

11th Circuit Holds Millings from Roadwork Fall Within Pollution Exclusion
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In its seminal decision *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.*, 711 So. 2d 1135 (Fla. 1998), the Florida Supreme Court held that the terms “irritants” and “contaminants” as used in an absolute pollution exclusion, are not ambiguous, and that the exclusion is not restricted to matters traditionally thought of as industrial or environmental pollution. The United States Court of Appeals for the Eleventh Circuit, in a matter involving Florida law, recently had occasion to address the *Deni* decision in *Markel Int’l Ins. Co. v. Florida West Covered RV & Boat Storage, LLC*, 2011 U.S. App. LEXIS 16552 (11th Cir. Aug. 11, 2011), a case involving the issue of whether millings resulting from road work constituted “contaminants” or “irritants” for the purpose of the pollution exclusion.

The insured, Florida West, was sued by an individual claiming to have suffered severe bacterial poisoning as a result of being required to wade through retained flood waters at the insured’s facility. Plaintiff claimed that the water had been contaminated by millings from nearby roadwork, and that these millings specifically were the source of his bacterial poisoning. The insurer, Markel, denied coverage based on the policy’s pollution exclusion, as well as another exclusion not relevant to the appeal. The federal district court held in favor of Markel, relying in large part on the decision in *Deni*.

On appeal, Florida West argued that the lower court erred by failing to consider whether “millings are irritants or contaminants under environmental regulations” and by failing to consider case law from other jurisdictions. Florida West also argued that the underlying plaintiff’s injuries were not caused by the millings, but rather by bacteria. The Eleventh Circuit rejected each of these contentions. The court stated that based on the holding in *Deni*, the lower court properly relied on a standard dictionary to defined the term “irritant” as anything that causes an “irritating effect”; it was not necessary to look to environmental regulations to further limit this term. The court further agreed that plaintiff alleged that his injuries resulted from the millings, since the underlying complaint alleged that:

... he contracted bacterial poisoning and infection from millings, which Florida West allowed to mix with flood water. We agree with the district court that “[w]hile millings may not inflict injury under normal circumstances, millings are alleged to have produced bacterial poisoning and infection, which certainly are ‘irritating effects.’” Thus, under the facts alleged in [the underlying] complaint, the millings constituted a pollutant.