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Policyholders to Court: You Must Be Having A Slurpee Brain Freeze

Scope of the Pollution Exclusion Under Review in Florida

Some policyholders get all wee-weed up when they see insurers asserting the pollution exclusion in circumstances that they believe simply go too far as to what's a pollutant. Policyholders in that category would be well-served to stay clear of the Sunshine State.

Last week saw a pollution exclusion twofer in the District Court of Florida.

First up, August 13, Lloyd's filed an action in the Middle District seeking a declaratory judgment that the pollution exclusion precludes coverage for bodily injury caused by the consumption of Slush Puppies, purchased at a Chevron station convenience store, that were allegedly contaminated with gasoline. *Certain Interested Underwriters at Lloyd's London v. Jindani*, United State District Court for the Middle District of Florida, No. 6:09-cv-1414. [With thanks to a loyal *Binding Authority* reader for tipping me off to this one.]

Presumably because federal court is notice pleading, the complaint does not describe a Slush Puppy. Obviously it's just a Slurpee-wannabe, but surely there must be more that can be said about it. Invented in 1970, the Slush Puppy is a fun frozen beverage that delivers cool crunchiness of ice, vibrant colors, a sweet smell and taste of the flavors and even the satisfying sound of the slush hitting your cup. While only cherry, grape, orange and lemon-lime existed in 1970, Slush Puppies now boast 20 flavors – including regular and unleaded. *See* www.slushpuppie.com.

Policyholders that believe that Lloyd's has gone too far with the pollution exclusion will be dismayed to learn that, just four days later, another District Court in Florida, this time the Southern, concluded that the pollution exclusion served to preclude coverage to a homeowners association and management company for bodily injury caused by the ingestion of swimming pool water.

In *First Specialty Insurance v. GRS Management*, the court described the facts as follows:

> The state court complaint alleged that Thailor Le was injured as a result of exposure to "dangerous, hazardous, and unsafe sanitary conditions" in the community swimming pool. (State court compl. ¶ ¶ 10, 22.) Specifically, Thailor Le "contracted a viral infection from contaminants within the water of the Nautica Isles West community pool." (Mar. 4, 2008 letter.) This viral infection was identified as the Coxsackie virus, which was contracted from "ingesting swimming pool water in the Nautica Isles West community swimming pool." Significantly, chlorination of swimming pool water is an"an effective way to kill harmful microbes, [such as the] Coxsackie viruses." (Harold I. Zeliger Letter.)

Id. at 7.

Looking to other Florida decisions, including the Supreme Court's in *Deni Associates*, the *GRS Management* court concluded that the substance in the swimming pool was a viral contaminant and a harmful microbe, and, hence, the pollution exclusion applied. *Id.* at 9-10.

A copy of the complaint filed in *Lloyd's v. Jindani* and the court's decision in *First Specialty Insurance v. GRS Management* are attached. Neither is ground-breaking, but they will surely be seen by policyholders as further examples of insurers taking the pollution exclusion too far, even in states that have upheld the exclusion in the context of non-traditional pollution.

Please let me know if you have any questions.

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