

## NO COVERAGE FOR DEFECTIVE FRUIT CUP PACKAGING WHERE THE FRUIT ITSELF IS NOT DAMAGED

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When Del Monte Foods received in excess of 5,000 complaints from consumers who encountered difficulties opening the pull-tabs on Del Monte's line of fruit cup products, it turned to the manufacturer of the defective cans, Silgan Container Corporation ("Silgan"). As a result, Del Monte withheld approximately \$6.5 million in payments owed to Silgan as compensation for Del Monte's alleged damages in connection with the defective cans. Silgan then turned to its liability insurers for coverage.

In *Silgan Containers Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, Case No. 08-02246 (N.D. Cal. March 29, 2010), United States District Court Judge Phyllis J. Hamilton of the Northern District of California granted summary judgment in favor of National Union, one of Silgan's insurers, holding that Silgan's defective pull-tab lids did not cause "property damage" within the meaning of National Union's umbrella policy.

The National Union policy covered "those sums in excess of the Retained Limit that the insured becomes legally obligated to pay" because of "property damage . . . that takes place during the policy period and is caused by an occurrence happening anywhere in the world." The policy defined "property damage" as "physical injury to tangible property, including all resulting loss of use to that property" or "loss of use of tangible property that is not physically injured." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured."

Silgan argued on cross-motions for summary judgment that Del Monte's claim satisfied the "property damage" definition. Specifically, Silgan argued that the fruit inside the defective fruit cups was "tangible property" that was "physically" injured because the defective pull-tab lids, which were incorporated together with the fruit itself, rendered the fruit commercially useless. The court, however, distinguished this case from "incorporation" cases, such as California's notable decision in

*Shade Foods, Inc. v. Innovative Prods. Sales & Marketing, Inc.*, 78 Cal. App. 4th 847 (2000), which involved the incorporation of the insured's contaminated nut clusters into cereal products manufactured by the underlying claimant. *Shade Foods* involved inherently dangerous products where the host product was "damaged" by the mere fact of incorporation. Here, however, the parties did "not dispute that there was no actual physical damage to the fruit itself (as a result of Silgan's faulty pull-tab lids) that caused an alteration in appearance, shape, color, or other material dimension." The court added, "the only injury being asserted and/or proven here is the failure of Silgan's cans to perform as intended." Therefore, the alleged damage to Del Monte's fruit did not qualify as physical injury to tangible property under the policy.

The court also disagreed with Silgan's position that the loss constituted "property damage" under the "loss of use" provision. The court relied on the Ninth Circuit's decision in *Sony Computer Entertainment America Inc. v. American Home Assur. Co.*, 532 F.3d 1007 (9th Cir. 2008), and concluded that if the defective property did not render the third party's product wholly unusable, "but merely unusable in conjunction with the insured's defective property, no 'loss of use' claim was implicated." The court found that Silgan failed to provide evidence that "the fruit contained within the defective pull-tab lid cups was completely unusable." Although Silgan established that Del Monte did not want to continue selling the fruit cups to the public because of the high failure rate and high cost associated with repackaging the fruit in new, non-defective cans, the court was unpersuaded that those facts rendered the fruit itself unusable.

The court further opined on the applicability of two relevant exclusions in National Union's policy. First, the court held that the "your product" exclusion eliminated coverage for any portion of Del Monte's claim that sought recovery of damages corresponding to the cost of Silgan's defective cans themselves (or the cost to replace the cans). The court relied on National

Union's forensic accountant in finding that \$1.8 million of Del Monte's \$6.5 million claim represented the cost of the defective cans, and was thus excluded from coverage. The court also held that the nearly \$350,000 Del Monte claimed in costs related to inspecting, gathering, sorting and segregating fruit cups packaged in defective cans was precluded from coverage under the policy's "product recall" exclusion.

*Silgan Containers* provides needed guidance to insurers and insureds on coverage issues unique to product recall claims. This case further demonstrates that the coverage analysis

applicable for product recall/product liability claims is fact sensitive, and each case requires diligent investigation and careful review.

*For additional analysis of coverage issues involving food contamination and product recall claims, or to discuss any questions you may have regarding the opinion discussed in this Alert and how it may apply to your particular circumstances, please contact Kevin Haas (khaas@cozen.com, 212.908.1322 (New York)) or Joseph Arnold (jarnold@cozen.com, 215.66.2795 (Philadelphia)).*