



Handle With Care



Prepackaged meal kits and new food delivery methods are serving up a new helping of food safety risks.

by Lori Chordas

In June 2016, National Frozen Foods Corp. recalled frozen peas and mixed vegetables it packages under 13 brands. The recalled products, thought to be contaminated with the microscopic pathogen *Listeria monocytogenes*, were included in several of HelloFresh's meal kits delivered to customers in 21 states.

New food delivery methods such as home-delivered meal kits and prepackaged fares are changing the food industry. However, the evolving ways in which consumers now receive and prepare foods are creating new liability concerns that some insurers, brokers and others fear could become a recipe for disaster.

On-the-go consumers are flocking to healthy alternative meal solutions. Within the past year,

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Key Points

A Full Plate: The meal-kit delivery market, which packages convenient, healthy preportioned food in a box, is expected to become a \$5 billion industry in the next several years.

Hard Nut to Crack: Those kits present new liability exposures throughout the supply chain, as well as the potential for foodborne illnesses and possible missed food allergens.

The Whole Enchilada: General liability, food product liability, product contamination and product recall, and cyber liability are a few of the coverages that can help recover losses stemming from those risks.

25% of Americans purchased a meal kit and 70% continued to buy them after making their first purchase, according to Nielsen.

But inside the neatly packaged boxes of preportioned ingredients and step-by-step recipes lurks the potential for foodborne illnesses and missed food allergens, and that has the insurance industry developing new offerings and risk

management programs to stave off those potential exposures.

In a recent study of 169 home meal kits, researchers at Rutgers University in New Jersey and Tennessee State University found the majority of meats, poultry and seafood in those kits arrived at consumers' doorsteps at temperatures above 40 degrees Fahrenheit, making them unsafe to consume.

Part of the problem is the time between refrigeration and delivery of those items. Only 5% of the orders required a signature upon delivery and many of the boxes were left outside for eight hours or more. Also, kits that arrived at temperatures between 60 and 70 degrees had "off the chart" microbial loads—the total number of bacteria and fungi in a given quantity of water or soil or on the surface of food, Rutgers professor Bill Hallman said at the 2017 annual Food Safety Summit in Rosemont, Illinois.

Menu of Risks

More than 100 subscription and a la carte meal-kit delivery service companies, such as Blue Apron, Home Chef, Chef'D and Plated, have sprung up in the past few years, and more competitors are continuing to crowd the multibillion-dollar market. National retailers, such as Whole Foods Market, Costco and Walmart; food purveyors, including Campbell Soup, Hershey and Tyson Foods, and Martha Stewart and other celebrities have also entered the meal-in-a-box fray.

But today's "changing plate" is blurring the lines on how food is produced and delivered, and that's raising liability concerns and prompting the need for clarification of responsibilities and regulations when it comes to new food delivery models including meal kits, said Tami Griffin, national practice leader at Aon Risk Solutions.

Under the lid of those kits lie many questions, including where food products and ingredients come from, whether product handlers are following proper safety protocols and if adequate packaging and temperature control measures are being taken.

The Rutgers-Tennessee State study offered a glimpse into some of those answers. Researchers found dry ice often used inside meal kits fails to come with warning labels or handling information, and only 37% of deliveries had visible information indicating the parcels contained perishable foods. Compounding the problem is that containers used to ship perishable food often are much larger than necessary and often don't have packing materials to fill the empty space, thereby compromising temperature control measures.

Also, non- or mislabeled food items inside meal kits bring about potential food allergy concerns,

and cross-contamination issues can arise during their transportation, said Steve Kluting, the Midwest regional director of Arthur J. Gallagher & Company's food and agribusiness practice group.

Concerns like those pose yet another question: Who is responsible if something goes awry?

So far there are more questions than answers. Because of the lack of regulation and the novelty of these delivery models, it is not always clear who to blame when a crisis occurs.

Adequate safety measures and protocols can lessen that risk.

For example, clearly labeled disclosures about potential food allergens on companies' websites or inside meal boxes is generally adequate enough to protect against liability, said Bill Marler, a managing partner at Seattle-based law firm Marler Clark. He has been a plaintiff's attorney for a number of foodborne illness and food safety cases over the years, including the highly-publicized Jack in the Box E.coli outbreak in 1993. Four children died and 178 other people became ill after eating contaminated beef patties served at 73 of the restaurant's chains.

"People with severe food allergies are good at reading labels and knowing what's in products," Marler said. "But if you're sourcing from different suppliers you need to familiarize yourself with each of those companies' food allergy profiles."

Labels should also include information about the products' manufacturers or suppliers, he said. "Doing so allows the box to work, in a sense, like a grocery store and liability becomes more limited. If some items are included in unnamed packages, the box entity may be on the hook for strict liability as a manufacturer."

Liability can fall anywhere along the supply chain—from growers and processors to suppliers and distributors.

Amazon, UPS, FedEx and other meal-kit carriers have largely been able to avoid liability because of the contractual relationships they have with their meal-kit providers, said James Neale, a partner at the law firm McGuireWoods LLP in Charlottesville, Virginia.

Researchers found shipping companies that delivered meal-in-the-box kits in the Rutgers-Tennessee State study washed their hands of any responsibility if products showed up spoiled.

Others in the supply chain, however, are at risk, and that's why traceability is key, said Jana Wilson, managing director of risk services and global lodging and leisure practice leader at Industria Risk & Insurance Services, a wholly owned subsidiary of GoodWorks Financial Group.

Also, the shorter the chain, the fewer the risks, she said. "Companies need to create and maintain

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Jana Wilson
Industria Risk & Insurance Services

relationships with all of their suppliers—from the guy who caught the fish, to the person who froze the fish, to the individual who transported the fish and finally to all of those who are responsible for preparing and serving the fish.”

Supply chains have increasingly become more global. That’s why companies need a good quality assurance process to test imported products to ensure foods and ingredients are what they claim to be, said Steven Simmons, associate vice president of risk management in Nationwide’s agribusiness insurance.

He also suggests suppliers secure indemnity agreements which defend and indemnify them in the event of a loss due to use of a supplier of a product/ingredient to include adequate limits of insurance. “When possible have yourself listed as an additional insured on the product/ingredient maker’s liability coverage,” he said. “Good contracts outlining duties and responsibilities will mitigate confusion in the event of a loss.”

Finding Solutions

Food product liability insurance is one of the insurance options companies may want to consider.

FPLI protects retail businesses against claims made from the sale of foods sold to the public, and it covers the retail seller’s liability for losses or injuries suffered as a result of purchasing a product by a buyer, user or bystander.

“Part of the problem is that FPLI is not a mandated coverage. At this point it is primarily the larger food service companies that are requiring FPLI from their suppliers,” Wilson said.

That may soon change. Vicarious liability that follows the entire food chain is too large of a risk not to have in place the kind of coverage FPLI provides, she said.

General liability policies help companies protect against third-party claims and provide defense and

indemnity costs if a contamination or foodborne illness outbreak arises, said Florida-based injury attorney Jason Turchin.

Each year, nearly 48 million Americans become sick and 3,000 die from foodborne diseases such as E.coli, salmonella and listeria, according to federal data.

General liability, however, is laden with holes when it comes to reputational risks, and smaller farms and local growers may not carry the coverage, Turchin said. “All it takes is one major outbreak to bankrupt them and shut down their entire operation.”

Product contamination and product recall insurance coverages can help fill the gap. The policies provide coverage for reputational harm and lost profits after an event, along with brand-building efforts and financial recovery for items that need to be removed from shelves or inventory stocks, said Amy Lochhead, a vice president and division underwriting manager at Liberty Mutual’s national insurance unit.

Today’s recall insurance market remains relatively soft, and a number of new entrants are flooding the sector, said Caitlin McGrath, vice president of national product recall and accidental contamination risk consulting at Lockton. “Despite recent losses, prices have remained low and companies are becoming more competitive with their coverages.”

Turchin suggests meal-kit providers and their suppliers also consider other coverage options such as medical payment insurance—a no-fault, good faith gesture that helps companies cover medical expenses, up to a certain amount, caused by a food product.

Also, stand-alone workplace violence policies, cyber liability to protect the online exchange of customer data in meal-kit transactions and add-ons such as a vaccination endorsement can cover risks associated with new food delivery models, McGrath said.

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James Neale
McGuireWoods LLP

Risk Action Plans

While adequate insurance coverages can certainly help, companies also need to adopt risk mitigation efforts and create crisis management plans, Marler said.

For instance, place warning labels outside kits indicating which products need to be refrigerated and at what temperatures they should be stored and cooked, he said. “Taking steps that will help lower a company’s risk profile and allow them to share—not shift—risk and responsibility from farm to fork.”

Also, know where products come from. Decide what kinds of food to include in a kit and which ones to avoid. “For example, raw oysters may not be the best choice,” Marler said. Individuals with certain medical conditions, including cancer, diabetes and liver disease, are at risk for becoming seriously ill or dying from eating raw oysters that are contaminated with *Vibrio vulnificus*—a gram-negative bacterium that occurs naturally in warm, unpolluted seawater.

Companies also need to examine their policy language and membership contracts. Blue Apron—the first U.S. meal-kit delivery service to go public, in 2017—requires members to agree to the provisions of a 20-page membership agreement outlining its terms of use and mandating members to go through an arbitration process on an individual basis limiting the remedies available to the consumer in the event of certain disputes, Wilson said. The New York startup, created by a professional chef, a venture capitalist and a computer engineer in 2014, currently serves about eight million meals a month.

Blue Apron’s terms of use agreement clearly holds its members responsible for inspecting all products for any damage or other issues upon delivery. Wilson said the company even goes as far as to recommend members use a thermometer to ensure that the internal temperature of meat, poultry and seafood is 40 degrees or below. “But each food element has a slightly different temperature requirement. While food safety experts must navigate, even anticipate,

trends in food safety practices, consumer behavior is the sole responsibility of the consumer,” Wilson said.

Companies also need to implement and maintain quality control measures, develop testing and traceability plans to monitor supply chain audits and keep abreast of current regulations, Liberty Mutual’s Lochhead said.

So far the meal-kit delivery industry remains relatively unregulated, experts say.

The Food Safety Modernization Act—the most sweeping reform to U.S. food safety laws in more than 70 years—was enacted in 2011. However, other than reminding consumers about safe handling instructions, neither the FDA nor the United States Department of Agriculture have yet to issue any substantial guidance around new food delivery methods such as meal kits.

Groups like the California Association of Environmental Health Administrators are hoping to change that. This year, the CAEHA proposed a new bill that would expand state-mandated food safety training to meal-kit delivery employees and would require them to obtain a food handlers card, which is a certificate obtained after an employee attends a food safety training course and passes an examination from an accredited organization. But companies like Blue Apron are pushing back over concerns with the bill.

In 2016, the final rule to FSMA’s Sanitary Transportation of Human and Animal Food regulation went into effect. The rule is designed to protect foods from farm to table by keeping them safe from contamination during transportation.

However, couriers—including meal-kit delivery services—are exempt from the final sanitary transport rule, which “ironically, was passed just as the meal-kit delivery model was on the horizon,” Turchin said.

Regulators are starting to examine home meal-kit delivery more closely, and as a result, Wilson expects

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Aon Risk Solutions

the FDA will soon incorporate technical guidelines into the FSMA that will "stretch the understanding of food safety in our new food technology world."

She also anticipates insurers will create micro-niche insurance products that would provide coverage for each of the "big eight" allergens, such as shellfish or peanuts, in an effort to help mitigate potential risks in the market. "As we dive deeper into this fat-free, gluten-free and other food sensitivities-free world we now live in, the government will continue to step in and more stringently regulate information about food allergies or sensitivities already being tested on countless menus and food packaging labels."

Technology's Role

Technology has a large hand in changing today's food industry.

By 2025, 70% of consumers are expected to purchase at least some of their food online, according to reports.

And new food preparation and delivery models are being overhauled by advances in robotics, analytics and big data.

California startup Zume Pizza relies on robots to prepare and bake its pies. The company also uses artificial intelligence and big data to predict order volume and make its food fresher.

Another startup, Chowbotics, recently created a robot it calls Sally to prepare custom, chef-inspired salads using pre-cut products stored in refrigerated canisters.

While technology is creating greater convenience, it's also upping the liability ante. And that's why companies need to think through their risk profile and ask themselves: Is convenience worth the risk, Marler said.

"It's similar to what we saw 15 years ago with the rise in ready-to-eat salad mixes," he said. "Unfortunately, some of those companies didn't

think about all of the potential risks that could arise if the mixes became contaminated while being shipped across the U.S. in refrigerated trucks, giving time for bacteria to grow."

Insurers have struggled to wrap their heads around evolving risks like those. And new delivery models including home meal kits are once again forcing carriers to come up with novel ways to underwrite and insure those exposures, Lockton's McGrath said.

"The thing about meal kits is that they aren't grocery stores. They're not frozen foods. So insurers have to figure out how to underwrite what is essentially a group of individual, prepackaged, portioned foods coming from multiple sources," she said.

Only now are those answers becoming clearer and carriers are starting to feel more comfortable with those risks, McGrath said.

Dinner-in-the-box delivery is more than a passing fad. The market is set to become a \$5 billion industry over the next decade, according to food industry analyst Technomic Inc.

So far claims and losses have remained low, Marler said.

"That's probably because these are individual deliveries, and large-scale food safety litigation generally involves outbreaks that affect many people. I don't think meal kits are immune from food safety problems, but this delivery model will probably cause more one-off problems." The challenge will be detecting and pinpointing problems, which may fly under the radar, he said. BR

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