2021 Annual Conference
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Roundtable: Breaking The Mold: Effectively Handling Fungi (And Other Indoor Air Quality) Claims Across Different Policies

Presentation Summary:

This roundtable presentation among environmental professionals with claims, legal and remediation consulting expertise discusses the exponential growth of mold and other indoor air quality claims (including legionella and COVID-19) and coverage issues arising under various insurance policies. Panelists will offer their perspectives on key issues with the objective of highlighting challenges in the adjustment and defense of these claims.

I. Applicable Insurance Policies

Fungi claims and other indoor air quality claims such as legionella bacteria and the recent emergence of the COVID-19 virus can potentially implicate several different insurance policies. These include:

a. Fixed site or pollution legal liability ("PLL")
b. Contractors pollution liability
c. Commercial General Liability
d. First Party Property Insurance/Builders' Risk

Affirmative pollution legal liability insurance policies (including fixed site/ PLL) provide first and third-party protection against "pollution conditions"[1], that are at, on under or migrating from a scheduled location. Contractors pollution liability insurance policies provide third party protection against "pollution conditions" that result from the performance of specifically identified operations

Both forms of pollution liability insurance policies require triggering "pollution" which is defined[2] in relevant part as:

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[1] Many policies use differing terms of art including "pollution events" or "pollution incidents".

[2] Among the many pollution liability carriers underwriting pollution insurance, there are variations in the definition of a "pollution" event – but generally the trigger is a discharge of pollutants into land, buildings or structures on land, the atmosphere (including the indoor atmosphere), and any body of

"Pollution Incident means:

1. the presence of **Mold Matter** [mold, mildew, or fungi, whether or not such mold, mildew or fungi is living}; and
2. the discharge, dispersal, release or escape of **Pollutants** on, into or upon land, Conveyances, buildings or other structures with foundations on land, the atmosphere, any body of water including surface water or groundwater.

Pollution Incident includes the illicit abandonment of Pollutants at, and which originated from beyond the boundaries of, any Covered Property provided that such abandonment takes place after the Inception Date and was committed by parties other than Insureds and without the knowledge of a Responsible Insured. With the exception of Legionella, Pollution Incident does not mean bacteria or virus."

Commercial general liability (CGL) insurance policies provide third party liability protection (duty to defend and duty to indemnify) for an insured against third party claims/suits alleging bodily injury or property damage due to an "occurrence". Although these policies typically have a broad insuring agreement, when mold claims began to spike in the early 2000's, insurers began adding Fungi and Bacteria exclusions to their policies.

Commercial property insurance policies typically provide coverage for "covered causes of loss." Any risk not specifically excluded or limited under the policy can be a "Covered Cause of Loss." Property insurers have, like CGL insurers, added mold exclusions to polices, however, as will be discussed, whether that exclusion can operate as a bar to coverage depends upon whether the mold is an "ensuing loss caused by water damage."

II. Emerging Indoor Air Contaminants

With a burgeoning plaintiffs' bar fueled (and encouraging prospective litigants) by headlines like: "Mold is the next asbestos" or "Is Your School Infected?", mold continues to be a significant and costly concern for insurers. Indeed, Allianz Global Corporate & Specialty listed indoor air quality exposures (including mold and legionella) among its "5 Liability Risk Trends: 2020 and Beyond". [3] In addition, more severe and frequent weather events have contributed to an increase in property damage claims involving both water and mold related property damage claims under insurance policies.

Another emerging trend is the uptick in Legionella cases in the United States. The Legionella bacteria is found naturally in the environment, usually in water, and grows best in warm water like the kind found in hot tubs, hot water tanks, large plumbing systems, decorative

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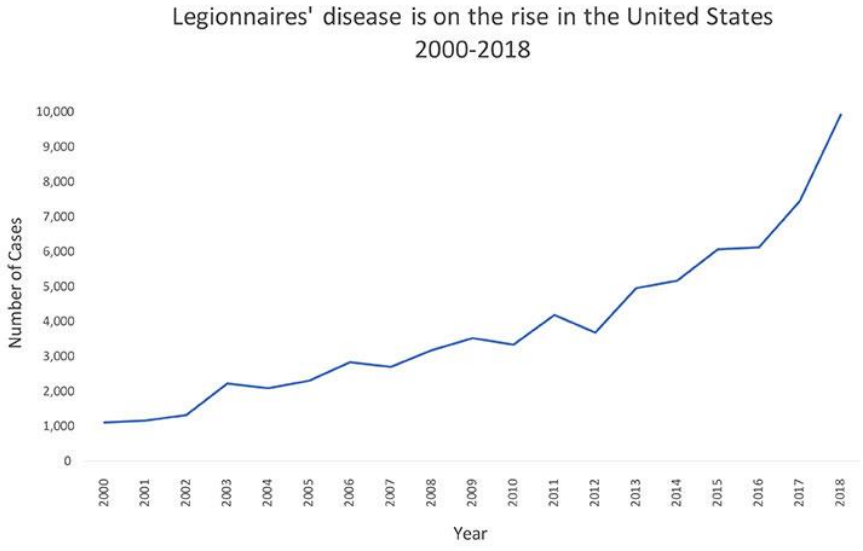
water. The definition included herein is from Ironshore's Site Pollution Incident Legal Liability Select (SPILLS) Real Estate Form (IE.COV.SPILLS>REAL_ESTATE.001 (06/16).

[3] https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/reports/AGCS-Liability-Loss-Trends-2020.pdf

fountains, and cooling towers. Named for attendees at an American Legion convention in 1976 who were exposed (and many of whom became ill and died), legionella has been on a steadily upward trend with health departments reporting nearly 10,000 cases of the disease in the United States in 2018.[4]



Source: Nationally Notifiable Diseases Surveillance System

The Covid-19 virus is the most recent, urgent and likely the most disruptive event in living human history. There is no doubt that all industries have been impacted by the surging virus and the efforts to reduce the surge, including stay – at – home orders to try to flatten the curve, in healthcare, hospitality, retail, construction and energy sectors, to name but a few.

III. Emerging Coverage Issues

a. Overlap in Coverage

Most of the commercial-insurance-implicated mold claims fall into two general categories – personal injury claims and property damage/remediation claims. With personal injury/bodily injury claims, litigants seek compensation for alleged medical conditions due to exposure to mold whether at their leased property (negligent landlord) whether as a tenant or an employee of a tenant. These types of claims require an insurer to defend its insured against alleged liability while the plaintiff provides the requisite evidence of exposure and a causal link between the exposure and the alleged damages. These types of claims can take years to come to trial (or settlement) and can range in values from nuisance values to multiple millions in damages.

Claims for such bodily injury can potentially implicate coverage under affirmative pollution policies (e.g., pollution (mold) at a covered location or pollution (mold) resulting from

[4] Source: https://www.cdc.gov/legionella/about/history.html. According to the Centers for Disease Control, it is likely that this number is significantly underestimated.

faulty operations such as HVAC installation and maintenance). Site pollution and contractors' pollution policies can be called upon to defend insureds in such claims. Similarly, commercial general liability policies may also be called upon to defend depending upon whether there is a specific exclusion in the policy and whether that exclusion can be enforced.[5]

With respect to first party mold claims, claimants often include owners/operators of premises (apartment buildings, commercial offices, hotels, warehouses) with visible mold growth which may be the result of construction – related activities, severe weather and/or a combination of both. Commercial property insurance may be called upon where the mold is the ensuing result of a "covered peril" – like a hurricane or flood and pollution coverage may also be implicated for the mold related damages. As will be discussed below, issues arise as to which policy may be primary and how differing deductibles and self-insured retentions can impact and complicate the loss adjustment process and frustrate the process.

First party business interruption loss presents a significant exposure for the insured and insurer alike. As with the complexities of which (or how many) policies may be implicated, issues including, but not limited to the nature of the covered compensable loss and whether it is "the direct result" of the covered peril present additional challenges. And ultimately, the calculation of the loss requires specialized expertise in forensic accounting and the opportunity for robust debate amongst financial professionals.

The emergence of the COVID-19 epidemic and its severe and financially devastating impact on businesses and the economy is still emerging. Insurance disputes have and will undoubtedly continue to emerge in the months and years ahead. Issues related to whether the virus is "physical loss or damage" (under property policies) or a "pollutant" (under pollution policies to trigger coverage or under general liability policies to exclude coverage) is controversial and unsettled. The most significant claim for most commercial businesses centers on business interruption losses from stay-at-home orders or closures prompted by positive tests necessitating disinfection before reopening. At the end of 2020, the data suggests that the majority of these business – interruption lawsuits have been dismissed -most premised upon a virus exclusion; but others dismissed notwithstanding the absence of a virus exclusion. [6]

b. Known Conditions Exclusions and Other Specific Exclusions

Because insurance is intended to cover "fortuitous" (unexpected and unknown) loss, most insurance policies explicitly exclude any circumstances or occurrences that are known prior to a policy's inception date. Indeed, most applications for insurance coverage require the applicant to disclose whether it is aware of any facts or circumstances that could lead to a covered loss. In the context of fungi and other indoor air quality concerns what is known and when it is known and by whom it is known can be of critical importance as to whether there is coverage or not.

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[5] See e.g., https://media.goldbergsegalla.com/uploads/tfs-ajs-mrs-mdc_50statesmoldmealeys_jan2013.pdf

[6] See the University of Pennsylvania Law's "Covid Coverage Litigation Tracker" - https://cclt.law.upenn.edu/judicial-rulings/

Take for example a not atypical fact pattern: a tenant in an insured's apartment building routinely complains about issues impacting the tenancy – "odors", mildew, water intrusion from leaking pipes or condensation from faulty heating, ventilation and cooling (HVAC) systems. An insured in this situation should seriously consider reporting (or the consequences of failing to report) this situation should the tenant subsequently (i.e., in a successive policy term) file an actual demand seeking compensation for the tenant's bodily injury and property damage. Failing that, as part of the coverage investigation, undoubtedly the carrier will evaluate whether the conditions were known prior to inception date of the policy potentially limiting or excluding coverage altogether.

In the commercial property context, issues regarding deficient or lacking maintenance and upkeep can also present grounds to deny or limit coverage where there may be damages from a covered peril such as weather-related loss as well as damages exacerbated by failed/inadequate repairs (such as roof repairs). Insureds have an affirmative obligation to mitigate their loss and failure to undertake necessary and timely repairs can impact coverage.

Further, specific to indoor air quality, exclusions such as Fungi and Bacteria or communicable disease exclusions will potentially be brought into play and serve to limit or exclude coverage. The coverage impact of any such exclusions will depend upon the facts and circumstances of the specific loss as well as the enforceability of any such exclusions under applicable law.[7]

c. Prior Consent/Voluntary payments and settlements

Virtually all insurance policies have a condition prohibiting an insured from voluntarily admitting liability, settling or attempting to settle or otherwise disposing of a claim. Apart from emergency first aid, or in the pollution liability context, a limited exception for emergency response to address an "imminent and substantial threat to human health or the environment"[8], an insured is obligated to seek and obtain the insurer's prior written consent before any such admission, settlement or disposition.

In the context of indoor air quality, and especially mold, owners and operators of premises may react to the commercial "urgency" of addressing the mold conditions and when the remediation work/disinfection is underway (or completed) seek reimbursement from its insurance carriers. This may seem, from the insured's perspective, to constitute an "emergency", but likely not from the insurer's perspective.

As a threshold matter, voluntary payment/consent to settlement conditions are generally enforceable.[9] There is, however, jurisdictional split as to whether an insurer is

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7 See footnote 4.

8 The exception for emergency response is often limited to 48-72 hours following discovery of the discharge of pollutants allowing the insured to focus on the emergency and providing limited relief from a policy's requirement that the insurer provide prior written consent to any remediation activities.

9 See, e.g., *Diversified Mortg. Investors v. U. S. Life Title Ins. Co.*, 544 F.2d 571, 1976 U.S. App. LEXIS 8228 (2d Cir. 1976) (an insured who does not comply with the terms of his policy by preserving for his insurer the opportunity to defend or compromise, is usually not entitled to recover under his

required to show prejudice as a condition of enforcing the clause. In some jurisdiction, the mere fact of settlement or payment constitutes prejudice as a matter of law.[10] Further,

d. Multiple Deductibles and Self-Insured Retentions

Where two (or more) insurance policies are potentially responding to a covered loss – issues as to the interplay with deductibles and self-insured retentions come into play. An insured is typically obligated to satisfy its retention before the insurer's obligation under the policy is triggered. But if one policy has a deductible and the other has a self-insured retention and the further complicating the situation, the amounts are different, complexities arise as to which insurer and when it has the obligation to participate in the defense of a lawsuit.

e. Other Insurance

A "sister" argument to the issue of multiple deductibles arises from competing (and sometimes "mutually repugnant") other insurance clauses. If all potentially triggered insurance purports to be "excess" of other valid and collectible insurance – who in fact has the duty to defend or respond to the claim?

With the advent of affirmative pollution insurance available in the market (and evolving over its 40 plus years of existence), environmental insurance brokers and their clients routinely seek to have the pollution insurance act in the primary position – the intent being to avoid the insured having to demonstrate exhaustion or invalidity or "uncollectibility" of historic (pre-pollution exclusion) liability insurance. With the emergence of mold – particularly mold related to weather – related conditions resulting from water damage, priority of coverage can be particularly complicated. For example, a commercial property insurance policy with a sub-limit for contamination may look to the other insurance clause of a pollution liability insurance policy to take a primary position on the fungi contamination aspect of the claim. This can result in confusion and frustration in the adjustment of the loss, delay in payments from coordination among insurance companies, in addition to requiring that an insured satisfy two insurance policy deductibles for a single loss.

f. Subrogation

After a loss is paid by an insurer, the insurer has the right to "step into the shoes" of its insured and seek to recover loss payments from a responsible third party. As losses from indoor air quality continue to grow in frequency and cost, insurers are looking more closely at ways of

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contract:; *U.S. Underwriter's Ins. Co. v. Ziering*, 2009 U.S. Dist. LEXIS 7077, 2009 WL 238562 (E.D. NY 2009) ("[p]rovisions … which reserve to the insurer the control of litigation and settlement, have been consistently enforced.")

[10] See *New York Central Mutual Fire Insurance Co. v. Danaher*, 736 N.Y.S.2d 195, 196 (App. Div. 2002)(an example of a jurisdiction that did not require a showing of prejudice. In that case a New York court held that an insurer "is not required to demonstrate prejudice to assert a defense of non-compliance"; contrast with *Public Util. Dist. No. 1 v. Int'l Ins. Co*., 881 P.2d 1020, 1029 (Wash. 1994) (acknowledging that such provisions are "clearly placed in policies to prevent the insurer from being prejudiced by the insured's actions. And so, to release an insurer from its obligations without a showing of actual prejudice would be to authorize a possible windfall for the insurers.")

recouping some of the losses from parties such construction companies, real estate maintenance companies, HVAC companies and even commercial tenants.

How those subrogation recoveries are allocated between the insurer and insured depend principally upon the language of the insurance contract (typical provisions pay the insured first for losses in excess of the limits of insurance, then the insurer to the extent of its payments, and then to the insured for the payment of its retention or deductible) and applicable state law[11].

Further, how those subrogation recoveries are navigated and allocated between multiple insurers who participate in a loss is an issue to be resolved.

Conclusion

Concerns regarding indoor air quality are undoubtedly going to continue to impact insureds and insurers alike for years to come. With the increasing frequency and costs associated with such claims (including the costs to remediate and restore impacted properties or defend an insured against third party claims alleging bodily injury), these issues may result in more limiting insurance terms and conditions, higher premiums, higher retentions and lower limits of insurance (including sub-limits) for such coverage. Clarity of coverage and management of all parties' expectations is critical to reducing the frustrations experienced when a claim is tendered. Assuring timely notice, responding to insurer requests for information, and working with capable legal and environmental professionals (including the speakers here today) can go a long way to effecting a more effective claim resolution.

[11] A policy of insurance may contain a specific "choice of law" and "choice of forum" condition. For example, many pollution liability insurance policies designate New York as the choice of law and forum. For many considerations, including but not limited to subrogation, a prospective insured should carefully evaluate whether the insured's home office location, the location(s) of its properties and/or its operations, suggest more appropriate jurisdictions should be considered and negotiated. For subrogation considerations, a specific state's view on "making whole" an insured can impact if and in what priority the insured participates in a recovery. For a discussion on the Made Whole Doctrine in all 50 states see: https://www.mwl-law.com/wp-content/uploads/2018/02/MADE-WHOLE-DOCTRINE-IN-ALL-50-STATES-CHART.pdf