

Practice Update

Georgia Federal Court Applies “Fungi or Bacteria” Exclusion and Holds Insurer Owed No Duty to Defend Mold Exposure Wrongful Death Suit

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In *Nationwide Property & Casualty Insurance Company v. Hampton Court, L.P., et al.*^[1] the United States District Court for the Northern District of Georgia granted an insurer’s motion for judgment on the pleadings that it owed no duty to defend an underlying suit alleging mold exposure at a Georgia apartment. The opinion gives insightful analysis on two exclusions commonly found in commercial general liability policies — the “Fungi or Bacteria” and “Pollution” exclusions — and broadly applies both in finding no defense obligation.

Background

In the underlying suit, the plaintiffs alleged the insured, Hampton Court, and other defendants allowed mold to grow in the decedent’s apartment, failed to warn the decedent, and failed to remediate mold growth, which caused the decedent’s untimely death. Hampton Court tendered defense and indemnity for the underlying lawsuit to its CGL insurer, Nationwide. Nationwide then filed a declaratory judgment action in federal court, seeking a declaration that it owed no coverage obligations to Hampton Court.

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In the declaratory judgment action, Hampton Court initially moved to dismiss Nationwide's complaint, and Nationwide likewise moved for judgment on the pleadings. The court denied both motions, finding that Nationwide's declaratory judgment complaint asserted plausible claims, but that Nationwide could not move for judgment on the pleadings until Hampton Court filed its responsive pleading. Following these initial rulings, Hampton Court filed its answer in the declaratory judgment action, and Nationwide renewed its motion for judgment on the pleadings.

"Fungi or Bacteria" Exclusion

The court began with the "Fungi or Bacteria" Exclusion Endorsement, which precluded coverage for "bodily injury" arising out of a "fungi or bacteria incident," defined to mean an incident which would not have occurred, in whole or in part, but for the actual, alleged, or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any fungi or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material, or product contributed concurrently or in any sequence to such injury or damage. The endorsement defined "fungi" to mean any type or form of fungus, including mold or mildew.

Here, the court explained that the underlying complaint's "repeated and specific references" to mold made clear that the pleading alleged that mold, *at least in part*, caused the decedent's alleged "bodily injury," which is all that was necessary to trigger the "Fungi or Bacteria" Exclusion. The court relied on the policy's anti-concurrent causation language in concluding that this exclusion unambiguously applied, considering the references to mold exposure throughout the underlying complaint and despite vague and occasional references to other non-mold substances.

The court briefly addressed via footnote the exclusion's exception regarding products "intended for human or animal consumption," and Nationwide's position that the exception squarely did not apply. The court agreed, finding nothing about the case related to the exception, and Hampton Court did not address it in its briefing.

"Pollution" Exclusion

The Nationwide CGL Policy also contained a "Pollution" Exclusion, which precluded coverage, in pertinent part, for bodily injury "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured." The policy defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, petroleum products and their derivatives, chemicals and waste."

Again, the court found this exclusion precluded coverage because the crux of the underlying pleading was alleged toxic and hazardous mold. And the mold alleged clearly qualified as a "pollutant," given the broad meaning of the terms "irritant or contaminant" under Georgia law. The court also applied a tenet of Georgia insurance law that different policy exclusions must be read independently of one another, meaning that even when two policy exclusions appear to overlap, such overlap does not render the exclusions mutually exclusive.

Conclusion

Hampton Court properly applied the plain and unambiguous terms of a CGL policy's "fungi or bacteria" and "pollution" exclusions to allegations of mold exposure. The opinion reinforces the significance of anti-concurrent causation wording, not just in property insurance policies but in the

liability insurance and duty to defend contexts as well. Insurers analyzing CGL coverage for claims involving mold should carefully review policy wording in conjunction with the operative complaint and applicable law and, when needed, seek an opinion from coverage counsel.

[1] *Nationwide Property & Casualty Insurance Company v. Hampton Court, L.P., et al.*, No. 1:23-cv-4726-TWT (N.D. Ga. Oct. 17, 2024).

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