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White and Williams LLP
Randy J. Maniloff
maniloffr@whiteandwilliams.com

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Naan Bread. Make That No Bread For Policyholder

11th Circuit Holds That Aroma Of Indian Food Is A Pollutant

Last week the 11th Circuit Court of Appeals held that the aroma of Indian food is a pollutant within the terms of a pollution exclusion. Despite its best effort to curry favor with the court, the policyholder was shown the tandoori. It is a decision that the policyholder will no doubt describe as papa-dumb. Of course, the insurer knew all along that the policyholder was going to vindallose. Let's tikka look.

Maxine Furs is a fur shop located next door to an Indian restaurant. Because the two establishments shared air-conditioning ducts, Maxine's furs soon began to smell like curry. Maxine had the affected furs cleaned and then made a claim with Auto-Owners Insurance Company. Auto-Owners denied coverage based on the absolute pollution exclusion clause in Maxine's policy. Maxine sued. PETA filed a *amicus* brief in support of Auto-Owners (just kidding). The district court concluded that coverage was excluded. *Maxine Furs v. Auto-Owners* at 1-2. The policyholder waved Mumbai to the District Court and proceeded to the Eleventh Circuit (Alabama law).

[The case appears to involve a first-party property policy. However, when it comes to whether a non-traditional pollutant falls with the pollution exclusion, the issue is generally the same between property and liability policies.]

The opinion is brief (and cites no Alabama law addressing the pollution exclusion, despite there being no shortage of it). *See* "General Liability Insurance Coverage: Key Issues In Every State" at p. 297-98).

The Auto-Owners policy excluded from coverage any damage or loss caused by "discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" The policy defined pollutant as: "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id.* at 2.

The parties disagreed whether curry aroma is a pollutant. The court looked to the policy's definition of pollutant, in conjunction with the applicable standard for interpreting a policy, and concluded that it did "not think that a person of ordinary intelligence could reasonably conclude that curry aroma is not a contaminant under these circumstances." *Id.* at 3.

The court explained:

A contaminant is something that "soil[s], stain[s], corrupt[s], or infect[s] by contact or association." *Webster's Third New International Dictionary* 491 (1986). Indeed, what happened here is that the curry aroma soiled Maxine's furs. Otherwise, they would not have needed cleaning. We do not think that a reasonable person could conclude otherwise. Accordingly, we conclude that curry aroma is a pollutant under the policy.

Id. at 3-4.

Lastly, the court concluded that the "wafting" of the curry aroma satisfied the "migrating, seeping, or escaping" requirement of the pollution exclusion. *Id.* at 4.

Of course, *Maxine Furs* stands in direct contrast with a New York federal court's 2010 decision in *Greengrass v. Lumbermans Mut. Cas. Co.*, No. 09 Civ. 7697, 2010 WL 3069560 (S.D.N.Y. July 27, 2010), which held that the absolute pollution exclusion did not preclude coverage for odors emanating from the "Sturgeon King's" delicatessen. The court noted that, according to Zagat's restaurant guide, "The smells alone are worth the price of admission."

A copy of the 11th Circuit's March 31st decision in *Maxine Furs, Inc. v. Auto-Owners Insurance Company* (unpublished) can be accessed here:

http://www.ca11.uscourts.gov/unpub/ops/201013547.pdf

Please let me know if you have any questions.

Randy
Randy J. Maniloff
White and Williams LLP
1800 One Liberty Place | Philadelphia, PA 19103-7395
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608
maniloffr@whiteandwilliams.com