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INSURING YOUR BUSINESS NEWS

March 2014

IS THAT COVERED? TIMELY REPORTING OF FOOD CLAIMS

By Michael R. Kelley

When food producers and distributors are faced with a product recall, one of the most common questions is: How soon, if at all, do you report the claim to your insurance company? The answer is simple—you should be reporting those claims as soon as possible. Otherwise, you face the possibility of having your insurance company deny the claim for failure to provide timely notice.

> **... FAILURE TO REPORT THE CLAIM IN A TIMELY MANNER CAN RESULT IN DENIAL OF COVERAGE—EVEN FOR AN OTHERWISE COVERED LOSS.**

Let's suppose that you have just been made aware that a number of consumers are claiming that they suffered bodily injuries as a result of eating food that you manufactured or distributed. Like any responsible company, you first want to investigate to determine whether there is any merit to the claims. You also may want to alert your wholesale distributors of a potential problem. You may even want to bring in outside experts to help you determine the existence and scope of any problem. This will likely take hours, if not days, to complete. Assuming that you have product liability coverage under your commercial liability policy—and recall insurance and business interruption coverage—how soon should you alert these insurance companies of the problem?

Keep in mind that some insurance policies are sold on what is called an "occurrence" form, while others are sold on a "claims-made" form. You may be able to tell the difference by looking at the first page of the declarations or of the actual policy, which sometimes identifies a policy as a "claims-made" type of form. A good rule of thumb is that general liability policies are usually "occurrence" policies; while recall coverage is often written on "claims-made" forms. What's the difference? Most "claims-made" policies require notice as soon as you believe there is a problem that may trigger coverage, even before any formal claim is asserted. Furthermore, failure to report the claim in a timely manner can result in denial of coverage—even for an otherwise covered loss. Courts look at the circumstances of each case to determine what is reasonable notice, but a good rule of thumb when no specific number of days is provided is to provide notice within twenty to thirty days. The notification period for occurrence based policies is more forgiving. They too require prompt notice, but an insurance company has to show that it was prejudiced by any delay in notice in order to deny coverage on that basis.

Therefore, under the scenario above, when should you report the claim? It is our recommendation that you report the claim to your insurance company within twenty-four to forty-eight hours of becoming aware of the potential claim for food liability. In fact, you should put both your commercial liability carrier and any recall carrier on notice almost immediately. There is no reason to wait to determine whether there is an actual claim. Simply reporting a claim will not result in your insurance premiums increasing or have an adverse impact on your premium ratings. Claims can only have a negative effect on your coverage or premium rates if they turn out to be viable, and the insurance company has to pay a claim on your behalf, or at a minimum, must set a reserve for the claim. Accordingly, there are no negative results from reporting a claim to the insurance company as soon as you suspect that coverage might be triggered, but there are potential negative consequences if you don't.

The McNees Wallace & Nurick LLC Insurance Recovery Group regularly assists clients with insurance issues relating to food claims. Please contact any member of our Insurance Recovery Group with questions about this or any other issue that you may have. ■

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BUSINESS INTERRUPTION COVERAGE FOR FOOD RECALL CLAIMS

By Michael R. Kelley

Most insurance coverage is aimed at accidental losses. Policyholders are generally on their own when it comes to economic losses. One important exception to this rule is coverage for business interruption losses. When determining coverage, food producers and distributors who are concerned about economic losses arising from food recall issues need to make sure that they have an adequate business interruption plan in place.

Business interruption insurance coverage is intended to return the policyholder the amount of profit it would have earned had a food recall not occurred. It is important to be patient in handling business interruption claims involving food recalls, as the lost profits may continue for several months or even years after a recall event. Your business interruption coverage will be capped at the amount set forth in your policy. How much business interruption coverage do you need? Ask yourself these questions:

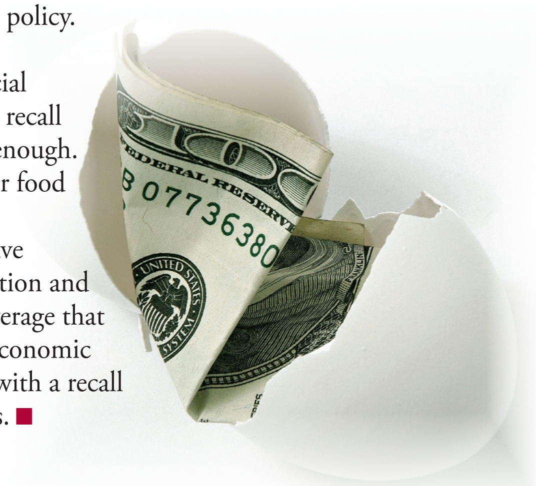
1) How much business would you lose if you could not sell your most popular product for six months or a year?

2) What is the longest period of time that you could go without selling your most popular product and still stay in business?

Honestly answering these two questions will give you an idea of how much business interruption coverage you need, and for what length of time.

Extra expense is a coverage that goes hand in hand with business interruption coverage. In a recall situation, you may need to use or rent additional warehouse space to store recalled product, have additional transportation costs associated with the recall, or even hire additional employees specifically to deal with the recall. These items or expenses may not be considered business income losses, but would be covered under the extra expense provision of your policy.

Having commercial liability and even recall insurance is not enough. It is important for food producers and distributors to have business interruption and extra expense coverage that will address the economic losses associated with a recall for food products. ■



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