

Mold is as old as the hills — literally. It also may be the next asbestos, and coverage may be as difficult to find.

Got Mold?

The Growing Concern Over Toxic Mold and How Insurers Are Dealing With It

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Owning a home is the American dream — unless, of course, that home is infested with mold. Then, this dream becomes more like a nightmare. Mold, in its various forms, is in homes, in workplaces — it's ubiquitous. In fact, it surrounds you now, even as you read this article.

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Old Problem — New Issues

Mold has probably been around since the beginning of time, with scientists suggesting that it has

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been evolving for more than 550 million years.¹ Mold also appears to be referenced in the Old Testament of the Bible.² In the Book of Leviticus, God explains to Moses and Aaron how to clean this “leprous disease in a house.”³ First, a priest must diagnose the problem, “and if the disease is in the walls of the house with greenish or reddish spots, and it appears to be deeper than the surface,” then the priest would shut up the house for seven days. If, on the seventh day, the “disease had spread in the walls of the house,” then the priest “shall command” that the contaminated parts be scraped or torn away and discarded and the house be rebuilt and replastered.⁴ If the mold grows back, then it is a “malignant leprosy in the house,” and the house must be torn down, “its stones and timber and all the plaster,” and be taken “out of the city to an unclean place.”⁵ When dealing with mold, times have not changed all that much since Moses and Aaron received these instructions from on High.

One ongoing debate is whether mold is a real or only a perceived risk to human health.

Fast forward to the present time: Prior to 1990, mold claims were virtually nonexistent. However, in recent years, the number of mold-related claims has skyrocketed, and the claims are getting national media attention. From television shows (like *48 Hours*), to magazines (like *People* and *Time*), to national newspapers (like *The New York Times*, *The Wall Street Journal*, and *USA Today*), to local newspapers (like *The Sacramento Bee*, *The Detroit Free Press*, and *The Dallas Morning News*), there have been countless stories chronicling homeowners’ battles with this “malignant leprosy” — as well as with contractors, building owners, and insurers, among other adversaries. Plaintiffs’ lawyers, environmental consultants, and doctors are starting to specialize in cases of toxic-mold exposure and are quite busy, with one California lawyer last year reportedly handling mold-related claims for over 1,000 clients.⁶

While lawyers and consultants are having a field day with the escalating number of mold-related claims, it feels more like doomsday to the insurers. Most are now taking steps to exclude mold and water damage

coverage from their policies. The specialty environmental insurance market is also limiting the scope of coverage for mold-related claims. From apartment complexes, to office buildings, to elementary schools, to courthouses, mold is part of a new reality of risk, and it is everywhere. This article provides a brief overview of mold and mold-related claims, as well as some of the insurance coverage issues surrounding this ongoing debate.⁷

What Is Mold? — Why Is It Dangerous?

All of us recognize some molds when we see them. That fuzzy, blue-black stuff we see growing on our bathroom tiles and ceiling — and maybe on our windowsills — is mold. But mold is much more complex than we would think. Mold is the generic term used for many different types of living organisms, which scientists categorize into large basic groups or kingdoms. Mold, which is in the Kingdom Fungi, was originally classified in the Kingdom Plantae, but by the late 1960s, over 100,000 different types of fungi were discovered, which led scientists to establish a separate kingdom.⁸ Some experts suggest that over 300,000 different species of mold exist in our natural environment.⁹ Thus, we are dealing with very old and very diverse organic substances, some that may be good for you and some that may not.

Good Mold and Bad Mold

Most of us ingest fungi or mold every day. Some may even taste great. For example, there are over 2,500 varieties of mushrooms in all shapes and sizes that many of us enjoy as part of our diets.¹⁰ The pharmaceutical industry utilizes fungi to make vitamins and other medicine, such as penicillin. The food and beverage industry uses different types of yeast in making beer, wine, and bread. The chemical industry also uses yeast in making solvents. While these “good” types of mold provide us with lifesaving medicines and tasty beer, a small number of “bad” types may be extremely toxic and even deadly.

More than 100 species of mold produce toxins called mycotoxins, which inhibit the growth of other organisms. The most common mycotoxin is called aflatoxin, “the most potent carcinogen yet discovered.”¹¹ This toxin can be found on a variety of substances, including such food products as corn, certain nuts, peanuts, and grain. Aflatoxin may be

spread to humans through the milk, meat, and eggs of animals fed contaminated grains. Airborne mold spores may be inhaled or ingested through the skin.¹² Nonetheless, because scientific evidence has not caught up with anecdotal evidence, one ongoing debate is whether mold is a real or only a perceived risk to human health.

Adverse Effects or the Power of Suggestion?

Mold affects people differently. Most of us will have little reaction, if any. However, certain individuals with weak or compromised immune systems, such as infants and the elderly, are at a higher risk for injury. The most common ailment is an allergic reaction. The problem with diagnosing an adverse reaction to mold is that the symptoms — aches and pains, fever, sore throat, dry cough, nasal and sinus congestion, and respiratory problems — often masquerade as a cold or the flu. Severe symptoms may include central nervous system problems, including mood changes, headaches, and memory loss. Since many of the symptoms mimic cold, flu, or other, more serious conditions, direct medical evidence of causation is often difficult to find. In fact, courts are split on the issue of even allowing medical testimony into evidence.¹³

In March 2000, the Centers for Disease Control and Prevention (CDC) reversed a previous finding that a possible link existed between tobacco smoke, mold, and acute pulmonary hemorrhage, or bleeding in the lungs. The CDC concluded that no inference could be drawn to support an association between mold and bleeding in the lungs, stating that there is a “diversity of opinion” on the issue of causation, and not enough is known about it to declare a definitive position.¹⁴ However, from 1994 through 1997, CDC recorded about 80 cases of unexplained lung bleeding in 24 states.¹⁵

Some say the increased media attention has contributed to the increase in reported mold-related claims. In fact, one insurance industry association has implied that the power of suggestion could cause psychosomatic reactions. This phenomenon is called somatization, a process similar to a medical student believing she or he has developed symptoms of a particular disease after reading about the disease in a textbook.¹⁶ Perhaps this is partially true, but many believe the adverse health risks are real, and the insurance industry as a whole is bracing for what

could be a long and contentious issue for years to come.

The Next Asbestos?

Comparing the circumstances between current mold-related claims and the ongoing fervor over asbestos, we see striking similarities.

- Both involve allegations of bodily injury, wrongful death, and property damage.
- Both also involve multiple plaintiffs, defendants, and third-party defendants in class-action lawsuits alleging various causes of action.
- Both are extremely expensive undertakings, with investigation and cleanup costs that can range into the hundreds of thousands of dollars, all in addition to the medical bills, pain and suffering, and monitoring costs.
- Both commonly give rise to claims for lost revenues, in the form of business interruption, extra expense, and diminution of property values.
- And both commonly lead to substantial expenses, including expert witness and legal fees.

No uniform standards for exposure and remediation exist.

Asbestos and mold-related claims have been made against a broad range of insurance policies, including homeowners, commercial general liability, commercial property, workers compensation, and professional errors and omissions.¹⁷ It's still too early to tell whether mold will be the “next asbestos,” but if the current trend is any indication, then mold-related claims could also reach a similar crisis stage for the insurance industry.

Mold-related claims fall into several categories, and insurers are being hit from all directions. For example, private homeowners, apartment owners, and tenants are claiming bodily injury and property damage against landlords and building managers, as

well as builders, contractors, architects, and engineers. Legal claims of tort and contract-related actions may include negligent maintenance, construction defect (breach of warranty), violation of civil and criminal codes, fraud, bad faith, implied warranty of habitability, nuisance, constructive eviction, and emotional distress.

Plaintiffs are also making claims under their own first-party property policies for investigation expenses, property damage, and cleanup costs, as well as lost rental value, business interruption, and loss in value (environmental-stigma damages). Defendants, in turn, are filing third-party claims for negligence and construction defects.

Since no uniform standards for exposure and remediation exist, the issue of "how clean is clean?" becomes a problem for environmental contractors as well. These firms face professional liability exposure for failure to test, remove, clean, and repair mold properly. This string of litigation causes each of the parties — both plaintiff and defendant — to seek insurance coverage for their alleged liability and damages.

Dreams or Nightmares

One reason the current mold hysteria has seemingly developed a life of its own is the tragic stories that some families, businesses, and state and local governments have endured in the face of this biblical menace. Let us take a look at a few representative examples of current mold-related claims.

Recent Headlines

Consider the following recent headlines:

1. "Family Longs for a Place to Call Home: Mold Problems Forced Them From House," *Richmond Times-Dispatch* (Richmond, Va., June 16, 2001): Local officials condemned the Stephenson family's rented house after finding dangerous levels of black, sticky, toxic mold called *Stachybotrys*. The family has complained of health problems, including headaches, pneumonia, and chronic respiratory problems.
2. "State, Local Governments Fighting Own Toxic Mold Woes," *Reno Gazette-Journal* (Reno, Nev., January 30, 2002): This article chronicles toxic mold problems faced by many Nevada officials over the last few years, including the state's largest public building in Reno, the University of Nevada, Las Vegas library, and numerous other schools around the state.
3. "McKinley, High School Funds Approved by Selectmen," *Fairfield Minuteman* (Fairfield, Conn., February 8, 2002): The Fairfield, Connecticut Board of Selectmen approved a \$20.65 million plan to demolish and reconstruct a mold-infested elementary school after studies found that it would cost more to clean up the school than it would to tear it down and build a new one.
4. "We've Got Killer Mold," *The New York Daily News* (New York, September 10, 2001): This was a front-page story about lawsuits in New York City, where over 150 families and 500 tenants have filed lawsuits against one building owner, claiming more than \$12 billion in damages. The allegations included physical injuries and wrongful death. After two months of trial, the case settled in early December 2001 for approximately \$1.8 million, with each plaintiff receiving about \$2,360, after expert witness fees and legal expenses.¹⁸
5. "Mold & Moisture Bankrupt Big Builder," *Journal of Light Construction* (Cincinnati, September 2001): Cincinnati, Ohio builder, Zaring Homes, which was building over 1,500 homes a year in the 1990s and had profits of over \$6 million, filed bankruptcy, claiming nearly \$50 million in liabilities in connection with mold-related claims as a result of faulty detailing of brick veneer on exterior walls.
6. "California Jury Awards Family \$2.7 Million in Mold Injury Case," *Mealey's Litigation Report* (November 9, 2001): The Mazza family received a record-setting verdict against building owners and managers for damages, including breathing problems, severe headaches, and gastrointestinal problems.

Stories like these have been repeated in the national and local media, with new but similar stories occurring every month.

The Most Famous Case

Perhaps the most famous case is the story of Melinda Ballard and her family from Dripping Springs, Texas. A cover story for the August 16, 2001, *New York Times Magazine*, "Haunted by Mold," tells the now-classic story of a family allegedly suffering from personal injuries and property damage associated with mold. This one is a bit different because it is also the "poster child" for insurance bad-faith litigation and has caused a firestorm in the world of Texas insurance.

In June 2001, the Ballards' homeowners insurer, Farmers Insurance Group, was ordered to pay the family \$32.1 million in damages as follows:

- \$6.2 million in property damage;
- \$5 million in emotional distress;
- \$12 million in bad-faith punitive damages; and
- \$8.9 million in legal fees.¹⁹

As a result of this claim and the proliferation of other claims, many insurers are looking at the possibility of exiting the personal lines property business in Texas. Shortly after this verdict, many of the largest property insurers in Texas — firms such as Farmers, Progressive, Safeco, State Farm, and Allstate — announced they would cease the sale of new homeowners policies.²⁰ Farmers took this action one step further when it announced, on November 9, 2001, that it would no longer renew the most commonly sold homeowners policy in the state, one which covers water-related damages. Over the last two years, Farmers has seen the number of mold-related claims skyrocket from 12 claims in 1999, to 499 claims in 2000, to over 8,000 claims in 2001. Farmers stated that it was "bleeding financially" and had to "stem the flow."²¹

The Texas insurance commissioner, Jose Montemayor, ordered Farmers to cease plans to withdraw from the state pending his decision on how to deal with the issue.²² In fact, Montemayor considered a proposal to limit coverage to \$5,000 for mold-related claims and allow policyholders the option to purchase more mold coverage.²³ While he ultimately decided against the dollar cap, on November 28, 2001, the commissioner issued an order that requires homeowners insurers to provide limited coverage for removal of mold that results from sudden and accidental water damage. However, if a policyholder

continually ignores indications of an obvious water problem, then the claim could be denied. Montemayor says that his decision is a "[c]ommon sense, middle-ground approach. It gives Texas homeowners basic protection plus the ability to purchase additional coverage if they so choose."²⁴

Private- and Public-Sector Woes

Mold-related claims are certainly not confined to private homes, schools, and public buildings. Hotels and commercial office buildings are also faced with this growing menace. For example, consider the case of the *California Job Journal* employees who filed a \$10 million lawsuit against Pacific Gulf Properties (PGP), a large real-estate investment trust (REIT). The lawsuit alleged unfair business practices by PGP in violating building codes, misleading with its advertising, and leasing commercial space that suffered from chronic roof and plumbing leaks resulting in the growth of toxic mold.²⁵ In a cover story, "Is Your Office Killing You?," *BusinessWeek Online* included one story of a Best Western hotel outside Cincinnati, Ohio, that spent over one year and \$2 million trying to get rid of toxic mold, filed for bankruptcy, and was sued by a former employee who became critically ill after being exposed to toxic mold during cleanup efforts.²⁶

The operative issue is whether the mold was the cause of loss or the result of another cause of loss.

Other reputable organizations also claim that mold and other aspects of indoor air quality (IAQ) affect U.S. workers. The U.S. Environmental Protection Agency (EPA) reports that an estimated \$60 billion in worker productivity is lost every year as a result of mold and other sick-building-syndrome-related illnesses.²⁷ In addition, World Health Organization (WHO) experts say that as many as one in three new or remodeled commercial buildings have unusually high rates of comfort complaints that may be related to IAQ.²⁸

Coverage for Mold-Related Claims

Mold and other IAQ problems face commercial and residential owners and tenants alike, and the

individuals and businesses affected by these claims and lawsuits are turning to the insurance industry to pay for their damages. So what are some common insurance coverage issues? Let us first look at three typical types of policies: homeowners, commercial property, and commercial general liability. We then examine what the specialty environmental insurance market is doing regarding mold in particular and IAQ in general.

Homeowners Policies

Insurance Services Office, Inc. (ISO) publishes the personal lines policies used by many insurers. The most commonly used forms for homeowners are the Homeowners 3 — Special Form (HO-3), which provides coverage for “all risks,” and the Homeowners 2 — Broad Form (HO-2), which is a “named perils” policy.

Mold Exclusions

The 1991 special form excludes coverage for loss caused by “smog, rust or any other corrosion, mold, wet or dry rot.” The operative issue surrounding this clause is whether the mold was the cause of loss or the result of another cause of loss not excluded. At least one court has ruled on this issue and found that the mold exclusion did not apply if the “efficient proximate cause” of the damages was an otherwise covered peril, such as a leaking roof.²⁹ Insurance industry experts agree that the intent of this exclusion is to preclude coverage for damages that are the result of mold that arises naturally as the result of humid conditions. And the 1991 HO-2 broad form does not contain a specific mold exclusion. Thus, it appears that both forms would provide coverage for mold-related damages if the proximate cause of loss is not otherwise excluded or is a covered peril. ISO clarified the intent of this distinction in its state Filing Memorandum to make sure a special-form policy would not provide lesser coverage than a broad-form policy.³⁰

In its newest HO-3 special form, filed in 2000, ISO separates mold, fungus, and wet rot into a separate exclusion. The exception to this exclusion specifically states, “we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings” if the loss was the result of an accidental discharge or overflow of water from a “plumbing, heating, air conditioning or automatic fire protective sprinkler

system,” a “household appliance,” a “storm drain,” or “water, steam or sewer pipes.” Once again, ISO’s Filing Memorandum stated that its intent was to clarify the fact that the coverage under the special-form policy was not less than under the broad-form policy. “This would seem to imply that the intent of the exclusion is that mold coverage is excluded even if it otherwise results from another covered peril (e.g., windstorm).”³¹ Given that the efficient-proximate-cause argument has prevailed in some courts, it is questionable whether the apparent intent of this new exclusion will be upheld.

Other Exclusions

Other exclusions exist in the homeowners forms that may preclude coverage for mold-related losses. For example, a common argument is that mold growth results from poor maintenance of the insured property. Thus, insurers rely on the exclusion for loss arising from wear, tear, and deterioration. In addition, many policies contain exclusions for faulty-design and construction-defect losses. The special-form policy also contains a pollution exclusion that precludes coverage for the “discharge, dispersal, seepage, migration, release or escape of pollutants” unless the discharge is caused by certain named perils. If the loss results from a covered peril, then the issue becomes whether mold is a “pollutant” and whether the mold has been “discharged” from the place from which it originated.

Pollutant is defined as “any solid, liquid, gaseous or thermal irritant or contaminant” It is hard to imagine how toxic mold could not be deemed a pollutant. However, the argument is as follows: Mold is an organic, naturally occurring substance, and the traditional meaning of a pollutant is an industrial waste or other chemical. In addition, some say that if the insurers wanted to exclude mold as a pollutant, then they should have included the word “mold” within the definition of “pollutant.”

The other argument is that no discharge has occurred. At least one court looking at this issue has ruled that mold trapped within the walls of a prefabricated home was not “released” into the environment and, therefore, the pollution exclusion did not apply.³²

Some insurers are now including more “absolute” exclusions that preclude coverage for mold regardless of whether it is caused by a covered peril. This type of

"concurrent causation" language attempts to clarify that "even if the mold is precipitated by an otherwise covered peril, the intent is to exclude the direct damage (if any) by the mold."³³

Other Pitfalls

Based upon the rash of homeowners claims, the insurance industry is taking positive steps to limit its "exposure" to mold-related claims. Nevertheless, personal lines coverage always presents insurers with a different set of pitfalls based upon public perception and good-faith claims handling. The Farmers Insurance Group case in Texas serves as a good example of how one of these claims can turn from bad to worse — in court, as well as in the public eye.

Commercial Property Policies

The insuring agreement in most commercial property insurance forms — including ISO forms — states that the insurer will pay for "direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." One threshold issue is whether mold is simply a "condition" of the property or whether it constitutes direct physical loss or damage. Since mold may be found everywhere, the mere presence of mold cannot be argued to fall within the meaning of "direct physical loss or damage." Some courts have held that the presence of asbestos in an otherwise undamaged building was an economic loss and not a physical loss, even though the asbestos was being removed.³⁴ But if excessive mold is discovered, it may be the result of water damage, and we are back to our proximate-cause argument.

Some commercial property policies — again, including ISO forms — also contain a limited coverage grant for "Pollutant Clean Up and Removal." This coverage is often limited to extracting "pollutants" from land or water if the discharge was caused by a "Covered Cause of Loss" and reported to the insurer within 180 days. This coverage grant would appear inapplicable to mold-related claims since any cleanup would most likely not be for "land or water."

Relevant Exclusions

Commercial property policies generally contain several exclusions that may be applicable to mold-related claims. ISO's Causes of Loss — Special Form, the "all risks" form, includes exclusionary language precluding loss or damage "caused by or resulting

from any ... [r]ust, corrosion, fungus, decay, deterioration, hidden or latent defect or any property that causes it to damage or destroy itself ... [and] [d]ampness or dryness of atmosphere." This exclusion appears to be more comprehensive than the HO forms in that it excludes coverage caused by or resulting from mold. However, the efficient-proximate-cause argument does not seem to be addressed by this apparent clarification. Even ISO has stated, "However, under all Causes of Loss forms, coverage exists for fungus which develops as a consequence of a covered peril."³⁵

This form adds another exclusion that precludes coverage if damage is the result of "[c]ontinuous or repeated seepage or leakage of water that occurs over a period of 14 days or more." Thus, even if the efficient proximate cause was a covered peril, such as a burst water pipe, and that condition occurred over a period of 14 days or more, no coverage would be afforded.³⁶

ISO's Causes of Loss — Broad Form, like its HO counterpart, does not include a specific mold or fungus exclusion. Thus, the same coverage arguments would seem to be applicable for both the CP and HO coverage forms. It is important to note, however, that some insurers use their own proprietary forms and endorsements. Therefore, it is critical to review your own specific policies to determine their applicability to any given situation.

Ordinance or Law Provisions

Commercial property policies, as well as homeowners forms, typically have an "Ordinance or Law" exclusion. This exclusion states that the policy will not respond to any loss arising out of the enforcement of any ordinance or law "(1) [r]egulating the construction, use or repair of any property; or (2) [r]equiring the tearing down of any property including the cost of removing its debris."³⁷ If city or state regulations are enacted requiring building owners to test for and remove mold in excess of certain concentration levels, then this provision may form the basis to preclude coverage.

Commercial General Liability Policies

Policyholders often look to their Commercial General Liability Form (CGL) policies to provide coverage for third-party bodily injury claims arising from mold exposure. Most CGL policies will have some form of "absolute" pollution exclusion. Once

again, care should be taken to review the exact version of the exclusion and its potential applicability to any given set of facts and circumstances. Some CGL pollution exclusions have exceptions for hostile fire and products-completed operations. The same types of arguments may be made in the CGL context as were made in context of the property pollution exclusions already discussed:

- What was the reasonable expectation of the policyholder?
- Is mold a “pollutant”?
- Has there been a “discharge” of the mold?

The litigation over mold-related claims is still in its infancy.

What Was the Reasonable Expectation?

Some courts have ruled differently in the context of other related toxic-tort cases. On November 14, 2001, the Ohio Supreme Court ruled that carbon monoxide was not a “pollutant” in the context of a CGL absolute pollution exclusion. In that case, a woman died after inhaling carbon monoxide emitted from a faulty heating unit. The building owner and manager filed a claim with the CGL insurer, and the insurer denied the claim based upon the absolute pollution exclusion. The court ruled that the policyholders “reasonably believed that [the insurer] would insure them against premises hazards and did not anticipate that coverage would be denied under the pollution exclusion.”³⁸

This public-policy argument is called the “reasonable expectations doctrine,” which says that an insured should be provided coverage for situations in which it reasonably expects the insurance policy should respond.³⁹

Is Mold a Pollutant?

Other courts have found that asbestos and fecal coliform bacteria were not “pollutants” within the meaning of the pollution exclusion.⁴⁰ Thus, the issue of classifying mold as a pollutant may face an uphill battle in the future.

Has There Been a Discharge?

If a court finds that mold is a pollutant, the issue

then becomes whether mold was “discharged” into the “environment.” As noted earlier, at least one court has said “no” in the context of a particular case where mold was trapped inside the walls of a prefabricated home.⁴¹ Some courts have made a distinction between indoor air and outdoor air for purposes of applying the pollution exclusion. For example, the Minnesota Supreme Court, in the context of an asbestos case, found that the pollution exclusion did not apply because the term “atmosphere” in the exclusionary language applied to claims relating to damage to the “natural environment” and not within a building.⁴²

In other toxic-tort situations, courts have also been reluctant to apply the exclusion. In a lead-based-paint case, a Massachusetts court said the terms “discharge, dispersal, release or escape” are “terms of art” used in the insurance industry and apply to typical cases of “industrial pollution” caused by “improper disposal of hazardous waste.”⁴³ Thus, the court refused to apply the pollution exclusion. However, the Wisconsin Supreme Court reached a different conclusion in a similar lead-paint case, stating that ingestion of paint chips, flakes, and dust was a “discharge” under the pollution exclusion.⁴⁴

Not all courts have taken such a narrow view on the applicability of the pollution exclusion. In 1997, a New York trial court ruled that mold was indeed a “contaminant” that was “released” within the meaning of the pollution exclusion. The court’s reading of the pollution exclusion “looked more to the plain meaning of the words and less to traditional environmental concepts of pollution” as other courts have done.⁴⁵

Different Courts, Different Views

Thus, depending upon the jurisdiction, it appears that courts will look at these issues differently. Cases could be decided based upon one or more of several factors, ranging from public-policy arguments to the plain meaning of the contracts. How this all plays out in the end is anyone’s guess. However, one thing seems clear: The litigation over mold-related claims from both a liability and an insurance-coverage standpoint is still in its infancy.

The Specialty Market

As more and more property-casualty insurers attempt to exclude mold-related coverage, the spe-

cialty environmental insurance market is being approached to fill in this coverage "gap." The scope of available coverage differs dramatically depending upon the insurer. Most environmental insurance is written on nonadmitted, excess and surplus (E&S) lines "paper," which means that the insurers do not have to go through the rigors of filing forms and rates with the various state insurance departments. As a result, each insurer's forms are anywhere from slightly to drastically different, and the need to analyze each form carefully becomes critically important.

What Policies Typically Cover

Under typical pollution legal liability (PLL) policies, coverage is provided for bodily injury, property damage, and cleanup costs that arise from a "pollution condition" if the claim is first made and reported during the policy period. PLL policies typically pro-

vide coverage for both first-party and third-party liabilities. The majority of policies in the marketplace today do not contain any specific reference to mold. Nevertheless, each of the commonly written PLL policies contains similar language regarding the definition of "pollution conditions" or "pollutants." Similar to most other policies, the PLL definitions also require a "discharge, dispersal, release, or escape" of the "pollutant" into the "atmosphere."

Some of the insurers add a condition precedent to the definition of pollution conditions that states coverage is granted for pollution conditions "provided such conditions are not naturally present in the environment in the amounts or concentrations discovered." Thus, one might be tempted to argue that since mold is a naturally occurring substance, no coverage is provided under the existing PLL policy. However, the last clause, "in the amounts or concen-

Figure 1

IAQ Questionnaire

Building Construction

1. When were the building and any subsequent improvements (additions) constructed?
2. Is the building air conditioned?
3. When is the air conditioning system shut down, and what is the protocol for start-up?
4. Is mold visible inside the building?
5. Are the bathrooms and dryers vented to the exterior?
6. Is there a pool in the building?
7. What is the age of the roof?
8. Is the roof flat?

Management

1. Does the property have a mold response plan?
If so, please attach / describe.
2. Does the building maintenance plan specifically refer to the handling of mold?
If so, please provide a copy or describe.
3. Has the building been sampled for mold?
If so, please submit lab results.

Previous Incidents

1. Have there been any incidents of water damage and / or leaks?
2. Have there been reports of illness due to air quality?

trations discovered," throws in an interesting twist. While mold is no doubt naturally present in the environment, such toxic molds as *Stachybotrys* may not be — especially in elevated or dangerous levels within a building.

Other insurers take this "naturally occurring substances" condition one step further and add specific endorsements precluding coverage for "mold, rot, or other fungi" without providing a specific definition for mold. Yet others add specific exclusions for "microbial matter," generally defined as "fungi or bacterial matter that reproduces through the release of spores or the splitting of cells, including, but not limited to, mold, mildew, and viruses, whether or not such microbial matter is living." This appears to be an all-encompassing exclusion not only for mold, but also for other infectious organisms, living or not. Still other insurers add an exclusion for any loss whether caused directly or indirectly by any fungus or spores or any substance, vapor, or gas produced by or arising out of any fungus or spores.

The specialty insurance market may still provide the best risk-transfer solutions.

Specific Mold and IAQ Coverage

Most environmental markets will consider providing specific mold and IAQ coverage. Each insurer offering this coverage requires the prospective policyholder to fill out an IAQ questionnaire that asks several basic questions about the proposed "insured property," such as those listed in Figure 1.

If a proposed "insured property" has experienced mold-related problems in the past or has experienced significant water damage, the insurer is likely to exclude mold coverage for that location. If the policyholder can show that any water damage and moisture sources have been abated, then coverage may be reinstated at a later date.

Typical PLL policies, in the past, would provide up to \$100 million in limits for any one risk and might have been issued for a policy term up to 10 years in duration. At the present time, however, the market is unclear as to how lengthy a policy term may be available, and most insurers are offering less

than full capacity for any one risk. Upon a satisfactory review of the IAQ questionnaire and application, coverage may be purchased for an additional premium and will include either higher self-insured retentions, sublimits (maximum of \$2 million), or co-pay arrangements — depending on the type of policy and existing exposures. Several insurers require copies of mold operation and maintenance (O&M) manuals. The markets are also unclear on how they will handle other typical coverage components of a PLL policy, such as business interruption as a result of mold contamination. Nevertheless, the specialty insurance market may still provide the best risk-transfer solutions to businesses faced with mold and other IAQ issues.

Legislative Response to Mold Issues

Several states, including California, Texas, and New York, introduced legislation in 2001 to address the growing concern over toxic mold.⁴⁶

California

In late 2001, California became the first state in the United States to pass toxic-mold legislation. Senate Bill 732, The Toxic Mold Protection Act — signed into law on October 5, 2001, and effective on January 1, 2002 — requires the California Department of Health Services (DHS) to convene a task force of experts to establish testing and cleanup standards, as well as to set exposure limits for mold in both residential and commercial buildings.⁴⁷ The new law also requires property owners and managers to provide buyers and renters with a written disclosure of the "presence and location of mold-containing construction materials in the building, HVAC [heating, ventilation, and air conditioning] system, or surrounding environments, and the potential health risks that may result from exposure to mold."⁴⁸

Assembly Bill 284 — also signed into law on October 5, 2001, and effective on January 1, 2002 — requires the California Research Bureau to perform a study of, and publish findings on, fungal contamination in indoor environments, as well as to "establish a toxic mold surveillance and monitoring program, and to examine the feasibility of establishing a toxic mold surveillance network with local agencies."⁴⁹

The problem with these new laws is that the legislature failed to appropriate the funds necessary

to convene the task force and study the issues. But public-health experts indicate that setting permissible mold-exposure limits may be nearly impossible to do until more research is completed. The DHS says it needs about \$400,000 this year and \$700,000 annually for the next two to three years to meet the demands of the law. The law requires the DHS to comply with its provisions only if funds are made available to accomplish the law's directives.⁵⁰ Thus, it still remains to be seen whether the California legislature and Governor Gray Davis will agree to provide the DHS with the necessary funds.

Texas

In February 2001, Texas introduced two bills concerning IAQ issues. One would establish voluntary IAQ guidelines for all publicly owned or leased buildings. The other would require school districts to perform IAQ tests in all schools, "including ambient temperature, relative humidity, the adequacy of ventilation and the presence of mold and other constituents."⁵¹ As of February 2002, both bills were left pending in committee.⁵²

New York

In October 2001, the New York State Senate, led by the chairman of the Environmental Conservation Committee, Senator Carl L. Marcellino, introduced Senate Bill S05799-A, The Toxic Mold Protection Act. If passed, this bill would require the Department of Health to establish a task force to perform a cost-benefit analysis and to "consider the feasibility of adopting permissible exposure limits to mold in indoor environments."⁵³ In addition, the task force would "consider the adoption" of mold identification and remediation standards, as well as "practical standards to assess the health threat posed by the presence of mold in an indoor environment and determine whether the presence of mold constitutes mold infestation."⁵⁴ At this stage, however, the bill would not require commercial, industrial, or residential landlords or public entities to conduct air or surface tests to determine whether the presence of mold exceeded any permissible standards set by the bill.⁵⁵ As of February 2002, the bill was discharged from Senator Marcellino's committee and is now before the Senate Health Committee. Senator Marcellino is confident that the legislation will pass into law in 2002.

A Word on Indoor Air Quality

While the focus of this article is on mold, IAQ in general deserves a special note. Experts suggest that most of us in the United States spend up to 90 percent of our time indoors.⁵⁶ As such, not just mold, but all IAQ issues — such as sick-building syndrome and multiple-chemical sensitivity — should be considered. Gases given off from drapes, furniture, carpets, paint, and adhesives can cause allergic reactions. For example, several years ago, the EPA in Washington, D.C., had to remove new carpets suspected of emitting dangerous fumes that created potential health risks.⁵⁷ In addition, poor building maintenance — including issues with HVAC — can also cause sick-building syndrome. As such, care should be taken when dealing with IAQ issues of any sort.

Conclusion

Times have changed. What seemed unimaginable less than a year ago no longer seems so strange. We are all faced with new challenges in our everyday lives. The debate over toxic mold and IAQ is gathering momentum, and it appears we have witnessed only the tip of the proverbial iceberg — with no end in sight. Whether mold will become the "next asbestos" still remains to be seen, but early indications suggest some relevant similarities.

An array of different businesses and their insurance programs may be affected by mold-related claims. From landlords and contractors to architects, building managers, and employers, many companies face potential liability arising from mold. If your company faces potential liability for mold or other IAQ-related claims, then prudent business judgment dictates that you thoroughly evaluate this issue. Proper due diligence will include an evaluation of potential liability (perhaps through testing and remediation), as well as an understanding of the details of available insurance coverage. Companies may protect not only their tenants and employees but also their partners and shareholders from this biblical menace with a proactive risk management strategy that includes a combination of mold and IAQ plans, as well as appropriate risk-transfer solutions.

Mold and IAQ-related issues are part of the new reality of risk facing us as we move through 2002 and beyond. More and more legislatures and state insur-

ance commissioners will inevitably enter this debate, and as standard property-casualty insurers look to limit their exposure to claims arising from this “leptorous disease,” specialty environmental insurers may likely fill the coverage gap.

Authors’ Note

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- 4 See note 3 above: 14:37-42.
- 5 See note 3 above: 14:43-46.
- 6 See note 2 above: 30.
- 7 This paper is not intended to be a comprehensive analysis of all mold-related and insurance issues and is presented for informational purposes only. Please consult a qualified environmental lawyer and insurance professional for more detailed information and analysis.
- 8 See note 1 above: 2.
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- 10 See <http://www.mushroomcouncil.com>.
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- 39 See *Atlantic Mutual Insurance Co. v. McFadden*, 413 Mass. 90, 595 N.E.2d 762 (1992).
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