

Fungi, Wet Rot, Dry Rot and “Virus”: One of These Things is Not Like the Other

The Hartford's so-called virus exclusion in its commercial property forms is getting a workout, and policyholders now have an argument that may help their cases move past the pleadings stage. A U.S. District Court in Florida has deemed the exclusion ambiguous and denied an insurer's motion to dismiss.¹ The exclusion applies to “presence, growth, proliferation, spread, or any activity of ‘fungi’, wet rot, dry rot, bacteria or virus.”² The Court held that the parties did not necessarily intend to exclude a pandemic.

In Urogynecology, the plaintiff sought coverage for the loss of the usefulness and functionality of its business location due to the Florida Governor's shutdown order. The policy contained a “ ‘fungi’, wet rot, dry rot, bacteria, or virus” exclusion.³ The carrier moved to dismiss, and the plaintiff argued that the exclusion only applied if COVID-19 was present on-site, which was not the case.⁴

The Court addressed none of the issues regarding direct physical loss and instead decided the motion on the fungi exclusion. The Court held the exclusion ambiguous because the exclusion of virus “does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.”⁵ In addition, the Court stated that pollution case law was not on point because “none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society – a distinction this Court considers significant.”

It is unclear *why* the Court thought the other excluded causes did not align with virus. The Court's opinion, at a minimum, however, indicates that the Court believed there was a possibility that the exclusion was not aimed at pandemics.

¹Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co. Ltd., Case No. 6:20-CV-1174-Orl-22EJK (M.D.Fla. Sept. 24, 2020). Sentinel is a Hartford Financial Services Group company. Two other U.S. District Courts dismissed cases on the basis of the identical fungi exclusion in September, but they do not appear to have been presented with the same arguments. See Franklin EWC, Inc. v. Hartford Financial Svces. Group, Inc. Case No. 20-CV-00434 JSC (N.D.Cal. Sept. 22, 2020) and Rhonda Hill Wilson et al. v. Hartford Casualty Co. et al., Case No. 2:20-CV-03384 ER (E.D.Pa. Sept. 30, 2020).

²There is an ensuing loss clause for specified causes of loss such as lightning and fire, but this does not appear to play a role in any of the three decisions.

³Curiously, the fungi exclusion was not a basis for denial in the reservation of rights letter, but the insurer asserted it in the lawsuit.

⁴The plaintiff's primary argument was that the Florida Governor's order, rather than COVID-19, was the cause of the loss. The plaintiff did not seek coverage in its memorandum in opposition under the civil authority provision. This permitted the plaintiff to argue that the virus exclusion applied only if the virus was present on the property, which it was not. Since the claimed direct physical loss was the loss of functionality from the Governor's order and not COVID-19 on site, the exclusion for virus should not apply.

⁵The carrier did not help itself by failing to submit other portions of the policy to the Court that the exclusion modified, and this was an alternative reason to deny the carrier's motion to dismiss.

The Court's ruling on ambiguity is correct. The Hartford's own explanation of its exclusion (when the Hartford filed its form in 2002 to obtain Florida insurance regulatory approval) confirms the Court's intuition. The Hartford filed it as a mold exclusion aimed at "the frequency and severity in Mold-related claims."⁶ Bacteria and virus were added as proxies for mold "[b]ecause Bacteria and Virus exist and fester in similar environments as fungi" Although the Court did not have the regulatory filing in front of it, it correctly identified virus as an awkward fit on the list. Since the Hartford's purpose in excluding virus was to sniff out mold, the exclusion should not apply to COVID-19. In further confirmation, the 2002 regulatory filing predated the last SARS (Severe Acute Respiratory Syndrome) outbreak in 2003. When the Hartford filed a revision of its form, SS 40 93, in Florida in 2005, it merely fixed typographical errors and reformatted the relevant portion without notifying Florida of any material change in purpose. Urogynecology is clearly the right decision.

Urogynecology gives life to policyholders with so-called "virus" exclusions. These exclusions rarely exist on policies as separate exclusions solely for virus. Instead, virus is grouped together with other pollutants, pathogens, or biological agents, and the effect on coverage for a pandemic may not be clear. The absence of clarity favors the policyholder.

Urogynecology also underscores the importance of a comprehensive approach to coverage issues. Regulatory filings not only explain the intent of endorsements but may even estop an insurer from arguing a novel application of an exclusion. Be sure to consult coverage counsel before giving up on your insurance!

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⁶In relevant part, the explanatory memorandum accompanying the regulatory filing reads as follows:

"The Hartford recognizes the recent increase in the frequency and severity in Mold-related claims. The exposure not currently contemplated in our rate structure or coverage forms. The rise in media attention leads us to believe the incident of claims will only continue to increase, thus increasing our exposure to mold-related losses. In response to this recent activity, The Hartford is introducing the above coverage form and will be mandatory for all SPECTRUM policies where the Standard Property Coverage Form (SS 00 06) or the Special Property Coverage Form (SS 00 07) applies.

"This form limits loss due to fungi, wet or dry rot, bacteria or virus. Because Bacteria and Virus exist and fester in similar environments as fungi, we have added Bacteria and Virus to our form. The exclusion built into this form **will not apply** if the fungi, bacteria or virus was the result of fire or lightning."