PURSUING INSURANCE COVERAGE FOR MOLD AND "SICK BUILDING" CLAIMS UNDER TRADITIONAL LIABILITY POLICIES:

Recent Developments in Applying the Pollution Exclusion[*]

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> "…[A] Sacramento jury awarded a family $2.7 million in November after finding their landlord was negligent for not preventing mold in their apartment. ***The landlord's insurance company is refusing to pay the claim, saying the pollution exclusion in the landlord's policy applies to mold*** …." – BestWire Services, January 15, 2002 (emphasis added).

While the concerns over coverage for terrorism-related events dominated the last quarter news in insurance circles during 2001, developments throughout the year made it plain to policyholders and insurers alike that coverage for mold-related claims is also a critically evolving situation. As homeowners and commercial property tenants aggressively pursue claims against builders, building owners, and other third-parties for alleged property damage and health issues arising from mold in the buildings that they occupy, the targets of those claims look to their liability insurers to cover those claims. The rise in mold-related claims has led insurers in recent months to revise their policies to more directly address mold claims, and endeavor to bar coverage for such claims through "mold exclusions."

With the emergence of policies that explicitly bar coverage for mold-related claims, policyholders may find it beneficial to pursue coverage under policies issued earlier in time, in which mold-specific exclusions did not appear. Because mold and similar "sick building" claims typically are latent problems that arise progressively, policyholders may be able to "trigger" coverage under policies from earlier years.[1] This would render it possible for the policyholder to avoid the language inserted in more recent policies that may be drafted with a direct eye toward barring coverage for mold-related claims.

For policyholders with occurrence-based, rather than claims-made, coverage, insurance may be available under each and every policy period during which the latent developing mold problem was occurring, including policies that expired long before the policyholder learned of the problem. Cases arising in the area of coverage for asbestos, environmental, and latent construction defect claims – not to mention other types of indoor pollution claims, such as lead paint – are generally supportive of the proposition that policies in place before damage or injury became known provide coverage for latently developing injuries under the theory of a "continuous trigger of coverage."[2] That same

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[1] "The word 'trigger' is not found in the CGL policies themselves …. Instead, 'trigger of coverage' is a term of convenience used to describe that which, under the terms of an insurance policy, must happen in the policy period in order for the potential of coverage to arise." *Montrose Chem. Corp. v. Admiral Ins. Co*., 913 P.2d 878, 880 n.2 (Cal. 1995).

[2] *See, e.g., YWCA v. Allstate Ins. Co.*, 275 F.3d 1145 (D.C. Cir. 2002) (Can. law) (deterioration of precast concrete panels caused by corrosion); *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672 (6th Cir. 2000) (Ohio law) (bodily injury from welding fumes); *Montrose Chem.*, 913 P.2d 878 (1995) (environmental claims); *Armstrong World Indus., Inc. v. Aetna Cas. & Surety Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (1st

body of law may support a continuous trigger for mold and other "sick building" claims.

Once the policyholder establishes that the mold or other sick building injury "occurred" during the period of coverage, then the policyholder must anticipate that the insurer may invoke a litany of coverage defenses and exclusions – including the "owned and occupied" and "care, custody, or control" exclusion when the policyholder is the building landlord or manager, and the "own product or work" and other "business risk" exclusions where the policyholder is the builder or subcontractor responsible for construction.

As discussed in this article, the insurer is likely to rely upon the "pollution exclusion" as another alleged bar to coverage for mold claims. To-date there are no reported decisions squarely deciding whether the pollution exclusion does bar coverage for mold claims.[3] In other closely analogous situations involving "indoor pollution" and toxic exposure cases within buildings, however, many courts have hesitated to apply such exclusions to bar coverage.

Background of the Pollution Exclusion

Standard pollution exclusions first began appearing in liability policies in the early 1970s in the form of what has been termed the "qualified pollution exclusion." In the mid-1980s, the insurance industry adopted the so-called "absolute pollution" exclusion, which was intended to eliminate what the insurance industry viewed as judicially-created loopholes to the original pollution exclusion. Both variants have been the source of extensive litigation.

Because it has been more than 15 years since policies with "qualified pollution" exclusions have been issued, most policyholders will probably not be seeking coverage under such policies for recently occurring mold claims. To understand the jurisprudence under the more recent "absolute" exclusion, however, a general understanding of the case law under the qualified exclusion is helpful.

In general terms, there were three arguments available to policyholders when faced by an insurer's denial of coverage under the earlier qualified exclusion: (a) that the substance at issue did not fit within the laundry list of "pollutants" to which the exclusion applied;[4] (b) that the discharge at issue was not "upon the land, the atmosphere, or any water course or body of water," as required by the exclusion, which tended to preserve coverage for claims arising from asbestos, lead paint, and other exposures that occur within buildings;[5] and (c) most commonly, that the claim fell within the final "exception" clause of the exclusion for "sudden and accidental" discharges or releases.[6]

Dist. 1996) (asbestos bodily injury); *U.S. Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 643 N.E.2d 1226 (1st Dist. 1994) (asbestos property damage); *Scottsdale Ins. Co. v. Amer. Empire Surplus Lines Ins. Co.*, 811 F. Supp. 210 (D. Md. 1993) (lead paint bodily injury).

[3] In *Stillman v. Travelers Insurance Company*, 88 F.3d 911, 912 (11th Cir. 1996), the district court had ruled that the pollution exclusion was "ineffective" to bar coverage for claims against a building owner by building occupants for injuries arising from exposure to "high levels of fungi, molds, and yeast." The Court of Appeals dismissed the appeal on jurisdictional grounds, without reaching the merits of the district court's interpretation of the pollution exclusion.

[4] *See, e.g., Westchester Fire Ins. Co. v. City of Pittsburgh, Kansas*, 768 F. Supp. 1463 (D. Kan. 1991) (claims arising when bypasser ingested malathion during spraying of pesticide not barred by exclusion because malathion not "pollutant"), *aff'd on other grounds*, 987 F.2d 1516 (10th Cir. 1993) (release was "sudden and accidental" so exception to exclusion applied).

[5] *See, e.g., Lumbermens Mut. Cas. Co. v. S.W. Indus., Inc.*, 39 F.3d 1324, (6th Cir. 1994) (Ohio law) (bodily injury arising from workplace exposure to toxic cement and solvents within building); *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 609 N.E.2d 506 (1993) (asbestos bodily injury); *U.S.F.&G. v. Wilkin Insulation*, 144 Ill. 2d 64, 578 N.E.2d 926, 933 (1991) (asbestos property damage).

[6] *See e.g., New Castle County v. Hartford Accid. & Indem. Co.*, 673 F. Supp. 1359, 1364 (D. Del. 1987) *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 353, 380

The 1986 revision of the pollution exclusion deleted the "sudden and accidental" exception to the exclusion and deleted the reference to releases "upon the land, the atmosphere, or any watercourse or body of water." Further, the "absolute" exclusion introduced a much lengthier definition of the types of "pollutants" and "waste" to which the exclusion applies. "Pollutants" under the standard ISO "absolute" exclusion used from 1986 to the present are defined to include:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.[7]

The language of the standard "absolute pollution" exclusion is generally recognized as barring coverage for traditional pollution claims, especially where the claims involve remediation of contaminated sites.[8] That language, however, has given rise to a debate as to whether it bars coverage for "indoor pollution" claims, including mold.

Application of the Exclusion to Indoor Pollution Cases

Many courts have held that the absolute exclusion does not bar coverage for toxic exposures within buildings.[9] Other courts,

S.E.2d 686, 688 (1989); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 157 Ill. 2d 90, 607 N.E.2d 1204 (1992); *American States Ins. Co. v. Kiger,* 662 N.E.2d 945 (Ind. 1996); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 324 Ore. 184, 923 P.2d 1200 (1996); *Greenville County v. Ins. Reserve Fund*, 443 S.E.2d 552 (S.C. 1994); *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wash. 2d 50, 882 P.2d 703 (1994); *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570, 573 (1990).

[7] ISO CG 00 01 96. While this definition of "pollutants" leaves considerable room for arguing that biological agents, like mold and fungi, are outside its scope, at least one insurer has used a broader definition of "pollutant" for many years that is harder to argue omits mold and fungi:

> any noise, solid, semi-solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, mists, acids, alkalis, chemicals, *biological* and etiological agents or materials, electromagnetic or ionizing radiation or energy, genetically engineered materials, teratogenic, carcinogenic and mutagenic materials. (Emphasis added.)

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[8] *See, e.g., Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992) (although noting that terms used in absolute exclusion's definition of a "pollutant," such as "contaminant" or "irritant" might "lead to absurd results" when viewed "in isolation," such as barring coverage for claims arising from spill of Drano or allergic reaction to chlorine in swimming pool, the exclusion did bar coverage for claims arising from PCB spill). *But see American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind. 1996) (because of ambiguity in phrasing of the absolute exclusion, it did not bar coverage for claims by state agency arising from leaking underground storage tank); *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891 (Ind. 1996) (absolute exclusion did not bar coverage for federal RCRA suit).

[9] *See, e.g., Nautilus Ins. Co. v. Jabar*, 188 F.3d 27 (1st Cir. 1999) (Maine law) (exclusion did not bar coverage for bodily injury claim arising from exposure at work to fumes from roofing material); *Boise Cascade Corp. v. Reliance Nat'l Indem. Co.*, 99 F. Supp. 2d 87, 101-02 (D. Me. 2000) (exclusion did not bar coverage for bodily injury claims arising from occupational exposure to chlorine gas) (following *Nautilus*); *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178 (6th Cir. 1999) (Mich. law) (exclusion did not bar coverage when teacher was affected by fumes from painting and drywall sealants applied in overhead classroom); *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335 (11th Cir. 1996) (Ga. law) (exclusion did not bar coverage for death of consumer caused by vapors from carpet sealant that he was using on his boat); *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 564 N.W.2d 728 (1997) (exclusion did not bar claims by office workers for sick building syndrome arising from excessive exposure to exhaled carbon dioxide because of inadequate building ventilation); *Roofers' Jt. Training Apprentice & Educ. Comm. v. Gen. Accid. Ins. Co.*, 713 N.Y.S.2d 615 (App. Div. 4th Dept. 2000) (exclusion did not bar coverage for injuries arising from exposure to fumes from roofing membrane applied during training class); *West Amer. Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692 (1991) (exclusion did not bar coverage when processed chicken parts were damaged by styrene vapors

however, have interpreted the absolute exclusion broadly in the insurers' favor to bar coverage for all types of indoor pollution claims.[10] This of course has the effect of rendering coverage for mold claims problematic in the latter jurisdictions.

A spate of cases in recent months involving toxic exposures to chemical products has tended to favor insurers on the scope of the absolute pollution exclusion.[11] Notably, however, these recent insurer victories did *not* arise in the area of lead paint and carbon monoxide claims.

When it comes to coverage for lead paint and carbon monoxide claims, courts have been especially sympathetic to policyholders' arguments that the absolute pollution exclusion does not bar coverage. Illustrative of such interpretations are recent decisions from influential state supreme courts in Ohio and Pennsylvania.

Lititz Mutual Insurance Co. v. Steely[12] is just the most recent of a series of decisions holding that the absolute exclusion does not bar coverage for lead paint claims.[13] Similarly *Andersen v. Highland House Co.*[14] is just the latest in a string of cases upholding coverage for claims involving carbon monoxide poisoning despite the exclusion.[15]

Among the arguments relied upon by courts in refusing to allow the absolute pollution exclusion to bar coverage for indoor pollution claims, such as those involving lead paint and carbon monoxide, are:

- The substances typically involved in indoor pollution claims do not fit clearly within the list of specific "pollutants" identified in the exclusion, nor are they of

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emanating from coating used by floor resurfacer at plant), *overruled in part on other grounds*, *Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 303, 524 S.E.2d 558, 565 (N.C. 2000) (relating to trigger).

[10] *See, e.g., National Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821 (4th Cir. 1998) (D.C. law) (exclusion barred coverage for bodily injury claims arising from occupational exposure to welding fumes); *Terramatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997) (exclusion barred coverage for tenant=s bodily injury and property damage claims arising when ammonia vapors from neighboring printer leaked through HVAC system); *Economy Preferred Ins. Co. v. Grandadam*, 275 Ill. App. 3d 866, 656 N.E.2d 787 (3d Dist. 1995) (exclusion in homeowners policy barred liability coverage for spill of mercury in neighbor's home).

[11] *See MacKinnon v. Truck Ins. Exch.*, 95 Cal. App. 4th 235, 115 Cal. Rptr. 2d 369 (4th Dist. 2002) (coverage for claims arising from residential insecticide spraying barred by absolute exclusion); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001) (exclusion barred coverage for claims of damage to food stored in warehouse caused by releases of xylene fumes arising from use of sealants during construction of building addition); *Selm v. Amer. States Ins. Co.*, 2001 Ohio App. LEXIS 4207 (1st App. Dist. Sept. 21, 2001) (exclusion barred coverage for releases of asbestos fibers arising from removal and replacement of residential kitchen floor).

[12] 785 A.2d 975 (Pa. 2001).

[13] *See Danbury Ins. Co. v. Novella*, 45 Conn. Supp. 551, 727 A.2d 279 (Conn. Super. 1998); *Ins. Co. v. Stringfield*, 292 Ill. App. 3d 471, 685 N.E.2d 980 (1st Dist. 1997); *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617 (1995); *Lefrak Organization, Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949 (S.D.N.Y. 1996); *Generali-U.S. Branch v. Caribe Realty Corp.*, 160 Misc. 2d 1056, 612 N.Y.S.2d 296 (Sup. Ct. N.Y. Cty. 1994). *But see Peace v. Northwestern Nat'l Ins. Co.*, 228 Wis. 2d 106, 596 N.W.2d 429 (Wis. 1999) (no coverage for lead claims because of absolute pollution exclusion); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. App. 1999) (same). Paragraphs 49 and 50 of *Peace* collect additional cases addressing whether the absolute exclusion bars coverage for lead paint claims.

[14] 93 Ohio St. 3d 547, 757 N.E.2d 329 (2001), *rev'ing,* 2000 Ohio App. LEXIS 2020 (8th Dist. May 11, 2000).

[15] *See, e.g., American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997) (claims by employees against building owners arising from inhalation of carbon monoxide fumes from faulty furnace not barred by exclusion); *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115, 686 N.E.2d 997 (1997) (carbon monoxide claims not barred by exclusion); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34 (2d Cir. 1995) (N.Y. law) (same).

the same type. Some courts have noted that the pollutants identified specifically within the definition are substances used to operate machinery and equipment, or their byproducts, and should not be expanded beyond that to encompass other types of substances.[16]

- The purpose of the exclusion was to bar coverage for traditional claims of environmental pollution, especially Superfund type claims, not to bar coverage for all types of claims involving exposure to toxic agents or substances. This argument often draws on drafting history.[17]

- The policy language is ambiguous as a matter of law as to the scope of the claims encompassed within its bar and therefore must be construed in the policyholder's favor.[18]

- The words used in the exclusion to describe the type of movement that the pollutants undergo – i.e., "discharge, dispersal, release or escape" – do not comport with the exposures involved in some indoor pollution cases.[19]

- The "reasonable expectations" doctrine.[20]

In short, policyholders should expect their insurers to invoke the pollution exclusion when denying coverage for mold claims. Policyholders should be alert to the ever-changing face of this body of law. And policyholders should be aware that, in highly analogous situations involving lead paint, carbon monoxide, and other "indoor pollution" situations, many courts have refused to allow that exclusion to serve as a bar to coverage.

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[16] *See, e.g., Lefrak Organization, Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 955-56 (S.D.N.Y. 1996) (N.Y. law) (bodily injury lead paint claims); *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 224, 231-34, 564 N.W.2d 728, 732-33 (1997) (ventilated carbon dioxide); *Sullins.*, 340 Md. at 510-511, 667 A.2d at 620 (bodily injury lead paint claims); *West American Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 323-26, 409 S.E.2d 692, 699-700 (1991) (chickens killed by vapors from floor resurfacing chemicals). *But see Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975, 980 (Pa. 2001) (although ultimately ruling for policyholder, holding that "the definition of 'pollutant' in the pollution exclusion clause unambiguously encompasses lead-based paint).

[17] *See, e.g., Stoney Run Co.*, 47 F.3d at 37; *Koloms*, 177 Ill. 2d at 488-93, 687 N.E.2d at 79-81; *Sullins*, 340 Md. at 512-516, 667 A.2d at 620-22.

[18] *See, e.g., Stoney Run*, 47 F.3d at 38-39; *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 549-50, 757 N.E.2d 329, 332 (2001) (because exclusion did not "clearly" bar coverage for carbon monoxide poisoning, it would not be applied to have that effect notwithstanding insurer's argument that the exclusion was capable of that interpretation); *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, (1st Cir. 1999) (Me. law) ("We agree … that the total pollution exclusion is ambiguous as applied" to claims for occupational asthma induced from exposure to fumes from roofing products "because an ordinarily intelligent insured could reasonably interpret the pollution exclusion as applying only to environmental pollution.").

[19] *See, e.g., Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, (6th Cir. 1999) (Mich. law) (where injury resulted in room adjacent to where floor sealant was applied that emitted fumes, within a few feet of where it was applied, it did not arise from the kind of migration encompassed within the exclusion); *Bituminous Cas. Corp. v. Advanced Adhesive Technology, Inc.*, 73 F.3d 335 (11th Cir. 1996) (Ga. law) (death caused by inhalation of chemical fumes emitted while installing carpet did not unambiguously arise from "discharge," "release," "escape," or "dispersal"); *Lititz,* 785 A.2d at 982 ("[o]ne would not ordinarily describe the continual, imperceptible, and inevitable deterioration of paint that has been applied to the interior of a residential setting" as a "discharge," "release," or "escape," and whether it were a "dispersal" is ambiguous).

[20] *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115, 120-21, 686 N.E.2d 997, 1000 (1997) (restaurateur-policyholder would not reasonably expect pollution exclusion to bar coverage for death of customer occurring while she dined and was exposed to carbon monoxide from cooking operations); *Andersen*, 93 Ohio St. 3d at 550-51, 757 N.E.2d at 332-33 (without deciding whether Ohio follows the "reasonable expectations" doctrine, notes that the doctrine would further support declining to allow the exclusion to bar coverage for carbon monoxide claim).