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COZEN O'CONNOR WINS UNITED STATES DISTRICT COURT JUDGMENT IN FAVOR OF INSURER ON FOOD CONTAMINATION – BUSINESS INTERRUPTION CLAIM

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On June 18, 2007, the United States District Court for the District of Colorado granted summary judgment in favor of Maryland Casualty Company, represented by Cozen O'Connor, holding that the business interruption clause in a first-party policy only provides coverage until the insured resumes operations, and does not provide coverage for market consequences resulting from the insured's temporary cessation of business. *Brand Management, Inc. et al. v. Maryland Casualty Company*, 05-cv-02293-REB-MEH (D. Colo. June 18, 2007). In so holding, the Court rejected the insureds' argument that they were entitled to coverage for their alleged loss of business income after the period their operations were suspended.

In *Brand*, the insureds operated a sushi-making business that suffered a *Listeria monocytogenes* ("Listeria") contamination incident that closed their business for a period of 15 days while their facility was cleaned and sanitized. The insureds did not dispute that their facility was free of Listeria and was able to operate as it had prior to the contamination on the date it reopened, but claimed that they were entitled to coverage until it moved to a new facility because its largest customer refused to continue purchasing their product until the insureds relocated. Alternatively, the insureds claimed that they were entitled to 30 days of additional coverage under the policy's Extended Period of Indemnity clause because their business was not operating at the same level as it had prior to the contamination incident. Because Maryland refused to pay the insureds for loss of business income after the date the insureds resumed operations at the facility, the insureds filed suit for breach of contract and bad faith breach of insurance contract.

The policy at issue provided coverage for the actual loss of business income the insureds sustained due to the necessary suspension of operations during the period of restoration so long as the suspension was caused by a direct physical loss of or damage to the property. Relying on a Fourth Circuit case, the insureds argued that the “due to the necessary suspension of operations” language only required that the lost income be traceable to the suspension of operations. The Court rejected this interpretation as unreasonable, holding that the policy unambiguously requires that (1) the claimed business income loss be causally linked to the necessary suspension of operations, and (2) it be sustained during the period of restoration. Although the phrase “necessary suspension of operations” was not defined in the policy, the Court relied on *stare decisis* in finding that it is generally understood to connote a total cessation of business activity. As such, the Court held that coverage was terminated under the business interruption clause once the insureds were able to resume operations.

The Court also rejected the insureds alternative argument that they were at least entitled to the additional coverage provided by the policy’s Extended Period of Indemnity clause, which is not triggered unless, following restoration of the covered premises, there is a continued “impairment of ‘operations.’” In rejecting that argument, the Court ignored the insureds’ claim that they lost customers as a result of the contamination and focused on the definition of “operations” in the policy, which means “business activities occurring” at the insureds’ property. Because there was no dispute that the insureds resumed full operation of their business, albeit with fewer customers, after their facility was free of *Listeria*, the Court held as a matter of law that no impairment of “operations” existed to trigger coverage under the extended coverage clause. As no genuine issue of material fact existed as to the insureds’ breach of contract claim, the Court concluded that their bad faith claim could not survive summary judgment under Colorado law.

The *Brand* decision will have a significant impact in the insurance industry by limiting food contamination claims, and other business interruption claims as well, to the period of time an insured’s operations are *completely* suspended. This decision is especially important because many policies that provide business interruption coverage do not define the phrase “necessary suspension of operations” and, therefore, it provides a well-defined benchmark for terminating coverage where an insured continues to suffer business losses after it resumes operations.

For a further analysis of the Brand decision and its impact on property insurers and, specifically, on the handling of business interruption claims, please contact Joe Bermudez, Chris Clemenson or Jason Melichar of Cozen O’Connor’s Denver, Colorado office. Cozen O’Connor is a nationally recognized leader in representing the insurance industry in all coverage areas, including food contamination claims.