfair or deceptive acts occurring in trade or commerce that affect the public interest. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). RCW 48.01.030 provides that "the business of insurance is one affected by the public interest," and therefore, the public interest requirement is satisfied for insurance bad faith claims.

<sup>20</sup> Underwriters spend substantial effort on two strawman arguments: that (1) they conducted a reasonable investigation and (2) Oberto had no damages as the result of a late response to one of its pre-litigation letters. App. Br. at 36-39. Although included in its Complaint, Oberto ultimately declined to pursue these claims and relied on them only as additional support for its position that the denial of coverage was unreasonable. See CP 274-76, 440.

contract are incorporated into and become a part of the contract. Wagner v. Wagner, 95 Wn.2d 94, 98-99, 621 P.2d 1279 (1980); see also Weyerhaeuser Co. v. Com. Union Ins. Co., 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (insurance policies construed as contracts). It is unreasonable to suggest that a food contamination policy would not be informed by FMIA and the federal regulations that govern this subject matter and by determinations of the agency responsible for enforcing them.

b. It was unreasonable for Underwriters repeatedly to ignore settled principles of insurance law, such as the requirement to construe ambiguities in favor of coverage. See, e.g., Kitsap Cnty., 136 Wn.2d at 575; Bushnell, 159 Wn. App. at 882. Prior to filing suit, Oberto sent several letters to Underwriters explaining in detail why it interpreted the Policy to provide coverage. Each time, Underwriters rejected Oberto's claim even though Oberto's letters showed that, at the very least, the Policy was ambiguous and for that reason must be interpreted in favor of coverage. The refusal to accept reasonable interpretations of undefined terms that support coverage continues to be found in Underwriters' appeal brief in its discussion of "contamination" and "malicious."

(1) It was unreasonable for Underwriters to deny coverage because Oberto had not shown that a "mixture" led to the contamination. Although Underwriters found a definition of

"contamination" stating that a "mixture" could lead to contamination, other dictionary definitions explicitly recognize that contamination can occur by "contact" as well as "mixture." See Webster's at 438; American Heritage at 406. Moreover, even the dictionary on which Underwriters rely recognizes that contamination may occur not only by mixture, but also by "render[ing] unfit for use by the introduction of unwholesome or undesirable elements." See App. Br. at 20-21 (quoting Third New Int'l at 491). It was thus unreasonable to insist that "contamination" can have only a meaning that excludes coverage when the word has other reasonable meanings that support coverage.

(2) It was unreasonable for Underwriters to contend that Hallmark's illegal actions were not "malicious" without considering all common definitions of "malicious" and investigating the proper legal standard for malice in Washington. Although "malicious" can reasonably be interpreted under standard dictionary definitions to involve a wanton disregard for the rights of others, see supra pp. 23-24, Underwriters unreasonably refused to consider this definition because it conflicted with their preferred definition that requires a showing of "actual malice"—a

concept that Washington courts repeatedly have declined to use, including in the insurance context.<sup>21</sup>

c. It was unreasonable for Underwriters to assert requirements for coverage not found in the Policy and not supported by dictionary definitions. For example, the Policy contains no requirement that there be a "mixture" in order for there to be "contamination." See App. Br. at 23. The Policy contains no requirement that there be "infection and or adverse public health impacts" for coverage to be found under Section 1. See App. Br. at 22. And the Policy contains no requirement that "malicious" behavior be based on "actual malice." See App. Br. at 24-25. Underwriters' post-hoc attempt to impose new limitations on coverage not only defies settled principles of insurance law, but violates their legal duty not to misrepresent the terms of the Policy. See WAC 284-30-330(1).

d. It was unreasonable for Underwriters to disregard explanations offered by Oberto (prior to filing suit) for why coverage exists under the Policy. For example, Oberto's counsel's July 1, 2008 letter explained that Hallmark had acted maliciously because of its wanton disregard for whether the downer cattle might be diseased and for the

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<sup>21</sup> Almost a year before filing this action, Oberto gave Underwriters a copy of the HSUS video that captured the inhumane treatment and the physical condition of the downer cattle, and an Internet citation for the video. CP 358. Even so, Underwriters did not budge on the coverage issue.

potential impact on Hallmark's purchasers and their customers. CP 358-59. The response from Underwriters' counsel completely ignored this point, focusing only on Hallmark's treatment of the cattle. CP 368. When Oberto's counsel pointed out Underwriters' failure to acknowledge that "malicious" can mean wanton and reckless disregard for others, CP 373, Underwriters' counsel again ignored the point, asserting only that "[y]ou have repeated the argument that the term 'malicious' refers to the manner in which the cattle were treated." CP 378.

These examples show that Underwriters were interested only in denying coverage, and had little if any genuine interest in finding a basis for coverage, in violation of their quasi-fiduciary duty to Oberto. See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129-30 & n.3, 196 P.3d 664 (2008); Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 793-94 & n.2, 16 P.3d 574 (2001). For any and all of these reasons, Underwriters' denial of coverage was unreasonable, unfounded and frivolous, and constituted bad faith. Smith, 150 Wn.2d at 485.<sup>22</sup>

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<sup>22</sup> Oberto contended below that Underwriters' denial of coverage under Section 2 also was unreasonable and in bad faith, but the Superior Court denied summary judgment on this claim. Oberto does not appeal this ruling, but Underwriters' unreasonable interpretations of Section 2 provide further evidence of their bad faith. For example, it was unreasonable for Underwriters to read the word "may" out of the phrase "may likely" to impose a bar to coverage under Section 2. Rendering a policy term superfluous in this way defies fundamental tenets of contract construction. See McDonald, 119 Wn.2d at 734 ("An

**2. Underwriters' unreasonable denial of coverage harmed Oberto.**

Underwriters' refusal to accept and pay Oberto's claim left Oberto with an uncompensated loss (after applying the Policy's deductible) of \$275,093. CP 825. Underwriters do not dispute this amount. CP 508. In addition, they forced Oberto to incur the expense of retaining counsel to write multiple, detailed letters to Underwriters in an attempt to obtain coverage without need for litigation, CP 309-10, and ultimately to pursue claims in these proceedings. Unquestionably, Oberto suffered economic harm from Underwriters' unreasonable and bad faith denial of coverage.

**3. Underwriters' explanations for denying coverage do not absolve them of bad faith.**

Underwriters state that they did not act in bad faith because:

(1) the decision to deny coverage was correct; (2) they based the decision to deny coverage on dictionary definitions of undefined policy terms; and (3) they relied on public statements by FSIS officials. App. Br. at 35-36. None of these explanations have merit.

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agreement should be interpreted in a way that gives effect to each provision.") It was also unreasonable for Underwriters to ignore the word "impairment" when analyzing coverage under Section 2—especially when the case cited by Underwriters, Gen. Mills, 622 N.W.2d at 152, specifically addresses the impaired value of food products. Not only was this unreasonable, but it violated Underwriters' affirmative duty to review its policy for the purpose of finding a basis for coverage. See WAC 284-30-350(1).

As discussed above, the decision to deny coverage was not correct. Moreover, Underwriters' purported reliance on dictionary definitions ignores the fact that they selectively chose definitions that would support the decision to deny coverage, and disregarded reasonable competing definitions that supported the conclusion that coverage existed. Underwriters not only violated their quasi-fiduciary duty not to place their interests ahead of Oberto's, see St. Paul, 165 Wn.2d at 129-30 & n.3; Van Noy, 142 Wn.2d at 793-94 & n.2, but they ignored the legal requirement to accept an interpretation that supports a finding of coverage when an undefined term has more than one reasonable meaning. Kitsap Cnty., 136 Wn.2d at 575; Daley, 135 Wn.2d at 784.

Nor does reliance on certain FSIS statements about the severity of health concerns arising out of the Hallmark contamination support Underwriters' position. Those statements concerned the potential for harm to persons who might eat products containing the Hallmark beef. That type of harm is not an element of a claim under Section 1. Because the summary judgment on the issue of bad faith and IFCA/CPA violations was limited to Oberto's claim under Section 1, the FSIS statements are irrelevant to this issue.

**E. The Superior Court Properly Exercised Its Discretion to Award Oberto Increased Damages**

An insurer may not make a coverage determination that is "unreasonable, frivolous, or unfounded." Smith, 150 Wn.2d at 484. If an insurer violates this fundamental rule, an insured may recover up to three times actual damages under both IFCA and the CPA. Although the CPA limits the increased award to \$25,000, RCW 19.86.090, IFCA allows up to full treble damages for an insurer's bad faith.<sup>23</sup> When the Legislature enacted IFCA four years ago, the treble damages provision was seen as "the most significant part of the bill." H.B.R. ESSB 5726, 60th Leg., Reg. Sess. at 4 (Wash. 2007) (staff summary of public testimony).

It has long been recognized that the CPA's treble damages provision "is designed to punish the defendant and deter further violations." Keyes v. Bollinger, 31 Wn. App. 286, 297 n.2, 640 P.2d 1077 (1982). Likewise, IFCA serves a punitive and deterrent purpose. Its trebling provision was designed to "correct" insurers' behavior and "to avoid violations" by the imposition of significant consequences: "If some insurers have to pay more in damages because they are cheating claimants,

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<sup>23</sup> Specifically, IFCA provides that "[t]he superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages." RCW 48.30.015(2).

they will be at a competitive disadvantage." H.B.R. ESSB 5726, 60th Leg., Reg. Sess. at 4 (Wash. 2007) (staff summary of public testimony).

Like other statutes that enable multiple damages awards, IFCA and the CPA reflect "displeasure with the proscribed conduct and [the] desire to deter such conduct . . . ." See Int'l Fid. Ins. Co. v. Wilson, 387 Mass. 841, 857, 443 N.E.2d 1308 (1983) (citation omitted) (addressing violation of Massachusetts' Consumer Protection Act). "Multiple damages are the appropriate punishment for forcing plaintiffs to litigate clearly valid claims." Id. (internal quotation marks omitted).

A secondary purpose of the IFCA and CPA treble damages provisions is to encourage victims of an insurer's bad faith conduct to avail themselves of available legal remedies.<sup>24</sup> This purpose is relevant here. Because Oberto's \$275,093 claim (after applying the deductible) is of modest size (as commercial claims go),<sup>25</sup> the potential to recover treble

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<sup>24</sup> CPA treble damages provide "sufficient financial rewards to victorious consumers on two levels: (1) on the individual level, to enable the injured plaintiff to pursue his own claim; and (2) on the public level, to reimburse the individual plaintiff . . . for enforcing the Act on behalf of the general citizenry." St. Paul Fire & Marine Ins. Co. v. Updegrave, 33 Wn. App. 653, 658, 656 P.2d 1130 (1983) (quoting Brian J. Linn and Gretchen Newman, Comment, Reasonable Attorneys' Fees and Treble Damages – Balancing the Scales of Consumer Justice, 10 Gonz. L. Rev. 593, 598 (1975)). There is no reason to think that similar considerations do not apply to IFCA's trebling provision.

<sup>25</sup> Underwriters try to distinguish the CPA's rationale from that underlying IFCA's treble damages provision, asserting that the CPA trebling provision is designed to encourage pursuit of "truly small claims" and that this concern does not apply here because IFCA allows recovery of attorneys' fees and

damages was a consideration for Oberto in deciding whether the potential benefits of protecting its rights outweighed the risks, costs and other burdens to its business of engaging in protracted litigation.

Here, the Superior Court was justified in concluding, with respect to Oberto's claim under Section 1, that Underwriters "denied coverage unreasonably and in bad faith" and violated insurance regulations listed in IFCA. CP 449, 827-29. As discussed above, the undisputed facts demonstrated (among other things) that Underwriters: (1) selectively chose definitions for undefined terms that they deemed favorable to their position, while ignoring every reasonable alternate definition; (2) asserted requirements for coverage not found in the Policy (and not supported by dictionary definitions), thereby misrepresenting the terms of the Policy in violation of WAC 284-30-330(1); (3) insisted on legal standards employed in some other states but rejected in Washington; (4) failed to acknowledge explanations proffered by Oberto as to why coverage existed; and (5) refused to follow basic tenets of insurance law, such as the requirement to construe ambiguous terms in favor of coverage.

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costs. App. Br. at 43. Underwriters' argument is unpersuasive. First, the CPA's treble damages provision is not limited to plaintiffs with "truly small claims." See RCW 19.86.090. Second, the \$25,000 limit on CPA trebling applies only to claims under RCW 19.86.020. Claims under other provisions of the CPA are subject to treble damages without limitation. RCW 19.86.090. Third, a prevailing plaintiff may recover attorneys' fees and costs under the CPA as well as under IFCA. See id.

The record thus reflects that Underwriters' primary concern was not the interests of their insured, or their quasi-fiduciary duty toward their insured, or their obligations under the Policy; rather, it was their own bottom line. Consistent with the legislative purposes underlying IFCA (and the CPA), the Superior Court acted within its discretion by awarding increased damages to Oberto. That award not only penalizes Underwriters for their pattern of bad faith conduct toward their insured in this instance, but potentially deters Underwriters from unreasonably denying coverage in the future and encourages policyholders who receive similar treatment from their carrier to file suit to protect their rights.

In an effort to escape the consequences of their actions, Underwriters assert that Oberto may recover treble damages only if they denied coverage maliciously or with evil intent, and cite three out-of-state cases that address punitive damages (not statutory treble damages) for this proposition. The proper focus is not out-of-state cases, however, but the plain language and history of the IFCA.

IFCA's treble damages provision contains no "malice" prerequisite. It requires only that Underwriters "ha[ve] acted unreasonably in denying a claim for coverage or payment of benefits or ha[ve] violated a rule in

subsection (5) of this section." RCW 48.30.015(2).<sup>26</sup> In fact, the Washington House of Representatives rejected a proposed amendment to IFCA that would have required a finding of "malice" before treble damages could be awarded. 1 House J., 60th Leg., 2007 Reg. Sess. 1136, 1137-38 (Apr. 5, 2007) (amendment 541).<sup>27</sup>

Because there is no "malice" requirement, the Superior Court's award of increased damages to Oberto fell well within the discretion given to it by IFCA and was consistent with its prior findings that Underwriters unreasonably denied coverage under Section 1 and violated insurance regulations in so doing.

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<sup>26</sup> When the Legislature intends a "malice" or similar prerequisite to recovery of treble damages, it imposes it explicitly. See, e.g., RCW 19.122.070 ("willfully or maliciously"); RCW 19.215.020(4)(b) ("willful"); RCW 42.17.400(5) ("intentional"); RCW 81.28.220 ("knowingly"); see also RCW 64.12.020 (no heightened standard for treble damages, but forfeiture and eviction remedy available only "when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice").

<sup>27</sup> The rejected amendment would have allowed treble damages

only after the first party plaintiff shows by clear and convincing evidence that the acts giving rise to the actual damages occur with such frequency as to indicate a general business practice and these acts are:

- (a) Willful, wanton, and malicious; or
- (b) In reckless disregard for the rights of the first party plaintiff.

1 House J., 60th Leg., 2007 Reg. Sess. at 1137.

## **VII. ATTORNEYS' FEES AND COSTS ON APPEAL**

Oberto is entitled to recover its attorneys' fees and costs under IFCA, RCW 48.30.015(1), (3); the CPA, RCW 19.86.090; and Washington common law, see Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 53, 811 P.2d 673 (1991); Panorama Vill. Condo. Owners' Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 144, 26 P.3d 910 (2001). Accordingly, pursuant to RAP 18.1, Oberto requests the Court to award it its reasonable attorneys' fees and costs incurred in defending this appeal.

## **VIII. CONCLUSION**

As explained above, under the terms of the Policy, applicable law, and the undisputed facts, Oberto was entitled to coverage under both Sections 1 and 2 of the Policy, and Underwriters acted unreasonably, in bad faith, in violation of its quasi-fiduciary duty to Oberto, and in violation of applicable insurance regulations, in denying coverage. Therefore, Oberto asks the Court to affirm the judgment and the summary

judgment orders entered in the Superior Court and to award it its legal fees  
and other expenses incurred in defending this appeal.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of August,  
2011.

**PERKINS COIE LLP**

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Attorneys for Respondent Oberto  
Sausage Company

## **APPENDIX A**

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THE HONORABLE JAMES CAYCE  
Hearing Date: Friday, September 3, 2010  
Hearing Time: 1 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

OBERTO SAUSAGE COMPANY, a  
Washington corporation,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT  
LLOYD'S, LONDON, identifiable under  
Contract No. 071083 and subscribing to  
Certificate No. MPT-0027300,

Defendants.

No. 09-2-27112-7 KNT

DECLARATION OF ELVA GONZALEZ IN  
SUPPORT OF PLAINTIFF OBERTO  
SAUSAGE COMPANY'S REPLY  
MEMORANDUM IN SUPPORT OF  
CROSS-MOTION FOR SUMMARY  
JUDGMENT

Elva Gonzalez declares:

1. I am a paralegal with the law firm of Perkins Coie LLP in Seattle,  
Washington, attorneys for plaintiff Oberto Sausage Company in this matter, and am over the  
age of 18. I have personal knowledge of the matters described herein, and if called to  
testify, I could and would testify competently thereto.

DECLARATION OF ELVA GONZALEZ IN SUPPORT OF  
PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF  
CROSS-MOTION FOR SUMMARY JUDGMENT - 1

26097-0029/LEGAL19054065.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

1           2.     Exhibit 1 to this declaration is a true and correct copy of a video regarding  
2  
3 Hallmark/Westland Meat Packing Company ("Hallmark") recorded by the Humane Society  
4  
5 of the United States ("HSUS") Video, which was downloaded from  
6  
7 <http://www.youtube.com/watch?v=kaM7Hpu47FY>. This is a copy of the same video that  
8  
9 Oberto's counsel Joseph E. Bringman attached to his letter of July 1, 2008, to Robert F.  
10  
11 Roarke, counsel for defendant Certain Underwriters at Lloyd's, London ("Underwriters").  
12  
13 (A copy of Mr. Bringman's letter is attached as Exhibit H to the Declaration of Bruce C.  
14  
15 Barry, which was filed in this case on August 9, 2010.) Exhibit 1, as well as the other  
16  
17 downloaded videos identified in this declaration, can be found on the disk attached behind  
18  
19 Tab 1 to this declaration.

20  
21           3.     Exhibit 2, attached to this declaration, is a true and correct copy of the  
22  
23 Adjuster's Report, dated April 5, 2008, that was prepared for Underwriters' agent,  
24  
25 Professional Indemnity Agency, Inc., by Premier Insurance Services, LLC. This report was  
26  
27 attached as an exhibit to Underwriters' responses to Plaintiff's First Set of Interrogatories and  
28  
29 Requests for Production to Defendant Certain Underwriters at Lloyd's, London, and was  
30  
31 produced as UNDERWRITERS001 through UNDERWRITERS017.

32  
33           4.     Exhibit 3 to this declaration (which can be found on the disk behind the tab  
34  
35 for Exhibit 1) is a true and correct copy of a video news report from the Associated Press  
36  
37 regarding the Hallmark recall, which was downloaded from  
38  
39 [http://hubpages.com/hub/USDA-Beef-Recall-Hallmark-Westland-Meat-Packing-beef-](http://hubpages.com/hub/USDA-Beef-Recall-Hallmark-Westland-Meat-Packing-beef-recalled)  
40  
41 [recalled](http://hubpages.com/hub/USDA-Beef-Recall-Hallmark-Westland-Meat-Packing-beef-recalled). This video is cited at page 8 of the Adjuster's Report referenced in paragraph 3,  
42  
43 above.

44  
45           5.     I was asked to research other news reports concerning the abuse of cattle at  
46  
47 the Hallmark slaughter facility and the resulting recall of beef. The remainder of this

1 declaration identifies a sampling of such news reports and provides internet addresses where  
2 the reports can be found.  
3

4  
5 6. I found numerous local news reports, dated between January 30, 2008, and  
6  
7 March 22, 2008, on komonews.com. Among these reports are the following, which are  
8  
9 attached collectively to this declaration as Exhibit 4:

- 10 • *Graphic video shows possible abuse of sick cows at slaughterhouse; Feds*  
11 *to investigate, <http://www.komonews.com/news/national/14980896.html>*  
12
- 13 • *State lists schools that ordered slaughterhouse beef,*  
14 *<http://www.komonews.com/news/15110461.html>*  
15
- 16 • *2 fired workers charged with abusing sick cattle at Southern California*  
17 *slaughterhouse,*  
18 *<http://www.komonews.com/news/national/15684787.html>*  
19
- 20 • *Investigation leads to huge beef recall,*  
21 *<http://www.komonews.com/news/local/15717442.html>*  
22
- 23 • *Beef industry and animal rights groups duel over video,*  
24 *<http://www.komonews.com/news/national/15764902.html>*  
25
- 26 • *USDA: More than a third of recalled beef went to schools,*  
27 *<http://www.komonews.com/news/national/15848217.html>*  
28
- 29 • *U.S. beef recall stymies trade negotiations,*  
30 *<http://www.komonews.com/news/business/15908302.html>*  
31
- 32 • *USDA takes new steps on meat safety in wake of recall,*  
33 *<http://www.komonews.com/news/national/16079987.html>*  
34
- 35 • *Slaughterhouse owner backs off claims,*  
36 *<http://www.komonews.com/news/national/16629931.html>*  
37  
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- 1 • *Worker gets jail time for slaughterhouse abuse,*

2 <http://www.komonews.com/news/national/16925011.html>

3  
4  
5 7. I also found two Seattle Times articles concerning Hallmark, which are  
6 collectively attached as Exhibit 5:

- 7  
8  
9 • *Beef off menus in local school districts* (Feb. 2, 2008),

10 [http://community.seattletimes.nwsourc.com/archive/\\$date=20080202&sl](http://community.seattletimes.nwsourc.com/archive/$date=20080202&slug=schoolbeef02m.html)  
11 [ug=schoolbeef02m.html](http://community.seattletimes.nwsourc.com/archive/$date=20080202&slug=schoolbeef02m.html)

- 12  
13  
14  
15 • *U.S. orders largest recall of beef ever* (Feb. 18, 2008),

16 [http://seattletimes.nwsourc.com/html/nationworld/2004187994\\_beef18.h](http://seattletimes.nwsourc.com/html/nationworld/2004187994_beef18.html)  
17 [tml](http://seattletimes.nwsourc.com/html/nationworld/2004187994_beef18.html)

18  
19  
20  
21 8. This matter was also covered extensively at a national level. For example, I  
22 found video coverage about the Hallmark recall that ran on CNN, including *USDA orders*  
23 *recall of 143 million pounds of beef*, which can be found at [http://www.cnn.com/2008/](http://www.cnn.com/2008/HEALTH/02/17/beef.recall/index.html?iref=storysearch#cnnSTCVideo)  
24 [HEALTH/02/17/beef.recall/index.html?iref=storysearch#cnnSTCVideo](http://www.cnn.com/2008/HEALTH/02/17/beef.recall/index.html?iref=storysearch#cnnSTCVideo). A true and correct  
25 copy of this video is designated as Exhibit 6 and can be found on the disk behind the tab for  
26 Exhibit 1.  
27

28  
29  
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31  
32 9. Attached as Exhibit 7 is a true and correct copy of an article from  
33 MSNBC.com, *USDA recalls 143 million pounds of beef*, dated March 3, 2008, which can be  
34 found at <http://www.msnbc.msn.com/cleanprint/CleanPrintProxy.aspx?1282928860701>.

35  
36  
37  
38  
39 10. Exhibit 8 (which can be found on the disk behind the tab for Exhibit 1) is a  
40 true and correct copy of a video news report from NBC, *USDA under fire for tainted beef*,  
41 dated February 18, 2008, which was downloaded from [http://www.msnbc.msn.com/](http://www.msnbc.msn.com/id/21134540/vp/23225611#23225611)  
42 [id/21134540/vp/23225611#23225611](http://www.msnbc.msn.com/id/21134540/vp/23225611#23225611).

1           11. Attached as Exhibit 9 is a true and correct copy of an ABC News article,  
2  
3 *Undercover Video Prompts Nation's Largest Beef Recall*, dated February 18, 2008, which  
4  
5 can be found at <http://abcnews.go.com/print?id=4305151>.

6  
7           12. Exhibit 10 (which can be found on the disk behind the tab for Exhibit 1)  
8  
9 consists of two ABC News videos from February 18, 2008, which were downloaded from  
10  
11 the ABC News website:

- 12           • *Gruesome Video Prompts Meat Recall*, which was downloaded from  
13           <http://abcnews.go.com/video/playerIndex?id=4305411>
- 14  
15           • *Slaughterhouse Scandal*, which was downloaded from  
16  
17           <http://abcnews.go.com/video/playerIndex?id=4308281>.

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19           13. Attached as Exhibit 11 is a true and correct copy of an article from USA  
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21 Today, *USDA orders largest beef recall: 143.4 million pounds*, dated February 18, 2008,  
22  
23 which can be found at [http://www.usatoday.com/money/industries/food/2008-02-17-](http://www.usatoday.com/money/industries/food/2008-02-17-slaughterhouse-recall_N.html)  
24  
25 [slaughterhouse-recall N.html](http://www.usatoday.com/money/industries/food/2008-02-17-slaughterhouse-recall_N.html).

26  
27           14. Attached as Exhibit 12 is a true and correct copy of an article from The Los  
28  
29 Angeles Times, *Huge beef recall issued*, dated February 18, 2008, which can be found at  
30  
31 <http://articles.latimes.com/2008/feb/18/local/me-beef18>.

32  
33           15. Attached as Exhibit 13 is a true and correct copy of an editorial from The  
34  
35 New York Times, *The Biggest Beef Recall Ever*, dated February 21, 2008, which can be  
36  
37 found at <http://www.nytimes.com/2008/02/21/opinion/21thu1.html?ref=westlandhallmark>  
38  
39 [meat company](http://www.nytimes.com/2008/02/21/opinion/21thu1.html?ref=westlandhallmark).

40  
41           16. Attached as Exhibit 14 is a true and correct copy of an article from US News  
42  
43 & World Report, *Beef Recall Latest in a Bad Year*, dated February 20, 2008, which can be  
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45

1 found at <http://politics.usnews.com/news/national/articles/2008/02/20/beef-recall-latest-in-a->  
2  
3 [bad-year.html](#).  
4

5 **I declare under penalty of perjury under the laws of the**  
6 **State of Washington that the foregoing is true and**  
7 **correct.**  
8

9 EXECUTED at Seattle, Washington this 30th day of August, 2010.  
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Elva Gonzalez

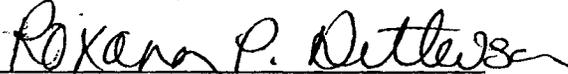
CERTIFICATE OF SERVICE

On the 30th day of August, 2010, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Roger L. Hillman, WSBA No. 18643 Heidi L. Craig, WSBA No. 41399 Garvey Schubert Barer 1191 Second Avenue, 18th floor Seattle, WA 98101 <a href="mailto:rhillman@gsblaw.com">rhillman@gsblaw.com</a> <a href="mailto:hcraig@gsblaw.com">hcraig@gsblaw.com</a>	<input checked="" type="checkbox"/> Via hand delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via CM/ECF System <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

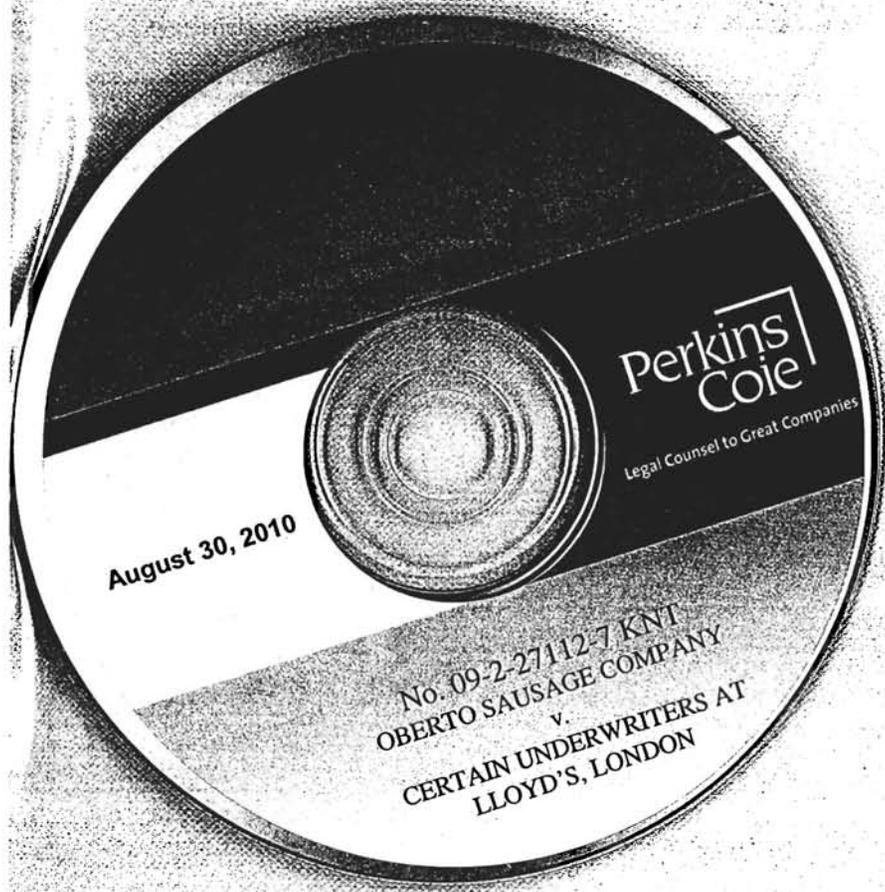
DATED at Seattle, Washington, this 30th day of August, 2010.

  
Roxann P. Ditlevson

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SEP 10 2009

Exhibit 1



Michael A. Tocicki, C.P.A.  
Executive General Adjuster

April 5, 2008

Professional Indemnity Agency, Inc.  
37 Radio Circle Drive  
P. O. Box 5000  
Mount Kisco, New York 10549

Attention: Albert Van Wagenen  
Senior Vice President

---

RE: Assured : Oberto Sausage Company  
Type of Loss : (Possible) Accidental Product  
Contamination  
Date of Loss : On or about 22 February 2008  
Your Ref. : MPT-00270300  
Our Reference : 08-02-730

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Dear Mr. Van Wagenen:

Having completed preliminary inquiries into the above-captioned claim, we attach our Report Number 1 for Underwriters' consideration.

Yours faithfully,  
**PREMIER INSURANCE SERVICES**

Michael Tocicki  
Executive General Adjuster

Ryan M. Tocicki

Enclosure: Report Number 1

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**PREMIER INSURANCE SERVICES LLC**

130 Church Street # 205  
New York, NY 10007

88 Tulip Road  
Southampton, PA 18966

Tel 267-377-7112  
Fax 619-639-1115

E-Mail ADJUST3MT@AOL.COM  
RMTOCICKI@YAHOO.COM

Exhibit 2

UNDERWRITERS001



April 5, 2008

Interested Lloyd's Underwriters  
c/o Professional Indemnity Agency, Inc.

Attention: Albert Van Wagenen  
Senior Vice President

**Adjuster's Report No. 1 - For the Consideration of Legal Advisors-Privileged**

**REPORT NO. 1**

Your Ref. : MPT-00270300

Our Ref. : 08-02-730

Assured : Oberto Sausage Company  
7060 S. 238<sup>th</sup> Street  
Kent, Washington 98032

Coverage : Accidental Product Contamination

Policy No. : MPT-00270300

Policy Period : 12 months commencing 1 May 2007

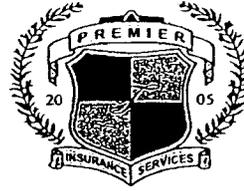
Limit of Liability : \$5,000,000 i.r.o. Accidental Product  
Contamination

Deductible : \$125,000 each and every loss

Type of Loss : (Possible) Accidental Product  
Contamination

Date of Loss : Discovered on or about 22 February 2008

Suggested Reserve : To be determined - pending claim data  
and coverage opinion from lawyers and



The Assured has submitted a claim under the referenced policy following a U.S.D.A. Class II recall announcement involving meat products sold to the Assured by supplier, Hallmark Westland.

The Assured used the meat purchased from Hallmark to manufacture various sausages, beef jerky, and meat products which were sold by the Assured sold to food wholesalers and retailers. Below is a U.S.D.A. Press Release which has triggered a claim under the Accidental Product Contamination policy:

## **STATEMENT**

United States Department of Agriculture • Office of Communications • 1400 Independence Avenue, SW  
Washington, DC 20250-1300 • Voice: (202) 720-4623 • Email: [oc.news@usda.gov](mailto:oc.news@usda.gov) • Web: <http://www.usda.gov>

Release No. 0046.08

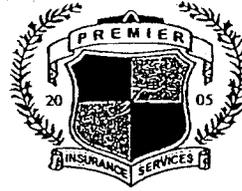
Contact:  
USDA Press Office (202) 720-4623

### **Statement by Secretary of Agriculture Ed Schafer Regarding Hallmark/Westland Meat Packing Company Two Year Product Recall**

*February 17, 2008*

Today, USDA is announcing additional actions as a result of the ongoing investigation at Hallmark/Westland Meat Packing Company. USDA's Food Safety and Inspection Service (FSIS) has evidence that Hallmark/Westland did not consistently contact the FSIS public health veterinarian in situations in which cattle became non-ambulatory after passing ante-mortem inspection, which is not compliant with FSIS regulations. Because the cattle did not receive complete and proper inspection FSIS has determined them to be unfit for human food and the company is conducting a recall.

The United States enjoys one of the safest food supplies in the world. To help ensure the safety of the food supply, we implement a series of safeguards to protect against foodborne disease. These safeguards include in-plant procedures to reduce dangerous foodborne pathogens such as E. coli O157:H7 and Salmonella. It also includes the removal of specified risk materials-those



tissues demonstrated to contain the bovine spongiform encephalopathy agent in infected cattle from the human food chain, along with the U.S. Food and Drug Administration's 1997 ruminant to ruminant feed ban. The prohibition of non-ambulatory cattle from the food supply is an additional safeguard against bovine spongiform encephalopathy.

Upon notification of possible violations of USDA regulations, we immediately began an investigation and placed products from this plant destined for the National School Lunch Program, the Emergency Food Assistance Program and the Food Distribution Program on Indian Reservations on hold. Since then, we also suspended all Federal food and nutrition program contracts with Hallmark/Westland Meat Packing Company. To date, Hallmark/Westland Meat Packing Company remains suspended by the Food Safety and Inspection Service. The products destined for the Federal food assistance programs, including the National School Lunch Program, will now be removed from schools and other holding facilities and destroyed.

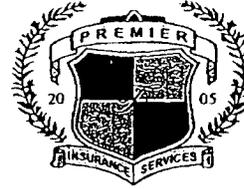
I am dismayed at the in-humane handling of cattle that has resulted in the violation of food safety regulations at the Hallmark/Westland Meat Packing Company. It is extremely unlikely that these animals were at risk for BSE because of the multiple safeguards; however, this action is necessary because plant procedures violated USDA regulations.

In addition, our Office of the Inspector General and the Food Safety and Inspection Service continue the investigation. We will respond immediately if further findings warrant. Details about this recall and USDA actions are available at [www.usda.gov/actions](http://www.usda.gov/actions) . "

#

The matter requires a coverage analysis based on the information supplied by Hallmark Westland and The U.S.D.A.

Having completed preliminary inquiries, we attach our Report No. 1 for Underwriters' consideration.



**COVERAGE:**

Coverage is claimed under a Lloyd's Accidental Product Contamination Policy No. MPT-00270300 written in the name of **Oberto Sausage Company** and effective for a period of 12 months commencing 1 May 2007.

The limit of liability in respect of Accidental Product Contamination is \$5,000,000 subject to a deductible of \$125,000 each and every loss.

The policy indemnifies the Named Insured for loss resulting directly from an **Accidental Product Contamination** first discovered by the Named Insured during the certificate period.

Loss shall include:

1. Cost of contaminated products
2. Recall expenses
3. Rehabilitation expenses
4. Crisis response expenses
5. Loss of gross profits

The policy defines **Accidental Product Contamination** to mean:

1. *"Any accidental or unintentional contamination, impairment or mislabeling during the manufacturing, blending, mixing, compounding, packaging, labeling, preparation, production or processing of the named insured's products, or PUBLICITY implying such*

Or,

2. *"Fault in design specification or performance of the named insured's products."*



*Provided always that the consumption or use of the named insured's contaminated products has, within one hundred twenty days of such consumption or use, either resulted, or may likely result, in physical symptoms of bodily injury, sickness, disease or death of any person and/or physical damage to tangible property including animals and/or livestock."*

*The policy defines Publicity to mean:*

*"The reporting of an actual or alleged accidental product contamination during the certificate period in local, regional, or national media (including but not limited to radio, television, newspapers, magazines or the internet) or any governmental publication where the Named Insured's product is specifically named."*

~~We have not yet seen any publication where Oberto's name or products are mentioned and we are continuing to search for any evidence of publicity.~~

Based on preliminary inquiries, it is possible that an Accidental Product Contamination, as defined, has occurred. We are continuing our inquiries into this matter and suggest that Underwriters obtain a legal opinion relative to coverage.

**ASSURED:**

In 1918, Constantino Oberto came to the United States from Italy and learned the art of salami making. Oberto and his uncle set up on South King Street in Seattle, Washington and the Oberto Sausage Company was formed.



In 1994, the Assured acquired Curtis Burns Meat Snack, Inc, doubling company sales and capacity. Overnight, the expansion jettisoned the Oberto Sausage Company into a position as the nation's largest jerky manufacturer, and the second-largest national meat snack company.

Oberto Sausage Company is operated by President Tom Campanile, Vice-President of Marketing Mick Tyler, and Vice-President of Finance David Yonce. Oberto reports annual sales over \$83,000,000 and has over 500 employees.

The company manufactures more than 400 varieties of dried meat products, such as jerky (in beef, pork, and turkey versions), snack sausages, and under the brand names Lowrey's Meat Snacks, Oh Boy! Oberto, Pacific Gold, and Smoke Craft.

Oberto's products are available across the US in supermarkets, club and convenience stores through a distribution alliance with Frito-Lay. Its products are also available in foreign markets, including Japan.

The company purchases raw materials from various suppliers (including Hallmark Westland) and manufactures their meat products which are sold across the U.S. to wholesale and retail food businesses.



CIRCUMSTANCES OF LOSS:

In late January and throughout February, 2008, there was a wave of publicity regarding alleged food safety violations at the Hallmark Westland Company in Chino, California.

Below is a link to a new release and a video of the activities at Hallmark Westland that prompted the U.S.D.A. investigation and recall:

<http://hubpages.com/hub/USDA-Beef-Recall-Hallmark-Westland-Meat-Packing-beef-recalled>

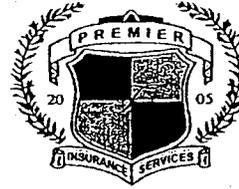
{Open this link and scroll down the page to the image of the meat grinder. Click on the triangle/play icon on the center of the image}

Below are some relevant developments since USDA launched its investigation into allegations of animal cruelty at Hallmark/Westland Meat Packing Co. in Chino, Calif. on Jan. 30, 2008:

- USDA suspended the company as a supplier of the National School Lunch Program and placed an administrative hold on products produced by the company on Jan. 30.
- The company voluntarily stopped all operations at the plant on Feb. 1 and FSIS officially suspended plant production on Feb. 4;
- USDA extended its hold on products produced by the plant on Feb. 8 pending the results of its investigation.
- On Feb. 15, criminal charges were filed against two former Hallmark/Westland Meat Packing Company employees.
- FSIS announced Feb. 17 Hallmark/Westland Meat Packing Co. is recalling 143 million pounds of beef products because the cattle did not receive proper inspection.

~~The Assured read the February 17, 2008 U.S.D.A. press release, and by February 22, 2008 they were advised of the details of the products and lot numbers of product manufactured and sold by Hallmark Westland, which were included in the recall.~~

~~The Hallmark Westland notice stated:~~



WESTLAND/HALLMARK MEAT COMPANY

ESTABLISHMENT #336

# WESTLAND/HALLMARK MEAT COMPANY

## RECALL NOTIFICATION LETTER

Date: February 22, 2008

Dear Madam or Sir,

Westland/Hallmark Meat Company, (WHMC), Establishment #336, located at 13677 Yorba Avenue Chino, California 91710, is voluntarily recalling all raw/frozen beef products because the product may contain foreign material/non-microbial contamination.

The USDA has classified the risk hazard of raw/frozen beef products produced by WHMC as being a Class II Product Recall. The recall shall implicate all products produced by this Establishment #336 from February 1, 2006 up to and including February 15, 2008.

For your information a Class II Product Recall is defined as being; "...a health hazard situation where there is a remote probability of adverse health consequences from the use of the product."

The following products and brands have been deemed subject to this recall:

- Regal Brand
- Westland Brand
- Hallmark Brand
- King Meat Brand Establishment #336

With regards to the above brands, the size is the net weight of the container; the production date, code, lot number is printed on the end panel of the weight sticker or the end panel itself and the production date is identical.

Being that this is a voluntary recall initiated by WHMC, WHMC has received this afternoon from the USDA several options for the final disposal of the said products as outlined below:

This recall shall include products that have been distributed to Federal Food Nutrition Programs and private/commercial customers. It shall also include products that have been commingled with any WHMC product that is included in this product recall.

It is the responsibility of each primary firm receiving this notice to convey this information to any subsequent consignees who have or may have received product, in whole or in part, containing beef harvested at Establishment #336. The options stated above for final disposal includes all product that was received from another Establishment and processed by WHMC. WHMC cautions all consignees to notify their USDA inspector to ensure any requisite paper documenting their final disposal prior to its final disposition including two witnesses to the final disposal.

UNDERWRITERS009

Product is to be incinerated on



{Full Press Release attached as an Exhibit to this Report.}

~~The U.S.D.A. then began advising all companies who had purchased meat from Hallmark to begin preparing to recall any product they (Oberto Sausage Company) had sold which contained any of the Hallmark meat. The U.S.D.A. stated to the media on February 21, 2008:~~

**TRANSCRIPT: USDA Technical Briefing - Hallmark/Westland Meat Packing Company - (02/21/08)**

**REPORTER:** So if you could, I know you don't have any opening remarks, but what's the status of this recall, and what efforts are you pursuing to round up these 143 million pounds of meat?

**DR. PETERSEN:** Hi, this is Dr. Petersen. *{Dr. Kenneth Petersen, is assistant administrator, Office of Field Operations for USDA Food Safety and Inspection Service;}* While we are initiating this recall, really consistent with how we would do other recalls, other than the size of it, but we have rather defined procedures. We have a recall direction board, where my folks follow certain prescribed procedures. That directive is available on our home page for those who want to get into any of the details of that. But basically the way it works is, the recalling firm, obviously in this case Hallmark, identifies their initial primary customers, who they sent products to. And that could be either other producing facilities—obviously in this case some of them were facilities that produced for the School Lunch Program. They could be facilities that produced for commercial markets or also in the School Lunch Program. And then those locations typically distribute further down the distribution chain.

And so we start out going to those locations, find out what they made and who else they distribute to. And as part of that initial notification that Hallmark would do, they would tell them, "Here's the products you receive," and tell them what they would do with it, which is in this case obviously control it, and then to destroy the product by landfill, incineration or inedible rendering.

And we work our way down the distribution chain until we develop basically all points of distribution down to the point of purchase for consumption. And once we have that, then we go randomly to various locations. Again this is a Class II recall, so I would go to a certain prescribed number of locations—that's based again on my directive—and make sure that folks throughout the distribution chain were notified that they had the products, they knew what to do with it, and that they took the appropriate action. And if we get to a location where that didn't occur, then we will cite them for failing to follow the provisions of a recall.

So we've already begun that practice. We really began it over the weekend. I mean certainly on the commercial side the folks in Marketing Regulatory Programs, because of the School Lunch contracts and tracking, have a slightly different nuance on it. So we're starting to track it through the chain.

But sitting here today, I cannot tell you how many locations in aggregate the product has gone to. And obviously we'll go to them and gather the information and really proceed from there. So our focus is on identifying the locations, the locations we go to make sure the products are under control and that they have notified their further customers if any that they received product. And that's standard practice for any recall that we do.



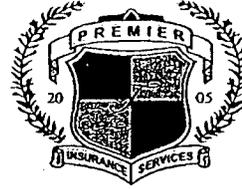
United Food Group thus began an analysis of their meat purchases from Hallmark and began planning to recall any products they had in commerce.

CLAIM:

~~The Assured's potential losses due to the recall of products they manufactured using meat from Hallmark Westland are not yet determined.~~

The Assured ~~does not have a precise estimate at this time as:~~

- ~~They are continuing to confirm which products they manufactured with Hallmark meat~~
- They must then check the shelf-life (product expiration date) as products past the expiration date should have already been sold or destroyed by customers
- They must then notify each customer who purchased product subject to the recall and wait for the customers to report the quantities and values of product in commerce
- The extent of recall costs will be based on the quantities of products, locations, destruction and transportation costs
- If there are lost profits due to the recall, this will not be known for months



## INVESTIGATION OF CIRCUMSTANCES AND VERIFICATION OF CLAIM:

Upon receipt of Underwriters instructions, we obtained policy details and commenced our inquiries.

We contacted the Assured and the Assured's broker to discuss the claim, the circumstances which caused the recall and the policy wording.

The Assured and the broker were eager to receive confirmation that their losses were covered by this policy.

We explained that Underwriters needed claim information and time to assess if the loss would be covered under the policy.

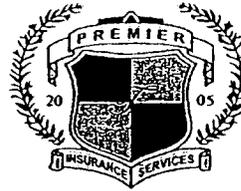
~~We researched the U.S.D.A. web site and other sources and confirmed that this is a Class~~

~~III recall.~~ The U.S.D.A. classifies recalls as follows:

If the Recall Committee recommends a recall, the Committee classifies the recall based on the relative health risk, as follows:

- **Class I** - A Class I recall involves a health hazard situation in which there is a *reasonable* probability that eating the food will cause health problems or death.
- **Class II** - A Class II recall involves a potential health hazard situation in which there is a *remote* probability of adverse health consequences from eating the food.
- **Class III** - A Class III recall involves a situation in which eating the food will not cause adverse health consequences.

We then found specific discussions regarding the Hallmark Westland recall:



**TRANSCRIPT: Technical Briefing - Hallmark/Westland Meat Packing Company - (02/21/08)**

**REPORTER:** What about the people that have already consumed the meat?

**DR. PETERSEN:** Well, I'd have to, you know, maybe go back over the facts here. And the facts are, you know, we had some animals that were presented on ante mortem, they were found healthy. And on a rare occasion through our investigation we learned that an animal would occasionally go down and the plant was expected to notify us so that we could, my veterinarian could reexamine that animal. But that's all predicated on a whole, you know, broad strategy of both food safety controls but, more importantly in this case, BSE controls in the United States going back to surveillance that began in the 1990s, the FDA feed ban that began in '97, aggressive surveillance by the department that began in 2004 in which we did upwards of 800,000 tests of animals, cattle, focused those tests on high risk end of the spectrum. Only 2 of those roughly 800,000 animals were positive. Both of those were born before the feed ban.

Then we get to a slaughter plant. We have a downer ban, which the Harvard Risk Assessment tells us controls roughly 3 percent of the risk. And most importantly at the slaughter plant we have removal of specified risk material, which the Harvard Risk Assessment tells us is slanted toward mitigating upwards of 99 percent of any possible risk.

So given all of that, what we tell the public and what we have been saying is, this is a Class II recall. **The reason we call it a very, very remote probability of any adverse illness is because of everything I just said.**

**REPORTER:** Thank you. I'm wondering if anyone has gotten sick from the meat or if there's anymore concern or any further recalls.

**DR. PETERSEN:** This is Dr. Petersen. Actually there has been no reported illness, and this is certainly a recall that goes back two years. Given the nature of what I'd said in response to the previous reporter and the decisions we made on this particular recall, **we really don't envision there to be any illnesses.** But the facts are, there have not been any that have been reported.

**Hallmark/Westland Beef Recall – Information for School Officials & Parents**

- On Feb. 17, 2008, the USDA notified States that beef produced by the Hallmark/Westland Meat Packing Company from Feb. 1, 2006, to Feb. 4, 2008 was voluntarily recalled due to regulatory noncompliance.
- Some of the USDA commodity beef supplied to the National School Lunch Program was produced by Hallmark/Westland. In addition, schools may have purchased Hallmark/Westland beef commercially.
- On Jan. 30, 2008, USDA instructed all school districts to hold and immediately discontinue use of any Hallmark/Westland commodity beef products in their inventory.
- Products affected by the recall are no longer being served in schools. To minimize disruption to school food service operations, USDA is working closely with States to quickly provide replacement commodity product from validated sources or credit their commodity entitlement accounts.
- USDA has given assurance that **the health risk of consuming the affected beef is negligible.** USDA remains confident in the safety of the food supply, including beef and other products available through the National School Lunch Program.
- **No reports of illness** have been associated with the affected product.



## **USDA Orders Largest Ever Beef Recall**

Posted on: Monday, 18 February 2008, 06:10 CST

The U.S. Department of Agriculture (USDA) issued a recall yesterday of 143 million pounds of beef from Hallmark/Westland Meat Packing Co. of Chino, California, after the beef was determined to be unfit for human consumption because the cattle did not receive complete and proper inspection. The recall includes frozen beef products from the company dating back to February 1, 2006.

The beef recall is the largest in U.S. history, surpassing a 1999 ban of 35 million pounds of ready-to-eat meats thought to be contaminated with listeria.

Officials said Hallmark/Westland had allowed meat from cattle unable to stand at the time of slaughter to enter the food chain. Such "downer" cattle are at greater risk of contamination by E. coli, salmonella or contracting mad cow disease, as they have weaker immune systems and greater contact with feces than standing cattle.

Earlier this month, authorities suspended after an undercover video surfaced which showed sick and crippled animals being prodded with the blades of a forklift truck, kicked, given electric shocks and sprayed with high-pressure water hoses by staff in an effort to get them to their feet before slaughter

The meat-packing plant is currently the subject of an animal cruelty investigation, and last Friday California prosecutors charged two former Hallmark/Westland employees with animal cruelty. At this time, no charges have been filed against Hallmark/Westland, but the USDA investigation continues.

"A recall of this staggering scale proves that it's past time for Congress and the USDA to strengthen our laws for the sake of people and animals," said Wayne Pacelle, president of the U.S. Humane Society.

The USDA classified the recall as Class 2, meaning there is a remote probability that the beef could be harmful if consumed, but said authorities had found no cases of illness linked to the newly recalled meat.

"We don't know how much product is out there right now. We don't think there is a health hazard, but we do have to take this action," Dick Raymond, USDA undersecretary for food safety, told Associated Press.

Officials said most of the recalled meat has likely been eaten already. They reported that 37 million pounds of the beef had gone to school lunch and other federal nutrition programs, while some was also supplied to major fast-food chains.

In a statement by Agriculture Secretary Ed Shafer, he said he had been "dismayed by the inhumane handling of cattle" that resulted in the violation of food safety regulations at Westland/Hallmark.

"It is extremely unlikely that these animals were at risk for BSE [mad cow disease] because of the multiple safeguards; however this action is necessary because plant procedures violated USDA regulations," he added.

A February 3rd statement issued by Hallmark/Westland president Steve Mendell said the company is cooperating with the USDA and called the practices shown in the video as "a serious breach of our company's policies and training".

"We have taken swift action regarding the two employees identified on the video and have already implemented aggressive measures to ensure all employees follow our humane handling policies and procedures."



**Westland/Hallmark president acknowledges illegal slaughter**

*By Tom Wray  
Editor, ProvisionerOnline*

WASHINGTON – The head of the Southern California slaughterhouse at the center of the largest beef recall in U.S. history acknowledged Wednesday that sick cattle were illegally slaughtered at his plant.

The Associated Press reported that Westland/Hallmark Meat Co. President Steve Mendell made the admissions after a congressional panel forced him to watch undercover video of abuses of cattle at his plant. Mendell watched head-in-hand as cows were dragged by chains, jabbed by forklifts and shocked to get them into the box where they'd be slaughtered.

Afterward he briefly bowed his head, then backed away from claims he made in his written testimony that no ill cows from his plant entered the food supply, according to the AP.

The panel's chairman, Rep. Bart Stupak, D-Mich., asked Mendell whether it was logical to conclude from the video that at least two downer cows entered the nation's food supply.

"That would be logical, yes sir," Mendell said.

The news service said it was Mendell's first public appearance since the undercover video by the Humane Society of the United States led to his plant's shutdown and last month's recall of 143 million pounds of beef.

We have advised the Assured and their broker that Underwriters are evaluating whether their losses are covered under the policy.

However, in the interim, we have been providing the Assured and their broker with recommendations to control the costs and extent of recall losses which will occur.

We have requested cost and loss documentation from the Assured to confirm the extent of cost losses and damages. Once the data is received, we will provide a supplemental report.



OTHER INSURANCE:

We have requested copies of the Assured's Property and G/L policies and have requested that the Assured place all carriers on notice of this loss. We will review those policies for other possible coverage for this loss.

We have advised Oberto Sausage Company to place Hallmark Westland on Notice that they expect Hallmark to be responsible for all losses.

~~We were unofficially advised that Hallmark may have up to \$7,000,000 of G/L coverage. However, the USDA and many others will be filing substantial claims against Hallmark. Also, Hallmark's carriers may decline coverage if Hallmark failed to comply with government regulations.~~

We will continue to analyze the other insurance aspect of this claim if coverage is agreed by Underwriters.

REMARKS AND RECOMMENDATIONS:

Based on the circumstances and U.S.D.A. announcements, this loss might not be covered under the policy. ~~We are searching for evidence that the Assured's name/products were listed in the media, which might result in coverage being confirmed under the PUBLICITY definition.~~

We suggest that a legal coverage opinion be obtained to evaluate the policy wording and the loss circumstances/U.S.D.A. announcements.



~~The Assured has preliminarily indicated that the extent of loss may be isolated to a few products and customers. However, it is always possible that they can lose a customer as a result of the recall and incur substantial lost gross profits. We cannot suggest a reserve at this time as we do not have any loss estimates from the Assured.~~

We will forward an additional report shortly.

Yours faithfully,  
Premier Insurance Services

Michael Tocicki  
Executive General Adjuster  
MAT:vs

Ryan M. Tocicki

Enclosure:

Hallmark Westland Press Release

**Exhibit 3 is a video that can be found on the disk located behind  
Tab 1**

**Exhibit 3**

Friday, August 27, 2010 - Seattle, WA

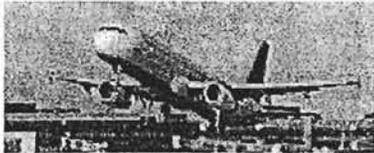
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 By TRAVELZOO STAFF



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# Graphic video shows possible abuse of sick cows at slaughterhouse; Feds to investigate

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By HOPE YEN Associated Press Writer  
**STORY**

Story Published: Jan 30, 2008 at 12:45 PM PDT | Story Updated: Jan 30, 2008 at 12:50 PM PDT

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WASHINGTON (AP) - The Agriculture Department said Wednesday it would investigate whether sick dairy cows were mistreated at a California slaughterhouse in violation of state and federal laws designed to ensure food safety and prevent animal cruelty.

Newly installed Agriculture Secretary Ed Schafer said the department was taking the allegations seriously after video footage showed workers at the Hallmark Meat Packing Co. repeatedly kicking cows and ramming them with the blades of a forklift as the animals squealed in pain.

Schafer said "appropriate actions will be taken" if violations are found in the facility but he said there was no evidence that the nation's beef supply was at risk.

"There is no immediate health risk that we are aware of," he said.

Hallmark, based in Chino, Calif., supplies the Westland Meat Co., which processes the carcasses. The facility is a major supplier to a USDA program that distributes beef to needy families, the elderly and to schools through the National School Lunch Program. Westland was named a USDA "supplier of the year" for 2004-2005 and has delivered beef to schools in 36 states.

The video, released Wednesday by The Humane Society of the United States after a six-week undercover investigation, also showed plant workers jabbing in the eyes and applying electrical shocks to

Exhibit 4

the "downed" dairy cows - those who are too sick or injured to walk - in an effort to force them into the federally inspected slaughterhouse.

WARNING: The video contains material that could be upsetting.

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In one scene, the workers shoot high-intensity water sprays up the cows' noses in what The Humane Society described as a form of animal "waterboarding," or torture that simulates drowning.

USDA regulations and California law generally do not allow mistreatment of disabled animals, such as dragging them by chains or lifting them with forklifts. Federal regulations also call for keeping downer cows out of the food supply because they may pose a higher risk of E. coli, salmonella contamination, or mad cow disease since they typically wallow in feces and their immune systems are often weak.

In a statement, Steve Mendell, president of Westland and Hallmark, said the company immediately terminated two employees shown in the video and suspended their supervisor.

"We are shocked, saddened and sickened by what we have seen today," Mendell said. "Operations have been immediately suspended until we can meet with all of our employees and be assured these sorts of activities never again happen at our facility."

Wayne Pacelle, president and chief executive of The Humane Society, called the mistreatment of downer cows alarming to U.S. consumers because 95 percent eat meat.

"We need to know how this food is getting to the table," he said. "Even when downed animals appear otherwise healthy, they may be harboring dangerous pathogens."

More informaton on the investigation can be found by clicking here.

---

Associated Press writer Mary Clare Jalonick contributed to this report.

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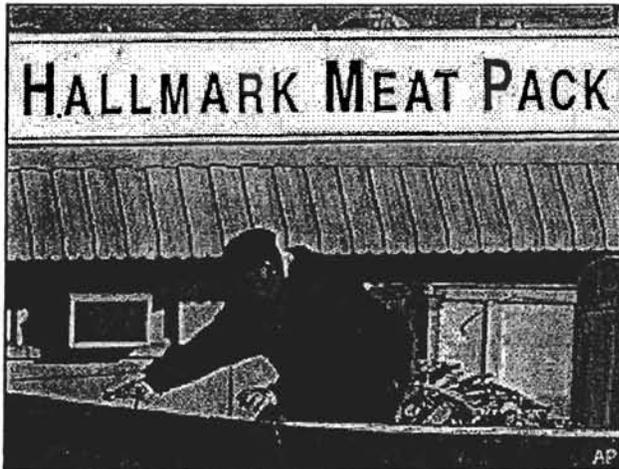
# State lists schools that ordered slaughterhouse beef

By KOMO Staff & News Services

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**STORY** **VIDEO**

Story Published: Feb 1, 2008 at 11:42 AM PDT | Story Updated: Feb 1, 2008 at 5:17 PM PDT



A worker walks on top of cattle carcasses scraps dropped into a parked truck at the Hallmark Meat Packing slaughterhouse in Chino, Calif. Wednesday, Jan. 30, 2008. (AP Photo/Damian Dovarganes)

SEATTLE - More than 100 school districts in Washington state have purchased raw beef from a slaughterhouse being investigated by the U.S. Agriculture Department and have been told not to serve any of the meat, state officials said Friday.

The affected school districts are listed below.

State school officials say a number of other districts that are not on the list, including Seattle Public Schools, may have received reprocessed, cooked beef that was handled by the affected meat packer. Many of those districts also have stopped serving beef to students.

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All the ground beef served by school districts in this state comes from three different meat processing companies, and at least one of those processors gets beef from Westland Meat Co., which processes carcasses from the Hallmark Meat Packing Co., said Nathan Olson,

spokesman for the Office of the Superintendent of Public Instruction.

Hallmark is being investigated following allegations that sick dairy cows were mistreated there in violation of state and federal laws designed to ensure food safety and prevent animal cruelty.

The federal government has asked state education officials to contact school districts and tell them to set aside beef connected to Hallmark and Westland, he said.

They're still gathering information, but Orson said the list already tops 100 of Washington 296 school districts.

State officials said they couldn't remember a similar situation affecting the Washington school lunch program.

The USDA said Wednesday it would investigate whether sick dairy cows were mistreated at a Hallmark slaughterhouse in California in violation of state and federal laws designed to ensure food safety and prevent animal cruelty.

Video footage, released Wednesday by The Humane Society of the United States after a six-week undercover investigation, showed workers at the plant repeatedly kicking cows and ramming them with the blades of a forklift as the animals squealed in pain.

Westland is a major supplier to a USDA program that distributes beef to needy families, the elderly and to schools through the National School Lunch Program. Westland was named a USDA "supplier of the year" for 2004-2005 and has delivered beef to schools in 36 states.

There have been no reported cases of tainted beef among the meat put on hold, Olson said. School districts have not been told to take beef off their menus, just to not serve any meat that comes from a processor connected to Hallmark or Westland.

"We've put a hold, so they can't use the beef. What they do after that is up to them," Olson said.

After being alerted about the USDA investigation, some districts, like Seattle Public Schools, have taken beef off the school lunch menu.

Here is a list of schools, provided by the state Office of the Superintendent of Public Instruction, that ordered beef from Westland Meat Co. in November or December:

#### WESTERN WASHINGTON

Aberdeen School District  
All Saints School  
Auburn School District  
Battle Ground School District  
Bethel School District  
Brinnon School District  
Camas School District  
Cape Flattery School District  
Centerville School District

---

Centralia School District  
Chief Leschi Schools  
Child Study Center  
Concrete School District  
Conway School District  
Darrington School District  
Denney Juvenile Justice Center  
DSHS-Echo Glen Children's Center  
DSHS-Green Hill School  
DSHS-Maple Lane School  
Enumclaw School District  
Evergreen School District-Clark  
Fife School District  
Friends of Youth  
Glenwood School District  
Goldendale School District  
Green Mountain School District  
Griffin School District  
Holy Rosary School  
Hood Canal School District  
Hoquiam School District  
Immaculate Conception  
Kalama School District  
Kelso School District  
King County Youth Services  
La Conner School District  
Lake Quinalt School District  
Lopez Island School District  
Lummi Indian School  
Lyle School District  
McCleary School District  
~~Mill A School District~~

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Montesano School District  
Morton School District  
Mossyrock School District  
Mount Vernon School District  
Mukilteo School District  
Napavine School District  
Naselle Youth Center  
Naselle-Grays River Valley School District  
Oak Harbor School District  
Ocean Beach School District  
Olympia School District  
Onalaska School District  
Pe Ell School District  
Pierce County Juvenile Court  
Pioneer Human Services  
Quilcene School District  
Rainier School District

Raymond School District  
Ryther Child Center  
Saint Joseph Catholic School  
San Juan Island School District  
Sea Mar Visions  
Shelton School District  
Skamania School District  
Snoqualmie Valley School District  
South Bend School District  
Southside School District  
Stanwood School District  
Stevenson Carson School District  
Tacoma School District  
Taholah School District  
Tenino School District  
Toledo School District  
Tuttle Lake School District  
Vancouver School District  
Villa Academy  
Washington School for the Deaf and Blind  
Washougal School District  
White River School District  
Willapa Valley School District  
Winlock School District  
Wishkah Valley School District  
Wishram School District  
Woodland School District  
Yelm School District  
Zion Preparatory Academy

#### EASTERN WASHINGTON

Asotin-Anatone School District  
Cashmere School District  
Christ the King School  
Christian Heritage School  
Clarkston School District  
College Place School District  
Colton School District  
Coulee-Hartline School District  
Creston School District  
Curlew School District  
Cusick School District  
Day Break Youth Services  
Dayton School District  
Endicott School District  
Entiat School District  
Freeman School District  
Grandview School District

Highland School District  
Holy Family School  
Inchelium School District  
Kahlotus School District  
Kittitas School District  
Lake Chelan School District  
Liberty School District  
Lind School District  
Mabton School District  
Methow Valley School District  
Moses Lake School District  
Nespelem School District  
Oakesdale School District  
Orient School District  
Orondo School District  
Oroville School District  
Othello School District  
Paschal Sherman Indian School  
Prescott School District  
Republic School District  
Rosalia School District  
Saint Aloysius School  
Saint John School District  
Saint Joseph/Marquette School  
Saint Michael's Academy of Spokane  
Saint Patrick's School  
Selah School District  
Selkirk School District  
Soap Lake School District  
Spokane County Juvenile Center  
Tekoa School District  
Thorp School District  
Trinity School  
Union Gap School District  
Valley School District  
Wapato School District  
Warden School District  
Waterville School District  
Wellpinit School District  
Wenatchee School District  
West Valley School District-Yakima  
Wilson Creek School District

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# 2 fired workers charged with abusing sick cattle at Southern California slaughterhouse

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By Associated Press  
**STORY**

Story Published: Feb 15, 2008 at 8:12 PM PDT | Story Updated: Feb 15, 2008 at 8:12 PM PDT



President and CEO Wayne Pacelle, of The Humane Society of the United States, answers questions from the media as San Bernardino County District Attorney Michael Ramos, center, and Deputy District Attorney Debbie Ploghaus, left, listen.

SAN BERNARDINO, Calif. (AP) - Two former slaughterhouse workers were charged Friday with abusing ailing cattle in a case based on an undercover Humane Society video showing crippled and sick animals being shoved with forklifts.

The video also showed workers kicking, shocking and otherwise abusing "downer" animals that were apparently too sick or injured to walk into the slaughterhouse. Some animals had water forced down their throats, San Bernardino County District Attorney Michael Ramos said.

"The facts of this case are horrendous," Ramos said. "It makes your stomach turn to

see what they did to these cows."

Daniel Navarro, 49, was charged with five felony counts of animal

Comments (0)

cruelty and three misdemeanors. Luis Sanchez, 32, was charged with three misdemeanor counts. The misdemeanors allege illegal movement of a nonambulatory animal.

Navarro, of Pomona, would face up to eight years in prison if convicted and Sanchez, of Chino, would face up to three years.

The men were due for arraignment Friday afternoon. The district attorney's office did not know if they had retained lawyers.

Prosecutors said Navarro and Sanchez were seen in the video. They were fired and their supervisor was suspended.

The slaughterhouse in Chino is operated by Westland/Hallmark Meat Co., which supplies meat to the federal school lunch program and to major hamburger chains. The U.S. Department of Agriculture suspended operations at Westland/Hallmark after the video surfaced earlier this year, and lawmakers in Washington called Thursday for an investigation.

Federal regulations call for keeping downed cattle out of the food supply because they may pose a higher risk of E. coli, salmonella contamination or mad cow disease because they typically wallow in feces and their immune systems are often weak.

USDA officials have put a hold on meat products from the Westland/Hallmark facility until Tuesday, though investigations have found no evidence that meat from disabled animals has entered the food supply.

Westland President Steve Mendell said in a letter posted on the company's Web site that he was "shocked and horrified" by the video.

The USDA inspector general is looking into Westland's procedures and could turn over information to the Justice Department for criminal charges, though no charges have been filed against the company or its management.

The district attorney said prosecutors would have to show management had knowledge of the activities and that had not been determined.

The video was shot by a person working undercover for The Humane Society of the United States.

Wayne Pacelle, president and chief executive of The Humane Society, said he couldn't estimate how many animals were mistreated at the plant. Regardless, the case should be a wake-up call to the government to do better monitoring; a USDA inspector was only at the plant for about two hours each day, he said.

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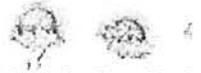
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# Investigation leads to huge beef recall

By KOMO Staff & News Services

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**STORY** **VIDEO**

Story Published: Feb 17, 2008 at 3:18 PM PDT | Story Updated: Feb 18, 2008 at 11:40 AM PDT



In a file photo a security guard closes a side gate at Hallmark Meat Packing Co. (AP Photo/ Inland Valley Daily Bulletin, Therese Tran)

LOS ANGELES -- An undercover video showing crippled and sick animals being shoved with forklifts has led to the largest beef recall in the United States and a scramble to find out if any of the meat is still destined for school children's lunches.

The U.S. Department of Agriculture on Sunday ordered the recall of 143 million pounds of beef from a Southern California slaughterhouse that is the subject of an animal-abuse investigation.

The recall will affect beef products dating to Feb. 1, 2006, that came from Chino-based Westland/Hallmark Meat Co., the federal

agency said. The company provided meat to various federal programs.

Comments (0)

Some of the recalled beef may have been gone to school districts in Washington state as part of the

lunch program. State education officials earlier disclosed that more than 100 school districts in Washington state have purchased raw beef from the slaughterhouse.

The districts were ordered not to serve any of the meat after the USDA investigation began.

Other districts that did not directly purchase beef from Westland/Hallmark, including Seattle Public Schools, may have received reprocessed, cooked beef that was handled by the affected meat packer. Many of those districts also stopped serving beef to students.

No illnesses have been linked to the beef at any schools across the nation.

Secretary of Agriculture Ed Schafer said his department has evidence that Westland did not routinely contact its veterinarian when cattle became non-ambulatory after passing inspection, violating health regulations.

"Because the cattle did not receive complete and proper inspection, Food Safety and Inspection Service has determined them to be unfit for human food and the company is conducting a recall," Schafer said in a statement.

A phone message left for Westland president Steve Mendell was not returned Sunday.

Agriculture officials said the massive recall surpasses a 1999 ban of 35 million pounds of ready-to-eat meats. No illnesses have been linked to the newly recalled meat, and officials said the health threat was likely small.

Officials estimate that about 37 million pounds of the recalled beef went to school programs, but they believe most of the meat probably has already been eaten.

"We don't know how much product is out there right now. We don't think there is a health hazard, but we do have to take this action," said Dr. Dick Raymond, USDA Undersecretary for Food Safety.

Federal officials suspended operations at Westland/Hallmark after an undercover video from the Humane Society of the United States surfaced showing crippled and sick animals being shoved with forklifts.

Two former employees were charged Friday. Five felony counts of animal cruelty and three misdemeanors were filed against a pen manager. Three misdemeanor counts - illegal movement of a non-ambulatory animal - were filed against an employee who worked under that manager. Both were fired.

Authorities said the video showed workers kicking, shocking and otherwise abusing "downer" animals that were apparently too sick or injured to walk into the slaughterhouse. Some animals had water forced down their throats, San Bernardino County prosecutor Michael Ramos said.

No charges have been filed against Westland, but an investigation by federal authorities continues.

About 150 school districts around the nation have stopped using ground beef from Hallmark Meat Packing Co., which is associated with Westland. Two fast-food chains, Jack-In-the-Box and In-N-Out, said they would not use beef from Westland/Hallmark.

Most of the beef was sent to distribution centers in bulk packages. The USDA said it will work with distributors to determine how much meat remains.

Federal regulations call for keeping downed cattle out of the food supply because they may pose a higher risk of contamination from E. coli, salmonella or mad cow disease since they typically wallow in feces and their immune systems are often weak.

Upon learning about the recall, some legislators criticized the USDA, saying the federal agency should conduct more thorough inspections to ensure tainted beef doesn't get to the public.

"Today marks the largest beef recall in U.S. history, and it involves the national school lunch program and other federal food and nutrition programs," said U.S. Sen. Tom Harkin, chairman of the Chairman of the Senate Committee on Agriculture, Nutrition and Forestry. "This begs the question: How much longer will we continue to test our luck with weak enforcement of federal food safety regulations?"

Advocacy groups also weighed in, noting the problems at Westland wouldn't have been revealed had it not been for animal right activists.

"On the one hand, I'm glad that the recall is taking place. On the other, it's somewhat disturbing, given that obviously much of this food has already been eaten," said Jean Halloran, director of food policy initiatives at Consumers Union. "It's really closing the barn door after the cows left."

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# Beef industry and animal rights groups duel over video

By Associated Press

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## STORY

Story Published: Feb 19, 2008 at 8:57 AM PDT | Story Updated: Feb 19, 2008 at 8:57 AM PDT



DENVER (AP) - The cattle industry and animal rights groups bickered over the treatment of beef destined for U.S. dinner plates a day after secret video triggered the nation's largest meat recall.

Undercover video taken at the Westland/Hallmark Meat Co. of Chino, Calif., shows workers shocking, kicking and shoving debilitated cattle with forklifts, prompting the government to pull 143 million pounds of the company's beef.

Bo Reagan, vice president of research for the Colorado-based National Cattleman's Beef Association, said the videotaped incident was not indicative of how most slaughterhouses operate.

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"The welfare of our animals - that's the heart and soul of our operations," Reagan said.

U.S. Department of Agriculture guidelines mandate that an inspector must review sick or injured

animals, called "downer" cattle, before they can be slaughtered, and that the 1958 Humane Slaughter Act sets strict rules for the humane treatment of animals.

"What happened in this case was that there were some animals that were harvested out of compliance," he said.

Federal regulations call for keeping downed cattle out of the food supply because they may pose a higher risk of contamination from E. coli, salmonella or mad cow disease since they typically wallow in feces and their immune systems are often weak.

Wayne Pacelle, president and CEO of the Humane Society of the United States, which videotaped the alleged abuse, said his organization chose to investigate the Westland/Hallmark plant at random, and said he was skeptical of the cattle industry's practices.

"I think this is the typical rhetorical and typical false assurances that we hear from the industry after glaring problems have been exposed," he said.

Pacelle said it's impossible to say whether the treatment depicted on the video is isolated, but stopped short of calling it widespread.

"I think we can't say for sure one way or another, but it's certainly a bad sign for the industry and the USDA to have been exposed for their failures in this single, random investigation," he said.

The recall affects beef products dating to Feb. 1, 2006. Agriculture officials estimate that about 37 million pounds of the recalled beef went to school programs, but they believe most of the meat probably has already been eaten.

"We don't know how much product is out there right now. We don't think there is a health hazard, but we do have to take this action," said Dr. Dick Raymond, USDA undersecretary for food safety.

Rep. Rosa L. DeLauro, chairwoman of the House Agriculture, Food and Drug Administration Appropriations Subcommittee, called the video inhumane and said she was concerned it "demonstrates just how far our food safety system has collapsed."

DeLauro, D-Conn., has also called for an independent investigation into the government's ability to secure the safety of meat in the nation's schools.

Recalled meat is piling up in at least seven Michigan school districts. Grand Rapids Public Schools must throw out 10 tons of hamburger, while the Ann Arbor Public Schools has about 200 pounds of the beef. The Detroit Public Schools system got a shipment of 150 cases of frozen chili and taco meat, but officials say none of it was eaten.

Some of the hamburger being recalled already was served to students in Portage Public Schools. "It was in our taco sauce and our spaghetti sauce," Portage district food service manager Lance Gerry told the Kalamazoo Gazette. "We've been serving those products for a while."

USDA spokesman Keith Williams said his department has evidence that Westland did not routinely contact its veterinarian when cattle became non-ambulatory after passing inspection, violating health regulations.

Williams said the recall was done primarily to revoke the USDA's seal of inspection for the meat - not because of the risk of illness.

"Everybody's going, 'Oh, a recall, that means death, that means sickness.' That's a different kind of issue," Williams said. "This is a lower severity, where there would be a remote probability of sickness."

DeLauro also asked what the USDA is doing to address staff shortages among slaughterhouse inspectors - an issue also raised by other food safety experts and watchdog groups Monday.

Washington, D.C.-based Food and Water Watch said the USDA has left up to 21 percent of inspector positions vacant in some areas. Williams, of the USDA, said there is no shortage of inspectors.

Two former Westland/Hallmark employees were charged Friday. Five felony counts of animal cruelty and three misdemeanors were filed against a pen manager. Three misdemeanor counts - illegal movement of a non-ambulatory animal - were filed against an employee who worked under that manager. Both were fired.

No charges have been filed against the company, but an investigation by federal authorities continues. A phone message left Monday for Westland/Hallmark president Steve Mendell was not returned.

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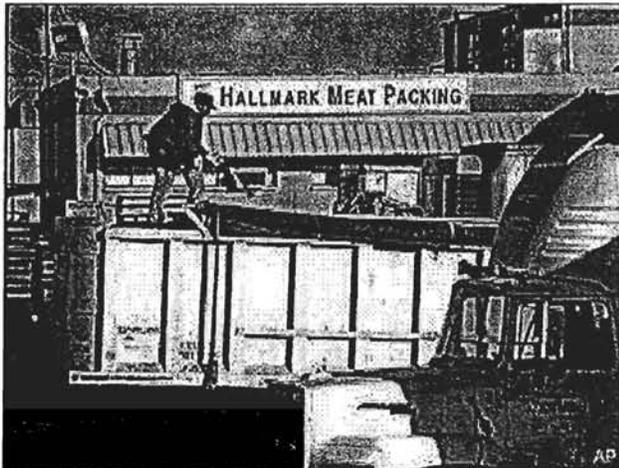
# USDA: More than a third of recalled beef went to schools

By GILLIAN FLACCUS, Associated Press Writer

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## STORY

Story Published: Feb 21, 2008 at 2:30 PM PDT | Story Updated: Feb 21, 2008 at 2:30 PM PDT



LOS ANGELES (AP) - More than a third of the 143 million pounds of California beef recalled last week went to school lunch programs, with at least 20 million pounds consumed, officials with the U.S. Department of Agriculture said Thursday.

About 50 million pounds of the meat went to schools, said Eric Steiner, deputy administrator of the U.S. Department of Agriculture's Food and Nutrition Service's special nutrition programs.

Of that amount, about 20 million pounds have been eaten, 15 million pounds are on hold at storage facilities and 15 million pounds are still being traced, he said.

Officials said, however, that they still weren't able to provide the names of all the places the meat wound up.

"Sitting here today, I cannot tell you how many locations the product has gone to," said Dr. Kenneth

Peterson, of the USDA's Food Safety and Inspection Service. "Our focus is identifying the locations and making sure the product is under control."

The USDA shut down Chino-based Westland/Hallmark Meat Co. and issued the nation's largest beef recall after the Humane Society of the United States released undercover video of workers kicking and shoving sick and crippled cows and forcing them to stand with electric prods, forklifts and water hoses.

The plant produces about a fifth of all the meat in the federal school lunch programs, said Bill Sessions, associate deputy administrator for livestock and seed Programs with USDA's agriculture marketing service.

One of the workers accused of abusing the debilitated cattle in the video, Luis Sanchez, turned himself in to Chino police on Wednesday, San Bernardino County prosecutors said Thursday.

Luis Sanchez pleaded not guilty Thursday to three misdemeanors involving illegal movement of sick or injured cattle. He was scheduled for a Feb. 28 pretrial hearing and remained in custody in lieu of \$15,000 bail, Deputy District Attorney Debbie Ploghaus said.

A county public defender was expected to represent Sanchez, Ploghaus said. A message left Thursday with the public defender's office was not immediately returned.

Worker Daniel Ugarte Navarro, 49, was taken into custody Saturday at his Pomona home and released Sunday on \$7,500 bail. He faces five felony counts of animal abuse in addition to three misdemeanors.

Attempts to find phone listings for Navarro and Sanchez were not successful.



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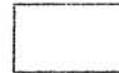
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# U.S. beef recall stymies trade negotiations

By GARANCE BURKE, Associated Press Writer



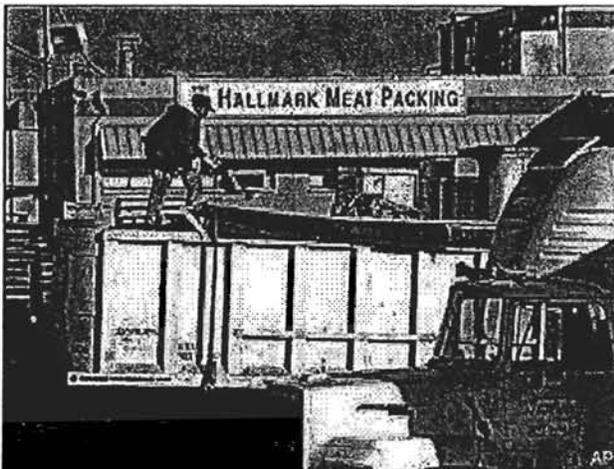
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## STORY

Story Published: Feb 23, 2008 at 5:20 PM PDT | Story Updated: Feb 23, 2008 at 5:20 PM PDT



MONTEREY, Calif. (AP) - U.S. Agriculture Secretary Ed Schafer said Friday he wants to wait to see the results of an investigation into the nation's largest beef recall before making any policy changes, but he acknowledged that the debacle has delayed negotiations to ship U.S. beef to Japan and South Korea.

Those markets closed to the U.S. cattle industry in 2003 after a scare over mad cow disease.

Speaking before meat packers and processors, Schafer said the

Westland/Hallmark Meat Co. recall announced earlier this week had already prompted diplomats to ask why the U.S. can't produce safe meat.

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"As people look for reasons to protect their own market places ... they say you can't even send us safe meat," he said. "Do we need to issue new regulations and things? Right now we're just not prepared to

do that."

Schafer, a former North Dakota governor, took office the day before the U.S. Humane Society released undercover video showing workers at the Chino-based slaughterhouse kicking and shoving sick and crippled cows and forcing them to stand with electric prods, forklifts and water hoses.

Downer cows, or those too sickly to stand, are banned from the food supply because they carry a higher risk of mad cow disease and other illnesses.

Sunday, the Department of Agriculture recalled 143 million pounds of beef from Westland, saying the agency had evidence that Westland violated health regulations. More than one-third of that meat was sent to school lunch programs.

No illnesses have been linked to the recalled meat, and authorities say the health threat is small.

Still, meatpacking industry officials worried the recall could affect global trade.

South Korea banned U.S. beef imports after 2003, citing concerns over mad cow disease. The illness has been linked to a rare and deadly nerve disease that has been blamed for more than 150 human deaths.

Japan's restrictions on American beef imports issued the same year have strained relations between the two largest economies. The country now allows only meat from cows 20 months old or younger.

Industry representatives feared the Westland recall would do away with gains President George W. Bush made in November, when Japanese Prime Minister Yasuo Fukuda had a state dinner at the White House.

"This thing came up and we all went 'oh, this is going to affect our trade,'" said Jeremy Russell, a spokesman for the National Meat Association, speaking at its annual convention in Monterey. "It's been four years since those markets closed, and people still have no idea when they'll open again. It's been the long winter of our discontent."

Russell said Westland belongs to the 400-member association, which represents slaughterhouses and meat processors in the U.S., Canada, Mexico and Australia. The recall has not only tarnished the company's reputation, but has hurt the image of the entire supply chain, Russell said.

Schafer said Friday he didn't want to make immediate changes to meat inspection regulations until the recall investigation showed who was responsible for the lapse in food safety.

He also rejected charges that chronic staff shortages among inspectors were endangering the public by allowing sick cows to get into the nation's food supply, and said the USDA meat inspection system was intact.

"Certainly when we have limited resources because the people of the United States can only afford so much tax burden, people get stretched," he said, speaking Friday afternoon after eating lunch with school children at a Salinas elementary school. "I am confident that the job is getting done."

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Martin Luther King Jr. Elementary Academy served chicken hot dogs Friday, rather than risk serving the beef they purchased from a vendor supplied by Westland, administrators said.

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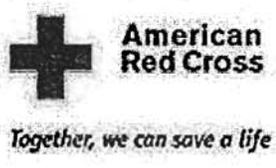
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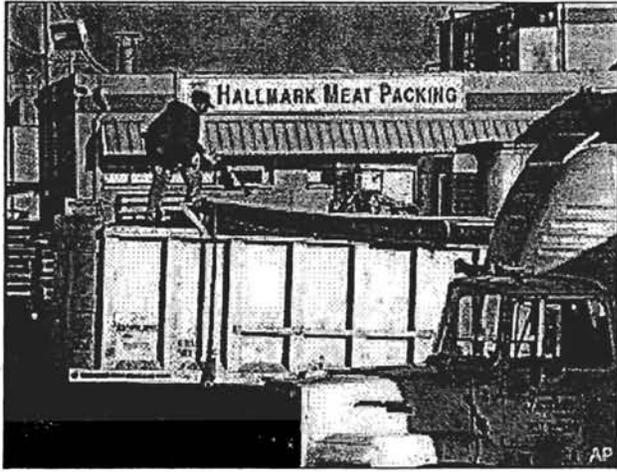
# USDA takes new steps on meat safety in wake of recall

By ERICA WERNER, Associated Press Writer

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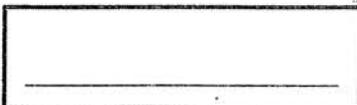
## STORY

Story Published: Feb 28, 2008 at 1:10 PM PDT | Story Updated: Feb 28, 2008 at 1:10 PM PDT



WASHINGTON (AP) - The secretary of agriculture on Thursday resisted calls from Democratic senators for a complete ban on so-called downer cattle - those unable to walk - from entering the food supply.

In the wake of the largest beef recall in U.S. history, Agriculture Secretary Edward T. Schafer announced new steps to ensure the safety of the country's meat supply, including more random inspections of slaughterhouses and immediate audits of plants that supply meat for federal programs.



But Schafer contended downer cattle could occasionally enter the food supply safely, in accordance with USDA rules, after an additional inspection by a veterinarian.

"The rules say if one goes down you call the veterinarian to make a judgment," Schafer told a Senate hearing.

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"Today I'm convinced the rules in place are such where we are protecting the supply," he said.

Schafer ran into resistance from Sen. Herb Kohl, D-Wis., chairman of the Senate Appropriations agriculture subcommittee.

"We cannot allow a single downer cow to enter our food supply under any circumstances," Kohl insisted. He also urged Schafer to install cameras in slaughterhouses and take other steps to ensure meat safety.

It was Schafer's first Capitol Hill appearance since the emergence of video - shot by the Humane Society of the United States - showing workers at Westland/Hallmark Meat Co. in Chino, Calif., shoving and kicking sick, crippled cattle, forcing them to stand by using electric prods, forklifts and water hoses.

In response, the Agriculture Department shut down the plant and has since ordered the recall of 143 million pounds of the company's beef - the largest recall in U.S. history - because the company didn't prevent downer cattle from entering the food supply. Downers, those too sick or injured to walk, pose a greater risk of illnesses such as mad cow disease.

Schafer insisted his agency is taking the problem seriously and will investigate fully.

"It is extremely unlikely that the mishandled animals pose a risk to human health," said Schafer.

"We are going to pursue these investigations wherever they lead and pursue whatever corrective actions may be called for," he said.

Schafer's testimony came a day after the Humane Society sued USDA over what it calls a loophole allowing downer cattle into the food supply.

In 2004, the USDA tightened regulations to prohibit the slaughter of all "downer" cows after a case of mad cow disease was discovered in Washington state. The lawsuit alleges that under last year's change, cows that fell down after an initial veterinarian inspection but appeared otherwise healthy were allowed to be slaughtered.

Schafer contended that in that situation downer cattle are supposed to be inspected again by a veterinarian and then can be safely slaughtered and consumed.



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# Slaughterhouse owner backs off claims

By ERICA WERNER Associated Press Writer

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## STORY

Story Published: Mar 12, 2008 at 7:05 PM PDT | Story Updated: Mar 12, 2008 at 7:05 PM PDT

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WASHINGTON (AP) - The head of the Southern California slaughterhouse that produced 143 million pounds of recalled beef acknowledged Wednesday that cows too sick to stand at his plant were apparently forced into the nation's food supply in violation of federal rules.

Westland/Hallmark Meat Co. President Steve Mendell made the admission after a congressional panel forced him to watch gruesome undercover video of abuses at his slaughterhouse. Mendell watched red-faced and grim, sometimes resting his head on his hand, as cows were dragged by chains, sprayed in the nostrils with water, shocked and harshly prodded with forklifts to get them into the box where they would be slaughtered.

Afterward Mendell briefly bowed his head, then backed away from claims he'd made in his prepared testimony, delivered under oath, that no ill cows from his plant had entered the food supply.

So-called "downer" cattle have been largely barred from the food supply since a mad cow disease scare in 2003 because they pose a higher risk for that disease and other illnesses, partly because they often wallow in feces.

The panel's chairman, Rep. Bart Stupak, D-Mich., asked Mendell whether it was logical to conclude from the videos that at least two downer cows had entered the nation's food supply.

"That would be logical, yes, sir," Mendell said.

"Has your company ever illegally slaughtered, processed or sold a downer cow?" Stupak asked.

"I didn't think we had, sir," Mendell said.

Asked about the discrepancy with his written testimony, Mendell said, "I had not seen what I saw here today." He said that the Agriculture Department had not shared with him some of the undercover video shot by the Humane Society of the United States.

Stupak pointed out that the video has been available on the Humane Society Web site.

After Mendell's testimony, his lawyer sought to clarify Mendell's remarks. Asa Hutchinson, a former GOP congressman from Arkansas who once led the Drug Enforcement Administration, said Mendell would not dispute logical conclusions drawn by Stupak about downed cattle illegally entering the food supply.

"But it can't be conclusive because he does not know all the facts of it, he hasn't studied it and he only saw one brief shot at it during his testimony," Hutchinson said.

Mendell was appearing under subpoena before the House Energy and Commerce investigative subcommittee. He was a no-show at a committee hearing last month.

It was Mendell's first public appearance since the undercover video led to his plant's shutdown and last month's beef recall, the largest in U.S. history. The recall stretched back two years, and Agriculture Department officials have said most of the meat has been consumed. Some 50 million pounds of the beef went to federal nutrition programs, mostly school lunches.

No illnesses have been reported, and Agriculture Department officials have insisted there is minimal risk. But Stupak noted that the incubation period for mad cow disease can be a dozen years or more.

Richard Raymond, Agriculture Department undersecretary for food safety, acknowledged "there is that remote possibility" that cases of mad cow could emerge years from now as a result of the Westland/Hallmark practices.

Raymond also said that the Agriculture Department had found evidence of more than the two non-ambulatory cattle shown in videos Wednesday improperly entering the food supply. Even though carcasses also undergo inspection and can be discarded after slaughter, "it's a reasonable statement to assume it did enter commerce, some of it," Raymond said.

Two workers from the Humane Society video were fired and are facing animal cruelty charges from San Bernardino County prosecutors in an ongoing criminal investigation. One of those workers has said he was just following orders while his supervisor has reportedly told police he was under pressure to ensure slaughter of 500 cattle per day.

Mendell said everyone at the plant was under pressure to do their job but that couldn't excuse abuses. He also disputed reports cited by lawmakers that the Humane Society's undercover investigator, who shot the videos with a hidden camera, didn't receive proper training in slaughter practices when he was hired at the plant.

Mendell gave the committee a form document signed by the investigator when he was hired acknowledging he'd received the requisite training. The Humane Society has declined to disclose the identity of its investigator, but on the training form he signed his name as Sean Thomas.

Mendell contended that there is good training at his plant and that he has a strong safety record and never previously knew of abuses like the ones on the Humane Society videos. "Obviously my system broke down," he said.

He said he's received death threats and has heard from people "praying for us to suffer and die like the cows."

"Our company is ruined. We cannot continue," Mendell said. Some 220 employees have lost or are about to lose their jobs, he said.

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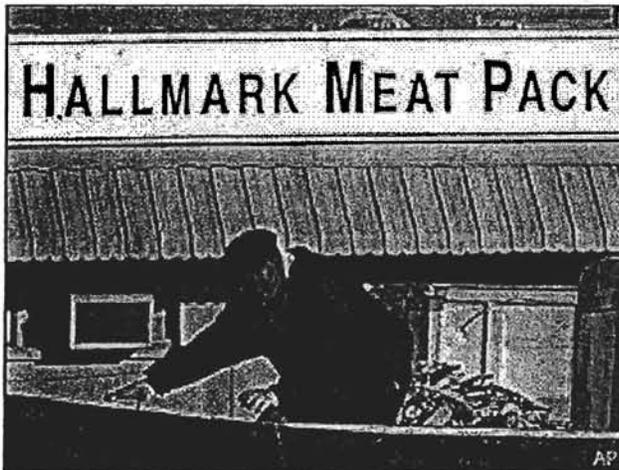
# Worker gets jail time for slaughterhouse abuse

By KOMO Staff & News Services

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## STORY

Story Published: Mar 22, 2008 at 11:42 AM PDT | Story Updated: Mar 22, 2008 at 11:42 AM PDT



A worker walks on top of cattle carcasses scraps dropped into a parked truck at the Hallmark Meat Packing slaughterhouse in Chino, Calif. Wednesday, Jan. 30, 2008. (AP Photo/Damian Dovarganes)

CHINO, Calif. (AP) - One of two men caught on videotape apparently abusing cattle at a California slaughterhouse has been sentenced to six months in jail.

Rafael Sanchez Herrera pleaded guilty to three misdemeanor counts of animal abuse in a San Bernardino County Superior Court on Friday.

Under the plea deal the 34-year-old Sanchez will be deported to his native Mexico after serving jail time.

A conviction on the three charges might have meant three years in jail.

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The video shows Herrera and other workers at the Westland/Hallmark Meat Co. dragging sick cows with metal chains and forklifts, shocking them with electric prods and shooting streams of water in their nose and faces.

It triggered the largest beef recall in U.S. history and led school districts across the nation to dispose of hundreds of tons of beef that it received from the slaughterhouse via the federal school lunch program.

In Washington state alone, officials estimate 250,000 pounds of beef was destroyed by school districts and another 340,000 pounds was never delivered after the recall.

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## Beef off menus in local school districts

By Linda Shaw  
Seattle Times education reporter

Cafeterias in Seattle elementary schools will serve waffles and scrambled eggs on Tuesday instead of waffles and sausage. For lunch Thursday, mu shu chicken will replace mu shu beef.

To be safe, school officials won't serve any beef until they learn more about the U.S. Department of Agriculture's investigation into allegations that a large supplier of beef to the national school-lunch program used meat from "downer" cows — those that cannot stand or walk.

"We want to err on the side of caution," said district spokesman David Tucker.

Seattle is one of hundreds of school districts in Washington state that were notified Thursday to stop using any beef from Westland Meat of Chino, Calif., until further notice. The state also notified a number of private schools and others that are part of federal food programs.

The concern arose after the release of a video that shows slaughterhouse workers at Hallmark Meat Packing using forklifts to prod or move animals. Westland Meat, which grinds meat, gets meat from Hallmark.

The video, produced by the Humane Society of the United States, raised concerns about animal cruelty and whether meat from "downer" cows is being used in school lunches.

No health problems from Westland meat have been reported. But nonambulatory cows may have a higher risk of being infected with mad-cow disease, E. coli and salmonella, according to the Humane Society.

Hallmark issued a statement Wednesday saying that it had taken immediate action to terminate two employees recorded in the video and has suspended their supervisor.

Along with Seattle, a number of other area districts have stopped serving beef while the USDA investigates. Those include Auburn, Edmonds, Federal Way, Kent and Renton.

In Seattle, the full ban was a way to ensure that no one mistakenly used the wrong box of beef, Tucker said.

The Shoreline School District doesn't think it has any Westland meat, but isn't serving beef until it's sure.

That's a wise course, said Skip Skinner, food-distribution supervisor with the Office of Superintendent of Public Instruction.

OSPI is working with the three companies that provide precooked beef to Washington schools to identify which products use meat from Westland, Skinner said.

But he also said that every lot of ground beef that goes into the school-lunch program is inspected twice for E. coli. The USDA decision to place all meat from Westland on hold, he said, is "ultracautious."

Agriculture Secretary Ed Schafer has said he is deeply concerned about the allegations, but said it's not clear whether any nonambulatory cows entered the food supply. USDA inspectors visit Hallmark at random times for about 1 1/2 hours each day, according to the department.

In Seattle, students may have consumed some of the Westland meat before the USDA notification. But the district was able to determine that the "beef teriyaki dippers" served in elementary schools Thursday were not from Westland, Tucker said.

The Humane Society video was shot in the fall.

### What area school districts are doing

Below is information from districts reached Friday. Parents should call individual schools or districts for information.

**Auburn** The district pulled about 100 cases of beef after receiving word of the beef warning. Chicken, turkey and vegetarian foods will be used in school lunches until officials hear more from state officials.

**Bellevue** Has no beef from Westland Meat.

**Edmonds** Stopped serving beef until further notice.

**Enumclaw** Has set aside all inventory of beef from Westland. Officials say none of the cases it has received in the past two months have been used.

**Federal Way** Won't serve beef pending further direction from the USDA.

**Kent** Has identified two products with precooked beef that came from Westland, and won't serve beef until further notice.

**Mukilteo** Will continue to serve hamburgers, which come from a different supplier. Will dispose of beef that came from Westland, including raw meat used in tacos, chili and spaghetti sauce.

**Renton** Still waiting to hear if it has any of the affected meat. Pulled beef from the district's menus Friday and will serve substitutes such as vegetables and fruit until more information is available.

**Seattle** Stopped serving beef until further notice.

**Shoreline** Doesn't think it has any beef from Westland, but won't serve any beef until it knows for sure.

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Exhibit 5

In all, about 100 districts in Washington state received raw beef from Westland in November and December. Many other districts, however, buy precooked beef products such as hamburger patties that also may have beef from Westland.

Seattle and many other districts stopped purchasing raw beef after 1993, when some students in the Finley School District in Eastern Washington got sick from undercooked taco meat contaminated with E. coli, said Anita Finch, Seattle's director of nutrition services.

This is the first time Finch can remember any issues with food from the national school-lunch program.

She added that the Centers for Disease Control, in a 2003 report, found that of the 7,390 food-borne illnesses reported nationwide between 1990-99, just 0.5 percent were linked to the federal school-meals program.

The Seattle district works hard to make sure all the food it serves is safe, Finch said. It keeps logs, for example, of food temperature at all stages of preparation.

For now, however, the district has about 1,000 cases of beef that won't be used. About 230 of them — roughly 5,000-6,000 pounds — are known to come from Westland. They are sitting in one part of a large freezer in the district's central kitchen, and are marked "hold."

That is where they'll stay until more is known.

Seattle Times staff reporter Karen Johnson and The Associated Press contributed to this story.

Linda Shaw: 206-464-2359 or lshaw@seattletimes.com

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# U.S. orders largest recall of beef ever

The U.S. Department of Agriculture (USDA) has ordered the largest meat recall in its history — 143 million pounds of beef, a California...

By David Brown  
The Washington Post

WASHINGTON — The U.S. Department of Agriculture (USDA) has ordered the largest meat recall in its history — 143 million pounds of beef, a California meatpacker's entire production for the past two years — because the company did not prevent sick animals from entering the U.S. food supply, officials said Sunday.

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Despite the breadth of the sanction, USDA officials underscored their belief that the meat, distributed by Westland Meat, poses little or no hazard to consumers, and that most of it was eaten long ago.

About 100 school districts in Washington state received raw beef from Westland in November and December. In late January, the USDA advised schools to stop using any Westland beef. Seattle Public Schools has about 5,000 to 6,000 pounds now stored in a freezer and marked "hold."

"It's already been identified," said district spokesman David Tucker. The recalled beef will likely be replaced by the USDA, or the school district will be reimbursed for the cost.

The recall comes less than three weeks after the release of a videotape showing what USDA later called "egregious violations" of federal animal-care regulations by employees of a Westland partner, Hallmark Meat Packing in Chino, Calif.

Hallmark did not consistently bring in federal veterinarians to examine cattle headed for slaughter that were too sick or weak to stand, Agriculture Secretary Ed Schafer said.

"Downer" cattle are not supposed to be used as meat unless a veterinarian determines that an animal stumbled or fell because of injury that would not affect the safety of their meat. Cattle weakened by disease are not supposed to enter the food supply, although the risk of harm to humans is still fairly low. There is, however, a slightly higher possibility that such cattle are suffering from bovine spongiform encephalopathy, better known as mad-cow disease.

The USDA said there was only a remote possibility that the recalled beef could make people sick. Schafer said it was "extremely unlikely" that any of the cattle were suffering from mad-cow disease.

Steve Mendell, president of Hallmark Meat Packing and its distributor, Westland, declined to comment.

About 37 million pounds of the meat — cuts, ground beef and prepared products such as meatballs and burrito filling — went to school-lunch and other public-nutrition programs, and "almost all of this product is likely to have been consumed," said Ron Vogel, a USDA administrator. The meat was not available to consumers through retail grocery or meat markets.

Technically, the recall was initiated voluntarily by the company, because the federal government does not have the authority to do so.

Some supermarkets immediately began removing Hallmark meat from their shelves.

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Because Hallmark/Westland suspended operations Feb. 4, it is unlikely that any of its fresh meat is still being sold, said Richard Raymond, undersecretary for food safety. Hallmark/Westland meat was also sold to restaurant chains, including In-N-Out Burger and Jack in the Box, but both of those companies said they stopped using it early this month after the first reports of problems at the plant.

The amount of beef affected by the recall may be far larger than 143 million pounds because meat from different companies is often mixed as it goes through numerous processors.

Seattle Times science reporter Sandi Doughton contributed to this report.

Information from the Los Angeles Times and Chicago Tribune

also was included.

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# USDA recalls 143 million pounds of beef

## Undercover video caught abuse of sick animals at S. Calif. slaughterhouse

**AP** Associated Press

updated 3/3/2008 10:39:15 AM ET

LOS ANGELES — An undercover video showing crippled and sick animals being shoved with forklifts has led to the largest beef recall in the United States and a scramble to find out if any of the meat is still destined for school children's lunches.

The U.S. Department of Agriculture on Sunday ordered the recall of 143 million pounds of beef from a Southern California slaughterhouse that is the subject of an animal-abuse investigation.

The recall will affect beef products dating to Feb. 1, 2006, that came from Chino-based Westland/Hallmark Meat Co., the federal agency said. The company provided meat to various federal programs.

Secretary of Agriculture Ed Schafer said his department has evidence that Westland did not routinely contact its veterinarian when cattle became non-ambulatory after passing inspection, violating health regulations.

### 'Unfit for human food'

"Because the cattle did not receive complete and proper inspection, Food Safety and

Inspection Service has determined them to be unfit for human food and the company is conducting a recall," Schafer said in a statement.

A phone message left for Westland president Steve Mendell was not returned Sunday.

Agriculture officials said the massive recall surpasses a 1999 ban of 35 million pounds of ready-to-eat meats. No illnesses have been linked to the newly recalled meat, and officials said the health threat was likely small.

Officials estimate that about 37 million pounds of the recalled beef went to school programs, but they believe most of the meat probably has already been eaten.

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“We don’t know how much product is out there right now. We don’t think there is a health hazard, but we do have to take this action,” said Dr. Dick Raymond, USDA Undersecretary for Food Safety.

Federal officials suspended operations at Westland/Hallmark after an undercover video from the Humane Society of the United States surfaced showing crippled and sick animals being shoved with forklifts.

**Two employees charged with animal abuse**  
Two former employees were charged Friday. Five felony counts of animal cruelty and three misdemeanors were filed against a pen manager. Three misdemeanor counts — illegal movement of a non-ambulatory animal — were filed against an employee who worked under that manager. Both were fired.

Authorities said the video showed workers kicking, shocking and otherwise abusing “downer” animals that were apparently too sick or injured to walk into the slaughterhouse. Some animals had water forced down their throats, San Bernardino County prosecutor Michael Ramos said.

No charges have been filed against Westland, but an investigation by federal authorities continues.

About 150 school districts around the nation have stopped using ground beef from Hallmark Meat Packing Co., which is associated with Westland. Two fast-food chains, Jack-In-the-Box and In-N-Out, said

they would not use beef from Westland/Hallmark.

Most of the beef was sent to distribution centers in bulk packages. The USDA said it will work with distributors to determine how much meat remains.

Federal regulations call for keeping downed cattle out of the food supply because they may pose a higher risk of contamination from E. coli, salmonella or mad cow disease since they typically wallow in feces and their immune systems are often weak.

Upon learning about the recall, some legislators criticized the USDA, saying the federal agency should conduct more thorough inspections to ensure tainted beef doesn’t get to the public.

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history, and it involves the national school lunch program and other federal food and nutrition programs," said U.S. Sen. Tom Harkin, chairman of the Chairman of the Senate Committee on Agriculture, Nutrition and Forestry. "This begs the question: How much longer will we continue to test our luck with weak enforcement of federal food safety regulations?"

Advocacy groups also weighed in, noting the problems at Westland wouldn't have been revealed had it not been for animal right activists.

"On the one hand, I'm glad that the recall is taking place. On the other, it's somewhat disturbing, given that obviously much of this food has already been eaten," said Jean Halloran, director of food policy initiatives at Consumers Union. "It's really closing the barn door after the cows left."

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**Exhibit 8**



# Undercover Video Prompts Nation's Largest Beef Recall

Government Recalls Record 143 Million Pounds of Beef From a Southern California Slaughterhouse

By LISA STARK, JESSICA HOFFMAN AND IMAEYEN IBANGA

Feb. 18, 2008 —

A disturbing undercover video showing cows too sick to stand being shoved with forklifts or dragged with chains across a cement floor at a Southern California slaughterhouse has sparked the largest beef recall in the nation's history.

The U.S. Department of Agriculture ordered a recall of 143 million pounds of beef Sunday evening from Chino-based Westland/Hallmark Meat Co., which is the subject of an animal-abuse investigation. The recall affects beef products dating back to Feb. 1, 2006 that came from the company.

"Because the cattle did not receive complete and proper inspection," the Food Safety and Inspection Service said, "[it] has determined them to be unfit for human food."

The USDA insists the threat is small.

Westland/Hallmark provides meat to the National School Lunch Program and about 150 school districts have stopped using its products. Now officials are scrambling to prevent the questionable beef from reaching school lunch counters. They estimate about 37 million pounds of the beef has gone to schools.

Westland/Hallmark also provided products to two fast food companies. Both Jack-in-the-Box and In-N-Out said they would not use beef from Westland/Hallmark.

The USDA said it had evidence Westland did not routinely contact its veterinarian when cattle became nonambulatory after passing inspection, which violates health regulations.

Federal regulations call for keeping downed cattle out of the food supply because they may pose a higher contamination risk from E. coli, mad cow disease or salmonella.

So far, no illnesses have been linked to the recalled beef and officials said they believe the majority of it already has been consumed.

Most of the beef was sent to distribution centers in bulk packages. The USDA said it will work with distributors to determine how much meat remains.

Agriculture officials said the massive recall surpasses a 1999 ban of 35 million pounds of ready-to-eat meats.

**Exhibit** 9

## Critical Response

Critics scolded the USDA upon learning of the recall, saying the federal agency should conduct more thorough inspections to ensure tainted beef doesn't get into the public's food supply.

"It's clear that USDA's system failed and it allowed this company to engage in long-term inhumane practices," said Carolyn Smith DeWaal, of the Center for Science in the Public Interest.

Animal activists said if it hadn't been for the Humane Society's undercover footage, the Westland/Hallmark may have continued produce meat.

The video showed downed cows struggling to get on their feet as operators shoved them into position with forklifts.

## Criminal Charges

The recall's fallout included criminal charges against two former workers Friday.

Five felony counts of animal cruelty and three misdemeanors were filed against a pen manager.

Also, three misdemeanor counts of illegal movement of a nonambulatory animal were filed against another employee who worked under that manager. Both were fired.

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# USDA orders largest beef recall: 143.4 million pounds

Updated 2/18/2008 10:29 PM

By James R. Healey and Julie Schmit, USA TODAY



By Damian Dovarganes, AP

A worker throws a piece of meat among the cattle carcasses in a truck at the Hallmark/Westland Meat Packing slaughterhouse in Chino, Calif., on Jan. 30.

The U.S. government on Sunday ordered the largest beef recall in U.S. history — 143.4 million pounds — and said the meat has been used in school lunches and food assistance programs.

The government portrayed the action as precautionary and classified it as a Class II recall, meaning there is little likelihood of illness.

The beef dates to cattle slaughtered two years ago, starting Feb. 1, 2006, at Hallmark/Westland Meat Packing, based in Chino, Calif. The USDA said it believes most already has been eaten. It will remove the rest from inventories.

**LATEST:** USDA will step up inspections at slaughterhouses

**COMPANY REACTION:** Hallmark/Westland Meat Packing website

"We don't know exactly where all the product went" but will "cast a wide net to make sure that we can find all the product that we can find," Ken Petersen at the USDA's Food Safety and Inspection Service said in a conference call with reporters Sunday.

Most of the beef was sent to distribution centers in bulk packages.

About 150 school districts around the nation have stopped using ground beef from Hallmark Meat Packing, which is associated with Westland. Two fast-food chains, Jack-In-the-Box and In-N-Out, said they would not use beef from Westland/Hallmark.

Jack in the Box, a San Diego-based company with restaurants in 18 states, told its meat suppliers not to use Hallmark until further notice, but it was unclear whether it had used any Hallmark meat. In-N-Out, an Irvine-based chain, also halted use of the Westland/Hallmark beef. Other chains such as McDonald's and Burger King said they do not buy beef from Westland.

Operations have been suspended at the slaughterhouse, and the facility continues to be under investigation, the USDA said.

The meatpacker is accused of improperly slaughtering what are called "downer" cattle — those unable to walk to slaughter.

Such cattle raise the fear of mad cow disease and are more likely to carry E. coli and salmonella bacteria

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Exhibit 11

because they typically wallow in feces and their immune systems are often weak.

The government said it had inspectors present "continuously" at the plant, as is standard procedure.

Even so, the use of downer cattle was brought to light by the Humane Society of the United States, which published a video last month it said was made by an undercover worker at Hallmark/Westland. The video shows cattle lying on the ground being moved by forklifts and being chained and pulled.

In a statement Sunday, the Humane Society said, "A recall of this staggering scale proves that it's past time for Congress and the USDA to strengthen our laws for the sake of people and animals."

A phone message left for Westland President Steve Mendell was not immediately returned.

Two former employees were charged Friday. Five felony counts of animal cruelty and three misdemeanors were filed against a pen manager. Three misdemeanor counts — illegal movement of a non-ambulatory animal — were filed against an employee who worked under that manager. Both were fired.

Authorities said the video shows workers kicking, shocking and otherwise abusing "downer" animals. Some animals had water forced down their throats, San Bernardino County prosecutor Michael Ramos said.

No charges have been filed against Westland yet.

The huge recall will put the safety of the U.S. beef supply "front and center" in Congress, said William Marler, a prominent food-safety lawyer.

He said it also will raise questions about USDA inspection of meat plants. "It's hard to imagine ... that they couldn't figure this out sooner."

Senate Agriculture Committee Chairman Tom Harkin said in a statement that USDA must toughen its inspection measures before animals are slaughtered to prevent future occurrences.

"How much longer will we continue to test our luck

with weak enforcement of federal food safety regulations?" said Harkin, an Iowa Democrat. "Federal regulations exist for a reason — to protect public health. For Hallmark/Westland to issue a recall that goes back two years indicates that violations may have been long-term."

Four senior Democrats in Congress, including Assistant Senate Majority Leader Dick Durbin, told the General Accounting Office on Thursday to investigate the safety of meat in the school lunch program in light of the Hallmark/Westland case.

U.S. Rep. George Miller, D-Calif., chairman of the House Education and Labor Committee, said Sunday that the recall "raises alarming questions about the U.S. Department of Agriculture's ability to monitor the safety of meat that is being shipped to our nation's schools. It is outrageous that it took a non-governmental organization to shed light on the egregious abuses that were happening right under the USDA's nose."

Miller said the USDA "still can't tell us exactly which schools may have received this tainted meat, or how much of it has already been consumed or reprocessed into other foods."

The previous record for a meat recall was 35 million pounds in 1999 by Thom Apple Valley, the government said.

The most recent large meat recall was 21.7 million pounds of ground beef by Topps Meat of Elizabeth, N.J., in September for E. coli contamination linked to

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reports of 32 illnesses.

Only 2.2 million pounds of the meat were recovered in the recall, USDA data show.

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### Huge beef recall issued

About 143 million pounds are targeted, but the amount may be much greater due to processing methods.

February 18, 2008 | Victoria Kim and Mitchell Landsberg, Times Staff Writers

The U.S. Department of Agriculture announced the largest beef recall in its history Sunday, calling for the destruction of 143 million pounds of raw and frozen beef produced by a Chino slaughterhouse that has been accused of inhumane practices.

However, the USDA said the vast majority of the meat involved in the recall -- including 37 million pounds that went mostly to schools -- probably has been eaten already. Officials emphasized that danger to consumers was minimal.

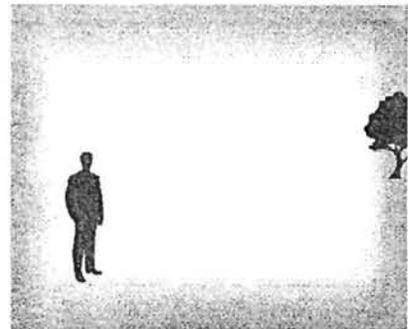
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The recall applies to beef slaughtered at the Hallmark/Westland Meat Packing Co. since Feb. 1, 2006. The company has produced no meat since Feb. 4 of this year, when operations were suspended.

The action came nearly three weeks after the Humane Society of the United States released a video showing workers at the plant using forklifts and water hoses, among other methods, to rouse cattle too weak to walk. In addition to issues of animal cruelty, the video raised questions about whether so-called downer cattle were entering the food chain in violation of federal regulations.

Although the Humane Society said at least four non-ambulatory cattle had been slaughtered for food, the USDA had repeatedly said it had no such evidence. On Sunday, federal officials said for the first time that they had evidence such cattle from Hallmark had been processed for food.

Downer cattle are not supposed to be used as meat unless a veterinarian determines that the animal stumbled or fell because of injury -- a broken leg, for instance -- that would not affect the safety of their meat. Cattle weakened by disease are not supposed to enter the food supply, although their risk of harming humans is still fairly low. There is, however, a slightly higher possibility that such cattle are suffering from bovine spongiform encephalopathy, better known as mad cow disease.

The USDA said there was only a remote possibility that the recalled beef from Hallmark could make people sick. Agriculture Secretary Ed Schafer said it was "extremely unlikely" that any cattle processed at the plant were suffering from mad cow disease.

Steve Mendell, president of Hallmark Meat Packing and its distributor, Westland, declined to comment. The company has refused to answer questions about its practices since the Humane Society video surfaced. Mendell released a statement on Feb. 3 that said he was "shocked and horrified" by the video and that the company had a long history of meeting federal safety standards.

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**Huge beef recall issued**

*About 143 million pounds are targeted, but the amount may be much greater due to processing methods.*

February 18, 2008 | Victoria Kim and Mitchell Landsberg, Times Staff Writers

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The recall was initiated voluntarily by the company, because the federal government does not have the authority to take such action.

Some supermarkets began removing Hallmark meat from their freezer shelves immediately after the USDA's announcement.

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Managers at the Costco store in Burbank said they received an urgent e-mail about 3:30 p.m. Sunday, indicating that Westland had at one time been a supplier. It was unclear whether any current stocks had been provided by the plant.

"We're going to pull it just in case," said assistant warehouse manager Roland Prydz. He said the notice involved frozen beef.

Managers at Vons and Ralphs stores in Burbank and the Silverlake-Echo Park area said they did not recognize the company and doubted that it had supplied their stores.

Because Hallmark/Westland suspended operations in early February, it is unlikely that any of its fresh meat is still being sold. "That has a very [short] shelf life and refrigerator life, so the great majority has probably been consumed," Richard Raymond, the USDA's undersecretary for food safety, told reporters.

Hallmark/Westland meat was also sold to restaurant chains, including In-N-Out Burger and Jack in the Box, but both of those companies said they stopped using it early this month after the first reports of problems at the plant.

The amount of beef affected by the recall may be far larger than 143 million pounds because meat from different companies is often mixed as it goes through numerous processors. Such mixing makes it extremely difficult for consumers to know whether meat products came from a particular plant.

At a USDA telephone briefing Sunday for retailers, school districts and food safety experts, a Costco representative raised concerns about beef that gets "commingled," according to Humane Society President Wayne Pacelle, who participated in the conference call. He said the Costco representative estimated that the amount of beef recalled may top a billion pounds.

USDA officials said the whole effect of the recall was difficult to estimate because beef from Hallmark was supplied through a "huge pipeline" that included numerous processors and distributors.

As an example, Bill Sessions of the Agricultural Marketing Service told reporters: "Coarse ground beef . . . goes into further processors, who make end items such as cooked hamburger patties, chili meat, taco meat, that type of thing, but it does not go into a distributor and then is distributed to a local school system."

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(Page 3 of 4)

By that time, the food packaging is not likely to carry any indication that a portion of the meat came from a particular plant.

Rep. George Miller (D-Martinez), who has been closely following the Hallmark case, called Sunday for a congressional hearing into the USDA's inspection process. Miller, who last week urged the Government Accountability Office to conduct independent investigations into the matter, said the "severity of this issue for both our nation's schools and consumers" made it necessary for Congress to step in.

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One consumer advocate questioned whether the likelihood of danger from the recalled meat was as low as the USDA contended.

Caroline Smith DeWaal, food safety director for the Center for Science in the Public Interest, a Washington-based consumer advocacy and research organization, said federal regulators "really don't know what conditions were making the cattle sick."

So, she said, "it is still possible some of them carried illnesses that pose a risk to the public."

DeWaal said the recall "really underscores the fact that consumers are losing confidence in the ability of the USDA to protect them from unsafe meat."

James O. Reagan, chairman of the Beef Industry Food Safety Council, issued a statement saying he supported the recall. "At the same time," he said, "we can say with confidence that the beef supply is safe." He said there were "multiple interlocking safeguards" in every beef processing plant so that a single lapse would not endanger consumers.

Before Hallmark, the largest meat recall involved Thorn Apple Valley's Forrest City, Ark., processing plant, which recalled 35 million pounds of hot dogs and pork and poultry luncheon products in January 1999 because of possible contamination with the bacteria that causes listeriosis, a dangerous condition that can lead to meningitis, among other potentially fatal diseases.

The USDA estimated that only about 8.4 million pounds of the recalled meat was recovered. However, no illnesses or deaths were reported in connection with consumption of the meat.

In September 2007, Topps Meat Co. recalled 21.7 million pounds of ground beef that may have been contaminated with E. coli bacteria. Thirty-eight people in eight states were found to have E. coli infections matching the strain.

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*About 143 million pounds are targeted, but the amount may be much greater due to processing methods.*

February 18, 2008 | Victoria Kim and Mitchell Landsberg, Times Staff Writers

(Page 4 of 4)

The Hallmark/Westland recall stems from an investigation that began in October 2007 by the Humane Society. An undercover investigator started working for Hallmark wearing a concealed camera to document the plant's handling of animals for six weeks. The group said it chose the plant at random.

In December, the animal rights group turned over video showing treatment of animals at the plant between Oct. 3 and Nov. 14, to the San Bernardino County District Attorney's Office.

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At the end of last month, the Humane Society made the video public. One section shows a manager using a paddle to hit a fallen cow in the face and eye in an attempt, authorities said, to urge the animal to its feet to be taken to slaughter.

The video's release led schools nationwide to pull beef from their menus out of concern that they may have received tainted meat from Hallmark, the second largest supplier of ground beef to the National School Lunch Program.

Schools in California were instructed to stop serving all dishes with ground beef, even those not supplied by Hallmark, because the at-risk beef was difficult to identify and isolate.

Within a few days, the Chino-based slaughterhouse fired two employees shown in the video and voluntarily halted operations. On Feb. 4, the USDA announced that it was suspending its routine inspections at the plant, in effect shuttering Hallmark.

At the time, the agency said the decision was based on evidence of inhumane treatment, not any risk to public health. USDA officials said there was no evidence of downer cattle entering the food supply, and expressed confidence in the USDA's inspection system.

Last Friday, San Bernardino County officials filed unprecedented felony and misdemeanor charges alleging animal cruelty against two Hallmark employees.

Police said the employees were using illegal methods in 11 different instances to force cattle to their feet and into the slaughter box.

That practice was banned in 2004, soon after an animal in Washington tested positive for mad cow disease.

The initial ban was temporary, and based on studies indicating that non-ambulatory cattle had a higher occurrence of the disease.

That ruling was finalized in July 2007, permanently prohibiting the use of downer cattle for human food.

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Times staff writers Greg Krikorian, Evelyn Larrubia and Carla Rivera contributed to this report.

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EDITORIAL

## The Biggest Beef Recall Ever

Published: February 21, 2008

A nauseating video of cows stumbling on their way to a California slaughterhouse has finally prompted action: the largest recall of meat in American history. Westland/Hallmark Meat Company has issued a full recall of more than 143 million pounds of beef produced over the last two years, including 37 million pounds that went to school-lunch programs.

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A lot of that beef has already been eaten, and so far, thankfully, there have been no reports of illness. But the question Congress needs to ask is how many people need to get sick or die before it starts repairing and modernizing the nation's food safety system?

Instead of strengthening the government's regulatory systems, the Bush administration has spent years cutting budgets and filling top jobs with industry favorites. The evidence of their failures keep mounting: contaminated

spinach, poisoned pet food, tainted fish.

At Westland/Hallmark, the latest horrors were secretly videotaped by the Humane Society of the United States, which said it had chosen the plant at random. The video showed workers kicking and using forklifts to force so-called "downer" cows to walk. The government has banned the sale of meat from most of these cows.

Officials have been busy assuring consumers that this massive recall is an "aberration." "Whistling in the dark" — that is how Caroline Smith DeWaal of the Center for Science in the Public Interest describes such assurances. "The fact that they have failed here so miserably makes you start to question what else is going on that we don't know about."

The Westland/Hallmark plant had five federal inspectors on hand, including at least one veterinarian whose job was to make sure that diseased cows did not make it into the meat supply. But where were these inspectors when workers were abusing these poor animals in order to get them to the slaughterhouse? Investigations have already begun in California and Washington.

Whatever the outcome with this particular plant, the larger point is that Congress needs to overhaul the entire food inspection program. That includes giving the Department of Agriculture and the Food and Drug Administration more power to demand mandatory recalls. Food producers should be able to track their supplies in order to more quickly

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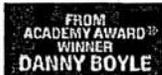
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Exhibit 13

root out problems. And foreign suppliers would have to create and implement a workable food safety plan that can be monitored better by federal inspectors.

The present patchwork of modest fines and penalties must also be stiffened.

Senator Richard Durbin and Representative Rosa DeLauro have a more ambitious idea: creating a single, powerful agency to oversee all food safety, instead of the current bureaucratic tangle of inspectors, some for vegetables, some for beef and some for imports. Right now the Agriculture Department oversees the safety of the home-grown beef supply (while also promoting the cattle industry) and the Food and Drug Administration monitors the safety of cattle feed. With Americans increasingly — and legitimately — mistrustful of the food they eat, their proposal is worth serious consideration.



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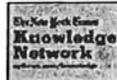
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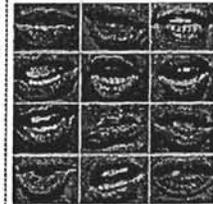
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## Beef Recall Latest in a Bad Year

By KENT GARBER  
 Posted: February 20, 2008



The USDA recalled 143 million pounds of beef from Westland/Hallmark Meat Co.

Of the 143 million pounds of beef being recalled nationwide, not a single potpie, patty, or dollop of meat sauce has caused someone to fall ill—yet.

But when the U.S. Department of Agriculture, responding to reports of safety violations at a California meatpacking plant, announced the largest recall of beef in U.S. history, Sen. Tom Harkin of Iowa was moved to ask: "How much longer will we continue to test our luck with weak enforcement of federal safety

regulations?"

Harkin is not the only one asking that question. The record recall, announced on Sunday and prompted by an explicit video taken by an undercover Humane Society employee, has generated outrage from members of Congress and other American consumers. The video shows downed cattle being forced from the ground with forklifts and electric shocks and prodded toward the slaughterhouse. In some shots, a cow is unable to support itself and falls over again, only to be subjected to a second round of battery.

But the primary concern has been for public health. Had the meatpacking plant followed government notification rules, the USDA says, some of the meat never would have seen the light of day, much less the inside of a gastrointestinal tract. "Downed" cows are often weak and diseased, and plant owners are required to notify USDA inspectors if a cow goes down on its way to the slaughterhouse. The USDA, which has closed the plant pending further investigation, has said that on multiple occasions no such notification took place.

Yet an estimated 37 million pounds of beef, as part of the National School Lunch Program, was sent to schools in at least 36 states, and the rest was purchased by wholesale food companies.

The recall at the California plant, which is owned by the Westland/Hallmark Meat Co., is not the first such case, though it is the largest. In fact, the United States just completed what is arguably the worst year for beef safety in its history. In 2007, there were 21 beef recalls nationwide for possible E. coli contamination, the most in five years; the amount of beef recalled—33.4 million pounds—was a new record.

In many of the cases in 2007, the reason for the recall was remarkably similar to the current one: The workers at the plant allegedly didn't communicate information to the government, and the government took action only *after* the meat was already in the grocery store or consumed. One notable example: the recall of 21.7 million pounds of meat in September by Topps Meat,

Exhibit 14



# Politics & Policy



In fact, recalls such as the Topps Meat case in 2007 are arguably more worrisome to public-health officials than the current one, even if they get less attention. The concern over "downed cows" usually stems from the possibility that they carry mad cow disease, which, though deadly, is also rare. According to Agriculture Under Secretary Richard Raymond, since 2004 only two cows out of 750,000 have tested positive for the disease. The low incidence largely reflects newer, tougher regulations that have been put into place since the 1990s, including the prohibition against downed cattle entering the food supply.

U.S. Secretary of Agriculture Ed Schafer concurred. "It is extremely unlikely that these animals were at risk for [mad cow disease] because of multiple safeguards," he said in a statement. "However, this action is necessary because plants violated...USDA regulations."

In a statement on the company's website, the president of Westland/Hallmark Meat Co., Steve Mendell, said he was "shocked and horrified" by what he had seen in the footage taken by the Humane Society of the United States and noted that his company was fully cooperating with the USDA's investigation.

The bigger concern, says Michael Doyle, director of the Center for Food Safety at the University of Georgia, is the government's ability to track and eradicate E. coli and salmonella in the food supply. "Together, these organisms account for more than 2 million cases of foodborne illnesses each year," Doyle told *U.S. News*.

Even more alarming is the jump in beef recalls related to E. coli between 2006 and 2007. In 2006, just shy of 200,000 pounds of beef was recalled. The following year, the number rose by more than 150-fold.

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## **APPENDIX B**

**FILED**

AUG 18 2009

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MONTEREY**

CONNIE MAZZEI  
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Date: August 18, 2009

Hon. Susan M. Dauphiné , Judge Perla Z. Conder , Deputy Clerk

Fresh Express Inc. Plaintiff/Petitioner	Case No. M88545
vs.	RULING
Beazley Syndicate 2623/623 at Lloyd's et al. Defendant/Respondent	

Trial of the above-titled matter began on May 11, 2009, and continued through June 8, 2009, before the Honorable Susan M. Dauphine in the Superior Court of the State of California, County of Monterey.

The parties submitted post-trial briefs to the Court on July 7, 2009, and the Court heard closing arguments on July 24, 2009.

Plaintiff Fresh Express Inc. ("Fresh Express") appeared by Andrew R. Running, Esq., Andrew T. Dustin, Esq., and James M. Golden, Esq., from the law firm Kirkland & Ellis LLP; Defendants Beazley Syndicate 2623/623 at Lloyd's and QBE International Insurance Limited, now known as QBE Insurance (Europe) Ltd. (collectively "Defendants"), appeared by Fred G. Bennett Esq. , Erica P. Taggart Esq., and Thomas M. O'Brien Esq., from the law firm Quinn Emanuel Urquhart Oliver & Hedges, LLP.

**Nature of Case**

Fresh Express, based in Salinas, California, is the nation's largest seller of bagged fresh spinach. This case concerns a "Total Recall+ Brand Protection Food/Beverage Policy" purchased by Fresh Express from

Defendants for coverage from August 29, 2005 through September 29, 2006 (the "Policy.") Subject to its terms, the Policy provided that Defendants would "reimburse the Assured [Fresh Express] for losses as specified in this Policy arising out of Insured Events first discovered during the Policy Period." (Policy at 1.)

The Policy defines three different forms of "Insured Event," one of which is "Accidental Contamination." Accidental Contamination is defined in the Policy as follows:

Error by the Assured [here Fresh Express] in the manufacture, production, processing, preparation, assembly, blending, mixing, compounding, packaging or labeling (including instructions for use) of any Insured Products or error by the Assured in the storage or distribution of any Insured Products whilst in the care or custody of the Assured which causes the Assured to have reasonable cause to believe that the use or consumption of such Insured Products has led to or would lead to: i) bodily injury, sickness, disease, or death of any person(s) or animal(s) physically manifesting itself by way of clear, obvious or visible symptoms within 120 days of use or consumption or (ii) physical damage to or destruction of tangible property (other than the Insured Products themselves).

(Policy at 2, section 3 (b)) Defendants' liability under the Policy for "Accidental Contamination" is capped at \$12 million "per Insured Event and in the aggregate." (Policy at 14.)

A nationwide outbreak of *E. coli* bacteria linked to fresh bagged spinach occurred in September 2006. The outbreak became the subject of an FDA Advisory issued on September 14, 2006. The September 14, 2006 FDA Advisory, and other FDA advisories that followed, warned the public of the outbreak and its dangers, and advised the public to refrain

from eating all brands of fresh bagged spinach, including Fresh Express spinach. The *E. coli* outbreak itself was severe. It was reported that three consumers died, many suffered kidney failure, many more were hospitalized, and hundreds became ill after eating contaminated spinach. The outbreak also received significant media attention. The FDA's Advisory against eating fresh spinach was in place until September 29, 2006. The FDA ultimately determined that a third party co-packer from Dole, Natural Selections Foods, was responsible for the contaminated spinach that caused the outbreak.

Fresh Express' Quick Response Team ("QRT") assembled immediately upon learning of the outbreak and conducted investigations that determined Fresh Express had violated its own food safety policies and protocols in acquiring and processing raw product used in its fresh bagged spinach products. Because of these errors, the QRT found reasonable cause to believe that Fresh Express spinach products had led or would lead to its consumers becoming injured.

Fresh Express gave Defendants notice of a claim for losses pursuant to the "Accidental Contamination" provision of the Policy in September 2006. After receiving notice of a potential claim, Defendants sent Fresh Express a letter on October 18, 2006, acknowledging a claim, reserving their rights under the Policy, and asking for additional information related to the claim. Fresh Express responded to that letter on November 8, 2006, providing the requested information. Defendants sent no further letters until they denied the claim in a letter dated January 4, 2007. Fresh Express sent a letter asking Defendants to reconsider their decision on January 26, 2009. Defendants confirmed their denial by letter dated March 1, 2007.

Fresh Express filed this lawsuit on January 15, 2008, making two claims. In Count I of its complaint, Fresh Express claimed that Defendants breached the terms of the Policy by denying its claim and failing to reimburse its losses. Fresh Express claimed it was entitled to

coverage because it committed "errors" that provided it with "reasonable cause to believe" that its spinach had led or would lead to bodily injury. Fresh Express contended that it thus satisfied the "Accidental Contamination" provision's requirements for coverage, and that it suffered losses exceeding the \$12 million maximum provided by the Policy. Fresh Express sought \$12 million in damages plus prejudgment interest. In response, Defendants concluded that Fresh Express did not commit any "errors," did not have "reasonable cause to believe" its products had led or would lead to bodily injury, and did not suffer any losses covered by the Policy. Defendants also argued that Fresh Express failed to satisfy a notice provision requiring Fresh Express to give a full description of the insured event, that there were failures to satisfy conditions precedent to coverage under the policy, and that exclusions to coverage applied.

In Count II of its complaint, Fresh Express claimed that Defendants breached their obligation of good faith and fair dealing by failing to conduct a good faith investigation of its claim and by unreasonably and in bad faith withholding benefits due under the Policy. Fresh Express alleged that Defendants denied its claims for the improper reason that Fresh Express' products were not actually responsible for the outbreak, that they decided to deny the claim before a sufficient investigation was completed, that Defendants failed to request information that they later claimed was highly relevant to their consideration of the claim, that Defendants misled Fresh Express about the claim, and that Defendants failed to provide adequate assistance with the claim. Fresh Express sought costs and attorneys' fees on this claim. Defendants denied Fresh Express' allegations.

### **Findings**

#### **Count I: Breach of Contract**

The Court finds by a preponderance of the evidence that Defendants breached the terms of the Policy by denying Fresh Express'

claim. Fresh Express introduced sufficient evidence at trial to establish that it committed "errors" within the meaning of the policy in the form of purchases from Seco Packing and Braga Eade Ranch in August 2006. The Seco Packing purchases qualified as "errors" because Fresh Express did not conduct a food safety audit of the field prior to purchases to verify that the growers had complied with Fresh Express' Good Agricultural Practices ("GAPs"), in violation of its own food safety practices. The Braga Eade Ranch purchases qualified as "errors" because they were purchased from Lot 4, a lot placed on a list of "prohibited" fields by Fresh Express' food safety group because it was too close to a cattle feedlot, a known source of *E. coli*.

Defendants argued that these purchasing errors were not committed in the course of "manufacture, production, processing, preparation, assembly, blending, mixing, compounding, packaging or labeling", as required by the Policy. The evidence at trial established, however, that sales of bagged fresh spinach without enforcing Fresh Express' GAP standards through a food safety audit program would create an unacceptable risk of harm to others. Fresh Express' verification of GAP compliance through grower audits was an integral and inseparable part of its safe manufacturing practices. Moreover, the evidence showed that the errors committed by Fresh Express occurred when the potentially-contaminated spinach from Seco Packing and Braga Eade was mixed and blended with spinach from other sources at Fresh Express' processing facilities. The evidence before the court showed that this mixing and blending could have further spread the contamination, and clearly resulted in errors in "blending, mixing," and "compounding," which satisfies the Policy's "error" requirements for coverage.

The Court also finds that Fresh Express introduced sufficient evidence at trial to establish that it had reasonable cause to believe that these errors – purchasing spinach from Seco Packing and Braga Eade Ranch, and then introducing it, producing it, blending it, mixing it, and

compounding it with other spinach in its processing facilities – had led or would lead to bodily injury. Evidence introduced at trial established that the consequences of consuming spinach contaminated with *E. coli* OH157 could be severe, resulting in illness, kidney failure, and even death. Furthermore, Seco Packing and Braga Eade Ranch also were known suppliers to Natural Selection Foods, the company that, even in the early stages of the outbreak, was suspected to be the most likely source of the contaminated spinach causing the outbreak. Based on the evidence at trial, it appeared that the spinach purchased from Eade Ranch caused particular concern to Fresh Express members of the QRT and other persons because it came from a prohibited lot that had been prohibited precisely because it was within a quarter-mile at its nearest point and downhill from a cattle feed lot, a known source of *E. coli* contamination. Evidence introduced at trial established that cattle feedlots posed extreme food safety risks to nearby grown produce, including *E. coli* contamination.

Defendants raised a number of affirmative defenses to these claims, including failures to satisfy conditions precedent, failure to provide notice of the claim, and applicability of exclusions in the policy. From the evidence at trial, it appeared that Fresh Express provided sufficient notice of the claim to Defendants in September 2006 and that it satisfied all conditions precedent for coverage. Defendants acknowledged that notice in their October 18, 2006 claim acknowledgement and reservation of rights letter. In addition, based on the evidence at trial, Defendants failed to establish that they were given insufficient notice of any “errors” committed by Fresh Express. Of the several letters sent by Defendants or their agents to Fresh Express during the investigation period through the end of 2006, not a single one asked specifically for any information regarding “errors” committed by Fresh Express. In addition, Defendants did not accept Fresh Express’ offer to visit Fresh Express’ facilities or further discuss the claims after

January 4, 2007. Moreover, Defendants did not follow up after Fresh Express' letter of November 8, 2006, to request additional information regarding "errors" even though they contended at trial that that information was crucial to their analysis. Finally, the evidence before the court did not establish that Defendants suffered any prejudice due to any alleged failure of notice or failure to satisfy any conditions precedent. Thus, Defendants' Second, Third, and Fourth affirmative defenses were not established by the evidence at trial.

In addition, the evidence established that Fresh Express' losses were not excluded by Section 5(g) of the Policy. Defendants contended that Fresh Express' losses were so excluded because they were caused by a "governmental ban" or "loss of confidence." The evidence at trial, however, did not show that the FDA Advisory was a "governmental ban." The evidence instead established that it was not a ban, and that the FDA lacked the authority to ban any spinach under the circumstances. Furthermore, it appeared from the evidence that Fresh Express' losses were not caused by the FDA Advisory or a loss of public confidence. Instead, it appeared that the ultimate cause of the losses suffered by Fresh Express was the 2006 *E. coli* outbreak, the "Insured Event" in this case. To adopt Defendants' interpretation of the policy, that is to read the Policy to Exclude coverage for losses related to "loss of public confidence" when an Insured Event has occurred, such as coverage for lost gross profits and for rehabilitating the brand name after a recall or withdrawal, would render the coverage provisions under the policy meaningless. For these reasons, Defendants have failed to prove their Seventh and Ninth affirmative defenses.

Defendants also raised several additional affirmative defenses in their Answer to Fresh Express' complaint. The Court finds that Defendants failed to introduce sufficient evidence to establish any of these additional affirmative defenses, and thus these additional affirmative defenses do not defeat Fresh Express' claim.

**Damages for Count I**

The Court finds that Fresh Express introduced sufficient evidence to establish that it suffered losses in excess of the Policy's \$12 million cap, that those losses were caused by an Insured Event, here the 2006 *E. coli* outbreak, and that those losses are covered by the Policy. The Court further finds that these losses were not caused by a "governmental ban" or "loss of public confidence," and are not excluded under Section 5 of the Policy. The Court also finds that the prejudgment interest on the \$12 million award is to be established at a post trial hearing.

**Count II: Breach of Good Faith and Fair Dealing**

Although the evidence on the issue of whether Defendants breached the implied covenant of good faith and fair dealing is close, the Court finds that Plaintiff has failed to meet its burden of proof to establish a clear breach of the covenant of good faith and fair dealing by showing that Defendants engaged in improper conduct either in the evaluation or investigation of Plaintiff's claim. The evidence at trial showed that both parties failed to communicate with each other in a clear, concise and straight forward manner that could have resolved many of the conflicts present in the current dispute.

The law is settled that Plaintiff must meet a high burden of proof in order to support its claim that the Defendants breached their duty of good faith and fair dealing. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). Erroneous denial of a claim for policy benefits by itself does not violate the implied covenant of good faith and fair dealing. Even though the evidence before the court raised questions about the actions taken by the Defendants in evaluating and investigating Plaintiff's claims, the court cannot reach the conclusion that they were done in a conscious and deliberate effort to frustrate the purposes of the policy. Accordingly, Plaintiff has failed to meet its burden.

The evidence showed that ICCI was retained by Beazley and QBE to investigate the claim. Cindy Hill, who was the lead investigator for ICCI, testified that she had been involved in the adjustment of approximately 20 product recall claims by ICCI at the time she worked on the Fresh Express claim. Ms. Hill also had training in food safety and in California law regarding the investigation of insurance claims. Cindy Hill's superior, Rebecca Flores – who was also involved in the claim investigation and signed the letters denying the claim – had training in food safety, HACCP, Risk Management and Good Claims Investigation processes.

James Short who managed the claim on behalf of Defendant Beazley, testified that his general procedure in connection with managing insurance claims for Beazley was to manage the claim fairly in accordance with the terms of the policy. Mr. Short testified at trial that he followed his claims management practices in connection with the Fresh Express claim. Christopher Flynn also testified that QBE had a practice of dealing with claims in a speedy and efficient manner and did so in the case of Fresh Express. To show bad faith, the insured bears the burden of proving that the insurer's delay or denial of policy benefits was unreasonable or without proper cause.

At trial Plaintiff contended, first, that Defendants prematurely denied Plaintiffs' claim, and unreasonably delayed informing Plaintiff of that decision, thereby breaching the covenant of good faith. Under the law for the court to find such a breach, the Plaintiff must show that the Defendants acted "unreasonably or without proper cause" in delaying or denying policy benefits. *Jordan v. Allstate Ins. Co.*, 148 Cal. App. 4th 1062, 1072 (2007). In this case, however, the alleged "delay" from roughly the middle of November to January 4, 2007, does not appear to be unreasonably in light of all the circumstances and timing of the claim, given the complexity of the issues involved, the monetary amount at stake, and the timing over a holiday period.

Plaintiff argued, secondly, that Defendants failed to investigate Fresh Express' claim in good faith. Plaintiff contended that Defendants denied the claim based on an improper interpretation of the policy, relying on evidence of lack of actual contamination of Fresh Express' spinach, even though actual contamination was not required by the policy. Further, Plaintiff contended that Defendants decided to deny the claim before conducting a fair investigation. While Plaintiff's points were well taken, according to the testimony in court, the persons handling the claim for Defendants had considerable experience in managing product recall claims and as such were aware of the steps required to adequately investigate the claim. Although it appeared from the evidence that Defendants could have performed a more thorough investigation and asked specific questions about whether there were any errors by Plaintiff, the court cannot conclude that Defendants' investigation was made in bad faith.

The evidence revealed that the officers and employees of Fresh Express were acting in a crisis mode during much of September 2006. The evidence showed that they acted promptly to protect public safety. There appeared to be confusion however, between Fresh Express and its parent company, Chiquita, with reference to the handling of their insurance claim for coverage under the "Total Recall" policy.

The evidence established that Plaintiff, through Lee Ward of Chiquita, did provide notice of the claim in September 2006, and he also notified Defendants that they should interview Michael Moser and Joan Rosen at Fresh Express to obtain information relevant to the claim. The evidence also showed that Defendants, through ICCL, did follow up and contacted Mr. Moser and Ms. Rosen.

Plaintiff contended that Defendants acted in bad faith by focusing only on whether Fresh Express' products were actually contaminated and by asking overly broad questions during its interviews with Mr. Moser and Ms. Rosen and failing to ask specifically about an error.

The evidence showed, however, that Plaintiff was given ample opportunity to explain the circumstances of its claim for coverage under the policy and to supply any information it felt was "probative," as well as to provide the names of any additional personnel which it believed Defendants should interview for further relevant information regarding the claim. The evidence revealed that during the time from September 2006 to March 2007, Plaintiff did not mention to ICCI or to Defendants the purchases from the Seco or Braga ranch properties or disclose to Defendants any errors it believed were critical to its claim entitling it to coverage under the policy.

Plaintiff also contended that Defendants breached the covenant of good faith by failing to inform Fresh Express that it needed to identify an error in order to be covered by the Policy. The evidence at trial showed that Defendants did not make any specific inquiries to Mike Moser or Joan Rosen about an error. In addition, as stated before, the claim acknowledgement letter of October 18, 2006, sent on behalf of Defendants, did not request any information about any error by Fresh Express, and it appeared from the evidence at trial that Defendants deliberately removed a specific request for information about errors after ICCI proposed such language for inclusion in the letter. However, Lee Ward, the former Director of Risk Management of Chiquita, the parent company for Fresh Express, testified that he was familiar with the policy and understood its terms and conditions. Mr. Ward showed that he had adequate knowledge of the requirement to show an error under the policy.

Based on California case law, Mr. Ward's testimony that he had adequate notice of the Policy's provisions must be imputed to Fresh Express because by law he acted as an agent for Fresh Express. See *Cal. Civ. Code* §2332.

Moreover, the California courts have held "The fact that the knowledge acquired by the agent was not actually communicated to the

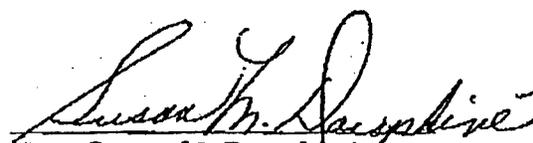
principal ... does not prevent operation of the rule." *Columbia Pictures Corp. v. DeToth*, 87 Cal.App.2d 620, 630 (1948). While Defendants' removal of proposed language regarding an error in the reservation of rights letter sent to Plaintiff in October 2006 raises questions, Plaintiff failed to prove by evidence at trial that this action on the part of the Defendants was deliberately done to deceive and manipulate the Plaintiff in violation of the covenant of good faith and fair dealing.

After reviewing the information provided by Fresh Express, Defendants issued their first letter of denial in January 2007, denying the claim and mentioning an "error by the Assured" on page 3. The Defendants' initial letter of denial clearly advised Plaintiff that it needed to identify an error to be covered by the Policy. The evidence showed that Plaintiff had notice between the first and second letters of denial that it was required to inform Defendants of an error if it believed it to be relevant to their claim, but failed to do so. Upon Fresh Express' inquiry as to why their claim was denied, Defendants' second letter of denial again noted, in part, that there was no known error on the part of Fresh Express, and that as a result, Fresh Express' claim was denied. While Defendants could have been more thorough in its investigation and more forthcoming about the requirements of the policy, Plaintiff failed to demonstrate that Defendants' conduct rose to the level necessary to breach the covenant of good faith and fair dealing.

The Court does not approve of Defendants' failure to disclose to Plaintiff the true facts regarding the close relationship between SRM and ICCI, nor does it appear appropriate that contact with SRM under such circumstances should have been a requirement of the policy, particularly given Fresh Express' own efforts to protect the public and its products during the crisis. Nonetheless, Plaintiff did not sufficiently demonstrate to the Court that the close relationship between the two parties unjustly biased Plaintiff's claim.

The evidence showed that Plaintiff and Defendants failed to communicate clearly, both internally and amongst each other. It appeared that at times Chiquita and Fresh Express executives did not effectively communicate with each other about the details and requirements of Fresh Express' insurance policy, and the requirements to place a claim, while also failing to transmit to Defendants the details of the error that was covered by the policy. At the same time Defendant also failed to communicate clearly and in writing with Plaintiff about the specific requirements Plaintiff needed to meet in order for its claim to be covered by the policy. Nevertheless, while the court cannot put a stamp of approval on Defendants' actions, the court finds that Plaintiff's have failed to meet the required burden necessary to prove that Defendants breached the covenant of good faith in its handling of Plaintiff's claim.

The Court designates Plaintiff to prepare a Statement of Decision consistent with this ruling and submit it in accordance with the provisions of California law. The court requests that the parties meet and confer as to the content of the Statement of Decision and comply with the provisions of CCP Sec. 632 and California Rules of Court, Rules 3.1590 and 3.1591.

DATE: 8-18-09

Hon. Susan M. Dauphiné  
Judge of the Superior Court

**CERTIFICATE OF MAILING**  
**C.C.P. SEC. 1013a**

I do hereby certify that I am not a party to the within stated cause and that on AUG 18 2009, I faxed and deposited true and correct copies of the following document:

**RULING**

in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California 93901, directed to each of the following named persons at their addresses, as hereinafter set forth:

A. David Parnie, Esq.  
2100 Garden Road, Suite No. I  
Monterey, California 93940

Megan Rodkin, Esq.  
555 California Street  
San Francisco, California 94104

Fred G. Bennett, Esq.  
865 South Figueroa St., 10th Floor  
Los Angeles, California 90017-2543

Dated: **AUG 18 2009**

**CONNIE MAZZEI, Clerk of the  
Superior Court, for the County of Monterey**

By P. Conder

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG -8 PM 3:45

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

OBERTO SAUSAGE COMPANY,  
a Washington corporation,

Respondent,

v.

CERTAIN UNDERWRITERS AT  
LLOYD'S, LONDON, identifiable  
under Contract No. 071083 and  
subscribing to Certificate No. MPT-  
0027300,

Petitioner.

No. 66815-3-I

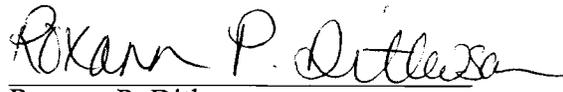
**CERTIFICATE OF SERVICE**

I certify that on the 8th day of August, 2011, I caused to be served on counsel of record, at the address stated below, via hand delivery, a true and correct copy of BRIEF OF RESPONDENT.

Roger L. Hillman  
Heidi L. Craig  
Garvey Schubert Barer  
1191 Second Avenue, 18th Floor  
Seattle, WA 98101

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 8th day of August, 2011.

  
Roxann P. Ditlevson