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OUTSIDE COUNSEL

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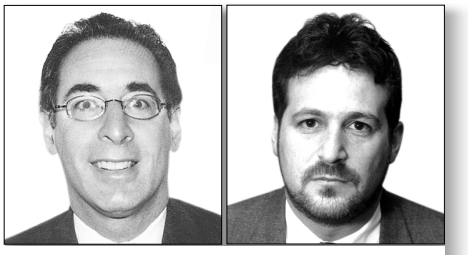
Got Mold?

The specter of mold litigation is closing in on New York. This article will briefly discuss some of the issues to be considered by the attorney defending a mold case as well as advising that attorney of those issues that are paramount in the minds of the insurance carrier who likely assigned him that case.

The Brewing Crisis

Texas is often used as the primary example of what runaway litigation could do to the insurance industry. Mold litigation in Texas has cost both the insurer and the insured an exorbitant amount of money. An award of $32 million was made for actual and contractual damages to a Texas woman from mold damage to her home (the *Ballard* case). Payment of $18.5 million was made to a California homeowner for mold, including punitive damages, and in New York, 500 lawsuits pertaining to a single apartment complex which sought $12 million in damages and which settled for approximately $1.2 million.

The existence of a mold crisis in Texas has been demonstrated by a 548 percent increase in the number of mold claims between the first quarter of 2000 and second quarter of 2001. These claims have cost Texas policyholders an additional $150 in terms of premium which amounts to an 800 percent increase over the past year.[1] Homeowners' insurance is becoming a market unavailable to both the insurer as well as the insured. Across the nation, premium costs rose by as much as 7 percent in 2002.[2] At the same time, the profit margin for the insurers dropped with, on an average, the insurer paying $1.16 for every dollar it takes in over the last 10 years.[3]



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It is with this background in mind, that the insurers are now concerned with the issue of mold litigation gaining root in New York. Practitioners have taken various viewpoints as to whether they believe mold litigation will take hold in New York. However, as we have seen with other "Toxic Torts," the public can easily be educated to perceive what the plaintiff's bar has set forth as the risk of mold contamination. This creates a ready market supporting the ongoing litigation. Articles have appeared in The New York Times, Time magazine, The Wall Street Journal, New York magazine and in other periodicals and newspapers setting forth the mold crisis.[4] These articles are disseminated across the public consciousness, filtering into everyday belief, confirming the existence of public health crisis.

Evaluating the Mold Claim

Mold claims are brought alleging negligence, strict liability, implied and express contract, constructive eviction, breach of contract, nuisance or any other theory for which support may be found. The intelligent plaintiffs' counsel will be careful to couch their complaint in terms for which the insurance carrier will provide coverage. With New York using the four corners of the complaint test (See *Seaboard Surety Co. v. Gillette Co.*, 64 NY2d 304), many plaintiffs' attorneys will barely mention mold within the complaint setting forth their pleadings to read more closely akin to a construction case or typical property damage matter.

The defense counsel, who is retained by the insurer to advise pertaining to coverage, must be aware of the applicability of the pollution exclusions found in most policies. While these clauses have not yet been tested in New York, as they pertain to mold, the probability that such exclusions will apply in New York to mold is minimal at best. Issues such as whether the mold is to be considered a pollutant; whether a discharge, dispersal, seepage, migration, release or escape has occurred and, most importantly, what is the effective causation of the loss must be addressed. Regarding the latter, the key to consider is whether the damage is the cause or effect of the mold. (See *Home Ins. Co. v. McClain*, 2000 Tex. App. LEXIS 969 (Tex. App. Dallas Feb. 10, 2000)). The savvy coverage counsel may request that the carrier involve an expert to properly evaluate

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the situs and to help in his determination. However, as New York courts have demonstrated in other litigation, such as lead paint, if there is a basis to provide coverage, coverage will be found. When examining these claims to determine whether mold is the cause of the damage, it is highly probable that most courts will make the determination that it is not the mold, but some other covered peril, which caused the damage.

Both coverage as well as defense counsel must carefully examine the trigger date to determine whether other coverage is also available for the insured. New York uses the injury-in-fact test to determine when the actual injury or damage took place. See *American Home Products Corp. v. Liberty Mutual Ins. Co,* 565 F Supp 1485 (SDNY 1983). For bodily injury claims, it would be the policies that were in effect when the exposure took place and for property damage claims it will often be the policies in effect when the mold-producing materials were installed. Numerous policies may be involved increasing the insured's potential coverage as well as spreading the risk for the insurer.

The particular provisions of the policy form must be examined. In homeowners' policies, both the ISO 1991 form as well as the 2000 form contain mold exclusions. The older 1991 form excluded losses caused by mold, which brings us back to the issue of effect causation and what actually caused the loss. The 2000 form adds an exclusion for loss caused by mold except when the loss results from accidental discharge of water from plumbing. While it appears that this provision is attempting to circumvent the causation argument by specifying a covered peril to which it applies, it is again unlikely that the courts will support this provision as excluding coverage due again to the causation argument. Commercial property policies may have better luck with an exclusion, which excludes coverage caused by seepage of water over a period of 14 days or more. More success may be met with this provision than the fungus exclusion often found in these policies.

Coverage counsel, when addressing the issues either to the insured or to the insurer, should be careful to address all applicable portions of the policy including the personal injury coverage. A mold claim may be couched in a wrongful eviction language and, as such, if there is a possibility of coverage, such portions of the policy need to be addressed or potential exclusions may be waived. Additionally, when discussing issues of coverage with the carrier, exclusionary grounds such as impaired property; owned property; defective workmanship; and products/completed operations should be addressed and a determination made whether either coverage or a basis for exclusion of coverage exists due to the specific facts of the claim.

Bad Faith

Concern has been expressed by many clients pertaining to the potential for extra contractual damage to be awarded should a claim be denied or not resolved to the benefit of the insured. While "bad faith" has not been prevalent in New York for many years now, it appears that the pendulum is shifting back. Since 1993, the standard for bad faith in a third-party liability claim has been a gross disregard of the insured's interests with punitive damages only to be awarded if it would vindicate a public right. See *Pavia v. State Farm Mut. Auto. Ins. Co.,* 82 NY2d 445; 626 NE2d 24; 605 NYS2d 208. A pattern of behavior is required, creating a difficult standard. First-party claims have an equal, if not greater burden to bear requiring that for extra contractual damages to be awarded, the conduct must be actionable as an independent tort; the conduct must be egregious in nature and the egregious conduct have been directed toward the plaintiff. In addition, it was required that the egregious conduct be part of a pattern directed at the public. While the standards have not changed, in more recent times, there clearly is a movement toward a more liberal interpretation. Recently, the First Department in *Acquista v. New York Life Insurance Co.,* 285 AD2d 73; 730 NYS2d 272, rendered a decision based upon a disability policy of insurance. In that decision, the court made the determination that it would not be an adequate remedy to limit the damages simply to the policy amount. While they did not call it "bad faith," they liberally interpreted consequential damages to include emotional distress, economic and noneconomic injury, thus awarding extra contractual damages. It is not believed that this is an aberration but simply an example of the pendulum shifting back in the other direction.

A few insurers are addressing their concerns by utilizing manuscript policy provisions specifically designed to control the carrier's exposure. These include mold exclusions that take away the causation argument by specifically referencing contributing and concurring causation. Additionally, sub-limits and specific mold endorsements are becoming more common. Better underwriting is being utilized to take into account the potential exposure and price the coverage accordingly. It is these writers' opinion that coverage for mold will not cease to exist but will become a part of the properly priced policy. To that extent, defense counsel needs to be aware where coverage will be found so that they may properly protect their clients. Coverage counsel needs to be equally familiar with the extent and nature of the applicable coverage so that coverage decisions based upon the law are not theory and guesswork and can be provided to the clients.

Conclusion

Whether an attorney is acting as coverage counsel or defense counsel, the expected increase in mold litigation in New York State cannot help but effect their practice. Prepared counsel will be familiar with the avenues of coverage, co-insurance and the ability to properly protect their client whether that client be the insurer or the insured.

(1) Source: Texas Department of Insurance Special Call for HomeOwners mold exposure issued July 30, 2001; Insurance Information Institute.

(2) Source: NAIC; Insurance Information Institute.

(3) Source: AM Best.

(4) "Haunted by Mold" New York Times Magazine, Aug. 12, 2001; "Beware: Toxic Mold" Time Magazine, July 2, 2001; New York Daily News, Sept. 10, 2001;"Insurers Blanch at Proliferation of Mold Claims" Wall Street Journal, June 3, 2001.

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