

IS THAT COVERED? FOOD RECALL CLAIMS

By Michael R. Kelley

Insurance Premiums represent the third or fourth highest business expenses for most food manufacturers and distributors. But, even with all of those premium expenses, many food producers and distributors find that their food recall claims are denied by their insurance company. What do you need to know to make sure that your next food recall claim is covered? Here are the key issues:

- **Commercial Liability Policies Are Not Enough**

Make sure that your commercial liability policy covers claims arising from your products. Your commercial liability policy will be triggered if there are claims of bodily injury or property damage to third parties. But, what about your recall expenses? You will likely be facing recall chargebacks from your customers, product disposal expenses, investigation costs, and notification costs. None of these expenses are covered under your standard commercial liability policy.

- **Recall Insurance Coverage Is Critical**

Depending on the size of the recall, you could be faced with significant costs associated with investigating the cause of any alleged food issues, notification expenses, chargebacks from customers who may have pulled the identified items from shelves and disposed of the product, and your own product disposal costs. You may also have additional employee costs and transportation expenses associated with the recall. An expert in crisis management or food recalls may be helpful to your efforts, but will, of course, be an additional expense. Food recall coverage exists to cover most or all of these expense items. The time to explore this coverage is before you have a significant food recall event.

- **Business Income Loss**

It is also important that you have business income or business interruption coverage. In many cases, the recall

event will result in decreased profits for your company over the short run of 6-18 months. Insurance companies provide business interruption coverage not only for catastrophic losses, such as a complete fire loss, but also for food recall events. If you want to make sure that your economic losses are covered by insurance, you will need to make sure that your business interruption coverage works hand in hand with your recall coverage.

INSURANCE COMPANIES PROVIDE BUSINESS INTERRUPTION COVERAGE NOT ONLY FOR CATASTROPHIC LOSSES, SUCH AS A COMPLETE FIRE LOSS, BUT ALSO FOR FOOD RECALL EVENTS.

- **Not All Recall Coverage Is Alike**

This is a particularly important point. When there were significant spinach recall issues several years ago, the most common type of recall coverage at that time excluded claims unless it was alleged that the policyholder's product specifically caused bodily harm or death, and that a government entity

required the recall. At that time, it was one producer in California that was the cause of the E. coli event, but that one event affected the entire spinach industry. Also, no government entity, including the Food and Drug Administration, ordered a recall. At the time, the FDA lacked such authority. Yet, many spinach producers and distributors had real economic losses as a result of the E. coli outbreak. More recent forms of coverage would be triggered and cover these expenses, even if an individual policyholder's own product was not the source of any alleged problem. Make sure that you have the broadened coverage.

There are, of course, additional issues that we see with food product recalls. Following the basic advice above, however, will go a long way to protecting your food business from food recall events. ■

Michael R. Kelley is Chair of the Insurance Recovery and Counseling group and practices in the Food Industry and Commercial Litigation groups.
717.237.5322 / mkelley@mwn.com





INSURANCE COVERAGE FOR FOOD CLAIMS: COMMUNICATING WITH YOUR INSURANCE COMPANY

By Michael R. Kelley

One of the most frustrating aspects of dealing with a food insurance claim can be communicating with your insurance company adjuster. Knowing your insurance company's obligations to you can help reduce the frustration.

Many businesses look at their insurance companies as partners. Businesses pay a significant sum every year in insurance premiums. In turn, insurance companies promise to cover a number of potential liabilities facing the business. But, keep in mind that insurance contracts are complex legal documents and that your insurance company will use that language (that it drafted) to reduce or deny its obligations to your business. In fact, legally, the mere fact that there is a contractual relationship between your business and your insurance company does not create any special relationship or require the insurance company to give you any special consideration.

Fortunately, the law does offer regulations that help business policyholders. These regulations require insurance companies to do the following:

- Every insurer must, within 10 days, acknowledge receipt of notice of a claim.

- An insurer must complete its investigation of a claim within 30 days, or notify you as to why it could not complete its investigation in that time.
- If the investigation of the claim cannot be completed within 30 days, the insurance company has a continuing

obligation to advise you of the reasons for the delay in investigating your claim, and to provide you with a reasonable timeframe for completion of your claim analysis.

IF A CLAIM DENIAL RELIES UPON LANGUAGE IN YOUR POLICY, THE INSURANCE COMPANY MUST CITE THE SPECIFIC LANGUAGE IN YOUR POLICY WHICH SUPPORTS ITS REASONS FOR DENIAL.

- An insurance company must accept or deny a claim within 15 days of receipt of a properly executed proof of loss.
- All claim denials must be in writing.
- If a claim denial relies upon language in your policy, the insurance company must cite the specific language in your policy which supports its reasons for denial.

In our experience, insurance companies frequently violate both the spirit and the letter of these regulations. The good news is that reminding insurance companies of their obligations under these regulations usually results in improved responsiveness. Keep these regulations in mind the next time you have trouble receiving a response from your insurance adjuster. ■

SUBSCRIBE FOR EMAIL DELIVERY

To receive the *Insuring Your Business* Newsletter in your email, please go to the "Newsletter Signup" page under the "Newsroom" tab at www.mwn.com.

Insurance Recovery & Counseling Group

Michael R. Kelley, Chair
717.237.5322/mkelley@mwn.com

Dana W. Chilson
717.237.5457/dchilson@mwn.com

Richard H. Friedman
717.237.5469/rfriedman@mwn.com

Bruce R. Spicer
717.237.5331/bspicer@mwn.com

Guy H. Brooks
717.237.5384/gbrooks@mwn.com

Geoffrey B. Fehling
717.237.5498/gfehling@mwn.com

Jonathan H. Rudd
717.237.5405/jrudd@mwn.com

© 2013 McNeese Wallace & Nurick LLC

INSURING YOUR BUSINESS is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.