

LIABILITY INSURANCE COVERAGE FOR MOLD EXPOSURES

Presented By

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Solving Water Intrusion and Mold Problems in Texas
Lorman Education Services
Dallas, Texas

January 17, 2003

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LIABILITY INSURANCE COVERAGE FOR MOLD EXPOSURES

I. INTRODUCTION

Mold, mildew and sick building syndrome exposures have been a fact of life for many insureds, including contractors, owners and occupiers of modern buildings and employers for quite some time. Often, they have been addressed as part and parcel of water damage claims. Now they have been the subject of a media frenzy for quite some time and are, consequently, the subject of much attention, whether the contaminated building is a single-family home, multi-family residential complex, a commercial office building or a public facility.

A. The Center of Attention

As other presenters at this institute have discussed, the limelight at least so far in Texas has been stolen by claims against homeowners insurance policies. As a result of large verdicts, settlements and claims, many of which allege bodily injury, regulatory efforts have resulted in modification of the Texas homeowners insurance policy forms, drastically reducing its coverage available to insureds under homeowners insurance policies.

B. Commercial and Industrial Claims

Nevertheless, mold claims are not confined to residential structures and homeowners policies. Mold litigation has become a serious a problem in the commercial and industrial context. As to bodily injury, insurers 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. For example, one of the earliest 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. 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. 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 exterior insulation finish systems (EIFS), 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. The scope of the problem is obvious from the size of judgments and settlements emerging from these cases. For example, in *Centex-Rooney Construction Co., Inc. v. Martin County*, 706 S.2d 20 (4th Dist. 1997), the Court affirmed a \$14 million judgment against the construction manager of a courthouse which was infested with mold, due to excessive humidity arising from the HVAC system and the leaky exterior installation finish system (EIFS). More recently, last summer, in *Pharr-San Juan-Alamo Independent School District v. Turner Construction*, the construction defendants settled mold claims in one school for millions of dollars. This paper will analyze what coverage is available to the insured when faced with these types of claims, primarily under the commercial general liability insurance policy.

II. CGL COVERAGE: OCCURRENCE AND TRIGGER

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. Although the issue is far from settled, the trigger of coverage for property damage under Texas law is the date of manifestation or discovery. See, *Guaranty National Ins. Co. v. Azrock Industries, Inc.*, 211 F.3d 239 (5th Cir. 2000). As to bodily injury, the Fifth Circuit has opined that the trigger of coverage occurs when the claimant has been exposed to the injury-causing harm. *Id.*¹

It would appear that mold and mildew claims are, for the most part, treated similar to other bodily injury and property damage claims to determine the existence of an occurrence under a particular state's law. For example, in Texas, it is likely that the trigger for property damage arising out of mold would likely be a manifestation trigger, or at least would be closely linked to manifestation of the water damage causing it. Nevertheless, it appears that since mold and mildew may develop from exposure to water over time, the possibility of multiple triggers under exposure or even multiple triggers may exist. In any event, continuous exposure to mold has been held to be an occurrence under a CGL policy. See, *Liberty Mutual Fire Ins. Co. v. Ravannack*, 2002 WL 441334 (E.D. La. March 19, 2002) (applying exposure theory to find the existence of an occurrence under multiple policies for a bodily injury claim alleging harmful exposure to mold from date of construction through date of discovery). In contrast, in *New Orleans Assets L.L.C. v. Carl E. Woodward*, slip opinion, No. 01-2171 (E.D. La. Jan. 25, 2002), reported in MEALEY'S LITIGATION REPORT: CONSTRUCTION DEFECTS (May 2002), a manifestation trigger was applied, resulting in a denial of coverage. The court held that mold and mildew resulting from building leaks and improper selection of materials was not sufficiently analogous to asbestos so as to justify a departure from a manifestation trigger. Instead, it relied on cases applying a manifestation trigger to foundation

settlement and termite infestation to support the granting of summary judgment in favor of the insurer.

III. CGL COVERAGE: POLLUTION EXCLUSIONS

Mold litigation normally involves some sort of defect which is alleged to have allowed water infiltration or other conditions which resulted in the mold. As is the case with most construction defect claims, litigation over mold involves the defendant's commercial general liability coverage. In addition to the typical issues involving exclusions designed to deny coverage for defective work or products, that is "business risks," 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.

A. 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 promulgation. 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 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 construction 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 subsequently revised and set out above, is referred to as the “1986 Pollution Exclusion” throughout this paper.

B. 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 included in a standard endorsement also promulgated by ISO, but its filing with the State Board of Insurance in 1990 was withdrawn and it has never been approved for use in Texas. Nevertheless, there are many endorsements, particularly in excess and surplus lines policies issued to Texas insureds, 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.

Of course, many carriers have begun to utilize manuscript pollution exclusions in their policies. For example, in *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 2002 W.L. 356756 (N.D. Tex. March 5, 2002), the pollution exclusion before the court defined the term “contaminants or pollutants” as “including, but not limited to, bacteria, fungi, viruses or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.” The court applied this exclusion in the commercial property policy before it to deny coverage for mold damage to first and second floor units of an apartment building arising out of roof leaks. A corollary to the court’s application of this exclusion to the claim before it, is that in the absence of a specific reference to mold, fungi, etc. within the pollution exclusion, the exclusion should not be applied. Of course, the standard 1973 and 1986 pollution exclusions contain no such specific reference to mold, fungi or other organisms.

IV. THE POLLUTION EXCLUSION: MOLD AS A “POLLUTANT”

The scope of coverage under a CGL policy for the party responsible for 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 and real estate owners and managers have so far lagged somewhat behind. The insured’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 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 under CGL policies.

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.”

A. 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.

More recently, a California trial court has held that bodily injury caused by mold alleged by tenants in an apartment complex was not excluded by the pollution exclusion. In arriving at that conclusion, the court determined that mold is not a "pollutant" in the standard definition of "pollutant", relying upon *Keggi v. Northbrook Property & Casualty Ins. Co.*, 13 P.3d 875 (Ariz. App. 2000), discussed immediately below. That ruling is currently on appeal, *California Capital Ins. Co. v. Sacramento Partridge Pointe*, No. C041143 (Cal. App. 3d Dist. 2002), reported in MEALEY'S EMERGING INSURANCE DISPUTES (July 16, 2002).

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, alkalies, 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.*, *supra*. In that case, the plaintiff was a professional golfer who on occasion lived and trained at her parents' 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 of 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.

Similar reasoning was applied in *Eastern Mutual Ins. Co. v. Kleinke*, 293 A.D.2d 801, 739 N.Y.S.2d 657 (2002). There, the court held that the pollution exclusion did not apply to a bodily injury claim arising from an *E. coli* bacteria outbreak at a county fair. In doing so, the court held that the pollution exclusion applied to only environmental releases of pollutants and that the insured had failed to demonstrate that *E. coli* exposure as a result of unsafe food handling was a pollutant. Specifically, the trial court determined that since the policy did not amplify the definition of contaminants or waste to include biological and etiological agents or materials, as some CGL policies have, the standard exclusion did not apply. Moreover, the court determined that exposure to unsafe food handling did not constitute environmental pollution. The appellate opinion of the Supreme Court, Appellate Division summarily affirms the trial court, and for a description of the trial court's ruling, see MEALEY'S LITIGATION REPORT: INSURANCE (April 16, 2002). Cases such as *Keggi* and *Kleinke* 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.

B. 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 under the 1986 policy form is *Cincinnati Insurance Co. v. Becker*, 262 Neb. 746, 635 N.W.2d 112 (2001), where the Nebraska Supreme Court held that an absolute pollution exclusion is not limited to traditional environmental damage, concluding that the CGL carrier had no duty to defend the property damage suit arising from the release of fumes from xylene, a concrete sealant into a food warehouse. The court also observed that merely because the xylene was brought in a liquid form to the job site, and it was fumes instead of the liquid which contaminated food stored in the warehouse in which the chemical was being used, it did not render xylene a non-pollutant. The product's label indicated that the vapors could be irritating to people unaccustomed to them, a fact that placed the xylene "squarely within the insurance policy's definition of 'pollutant' as a 'contaminate or irritant.'"

Another such case is *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.

1. 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.

2. Carbon Monoxide

In *Andersen v. Highland House Co.*, 757 N.E. 2d 329 (Ohio 2001), a landlord and apartment manager sought coverage from their CGL insurer for claims for death and injury from carbon monoxide emitted from a malfunctioning residential heater in a multi-unit apartment complex. The court held that carbon monoxide admitted from the heater was not a pollutant within the 1986 pollution exclusion since residential carbon monoxide was not specifically enumerated with the definition of pollutant. Therefore, the pollution exclusion was ambiguous. The court also pointed out that the 1986 Pollution Exclusion replaced the sudden and accidental exception in the 1973 Pollution Exclusion due to concern over coverage for gradual, but unintentional pollution. Therefore, the exclusion was designed to bar coverage for gradual environmental degradation and to preclude coverage for government-mandated clean up. Basically, it was reasonable for the insureds to believe that the policies would not exclude claims for injuries due to carbon monoxide leaks.

3. 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 upholding 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.

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 N.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 A.2d 607 (Pa. Super. 1999) (flaking lead-based paint is a “pollutant” under 1986 Pollution Exclusion); *Auto Owners Insurance Co. v. City of Tampa Housing Authority*, 231 F3d 1298 (11 Cir. 2000) (applying Florida law, holding that lead paint is a pollutant under the 1986 Pollution Exclusion).

4. 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.

For other similar cases, see *Belt Painting Corp. v. TIG Ins. Co.*, 293 A.D.2d 206, 742 N.Y.S.2d 332 (2002) (“absolute” pollution exclusion not applicable to injuries sustained by employee as a result of indoor dissemination of paint or paint solvent fumes; no allegation that activities resulted in anything which would ordinarily be described as “pollution”); *Kerr-McGee v. Georgia Casualty & Surety Co.*, 2002 WL 818104 (Ga. App. May 1, 2002) (total pollution exclusion ambiguous and does not apply to claim for unintended release of industrial chemical within chemical plant).

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 *Carpet Workroom v. Auto Owners Ins. Co.*, 2002 W.L. 1747884 (Mich. App. 2002) (1986 pollution exclusion applies to fumes from carpet installation); *Bituminous Casualty Corp. v. Cowen Construction, Inc.*, 2002 W.L. 799707 (Okla. 2002) (total pollution exclusion not limited to environmental pollution and excludes coverage for lead poisoning from alleged release from lead into kidney dialysis center constructed by insured); *Feinberg v. Commerical Union Ins. Co.*, 766 N.E.2d 888 (Mass. App. 2002) (total pollution exclusion applies to soil and ground water contamination from rubber products manufactured by insured, rejecting argument that pollution exclusion does not apply to ‘useful products’); *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); *Amoco Production Co. v. Hydroblast Corp.*, 90 F. Supp. 2d 727 (N.D.Tex. 1999) (1986 Pollution Exclusion precludes coverage for injuries sustained as a result of exposure to a cleaning solvent).

The wide disparity in the court decisions 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.

V. 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, the resolution of that issue involves further questions, that 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.

A. 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 . . .*”

1. The 1973 Language

One of the earliest cases addressing these issues is *Leverence v. USF&G*, 462 N.W. 2d 218 (Wis.App. 1990). In that case, occupants of homes built by the insured contractor filed suit alleging that the homes retained excessive moisture within their exterior walls, promoting the growth of mold, mildew, fungus, spores and other toxins that caused a continuing health risk and adversely affected the value of their homes. They alleged the defective design of the walls and roofs and inappropriately selected building materials resulted in the excessive moisture, seeking recovery for both bodily injury and property damage.

One of the issues raised by the insurance company to deny coverage was the 1973 pollution exclusion contained in its policy. The insurer argued that the exclusion was broad enough to include the home environment contaminated with the mold and moisture. In rejecting that argument, the court relied on the trial court’s determination that the alleged cause of the bodily injury and property damage was exposure to water trapped in walls, which in turn caused the growth of microorganisms. The court concluded that, “No contaminants were released, but rather formed over time as a result of environmental conditions.” The case contains no discussion as to whether mold or microorganisms constitute pollutant under the pollutant exclusion.

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 1973 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).

2. 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.

Still other courts have refused to apply the 1986 exclusion in actions 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:

- *Kerr-McGee v. Georgia Casualty & Surety Co*, 2002 WL 818104 (Ga. App. May 1, 2002)—total pollution exclusion is ambiguous and did not apply to release of a chemical within a plant which injured an industrial subcontractor’s employee.
- *Republic Bank and Insurance 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, for the term “released, discharged, or dispersal” of pollutant 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.
- *Andersen v. Highland House Co.*, 757 N.E.2d 329 (Ohio, 2001)—bodily injury due to leak of residential carbon monoxide not subject to 1986 Pollution Exclusion since it does not “remotely resemble traditional environmental contamination.”

On the other hand, a sampling of cases which have found indoor emissions to constitute dispersal or discharge under the 1986 Pollution Exclusion. Those cases denying coverage on that basis include:

- *William E. McKusick v. Travelers Indemnity Co.*, 2001 Mich.App. LEXIS 1999 (June 8, 2001) – a pollution exclusion denying coverage for “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 pollutant.

- *PPR Tech Systems, Inc. v. Mt. Hawley Ins. Co.*, No. 100 CV368 (N.D. Ohio), 15 MEALEY’S LITIGATION REPORT: INSURANCE 5 (June 19, 2001) — a spill of PCB’s during the process of transferring contaminated 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 Md. App., 648 A.2d 1047 (1994)—court applies 1986 Pollution Exclusion to carbon monoxide 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.

B. Texas Cases Applying the 1986 Pollution Exclusion

In *Zaiontz v. Trinity Universal Ins. Co.*, 2002 W.L. 753815 (Tex. App.-San Antonio April 30, 2002), the court held that an absolute pollution exclusion in an umbrella policy barred coverage for injury to an employee spraying an odor eliminator inside an airplane. The insurer argued that no coverage existed under its policies because the injuries arose from an actual dispersal of a pollutant, that is, the smoke and fire odor eliminating chemical. It rejected the insured’s reliance on *Union Pacific Res. Co. v. Aetna Casualty & Surety Co.*, 894 S.W.2d 401 (Tex. App.-Fort Worth 1994, writ denied), since *Union Pacific* addressed the 1973 sudden and accidental language in the pollution exclusion. Under the later language before the court, the smoke and fire odor eliminator was applied using a fogger, which allegedly caused the employee’s injury. The fogging was a discharge, dispersal or release of a pollutant as defined in the policy.

Two cases from federal courts in Texas touch on this issue. 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 case applying Texas law 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 under Texas law a court may 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.

VI. APPLICABILITY OF THE POLLUTION EXCLUSION: PRODUCTS-COMPLETED OPERATIONS

Most insureds have products-completed operations coverage as part of their CGL policy. That coverage provides protection against liability of insureds, particularly construction contractors, resulting from services, materials or structures which they erect or install. It also includes 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 since it provides protection for bodily injury and property damage arising out of the work once it has been completed or after the product has been sold.

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 to 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.

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.

VII. EFFECT OF THE “BUSINESS RISK” EXCLUSIONS

Much of the case law under the pollution exclusion 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.

A. Construction Defect Coverage Analysis

Mold which is the subject of construction litigation usually is alleged to be a result of 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.² 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 sources of the moisture giving rise to the mold problem include faulty HVAC and mechanical systems, leaking windows, curtain walls, EIFS 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 was 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.

B. Owned Property Exclusion

Another of the "business risk" exclusions, one that is of potential application to property owners, is Exclusion (j)(1) which denies coverage for property damage to "property you [the named insured] own, rent, or occupy." This exclusion basically excludes coverage for property owned or controlled by the insured and is intended to avoid CGL coverage from being converted to first party property insurance. OSTRAGER AND NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES §10.03 [d] (10th ed. 1998). The exclusion has been the subject of much attention in the context of environmental claims and in general, it has been upheld to deny coverage for property damage to the insured's own property, but not to apply to damages caused to third party's property. See, generally, *American States Insurance Co. v. Hansen Industries*, 873 F.Supp. 17 (S.D. Tex. 1995); *Intel Corp. v. Hartford Accident & Indemnity Co.*, 952 F2d 1551 (9th Cir. 1991).

The exclusion will most likely be applied in a similar fashion to mold claims, so that claims for property damage involving mold should be carefully scrutinized to determine whether the exclusion would apply. In a typical scenario, this exclusion may not apply to damages sought against a landlord or property damage to a tenant's (third party's) property in the leased premises.

VIII. PERSONAL INJURY COVERAGE

Coverage B of the CGL policy provides personal injury coverage to the insured. Although personal injury coverage is not, under the terms of a CGL policy, subject to the pollution exclusion which applies only to bodily injury and property damage under Coverage A, some courts have nevertheless been unwilling to uphold personal injury coverage in the environmental context as an effort to avoid the pollution exclusion. See, *Bituminous Casualty Corp. v. Kenworthy Oil Company*, 912 F.Supp 238 (W.D. Tex. 1966), *affirmed without opinion*, 105 F3d 656 (5th Cir. 1996) (reliance upon trespass allegations to create a duty to defend is unreasonable in that it would render the pollution exclusion meaningless).

One of the personal injury offenses for which coverage is allowed under Coverage B includes “the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.” Is it likely that insureds may argue that a mold infestation could constitute an invasion of the right of private occupancy within the meaning of this coverage. However, as discussed above, the hesitancy of courts to uphold personal injury coverage in the context of environmental claims which may otherwise be subject to the pollution exclusion, makes this type of argument difficult. Moreover, due to the technical elements of the tort of invasion of the right of private occupancy, this type of argument becomes further complicated. These issues are beyond the scope of this paper, but for cases discussing personal injury coverage for invasion of the right of private occupancy under Texas law, see *Patel v. Northfield Insurance Co.*, 940 F.Supp. 995 (N.D. Tex. 1996); *Decorative Center of Houston v. Employers Casualty Co.*, 833 S.W.2d 257 (Tex. App. - Corpus Christi 1992, writ den.).

IX. THE INSURANCE INDUSTRY RESPONSE

The wave of mold litigation has obviously caused concern for the insurance industry. For example, one of the most notorious debates which has been somewhat uncustomarily played out in the media is the revision of Texas homeowners insurance policy forms by the Texas State Department of Insurance. That revision is a response to verdicts against homeowners insurers such as the \$32 million verdict in *Ballard v. Farmers Insurance Exchange* in June 2001. Obviously, mold is of great concern to commercial property insurers providing first party coverage for owners of commercial, industrial and public buildings, as well as landlords. First party coverage is the subject of other presentations at this mid-year meeting, and the purpose of this paper is to discuss the response of insurers to mold litigation in the third-party context. That response has primarily involved revisions and endorsements to commercial general liability (CGL) policies, as well as pollution legal liability (PLL) policies. In general, it is likely that approval or use of these policy forms in the various states will not generate the notoriety which revisions in personal lines, such as homeowners policies, have generated in states such as Texas. Also, it is safe to say that any, if not most, insureds will be faced with addressing insurers’ efforts to exclude mold coverage on their next renewal, if they have not been faced with that situation already.

The current litigation involving mold bears many similarities to asbestos litigation in earlier decades. That litigation led the insurance industry to promulgate absolute asbestos exclusions and

endorsements which are attached to most liability insurance policies. The insurance industry's response to mold claims is substantially similar. Due to the nature of mold claims, that is, the fact that they involve water infiltration or excess humidity in enclosed buildings, they usually involve some sort of allegation of construction or maintenance defect. As such, they typically involve several groups of exclusions. The pollution exclusion may be involved, both for allegations of bodily injury and property damage. As to the allegations of construction defect itself, and resulting property damage from the mold and clean up costs, the so-called "business risk" or "work product" exclusions are invoked.

Superficially, mold claims are similar to environmental or other toxic tort claims. As discussed above, issues have arisen as to whether an infestation of mold in an indoor environment constitutes the type of discharge, dispersal or release of pollutants intended to be excluded under a pollution exclusion which was originally developed in response to wide-spread industrial environmental contamination. Moreover, a companion issue is whether microorganisms such as mold and their mycotoxins constitute the type of industrial chemicals and substances which are generally thought of as pollutants under the standard pollution exclusion. Finally, the current pollution exclusion promulgated by the Insurance Services Office (ISO) in 1986 does not apply to products-completed operations exposures. To date there appears to be no definitive appellate opinion which addresses the applicability of the pollution exclusion to mold claims, either in the bodily injury or property damage context.

A. Modification of CGL Policies

Due to the uncertainties as to the applicability of the pollution exclusion and "business risk" exclusions to these types of claims, the insurance industry is adding endorsements to liability policies to absolutely exclude, or to severely reduce the coverage available for mold claims to commercial insureds.

1. CGL Endorsements and Exclusions

ISO, the industry organization which promulgates standard CGL forms, has drafted its forms for attachment to ISO CGL policy forms. For example, the "Fungi or Bacteria Exclusion Endorsement," No. CU 21 27 04 02, the basic mold exclusionary endorsement, states as follows:

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2., Exclusions of **Section I - Coverage A - Bodily Injury And Property Damage Liability**:

2. Exclusions

This insurance does not apply to:

FUNGI OR BACTERIA

- a.** “Bodily injury” or “property damage” which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b.** Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the affects of, “fungi” or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for consumption.

B. The following exclusion is added to Paragraph 2., Exclusions of **Section I - Coverage B - Personal And Advertising Injury Liability:**

2. Exclusions

This insurance does not apply to:

FUNGI OR BACTERIA

- a.** “Personal and advertising injury” which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
- b.** Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, “fungi” or bacteria, by any insured or by any other person or entity.

C. The following definition is added to the **Definitions Section**.

“Fungi” means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or by products produced or released by fungi.

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As can be seen, the ISO mold exclusionary endorsement expressly extends to clean up and remediation costs, personal injury and does not contain an exception for completed-operations exposures. An obvious problem for insured building owners or contractors may be the scope of “cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of” mold. Generally, repairs of water damage to buildings or construction included not only repair of the defect or condition causing the water infiltration or humidity, but also the mold itself. It is unclear what effect this exclusion will have on those types of repairs of water damage where mold is involved.

ISO has also promulgated a “Limited Fungi or Bacteria Coverage Endorsement” which provides a separate, and presumably smaller, aggregate limit for a “fungi or bacteria incident” resulting in bodily injury or property damage. Endorsement CG 24 25 04 02, provides as follows:

LIMITED FUNGI OR BACTERIA COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Schedule

Fungi and Bacterial Liability Aggregate Limit \$ _____

A. The following exclusion is added to Paragraph 2., Exclusions of **Section I - Coverage B - Personal And Advertising Injury Liability**:

2. Exclusions

This insurance does not apply to:

a. “Personal and advertising injury” arising out of a “fungi or bacteria incident.”

- b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of “fungi” or bacteria, by any insured or by any other person or entity.
- B. Coverage provided by this insurance for “bodily injury” or “property damage” arising out of a “fungi or bacteria incident”, is subject to the Fungi and Bacteria Liability Aggregate Limit as described in Paragraph C of this endorsement. this provision B. does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for consumption.
- C. The following are added to **Section III – Limits of Insurance**:
1. Subject to paragraphs 2. and 3. of **Section III – Limits of Insurance**, as applicable, the Fungi and Bacteria Liability Aggregate Limit shown in the Schedule of this endorsement is the most we will pay under Coverage A for all “bodily injury” or “property damage” and Coverage C. for Medical Payments arising out of one or more “fungi or bacteria incidents.” This provision C.1. does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for consumption.
2. Paragraph 5., the Each Occurrence Limit, Paragraph 6., the Damage To Premises Rented To You Limit, and Paragraph 7., the Medical Expense Limit, of Section III – Limits of Insurance continue to apply to “bodily injury” or “property damage” arising out of a “fungi or bacterial incident.”
- D. The following definitions are added tot he Definitions Section:
1. “Fungi means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents, or byproducts produced or released by fungi.
2. “Fungi or bacterial incident” means an incident which would not have occurred in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

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These endorsements have been filed with state regulators, and are expected to be implemented in various states in April, May and June, 2002. As part of the filing, ISO has included endorsements to be used with its standard umbrella liability form, as well as with owners and contractors protective liability and products/completed operations liability coverage forms. These other endorsements are substantially similar to those discussed above

B. Pollution Legal Liability (PLL) Policies

In addition, carriers are addressing coverage for mold under pollution legal liability (PLL) and other pollution policies such as contractors pollution liability (CPL) policies, expressly extending the definition of pollutant to include fungi or bacterial matter which produces the release of spores or the splitting of cells, including mold, mildew and viruses. However, underwriting considerations may dictate that such coverage be provided only through a relatively small sublimit. Alternatively, in order to obtain a higher sublimit, an additional premium may be charged on a case-by-case basis. Still other carriers may not offer such coverage or enhancements at all. The tendency appears to be that carriers issuing both CGL and PLL policies to the same insured will attempt to absolutely exclude mold and mildew exposures from the CGL, and attempt to isolate them in a PLL-type policy. This may allow carriers to provide more control over available sublimits, as well as to adjust deductibles which are more common in PLL policies. Moreover, since PLL policies are usually written on a claims-made basis, avoidance of long tail *Montrose*-type losses may be accomplished.

An example of one carrier's language adding mold exposures to the definition of "pollutants" to be covered under a PLL policy is as follows:

Pollution Conditions means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste, and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts and concentrations discovered. Pollution Conditions shall include Microbial Matter in any structure on land and the atmosphere contained within that structure.

Microbial matter means fungi or bacterial matter which reproduces through the release of spores or the splitting of cells, including but not limited to, mold, mildew and viruses, whether or not Microbial Matter is living.

Endorsements or revisions to liability policies will most likely eliminate coverage for mold in similar sick building exposures. Insureds should be on the lookout for such endorsements to their policies at the time of renewal. While coverage may be available, the amount and premium will surely require intense negotiation.

IX. 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.

Endnotes

1. These “trigger theories” are far from settled and are the subject of much debate. For additional discussion, see Mark Lawless, “Insurance Coverage for Environmental, Asbestos, and Other Long-Tail Claims: Decisions Applying Texas Law,” *THIRD ANNUAL INSURANCE LAW INSTITUTE, UNIVERSITY OF TEXAS SCHOOL OF LAW* (September 1998); Christopher Martin and M. Jarrett Coleman, “Coverage for Long-Tail Claims: Asbestos and Beyond . . .,” *THIRD ANNUAL INSURANCE LAW INSTITUTE, UNIVERSITY OF TEXAS LAW SCHOOL* (September 1998). For a general discussion of trigger theories as applied to defective work claims, see Patrick Wielinski, *INSURANCE FOR DEFECTIVE CONSTRUCTION, BEYOND BROAD FORM PROPERTY DAMAGE* (International Risk Management Institute 2000).

2. The “business risk” exclusions of the standard CGL policy state that the insurance does not apply to:
 - j. “Property damage” to:
 - (1) Property you own, rent, or occupy;
 - (2) Premises you sell, give away or abandon, if the “property damage” arises out of any part of those premises;
 - (3) Property loaned to you;
 - (4) Personal property in the care, custody or control of the insured;
 - (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
 - (6) That particular part of any property that must be restored, repaired or replaced because of “your work” was incorrectly performed on it.

Paragraph (2) of this exclusion does not apply if the premises are “your work” and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a side-track agreement.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard.”
 - k. “Property damage” to “your product” arising out of it or any part of it.

- l. “Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”. This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

- m. “Property damage” to “impaired property” or property that has not been physically injured, arising out of:
 - (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work;” or
 - (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

- n. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
 - (1) “Your product;”
 - (2) “Your work;” or
 - (3) “Impaired property;”

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

For a discussion of CGL coverage for construction defects generally, see Patrick Wielinski, *INSURANCE COVERAGE FOR DEFECTIVE CONSTRUCTION: BEYOND BROAD FORM PROPERTY DAMAGE COVERAGE* (IRMI 2000); Scott Turner, *INSURANCE COVERAGE FOR CONSTRUCTION DISPUTES, SECOND EDITION* (West 1999); Patrick Wielinski, “Just Trying to do My Job: Breach of Contract and Liability Insurance,” 12TH ANNUAL CONSTRUCTION LAW CONFERENCE, STATE BAR OF TEXAS (1999).

- 3 Both the terms “business risk” and “work product” are something of a misnomer. Those terms are not usually used in standard liability insurance forms such as the ISO CGL policy form. Rather, they refer to somewhat nebulous underwriting concepts such as the hesitancy of insurers to cover the business risks or defective work or products of their insureds.