

Sometimes, An Exclusion Is Just An Exclusion

Law360, New York (June 03, 2010) -- The Eleventh Circuit recently upheld a lower court opinion in the Southern District of Florida holding that a fungi exclusion and a defective materials exclusion preclude coverage for an insured's costs to remediate damage to drywall at a condominium complex caused by mold. The Eleventh Circuit U.S. Court of Appeals affirmed May 18, *Residences at Ocean Grande Inc. v. Allianz Global Risks US Insurance Co. f.k.a. Allianz Insurance Co.*, No. 09-15145, 11th Cir.; 2010 U.S. App. LEXIS 10108.

The panel agreed with the entry of final judgment entered by U.S. District Court Judge Joan A. Lenard of the Southern District of Florida in favor of Allianz Global Risks US Insurance Co. regarding reimbursement claims sought by its insured, the Residences at Ocean Grande Inc. (ROG).

The panel comprised Circuit Judges Stanley F. Birch Jr. and Stanley Marcus and U.S. Judge Wm. Terrell Hodges of the Middle District of Florida, sitting by designation.

Factual Background

On June 9, 2005, the project manager for ROG informed the developer of the high-rise luxury condominium complex that it had discovered visible fungal growth in the condominium units. Ultimately, mold contamination was found on green board in 273 of the 278 units, with the contamination in many of the units spreading to other materials.

ROG notified its builders risk insurer, Allianz, of its loss in the amount of \$11 million for water damage and mold remediation. The insured argued that the damage was not solely due to mold but also due to moisture. Allianz denied the claim, saying that the insured's late notice prejudiced its investigation and ability to determine whether the damages resulted from an insured event. The insurer also said that it was prejudiced because it could not determine whether the repairs for which ROG was making claim were necessary or reasonable.

On Sept. 30, 2007, ROG sued Allianz in the Miami-Dade County, Fla., Eleventh Judicial Circuit Court, alleging that the insurer breached its obligations by failing to pay for the damages. Allianz removed the case to federal court and moved for summary judgment.

The Policy Exclusions

Allianz had issued a builder's risk property insurance policy to ROG which provided insurance coverage for Trump Palace, a high-rise beachfront condominium complex located in Sunny Isles Beach, Fla., during its construction. The Insuring Agreement of the Policy stated that "[t]his Policy subject to the Limit of Liability and the terms, conditions, and limitations contained herein or endorsed hereon, insures against all risks of direct physical loss of or direct

physical damage to Insured Property” The policy contained several exclusions, including a Fungi Exclusion Endorsement (“Fungi Exclusion”), which provided:

“A. Exclusion

Notwithstanding any terms or conditions, this Policy does not insure against:

1. Any cost or expense incurred to clean up, remove or remediate any Fungi, or
2. Any cost or expense incurred to test for, monitor, or assess the existence, concentration or effects of Fungi.

B. Definition

1. For the purpose of this Endorsement, Fungi shall mean any form of fungus, including but not limited to, yeast, mold, mildew, rust, smut, mushroom, spores, mycotoxins, odors, or any other substances, products, or byproducts produced by, released by, or arising out of the current or past presence of Fungi.

The Policy also contained an exclusion which pertained to the cost of making good faulty workmanship, material, construction, designs and or specifications (“the defective materials exclusion”).”

Fungi Exclusion Endorsement

Initially, ROG filed a motion for partial summary judgment seeking a finding that the policy’s fungi exclusion was ambiguous. The district court denied that motion, finding that the Fungi Exclusion was clear and unambiguous as written. Specifically, the court held that the policy clearly and unambiguously states that “Fungi shall mean any form of fungus ...” At the conclusion of discovery, Allianz moved for summary judgment, arguing that all of ROG’s claimed damages were excluded by the policy’s fungi exclusion and defective materials exclusion.

On Sept. 9, Judge Lenard granted Allianz’s motion and held that the damage claimed by ROG was mold and not water, moisture or humidity damage as alleged by the insured. The judge noted that ROG took the position in separate lawsuits involving another one of its insurers and the general contractor on the condominium project that the damage was mold and that the costs for which they were making claim under the Allianz policy were to remediate that mold. The judge also found that ROG did not provide any competent evidence establishing there was any damage to the wallboard other than mold.

In so holding, the district court stated that, "Under ROG's theory of the cause of the damage, every time there is damage to a building due to mold, the damage should be considered caused by both mold and moisture. ROG's theory of moisture damage invites an infinite regression backwards to antecedent causes; i.e., the Court might as well say that human error caused the damage, because the contractor failed to properly control environmental conditions during construction, which led to excessive moisture, which led to the mold growth, and so on and so forth," she said. "Every claim for mold damage would automatically be attributable to both moisture and mold. This is too broad, as parties would be able to circumvent exclusions for mold damage by pointing to the myriad circumstances leading up the growth of mold."

Next, Judge Lenard ruled that any costs incurred to clean, remove and correct the mold growth and any costs incurred to test for, monitor or assess the existence, concentration or effects of mold are barred by the fungi exclusion. The judge also found that the insured's efforts to avoid application of the fungi exclusion by dividing its claimed loss into "pre-remediation," "remediation" and "post-remediation" categories fail.

"For example, ROG contends that the 'preremediation' costs incurred to remove the bathroom components were not part of the costs incurred to clean up, remove, and correct the mold damage. For what reason were the bathroom components removed, then? Undeniably, the bathroom components were removed in order to clean the mold and remove the mold-damaged green board," she said.

Defective Materials Exclusion

Alternatively, Judge Lenard held that the policy does not cover the cost of making good faulty or defective workmanship, material, construction, designs, plans or specifications unless direct physical loss or direct physical damage not otherwise excluded ensues. She explained that the drywall used in the building was defective and, therefore, the exclusion applies.

The judge noted that ROG retained the services of a material science engineer who concluded that some of the installed green board did not meet water-resistant specification requirements due to an unequal distribution of petroleum wax on the green board.

The engineer said that the defective green board absorbed water at a faster rate than the nondefective green board.

"Not only has ROG failed to produce any evidence to the contrary demonstrating a disputed issue of material fact, ROG, in its Statement of Additional Material Facts in Dispute, has actually alleged facts supporting application of the exclusion," the judge said. "ROG may not simply rest on its contention that it is Allianz's burden to prove the applicability of the exclusion and then completely fail to provide any evidence to the contrary once Allianz has satisfied its burden.

Summary

While the district court opinion is unpublished, it provides a focused and straightforward analysis of a court's recognition of the creative types of arguments made by a policyholder in an effort to create coverage, where none was intended. In addition, the lower court opinion as well as the Eleventh Circuit affirmance demonstrates the refusal of the courts to torture the meaning of an insurance policy where both the written language and the intent as evidenced by that language was clear and unambiguous.

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