

Insuring the Mold Exposure

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Insuring the Mold Exposure

Course Overview

Mold is a serious problem for the insurance industry. The damage done to property is extensive and the health issues are alarming. Insurance companies have been blindsided by the number and severity of mold claims. Some companies have ceased writing property insurance in states where the mold problem is out of control. This course is designed to help you better understand what mold is and how it affects property. We will look at the insurance company perspective as well as the issues facing the property owner. The course will also review some typical property coverage forms and how they respond to mold losses and the ramifications that mold has had on the insurance industry.

Course Objectives

After completing this course, you should be able to:

- Determine what mold is and the damage it causes
- Recognize the affect mold claims have had on the insurance industry
- Identify the possible liability issues surrounding mold
- Understand how mold relates to risk management

Part I: What is Mold and What Damage Does It Cause?

In this section we will explore the definition of mold to find out exactly what is and is not mold. We will also look at the damage that it can cause to property and to your health. Once the mold is discovered, the next question is how to clean it up and control it in the future. This section will also look at ways mold can be "hidden" in buildings. Mold is a problem that may not be detectable, yet a problem just the same.

The Definition of Mold

Mold is a fungus, a simple microscopic plant. Outdoors they live in the soil and help breakdown organic matter. Indoors, it can grow on virtually any substance when moisture is present. They produce "spores" which waft in the air and form "colonies" wherever they land. So you have mold flying around you right now!! Don't panic, you are in no immediate danger. The spores in and of themselves are not a threat to our health or our property. It is only when moisture is added to these "colonies" that the problem begins and damage occurs.

Different Types of Mold

There are thousands of species of mold but only a few dozen are significant allergens that can cause allergies and asthma. In some cases they can produce potentially toxic substances called "mycotoxins." In addition, some mold species are carcinogenic and can, for example, cause kidney cancer.

Do you like Blue Cheese dressing on your salad? Do you know someone who does? Well you may have just consumed mold!! Mold comes in many colors, most often a bluish green or white. How does that Blue Cheese dressing sound now? Believe it or not, some molds ARE consumable and will not harm you. Sure doesn't sound very appetizing, does it?

On the other hand, STACHYBOTRYS (pronounced STACK-E-BOT-RIS), is a type of mold that is a greenish-black color that grows on materials with high cellulose content such as drywall, ceiling tiles and wood that become chronically moist due to excessive humidity. This greenish-black form is often referred to as "Black Mold" and it is a different type of fungus. It is considered so dangerous, that it is listed as an agent of biological warfare in many military manuals.

It is important to note here that mold is a fungus, but not all fungi are considered mold! This is where the insurance problem lies and the causes of all the concern within the property and liability coverage forms which we will discuss in detail later in this course.

Cause and Affect of Mold on Property and Health

What causes mold to grow? When does it become dangerous? First off, fungi spores are present everywhere floating through the air and landing on materials forming colonies. Up to this point, we do not have a problem. Building materials in drywall, wood, ceiling tiles, paint and plaster act as a food source for the mold spores. Landing on these items and using them as a food source creates the "colony" we spoke of earlier. Water or moisture when added to this mixture creates the medium for digestion and the beginning of active fungal growth. Nothing happens until we add moisture or water to the mix!

Think about the activities that go on in the normal household on any given day that can add moisture or water to these "colonies" of spores that have landed on drywall, wood, ceiling tiles, paint and plaster. In fact the more porous the material, the more likely a spore colony may exist. Imagine the moisture that is present in a bathroom. Running water in a sink in and of itself is not the problem, but what if the water were to spray outside the sink area making the counter top wet or the cabinetry below the sink moist?

Most of the cabinetry in our bathrooms are made up of pressed particleboard and are not solid pieces of wood. The composite material in the bathroom cabinets and counter tops are a great food source for mold spores. When the water from the sink overflows, or is sprayed outward and spills onto the cabinets and counter-tops, do we clean it all up promptly and properly? If not, we just added moisture to a possible colony of mold spores just waiting for a drink!!

How about the last time someone in your household used the shower? Most of us will run the shower with rather hot water for quite some time. Did you ever notice the walls around the shower after you're done? Notice how damp they are with the fine mist of moisture contained in that small confined area.

Most bathroom walls are made of drywall, which is a great food source for mold, and YOU just added the water. It is probably safe to say that most people do NOT wipe down their bathroom walls after a shower.

Let's move into the kitchen and think about all the moisture going on in there. Stuff spills out of the refrigerator, steam escaping from the cooking procedures going on, containers being opened, and so on and so on. Where is this moisture landing? Once again the countertops, cabinetry and walls behind the sink, stove and refrigerator are possibly all drywall or very porous materials.

Here are a couple of questions to ask. What kinds of moisture situations exist in the area of the house where the laundry is done? Where is water coming into the building on a regular basis and what is that water touching and where is it going to end up?

Mold has been around for ages, but the changes in the building designs from the 1970's onward have heightened the problem. The drive toward energy efficiency had the unintended effect of sealing off indoor airflow so that moisture doesn't evaporate well once it is introduced to the structure. Today's building materials are more cellulose based and made of composite materials with a very high paper content which mold thrives on.

If you live in a structure built prior to 1970, the chances of your home being very energy efficient are low. Back then, contractors were not concerned about energy efficiency as the cost to heat and cool a home were not a major concern. Many of these "older" structures have often been referred to as "chilly" or "not warm and cozy" because of the airflow through the walls, windows and roof.

From a mold standpoint though, these older structures were not a problem. Moisture was still introduced into the structure in everyway mentioned before, but the natural air flow in the structures could in affect dry up the dampness and moisture thereby stopping the active fungal growth.

The situations we have just presented are mostly confined or planned times when water is released into our homes, but what about unconfined water being released into the building environment? Accidental discharge of water from a plumbing device could be an example of unconfined water. A plumbing device can be considered any or all of the following:

- Household plumbing including all pipes, drains, gutters & downspouts
- Toilets
- Bathtubs and shower enclosures
- Sinks
- Hot Water Tank
- Washing Machine
- Aquariums
- Water Beds
- Coffee and Tea brewing machines

Unconfined water could also enter from a hole in the roof, or a window or door that has been left open or a hole is now present in those items. Open chimneys and furnace flues can also be an avenue of entrance for water.

So let's see where we are up to this point. Mold and fungi spores are wafting through the air and landing on porous types of materials and then we let moisture into the mix and the active growth starts. In other words, nothing happens until we let it happen!! Fungal growth begins within 12 hours and colonization can occur within 2 to 3 days!

Visible mold can be an indication of more extensive, unseen growth in wall cavities, ceiling plenums, attics and crawlspaces. What you see may only be the tip of the iceberg to what is really there. Common physical ailments are flu-like symptoms such as: headache, muscle aches, nausea, runny nose, congestion, coughing, sneezing, wheezing, and other respiratory symptoms.

Many of the reactions are allergy like symptoms in nature. Have you met any people that feel like they have an allergy all of sudden when these symptoms have never been a problem in their past? They were not allergic to anything before, but all of sudden they are showing allergic symptoms and trying to figure out why. Allergies usually first manifest themselves when we are young. Isn't it strange the number of adults with first time allergy symptoms? Could there be a mold problem in their homes or where they work?

Hidden Mold in Buildings

Mold spores can be anywhere in a building but require food sources and unconfined water or moisture to grow. The visible presence of mold could mean that spores not yet activated can exist throughout the building. A "moldy" "musty" odor is given off by active fungal growth. Spores that are not yet active do not give off any odor. How many times have you walked into a building or home and thought it smelled "moldy" "damp" or "musty"? That smell is there for a reason. It could be caused by a lot of things we leave around the house in a damp or moist condition, such as clothing and food, but if you can't pinpoint the odor to a specific item, then a closer look around may be in order.

Flood Cleanup and Air Quality

During a flood cleanup, the indoor air quality in a home or office may appear to be the least of your problems. However, failure to remove contaminated materials and to reduce moisture and humidity can present serious long-term health risks. Standing water and wet materials are a breeding ground for microorganisms, such as viruses, bacteria, and mold. They can cause disease, trigger allergic reactions, and continue to damage materials long after the flood. It is important to realize that excess moisture in the home is an indoor air quality concern for three reasons:

- Microorganisms brought into the home during flooding may present a health hazard. These organisms can penetrate deep into soaked, porous materials and later be released into air or water. Coming in contact with air or water that contains these organisms can cause illnesses.
- High humidity and moist materials provide ideal environments for the excessive growth of microorganisms that are always present in the home. This may result in additional health concerns such as allergic reactions.
- Long-term increases in humidity in the home can also foster the growth of dust mites which are a major cause of allergic reactions and asthma.

How to Control Mold and Clean It Up

It is impossible to get rid of all the mold and mold spores indoors. Some mold spores will be found floating through the air and in house dust. Mold spores need moisture to grow. All wet areas need to be dried thoroughly within 24 to 48 hours to prevent growth. Here are some other ways to control the mold and clean it up as presented by the Environmental Protection Agency in their publication of "Mold, Moisture, and Your Home":

- Fix plumbing leaks and other water problems as soon as possible. Dry all items completely.
- Scrub mold off of hard surfaces with detergent and water and dry completely.
- Some areas like bathrooms are hard to keep free from mold. Increase the ventilation (running a fan or opening a window) to keep mold at a minimum and scrub surfaces frequently.
- Mold discovered around air conditioning systems may require professional help. Turn off HVAC systems until remedied.
- Absorbent or porous materials such as ceiling tiles and carpet may have to be discarded if mold appears. Mold grows in empty spaces and crevices of porous materials, so it may be difficult to remove completely.
- Clean and repair roof gutters and downspouts regularly.
- Monitor air levels by checking the outside air humidity compared to the inside and keep the inside humidity level at 60% or lower.

More information is available at www.epa.gov/iaq

Summary

Although there are many types of mold, only certain forms are harmful to us and can damage our property. Mold spores are everywhere and need organic material as a food source. It is only when moisture or water is added to the mix that any active fungal growth begins. It is important to control all wet areas and any area where moisture may occur on a regular basis. Unconfined sources of water from accidental discharge of plumbing devices or holes in walls or a roof must be contained and dried immediately.

Active fungal growth begins within 12 hours and colonization can occur within 2 to 3 days. The EPA has published some guidelines on how to control mold and clean it up once it appears. Recognizing what causes mold in the first place and then knowing what to do if it appears will take care of most situations before they cause severe damage to property or possibly affect our health with allergic type symptoms. If the health concerns are ignored, they could escalate into some life threatening situations.

Part 2: Mold Claims and the Affect on the Insurance Industry

Introduction

Mold losses have had a devastating affect on the insurance industry. Insurer's were basically caught unaware of the severity of this type of claim and the wording in the property policies were vague. In this section we will examine the wording in the policies and see where the problem first began and then what the insurance industry has done to try and control and rectify the situation.

Homeowners Insurance Implications

The following is a summation an article that appeared in the Wall Street Journal which details the case of the Ballards. These homeowners sued the Farmers Ins. Group and were awarded \$32.1 million: \$6.2 million to replace the home and possessions; \$5 million for mental anguish, \$12 million for punitive damages and \$8.9 million for legal fees. The Ballards intend to go after Farmers for even more money, claiming bodily injury to Mr. Ballard and the couple's son.

The mold loss originated with a bathroom plumbing leak that damaged flooring. Mrs. Ballard claimed that the contractor told the insurer that the sub flooring should be removed, since the mold could grow in it, but that Farmers ignored the warning.

There is an exclusion for mold in homeowner forms. The reason is that the exclusion lies within the group of things that will happen over time, such as rust, corrosion, and wear-and-tear, and thus are uninsurable.

When a homeowner allows a leaky pipe to keep on dripping, or allows mold to grow within a steamy bathroom, then there is no coverage. But, the industry position is that mold originating from a covered event, such as a major storm or a burst pipe, is covered. And in fact, under certain circumstances, the newer ISO homeowner forms specifically cover mold, fungus, or wet rot damage; coverage exists when the damage results from accidental discharge if such damage is hidden.

Because of this \$32 million Ballard award the Insurance Services Office (ISO) and American Association of Insurance Services (AAIS) have formulated homeowners endorsements restricting or eliminating coverage for mold damage. (Note: in the remainder of this discussion mold is used as a catch-all term for any and all molds and fungi.) AAIS has not yet filed the endorsements with states; however, insurers using their forms may file them for themselves. Insurers who draft their own forms are addressing mold as well. Given the need to formulate homeowners rates based on actuarial principles, one sees the reasoning behind the current trends. Unfortunately, coverage that should have been available now will be curtailed.

Most have held that in the ISO homeowners forms mold damage resulting from a covered cause of loss is covered, so long as an intervening exclusion (such as neglect) does not apply. The list of excluded perils, of which mold is one, stems from earlier marine coverage forms and refers to things that will deteriorate over time and are thus uninsurable.

In the 1991 ISO HO 00 03 10 00 there are exclusions 2.e.(1) through 2.e.(8). For example: metal rusts; industrial smoke discolors walls; furnaces break down; foundations settle. These excluded causes of loss are not prefaced by concurrent causation language, as are the Section I general exclusions (1.a. through 1.h.).

Therefore, we see the efficient proximate cause theory applying - the predominate cause without which the final loss would not occur. (Be aware that not all jurisdictions recognize the efficient proximate cause theory.) For example, if a tornado removes a portion of a dwelling's roof and water gets into the interior, particularly between walls, mold damage resulting from the covered cause of loss should be covered as well. Most mold remediation experts agree that dry-out must begin within 24 to 48 hours after water damage occurs to prevent mold growth.

This time-frame is not always possible. When there is widespread loss (such as the May 3, 1999 tornado that damaged a large area of Oklahoma City; wind speeds of 318 MPH were recorded) restoration firms are often stretched beyond capacity. The homeowner whose roof has been removed may wish to mitigate damage, but given lack of resources may be unable to do more than cover the damaged area with a tarp. The exclusion for mold should not be used in that case to preclude coverage.

This is a rather extreme example. It is more common for mold damage to occur as the result of plumbing leaks. Although coverage is sometimes denied, it must be remembered that hidden

damage should be covered. An insured cannot know he has a loss and take steps to prevent further loss unless the result is visible. A bathroom pipe can leak undetected for considerable time until damage becomes visible. At that point the first manifestation of the loss becomes the date of the loss. If the insured then does nothing the exclusions of mold and neglect may be used to deny coverage. However, if the insured immediately calls a plumber to rectify damage and finds mold, the remediation should be covered.

The ISO 2000 homeowners forms recognize this. The current exclusion is A.2.c.(5) which excludes "mold, fungus, or wet rot." But the exclusion continues: "However, we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors of above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within: (a) [A] plumbing, heating, air conditioning or automatic fire protective sprinkler system, or a household appliance, on the 'residence premises'; or (b) [A] storm drain, or water, steam or sewer pipes, off the 'residence premises'."

That is not to say that only mold resulting from leaking pipes is covered; again, there is no concurrent causation language preceding this exclusion.

Not all homeowner forms are the same, however. The AAIS forms' exclusion for wear and tear, marring, deterioration, smog, mold, etc., is located in the section of general exclusions prefaced by the statement "'We' do not pay for loss if one or more of the following exclusions apply to the loss...However, 'we' do pay for an ensuing loss that is otherwise covered by this policy." And, under the exclusions applying to coverages A and B, is the preclusion of coverage for "loss caused by repeated or continuous seepage or leakage of liquids or steam from within a plumbing, heating, air conditioning, or automatic fire protective sprinkling system; water heater; or domestic appliance." Therefore, less of a case can be made for coverage for mold damage if the AAIS insured has an on-going leak. (The "continuous or repeated" language was removed from the ISO homeowners forms in the 1991 edition.)

Mold, Fungi and the Insurance Contract

In any insurance policy covering property, it is very important to understand the definitions section of the contract. In this section the insurance company defines the many terms that are going to be used throughout the policy.

The important thing to remember here is that all insurance contracts are based on the Doctrine of Adhesion which simply means that since the customer must accept the policy as it is written with no opportunity to change any of the wording, any ambiguity or vagueness in the content will always be ruled or interpreted in the favor of the policyholder. This doctrine is very important as it protects the consumer from misleading and confusing statements within the policy. Courts will almost always rule in favor of the customer if the wording in the policy is vague.

The Insurance Service Office (ISO) policy forms for property coverage that most insurance companies use when issuing policies define "fungi" as any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi. Clear as mud huh? Isn't it interesting in the definition of "fungi" they used the word "fungus" twice. How do you define a word by using the word in the definition!

Let's take a look at how the homeowner policy issued by ISO in 1991 treats damage done to real property. If the policy was written on a named peril basis, where the coverage is only for direct

damage done to property by a listed and named peril, there was no coverage for any damage done by mold, fungus, wet or dry rot because these perils were NOT listed and named. Some homeowner policies presented coverage for the dwelling and other structures on an all-risk basis where coverage was provided for ALL risk of physical loss unless the peril was specifically excluded.

The same provisions apply to commercial property policies. If the coverage was written on a Basic or Broad cause of loss form, the coverage was on a named peril basis and the mold issue is moot because the peril is not named. If the Special all-risk cause of loss form was used, then coverage was implied unless the peril was excluded.

It seems simple that any named peril form covering property will not be covering any mold issues because the peril is not named. But what about the all-risk forms? Here is where the problem lies.

In the homeowners HO-3 form issued by ISO in 1991 coverage on the dwelling and other structures is written on an all-risk basis. However, there is NO coverage for damage caused by "smog, rust or other corrosion, mold, wet or dry rot." Notice the word "fungus" or "fungi" is not listed among the excluded perils. Could this imply coverage?

Remember, mold is a fungus but not all fungi are mold! Remember also, that the most common form of "black mold" is not really considered to be mold. It is a "fungus". This exclusion was also meant to eliminate the direct loss caused by these items. There is no mention in the form about any kind of ensuing loss that may occur. What if the mold is as a result of a loss that was covered by the policy? Contents coverage if written on a named peril basis, does not cover mold damage, but there is coverage for water damage caused by the accidental discharge from a plumbing device. If the water damaging the property is covered, then what about the ensuing mold loss that happens as a result of the water damage?

What if the damage done to property is caused by two or more perils at the same time? This is referred to as "concurrent causation ". In most cases the insurance company will look at which peril is predominately responsible for the loss and make a decision from there. In this case we are back to square one. What caused the loss? Is it covered under the policy and what about any ensuing damage as a result of the loss?

Do you see how important the Doctrine of Adhesion becomes now? Can you see the conflict between the insurance company and the customer? Insurance companies cannot afford to cover catastrophic perils where the damage is so hard to calculate. The company must anticipate losses to be able to properly price the product. Predictable perils are often excluded due to the high probability of occurrence. Insurance is predicated on the probability, the uncertainty that a loss will occur and is not meant to be a maintenance contract for property. The insured on the other hand is looking for protection against this nasty peril.

In 2000, ISO came out with a revised homeowner form. Nothing changed in regards to the named peril policies. If the peril was not listed and named, there was no coverage. The new Homeowners 2000 all risk policy did make some interesting changes in regard to mold and fungus. The coverage on the dwelling and other structures on the premises were still written on an all-risk basis, but this time in the exclusions of coverage, the word "fungi" was added to the list.

It also went a little further in clarifying the ensuing loss. The form stated that it would not pay for loss caused by "mold, fungus wet or dry rot ". However we do insure for loss caused by mold,

fungus or wet rot that is "hidden" within the walls or ceilings or beneath the floors or above ceilings of a structure IF such loss results from an accidental discharge or overflow of water or steams from within:

- A plumbing, heating, air-conditioning or automatic fire protective sprinkler system, or a household appliance, on the "residence premises", or
- A storm drain, or water, steam or sewer pipes, off the "residence premises".

For purposes of this provision, a plumbing system or household appliance does not include a sump, sump pump, or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment.

The intent here was to cover an undetected loss and to preclude coverage for further damage where no action was taken once the loss was discovered. This puts the burden on the insured to take care of the mold issue as soon as possible or coverage could be denied.

ISO Endorsements

These endorsements (HO 04 26 04 02, HO 04 27 04 02 and HO 04 28 04 02) were introduced in 2002 as a response to insurers wishing to limit their exposure to wet rot and mold. The first endorsement, HO 04 26, may be used with all forms except HO 00 03 and HO 00 05. Form HO 03 27 is intended to be used with forms HO 00 03 and HO 00 05. If open perils coverage is added to form HO 00 04 or HO 00 06, then form HO 04 28 is attached.

These endorsements were designed to further enhance the new homeowner's 2000 edition in regards to mold and fungus. It limited the coverage for this "hidden" exposure to a maximum of \$10,000 as the other endorsement did in the old homeowners form. It also introduced a \$50,000 maximum liability exposure. In both cases, the damage caused had to be "unknown to all insured's" and only as a result of a loss caused by a peril insured against that occurs during the policy period and ONLY if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured Against occurred. The \$10,000 property limitation did not apply to damage ensuing from fire or lightning. The extensive use of water to put out a fire could easily result in mold damage and this should not be held against the insured in the \$10,000 limit of coverage to clean up the mold.

The endorsements add a definition of fungi: "any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by "fungi". They then go on to amend the additional coverages by adding a new coverage for loss caused by fungi, which is limited to the amount indicated in the schedule for Section I. Included in this amount is the cost to remove the fungi or wet rot, the cost to tear out and replace any part of the building as needed to gain access to the fungi or wet rot and the cost to test the air to confirm that fungi are present. Coverage under this endorsement only applies when the fungi or wet rot results from a covered cause of loss. Notice how it mentioned that any fungus intended for consumption does not fall into the definition. This eliminates "bleu cheese dressing" as a cause of loss!

The most important aspect of the endorsement is the "give back" of up to \$10,000 coverage for loss due to "fungi" But, the loss must "ensue" from a covered peril. The loss must have also occurred under the policy period. Notice how the coverage does NOT apply to costs or expense to:

- test for
- classify;
- monitor, or
- assess the experience, concentration or effects of "fungi"

The policy will pay for testing, which is done in the course of cleaning up or removing "fungi". This is not added insurance and a deductible applies. So what the form is saying is that up to \$10,000 of the policy limit on the property can be used for "fungi" loss, but not to test to see if you even have mold or fungi!

Commercial Insurance Implications

Commercial Property forms contain many of the same definitions and exclusions as personal lines policies. You may need to refer to the exact coverage form for proper wording. Some companies are eliminating coverage altogether while others consider the cleanup as part of the additional coverage for pollutant cleanup of \$10,000 on the premises only. This clause is contained in the commercial building and personal property form CP 00100607. This additional coverage applies only after a covered loss that directly damages covered property. So the question in commercial still looms large. What caused the direct loss to the property? Was this cause of loss covered by the policy? What about the ensuing loss or indirect loss that results?

Many claim adjusters also have a problem with the \$10,000 pollutant cleanup being applied here. The discussion centers around whether or not mold and/or fungus is considered a "pollutant". Some feel that a pollutant is an air-borne material and that is how it is distributed. However, mold spores are harmless in the air. It is only when they land and we add water or moisture do they colonize and cause damage.

Once again, do you see how important the interpretation of the policy becomes? Where do the courts side on issues concerning vagueness or ambiguity?

The Commercial Property cause of loss forms include a provision that will pay for mold and mildew type of losses if as a result fire or lightning. However, for other covered cause of losses the coverage is limited to \$15,000.

The Commercial General Liability Policy contains an absolute pollution exclusion that precludes coverage for damages arising out of the actual, alleged, or threatened "discharge, release, dispersal, seepage, migration or escape of pollutants." If mold is a pollutant, as is commonly asserted by property owners and the scientific community, and is released into the air, the pollution exclusion should bar coverage.

Will the courts uphold that mold is a pollutant? Can the insurer prove that it was "discharged, dispersed or released?" What kind of commercial environment do we have? Industrial or non-industrial? Traditional or non-traditional? As you can see, it is difficult to predict how the courts will rule on the application of the pollution exclusion under the liability portion of a policy in regards to mold claims.

In some cases, courts had a field day with their interpretation of the policies in question and some very large monetary awards were given due to bad faith claim settlement procedures in regard to mold losses. Some insurance companies ceased writing business in the states where these claims escalated and the damage awards were so exhaustive.

Summary

As we have seen, the insurance industry has reacted to the problems of insuring the mold exposure. It has amended the homeowner and commercial property insurance forms and at the same time created endorsements to provide limited coverage. The 2000 and 2001 homeowner forms state that mold, fungus or wet rot is excluded. However, the policy will insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within:

- A plumbing, heating air conditioning or automatic fire protective sprinkler system, or a household appliance, on the “residence premises”, or
- A storm drain, or water, steam or sewer pipes, off the “residence premises”.

These homeowner forms do not provide a limitation as to a specific limit for the damage that would apply. However, with the introduction of the endorsements previously discussed, the consumer faces mold type claims that are either excluded or are limited by endorsement such as the \$10,000 limitation or claims from an insured peril other than fire or lightning. The liability limit under the endorsement caps the limit at \$50,000 leaving an insured at high risk. Keep in mind that some companies may not use these restrictive endorsements. Perhaps some states have not approved the forms for company use or the company, for whatever reason, has decided not to restrict the coverage.

In all, the problem for the consumer, the insurance agent and the insurance company still exists. The consumer may or not have the needed coverage. They must be aware of what insurers are doing with this problem and how coverage is restricted

The insurance industry is deeply concerned about its exposure to losses as well as bad faith claims when it has to pay large sums of money and must contemplate this in the promulgation of insurance rates.

Part 3: Liability Issues Surrounding Mold

In this section we will address the liability issues regarding mold. When is the insurance company "liable" to the insured to pay a property damage claim to the insured's property caused by mold? We will also look at the indirect losses caused by mold damage and whether or not these claims are covered. Because of the obvious misunderstanding when it comes to these types of claims, the customer has turned to the courts to determine if there is coverage under the policy in both property and liability situations. We will look at how the courts have addressed this issue.

Insurance Companies and Their Legal Liability Regarding Mold

Most insurance policies are written on an occurrence form which means they respond to claims that "occurred" during the policy period. In property situations, it is easier to determine if the damage to the property actually "occurred" during the policy period. It was easier, that is until mold losses started being claimed.

Mold damage may not be continuous, but rather, episodic; appearing, disappearing and reappearing based on the season and the amount of moisture that the building contains. So the question of when the damage occurred when it comes to mold losses is not that easy to

ascertain. What policy will respond? If there are multiple policies that were in force over a period of time, which one or will they all have to respond?

Do you see how easy it would be for an insurance company to deny coverage if they could somehow determine that the mold was appearing and reappearing over a period of time and therefore the exact "occurrence" causing the loss is undetermined? Do you see how easy it is in these situations especially when they are multiple companies involved of the final resolution of the issue being handled by the courts?

If the courts determine that more than one policy could be involved in the loss, could this decision also raise the possibility of the limits of coverage on each policy "stacking" on top of one another to increase the potential payout amount?

What if a bodily injury claim is made against a property owner due to health injuries sustained by a tenant or occupant due to mold, or the lack of cleanup of mold on behalf of the building owner?

Once again, most liability policies are written on an "occurrence" basis meaning that the injury must have "occurred" during the policy period.

In liability issues, courts have concluded that the policy must respond in accordance to the date the injury takes place. Once again, what about exposures that may have "occurred" over multiple policy years? What company responds? Is there a possibility that more than one company should respond?

In order to determine what policies are triggered by mold-related claims, it is necessary to determine when the claimants were injured, i.e., when they actually suffered injury. The courts have used different theories in order to pinpoint the responsibility of the insurers involved in the loss. Some jurisdictions have also used these theories in trying to determine who must respond in property damage issues as well.

Remember that in an "occurrence" form policy, if the damage or injury "occurred" during the policy period, then that policy must respond. It does not matter when the claim was reported, only when it occurred. Many companies have time limits on when the insured must report a loss. Many companies have used this time limit stated in the loss conditions of the policy as a way to determine if coverage does or does not apply. This has also created a situation where the insured takes the matter of coverage being in force to the courts for determination of when the loss occurred. It is these situations that the following "theories" of occurrence are so important.

Let's take a look at the four ways some courts have determined when a loss or injury "occurred" and therefore which company or companies may be liable.

- Exposure Theory - In this situation, courts have determined that the damage or injury is deemed to have commenced upon the claimant's first exposure. With mold appearing, disappearing, and reappearing thereby being very episodic, the company that was insuring the property and liability when the mold first appeared could be on the hook. Now what about the insured's duty to report a claim promptly? What if the mold first appeared and the claimant was first exposed years ago but the mold was "hidden"?
- Manifestation Theory - In this theory, no claim occurs until the injury becomes reasonably capable of discovery. The "hidden" issue is resolved here, but what do the words "reasonably capable of discovery" really mean? What is reasonable to one may not be

reasonable to another. Does the insurance company feel the injury or damage was within the reasonable discovery of the insured and the insured did not report the loss promptly? How does the insured feel?

- Continuous Theory - The process is continuous, and all policies are triggered for a claim if they were in effect during the "exposure" period, at manifestation, or anytime in between. Can you imagine the exposure here in this case? This is the main issue with mold, since it is common belief that mold and the damage it can cause is so episodic in nature. Courts that use this theory to assign coverage and award damage are the most threatening to the insurance industry. Since policies are mainly written on "occurrence" forms, this theory could be and has been catastrophic to insurers.
- Injury- in- Fact - Coverage is triggered when the actual injury is shown to have occurred. This is the theory that most insurers wish the courts would use. It follows the "occurrence" wording in the policies and does limit the company to claims that actually occurred during the policy period.

The Doctrine of Adhesion discussed earlier has created this nightmare situation for insurance companies. It is impossible to address every issue in the contract language. When the insurer feels comfortable with the wording of the policy or any endorsement issued to clarify the language, the insured invokes the Doctrine of Adhesion and takes the contract to court for interpretation. Which "theory" that we have just examined will the court use in trying to interpret the coverage? Which "theory" would benefit the insured? The Doctrine of Adhesion says if the language is vague or ambiguous, the courts will rule in favor of the insured!!

Indirect Losses Due to Mold

Damage done to property by a peril is considered to be a direct loss to that property. The policy will determine which direct losses it will pay for according to the perils covered by the policy. Named peril policies will only cover direct damage done to real property caused by a peril insured against. The all-risk policy will provide for damage done to real property by all direct physical causes of loss unless the peril causing the loss is excluded. But what about the indirect loss the insured could also suffer?

An indirect loss, sometimes referred to as a consequential loss, occurs as a result of the direct loss. For example a home burning down would be a direct physical loss to the structure by the peril of fire. Now where are the occupants of that home supposed to live since the structure is now uninhabitable due to the fire? Any expenses incurred by the occupants to live somewhere else because their current home is uninhabitable would be an indirect loss.

Since the indirect loss is as a consequence of the direct loss, it would make sense to think that you cannot suffer an indirect loss WITHOUT suffering a direct loss first. This is the case in most property claim situations. On the other hand, there are exceptions. You could be asked to vacate your dwelling due to an evacuation order of the local government. Your home has NOT been damaged by any peril, yet you cannot live there and may incur extra expenses to house your family elsewhere until the evacuation order is lifted. In this case you have suffered an indirect loss of use of your residence without any direct damage being done to the structure. The question is, will there be coverage for these indirect losses? How will the policy respond?

Most property policies are very simple in these situations. If there is no coverage for the direct loss, then there is no coverage for the indirect loss. If there was NO damage done directly to the property, then there can be no coverage for the loss of use of that property. This is the common rule of thumb in both personal and commercial lines coverage. As mentioned before, there are exceptions, and you must take a close look at the policy and how it is worded.

Where does that leave us with MOLD?

If the peril that damages the building is not covered, then the extra expenses incurred because the structure is uninhabitable, is not covered. So it looks like we are back to the same old argument. Is the mold damage covered or not? What caused the mold in the first place? If the water damage is not covered, then the mold that ensues as a result of the water damage is also not covered. If the damage to the property is declined for coverage, then the costs for you to live elsewhere while the mold is being removed will also be declined. Remember that the policy and the various endorsements we have studied will NOT pay for the cost to "detect" or "test" to see if you have mold. It will only pay for the cleanup of the mold that ensues after a covered peril and for a limited amount of coverage if there is any coverage for cleanup at all.

Do you see the liability issue that could arise in the landlord/tenant situation? What if mold is discovered in the building? Who is going to pay for the tenant's loss of use expenditures? When does the landlord evacuate the building to prevent bodily injury liability lawsuits being brought against him by the tenants? What is the landlord's standard of care in regards to the safety of the tenants in a negligence suit? What "theory" of responsibility is the court going to use in determining liability and/or coverage issues? This is just another facet when insuring the mold exposure. The largest damage claims awarded by the courts have been for bad faith claim settlement practices of insurers, claim adjusters, and mold remediation experts.

The emphasis is shifting from the terms of the policy to the conduct and timeliness of the company or companies or adjusters handling the claim. The indirect losses suffered by the claimant are many times exceeding the actual direct damage to the property. Punitive awards are escalating in order to punish the insurance carrier and/or adjusters for improper handling of water losses that lead to mold claims.

The situation is of such epidemic proportions, that many companies have ceased writing property coverage in states where the courts have applied some of the theories we discussed earlier. The losses in some states and around the country have changed the mindset of the insurance company regarding that "small water loss" that the insured may have suffered some time in the past. What can happen in the future is the major concern.

Non-renewals for past water claims, rejection of new applications if a previous water loss occurred, shutting down of the property line of coverage completely and in some cases a total pulling out of doing business in some states have been the line of recourse for a lot of companies. When the courts set legal precedent in the interpretation of mold claims, those cases become like a "law unto itself" in the review of future cases. Insurance companies have to be able to predict what kinds of losses and what monetary amounts they can expect to pay out for claims in order to properly price the product. Without that availability, the system will not work.

Courts have also been involved in deciding the "efficient proximate cause" of the loss. This situation is present when two or more perils cause the loss at the same time. One peril might be covered and the other is not. So the courts are forced to decide which peril can be described as

the "predominating cause" or the "efficient proximate cause" of the loss. What if mold claims arise out of covered perils (e.g. weather) and non-covered perils (e.g., latent defect)? The issue is raised as to which of the two causes was the predominating cause! What happens to the insured in the meantime while the insurance company or the courts are trying to figure this out? Who pays for all the indirect expenses incurred by the customer awaiting a decision?

Summary

The direct damage done by mold is a tricky coverage issue. The property policies have rewritten the wording and added endorsements to redefine what the loss by mold and fungi is and when it is and is not covered. Generally, if mold ensues after a covered peril then the cost to clean it up may be covered. Depending on the endorsement used by the company, this coverage may be limited. Liability limitations are also well defined and amounts of coverage have been curtailed.

Because the customer has no input in the make up or wording in the policy, the Doctrine of Adhesion applies to an insurance contract. Simply stated, if the wording is vague or unclear, then the courts will always rule in favor of the insured since they are stuck with the policy and/or endorsements as written.

This has brought the legal system into the forefront of mold and related claims. It has been the burden of the court to not only determine IF there is coverage for the direct damage done by mold, but also if there is any coverage for the indirect losses suffered as a result of the mold claims. Courts have been applying often-used liability "theories" in not only determining liability issues but property coverage as well.

The Exposure Theory, The Manifestation Theory, The Continuous Theory and the Injury-in-Fact Theory have all had an affect on which policy or policies are required to respond to the mold claim. Insurance companies are finding themselves on the hook for claims long after their policies have expired. Because several insurers can now be brought into the claim, the question of the stacking of limits of each policy on top of one another is deepening the pot of available funds to pay claims.

Courts have been awarding substantial sums to injured parties due to the negligence of the landlord in regards to mold and its cleanup. Staggering amounts have been awarded to clients due to the improper handling of water losses and the mold that ensues and for bad faith claims settlement practices.

The issue boils down to what is the responsibility of the property owner and what is the responsibility of the insurance company when it comes to mold claims?

Part 4: Risk Management, Mold and the Insurance Company

The insurance industry has been dealing with this risk for some time. In the past sections we have mentioned all of the underwriting rules and procedures that have been implemented as a result of mold claims. What responsibility does the insurance company have to the insured? Handle the claim in a very expeditious manner. Water claims are no longer a small loss. These claims must be handled promptly and efficiently. The carrier must be involved in the immediate and thorough remediation of these types of claims. The carrier must also be careful in recommending the contractors to do the work. If the insurer is using or recommending a contractor, then they

better follow through to see that the work is completed promptly and correctly. Mold losses are as a result of other types of water losses.

If a carrier has accepted responsibility for a water loss, it will be difficult in the eyes of the courts to deny the ensuing mold loss. Insurance carriers do not want to be involved in a bad faith claim settlement suit.

Risk Management, Mold and Insurance Agent

The insurance contracts that we sell are based on the Doctrine of Reasonable Expectations. This doctrine simply states that coverage for certain perils and types of property should be "reasonably expected" by the insured. Remember very few insured's actually read their policies and are not expected to read or understand them by the courts. It is the agent's job to explain any limitations in coverage. The agent has a fiduciary responsibility to the customer and company he serves. An agent is considered to be a fiduciary because the insurance buying public puts their faith and trust in the agent for their expertise and advice. We are the "learned professional" who's advice the customer has come to rely on.

For most individuals and businesses, the insurance policy we sell them is probably the only thing that stands between them and financial ruin if a loss occurs! Here are some of the responsibilities of the agent to the customer in the eyes of the law when it comes to mold claims:

- Explain all the limits of coverage under the policy
- Inform the insured of their duties after a loss
- Notify a professional water restoration and remedial service promptly or inform the insured of their duty to get a professional in there immediately to handle the loss and cleanup.
- Notify the carrier of the loss immediately so proper procedures for claim settlement can be followed.

What does the agent say or do when presented with a situation where the insured calls regarding a water loss and wants to know what to do next? How about the situation where the insured calls regarding a water claim that the agent knows is not covered under the policy? Does the agent tell the client that there is no coverage and close his file? What about the ensuing loss that the water may have caused? What if the client informs the agent of a loss but does not want to turn the claim in because they know the damage is under the deductible or they do not want a claim logged against their policy?

In each of these situations, what is the responsibility of the agent to the insurance company he or she represents? Most agents feel the claim should be reported to the carrier immediately regardless of the outcome or future underwriting ramifications. The possibility of an errors and omissions claim against the agent looms large when the customer has had a claim and says "I'll get back to you if I want to pursue the claim".

Remember the agent is a representative of the company first, not the client! The agent should also alert any contractors that they insure who are doing any kind of water control, cleanup or construction. These contractors must be made aware of the limitations in their insurance policies for product liability and completed operations liability lawsuits that may arise based on the work they perform.

The insurance company that is covering the contractor also needs to be informed of exactly what kind of work these contractors are doing. It is one thing to insure a plumbing operation, and another thing if that plumber is advertising that he does mold cleanup and remediation. The same holds true for our construction and remodeling contractors. It is one thing to repair or remodel bathrooms and another to advertise water restoration work, which would inevitably involve mold or the testing for mold.

Contractors could be jeopardizing their liability policies but not fully disclosing what they are doing and the agent could find themselves in equal hot water with the carrier if they were aware of these activities.

Summary

The risk management of mold falls on the insured, the insurance company and the agent as a representative of both. The insured must protect their property from further damage and also maintain the property. The insured cannot let things happen to the property that will eventually damage it and then expect the insurance company to take care of the loss. When it comes to water losses and the mold damage that may ensue, the insured must do everything to dry up the water and dry out the area. If mold appears, they must promptly clean it up or get a professional to take care of this problem.

The insurance company also shares the mantle of responsibility in these cases. The policies issued to the customer need to be easy to read and understand so the customer has a sense for where coverage is and is not going to apply. The carrier must make sure that the customer is handling the loss properly on their end and also make sure that the claim is handled promptly and expeditiously even if the end result is a denial of coverage.

The customer must be told why the claim is being denied citing the provisions of the policy where the denial is based on. Every effort must be made on the part of the carrier to facilitate the claim in a fair manner to try and keep the interpretation of the policy out of the courts. The insured should not be forced to sue the insurer to get what should have been paid out under the policy in the first place. The courts are very consumer oriented and a protector of the customer against the large insurance company. Bad faith claim settlement practices of insurance companies have resulted in large awards.

These large settlements meant to punish the insurance carrier for failing to respond properly has caused an industry wide panic in regards to mold claims and water losses in general. This panic has dovetailed into underwriting restrictions and loss of availability for much needed insurance coverage in a lot of states.

The agent is also a part of this trinity of responsibility. As a representative of the company, the agent must inform the carrier promptly of any and all losses whether the insured wants to or not. Informing the agent of a potential claim is the same as informing the company. Failure on the part of the agent to process the claim or turn it into the company can be a violation of the agent's contract with the carrier and an example of bad faith claim settlement practices in regards to the agent/customer fiduciary relationship.

Part 5: Educating the Insured

Protecting the Home from Water Damage and Mold

Insureds should be aware of measures to prevent future water damage and mold. Homes should be inspected regularly for possible signs and sources of indoor moisture. After it rains, check for evidence of water stains or odors inside the house. Homeowners should establish a maintenance schedule to check the following sources of water leaks on a regular basis:

- Hot water heaters - Hot water heaters may rust or develop cracks over time. Water heaters should be checked for rust and deterioration every year. Check the drain pan for water and ensure that the drain line for the overflow pan is not clogged. Drain and clean the water heater as recommended by the manufacturer.
- Waste/garbage disposal systems - Routinely check for cracks or other sources of leaks in the garbage disposal.
- A/C drain lines - Damage can occur when the line that drains condensation from the evaporator coils becomes clogged and water overflows from the drip pan. To prevent this, periodically check the drip pan for water and consider an annual service call to reduce the buildup of algae and mold in the drain line.
- Indoor and outdoor pipes and faucets - Routinely check indoor pipes under cabinets and sinks for leaks, rust, and any signs of deterioration. Minimize the potential for water damage from frozen and broken outdoor pipes by insulating supply lines (in attics, crawlspaces, and exterior walls), protecting exposed outdoor faucets, sealing gaps in exterior walls, and maintaining adequate heat in the home.
- Appliance hoses - Broken hoses are among the most common causes of water damage. Regularly inspect hoses and hose fittings on washing machines, icemakers, and dishwashers for kinks, cracks, bulges, or deterioration. Replace standard rubber washing machine hoses every two to five years or more frequently if they are showing signs of wear. Consider using steel-reinforced hoses for longer life.
- Showers, tubs, sinks, toilets, windows, and doors - Water leaks around bathtubs, showers, sinks, and toilets can cause extensive damage because the leak is often hidden from view. To prevent leaks, one should make sure there is a continuous watertight seal of caulk around tubs, sinks, toilets, tubs, shower stalls, windows, and doors. Cracks or mold on caulk or tile grout may indicate that there is not a watertight seal. Remove all caulk or grout, clean and dry the surface thoroughly, and apply fresh caulk. Do not apply new caulk or grout on top of the old materials.
- Attics and ceilings - Routinely check for wet insulation and water stains.
- Wallpaper - Routinely check for bubbling, peeling, and stains.
- Roofs - Keep roofs free of debris that can damage roofing and allow water to seep in. Trim tree branches to prevent them from rubbing and damaging the roof. Repair missing or damaged shingles. Properly seal any cracks around chimneys, skylights, and vents. Check metal flashing for holes, cracks, or other damage. Replace flashing or use silicon caulk to seal any openings.
- Rain gutters and downspouts - Rainwater should be directed away from the home. Keep gutters clear and make sure downspouts are long enough to carry water away from your foundation. Gutters that are filled with leaves and other debris allow water to back up on the roof, which can result in water damage to eaves and roofing material.

- Sump pumps - Sump pumps are the first line of defense in preventing water from seeping into basements. Periodically check the sump and remove any debris that could clog the pump. Consider installing a battery-powered backup to protect the basement during power outages.
- Weep holes - Weep holes are openings at the foundation level of a brick wall that allow moisture to escape from behind the wall. Do not close or block these openings.
- Landscape - Yards should slope away from the house to prevent puddling near the foundation or under pier and beam houses. Do not allow sprinklers or sprinkler heads to soak the exterior of the home.

Other Precautions

- Know the location of water valves - Make sure everyone in the household knows where the main valve is located and how to turn the water off.
- Monitor utility bills - An unusually high water bill could signal a water leak.
- Turn off water before traveling - Turn the water off at the main valve or directly on major appliances. Consider leaving a house key and contact information with a neighbor or trusted friend and ask the person to check the inside and outside of the home periodically while you are away.

Filing an Insurance Claim

If a claim does occur, the policyholder should notify the insurance company as soon as possible. Insureds should be aware of the following tips to help the claims process go more smoothly:

- Insureds should make sure they understand what losses are covered by the policy. Contact the agent or an insurance company representative if an explanation is needed.
- Have the policy number ready when calling the company and be prepared to answer questions about the severity of the damage. The initial contact with the company may be with the insurance agent, a claims office, or the company's toll-free claims center. The telephone number should be listed on the policy.
- Photograph or videotape the damaged area and any damaged property before making any repairs. This is important because it can help document the losses, especially if clean up or repairs are done before the insurance adjuster has viewed the damage.
- Don't throw away removed or damaged materials until the insurance adjuster has seen them.
- Make reasonable and necessary repairs to protect the home and property from further damage. Don't make large structural or permanent repairs until instructed by the insurance company.
- Keep an accurate record of all repair expenses and save all receipts.
- Keep an activity log, including a record of everyone spoke with at the insurance company.
- Note the time, date, name of the person spoke with, and a description of the discussion.
- Keep copies of letters or other documents sent to and received from the company.

Part 6: Wrap Up and Review

In this course we have discovered what mold is and what damage it can cause. The insurance policies that cover our property need to be reviewed as to the exact wording when it comes to mold or fungus. The policies have changed over the last ten years to reflect the ever changing interpretation and definition of what mold or fungus is and when and where it is covered.

We have seen how policies will deny damage done to property by mold. But then again, these policies say nothing about the damage caused by mold that ensues after a covered loss. Endorsements were issued to redefine the definition of what mold is and to include the word "fungi." These endorsements were also meant to limit the payout for mold cleanup and removal, to redefine this coverage to only be applicable after a covered loss and also meant to limit or take away the liability coverage for bodily injury claims as a result of mold entirely.

Policy revisions were made in 2000 and 2001 to still deny direct damage done by mold, but offer cleanup of mold that ensues after a covered loss as long as the mold was "hidden and undetected" at the time of the covered loss. Endorsements were also issued after the revisions to further define and redefine the coverage for property and liability as a result of mold.

Because of all this confusion, the courts became involved when customers could not get any satisfaction from the insurance company. Large monetary damages were awarded against the insurance companies for bad faith claim settlement practices in water and mold losses and because insurance companies couldn't decide when and where the coverage was on a definitive basis. Courts starting using all kinds of theories to determine which policy had or did not have coverage and which policy or policies should be responding.

This epidemic of misunderstanding and confusion sent insurance companies to the non-renewal, cancellation, and closure of property coverage markets across the country. Water losses have not been the same since. It is only natural for the insurance industry to tighten the underwriting requirements and coverage issues when it comes to mold claims.

Insuring the mold exposure is a dilemma. It is the responsibility of the insured, the insurance company and the agent, to prevent it, clean it up properly, and handle it expeditiously to resolve the dilemma.

Part 7: Case Studies

Mold Damage over Time

Case #1: An insured has a very large two story deck off the front of his home. He lives on the Oregon Coast so the wood has a tendency to rot and decay faster than in other regions. The underside of the deck is open which is clearly visible from the ground floor. It was found that one of the 6x6 wooden support posts along with other parts of the deck has started to rot and needs to be replaced. The insured believes coverage should be extended under the wet or dry rot endorsement. What do you think?

Mold Damage Claim under a Time Limit

Case #2: This case involves an insured who sustained damage to personal property as a result of a defective air conditioning unit. The carrier did not investigate the cause of the loss. They relied on the HVAC contractor that originally installed and subsequently repaired the unit. The contractor indicated that the manufacturer sent the unit without the condensate plug. The unit was installed and was regularly maintained. Six months after installation the contractor indicated the plug was missing and caused the unit to leak. The insured is a science lab and noted unusual cell growth in the scientific samples. They disposed of the few beakers that contained the cell growth, believing that the beakers were contaminated. Within a few days they noticed additional growth within some of the research material. They determined the contamination was mold and began to investigate the source of the mold growth. They determined there were a few wet ceiling tiles and found the A/C unit to be leaking. The carrier denied the claim, stating that the loss does not meet the definition of "water damage." The client's policy contains mold coverage.

The mold exclusion endorsement provides three changes to the insuring agreement. The first change amends the wear, tear, deterioration, animals exclusion by removing the wording excluding mold and wet or dry rot. The second change adds to the endorsement's coverage for mold or other fungi, wet or dry rot, or bacteria but limits the coverage to certain perils. The third change adds to the endorsement's coverage for seepage or leakage. This wording reads: "3. The following is added to the "Exclusions—Losses We Won't Cover" section. Seepage or leakage - We won't cover mold or other fungi, wet or dry rot, or bacteria loss caused by or resulting from water or steam that seeps or leaks, or the presence of condensation or humidity, moisture, or vapor, that occurs over a period of 14 days or more."

The insured's position on this claim is that the peril of seepage or leakage exclusion provides the insured with coverage for mold, resulting from seepage or leakage, as long as the loss is discovered within 14 days of occurrence. The carrier disagrees with this position, indicating that the loss must first meet the definition of "water damage" before seepage or leakage would be given. The insured advised the carrier that they believe the policy drafters intended to cover the subsequent mold damage as a result of unforeseen seepage or leakage but limits the amount of time they were willing to cover the subsequent mold damage. What do you think?

Mold Claim under Personal Auto Policy

Case #3: This case involves an insured who reports mold growing in her car. There was a hole in the car's convertible top. The insured had it repaired but apparently rain had already entered the interior of the car through the hole and had saturated the back seats without the insured knowing it. The insured parked her car in a small brick garage while she was away on a trip and she thinks the dark, damp brick garage caused the moisture in the car seats to grow mold. She is not sure if any exclusion on the auto policy applies to this claim. What about the wear and tear exclusion or maybe this was not an accidental loss? What is your opinion?

Mold and Frozen Pipes

Case #4: An insured was away from his home for a period of time over the winter. He had left the thermostat set on low, but it malfunctioned and the furnace never came on during an extremely cold spell. The pipes froze and burst, and when the homeowner returned he found

considerable water damage as well as mold beginning to form. The insurer has no problem paying for the water damage, but is not sure whether it owes for the mold damage. The ISO HO 00 03 10 00 states that the policy does not pay for mold, fungus, or wet rot unless it is "hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within [a] plumbing ...system." But here, the mold was not hidden; it was obviously beginning to grow. Does the insurer owe for this loss? Would it make any difference if endorsement HO 04 27 04 02 limited fungi, wet or dry rot, or bacteria coverage were attached?

Mold Damage Claim Covered by CGL Form?

Case #5: Will the CGL form respond to mold/fungi bodily injury claim? An insured has discovered mold on one side of a duplex apartment building that he owns. This area has been vacant for awhile but the adjoining area is occupied. The insured wants to know if the general liability policy will provide coverage for him in case the occupants of the adjoining area make any claims for bodily injury due to the presence of mold. What is your opinion?

(Disclaimer: These cases are included as examples of coverage. Interruptions of coverage may vary based on individual cases, state law and court decisions in the various states.)

Answers to Case Studies

Case #1 Answer: The policy (HO 00 03 02 00 with HO 04 05 12 02) has the usual wear and tear exclusion, as well as the mold, wet or dry rot exclusion. The endorsement provides coverage for fungi, wet or dry rot when the loss is caused by a peril insured against. The insured's damage to the deck is simply wear and tear and is not covered, even by the endorsement. The endorsement excludes the presence of condensation, humidity, moisture or vapor over a number of weeks unless the damage is unknown to the insured and hidden. As the deck is readily visible, and the insured knows he's in an area that is prone to faster decay due to being on the coast, the damage to the deck was not hidden.

Case #2 Answer: If it can be shown that the seepage or leakage did not occur for more than a period of fourteen days, the mold loss should be covered. The provision provided does not state that the definition of "water damage" must first be met.

Case #3 Answer: The personal auto policy will pay for direct and accidental loss to the insured's covered auto and its equipment. This is a direct loss since the interior of the car has been actually physically damaged. As for accidental, that is interpreted from the insured's viewpoint. If the insured did not know the back seats were soaked with water and did not know that mold was growing while she had the car parked in the garage, that would be considered an accidental incident from the insured's point of view. So, the terms of the insuring agreement have been met. None of the policy's exclusions apply. There is no pollution or mold exclusion. And the wear and tear exclusion is for the normal aging of a car from its use. For example, if the hole in the convertible top was caused by constant exposure to the sun and wind or just by the top aging over several years, that would be a loss that the car policy would not cover because of the wear and tear exclusion. In this case, the loss was the result of moisture and mold; and even though mold grows over a period of time, this was not the normal aging process of the car itself. The claim should be covered as an "other than collision" loss.

Case #4 Answer: The cost to clean up the mold is covered. The proximate cause of the loss was the pipes freezing and then bursting. The same would be true if, for example, a tornado ripped the roof off and before remediation could effectively be undertaken mold began to develop. The mold would be attributable to the windstorm peril. The accidental discharge or overflow of a plumbing system cause of loss is a different covered cause of loss than freezing of pipes. The language in the form makes that clear. The mold resulting from accidental discharge is covered only if it is hidden, but nothing is said about mold resulting from freezing of pipes since it is a distinct peril. Further clarification is provided by the named perils applicable to coverage C, personal property. Under peril B.12. accidental discharge or overflow of water or steam, paragraph b.(2) states the peril "does not include loss caused by or resulting from freezing except as provided in Peril Insured Against 14. Freezing." If form HO 04 27 was attached, the coverage for mold remediation would still be there; however, it would be limited to the amount indicated in the endorsement's schedule. Because the endorsement refers to an "additional coverage" for mold, the impression is that it is providing coverage when none existed, but this is not the case. The endorsement limits the coverage, on a per occurrence basis that will be provided for mold remediation and this amount is included in the limit applicable to the damaged property. The endorsement also includes a Section II aggregate sublimit for claims for bodily injury or property damage resulting from mold.

Case #5 Answer: There can be at least two problems with the CGL form responding to a claim such as this. First, the insured has to be legally responsible for the bodily injury. In a case such as this, the insured may be held legally responsible because he took no action to get rid of the mold, or because as the owner of the building, he is strictly liable for the condition of the building being the cause of harm to someone; this is a legal issue that we cannot answer. But, if the insured is held responsible for the injuries, that leads to the second problem. The pollution exclusion can be used to deny coverage for a bodily injury claim. Mold and fungi can fit the definition of a pollutant since they are irritants and contaminants. And, the injury would arise from the discharge or escape of the pollutant from premises owned by the insured. This situation is what the pollution exclusion addresses. It is true that mold and fungi are not specifically mentioned in the pollution exclusion but there is an endorsement that allows the insured to buy back some limited coverage for fungi or bacteria exposure, so the intent is there to exclude such coverage under the standard CGL form. Based on these problems, a claim against the insured could very reasonably be denied by an insurer.