SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART: 45

DIANE B. MINKOFF and LAWRENCE A. MINKOFF,

Action No. 1

INDEX NO.: 559/06

Plaintiff,

MOTION DATE:2-17-10
SUBMIT DATE:7-7-10
SEQ. NUMBER - 007

-against-

ACTION REMEDIATION, INC.,
THE SPORICIDIN and SPORICIDIN
INTERNATIONAL,

MOTION DATE: 5-26-10
SUBMIT DATE:7-7-10
SEQ. NUMBER - 008

Defendants.

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ACTION REMEDIATION, INC.,

Action No. 2

INDEX NO.: 08175/06

Plaintiff,

MOTION DATE:5-20-10
SUBMIT DATE: 7-7-10
SEQ. NUMBER - 002

-against-

AMERICAN SAFETY CASUALTY INSURANCE
COMPANY, DIANE B. MINKOFF and LAWRENCE
A. MINKOFF, and THE SPORICIDIN COMPANY,

MOTION DATE: 6-3-10
SUBMIT DATE: 7-7-10
SEQ. NUMBER - 003

Defendants.

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The following papers have been read on this motion:

Notice of Motion (Seq. 007 Action 1), dated 2-17-10.....1
Memorandum of Law in Support, dated 2-17-10.....2
Affirmation in Opposition (Plaintiffs), dated 4-1-10.....3
Memorandum of Law in Opposition (Plaintiffs), dated 4-1-10.....4
Affirmation in Opposition (Defendant Action Remediation, Inc.), Dated 4-2-10.....5
Affirmation in Reply, dated 6-23-10.....6
Sur-Reply Affirmation (Defendant Action Remediation Action 1), Dated 7-6-10.....7

Notice of Motion (Seq. 008 Action 1), dated 5-26-10.....1
Affirmation in Opposition (Defendant Action Remediation), Dated 6-30-10.....2
Affirmation in Opposition (Defendant Sporicidin), dated 7-1-10.....3

Notice of Motion (Seq. 002 Action 2), dated 4-19-10.....1
Memorandum of Law in Support, dated 4-19-10.....2
Affirmation in Opposition (Defendant American Safety Casualty), Dated 6-22-10.....3
Memorandum of Law in Opposition (Defendant American Safety Casualty), dated 6-22-10.....4
Affirmation in Reply, dated 7-6-10.....5

Notice of Motion (Seq. 003 Action 2), dated 4-19-10.....1
Memorandum of Law in Support, dated 4-19-10.....2
Affirmation in Opposition (Defendants Minkoff), Dated 5-18-10.....3
Memorandum of Law in Opposition (Defendants Minkoff), Dated 5-18-10.....4
Affirmation in Opposition (Defendant Minkoff), dated 6-24-10.....5
Affirmation in Opposition (Plaintiff Action Remediation), Dated 6-22-10.....6
Affirmation in Reply, dated 7-6-10.....7

Motion by defendants The Sporicidin Company and Sporicidin International for an order pursuant to CPLR 3212 awarding them summary judgment and dismissing the complaint against them is denied. Motion by plaintiffs Lawrence A.

Minkoff and Diane B. Minkoff for an order quashing a subpoena duces tecum and testificandum served upon Robert Link, Chubb Group of Insurance Company is denied. Motion by defendant American Safety Casualty Insurance Company for an order dismissing the complaint of Action Remediation, Inc. is denied. Motion by plaintiff Action Remediation for an order awarding summary judgment against American Safety Casualty Company is denied.

In this action plaintiffs Lawrence and Diane Minkoff seek to recover damages arising out of the chemical and mold contamination of their home located at 8 Danton Lane South, Lattingtown, New York. The subject property, consisting of a 4000 square foot residence on four acres, is titled in Lawrence Minkoff, while the home's furnishings and other personalty are owned by both plaintiffs.

The complaint alleges that defendant Action Remediation, Inc. contracted with plaintiffs to provide mold remediation services at their residence in November of 2004. Plaintiffs allege that Action negligently mixed a product known as Sporicidin Sterilizing and Disinfecting Solution with a bleach solution, resulting in the formation of chemical and carcinogenic constituents and odors that have permeated all porous surfaces and contaminated their residence and its contents. Plaintiffs assert that their home has become unusable, and a danger to their family's health and safety. They allege that the extent of the damage renders their residence uninhabitable and that the entire structure requires demolition.

Defendants the Sporicidin Company and Sporicidin International (hereafter referred to collectively as Sporicidin) are the manufacturers of Sporicidin Sterilizing and Disinfecting Solution. Defendant Action Remediation, Inc. asserts that Sporicidin misrepresented the efficacy of its product, and recommended uses which were in conflict with its chemical nature, as well as in contravention of its EPA approved labeling.

Chubb Group, a subpoened non-party, is the insurance carrier for plaintiffs'

residence. The Minkoffs formerly commenced a declaratory judgment action against Chubb, which action was settled. The settlement is alleged to be confidential.

Plaintiffs' first cause of action against Action Remediation states that Action used the Sporicidin product "in combination with bleach" , that the application of the product created exposure to toxic chemicals and created a condition where noxious odors permeated their residence. They also allege that this condition resulted from the use of the product "either solely or in combination with bleach, " and that Action failed to follow label instructions.

The second cause of action against Action asserts a claim for breach of contract and breach of warranty.

The first cause of action against Sporicidin alleges that it warranted and promoted its product as EPA registered to clean, disinfect and deodorize and that the product was non-corrosive to surfaces including plastic, latex, vinyl, glass, wood, metal and porcelain. They allege that the Sporicidin was "careless in design, testing, inspection, manufacturing, distribution, labeling, sale and promotion" of the product.

The second cause of action alleges that Sporicidin represented the product as suitable for wood surfaces, and that it breached this express and implied warranty. The third cause of action alleges strict liability and a fourth cause of action asserts gross negligence and asks for punitive damages.

Addressing the motion to quash first, the contested subpoena requests a deposition of Robert Link, a Chubb adjuster who handled plaintiffs' homeowner's claim. The subpoena also seeks production of "all claims file documents, and any and all settlement agreements or documents / cancelled checks to the Minkoffs or their counsel / releases".

Plaintiffs assert that pursuant to CPLR 3101(a)(4) a subpoena upon a non party

must state the "circumstances or reasons" that make it necessary for the discovery to be sought from the non-party. They contend that the subpoena is "facially defective" because it does not state the reasons why the discovery from Mr. Link is sought or required. They also assert that the information sought is not relevant to the claims against Action and that the settlement agreement with Chubb is confidential.

There can be no argument; the claim with Chubb is relevant to this action; it covers the same damage to plaintiffs' residence, and arises out of the same alleged cause.

A Remediation Agreement between Chubb and plaintiffs dated March 8, 2007 concerns the very damage at issue here. Chubb agreed to reimburse for the remediation to plaintiffs' home, without prejudice to a claim by plaintiffs should the remediation fail to satisfy criteria to be agreed upon by the parties. Plaintiffs were unable to come to a final agreement with Chubb, and brought a declaratory judgment action for coverage.

During the proceeding against Chubb, defendant Action served a subpoena upon Robert Link and agreed that he would be deposed at the same time that plaintiffs deposed him. The subpoena was identical to the one at issue here, and went unchallenged. However, the declaratory judgment action was settled before depositions were held.

In sum the information sought is relevant and has not been produced by plaintiffs, and the subpoena remains unopposed by Chubb and Robert Link.

The court rejects plaintiffs blanket assertion that disclosure from a third party requires more than relevance, i.e. that it must be more than merely material and necessary. "Where a request for discovery from a nonparty is challenged solely on the ground that it exceeds the permissible scope of matters material and necessary in the prosecution or defense of the action, a motion to quash is properly denied if that threshold requirement is satisfied * * * or properly granted if the discovery sought is not material and necessary (*Kooper v. Kooper*, 74 AD3d 6, 318 [2d Dept 2010]).

A non party must be given notice "stating the circumstances or reasons such disclosure is sought or required", which notice is intended to afford either a nonparty "who has no idea of the parties' dispute", or a party "affected by such request" an opportunity to formulate a response (*Kooper v. Kooper, supra* at p 319).

The subject subpoena contains the following notice:

> The requested information is sought in connection with the above referenced action in which Lawrence and Diane Minkoff allege that following the remediation of a mold condition at their home by Action Remediation, that the house became uninhabitable and they became sick as a result of chemicals used in the remediation. The Minkoffs further allege that the alleged condition in the house cannot be remediated without complete demolition.

The foregoing notice clearly states the circumstances and gives Chubb the requisite notice. Plaintiffs' assertion that the subpoena does not state the reasons why the discovery is sought "from" Mr. Link adds a burden to the notice provision which the statute does not impose. While the court may review whether the information sought is discoverable from a source other than the subpoened non party, there is no requirement that this information be provided in the notice. Moreover Chubb, as defendant in the declaratory judgment action concerning coverage for the same damage, is on notice of the circumstances and the need for disclosure, and, being informed as to the issues, has not objected or sought to quash.

With respect to the assertion of a confidential settlement agreement, the terms of the settlement, i.e., payments by Chubb to plaintiffs, may constitute collateral source payments which must be revealed pursuant to CPLR § 4545. In this regard, pretrial discovery is available "so defendants can acquire information and documents that may later be used to support a motion for a collateral source hearing" (*Firmes v. Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 35 [2d Dept 2008], *lv app denied* 11 NY3d 705 [2008]). Accordingly, the motion to quash is denied.

Turning to Sporicidin's motion for summary judgment dismissing the complaint, the movants rely solely upon a theory of preemption under the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (FIFRA) (7 USC § 136 *et seq.*). The memorandum of law phrases the defense as follows:

> The Minkoffs claim as a basis to his (sic) lawsuit, that the labeling on the Sporicidin container was defective. However, as cases based on labeling are preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) of 1947, the Minkoffs' claims against Sporicidin must be dismissed.

FIFRA expressly prohibits anyone selling products with EPA approved warning labels "from making any claims that 'substantially differ' from the claims made for the product at the time of registration" (*Lowe v. Sporicidin,* 47 F3d124, 127 [4th Cir 1995]; 7 USC § 136j[a][1][B]). Preemption does not extend to a state imposing "common law liability" if a manufacturer's advertisements make claims "as a part of its distribution or sale" that substantially differ from "claims made for it as part of the statement required in connection with it registration" (*supra* at p. 130). FIFRA does not preempt a claim for negligent misrepresentation (*see Williams v. Dow Chemical Co.*, 255 F.Supp.2d 219, 229-230 [District Court SDNY 2003]).

Defendant Action has submitted sufficient admissible factual evidence to raise a question whether Sporicidin promoted an application "inconsistent with labeling" instructions, and whether it made a negligent misrepresentation relied upon by Action. According to Richard Daly, Operations Manager for Action, he first became aware of Sporicidin from vendor recommendations and trade journal advertisements. Bullseye Environmental, Actions's distributor of mold remediation products, recommended Sporicidin for use in mold remediation because it offered "residual mold killing power" and was effective against "Stachybotrys" or black mold. Daly

states that Sporicidin advertised and promoted its product in a manner which is misleading and contrary to its EPA approved label. He states, "Specifically, Sporicidin promoted Sporicidin Disinfectant Solution for use on porous building materials such as studs and drywall in connection with mold remediations" (p.2 Daly affidavit). Sporicidin also distributed a 2001 University of Maryland Study as a marketing tool, which Ken Burns, Action's sales/project manager, obtained and provided to Daly.

The University of Maryland study stated that Sporicidin Disinfectant Solution offered residual mold killing power for several months when used on porous building materials. It also stated that the Sporicidin Disinfectant solution killed Stachybotrys. Ken Burns purchased the Sporicidin Solution for use on Action remediation jobs based upon the claim that it prevented reinfestation of infected building materials, as no other product offered such protection.

The affidavit of expert chemist Gerard Macri, PhD also asserts that the label on the Sporicidin bottle tested had an inaccurate statement of the concentration of ingredients found. Phenol, the product's active ingredient, was 30% lower than the label's stated percentage. Moreover toluene, benzene, acetonitrile and acetone, volatile chemicals, were found in the head space over the tested Sporicidin, in concentrations equal to the phenol level. TCP was found in plaintiffs' residence and there is a question of fact whether it was the product of a chemical reaction between the Sporicidin and other reactants present at plaintiffs' residence, or if it preexisted as impurity in the bottle of Sporicidin.

In addition Macri advises that defendant Sporicidin advised Dr. Minkoff to apply a solution of citric acid to the portions of the house that had been treated by Action.

Citric acid, according to Macri, exacerbated the condition by causing the fibers of the wood studs and sheathing to "open", thus allowing more of the odor to escape into

the air and spread. The expanded wood fibers allowed "greater volatization of chlorinated phenolics" which spread throughout plaintiffs' residence, contaminating all porous materials including furnishings and clothing.

Turning again to FIFRA, its pre-emption provision applies only to state-law "requirements for labeling or packaging" that impose requirements that are "in addition to or different from those required" under FIFRA (*Bates v. Dow Agrosciences LLC*, 544 US 431, 433 [US 2005]; 7 USC § 136v[b]). The pre-emption of state requirements includes common law, and accordingly, a common law remedy may be preempted (*supra*). However, *Bates v. Dow* held that state rules which require manufacturers to "design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects" and require them to "honor their express warranties or other contractual commitments" do not qualify as requirements for labeling or packaging (*Bates v. Dow Agrosciences LLC supra* at p 444). None of the foregoing rules require manufacturers to label or package their products "in any particular way", and accordingly, claims for "defective design, defective manufacture, negligent testing, and breach of express warranty" are not pre-empted (*supra*; see *also Restrepo v. Rockland Corp.*, 38 AD3d 742, 743 [2d Dept 2007][negligent design and manufacture not pre-empted]).

Bates adopted what is referred to as a "parallel reading" of section 136v(b) which regulates state preemption, and held that the section "does not preempt a state-law requirement that is equivalent to and fully consistent with, FIFRA's labeling standards" (*supra* at p 432). Thus a claim for negligent failure to warn that is consistent with the statutory prohibition against "misbranding", including a false or misleading statement "concerning the efficacy of the pesticide", as a requirement which may be considered parallel, is not precluded (*supra* at p 438).

Section 136 § (q)(1)(F) requires that a label contain "directions for use . . . adequate to protect health and environment" and 136 § (q)(1)(G) prohibits omission of a "necessary warning or cautionary statement". Registration is "prima facie evidence that the pesticide and its labeling comply with the statute's requirements, but registration does not provide a defense to a violation of the statute." (*supra* at p 438).

The court rejects Sporicidin's assertion that all failure to warn claims are preempted. Such position is contrary to the Supreme Court's explicit acceptance of a failure to warn claim for equivalent and consistent state requirements. Although the Second Department has stated that "FIFRA . . . preempts state law causes of action based on . . . a failure to warn" (*Restrepo v. Rockland Corp.*, 38 AD3d 742, 743 [2d Dept 2007]), a failure to warn was not at issue in *Restrepo*.

Restrepo does not address or acknowledge *Bates*, but instead cites case law decided years before the *Bates* decision. It cannot be presumed that the Second Department would derogate without comment a ruling of the United States Supreme Court interpreting federal statute (FIFRA) which ruling favors a state common law remedy.

Sporicidin has not addressed whether plaintiffs' claims based on failure to warn "are equivalent to FIFRA's requirements that a pesticide label not contain "false or misleading" statements, § 136(q)(1)(A), or inadequate instructions or warnings. §§ 136(q)(1)(F), (G)" and thus this court will not decide on summary judgment whether "whether these particular common-law duties are equivalent to FIFRA's misbranding standards" in this case. Accordingly, the motion for summary judgment is denied.

Turning to the insurance issues, Action Remediation's declaratory judgment claim against American Safety Casualty Insurance Company (American) seeks a declaration that American is obligated to defend and indemnify Action for its alleged

negligence in mixing Sporicidin with bleach, which created toxic chemicals and noxious odors which permeated the Minkoff residence rendering it uninhabitable.

American asserts that coverage is excluded for the mold remediation, Action's primary business endeavor, under the Commercial General Liability policy (CGL). It also asserts that there is no coverage under the Endorsements for Environmental Consultant Professional Liability (ECPL), Contractor's Pollution Liability (CPL) or Microbial Decontamination Limited Coverage (MDL), all of which are governed by Georgia law under the insurance contract.

American also claims that Action's notice to American was untimely under the policy provisions. Action first received a written notice of claim from Minkoff dated June 9, 2005 which stated "please be advised that we hereby make claim against Action Remediation based on their negligent selection and application of chemicals applied in connection with a mold remediation service". The notice was forwarded to American by its agent Gremesco on June 27, 2005 by facsimile transmission. American did not disclaim coverage until March of 2006, some nine months later.

American's March 2006 letter bases the disclaimer on a mix of the following coverages and exclusions. Coverage under the Commercial General Liability policy addresses bodily injury and property damage caused by an "occurrence", i.e., "an accident including continuous or repeated exposure to substantially the same general harmful conditions". Coverage is conditioned upon written notice to American "within ten (10) days of any 'supervisory personnel' becoming aware of an 'occurrence' . . . which may result in a claim." Multiple exclusions are relied upon to disclaim coverage under the Commercial General Liability.

Excluded are: expected or intended injury; damage to that particular part of property on which the insured is performing operations, or that particular part of property that must be restored, repaired or replaced because the insured's work was incorrectly performed on it; bodily injury or property damage arising from the

rendering or failure to render any "professional services" by or for any insured; damages arising from intentionally or grossly negligent tortious conduct, including "claims" for punitive damages and breach of or failure to perform any contract or agreement, and damages arising from pollution.

Pollution is defined in relevant part as the dispersal, migration, release or escape of "hazardous substances", i.e., "any solid, liquid, gaseous, or thermal irritant or contaminant, including but not limited to acids, alkalis . . . chemicals, fumes . . . mold/mildew/fungus . . . smoke, soot, vapor . . . and the by-product of any chemical, mechanical or thermal process or reaction." Thus the CGL excludes coverage for pollution consisting of mold and chemical fumes.

In addition to the pollution exclusion for mold, the policy includes a Mold, Mildew, Fungus Exclusion Endorsement which states that it shall apply to all Sections and coverage parts of the policy. The endorsement states that the insurance does not apply to "bodily injury or property damage arising out of, relating to or resulting from the actual or alleged existence , exposure , ingestion, inhalation, abatement, testing, monitoring, remediation, enclosure, decontamination repair, removal of mold, mildew or fungus in any form." Coverage does not apply to "any loss . . . whether actual or alleged, arising out of, relating to, or resulting from mold, mildew or fungus that arises from any cause whatsoever, whether caused by the insured . . . [or] whether caused by chronic water intrusion into the building envelope."

Notwithstanding the two separate exclusions for mold, coverage exists by virtue of a coverage endorsement entitled Microbiological Decontamination Limited Coverage Endorsement. Subject to a self insured retention, it provides coverage for damages because of bodily injury or property damage "arising solely out of actual discharge, dispersal, release, escape of 'microbial contaminants' caused solely by your performance of 'microbiological decontamination'". Microbiological

contaminants are defined to include mold, thus the coverage Endorsement negates the mold exclusions in part. The Endorsement also contains an exclusion for any suit "arising from: The discharge, release, escape, dispersal, contamination or exposure to 'pollutants' in whatever form, which occurs after the completion of that part of 'your work' involving "microbiological decontamination."

The Minkoffs' complaint does not state that the toxic odors which rendered their home uninhabitable were the result of mold release to other parts of the residence, but rather a chemical release as a result of the negligent mix of Sporicidin and bleach and its application to porous wood members of that part of the residence which was contaminated by mold. Accordingly, the coverage of the limited microbiological endorsement does not cover plaintiff's allegations against Action, as the Endorsement does not apply to the release of chemicals.

The release of chemicals brings the court to consideration of a Contractor's Pollution Liability Coverage Endorsement which adds coverage for pollution to Section I Coverage A, Par. 1 of the CGL Policy. Notwithstanding the terms of the CGL Pollution Exclusion, coverage is provided for damages, subject to a self-insured retention, that the insured becomes legally obligated because of bodily injury or property damage that takes place during the policy period because of a "pollution incident" caused by the performance of "covered contracting operations" during the policy period in the policy territory.

A "pollution incident" and "Covered Contracting Operations" are defined terms under the policy. A pollution incident is defined as "the actual discharge, dispersal, release or escape of 'pollutants' into or upon land, the atmosphere or any watercourse or body of water, provided such conditions are not naturally present in the environment". Pollutants are defined under the Endorsement as "any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals and waste materials". One Covered

Contracting Operations Endorsement states that the following are covered: "Those activities, procedures or operations required to clean up, detoxify, dilute, remove or abate "pollutants".

A second "Covered Contracting Operations Endorsement" includes activities, procedures or operations concerning "Drywall/Remediation & Closure" and Demolition Non Structural (Interior Remodel), Demolition Two or Less Stories. Accordingly an escape of pollutants would also be covered during operations concerning drywall/ remediation and non structural demolition.

One further coverage Endorsement appears inapplicable. The Environmental Consultant Professional Liability Endorsement covers Laboratory Analysis, Indoor Air Quality Consulting, Soil Testing and Underground Storage Tank System Testing. Laboratory, soil and septic tanks are not remotely involved. The indoor air quality was not tested by Action, which had no part in the analysis. Moreover, the plain import of the words used indicates that the endorsement addresses diagnostic activity, rather than remedial activity.

As stated, American disclaims all defense and coverage obligations under the policy arising from any alleged negligent work performed by Action.

Under Georgia law, the construction of insurance contracts is a matter of law for the court, an issue which may properly be disposed of by summary judgment (*Lumbermens Mut. Cas. Co. v. Plantation Pipeline Co.*, 214 Ga.App. 23, 28 [1994]). Where an insurer grants coverage to an insured, "it must define any exclusions in its policy clearly and distinctly" (*supra*). In general, ambiguities "are construed favorably to the insured and against the insurer, particularly if exemptions or exclusions are at issue" *(American Nat. Property and Cas. Co. v. Amerieast*, 297 Ga.App. 443, 446 [2009]). In sum, the State of Georgia construes policies "liberally" in favor of coverage, and "strictly" against an insurer who prepares the contracts,

particularly with respect to exclusions from coverage (*Barrett v. National Union Fire Ins. Co. of Pittsburgh*, 304 Ga.App. 314, *5 [2010]).

In this regard, construction of the same word may differ, depending on whether it appears in coverage sections or exclusions. In *Barrett*, supra, National Union argued that plaintiff Barrett's injury arose out of "his exposure to natural gas and that such gas was a pollutant, as that term is defined under the Policy" thus excluding coverage for his injuries (*supra* at p *3). Barrett's complaint alleged that the negligence of AGL employees allowed natural gas from a tap to accumulate in a ditch where Barrett was working "thereby creating an oxygen-deprived atmosphere and that it was the lack of oxygen that injured Barrett" (*supra*). The court found that natural gas was not a "contaminant or irritant" so long as the supply of oxygen was not impeded, and therefore it was not a pollutant under the policy exclusion.

The court also construed the language "arising out of" in the exclusion. Under a coverage provision the language would cover "almost any causal connection or relationship" and that proximate cause in the strict legal sense was not required. (*supra* p *5). When construing the same language in an exclusion, the words were held to require "but for" causality. The court held that the release of natural gas did not show a "definitive 'but-for' causal link" (*supra*). Rather the record showed that the negligence of AGL employees, who failed to monitor oxygen levels in the excavation ditch after the taps had been open for a longer than usual time period, failed to view the space in the ditch as an enclosed space, failed to provide respirators and failed to ensure that Barrett took sufficient breaks while working to retrieve a plug which had fallen into the gas valve, caused Barrett's injuries and that "but for" their negligence Barrett would not have been harmed by the exposure to gas.

Barrett addressed an additional and crucial theory under Georgia law regarding enforcement of exclusions. The state of Georgia will not enforce an exclusion in an

insurance contract which violates public policy. *Barrett* held that it would be a violation of public policy to allow an insurer to sell a liability policy to cover an insured whose main product is natural gas, while at the same time including an exclusion for all damages resulting from natural gas. "Georgia public policy disfavors insurance provisions that 'permit[ ] the insurer, at the expense of the insured, to avoid the risk for which the insurer has been paid' and for which the insured reasonable expects it is covered" (supra at p *4).

Insurance contracts are to be "construed in accordance with the reasonable expectations of the insured" and "in favor of the object to be accomplished" (*supra*, quoting *Ga. Farm Bureau Mut. Ins. Co. v. Meyers*, 249 Ga. App. 322, 324 [1998] and *Anderson v. Southern Guaranty Inc. Co. of Ga.*, 235 Ga. App. 306, 309 [1998]). In construing an insurance policy, "the test is not what the insurer intended its words to mean, but what a reasonable person *in the position of the insured* would understand them to mean" (*Ace American Ins. Co. v. Truitt Bros.*, 288 Ga.App. 806, 807-808 [2007]; citing *Hocker Oil Co., Inc. v. Barker-Phillips-Jackson,* 997 S.W.2d 510, 518 [Mo.App.1999][owner of a gas station "could have reasonably concluded that gasoline was not deemed a pollutant for purposes of the [pollution] exclusion since it was not specifically identified as such [and] ... it would be an oddity for an insurance company to sell a liability policy to a gas station that would specifically exclude that insured's major source of liability"]).

Here the insured alleges that its main business is mold remediation. The American policy includes a Mold, Mildew, Fungus Exclusion Endorsement which excepts coverage for any damage arising out of the remediation of mold. Clearly were the endorsement to end there, the violation of Georgia public policy would be stark. But this mold exclusion is arguably saved from a public policy violation by the Limited Microbiological Decontamination Endorsement, which is to read broadly

to provide coverage while the exclusion is read narrowly. Thus the release of mold is covered by the policy. However, it is not the release of mold which is alleged in the complaint, it is the release of toxic chemicals due to the negligence of the insured during a mold remediation contract.

The policy is saved by another section which may be read to include mold in its coverage. The Contractor's Pollution Liability Coverage Endorsement (CPL) provides coverage for a pollution incident caused by the performance of covered contracting activities. A pollution incident means the actual discharge, dispersal, release or escape of pollutants, i.e., solid, liquid or gaseous or thermal irritants or contaminants. The covered contracting activity includes "activities, procedures, operations required to clean up, detoxify, dilute, remove or abate pollutants."

Here a reasonable insured would expect the chemicals released by the mix of bleach and Sporicidin, which produced toxic odors and a chemical release to the entire Minkoff residence, to be covered by the CPL. And, as coverage is read broadly and construed against the insurer, this court finds that the chemical release in the Minkoff residence constituted a covered pollution incident under the CPL. Furthermore, exclusion of coverage for such chemical release would raise public policy issues.

In American's twenty-eight page disclaimer letter, it relies upon multiple exclusions to negate coverage under all endorsements, including but not limited to the following; expected damage, goods manufactured by the insured, damage arising out of mold decontamination work, damage to real property, and notice provisions.

The expected damage exclusion precludes coverage for damage "expected or intended from the standpoint of any insured". The quoted language applies to intentional torts, in particular assault and battery, clear from its statement that it does not apply to "bodily injury resulting from the use of reasonable force to protect

persons or property" (*see, ALEA London Ltd. v. Woodcock*, 286 Ga.App. 572 [2007] [incident alleged to fall within the policy's assault and battery exclusion]) . In any event, the damage here cannot be described as expected or intended.

American also relies upon a manufactured goods exclusion under the Covered Professional Activities Endorsement. While the court finds that the CPA does not apply, because the covered activities address diagnostic rather that remedial activity, the exclusion would not apply in any event. The relied upon exclusion, which is asserted to exclude pollution coverage as well, states that coverage does not apply to damage arising out of any "goods, products or equipment *manufactured, sold, handled, installed, distributed or disposed* of by you" (emphasis supplied).

American states that Action handled and installed the Sporicidin/bleach mixture to the Minkoffs residence. The quoted definition includes the term "equipment". Equipment is capable of being installed, i.e., set up for use or service (Webster's Third New International Dictionary). The court finds the word installed is meant to refer to equipment, and not to sprays, which clearly cannot be and do not need to be installed for use.

The word "handled" has been construed and in context is not used in the sense of touch, as its association with the words manufacturer and seller in the same clause "indicates that it should be given its commercial connotation, and construed to refer to products in which the insured trades or deals" (*Frontier Insulation Contractors, v. Merchants Mut. Ins. Co.*, 91 NY2d 169 [1997]). Georgia law does not differ from the foregoing construction by the New York Court of Appeals, as the only cases applying the exclusion deal with products of manufacturers (*Lewis Card & Co. v. Liberty Mut. Ins. Co.*, 127 Ga.App. 441, 444 [1972][handle affixed to bucket during manufacturing process was part of product]; *Lavoi Corp., Inc. v. National Fire Ins. of Hartford*, 293 Ga.App. 142, 150 [2008][baker sued for contaminated breads];

Stratton & Co., Inc. v. Argonaut Ins. Co., 220 Ga.App. 654 [1996][issue of whether a building should be considered the "product" of its builder]). Accordingly, construing the clause narrowly, the court finds that the exclusion does not apply to the products purchased and used by Action without resale .

American broadly relies upon the Mold Exclusion Endorsement stating:

> The Mold, Mildew, Fungus Exclusion bars coverage for property damage arising from , among other things, the "abatement", "remediation", or "removal" of "mold, mildew, or fungus" in any form as well as any other mold-related activities. The complaint in the Minkoff action alleges that the property damage at issue arose from the application of Sporicidin during the abatement, remediation and/or removal of mold. Accordingly, coverage for such claim is excluded (emphasis supplied).

Noted first, the Exclusion Endorsement is to be read narrowly while the Microbiological and Pollution Coverage Endorsements are to be read broadly. Accordingly, insofar as the exclusion addresses items added by specific coverage endorsements, they cannot be read to exclude all coverage. The CPL, which is also an additional coverage endorsement, provides coverage for pollutant remediation and the general exclusion for mold therefore cannot negate coverage provided by the CPL.

With respect to real property, American also states that exclusion 2(k)(5) bars coverage because "there was damage to real property, the home of plaintiffs, caused by the operations of Action." Section 2(k)(5) bars coverage only to "*that particular part* of real property" on which the insured performed operations. The omission is misleading and the section is rejected as the insured clearly was working on a limited part of the Minkoff residence and the damage alleged extends to the entire residence.

Finally American relies upon certain notice provisions of the insurance contracts to deny coverage. The disclaimer states at page twenty-five:

> Coverage . . . is barred by the failure of Action to comply with the conditions of the Primary Policies, including Condition 2, the New York Amendatory Endorsement and/or the CPL Endorsement in that Action failed to give [American] the required notice. Condition 2 states: "You must see to it that we are notified in writing within ten (10) days of any negligent acts, errors or omissions that may result in a claim or suit" [Emphasis added]. Action was required to give . . . written notification within 10 days "of any 'supervisory employee' becoming aware of any 'claims' . . . " However Action failed to notify [American] within ten days after first learning of the problem on or about December 3, 2004 or upon receiving correspondence from plaintiffs counsel on or about June 9, 2005 advising of "a claim". . . There is no apparent reason why it was not reasonably possible for Action to give notice to [American] during that time period. Notwithstanding the foregoing, it is also the position of [American] that Action failed to give notice as soon as reasonably practical.

The foregoing "coverage is barred" paragraph represents American's total reasoning with regard to timeliness. The determinative words in the disclaimer are "that may result in a claim or suit." Addressing the first assertion regarding "Condition 2", notice within ten days of any negligent action which may give rise to a suit, quite simply the facts indicate that Action was not aware of any "negligent act, error or omission" at the time it occurred. There was no immediate damage from the mixing of chemicals to alert Action as to its own negligence, particularly since Action's employee testified that he had mixed the chemicals on a prior occasion without incident. The alleged unremediable and extensive consequences which arose from that act were delayed. When the toxic odor was discovered in December, its unremediable nature was still not apparent. Nor was it clear that it might give rise to a claim against Action, as Chubb, the Minkoffs homeowner's carrier, agreed to cover remediation of the damage.

Shortly after Action received notice that Chubb was rejecting certain expenses submitted by Lawrence Minkoff, it received a notice of claim from the Minkoff's

attorney, on or about June 9, 2005. The time between the two notices was a little more than five weeks. The attorney's notice was forwarded to Action's insurance broker on June 14, 2005 and to American's agent on June 20, 2005.

Whether an insured gave an insurer timely notice of an event or occurrence under a policy generally is a question for the fact finder (*State Farm Fire and Cas. Co. v. Walnut Avenue Partners, LLC*, 296 Ga.App. 648, 651 [2009]). An insured "is not required to foresee every possible claim that might arise from an incident" and "often may be able to present evidence of excuse or justification for the delay" (*supra* at p 653). Whether the excuse or justification is sufficient and whether the insured "acted diligently in giving the notice" are questions of fact to be determined by a jury, depending upon "the nature and circumstances of each individual case" (*supra*). Moreover, if an insured did not know the policy might afford coverage such lack of knowledge could provide justification for the failure to give notice , and where there is a conflict regarding lack of knowledge, a jury must determine the question" (*Newberry v. Cotton States Mut. Ins. Co.*, 242 Ga.App. 784 [2000]).

Here Action's failure to foresee that a claim would arise from the actions of its employee until it received a notice of claim presents a question of fact as to whether it was reasonable under the circumstances presented. Those circumstances include, but are not limited to the following; Action was not aware of the negligent nature of its action in mixing chemicals as it had done on a prior occasion as damage was not immediately apparent; its actions intended to remediate the resulting odors and knowledge that plaintiff's homeowner's coverage by Chubb's acted to provide coverage for remediation of the damage; and finally, the discovery only after the passage of time that the toxic odors were not responsive to remediation. It is noted that the chemical identification of the odors did not take place for some time, and not until after American received notice. The circumstances presented do not establish

clearly when a supervisory employee of Action became aware of a pollution incident or when they were aware of an occurrence which might result in a claim.

The same rationale applies to the New York Endorsement and the CPL Endorsement. The New York Endorsement forecloses a disclaimer of coverage if the insured shows that "it was not reasonably possible" to give such notice in timely fashion, and that it provided such written notice "as soon as it was reasonably possible." The factual issues here render what may be "reasonably possible" a question of fact.

The CPL endorsement states that a condition precedent to coverage requires the insured to notify American "in writing of any 'pollution incident' as soon as possible, and in any event, not later than ten (10) days after any 'supervisory employee' becomes aware of any such event." When a supervisory employee became aware of a pollution event is, like those issues above, a factual question.

In any event, American did not identify or address this notice provision in the above quoted "coverage is barred" paragraph and it is limited to the rationale set forth in its disclaimer.

Based upon the foregoing, the summary judgment motions of both American and Action are denied (see, *Newberry v. Cotton States Mut. Ins. Co.*, 242 Ga.App. 784 [2000][insured notified carrier about the claim 17 days after receipt of service of the underlying lawsuit, but 11 months after the actual occurrence of the incident]).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 30, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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