MOLD LITIGATION - - 2008 OVERVIEW

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New York City
July 15, 2008

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QUESTIONS

MOLD CLAIMS: AN OVERVIEW

Introduction

The number of negligence lawsuits in New York State arising out of the existence and growth of mold peaked in the late 1990s and has steadily fallen since then. Some recent case law, however, may now portend an increase in these suits.

Plaintiff's claims in a mold case fall into four main categories: (1) bodily injury; (2) property damage; (3) contractual damages under a lease agreement (relocation expenses, rent abatement, and attorneys fees); and (4) diminution in value of the premises.

This overview puts forth the main considerations that go into the defense of a typical mold lawsuit in New York State, and provides insight on what property owners and managing agents might expect in this kind of litigation.

Bodily Injury as a Result of Exposure to Mold

The typical mold plaintiff who alleges bodily injury generally asserts that indoor residential mold in his/her apartment caused a host of illnesses, usually respiratory. There seems to be no or little general acceptance in the medical community that causation exists between indoor residential mold and bodily injury; and one New York court has held that the lack of general acceptance meant that a mold plaintiff's bodily injury claim *had* to fail. That case, *Fraser v. 301-52 Townhouse*, 831 NYS2d 347 (NY Cty 2006) is presently on appeal to the Appellate Division, First Department.[1]

Since the *Fraser* case (dismissing mold bodily injury claim after a *Frye* hearing, and concluding there was no general acceptance in the medical community that indoor residential mold caused illness), several other cases have come down that take an opposing view. One of these cases (*BTN v. Auburn School District* (845 NYS2d 614 (4th Dept. 2007)) is from the Appellate Division, Fourth Department, which held that the disputed issue of whether mold causes illness should go to a jury.

The law on mold causation in New York is therefore unsettled at the moment, at least as to Departments other than the Fourth. Naturally, though, until the definitive

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[1] *Cf. Lebouef v. Safeguard*, 851 NYS2d 614 (West. Cty 2007).

resolution of the issue, landlords, agents, and their counsel should continue to make the "lack of general acceptance" argument as one part of the defense of these lawsuits.[2]

Another hurdle for the mold plaintiff to overcome is *allergy*: for an arguable bodily injury claim to exist, a mold plaintiff must be allergic to the type of mold found in the residence. The allergy can be accurately diagnosed only through diagnostic tests. If a plaintiff is not allergic to the particular mold, there can be no claim for bodily injury based on the mold.[3]

A third obstacle to plaintiff's bodily injury claim: a mold plaintiff often cannot exclude other causes for his/her symptoms. In other words, the injuries alleged by the mold plaintiff sometimes can be ascribed to a different cause. For example, common mold plaintiff injuries include restrictive airway disease, obstructive pulmonary disease, fatigue, asthma, sinusitis, shortness of breath, memory loss, and skin rashes. The plaintiff's medical history often discloses, however, that the plaintiff is a smoker, or has been diagnosed previously with chronic fatigue syndrome, or suffered from Lyme disease, or has a deviated septum, or has had rhinoplasty, or has eczema or some other autoimmune disease. Any one of these other conditions may cause one or more of the complaints alleged.[4] [5]

Finally, there is the defense of the statute of limitations relative to the bodily injury claims. In New York, claims sounding in personal injury from exposure to mold are negligence claims, but are subject to a special three-year statute of limitations. CPLR 214-c; see, e.g., *Felice v. Amer. NWS Corp.*, 46 A.D.3d 505 (2d Dept. 2007). Critically, the three-year period is measured from the onset of the injuries/symptoms. We find that at deposition, plaintiff will detail his/her medical problems by testifying to the very lengthy time period over which he/she has been suffering. As a matter of law, injuries that began more than three years prior to the filing of the summons should be dismissed.

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[2] Tactically, defense counsel should bring the issue of causation to a head with a summary judgment motion, and should request in the alternative a Frye hearing (which in New York is the hearing that determines whether plaintiff's allegation of causation passes muster under generally accepted scientific principles).

[3] It is worth noting that if a plaintiff is indeed allergic to the particular mold, then relocation from the affected premises should result in an alleviation of his/her injuries.

[4] It is therefore critical from the defense perspective that counsel question the plaintiff at deposition as to all medical conditions that could cause the symptoms alleged.

[5] The mold plaintiff's other allergies are also relevant; for example, an allergy to cat dander sometimes can explain the respiratory symptoms alleged.

It therefore is imperative in all mold cases that the defense of statute of limitations be considered for inclusion in the Answer, and be explored by way of a demand for bill of particulars, and questioning at deposition.

Property Damage as a Result of Exposure to Mold

Often accompanying the bodily injury claim is a claim for property damage. The property damage claim seeks money damages for personal property that was exposed to mold. The personal property tends to be the ordinary property found in residences, but sometimes includes high-end apparel, collectors' edition books and paper, and business inventory (in the case of the plaintiff who operates a business out of the residence).

To recover on this claim, plaintiff needs to prove negligence (notice of a mold condition)[6], and must prove that specific property was damaged as a result of the mold exposure. Plaintiff also needs to prove the cost of repair or the value of the damaged property. Plaintiff sometimes fails in this obligation because he/she disposes of the damaged property relatively soon after discovering the damage. This disposal permits the defense to utilize the doctrine of *spoliation.*

Under New York law, a court can dismiss a claim where the plaintiff disposed of critical evidence. The rationale for dismissal is simple: without the property, there is no way for defendant to inspect or test the property, and therefore no way to defend against the claim.

Even if a court is loath to dismiss plaintiff's claim on those facts, it may agree to give a "spoliation charge" at trial on the property damage claim. This charge alerts the jury to a presumption that because plaintiff disposed of critical evidence, the jury may assume the evidence would have been favorable to the defendant.[7]

The defense of spoliation can result in dismissal of a mold plaintiff's property damage claim, but it is critical that counsel adduce the requisite facts of the spoliation at deposition. Counsel should determine what the property was, who disposed of it and when, why the property was disposed, and whether plaintiff intended to bring legal action at the time he/she disposed of the property. Answers to these questions lay the

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[6] For the requirement of notice in a mold case, see *Litvack v. Plaza*, 40 A.D.3d 250 (1st Dept. 2007)(on appeal to the Court of Appeals at present); and *Lark v. DeMatteis*, 48 A.D.3d 354 (1st Dept. 2008).

[7] The spoliation charge makes sense only in jury trials, more of which *anon.*

groundwork for the summary judgment/spoliation motion as to plaintiff's property damage claim.

Of some use for plaintiff's bar: insurance carriers, if they pay on the mold claim, generally look to the property damage claim to assess the true value of the claim. The mold lawsuits that get resolved the fastest tend to be the ones that focus on the property damage (and the reasonable value of same), as opposed to those that focus primarily on the bodily injury.

Damages under the Lease Agreement

A third category of damages sought by the mold plaintiff consist of contractual damages under a lease agreement between the defendant/landlord and the plaintiff/tenant. Plaintiff can recover: (1) reasonable relocation expenses, permitting him/her to live elsewhere until the mold condition is abated; (2) a rent abatement, stemming from the legal concept that rent is due only to the extent the residence is habitable; and (3) attorneys fees, because the insured-landlord almost always has an attorneys fees provision in the lease agreement.[8]

Assuming plaintiff still has leasehold rights to the premises, an aggressive plaintiff's counsel also will make any number of motions throughout the action to force the landlord to "remediate" the premises. These motions usually result in an interim stipulation between the parties, providing in essence for the landlord to do work on the premises, and for the plaintiff to resume occupancy/payment of rent upon environmental testing and clearance. Defense counsel must take extreme care in the wording of any such stipulation because any admission that there is mold in the premises, or that there is damage to the property, arguably gives the plaintiff a *prima facie* case for contractual damages.

Defenses available against these contractual claims tend to be defenses on the merits. For example, defense counsel might argue that the residence is in fact habitable,

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[8] An attorneys fees provision in favor of landlord is deemed reciprocal under New York's Real Property Law.

that plaintiff did not need to relocate, that no valid test was ever done proving the existence of high levels of mold in the premises, etc.[9]

Diminution in Value of Property

Some mold plaintiffs are lessees in a cooperative corporation, or fee owners of a condominium unit. These plaintiffs sometimes include in the complaint a claim for the diminution in value to the co-op (or condo) caused by the stigma of mold that now attaches to the property.[10]

There are certain legal hurdles a mold plaintiff has to overcome to establish a diminution in value claim. Plaintiff needs to establish that there is indeed a stigma of mold attached to his/her property. This will rarely be the case in a building where there is only one mold claim. Furthermore, plaintiff will need expert testimony proving the monetary effect of the stigma on the value of the property. Plaintiff will also have to overcome the fact that market forces (recession, post-9/11 slowdown, etc.) may account for any diminution in value.[11]

Plaintiffs' Bar

There is a small pool of attorneys who claim to specialize in plaintiffs' mold cases, likely because of (1) the unsettled state of the science, (2) the need for an allergic plaintiff, (3) the near certainty of a Frye hearing, and (4) the sometimes *de minimis* damages (relative to damages found in other toxic tort cases).

There is also a small cottage industry of experts who service both sides of the bar with respect to mold claims. They offer litigation support services to the bar consisting of mold testing, medical examinations, and remediation services. In choosing an expert, care should be taken by counsel for both sides to learn on which side of the bar the potential consultant "sits".

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[9] There are disputes as to what a "high" level of mold is. This fact generally helps the defense, but it also makes remediation agreements difficult to negotiate because neither party ever knows if a residence that has been remediated is truly habitable.

[10] It sometimes can be argued that the *plaintiff* created the stigma by bringing (and sometimes publicizing) the lawsuit.

[11] There is very little New York State case law on diminution damages in the mold context.

The Landlord-Tenant Proceedings

Simultaneous with the negligence claim, there usually exists a separate proceeding in landlord-tenant court, brought by the defendant-landlord, seeking to evict the plaintiff-tenant for non-payment of rent. The plaintiff-tenant almost always sets up as a defense in that separate proceeding the fact there is/was mold in the premises.

This related landlord-tenant proceeding is fraught with risk for both sides. Consideration should be given to motion the court to consolidate the landlord-tenant proceeding with the negligence case, so that neither case is adjudicated before the other. Some plaintiffs oppose the motion but the existence of common questions of law and fact between the two cases usually carries the day.

The risks of not consolidating are several: without consolidation, the landlord runs the risk of having a determination made in landlord-tenant court as to the existence of mold in the premises. This adjudication will be made outside the presence of tort-defense counsel (who is not privy to the landlord-tenant proceeding). It will also be made without the benefit of discovery, since in New York landlord-tenant proceedings (with few exceptions) do not afford the parties an automatic right to discovery. An adjudication in landlord-tenant court on the presence of mold in the premises could also collaterally estop the parties from arguing the issue in the negligence case. To squelch all of these risks, counsel for the defendant-landlord should consider moving to consolidate the two matters.

Upon consolidation, plaintiff sometimes no longer has a right to a jury trial. If plaintiff's counsel consents to the consolidation, or if plaintiff's counsel has joined equitable and money damage claims in the complaint, there is good authority that plaintiff has waived its right to a jury trial. Counsel for both sides should therefore think through the effect consolidation has on the right to a jury.[12]

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[12] Care should also be taken in determining whether *joinder*, as opposed to consolidation, is desired. Consolidation merges two actions into one organic whole, with the resulting consolidated action bearing one caption. In a joint trial, on the other hand, each of two joined actions retains its own caption and its own identity, and presumably its own suitability for a jury.

HANDLING MOLD CLAIMS: THE INSURER'S PERSPECTIVE
CLAIMS TIPS AND COVERAGE ISSUES

THE MOLD LIABILITY CLAIM

The mold liability claim will likely consist of a combination of bodily injury and property damage. As an example, consider a liability claim brought against an insured HVAC company. It is discovered an air conditioning unit installed by the insured was incorrectly installed resulting in improperly draining condensation that resulted in a heater leaking between walls. The insured made arrangements for the repair of the damaged premises, but several years later it is discovered that the same wall contains extensive mold contamination, the wallboard is crumbling and the studs have developed mold. Worse yet, another condensation problem developed that contributed to the moisture problem and again was the result of incorrect installation.

The homeowners have been complaining of headaches, allergies, fatigue, and various ailments for several years without any medical reason. The symptoms have worsened since the mold was discovered and effectively released into the air. Moreover, their medical records reflect relatively healthy individuals until approximately the time the initial condensation problem was discovered.

Inspect the Property. This presents an initial conflict for the carrier. The property must be inspected, yet it may be unsafe. If the claimants have not arranged for independent evaluation of a health expert, the insurance professional should consider retaining a qualified environmental engineer prior to inspection.

Determine nature of molds. If not yet retained, locate a qualified environmental engineer. The engineer can arrange for testing of the molds to determine if there is an "unsafe" level of any toxic molds. Should health be at risk, consider making arrangements for the removal of the individual claimants from the premises.

Determine property damage. Once the health issues have been addressed, it is time to estimate the extent of the property damage and determine the necessary remediation. With the assistance of the environmental engineer, the extent of the contamination can be assessed and a remediation plan developed.

Another aspect of property is the resulting diminution in value of the property itself, even after thorough remediation. Certainly the existence of mold will be required disclosure upon sale of the real estate, a disclosure that may reduce the sale price. Moreover, the failure to remediate the problem adequately may result in future liability for the insured, the environmental company, and possibly the insurance carrier.

Obtain Property History. Although this may not always be appropriate, it may be helpful to consult prior records relating to the property. Plat records may show whether the property is in a flood plain; prior records may reveal a disclosure of a mold problem; insurance indexing may reflect prior water damage claims; and interviews with neighbors and prior owners may reveal other moisture problems.

Remediation. Arrange for all necessary remediation of the property to return the premises to normal use. Remediation may be as simple as arranging for a proper cleaning or as complicated as requiring removal of all building materials in the infected area. In extreme cases, it may be necessary to arrange for the cleaning of all clothing and furniture items, removal and replacement of carpeting, and possibly destruction of the building itself, if feasible.

The environmental engineer should be able to recommend or arrange for proper remediation through a qualified remediation company. Companies with histories of asbestos abatement and removal of lead paint will likely have some experience in remediation of mold.

As a final step in the remediation process, an air quality check may be necessary to assure complete removal or even provide peace of mind to the claimant and the carrier. Moreover, arranging for intermittent follow-up inspections is appropriate.

Obtain Medical Records. The medical claims relating to the mold contamination will likely be the focus of any dispute between the parties. While property damage is fairly obvious, the medical damage is less clear. Although modern medicine now recognizes some health concerns associated with certain molds, it remains a controversial area. For obvious reasons, medical records should be consulted.

Retain Experienced Defense Counsel. Should litigation be necessary, a firm or attorney with experience and knowledge of mold claims should be retained. As the medical issues will be the centerpieces of the litigation, the defense counsel should have a strong understanding of the issues presented and a background in handling unconventional medical claims.

COVERAGE ISSUES

Generally, property policies provide coverage for all "direct physical loss or damage" to covered property by a peril not excluded by the policy. "Direct" has been interpreted to mean the loss occurs as a natural consequence of the peril. To the extent the mold is the result of an otherwise covered peril, it is difficult to argue that the cost of cleaning or replacing that part of the structure contaminated with mold growth is not part of the "physical loss."

The question is more difficult if the cause of the mold is unknown. Mold requires mold spores, moisture (including high humidity), a nutrient source, and

average temperatures for growth. Moreover, mold by its very nature eats away or consumes the building materials, thus there is little question a physical change has occurred. However, when the mold can be removed without damage to the premises a "physical loss" may not be present.

Another issue is presented in connection with a claim that a building is uninhabitable because of the existence of the mold. While loss of use does not appear consistent with the phrase "physical loss or damage," several courts have held loss of use may in fact be covered. In another case, the insurance company argued that damages caused by odor from methamphetamine cooking represented a direct physical loss covered by the policy. The court held that a pervasive odor persisting in the house was physical, because it damaged the house.

The general rule is the manifestation of the damage is the trigger. However, mold claims result from a brief or continuous exposure. Moreover, when mold is the result of improper ventilation or continuous water exposure, it may be difficult to determine the date the property damage occurred depending upon the cause of the mold.

Exclusions – First Party Policies

Cases that have analyzed the pollution exclusion in first-party policies in the context of "sick building syndrome" often involve an analysis of whether there is a contaminant or pollutant. One court has held that mold resulting from water vapors trapped in the walls was not subject to the pollution exclusion because it did not involve the release of contaminants.

Another issue is whether the contamination is the cause of the damage or the result of a covered peril. If the cause of the release of contaminants is an insured risk, the damage is covered even if it appears to be outside the terms of the policy.

Property policies generally contain exclusions for damage caused by deterioration, rust, corrosion, fungus, decay, or similar terms. This exclusion is generally intended to eliminate coverage for conditions that are simply functions of the property's normal aging process.

In *Aetna Casualty and Surety Co. v. Yates* the insureds filed suit on an all-risks homeowner's policy to recover costs for repair of their home after they discovered that the joists, seals, and sub-flooring of their house had almost completely rotted away. Apparently, the condition was caused by air trapped between the crawl space and the sub-floor and the seals, which had been chilled by air conditioning and which, in turn, produced condensation and consequent rotting. The court held the exclusion for "deterioration, rot, mold or other fungi and dampness of atmosphere" applied to prevent coverage.

Another common exclusion is for loss or damage caused by "faulty, inadequate, or defective...design, specifications, workmanship, repair, construction, renovation...[or] materials used in repair, construction, renovation or remodeling." This appears to exclude mold claims relating to the faulty workmanship, such as HVAC, plumbing, or other construction related causes.

The first principle regarding the inherent or latent defect exclusion is that the defect must be undiscoverable by any known or customary test. The second principle that can be drawn from the case law is that the inherent or latent defect must reside within the property insured. The term is confined to a loss entirely from internal decomposition or some quality that brings about an object's own injury or destruction. The vice must be inherent in the property for which recovery is sought.

Faulty workmanship or construction is not a latent or inherent defect. Components of the insured property must suffer from some sort of constitutional infirmity; they must contain "the seeds of their own destruction." The court held that there was coverage under the all risk policy because, had the parties in the case intended to exclude negligent workmanship and faulty design by virtue of the inherent defect exclusion, it would have been a simple matter for the insurer to have included express terms more consistent with that result.

In *Petrolia Insurance Company v. Everett,* the insureds sued under a standard Texas standard homeowners' insurance policy for damages to their swimming pool. The policy contained an inherent vice exclusion and an exception for ensuing loss caused by water damage. The pool was built in 1981 and "cool coat" was applied to concrete surrounding the pool. Insureds experienced no problems with the cool coat until the winter of 1983, the worst winter on record, with at least 14 days of below-freezing temperatures. Shortly thereafter, the cool coat started crumbling. The court found that there was some evidence to support the trial court's implied finding of no inherent vice and that the damage was an ensuing loss that occurred from water freezing.

Exclusions - Third-Party Policies

Bodily Injury Claims

Under the definition of bodily injury provided in a comprehensive general liability (CGL) policy, there must be an allegation of "injury to the physical structure of the body" for coverage to exist. Purely emotional or mental injuries, absent a physical component, do not fall within the definition of "bodily injury." Given the physical symptoms associated with mold claims, the existence of bodily injury will likely not be an issue. However, a claimant asserting only emotional or mental harm, without associated physical symptoms, may not fall within coverage.

Property Damage Claims

In most CGL policies, "property damage" is defined as "physical injury to tangible property" or "loss of use of tangible property which has not been injured." Very little is in dispute if the mold has begun forming on building materials requiring their replacement. Additionally, if a building is deemed unsafe, loss of use damages may be appropriate even absent physical injury.

The more difficult question is presented by the phrasing of the insuring agreement that provides coverage for "damages because of...property damage." This phrasing has been interpreted broadly enough to include diminution in value and/or costs of remediation. Courts have held that an insured must be reimbursed for costs incurred to prevent covered damages from arising, especially when the repairs are not merely prophylactic but are necessary to prevent further damage. Under these authorities, an argument can be made that the coverage is not limited to the costs associated with cleaning up the mold; rather, there is coverage for the entire remediation program if reasonable and necessary to clean up the premises as well as any investigative costs.

Occurrence

The Texas Supreme Court recently considered the definition of "occurrence" in *Mid-Century Insurance Co. v. Lindsey.* The court held "an injury is accidental if 'from the viewpoint of the insured, [it is] not the natural and probable consequence of the action or occurrence which produced the injury; or in other words, if the injury could not reasonably be anticipated by [the] insured, or would not ordinarily follow from the action or occurrence which caused the injury.'" In other words, "[a]n effect that 'cannot be reasonably anticipated from the use of the means that produced it, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means.'" Thus the focus is on whether the effect was unexpected, unforeseen, or unintended rather than on whether the insured's act was negligent.

Personal Injury

Not surprisingly, a theory has been proffered that a landlord sued for mold contamination by its tenants is a claim for wrongful eviction. The definition of "personal injury" under the 1998 ISO form states:

The wrongful eviction from, or wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

Unlike bodily injury or property damage, which are all-risk coverage, personal injury coverage is a named-perils coverage. Therefore, the pre-suit allegation of wrongful eviction may trigger coverage under this provision.

To the extent the claim is asserted with pending litigation, the applicability of the personal injury liability insuring agreement is governed by whether the facts alleged state

one of the enumerated personal injury offenses. For example, in *Losey v. Aetna Casualty & Surety Co.,* the court rejected the insured landlord's claims for coverage for a tenant's suit arising out of the failure to return a security deposit with no greater discussion than to note that such failure was not within one of the listed personal injury offenses.

Some courts go further and hold that the applicability of the non-bodily harm personal injury definition turns on whether the pleading actually assets a particular *cause of action* constituting one of the enumerated offenses.

Construction Claims

For construction claims, it is generally asserted that the injury results from actual exposure to the molds. Thus, exposure and continuous trigger theories appear to give the same result. If each exposure causes sneezing, wheezing, etc., then manifestation, exposure, and continuous triggers equal the same result.

Pollution

Current CGL policies generally contain an absolute exclusion for all bodily injury and property damage claims arising out of pollution. Courts have differed on the meaning of pollution, defined as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes acids, alkalis, chemicals, and waste." Generally, many courts have been reluctant to apply the pollution exclusion to situations involving "indoor" pollution.

Defective & Faulty Workmanship

A CGL policy contains several exclusions intended to apply to any liability arising from the insured's defective workmanship that causes damage to the project itself. These are commonly referred to as the "business risk" exclusions. Of course, the application of any exclusion is dependant upon the facts giving rise to the claim for which coverage is sought. However, a discussion of their general application is pertinent here.

When confronted with the business risk exclusions, courts generally note that CGL policies are intended to provide protection for bodily injury and/or property damage "caused by the completed product, but not for the replacement and repair of that product." The rationale for the distinction is an insured can exercise control over the quality of goods and services and thereby limit liability, but is exposed to unlimited liability resulting from accidental injury to property arising out of its work. Further, an insured has already received payment for its defective work or product and should not receive subsequent payment to correct those deficiencies.

Exclusion j(6), the faulty workmanship exclusion, was considered by the court in *Houston Building Service, Inc. v. American General Fire & Casualty Co.* In that case,

HBS employees applied linseed oil to wooden doors and door frames causing damage. The court held that exclusion j(6) precluded coverage for the damage because the damage had resulted from faulty workmanship. The court also considered the application of exclusion "j(5)," finding that because the polishing was done as part of an ongoing maintenance contract, the damage arose while the insured was "performing operations," and exclusion j(5) was applied.

The application of exclusion j(6) is intended to exclude coverage for damage to property that constitutes the insured's own work except when the work complained of falls within the definition of "products-completed operations hazard." One court has held that this exception limits exclusion j(6) to property damage occurring while the insured's work is incomplete.

The impaired property exclusion may prove critical when an entire structure is rendered useless or uninhabitable because of the defective or inadequate work by an insured on a portion of the structure, such as improper drying after previous water damage. In *American International Surplus Lines Ins. Co., v. IES Lead Paint Division, Inc.*, the court considered application of exclusion "m" to liability arising out or an insured's improper removal of asbestos material from a department store. The court held that the store was "impaired property" because, in the condition it was left in by the insured, it posed a threat to the public health and could not be used. Further, the court held that the property became impaired because of the defective work of the insured: the improper removal. Therefore, exclusion "m" precluded coverage.

The exclusion known as the "sister ship exclusion" originated after an aircraft crash when the airplane's sister ships were grounded and recalled to correct a common defect. The exclusion has been applied to claims for repair or removal of the insured's defective work itself.

Completed Operations

The products-completed operations hazard exclusion is intended to exclude potential liability for damage that arises out of the insured's completed work. For example, if a building the insured has constructed collapses sometime after its completion, the completed operations exclusion likely excludes resulting claims against the insured for bodily injury or property damage to property other than the work itself.

In *Hargess v. Maryland American General Insurance Co.*, the insurer denied coverage from injuries resulting from the explosion of an air conditioner unit. The unit allegedly exploded as a result of work performed by the insured a year earlier. The insured performed the work, rewinding a motor, for another entity that reinstalled it in the air conditioner unit. The insurance company relied upon the completed operations hazard exclusion in denying coverage. The insured argued that the provision did not apply because the insured "had not performed what it was to have performed; therefore, there was not a completed operation." The court held that the exclusion applied because even if the unit needed "correction, repair, or replacement because of any defect or deficiency,

there was a completed operation as defined by the policy and injury [had] occurred after the unit was physically delivered."

These cases demonstrate that the completed operations exclusion generally precludes coverage for liability for damage arising from the insured's work, once completed. To be more exact, bodily injury or property damage arising from the insured's work, if that work is completed, falls within the definition of products-completed operations hazard.

Typically, the completed operations exclusion is combined with the business risk exclusions to limit coverage under a CGL policy. However, completed operations coverage can be purchased in connection with a CGL policy by electing the coverage on the face of the policy or by purchasing an endorsement which either adds the coverage to the policy or deletes the exclusion relating to completed operations.

Cases that discuss completed operations *coverage,* as opposed to the completed operations *exclusion,* are rare. However, whether discussing coverage or exclusions, the critical determination is whether the injury or damage arose out of acts that fall within the definition of products-completed operations hazard. Therefore, we can look to cases that consider the products-completed operations hazard *exclusion* as authority, or at least a reliable guide for determining the existence of coverage.

RECOMMENDATIONS TO INSURERS

1. Consider forming a multidisciplinary claims unit made up of first party, third party, and surety bond adjusters.

2. Identify and qualify experts in the fields of toxicology, industrial hygiene, neurology, and environmental engineering.

3. Consider drafting a specific mold exclusion on first- and third-party policies and filing it with various Departments of Insurance throughout the United States.

4. Identify the business segments within the company and the policies that will most likely be impacted by mold claims and create a review committee that will be involved in evaluating and reviewing all mold claims.

5. Establish a consistent approach to evaluating and analyzing insurance coverage issues associated with mold claims. Do this in conjunction with designated insurance coverage counsel in each state.

CONCLUSION

Mold represents a new challenge to the insurance industry. Claims have and will be presented in first-party property policies, third-party liability policies, worker's compensation policies, as well as bonds. It is a blend of property damage and bodily injury and, possibly, personal injury.

Certainly the handling of mold claims will present unique challenges as the public becomes more aware of the potential dangers and medicine works to get a grasp of the diagnosis and treatment. The claims professional should handle these claims, or the potential for such claims, with the utmost care and concern for present and future complications. Even more careful consideration should be given to the policy terms and exclusions as well as court decisions on these issues.

RELEVANT CASELAW RELATED TO MOLD LAWSUITS

ADMISSIBILITY OF EXPERT TESTIMONY

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)(polygraph test results excluded because test had not gained general acceptance among authorities in fields of physiology and psychology)

Daubert v. Merrell, 509 U.S. 579 (1993)(to be admissible, expert testimony must be reliable, for which a number of factors – including general acceptance – are to be considered)

People v. Wesley, 83 N.Y.2d 417, 436 (1994)(In addition to passing muster under *Frye* (general causation), expert testimony must also have proper foundation (specific causation))

Parker v. Mobil Oil, 7 N.Y.3d 434 (2006)(plaintiff exposed to benzene turned away for failure to prove specific causation)

Nonnon v. City, 819 N.Y.S.2d 705 (1st Dept. 2006)(plaintiffs' epidemiological studies involving the Pelham Bay landfill were not novel science, and therefore did not require *Frye* hearing)(affirmed on procedural grounds only in the Court of Appeals)

Fraser v. 301-52 Townhouse, 831 N.Y.S.2d 347 (2006)(mold plaintiff turned away after *Frye* hearing; no general acceptance that indoor mold causes plaintiffs' respiratory ailments)(presently on appeal to First Department)

Lebouef v. Safeguard, 851 NYS2d 70 (West. Cty 2007)(mold plaintiff fails to satisfy causation element in bodily injury claim).

BTN v. Auburn School District, 845 N.Y.S.2d 614 (4th Dept. 2007)(issue of mold causing illness should go to jury)

Marso v. Novak, 840 N.Y.S.2d 53 (1st Dept. 2007)(differential diagnosis not generally accepted if it leads to a conclusion that is not generally accepted (discussing *Nonnon*)).

PROVING NEGLIGENCE

Litwack v. Plaza Realty, 2007 NY Slip Op 3834 (May 3, 2007)(landlord's notice of brown spot on wall and surrounding wetness held not to be notice of mold condition that allegedly caused tenant's injuries)(presently on appeal to the Court of Appeals)

Lark v. DeMatteis, 48 A.D.3d 354 (1st Dept. 2008)(leak in plaintiff's closet that landlord fixed within a week held not to be notice of a mold condition that allegedly caused tenant's injuries)

CONSOLIDATION

Carroll v. Nostra Realty, 2005 NY Misc. LEXIS 3307 (general standard for consolidating summary proceeding and tort case)

Amtorg Trading v. Broadway, 191 A.D.2d (1st Dept. 1993)(standard for consolidation of summary proceeding and action)

SPOLIATION

Bannon v. Auerbach, 785 N.Y.S.2d 650 (2004)(spoliation remedies not awarded)

Bouzo v. Citibank, NA, 96 F.3d 51, (2d Cir. 1996)

Mudge, Rose v. Penguin Air Conditioning, 633 N.Y.S.2d 493, 221 A.D.2d 243 (1st Dept. 1995)

JURY WAIVER

Tanne v. Tanne, 30 A.D.2d 956, 294 N.Y.S.2d 247 (1st Dept. 1968)(plaintiff's right to trial on his legal action had been waived because equitable and legal claims had been consolidated, such claims arose from the same facts, and the plaintiff acquiesced to the Court's consolidation)

Trepuk v. Frank, 104 A.D.2d 780, 480 N.Y.S.2d 889 (1st Dept. 1984)

Meltzer v. Lincoln Square Apartments, 135 Misc. 2d 315, 515 N.Y.S.2d 208 (NY County 1987)

LIMITATIONS

Martin v. 159 West 80 Street Corp., 3 A.D.3d 439, 770 N.Y.S. 2d 720 (1st Dept. 2004)(CPLR 214-c – limitations period is 3 years from injuries)

Felice v. Amer. NWS Corp., 46 A.D.3d 505 (2d Dept. 2007)(defendant permitted under CPLR 214-c to prove facts showing that plaintiff could have discovered injuries earlier)

Kaymakcian v. Board of Managers of Charles House Condominium. 2008 Slip Op. 02487 (1st Dept. 2008)(where tort was continuing, plaintiff was not barred by statute of limitations, but may seek damages only three years back)