

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

---



Randy J. Maniloff  
maniloffr@whiteandwilliams.com

Notes: Please see below for the Coverage College Epilogue and Seeking Your Help with the 2<sup>nd</sup> edition of "General Liability Insurance Coverage: Key Issues in Every State."

October 15, 2011

## Magic Mushrooms: Florida District Court Opens Its Mind Wide Open To The "Fungi" Exclusion

I'm easily fascinated. This may explain why I can't walk past a display of Mexican jumping beans without making a purchase. I'm also fascinated about insurance coverage – and a decision this week from a Florida District Court was as surreal as any I've ever seen. And I read a lot of coverage cases. Between research for "Key Issues" and *Binding Authority* I've read about 8,000 coverage cases, give or take, in the past 4 years alone. My friends, this one gets the award.

At issue in *Westport Insurance Corp. v. VN Hotel Group, LLC* was the applicability of the Pollution Exclusion and Fungi or Bacteria Exclusion. The claim involved coverage for wrongful death under the following circumstances:

A guest at the Quality Suites hotel used the spa tub located in a courtyard on hotel property but outside of the hotel building. The spa tub contained Legionella bacteria. Due to the use of the spa tub, the guest contracted Legionnaires' disease, which resulted in his death. Sadly, these spa-Legionnaires' disease claims are not that infrequent.

Westport Insurance issued a CGL policy to VN Hotel. Nobody disputed that the death constituted "bodily injury" and was caused by an "occurrence." So far so good. At issue was the applicability of the Pollution Exclusion and Fungi or Bacteria Exclusion

The Fungi Exclusion is where the Wow moment takes place. But first, briefly, notwithstanding that Florida courts have issued umpteen decisions that uphold the Pollution Exclusion in the context of non-traditional pollution, the court concluded that the Pollution Exclusion did not apply. The court's rationale was as follows:

[I]t is not unreasonable to classify bacteria as "contaminants" in the abstract. However, the Policy language specifically requires contaminants to be "solid, liquid, gaseous or thermal" and Legionella

bacteria are "living organisms [which are] not readily classified as "solid, liquid, gaseous, or thermal" substances."

There was a little more to the court's discussion of the Pollution Exclusion but that's not what we're here to discuss.

The court next turned to the Fungi or Bacteria exclusion. The exclusion provided as follows:

"Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage. (emphasis added).

The Court's main holding was that the exclusion did not apply because the spa tub did not constitute a "structure" within the meaning of the Policy. The court went on for a little bit discussing why that was so.

Now, the Wow moment. The court then held that, "even if the Fungi or Bacteria Exclusion did apply, the Policy contains an exception to the Fungi or Bacteria Exclusion ('the Consumption Exception') that would impose a duty to indemnify on Westport." The Consumption Exception provides that the Fungi or Bacteria Exclusion "does not apply to any 'fungi' or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption."

While I don't have the drafting history of the Consumption Exception, I'm pretty confident saying that it is intended to mean that the Fungi or Bacteria Exclusion does not apply to eating mushrooms or other edible items that contain fungi – like if you ate the cream cheese that's been in the refrigerator too long. I just Googled it and there are loads of edible fungi.

But the Florida District Court interpreted the "Consumption Exception" just a tad broader than that. It held that water in a hotel hot tub, from which a bather allegedly contracted Legionnaires' disease, is a good or product intended for bodily consumption under the Consumption Exception. As the court explained, in this Alice and Wonderland moment:

***A good is something that has economic utility or satisfies an economic want and consumption is the utilization of economic goods in the satisfaction of wants. Hotel guests bathing in a hot tub consume the water because they enter the tub to satisfy a desire or want and such consumption is "bodily" because the utilization in the satisfaction of wants is relating to the body.***

As my favorite state Supreme Court justice once said: "I remain troubled by the way the Court goes about reading insurance policies, which we constantly reiterate must be interpreted and construed like other contracts, but which hardly ever are because courts approach them, not as neutral arbiters of words on a page, but in hopes there will be coverage." *Utica National Insurance Company v. American Indemnity Company, et al.*, 141 S.W.3d 198, 206 (Tex. 2004) (Hecht, J., dissenting).

A copy of the October 11 decision in *Westport Insurance Corp. v. VN Hotel Group, LLC* is attached here.

Please let me know if you have any questions.

Randy

**Coverage College Epilogue:** Thank you to everyone who attended the 5<sup>th</sup> White and Williams Coverage College on October 6 at the Pennsylvania Convention Center. Over 600 people participated in the College, from over 150 companies and 19 states. A good time was had by all. We really appreciate the support that so many of you show for the College. Thank you.

We had a lot of fun with the Coverage College opening. Folks have asked to see it again. Here it is:

<http://www.xtranormal.com/watch/12498351/coverage-college-2011>

**Seeking Your Help:** The 2<sup>nd</sup> Edition of "General Liability Insurance Coverage: Key Issues in Every State" is currently in production and intended for release by Oxford University Press in early February. The 2<sup>nd</sup> edition of "Key Issues" cites 800 new cases – an increase of 40% from the 1<sup>st</sup> edition. The number of new cases speaks volumes about how constantly changing insurance coverage is.

Many of you have been kind enough to say nice things about "Key Issues." The comments that I've heard most often are how frequently people turn to the book for answers and that it has paid for itself many times over by cutting down on the number of calls to coverage counsel. Yikes. I would love to have some of your comments printed in the 2<sup>nd</sup> edition of "Key Issues" and on the book's website. If you are willing to send me a blurb about the book – no more than 2 sentences – Oxford will consider it for publication. If they use it you will receive, in addition to fame, a complimentary copy of the 2<sup>nd</sup> edition. To be published, your blurb must include your name, title and company. Jeff and I appreciate your help. Thank you.



**Randy J. Maniloff**

1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395

Direct 215.864.6311 | Fax 215.789.7608

[maniloffr@whiteandwilliams.com](mailto:maniloffr@whiteandwilliams.com) | [whiteandwilliams.com](http://whiteandwilliams.com)

The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients. The information contained herein shall not be considered legal advice. You are advised to consult with an attorney concerning how any of the issues addressed herein may apply to your own situation. The term "Binding Authority" is used for literary purposes only and is not an admission that any case discussed herein is in fact binding authority on any court. If you do not wish to receive future emails addressing insurance coverage decisions, please send an email to the address listed above with "unsubscribe" in the subject line. No animals were harmed in the drafting of this e-mail.