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**FOOD CONTAMINATION COVERAGE ALERT**

**WHO CONTAMINATED MY CHEESE?**

**U.S. DISTRICT COURT OF COLORADO HOLDS THAT  
INSURED MUST PROVE LOSS OF CONTAMINATED  
CHEESE CAUSED BY FORTUITOUS EVENT**

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Senior District Judge Richard Matsch recently rejected an insured's argument that it was not necessary for it to prove an identifiable event causing the contamination of 8 million pounds of cheese stored in the insured's warehouse. In *Leprino Foods Co. v. Factory Mutual Insurance Co.*, No. 02-cv-01559 (D. Colo. July 31, 2007), the cheese manufactured by the insured, Leprino Foods Co. ("Leprino"), developed an off-flavor and contained high concentrations of naturally occurring compounds that provide flavor in fruit drinks and similar products. Leprino sought to recover its \$13 million loss from an all-risk liability policy issued by its insurer, Factory Mutual Insurance Company ("Factory Mutual"). Factory Mutual denied coverage under the policy's contamination exclusion, which excluded coverage unless such damage directly results from other physical damage not excluded.

In its motion for summary judgment, Leprino argued that the condition of the warehouse, which was poorly kept and contained open vats and spilled fruity concentrate, qualifies as "other physical damage" and that it was not required to prove an identifiable event causing the contamination. In rejecting Leprino's argument, the Court recognized that every all-risk insurance policy contains the implied requirement that the loss be fortuitous and that the insureds bear the burden of proof in proving a fortuitous loss. Significantly, the Court held that Leprino had not met its burden to prove that the loss was fortuitous by the mere storage of other food products with the cheese. Rather, the Court concluded that Leprino was required to establish that some event or condition in the warehouse caused the contamination.



The *Leprino Foods* decision is significant in that it held the insured to its burden of establishing that the loss was caused by a fortuitous event even where the insurer's denial of coverage is based upon an exclusion. Although an insurer undoubtedly bears the burden that an exclusion applies, an insured is not relieved of its obligation of identifying the cause of the purported fortuitous loss.

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

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