

FEDERAL COURT FINDS NO OCCURRENCE FOR DELIVERY OF SOUR MILK

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A Pennsylvania federal judge recently held that an insurer had no duty to defend or indemnify its insured because the insured's delivery of contaminated milk did not constitute an occurrence. *United National Insurance Co. v. St. Paul Reinsurance Company, et al.*, No. 1:CV-07-2092 (M.D. Pa. October 17, 2008). In the underlying action, the insured, Clouse Trucking Inc. ("Clouse"), a distributor and marketing company, was sued for fraudulent misrepresentation, negligence and breach of implied contract, among other claims, because it delivered a load of contaminated milk that was mixed with other marketable milk to a Land O' Lakes Inc. facility. After Clouse's other insurers denied any defense obligation and the underlying action settled, United National Insurance Co. ("United National") filed a declaratory judgment action against Clouse's other insurers seeking contribution and indemnification.

With respect to the underlying claims of Land O' Lakes Inc., the Court first noted that the policies defined "occurrence" as an "accident" and, therefore, did not afford coverage for intentional acts. Because the claim of fraudulent misrepresentation requires an intent to mislead, the Court held that no coverage existed for that claim. While a negligence claim was also pled, the Court reasoned that its task was to determine whether the conduct causing the harm was alleged to be intentional or negligent. Because the negligence claim was predicated upon allegations of Clouse's intentional conduct, the Court held that no coverage existed for that claim either. In so holding, the Court focused on the importance of the factual allegations contained within the four corners of the complaint rather than the causes of action themselves.

The Court next examined coverage for the breach of an implied contract and negligence claims. United National argued that the contractual liability exclusion did not apply because no written agreement existed and the implied agreement did not rise to the level of creating a contractual relationship regarding the harm alleged. In rejecting that argument, the Court noted that the "implied agreement" obligated the insured to pick up uncontaminated milk and deliver it to dairy plants. Because the implied breach of contract claim alleged a breach of the duties arising from that agreement, the Court reasoned that coverage was precluded by virtue of the contractual liability exclusion. Because the negligence claim likewise concerned a breach in the performance of the insured's duties under the implied agreement, the Court held that it was also excluded from coverage because it was contractual in nature.

This decision is significant for insurers because claimants will continue in their attempts to craft complaints sounding in negligence so that coverage is triggered. While an insurer's duty to defend is broadly interpreted, however, it is important to recognize that courts will generally focus on the nature of the allegations rather than the label of particular claims. Thus, the arbitrary pleading of "negligence" will often be rejected when the claim is properly defended.

For a further analysis of the issues currently facing the food industry, including insurance coverage for claims arising from contaminated food products, please contact Joe Bermudez, Jason Melichar or Suzanne Meintzer of Cozen O'Connor's Denver, Colorado office. Cozen O'Connor is a recognized leader in identifying and analyzing emerging trends in food contamination coverage.