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MOLD & RELATED TOXIN LITIGATION SEMINAR
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*“What do you do when the claim comes in?:
Good Faith & Ethical Issues”*

Mold claims, whether they be first party or third party claims, tend to generate reservations of rights. To be enforceable, the reservation must be timely, it must be in writing, and it must be sufficiently detailed and clear to enable the average insured fair notice of the issues. Reservation of rights agreements are strictly construed against the insurer, and will typically not be extended by implication beyond their exact terms. If the reservation does not identify each specific coverage issue, the insurer has probably not effectively reserved its rights on that issue. Failure to identify all issues may result in the insurer waiving its rights to the issue not properly identified.

An ineffective reservation of rights results in the waiver of, or estoppel to assert, policy defenses, if the insured shows (1) the insurer had sufficient knowledge of the facts or circumstances indicating non-coverage but (2) assumed or continued to defend the insured without obtaining an effective reservation of rights, and (3) the insured suffered some type of harm. The insurer is entitled to assume that its reservation of rights position has been accepted by the insured, if no objection to it is made. Thus, any objections to, or disagreements with positions taken in the reservation of rights letter should be memorialized in a letter to the insurer if the defense is accepted.

A defense under a reservation of rights letter can be rejected by the insured. This rejection forces the carrier to make decisions about whether to assume an unqualified defense or turn the defense over to counsel of the insured's choosing. The judicial rationale for allowing the insured to choose its own counsel is the potential conflict of interest faced by defense counsel retained by the insurer in such a situation. In many states, the insured is not required to accept counsel who could be in a position to help the carrier assemble evidence that could later be used to avoid coverage. Both the insurer and insurer-retained defense counsel must be careful to zealously protect the interests of the insured/client.

Insurers should always provide copies of the reservation of rights to defense counsel, so counsel may protect against the inadvertent disclosure of information to the insurer which could potentially harm the insured/client's interests. Defense counsel should take additional precautions by explaining to the client the limitations of the engagement for which the attorney has been hired. This discussion is particularly important in the commercial setting where the client typically has a counter-claim for unpaid rent, failure to properly maintain or repair, or some other type of contract claim.

By the same token, the carrier must have a clear understanding with its retained counsel about its expectations in situations where the potential for perceived conflicts exist. Recently drafted guidelines between panel counsel and insurers incorporate the applicable ethics statutes of the various jurisdictions. These ethics have guided the relationships between clients and their counsel for many years and should serve as the standard for determining appropriate conduct as between insureds and counsel chosen for them.

The marshaling of key documents is critical to the early understanding of the parameters of a significant mold claim. All contracts, closing documents, insurance policies, as-built design drawings and specifications, projects files and lease agreements should be obtained in order to identify all potential parties necessary to completely adjust a claim. For instance, in a lease situation, adjusters often overlook the contractual provision identifying the party responsible for maintaining the premises. In many cases, the lease actually requires the claimant to maintain the very area where the mold or contaminant is located.

Other lease provisions provide strict notification requirements which may ultimately result in the claimant being held responsible for the loss due to its failure to timely correct or report the condition.

Most states require disclosure of conditions such as mold or the prior presence of mold. By reviewing closing documents, one can learn the history of the building and whether there has been a similar claim made previously.

A review of construction files and drawings will help identify potential responsible parties as well as their respective carriers.

There are two primary sources of indoor air quality-related problems:

- A. Microbial contamination—those that are naturally occurring as a result of bacterial and fungal growth. This is often associated with

excessive moisture within the building envelope. Typically, this problem is the result of improper drain-in during the construction process, faulty roof or curtain wall construction, improper design, or lack of proper cleaning and maintenance of the HVAC system.

- B. Volatile organic compounds— these are man-made and consist of often-invisible and sometimes odorless fumes associated with almost any synthetic product in a confined space—plastics, fibers, coatings, and cleaning materials. Also included in this category would be a microscopic fiber for “man-made materials” associated with insulation, acoustical ceiling tiles, and other building components.

Most local libraries have a reference book regarding local climatological data from the National Climatic Data Center. It has a certification on it signed by the director of the NCDC. This is usually cheaper and faster than writing to the NCDC for the information. However, if you order the report directly from the NCDC with the Department of Commerce certification seal, the certification seal cost is \$60. Send the request to National Climatic Data Center, 151 Patton Avenue, Room 120, Asheville, North Carolina 28801-5001; (704) 271-4800, extension 159; fax (704) 271-4876.

The American Society of Heating Refrigeration and Air Conditioning Engineers (“ASHRAE”) is the leading organization in the field of HVAC and indoor air quality issues. As such, ASHRAE has adopted a standard for managing air quality. According to ASHRAE, the “purpose of this standard is to specify minimum ventilation rates and indoor air quality that would be acceptable to human occupants and/or intended to minimize the potential for adverse health effects.”

ASHRAE Standard 62-20001 defines acceptable indoor quality as “air in which there are no known contaminants at harmful concentrations as determined by cognizant authorities and with which a substantial majority (80 percent or more) of the people exposed do not express dissatisfaction.”

ASHRAE Standard 62-Ventilation for Acceptable Indoor Quality sets forth the criteria for commercial facilities, institutional facilities, and residential facilities, including private dwellings and single and multiple occupancies. However, the purpose and scope of the standard expressly acknowledges that acceptable indoor air quality may not be achieved in all buildings meeting the requirements of this standard for one or more of the following reasons:

- A. Because of the diversity of sources and contaminants and indoor air;

- B. Because of the many other factors that may affect occupant perception and acceptance of indoor air quality, such as air temperature, humidity, noise, lighting, and psychological stress; and
- C. Because of a range of susceptibility in the population.

Consequently, compliance with the standard will not necessarily result in acceptable indoor air quality. This disclaimer was added and approved by the ASHRAE board of directors on January 27, 1999.

Other ASHRAE standards to consider are ASHRAE 55, Thermal Condition; and ASHRAE 52, Methods of Testing General Ventilation Air Cleaning Devices for Removal Efficiency by Particle Size.

First party claims often turn into third party claims. Consistency in adjusting protocols between the various types of policies is of paramount importance. While it is appropriate to maintain the “Chinese Wall” between adjusting groups, the claims department needs to have consistent adjusting guidelines so as to generate consistent results. All too often, first party claims are investigated by outside adjusting companies whose sole claim to fame is the ability to adjust quickly. Too often, outside experts are being used who are not adequately qualified. Great care should be taken to avoid the outside adjuster whose sole qualification is attendance at a recent mold seminar. Third party outside adjuster / experts tend to have greater qualifications. By the time the claim has gotten to suit level, adjusters are in a better position to understand the risk to the insured and are allocating greater resources in order to obtain confidence in the result. Often, the first party expert and the third party expert are at odds over the cause of the damage. In many cases, the third party expert determines the cause to be a source which would have been covered, had it been the opinion of the first party expert.

Inconsistent findings by experts for the same carrier are the breeding ground for bad faith claims. Greater consideration should be given to reconciling the potential for dissimilar opinions, prior to them arising.