

Stunted-Chicken Ruling Hatches Fight Over Defect Exclusions

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A New Jersey appeals court's Thursday ruling that adverse side effects caused by chicken feed additive are covered property damage chips away at precedent long relied upon by insurance carriers in product defect cases, but the court's new test for how an exclusion for impaired property is applied sets up fierce battles between insurers and policyholders, experts say.

In a published decision, a panel of the state Appellate Division held that, contrary to a trial court's conclusions, the stunted growth suffered by chickens that ingested policyholder Phibro Animal Health Corp.'s additive constitute an accidental "occurrence" and "property damage" under Phibro's commercial general liability policy with an American International Group Inc. unit.

Several of Phibro's customers alleged that the additive, which was designed to ward off a parasitic disease, stunted their chickens' growth, resulting in losses in the form of reduced meat output and higher processing costs.

The panel disagreed with the lower court's finding that the New Jersey Supreme Court's 1979 ruling in the case of *Weedo v. Stone-E-Brick* supports the position that claims for breach of contract, without the potential for tort liability, are not occurrences under a CGL policy. According to experts, the appellate panel's decision is the latest in a recent string of rulings diminishing the precedential value of *Weedo*, which involved policy language that is no longer in use.

"The decision is also notable because it reminds that 'physical damage' doesn't mean only that damage which is obvious and visible, but also includes property that has lost some of its use, value or function," said Sheri Pastor, leader of McCarter & English LLP's insurance coverage group.