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## The Eleventh Circuit Enforces General Liability Policy's Mold Exclusion Notwithstanding Florida's Efficient Proximate Cause Doctrine

On May 4, 2009, the United States Court of Appeals for the Eleventh Circuit ruled that a mold exclusion in a general liability insurance contract applied to bar coverage for a claim alleging that the negligent failure to install a vapor barrier resulted in mold damage. Although the alleged negligence was one cause of the loss, the mold exclusion applied because the provision barred coverage "regardless of any other cause." *Empire Indem. Ins. Co. v. Winsett*, No. 08-12359, 2009 WL 1178516 (11th Cir. May 4, 2009).

### Background

The coverage dispute involved claims by dozens of tenants of The Preserve at San Luis, LLC, and the Housing Trust Group of Florida, LLC (collectively, "Preserve"). In the underlying litigation, the tenants alleged that the Preserve failed to build a vapor barrier in the apartment properties and that this failure was the direct and proximate cause of the resulting mold-related injuries and damages. The litigation was eventually settled.

In the ensuing coverage litigation, the Preserve's liability insurer — Empire Indemnity Insurance Company — argued that coverage was excluded based on the following exclusion:

- a. "Bodily injury" or "property damage" 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.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or accessing the effects of, "fungi" or bacteria, by any insured ... or by any other person.

This exclusion does not apply to any "fungi" or bacteria that are on or are contained in a good or product intended for consumption.

The district court ruled that the exclusion did not preclude coverage, finding that the failure to install the barrier was the efficient proximate cause of loss under Florida law.

### Eleventh Circuit's Ruling

The Eleventh Circuit reversed. The appeals court explained that under the insurance contract terms in this case, the district court's focus on efficient proximate cause was flawed. The district court had reasoned that the efficient proximate

cause is “the one that sets others in motion” and that if the efficient cause is covered, then coverage exists even if the other causes are not covered.

The district court then concluded that there was coverage because the failure to build a vapor barrier was a covered cause and the resulting mold, an excluded cause, was immaterial in determining whether coverage exists.

The Eleventh Circuit found that the trial court’s decision was in error because it ignored the applicable contract terms. Specifically, the efficient proximate cause doctrine “cannot be

incorporated into an insurance policy if doing so would render part of the policy meaningless.” As explained by the court, the insurance contract provided that the exclusion barred coverage “regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.” The “in any sequence” language was particularly significant because this plain language was inconsistent with applying the efficient proximate cause doctrine.

## Implications

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The *Winsett* ruling underscores the significance of specific terms in an insurance contract in situations involving more than one cause of loss. The decision also illustrates the material impact that particular word in the contract can have, even when the impact is to narrow coverage. The Eleventh Circuit’s decision carefully applied the precise policy language instead of looking to general principles as the district court had done.

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