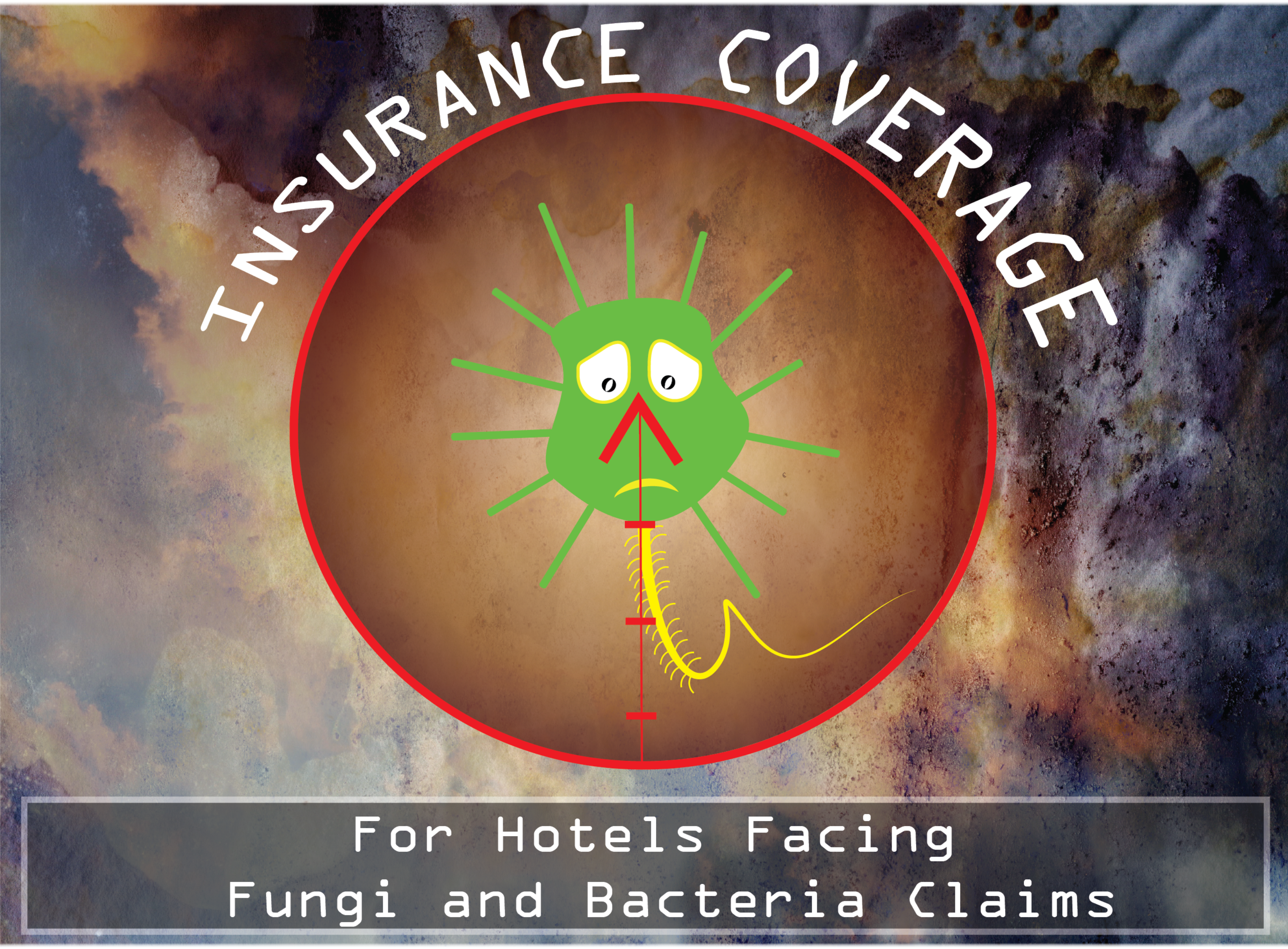
Insurance Coverage For Hotels Facing Fungi and Bacteria Claims



*By **David P. Bender, Jr. and Michael J. Stoner***

One nightmare scenario faced by hotel and resort executives is dealing with the former guest who claims that he or she contracted a fungal or bacterial illness at their establishment. True or not, the last thing that a hotel or resort wants associated with its name is "fungus" or "bacteria." Yet with the increasingly widespread usage of social media and anonymous access to review sites such as Yelp or TripAdvisor, the mere allegations of "fungus" or "bacteria" can cause potential guests to, at the very least, take their business elsewhere. In addition to the public relation problems, allegations of bacterial and fungal injuries at a hotel or resort can lead to expensive litigation and substantial liability.

Too often, though, insurance companies refuse to defend or settle these types of claims under the comprehensive general liability policies they have sold, basing the denial on two common policy exclusions: a Fungi and Bacteria Exclusion and the Pollution Exclusion. In such cases, policyholders in the hospitality industry should be prepared to fight back. The insurance company's ability to deny these claims on the basis of this exclusion may be more limited than it leads one to believe.

FUNGI AND BACTERIA EXCLUSION

The standard Fungi and Bacteria Exclusion is not as broad as the name may imply. Endorsed to many comprehensive general liability policies, the Fungi and Bacteria Exclusion does not eliminate coverage for all claims arising out of exposure to a fungi or bacteria, but only when the fungi are "on or within a building or structure…" There are numerous places within a hotel or resort where a guest could potentially be exposed to a harmful bacterium of fungi: Outdoor swimming pools, golf courses, gardens, spas, parking lots, ski slopes, etc. If it's not in a building or structure, it's not excluded under the Fungi and Bacteria Endorsement.

"Building" and "structure" are usually not defined in the standard Fungi and Bacteria Exclusion. Alert policyholders can employ this vagueness in their evaluation. Exclusions are construed narrowly and ambiguous terms are resolved in favor of the policyholder in most jurisdictions. Therefore, if there are reasonable grounds to say that something is not a building or structure, then it's not a building or structure with respect to the Fungi and Bacteria Exclusion. So long as it is possible that the exposure occurred somewhere on the property other than a building or structure, the insurance company will generally owe a complete defense in the matter.

POLLUTION EXCLUSION

Perhaps recognizing that the Fungi and Bacteria Exclusion did not completely eliminate the potential for coverage, more and more insurance companies are seeking to expand the scope of the pollution exclusion to include Fungi and Bacteria. "Pollution" is often defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste . . ." As virtually any substance could theoretically be shoehorned into that definition by a clever insurance company, many carriers have aggressively relied on the pollution exclusion to limit coverage.

A recent decision by the Eleventh Circuit Court of Appeals highlights a flaw in the insurance industry's reasoning. The court reasoned that if fungi and bacteria were included within the scope of the Pollution Exclusion, there would be no reason at all for the existence of a Fungi or Bacteria Exclusion. Westport Insurance Co. v. VN Hotel Group, LLC, 2013 WL 1196957 (11th Cir. Mar. 22, 2013). Because every claim triggering the Fungi or Bacteria Exclusion would already be excluded under the Pollution Exclusion, the Fungi or Bacteria Exclusion would serve no useful purpose. Such a result would fail to give full meaning and operative effect to the entire policy – a standard rule for interpreting insurance policies. See id. at * 9. As such, the Court rightly recognized that the fungus and bacteria fell outside the scope of "pollutant" under the policy.

CONCLUSION

Dealing with bacteria and fungus claims can be a headache for any hotel or resort for many reasons – but uncooperative insurance companies should not be one of them. By understanding the limits of the Fungi and Bacteria Exclusion and the Pollution Exclusion, a hotel or resort can substantially increase its chance of recovery from its insurance company without the need to resort to expensive litigation. Of course, given the complexity of these cases and the nuances of each individual insurance policy, it is always recommended that coverage counsel be consulted for any specific matter.

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