



Weekly Law Resume

A Newsletter published by Low, Ball & Lynch
Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

Issue By: DAVID BLINN

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Insurance Coverage - "Insured Event"

Fresh Express, Inc. v Beazley Syndicate 2623/623 At Lloyd's, et al.

Court of Appeal, Sixth District (October 4, 2011)

Many manufacturers of consumer goods will purchase specific policies to cover losses associated with tampering or contamination claims. This case considered the definition of "insured event" under one such policy stemming from an E. coli outbreak related to spinach in 2007.

In 2006, Fresh Express was the largest producer of bagged spinach in the United States, and Dole was the only other producer with a large market share. Fresh Express' primary spinach supplier was Fresh Farms. On occasion, when demand was greater than Fresh Farms could meet, Fresh Express would make "spot purchases." Its own procedures required that these purchases be from certified suppliers that it knew met its requirements. Certification could not be granted if produce grew within one mile of a cattle yard, and also required a pre-harvest food safety audit be performed on the farm. In contrast to this requirement, between July 31, 2006 and August 21, 2006, Fresh Express made spot purchases from two producers who were not among their certified growers. One of these had not been safety audited, and another had certain produce grown within a mile of a cattle yard.

In September of 2006, numerous cases of E. coli infections in multiple states were reported. They were linked to the same strain of E. coli, and a number of infected patients reported having consumed Dole bagged baby spinach in the week before they became ill. The FDA became involved as the number of cases grew, and on September 14, 2006, it issued a "no consumption advisory" advising that "consumers not eat bagged fresh spinach" due to an outbreak of E. coli "possibly" linked to the consumption of bagged fresh spinach. Within 24 hours, bagged spinach had been removed from all grocery store shelves. By the end of September, it was determined that all of the E. coli cases came from the

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same farm that had supplied only Dole, and no cases of E. coli were linked to Fresh Express or its suppliers.

Fresh Express had purchased a "malicious contamination, accidental contamination and products extortion" policy from Beazley Syndicate 2623/623 at Lloyd's and QBE Insurance (Beazley). The policy had limits of \$12,000,000. The policy provided that the carrier would "reimburse [Fresh Express] for losses...arising out of Insured Events...incurred by [Fresh Express] only where such losses arise because of ...Accidental Contamination." "Accidental Contamination" was further defined by the policy as "[e]rror by [Fresh Express] in the manufacture, production, processing, preparation, . . . of any Insured Products . . . which causes [Fresh Express] to have reasonable cause to believe that the use or consumption of such Insured Products has led or would lead to" bodily injury." Fresh Express made a claim to Beazley for its product losses and other damages, which Beazley denied.

Fresh Express filed an action for breach of contract and breach of the covenant of good faith and fair dealing. Fresh Express alleged that its own violation of company policies in making the purchases from the two farms that were not certified were "errors" under the policy which gave Fresh Express "reasonable cause to believe" that its products were "partially responsible for the E. coli outbreak. Fresh Express sought the policy limits of \$12,000,000. At trial, Fresh Express' two damage experts testified that Fresh Express suffered \$18.8 million in losses between September, 2006 and December, 2006 "attributed to the E. coli outbreak."

The trial court ruled in Fresh Express' favor. It determined that the losses were not caused by the FDA Advisory or a loss of public confidence, but instead were ultimately caused by the E. coli outbreak itself, which the court found to be the "Insured Event." The carrier appealed.

The Court of Appeal reversed, finding that the trial court had misinterpreted the meaning of the policy when it concluded that the E. coli outbreak was an "Insured Event" under the policy's coverage for Accidental Contamination." Here, the E. coli event itself was not an insured event, because it was not "the direct result of an error by Fresh Express." Rather, the outbreak was the result of contaminated spinach that was not bought or sold by Fresh Express. The trial court was thus wrong in its determination that the E. coli outbreak itself was an "Insured Event."

In addition, while there was no question that Fresh Express' violation of its own standards in making these spot purchases were errors which might amount to an "Insured Event" of "Accidental Contamination," there was no evidence that the losses arose from this. Instead, at trial, Fresh Express' experts had denied making any attempt to relate the

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damages to Fresh Express' own errors, and instead indicated that they were due to the E. coli outbreak itself

The trial court's judgment was reversed in favor of a judgment for dismissal for the insurance carrier.

COMMENT

In policies for accidental contamination, there must be a link between an erroneous act of the insured and the losses claimed. It is not enough the insured's actions were also negligent, unless these were an actual cause of those damages.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/H035246.PDF](http://www.courtinfo.ca.gov/opinions/documents/H035246.pdf)

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