

TWO CONTAMINATION DECISIONS AFFIRMED ON APPEAL

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Cozen O'Connor's Food Contamination and Product Recall Practice Area attorneys handle, litigate and monitor related coverage matters. Earlier this year, the authors prepared a Year-End Retrospective on 2007 court decisions addressing insurance coverage for contamination claims. Two of the decisions analyzed in the 2007 Year-End Retrospective were *Hueske v. State Farm Fire & Cas. Co.*, No. 1:06-cv-057, available at 2007 U.S. Dist. LEXIS 73405 (D.N.D., Oct. 1, 2007) and *ACE American Ins. Co. v. Truitt Brothers, Inc.*, available at 2007 Ga. App. LEXIS 1295 (Ga. Ct. App., Dec. 7, 2007). Both decisions were recently affirmed on appeal. See *Hueske v. State Farm Fire & Cas. Co.*, No. 07-3582, available at 2008 U.S. App. LEXIS 1749 (8th Cir., Aug. 13, 2008); *ACE American Ins. Co. v. Truitt Brothers, Inc.*, available at 2008 Ga. LEXIS 492 (Ga., May 19, 2008). The *Hueske* decision was decided in favor of the insurer, while the *Truitt* decision was decided against the insurer.

The *Hueske* decision construed a first-party Farm/Ranch policy and an umbrella policy issued by State Farm. Both policies contained similar business pursuits exclusions, which excluded coverage for property damage arising out of the insured's business pursuits. Because the insured had sold several thousand tons of corn syrup to ranchers over the course of two years, the court concluded that insured's activities were

continuous and motivated by profit. *Id.* Accordingly, the court held that the business pursuits exclusion applied to exclude coverage for the claimants' claims. *Id.* On appeal, the Eighth Circuit affirmed, adopting the "reasons stated in the [district court's] thorough and well-reasoned opinion."

The *Truitt* decision construed a vermin exclusion in a first-party policy issued by ACE American. The exclusion provided that a loss caused by vermin was excluded "unless caused by a Covered Cause of Loss not excluded elsewhere" in the policy. An exception to the exclusion, however, provided that losses from vermin are excluded "only if the vermin infestation was, in turn, caused by a different exclusion in the policy." Because the alleged infestation was caused by poor sanitation practices, and the insurer provided no evidence showing that a risk excluded in a separate provision of the policy caused the rat infestation, the court concluded that summary judgment in favor of the insureds was appropriate. The Georgia Supreme Court denied *certiorari*, and as such, the appellate court's decision construing an exception within an exclusion stands.

For a further analysis of the coverage issues raised in the context of food contamination and product recall claims, please contact Joe Bermudez, Jason Melichar or Suzanne Meintzer of Cozen O'Connor's Denver, Colorado office.