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## PITIFUL FRUIT MAY CONSTITUTE A COVERED LOSS

### U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DENIES INSURERS' MOTIONS FOR SUMMARY JUDGMENT, HOLDING THAT COVERAGE FOR PITTED FRUIT NOT BARRED BY EXCLUSIONS

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The U.S. District Court for the Eastern District of California recently refused to apply various exclusions to exclude coverage for an insured's pitted nectarines. *Gerawan Farming Partners v. Westchester Surplus Lines Ins. Co., et al.*, No. 05-1186, slip op., 2008 WL 80711 (E.D.Cal. Jan. 4, 2008). Gerawan Farming Partners, Inc. ("Gerawan") owns, grows, packs, and processes stone fruit, such as nectarines. In August 2003, Gerawan discovered that a number of its nectarines were suffering from "pitting," a cosmetic problem that affects the surface of the fruit and is characterized by multiple small craters on the surface. *Gerawan*, 2008 WL 80711 at \*1. Although pitting is not uncommon, 2003 noticed an explosion of pitting beyond what had occurred in prior years. Thus, Gerawan made a claim under its all-risk commercial property policy issued by Westchester Surplus Lines Ins. Co. ("Westchester"), which was subsequently denied in December 2004, after a lengthy investigation. *Id.* at \*1, \*5. Westchester's denial was based in Gerawan's inability to show a covered cause of loss as well as approximately 14 policy exclusions.

The Court noted that the policy provided coverage for direct physical loss of or damage to covered property caused by or resulting from any covered cause of loss. *Id.* at \*9. In discussing the initial grant of coverage, the Court rejected Westchester's argument that Gerawan was required to show that the loss of the nectarines was caused by a covered peril. *Id.* at 11-13. Because the "covered cause of loss" definition essentially duplicated the requirement of a physical loss or damage, the Court reasoned that the policy covered all risks of direct physical loss, unless otherwise excluded or limited. *Id.* at \*13. As such, because the pitting is a physical condition that caused the loss of, or damage to, the nectarines, the Court held that Gerawan had met its burden of showing a covered loss. *Id.*

The Court next addressed Westchester's arguments that the latent defects and growing crop exclusions applied because expert opinions established that growing conditions in the field caused the nectarines to develop weakened lenticals not observable to the naked eye, thereby later causing the pitting. *Id.* at \*13. In denying summary judgment for Westchester, the Court noted that the parties' experts disagreed as to the cause of the pitting, as Gerawan submitted evidence that the pitting occurred only after its packing and processing procedures were applied to the nectarines. *Id.* at \*16. Because the pitting may have been caused by extraneous factors not inherent in the nectarines, the Court held that summary judgment would not be appropriate. *Id.* at \*16-17. Similarly, the Court held that the exclusion for growing crops, which applies to damage done to crops that are unharvested or unsevered from the land, is not applicable because the pitting occurred after harvest and after the nectarines were subjected to Gerawan's packing and processing procedures. *Id.* at \*17-18.

Finally, the Court refused to apply an exclusion for marring, disfiguring marks or blemishes that occur naturally over time because the evidence suggested the 2003 pitting was an "explosion" that exceeded prior years and was unexpected. *Id.* at \*18-20. The Court reasoned that while the evidence suggested the nectarines pitted after they were packed and processed in the usual and customary manner, the evidence also indicated that the pitting was unusual and extraordinary. *Id.* at \*20. Thus, the Court concluded that summary judgment was inappropriate.

*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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