

CONSTRUCTION DEFECT SEMINAR***MOLD: IS THERE COVERAGE IN YOUR CGL?***

Presented by

Patrick J. Wielinski
Of Counsel
Haynes & Boone, LLP

Monday, October 29, 9:00 a.m.-5:00 p.m.

Want to Make Your E&O Carrier

Really Happy?



**Then Offer Your Contractors & Manufacturers
The CGL Gap Policy[®]**

Offered exclusively by U.S. Risk Insurance Group, Inc. the CGL Gap Policy allows you to fill in many of the gaps that are created by your CGL Policy exclusions.

Coverage Options Include:

- Property Damage Liability Coverage for Damage to your Manufactured Product
- Property Damage Liability Coverage for Damage to your Completed Work
- Property Damage Liability Coverage for Damage to Impaired Property or Property not Physically Injured

For More Information Contact Jim Leonard at: 800.232.5830 ext. 927



U.S. Risk Insurance Group, Inc.
10210 N. Central Expwy. • Dallas, TX 75231
visit our website at usrisk.com

Patrick J. Wielinski
Of Counsel
Haynes & Boone, LLP

Pat Wielinski is a presenter for Monday's all-day seminar, "Construction Defect." He is of counsel in the Fort Worth office of Haynes and Boone, LLP. He represents general contractors, subcontractors, owners, and insurance companies, emphasizing the areas of insurance coverage and risk management. Mr. Wielinski has advised clients and litigated and appealed insurance coverage claims involving construction defects for nearly 20 years. He is admitted to practice before the courts of the state of Texas, the United States Supreme Court, United States Courts of Appeals, and other state and federal courts.

He is a member of the Insurance Litigation Committee of the Tort and Insurance Practice Section of the American Bar Association, along with the ABA Forum Committee on the Construction Industry and the Insurance Coverage and Construction Committees of the ABA Litigation Section, cochairing the Construction Committee's Subcommittee on Insurance Coverage. He is a member of the Risk Management Committee of the Associated General Contractors of America. He received his B.A. degree from St. John's University and his law degree from the University of Minnesota.

Mr. Wielinski regularly lectures to construction, insurance, and legal groups on insurance coverage and risk management issues. He is the author of *Insurance for Defective Construction: Beyond Broad Form Property Coverage*, published by International Risk Management Institute, as well as numerous other publications for construction, insurance, and legal organizations. He is the coauthor of *Contractual Risk Transfer: Strategies for Contractual Indemnity and Insurance Provisions*, also published by International Risk Management Institute.

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

MOLD: IS THERE COVERAGE IN YOUR CGL?

*Patrick J. Wielinski
Haynes & Boone, LLP*

- I. Introduction**
- II. CGL Coverage: Standard Pollution Exclusions**
 - A. Standard pollution exclusions
 - B. Other pollution exclusions
- III. The Pollution Exclusion: Mold as a "Pollutant"**
 - A. Microorganisms as pollutants
 - B. Other indoor emissions "gone awry"
 - 1. Carbon dioxide, lead paint, etc.
 - 2. Construction materials and operations
- IV. The Pollution Exclusion: Discharge, Dispersal, or Release**
 - A. 1973 pollution exclusion versus the 1986 pollution exclusion
 - B. The 1973 language
 - C. The 1986 language
- V. The Pollution Exclusion: Products-Completed Operations**
- VI. Property Damage Claims: Effect of the "Business Risk" Exclusions**
 - A. Construction defect coverage analysis
 - B. Repairs as "cleanup"
- VII. Will the Insurance Industry Respond?**
- VIII. Conclusion**

Notes

CGL COVERAGE FOR CONSTRUCTION DEFECTS INVOLVING MOLD

**Patrick J. Wielinski
Haynes and Boone LLP**

Introduction

Mold, mildew and sick building syndrome exposures have been a fact of life for owners and occupiers of modern buildings, and employers, for quite some time. Now they are the subject of a media frenzy and cannot be ignored, whether the contaminated building is a single-family home, multi-family residential complex, a commercial office building or a public facility.

Homeowners Claims

To date, the lion's share of the headlines are being grabbed by homeowners cases. For example, recently a Texas jury awarded a couple a judgment of \$32 million against the couple's homeowners insurer. The couple's home developed a series of plumbing leaks that resulted in a massive infestation by mold, particularly *stachybotrys*, a variety widely believed to be toxic. The allegations against Farmers included negligence, negligent misrepresentation, fraud and breach of contract in failing to timely and adequately respond to the claims the couple made. As a result of the infestation, the home eventually will be decontaminated, razed, and then rebuilt. While the award included mental anguish and punitive damages, it did not cover damages for the health problems the couple alleged—headaches, dizziness, fatigue, respiratory and sinus problems, profusely bloody noses, coughing up of blood and serious cognitive dysfunction. The medical science behind the claimed personal injuries did not withstand a *Daubert* challenge, so that the court refused to allow expert testimony as to the medical effects of mold. The couple had been seeking damages in excess of \$100 million. Perhaps the most astonishing aspect of the *Ballard* verdict is the fact that even though the plaintiffs were not allowed to put on evidence to link the mold to their alleged medical condition, the jury awarded \$32 million of the \$100 million requested. As a result of such cases, the Texas Department of Insurance has conducted a series of public hearings to determine whether the Texas homeowners insurance policy form should be modified to address mold coverage.

Commercial and Industrial Claims

Insurers are still unsure whether mold litigation will become as serious a problem in the commercial and industrial context. Nevertheless, insurers do expect that the increased homeowner awareness, together with the increasing media attention, will lead more employees to fear mold-related health problems in the work place. Those fears can translate into lawsuits against their employers, property owners, landlords and, of course, contractors and design professionals. At this point, the insurance industry may be overly optimistic. For example, one of the more high profile mold lawsuits in the United States involves the Tulare County Courthouse, located in Visalia, California, midway between Fresno and Los Angeles. In that case, the lead plaintiff is a state district judge who alleges that defects in the HVAC and curtain wall systems, resulted in the growth of *stachybotrys* mold and serious bodily injury. Following the judge's lead, over 100 other employees have sued for injuries arising out of the contamination of the courthouse, alleging fraud and concealment by the county of the condition of the courthouse. They have also sued the construction manager, the general contractor, various subcontractors, and designers on the project on various construction defect causes of action, including negligent construction and design. This case, No. 00-1090367; *Krant v. County of Tulare, et al.*; In the Superior Court of California, County of Tulare, Visalia Division, illustrates a potentially dangerous aspect of these types of claims for

the construction defendant. The addition to the courthouse which is the subject of the lawsuit was built in 1988, with the claim being first alleged in 1998, 10 years after construction. In states which have enacted extended statutes of repose, mold can develop over an extended period of time prior to discovery, but still potentially trigger liability for the construction defendant. The comparison to other long tail claims, such as liability for asbestos, is inevitable.

Mold and sick building syndrome litigation is not necessarily new, but it is obvious that it is becoming increasingly prevalent. Newer buildings appear to be more prone to mold and sick building problems since they are more airtight, with air-conditioning and heating systems recirculating contaminated air. In addition, new building materials such as synthetic stucco products (EFIS), and other construction materials trap moisture behind the walls and provide an environment for the growth of mold and mildew.

With all of that said, it is likely that this is only the inception of a period in which these claims will become increasingly commonplace against property owners and landlords, and also the construction industry which has built and designed the allegedly contaminated structures. This paper will analyze what coverage is available to the contractor when faced with these types of claims, primarily under its commercial general liability insurance policy. For the most part, builders risk policies are not involved to a great extent since mold infestations often develop over time, well after completion of the project. Coverage for mold contaminations under the standard homeowner's policy will not be addressed since this type of coverage is typically not available to the contractor, but rather only the homeowner. For a discussion of homeowners coverage for mold, see Lee Shidlofsky, "Coverage for Mold and Other Environmental Things Under the Homeowner's Policy: It Kind of Grows on You," 10th Annual Ultimate Insurance Seminar, State Bar of Texas (March 2001); Fred Hagans and Paula Janacek, "Mold—It Generally Is Covered by the Homeowner's Policy," MEALEY'S LITIGATION REPORT: MOLD (March 2001). However, the coverage available to a homeowner for mold and mildew as an ensuing loss resulting from covered instances of water infiltration is nevertheless of concern to homebuilders since, upon payment of those claims, the homeowner's carrier is subrogated to the homeowner's rights against a builder whose construction may have caused the water infiltration, and thus the mold contamination.

CGL Coverage: Standard Pollution Exclusions

As is the case with most construction defect claims, litigation over mold involves a contractor's commercial general liability coverage. In addition to the typical issues involving exclusions designed to deny coverage for the contractor's own defective work, that is its "business risk," mold and sick building cases present additional coverage issues.

Since the presence of mold often releases spores into the internal environment, these claims raise unique issues with respect to the applicability of the pollution exclusion to the bodily injury or property damage arising out of the mold infestation. Courts appear hesitant to apply the standard pollution exclusion for such damage or injury largely on the theory that mold may not constitute the type of "pollutant" to which the exclusion is directed. Nor does indoor contamination appear to be regarded as the type of environmental dispersal or release to which the exclusion traditionally applies.

At the same time, while many mold claims are limited to bodily injury, the cleanup of a mold contamination and the repairs necessary to accomplish the cleanup, as well as to prevent future excess moisture in the building, will likely generate a companion property damage claim. With regard to the bodily injury, the pollution exclusion in the standard commercial general liability (CGL) form issued to a contractor will potentially affect the availability of coverage. As to property damage issues, it is likely that the pollution exclusion will have less effect.

Standard Pollution Exclusions

The pollution exclusions found in the standard CGL forms, as drafted by Insurance Services Organization (ISO), are on two general forms, and are usually differentiated based upon the year of their pro-

mulgation. The first exclusion was added to the standard forms during the 1973 revisions by ISO. That exclusion provides that the insurance does not apply:

- f. To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Because of the exception for "sudden and accidental" discharges, this exclusion is frequently referred to as the "sudden and accidental" exclusion. Throughout this paper, it will be referred to as the "1973 Pollution Exclusion."

The CGL forms underwent major revision in 1986 and the pollution exclusion added in that year did away with the sudden and accidental exception, as well as making various other changes. That exclusion provides that the insurance does not apply to:

- f. 'Bodily injury' and 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
 - (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or
 - (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Subparagraphs (a) and (d)(i) do not apply to 'bodily injury' or 'property damage' arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

- (2) Any loss, cost or expense arising out of or any:
 - (a) Request, demand or order 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; or
 - (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.

Pollutants 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.

This exclusion is sometimes referred to as the "absolute pollution exclusion," especially by insurers. However, this reference is something of a misnomer since the exclusion does not apply to all pollution-related losses, particularly for contractors. See, *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 467 (Tex. 1998) (observing that coverage is available under the exclusion in certain instances, including off-site pollution releases). In addition, another significant exception to the exclusion is for bodily injury and property damage within the "products-completed operations hazard," i.e., which occurs after completion of operations by an insured contractor. The effect of this exception is discussed more fully below. For these reasons, the pollution exclusion originally inserted into the standard ISO CGL form in 1986, and as revised in 1988 and set out above, is referred to as the "1986 Pollution Exclusion" throughout this paper.

Other Pollution Exclusions

In addition to the standard forms, there are other pollution exclusions in use. Another frequently encountered exclusion is often referred to as the "total pollution exclusion," which states that the insurance does not apply to:

- f. (1) 'Bodily injury' or 'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand or order 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; or
 - (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.

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

This exclusion is usually regarded as being broader in scope than the 1986 Pollution Exclusion. See, *Kelley-Coppedge v. Highlands, supra*, largely because it applies in the products-completed operations context. It should be noted that the total pollution exclusion is set out in a standard endorsement also promulgated by ISO. There are many endorsements, particularly in excess and surplus lines policies, which are similar in scope. Many of the cases discussed in this paper address this type of total pollution exclusion and their rationale is applicable to coverage for mold contamination.

The Pollution Exclusion: Mold as a "Pollutant"

The scope of coverage for the party responsible for defective work giving rise to a mold infestation is, for the most part, yet to be determined. Unlike claims by homeowners on their homeowners insurance policies, claims against the construction industry, that is, contractors, subcontractors, suppliers and design professionals, have so far lagged behind. A contractor's claim for coverage is likely to arise as a result of a claim or lawsuit being filed against it, that is, a third party claim in which it seeks a defense. Often the coverage case which develops out of such construction litigation lags behind the underlying lawsuit, further delaying the insurance coverage determination. In addition to the handful of cases which have directly addressed mold contamination, other cases which have addressed the applicability

of a pollution exclusion to the indoor contamination context involving fumes, lead paint and carbon dioxide provide some guidance as to the manner in which the insurance industry will approach mold claims.

These types of cases address the issue of whether substances which are normally not regarded as the byproducts of industrial activities (such as discharges of hazardous chemicals into water or the atmosphere) constitute "pollutants" under the standard pollution exclusion. In other words, numerous cases have addressed whether the escape of potentially harmful fumes and vapors in an enclosed area constitutes the discharge of a "pollutant" subject to the exclusion. Mold adds yet another issue, that is whether a naturally occurring microorganism can constitute a "pollutant."

Microorganisms as Pollutants

Case law directly addressing mold as a pollutant is scarce so far. One case which has addressed the issue and in which the court was hesitant to classify airborne mold, fungi or other organisms as "pollutants" under the standard pollution exclusion was *Stillman v. Charter Oak Fire Insurance Co.*, No. 1949-CV-Highsmith (S.D. Fla. June 18, 1993). In that case, molds, fungi and yeasts were released into the air of an office building and former bank employees sued the owner of the building, alleging various health impairments resulting from the negligent design, maintenance, installation and repair of the HVAC system. The plaintiffs alleged that the owner failed to prevent recirculation of stale air and did not make fresh air available when the HVAC system released contaminants, including the molds, fungi, and yeasts into the building.

The owner tendered its defense to its CGL carrier which denied coverage based upon, among other things, the pollution exclusion. The parties filed cross-motions for summary judgment on the issue and the trial court found the policy to be ambiguous since it did not expressly define "pollutant." In the absence of a definition, the term was to be interpreted according to its popular meaning, and broadly defined, it could include naturally occurring substances, such as dust which causes adverse reactions in people. It could also be defined narrowly to include only such things as nuclear waste. Therefore, the court concluded it was ambiguous.

The court also looked at varying interpretations of the term "pollutant" by different courts, one of which had held that pollutants include toxic or harmful materials recognized as such by governmental regulators. Since government regulators have classified biological organisms such as mold to be indoor air pollutants they could constitute "pollutants" under the pollution exclusion. On the other hand, the *Stillman* court noted that other courts have adopted a common sense approach and have held that the pollution exclusion does not apply to substances which are commonly present in the environment. This would include fungi and molds. Based on these varying interpretations the court in *Stillman* determined that the policy was ambiguous and upheld coverage. Nevertheless, many cases have held that the mere fact that courts disagree as to the meaning of terms in an insurance policy does not render the policy ambiguous.

Be that as it may, the summary judgment granted in favor of the insured by the trial court in *Stillman* was reversed by the Eleventh Circuit in *Stillman v. Travelers*, 88 F.3d 911 (11th Cir. 1996). The summary judgment was reversed upon procedural grounds since the trial court had granted summary judgment in favor of the insured based only upon its finding that the pollution exclusion did not apply to the claim. However, the insurer had asserted other grounds for denial of the claim, none of which were ruled upon by the trial court, so that its ruling on the applicability of the pollution exclusion was a partial summary judgment. Nevertheless, the trial court's determination as to the ambiguity of the pollution exclusion as it applies to mold remains intact.

As quoted above, the 1973 Pollution Exclusion did not define the term "pollutants," but with the advent of the 1986 Pollution Exclusion, the term "pollutant" was specifically defined to include:

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.

Nevertheless, despite the addition of a definition for the term pollutant, courts have continued to wrestle with that issue. A prime example, another of the few cases to address the applicability of the pollution exclusion to microorganisms, is *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 875 (Ariz. App. 2000). In that case, the plaintiff was a professional golfer who on occasion lived and trained at her parent's home in Desert Mountain, north of Scottsdale. In February 1993, the city of Scottsdale detected both total and fecal coliform bacteria in the water system. The source of the bacteria was unknown, and before receiving notice of the contamination, Keggi, the plaintiff, became seriously ill from drinking the water. Keggi sued Desert Mountain for her injuries, and after entering into an agreed judgment and covenant not to sue, she sought recovery of \$1.2 million from Northbrook, Desert Mountain's CGL carrier.

Northbrook defended on the basis that the bacteria constituted a contaminant under the definition of "pollutant" in the 1986 Pollution Exclusion contained in its policy. The court rejected this argument, noting that since bacteria was not listed in the definition of pollutants, under the rule of *ejusdem generis*, bacteria was not similar enough in nature to the other listed items in the definition. Therefore, it did not constitute a pollutant.

The court also ruled that the pollution exclusion was intended to preclude coverage for environmental pollution, and "not for all contact with substances that can be classified as pollutants," citing *Stoney Run Co. v. Prudential-ALI Commercial Ins. Co.*, 47 F.3d 34 (2nd Cir. 1995) and *Island Associates, Inc. v. ERIC Group, Inc.*, 894 F.Supp. 200 (W.D. Pa. 1995), both discussed below. Moreover, the court determined that the exclusion was intended to preclude coverage for cleanup operations ordered under environmental laws, such as RCRA and CERCLA. Finally, the court determined that, based on the summary judgment evidence, the source the bacteria was unknown and could have resulted from causes unrelated to traditional environmental pollution. Therefore, Northbrook did not sustain its burden to demonstrate that the exclusion was intended to apply to the facts presented before the court.

Cases such as *Keggi* will undoubtedly be relied upon by insureds in arguing that naturally occurring mold, including even its airborne spores which are spread throughout a building, do not constitute the type of substances, that is, irritants and contaminants which are the products of industrial activities which are the target of the pollution exclusion.

Other Indoor Emissions "Gone Awry"

Another line of cases which will impact the applicability of the pollution exclusion to mold and mildew claims are those which deal with indoor contamination due to unexpected results stemming from every day activities. Once again, some courts have tended to view indoor contamination generated by such activities to be beyond the scope of a pollution exclusion regarded as applying to industrial polluters. Perhaps the most frequently cited judicial statement of this point of view is found in *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992). In that case, the insured purchased an electrical transformer for use at its garage. It was disconnected, and 12 years later, it was sold to a scrap metal processor. An employee of the processor cut the transformer open with a blowtorch while preparing it for resale as scrap, and in the process released 80 gallons of oil laden with polychlorinated biphenyls. The insured sought coverage from its CGL carrier for the lawsuit filed against it by the scrap metal processor's employee and its carrier denied coverage, based upon, in part, the pollution exclusion, which was written on the 1986 form. Despite the hazardous nature of the spill, the court accepted the insured's argument that the term "pollutants" in the exclusion did not encompass all releases of irritants or contaminants, but only those associated with industrial emissions, waste disposal or other pollution-generating activities. The court's oft-quoted analysis is as follows:

The terms 'irritant' and 'contaminant,' when viewed in isolation, are virtually boundless, for 'there is virtually no substance or chemical in existence that would not irritate or damage some person or property.' Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injury suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain

conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution. [Discussing various court cases] ... All involve injuries resulting from everyday activities gone slightly, but not surprisingly, awry. There is nothing that unusual about paint peeling off the wall, asbestos particles escaping during the installation or removal of insulation, or paint drifting off the mark during a spray painting job. A reasonable policyholder, these courts apparently believed, would not characterize such routine incidents as pollution.

Id. at 1043-1044.

A case taking the opposite view is a *Assicurazioni Generali v. Neil*, 163 F.3d 997 (4th Cir. 1998), in which hotel guests suffered from carbon dioxide poisoning. There, the court rejected the insured's argument that the pollution exclusion was intended to apply only to environmental pollution, holding, instead that the exclusion applied to carbon dioxide contamination of the hotel. It should be noted that this case involved a manuscript pollution exclusion, which, even though it included the standard definition of "pollutant," it also applied to the contamination of "any environment by pollutants that are introduced at any time, anywhere, or in anyway," which influenced the court's decision.

Courts which have considered the rationale of cases such as *Pipefitters v. Westchester* have, at best, reached a mixed bag of results, none of which point to a clear direction for resolution of CGL coverage for indoor mold contamination. The following are just a few examples of general categories of indoor contamination cases upon which courts have disagreed on the applicability of the pollution exclusion.

Carbon Dioxide

In *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997), the Wisconsin Supreme Court held that the 1986 Pollution Exclusion did not apply in a "sick building" claim where an inadequate air exchange ventilation system in an office building caused an excessive accumulation of carbon dioxide in the work area. The resultant poor air quality caused the plaintiffs to sustain headaches, sinus problems, eye irritation, extreme fatigue, etc. Relying upon *Pipefitters v. Westchester*, the court held that the pollution exclusion was ambiguous when applied to injuries resulting from the breathing of carbon dioxide, an everyday activity gone slightly, but not surprisingly, awry. Due to its ruling that the exclusion was ambiguous, the court specifically stated that it did not consider whether there had been a discharge or dispersal under the pollution exclusion clause.

Similarly, the court in *Mt. Lebanon v. Reliance Ins. Co.*, 2001 Pa.Super. 177, 2001 Pa.Super. LEXIS 924 (June 14, 2001), held that methane contained in natural gas is not a "pollutant" under the standard definition of "pollutant" in the pollution exclusion. In that case, gas from a ruptured line entered the sewer system and traveled into the plaintiff's property, causing a failure. The city of Mt. Lebanon sought coverage under a CGL policy, to which a "total pollution exclusion" was attached as an endorsement. The insurer denied coverage. In making its determination, the court applied principles set out in *Madison Constr. Co. v. Hollysville Mut. Ins. Co.*, 557 Pa. 595, 735 A.2d 100 (1999), a case in which the Pennsylvania Supreme Court affirmed a grant of summary judgment to an insurer that a concrete curing compound constituted a pollutant. The court determined that the policy did not define the terms "contaminant" or "irritant." It rejected the insurer's argument that natural gas is not innocuous and that it has harmful effects such as causing explosions, asphyxiation and death.

The court reasoned that rather than speaking in terms of the danger or harmful effects of natural gas, the pollution exclusion requires the court to determine whether in the context of a particular factual situation natural gas is an irritant or a contaminant. To deem any substance which may have harmful effects under certain circumstances to be unambiguously a pollutant *per se* would be to create an absurd result. Therefore, the court upheld the insurer's duty to defend.

Lead Paint

Lead paint has also been the subject of analysis of whether it constitutes a "pollutant" in a pollution exclusion. The exclusion in that case, part of the homeowner's policy, excluded coverage for damage resulting from the discharge, dispersal, release or escape of irritants, contaminants, or pollutants. In up-

holding coverage for a landlord in connection with an action brought by a tenant for lead poisoning of a tenant's infant child, the court in *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617 (1995), held that as applied to flaking lead paint, the exclusion was ambiguous. Another case is *Atlantic Mutual v. McFadden*, 413 Mass. 90, 595 N.E.2d 762 (1992). There, the court stated that the Insured could reasonably have understood that the 1986 Pollution Exclusion applied to coverage for injury caused by certain forms of industrial pollution, but not injury caused by presence of leaded materials in a private residence."

A case which applies even broader reasoning in favor of coverage is *Schumann v. State of New York*, 166 Misc. 2d 802, 610 N.Y. S.2d 987 (1994). In that case an employee of the insured bridge contractor was injured and filed an action against the State of New York which was also insured on the same policy. The insurer denied coverage under the 1986 Pollution Exclusion. One of the allegations was that the contractor had failed to provide its employee with appropriate protective devices and the court held that "in New York, there is evidence of a reluctance to absolve insurers from any responsibility solely because the injury in question resulted from the injured party's contact with a substance that, in other circumstances, could be considered a pollutant ... Because the exclusion clause may be reasonably interpreted to apply only to instances of environmental pollution, we find that the court did not err in holding that the exclusion did not apply in this case." *Id.* at 806-807.

Of course, other courts have disagreed, with one of the more complete analyses being set out by the Wisconsin Supreme Court in *Peace v. Djukic Enterprises, Inc.*, 596 N.W.2d 429 (Wis. 1999). That claim involved injuries to a plaintiff's child from ingesting lead paint in an apartment owned by the insured. The court ruled that the pollution exclusion denied coverage for bodily injury from the ingestion of lead in paint that chips, flakes, breaks down into dust or fumes. When the pollutant, lead, once contained, begins to disperse, discharge or escape from the containment of the painted surface, it falls within the plain language of the pollution exclusion. The court distinguished *Donaldson v. Urban & Land Interests, supra*, decided by that court only two years earlier, as simply a "sick building" case involving exhaled carbon dioxide, which is universally present and generally harmless in all but the most unusual circumstances. The same cannot be said for lead paint chips, fine flakes, and dust. They are widely, if not universally understood to be dangerous and capable of producing lead poisoning. The court also stated that the toxic effects of lead have been recognized for centuries, and reasonable owners of rental property understand their obligation to deal with the problem. *See also, Auto-Owners Ins. Co. v. The Housing Authority of the City of Tampa*, 121 F.Supp.2d 1365 (N.D. Fla. 1999)(lead paint is a "pollutant" under the category of chemicals found in the 1986 pollution exclusion).

While mold spores are live organisms, as opposed to man-made chemicals, nevertheless, the analogy to lead is powerful. The mold grows in the plenums, duct work and walls of buildings, flaking out or otherwise dispersing spores into the air, like lead flakes from paint. However, mold more closely resembles these type of generally harmless substance like carbon dioxide, which the *Peace* court intimated was less likely to be excluded from the 1986 pollution exclusion.

Other cases involving whether indoor lead contamination constitutes a "pollutant" under the pollution exclusion include: *Byrd v. Blumenreich*, 317 N.J.Super. 496, 722 A.2d 598 (1999) (1986 Pollution Exclusion does not apply to injury caused by lead poisoning resulting from flaking off of lead paint, in an apartment over a number of years; exclusion applies to an active physical event; *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. App. 1999) (denying coverage under 1999 exclusion under ordinary, not technical meaning of "pollutant"); *Oates v. State of New York*, 157 Misc.2d 618, 597 M.Y.S.2d 550 (1993) (lead paint is a chemical and a contaminant that can irritate and poison and a "pollutant" under the 1986 Pollution Exclusion; *Lititz Mutual Ins. Co. v. Clifford Stely*, 746 A2d 607 (Pa. Super. 1999) (flaking lead-based paint is a "pollutant" under 1986 Pollution Exclusion."

Construction Materials and Operations

Frequently, construction operations can produce fumes and vapors in enclosed areas. It is no surprise that courts have reached varying results when determining injury caused by such emissions are within the pollution exclusion. Once again, one of the key issues is whether the substance constitutes a "pollutant" under the facts of the claim for purposes of exclusion.

One of the cases to address that issue is *Island Associates, Inc. v. ERIC Group, Inc.*, 894 F.Supp. 200 (W.D.Pa.1995). In that case, employees of a medical center claimed they were exposed to fumes due to the insured's use of a cleaning compound to clean and remove asbestos floor tile mastic. The CGL policy under which the insured sought coverage included a pollution exclusion substantially similar to the 1986 Pollution Exclusion. The court held that the exclusion was ambiguous as applied to the specific facts of the claim. The court applied the "common sense approach" set out in *Pipefitters v. Westchester, supra*, and held that fumes from a cleaning compound which had not been identified as hazardous or toxic and which was confined to a small area within a work site did not constitute a pollutant which had been discharged within the meaning of the exclusion. For a similar result, see *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27 (1st Cir. 1999). In that case, the court applied a "reasonable insured" standard to the total pollution exclusion. The claim involved injury to an employee who contracted occupational asthma as being exposed in her work place to fumes discharged by the roofing products used by a roofer while repairing the roof of her office. The court, again applying cases such as *Pipefitters v. Westchester*, determined that the exclusion was ambiguous as a matter of law when applied to the claim before it.

Other courts have taken an opposite tact, exhibiting little difficulty denying coverage for similar claims. For example, in *Madison Constr. Co. v. The Harleysville Mutual Ins. Co.*, 735 A.2d 100 (Pa. 1999), the court applied the 1986 Pollution Exclusion, holding that the fumes from a concrete curing chemical being used in an enclosed polyethylene envelope on a construction site constituted a pollutant. The court quoted the reasoning of the lower court as follows:

The court simply cannot construe the policy language any way other than finding that the fumes in the instant case were pollutants. First, the language of the exclusion provision clearly states that 'fumes' are regarded as a 'pollutant.' Second, when canisters of a liquid or other compound are brought onto a premises, opened, and the material, upon exposure to the air or application to a surface, causes noxious fumes to emanate and make person dizzy, the fumes are clearly pollutants.

Id. at 604. The court further noted that the specific product at issue was not innocuous, rather, its harmful effects were well known.

Similar cases denying coverage on the basis that the substance constituted a "pollutant" include *American States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) (applying Mississippi law, fumes from ordinary paint used on interior walls and floor causing injury due to claims' chemical hypersensitivity constituted a pollutant under the 1986 Pollution Exclusion); *A-One Oil Inc. v. Massachusetts Bay Ins. Co.*, 250 A.D.2d 633, 672 N.Y.S.2d 423 (1998)(asbestos dust released upon removal of furnace constitutes a pollutant); *Deni Associates of Florida, Inc. v. State Farm Fire & Cas.*, 711 So.2d 1135 Fla. (1998)(claim arising out of ammonia spill when tenant moves blueprint machine resulting in evacuation of building is excluded as a pollutant under 1986 Pollution Exclusion); *Altantic Avenue Associates v. Simple Solutions, Inc.*, 24 P.3d 188 (Kan. App. 2001)(cement cleaner spilled from drum, and which damaged concrete floor in building, is a pollutant under 1986 Pollution Exclusion since definition contained no exception for "finished consumer products").

The wide disparity of the court decision as to what constitutes a "pollutant" under the Pollution Exclusion makes it very difficult to hazard a guess as to how the mold issue will be eventually resolved. Factors which support coverage under these circumstances include the fact that the mold infestation usually results from an innocuous source, i.e., water, rather than toxic or poisonous chemicals. Moreover, mold is a micro-organism and does not readily fit with the substances which are defined as pollutant under the standard exclusions, including irritants, contaminants, including smoke, vapor, soot, fumes, acids, alkaloids, chemicals and wastes. The reasoning of courts such as *Keggi v. Northbrook* may be persuasive in these instances, especially when considered together with issues as to whether an indoor contamination is truly an environmental discharge, as set out immediately below.

Applicability of the Pollution Exclusion: Discharge, Dispersal or Release

The other issue which is part and parcel of the analysis of whether an indoor contamination, whether by mold, carbon dioxide, lead, or other substances is subject to the pollution exclusion is whether such an indoor contamination constitutes the type of discharge, dispersal or release targeted by it. In other words, can an indoor contamination be regarded as the type of environmental pollution to which the pollution exclusion is directed? Of course, part and parcel of the resolution of that issue is whether in fact the pollution exclusion is directed only at the classic type of environmental pollution, the type which led to regulation by state and federal governments, or whether it should apply to any and all emissions. Frequently, the determination of this issue presupposes the result which a court reaches as to applicability of the pollution exclusion, as was discussed above in connection with the definition of "pollutant." The same type of analysis applies to the discharge, dispersal or release issue.

1973 Pollution Exclusion versus the 1986 Pollution Exclusion

This issue was more easily resolved under the language of the 1973 Pollution Exclusion. In that connection, the 1973 Pollution Exclusion denied coverage for the "discharge, dispersal, release or escape" of pollutants "**into or upon land, the atmosphere, or any course or body of water ...**"

The 1973 Language

Due to the 1973 requirement that the pollution be discharged or released into or onto land, the atmosphere or water, various courts have indicated that the 1973 Pollution Exclusion does not apply or is ambiguous when applied to indoor pollution. For example, in *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479 (3d Cir. 1981), the court held that CGL carrier was obligated to defend a claim against an insured oil company brought by an employee who was injured on the job. At the time of his injury, the employee was exposed to highly toxic lead while cleaning the inside of a tank. The court determined that there was no discharge or release of toxic chemicals into or upon land, the atmosphere or any body of water, so that the exclusion did not apply.

Other courts have found the 1973 Pollution Exclusion to be ambiguous when applied to indoor exposures. In *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506 (N.Y. 1993), the court held that the 1973 Pollution Exclusion's requirement that the pollutants be discharged into the "atmosphere" was ambiguous as to workers exposed to asbestos while working with or around asbestos manufactured by the insured. In the eyes of the court, the pollution exclusion was intended to exclude coverage only for broadly dispersed environmental pollution into the external atmosphere. Similar interpretations of the 1973 language were made by the courts in *National Standard Ins. Co. v. Continental Ins. Co.*, Slip. Op., No. CA-3-81-1015-D (N.D. Tex. Oct. 4, 1983). Applying Texas law, the court held that the Pollution Exclusion applied to claims of injury based upon exposure to carcinogens emitted into the ambient atmosphere, but not to claims of employees exposed to toxic carcinogens in enclosed working environment. See also, *USF&G v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991) (1973 Pollution Exclusion applies to emissions into external atmosphere which surrounds the earth and not the release of a contaminant or a pollutant within a building).

The 1986 Language

However, the language relating to release of pollutants "into or upon land, the atmosphere or any water course or body of water" was not included in the 1986 pollution exclusion. Rather, the 1986 Pollution Exclusion speaks in terms of discharge as "at or from any premises, site, or location." The effect of the removal of this language was recognized by the court in *Oates By Oates v. State of New York*, 597 N.Y. S.2d 550 (N.Y. Cl. 1993). In that case, the former custodian of a university building whose family had occupied an apartment brought suit against City University of New York ("CUNY") for its alleged negligent failure to remove lead paint from the apartment or to have warned of its dangers. CUNY was insured under a CGL policy including a 1986 Pollution Exclusion and filed a declaratory judgment against

the carrier claiming that it was obligated to defend CUNY against the claim. In response, the insurer relied upon the pollution exclusion. In opposition, the insured argued that the exclusion was intended to apply to intentional environmental pollution, based upon *Continental Casualty Co. v. Rapid-American Corp.*, *supra*, the case discussed above and which dealt with the 1973 exclusionary language. However, the court recognized the difference between the 1986 and 1973 language, stating:

Not surprisingly, many insurance policies were then redrafted. However, not only did they take out the 'sudden and accidental' language, but they also removed the reference to 'land,' 'atmosphere'; and 'body of water' substituting 'at or from premises you own, rent, or occupy.' These are now referred to as 'absolute' pollution exclusion provisions. Cases subsequent to *Continental*, when confronted with this exclusionary language, have held that the only reasonable interpretation is that it 'is just what it purports to be – absolute' ... and it excludes any and all personal injuries resulting from pollutants released at or from the insured's premises whether intentional or not. In all candor, we cannot imagine a more unambiguous statement of intent than, after being told by the courts that "land, atmosphere and water course' imply industrial pollution, to replace such language with 'premises you own, rent or occupy.' In the absence of an ambiguity we cannot rewrite the policy to suit CUNY and hold that *Continental* result to be inapplicable to the instant matter.

* * *

We therefore interpret the language to exclude coverage if, but only if, personal injury resulted from the poisoning, internal or external, caused by a chemical or chemical-like substances contained in the definition of pollutants or similar to those listed.

Id. at 553.

Other courts have similarly applied the 1986 pollution exclusion to situations involving indoor emissions. For example, in *League of Minnesota Cities Insurance Trust v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. App. 1989), the court applied the 1986 Pollution Exclusion to a claim involving injuries which occurred when the levels of nitrogen dioxide, a toxic byproduct of a Zamboni ice cleaning machine, built up in the interior of an arena. Similarly, in *Prudential-LMI Commercial Ins. Co. v. Meadowood Condominium Association*, 1992 U.S. Dist. LEXIS 11461 (E.D. Pa. Aug. 3, 1992), suit was filed against a condominium association for bodily injuries suffered by condominium owners after the insured association had the condominium complex sprayed with insecticides. The court held that the 1986 Pollution Exclusion "must be applied as written," and that it denied coverage for damages which arose out of the dispersal of insecticide/pollutant.

However, other courts have refused to apply the 1986 exclusion in an action which did not involve the dispersal of pollutants into the atmosphere. In *West American Ins. Co. v. Tufco Flooring East, Inc.*, 409 S.W.2d 692 (N.C. App.1991), the insured floor resurfacers was sued by a chicken processor after fumes from styrene used in the resurfacing of the floor of a chicken processing plant caused damage to chickens by infiltration of the vapors and fumes into chickens being processed. The court held that the pollution exclusion and the operative policy terms indicated that a discharge into the environment was necessary for the exclusion to be applicable. The court stated that the historical purpose of the pollution exclusion limited its scope to environmental damage. While recognizing that the exclusion was rewritten in 1986 and that the revision deleted the "into or upon land, the atmosphere or any water course or body of water" language, the court nevertheless held that the terms "discharge," "dispersal," "release" and "escape," were terms of art in environmental law and that any discharge, dispersal, release or escape of a pollutant must be into the environment in order to trigger the pollution exclusion clause to deny coverage for the insured. In that case, there was no discharge into the atmosphere, so that coverage was upheld for the damage to the chickens.

Other courts followed the lead of *Tufco* in refusing to apply the 1986 Pollution Exclusion despite the deletion of the "land, atmosphere, or body of water discharge requirement." These cases relied on the rationale that the pollution exclusion is intended to deny coverage for traditional pollution of the environment, and not indoor contamination. Of course, the cases are split on this issue and most likely an

equal number of courts have applied the 1986 Pollution Exclusion to indoor emissions. A very partial score card is as follows.

Cases refusing to apply the exclusion include:

- *Republic Franklin Ins. Co. v. L&J Realty Corp.*, 280 A.D.2d 351, 720 N.Y.S.2d 473 (App. Div. [1st Dept.] 2001), *mot. for leave to appeal denied*, 2001 N.Y. LEXIS 1919 (June 28, 2001)—upholding coverage for mental injuries suffered by small child resulting from exposure to carbon monoxide released from a faulty boiler in an apartment building. Ambiguity exists where the term “release, discharge, or dispersal” of pollutants implies that the contamination must be environmental.
- *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997)—upholding coverage for tenant’s claims arising out of carbon monoxide emissions from furnace of building after undertaking extensive review of legal authorities and concluding that the deletion of the land, atmosphere, and water requirement from the 1986 Pollution Exclusion did not portend an expansion of the pollution exclusion beyond the context of traditional environmental contamination. Operative policy terms such as a “discharge, dispersal, release and escape” are environmental terms of art, citing *Tufco Flooring, supra*.
- *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34 (2nd Cir. 1995)—1986 Pollution Exclusion is ambiguous because it was reasonable to interpret the clause as applying only to environmental pollution, and the release of carbon monoxide into an apartment was not the type of environmental pollution contemplated by it.
- *Meridian Mutual Ins. Co. v. Kellman*, 197 F.3d 1178 (6th Cir. 1999)—upholding coverage for a teacher’s claim against a contractor when she was injured by fumes from a dry wall sealant being used on a floor immediately above her. No reasonable person could conclude that the policy unambiguously excluded coverage for injuries which occurred only a few feet from where the chemicals were being used.
- *Island Associates, Inc. v. ERIC Group, Inc.*, 894 F.Supp. 200 (W.D.Pa. 1995)—fumes from a cleaning compound used to clean and remove asbestos floor tile mastic in a medical center was not discharged or dispersed within the terms of the 1986 Pollution Exclusion.
- *Bituminous Casualty Corp. v. Advanced Adhesive Technology, Inc.*, 73 F.3d 355 (11th Cir. 1996)—ambiguity in the term “discharged” was resolved in favor of an insured manufacturer where claimant died while installing carpet using insured’s adhesive product in his boat.
- *Generali-U.S. Branch v. Caribe Realty Corp.*, 160 Misc.2d 1056, 612 N.Y. Supp.2d 296 (1994)—no discharge under 1986 Pollution Exclusion arising out of a claim involving ingestion of paint chips containing lead.

On the other hand, a sampling of cases which have found indoor emissions to constitute a dispersal or discharge under the pollution exclusion include:

- *William E. McKusick v. Travelers Indemnity Co.*, 2001 Mich.App. LEXIS 1999 (June 8, 2001)—a pollution exclusion denying coverage for a “discharge, dispersal, seepage, migration, release or escape” of a pollutant which arises out of the insured’s work or product applies to toxic tort injuries arising out of the failure of the insured’s high-pressure hose delivery system used to carry polyhydroxyl resin and toluene diisocyanate (TDI), causing plaintiff employees to be exposed to and injured by the toxic substances. The court rejected the insured’s argument that the injuries did not arise out of the insured’s product, the hose delivery system. Rather, the court held that the release of the TDI and the resulting injuries had a significantly more than remote connection to the defective product, and were the result of the spill of pollutants.
- *PR Tech Systems, Inc. v. Mt. Hawley Ins. Co.*, No. 1:00CV368 (N.D. Ohio); 15 Mealey’s Litigation Report: Insurance 5 (June 19, 2001)—a spill of pcb’s during the process of transferring contami-

nated waste into a tanker and pumping it through the insured's waste reclamation system fits within the ordinary definition of dispersal or migration under the terms of a pollution exclusion contained in a property policy.

- *West American Ins. Co. v. Bend & Desenberg*, 925 F.Supp. 758 (N.D.Fla. 1996)—applying the 1986 Pollution Exclusion to claim involving sick building syndrome due to air-borne contaminants from the attic space. The case does not discuss the actual causes of the sick building syndrome.
- *Bernhardt v. Hartford Fire Ins. Co.*, 102 M.D. App., 648 A.2d 1047 (1994)—court applies 1986 Pollution Exclusion to carbon dioxide fumes from a central heating unit. Based on a drafting history of the exclusion, it was clear and unambiguous as applied to the facts of the case and was not limited to industrial pollution.
- *Madison Constr. Co. v. The Harleysville Mutual Ins. Co.*, 557 Pa. 595, 735 A.2d 100 (1999)—injuries due to fumes from concrete curing chemical being used in an enclosed envelope on a construction job site were discharged and dispersed within the terms of the exclusion. The court was not at liberty to engraft upon the exclusion the requirement that the discharge or the dispersal be into the environment or to the atmosphere.
- *Peace v. Djukic*, 228 Wis.2d 106, 596 N.W.2d 429 (1999)—1986 exclusion applies to chipping, flaking, or breaking down of lead paint into dust or fumes which dispersed, discharge or escape from a containment of the painted surface.
- *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. App. 1999)—under the 1986 Pollution Exclusion, lead poisoning from flaking paint constitutes a discharge, dispersal or release.
- *Lititz Mutual Ins. Co. v. Steely*, 746 A.2d 607 (Pa. Super. 1999)—movement of paint dust from the wall constitutes a dispersal or discharge under the 1986 Pollution Exclusion.

The rationale of the last couple of lead cases mentioned above may provide carriers with an argument as to the contamination of building with mold spores, once they are no longer contained behind wall covering or insulation, etc. At that point, the "movement" of the spores throughout the building could be regarded as a type of discharge or dispersal under those cases.

Other Cases Addressing "Dispersal"

Two cases from federal courts in Texas illustrate the fluidity of the term "dispersal." In the first, *Certain Underwriters at Lloyds v. C.A. Turner Constr. Co. Inc.*, 112 F.3d 184 (5th Cir. 1997), pipefitters were injured while welding pipe at a Texaco chemical plant. At the time, they were outdoors, engaged in welding and were standing on scaffolding which was enclosed in a plastic tent to protect them and the pipe they were repairing from rain. Rags had been stuffed into pipe to prevent chemical leakage but when the rags were removed from the pipe, either the rags or the chemicals made contact with the pipe which had just been welded and the cloud of phenol gas was created. One employee was injured by inhaling the gas. The insurer denied coverage based upon a total pollution exclusion for "pollution and/or contamination of air, land, water and/or any other property and/or any person irrespective the cause of the seepage and/or pollution and/or contamination, and whenever occurring."

The court rejected the insured's contention that there should have been a distinction between environmental pollution and workplace contamination under the pollution exclusion clause before the court. The insured also argued that under the rationale of *Pipefitters v. Westchester, supra.*, the exclusion should not apply where the incident involved a commonly used chemical or only a slight amount of substance was released. In addressing the *Pipefitters v. Westchester* argument, the Fifth Circuit stated:

We agree with the Seventh Circuit's common-sense approach. However, we do not believe that our conclusion offends that approach in view of the substantial nature of the discharge that occurred here. According to Galbreath's deposition testimony, once the rags were removed from the pipe, "it was just like somebody ... threw a smoke bomb in there. I couldn't even see – couldn't see a hand in

front of your face.” The emission of the harmful fumes filled up a temporary plastic tent that enclosed scaffolding intended to support at least three people. The scope of this release distinguishes it from the Seventh Circuit’s example of the sale of a bottle of Drano and supports our conclusion.

Id. at 189. This case appears to indicate that where there is a more limited emission, perhaps within a building, and perhaps one that occurs over time like a mold infestation, the pollution exclusion may not apply.

Another such case is *Clarendon American Ins. Co. v. Bay, Inc.*, 10 F.Supp. 2d 736 (S.D. Tex. 1998). This case involved a companion insurance coverage dispute to toxic tort litigation filed by numerous plaintiffs, both third parties and employees, alleging injury from the defendants’ manufacture and installation of concrete throughout Texas. One of the policies included a total pollution exclusion identical to the one quoted earlier in this paper and which denied coverage for bodily injury and property damage arising out of “discharge, dispersal, seepage, migration, release or escape of pollutants at any time.” There were differing allegations by the plaintiffs. One set maintained that they were injured through air fume emissions of cement, raw materials and additives due to the activities of the defendants. Another set, apparently employees of certain of the defendants, alleged that they often exposed different portions of their bodies to wet cement and that they contacted wet cement. Based on those allegations, the court determined that it was unable to ascertain definitively from the pleadings whether the bodily injury caused by such contact or exposure occurred when the plaintiffs’ skin touched the wet concrete while the concrete and its ingredients were in the concrete’s intended container or location, in which case resulting injuries did not stem from the discharge, dispersal, or release of pollutants. Therefore, the court found the exclusion to be latently ambiguous as to the facts alleged in the pleadings before it.

Even though neither of these cases directly addresses the issue head on, it appears that a court will closely examine the facts of the emission before it in order to determine whether a discharge, dispersal, or release of pollutants within the meaning of the pollution exclusion has occurred. The size, duration and operations being conducted during which the release occurs all seem to be factors which should be considered.

Applicability of the Pollution Exclusion: Products-Completed Operations

Most insureds, including contractors, have completed operations coverage as part of their CGL policy. That coverage provides protection against liability resulting from services, materials or structures which contractors erect or install. It is analogous to products liability coverage for manufacturing companies which produce goods.

The CGL policy defines “products-completed operations hazard” as follows:

- a. ‘Products-completed operations hazard’ includes all ‘bodily injury’ and ‘property damage’ occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work’ except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned.
- b. ‘Your work’ will be deemed completed at the earliest of the following times:
 - (1) When all of the work called for in your contract has been completed.
 - (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.

- (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, and will be treated as completed.

* * *

This coverage is critical for a contractor since it provides protection for bodily injury and property damage arising out of the work once it has been completed.

The 1986 Pollution Exclusion is generally regarded, both by the Insurance Services Office and the insurance industry in general as not applying to most completed operations exposures, particularly completed operations exposures of contractors. See, Gibson & McClendon, *Commercial Liability Insurance*, page V.D.24 (IRMI 2001). Legal commentators agree. Ostrager & Newman, *Handbook on Insurance Coverage Disputes*, § 10.02 [a] (10th Edition 2000).

The exception from the 1986 Pollution Exclusion has been noted and accepted by the courts. In *West American Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), the insured completed its floor resurfacing two days before the damage was discovered, that is, contamination of chickens at a chicken processing facility with styrene from the floor resurfacing. Quoting from IRMI's *Commercial Liability Insurance*, *supra*, the court stated:

An exception for pollution liability falling within the products-completed operation hazard is inferred by the exclusion, and ISO has stated that the exception is intended. This exception does have important coverage consequences. *If a pollution release causing bodily injury results from the insured's product are completed operation, the insured's liability to injured party is covered.*

Tufco Flooring, at 320, emphasis in original.

Although the evidence is far from conclusive, it appears that most mold infestations arising out of leaks in buildings or defective equipment take place over time. That being the case, it is most likely that property damage or bodily injury would not occur until after a contractor has completed the project or its work at the site.

This raises issues as to the applicable trigger of coverage. For example, some states, like Texas, may follow a manifestation theory pursuant to which the applicable policy triggered by property damage is the one in effect when the property damage manifests. See, *Guaranty National Ins. Co. v. Azrock Industries, Inc.*, 211 F.3d 239 (5th Cir. 2000). On the other hand, other states, notably California, may follow a multiple trigger theory, whereby all policies are triggered from the date of installation through discovery. *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 42 Cal.Rptr.2d 324, 897 P.2d 1 (1995). Obviously, in most states where the trigger of coverage is discovery of the property damage, i.e., discovery of the damage caused by mold, or, as far as bodily injury, the dates of exposure to the mold, it appears unlikely that such can occur while the insured is performing operations. In other words, the triggered policy would be one in place after the building is put to its intended use, and thus, it is a completed operation. As such, the 1986 Pollution Exclusion may not apply even though issues relating to the definition of pollutant and discharge are resolved against the insured.

Nevertheless, caution must be taken since as discussed above, many policies may contain non-standard pollution exclusions, either within the body of the policy or added by endorsement. These exclusions may, in fact, apply to bodily injury or property damage within the completed operations hazard. For example, the total pollution exclusion endorsement quoted earlier in this paper is an example of such an endorsement. Non-standard policies may include similar endorsements.

Will the Insurance Industry Respond?

The wave of mold litigation has many similarities to the asbestos litigation several decades ago. That litigation spawned a raft of insurance coverage litigation, which in turn led to the insurance industry modifying their policies to limit coverage for those exposures. Many carriers promulgated asbestos exclusion endorsements. Based on the similarities of these types of claims, i.e., the potential for large numbers of plaintiffs alleging injuries spanning over many years, the insurance industry is developing similar endorsements.

While it does not appear that standard forms have been developed as of yet, some carriers have promulgated such endorsements to be used on their CGL policies. An example of such an endorsement is as follows:

Fungus, Mildew and Mold Exclusion

This insurance does not apply to:

1. 'Bodily injury,' 'property damage,' 'personal or advertising injury' or 'medical payments' arising out of, resulting from, caused by, contributed to, attributed to, or in any way related to any fungus, mildew, mold or resulting allergens;
2. Any costs or expenses associated, in any way, with the abatement, mitigation, remediation, containment, detoxification, neutralization, monitoring, removal, disposal or any obligation to investigate or assess the presence or effects of any fungus, mildew, mold or resulting allergens; or
3. Any obligation to share with or repay any person, organization or entity, related in any way to items 1 and 2.

Such an endorsement would most likely eliminate coverage and insureds should be on the look out for such endorsements to their policies, at the time of renewal. Right now, they appear to be in sporadic use.

In addition, other carriers are contemplating coverage for mold under pollution legal liability (PLL) policies, expressly extending the definition of pollutant to include fungi, bacterial matter which produces the release of spores or the splitting of cells, including mold, mildew and viruses. However, it appears that such coverage may be provided only through a relatively small sublimit. Alternatively, in order to obtain a higher limit, an additional premium may be charged on a case-by-case basis. Still other carriers may not offer such coverage or enhancements at all.

Bodily Injury Versus Property Damage: Effect of the "Business Risk" Exclusions

The analysis above is directed primarily to the bodily injury claims arising out of exposure to harmful mold and organisms in the air inside sick buildings. In addition, property damage cases are being filed nationwide as a result of allegedly mold infested buildings. An early case of that type which has already made its way through the appellate courts is *Centex-Rooney Construction Co., Inc. v. Martin County, Florida*, 706 So. 2d 20 (Fla. App. 1998). In that case, the county sued its construction manager for dampness which promoted mold growth and excessive humidity throughout a courthouse. The source of the water infiltration, among other things, was the EIFS system. The concerns over the indoor air quality led to evacuation of portions of the building. On appeal as to issues of the scientific basis for the expert opinion supporting the verdict, the court affirmed a \$14,000,000 verdict against the construction manager. The damages were awarded for the costs of repairing the courthouse to prevent future water infiltration. Insurance issues were not the subject of the lawsuit.

Construction Defect Coverage Analysis

Mold which is the subject of construction litigation usually is the result of alleged construction defects which have allowed water to infiltrate into the building. Besides issues directly related to mold, insurance coverage for such construction defects involves a careful analysis of typical coverage issues such as whether a breach of the construction contract involves a "legal obligation" for which the insured is entitled to coverage under its CGL policy, whether a breach of contract constitutes an "occurrence," that is, unexpected or unintended injury, and primarily, the applicability of numerous so-called "business risk" exclusions. Basically, these exclusions are designed to ensure that the policy does not provide coverage to a contractor for its "business risks," those risks such as faulty workmanship which are within the contractor's own control.

Construction defect mold cases allege that the source of the moisture giving rise to the mold problem include faulty HVAC and mechanical systems, leaking windows, curtain walls, EFIS and any other defects that result in wet and damp building materials which in turn serve as a breeding ground for mold, mildew and other organisms. The water damage to the building itself (which provides a breeding ground for the mold) constitutes the potentially covered property damage forming the basis of the CGL insurance claim. That damage should usually be unrelated to the mold and most likely would have to be repaired regardless of the presence of a "pollutant" within the building. The long and the short of it is that the water damage to the building is usually not a result of pollution, so that it shall not be a release, discharge or dispersal of a pollutant. As such, the pollution exclusion in the CGL policy should not apply. Therefore, coverage for repairing the alleged building defects, in the event they are sought from the insured contractor, will need to be evaluated pursuant to the traditional analysis of property damage claims involving defective work under the CGL policy.

A case which recently addressed the applicability of these types of business risk exclusions to a claim involving mold is *Radenbaugh v. Farm Bureau Gen. Ins. Co.*, 240 Mich. App. 134, 610 N.W.2d 272 (2000). In that case, an insured was sued for defective workmanship, breach of contract and breach of warranty in connection with the sale of a mobile home to the plaintiffs. The insured had provided erroneous schematics and instructions for construction of the home's basement foundation to the buyer. The errors resulted in seepage of water and condensation in the basement walls, constituting the threat of rot and causing mildew and mold and other health hazards, rendering the basement totally unusable. The CGL insurer refused to defend the insured's seller based upon various exclusions for damage to the insured's product and property damage expected or intended from the standpoint of the insured. The court rejected the insurer's contention that there is no occurrence under the policy, and basically determined that because the underlying lawsuit involved physical injury to property, the basement, other than the insured's own product, the double-wide mobile home, the typical business risk exclusions did not apply.

Construction defect cases are already complex in terms of insurance coverage due to the many exclusions which apply and the close scrutiny to which CGL carriers subject them. The environmental issues surrounding construction defects involving mold, arising out of the applicability of the pollution exclusion, simply add another layer of complexity.

Repairs as Cleanup

It is possible that an action against the insured contractor could be framed, at least in part, as a "cleanup" of "pollution," of the mold contamination. In that event, the second clause of the 1986 Pollution Exclusion, paragraph f(2), stating that the insurance does not apply to property damage arising out of any request, demand or order that the 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" could arguably be invoked. However, the argument for applicability of the clean up provision of the 1986 Pollution Exclusion should suffer from the same weakness as the argument for applying the general provision of the exclusion: the repairs are made for the purpose of curing the moisture problem, that is, the actual property damage. Elimination of the alleged pollutant, the mold, is a collateral benefit to repairing the defect.

Conclusion

As can be seen, there are many issues to be decided as to the coverage available to an insured contractor for indoor mold and mildew problems. These issues are sure to be addressed by the courts in light of the proliferation of these problems and lawsuits seeking redress for them. If past experience with court treatment of the pollution exclusion is any indication, the results should be interesting *and* controversial.