INSURANCE COVERAGE FOR MOLD CLAIMS UNDER THIRD PARTY LIABILITY POLICIES

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Much has been written in recent years about the increased volume of litigation relating to mold in building structures. Celebrities ranging from Ed McMahon to Michael Jordan, as well as vast numbers of less famous building owners, have pursued claims for both bodily injury and property damage arising from mold. They typically assert such claims against both the first-party property insurers who cover the structures and the various construction and real estate professionals responsible for the design, construction, management, and sale of those buildings and it components.

As those construction and real estate professionals are drawn into mold litigation, they naturally look to their liability insurance policies to provide coverage for such suits. There is relatively little case law, however, directly addressing insurance coverage for mold claims under third-party liability policies. As of the writing of this article, we have identified only six reported decisions directly addressing issues of third-party liability coverage for mold claims.[2] Despite the lack of case law directly addressing liability

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[2] *See Liberty Mut. Fire Ins. Co. v. Ravannack*, 2004 WL 722440 (U.S. Dist. E.D. La. March 31, 2004) & 2002 WL 441334 (U.S. Dist. E.D. La. March 19, 2002) (denying insurers' motions for summary judgment as to coverage under successive CGL policies

coverage for mold claims, there is abundant precedent developed in the context of other torts – especially "long-tail" claims involving construction defects and building components, such as asbestos products and lead paint – from which the basic rules of coverage for mold claims can be fashioned and predicted.

This article identifies the major issues that may face commercial policyholders who seek coverage under liability policies for mold claims.

A. Challenges to Recovering Insurance under Recent Policies

1. Mold Exclusions

Starting in approximately 2002, many liability insurers inserted exclusions in their general liability policies for the express purpose of precluding insurance for mold claims. For example, the Insurance Services Organization ("ISO") developed its form "Fungi or

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issued to plastering subcontractor for suit brought by homeowners arising out of mold damage allegedly caused by EIFS system); *Auto-Owners Ins. Co. v. Newmech Cos.*, 678 N.W.2d 477 (Minn. App. 2004) (affirming summary judgment for condominium developer, finding coverage under CGL policy for claims by unit owners relating to mold caused by faulty mechanical system); *Allstate Ins. Co. v. Hicks*, 2003 WL 22096500 (Tex. App. Sept 10, 2003) (denying coverage to seller of residence under general liability policy for claims by buyer that insured failed to disclose building defects that caused mold problems) (not released for publication); *Droegkamp v. Langdon*, 266 Wis. 2d 1062, 668 N.W.2d 563, 2003 WL 21749514 (Wis. App. 2003) (affirming summary judgment that insurer had duty to defend real estate broker under errors and omission policy for suit by buyer that broker failed to disclose construction defects in home, which resulted in mold) (reported in table format; unpublished opinion); *State Farm Fire & Cas. Co. v. MLT Constr. Co.*, 849 So. 2d 762 (La. App. 2003) (coverage existed under liability policy issued to roofing contractor for mold-related bodily injury claims asserted by office worker employed in building where policyholder installed roof); *Leverence v. U.S.F.&G.*, 158 Wis. 2d 64, 462 N.W.2d 218 (Wis. App. 1990) (coverage under CGL policy for manufacturer of prefabricated homes for mold claims asserted by homebuyers), *overruled on other grounds*, *Landis v. Physicians Ins. Co.* , 245 Wis.2d 1, 628 N.W.2d 893 (2001) (relating to statutes of repose and limitations). *See also Stillman v. Travelers Ins. Co.*, 88 F.3d 911 (11th Cir. 1996) (in unreported opinion, district court held that pollution exclusion did not bar coverage for mold under liability policy, but court of appeals sidestepped coverage issue on jurisdictional grounds).

Bacterial Exclusion," No. CU 21 27 04 02, effective May 1, 2002, which bars coverage in CGL policies for:

> a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
>
> b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing or, or in any way responding to, or assessing the affects of, "fungi" or bacteria, by any insured or by any other person or entity.

The endorsement defines "fungi" as "any type or form of fungus, including mold or mildew or any mycotoxin, spores, scents or by products produced or released by fungi."[3]

In the alternate to completely barring coverage for such claims, ISO also drafted its Endorsement CG 24 25 04 02, called "Limited Fungi or Bacteria Coverage." That endorsement provides for separate aggregate limits of liability for mold claims, presumably at an increased premium above the standard liability coverage. In addition, coverage for mold may be available under separately purchased Pollution Legal Liability Policies, again for an additional premium.

On their face, the breadth of the language used in the mold exclusions will almost certainly exclude or limit coverage (depending on the endorsement used) for mold claims under third-party liability policies. In this respect, the development of policy language directly barring coverage for mold claims parallels exclusions for asbestos and lead paint

[3] Although apparently drafted to bar coverage for mold claims, the language also has the effect of precluding coverage for contamination by anthrax or similar pathogens.

claims. Courts typically enforce broadly worded exclusions in liability policies, similar to the 2002 ISO endorsements, when applied to classes of claims that are squarely encompassed within the language of the exclusions.[4]

In short, there are relatively scant prospects for recovering for mold claims under liability policies that contain broadly worded exclusions similar to those quoted above, at least in situations where the claims arise in the context of alleged construction and building defects. There may be "offbeat" mold-related claims where the courts will refuse to allow the exclusion to bar coverage on the theory that the exclusion was not intended to reach the situation. For example, recent claims against certain washing machine manufacturers that defects in the appliances promote the growth of mold within the appliances, which then damages clothing, might be deemed literally within the scope of the exclusion – depending upon the interpretation of the language that the condition develop "on or within a … structure." Courts nonetheless may conclude that the exclusion does not bar coverage for such claims.[5]

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[4] By contrast, in the area of first-party insurance -- especially personal lines policies -- some courts have carved out exceptions to the enforcement of mold exclusions under the doctrines of "ensuing loss" and "efficient proximate cause." *See, e.g., Shelter Mut. Ins. Co. v. Maples*, 309 F.3d 1068 (8th Cir. 2003) (Ark. law) (reversing grant of summary judgment for insurer as to homeowners policy with mold exclusion); *Kelly v. Farmers Ins. Co.*, 281 F. Supp. 2d 1290 (W.D. Okla. 2003) (denying summary judgment for insurer despite presence of mold exclusion in homeowners policy); *Flores v. Allstate Tex. Lloyd's Co.*, 278 F. Supp. 2d 810 (S. D. Tex. 2003) (same); *Liristis v. American Fam. Mut. Ins. Co.*, 204 Ariz. 140, 61 P.3d 22 (App. 2002) (reversing summary judgment for insurer on homeowners policy with mold exclusion). *But see Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004) (affirming summary judgment for insurer where policy had mold exclusion); *Dahlke v. Homeowners Ins. Co.*, 2003 WL 23018291 (Mich. App. 2003) (unpublished) (same).

[5] *Cf. Bowers v. Farmers Ins. Exch.*, 99 Wash. App. 41, 991 P.2d 734 (2000) (where mold developed because tenants engaged in illegal marijuana cultivation in basement, resulting

Policyholders should *not*, however, assume that merely because their policy was issued during or after 2002 that it contains an exclusion for mold claims. The ISO form, for example, is an "endorsement" – i.e., a separate rider that is supplemental to the main policy form. There may be situations in which the policy was issued without the exclusion. As is the case in virtually every situation involving questions of insurance coverage, the starting point of any analysis is to *read the policy*.

2. Claims-Made Policies

Liability insurance policies are issued on either a "claims-made" or "occurrence" basis. An "occurrence" policy responds based upon the date when the injury or damage occurred regardless of the date when the claim was asserted or suit filed. A "claims-made" policy responds to suits based upon the date when the claim was first asserted.

"Claims-made" liability policies are inherently less expansive in coverage than occurrence-based policies, especially with respect to emerging torts. Whereas there may be an interval of several years – or even decades – between when an occurrence-based policy was issued and when the claim is asserted, the interval between issuance of the claims-based policy and when the claim is asserted is generally a matter of months. This means that the policy is likely to have been drafted with emerging torts in mind, and may contain language directly excluding or limiting coverage for such torts. Especially in the area of professional malpractice and E&O coverage, virtually all liability coverage has been written on a claims-made basis in recent years

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in build-up of moisture and lack of ventilation, coverage was available to landlord under first-party property damage policy, which included coverage for "vandalism and malicious mischief" even though policy excluded coverage for mold claims).

For policyholders who have been insured under claims-made policies for the past several years, they may face particular challenges in obtaining coverage for any mold claims that have been asserted against them since 2002, when most insurers began inserting mold exclusions in their policies, unless they purchased specialty policies for such claims. But even such policyholders, if they were covered under occurrence-based policies in the more distant past, may be able to obtain some coverage, depending upon the nature of the claims asserted against them, as discussed in the sections that follow.

B. Occurrence-Based Policies that Lack Mold Exclusions

Over the course of the last decades, a large body of insurance law has emerged as commercial policyholders have sought insurance coverage for an ever-increasing variety of long-tail tort claims from an increasingly creative plaintiff's bar. By "long-tail" claims, we are referring to latent or progressive injuries or damage, where an interval of many years may separate the initial creation or exposure to conditions and the onset of manifest injury and claim. Among the "long-tail claims" that have spawned copious insurance coverage law are those relating to asbestos, environmental liabilities, lead paint, breast implants, and various pharmaceutical products. The coverage principles that the courts have enunciated in those contexts can be applied directly to the issues of insurance coverage for mold claims.

In the following sections, we outline the main issues that policyholders confront in seeking coverage for mold claims under occurrence-based liability policies.

1. The Insuring Agreement

The heart of an insurance policy is the insuring agreement or "grant," which contains the basic language in which the insurer commits to provide coverage. The standard form CGL policy contains an insuring agreement in which the insurer agrees to:

> pay on behalf of the insured all sums *which the insured shall become legally obligated to pay as damages* because of *bodily injury* or *property damage* to which this insurance applies, *caused by an occurrence*, and the company shall have the right and duty to *defend any suit* against the insured seeking *damages* on account of such bodily injury or property damage *even if the allegations of such suit are groundless, false or fraudulent* ….

The italics highlight the main sources of coverage disputes for policyholders in long-tail disputes. In particular, coverage disputes arising out of the insuring agreement often center on whether:

- the loss constitutes "bodily injury" or "property damage" within the meaning of the policy;
- the loss constitutes an "occurrence" under the policy; and
- the insured has become "legally obligated" to pay sums "as damages."

a. The Requirement of "Bodily Injury" or "Property Damage."

In mold cases, as with many tort claims, there is often considerable skepticism whether the underlying plaintiff has actually sustained any "bodily injury" or "property damage." For example, while there may be evidence that mold is present in a structure, it may be disputed whether such mold has actually resulted in any adverse consequences either to the health of those exposed or to the building structure itself. The insurers may try to bootstrap the denials of injury that the policyholder asserts in the underlying claim

into a basis for denying coverage, arguing that no "bodily injury" or "property damage" has taken place.

At the duty to defend stage of the coverage dispute, such a denial of coverage by the insurer is improper because the insurer's defense obligations turn on what the underlying plaintiff alleges, no matter if those allegations are "groundless, false or fraudulent." The duty to defend is determined by comparing the allegations of the complaint to the scope of coverage under the policy. The insurer must defend "[i]f the underlying complaint[] alleges facts within or *potentially* within policy coverage."[6] Thus, regardless of the true facts as to whether the plaintiff has sustained any health problems or the building has been physically impaired by the presence of mold within the structure, if the underlying complaint contains such allegations, then "bodily injury" or "property damage" exists for the purpose of determining defense obligations.[7]

Further, when the policyholder is seeking to be indemnified for a settlement or an adverse judgment, the insurer does not have the right to *de novo* determination of whether the underlying plaintiff did in fact sustain "bodily injury" or "property damage." Where a verdict of liability has been returned against the policyholder in the underlying case, coverage is determined by comparing the definition of "bodily injury" or "property damage" within the policy to the type of damage or injury for which the policyholder was

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[6] *U.S.F.&G. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 578 N.E.2d 926, 930 (1991) (emphasis in original) (insurers had duty to defend claims for alleged property damage arising from presence of asbestos-containing products installed in building).

[7] This assumes, of course, that the insuring agreement includes language imposing a defense obligation on the insurer. Umbrella and excess policies, as well as certain manuscript or specialty liability policies, may omit language requiring that the insurer provide or pay for a defense.

found liable in the underlying suit. In Illinois, this rule was announced in the case of *U.S. Gypsum v. Admiral Insurance Co.*, where the court held that the insurers could not retry in the coverage case the question of whether the presence of asbestos-containing products in buildings constituted damage to those buildings.[8]

So too, where the underlying claim is settled, the insurer is not entitled to a *de novo* review of the merits of whether the underlying plaintiffs did in fact sustain the claimed "bodily injury" or "property damage." Rather it suffices that the settlement was made in the face of a "reasonable anticipation" that the insured might be held liable in the underlying action, and was for a reasonable amount.[9]

On the other hand, there may be situations where the nature of injury claimed does not fit within the policy's definitions of "bodily injury" or "property damage." If no actual physical injury is claimed to have happened in the past, but the complaint merely alleges apprehension as to future injury, the policy definitions of "bodily injury" or "property damage" may not have been met. Thus, courts often refuse to allow a policyholder to invoke the "bodily injury" coverage for claims of purely emotional distress or medical monitoring where no physical injury is claimed.[10] Similarly, courts

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[8] 268 Ill. App. 3d 598, 643 N.E.2d 1226, 1242-43 (1st Dist. 1994).

[9] *Id.*, 643 N.E.2d at 1244.

[10] On claims of emotional distress, *see, e.g., Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 n.2 (Tex. 1997) (claims that are purely for emotional distress, without any manifested physical symptoms, do not constitute "bodily injury"); *Moore v. Continental Cas. Co.*, 252 Conn. 405, 746 A.2d 1252 (2000) (same). A minority of jurisdictions, however, will permit coverage for purely emotional distress injuries under the "bodily injury" coverage even where there are no manifest physical symptoms. *See, e.g., Lavanant v. General Accid. & Indem. Co.*, 595 N.E.2d 819 (N.Y. 1992).

On medical monitoring, *see, e.g., HPF, L.L.C. v. General Star Indem. Co.*, 338 Ill.App.3d 912, 788 N.E.2d 753 (1st Dist.) (no coverage for suit seeking medical

have declined "property damage" coverage for claims that a product has been supplied – such as a building component – that is prone to failure, if it has not yet caused physical damage to property.[11]

b. The Requirement of an "Occurrence"

Liability insurance policies typically define an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." This definition implicates two issues: First, this language bars coverage as to certain kinds of intentional actions that cannot be deemed "accidental." Second, the "occurrence" definition is the jumping off point for the "trigger of coverage" – i.e., the question of exactly what event must take place during the policy period to implicate the coverage of that policy, especially where the damage is of a latent or progressive type.

(i) "Expected" or "Intended" Injury

The language requiring an "occurrence" bars coverage where the conduct or event at issue does not constitute an "accident" that "is neither expected nor intended from the standpoint of the insured." Although the conduct must be an "accident," it need not arise as the result of a cataclysmic event. Rather, the "occurrence" definition includes situations where the event at issue is "a continuous or repeated exposure to conditions."[12]

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monitoring for plaintiff who used dietary supplement but did not claim he had to-date sustained injury), *app. denied*, 205 Ill. 2d 581, 803 N.E.2d 481 (2003).

[11] *E.g.*, *Travelers Ins. Co. v Eljer Mfg., Inc.*, 197 Ill. 2d 278, 757 N.E.2d 481 (2001) (where plumbing systems had five percent chance of failing, property damage did not occur at time that systems were installed in structure but only if and when they did fail).

[12] This language first appeared in standard form policies in 1964. Before that, the policies insured "accidents," not "occurrences." But even then, the courts had interpreted

With construction claims especially, insurers often contend that there is no "occurrence" because the installation of a particular component or construction of the building was intentional, not accidental. For coverage purposes, however, the focus is on whether the injury – e.g., adverse health effects or property damage – was intentional.[13] Where the focus of the complaint is that a product or structure failed to function as intended – e.g., an HVAC system that failed to properly heat or cool or roofing system that leaked – the courts have been reluctant to deem such events an "occurrence."[14] Mold claims, however, derive from an unwanted side-effect – the growth of mold – and not merely the non-functioning of a building component; in the context of asbestos claims, the courts have held that this distinction is important and negates the argument that there has been no "occurrence."[15]

The language barring coverage for "expected" or "intended" injury does mean that a policyholder may be deprived of coverage if it intentionally conducted itself in a

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the term "accident" to include situations involving latent, progressive exposures. *See Canadian Radium & Uranium Corp. v. Indemnity Ins. Co.*, 411 Ill. 325, 333, 104 N.E.2d 250, 253 (1952) (injury from occupational exposure to radium over time an "accident").

[13] *Wilkin*, 144 Ill. 2d at 77-78, 578 N.E.2d at 932 (where plaintiffs alleged that presence of asbestos-containing products led to "contamination" of buildings, there was an "occurrence" because there had been no intention to contaminate the buildings although the product installation was intentional).

[14] *Diamond State Ins. Co. v. Chester-Jensen Co.*, 243 Ill. App.3d 471, 611 N.E.2d 1083 (1st Dist. 1993) (no coverage for claims for faulty HVAC system); *Hartford Fire Ins. Co. v. Flex Membrane Int'l., Inc.*, 2001 WL 86923 (U.S. Dist. N.D. Ill. 2001) (no coverage for leaks arising from faulty roofing system).

[15] *Cf. Wilkin*, 144 Ill. 2d at 83, 578 N.E.2d at 935 (finding coverage for asbestos-related claims because, "[t]he underlying complaints do not allege that this product failed to fireproof or insulate the buildings …. [but] that, in serving its intended purpose, the insulation product released toxic asbestos fibers, causing property damage to the buildings and the contents therein.") (addressing business risk exclusions).

manner that was "practically certain" to cause injury or damage.[16] This requires a much higher level of "expectation" that injury will result than the negligence standard that is applied in tort cases; otherwise, coverage for virtually every "garden-variety" negligence claim would be negated by the "expected or intended" language.[17] Nonetheless, policyholders involved in mold claims should expect that their insurers may try to deny coverage on the basis of alleged deliberate misconduct, such as deliberate use of shoddy construction methods or products known to trap moisture and promote mold growth. Such allegations may mirror claims for intentional torts in the underlying lawsuit.

Importantly, at the duty to defend stage, an insurer must defend the *entire* lawsuit as long as at least one claim is within or potentially within the policy coverage. Thus, where a suit joins claims of negligence and intentionally inflicted injury, the insurer has a duty to defend the entire suit.[18] And, because the insurer inherently has a conflict of interest in such a situation – i.e., if liability is found in the underlying suit on the

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[16] *Bay State Ins. Co. v. Wilson*, 96 Ill. 2d 487, 493-94, 451 N.E.2d 880, 882 (1983).

[17] *See PSI Energy Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 728 (Ind. App. 2004) ("negligent and reckless conduct 'is not enough to meet the 'practically certain' standard required for an insurance policy to exclude expected injuries'"); *Travelers Indem. Co. v. Miller Bldg. Corp.*, No. 03-1510 slip op. at 6-9 (U.S. Ct. App. 4th Cir. May 20, 2004) (N.C. law) ("foreseeability in the context of an insurance dispute does not carry the same meaning as it does in the context of a negligence claim" as this would negate coverage for virtually all tort claims for which policyholder were found liable in negligence).

[18] *Wilkin*, 144 Ill. 2d at 78, 578 N.E.2d at 932 (where asbestos suits alternately pled negligence and intentional tort theories, insurers had duty to defend entire suits); *Droegkamp v. Langdon*, 2003 WL 21749514 (Wis. App. 2003) (insurer had duty to defend entire complaint that alternately pled that real estate broker intentionally or negligently failed to disclose construction defects).

intentional tort, then coverage could be negated – the insurer is required in such cases to fund independent defense counsel, who is selected and controlled by the policyholder.[19]

(ii) The "Trigger" of Coverage and Allocation

The term "trigger" of coverage, which is *not* a term that appears anywhere within most insurance policies, is "a term of convenience used to describe that which, under the terms of the insurance policy, must happen in the policy period in order for the potential of coverage to exist."[20] For example, is coverage for a mold claim afforded under the policy that was in place when a structure was originally built, when the building occupants first noticed evidence of moisture, when they first detected evidence of mold, or at some other date? The courts and cases have identified four possible "triggers":

- the "exposure" or "installation" trigger
- the "discovery" or "manifestation" trigger
- the continuous trigger
- the "injury-in-fact" trigger

The Illinois courts generally apply continuous triggers or "injury-in-fact" triggers to latent or progressive injury cases involving third-party liability policies. The rationale is the policy language in "occurrence"-based policies to the effect that the policy will respond to claims arising from injury or damage that takes place during the policy period. Illinois courts reject efforts to limit coverage to the policy in place when the injury is

[19] *Gibraltar Cas. Co. v. Sargent & Lundy*, 214 Ill. App. 3d 768, 785, 574 N.E.2d 664, 674 (1st Dist. 1991). *See also Amec Constr. Mgmt. v. Regent Ins. Co.*, 2004 WL 816720 (N.D. Ill. March 12, 2004) (Ill. law) (generally addressing rules when insurer has conflict in defending underlying suit and must cede control of defense to the policyholder).

[20] *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 880 n.2 (Cal. 1995).

discovered or becomes manifest.[21] They also reject efforts to trigger policies based on when a product was first installed or exposure to conditions first occurred, unless there is evidence that injury or damage began to occur within a short time thereafter.[22]

The continuous trigger is a variant on "injury-in-fact," and is used when there is sufficient evidence to suggest that injury was occurring either continuously or with frequent repetition such that each policy in place from first exposure to discovery of injury must respond, especially where it would be virtually impossible to pinpoint any more precisely when injury occurred:

> Conceptually, the injury in fact trigger and the continuous trigger are on the same continuum and are complimentary, rather than mutually exclusive. Accordingly, courts have stated that "where the injury-in-fact occurs continuously over a period covered by different insurers or policies and actual apportionment of the injury is difficult or impossible to determine, the continuous injury trigger may be employed to equitably apportion liability among insurers."[23]

Under either trigger, multiple policies may be responsible for the same claim.

Although the right to ask multiple insurers to cover the same claim may initially seem appealing to policyholders, the issue then arises whether the coverage for the claim

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[21] *U.S. Gypsum Co.*, 268 Ill. App. 3d at 641, 643 N.E.2d at 1253 ("if property damage within the meaning of the policy occurs during the policy period in question, coverage is triggered. There is no language, however, which conditions, limits, or connects the existence of property damage to when that damage was discovered."); *Zurich Ins. Co. v. Raymark Indus. Inc.*, 118 Ill. 2d 23, 514 N.E.2d 150, 160 (1987) (when "lung cells are physically and chemically damaged" such "microscopic injuries, *although they cannot be detected*, constitute 'bodily injury,'" triggering coverage) (emphasis added).

In cases of *first-party* coverage, many courts hold that the discovery trigger applies. *See, e.g., Sapiro v. Encompass Ins.*, 2004 WL 938375 (U.S. Dist. N.D. Cal. April 30, 2004) (manifestation trigger applied to coverage for mold claims under first party policy).

[22] *See, e.g., Eljer*, 197 Ill. 2d 278, 757 N.E.2d 481 (2001) (coverage not triggered until plumbing systems began to leak, not when they were installed).

[23] *U.S. Gypsum*, 168 Ill. App. 3d at 644, 643 N.E.2d at 1256.

must be allocated among each triggered policy. Where a single claim triggers successive policies, the policyholder may prefer to assign responsibility to only one policy. Especially where there are high self-insured retentions (or retrospective premium programs), apportioning the claim over all triggered policies may result in the policyholder bearing a much larger share than if it were apportioned into a single triggered policy, after satisfying just that policy's SIR.

The rules that have evolved as to allocation of claims are complex and not wholly reconcilable. Suffice it to say that insurers often insist that the claim be spread over multiple, triggered policies. Many courts, but not all, have accepted this position.[24]

c. The "As Damages" and "Suit" Requirements

The standard insuring agreement provides indemnity, *not* for "claims," but for "sums which the insured shall become legally obligated to pay as damages." This language has been the source of a variety of coverage issues.

First, where an insured settles a claim before any lawsuit is filed, insurers have denied coverage on the ground that the settlement is not a sum that the "insured is legally obligated to pay as damages." This argument has arisen most frequently in connection with environmental claims, where policyholders often find themselves engaged in governmental regulatory proceedings well in advance of any formal lawsuit. Some

[24] Compare, e.g., *Benoy Motors Sales, Inc. v. Universal Underwriters Ins. Co.*, 287 Ill. App. 3d 942, 679 N.E.2d 414 (1st Dist. 1997) (insured not required to allocate coverage into triggered periods for which there were coverage gaps); *Allstate Ins. Co. v. Dana Corp.*, 737 N.E.2d 1177, 1189-92 (Ind. App. 2000) (same); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 283 Ill. App. 3d 630, 670 N.E.2d 740 (2d Dist. 1996) (policyholder required to allocate environmental claims on pro rata basis among all triggered policies); *Northern States Power Co. v. Fidelity & Cas. Co.*, 523 N.W.2d 657 (Minn. 1994) (same).

courts have adopted the rule that the settlement meets the "as damages" language of the insuring agreement if the policyholder was under a legal compunction to incur those sums – e.g., to remediate environmentally contaminated property – even if no suit has been filed.[25] Other courts, however, have held that a suit is a prerequisite to a settlement constituting a sum that the insured has become "legally obligated to pay as damages."[26] In this regard, notably, unlike the clause defining the duty to defend, the indemnity grant does not use the term "suit." Thus, courts that require a "suit" for indemnity do so by implication, derived from the "as damages" language.

Second, even where suit has been filed, insurers also sometimes decline to reimburse policyholders for sums they have incurred in remediation or similar compliance with injunctive remedies. This position is based on the argument that the "as damages" language does not contemplate coverage for equitable remedies not available "at law." Although this argument held considerable sway with many courts for several years, it has largely been disavowed. Today most courts hold that, at least where remediation expense or other equitable remedies are the result of formal court proceedings, they qualify as insured sums under the "as damages" language.[27]

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[25] *See, e.g., Central Ill. Light Co. v. Home Ins. Co.*, 342 Ill. App. 3d 940, 960-61 795 N.E.2d 412, 429-30 (3d Dist.), *app. pending*, 206 Ill. 2d 615, 806 N.E.2d 1065 (2003).

[26] *See, e.g., Northern Ill. Gas Co. v. Home Ins. Co.*, 334 Ill. App. 3d 38, 777 N.E.2d 417 (1st Dist. 2002).

[27] *See, e.g.,Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 607 N.E.2d 1204, 1216 (1992) ("as damages" does not have a technical meaning and includes equitable remedies); *Johnson Controls, Inc. v. Employers Ins.*, 264 Wis. 2d 60, 85-106, 665 N.W.2d 257, 270-81 (same), *overruling, City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 517 N.W.2d 463, 478-79 (1994) (*contra*); *Hartford Accid. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 297-98 (Ind. App. 1998).

Relatedly, insurers have relied on the term "suit" in the defense clause to decline paying legal fees incurred before the onset of formal litigation. Especially in environmental claims – where lengthy regulatory proceedings pre-date the filing of a lawsuit -- this rule can impose considerable litigation expense on the insured. Where litigation expense is incurred in administrative proceedings of an adversarial and coercive nature, some courts have held that this is sufficient to invoke the insurer's duty to defend "suits."[28] Other courts have rejected this argument.[29] Because most mold claims are not subject to pre-suit administrative proceedings, policyholders facing such claims should anticipate that they may be held responsible for all pre-suit legal fees and defense.

2. Exclusions

The typical insurance policy contains a number of standard-form exclusions within the policy jacket. In addition, exclusions may take the form of an endorsement – i.e., an amendatory document – appended to the jacket. Some endorsements, such as the mold exclusions discussed above, may be standard form. Other endorsements may be "manuscript" – for example, if the policyholder's application or loss history reveals that it has been subject to particular types of claims, the insurer may endorse the policy with a specially drafted exclusion to bar coverage for such claims. Therefore, some policyholders may have manuscript mold exclusions in policies that pre-date the 2002 implementation of the standard exclusion.

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[28] *E.g., Johnson Controls*, 264 Wis. 2d at 108-115, 665 N.W.2d at 281-85; *Travelers Indem. Co. v. Summit Corp.*, 715 N.E.2d 926, 933 (Ind. App. 1999).

[29] *E.g., Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 655 N.E.2d 842 (1995).

In the subsections that follow, we will address the standard form exclusions that most often present coverage issues for mold claims:

- the pollution exclusion
- the business risk exclusions, including "own work" or "own product"

a. The Pollution Exclusion

For policies that pre-date the adoption of mold exclusions, the pollution exclusion is often the first defense raised by insurers to deny coverage. Of the seven cases involving coverage for mold claims under liability policies (see footnote 2), four involve the application of the pollution exclusion. In each case, the court held that the exclusion was *not* a bar to coverage for mold claims, at least at the duty-to-defend stage.[30]

Standard pollution exclusions first appeared in liability policies in the early 1970s in the form of what has become known as the "qualified pollution exclusion." In the mid-1980s, insurers revised the language to eliminate what they perceived as judicially created loopholes, adopting what has been called the "absolute" or "total" pollution exclusion. The ISO standard absolute exclusion used during the 1990s and early 2000s, in relevant part, bars coverage for:

> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

[30] *Droegkamp v. Langdon*, 2003 WL 21749514 (Wis. App. 2003) (coverage for real estate broker); *State Farm Fire & Cas. Co. v. MLT Constr. Co.*, 849 So. 2d 762 (La. App. 2003) (coverage for roofer); *Stillman v. Travelers Ins. Co.*, 88 F.3d 911 (11th Cir. 1996) (dismissing, on jurisdictional grounds, appeal from district court opinion that pollution exclusion did not bar coverage for mold claims asserted against landlord) (Fla. law); *Leverence v. U.S.F.&G.*, 158 Wis. 2d 64, 462 N.W.2d 218 (Wis. App. 1990) (coverage for manufacturer of prefab homes), *overruled on other grounds, Landis v. Physicians Ins. Co.* , 245 Wis.2d 1, 628 N.W.2d 893 (2001).

> (a) At or from any premises, site or location which is or was at any time owned by or occupied by, or rented or loaned to, any insured ….
>
> (2) Any loss, cost or expense arising out of any
>
> (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of "pollutants";
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants."
>
> However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.[31]

This exclusion defines "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[32]

The first thing to note is that the exclusion only applies when the insured is acting in certain capacities or engaging in certain types of conduct. Under this standard ISO exclusion, a mold lawsuit against a contractor, product supplier, or architect who never had any ownership stake in the premises generally would not be barred by the exclusion, although subpart 1(a) might apply to mold claims asserted against landlords or developers. As to subpart 2(b), insurers may try to use that as a bar to mold claims

[31] ISO Form CG 00 01 07 98, Section I, Exclusion f. Subsections 1(b)-(e) of the exclusion, which we do not quote, relate generally to the handling and storage of waste, and to other practices that are unlikely to be invoked as a coverage bar for mold claims.
[32] *Id.*, Section V, Definition 15.

asserted by governmental units – for example, to remediate mold in schools. Given, however, the language of the last paragraph of the exclusion, this position almost certainly would be improper if in fact the structure has sustained mold or other damage from water intrusion.

But even where the status or activities of the policyholder come within the scope of the pollution exclusion, the application of the exclusion to mold claims is doubtful because (a) mold may not fit within the definition of "pollutant," or (b) the manner in which the damage arises does not to constitute a "discharge, dispersal, seepage, migration, release or escape of pollutants." For example, in *Leverence*, the Wisconsin Court of Appeals held the exclusion inapplicable because the source of the damage was moisture that had been released and trapped; "[n]o contaminants were released, but rather formed over time as a result of environmental conditions."[33] *MLT* rejected that a "pollutant" was involved: "[T]he complained-of pollutant was rainwater and, arguably, the mold and mildew that allegedly resulted from the influx of that rainwater."[34]

The case law on mold claims can be expected to follow a host of other "indoor pollution" cases addressing whether the absolute pollution exclusion applies.[35] In

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[33] 158 Wis. 2d at 97, 462 N.W.2d at 232. *Leverence* involved the application of a qualified pollution exclusion.

[34] 849 So. 2d at 770.

[35] For examples where the pollution exclusion was held to bar coverage, see, e.g.,: *Heringer v. Amer. Family Mut. Ins.*, 2004 WL 941339 (Mo. App. May 14, 2004) (lead paint); *Peace v. Northwestern Nat'l Ins. Co.*, 228 Wis. 2d 106, 596 N.W.2d 429 (Wis. 1999) (lead paint); *National Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821 (4th Cir. 1998) (occupational exposure to welding fumes); *Terramatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997) (building tenant incurred bodily injury and property damage from ammonia vapors that traveled through HVAC system from neighboring printing company).

applying this case law, however, it is important to take care to compare the actual language used in the case with the policy under which coverage is sought. The language discussed above is the standard form ISO exclusion, but many insurers have developed their own variant pollution exclusions. For example, some exclusions may include "biological agents" in their definition of a "pollutant." Others may be more expansive in the types of activities by the policyholder that are encompassed by the exclusion.

b. The Business Risk Exclusions

Standard liability policies have a series of interrelated exclusions barring coverage for the policyholder's "own product" and "own work," "loss of use," design defects, "repair and replacement," "impaired property," and product recall or withdrawals. These exclusions are often loosely grouped under the rubric of "business risk exclusions," although sometimes that term is used to refer to a particularly worded exclusion barring coverage for certain type of "design defect" claims.

The precise wording of these exclusions has varied over time and between insurers. A complete discussion of them is impossible without a detailed examination of the language used in each – although oftentimes the courts are careless and will adopt a

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For examples where the exclusion did not bar coverage, see, e.g.: *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789 (Ala. 2003) (although lead paint deemed a "pollutant," claim did not arise from "discharge, dispersal, seepage …"); *Richardson v. Nationwide Ins. Co.*, 826 A.2d 310 (D.C. App. 2003) (claim against building manager for carbon monoxide emitted by malfunctioning furnace), *vacated*, 844 A.2d 344 (D.C. App. 2004) (case settled pending rehearing); *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178 (6th Cir. 1999) (Mich. law) (teacher's bodily injury claim arising from fumes from painting and drywall sealants applied in overhead classroom); *Amer. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997) (carbon monoxide); *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335 (11th Cir. 1996) (Ga. law) (death caused by vapors emitted from carpet sealant used on boat).

ruling without realizing that the language at issue in the case cited as precedent varies from the policy at issue.

Generally speaking, the exclusions are intended to complement the requirement that coverage is available under a liability policy only where some sort of third-party property damage or bodily injury has occurred. Where the only injury is to the insured's own product or work – e.g.., a building component that the insured supplied or structure that the insured built – then the exclusions bar coverage. Where, however, the insured's product or work caused damage to some other property, coverage generally is available, at least where the third-party damage did not arise from a failure of a product to function in the manner intended. For example, where an insulation product damages other property by emitting asbestos fibers then coverage is available, but if pipes freeze and burst as a consequence of the insulation not working, coverage may not be available.[36]

In *Leverence v. U.S.F.&G.*, the court held that a business risk exclusion barred coverage for any mold-related claims for repair or remediation of the prefabricated homes that the policyholder supplied but did not bar coverage for bodily injury claims asserted by the occupants nor for damage to any personal property.[37] The exclusion took the form of an "own products" exclusion, which barred coverage for damage to:

> the Named Insured's products arising out of such products or any part of such products ... to property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of the materials, parts or equipment furnished in connection therewith.

[36] *Wilkin*, 144 Ill. 2d at 83, 578 N.E.2d at 935.
[37] 158 Wis. 2d at 78-82, 462 N.W.2d at 224-26.

The court specifically rejected the argument that the costs of repairing and remediating the mold damage to the house could be recovered as "consequential damages" to address the bodily injury claims. On the other hand, in *U.S. Gypsum*, the Illinois Appellate Court held that the costs of removing and replacing the insured's asbestos-containing product was compensable, despite the presence of business risk exclusions, because "such costs were incurred in remedying the damage done to the building and its contents by the release of fibers from Gypsum's products."[38]

Typically, component suppliers and subcontractors may have more success in recovering for property damage claims under liability policies in the face of the business risk exclusions because their "work" or "product" is only a part of the entire structure.[39] Depending upon the facts and policy language, however, general contractors also may be able to avoid the application of the business risk exclusion. In a case just decided by the Minnesota Supreme Court, a general contractor was sued because of damage to a swimming pool that it constructed, caused by faulty coping stones.[40] Notwithstanding that the swimming pool constituted the policyholder's "own product," the court held that the business risk exclusion did not apply because of an exception in the exclusion for damage to the insured's product caused by a "subcontractor." The Court held that the supplier of the coping stones constituted a "subcontractor" for purposes of this exclusion.

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[38] 168 Ill. App. 3d at 634, 643 N.E.2d at 1249.
[39] *Cf. Travelers Indem. Co. v. Miller Bldg. Corp.*, No. 03-1510 slip op. at 3-6 (U.S. Ct. App. 4th Cir. May 20, 2004) (where defective construction of exterior walls, windows, and doors caused water damage to carpeting, there was duty to defend because of allegations of damage to property other than the building constructed by contractor).
[40] *Wanzek Constr., Inc. v. Employers Ins.*, 2004 WL 906378 (Minn. April 29, 2004).

Conclusion

This article necessarily is an overview of the insurance coverage issues that may be implicated in mold-related claims. As such, there is a variety of other coverage issues, not addressed here, that may also arise – for example:

- issues relating to coverage under "additional insured" endorsements in the context of subcontractor and vendor relationships;[41]
- securing coverage when insurance policies are lost;[42]
- interpretation of per "occurrence" deductibles and policy limits applied to multiple claims arising from similar causes,[43]
- professional services exclusions under general liability policies;[44]
- claims of bad faith denials of coverage;[45]
- timeliness of notice[46] and
- choice of applicable state law.[47]

A detailed exploration of these issues is beyond the scope of this article. As with the other coverage issues addressed above, however, it is important for parties in mold-related claims to realize that they are not writing on a blank slate. Although coverage

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[41] *See, e.g., U.S. Fire Ins. Co. v. Aetna Life & Cas.*, 291 Ill. App. 3d 991, 684 N.E.2d 956 (1st Dist. 1997).
[42] *See, e.g., PSI Energy Inc. v. Home Ins. Co.*, 801 N.E.2d 705 (Ind. App. 2004).
[43] *See, e.g., U.S. Gypsum*, 168 Ill. App. 3d at 647-51, 643 N.E.2d at 1257-60.
[44] *See, e.g., Prisco Serena Sturm Architects, Ltd. v. Liberty Mut. Ins. Co.*, 126 F.3d 886 (7th Cir. 1997) (Ill. law).
[45] *See, e.g., Cramer v. Ins. Exchange Agency*, 174 Ill. 2d 313, 675 NE2d 897 (1996).
[46] *See, e.g., Progressive Ins. Co. v. Universal Underwriters Co.*, 807 N.E.2d 577 (Ill. App. 1st Dist. 2004).
[47] *See, e.g., Lapham-Hickey Steel Corp. v. Protective Mut. Ins. Co.*, 166 Ill. 2d 520, 655 N.E.2d 842, 845 (1995).

under liability policies for mold claims is relatively uncharted territory, the issues that arise will be interpreted against a backdrop of decades of case law interpreting similar issues in other coverage contexts.