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Mold Problems Increase: Is Coverage Available?

By: Anne Simmons and David J. Dybdahl

The presence of mold in buildings and the resulting health effects are increasingly becoming a public concern. Office buildings have been evacuated, homeowners are fleeing their homes, renters are being relocated, and schools have been closed all due to what some think will be the next "asbestos".

Mold is a microscopic fungi and is present in almost any home, school and commercial building. It thrives where moisture, oxygen, and a food source (wood, paper, or other organic material) are present, implying conditions for mold growth are ubiquitous. Mold reproduces through spores, which are very buoyant and are able to travel through the air. Spores reproduce quickly, often multiplying by millions in a few days.

The products and techniques used today in construction increase the likelihood of mold. The use of paper and wood products in construction materials such as drywall, wallpaper, and ceiling tiles give mold a food source and a rich breeding ground. Airtight buildings trap mold indoors and HVAC systems spread it through buildings. Add moisture to this environment via plumbing, flooding, leaks, high humidity or any other water related problem, and mold will proliferate sometimes unknowingly to the owner until health or structural problems arise.

A number of health problems have been reported as a result of touching, ingesting or inhaling mold. These include; asthma, allergies, nosebleeds, headaches, eye irritation, fatigue, coughing and in extreme situations, immune deficiency, brain damage and even death. Although, evidence suggests children and the elderly are most susceptible to potential health risks associated with molds, the scientific community is not in agreement regarding the cause-effect relationship between mold and health.

Along with adverse health effects, mold also causes structural damage to buildings. Mold infested ceiling tiles, carpets or floorboards must be replaced. In some homes and office buildings, mold remediation can reach astronomical costs and look like asbestos removal projects. In the worst scenario, the building has to be demolished.

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Many homeowners faced with testing and remediation expenses, relocation costs, and mortgage payments on houses that are uninhabitable are turning to their homeowner policies for relief. In Texas alone, in the aftermath of tropical storm Allison, Farmers Insurance Group saw an increase of mold claims from nonexistent four years ago to 1000 in the first six months of 2001. State Farm states that mold claims in Texas have increased 650% this year. Estimates indicate homeowners could see a 30 - 40% increase in homeowner premiums as a result of mold claims. Insurers do not believe that these types of claims were included in their premium structure and have requested that the Texas state insurance commissioner exclude mold coverage from homeowners policies.

Lawsuits abound! Some believe that mold litigation will outpace asbestos litigation. This media driven craze is sending many who believe they are mold victims to plaintiff's attorneys in record numbers. Although, the health effects of mold are still in question, plaintiffs are suing contractors, landlords and insurance companies.

Based on negligence, suits against contractors are most common. Design or infrastructure errors can cause windows, roofs and sprinkler systems to leak. Other errors can allow moisture to collect inside walls and under floors due to improper drying periods during construction. In July of this year, Santa Clara County, California settled a \$12 million lawsuit against 19 defendants alleging design and construction flaws in their newly built courthouse. Soon after occupying the new building, leaks sprang from the roof, windows and walls. Repeated attempts were made to repair the leaks. After numerous health complaints from employees, toxic molds were found and the courthouse was closed.

Claims against landlords result from improper maintenance of common areas such as crawl spaces and attics where mold can live and grow. A student at the University of California at Berkeley is suing the university for an undisclosed amount stating that the married housing apartment in which he lives is contaminated with mold. The suit alleges that as a result the plaintiff's young son suffers from coughs, congestion, runny nose, eye

irritation and breathing problems. The suit sites negligence and nuisance and orders the university to remove the mold.

Liability claims where exposure to mold is the proximate cause of the loss are certain to create many untested coverage issues on commercial insurance policies. Although mold is not specifically mentioned within standard pollution exclusions in commercial general liability policies, expect insurers to deny the claim based on the exclusion.

The absolute pollution exclusion in the commercial general liability policy contains the following language:

f.(1) "Bodily Injury" or "Property Damage" arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants, etc.

Pollutant means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

Insurers could argue that the plaintiff's adverse health effects were a result of exposure to mold which "released or escaped" and irritated the plaintiff. In this case, the pollution exclusion would apply. There are many counter arguments. For example, when the pollution exclusion was filed with the insurance commissioners for approval there was no mention of excluding mold claims. In this case, the exclusion should not apply. There may be coverage in a general liability policy for a mold claim but do not bet your career on it! Get the appropriate environmental insurance coverage on the risk or at least recommend it to reduce the risk of professional liability claims.

According to a number of senior insurance executives at the recent Environmental Insurance Forum in New York, they expect mold exclusions to find their way onto standard GL and umbrella policies.

In an environmental insurance policy, the definition of a pollutant is broad enough

EPA's Enforcement Initiative Against Colleges and Universities

By: Lawrence P. Schnapf, Schnapf Environmental Law Center

Reprinted with permission. *Schnapf Environmental News Report*, April 2000 and May 2001.

College and university campuses often have populations the size of small cities and carry on a variety of activities that can result in impacts to the environment. For example, educational institutions may discharge large volumes of wastewater, operate power plants to heat their facilities which generate air pollution, maintain and service large fleets of vehicles which generate hazardous wastes, use underground storage tanks to fuel vehicles and facilities and may have research labs and printing facilities which use and dispose of a wide variety of hazardous materials.

As a result, a number of EPA regional offices have launched inspections of educational facilities within their jurisdiction to determine their compliance with hazardous waste and other environmental laws. For example, the University of New Hampshire ("UNH") was cited for a number of RCRA violations. Some of the violations at UNH included improper storage of incompatible hazardous wastes, pouring mercury waste down a drain without complying with pre-treatment requirements and storing large stockpiles of used fluorescent bulbs containing mercury or PCBs in insecure locations. Yale University and Boston University have been cited for violations of RCRA and the Clean Water Act.

In the latest example of the EPA university enforcement initiative, the University of Rhode Island agreed to pay a \$250,000 fine and spend \$550,000 on environmental improvement projects to resolve 19 violations of the various environmental statutes. Some of the projects will include the replacement of a containment storage area built a top a key "sole source" drinking

water aquifer and a new hazardous waste storage area.

In addition, the Massachusetts Institute of Technology ("MIT") agreed to pay a civil penalty of \$150,000 and fund more than \$400,000 in innovative environmental projects. The settlement resolves 18 violations discovered in 1998 involving 56 labs, a medical waste incinerator and a power plant. MIT will develop a computer-based 'virtual campus' compliance assistance tool to help universities and colleges nationwide comply with environmental laws. The university will also construct a state-of-the-art facility using biofiltration which will reduce the volume of storm-water runoff in the Cambridge community by 50 percent and the amount of solids in the runoff by 80 percent. In addition, three environmental education projects will be developed and implemented in the community public school system.

Editors Note: Educational institutions are realizing the need for environmental risk management programs to minimize the financial risk of a pollution incident. Since the pollution exclusion in the general liability policy eliminates coverage for environmental incidents, universities are turning to pollution policies to fill the gap in their insurance programs. Environmental Impairment Liability (EIL) policies can be written to cover on-site and off-site, sudden and gradual, historical and ongoing pollution events. EIL policies can be tailored to meet the insured's needs and premiums can be surprisingly affordable. For more information on EIL insurance, check out the SEiP website at www.armr.net.

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to include mold. However, some environmental insurers are now adding mold exclusions to their policies.

If there is a need to cover potential claims from mold, an environmental impairment liability policy with coverage for on site pollution and no mold exclusion would be

the appropriate policy form. On contractors pollution and professional liability policies, there should normally be coverage in the standard policy form in the absence of a separate mold exclusion.

More information on mold can be found on the SEiP web site at www.armr.net.

Resources

EPA Region 2 has prepared a fact sheet "Compliance Assistance Internet Sites for Colleges & Universities" that can be found at <http://www.epa.gov/region02/p2/college/ca-sites.htm>.

EPA Region 1 has created a university compliance page at <http://www.epa.gov/region01/steward/univ/>.

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