

## 11th Circ. Could Lend Wider Net To Fla. Pollution Exclusions

By **Bibeka Shrestha**

*Law360, New York (August 14, 2012, 8:24 PM ET)* -- In a coverage fight over a wrongful death suit, Westport Insurance Corp. on Friday urged the Eleventh Circuit to find that bacteria and other living organisms can count as pollutants excluded under liability policies, a ruling that attorneys say would stretch Florida's already-broad interpretation of pollution exclusions.

The underlying suit against Choice Hotels International Inc. and VN Hotel Group LLC claimed that a man died after contracting Legionnaires' disease from inhaling bacteria-containing vapor while using a hot tub at a Quality Suites hotel in Orlando, Fla.

A Florida federal court ruled that Westport had a duty to defend and indemnify the hotel defendants, partly because its pollution exclusion did not bar coverage. According to the lower court, living organisms did not meet the pollution exclusion's characterization of pollutants as a solid, liquid, gaseous or thermal substances.

Policyholder attorneys said Tuesday that adopting the view that living organisms can constitute pollutants would take the pollution exclusion too far in a state that already broadly interprets the policy provision.

"The pollution exclusion doesn't say that a pollutant is anything that irritates or anything that contaminates," Robert Friedman, a policyholder attorney based in Palm Beach, Fla. "It says a pollutant must be solid, gaseous, liquid or thermal. [Bacteria are] really not any of those things."

But attorneys for insurers told Law360 that Westport's position was consistent with Florida law and that the lower court should have applied the pollution exclusion to bar coverage because the deceased hotel patron was harmed by a contaminant or through toxic exposure.

Laura Foggan, a Wiley Rein LLP partner who represents carriers, stressed that Florida courts had squarely rejected the idea that only "traditional" pollutants fall under pollution exclusions and they had made it clear that pollution exclusions would be given full effect.

"If the Eleventh Circuit weighs in and finds that there is no coverage, it will really just reinforce the strength of Florida law and the application of the pollution exclusion on the terms it's written on and maybe help to put aside a tendency to continue litigation questions that probably should be settled," Foggan said.

John Nevius, an Anderson Kill & Olick PC shareholder who counsels policyholders, said the insurance industry has tried to apply the pollution exclusion to almost every conceivable situation, but it was clear in this case that Westport should have stepped up to provide coverage.

Nevius noted that Westport had not explicitly defined irritants and contaminants that fall under the pollution exclusion, while the insurer also explicitly mentioned bacteria in another exclusion that the court found didn't apply. He added that the stakes were high in the Eleventh Circuit appeal, as insurers could potentially hold up the pollution exclusion to bar coverage for claims arising from SARS, the swine flu, the Ebola virus and other illnesses.

"The pollution exclusion shouldn't apply to bacteria ... this just shows the lengths to which the insurance industry will go to stretch the pollution exclusion to suit their interests," Nevius said. "If the Eleventh Circuit does overturn this, it will reflect the idea that economic interests should outweigh basic contract interpretation principles."

Before the Eleventh Circuit, Westport is arguing that the lower court too narrowly interpreted its pollution exclusion and improperly relied on Arizona appeals court decision that held living organisms cannot be pollutants, even though the Southern District of Florida had already rejected that finding.

The insurer points out that the Eleventh Circuit itself has concluded that a substance that is not generally considered a pollutant can still count as one under a CGL policy exclusion if it has an effect of irritating or contaminating. The question is not whether the substance is gaseous, thermal or even naturally occurring, it said.

Westport's pollution exclusion defined pollutants as any solid, liquid, gaseous or thermal irritant or contaminant and included a list of examples of pollutants, according a brief filed by Victoria Walker, the widow who settled the underlying suit with the hotel defendants and who is now seeking coverage from Westport.

Since the policy did not define the word "contaminant," the lower court looked at the words modifying contaminant as well as the examples provided to rule that living organisms didn't count as a pollutant.

Thomas Segalla, a Goldberg Segalla LLP partner who represents carriers, said the language used in pollution exclusions like the one in Westport's policy is not meant to be limiting, but instead to be interpreted broadly. Foggan echoed this interpretation.

"The purpose of the language is to show how broad the exclusion is," Foggan said. "It doesn't matter what form the pollutant takes."

Attorneys for the Westport, Walker, VN Hotel and Choice Hotels were not immediately available for comment Tuesday.

Westport is represented by John Catizone and Stacey Papp of Litchfield Cavo LLP.

Walker is represented by John Mills and Courtney Brewer of The Mills Firm PA and Edmund Normand of Wooten Kimbrough & Normand Pa.

VN Hotel Group is represented by Edmund Gegan of Pinkard Lynch & Equitas PA. Choice Hotels International is represented by Chris Ballentine of Fisher Rushmer Werrenrath Dickson Talley & Dunlap PA.

The case is Westport Insurance Corp. v. VN Hotel Group LLC et al., case number 11-14883, in the Court of Appeals for the Eleventh Circuit.

--Editing by Elizabeth Bowen and Katherine Rautenberg.

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