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MOULD: FIRST PARTY PROPERTY AND THIRD PARTY LIABILITY ISSUES FACING CANADIAN INSURERS

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MOULD: FIRST PARTY PROPERTY AND THIRD PARTY LIABILITY ISSUES FACING CANADIAN INSURERS

I. INTRODUCTION

Mould is found almost everywhere. It is a fungus, and is able to grow in most man-made environments where there is adequate heat and moisture. According to recent media reports, mould is invading our homes and office buildings, and poses a serious risk to human health. A rising tide of personal injury claims, and high profile bad faith claims against insurers in the United States has reverberated in this jurisdiction, causing insurers to reflect on if, how, and when mould claims will begin to impact the Canadian insurance industry.

Mould is ubiquitous, and can grow almost anywhere, including most building surfaces, like drywall, wood, ceiling tiles, and all types of fabric including carpet.¹ The mould life cycle begins with airborne spores, which are present in most indoor environments. Spores are released into the air by existing mould colonies, and can last for months and even years. When a spore finds the correct level of humidity, ambient temperature, and a carbon substrate (like wood) it germinates much like a seed. Spores grow micro-filaments called hyphae, which in turn release an enzyme used by the fungus to break down and absorb the carbon substrate.

Mould presents a number of challenges to the insurance industry in Canada, as the industry braces itself for potential mould related claims in both the property and bodily injury settings. This paper will review a series of topics relevant to the insurance industry, centering on a discussion of property and bodily injury claims. Several questions arise in the context of potential mould litigation. Can mould cause serious injury? Is mould related property damage covered by the general liability policy? Are current policy wordings sufficient to exclude mould claims? Will Canadian civil courts deliver massive damage awards like their American counterparts?

II. THIRD PARTY BODILY INJURY CLAIMS

A. WHAT IS “MOULD” AND CAUSATION?

Mould personal injury claims are on the rise in the United States. While it is unlikely that insurers will face a dramatic number in British Columbia, they should certainly prepare for mould related bodily injury claims in the third party setting. Mould related

¹ C. Little, R. Philip, “Insurance can Help Manage the Risk of Toxic Mould”, *The Lawyers Weekly*, at 14.

bodily injury claims will most likely be brought in negligence, pursuant to the *Occupiers Liability Act*, and for breach of contract.

This portion of the paper will consider the issues relevant to potential personal injury claims – the known health effects of mould exposure, the admissibility of “novel” science related to mould injuries, establishing causation, potential class actions, and relevant policy exclusions.

1. Health Effects of Mould

Mould can have two possible adverse effects. First, mould spores are allergens, and can trigger allergic reactions in some people, such as cold like symptoms, and aggravation of asthma. Second, some types of mould produce toxins, called mycotoxins, which may cause illness in people. According to a study conducted by the New York City Department of Health², there are a number of risks associated with these toxins, which can occur after long-term exposure, or in some cases after a short, high volume exposure. Reportedly these risks are particularly acute with individuals with compromised immune systems. According to the New York report, health effects from exposure to mycotoxins include fatigue, nausea, headaches and other flu-like symptoms.

Several types of mould species are capable of producing mycotoxins,³ all of which exist in British Columbia, and present potential risks. Coastal environments, where there are significant rainfall levels, create a higher level of risk for contamination, given that the single most important factor contributing to mould growth is moisture. As such, insurers should be aware of potential mould contamination when investigating water damage claims, and should be prepared to employ environmental engineers with expertise in mycology to test mould growths if third party claims of injury seem likely.

While the scientific community has not determined exactly what mould’s effect on human health is, it is safe to say that high levels of mould can have deleterious health effects. Potential mould hazards are found in indoor environments, where sufficient quantities of mould exist, and where mould spores circulate in the indoor air. Recent studies have examined the claims that mould causes a host of human illnesses, including allergic reactions, irritation, and toxicity. Toxic effects are the most

² New York City Department of Health & Mental Hygiene “Guidelines on Assessment and Remediation of Fungi in Indoor Environments”, **online**:

<http://www.ci.nyc.ny.us/html/doh/html/epi/molldrpt1.html>

³ According to the New York Report (*supra* note 2): “many fungi (e.g. species of *Asperigillus*, *Penicillium*, *Fusarium*, *Trichoderma*, and *Memnoniella*) in addition to Statement of Claim can produce potent mycotoxins...”

controversial, and to date there is no scientific proof that links mould exposure to specific, serious illness.

It is estimated that 20 percent of North Americans suffer from some form of allergic rhinitis, and 10 percent have allergy related asthma. These allergies can be caused by a wide range of different aerosols, and linking allergic symptoms to mould would require a medical examination, and testing for a specific antibody produced in response to a specific mould.⁴ According to the New York study, the predominant symptoms of fungal exposure are runny nose, eye irritation, cough, congestion, and aggravation of asthma.

2. What is “Toxic” Mould?

Certain types of moulds also produce metabolites, or by-products of mould growth, called mycotoxins. The effects of mycotoxins are not well understood by the scientific community, which has not established the specific effects of mycotoxins, or “toxic” moulds. Although *Stachybotrys chartarum* has gained notoriety as a toxic mould, because it produces mycotoxins, it is not the only variety that does so.⁵

The New York study notes that reactions to mould will vary depending on the individual exposed. The report states:

The presence of fungi on building materials as identified by visual assessment...does not necessitate that people will be exposed or exhibit health effects. In order for humans to be exposed indoors, fungal spores, fragments, or metabolites must be released into the air and inhaled, physically contacted (dermal exposure), or ingested. Whether or not symptoms develop in people exposed to fungi depends on the nature of the fungal material (e.g. allergenic, toxic or infectious), age, state of health, and concurrent exposures. For these reasons, and because measurements of exposure are not standardized and biological markers of exposure to fungi are largely unknown, it is not possible to determine “safe” or “unsafe” levels of exposure for people in general.⁶

While scientists have not determined the precise effects of mycotoxins, some observers link toxic mould, particularly *Stachybotrys chartarum*, to various health risks. The report details some of these effects:

⁴ F. Fung, “Toxic Mould, Science or Speculation” (Construction Law Conference, September 2001), at 138.

⁵ *Supra*, note 2 at 3. The report notes: Many fungi...in addition to SC can produce potent mycotoxins, some of which are identified as toxic agents. For this reason, SC cannot be treated as uniquely toxic in indoor environments”.

⁶ *Ibid* at 5.

A wide variety of symptoms have been attributed to the toxic effects of fungi. Symptoms, such as fatigue, nausea, and headaches, and respiratory and eye irritation have been reported. Some of the symptoms related to fungal exposure are non-specific, such as discomfort, inability to concentrate, and fatigue. Severe illnesses such as ODTS [Organic Dust Toxic Syndrome] and pulmonary hemosiderosis have also been attributed to fungal exposures. ODTS describes the abrupt onset of fever, flu-like symptoms, and respiratory symptoms in the hours following a single, heavy exposure to dust containing organic material including fungi. ...Pulmonary hemosiderosis is an uncommon condition that results from bleeding in the lungs. The cause of this condition is unknown, but may result from a combination of environmental contaminants and conditions (e.g., smoking, fungal contaminants and other bioaerosols, and water-damaged homes), and currently its association with SC [Stachybotrys Chartarum] is unproven.⁷

In general terms, the less serious adverse health effects of mould arising from allergic reactions are well documented and not in dispute. However, the more profound health consequences associated with mycotoxins, or “toxic mould” are less well documented. One scientist notes that, while many adverse health effects associated with mould are suspected, the effects of toxic mould are still not fully understood:

The evidence for the clinical effects of exposure to indoor air molds is clear for conditions such as asthma, hypersensitivity pneumonitis, fungal infections, organic dust syndrome and aflatoxin cancers. However, the association between mold and non-specific symptomology, or more precisely, the direct chemical effects of mycotoxins and non-specific clinical syndromes (including respiratory and non-respiratory symptoms) is less well understood.⁸

Another scientist points out the necessary scientific process which must occur in order to obtain conclusive evidence concerning the effects of mould. He writes:

The process of documenting toxic effects from any mycotoxin should include (a) documenting the presence of airborne spores containing toxin; (b) identifying observed health effects that would be related to toxin rather than to other components of the spores/mold; (c) confirming that sufficient toxin exposure has occurred to show a dose-response relationship. At this time, there are no peer reviewed epidemiological/toxicological human

⁷ *Supra*, note 2 at 5.

⁸ Thomas Rand, “Moulds, Building Disfigurement and Health Consequences” Canadian Litigation Counsel; “Mould: The Emerging Enemy” at 12.

studies that fulfill all three criteria to demonstrate that inhaling a mycotoxin in a non-agricultural indoor setting will cause a specific medical condition.⁹

The Centers for Disease Prevention and Control in the United States has also reviewed the evidence to date linking toxic moulds with human illness. In its March 9, 2000 bulletin it states:

There are very few case reports that toxic moulds (those containing certain mycotoxins) inside homes can cause unique or rare, health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of toxic mold and these conditions has not been proven...the hazard presented by moulds that may contain mycotoxins should be considered the same as other common moulds which can grow in your house. There is always a little mould everywhere – in the air and on many surfaces...in summary, Stachybotrys chartarum (Stachybotrys atra) and other molds may cause health symptoms that are non-specific. At present there is no test that proves an association between Stachybotrys chartarum (Stachybotrys atra) and particular health symptoms.¹⁰

Not only is there little understanding of whether mycotoxins cause specific illnesses, it is not known what level of exposure to mould is necessary to produce a toxic effect, or how surface growing mould translates into exposure to toxins. Another scientist writes:

These agents [toxic moulds] can cause serious disease following massive exposures. But there is, to date, no scientific evidence that amounts found on surfaces in offices can give rise to levels that produce harm. Moreover, there is little reason to believe that they can. It is important to keep in mind that mold on walls is not the same as spores in the air. For the most part, hazardous exposures arise from direct contact with or inhalation of the agents or their spores. Although surface contamination can lead to airborne contamination, the actual quantitative relationship is at best indirect.¹¹

One of the reasons that scientists have been unable to establish a link between mould and illness is that toxic moulds do not leave “biomarkers”. Biomarkers are chemicals left in the human body which are measured in order to determine whether a person has

⁹ *Supra* note 3 at 139.

¹⁰ CDC, “Questions and Answers on Stachybotry chartarum and other molds”, **online:** www.cdc.gov/nceh/asthma/factsheets/molds/default.htm.

¹¹ R.E. Gots, “Indoor Air and Health: Clear-Cut, Equivocal, and Unlikely” **online:** www.mealeys.com/mold.html.

been exposed to a certain agent. At present there are no known biomarkers which researchers can use to establish that an individual has been exposed to toxic mould.¹²

It is clear from this brief review that the body of scientific knowledge linking mould exposure to specific serious illness is inconclusive. Despite this fact, mould exposure continues to elicit media attention, and a rising number of claims, particularly in the United States. In Canada, there has been more than one high profile evacuation of public facilities upon discovery of large amounts of indoor mould, including the evacuation of the Alberta Court of Appeal in the summer of 2001 where it was reported that 2/3 of the judges and 3/4 of the staff were suffering from “respiratory and other health problems”, apparently related to mould exposure.¹³

This brings us to the next question, which is whether or not expert evidence in this area will be admissible, and if so, how plaintiffs will prove that mould exposure caused, or significantly contributed to, their injuries.

3. “Novel” Science - Is Expert Evidence on Mould Injuries Admissible in British Columbia?

In the United States, mould litigation in the personal injury arena is on the rise. This phenomenon can be at least partly explained by the dramatic damage awards delivered by civil juries in the U.S. While the U.S. cases are relevant, key differences make the threat of mould personal injury litigation less ominous in this jurisdiction.

In practical terms, the less serious effects attributed to mould, such as allergic rhinitis and aggravation of asthma, are far less likely to result in personal injury claims in Canada, at least on an individual basis.¹⁴ In contrast to dramatically large awards handed down by civil juries, Canadian courts are comparatively frugal. In addition, depending on the injuries claimed, plaintiffs in British Columbia will face evidentiary problems, both in terms of admissibility, and proving causation.

A review of recent U.S. cases shows that the admissibility of scientific evidence advanced to establish a causal link between serious injuries and exposure to mould is controversial. Plaintiffs depend on the admissibility of expert testimony to prove their

¹² California Department of Health Services, Environmental Health Investigations Branch, “Misinterpretation of Stachybotrys Serology”, December, 2000; S. Hickman, M. J. Hess, and J. G. Wehrle, “Mold, the Risk and the Reality”, **online:** www.mealeys.mold.com/mold.html.

¹³ Press release, Alberta Court of Appeal, **online:** <http://www.albertacourts.ab.ca/ca/news>

¹⁴ Class actions, which are discussed below, may offer a realistic avenue for groups of plaintiffs to bring an action, even if none of their injuries are particularly severe.

claims. A review of recent key U.S. decisions reveals a lack of uniformity between different states, some courts admitting evidence in this area, and some excluding it.

In some instances U.S. courts have refused to admit evidence that mould causes serious injury because such evidence has not been accepted by the scientific community. While there is a growing body of scientific research linking mould exposure to various allergic reactions, such as asthma and rhinitis¹⁵, there is a lack of conclusive scientific research linking mould exposure to more serious injuries, such as damage to vital organs, and brain damage. A brief review of recent notable U.S. cases shows that different state courts have ruled differently on this issue:

- In *Ballard v. Fire Ins. Exch.*¹⁶ one of the plaintiffs claimed that he suffered from memory loss and concentration problems caused by exposure to toxic mould, which caused him to lose his job as an investment banker. Dr. Johanning diagnosed the plaintiff with toxic encephalopathy, a form of brain damage. The court disallowed the evidence, because the plaintiff was unable to prove specific causation, and there were insufficient epidemiological studies to establish a link between the damage claimed and the mould toxins found in the plaintiff's home.
- In *New Haverford Partnership v Stroot*,¹⁷ the plaintiff claimed that she had suffered permanent cognitive impairment in the areas of attention, concentration, memory, and executive function. Dr. Johanning from the *Ballard* case was permitted to testify. The Doctor relied on blood sampling, data from the apartment building concerning the presence of mould gathered two years after the exposure, and the plaintiff's medical history. The Court accepted that the doctor's medical opinion was sufficiently founded, and allowed the evidence.
- In *Davis v. Henry Phipps Plaza South*¹⁸ the defendant accepted the admissibility of evidence led to establish respiratory problems caused by mould. However, the defendant objected to evidence led to establish that mould had caused cognitive impairment. The court disallowed the

¹⁵ Evidence supporting allegations of asthmatic reactions to mould has been uniformly admitted in recent U.S. decisions, see: *Mondelli v Kendel Homes*, 262 Neb. 263, 631 N.W.2d 846 (2001); In *Davis v Henry Phipps Plaza South*, (N.Y. Sup. Ct. Oct. 11, 2001)(No. 116331/98) the defendant conceded the admissibility of evidence going to prove respiratory ailments caused by mould; *Centex-Rooney Constr. Co., Inv. v. Martin County*, 706 So.2d 20, 23 (Fla. Dist. Ct. App. 1997).

¹⁶ (Tex. Dist. Ct.) (No. 99-05252)

¹⁷ 772 A.2d 792 (Del. Sup. Court 2001)

¹⁸ (N.Y. Sup. Ct. Oct. 11, 2001)

evidence because it was not generally accepted within the scientific community.

- In *Nicholson v. Property Mgmt. Inc.*¹⁹ a five year old boy alleged that mould had caused liver damage. A paediatrician and a toxicologist testified on behalf of the plaintiff, while the boy's own doctor testified that there was no link between mould exposure and exacerbation of the boy's pre-existing liver condition. The expert evidence adduced by the plaintiff was admitted, and the plaintiff was successful in the action.

4. The Admissibility of "Novel" Scientific Evidence in British Columbia

The admissibility of expert evidence in British Columbia is governed by the "test" in the Supreme Court of Canada case *R. v Mohan*²⁰, which is in turn influenced by the leading U.S. case on the admissibility of "novel" science, *Daubert et al. v. Merrell Dow Pharmaceuticals, Inc.*²¹ In *Mohan* the Court adopted a test requiring that evidence be both relevant, and necessary – relevant in the sense that the evidence tends to make the plaintiff's allegations more or less likely, and necessary in the sense that without it the trier of fact would be unable to arrive at an informed conclusion.

Part of the test for the relevance of scientific evidence is reliability. Scientific evidence that is not supported by a body of peer-reviewed scientific research will receive heightened scrutiny by the courts because it may not be reliable. As one author points out:

The Supreme Court of Canada adopted a similar approach in R. v. Mohan...It went on, however, to explain that the "necessity and reliability" inquiries are to be undertaken with special scrutiny when applied to novel science, and a basic threshold of reliability for the science or theory must be established by the party seeking to call the evidence. Although the "necessity" requirement is not applied strictly for established science, for novel science the opinion evidence must be "essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert." With respect to reliability, the trial judge must be satisfied that the evidence "reflects a scientific theory or technique that has either gained acceptance in the scientific community, or if not accepted, is considered otherwise reliable in accordance with the methodology validating it." The judge is to decide

¹⁹ (No. 08-C-00-005586) 9 Md. Cir., Baltimore Co.(2001).

²⁰ [1994] 2 SCR 9 (S.C.C.).

²¹ 113 S.C.T. 2786, (1993) 509 U.S. 579.

whether the novel technique is sufficiently reliable to put to the jury for its review, given the dangers that the evidence presents. Finally, "the closer the evidence [about a novel scientific technique] approaches an opinion on an ultimate issue, the stricter the application of this principle." Where the evidence relates directly to the ultimate issue in the case, "very careful scrutiny" is required. The higher scrutiny is warranted for novel science because it both raises the usual risk that triers of fact may accept it uncritically, as well as the added risk that the opinions offered may be based on science that is wrong or overstated.²²

In *R. v. Murrin*,²³ the British Columbia Supreme Court considered both *Mohan*, and the U.S. case *Daubert* in deciding whether evidence of a new form of DNA testing was admissible. The Court, when assessing the reliability of expert evidence, states:

*An appropriate starting point is to ask whether the principles and conclusions upon which mtDNA analysis is based bear the traditional hallmarks of scientific knowledge. These hallmarks are: falsifiability, peer review and publication, general acceptance within the relevant academic community, a known rate of error and the existence and maintenance of standards. These criteria are identified and discussed by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.**

Emerging from the case law are several points that weigh against the admissibility of expert evidence aimed at establishing a causal link between mould exposure and injuries such as brain damage, or internal injuries, when this evidence has not been accepted by the general scientific community. First, a court will more likely consider it unreliable. Second, if the Plaintiff has proven that the defendant was negligent, then the evidence establishing causation between mould exposure and the plaintiff's injury will be determinative of the ultimate issue, raising the risk of prejudice to the defendant, and bringing the evidence under closer scrutiny. Third, scientific evidence is prejudicial to the defendant because it has an aura of infallibility, particularly to juries.

Despite the risk of prejudice to the defendant unreliable scientific evidence poses, this factor alone will not bar its admission. The Ontario Court of Appeal decision *Regina v. Buric and Parsniak*²⁴ stands for the proposition that "inherent unreliability" of evidence alone does not make it inadmissible. Rather, the court opined, unreliability should go to the weight of the evidence.

²² D.M. Paciocco, L. Stuesser, *The Law of Evidence*, 2nd Ed., (Irwin Law, 1999) at 138 - 139.

²³ [1999] BCJ No. 2715 (BCSC) at Paragraph 59.

²⁴ 106 C.C.C. (3d) 97 (Ont. C.A.), Affirmed 114 C.C.C. (3d) 95, Appeal to Supreme Court of Canada dismissed, [1997] 1 SCR 535 (S.C.C.).

Ultimately, the admissibility of “novel” science in this area will be determined on a case by case basis. At the present time, because there is not a widely accepted body of evidence linking mould exposure to serious injuries, such as brain damage, this evidence may be excluded by our courts. However, given the inconsistent approaches seen in different U.S. state courts, this issue is difficult to predict. In general, the more “novel” the evidence advanced by the plaintiff is, the greater scrutiny it will receive before being admitted by our courts. As the *Buric* decision points out, even if novel scientific evidence is admitted by our courts, it may be of questionable weight.

5. How will Plaintiffs Establish Causation in the Bodily Injury Setting?

In order for a claimant to succeed in a bodily injury claim, he or she must be able to lead evidence to establish the following:

1. The presence of mould spores, or mycotoxins in an indoor environment inhabited by, or frequented by the plaintiff;
2. The presence of a sufficient volume of mould spores to produce a toxic injury, or allergic response;
3. If an allergic response is alleged, the plaintiff’s specific allergic response to a specific type of mould, or, mycotoxin; and
4. If the plaintiff alleges a toxic injury the plaintiff must prove that:
 - i) the mycotoxin, or spore present in the indoor environment is toxic to humans;
 - ii) that this toxicity is causative of the injury alleged;
 - iii) that there were sufficient concentrations of the toxins to cause the alleged injury; and
 - iv) that the plaintiff was exposed to the toxins for a sufficient length of time to cause the injury, or suffer an allergic response.

The battery of experts the plaintiff would require to establish causation would include mycologists, indoor air quality technicians, doctors, allergists, toxicologists, and epidemiologists.

6. Defending Mould Bodily Injury Claims - Defence Strategies

There are several gaps in the scientific knowledge about mould injuries. In the case of mould allergies, plaintiffs will have a far easier time proving that their allergic responses were caused by mould. This is because it is possible to test individuals for

specific allergic responses, and to test indoor air for the presence of mould allergens. In defending a mould claim for allergic response, defendants will retain an indoor air technician to test the air in question for alternate allergens, or chemicals, which may be causing the alleged allergic reaction.

With respect to toxic injuries, there are no reliable studies to date linking mould with specific illnesses. Further, the mechanisms which create sufficient quantities of mould spores in the air itself are not well understood. For these reasons, plaintiffs alleging mould-related toxic injuries will face significant challenges proving that mould caused their injuries.

Despite this fact, once a plaintiff's evidence has been admitted, he must only prove that it is more likely than not that mould exposure contributed materially to his injuries. The civil standard of proof is the balance of probabilities. As stated by the Supreme Court of Canada in the leading case *Snell v. Farrell*, "causation need not be determined with scientific precision".²⁵ In practical terms, if a plaintiff can show that the onset of his injuries coincided with exposure to mould, that the mould is considered "toxic", and the defendant cannot point to other possible causes of the injury, it is likely that the plaintiff will have met the burden of proof in this respect.

B. CLASS ACTIONS FOR MOULD BODILY INJURY CLAIMS

1. Potential Class Action Plaintiffs

In cases where there is widespread mould exposure, especially within the same building, the British Columbia *Class Proceedings Act* (the "Act") may provide groups of potential plaintiffs with a practical way to advance their claims collectively, through class action proceedings. Groups of individuals who may utilize class action proceedings could include:

- (a) occupants of condominiums, or, housing co-operatives who complain of mould related illness related to a common set of water ingress problems;
- (b) occupants of commercial buildings such as office towers, schools, or public buildings (like courthouses) – for example occupants of one or more floors where there is mould growth in the HVAC system, creating exposure from a common source;

²⁵ [1990] 2 S.C.R. 311 at 312 (S.C.C.).

- (c) occupants of homes built by a single developer and construction company, provided that the general contractor's negligence contributed to water ingress and ensuing mould growth in a similar fashion as between the different home owners/occupants.

In many cases individuals will be dissuaded from advancing a claim by the costs involved considering the cost of expert testimony which claimants will require to advance mould related bodily injury claims. Individual lawsuits for asthma, or minor respiratory ailments will often not garner sufficiently large damage awards to make these claims economically feasible to commence and maintain. However, class actions allow large numbers of claimants to bear litigation expenses collectively, and may facilitate these types of claims in the future.

2. What is "Class Certification"?

Class action proceedings occur in two stages. Before a potential class of litigants (the class members) can proceed with a class action, a judge of the British Columbia Supreme Court must "certify" the action. If the class members cannot certify the action at this preliminary stage, the court will not allow the action to proceed, and it will fail. For this reason, the class certification stage of the action is crucial from the defence perspective.

The Act sets out criteria which the class must satisfy before the action can proceed, which are:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of class members raise common issues, whether or not those common issues predominate over issues affecting only individual members; and
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

In the context of claims for injuries caused by mould exposure, it seems likely that, in some circumstances at least, class actions will be available to potential litigants. The most likely scenario for a class action claim in this arena is a group of residents in a building contaminated by mould where the mould affecting all of the class members was caused by the same event, or the same series of events.

The decisions in *Rumley v. British Columbia*²⁶ and *Hollick v. Toronto*²⁷ are the two leading cases on class action certification; both decided by the Supreme Court of Canada in 2001, and establish a number of principles. In practical terms, the first three requirements set out in s. 4(1) (a), (b) and (c) of the Act do not create a significant obstacle to class certification. These sections require that the pleadings disclose a cause of action, that there be two or more identifiable members to the class, and that there are common issues to be decided as between the class members.

With respect to the latter requirement, in *Rumley* the Supreme Court of Canada found that so long as there is one common link between the class members and the defendant, this requirement will be met. In a mould exposure class action, it is clear that potential defendants such as building contractors, maintenance companies, architects and engineers all owe a duty of care to building residents. If the pleadings allege that it was their negligence that led to the residents' mould exposure and injuries, then this would satisfy the requirement in sub-paragraph (c) that "*the claims of class members raise common issues*".

The fourth requirement in s. 4 (1) (d) of the Act requires class members to prove that a class action is the most preferable method to resolve the dispute. The Act states that a court must consider a set of criteria when making this determination.²⁸ Among these criteria, are "*whether questions of fact and law common to the class members predominate over any questions affecting only individual members*" and "*whether other means of resolving the claims are less practical and less efficient*". In essence, so long as a class action is the most efficient way to resolve common issues between the class members, and the issues of fact and law common to the class members predominate over the facts and issues uncommon to the class members, the court will allow the action to proceed.

²⁶ (2001) 205 D.L.R. (4th) 39.

²⁷ (2001) 205 D.L.R. (4th) 19.

²⁸ Section 4(2) of the Act states: 2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means

In *Rumley* the class members were a group of deaf children who had been physically, sexually, and/or psychologically abused over a period of nine years. There were considerable differences between the class members in terms of the types of injuries claimed, when the injuries occurred, how they occurred, and what the standard of care was in relation to different class members. Despite these significant differences in areas of causation, standard of care, and damages, the Court certified the class. The Court noted that the predominant common issue was that the Province owed the students a duty of care, and that the issues of causation and damages could be decided in individually separate proceedings.

In *Hollick*, the class members claimed that they suffered property damage as a result of dust and other pollutants emitted by a city landfill. The court ruled against certification, reasoning that the different issues between the class members greatly outweighed the common issues. These differences were that the class members were situated at different distances from the landfill, had suffered varying degrees of damage, and had suffered damage at different times. Perhaps the factor fatal to class certification was the Court's finding that a class action was not the most efficient way to settle the various claims, because most of the claims were of little value, or were of such a value that it would have been worthwhile for individual members to pursue them individually.

3. Will Mould Bodily Injury Class Actions Likely be Certified?

In the arena of mould litigation, whether a class action is certified or not depends on a number of factors. To pose a hypothetical situation, suppose that there is a wood frame condominium building with 60 residents, with widespread mould growth in wall cavities caused by the negligent design and construction of the building. All of the residents suffer adverse health effects of varying degrees as a result. According to the reasoning in *Hollick* and *Rumley*, this action would likely be certified. There would be issues common to the residents (they all suffered harm due to the negligence of the building contractor, architects et al), and the negligence of the defendants would be the central common issue between the class members, predominating over uncommon issues. Even if the type and degree of injury varied between class members, the *Rumley* decision makes it clear that damages and causation can be addressed by individual class members in separate proceedings once the court establishes that the defendants were negligent.

There are other circumstances where a class action may not be certified. For example, imagine that there is widespread mould growth in the same condominium, but some of it was caused by inadequate ventilation in the air exchange system, some of it was caused by a leak in the roof, some of it was caused by a leak in the building envelope,

and some was caused by faulty window installation. Further, the residents in the south west corner of the building have been exposed to the mould caused by the leak in the roof, the residents in the north east corner by the mould caused by faulty window installation, and so on. In these circumstances, the issues uncommon to class members would predominate over common issues, and it is unlikely that a court would certify their class.

An example of such a case appeared in *McDonald v. Dufferin-Peel Catholic District School Board*²⁹. In this case the class members were students within a school district who had studied in portable buildings, where it was alleged toxic mould grew. The Court refused to certify the class on the basis that there were too many different issues, many of which were unique to individual class members, or unique to individual locations. For example, the court found that there were different types of portable buildings, all with different structural attributes, and varying moisture levels. The court also found that there were numerous differences between the class members in terms of their health, including whether they were exposed to mould previously, and if and to what degree class members were allergic to mould. For these reasons the court refused to certify the action.

Class action proceedings may make it more economically feasible for individual litigants to advance personal injury claims for mould-related injuries. As is noted above, mould exposure litigation will certainly be costly, and may not warrant litigation on an individual basis. However, class actions permit groups of litigants to defray legal expenses, and proceed in cases where they would not otherwise. This fact creates an additional risk to insurers who issue general liability policies to the parties involved in building construction, maintenance, and design such as contractors, architects, engineers, maintenance companies, and strata corporations.

III. GENERAL LIABILITY POLICIES -DUTY TO DEFEND AND INDEMNIFY FOR THIRD PARTY LIABILITY CLAIMS FOR MOULD-RELATED PROPERTY DAMAGE

A. THE COST OF MOULD REMEDIATION

The cost to remediate and repair mould infected structures is potentially enormous. In a notable Florida case, the Martin County courthouse was infested with two forms of mould owing to numerous building defects which led to severe water ingress.³⁰ Because the mould growth was so severe, and the defects were so large, the court ordered that the structure be demolished and rebuilt, at a cost of \$26,000,000. At trial

²⁹ [2000] O.J. No. 5014 (Ont. Sup. Ct. Jus.) .

³⁰ *Centex-Rooney Construction Co. v. Martin County*, 706 So. 2d 20 (Fla. App. 1997).

the court found that the construction manager had breached his duty of care to the county, and ordered him to pay over \$14,000,000 in damages, interests, and costs.

A host of mould related remediations have occurred in Canada as well, among them³¹:

- The Ontario government expects to spend almost \$90 million per year to repair over 58 mould infested buildings including police detachments, courthouses, and jails;
- The Royal Victoria Hospital at McGill University replaced a mould infested operating room ventilation system at a cost of over \$100,000;
- The Province of Ontario paid \$40 million to school boards in grants to correct “mould contamination problems” in schools;
- Mould infestation led to the remediation of two nursing homes in Halifax, with a cost of over \$1 million.
- In 2000 in Newmarket, Ontario the 165,000 square foot Provincial Court building had all of its walls and ceilings replaced to eliminate traces of mould;
- The cost of building a new Court of Appeal facility in Alberta is estimated at \$250 million, and the Alberta government is currently paying \$1.7 million per year to lease alternate space, as the courthouse is not in use due to mould contamination.

Clearly the potential cost of mould remediation is staggering, and poses significant risks to insurers from both a third party and first party perspective. The following discussion canvasses some of the issues pertinent to this discussion, such as the meaning of “property damage”, the applicability of the “pollution” exclusion to mould contamination, and policy wording purporting to exclude damage “caused by mould”.

B. THE DUTY TO DEFEND – A BRIEF REVIEW

An insurer’s duty to defend and indemnify arises when a third party brings claims against the insured entailing allegations that are covered by the liability policy.³² The Supreme Court of Canada has held that this duty to defend is not triggered by the acts

³¹ See D. Liblong “Insurance Coverage Issues in Mold Claims” and P. Chapman “What’s Green, Gross, and Attracts Liability?” – Canadian Litigation Counsel, *Mold: The Emerging Enemy*; G. Gibson & D. Pym Sr., “Toxic Mould Claims in Canada” Crawford Adjusters Canada; August 2002.

³² This section written with reference to A. Evangelista, J.T. Balaban, “Understanding the Duty to Defend: Continuing Development in the Post-*Scalera* World”, 2nd Annual Insurance Litigation: Cutting-Edge Strategies for Dealing with Today’s Exposures and Tomorrow’s New Risks”, (Canadian Institute Publications, Toronto, 2002).

or omissions of the insured, but rather by allegations in the pleadings which, if proven, would be covered by the policy.³³ The allegations in the pleadings do not have to be reasonably supported by evidence or fact – so long as the allegations have been made against the insured the duty to defend and indemnify arises.

In the context of liability policies issued to parties involved with building maintenance and construction, such as architects, engineers, and building contractors, it is important to understand the scope of “property damage” in order to effectively assess when the duty to defend arises. A typical example of this duty may include an allegation made by a building owner that a building contractor negligently installed a roof, which resulted in water ingress, and the growth of mould. If a building owner sues for mould growth, the question which arises is whether this constitutes “property damage” for the purposes of the liability policy, and creates a corresponding duty to defend.

C. GENERAL LIABILITY POLICY WORDINGS - WHAT CONSTITUTES “PROPERTY DAMAGE”?

Four common wordings have been in use, emerging from the published ISO, and Insurance Bureau of Canada wordings relating to “property damage” and “bodily injury” – pre - 1966, 1966, 1973, and 1986.³⁴ For the purposes of this analysis, the substantial difference between the 1966 wording and the 1973, and 1986 wordings centers on the judicial interpretation of “injury” as opposed to the more narrowly defined “physical injury”. The pre-1966 and the 1966 wordings refer to “injury to or destruction of tangible property”. However, the 1973 and 1986 wordings both refer to “physical injury”. The 1973 ISO policy wording defines property damage as:

1. Physical injury or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or;
2. Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

The 1986 ISO policy wording defines property damage as:

- (a) Physical injury to tangible property, including all resulting loss of use of that property; or

³³ *Nichols v American Home Assurance Co.* [1990] 1 S.C.R. 801, (S.C.C.).

³⁴ M.B. Snowden, M. G. Lichty, *Annotated Commercial General Liability Policy*, (Aurora: Canada Law Book, 2001).

- (b) Loss of use of tangible property that is not physically injured.

The most significant difference between these two wordings and the prior wordings is the change from “injury” to tangible property, and “physical injury” to tangible property. Courts have consistently held that the meaning of “injury” within the earlier wordings is broader than physical damage, and includes interference with ownership rights.

D. JUDICIAL INTERPRETATION OF “PROPERTY DAMAGE” IN BRITISH COLUMBIA - PRIVEST PROPERTIES

The leading case on point in British Columbia, as potentially relevant to mould, is *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*³⁵ In *Privest* the British Columbia Supreme Court examined a claim that a construction company had caused “damage” to a building when it used a spray-on asbestos fireproofing material. Later, when the building owner wanted to perform further renovations to the building, the Worker’s Compensation Board issued a Cease Work Order, halting the renovation until the asbestos material was removed.

As a result, the building owner sued the general contractor, seeking indemnity for the cost of removing the asbestos fire proofing material. In turn, the general contractor sought a declaration from the court stating that its liability insurers owed a duty to defend. The general contractor’s position was that the building owner’s claim against it was for property damage, and was therefore covered under the general liability policies in effect at the relevant time. The court disagreed, ruling in favour of all the insurers except Allstate. Allstate’s general liability wording was similar to the earlier wording, and covered:

injury to or destruction of property, including loss of use of property which has not been physically injured or destroyed provided such injury or loss of use is caused by an accident; or...injury to or destruction of tangible property...

Since the actions of the general contractor interfered with rights of ownership – in this case the owner was unable to renovate – the building owner alleged to have suffered an “injury” as that word has been interpreted. Accordingly, the wording in Allstate’s policy, which uses “injury”, and not “physical injury”, provided coverage, and a corresponding duty to defend against the losses alleged.

³⁵ (1991) 57 BCLR. (2d) 88 (BSSC.)

The Court then went on to determine that the other liability insurers did not owe a duty to defend because there was no “property damage”. As the court surmised, property damage only includes *actual physical damage to property*. In the context of potential mould litigation, general liability policies will only be triggered when there is an occurrence of physical damage to the building caused by mould, provided that the wording does provide for “injury” to tangible property.

In practical terms, the *Privest* case stands for the proposition that asbestos which does not pose a risk of bodily injury, and does not cause physical harm to property does not constitute “physical injury” to property. Similarly, it is possible that small amounts of mould would not constitute “physical injury” to property. Conversely, if the wording of the general liability policy states that the policy covers “injury” to property, so long as presence of the mould or asbestos interferes with a broad spectrum of rights associated with ownership – such as the right to renovate the property and remove the mould without endangering the health of residents and workers – then the duty to defend will arise.

Whether mould has actually caused physical damage will depend on the facts of each case. Substantial amounts of mould may contribute to the deterioration and rot of the building itself, which would constitute “property damage”. Smaller amounts however, may not cause actual “physical injury” to building structures. For example, relatively small amounts of mould growing on concrete surfaces, or in wall cavities, would probably not be considered “physical damage” if they had not harmed the structure itself. In addition, if moulds marred or stained visible materials such as tiles, outdoor stucco, carpets and the like then this would also likely be considered “physical injury to tangible property”.

E. HOW “ABSOLUTE” IS THE “ABSOLUTE POLLUTION” EXCLUSION - IS MOULD A “POLLUTANT”?

Another important factor to consider when assessing the potential duty to defend and indemnify is whether mould-related property damage claims are effectively excluded from coverage by reason of an exclusion. In this context, there is much debate about whether or not mould is a “pollutant” as that term is defined in most liability policies.

F. THE “SUDDEN AND ACCIDENTAL” EXCLUSION

As drafted by the ISO³⁶, general liability policies typically contain one of two exclusions with regards to “pollutants” - the 1973 “sudden and accidental” exclusion and the 1986 “absolute exclusion”. The “sudden and accidental” exclusion states that insurance does not apply:

To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the 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 or accidental.

It is doubtful that this exclusion would prevent third party claims for mould in either the property damage or bodily injury settings. U.S. courts have interpreted the phrase “sudden and accidental” to mean “unexpected”, rather than occurring rapidly³⁷. In the mould context, in most cases the discovery of the mould would be unexpected, and as such the exclusion would not apply.

In addition, this exclusion refers to the release of pollutants or contaminants “into or upon the land, the atmosphere or water course or body of water”, which would also seem to exclude indoor mould contamination.

G. THE “ABSOLUTE POLLUTION” EXCLUSION

The more recent exclusion which is more common in general liability policies today is the 1986 version, which says:

This insurance does not apply to:

1. ***Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:***

³⁶ The ISO wordings were similarly adopted by the Insurance Bureau of Canada, and reflect common wording found in liability policies issued by insurers in this jurisdiction.

³⁷ In *Re The Queen in Right of the Province of Ontario and Kansa General Insurance Co. v. Kansa General Insurance Co.* 17 O.R. (3d) 38 the Ontario Court of Appeal considered a similar clause. However, the clause referred to a discharge, dispersal, release or escape as being “caused by accident” as opposed to being “sudden and accidental”. Even so, some interpret this case to stand for the proposition that “sudden and accidental” should be given their plain meaning – i.e. sudden in the temporal sense.

- 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 in the premises, site or location in connection with such operations by such insured contractor*
 - 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 effect 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 effect 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 materials to be recycled, reconditioned or reclaimed.

An analysis of U.S. cases which have considered this exclusion reveals that courts focus primarily on two facets of the wording, having regard to (a) whether or not the substance in question (such as mould) can be properly described as a “pollutant”, and (b) whether or not the exclusion applies to the “discharge, dispersal or release” of

pollutants within the indoor environment, or whether the exclusion is limited to traditional environmental pollution.

1. Is Mould a “Pollutant” as Conceived by the “Absolute Pollution” Exclusion?

Several U.S. cases have explored the meaning of “pollutant”. In general, these cases establish the common principle that the term “pollutant” must be given a restricted, common sense meaning. Since nearly any substance can be viewed as a pollutant in the correct circumstance, the judiciary in the U.S. has narrowed the definition.

In *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*³⁸ the court observed:

*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”. [citing Westchester Fire Ins. Co. v. City of Pittsburgh, 768 F. Supp. 1463, 1470 (D. Kan. 1991)]. Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd result. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries 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 and contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution. To redress this problem, courts have taken the common sense approach when determining the scope of pollution exclusion clauses...The bond that links these cases is plain. All involve injuries resulting from everyday activities gone slightly, but not surprisingly, awry. There is nothing that unusual about paint peeling off a wall, or asbestos particles escaping during the installation or removal of insulation, or paint drifting off the mark during a spray painting job. A reasonable policyholder...would not characterize such routine incidents as pollution*³⁹.

In *Stillman v. Charter Oak Fire Insurance Co.*⁴⁰ the court found that the definition of “pollution” was ambiguous because it was not defined in the exclusion. As such, they ruled in favour of the insured, and found that mould fell outside the meaning of “pollution”.

³⁸ 976 F. 2d 976 (7th Cir. 1992).

³⁹ *Ibid* at 1043-44.

⁴⁰ No. 92-1949-CIV-Highsmith (S.D. Fla. June 18, 1993).

In *Keggi v Northbrook Prop. & Cas. Ins. Co.*⁴¹ the court considered whether fecal coliform bacteria in the municipal water system was a “pollutant”. The court ruled that fecal coliform bacteria was not a “pollutant”, because it was not enumerated in the definition provided in the 1986 ISO wording. In addition, the court ruled that the examples of pollutants in the definition were all non-living, industrial or chemical byproducts, and did not include examples of biological contaminants or irritants.⁴²

According to the *ejusdem generis* principle, when there is an enumerated list of items of the same class or type, in order for a court to find that an item is included within the definition, it must be consistent with the enumerated class.⁴³ The *Keggi* decision is consistent with this principle because mould is not part of a class of industrial pollutants enumerated in the exclusion.

Another factor that makes it less likely that mould will be excluded from coverage based on the pollution exclusion is the wording in 1(d) which confines the exclusion a “pollutant” caused by the insured, contractors etc. who “are working”. Since third party claims from mould exposure, or mould claims almost always arise long after the departure of the insured, the exclusion may not apply.⁴⁴

While these factors weigh against the likelihood that Canadian courts will find that mould is a “pollutant” under this exclusion, there are U.S. cases that have found the opposite result. In *Stillman v Travelers Insurance Co.*⁴⁵ the Florida District Court concluded that an absolute exclusion clause applied to “high levels of fungi, molds, and yeast” in a bank building.

In addition, there are several U.S. cases which have considered the meaning of “contaminant”. In the exclusion clause, pollutants are defined as “any solid, liquid, gaseous or thermal irritant or **contaminant**, including smoke, vapor, soot, fumes, acid alkalis, chemicals and waste”. The weight of U.S. authority to date has concluded that a “contaminant” is a foreign substance which mixes with property, thereby damaging it, such as oil spilled into a fresh water source, or toxic chemicals mixing with soil, creating

⁴¹ 13 P. 3d 875 (Az. App. 2000).

⁴² Review of pollution exclusion clause written with reference to J.M. Jauregui “Mold: Can the Pollution Exclusion Help?” DRI Papers. For other cases where mould has not been considered a “pollutant”, see *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E. 2d 506 (N.Y. 1993); *USF&G v Wilkin Insulation Co.*, 578 N.E. 2d 926; and *Leverance v. United States Fidelity and Guaranty*, 158 Wisconsin 2d. 64, and 97 (1990).

⁴³ **Canada (Attorney General) v. Ward**, [1993] 2 S.C.R. 689.

⁴⁴ R. Black, S. Lerner, “Toxic Mould: Legal Principles as they Relate to Property” Canadian Litigation Counsel, *Mold: The Emerging Enemy*.

⁴⁵ No. 92-1949-CIV-SH (Dist. Ct.).

an “impure” substance⁴⁶. Using this reasoning, it is possible that mould will fall within this definition in that it mixes with wood, damaging the original material by causing deterioration and rot, causing affected building materials to become “impure”.

2. Do Indoor Contaminants such as Mould Fall Within the Ambit of the “Absolute Pollution Exclusion”?

The second issue in this debate centers on the issue of whether or not indoor contaminants released into indoor air have been “discharged, dispersed, or released” as required by the exclusion wording. A number of U.S. cases have considered this issue, producing mixed results. As one author notes, an important difference between the 1973 and 1986 wordings is the removal of the words “into or upon land, the atmosphere or any water course or body of water”, and the addition of “at or from any premises, site, or location”.⁴⁷ U.S. cases considering the meaning of the 1973 exclusion concluded that it only applied to pollution which moved into the outdoor environment – based on the policy wording which refers to release of pollutants onto or into land, the atmosphere, and bodies of water.

However, judicial interpretations of the more recent wording has created two divergent bodies of case law in the U.S. One group of cases stands for the proposition that, given the difference between the 1973 and 1986 wordings, that the “absolute pollution” exclusion now effectively excludes the release of all indoor pollutants. Conversely, a number of recent decisions adhere to the view that the 1986 wording still excludes only traditional environmental pollution, which encompasses discharges of pollutants into the outside atmosphere.

The former view, that the “absolute pollution” exclusion now effectively excludes releases of indoor pollutants, is expressed by the court in *Oates By Oates v. State of New York*.⁴⁸ This interpretation is representative of a number of cases which have held that incidents of indoor pollution are effectively excluded by the 1986 wording.⁴⁹ These

⁴⁶ *HI-G Inc. v. St.Paul Fire & Marine Insurance Co.*, 283 F. Supp. 211 (D. Mass. 1967); and *American Casualty Company of Reading, Pennsylvania v. Myrick*, 304 F. 2d. 179.

⁴⁷ P. J. Wielinski, “CGL Coverage for Moldy Work”, (Defence Research Institute, Construction Law, Sept. 2001) at 171.

⁴⁸ N.Y.S. 2d 550 (N.Y. Cl. 1993).

⁴⁹ A number of U.S. courts have held that a pollution exclusion bars coverage for all injuries caused by the release of contaminants, even where the contaminant is dispersed into a confined or indoor area. See, e.g., *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1004-05 (4th Cir. 1998) (applying Maryland law); *Technical Coating Applicators, Inc. v. United States Fidelity and Guar. Co.*, 157 F.3d 843, (11th Cir. 1998) (applying Florida law); *West American Ins. Co. v. Band & Desenberg*, 138 F.3d 1428 (11th Cir. 1998) (applying Florida law); *Reliance Ins. Co. v. Moessner*, 121 F.3d 895 (3d Cir. 1997) (applying Pennsylvania law); *Certain Underwriters at Lloyd's London v. C. A. Turner Constr. Co., Inc.*, 112 F.3d 184, 188 (5th Cir. 1997)

cases consider several types of indoor pollution, including carbon monoxide, paint fumes, concrete sealant fumes, ammonia fumes, cigarette smoke, and asbestos particles. It should be pointed out that most of these substances all fit within the prescribed definition of pollutant in the 1986 wording in that they are “smoke, vapor, fumes”, and fit into a class of man-made pollutants. None of the decisions cited in this regard consider whether or not mould is included within this class.

In the *Oates* case, the former custodian of an apartment building took action against the state for failing to remove lead-based paint from his apartment, which he claimed caused him injury. The court applied the “absolute pollution” exclusion, noting:

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 the “absolute pollution” exclusion provisions. Cases subsequent to Continental when confronted with this exclusionary language, have held that the only reasonable interpretation is that “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.⁵⁰

It is noteworthy that, while the court accepts the argument that the 1986 wording effectively excludes both traditional environmental pollution, and indoor pollution, the

(applying Texas law); *American States Ins. Co. v Nethery*, 79 F.3d 473 (5th Cir. 1995) (applying Mississippi law); *Longaberger Co. v. United States Fidelity & Guar. Co.*, 31 F. Supp. 2d 595 (S.D. Ohio 1998); *Brown v. American Motorists Ins.*, 930 F. Supp. 207 (E.D. Pa.1996); *Essex Ins. Co. v Tri-Town Corp.* 863 F. Supp. 38 (D. Mass. 1994); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998); *American States Ins. Co. v. Zippro Constr. Co.*, 216 Ga. App. 499, 455 S.E.2d 133 (Ga. Ct. App. 1995) ; *Bernhardt v Hartford Fire Ins. Co.*, 102 Md. App. 45, 648 A.2d 1047 (Md. Ct. App. 1994); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W. 2d 777 (Minn. Ct. App. 1999); *Demakos v Travelers Ins. Co.*, 205 A. D.2d 731, 613 N.Y.S.2d 709 (N.Y. App. Term. 1994); *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100 (Pa. 1999); *Cook v. Evanson*, 83 Wn. App. 149, 920 P.2d 1223 (Wash. Ct. App. 1996); *Peace ex rel. Lerner v. Northwestern Nat'l Ins. Co.*, 228 Wis. 2d 106, 596 N.W.2d 429 (Wis. 1999).

⁵⁰ *Supra* note 47.

pollutant itself must still fall within the definition of pollutants, which means being “similar to those listed”. This sentiment again brings into question whether mould fits within the list of exclusively man-made, industrial pollutants listed in the exclusion.

While the *Oates* case interprets the 1986 wording to mean that *all* forms of pollution, whether indoor or outdoor, are excluded, many other cases have taken the opposite view.⁵¹ This group of cases stands for the proposition that, despite the differences between the 1973 and 1986 wording, the “absolute pollution” exclusion applies only to outdoor environmental damage. In most of these cases U.S. courts have found that the more recent wording is ambiguous in this regard, and accordingly have ruled in favor of the insured. Further, the courts which have decided that indoor pollution falls within coverage view the words “discharge”, “release”, and “dispersal” as terms of art in environmental law, further reinforcing the view that the clause does not exclude indoor pollution.

3. The “Absolute Pollution” Exclusion – Summary and Conclusion

Having regard to both aspects of this issue – (a) whether mould is a “pollutant” as defined within the exclusion and (b) whether the 1986 wording effectively excludes indoor pollution, or merely applies to traditional environmental pollution – it seems more likely than not that the “absolute pollution” wording will *not* effectively exclude coverage for mould.

⁵¹ Many courts have held that a pollution exclusion clause in a CGL insurance policy applies only to injuries caused by traditional environmental pollution. See, e.g., *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30-31 (1st Cir. 1999) (applying Maine law); *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 530-31 (9th Cir. 1997) (applying Montana law); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 38 (2d Cir. 1995) (applying New York law); *Bituminous Cas. Corp. v. Advanced Adhesive Tech.*, 73 F.3d 335 (11th Cir. 1996) (applying Georgia law); *Lumbermens Mut. Cas. Co. v. S-W Indus., Inc.*, 23 F.3d 970, 981-82 (6th Cir. 1994) (applying Ohio law); *Regional Bank of Colo., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir. 1994) (applying Colorado law); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043-44 (7th Cir. 1992); *C. H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479 (3d Cir. 1981); *Sphere Drake Ins. Co. v. Y.L. Realty Co.*, 990 F. Supp. 240 (S.D.N.Y. 1997); *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949 (S.D.N.Y. 1996); *Island Assocs., Inc. v. Eric Group, Inc.*, 894 F. Supp. 200 (W.D. Pa. 1995); *Center for Creative Studies v. Aetna Life & Cas. Co.*, 871 F. Supp. 941 (E.D. Mich. 1994); *Minerva Enters., Inc. v. Bituminous Cas. Corp.*, 312 Ark. 128, 851 S.W.2d 403 (Ark. 1993); *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (Ill. 1997); *Thompson v. Temple*, 580 So. 2d 1133 (La. Ct. App. 1991); *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617 (Md. 1995); *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115, 686 N.E.2d 997 (Mass. 1997); *Cepeda v Varveris*, 234 A.D.2d 497, 651 N.Y.S.2d 185 (N.Y. App. Term. 1996); *Kenyon v Security Ins. Co.*, 163 Misc. 2d 991, 626 N.Y.S.2d 347 (N.Y. Sup. Ct. 1993); *West American Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692 (N.C. Ct. App. 1991); *Owens-Corning Fiberglas Corp. v Allstate Ins. Co.*, 74 Ohio Misc. 2d 144, 660 N.E.2d 746 (Ohio Ct. Com. Pleas 1993).

It remains to be seen how courts in Canada will treat the diverging lines of U.S. case law considering this issue. The results of the case law considering this issue are inconsistent, both in determining whether or not mould is a “pollutant”, or “contaminant”, and whether the exclusion applies to indoor pollution. This inconsistency in interpretation fortifies the proposition that the exclusion is in fact ambiguous, and will most likely lead courts to interpret these wordings in favor of the insured.⁵²

With regard to whether mould is a “pollutant” as defined within the exclusion, it is likely that courts in Canada will not consider mould a “pollutant”, because it does not fit within the list of chemical, man-made or industrial pollutants. While a valid argument remains that mould is a contaminant as that term is defined, the Arizona Court of Appeal rejected this interpretation when considering the presence of fecal bacteria in drinking water supply because it determined that living, organic contaminants are not properly described as “solid”, “liquid” “gaseous”, or “thermal”.

With regards to the “absolute pollution” exclusion, predicting how courts in British Columbia will react to various conflicting interpretations is difficult, leaving both the insurer and insured wondering about the ambit of coverage in these policies. In light of this uncertainty, insurers should give serious consideration to altering the wording of the absolute pollution exclusion to definitively include or exclude mould and other biological contaminants.

H. THE EFFECT OF STATUTORY ORDERS TO REMEDIATE MOULD CLAIMS

Part 2 of the “absolute pollution” exclusion states:

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 effect of pollutants.*

⁵² “...In light of the disarray that characterized this area of law in 1994, and continues to characterize it today, no reasonable person could find that the insurance policy unambiguously excluded coverage...” *Meridian Mut. Ins. Co. v Kellman* 197 F. 3d 1178 (Sixth Circuit 1999) at 1186.

This portion of the “absolute pollution” exclusion may effectively exclude from coverage the cost of mould remediation in cases where it is ordered by a governmental authority, or where a governmental authority is seeking damages from the insured for “testing, monitoring or cleaning up...” pollutants. The effectiveness of this exclusion will hinge on the meaning of “pollutants”, which is canvassed above. Provided that (a) Canadian Courts conclude that mould is a “pollutant” as contemplated by the exclusion; or (b) insurers alter policy wordings to ensure that mould is included within the definition of “pollutant”, this portion of the clause will offer substantial protection to insurers in this jurisdiction.

I. HOW WILL THIS SECTION OF THE EXCLUSION APPLY IN BRITISH COLUMBIA?

In British Columbia, certain statutory bodies have the authority to issue clean up orders for certain types of pollution. While the *Waste Management Act*⁵³ deals strictly with outdoor pollution – principally soil contamination⁵⁴ – the Worker’s Compensation Board has the authority to order mould remediation in buildings where people work on a large scale. The Workers’ Compensation Board derives its statutory authority from the *Workers Compensation Act*⁵⁵, (the “Act”), and accompanying regulations, principally the *Occupational Health and Safety Regulation*⁵⁶, (the “Regulation”). Section 115 (1) of the Act states:

Every employer must:

- (a) ensure the health and safety of
 - (i) all workers working for that employer, and
 - (ii) any other workers present at a workplace at which that employer’s work is being carried out, and
- (b) comply with this Part, the regulations and any applicable orders.

The Workers Compensation Board has also issued guidelines, which are published as an addendum to regulation 4.79, which is entitled “Moulds and Indoor Air Quality”⁵⁷,

⁵³ R.S.B.C. [1996] c. 482.

⁵⁴ Section 26(1) of the Act states: “**contaminated site** means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains...”

⁵⁵ R.S.B.C. 1996, c. 492

⁵⁶ B.C. Reg. 296/97

⁵⁷ **online:** <http://regulation.healthandsafetycentre.org/s/GuidelinePart4.asp#SectionNumber:G4.79>

which affords guidance, and information about mould growth, and potential harm (the “Guidelines”). The Workers Compensation Board has adopted what is known in some circles as the “precautionary principle”, and has assumed that large quantities of mould growing in wall cavities, or in air ventilation systems and ductwork pose a risk to human health. The Guidelines also adopts the remediation guidelines set out in the report published by the New York City Department of Health, referred to above.

Because the Workers’ Compensation Board has a duty to ensure the safety of work places, it will order remediation of significant quantities of mould present in work environments. Examples of buildings which are likely to receive this type of remediation order include office buildings, hospitals, long term care facilities, schools, public buildings, and libraries.

The Workers Compensation Board is granted authority to make these orders under s. 187 of the Act, which states:

187 (1) The board may make orders for the carrying out of any matter or thing regulated, controlled or required by this Part or the regulations, and may require that the order be carried out immediately or within the time specified in the order.

(2) Without limiting subsection (1), the authority under that subsection includes authority to make orders as follows:

...

(b) requiring a person to take measures to ensure compliance with this Act and the regulations or specifying measures that a person must take in order to ensure compliance with this Act and the regulations;

...

(c) doing anything that is contemplated by this Part to be done by order;

(i) doing any other thing that the board considers necessary for the prevention of work related accidents, injuries and illnesses.

(3) The authority to make orders under this section does not limit and is not limited by the authority to make orders under another provision of this Part.

The relevance of the Act to the “absolute pollution” exclusion is clear. In circumstances where the insured submits a claim for costs related to mould remediation which was ordered by the Workers Compensation Board, or any other statutory authority⁵⁸, so long as mould is considered a “pollutant”, these claims will be excluded from coverage. The potential significance of this portion of the exclusion is important for insurers, as employees’ collective sensitivity to, and awareness of, mould increases. Informal statements from representatives of the Workers Compensation Board indicate that these types of claims are on the rise. As such, insurers will want to ensure that the definition of “pollution” is tailored to include mould, if they want to effectively exclude these types of claims from coverage.

J. FIRST PARTY PROPERTY CLAIMS - ISSUES ARISING IN COMMERCIAL AND HOMEOWNER PROPERTY POLICIES

There have been several notable U.S. cases in the first party setting concerning mould infestation. These cases have garnered significant media attention, with insurers facing devastating jury awards including “bad faith” allegations. While the specter of multi-million dollar bad faith claims is not as ominous in this jurisdiction⁵⁹, insurers must consider the risks associated with underwriting mould claims. An important component of managing these risks is the use of effective coverage exclusions.

Exclusions are concerned with either *risks* or *losses*: a typically excluded risk would be war or civil unrest, or the escape of radioactivity. A typically excluded loss might be especially valuable property such as money or negotiable securities. All-risks policies usually place detailed limitations on the insurer’s responsibility for both risks and losses, although residential and commercial policies vary considerably in the type of risks and losses which they exclude.

⁵⁸ For example, the Vancouver City Health By-Law no. 6580, s. 2.1 and 2.2 allow a public health officer to order the clean up of a building that is not sanitary, or poses a risk to human health; practically speaking at this time the City is not taking a stance in respect of mould remediation, until more is known about the actual health effects of mould.

⁵⁹ In *Whiten v. Pilot Insurance Co* (2002) 209 DLR (4th) 257 (S.C.C.) the Supreme Court of Canada found that a punitive damage award for bad faith is suitable where an insurer has no reasonable basis for denying a claim, and displays reprehensible conduct toward the insured. In *Whiten* the insurer denied a fire loss claim based on arson even though its own experts, as well as the fire department advised it that no arson was apparent on the evidence. The Court approved an award of \$1 million, noting that such an award was on the high end of an acceptable range. In the context of mould claims, it is far less likely that an insurer would face a bad faith claim unless it had no reasonable basis for denying a claim.

IV. SCENARIOS:

For illustrative purposes, this paper will address three actual coverage scenarios, which grapple with common policy exclusions as they apply to mould coverage issues.

A. SCENARIO # 1 - MOULD REMEDIATION IN A CONDOMINIUM UNIT

1. The Facts

In this scenario there was a fire in a condominium unit, which destroyed the overhead skylights above the units. The restoration company removed the skylight, but due to a series of delays, the skylight was not replaced for roughly 11 months. The company replacing the skylight draped a tarp over the exterior of the building, but this was insufficient to prevent water ingress, which entered the wall cavity of the suite immediately below. In addition, when the Fire Department attended to extinguish the fire originally, they poured water through the roof of the building. Predictably, the original deluge of water from the Fire Department, combined with the continuing influx of moisture through the skylight, caused the wall cavity to become infested with mould.

The Strata Corporation then hired an air quality testing firm to test the air for mould spores. The resulting report advised the residents to remediate the wall cavity, at a cost of between \$15,000 and \$25,000. The wall cavity was part of the common property which was covered by the Strata Corporation's insurer.

2. Coverage Issues

Two primary issues arose in this scenario. The first issue related to the grant of coverage in the Strata Corporation's policy, which stated:

In consideration of the premium charged, this policy is extended to cover for additional insurance as follows:

- l) Clean up Expenses for on Premises Pollutants - this form is extended to insure, subject to all terms and conditions, **loss or damage caused directly by:***

 - i) the perils insured under this form to "building(s)", structure(s), machinery, "equipment" or "stock" at the "premises"; or*
 - ii) the dumping of "pollutants" at the "premises" without the knowledge or consent of the insured*

for not more than \$10,000, in the aggregate during each separate twelve month period of this policy, expenses incurred in clean up of “pollutants” at the “premises” provided the discharge, dispersal, release or escape of “pollutants”:

- i) originates at the “premises”; and*
- ii) is sudden, unexpected and unintended from the standpoint of the Insured;*
- iii) occurs during the policy period.” (emphasis added)*

The term “Pollutant” is defined in the policy as follows:

- “k) “Pollutants” means any solid, **liquid**, gaseous or thermal irritant, or **contaminants** including odour, vapour, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.” (emphasis added)*

As the analysis of the term “pollutants” and “contaminants” points out, there is U.S. case law which states that mould infestation in a building wall cavity is a “contaminant”. In any case, based on common law principles of interpreting insurance policies, when a court finds that there is ambiguity in policy wording, it will rule in favor of coverage.

For this reason, it is likely that the insured was entitled to the \$10,000 coverage available under this sub-limit in the policy. This scenario highlights the importance of the sub-limit clause, which the insurer can use to its advantage to provide coverage under certain risks, such as mould, but limit its exposure by placing a ceiling on potential claims.

3. The “Sue and Labour” Clause – the Insured’s Obligation to Repair and Prevent Damage

The same scenario also invites discussion of the “sue and labour” clause which is common in property policies. A typical “sue and labour” clause contained in a commercial all-risks policy states:

The insured, in the event of any loss or damage to any property insured under the contract, shall take all reasonable steps to prevent further damage to any such property so damaged and to prevent damage to other

property insured hereunder including, if necessary, its removal to prevent damage or further damage thereto.

The responsibility of the insurer is stipulated as follows:

The insurer shall contribute pro rata towards any reasonable and proper expense in connection with steps taken by the insured and required under the preceding paragraph of this condition according to the respective interests of the parties.

The policy wording establishes limitations on expenses that an insured can claim. First, the words “*in the event of any loss or damage*” do not provide coverage for expenses incurred preventing loss, the loss must have already occurred.

Second, the expenses are only recoverable if they have been incurred for the purpose of averting further losses caused by a covered peril⁶⁰. In this scenario, both of these requirements would have been met – the loss had already occurred, and the loss which led to the secondary mould damage was covered by the policy.

A corollary of the insurer’s obligation to indemnify the insured for expenses incurred averting further loss is the insured’s obligation to undertake such measures. Below is a sample policy wording in this regard, which states:

*9(1) The insured, in the event of any loss or damage to any property insured under the contract, **must take all reasonable steps to prevent further damage to any such property so damaged** and to prevent damage to other property insured under this contract including, if necessary, its removal to prevent damage or further damage to it.*

(2) The insurer must contribute proportionately towards any reasonable and proper expenses in connection with steps taken by the insured and required under subparagraph (1) of this condition according to the respective interests of the parties. (emphasis added)

The potential result for the insured illustrated by this scenario is that coverage for mould damage, which is secondary to the original fire damage, may be denied if the insured fails to “*take all reasonable steps to prevent further damage*”. In this scenario, if it could be shown that representatives of the Strata Corporation knew of the water ingress which caused the mould infestation, but did nothing to expedite the replacement of the window, or improve the ad hoc covering of the window with a tarp, then the insurer

⁶⁰ See *Weissberg v Lamb* (1950) 84 L.I.L. Rep. 509.

could deny coverage for the mould remediation costs, relying upon the Strata's failure to prevent the water ingress when they reasonably should have done so.

From a practical standpoint, the insurer may not want to bear the expense of litigation associated with a denial of coverage when a \$10,000 sub-limit is in place. However, in other cases where the costs associated with mould remediation are substantial, and not capped by a sub-limit as in this case, the sue and labour clause may provide some protection, or at least some leverage in settlement negotiations should a coverage dispute arise.

B. SCENARIO # 2 - BURST PIPES IN A SEASONAL HOTEL - THE "WEAR AND TEAR" EXCLUSION

In this case the insured owned a hotel in a small British Columbia community. The insured operated a bar in the hotel and had rooms for rent upstairs. The insured hired a caretaker to undertake routine inspections of the hotel and to keep an eye on the tenants.

The insured intended to close the hotel and sell the premises. When the last tenant moved out he turned the heat off in a room upstairs. Freezing temperatures caused the hot water heating lines to freeze and rupture, leaking significant amounts of water over the winter months. Water flooded three upstairs rooms on the south side of the hotel, and leaked into the bar on the main floor

The independent adjuster retained a restoration company to undertake emergency repairs and to address the water damage. The adjuster also retained a plumbing company to undertake repairs to the ruptured pipes, and winterize the heating system so that the hotel could be closed. The insured planned to re-open the hotel after the structural repairs were completed the following spring.

When the insured applied for a building permit, the municipal inspector informed him that there were large quantities of mould growing in the hotel which should be remedied before building began. The adjuster retained an engineer to undertake a review of the premises, who in turn provided a report which established that a) some of the mould in the south part of the hotel was caused by the burst pipe, and b) the mould on the north side of the building was caused by a number of building defects, such as a leaking roof, and deteriorating stucco. The estimated cost of remediating the mould was over \$100,000.

Common to both commercial and personal lines property policies is the “wear and tear” exclusion, which is important in the context of mould claims. A sample wear and tear exclusion states:

Nor does this Policy insure...latent defect, inherent vice, gradual deterioration or wear and tear; the cost of making good faulty or improper material, faulty or improper workmanship, faulty or improper design provided, however, to the extent otherwise insured and not otherwise excluded elsewhere in this Policy, resultant damage to Insured Property is insured;

The leading case interpreting this clause is *Simcoe & Erie General Insurance Company v Royal Insurance Company of Canada*⁶¹. In this case the court considered a wear and tear exclusion similar to the one above in the context of faulty workmanship which caused a bridge to collapse. Plaintiff’s counsel, who was arguing in favor of coverage for the replacement of the bridge, attempted to segment, or isolate the portion of the bridge which was faulty, and classify the remainder of the bridge which collapsed as “resultant damage”. However, the court disagreed, stating that coverage does not apply so long as the faulty workmanship results in damage to the same structure.

With respect to buildings, the result of this reasoning is that damage caused by a leaking roof to a different part of the same structure, such as the walls or floors, is not “resultant damage” and remains excluded from coverage. With respect to this scenario, the implication is that the mould growth caused by a leaking roof on the north side of the property is effectively excluded from coverage. This exclusion is extremely important in examining coverage issues in the mould context, because mould will often result from water ingress caused by faulty workmanship, or deterioration.

An important facet of the wear and tear exclusion from a claims handling point of view is the issue of causation. Adjusters handling potential mould claims, and water damage claims must be alive to whether the covered peril – such as a burst water pipe in this scenario – caused the mould contamination, or whether the mould was caused by a non-covered peril, or was pre-existing and falls outside the coverage umbrella⁶². In this scenario, the adjuster consulted an engineer to provide an opinion about the causes of the mould infestation, and was able to determine that the mould on the north side of the building was caused exclusively by water ingress resulting from wear and tear. As a result of the above analysis, this mould damage was excluded from coverage.

⁶¹ [1982] 3 WWR 628.

⁶² For a discussion of “triggers” to coverage, see E. Dolden, “The Emergence of “Trigger Theories” in Western Canada”, online: <http://www.dolden.com/library4.php>.

C. SCENARIO # 3 - SPECIFIC MOULD EXCLUSIONS, AND THE MULTIPLE CAUSATION PROBLEM

In this scenario plumbing leaks occurred in two locations in the insured's home – from his toilet and from the dishwasher. The water escape damaged the wood flooring in the home, and moved into wall cavities. Mould growth resulted, which necessitated remediation, which was estimated to cost \$25,000 over and above the normal drying of the premises, and repair of the floors.

In this scenario, the property insurer determined that the water escape was covered by the policy. However, the insurer had a specific clause excluding damage “caused by mould”. At first glance one might think that the policy coverage was effectively limited to cover only the repairs related to the damage to the flooring, and to the emergency clean up and drying of the premises. However, as the discussion below points out, when there is more than one cause of damage, a complex coverage issue arises. In this scenario there were two effective causes of the mould damage – the mould and the water escape which led to the mould. One of these perils is covered, and one is excluded. The question is, who prevails in this situation, the insurer, or the insured?

1. Concurrent and Multiple Causation – When One Cause of Damage is an Excluded Peril, and one Cause is Covered, Does the Insurer Prevail?

Historically, disputes over coverage arose when multiple causes contributed to a loss, and one of the causes was covered by the policy, while another was specifically excluded. In the case of damage caused by mould, there are typically at least two causes. First, there is water damage, which in many cases will be covered by the policy. For example, the policy may cover losses caused by “sudden and accidental” water leaks, such as a burst pipe. However, a coverage issue arises when mould, an excluded peril, grows as a result of the burst pipe, a covered peril, and causes independent damage to property.

Prior to 1994, the British Columbia Courts concluded that if an insured had a loss arising from either concurrent or consecutive causes, then the property insurer prevailed on coverage. In the above scenario where there was one included peril (accidental water escape), and one excluded peril (mould damage), the insurer succeeded on the coverage issue.

However, in *Pavlovic v. Economical Mutual Insurance Co.* the BC Court of Appeal reversed this trend, and took the opposite approach⁶³. The Court stated that if two or more sequential or concurrent events resulted in first party property loss, unless the insurer had clear language stating that the loss was excluded, the insured prevailed.

To be precise, the language needed to accomplish a favorable result for the insurer had to read:

*We do not cover loss caused by, **resulting from, contributed to or aggravated by...***

or:

*We do not insure for loss caused by or resulting from the following, **whether other causes acted concurrently or in any sequence with the excluded event, to produce the loss...***

In the fall of 2001 in *Derksen v. 539938 Ontario Ltd.*⁶⁴ the Supreme Court of Canada handed down a definitive judgment on interpreting exclusion clauses, adopting an approach similar to that of the BC Court of Appeal. The Court decided that in cases where there are concurrent causes of a loss, some covered, and some excluded, the losses will fall within coverage *unless* the insurer specifically states in its policy that it does not cover a given peril, such as mould damage, *despite the existence of concurrent, or sequential causes which are covered under the policy.*

With reference to the *Pavlovic* decision, the Supreme Court stated that property insurers could use suitably worded language to entirely avoid arguments over this issue by simply stating, at the outset of exclusionary language:

*We do not insure for such loss regardless of the cause of the excluded event, other causes of the loss, or whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.*⁶⁵

In addition to the concurrent causation issue, U.S. courts considering mould exclusions have distinguished between the expressions “...**caused** by mould”, and “...**resulting from** mould”. The cases which have considered the expression “*caused by* mould” have determined that the mould must develop as a result of natural environmental

⁶³ (1994) 99 B.C.L.R. (2d) 298.

⁶⁴ (2001) 205 D.L.R. (4th) 1.

⁶⁵ *Ibid* at 15.

conditions, as opposed to some direct occurrence (i.e. plumbing leaks from the dishwasher and toilet).

2. Underwriting Issues – Effective Policy Wordings

Accordingly, it is important that insurers review policy wordings to ensure the mould exclusions withstand judicial scrutiny. This means ensuring that:

1. Mould exclusions specifically exclude mould damage caused by concurrent causation. This can be accomplished by using the words:
 1. *We do not cover loss caused by, **resulting from, contributed to or aggravated by...**;*or
 2. *We do not insure for loss caused by or resulting from the following, **whether other causes acted concurrently or in any sequence with the excluded event, to produce the loss.***
2. Further, the insurer should include, as a preface to the exclusions in the policy a phrase which clarifies that it does not cover losses caused by multiple causes, even where some of the causes are included perils. For example:

*We do not cover loss if caused by or resulting from one of the excluded perils listed below **even if that peril operates concurrently or sequentially in combination with other perils that are insured.***
3. Last, review policy wordings to ensure that the phrase “we do not insure against losses *caused by* mould” is replaced by the phrase “we do not insure against losses *resulting from* mould”.

V. CONCLUSION

While this paper does not attempt to analyze every policy wording or issue that arises in respect of potential mould claims, it highlights several issues facing the Canadian insurance industry with respect to mould. The specific wordings of exclusion clauses

are crucial in light of judicial interpretations that favor the insured where ambiguity exists in a policy wording. It is clear that many of the exclusion clauses, such as the “absolute pollution” exclusion, were not drafted in contemplation of mould claims. As such, it is not surprising that judicial interpretations of this clause, and other policy wordings have been inconsistent.

This inconsistency leaves an element of doubt in this area, and impacts both the insurer’s, and insured’s ability to manage risk. For this reason, it is recommended that insurers work with underwriting departments and legal counsel to clarify policy wordings in order to expand, or contract coverage in the face of this emerging peril.

In the bodily injury arena, it remains to be seen exactly what epidemiological effects will be tied to “toxic” mould, and the length and intensity of exposure necessary to cause these effects. Undoubtedly scientific studies will continue to examine these issues, and be able to deliver more definitive information on the causes and effects of mould, either affirming public fears, or debunking the claim that mould causes grave illness. The California government is currently attempting to establish guidelines establishing permissible exposure limits and it is likely that statutory authorities, such as the Workers’ Compensation Board, will follow suit once more information comes to light.

Insurance companies will have to be vigilant as these issues continue to arise in British Columbia. While the level of mould litigation, and the size of damage awards may not become as daunting as in the U.S., few observers doubt that mould will continue to present unique challenges to Canadian insurers.