

Mold/Apartment Complex Construction Project: Federal Court Addresses Insurance Coverage Dispute



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A United States District Court (C.D. California) (“Court”) addressed in a September 27th Order insurance coverage issues arising out of the construction of an apartment complex in California. *See The Haven at Ventura, LLC vs. General Security Indemnity Company of Arizona, et al.*, 2024 WL 4343190.

The issues involved a dispute as to whether certain insurance policies excluded coverage for mold that developed during construction of an apartment complex.

Haven at Ventura, LLC (“Haven”) constructed a multi-building residential apartment complex (“Project”). It purchased insurance coverage for the Project. The policies issued were first-party builder’s risk policies which insured certain construction risks that could be experienced by Haven.

The insurance policies related to the construction were purchased from the following insurance companies:

- General Security Indemnity Company of Arizona (“General Security”).
- Westchester Surplus Lines Insurance Company (“Westchester”).
- Endurance American Specialty Insurance Company (“Endurance”).
- Certain Underwriters at Lloyd’s London Known as Syndicates TMK 510 and TMK 1880 (“Lloyd’s”).

The insurance companies are collectively denominated “Insurers”.

The components of the policies at issue included:

- Fungus Exclusion.
- Cost of Making Good Exclusion.
- Limited Fungus Extension.

The Court states that after cabinets and other materials were installed in the apartment complex, that because concrete was not given sufficient time and ventilation to dry, mold developed. The property was stated to not have been dehumidified in between installation of Gypcrete and the installation of other building materials.

Instead, Haven’s contractors are stated to have continued with other work, including installation of cabinets and other materials, etc. which were affected by the development of mold.

Haven submitted a claim to the Insurers. The Insurers denied the claim and Haven filed suit bringing six causes of action against the Insurers:

1. A claim for declaratory relief that certain of Haven's losses fall outside the scope of the Fungus Exclusion.
2. A claim for declaratory relief that the Claim falls within the Mold Coverage Extension.
3. A claim for declaratory relief that the Claim falls within the coverage afforded for Delay in Opening.
4. A claim for breach of contract based on Defendants' failure to pay the Claim.
5. A claim for breach of contract based on Defendants' failure to cover the losses related to a delay in opening.
6. A claim for breach of implied covenant of good faith and fair dealing.

Lloyd's was dismissed.

The remaining Insurers filed a motion for summary judgment.

The Court provides a description of both the basic coverage and the various policy provisions at issue. It indicates that there is no evidence suggesting that mold would have developed if not for the installation of the cabinets and other materials before the Gypcrete had time to dry and the area was dehumidified. This is due to the fact that mold is indicated to not generally grow instantaneously upon the installation of organic materials on top of Gypcrete.

Haven is noted to have hired Restoration Hardware Company ("RHC") to remove the cabinets and other building materials that were installed without properly dehumidifying first. The buildings affected by mold were stated to have suffered damage in the lower kitchen and bathroom cabinets which were removed. RHC's invoices to Haven described its work as mold remediation and reconstruction. It did not specifically invoice any costs related to water damage.

The Insurers determined that "mold growth" is not covered by the policies. They further concluded that the extension of coverage for mold did not apply because there was no cause of that loss that led to the mold.

The Court addressed each of the relevant insurance provisions, concluding:

- "Dampness of the atmosphere" does not bar coverage.
- Insurers argued that Haven could not establish that its losses were within the scope of coverage because the cause was the damp atmosphere.
- Court indicates that it is not Haven's burden to prove that the exclusion does not apply (instead, must show that the loss was in the basic scope of the agreement).
- Insurers bear the burden of proving that all losses are excluded by the dampness of the atmosphere exclusion.
- Court finds a triable issue of fact as to whether all losses were caused by moisture in the air as opposed to direct contact with water.
- There are triable issues of fact regarding whether the fungus extension applies.
- Insurers argue that this provision does not apply because there was no underlying "occurrence" covered by the policies.
- Policies do not cover losses consisting of, caused by, contributed to, or aggravated by fungus but they extend limited coverage for mold losses through the Fungus Extension which provides up to \$1 million of coverage for direct physical loss to the insured Project caused by fungus.
- Haven had argued that while it is not entitled to full coverage for its mold losses (pursuant to the Fungus Exception) it is entitled to \$1 million in coverage for mold losses through the Fungus Extension.
- Because the provision at issue is an extension as opposed to an exclusion of coverage, it is not the Insurers' burden to demonstrate that the extension does not apply.

- Court determines that there must be an occurrence (i.e., a loss of some kind covered by the policies) which directly resulted in mold for the Mold Extension to apply (i.e., there must be some other loss that the policies covered that led to the mold).
- Court holds that Haven will have to show that some covered occurrence directly resulted in mold for the Fungus Extension to apply.
- Summary Judgment is not granted to the Insurers because the undisputed evidence does not establish that Haven will be unable to show a covered loss that resulted in the mold.
- There are triable issues of fact regarding whether the Cost of Making Good Exception bars coverage.
- Insurers argue that this exclusion applies because the losses are equivalent to the costs that Haven would have incurred if it had rectified the issues immediately before the losses occurred.
- Haven argues that the Insurers have not properly calculated which costs are excluded.
- The Court concludes that there are triable issues of fact regarding whether it bars coverage for all losses.
- There are triable issues of fact regarding whether there is coverage for Project delays.
- Insurers argue that despite the extension of the coverage for delays in opening, Haven is not entitled to coverage for such losses because this coverage only extends when there is an underlying occurrence.
- Summary Judgment is not granted for this provision for the same reasons articulated by the Court in regard to the Fungus Extension.
- The Court does not grant Summary Judgment as to contract claims.
- Court concludes there are triable issues of fact regarding whether the Insurers breached the contract by failing to pay the claim (4th cause of action) and failing to pay for delays (5th cause of action).
- Insurers are not entitled to summary judgment as to the claim for breach of implied covenant of good faith and fair dealing (sixth cause of action), but are entitled to summary judgment as to Haven's request for punitive damages.
- Court finds that the Insurers are not entitled to Summary Judgment on the claim as a whole but are entitled to Summary Judgment as to the request for punitive damages (arguing that there was no underlying breach of contract, and no benefits were ever due).
- Court concludes there are triable issues of fact regarding whether benefits were due and whether there was a breach of contract.
- Haven conceded that there is no evidence that will support a finding of punitive damages.

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