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## FOOD CONTAMINATION COVERAGE ALERT

### NO FRUIT FROM THE POISONOUS TREE COVERAGE?

### THE MISSOURI COURT OF APPEALS CONCLUDES THAT AN INSURER IS REQUIRED TO DEFEND AND INDEMNIFY A LOSS OF USE PROPERTY DAMAGE CLAIM ARISING OUT OF THE FAILURE OF BACTERIALLY-CONTAMINATED APRICOT TREES TO PRODUCE FRUIT

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In *Stark Liquidation Co. v. Florists Mutual Ins. Co.*, No. ED87852 (Mo. Ct. App. Aug. 14, 2007), the Missouri Court of Appeals recently held that an insurer is required to defend a loss of use property damage claim asserted against its insured for damages caused by the failure of bacterially-infected apricot trees to produce fruit. The *Stark* decision will likely be relied upon in future food contamination cases and claims because it construes several coverage issues frequently raised in those claims, such as “occurrence” and trigger and business risk, sistership and loss of use exclusions.

In *Stark*, James Duffin (“Duffin”) purchased approximately 3,500 apricot trees from Stark Liquidation Company (“Stark”), and then planted them on half of his forty-acre plot. *Stark*, No. ED87852 at \*3. Although the trees grew and developed over the next three years, they either failed to yield commercially sufficient quantities of fruit or yielded no fruit at all. *Id.* When Duffin complained about the problems to Stark, Stark tendered the claim to Florists Mutual Insurance Company (“Florists”), which insured Stark under a broad form CGL policy, effective between June 1, 1993 and November 15, 1994. *Id.* Florists denied the claim because the trees’ failure to yield fruit did not constitute an “occurrence” and did not occur within the policy’s effective dates. *Id.*

Duffin subsequently filed suit against Stark, and eventually amended his claims to assert that Stark negligently failed to test for bacterial canker; negligently brought bacterial canker to the orchard; and negligently failed to test the trees to determine whether they were self-pollinating. *Id.* at \*4. Stark tendered Duffin's suit to Florists, which again denied coverage, additionally asserting that a "Seed Merchant Errors & Omissions" exclusion barred coverage. *Id.* Stark tendered Duffin's claim to Florists two more times, which continued to deny coverage, further contending that the "Loss of Use" exclusion also applied to bar coverage. *Id.* at \*4-6.

During settlement negotiations with Duffin, Stark advised Florists that a report had concluded that bacterial canker was present in the apricot trees. *Id.* at \*6-7. Although Stark informed Florists that bacterial canker may have caused Duffin's damages and that the parties had entered settlement negotiations, Florists did not investigate the claim, and it was eventually settled. *Id.* Duffin agreed not to execute on any judgment entered against Stark in exchange for assignment of Stark's rights under the Florists' policy. *Id.* Ultimately, an arbitrator found in favor of Duffin, concluding that the apricot trees were infected with bacterial canker when they arrived at the orchard; that the canker spread from the apricot orchard to an adjoining nectarine orchard; and that Stark's failure to test for bacterial canker caused sudden and repeated exposure of the entire orchard. *Id.* A California court then confirmed the arbitration award, and entered judgment against Stark. *Id.*

In the ensuing coverage action, Stark sought a declaration that the Florists' policy covered Duffin's claims. *Id.* Duffin intervened as a necessary party-plaintiff, and the trial court entered summary judgment in favor of Stark and Duffin. *Id.* On appeal, Florists argued, in part, that Duffin's damages did not constitute an "occurrence;" that Duffin's claim fell outside the policy period; and that the "Your Products," "Loss of Use," and "Seed Merchant Errors & Omissions" exclusions applied to bar coverage. The Missouri Court of Appeals rejected each argument.

First, the court reasoned that Stark's negligent sale of bacterially-contaminated apricot trees constituted an "occurrence." *Id.* at \*14-15. Because the claim did not involve bodily injury, the court applied a continuous trigger theory, reasoning that the injury began with delivery of the contaminated trees and continued until Duffin's discovery that the trees could not bear fruit. *Id.* at \*15-18. Because Duffin alleged the trees were infected at the time of delivery in 1994, the policy was triggered, and Florists had a duty defend. *Id.* at \*17-18.

The court then reasoned that the first section of the "Your Products" exclusion did not apply because Duffin sought coverage for damage to property other than for the apricot trees themselves. *Id.* The court also reasoned that the sistership section of the "Your Products" exclusion did not apply because Stark did not withdraw or recall the trees from the market. *Id.* at \*20-22. The court further concluded that the "Loss of Use" exclusion also did not bar coverage because Duffin's claim—that Stark's negligent introduction of bacterial canker into the apricot trees caused Duffin to suffer loss

of use of his orchard—fell within the exception to the exclusion. *Id.* at \*24. Finally, the court found that the “Seed Merchant Errors & Omissions” exclusion did not apply because Stark did not “manufacture, sell, handle or distribute seeds” with respect to Duffin’s claim. *Id.* at \*26.

The *Stark* decision addresses a property damage claim arising from bacterial contamination, and therefore, provides important guidance with respect to coverage issues often raised in food contamination claims, such as “occurrence” and trigger and business risk, sistership, and loss of use exclusions. Cozen O’Connor continues to opine, litigate and monitor the many coverage issues involved in food contamination claims. Our team of food contamination coverage attorneys are prepared to provide immediate, effective assistance. Through meetings, conference calls, seminars, coverage alerts and the preparation of papers and articles, Cozen O’Connor is prepared to assist clients effectively and efficiently handle the next food contamination claim.

*For analysis on food contamination issues or how the Food Contamination Coverage Practice Area can assist you, please contact Joe Bermudez or Suzanne Meintzer of Cozen O’Connor’s Denver, Colorado office. Cozen O’Connor is a nationally recognized leader in representing the insurance industry in all coverage areas, including food contamination claims.*