Mold, which has quietly coexisted with humans for centuries, has been getting a lot of attention recently. The spotlight on mold stems from large jury verdicts and settlements and sensational media portrayal about "Killer Mold" and the alleged health problems it causes. Because of the current perception that mold can cause serious injuries, it has become an issue ripe for litigation when found in homes, schools, offices and other buildings. In fact, the ubiquitous nature of mold and the heightened public awareness is expected to result in an increase in mold litigation, causing some to categorize mold as "the next asbestos." Part one of this article provides a primer on mold, how it grows, where to look for it indoors and techniques to address it if found. Part two discusses current litigation involving mold claims, who is suing whom and under what theories, litigation strategy and the potential for insurance recovery.

I. MOLD- A PRIMER ON ITS GROWTH, INVESTIGATION AND REMEDIATION

The Basics
What is Mold? Mold is everywhere. It grows on old bread, turns milk into some of the finest cheeses and produces medicine. It is estimated that there are hundreds of thousands of species of mold. Molds are simple, microscopic organisms, present virtually everywhere, indoors and outdoors. Molds, along with mushrooms and yeasts, are fungi and are necessary to break down dead material and recycle nutrients in the environment. For molds to grow and reproduce, they need only a food source- any organic material, such as leaves, wood, paper, or dirt and moisture. The ideal environment for mold growth is present in most buildings, temperatures between 40 and 100 degrees Fahrenheit and the availability of food and moisture (either a water source or even relative humidity between 80 and 90%). Mold will not grow without a source of moisture. Thus, the key to controlling mold growth...
is to control the source of moisture.

Molds reproduce by releasing countless tiny, invisible, lightweight spores, which travel through the air. The presence of mold spores indoors is normal. Mold may begin growing inside when mold spores, which float inside through windows or doors or are brought indoors on clothing or shoes, land on moist organic surfaces (e.g., wallboard, carpeting, ceiling tiles, cubical dividers, upholstered furniture, glues) and germinate. Mold growth can occur quickly. According to EPA guidelines, if wet organic building materials and/or furniture are not completely dried within 24 to 48 hours, conditions are favorable for mold growth. See EPA Publication, 402-K-02-003, A Brief Guide to Mold Moisture and Your Home. The presence of mold growth indoors is cause for further investigation as it may pose comfort issues (and potentially health risks) for occupants. Mold growth may also cause structural damage to buildings because molds grow by digesting the organic material they live on.

Indoor mold growth is often the result of an accidental or unknown release of water into a building. The water intrusion can be sudden (burst pipe, flood, sprinkler release) or chronic (roof or window leak, seepage through concrete slab or into sub-grade space). In addition, moisture can be created through the poor design or operation of a ventilation system. If the drainage of a ventilation system is not properly designed, installed or maintained, water may accumulate, creating wet insulation that may support mold growth. Similarly, if a ventilation system does not adequately control humidity, excess humidity may condense on cold walls in the building, again creating a chronic moist condition that may cause mold growth.

**Mold and Human Health**

Whether exposure to mold results in adverse human health effects is a VERY CONTROVERSIAL issue. Initially, it should be noted that the mere presence of mold is not enough to cause adverse health effects, rather there must be a pathway for human exposure (e.g., through inhalation, direct contact or ingestion). Typically, persons with pre-existing respiratory problems, compromised immune systems, infants and the elderly are more likely to become sensitized and react adversely to mold. Exposure to mold or mold spores may cause allergic reactions such as headaches, sneezing, congestion, red itchy eyes or skin rashes for people who are sensitized to mold. The more an individual is exposed to mold, the more likely that person will become sensitized. For asthmatics who are allergic to molds, exposure may cause asthma attacks.

Because some molds produce potentially toxic substances called mycotoxins, there is a significant debate about health risks associated with exposure to certain types of molds. Mold-related personal injury claims typically arise as the result of alleged exposure to molds that produce mycotoxins, including aspergillus, penicillium, cladosporium and, principally, stachybotrys chartarum (a/k/a stachybotrys atra), the green-black mold blamed for a wide variety of illnesses when found indoors. There is on-going research into health effects caused by exposure to mold and mycotoxins, especially stachybotrys. To date, however, no causal connection has been established between mold
Investigation and Sampling of Mold

When does a building have a mold problem? In the easy case, mold is present when it is visible. A musty smell and occupant complaints of allergic symptoms may also be indicative of mold growth. If visible mold is not observed, then "hidden" mold may be the problem (e.g., beneath wallpaper, paneling, carpeting or flooring, behind wallboard, or above the ceiling tiles). Investigating the presence of mold in a building should begin with a thorough visual inspection for both mold growth and potential sources of moisture. Mold typically appears as staining or discoloration on the surface of building materials, but all staining is not necessarily mold growth. To ensure an adequate investigation, a trained person should perform the investigation. Certified industrial hygienists ("CIH") are trained to investigate, control and eliminate health hazards and should be utilized to inspect for mold, especially if the mold is hidden. If not performed correctly, the search for hidden mold may result in a large release of spores. Thus, unless qualified, building personnel should not begin ripping out wall or floor coverings or wallboard in a search for mold. In an effort to promote prompt remediation, guidance issued by Federal and state health agencies states that during investigation, testing of mold is not necessary. The guidance encourages the removal of all visible mold growth from the indoor environment regardless of type or quantity, rather than waiting for sample results, which can take up to ten days depending upon the type of sample. When litigation is anticipated or pending, however, sampling may be advisable to determine the type of mold present, toxicity, causation and the assignment of fault or financial responsibility. Similarly, if there is a complaint of a severe health effect, testing to determine the type of mold present may assist the treating physician. Again, any sampling for mold should be performed by a professional, typically a CIH, who has specific experience in designing mold sampling protocols, implementing the various sampling methods and interpreting the results.

When sampling is performed, especially if it is to assist with litigation, chain of custody protocols should be respected, otherwise the credibility of the samples and the results are compromised. Using an American Industrial Hygiene Association ("AIHA") accredited laboratory is also advisable (currently there are eight accredited labs nationwide, two of which are in New Jersey: P&K Microbiology in Cherry Hill and Pure Earth in Pennsauken. Other labs are in the process of obtaining accreditation).

Several sampling types or methodologies can be used to evaluate mold. A bulk sample can confirm that visible staining is actually mold growth and qualitatively determine whether the growth is currently active, is a remnant of prior growth that has decayed or is an area of deposited spores where there is no active growth, indicating that the source is in another location. A bulk sample is a piece of mold-infested material (e.g., carpet, drywall, wall covering etc.), which is cut from its original location and sent to the laboratory for analysis. The laboratory can examine the exposure, including exposure to stachybotrys, and serious adverse health effects. See American College of Occupational and Environmental Medicine, *Adverse Human Health Effects Associated with Molds in the Indoor Environment*, October 2002.
material directly under a microscope to identify the number and types of mold spores present to the genus level (a group of closely related species of molds). This direct examination counts both living and dormant spores. The laboratory can also culture the sample by placing it in a growth medium and incubating it for approximately seven to ten days. Culture samples allow for the identification of the number and types of living mold present to the species level (the basic biologic classification for that particular type of mold), which are expressed as colony-forming units ("cfu").

Surface samples, like bulk samples, are also collected to confirm and identify visible mold growth. There are two types of surface samples, tape-prep and swab/wipe samples. Tape-prep samples are taken by placing a piece of tape on the area of mold growth to lift away spores. The sample is then sent to the laboratory for direct (microscopic) examination. Swab or wipe samples are collected by rubbing a cotton swab over area of mold growth and then rubbing the swab on a culture plate. In addition, dust samples can be collected from porous materials (e.g., carpeting and upholstery), where settled spores may not be picked up by tape-prep or swab samples, by using a vacuum.

The surface sample techniques described above provide information regarding the mold that is growing on surfaces in the building, but not about airborne mold. To obtain information regarding airborne mold, air samples are necessary. In addition, air samples may be used to identify hidden sources of mold if only an odor is present and there is no visible mold growth. Mold spores are always present at some level in the indoor environment. An indoor source of mold growth is indicated if the indoor air samples exhibit levels of mold that are greater than the levels of mold detected outside and/or the species of mold found indoors are different than the species of mold found outside. Accordingly, when indoor air samples are taken, outdoor samples are taken at the same time, otherwise the information from the indoor sample is meaningless. Air samples can be taken by spore-trap, where air is drawn across a sticky surface that collects spores, which are then directly examined under a microscope. Air samples also can be taken by an impaction technique where the spores in the air are drawn directly onto a culturable medium.

In all cases where mold is evaluated directly under a microscope, total spore counts include active and dormant spores, regardless of their ability to reproduce. The mycologist should be able to determine presence of fruiting bodies or roots indicating active growth, whereas the presence of only spores may indicate that spores have settled on a surface but the active growth is in another location. For cultured samples, the mold is placed in a medium that is optimum for mold to grow. Thus, the culture results may not be indicative of actual mold growth in the less optimal building climate. The most comprehensive picture is given by conducting sampling that will yield both direct and cultured results. It is important to note, however, that the type of sampling performed along with the interpretation of results is subjective since, currently, there are no applicable mandated standards. Thus, again, it is important to use a qualified consultant for the investigation, including sampling.
There are no established standards for investigation or remediation of mold. Several guidelines have been published that are listed at the end of this article. In New Jersey, Senate Resolution (SR 77), adopted May 3, 2001, urges the Commissioner of Health and Senior Services and the Commissioner of Community Affairs to develop methods to help State residents facing an infestation of stachybotrys atra identify the mold and develop the best strategies to address such infestations, and to investigate the health effects of and effective cleanup methods for infestations of stachybotrys atra.

Similarly, there currently are no Federal or state standards establishing safe levels of mold in indoor air. Whether or not symptoms develop in people exposed to mold depends on the nature of the fungal material (e.g., allergenic, toxic, or infectious), the amount of exposure, and the susceptibility of exposed persons. Susceptibility varies with genetic predisposition (e.g., allergic reactions do not always occur in all individuals), age, state of health and concurrent exposures to other irritants and allergens. For these reasons, no "safe" or "unsafe" levels of exposure for people in general have been established to date. Several pieces of legislation have been proposed and/or adopted at both the Federal and state level seeking to assess and/or establish permissible mold exposure limits. See U.S. Toxic Mold Safety Protection Act (H.R. 5040) "the "Melina" Bill, introduced in the House of Representatives by Michigan Rep. John Conyers (D) in June 2002, which has as a component establishment of mold exposure limits. On the state level, California passed the Toxic Mold Prevention Act (SB 732, October 7, 2001), which requires establishment of permissible mold exposure limits by July 2003. New York has proposed the Toxic Mold Protection Act (SB896, January 23, 2002), which directs a task force to consider the feasibility of adopting permissible exposure limits to mold in indoor environments.

**Remediation and Clearance**

Guidance recommends that mold growth be eliminated (i.e., remediated). A fundamental element of remediation is to eliminate the source of moisture; otherwise, mold growth will recur. Experts, such as structural and mechanical engineers, architects and environmental consultants, may assist in determining the source of moisture if it is not readily discoverable. The second aspect of remediation is to remove moldy materials or, under certain conditions, clean the moldy materials. It is recommended that porous materials (e.g., drywall, wood, fabrics) impacted with mold be removed and replaced. Non-porous materials (e.g., plastic, wood, glass) may be cleaned with a detergent solution and re-used, unless the structural integrity of the non-porous material has been compromised.

Moldy materials must be handled during the remediation in a controlled manner to prevent spreading spores. The area being remediated is typically placed under containment to minimize the spread of spores to uncontaminated areas. Obviously, only persons performing the remediation are allowed in the containment area and workers performing the mold abatement should wear personal protective equipment. The level of containment necessary will depend upon the extent and type of contamination being remediated. No containment may be necessary for
very small areas (less than 10 square feet), whereas complete isolation, use of negative pressure with High Efficiency Particulate Air ("HEPA") filtration and a decontamination room is recommended for areas of extensive contamination. In almost all mold remediations, dust suppression, which minimizes the spread of spores, is a key element. After moldy materials are removed, any areas where spores may have settled should be HEPA vacuumed.

For any mold remediation, protection of the building occupants is the highest priority. Unless the mold impact is very small, the question may arise as to whether all or a portion of the building must be vacated during the remediation. If evacuation is necessary, there are increased costs, which are potentially significant, associated with relocation, lost revenue and rent. To assess the need for evacuation, it is important to consider the type of health effects complained of and the disruption caused by the remedial activities. It is good practice to make sure that any highly sensitized or susceptible individuals are not present when remediation occurs.

To verify that remediation has been completed properly, post-remediation clearance sampling is typically performed. Clearance sampling should be performed by a different consultant than the consultant who performed the mold abatement work. There are, however, no standards to determine how clean is clean. Since mold is normally present in the indoor environment, the goal is not to sterilize the building, but to return the indoor levels of mold to background by removing active mold growth. Thus, the measure of a successful remediation is qualitative, not quantitative. Ultimately, the remediation should successfully repair or remove the source of moisture and mold-impacted materials, and any secondary spores that have settled in other areas should be removed through HEPA vacuuming.

In the context of litigation, when destructive testing, for example when a bulk sample is taken, or when remediation, which requires the removal of moldy materials, is performed, the parties must be aware of spoliation of evidence claims. Prior to commencing work, the party should assess whether notice should be provided to adversaries and insurance companies. Similarly, expert assistance may be needed to preserve evidence, for example keeping sections of moldy material or photodocumentation.

II. MOLD LITIGATION

The Parties

Mold claims typically involve both claims for personal injury and property damage. Potential plaintiffs include building/home owners, purchasers, tenants, employees, and other individuals routinely exposed to mold indoors. Potential defendants include any persons responsible for allowing mold to grow or who fail to adequately address the situation. Claims have been mounted against building owners and property managers for failure to investigate water and/or odor complaints in timely manner, undertaking renovations resulting in inadequate ventilation and
negligent repair resulting in water damage and mold growth. Architects and builders are pegged for defective workmanship or design resulting in water intrusion. Suits are brought against sellers and realtors for failure to disclose moisture and/or mold conditions in connection with the sale of property and against home inspectors for failure to discover water damage and/or mold. Claims can be brought against HVAC contractors and plumbers for negligent installation or maintenance of equipment leading to moisture and mold. Cleaners or maintenance personnel are subject to claims based upon carpet cleaning practices that leave carpeting wet. Professional liability claims are asserted against testers, remediators and others for failure to properly test and remove mold. And last, but certainly not least, claims are brought against insurance carriers, both property and liability, seeking coverage for the costs of remediating the mold and responding to plaintiffs' complaints. Plaintiffs' claimed damages are usually significant, consisting of investigation and remediation costs, loss of use, lost rent, diminution in value, relocation expenses, medical expenses and emotional distress.

The Claims
There are numerous theories of liability that plaintiffs utilize in mold cases. Negligence most likely will be a cause of action in all mold related litigation. In order to allege negligence, plaintiff must establish that the defendant's breach of duty caused the damage. For example, a tenant may bring a claim against a building manager based upon negligent failure to investigate moisture complaints, which results in mold and damage. *Nicholson v. Metro Property Management, Inc.*, Case No. 03-C-00-005586 (Cir. Court Balt. Cty. Md. 2002) (jury verdict of $219,200 against property manager for failure to investigate plaintiffs' complaints of hearing running water in the apartment beneath them until extensive mold occurred in the apartment below. Plaintiffs claimed both personal injury and property damage claiming that their unit had become unmarketable). As a defense to a negligence claim, the defendant will attempt to establish that due care was taken, thus defeating the negligence claim.

Breach of contract claims will apply to actions involving owners and tenants regarding the duty to repair or maintain the premises. These claims will be governed by the specific terms of the contract (e.g., the lease agreement). Breach of contract claims also will arise in suits by building owners against contractors, architects and builders for construction defects. *Centex-Rooney Const. Co., Inc. v. Martin County*, 706 So. 2d 20 (Fla. App. 4 Dist. 1997) (The county sued the construction manager of a county courthouse alleging that construction defects created water damage and ensuing mold growth. The final judgment against contractor was $8,800,000 in damages). Plaintiffs also may sue for breach of warranty, express or implied. Claims for breach of express warranties are contract claims that will also focus on the terms and conditions of the contract involved. Liability depends upon whether the affirmative representations in the contract are breached. For example, claims may be brought against the company who maintains the building's HVAC system if the contract contains indoor air quality representations that are not met. Breach of implied warranties, on the other hand, are common law claims based upon the fundamental notion that the building was designed and is usable for its intended purpose; in other words, it is safe and habitable. In the
landlord-tenant context, if not expressly in the lease, there is an implied warranty that a landlord must maintain and 
repair the premises. If not, the tenant may have a claim for constructive eviction and/or rent abatement. Muro v. 
Luhn, 2000 WL 1196508 (Conn. Super. Aug. 2, 2000). Similarly, a contractor who performs repair work at the 
building has an implied duty to perform work in a workmanlike manner. Dawn Court Associates v. Cristia, 115 

In the context of a sale of real estate, the seller has a duty to disclose latent defects to the buyer which are known 
or should be known and that are not discoverable to the buyer upon reasonable inspection. T&E Indus., Inc. v. 
Safety Light Corp., 123 N.J. 371 (1991). This duty also extends to the real estate broker for known conditions that 
are not disclosed or concealed. Weintraub v. Krobatsch, 64 N.J. 445 (1974) and Strawn v. Canuso, 140 N.J. 43 
(1995). If either party breaches this duty, the buyer may file a suit to rescind the contract based on fraudulent 
misrepresentation or concealment. Thus, failure of the seller or its real estate agent to disclose to purchaser water 
leakage, prior water damage and/or resulting mold growth may give rise to a cause of action. (A bill was introduced 
into the New Jersey Assembly (A-3561) in May, 2003 that, if passed, would require home sellers to disclose to 
buyers the presence of any known mold, give buyers 10 days to conduct an inspection of the home and provide 
buyers with mold information pamphlets. If sellers fail to perform any of these tasks, buyers would be released 
from all obligations under their contracts. The bill also would provide for loans and grants to homeowners to help 
solve mold problems in their homes and would set up a Mold Hazard Assistance Fund that would be funded 
through new licensure fees for home inspectors. The legislation would also appropriate $1 million to pay for the 
emergency relocation of children and their families suffering from mold-related illnesses.)

Also in the context of a real estate purchase, the failure of a home inspector to discover potential latent defects 
during inspection of premises and/or the performance of an inspection that fails to comply with the American 
Society of Home Inspectors Standards of Practice and Code of Ethics ("ASHI Standards") may give rise to 
professional malpractice claims. A home inspection report that states that the premises is in good condition may 
then give rise to a negligent misrepresentation claim if the purchasers relied upon the report in buying the house.

**Causation May Be The Weakest Link In Plaintiff's Case**

Since science has not yet established a causal relationship between the inhalation of mold toxins and human illness, 
causation is often the weakest element of plaintiff’s case. As a result, defendants will try to exclude or discredit 
plaintiff’s expert causation testimony regarding mold-related personal injuries. Should the defendant be successful in 
excluding the testimony, it is questionable whether plaintiff will be able to carry its burden of proof. See 
prove her mold toxicity claim where the causal link between the mold and plaintiff’s health problem was "too 
tenuous" to impose liability).
Plaintiffs bringing personal injury claims will have to rely on expert testimony to establish a causal connection between mold exposure and injury. Plaintiff must prove both 1) that mold has been scientifically shown to cause the type of injury complained of and 2) that plaintiff was exposed to the mold in sufficient quantity to cause injury. Given the lack of scientific evidence linking mold exposure to adverse health effects and given that the symptoms complained of (e.g., runny nose, headache, sinus congestion, etc.) are non-specific and could result from common ailments or other environmental irritants, there are ample grounds for defendants to challenge plaintiffs' experts.

Historically, the standard for admissibility of scientific evidence in Federal and most state courts was the "general acceptance test" developed under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Under the Frye test, the court considers whether the evidence proffered by the proposed expert is "generally accepted" in the relevant scientific community. If so, the expert testimony is admissible. The United States Supreme Court established a new standard in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which relaxed the Frye standard since "general acceptance" is not a precondition to admissibility of scientific evidence, rather the testimony must be based upon a "reliable foundation" and be "relevant to the task at hand."

Although Frye has been replaced in the Federal court system in favor of the more relaxed standard set forth in Daubert, in New Jersey, with the exception of toxic tort litigation, the general acceptance approach of Frye remains the standard. State v. Harvey, 151 N.J. 117, 170 (1997). The New Jersey Supreme Court has relaxed the general acceptance standard in cases involving novel theories of causation to connect plaintiff's injuries to toxic substances or drugs. Kemp ex rel. Wright v. State, 174 N.J. 412, 430-31 (2002); Landrigan v. Celotex Corp., 127 N.J. 404 (1992); Rubanick v. Witco Chem. Corp., 125 N.J. 421 (1991). In these cases, "a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately-founded methodology involving data and information of the type reasonably relied on by experts in the scientific field." Rubanick, 125 N.J. at 449. The New Jersey courts have not yet ruled on whether in a mold exposure case, the general acceptance or more relaxed standard would apply. Regardless, given the lack of scientific study regarding the effects on human health from mold exposure, it is possible to have such expert testimony excluded under either test.

**Insurance Issues**

**First-Party Policies**

The typical homeowners policy provides coverage for all direct physical loss to a building or dwelling unless the peril is specifically excluded in the policy. These policies contain exclusions precluding coverage for damage caused by 1) "smog, rust or other corrosion, mold, wet or dry rot" and 2) the "discharge, dispersal, seepage, migration, release or escape of pollutants, unless the discharge, dispersal, seepage, migration, release or escape" is caused by an insured peril. Pollutant is defined to mean "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke,
vapor, soot fumes, acids, alkalis, chemicals and waste." These exclusions may appear to bar coverage for mold. Policyholders, however, have successfully advanced arguments that policies, notwithstanding these exclusions, should respond to a mold claim.

With respect to the "mold exclusion," mold is listed in the exclusion with other types of damage that occur naturally over a period of time, like rust corrosion. Losses that happen over time, such as wear and tear, are not intended to be insurable risks. Thus, using the rule of contract construction "ejusdem generis" - "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated" - policyholders argue that the exclusion is intended to bar coverage for predictable, gradual damage (e.g., a leaky pipe that goes unattended), but not for damage resulting from a fortuitous event (e.g., a burst pipe or major storm). Similarly, insurance policies sometimes contain an "ensuing loss" exception, reinstating coverage for "ensuing loss to the building, if the loss would otherwise be covered under this policy." Policyholders argue that mold damage resulting from a covered loss such as a major storm is covered as an ensuing loss, despite the presence of a mold exclusion in the policy. Thus, if the mold is the result of an insurable event, the potential for coverage to respond to the claim is greatly increased.

With respect to the pollution exclusion, coverage is excluded for damage arising out of the "discharge, dispersal, seepage, migration, release or escape" of pollutants. The policies define "pollutants" to include "smoke, vapor, soot, fumes, acids, alkalis, chemicals and wastes." Courts are split as to whether the pollution exclusion will bar losses arising from mold. The threshold question is whether mold, a living organism, fits within the definition of pollutant. Some courts hold that the exclusion does not apply to non-traditional environmental pollutants such as mold. Accordingly, certain carriers have now included "fungi" in the definition of pollutant. *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks Ltd.*, 2002 U.S. Dist. LEXIS 3594 (N.D. Tex., March 5, 2002) (holding that the pollution exclusion barred coverage under a first party policy that included the word "fungi" in the definition of pollutant). If mold is found to be a pollutant, the next question is whether mold is "dispersed, released, or discharged" into the environment, which includes the air. At least one court has relied upon expert testimony that, during the reproductive process, mold spores are transmitted through the air to find that mold was "dispersed" onto the property and thus coverage was barred by the pollution exclusion. *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks Ltd.*, 2002 U.S. Dist. LEXIS 3594 (N.D. Tex., March 5, 2002). Other courts, however, have held that the pollution exclusion did not bar coverage because mold is not "released," but rather, forms over time as a result of environmental conditions. *Leverance v. United States Fid. & Guar.*, 158 Wis. 2d 64, 97 (1990). In New Jersey, while no reported case addresses mold, in the context of chipping and flaking lead paint, the Appellate Division found that the terms "discharge, dispersal, release or escape" imply "an active or clearly perceived physical event . . . [and are] not ordinarily understood to apply to the imperceptible chipping or flaking of lead paint which is attributable, not to an active or physical event, but rather to an involuntary effect occurring over a considerable period of years." *Byrd ex rel. Byrd v. Blumenreich*
Thus, based upon the Appellate Division's analysis, it is likely that the pollution exclusion will not bar coverage for mold growth since it is not a physical event.

**Third-Party Policies**

With respect to third-party claims, Comprehensive General Liability policies ("CGL") protect policyholders for claims made against them by third parties for property damage and bodily injury. These typically are occurrence-based policies, i.e., they will respond to a loss incurred during the policy period. As with first-party policies, insurers argue that the pollution exclusion precludes coverage for mold claims. Whether the pollution exclusion will actually bar coverage is dependant upon the specific policy at issue and the interpretation applied.

In addition to CGL coverage, insurance that may respond to third-party claims may be found in Pollution Liability Policies, which provide coverage for property damage and bodily injury caused by "pollution." Typically, claims-made (meaning a claim has to be made during the policy period), these policies also cover remediation expenses that a governmental authority requires the policyholder to undertake. Since it is questionable whether mold is a pollutant and since there are no governmental standards for mold remediation established at this time, it is unlikely that a pollution policy will cover the costs of remediation mold.

**What Policies Will Provide Coverage?**

In order to determine which policies will respond to a claim, it is necessary to determine when an insurance policy is triggered. For claims-made policies, such as most first-party and pollution liability policies (e.g., a claim must be made during the policy period to be covered), the trigger is usually the manifestation of injury. In other words, the policy that is on the risk at the time that damage is discovered (manifested) and reported is triggered. There are three potential triggers for occurrence-based policies like CGL policies, i.e., (1) manifestation: the policy on the risk at the time that damage is discovered (manifest) is triggered; (2) exposure: policy on the risk at the time the property is exposed to the cause of injury; and (3) continuous: all policies on the risk during the period from exposure through manifestation of the injury. Similar to asbestos and hazardous substances claims, it is likely that New Jersey courts will adopt the continuous trigger as applicable for mold cases. Thus, all insurance policies in effect from the time water infiltration commenced though to the discovery of mold growth may be triggered under the continuous trigger theory.

**Bad Faith**

To date, some of the largest verdicts in mold cases have been against insurance carriers for failure to handle mold claims in an appropriate manner, thus exacerbating the insured’s financial burden and, allegedly, the health problems of the individuals exposed to the mold. Bad faith for claims handling or denial of coverage is subject to the "fairly debatable" test: to prove bad faith against a carrier, the insured must prove the carrier’s refusal to pay was not "fairly debatable" under the circumstances. *Pickett v. Lloyds*, 131 N.J. 457 (1993). See also *Ballard v. Fire Ins. Exchange*, Docket No. 99-05252 (Tex. Dis. Travis Cty. 2001) ($32 million dollar jury verdict against carrier for...
failure to make prompt and full payment for removal of water damaged floor; the award has since been reduced to $4 million in 98 S.W.3d 227 (Tex. Ct. App. 2002)); Anderson v. Allstate Ins. Co., Docket No. 00-907 (E.D. Cal.) (appealed to 9th Cir.) (jury awarded $500,000 in compensatory and $18 million in punitive damages against carrier for bad faith claims handling- appellate court reduced to $2.5 million).

The insurance industry has reacted to the onslaught of mold claims and large recoveries by trying to limit coverage for mold damage. With respect to first-party policies, carriers attempt to limit the "ensuing loss" doctrine by making clear their intent not to cover mold damage- for example, "whenever water damage occurs the resulting loss is always excluded under this policy." In addition, carriers also are adding explicit mold/fungus exclusions that preclude coverage for mold regardless of how caused. Carriers are adding these "mold exclusions" to CGL policies, which previously did not have such exclusions, and even to Pollution Liability policies. These provisions bar coverage for damage (bodily injury and property damage) that arises directly or indirectly from any type of fungi, including mold, yeast and mildew. Should a policyholder seek coverage for mold damage, the cost for obtaining that coverage is increasing. Carriers are also lowering limits of liability for mold-related claims. Some carriers, however, are now drafting new products (i.e., mold policies) to respond to these claims, albeit the coverage provided is typically very limited.

**Conclusion**

There is much public sympathy for building occupants who are exposed to indoor air quality problems, especially mold. This sympathy, in large part generated by the highly publicized fear of "Toxic Mold," leads to large recoveries for plaintiffs asserting mold claims. In light of the frenzy generated by the current media attention to mold, it is wise for building owners and managers to be vigilant in preventing unwanted moisture intrusion. Without a moisture source, mold will not grow. Thus the key to stemming mold growth, and litigation, is to routinely inspect the property to find and immediately correct water problems. While these proactive steps will not entirely eliminate mold, they will assist in defending claims and, potentially, in the pursuit of insurance coverage.

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