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Client Alert

In *Standard Fusee*, PSRB Obtains Rulings Favorable to Policyholders

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On December 3, 2009, PSRB secured another victory for policyholders seeking coverage under their comprehensive general liability (“CGL”) insurance policies for environmental liability claims. In *National Union Fire Insurance, et al., v. Standard Fusee Corporation*, 49A04-0811-CV-00665, the Indiana Court of Appeals made important rulings concerning choice of law, the absolute pollution exclusion, “suit,” notice, and the duty to defend.

Background: Standard Fusee Corporation is a manufacturer of safety flares. It had been alleged that Standard Fusee was liable for the release of perchlorate into the environment at and around a former manufacturing site in California and a current manufacturing site located in Peru, Indiana. (Perchlorate is an ingredient used in the manufacture of safety flares.) Standard Fusee successfully defended against the claims in California; the Indiana site is working its way through Indiana’s Voluntary Remediation Act.

In late 2005 Standard Fusee filed an action against its CGL insurers in Marion County Superior Court. Standard Fusee filed a motion for partial summary judgment seeking a declaration that its insurers had, and have, a duty to defend. The trial court held Indiana law would apply to both the Indiana and the California claims, that Standard Fusee was entitled to a defense, and with respect to the perchlorate claims, that none of the insurers’ coverage defenses – the pollution exclusion, the lack of a “suit,” alleged deficiencies in notice -- were a bar to coverage.

The Appellate Rulings: Choice of Law. The Court of Appeals held that it would apply a site-specific approach, such that Indiana law would apply to the Indiana site, and California law, to the California site. Standard Fusee has filed a petition for rehearing on this one point, believing that the trial court correctly applied Indiana’s “uniform contract interpretation” approach to find that Indiana law should be applied to the entire controversy.

Pollution Exclusion. As to the Indiana site, under Indiana law, the Court affirmed the trial court and held that the absolute pollution exclusion is ambiguous and unenforceable with respect to the perchlorate claims, consistent with *American States v. Kiger* and the many cases that have followed since *Kiger*.

“Suit.” Consistent with *Hartford Accident Indem. Co. v. Dana Corp.*, the Court also held that a cleanup action proceeding under Indiana’s Voluntary Remediation Act satisfies the requirement under the policies, with respect to the duty to defend, that there be a “suit” seeking damages. This decision is now the clearest expression of Indiana law on this point.

Notice. The Court ruled that the trial court had correctly determined that notice had been established by the affidavit testimony proffered by Standard Fusee.

Duty to defend. Finally, the Court held, applying Indiana’s potential-for-coverage standard, that Standard Fusee’s insurers had, and have, a duty to defend with respect to liability arising from the Indiana site.

PSRB counsel for Standard Fusee included Jeff Claflin, Greg Gotwald, Thao Nguyen and Theresa Willard.