



2016 CLM Annual Conference
April 6-8, 2016
Orlando, FL

KNOW YOUR POOP: CATEGORY 3 BLACK WATER CLAIMS

I. Overview

While mold claims and litigation exploded well over a decade ago, and policy exclusions for fungi and bacteria are now common, claims and litigation associated with the presence of Category 3 Black Water, as defined by the Institute of Inspection Cleaning and Restoration Contractors (IICRC), have increased exponentially to the point that there are more claims for Category 3 Black Water than mold. Further, environmental insurance policies may provide coverage in situations where first party property coverage would exclude Category 3 contamination claims; however, coverage may still depend on proper assessment of the damage (or lack thereof) and responding to allegations of the presence of a Category 3 contaminants associated with a loss. Failure to address these claims head on can result in claims regarding bad faith, the incorrect application of sublimits or failure to exclude coverage resulting in significant costs to remediate. Thus, this discussion will discuss the definition of all types of water damage, environmental testing necessary to support these claims, as well as provide litigation case studies where these claims have arisen. At the end of this discussion, attendees will know their poop and how to handle it to avoid further litigation consequences.

II. What are the Issues?

Are the IICRC Guidelines and Procedures Helping or Hurting Claims?

The Institute of Inspection Cleaning and Restoration Contractors (IICRC) is a restoration industry organization that published guidelines for water restoration. Essentially, the organization provides a procedure for contractors and their workers responding to water intrusion. The procedures are designed to assist contractors in managing water losses. It is not a guideline produced by a science-based entity, and is designed to assist in establishing water damage restoration efforts. This guideline has become the “driver” for claims regarding water restoration, and has significant ability to impact the claim and claims management process itself.

Types of Water Damage

IICRC defines three types of water (Category 1-3) that make reference to the degree of contamination associated with the water intrusion. The categories of water range from water that is considered to be free of environmental risk of exposure to water that is “grossly contaminated.” The categories of water include and resulting risk of exposure consider time and temperature that can impact whether water that may not pose a risk of exposure to contamination may become an environmental risk. These degrees of cleanliness of the water impact the cost and time associated with restoration efforts.

Defining the Issues That Arise

In general, these issues arise out of water intrusion claims that can occur in properties where sanitary water lines break, but they also occur in properties where flood waters impact a property, as well as from the upset of sewage lines or waters from hurricanes through breeches in building envelopes. Fire suppression water is also an event that can trigger restoration efforts where these guidelines are used. The terms described are generally used by restoration contractors, but have been used by consultants also, without understanding the role of science in the use of the terms and guidelines.

The claims of grossly contaminated water can be predictable, and follow a general pattern, whereby bacterial contamination or other contaminants are claimed that require special handling and cleanup methods to be utilized. The key to addressing these claims is to determine materials that are impacted and those that are not and directly test for the presence of those claimed parameters and compare the presence of the parameters between impacted and un-impacted substrates. The presence of the constituents of concern should drive the restoration protocol, and not the automatic assumption of the presence of grossly contaminated water.

Potential Impacts to the Claim When Grossly Contaminated Water is Alleged

There are significant potential impacts to these property damage claims when grossly contaminated water is alleged. These impact the cost associated with the completion of water removal and drying activities, but also impact the cost associated with replacement of building materials or furniture, fixtures, and equipment (FFE) that may or may not actually be impacted. The claim of grossly contaminated water can exponentially expand the scope of the restoration efforts, but also expand the timeframe for restoration efforts to occur, which has resulting impacts on business interruption costs.

Understanding Positions of Defense Against These Allegations

The utilization of science experts that are experienced and credentialed in fields of industrial hygiene and toxicology are vital to responding to these allegations. Further, use of properly accredited laboratories to analyze for the presence of these constituents of concern, following peer reviewed and accepted methodology should occur. Allowing the science expert to access damaged and non-damaged materials for testing, followed by timely notification of the results to the insured or parties involved is critical to addressing and resolving these allegations. Claims adjusters and claims counsel have a vital role in these matters, as the presence of these constituents may impact coverage.

III. Case Study: A hotel is impacted by water intrusion through the building envelope from a weather event, and the owner reports through the environmental consultant that a Category 3 Water Condition is Present

Assessing Damages

The hotel owner/operator's main concern is to remediate the damages and get his rooms back on line. Thus, many times that hotelier will have remediation companies at the ready in case of an event such as this one and will hire the company and then worry about getting its insurer(s) on board.

This leaves an interesting scenario for the insurer(s), as they will want to not only assist its insured, but also make sure that the project is done within the scope of its coverage. Moreover, the insurer(s) needs to make sure that the response to its insured is timely not only for the benefit of mitigation, but to comply with extra-contractual statutes in the jurisdiction. However, both the hotel and insurer(s) need to line up their experts early and make sure that they are fully vetted as not getting them early and/or not vetting them can come back to haunt you.

Timely Response to Insured's Allegations

While the key to any good adjustment is timeliness, all adjusters need to make sure to also be aware of each individual jurisdiction's state law, so that it doesn't violate extra-contractual statutes.

Coverage Issues: Property, Pollution and/or BI Coverage

Coverage scenarios for the insurer(s) include, but are not limited to, issues pertaining to sublimits, exclusions, and segregation of damages between property and pollution policies and/or other insurance clauses. Additionally, the insurers cannot ignore the Time Element considerations, depending on the completion and results of the damage assessment. However, the hotel continues to remain focused on the fact that it needs its hotel fixed.

ADR and/or Litigation

ADR

In instances where a conflict arises between the hotel and insurer(s) and between insurer and insurer, early ADR, even prior to litigation, can provide an avenue that can save and time for all parties. However, regardless of whether the ADR is agreed upon before or after litigation has arisen, the insurer(s) and hotel can benefit from working closely with their experts in both strategy and defense.

Litigation

If the matter cannot be resolved via ADR, the Hotel and insurer(s) will also need to consider utilizing its experts in discovery (assisting with depositions) and at obviously at trial. However, the hotel and insurer need to pay careful attention needs to any changes or “updates” regarding their experts. Although, the experts should have been vetted when hired, time goes by and things happen over time, which may impact whether that expert can overcome a Daubert challenge.

IV. Predictability is Key to Success

As discussed, these Category 3 claims and litigation cases and the allegations and conditions involved are predictable. In the vast majority of the claims, it can be said that “One size does fit all;” thus, the strategy and plan of resolution followed in one case/claim could potentially impact future claims. The claim/allegation is the same in each and the response should directly address the claim. Therefore, the goal is to address the claim with science-based information directly addressing the allegations. Moreover, if Category 3 Conditions do not exist, then the key is to segregate the damages, i.e. Water Loss (Property) vs. Pollution Loss.#