

§ 25.02 Modern Liability

[8]—Mold: The Associated Risks and Insurance Coverage^{21.1}

[a]—Introduction

Risks associated with the presence of mold and the damage it may cause have become serious insurance coverage concerns. Mold claims have grown dramatically since the early 2000s. Policyholders have been seeking insurance recoveries for property damage losses, including removal costs²² and the cost of alternative business accommodations,²³ as well as damages for lost rent.²⁴ Tenants have claimed to develop medical problems when their offices became contaminated by mold.

Among the injuries alleged are general respiratory problems,²⁵ mold-induced asthma,²⁶ and damage to the lungs.²⁷ In some circumstances,

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²² Mathias, Shugrue & Marrinson, *Insurance Coverage Disputes* § 11.01[8] (Law Journal Press 1996), citing:

Fifth Circuit: Maynard v. Lloyd's, 2002 WL 1461923, at *2-*3 (N.D. Tex. 2002); Lexington Insurance Co. v. Unity Waterford-Fair Oaks, Ltd., 2001 WL 694582 at *1 (N.D. Tex. 2001).

State Courts:

Arizona: Hatley v. Century-National Insurance Co., No. CV 2000-006713 (Ariz. Super. Nov. 5, 2001), reprinted in 15 Mealey's Litigation Report: Bad Faith (Dec. 5, 2001).

Washington: Bowers v. Farmer's Insurance Exchange, 99 Wash. App. 41, 43-44, 991 P.2d 734, 736 (2000).

²³ *Id.*, citing:

Arizona: Hatley v. Century-National Insurance Co., No. CV 2000-006713 (Ariz. Super. Nov. 5, 2001), reprinted in 15 Mealey's Litigation Report: Bad Faith (Dec. 5, 2001).

Texas: Home Insurance Co. v. Dennis D., 2000 WL 144115 at 6 (Tex. App. 2000).

²⁴ *Id.*, citing:

Ninth Circuit: Factory Mutual Insurance Co. v. Estate of James Campbell, No. 01-7518 (C.D. Cal. Mar. 18, 2002), reprinted in 1 Mealey's Litigation Report: California Insurance (April 16, 2002).

State Courts

Washington: Bowers v. Farmer's Insurance Exchange, 99 Wash. App. 41, 43-44, 991 P.2d 734, 736 (2000).

²⁵ *Fifth Circuit*: Maynard v. Lloyd's, 2002 WL 1461923, at *2-*3 (N.D. Tex. 2002).

State Courts:

Texas: See Ballard v. Fire Insurance Exchange, No. 99-05252 (Texas Dist. Oct. 30, 2001) (claiming general health problems caused by Stachytobrys Atra mold), reprinted in 15 Mealey's Litigation Report: Bad Faith (Nov. 7, 2001).

²⁶ Strader v. Grange Mutual Insurance Co., 179 Ore. App. 329, 331-332, 39 P.3d 903, 905 (Ore. App. 2002).

claimants have sought recovery for reactive airways dysfunction disease and cognitive impairment.²⁸ Some claimants have been able to recover for these bodily injuries by asserting that the injuries resulted from “the first-party property insurer’s negligence in identifying or repairing the mold problem or bad faith breach of the insurance agreement.”²⁹ Damage to the property caused by mold may be covered by commercial all-risks property insurance policies,³⁰ landlords insurance policies,³¹ and other first-party property policies.³² “Mold-related property damage may be covered if it was caused by a covered peril.”³³ Just one example of mold damage is caused by water.³⁴

²⁷ *Hatley v. Century-National Insurance Co.*, No. CV 2000-006713 (Ariz. Super. Nov. 5, 2001), reprinted in 15 Mealey’s Litigation Report: Bad Faith (Dec. 5, 2001).

²⁸ Mathias, Shugrue & Marrinson, *Insurance Coverage Disputes* § 11.01[8] (Law Journal Press 1996), citing: Traub v. Great American Insurance, No. 1995-C-153 (Pa. Comm. July 3, 2002), reprinted in Mealey’s Litigation Report: Mold, Vol. 2, No. 8 (Aug., 2002).

²⁹ *Id.*, citing:

Arizona: *Hatley v. Century-National Insurance Co.*, No. CV 2000-006713 (Ariz. Super. Nov. 5, 2001), reprinted in 15 Mealey’s Litigation Report: Bad Faith (Dec. 5, 2001).

Pennsylvania: Traub v. Great American Insurance, No. 1995-C-153 (Pa. Comm. July 3, 2002), reprinted in 2 Mealey’s Litigation Report: Mold (Aug. 2002).

Texas: Ballard v. Fire Insurance Exchange, No. 99-05252 (Tex. Dist. Oct. 30, 2002), reprinted in 15 Mealey’s Litigation Report: Bad Faith (Nov. 7, 2001).

³⁰ *Columbiaknit, Inc. v. Affiliated FM Insurance Co.*, 1999 WL 619100, at *8 (D. Ore. 1999) (commercial all-risks property insurance covered mold damage to garments stored in leaking warehouse).

³¹ See:

State Courts:

Ohio: Belich v. Westfield Insurance Co., 2000 Ohio App. Lexis 6212 (Ohio App. 2000) (discussing commercial landlord’s property insurance coverage).

Washington: Bowers v. Farmer’s Insurance Exchange, 99 Wash. App. 41, 43, 991 P.2d 734, 736 (Wash. App. 2000) (noting that plaintiff was covered under a “Landlord’s Protection Package insurance policy”).

Wisconsin: Ramsey v. Landmark American Insurance Co., No. C5-01-7827 (Minn. Dist. July 24, 2002), reprinted in Mealey’s Litigation Report: Mold, Vol. 2, No. 8 (Aug., 2002) (noting that plaintiff was covered under “Owner’s, Landlord’s and Tenant’s” insurance policy).

³² See the discussion in Mathias, Shugrue & Marrinson, *Insurance Coverage Disputes* § 11.01[8] (Law Journal Press 1996), citing:

³³ *Id.*, citing: Bowers v. Farmer’s Insurance Exchange, 99 Wash. App. 41, 47, 991 P.2d 734, 738 (Wash. App. 2000) (“When the insured can identify an insured peril as the proximate cause, there is coverage ‘even if subsequent events in the causal chain are specifically excluded from coverage’”), quoting Findlay v. United Pacific Insurance Co., 78 Wash. App. 17, 20, 895 P.2d 32 (Wash. App. 1995).

But see Cooper v. American Family Mutual Insurance Co., 184 F. Supp.2d 960 (D. Ariz. 2002) (holding that the efficient proximate cause rule would not be enforced due to specific mold exclusion).

[b]—Insurance Coverage Exclusions

Despite the fact that mold claims have really only been asserted during the 2000s, such claims have resulted in almost as much exposure as asbestos claims.³⁵ In fact, in the year 2002, there were approximately 300,000 mold claims.³⁶ The risks associated with “exclusions for mold losses expose insurance buyers to a greater degree of risk than being uninsured for fire claims.”³⁷

In an attempt to limit their exposure to the potential of multi-million dollar verdicts, the insurance companies have formally excluded coverage for mold-related injuries and damage. There are, however, a group of specialized underwriters still issuing policies. Many factors have contributed to the rise of mold claims, including: changes in building materials and techniques; energy efficiency; poor workmanship in new buildings; scientific developments which have made it easier to discover the damages and mold as the cause; coverage in the press; and the success of cases brought claiming damages as a result of exposure to mold.³⁸

³⁴ See:

Ninth Circuit: Anderson v. Allstate Insurance Co., 45 Fed. Appx. 754, 757, 2002 WL 2021617 at *2 (9th Cir. 2002) (upholding jury award for mold damage caused by ruptured pipe); Columbiaknit, Inc. v. Affiliated FM Insurance Co., 1999 WL 619100 (D. Ore. 1999) (holding that mold damage to garments was covered by corporation’s all-risks policy insofar as it was caused by water infiltration).

State Courts:

Texas: Home Insurance Co. v. Dennis D., 2000 WL 144115 at 1 (Tex. App. 2000) (holding that the insurance policy did cover mold damage despite the policy’s specific mold exclusion because the mold growth was directly caused by otherwise covered water damage and thus fell within the policy’s ensuing loss provision).

³⁵ Dybdahl, “Mold Risk Management and Insurance Strategies” (2003), available at www.nibs.org/BETEC/M4/05_Dybdahl-M4%20may%2028.pdf (last visited Nov. 16, 2003). See also, Dybdahl and Lemon, “The Risk Advisor’s Survival Guide too Mold Exclusions,” *Env’tl Claims J.* (Winter 2003), available at www.erraonline.org/envclaims.pdf (last visited July 8, 2004).

³⁶ *Id.*

³⁷ Dybdahl, “New Insurance Exclusions for Terrorism and Mold Create Unprecedented Levels of Uninsured Risks for Property Managers, Property Owners and Lenders or Sorry We Forgot to Tell You . . .,” available at www.erraonline.org/journalproperty.pdf (last visited Nov. 16, 2003).

³⁸ Dybdahl, “Mold Risk Management and Insurance Strategies,” (2003) available at www.nibs.org/BETEC/M4/05_Dybdahl-M4%20may%2028.pdf (last visited Nov. 16, 2003). According to this article, \$20 billion in damages were paid based on asbestos claims as of the time the article was written, while \$15 billion had been paid on mold claims as of that date. See also, Dybdahl and Lemon, “The Risk Advisor’s Survival Guide too Mold Exclusions,” *Env’tl Claims J.* (Winter 2003), available at www.erraonline.org/envclaims.pdf (last visited Nov. 16, 2003). The authors of this article note that mold has become a much more significant problem with the buildings constructed during the 1980s and thereafter. The airtight construction increases

In the past, insurance policies were written to exclude coverage for pollution damage. The standard policy stated:

“This insurance does not apply to bodily injury or property damage arising out of the actual, alleged or threatened discharge, disposal, release or escape of pollutants at or from the premises”³⁹

This type of exclusion is called an absolute pollution exclusion. Insurers faced with mold-related damage claims often argue that the policy’s pollution exclusion bars coverage.⁴⁰ “Insurers have argued that mold and fungus spores are airborne pollutants and thus fall within the exclusion from coverage.”⁴¹ Some courts have held that mold and fungus do not fall under the general definition of pollutants contained in many pollution exclusions.⁴² These courts reason that “the broad ‘catch-all’ language of a pollution exclusion cannot be interpreted to include ‘every conceivable solid, liquid or gaseous contaminant or irritant.’”⁴³ One court held that “a pollution exclusion did not bar coverage for mold damage because the clause was ambiguous—opining that if the insurer had ‘intended to exclude coverage for exposure to fungi, it would have listed them expressly in the definition of ‘pollutant’ or set out separate exclusions for them as it did for asbestos and lead paint.”⁴⁴

the likelihood of mold damage and the recycled wood is a breeding ground for mold. *Id.* at 16.

³⁹ Larkin, “How Mold Can Ruin a Business: What Steps You Need to Take,” 45 *Water Conditioning & Purification* 101 (Feb. 2003), available at www.wcp.net/toc-cfm?ISN=66 (last visited Nov. 16, 2003).

⁴⁰ Mathias, Shugrue & Marrinson, *Insurance Coverage Disputes* § 11.01[8][b] (Law Journal Press 1996), citing:

Fifth Circuit: *Lexington Insurance Co. v. Unity Waterford-Fair Oaks, Ltd.*, 2002 WL 356756, at *1-*2 (N.D. Tex. 2002).

Eleventh Circuit: *Stillman v. Travelers Insurance Co.*, 88 F.3d 911, 914 (11th Cir. 1996).

State Courts:

Minnesota: *Ramsey v. Landmark American Insurance Co.*, No. C5-01-7827 (Minn. Dist. July 24, 2002), reprinted in 2 *Mealey’s Litigation Report: Mold* (Aug. 2002).

Wisconsin: *Leverence v. United States Fidelity & Guaranty*, 158 Wis.2d 64, 96-97, 462 N.W.2d 218, 232 (1990).

⁴¹ *Id.*

⁴² *Id.*, citing *Ramsey v. Landmark American Insurance Co.*, No. C5-01-7827 (Minn. Dist. July 24, 2002), reprinted in 2 *Mealey’s Litigation Report: Mold* (Aug. 2002).

⁴³ *Id.* See, e.g., *Ramsey v. Landmark American Insurance Co.*, No. C5-01-7827 (Minn. Dist. July 24, 2002), reprinted in 2 *Mealey’s Litigation Report: Mold* at 20 (Aug. 2002).

⁴⁴ Mathias, Shugrue & Marrinson, *Insurance Coverage Disputes* § 11.01[8][b] (Law Journal Press 1996), citing:

Some policyholders have also tried to defeat the pollution exclusion defense by arguing that the “sudden and accidental” exception allows coverage for mold damage.⁴⁵ One court held that the “growth of the molds, fungus, mildew, etc. were unexpected and unintended,” thus triggering the “sudden and accidental” exception and rendering the pollution exclusion inapplicable.⁴⁶

[c]—Exceptions to Exclusion

While in the absence of a specific mold exclusion, mold claims may still be denied under the terms of a standard policy containing a pollution exclusion provision, such provisions tend not to be the safest way protect the insurers. Claimants are stating that mold and the resulting damage and injury do not fit in that exclusion. And, the courts are listening. Many are “hesitant about applying the standard pollution exclusions” reasoning that mold “may not constitute the type of ‘pollutant’ to which the exclusion is directed.”⁴⁷

One commentator has noted that mold-related damage and injury should not be subject to the absolute pollution exclusion because:

(1) “Mold does not release or escape within the intent of the pollution exclusion.”⁴⁸

(2) “Mold is not a waste.”

(3) Water is the “proximate cause of mold” and water does not fit the policy definition of pollutant.

⁴⁵ *Id.*, citing *Leverence v. United States Fidelity & Guaranty*, 158 Wis.2d 64, 96-97, 462 N.W.2d 218, 232 (1990).

⁴⁶ *Id.*

⁴⁷ Larkin, “How Mold Can Ruin a Business: What Steps You Need to Take,” 45 *Water Conditioning & Purification* 101 (Feb. 2003), available at www.wcp.net/toc.cfm?ISN=66 (last visited Nov. 16, 2003).

⁴⁸ Dybdahl, “Managing Mold Related Risks, After the Mold Exclusions Become Effective” 4-5, available at www.erraonline.org/moldrisks.pdf (last visited Nov. 16, 2003). See also, Mathias, Shugrue & Marrinson, *Insurance Coverage Disputes* § 11.01[8][b] (Law Journal Press 1996), citing *Lexington Insurance Co. v. Unity Waterford-Fair Oaks, Ltd.*, 2002 WL 356756, at *2-*3 (N.D. Tex. 2002). The policyholder in the *Lexington Insurance* case unsuccessfully attempted such an argument, claiming that the “pollution exclusion does not apply to claims for mold damage because mold and fungi are never ‘dispersed, discharged or released’ and thus fall outside the scope of the pollution exclusion even if they are considered pollutants.” *Id.* According to the policyholder, “the mold that caused the extensive damage to the [property] ‘was simply already present and thrived because of the moisture.’” *Id.*, citing 2002 WL 356756, at *2. The court rejected the policyholder’s argument, reasoning “that the mold that was the cause of the damage at issue was dispersed within the covered properties and, consequently, that the damage caused thereby falls within the scope of the Pollution and Contamination Exclusion contained in the policy.” *Id.*

(4) Mold occurs naturally. It is a living thing and does not fit the definition of pollutant in an insurance policy.

(5) Some “environmental impairment liability insurance policies specifically exclude naturally occurring substances from the definition of ‘Pollutants’ in their environmental insurance contract.” This demonstrates that the underwriters thought that these “naturally occurring substances [like mold] were not excluded under the absolute pollution exclusion in the general liability insurance policy.”

(6) Mold was only addressed as a separate loss event in late 2001.

(7) If mold were already excluded in the standard pollution exclusion provision, there would be no need for a separate mold exclusion provision in newly issued liability insurance policies.⁴⁹

Another commentator noted that since water damage usually is not the result of pollution, it follows that it is “not the release, discharge or dispersal of a pollutant.”⁵⁰ Therefore, it can be effectively argued that the standard pollution exclusion in general liability policies may not apply. In that case, the insurance company will be liable for repairing the damage caused by the mold. It can also be argued that the insurance company should be responsible for clean up since it is really the repair of the damage to the property that is being undertaken.⁵¹ The fact that the mold will now be gone, causing no further injury or damage, is merely an added benefit.⁵²

[d]—Avoiding Liability—Allocating Responsibility

To avoid these liability problems, nearly all insurance companies have now specifically excluded mold coverage.⁵³ This exclusion of coverage for mold-based claims means the risks associated with mold now must be allocated. Who will bear the risk for such claims—the landlord, the tenant, the property owner, the property manager, lenders? How will the risk be allocated? How can the risk be reduced? The parties will need to shop around for coverage. Some policies may coverage damage, at a price. It is also possible to obtain environmental insurance, or a stand-alone (separate) mold coverage policy. Likely these options will be quite costly.

⁴⁹ Dybdahl, “Managing Mold Related Risks, After the Mold Exclusions Become Effective” 4-5, available at www.erraonline.org/moldrisks.pdf (last visited Nov. 16, 2003).

⁵⁰ Larkin, N.47 *supra*.

⁵¹ *Id.*

Environmental impairment liability insurance may be available to property owners, lessees and lenders. This type of policy covers “bodily injury, property damage, remediation expenses and defense” and may also cover contractual liability, business interruption, extra expense, and non-owned disposal sites.”⁵⁴ Landlords (and building owners) will now need to take specific steps to limit their exposure to liability.

All leases should reflect the fact that mold is excluded from coverage. The landlord (or owner) will want to shift the responsibility for obtaining coverage for mold damage and injury to the lessee (or purchaser) or at least shift responsibility for detecting and monitoring visible or known mold problems. Why should the landlord bear sole responsibility if the tenant was aware of a problem and failed to report it promptly. It seems only fair that the additional damage should be the tenant’s responsibility. Whoever ends up as the responsible party will want to make certain to have a policy that specifically covers mold-related injuries and damage. There is also the possibility of self-insurance. If the landlord is unable to obtain coverage at an affordable price, self-insurance may be his only, or at least his best, option.

In 2003, nearly all newly issued property and liability insurance policies exclude mold, microbial matter and fungus.⁵⁵ These exclusions apply to new loss events incurred during the policy period.⁵⁶ However, since most companies have occurrence based liability insurance policies, such policies should provide coverage for any event that took place during the when the policy was in force.⁵⁷ This would include “continuous or repeated exposure to the cause of the loss.”⁵⁸

Determining when the loss or damage occurred is not always a simple matter and that date will have a direct impact on whether the claim is or is not covered by a particular policy. For example, in the case of mold caused by water damage, is the late of loss when the mold develops, when the leak or other water entered the building, the date the mold was discovered or some other date. In fact, it would seem that the damage occurs over time. The mold condition develops

⁵² *Id.*

⁵³ A number of states have allowed insurers to specifically exclude mold coverage in their policies. Other states have allowed limitations on coverage. *Id.* at 103.

⁵⁴ Dybdahl, “Mold Risk Management and Insurance Strategies,” 14 (2003) available at www.nibs.org/BETEC/M4/05_Dybdahl-M4%20may%2028.pdf (last visited Nov. 16, 2003).

⁵⁵ Dybdahl, “Managing Mold Related Risks, After the Mold Exclusions Become Effective,” available at www.erraonline.org/moldrisks.pdf (last visited Nov. 16, 2003).

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *Id.*

and worsened unless the damage is properly repaired. When did the mold reach such a point that it creates a health and safety hazard? How will the damages be measured? The best way to insure against the damage or loss is to purchase a policy specifically covering mold. It is possible to buy an environmental policy that is modified to cover loss, damage or injury resulting from mold.⁵⁹

[e]—The Effect of the Mold Exclusion in the Claims-Made Liability Insurance Context

The effect of the mold exclusion is very different in the claims-made liability insurance context. In a claims-made policy, the mold exclusion on the policy renewal “is, in effect, a full prior acts and prospective work exclusion for all mold related damage claims.”⁶⁰ This retroactive gap in coverage must be addressed. The parties will want to provide some form of protection during that gap period.

[f]—Concluding Comment

Basically, mold exclusions will force parties to make claims under their liability policies instead of under property insurance. For the time being, while the exclusions on liability insurance policies will eliminate insurance coverage for new occurrences,” “most businesses will still have some residual liability insurance protection in place.”⁶¹

Certainly during the construction phase, it makes sense to hire an industrial hygienist to examine the plans, property and actual construction to ascertain and advise with respect to mold and other such environmental concerns.

In light of the escalating insurance costs, litigation and evidence of the dangers caused by mold and other indoor environmental problems, better air quality and prevention of sick building syndrome⁶² need to be addressed by landlords, building owners and tenants. Landlords and building owners will want to adopt strict measures to prevent mold and have a plan set up for treating mold and correcting the damage when mold appears.⁶³ These measures and any plan of action

⁵⁹ *Id.* at 4. See also: Dybdahl and Lemon, “The Risk Advisor’s Survival Guide to Mold Exclusions,” *Env’tl Claims J.* 5 (Winter 2003), available at www.erraonline.org/envclaims.pdf (last visited Nov. 16, 2003); Dybdahl, “Mold Risk Management and Insurance Strategies,” 14 (2003) available at www.nibs.org/BETEC/M4/05_Dybdahl-M4%20may%2028.pdf (last visited Nov. 16, 2003).

⁶⁰ Dybdahl, “Managing Mold Related Risks, After the Mold Exclusions Become Effective” 5, available at www.erraonline.org/moldrisks.pdf (last visited Nov. 16, 2003).

⁶¹ *Id.* at 6.

⁶² See § 13.06[3] for a discussion of sick building syndrome.

⁶³ Harris, “Mold Spreads,” *CFO Magazine*, p.2 (Sept. 2003), available at www.cfo.com/Article?article=10540 (last visited Nov. 17, 2003).

must be clearly communicated to the members of the landlord's and owner's management team. In light of the potential damage claims and resulting potential liability, it is advisable for landlords to address mold-related issues specifically in their leases.⁶⁴

⁶⁴ Jones and Weinberg, "Using Lease Provisions to Address Mold Growth," 16 Commercial Leasing Law & Strategy 1 (Law Journal Newsletters Jan. 2004).