

# Mold Exclusion: Federal District Court Addresses Issue Involving Previously Covered Loss



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The United States District Court for the Western District of Kentucky (“Court”) in a February 18, 2020 opinion addressed an insurance coverage issue related to mold. See *Evans v. Auto Club Prop.-Cas. Ins. Co.*, No. 3:18-CV-486-CRS, 2020 WL 807531 (W.D. Ky. Feb. 18, 2020).

The coverage question involved a claim that prior roof repair was related to mold damage.

A homeowner filed a lawsuit against her insurance company alleging:

- Breach of contract
- Tortious breach of the implied covenants of good faith and fair dealing
- Unfair trade practice
- Bad faith

The insurance company denied the Plaintiff’s claim for mold and water damage. It contended no coverage was provided by the policy.

The policy did not cover mold damage. However, Plaintiff contended that the mold was caused by a prior covered roof leak which occurred in 2013. Therefore, the damage was argued to be covered by the policy.

Defendant moved for summary judgement on all claims.

The Court declined at that time to rule on the final three claims. It focused exclusively on the breach of contract claim.

Defendant first contended that there was no evidence that the mold damage the Plaintiff discovered was related to the previously covered loss. Therefore, the contract was stated to have not been breached.

The Court noted that the Plaintiff did have the burden of proving that the claimed loss fell within the coverage of the insurance policy. Nevertheless, it held that for the purposes of summary judgement the Plaintiff met this burden when she hired experts testifying the mold damage was caused by the Defendant’s failure to remediate the mold caused by a prior covered loss. The Court held that this was sufficient evidence to raise a question of fact in regards to whether the mold was caused by a previously covered loss.

The Defendant then contended that the exclusion of fungi from the Plaintiff’s policy meant the loss was not covered. If so, the contract was argued not to have been breached.

Though the Court noted that the terms of the policy explicitly excluded coverage for mold damage, it stated that “Kentucky courts apply the ‘efficient proximate cause doctrine.’ The doctrine is used to determine whether mold may constitute a covered loss despite the presence of a mold exclusion provision. If a covered event is the proximate cause of the mold damage, then the mold damage is also covered.” The Court held that the Plaintiff had presented sufficient evidence to raise a question of fact regarding whether the mold was caused by a prior covered loss. As a result, the mold exclusion did not excuse the nonperformance of the contract.

Finally, the Defendant argued that the Plaintiff had made material misrepresentations in regards to the claim. It argued that the contract should not be enforced.

The Defendant presented evidence from Plaintiff’s interrogatories and her deposition. She is stated to have claimed unawareness of the source of any water damage other than the previously covered roof leak. This was stated to be untrue. In support, the Defendant presented documents signed by the Plaintiff which contracted for the repair of water damage caused by leaks in her basement. These were not covered by the policy.

Plaintiff admitted she knew about this prior water damage and therefore made misstatements in her discovery responses. Still, the Court held that Kentucky law prohibited the exercise of the fraud provision because the misstatements were made during discovery. They were not in connection with filing or settling the claim.

The Court quoted the Supreme Court of New Jersey, stating that “if the insurer denies liability and compels the insured to bring suit, the rights of the parties are fixed as of that time for it is assumed that the insurer, in good faith, then has sound reasons based upon the terms of the policy for denying the claim of the insured. . . . It is at the trial that the insurer must display, not manufacture, its case.” Because the allegedly material misstatements were made during discovery, they did not invalidate the contract.

The Court found that sufficient evidence had been presented to raise a question of fact as to whether the mold was caused by the previously covered loss. Further, alleged material misstatements made during discovery would not void the contract. The Court denied the motion for summary judgement.

A copy of the decision can be downloaded [here](#).