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CASE ILLUSTRATES RISKS ASSOCIATED WITH IMPORTED FOOD PRODUCTS

U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DENIES AN INSURER'S SUMMARY JUDGMENT MOTION, REASONING THAT A CGL POLICY MAY COVER CLAIMS RELATED TO MERCURY-CONTAMINATED VANILLA BEANS

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On February 11, 2008, the United States District Court for the District of New Jersey denied an insurer's summary judgment motion, reasoning that a commercial general liability ("CGL") policy may cover claims arising from an insured's mercury-contaminated vanilla beans. *Travelers Indem. Co. v. Dammann & Co., Inc.,* No. 04-5699, 2008 U.S. District LEXIS 9759 at *27 (D.N.J. Feb. 11, 2008). Travelers Indemnity Company ("Travelers") had issued a CGL policy and an excess policy to Dammann & Co., Inc. ("Dammann"). *Dammann,* 2008 U.S. Dist. LEXIS 9759 at *1-2. Dammann imported and produced raw food, and then distributed it to various food manufacturers, including International Flavors & Fragrances, Inc. ("International Flavors"), which processed the food and in turn passed it on for consumption. *Id.* at *2-3.

Dammann entered into a contract to provide International Flavors with vanilla beans, which International Flavors used to make vanilla extract. *Id.* at *3. International Flavors discovered that certain lots of Indonesian vanilla beans imported by Dammann were contaminated with mercury, and notified both the Food & Drug Administration and Dammann that the contamination was likely caused by injections of mercury into the vanilla beans by Indonesian farmers seeking to boost the weight of their crop yields. *Id.* at *3-4. International Flavors then submitted a claim letter to Dammann, seeking over $5 million in damages for losses associated with using 5 metric tons of contaminated vanilla beans to make vanilla extract. *Id.* at *4-5. International Flavor's alleged damages consisted of: the value of vanilla extract already shipped to customers; the value of vanilla extract not yet shipped to customers; and remediation and cleaning costs associated with the de-contamination of its processing equipment. *Id.*

Dammann's broker subsequently tendered a notice of claim to Travelers, notifying Travelers of International Flavor's claim against Dammann. *Id.* at *5. Travelers denied coverage, explaining that International Flavor's alleged losses did not constitute "property damage" caused by an "occurrence." *Id*. at *5-6. In addition, Travelers also explained that the contractual liability exclusion and business risk exclusion excluded coverage for International Flavor's alleged losses. *Id*. at *6. Anticipating that Dammann and/or International Flavors would bring suit against it due to the denial of coverage, Travelers filed an affirmative declaratory relief action and moved for summary judgment. *Id.* at *4.

In denying Travelers' summary judgment motion, the court first reasoned that, despite the fact that suit had not been filed against Dammann, the allegations in International Flavor's claim letter to Dammann adequately set forth a claim for "property damage" caused by an "occurrence." *Id*. at *10-12. Travelers argued that International Flavor's claims did not constitute an "occurrence" because they arose out of the contract between Dammann and International Flavors, and not out of a tort obligation. *Id.* at *13. Relying on *Weedo v. Stone-E-Brick, Inc.,* 81 N.J. 233, 249 (1979), the court disagreed and concluded that International Flavor's claims articulated circumstances that rose above a "mere accident of faulty workmanship, and instead constitute[d] faulty workmanship that [caused] an accident." *Id.* at *12 (citing *Weedo,* 81 N.J. at 249) (internal quotations omitted). Because Damman's failure to conform its product to the terms of the contract also allegedly caused resultant property damage to International Flavors, the court held that International Flavor's claim letter sufficiently alleged an "occurrence" under the policy. *Id.* at *14.

Travelers also argued that because International Flavor's claims related to vanilla extract made from Dammann's product, the claims did not allege "property damage," and were therefore, excluded under the CGL policy. *Id.* at *16-17. The court again disagreed and reasoned that because International Flavor's allegations included damage to vanilla extract and processing equipment, which are tangible property, the claim letter sufficiently alleged "property damage" under the policy. *Id.* at *18. Travelers next argued that certain business risk exclusions, including Exclusion k. ("Damage to Your Product Exclusion"); Exclusion m. ("Damage to Impaired Property not Physically Injured Exclusion"); and Exclusion n. ("Recall of Products, Work or Impaired Property Exclusion") applied to exclude International Flavor's claims from coverage under the policy. *Id.* at *18-19.

The court reasoned that the Damage to Impaired Property not Physically Injured Exclusion only applies to damages to an insured's *own* work arising out of its faulty workmanship. *Id.* at *20. Thus, because the claim was for damages to International Flavor's property, the court found that this exclusion did not apply. *See id.* Similarly, the court concluded that the Recall of Products, Work or Impaired Property Exclusion also did not apply, as there was "no allegation of damages for extraneous recall costs . . . ." *Id.* at *21. Thirdly, despite the fact that the vanilla beans were an integral ingredient of the vanilla extract, the court refused to apply the Damage to Your Product

Exclusion to exclude coverage for International Flavors, as the injury was to International Flavor's product—the vanilla extract—and not to any product of Dammann's. *Id.* at *21-24. Additionally, the court noted that International Flavor's claims were not limited to damages to the vanilla extract alone, but also included allegations of damage to International Flavor's processing equipment. *Id.* at *24.

Finally, in opposition to Travelers' summary judgment motion, Dammann argued that the shut-down of its operations to clean and remediate the mercury contamination constituted "loss of use." *Id.* at *24-27. The court agreed, reasoning that: "loss of a non-physical use of a product, such as offering it for sale, should be considered loss of use." *Id.* at *25 (citing *Lucker Mfg.,* A *Unit of Amclyde Engineered Prods., Inc. v. Home Ins. Co.,* 23 F.3d 808, 815 (3d Cir. 1995)). Although Travelers' summary judgment motion did not address whether International Flavor's cleaning and remediation of its own equipment constituted "property damage," the court concluded that it did, and noted that that fact alone probably prevented the court from entering summary judgment in favor of Travelers. *Id.* at *26. Consequently, the court denied Travelers' summary judgment motion. *Id.* at *26-27.

For analysis on food contamination coverage issues or how Cozen O'Connor's national team of food contamination coverage attorneys can assist you, please contact Joe Bermudez, Chair of the Food Contamination Coverage Practice Area. Cozen O'Connor is a nationally recognized leader in representing the insurance industry in all coverage areas, including food contamination claims.

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