

## Insurance company must defend hotel in negligence lawsuit

### Court declares that policy did not exclude Legionella bacteria

By Robert D. Chesler & Eric Jesse

A Florida District Court's broad interpretation of a hotel's general liability insurance policy will require a hotel's insurer to defend it in a lawsuit filed by guests who claimed they contracted Legionnaires' disease during their stay. In *Westport Insurance Corp. v. VN Hotel Group, LLC et al.*, No. 10-222 (M.D. Fla. 12/09/10), the court held that the insurance company had a duty to defend, finding for the hotel on ambiguous provisions in the hotel's insurance policy and narrowly interpreting its exclusions.

Several former guests of the Quality Suites in Orlando, owned by VN Hotel Group, LLC, alleged that they contracted Legionnaires' disease from the spa tub and guest room showers, alleging that the hotel "negligently maintained [its] potable water and plumbing systems, causing an accumulation of Legionella bacteria in the water" that they inhaled and ingested. The insurance company denied coverage under its general liability policy and filed a declaratory action declaring that it has no duty to defend or indemnify the hotel.

The insurance policy contained a pollution exclusion for bodily injuries that arise "out of the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants" defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."

The insurer argued that Legionella bacteria are "contaminants" and therefore "pollutants," and several government sites also refer to Legionella bacteria as contaminants.

However, the court found that the state examples of pollutants in the policy "unambiguously show that Legionella bacteria are not 'pollutants.'"

The court also declared that even if Legionella bacteria fell within the exclusion, the underlying actions fall within an exception to the pollution exclusion, which provides coverage for bodily injury "if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from ... equipment that is used to heat water for personal use."

### Analyze insurance policies

At the outset of its analysis, the court in *Westport Insurance v. VN Hotel Group* acknowledged guiding principles of insurance law:

1. When a policy's language is plain and unambiguous, courts give the language "the meaning which it clearly expresses;"
2. When policy language is susceptible to more than one reasonable interpretation and ambiguous, the language is construed in favor of the insured; and
3. Policy exclusions are "construed even more strictly against the insurer than coverage clauses."

To determine whether a duty to defend exists, courts look to the facts alleged in the complaint. If they fall within the insurance policy, the insurer is obligated to defend the entire suit. ■

The insurance company also asserted that the hotel's claim falls within a fungi/bacteria exclusion, precluding coverage for bodily injury that would not have occurred "but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence" of any fungi or bacteria "within a building or structure." While the parties agree that the guest room showers fall within the exclusion, the court held that despite the broad definition of "structure" that clearly embraces the spa tub, "there is no basis in the policy or applicable law for applying that definition" because "the ambiguous term ... must be strictly construed against the insurer and in favor of coverage."

The court also noted that the "consumption exception" in the policy provides that the fungi/bacteria exclusion "does not apply to any 'fungi' or bacteria that are, are on, or contained in, a good or product intended for bodily consumption." Specifically, the court considered the hot tub water a good, and that "hotel guests bathing in a hot tub consumed the water because they entered the tub to satisfy a desire or want."

The court, therefore, declared that the insurance company had a duty to defend the hotel, but declined to state whether it has a duty to indemnify as well.

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### Canadian wing chain tries to block U.S. chain from entering market

A Canadian wings restaurant is hoping to prevent an American rival from using its similarly trademarked name in Canada.

Wild Wing, a large chicken wing franchise in Canada, is hoping to prevent Minnesota-based Buffalo Wild Wings from conducting business under its name in the country, arguing that the slight name difference will cause customer confusion. Buffalo Wild Wings has stated its intent to open more than 50 locations throughout Canada. The company is in the process of constructing its first location above the border in Ontario.

The two restaurants differ substantially in size. Buffalo Wild Wings, which has approximately 700 locations in the U.S., also has very large restaurants that typically top out at 6,000 square feet and have the ability to seat 300 customers. The U.S. chain also makes beer and sports a prominent feature, covering the walls of its restaurants with flat screen televisions.

Wild Wing also features sports promotions and drink specials, but its restaurants are decorated like old-fashioned saloons, and the chain has 70 franchise locations in Canada.

The owner of Canada's Wild Wing has claimed to other media outlets that he intended to challenge Buffalo Wild Wings' Canadian trademark application, but that he missed the deadline, leading him to file a complaint in court. ■