

MEALEY'S™

# Personal Injury Report

## **A Retrospective Of 2010 Product Recall And Food Contamination Coverage Decisions**

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# Commentary

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## A Retrospective Of 2010 Product Recall And Food Contamination Coverage Decisions

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### I. Introduction

The year 2011 will be a watershed year for the consumer product and food industries as well as the insurers that underwrite the associated risks. As new regulations and the "Database of Doom" under the Consumer Product Safety Improvement Act of 2008 are implemented and potentially new food safety legislation is passed, the corporate environment will become significantly more hostile. The companies and their respective insurers will endure a substantial increase in responsibilities, obligations, risks, recalls and claims. Moreover, the era of catastrophic recalls continues unabated as companies expand global supply lines, multi-state recalls increase, news, internet and social media coverage expands and filings of consumer class actions rise.

We witnessed an increase in the filing of coverage actions in 2010 involving crisis management events and the corresponding decisions will be rendered throughout 2011. NLdH has monitored crisis management and recall coverage matters for several years and continues to assist the insurance industry in addressing the novel and unique policy wording issues, policyholder needs and coverage matters that continue to emerge in this evolving market. As part of our efforts, we present this 2010 Retrospective on product recall and food contamination coverage decisions.

This Retrospective will address coverage issues under commercial general liability, property/business interruption, and specialty policies. Section II. addresses general liability policy coverage issues and focuses upon the requirements and standards regarding “bodily injury,” “property damage,” determination of an “occurrence,” number of “occurrences,” the pollution exclusion, tort versus contract law, advertising injury, speculative lawsuits and recall claims arising in excess layers. Section III. addresses the pertinent property insurance policy from 2010. Finally, Section IV. discusses decisions interpreting specialty insurance policies.

## II. General Liability Policy Coverage Issues

### A. Bodily Injury

#### 1. Underlying Allegations Could Result In Compensation For ‘Bodily Injury’ Although The Injured Were Not Parties To The Lawsuit

In *Hartford Lloyd’s Insurance Co. v. Apothecure, Inc.*, 2010 WL 3184323 (N.D. Texas Jan. 20, 2010), the Texas Attorney General brought suit against Apothecure, Inc. (“Apothecure”), Gary Osborn (“Osborn”), and Spectrapharm, Inc. (“Spectrapharm”) due to violations of the Texas Food, Drug and Cosmetic Act (“TFDCA”) and the Texas Deceptive Trade Practices Act (“DTPA”). Apothecure and Osborn were insured under a policy issued by Hartford Lloyd’s Insurance Company (“Hartford”), but Spectrapharm was not named or identified therein and was not entitled to coverage. The Policy contained both a Business Liability Coverage form and an Umbrella Liability Supplemental Contract.

After the complaint was filed, Hartford brought a declaratory judgment action seeking a declaration that it did not have any obligation to defend or indemnify the defendants on the grounds that the underlying action did not include any injured parties (or their representatives) and the DTPA claims did not seek damages due to bodily injury. The defendants filed an answer and then the parties filed cross motions for summary judgment.

The complaint in the underlying case stated that there had been three deaths in Oregon based upon mislabeled drugs manufactured by defendants. The court

evaluated whether any of the claims in the complaint, if true, would support an award of damages against the insured because of bodily injury. None of the injured parties were named in the underlying action. While the complaint addressed the deaths in Oregon, it did not actually seek any damages due to those deaths. The causes of action centered on defendants’ DTPA violations.

The Northern District of Texas held that the claims asserted in the underlying litigation could result in compensation for bodily injury. The court held that Hartford was obligated to defend Apothecure and Osborn, but not Spectrapharm in the litigation brought by the Texas Attorney General. Consequently, the court granted Hartford’s motion for summary judgment in part holding that Hartford did not have a duty to defend or indemnify Spectrapharm.

Next, the court considered whether the DTPA claims could support a damages verdict due to bodily injury. The DTPA does not provide a basis for damages due to bodily injury except in the following two limited circumstances: (1) “in circumstances in which the conduct was intentional, or knowingly and it resulted in mental anguish;” or (2) if there is another law that authorizes recovery under the DTPA.

The underlying complaint did not include any allegations of intentional or knowing activity, so the court held that the first exception did not apply. The underlying complaint also did not identify any other law that would provide for recovery under the DTPA. The defendants pointed out, however, that the Attorney General was allowed to seek “actual damages.” After analyzing the statutory history, the court found that the allegations of three deaths “associated with these misbranded and adulterated drugs” could support a jury award of damages to identifiable persons. Therefore, the duty to defend was triggered and Hartford was obligated to provide a defense to Apothecure and Osborn. However, there could not be a determination on the duty to indemnify because the underlying action was still pending.

#### 2. No Coverage Because Health Risks Do Not Rise To Level Of ‘Bodily Injury’

In *Medmarc Cas. Ins. Co. v. Avent America, Inc.*, 612 F.3d 607 (7th Cir. 2010), the United States Court of

Appeals for the Seventh Circuit examined three liability insurers' potential duty to defend a number of putative class actions brought against a policyholder. The underlying actions concerned the alleged use of Bisphenol-A in products manufactured by the policyholder for use by infants and toddlers. In these complaints, the putative class representatives contended that the defendant policyholder was aware of safety problems caused by Bisphenol-A, but nevertheless marketed its products as superior in safety. The class representatives alleged that they stopped using these products once they learned of the health concerns. In response to the policyholder's motion to dismiss the underlying lawsuits, the putative class representatives conceded that they were not pursuing claims for bodily injury.

The policyholder sought coverage on commercial general liability policies issued by three insurers, citing policy language providing indemnification for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,'" as well as the costs of defending lawsuits alleging such damages. The policyholder and liability insurers filed a number of declaratory judgment actions regarding the insurers' duty to provide defense and indemnification, which were consolidated into the above-captioned action. The trial court granted summary judgment in favor of the insurers, on the grounds that the underlying case did not raise allegations of bodily injury.

The Seventh Circuit began its discussion by considering the insurers' argument that the policyholder was judicially estopped from arguing that the underlying lawsuits sought damages "because of bodily injury," in light of its argument in these lawsuits that the class plaintiffs did *not* seek damage for bodily injury. In response, the policyholder contended that its previous recognition that the lawsuit did not seek damages "for bodily injury" did not preclude it from now contending that the lawsuit sought damages "because of bodily injury," given its argument that the phrase "because of bodily injury" encompassed a broader duty to defend than the phrase "for bodily injury." The court held that while this argument "may appear to be threading the judicial estoppel needle," it was nonetheless meritorious.

However, the court concluded that the mere fact that the underlying complaints raised the potential of physical harm arising from the products at issue did not

bring these lawsuits into the scope of coverage for claims "because of bodily injury." In so doing, the court emphasized that the plaintiffs did not allege that the use of the products at issue actually resulted in bodily injury, or even created an increased risk of bodily injury. Rather, the underlying complaints were based upon the contention that the plaintiffs would not have purchased the products if they had been aware of the health risks of Bisphenol-A. As these claims were not dependent upon establishing the existence of bodily injury, the court determined that the underlying lawsuits fell outside the scope of coverage. The court therefore affirmed the trial court's judgment in favor of the insurance companies.

## B. Property Damage

### 1. No 'Property Damage' When Pull-Tab Containers Did Not Perform As Warranted, But Food Was Still Usable

In *Silgan Containers Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2010 WL 1267127 (N.D. Cal. Mar. 29, 2010), the court held that when no inherently dangerous product is incorporated into another, or when there is no alteration in appearance, shape, color or other material dimension, or when the product is not unusable, there is no "property damage," and therefore, no coverage under a commercial general liability policy.

Silgan Containers Corporation ("Silgan") manufactures and sells steel and aluminum containers with pull-tab lids, which food processors and packagers use for food products. Del Monte was one of Silgan's customers, and the two companies had an agreement under which Silgan was obliged to provide pull-tab fruit cups to Del Monte. Del Monte used the pull-tab fruit cups to package ready-to-go fruit for consumers.

Del Monte received increasing complaints concerning its customers' inability to readily remove the tops off the fruit cups, and notified Silgan of the pull-tabs' failure. Silgan determined that various design and manufacturing issues contributed to the problem, and Del Monte subsequently advised Silgan that it planned to reject Silgan's products given the high failure rate. Del Monte also sought to recover from Silgan the costs it had incurred as a result of the defective pull-tab containers provided by Silgan, including: the value of the

finished fruit products that were rejected; the value of finished fruit products that required special handling; the costs incurred to inspect, gather, sort and segregate fruit products utilizing the defective pull-tabs; and consumer reimbursements.

Silgan was insured under a primary commercial general liability policy issued by Zurich and an umbrella commercial policy issued by National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"). Zurich, the primary carrier, conceded coverage for the limits of its policy. National Union disclaimed coverage on the ground there had been no physical injury to the fruit contained in the cups with defective pull-tabs. Silgan then initiated suit against National Union.

The court entered summary judgment in National Union's favor, holding that neither prong of the policy's "property damage" definition was satisfied and that "your product" exclusion and the product recall exclusion would exclude coverage for certain damages sought by Del Monte. In reaching its conclusion, the court reasoned that because the parties did not dispute there was no physical damage to the fruit and because the only injury was that Silgan's pull-tab containers did not perform as warranted, the physical injury prong of the policy's "property damage" definition was not satisfied. Further, the court reasoned the fruit was not completely unusable. The fact that Del Monte made a business decision not to utilize the fruit was not sufficient to satisfy the loss of use prong of "property damage" definition. Accordingly, the court concluded there was no coverage under the National Union policy.

The court continued its analysis and additionally held that the "your product" exclusion would apply to exclude coverage for any portion of Del Monte's claim that sought recovery of damages corresponding to the cost of Silgan's defective pull-tab containers themselves, or the cost of replacing the containers. Moreover, the court reasoned the product recall exclusion would apply to exclude coverage for the amount of costs incurred to segregate and dispose of the containers with defective pull-tabs.

Thus, based on its conclusion that there was no "property damage" and that certain of the claimed costs would be excluded from coverage, the court entered summary judgment in National Union's favor.

## 2. A Theoretical Possibility Of 'Property Damage' Was Insufficient To Trigger Coverage For Defective Door Latches

In *Amerisure Mutual Ins. Co. v. Microplastics, Inc.*, 2010 WL 3619785 (7th Cir. Sept. 20, 2010), the Seventh Circuit affirmed the district court's conclusion that an insurer does not have a duty to defend when the complaint against the insured seeks setoff and damages for economic loss incurred as the result of the insured's failure to comply with engineering and quality specifications.

Amerisure Mutual Insurance Company ("Amerisure") issued a commercial general liability policy to Microplastics, Inc. ("Microplastics"), who manufactured insert-molding components used in certain mechanical devices. Microplastics sold the insert molding components to Valeo Security Systems ("Valeo"), which in turn used them to manufacture automobile door latch assemblies that it sold to several automobile manufacturers.

After an automobile manufacturer complained to Valeo regarding problems with the door latch assemblies, the involved parties determined that Microplastics was selling Valeo defective parts. Valeo subsequently sent a demand letter to Microplastics, formally asserting that Microplastics had breached the engineering and quality specifications of the contracts between them. Microplastics and Valeo entered into settlement negotiations, which were unsuccessful, and Microplastics filed a breach of contract suit against Valeo, asserting it had not been paid for the products delivered. Valeo asserted counterclaims against Microplastics, seeking setoff and damages for economic loss incurred as the result of Microplastics' failure to conform to the engineering and quality specifications of the contracts.

Microplastics tendered a claim to Amerisure, who denied coverage because there was no "property damage" caused by an "occurrence." Amerisure initiated a declaratory relief action, seeking a determination that it did not have a duty to defend Microplastics against Valeo's counterclaims. The district court granted summary judgment in favor of Amerisure, holding the policy was not triggered because Valeo's counterclaims did not allege "property damage" caused by an "occurrence."

On appeal, the Seventh Circuit affirmed, reasoning that a commercial general liability policy is not intended to cover the costs associated with repairing or replacing an insured's defective work and products. In reaching its conclusion, the court noted that Valeo's counterclaims did not contain specific factual allegations addressing "property damage." That there was a "theoretical possibility" of "property damage" was insufficient to trigger coverage. The court stated:

If these allegations by Valeo of unspecified costs charged back by its customer are enough to trigger the duty to defend, then we would expect that CGL insurers would quickly find themselves responsible for defending routine breach of warranty disputes between commercial manufacturers and their buyers.

Because the right to a defense under Illinois law depends not on the legal theories stated by the claimant, but rather on the factual allegations contained in the complaint, and because Valeo's counterclaims did not contain "property damage" allegations, the Seventh Circuit concluded Amerisure did not have a duty to defend Microplastics and affirmed the district court's decision.

### C. Occurrence

#### 1. 'Occurrence' Transpired Where The Exposure To Lead Paint Occurred, Not Where The Product With Lead Paint Was Manufactured

In *ACE American Ins. Co. v. RC2 Corp., Inc.*, 600 F.3d 763 (7th Cir. 2010), applying Illinois law, the United States Court of Appeals for the Seventh Circuit held that, for purposes of determining whether an "occurrence" falls within a policy's coverage territory, the occurrence takes place where the event causing the alleged harm takes place, not where an "antecedent negligent act" took place.

RC2 Corporation ("RC2") was in the business of designing and marketing toys, many of which were manufactured in China. In June 2007, RC2 recalled a certain line of its toys, after discovering that the products contained lead. Following the recall, RC2 faced a surge of litigation, alleging negligent manufacture and testing of the products. RC2 sought defense and indemnification from its two commercial general liability carriers.

The first carrier covered occurrences within the United States, but expressly excluded damages arising from lead. Therefore, the carrier denied coverage on the grounds of the lead exclusion. The second carrier, ACE American Insurance Company ("ACE"), covered international occurrences, but excluded the United States from its coverage territory. ACE denied coverage on the grounds that the occurrences underlying the lawsuits had taken place in the United States, and thus fell outside the policy's coverage territory. RC2 argued, however, that the accident occurred in China, where the product was manufactured and tested, and thus did fall within the coverage territory. ACE and RC2 both filed declaratory judgment actions and cross-motions for summary judgment.

The United States District Court for the District of Illinois declared that ACE had a duty to defend the claims because the negligent manufacture of the products had taken place in China, and thus fell within the coverage territory. ACE filed an appeal. The parties had settled the indemnity claims, and the district court dismissed them with prejudice, leaving a question only as to ACE's duty to defend the claims.

On appeal, the Seventh Circuit identified the only relevant question as *where* the occurrence took place. Looking to the policy's language, which defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," the court held that an occurrence unambiguously took place "when and where all the factors come together at once to produce the force that inflicts injury and not where some antecedent negligent act takes place." Though the products were manufactured and tested in China, the "accident" took place at the time and place of the exposure to the lead paint. Because such exposure was in the United States, and the United States fell outside the policy's coverage territory, ACE had no duty to defend the claims.

#### 2. No 'Accident' Because The Damage Was Reasonably Foreseeable

Next, in *National Union Fire Ins. of Pittsburgh, Pennsylvania v. Puget Plastics Corp.*, 2010 WL 3362117 (S.D.Tex.), Puget Plastics Corporation ("Puget") manufactured plastic water chambers. Puget sold the water chambers to Microtherm to use in its production of tankless water heaters. When Puget's water chambers

began to fail, Microtherm filed suit against Puget in Texas state court, alleging that Puget had intentionally under-heated the plastic chambers during the manufacturing process, which resulted in leaky chambers, thus damaging Microtherm's reputation and profits. The Texas jury found in favor of Microtherm. The jury found Puget had engaged in false, misleading, or deceptive acts or practices and unconscionable action; failed to comply with warranties; engaged in negligent misrepresentation; and committed fraud. See 2010 WL 3362117 at \*1 (citing *Nat'l Union Fire Ins. Co. v. Puget Plastics Corp.*, 649 F.Supp.2d 613, 167-18 (S.D.Tex.2009)).

Puget was covered by a commercial umbrella policy issued by National Union Fire Insurance of Pittsburgh, Pennsylvania ("National Union"). National Union immediately filed a declaratory judgment action with the Southern District of Texas, seeking a determination that it had no duty to defend or indemnify Puget for its conduct giving rise to the state court action. During the course of this declaratory judgment action, Microtherm and Puget entered a settlement agreement, by whose terms Microtherm assumed Puget's rights under the National Union policy (for the purposes of clarity, Puget will still be identified as the insured). After the court held that National Union had no duty to defend or indemnify Puget, Puget filed a motion for a new trial, or, in the alternative, to alter or amend the judgment.

In support of its motion, Puget contested the court's determination that Puget's conduct and the resulting damage was not an "occurrence" under the policy. The policy defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in 'bodily injury' or 'property damage' neither expected nor intended from the standpoint of the insured." In considering whether the insured expected or intended the injury or damage, the court noted that Texas courts have applied an objective standard which looks to "what the insured knew at the time of the conduct in question, [and] then ask[s] whether a reasonable person, in similar circumstances and knowing what the insured knew, would have expected the damage or injury that resulted from the conduct."

Applying this objective standard to the case at hand, the court referred back to the state-court jury's finding that Puget had deliberately lowered the melt temperatures when making the plastic chambers, which in turn resulted in Microtherm's claimed damages. Because

a reasonable molder under those same or similar circumstances would have known that that lowering the melting temperature would cause damage to Microtherm's final product, the court affirmed that Puget's conduct did not constitute an "accident" under the policy.

In addition to a consideration of Puget's argument under the traditional, objective standard analysis, the court also considered the argument under a "chain of events" analysis. Under this test, in determining whether an "occurrence" has occurred in connection with an intentional act, the court first must identify the final intentional or deliberate act taken by the insured in the chain of events leading up to the damages at issue. If the insured's intentional conduct caused the damage, the court then asks if: (1) the act was an intentional tort committed by the insured; (2) the insured intended the resulting damage; or (3) the resulting damage was reasonably foreseeable by the insured. If the court answers "yes" to any of these three questions, no accident has occurred.

Applying this test, the court again asked: (1) whether Puget intended the resulting damage; or (2) whether the resulting damage was reasonably foreseeable from Puget's viewpoint. Referring back to its previous holding, the court noted that while Puget did not intend to cause the damage, such damage would have been reasonably foreseeable by a molder under the same or similar circumstances, and thus would have been reasonably foreseeable by Puget as well. Therefore, under Texas law, no accident had occurred.

#### D. Number Of Occurrences

##### 1. The Claims Did Not Arise From A Single 'Occurrence' When The Exposures Were 'Separate And Distinct'

In *Bausch & Lomb Inc. v. Lexington Ins. Co.*, 679 F. Supp.2d 345 (W.D.N.Y. 2009), the insured, a manufacturer of various brands of contact lens solutions, filed a declaratory judgment against one of its insurers, Lexington Insurance Company ("Lexington"), seeking a declaration that Lexington was obligated to provide coverage for more than 2,000 claims asserted by consumers alleging injuries arising out of the use of the insured's contact lens solutions. The claimants alleged

that they were subject to bacterial or fungal infections in their eyes because the solutions either fostered or failed to prevent such infections.

Lexington took the position that each alleged injury sustained by users of the insured's contact lens solutions constituted a separate "occurrence" and, as a result, Lexington agreed to provide coverage only when the specified limits of liability had been met for each occurrence. Bausch & Lomb, in turn, argued that the alleged injuries were not the result of multiple occurrences and, further, that Lexington's interpretation ignored a "grouping" provision in the policies that required Lexington to treat the injuries allegedly suffered by consumers as arising from a single occurrence.

Lexington issued three commercial umbrella policies to Bausch & Lomb that were in effect for the three calendar years between 2004 and 2006. Each of the policies had a \$25 million per occurrence and aggregate limit excess of certain retained limits specified in each of the policies. The retained limits for the 2004 and 2006 policies were \$2 million per occurrence with a \$4 million aggregate retained limit. The 2005 policy contained a retained limit of \$2 million per occurrence, and a \$2 million aggregate retained limit. The 2004 and 2005 policies also contained "maintenance retention obligations" of \$100,000 per occurrence once the aggregate limits had been reached. The 2006 policy contained a maintenance retention obligation of \$250,000 per occurrence. When Bausch & Lomb tendered the claims, Lexington advised not only that it deemed each individual claim to have arisen out of a separate occurrence, but also that it would only be obligated to pay on behalf of Bausch & Lomb judgments or settlements that exceeded the aggregate retained limits described above, subject to the applicable maintenance retention of either \$100,000 or \$250,000.

The 2005 and 2006 Lexington policies defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The definition of "occurrence" included a grouping provision that further provided that "[a]ll such exposure to substantially the same general harmful conditions shall be considered as arising out of one Occurrence." The definition of "occurrence" in the 2004 policy was not materially different, and the parties agreed that the minor differences had no effect on the term's meaning.

The parties disagreed as to how the above definition of "occurrence" — which the court found was unambiguous under New York law — should be applied. Lexington argued that the language evinced the parties' understanding that injuries such as those alleged by the users of the insured's contact lens solutions constitutes separate occurrences, and that each occurrence is subject to the policies' respective limitations provisions. Bausch & Lomb, in contrast, contended that all exposures to its contact lens solutions constituted a single occurrence based on the policies' grouping provision. As explained below, the district court ruled that the insured had not met its burden of establishing either that the claims arose out of a single occurrence, or that the claims arose out of multiple occurrences that were subject to the Lexington policies' grouping provisions.

In ruling that the claims were not the result of a single occurrence, the district court noted that in order to constitute an occurrence under the Lexington policies, the continuous or repeated exposure to a harmful condition must have been the result of an "accident." According to the court, there was no allegation or evidence that the claimants' contact lens solutions were tainted by the "accidental inclusion or exclusion of any ingredient, or unintended presence of a foreign substance" nor was there any allegation that the solutions were not manufactured as intended. Therefore, the court concluded it was the "exposure by consumers to the product" — not the manufacture, sale or distribution of the product — that constituted the "accident."

The district court noted that its determination that the individual exposure to the product constituted the accident or occurrence was consistent with the "unfortunate events" test applied under New York law. This test is used to determine whether a set of circumstances amounts to one accident or occurrence or multiple accidents or occurrences. In applying this test, courts determine "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum."

Against the backdrop of New York's unfortunate events test, the *Bausch & Lomb* Court noted that there was no dispute that the incidents giving rise to liability (i.e., exposure to the insured's contact lens solutions) "occurred in thousands of different locations, at thousands of different times, as result of different solutions

manufactured at different times and in different locations.” The court noted that the claimants came from several different states and countries, alleged different types of injuries, and alleged that their exposure to the insured’s products took place at various times, in various locations over the course of several years. For this reason, the district court concluded that the incidents giving rise to the injuries lacked a close temporal and spatial relationship and, therefore, the claims against the insured do not arise from a single occurrence.

With respect to the Lexington policies’ grouping provision, the district court held it was inapplicable on the facts of this case. As the court explained, by including a provision in the policy providing that “[a]ll . . . exposure to substantially the same general conditions shall be considered as arising out of one ‘Occurrence,’” the parties merely confirmed that “one individual’s repeated or continuous exposure on multiple occasions to a harmful condition will not be treated as separate occurrences, but instead, will be deemed to be the result of one occurrence.” Accordingly, the court concluded that it could not be said that the claimants were exposed to the same or substantially the same harmful conditions. The court held, “. . . it was each individual’s exposure to the solution, under conditions unique to each individual, that constituted the accident that caused the injury.” Because these exposures were “separate and distinct,” the court held that they could not be combined under the Lexington policies’ grouping provisions.

## **2. There Were ‘Two Distinct Places Of Injury And, Thus, Two Separate Occurrences’ Of *E. Coli* Induced Illnesses**

In another 2010 case addressing the issue of multiple occurrences, *Republic Underwriters Ins. Co. v. Moore*, No. 09-CV-741, 2010 WL 4365566 (N.D. Okla. Oct. 28, 2010), a restaurant-insured sought coverage under a commercial general liability policy issued by Republic Underwriters Insurance Company (“Republic”) and a commercial umbrella policy issued by Southern Insurance Company (“Southern”) for numerous bodily injury claims against the insured. The claims against the insured arose from an outbreak of *E. coli* which caused the death of one person and the illnesses of 341 more after they ate contaminated food originating from the restaurant. The contaminated food had been served to customers on the restaurant’s premises and to

twenty-one attendees of a private church tea that was catered by the restaurant and served at the church.

The Republic primary policy had a per occurrence limit of \$1 million, a general aggregate limit of \$2 million, and a “products-completed operations” aggregate limit of \$2 million. The Southern umbrella policy had an aggregate of \$2 million. The insurers filed an interpleader action against the insured and various third-party claimants seeking a declaration that the *E. coli* claims resulted from one, uninterrupted and continuous “occurrence” as defined by the Republic and Southern policies. Alternatively, the insurers argued that should the court determine there to be more than once occurrence, the Republic policy’s \$2 million products-completed operations aggregate limit should apply, not the policy’s general aggregate limit. Significantly, the Republic primary policy provided that the policy’s general aggregate limit was inapplicable to bodily injury claims within the products-completed operations hazard.

The insureds, in turn, argued that: (1) the *E. coli* claims resulted from multiple occurrences; (2) the Republic policy’s \$2 million general aggregate limit applied to claims based on the consumption of contaminated food at the church tea catered by the restaurant; (3) the Republic policy’s \$2 million products-completed operations aggregate limit applied separately to bodily injury claims arising from the consumption of contaminated food on the restaurant’s premises; and (4) the Southern policy’s \$2 million aggregate limit of liability applied to all injuries caused by the consumption of contaminated food on and off the restaurant’s premises.

The policies at issue defined “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The court noted that while there was no Oklahoma law on point, the Tenth Circuit Court of Appeals had predicted that Oklahoma Courts would follow the majority rule that the number of occurrences is determined “by looking to the cause or causes of the resulting damage, rather than to the number of individual claims or injuries (the ‘effect’).” Republic and Southern argued that the “cause” of the *E. coli* outbreak and resulting injuries was the “preparation, handling or storage of contaminated food” by the restaurant during a discrete time period and, therefore, the restaurant was only liable for one occurrence under the policies. The

insureds, on the other hand, argued that the “deliberate sale and service of food which was contaminated due to the [restaurant’s negligence] in failing to either prevent, discover or eliminate the contamination and not serve the contaminated food” was the immediate cause of each person’s injury and, therefore, a separate occurrence.

In deciding the number of occurrences issue, the *Moore* Court relied on the Tenth Circuit’s analysis in *Farmers Alliance Mutual Ins. Co. v. Salazar*, 77 F.3d 1291, 1296 (10th Cir. 1996). In *Salazar*, the Tenth Circuit instructed that in determining whether a bodily injury was “caused by an occurrence,” the question of whether there was an “occurrence” should be resolved by focusing on the injury and its immediately attendant causative circumstances. According to the circuit court, “[i]f the time and place of an ‘occurrence’ are determined by the time and place of the injury, then the acts which are said to constitute the ‘occurrence’ must necessarily fall within the same temporal and spatial parameters.”

Based on the foregoing, the district court determined that there were “two distinct places of injury and, thus, two separate occurrences.” According to the court, the undisputed facts at least establish two separate occurrences of *E. coli* induced illnesses covered under the policies resulting from: (1) the negligent contamination of food prepared and served at the restaurant; and (2) the negligent contamination of food prepared and served at the church tea. The court further explained that regardless of any “temporal overlap between these two occurrences,” the geographical distinction between the physical location of the restaurant and the Baptist church where the church tea took place is “appreciable” and “concrete.”

In ruling that there were multiple occurrences, the district court also concluded that all of the claims against the insured were subject to the \$2 million products-completed operations aggregate limit in the Republic primary policy, not the general aggregate limit. An endorsement to the Republic policy generally provided that the products-completed operation limit applied to “bodily injur[ies] . . . arising out of [the insured’s] products’ . . . sold, handled or distributed [i]n connection with the conduct of [operating a restaurant] . . . , when conducted by [the insured] or on its behalf.” In ruling that the products-completed operations aggregate limit applied to all of the bodily injury claims, the court

rejected defendants’ argument that the catering of food off premises at the church tea was not done “in connection with” the conduct of the insured’s business as a restaurant.

### 3. Production Of A Defective Plumbing System Constituted One ‘Occurrence’ Based Upon Cause-Based Theory

In *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254 (Del. June 3, 2010), the Supreme Court of Delaware applied the cause-based theory of determining the number of occurrences and held that an insured manufacturer’s production of a defective plumbing system product constituted one “occurrence.” The court also upheld the motion judge’s interpretation of a non-cumulation clause and reversed the motion judge’s calculation of pre-judgment interest.

Between 1983 and 1989, E.I. du Pont de Nemours & Company (“du Pont”) developed and sold an acetal resin product to bridge connections between metal and plastic for use in polybutylene plumbing systems. When complaints that the product was inherently defective arose, du Pont ceased selling the product to polybutylene manufacturers, and incurred liabilities in excess of \$239 million in the course of defending and settling claims involving leaking plumbing systems.

Under its insurance program, du Pont maintained \$50 million self-insured retentions, which applied on a per occurrence basis, as well as multiple excess policies to cover losses exceeding the retentions. Stonewall Insurance Company (“Stonewall”) provided \$5 million in excess coverage to du Pont in 1985. After recovering from its other carriers, du Pont demanded a full-limits recovery under Stonewall’s policy. Stonewall denied coverage, asserting that multiple occurrences had taken place and that du Pont had not satisfied the applicable \$50 million retentions. Stonewall also took the position that the policy’s non-cumulation clause negated its coverage obligations, as du Pont had already recovered from other insurers that were on the risk prior to 1985.

The motion judge found that only one occurrence had taken place and that the non-cumulation clause did not reduce Stonewall’s liability for the 1985 policy period. Thus, the motion judge entered judgment in du Pont’s favor for the full limit of Stonewall’s policy, and

awarded pre-judgment interest from the date du Pont filed its initial complaint. On appeal, the Supreme Court of Delaware affirmed the motion judge's number of occurrences and non-cumulation clause rulings, but reversed on the date from which pre-judgment interest should be awarded.

In reaching its conclusion, the court reasoned that the number of occurrences is determined by the cause or causes of the resulting injury. Stonewall argued that the problems with du Pont's products were caused by two separate defects and that there were 469,000 claims for damages resulting from the defective products. Thus, Stonewall contended there were multiple occurrences. The court rejected Stonewall's argument, noting that in a products liability case, the proper focus is on production and dispersal, not the location of the injury or the specific means through which the injury took place. The court further noted that Stonewall's position with respect to the number of occurrences would render coverage under the policy meaningless, as du Pont would be required to incur almost \$24 trillion in damages before Stonewall's obligation was triggered. Accordingly, the court found there was just one occurrence and affirmed the motion judge on this issue.

With respect to application of the non-cumulation clause, the court stated that the motion judge utilized an "all-sums" allocation methodology, that no party objected to this methodology and that under such an allocation methodology, du Pont was entitled to choose a single policy period of coverage from which to seek indemnity and defense costs. Because du Pont selected the 1985 policy period from which to seek indemnity and defense costs, Stonewall was obligated to respond after exhaustion of the \$50 million retention and after deduction of the amounts du Pont had already recovered from the carriers on the risk in the 1983 and 1984 policy periods. Because this amount fell within the Stonewall's coverage, the court concluded the motion judge properly applied the policy's non-cumulation clause, and therefore, affirmed.

#### **4. Where One Accident Is The Sole Proximate Cause, There Is Only One 'Occurrence' Regardless Of The Number Of Claims**

In *Westchester Surplus Lines Ins. Co. v. Maverick Tube Corp.*, 2010 WL 2635623 (S.D. Tex. 2010) the United States District Court for the Southern District of Texas,

applying Missouri law, held that where one accident is the sole proximate cause of all resulting damages, there is only one "occurrence," regardless of the number of claims resulting from that single act.

Maverick Tube Corporation ("Maverick") manufactured drill casings, which it sold to its distributor to be shipped to Dominion Exploration and Production Company ("Dominion") for use in multiple gas wells. After incorporating the casings into four of its wells, Dominion reported that the wells failed, allegedly due to Maverick's negligent manufacture of the casings. Dominion sent a demand letter to Maverick alleging breach of contract, and offered to complete a release of all claims associated with the defective casings in exchange for \$9,802,506.

Eager to respond to the settlement offer from one of its best customers, Maverick forwarded Dominion's letter to Westchester Surplus Lines Insurance Company ("Westchester"), with whom it held a commercial general liability policy and an umbrella policy. Westchester reserved its rights under the policy and proceeded to investigate the claim. Thereafter, Westchester denied coverage on the basis that there had been no "occurrence" as defined by the policies. The CGL policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The umbrella policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions that results in 'Bodily Injury' or 'Property Damage' that is not expected or intended by the 'Insured.'" Westchester filed a declaratory judgment action in the U.S. District Court for the Southern District of Texas, and Maverick filed a breach of contract action against Westchester in the Eastern District of Missouri, which was transferred to the Southern District of Texas and consolidated. The parties filed cross-complaints for summary judgment.

The district court judge determined that Dominion's claim against Maverick was not an "occurrence" under the policies, and accordingly granted Westchester's motion for summary judgment. Maverick appealed to the Fifth Circuit, which reversed, holding that the casing failure was an occurrence. The case was then remanded to the district court for a determination of damages.

Because the policies required Maverick to pay a self-insured retention for each occurrence, in determining the damages on remand, the district court was faced with determining whether failure of the wells was triggered by a single occurrence or by multiple occurrences. The court noted that both Missouri courts have applied a "cause" analysis when determining the number of occurrences. Under this approach, courts determine whether there was one "accident" based on whether there was one negligent act or omission serving as the sole proximate cause of the resultant damages.

Here, the court reasoned that the event giving rise to Maverick's liability was its defective manufacturing of the drill casing, and this manufacturing defect was the proximate cause of all resulting claimed damages. Because Maverick would have been liable for the defectively manufactured casing regardless of who sold the product or who installed it, neither the casing's sale nor its installation interrupted the causal chain, and Maverick's defective manufacturing constituted a single occurrence.

#### **E. Application Of Fungi/Bacteria Exclusion**

In *Amco Ins. Co. v. Swagat Group, LLC*, No. 07-3330, 2010 WL 325937 (C.D. Ill. Jan. 21, 2010), the United States District Court for the Central District of Illinois examined whether a commercial general liability insurer had a duty to provide defense and indemnification for two lawsuits against policyholders regarding alleged exposure to bacteria in a hotel pool and hot tub.

The first lawsuit was brought by an individual who contended that she developed Legionnaire's disease and sustained permanent injuries as a result of the exposure. The second lawsuit was brought by a relative of an individual who died of Legionnaire's disease allegedly caused by the exposure. In response to the policyholders' demand for defense and indemnification for these lawsuits, the policyholders' liability insurer filed a declaratory judgment action, contending that coverage was precluded by exclusionary clauses in the two subject policies stipulating that coverage was not provided for "[t]he actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any 'fungi' or bacteria."

The policyholders responded by relying upon the testimony of a representative of the policyholders, in

which the representative indicated that he directed the insurance agent to provide "full coverage" and stated that the agent did not disclose the existence of the fungi/bacteria exclusions. The policyholders contended that in light of these facts, the insurer was estopped from enforcing the exclusions and the policies must be reformed to eliminate the exclusions.

In analyzing the insurer's motion for summary judgment, the court held that the policyholders' equitable estoppel claim was without merit, as the subjective intent of the policyholders regarding the scope of coverage was rebutted by the clear and unambiguous language of the policy exclusions. In so doing, the court observed that the policyholders continued to renew the subject policies after a letter from the insurer's claims handling service made the policyholders aware of the fungi/bacteria exclusions. The court also held that the policyholders' purported request for "full coverage" was too vague to support reformation of the subject policies.

The court also rejected the argument of the plaintiffs in the underlying lawsuits (appearing as co-defendants in the declaratory judgment action) that the exclusionary clauses should be disregarded to reflect their "reasonable expectations" of coverage. The court noted that under Illinois law, the doctrine of reasonable expectations could only be utilized to interpret insurance policies when the policy language was ambiguous. Finally, the court rejected the underlying plaintiffs' contention that the fungi/bacteria exclusions should not be applied to "injuries resulting from everyday activities gone awry." While acknowledging that Illinois courts had interpreted standard pollution exclusions in such a manner, the court noted unlike the broad term "pollution," "bacteria" was a scientific term that undoubtedly applied to the instant case.

The court therefore granted summary judgment in the insurers' favor.

#### **F. Court Finds Economic Loss Doctrine Bars Product Liability Claim From Sophisticated Business Entity**

In *Travelers Indem. Co. v. Dammann & Co. Inc.*, 594 F.3d 238 (3rd Cir. 2010), the Third Circuit Court of Appeals held that New Jersey's economic loss doctrine barred a buyer's product liability claim where there was no indication that buyer and seller were anything other than sophisticated players on equal footing, and buyer

sought damages for losses that were traditionally recoverable in contract.

In *Dammann*, the insured was a producer of raw foods, including vanilla beans. The insured agreed, via a written contract, to sell vanilla beans to International Flavors & Fragrances Inc. (“IFF”) and delivered the shipments in January 2004. IFF incorporated the beans into its vanilla extract, which it had sold to several customers. Thereafter, IFF learned that the vanilla beans were contaminated with mercury. IFF sent a letter to the insured in May 2004, claiming damages in connection with the contaminated beans. In turn, the insured sought coverage from its insurer, Travelers Indemnity Company (“Travelers”), under a commercial general liability policy for liability arising out of IFF’s claim.

As a result of the claimed damages, Travelers brought a declaratory judgment action against the insured and IFF in the United States District Court for the District of New Jersey, seeking a judicial determination that it was not obligated under the insured’s policy to cover any claims asserted against the insured by IFF. In February 2008, IFF sought leave to file cross-claims against the insured for breach of express warranty, breach of implied warranty, and product liability. The trial court held that because IFF’s claims were contractually based, the Uniform Commercial Code (“UCC”) and its four-year statute of limitations were applicable. Because the claim accrued when the insured delivered the beans in January 2004, the trial court held that IFF’s cross-claims were time barred.

On appeal, the insured argued its product liability claim sounded in tort, not contract, and as a result, the longer statute of limitations period for torts applied. On appeal, the Third Circuit rejected this argument. The Court of Appeals first recognized that the New Jersey Courts have not directly addressed the interaction between the New Jersey Product Liability Act (“NJPLA”) and the economic loss doctrine. The NJPLA provides that a manufacturer or seller of a product shall be liable if the claimant proves the product causing the harm was not reasonably fit, suitable or safe for its intended purpose. The statute defines “harm,” in pertinent part, as “physical damage to property, other than to the product itself.” Conversely, the economic loss doctrine “defines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort.”

The Court of Appeals noted that there is a tension between the economic loss doctrine and the NJPLA. Specifically, the economic loss doctrine precludes tort claims for purely economic loss without reference to whether the loss stems from damage to “the product itself” or “other property.” At the same time, the NJPLA permits a plaintiff to pursue a tort remedy in the event of harm to “other property” without reference to New Jersey’s preference that a tort action is separate and distinct from a contract action. Nevertheless, after reviewing New Jersey law, the Third Circuit held that the New Jersey Supreme Court would not permit IFF to pursue its product liability claim under the circumstances of the case.

In reaching its decision, the Third Circuit recognized that New Jersey state courts have consistently held that contract law is better suited to resolve disputes between parties where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities with equal bargaining power and that could have been the subject of their negotiations. To this end, the Court held IFF’s damages fall squarely within the ambit of economic losses, because the damages alleged by IFF include: the scrapping of contaminated finished flavoring products; claims from customers who bought the products; testing costs; plant cleaning costs; internal labor and administrative costs; and lost profits. As such, if IFF was allowed to pursue tort remedies for its damages that are recoverable under the UCC recovery and for which IFF could have contractually shielded itself, it would effectively authorize duplicative recovery. Moreover, the Court of Appeals recognized the availability of a tort remedy for IFF’s product liability claim would be particularly anomalous under the facts of the case, because the parties did in fact include such protection in their contract in the form of indemnification and warranty clauses, thus evidencing their ability to negotiate and to provide for the allocation of risk and the limitation of liability.

### G. Advertising Injury

In *Giovanni Cosmetics, Inc. v. Arch Ins. Co.*, No. CV 09-5548 GAF (RZx)(C.D. Cal. Feb. 5, 2010), Giovanni Cosmetics (“Giovanni”) brought a declaratory judgment action against its liability insurance carriers seeking a determination of its rights under its policies after its insurance carriers denied coverage with respect to an underlying action brought by a competitor.

Giovanni markets personal care products and labels them as “organic.” A competitor of Giovanni, Dr. Bonner’s Magic Soaps (“Magic Soaps”) also sells organic personal care products. In its action against Giovanni, Magic Soaps alleged that Giovanni improperly labeled and advertised its products as “organic” when the products do not actually meet U.S.D.A. standards.

After Giovanni was served with an injunction brought by Magic Soaps in an effort to prevent Giovanni from labeling and advertising its product as organic, Giovanni tendered the matter to its commercial general liability insurer Arch Insurance Company (“Arch”) and to National Union, which provides Giovanni with excess coverage. Arch and National Union declined to defend or indemnify Giovanni on the ground that the claims asserted by Magic Soaps did not fall within the ambit of the policies’ advertising injury coverage. More specifically, they contended that advertising injury occurs only where the insured uses the advertising idea of another, and that the term “organic” was not Magic Soaps.

Upon consideration of Motions for Summary Judgment filed by Arch and National Union the court in *Giovanni* agreed with the carriers. The court held that Magic Soaps had not claimed the wrongful “use of another’s advertising idea” in the underlying complaint. According to the court, the “use of another’s advertising idea requires more than the mere use of a generic term to describe one’s products.” Instead, according to the court, in the context of claims such as the one here, there must be a knowable relationship between the “advertising idea of another” and the offending advertiser’s product.

As a result, the court concluded Magic Soaps had not alleged that Giovanni misused its Magic Soaps’ advertising idea. Instead, the court held that Magic Soaps had simply claimed that Giovanni had misused a marketplace labeling term promulgated by the third-party U.S.D.A, the result of which was a potential unfair advantage in the marketplace.

Consequently, the court granted the Arch-National Union Summary Judgment Motion and held that the allegations therein did not fall within the confines of the advertising injury coverage.

#### **H. Lawsuit Too Speculative To Determine Coverage Issues**

In *Cincinnati Ins. Co. v. Jianas Bros. Packaging Co.*, 2010 WL 2710732 (W.D. Mo. July 7, 2010), the policyholder, Jianas Brothers Packaging Co., was a manufacturer of a dairy shake product containing a dry milk powder manufactured by a third party, Plainview Milk Products Cooperative. After salmonella was detected at one of its plants, Plainview recalled numerous products containing the dry milk powder, including the dairy shake manufactured by Jianas Brothers. Two of Jianas Brothers’ customers were ordered to reimburse the government for the cost of replacing any recalled products, and the customers issued demand letters to Jianas Brothers requesting reimbursement of the amounts paid to the government.

The policyholder forwarded the demand letters to Cincinnati, its commercial general liability insurer. Cincinnati in turn filed a declaratory judgment action seeking a judicial determination of its rights and obligations under the policies. The court dismissed Cincinnati’s action, holding that it was not yet ripe for judicial determination. In so holding, the court noted that the federal declaratory judgment act, 28 U.S.C. § 2201, states that declaratory judgments actions cannot be used by a party to obtain an advisory opinion regarding a controversy that had not yet arisen. The court stated that since lawsuits had not yet been filed, Jianas Brothers’ potential liability was highly speculative. Therefore, Cincinnati’s duty to defend and/or indemnify Jianas Brothers was also too speculative to be determined, such that any decision by the court would amount to no more than an advisory opinion.

#### **I. Insurer Liable For Recall Claims Arising In Its Excess Layer**

In *Am. Ins. Co. v. St. Jude Medical, Inc.*, 2010 WL 3733009 (D. Minn. Sept. 20, 2010), St. Jude’s ran a clinical trial for Silzone-coated artificial heart valves. After a number of participants in the trial exhibited adverse results, St. Jude’s ended the trial and recalled all of its products coated with Silzone. St. Jude notified all of its insurers, including American Insurance Company (“AIC”), who issued a follow form excess policy. The underlying insurer determined that any claims by patients who developed complications from the heart valves would be covered under its policy, and would constitute a single occurrence.

AIC filed a declaratory judgment action seeking a determination that no bodily occurred within its policy period. The dispute involved an eight-layer, \$250 million products-liability insurance program for which AIC provided the sixth layer of excess insurance. The underlying policy stated that it only applied if bodily injury did not occur after January 31, 2000. They were first notified on January 21, 2000, about the possible bodily injury based on data from a trial with Silzone-coated products. There was also a phone log from January 28, 2000, indicating that a patient had contacted St. Jude's about compensation related to his silzone-coated valve. St. Jude's argued that all the claims arising out of Silzone products were aggregated into the policy period by the batch clause. AIC argued that the batch clause did not alter the policy's requirement that bodily injury occur prior to the expiration of the policy period. The court held in favor of St. Jude's, stating that AIC's interpretation of the batch clause would render the clause meaningless by placing a claim in one policy period while assigning bodily injury to another policy period.

AIC also argued that only claims for a particular defect would be covered. The batch clause defined a batch as all products with "the same known or suspected defect," and AIC asserted that since the definition uses the defect to identify the products included, only claims arising out of the specific defect should be covered. St. Jude's argued that the batch clause covers all Silzone-coated products, not just its artificial heart valves. The court agreed with St. Jude's, holding that the plain language of the batch clause clearly contemplates that once the batch of products is determined, the only question is whether the claim at issue involves a product contained in the batch. Since the court determined that all Silzone-coated products contained the same defect, the policy applied to all claims arising out of such products during the policy period.

In addition, AIC argued that St. Jude's was not entitled to coverage because it had not shown "proper" exhaustion of its underlying insurance. St. Jude's responded that the policy does allow AIC to inquire into the propriety of each claim made. The court agreed with St. Jude's, and held that the policy only required St. Jude to make a prima facie case that the underlying insurers made payments equal to their policy limits. Therefore, the court granted partial summary judgment to St. Jude's, holding that AIC was liable to St. Jude's for

payment of any claim arising from the Silzone-coated products that were litigated or settled in AIC's layer of excess coverage.

### III. First-Party Property Policy Coverage Issues

#### A. Coverage Excluded Due To 'Property Being Manufactured' Exclusion

In *JTC Industries, Inc. v. The Travelers Indem. Co. of America*, No. 09-CV-6331, available at 2010 WL 3522252 (W.D.N.Y. 2010), the Western District of New York held that the use of contaminated raw materials in the manufacture of business property is excluded from coverage by an insurance policy that excluded coverage for losses attributed to property that was being "processed," "manufactured," or "worked upon."

The insured, JTC Industries, Inc. ("JTC") was a manufacturer of treater rollers. Several of the rollers were damaged and rendered unusable as a result of the use of contaminated raw materials, which were supplied by a third-party, in the manufacturing process. The insured also claimed the contaminated raw materials damaged the equipment used to make the rollers, resulting in a halt of production.

JTC was insured under a Businessowners Property Insurance policy. JTC submitted a claim to its insurer, Travelers for the damaged rollers, repair and cleaning of the contaminated manufacturing equipment, and lost business income resulting from production delays. Travelers disclaimed coverage on grounds that the policy at issue excluded coverage for losses attributable to business property that was being "processed," "manufactured" or "worked upon." Travelers also cited to exclusions for losses attributable to contamination, or property damaged as a result of faulty or defective materials. Thereafter, the insured filed a declaratory judgment action seeking a declaration that the damages it sustained are covered under the policy.

Travelers subsequently moved for summary judgment, on the grounds that no material facts were in dispute, and, as a matter of law, it was entitled to judgment in its favor. In defending against summary judgment, the insured argued the policy provisions relied on by Travelers did not apply or were ambiguous.

The policy excluded from coverage the cost of correcting damage to property in cases where the damage is attributable to the property being “manufactured.” As such, the court found that the policy exclusion for damage to business property attributed to the property being “manufactured” was unambiguous, and clearly precluded the coverage sought by the insured for the damages it suffered when it used contaminated raw materials to manufacture its treater rollers. Because the damage to the treater rollers, and the equipment used to manufacture the rollers, was attributable to the rollers being manufactured by the insured, the policy exclusion expressly precluded coverage for damage to those rollers and to the equipment used to manufacture the rollers.

Despite the clear language of the exclusion, the insured argued that the damage to the rollers was not attributable to the manufacture of the rollers, but instead to the contaminated raw materials. In responding to this argument, the court cited to the well-established rule that when determining the cause of a loss for purposes of accessing insurance coverage, courts are to look at the specific incident giving rise to liability, and not to look to “some point further back in the causal chain.” As such, it was not the shipment of the contaminated raw material itself that caused damage to the rollers. Rather, it was the manufacture of the rollers, which manufacture included application of the raw materials to the rollers, that caused the damage to the rollers, and the machinery used to manufacture the rollers.

In its final analysis, the court rejected the insured’s argument that the policy exclusion was ambiguous. Instead, the court held that the clear and unmistakable language of the exclusion simply provides that damage attributed to the manufacture of business property is excluded. Any contrary reading would require Travelers to essentially become the guarantor of the insured’s products. Because the “property being manufactured” exclusion applied to the case, the court did not analyze the remaining exclusions invoked by Travelers.

#### IV. Specialty Policy Coverage Issues

##### A. No Summary Judgment For Insurer Regardless Of Misrepresentations

In *AXIS Ins. Co. v. Innovation Ventures, LLC*, 2010 WL 3124160 (E.D. Mich. Aug. 4, 2010), AXIS Insurance Company (“AXIS”) brought a declaratory judgment

against its insured seeking a declaration that the policy of insurance was void *ab initio* for various allegedly false material misrepresentations made on the application for insurance. The policy at issue was a multimedia liability policy, which provided defense and indemnification coverage for claims arising out of Innovation’s publication, broadcast or sale of information in connection with its advertising. Both parties filed motions for summary judgment. In its motion, AXIS argued that it was entitled to rescind the policy because Innovations falsely represented on its application that it operated regionally as opposed to internationally, that it had no previous claims or suits filed against it in the past five years, and that it had no knowledge of any potential claims arising out of the activities described in the policy.

The court began its analysis by noting that, in Michigan, the term material misrepresentation is defined as a false statement of a fact that, if communicated truthfully, would result in the carrier declining to provide coverage, or charging an increased premium for coverage. Regarding the geographic scope of Innovation’s operations, AXIS argued that Innovations’ representation that it “operates” in only five states was false because its products were advertised and sold in all fifty states, as well as internationally. The court held that summary judgment was inappropriate because the term “operates” was ambiguous as to whether it included advertising and sales activities, or whether it was limited to a company’s manufacturing and corporate facilities.

With regard to the question concerning previous claims, the court noted that Innovations did indeed make a false statement on its application because it was involved in three suits during the five years preceding its application with AXIS. In response to Innovations’ argument that it did not disclose these suits because they would not have been in the realm of coverage provided in the policy, the court also noted that the question was not limited in any such way. However, the court declined to enter summary judgment in AXIS’ favor, because an AXIS underwriter testified at her deposition that she would only expect relevant claims to be disclosed.

With regard to whether Innovations had knowledge of any potential claims that might arise under the policy, the court again noted that Innovations made a misrepresentation because, at the time that the policy was

issued, it was involved in a business dispute with a competitor involving potential patent infringement and an allegedly false advertising campaign initiated by Innovations. The court also noted that a claim that Innovations embarked on a false advertising campaign would clearly be within the scope of the policy's coverage. However, the court again declined to enter summary judgment in favor of AXIS because there were material issues of fact regarding the timing of the advertisement's release.

### **B. No Coverage In False Advertising And Deceptive Labeling Case**

POM Wonderful, LLC ("POM") and Welch Foods, Inc. ("Welch") are both producers of pomegranate juice. POM filed suit against Welch alleging false advertising and deceptive labeling. Welch labeled its pomegranate juice with prominently displayed pictures of pomegranates, but the primary ingredients in the Welch product were actually white grape and apple juice.

When POM sued, along with a class of putative consumers, Welch tendered the complaints to its insurers. Two of its insurers, Zurich and National Union denied coverage and declined to defend. Another one of its insurers, Axis Surplus Insurance Company ("Axis Surplus"), denied coverage under two policies, but agreed to defend under a third while reserving its rights. Welch then brought a declaratory judgment action against its insurers. *Welch Foods, Inc. v. National Union Fire Insurance Co.*, No. 09-12087-RWZ (D. Mass. Oct. 1, 2010).

Under Massachusetts law an insurer has a duty to defend an action when the allegations as contained in the complaint are reasonably susceptible to an interpretation that they state a claim covered by the policy terms. Further, the policyholder has the initial burden of proving coverage. Once this initial burden is satisfied, the burden shifts to the insurer to establish that a relevant exclusion applies.

First, the National Union policy covers loss arising from claims for any actual or alleged wrongful act of Welch. The policy defines "wrongful act" as "any breach of duty, neglect, error, misstatement, misleading statement, omission or act by" by Welch. However, an Antitrust Exclusion contained in the Welch-National Union Policy excludes claims "alleging, arising out of,

based upon or attributable to, or in any way involving either directly or indirectly, antitrust violations, price fixing, price discriminations, unfair competition, deceptive trade practices and/or monopolies, including actions, proceedings, claims or investigations related thereto."

The issue was whether the underlying claims of false advertising and deceptive labeling fell under the "unfair competition" or "deceptive trade practices" language as contained in the policy. The policy does not define either term. Welch claimed the exclusion should be limited to antitrust claims. However, the court disagreed, finding that the text of the antitrust exclusion was broad enough to include a variety of anti-competitive behavior.

Second, the Zurich policy covered injury arising out of "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services" and the "use of another's advertising idea in your advertisement." Here, Welch claimed that the actions by POM and the consumers both alleged that Welch disparaged POM's product by falsely advertising that Welch's product contained pomegranate juice, the result of which was damage to POM's reputation. POM's complaint alleged Welch attempted to "cash in on POM's idea of selling bottled pomegranate juice by marketing and selling to consumers products labeled as 'pomegranate juice' [and] that in fact [it] contain[s] little or no actual pomegranate juice." Because the advertisements at issue did not disparage POM or its products by asserting false claims about POM (Welch is alleged to have misstated the content of its own product), the court found that coverage for advertising injury was not applicable under the Zurich policy.

Third, the Axis Surplus policy afforded Welch Media Wrongful Act Coverage and Professional Services Wrongful Act Coverage. Media Wrongful Act coverage covers wrongs "in connection with the creation or dissemination of the Covered Media, or in connection with the creation or dissemination of Advertising Material relating to the Covered Media." Here, the court concluded that the underlying allegations do not arise from "errors or omissions in content in connection with the creation or dissemination of covered media or advertising material." In other words, the underlying

complaints did not allege a loss arising from the creation or dissemination of Welch's advertising material. The court also found that the underlying complaints did not claim disparagement or misappropriation.

The Axis Surplus policy defines a Professional Services Wrongful Act as "any actual or alleged negligent act, error or omission committed or attempted solely in the performance of or failure to perform Professional Services by any Insured in his, her or its capacity as such" and it defines Professional Services as "promotional and marketing services," including electronic and internet advertising. Here, the court found that the false advertising claims did not fall under this definition and it concluded that this provision is "usually intended to provide liability protection for insureds whose clients hire them to provide professional services." Further, the court intimated that professional services coverage is not intended to cover claims by competitors. Such claims, according to the court, "pertain to how the insured does business rather than breach of professional duties."

### **C. Court Dismisses Insured's Extra-Contractual Claims Against The London Market**

On February 1, 2010, the United States District Court for the Southern District of New York entered an order dismissing the extra-contractual claims an insured asserted under Texas law against Dornoch Limited (for and on behalf of the Underwriting Members of Lloyd's Syndicate 1209) ("Dornoch"). See *Siméus Foods Int'l, Inc. v. Dornoch, Ltd.*, No. 09 CV 7286 (S.D.N.Y. Feb. 1, 2010) (order granting motion to dismiss).

The dispute between the parties resulted from product contamination claims submitted under a Product Contamination Policy — Food and Beverage, which Dornoch issued to Siméus Foods International, Inc. ("Siméus"). The Policy contained a Choice of Law and Jurisdiction Clause, which provided that the Policy must be interpreted under New York law, and mandated that suits arising under the Policy be filed in a New York court.

Siméus alleged that it was a Texas corporation and that its principal place of business was located in the State of Texas. Siméus asserted several causes of action against Dornoch, including Violation of the Prompt Payment

of Claims Provisions in Chapter 542 of the TEXAS INSURANCE CODE and Violation of the Unfair Claims Settlement Practices Provisions in Chapter 541 of the TEXAS INSURANCE CODE. Siméus also included a Texas remedy for its requested relief by contending that it was entitled reasonable attorneys' fees and expenses pursuant to Section 38.001 *et. seq.* of the TEXAS CIVIL PRACTICE AND REMEDIES CODE (BREACH OF CONTRACT).

Dornoch moved to dismiss Siméus' Texas causes of action, arguing that the Policy mandated application of New York law, and that under New York law, contractual and extra-contractual claims arising under insurance policies are "inextricably intertwined." Dornoch also argued that because Siméus freely elected to purchase the Policy from a London-based insurer, the transaction was international, and therefore, the Policy's Choice of Law and Jurisdiction Clause was presumptively valid. Dornoch further asserted that by filing its suit in the United States District Court for the Southern District of New York, Siméus recognized the validity of the Policy's Choice of Law and Jurisdiction Clause.

Siméus opposed Dornoch's motion to dismiss by arguing that the Policy's Choice of Law and Jurisdiction Clause applied only to contractual claims arising under the Policy. Siméus also attempted to distinguish between construction of the Policy and enforcement of the Policy, asserting that the Policy's Choice of Law and Jurisdiction Clause applied only to construction of the Policy.

Judge Pauley granted Dornoch's motion to dismiss Siméus' Texas causes of action, finding that New York applied to both contractual and extra-contractual claims arising under the Policy. The court also found that Siméus would not be entitled to recover its attorneys' fees and costs under New York law. At oral argument on the motion to dismiss, Judge Pauley further noted that recovery for extra-contractual claims under New York law required a showing of repeated conduct and public impact.

In the *Siméus* decision, London market underwriters issued a policy insuring a Texas insured, which manufactured products in several different states. Although the insured attempted to take advantage of its home state's insurance coverage law with respect to extra-contractual claims, the policy's unambiguous choice

of law and forum selection clause required application of New York law in New York courts.

## **V. Conclusion**

There is a broad range of emerging product recall, food contamination and crisis management insurance coverage issues that insurers and insureds must address. Due to the climbing number of product contamination and recall cases, it is becoming increasingly important

that companies expand their traditional insurance portfolios in order to properly safeguard themselves in regard to these issues. Currently most of these cases are reaching the courts regarding insurance coverage issues under commercial general liability policies. It is evident from the nature of these cases that a focused insurance program is needed to address the unique issues that are created as a result of these crisis management events. ■