

## Chapter 13

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# Environmental Law

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## 13.1 Clean Air Act Litigation

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### 13.1.1 U.S. Supreme Court Upholds EPA's Authority to Establish National Ambient Air Quality Standards

In a landmark decision under the Clean Air Act ("CAA"), the United States Supreme Court upheld the authority of the United States Environmental Protection Agency ("EPA") to set national ambient air quality standards ("NAAQS") to protect the public's health from air pollution. *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). The decision, which arose out of EPA's 1997 revisions to the NAAQS for ozone and particulate matter, reversed the holding of the United States Court of Appeals for the District of Columbia Circuit that EPA's interpretation of the CAA resulted in an unconstitutional delegation of legislative powers to EPA. *American Trucking Associations v. United States E.P.A.*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

The constitutional question focused on CAA section 109(b)(1), which authorizes EPA to establish "ambient air quality standards the attainment and maintenance of which in the judgment of [EPA] . . . and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The Court of Appeals held that, as interpreted by EPA, this section did not provide an "intelligible principle" to the agency's exercise of authority in setting NAAQS and, thus, violated the nondelegation doctrine. 175 F.3d at 1034. In an opinion without a dissent, the Supreme Court reversed, finding that CAA section 109(b)(1)'s standard for setting "air quality standards at a level that is 'requisite' -- that is, not lower or higher than is necessary -- to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our [nondelegation] precedent." 531 U.S. at 475-76.

The Supreme Court's decision also addressed two other issues concerning the NAAQS. First, the Court affirmed the Court of Appeal's decision that the CAA prohibits EPA from considering economic costs in setting NAAQS. *Id.* at 471. In doing so, the Court distinguished implementation of the NAAQS, where the CAA directs EPA and the states to take costs into account. Second, the Supreme Court rejected EPA's plan to implement the revised ozone NAAQS because the plan nullified the CAA's provisions for implementing the old ozone NAAQS. *Id.* at 485. For example, EPA's plan would have required certain areas of the country to meet the new, more stringent 8-hour ozone NAAQS at the same time that the CAA had allowed them to meet the old 1-hour standard. Thus, the Court found EPA's plan to be an unreasonable interpretation of the CAA because it was "so at odds with [the Act's] structure and manifest purpose." *Id.* at 486.

The Supreme Court's decision has not ended the controversy surrounding the revised ozone and particulate matter NAAQS. The Court left EPA to develop a lawful implementation plan for the revised ozone NAAQS and left the Court of Appeals to decide other preserved challenges to the revised NAAQS, including whether the revised standards were reasonable based on public health data. Those issues remain unresolved. However, EPA did propose a response to the Court of Appeals decision remanding the ozone NAAQS to the agency for consideration of the alleged beneficial health effects of ozone pollution in

shielding the public from the sun's harmful ultraviolet rays. 66 Fed. Reg. 57268 (Nov. 14, 2001). EPA's proposed response concludes that the link between ground level ozone and exposure to ultraviolet radiation is too uncertain at the present time to relax the revised ozone NAAQS.

### **13.1.2 EPA's New Source Review Enforcement Initiative Moves Forward**

In the late 1990s, EPA instituted a series of highly controversial enforcement actions against electric utilities and petroleum refineries alleging violations of the CAA's new source review ("NSR") requirements. The NSR enforcement actions generally allege that these facilities have upgraded major equipment over the years without obtaining air permits or installing air pollution control equipment that are required for new or modified sources of air pollution. Several significant developments impacting the NSR enforcement initiative occurred in 2001.

In May 2001, the National Energy Policy Development Group recommended that the United States Department of Justice review the NSR enforcement actions to determine whether they were consistent with the CAA and its implementing regulations. On January 15, 2002, the Department of Justice issued its report, concluding that EPA has a reasonable basis to argue that its NSR enforcement actions are consistent with the CAA and the Administrative Procedure Act. In light of the report's conclusions, the Department of Justice will continue to prosecute the NSR enforcement actions pending in the federal courts. The report does not address how the Clean Air Act should be enforced in the future.

The National Energy Policy Development Group's May 2001 report also recommended that EPA, in consultation with the Secretary of Energy and other relevant agencies, review the NSR program's impact on investment in new utility and refinery generation capacity, energy efficiency and environmental protection. On June 22, 2001, EPA issued its "NSR 90-Day Review Background Paper," which provided an overview of the NSR program, its implementation, and the information EPA is developing for its report to the President. EPA held public hearings on the report in July 2001, but has not yet issued its final report.

Several court rulings in 2001 also addressed the NSR enforcement initiative. For example, in a consolidated case involving EPA and citizen group allegations of NSR violations against several electric utility stations, a federal district court rejected several procedural arguments and ruled that the lawsuits could continue. United States v. American Electric Power Service Corp., 137 F. Supp. 2d 1060 (S.D. Ohio 2001). A potentially important aspect of the Court's decision concerns the application of the five-year federal statute of limitations. The Court ruled that while the statute of limitations did not bar a lawsuit alleging continuing or historical violations of the CAA, it did limit the imposition of civil penalties to days of violation occurring within the five-year period. 137 F. Supp. 2d at 1067.

More importantly, the United States Court of Appeals for the Eleventh Circuit decided that it did have subject matter jurisdiction to review EPA's order requiring the Tennessee Valley Authority to bring eleven coal-fired plants into compliance with NSR requirements. Tennessee Valley Authority v. Whitman, 2002 U.S. App. LEXIS 249 (Jan. 8, 2002). The decision is significant in that it clears the way for the Court to decide the merits

of TVA's contentions and, more generally, industry's contentions that EPA's NSR enforcement initiative is unlawful.

### **13.1.2 Challenge to EPA's Mobile Source and Fuel Standards**

On February 10, 2000, EPA published its "Tier 2" motor vehicle emission standards. These regulations set stringent emission standards that both gasoline vehicles and light-duty diesel vehicles must begin to meet for model year 2004. The EPA based the standards on a "systems approach," which considers vehicles and their fuels to be an integrated system. Recognizing that high-sulfur fuel can ruin the sensitive emission control systems necessary to achieve Tier 2 emission reductions, EPA capped the sulfur level in gasoline and stated that it would soon publish a rule concerning sulfur requirements for diesel fuel. A timely challenge to the Tier 2 Rule has been stayed by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

On January 18, 2001, EPA promulgated a final rule to control the sulfur level in highway diesel fuel ("Diesel Sulfur Rule"). The rule was published in conjunction with heavy-duty engine and vehicle Tier 2 standards that tightened the emissions standards for large trucks and buses. In the Diesel Sulfur Rule, EPA required a 97 percent reduction in highway diesel sulfur levels nationwide. Specifically, EPA required 80 percent of highway diesel fuel to meet a 15 ppm sulfur standard ("ultra-low sulfur diesel" or "ULSD") beginning in 2006. The Diesel Sulfur Rule also contained other flexibility mechanisms for refiners during the transition to ULSD -- including small refiner, geographic phase-in area in Rocky Mountain states, and hardship exemptions.

Several petitioners challenged the Diesel Sulfur Rule in the D.C. Circuit. The American Petroleum Institute, National Petrochemical & Refiners Association, Antek Instruments, L.P., National Association of Convenience Stores, and Society of Independent Gasoline Marketers of America (collectively, "Fuel Petitioners") alleged that EPA's actions in promulgating the Diesel Sulfur Rule were arbitrary and capricious because the Agency relied on technology not shown to be in or near general use and the sulfur limit would cause a shortage of highway diesel fuel. Conversely, the Alliance of Automobile Manufacturers ("Alliance") and the Association of International Automobile Manufacturers, Inc. ("AIAM") claimed that the Diesel Sulfur Rule was deficient because EPA should have required that ULSD be available for light-duty vehicles before 2006.

Other petitioners took issue with EPA's emissions standards for heavy-duty diesel engines. Cummins, Inc. said that adequate technology to meet the emissions standards and to measure compliance with the standards does not exist. Mack Trucks, Inc., Volvo Truck Corporation, Renault, V.I., s.a., and Volvo Powertrain asserted that EPA violated the CAA when it reversed its long-standing prohibition on cross-class averaging. Furthermore, the Engine Manufacturers Association opposed EPA's supplemental "not-to-exceed" emissions requirements on the grounds that the Agency adopted the standards in violation of the CAA and without adequate notice, failed to specify sufficient test methodology for demonstrating compliance with the not-to-exceed standards, and failed to establish the feasibility and cost effectiveness of the standards. The not-to-exceed challenge has been stayed pending settlement discussions.

Once the litigation was underway, a number of parties intervened on behalf of EPA, including the American Lung Association, major environmental groups, and several northeastern states. International Truck and Engine Corporation, the California Trucking

Association, the Alliance and AIAM intervened to support EPA's findings that ULSD is necessary as part of a system designed to achieve emissions reductions under section 202 of the CAA, and to underscore that the CAA, the rulemaking record, and the refiner flexibility measures support the ULSD requirement. National Petrochemical & Refiners Association and the American Petroleum Institute also intervened to counter the Alliance's arguments that EPA should have required ULSD to be available sooner than September 2006. The Court heard oral argument in the case on February 26, 2002, and a decision is expected in the near future.

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## **13.2 Environmental Justice Litigation**

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Environmental justice advocates experienced successes and then significant setbacks in litigation in New Jersey that has national repercussions. The litigation involves the New Jersey Department of Environmental Protection's (DEP) approval of an air permit for a cement plant in the City of Camden. Local residents challenged the permit on environmental justice grounds, claiming that the permitted emissions would have adverse, disparate impacts on their community, in violation of their civil rights. The case does not involve claims of intentional discrimination.

The United States District Court provided the residents two key victories. First, on April 19, 2001, the Court issued a preliminary injunction against operation of the plant, based on its findings that the DEP had not fully considered the plant's potential adverse, disparate impacts on the neighboring community. That determination was premised on the assumption that there is an implied private cause of action under section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, and EPA's implementing regulations thereto, codified at 40 C.F.R. § 7.10 *et seq.* See *South Camden Citizens in Action v. N.J. Dep't of Environmental Protection*, 145 F. Supp. 2d 446 (D. N.J. 2001).

Five days later, on April 24, 2001, the United States Supreme Court ruled in *Alexander v. Sandoval*, 532 U.S. 275 (2001), a non-environmental case, that Title VI does not provide an implied private right of action to enforce disparate impact (unintentional discrimination) regulations promulgated by federal agencies pursuant to section 602. However, the Court appeared to leave open the possibility that such claims might be brought pursuant to 42 U.S.C. § 1983, a provision that establishes a cause of action for civil rights violations committed by states or under "color of state law." In light of *Alexander*, the District Court in *South Camden* reconsidered its prior ruling. In a second opinion, issued on May 10, 2001, the Court ruled that the injunction would remain in effect because the plaintiffs had the right to pursue the same remedies under section 1983. See *South Camden Citizens in Action v. N.J. Dep't of Environmental Protection*, 145 F. Supp. 2d 505 (D. N.J. 2001).

When the cement company appealed to the United States Court of Appeals for the Third Circuit, it immediately asked the Court to lift the District Court's injunction. The Third Circuit agreed to lift the injunction pending the appeal, ruling that the company was likely to prevail on the merits on appeal and that the economic losses allegedly being suffered by the plant's owner as a result of non-operation of the plant outweighed the alleged public health and safety risks due to operation of the plant. In finding that the company was likely to prevail on the merits, the Third Circuit strongly hinted that the plaintiffs could not, through a

section 1983 claim, enforce Title VI and EPA's implementing regulations. *See South Camden Citizens in Action v. N.J. Dep't of Environmental Protection*, No. 01-2224 (3rd Cir. June 15, 2001).

In a December 17, 2001 ruling on the merits, the other shoe dropped on the plaintiffs' claims. The Third Circuit overturned the District Court's decision and ruled that Title VI of the Civil Rights Act did not create a federal right to be free from disparate impact discrimination. Because Title VI did not create such a right, the Court reasoned, EPA's regulations implementing Title VI, even if valid, cannot create a right enforceable through section 1983. In other words, neither Title VI, its implementing regulations, nor section 1983 created a private right of action for disparate impact discrimination. *See South Camden Citizens in Action v. N.J. Dep't of Environmental Protection*, 274 F.3d 771 (3rd Cir. 2001).

On January 15, 2002, the Court of Appeals, by a 9-3 vote, denied the residents' motion for a rehearing *en banc*. Consequently, at least in the Third Circuit, in the absence of evidence of intentional discrimination, private parties may not sue for violations of the Civil Rights Act. It remains to be seen whether the Third Circuit decisions will be the death knell for the environmental justice movement.

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### 13.3 Lead Paint Litigation

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Lead-contaminated dust is a problem in both urban and rural America. Initially, cities and individuals tried to force property owners to address health problems allegedly caused by lead dust. More recently, however, state and local governments and individuals have attempted to apply traditional legal principles in suits against paint manufacturers and associations.

Claims against paint manufacturers and associations can generally be divided into three categories. Equity claims (*e.g.*, restitution and indemnity) are a recent attempt to hold manufacturers and associations liable for monies various cities have spent to abate lead paint, and in 2001 at least one court appeared receptive to this type of claim. By contrast, traditional tort claims against manufacturers (*e.g.*, negligence or strict liability) typically fail because the plaintiff cannot identify the product's manufacturer and courts find novel theories of liability (*e.g.*, market share liability, alternative liability, or enterprise liability) inapplicable. Finally, conspiracy claims against manufacturers and associations (*e.g.*, conspiracy or concert of action) fail because there is no underlying tort. Some recent cases that addressed these issues include *Rhode Island v. Lead Industr. Ass'n, Inc.*, C.A. No. 99-5226, 2001 WL 345830 (R.I. Super. Ct. 2001); *Brenner v. Amer. Cyanamid Co.*, 699 N.Y.S.2d 848 (N.Y. App. Div. 1999); *Smith v. Lead Industr. Ass'n, Inc.*, No. 24-C-99-004490 (Baltimore City Cir. Ct. Sept. 20, 1999); *Young v. Lead Industr. Ass'n, Inc.*, No. 24-C-99-004491 (Baltimore City Cir. Ct. Sept. 20, 1999); and *Wright v. Lead Industr. Ass'n, Inc.*, No. 94-363042 (Baltimore City Cir. Ct. June 20, 1996).

In *Rhode Island v. Lead Industr. Ass'n, Inc.*, the Court found that the State sufficiently plead a claim for equitable indemnity and denied defendants' motion to dismiss that claim. Equitable indemnity, according to the Court, is based on the concept that "a party who has been exposed to liability solely as a result of wrongdoing of another should be able to recover from the wrongdoer." 2001 WL 345830, at \*14. Since Rhode Island alleged that it owed a duty to its residents to make lead-related expenditures, in order to protect them from

exposure to lead because the lead pigment manufacturers failed to provide a reasonably safe product, the Court found that the State sufficiently plead an equitable indemnity claim. *Id.*

By contrast, *Brenner v. Amer. Cyanamid Co.* and *Wright v. Lead Industr. Ass'n, Inc.* had found for the defendants. Traditional tort law principles require "identification of the exact defendant whose product injured the plaintiff . . ." *Brenner v. Amer. Cyanamid Co.*, 699 N.Y.S.2d at 850. Indeed, courts hold that "the failure to identify a particular defendant caused harm is 'ordinarily fatal' to a claim." *Wright v. Lead Industr. Ass'n, Inc.*, Mem. Op. at 3 (June 20, 1996). Accordingly, absent some novel theory of liability (e.g., market share liability, alternative liability, or enterprise liability), manufacturers defeat tort claims because plaintiffs cannot identify the companies that manufactured the paint that allegedly harmed them.

Finally, in two very recent Maryland cases, *Smith v. Lead Industr. Ass'n, Inc.* and *Young v. Lead Industr. Ass'n, Inc.*, the conspiracy claims failed because the court dismissed the underlying tort claim (*Smith v. Lead Industr. Ass'n, Inc.* dismissal entered on Feb. 14, 2002; *Young v. Lead Industr. Ass'n, Inc.* dismissal entered on Dec. 6, 2001). In Maryland, "conspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." *Alleco, Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 665 A.2d 1038, 1045 (Md. 1995). A conspiracy claim cannot be maintained "unless the plaintiff can show that he has in fact been aggrieved, or has sustained actual legal damage by some overt act, done in pursuance and execution of the conspiracy." 665 A.2d at 1045.

Conspiracy claims have suffered a similar fate in other states. *See, e.g., Brenner v. Amer. Cyanamid Co.*, 732 N.Y.S.2d 799 (N.Y. App. Div. 2001) ("There is no independent tort in New York for civil conspiracy"). Accordingly, a defendant that defeats the underlying tort claim also defeats the conspiracy claims.

## 13.4 Parent Corporation Liability

A recent federal district court ruling in *Best Foods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001), offers guidance on how businesses might avoid liability for their subsidiaries' contaminated facilities under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* The District Court applied a 1998 United States Supreme Court ruling in the same case, *United States v. Bestfoods*, 524 U.S. 51 (1998), which had set forth a test for determining whether a parent corporation is an "operator" of its subsidiary's contaminated facility. *Best Foods* did not involve a claim that the parent was an "owner" of the facility, an alternative basis for liability under CERCLA.

The Supreme Court had held that a parent corporation cannot be held liable under CERCLA as an operator of its subsidiary's contaminated facility based merely on having operated that subsidiary. Instead, the parent must operate the specific facility. The key factor is whether the parent actively participates in activities at the contaminated facility. Among other things, a parent corporation may be liable if it manages, directs or conducts at the facility operations that are specifically "related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." 524 U.S. at 66-67.

On remand, the District Court applied the Supreme Court's test to determine whether the parent was an operator of its subsidiary's contaminated facility under CERCLA. On November 9, 2001, the Court ruled the parent was not liable, despite having had extensive involvement with the subsidiary's activities. The Court considered several areas where the parent had been directly involved with the subsidiary's operations, but held that none indicated sufficient control over the facility to trigger CERCLA liability. The conduct that fell short of triggering CERCLA operator liability included the following:

**Providing advice on environmental compliance.** The parent's government affairs director gave advice to the subsidiary on several environmental issues. However, the advice did not involve directing the facility's waste disposal activities and, thus, was more akin to an "expression of overall policies and procedures" than facility operation. Further, the subsidiary had often rejected that advice and failed to notify the parent of environmental matters.

**Providing legal advice.** While the parent provided legal advice regarding environmental compliance, the Court considered such advice to be consistent with a parent corporation's normal oversight role.

**Sharing directors and officers.** Although several directors and officers of the parent also acted as directors and officers of the subsidiary, the Court was not convinced that they had served the interests of the parent while ostensibly acting on behalf of the subsidiary.

**Using the facility to develop and manufacture the parent's product.** Although the parent purchased products from its subsidiary rather than from a third party, there were valid business reasons for that decision.

**Providing assistance to the subsidiary's operations.** The parent's assistance to the subsidiary in developing and manufacturing products did not mean that the parent controlled the operation of the facility. Notably, the subsidiary's, not the parent's, employees directed and operated the manufacturing processes. The parent's role was similar to that of a consultant.

Based on the Supreme Court's test and the District Court's application of that test, corporations looking to avoid CERCLA "operator" liability for contamination at a subsidiary's facility must ensure that they do not go beyond the typical corporate oversight functions of a parent corporation and do not actively operate or direct the facility.

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## 13.5 Toxic Mold Litigation

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Claims arising from alleged indoor air quality defects, especially as a result of mold contamination, are becoming the grist for high profile, high stake, toxic tort litigation. A \$32 million jury award against an insurer in Texas (*Ballard v. Fire Insurance Exchange*, No. 99-0525 (Texas Dist. Ct. Travis Cty. 2001)); a \$4 million jury award to a homeowner and his family in Arizona against their insurance carrier (*Hatley v. Century-National Insurance Co.*, No. CV 2000-006713 (Ariz. Super., Maricopa Co.)); a \$2.7 million verdict against a building owner and property manager to a family in California (*Mazza v. Schurtz*, No. 00ASO4795 (Cal. Super., Sacramento Ct.)); a \$1 million jury award against a landlord in Delaware (*New Haverford Partnership v. Stroot*, 772 A.2d 792 (Del. 1999)); and several large class action cases filed by plaintiffs in California (*Garcia v. Regents of Univ. of Cal.*, No. 841640-7 (filed in Cal. Super. Ct.)), New York (*Davis v. Henry Phipps Plaza South*, No. 116331/98 (N.Y.

Sup. Ct. New York Co.)), and Texas (*Theriot v. Franco*, No. 00-09-05-961 (Tex. Dist. Ct. Montgomery Co.)) appear to be the proverbial tip of the iceberg.

While mold, a kind of fungus, is a naturally-occurring, living substance common in our environment, reports of a link between fungal "mycotoxins" (toxins released by molds) and human health effects have begun to surface and support claims of personal injury and property damage across the country. Arguments have been successfully made that exposure to sufficiently high doses of certain types of mold may cause toxic, allergic, or infectious human health effects. Physical symptoms, often not clearly defined, include respiratory difficulties, headaches, skin irritation, poor concentration, fatigue and insomnia. Molds multiply in warm, moist areas and cannot live without a source of moisture. Thus, claims typically involve leaky pipes or roofs, defective HVAC systems, or improperly installed exterior wall boards.

The defendants in mold cases include landlords and property managers who typically face contract or tort claims based on breach of a lease agreement, negligence, or failure to warn. Architects and engineers have been sued for failure to select a proper construction site or materials or faulty design of a building. Contractors and developers have faced suits for breach of warranty or negligent selection of subcontractors, and subcontractors have had to defend claims of faulty workmanship or materials. HVAC system installers, landscape architects, realtors, and insurers have also faced mold claims.

For personal injury cases, causation can be difficult to establish, as mold-related illnesses are not as easy to diagnose as illnesses with specific symptoms. The plaintiff's expert must be able to withstand the *Daubert* challenge as to admissibility (whether the testimony, *inter alia*, constitutes scientific knowledge) and credibility. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In the landmark *Ballard* case, the \$32 million jury award covered actual damages, punitive damages, mental anguish, and attorney's fees, but not personal injury damages because the plaintiffs' experts did not survive the *Daubert* challenge. When experts do withstand *Daubert*, plaintiffs have found more sympathetic juries. In the *Mazza* case, the defense failed to keep expert medical testimony out of evidence, allowing testimony of the plaintiffs' headaches, respiratory ailments, skin rashes and numerous other health problems to be presented to the jury, and resulting in the \$2.7 million verdict to the family of three. Similarly, in *Stroot*, the Delaware Supreme Court upheld a jury award of over \$1 million to plaintiffs who alleged that a landlord's failure to properly and promptly repair leaks led to mold-related ailments. On an appeal of the admission of the tenants' experts' testimony, the Supreme Court recognized the experts' methodology as reliable in the medical community and upheld the trial court's ruling to admit the testimony.

Insurers have found themselves defending claims under homeowner's policies and commercial general liability ("CGL") policies. A typical homeowner's policy provides coverage if there is a direct physical loss to the covered property. These policies usually contain a mold exclusion, such that the homeowner is not insured for loss caused by rust, smog, other corrosion, mold, or wet or dry rot. This language is commonly interpreted, however, to bar coverage where the mold damage has occurred naturally, over a period of time, due to climate, rather than a sudden or accidental occurrence like a burst pipe.

With CGL policies, one line of defense for insurers has been the pollution exclusion. While there are few reported cases addressing whether the pollution exclusion bars coverage for mold claims, courts across the country are split in the application of the absolute pollution

exclusion to claims that involve "nontraditional" environmental pollution, such as lead paint, carbon monoxide, and chemicals in housing materials. The evaluation as to coverage would include an analysis of whether mold is a "pollutant," whether there has been a discharge or release into the environment, and whether the insured had a reasonable expectation of coverage. While an insured may have a good argument that mold, as a naturally occurring substance, is not a pollutant (the standard exclusion defines pollutants that tend to be "non-living," rather than "living" substances), recent federal, state, and local guidance documents on indoor air quality often classify biological organisms, including microbial matter such as mold, as "pollutants," which an insurer would argue supports its position. Insurers are now revising the definition of pollutant in standard CGL policies to specifically include "harmful microbial matter," and standard homeowner's policies can be expected to more specifically exclude mold damage.

The \$12 million punitive damages award in the *Ballard* case represents one of the deepest concerns for insurers: claims of bad faith. Plaintiffs, such as those in *Ballard*, that have successfully argued that the insurer maliciously handled water and mold damage claims under a homeowners policy, have found hugely sympathetic juries.

While it appears that the recent cases, and those pending, may reflect only the tip of the iceberg, the future of mold litigation will turn, in part, on decisions by the insurance industry (in terms of policy revisions), insurance regulators, and governmental agencies that attempt to regulate indoor air quality.