ALERT
FEBRUARY 5, 2009

INSURANCE COVERAGE
News Concerning
Recent Insurance Coverage Issues

COZEN O'CONNOR
www.cozen.com

ANOTHER YEAR OF AMERICANS EATING DANGEROUSLY: A RETROSPECTIVE OF 2008 FOOD CONTAMINATION COVERAGE DECISIONS

Joseph F. Bermudez • 720.479.3926 • *jbermudez@cozen.com*
Jason D. Melichar • 720.479.3932 • *jmelichar@cozen.com*
Suzanne M. Meintzer • 720.479.3909 • *smeintzer@cozen.com*

For a third consecutive year, Americans begin a new year enduring another international food contamination outbreak. Like the two previous years, the outbreak involves a staple of the American diet. And, similar to the 2006 outbreak, the All-American food under attack is peanut butter.

The Peanut Corp. of America ("Peanut Corp.") outbreak has sickened over 550 people in 43 states and 8 have died. Over half of the victims are children. One in five of the victims has required hospitalization. More than 1,313 products have been recalled. Despite these critical numbers, certain knowledgeable experts believe Americans dodged a bullet.[1]

The Peanut Corp. outbreak highlights several issues we have examined over the past few years. The consolidation and centralization of food production and supply; the growing complexity of food manufacturing and distribution; the increased appetite for processed foods; and evolved food pathogens are just certain of the potential causes leading to larger and deadlier outbreaks.

As the Director of the FDA's Center for Food Safety and Applied Nutrition admitted, this outbreak is "among the largest recalls that we've had."[2] Yet, surprisingly, the Director described Peanut Corp. as "a relatively small supplier on the national scene."[3] Due to the increased consolidation and complexity of food production and distribution, a small supplier caused a critically significant international outbreak, as Canada has also been impacted. Moreover, this small supplier has created liability and coverage issues throughout the entire supply chain as each link of the chain will face questions, claims and likely litigation.

America's appetite for processed food has also contributed to the size of the outbreak. Based on the current findings of the investigation, most peanut butter sold in jars appears to be safe. In fact, the manufacturer of JIF peanut butter has taken out full-page ads proclaiming the safety of its product. However, the vast majority of the over 1,313 recalled products are processed foods. Crackers, cookie dough, ice cream and energy bars lead the long list of processed foods to be recalled.

A significant future concern raised by this outbreak is the possibility of another international outbreak involving a multi-drug resistant pathogen such as salmonella. Salmonella Typhimurium is the strain linked to the Peanut Corp. outbreak. Almost a quarter of Salmonella Typhimurium bacteria are resistant to several of the most widely used antibiotics, certain of which doctors are comfortable giving to children. Moreover, certain Typhimurium bacteria are resistant to antibiotics of last resort. Though none of the drug-resistant bacteria have been identified with this outbreak, we may not be so lucky next time.

The outbreak has resulted in at least two lawsuits filed in Georgia and Minnesota. Clearly, the litigation response to these outbreaks is also growing faster.

The critically relevant question raised is whether international and national outbreaks are covered by traditional insurance products. The multitude of answers to this complex question are starting to be addressed by courts across the country. We review certain of the significant coverage decisions rendered in 2008.

1. *Drug-resistant salmonella? Maybe Next Time.* By JoNel Aleccia. MSNBC.com Jan. 28, 2009.
2. *Peanut Corp. Recalls all Products Back to 2007.* MSNBC.com Jan. 28, 2009.
3. *More Peanut Butter Products Recalled.* MSNBC.com Jan. 18, 2009.

FIRST-PARTY PROPERTY/ALL-RISK POLICY COVERAGE ISSUES

Direct Physical Loss

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.

The U.S. District Court for the Eastern District of California 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 on 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.

The Pollution Exclusion

Something's Fishy! The U.S. District Court for the Southern District of Florida Finds a Conflict Between an All-Risk Policy's Pollution Exclusion and Pollutant Cleanup and Removal Provision.

The United States District Court for the Southern District of Florida denied an insurer's motion to dismiss, reasoning that a Pollution Exclusion and a Pollutant Cleanup and Removal provision in an all-risk policy created an "ambiguity as to the extent of the exclusion's application." *SeaSpecialties, Inc. v. Westport Ins. Corp.,* No. 08-20917-CIV-MORENO at 5-6 (S.D. Fla. Nov. 11, 2008) (order denying motion to dismiss).

After SeaSpecialties, Inc.'s ("SeaSpecialties") facility and certain products tested positive for *listeria monocytogenes* in January 2005, SeaSpecialties suspended production and issued product recalls. *SeaSpecialties,* No. 08-20917-CIV-MORENO at 2. SeaSpecialties implemented safety measures, but it nevertheless had another recall and halted its operations. *Id.* It then filed for bankruptcy. *Id.*

SeaSpecialties submitted a claim to Westport Insurance Corporation ("Westport"), which denied coverage based upon application of the policy's Pollution Exclusion. *Id.* at 4.

The Pollution Exclusion excluded coverage for the "discharge, dispersal, seepage, migration, release or escape" of pollutants, unless directly caused by physical loss or damage not otherwise excluded. *Id.* (internal quotations omitted). The policy's definition of "pollutants" included bacteria. *Id.*

In examining the policy, the court found a provision that it felt created an ambiguity, despite the fact that the parties did not reference the provision. *Id.* at 5. The policy section outlining covered expenses contained a Pollutant Cleanup Removal provision, which stated that costs for cleanup and removal of pollutants directly caused by physical loss or damage not otherwise excluded were covered. *Id.* The court, though, found that the Pollutant Cleanup Removal provision "provided coverage for cleanup and removal of pollutants unless . . . otherwise exclude[d]." *Id.* at 6.

The court reasoned that the Pollutant Cleanup Removal provision conflicted with the Pollution Exclusion. *Id.* As such, the court concluded that, at that point in the litigation, it was unclear whether the Pollution Exclusion excluded coverage and denied Westport's motion to dismiss. *Id.*

The *SeaSpecialties* decision is significant because it illustrates the court's misapplication of policy terms and definitions in an attempt to find coverage for the insured. The Pollutant Cleanup Removal provision described which pollutant cleanup costs would be covered when a covered cause of loss directly caused the dispersal of pollutants. That is, the Pollutant Cleanup Removal provision did not expand coverage under the policy, it only described what costs the carrier would pay if a covered cause of loss occurred. Because the insured did not allege a covered cause of loss directly caused its damages, the court should have applied the Pollution Exclusion and granted the carrier's motion to dismiss.

2007 Decisions Confirmed

Two of the decisions analyzed in the 2007 Retrospective were *Hueske v. State Farm Fire & Cas. Co.*, No. 1:06-cv-057, *available at* 2007 U.S. Dist. LEXIS 73405 (D.N.D. Oct. 1, 2007) and *Ace American Ins. Co. v. Truitt Brothers, Inc.*, *available* at 2007 Ga. App. LEXIS 1295 (Ga. Ct. App. Dec. 7, 2007). Both decisions were recently affirmed on appeal. *See Hueske v. State Farm Fire & Cas. Co.*, No. 07-3582, *available at* 2008 U.S. App. LEXIS 1749 (8th Cir. Aug. 13, 2008); *Ace American Ins. Co. v. Truitt Brothers, Inc., available at* 2008 Ga. LEXIS 492 (Ga. May 19, 2008). The *Hueske* decision was decided in favor of the insurer, while the *Truitt* decision was decided against the insurer.

Business Pursuit Exclusion

The *Hueske* decision construed a first-party Farm/Ranch policy and an umbrella policy issued by State Farm Fire & Casualty Company. Both policies contained similar business pursuits exclusions, which excluded coverage for property damage arising out of the insured's business pursuits. Because the insured had sold several thousand tons of corn syrup to ranchers over the course of two years, the court concluded that the insured's activities were continuous and motivated by profit. *Id.* Accordingly, the court held that the business pursuits exclusion applied to exclude coverage for the claimants' claims. *Id.* On appeal, the Eighth Circuit affirmed, adopting the "reasons stated in the [district court's] thorough and well-reasoned opinion."

Vermin Exclusion

The *Truitt* decision construed a vermin exclusion in a first-party policy issued by Ace American Insurance Company. The exclusion provided that a loss caused by vermin was excluded "unless caused by a Covered Cause of Loss not excluded elsewhere" in the policy. An exception to the exclusion, however, provided that losses from vermin are excluded "only if the vermin infestation was, in turn, caused by a different exclusion in the policy." Because the alleged infestation was caused by poor sanitation practices, and the insurer provided no evidence showing that a risk excluded in a separate provision of the policy caused the rat infestation, the court concluded that summary judgment in favor of the insureds was appropriate. The Georgia Supreme Court denied *certiorari,* and as such, the appellate court's decision construing an exception within an exclusion stands.

THIRD-PARTY LIABILITY COVERAGE ISSUES

"Occurrence"/"Property Damage"

Risks Associated with the Global Food Supply Chain. 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.

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 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.

"Your Product" Exclusion

Insured's Claims Crumble to Nothing! U.S. District Court for the Southern District of New York Holds that the "Your Product" Exclusion Excludes Coverage for Contaminated Raspberry Crumble.

On January 29, 2008, the U.S. District Court for the Southern District of New York applied the "your product" exclusion to exclude coverage for an insured's contaminated food product. *Tradin Organics USA, Inc. v. Maryland Cas. Co.,* No. 06 Civ. 5494 (WHP), 2008 U.S. Dist. LEXIS 5820 at *7-8 (S.D.N.Y. Jan. 29, 2008) (applying New Hampshire law). Canadian-based Crofters Food Ltd. ("Crofters") purchased eighty metric tons of raspberry crumble from Tradin Organics USA, Inc.'s ("Tradin") Amsterdam-based parent. *Tradin Organics,* 2008 U.S. Dist. LEXIS at *1. In order to fulfill the order, Tradin subcontracted with a Serbian company, which agreed to deliver the crumble directly to Crofters. *Id.* at *2.

After Crofters accepted delivery of the crumble, the crumble "was discovered to contain plastic, pits, cherry stems, glass and other materials, and the Canadian government ordered it recalled." *Id.* Tradin agreed to compensate Crofters in the amount of $214,444.32 for the contaminated crumble, and then filed a claim with Maryland Casualty Co. ("Maryland"), its CGL carrier. *Id.* Maryland denied coverage under the "your product" exclusion, which excluded coverage for "any property damage due to your product arising out of it or any part of it." *Id.* at *3 (internal quotations omitted). The policy defined "your product" as "any goods or products . . . manufactured, sold, handled, distributed or disposed of by" Tradin. *Id.* at *3 (internal quotations omitted). Tradin then brought breach of contract and bad faith claims against Maryland, asserting that it had a right to full reimbursement of the settlement amount. *Id.* at *1-2. Both parties moved for summary judgment. *Id.* at *1.

In granting summary judgment for Maryland, the court determined that New Hampshire law applied to the claims, since Tradin was a New Hampshire company, the policy was delivered to a New Hampshire agent, and the premiums were paid from New Hampshire. *Id.* at *5-6. Because New Hampshire courts have not yet addressed the "your product" exclusion, however, the *Tradin Organics* court looked to New York and other jurisdictions and found that the "your product" exclusion unambiguously precludes coverage for "losses caused by a contaminated or defective product sold by the insured." *Id.* at *7. Consequently, the court entered summary judgment in favor of Maryland on Tradin's breach of contract claim. *Id.* at *8.

The court also dismissed Tradin's bad faith claim on the ground that absent a breach of contract, there is no bad faith. *Id.* at *9.

Pollution Exclusion

What Is That Smell? Minnesota Court of Appeals Concludes That Mold, Bacteria And Bioaerosols Dispersed From A Composting Site Are "Pollutants."

The Minnesota Court of Appeals recently concluded that mold, bacteria and bioaerosols dispersed from a composting site fall within a commercial general liability ("CGL") insurance policy's pollution exclusion. *Larson v. Composting Concepts, Inc.,* Nos. A07-976, A07-977, A07-976, *available at* 2008 Minn. App. Unpub. LEXIS 551 (Minn. Ct. App. May 13, 2008).

Composting Concepts, Inc. ("Composting Concepts") operated a soil composting site between June 1994 and September 1996. *Larson,* 2008 Minn. App. Unpub. LEXIS 551 at *2. In 2001, Robert Larson ("Larson"), who resided near the composting site, brought suit against Composting Concepts on "theories of nuisance, negligence, and intentional infliction of emotional distress, alleging . . . personal injuries and property damage [resulting] from living organisms, mold, bacteria, and bioaerosols generated by the composting materials." *Id.*

Farm Bureau Mutual Insurance Company ("Farm Bureau") insured Composting Concepts, and after Composting Concepts assigned its rights under the CGL policy to Larson in settlement of Larson's claims, Larson brought a garnishment action against Farm Bureau. *Id.* Farm Bureau denied coverage, relying in part on the policy's pollution exclusion. *Id.* The trial court agreed with Farm Bureau and discharged the garnishment proceeding. *Id.* at *2-3.

On appeal, the primary dispute was whether the "living organisms, mold, bacteria, and bioaerosols that . . . were dispersed from the composting site fall within the policy's definition of 'pollutants.'" *Id.* at *4. Larson argued that the term "pollutant" was ambiguous, and attempted to use extrinsic evidence in support of that argument. *Id.* at *6-8. The appellate court, however, reasoned that previous decisions had already determined the pollution exclusion to be unambiguous, and as such, refused to consider any extrinsic evidence in construing "the plain language of the policy." *Id.* at *6-7.

Additionally, Larson argued that an ISO "Fungi or Bacteria Exclusion" created an ambiguity because the mere existence of the ISO form proved that the pollution exclusion encompassed only inorganic substances. *Id.* at *7. Because Farm Bureau had not adopted the ISO "Fungi or Bacteria Exclusion," and because it was not part of the Composting Concepts policy, the court also rejected this argument. *Id.* at *8.

Next, Larson argued that an exception to the pollution exclusion applied. *Id.* at *15. Because that exception did not become part of the Composting Concepts policy until 1999—after the relevant time period—the court held that there was no basis upon which the exception could apply. *Id.* Finally, Larson attempted to argue that an actual injury trigger rule should apply. *Id.* Larson, however, failed to raise the trigger issue at the trial court level, and as such, the appellate court declined to address the argument. *Id.* at *15-16.

In rejecting Larson's arguments, the court reasoned that the essence of his claim was that "living organisms dispersed from the composting site contaminated or irritated" his body and home. *Id.* at *10. The policy did not distinguish between organic and inorganic contaminants, and therefore, the court concluded that it would be difficult "to imagine a more clear-cut scenario where a substance could be classified as a contaminant." *Id.* Accordingly, the appellate court affirmed the trial court's application of the pollution exclusion to exclude coverage for Composting Concepts' settlement of Larson's claims. *See id.*

Following a general trend and the majority of jurisdictions that have ruled on the issue, the *Larson* decision affirms application of a CGL pollution exclusion in the context of biological contamination claims. As bodily injury and property damage contamination claims continue to increase, the *Larson* decision provides additional authority for insurers to rely upon the pollution exclusion in issuing reservation of rights and disclaimer of coverage letters in such claims.

Impaired Property Exclusion

Contaminated Bread Claims Do Not Rise To Coverage. Georgia Court of Appeals Applies Exclusion M.

The Georgia Court of Appeals recently upheld an insurer's denial of coverage for claims related to use of contaminated bread through application of Exclusion m. *See Lavoi Corp. v. National Fire Ins. of Hartford,* 666 S.E.2d 387, 395 (Ga. Ct. App. 2008). National Fire Insurance of Hartford ("National Fire") insured Lavoi Corporation ("Lavoi"), which provided contaminated bread to a franchise sandwich restaurant. *Lavoi,* 666 S.E.2d at 393-94.

The restaurant asserted several causes of action against Lavoi, including breach of warranty, strict liability, deceptive trade practices, interference with business relations and violation of federal anti-trust laws. *Id.* at 394. After Lavoi tendered its defense to National Fire, National Fire denied coverage, applying Exclusion m., the impaired property exclusion. *Id.* The trial court entered summary judgment in National Fire's favor. *See id.* at 389.

On appeal, Lavoi argued that the restaurant may have been able to prove that the contaminated bread caused property damage to the restaurant and bodily injury to its customers. *Id.* at 395. The Georgia Court of Appeals rejected the insured's argument, reasoning that "[t]here is no allegation in the complaint that any . . . customers sustained bodily injury." *Id.*

Additionally, the court rejected the insured's argument that the restaurant may have been able to prove that it sustained property damage because the definition of "impaired property" unambiguously included the contaminated bread the restaurant incorporated into its sandwiches. *Id.* The court further reasoned that even if the restaurant's complaint had alleged property damage in the form of returned sandwiches, those damages would not have been covered through application of the impaired property exclusion. *Id.* Because there was no coverage, the appellate court also affirmed the trial court's entry of summary judgment on the insured's bad faith claim. *Id.* at 395-96.

The *Lavoi* decision is significant because the court applied a business risk exclusion in concluding that there was no coverage for claims arising from the insured's contaminated product.

CONCLUSION

The Peanut Corp. outbreak is the latest in a series of international and national outbreaks to rock the food

industry over the past three and a half years. Given the serious allegations recently raised against Peanut Corp., this outbreak involves significant coverage issues for each and every entity involved in the food supply chain. As the number, size and extent of food contamination outbreaks continue to increase, so will the multitude of insurance coverage issues raised throughout the global supply chain. Only a few courts have recently rendered decisions in related coverage matters. As we have seen with these increasingly larger outbreaks, no jurisdiction will be left untouched by these issues. During the initial stages of this long-term crisis, insurers and insureds involved with the food industry must carefully examine and review policy language, insurance programs and claim determinations.

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