

## Insurance Marketplace Newsletters 21st Century Edition – No. 3

### MILDEW & TOXIC MOLD

When asbestosis was added to the lexicon of the insurance industry, several questions came up:

- Is it covered under the Bodily Injury section of the General Liability policy?
- If so, why didn't the insurance industry (especially Lloyds) have the foresight to exclude it, especially when underwriting calculations did not anticipate it?
- Now that the courts have ruled it is a non-excluded peril (and therefore covered) which theory of coverage applies – the manifestation or the exposure theory?

After several years and millions of pages of testimony, a number of courts in different jurisdictions finally ruled that since years of exposure to friable (airborne) asbestos had a cumulative effect, those insurers (both primary and excess) whose policies were in effect over the years should respond, as opposed to the few who were writing General Liability and Umbrella coverage when the disease manifested itself. Total payments to date - \$21.6 billion.

As a side effect, this ruling was a wake-up call for those insureds who had not maintained complete records for all those years and was also a boon to insurance archeologists who unearth heretofore hidden policies.

It also acted to reinforce the importance of buying third-party coverage from financially strong insurers who would be around to respond to long-tail claims.

The scenario was repeated as a microcosm of the asbestos situation with the discovery that lead paint ingested by infants and young children caused irreversible brain damage.

Today, the new buzz words are toxic mold, and to a lesser extent, mildew.

Most "All Risk" property policies contain an exclusion for mold and mildew. While there can be significant damage to an insured's property from these growths (especially as respects remediation) the larger exposures appear to be bodily injury and tenant loss of use due to odor and the threat of bodily injury.

In our own practice we have already seen claims in a southern mall where vandals had opened water valves, as well as in apartment buildings where, once again, accumulated water was the culprit. The remediation costs in the mall were paid by the carrier after we argued with their counsel that the proximate cause was vandalism/water damage, which are covered perils.

The odor leading to loss of use and purported bodily injury in the apartments is still being contested. Issuers of Commercial General Liability policies are seeking to deny coverage based upon the pollution exclusion contained therein. We refer you to the John Liner Letter,

Vol. 38, No. 4 (March 2001) for an excellent discussion, along with legal citations, supporting coverage under CGL policies citing the theory that microorganisms are not pollutants.

Other recent cases:

- Jamaica, N.Y. – A New York employee seeks \$65 million for injuries and damages allegedly caused by mold exposure, i.e., the building has toxic mold and fungus, water leaks, unsafe and unsanitary conditions, improper ventilation and other dangerous conditions. He alleges that as a result of the building's conditions, he has suffered from personal injuries as well as pain and suffering in an amount not expected to exceed \$10 million. "Plaintiff requests that the Court award punitive and exemplary damages in the sum of fifty million dollars."
- In 1998, three California families collected \$545,000 in the settlement of a lawsuit against their condominium association. The families claimed that their psychiatric and numerous physical illnesses were caused by mold growth that developed from leaky pipes in their condominiums.
- In early 2000, a California apartment complex owner and its individual employees were sued for negligently allowing mold to grow within the units, allegedly causing residents to suffer severe personal injury and death.
- The employees of a newspaper are suing the landlord for \$10 million in damages for failing to make repairs that allowed several types of mold to grow which they claim caused lung and sinus infections.
- A condo association is suing real estate developers, contractors and managers for personal injury and property damage caused by inadequate waterproofing that permitted toxic mold to grow.

Finally, a Texas jury awarded a family \$32 million from Farmers Insurance Group, ruling that the insurer had failed to properly address the plaintiff's water damage and mold claim. The award included costs to tear the house down and rebuild it; loss of possessions; mental anguish; punitive damages and legal fees.

If we had to single out one line of coverage which had appeared to be immune from recent market trends, it would be Pollution Legal Liability. There have been more entrants providing broader policies and premium rates have actually gone down in the past few years. However, in the past month or so we have learned that major insurers offering this policy are either setting unrealistically low sublimits (such as \$25,000 in a \$10 million policy) or excluding mold and related claims altogether.

The plaintiff's bar's new slogan is "Mold is gold."

We have been advising clients as follows:

- If you have not already purchased a Pollution Legal Liability policy (most have done so) then let's find one quickly as it is becoming difficult to obtain without this onerous exclusion.
- If you have purchased such coverage it was for a 5, 10 or 15-year term; if your insurer tries to diminish coverage mid-term then resist to the point of retaining legal counsel.
- Look for conditions (water accumulation; very high humidity within a confined area; and high temperatures) which could foster the growth of toxic mold. Then correct them promptly.
- Where there is already evidence of toxic mold, secure the assistance of forensic engineering and similar environmental firms who perform testing and remediation services.