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Courts Uphold Denials of Coverage Even in the Absence of Mold, Lead, and Asbestos Exclusions

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ABSTRACT

Courts have upheld insurers' disclaimers on mold, lead, and asbestos claims under comprehensive general liability (CGL) policies, evidencing the importance of maintaining affirmative cover in the emerging environmental insurance marketplace. Removing a CGL mold, lead, or asbestos exclusion is helpful, but insurers may assert a coverage defense and not pay a claim for reasons that have included: failure to meet the burden of proof, failure to trigger coverage, an absolute pollution exclusion, a preexisting condition exclusion, a defective design exclusion, a faulty workmanship exclusion, a business risk exclusion, a known loss or loss in progress, a custody and control exclusion, an owned property exclusion, and late notice. Accordingly, affirmative coverage grants contained in environmental insurance policies are necessary to protect against such losses and maximize recoveries.

I. Introduction

Mold, lead, and asbestos claims are all commonly litigated environmental hazards. They represent a serious threat to human health and safety,[1] and claims are expensive to defend and address once they impact the environment. Insurance carriers seek to exclude coverage for these three contaminants in comprehensive general liability (CGL) policies.[2] State court decisions arising from insurance coverage

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[1] Mark J. Mendell et al., "Respiratory and Allergic Effects of Dampness, Mold, and Dampness-Related Agents: A Review of Epidemiologic Evidence," *Environmental Health Perspectives* 119 (2011): 752, 752 ("mold [has been] associated consistently with a wide range of respiratory or allergic health effects, including asthma development and exacerbation, current and ever diagnosis of asthma, dyspnea, wheeze, cough, respiratory infections, bronchitis, allergic rhinitis, eczema, and upper respiratory tract symptoms"); Lisa H Mason et al., "Pb Neurotoxicity: Neuropsychological Effects of Lead Toxicity," *Biomed Research International* 2014: 1,5 (lead exposure has been shown to "result in declines in intelligence, memory, processing speed, comprehension and reading, visuospatial skills, motor skills, and, to a probable lesser extent, executive skills"); Leslie Stayner et al., "The Worldwide Pandemic of Asbestos-Related Diseases," *Annual Review of Public Health* 34 (2013: 4.1, 4.2 ("[asbestos exposure has been] associated with an increased risk of mesothelioma and lung, laryngeal, and ovarian cancers").

[2] See e.g., Bryan Lake, "The Empire Strikes Back: The Insurance Industry Battles Toxic Mold," *William Mitchell Law Review* 33 (2007): 1527, 1539 ("At least forty state insurance departments have approved mold exclusions or limitations in homeowners' policies"); See also Howard M. Tollin and Boris F. Strogach, "Defining 'Pollutant': What You Don't Know Can Hurt You," *Environmental Claims Journal Environmental Claims Journal* 21 (2009): 156, 157–159 (discussing the litigation of pollution exclusions); T. McRoy Shelly III, "Insurance Coverage for Environmental Claims: Current Litigation Issues in the United States," *Environmental Claims Journal* 26 (2014): 4, 4-5 (discussing emerging trends in litigation of environmental claims).

litigation vary because insurance coverage is state substantive contract law,[3] but the vast majority of rulings demonstrate that only environmental insurance effectively covers mold, lead, and asbestos.[4]

While environmental coverage was previously considered cost prohibitive for small property or business owners,[5] a GREEN Program was developed to provide economical mold, lead, and asbestos coverage.[6] Unfortunately, many insureds operate under a faulty assumption that the lack of a specific exclusion equals an affirmative coverage grant. This article summarizes reported case law to highlight why insureds may not have coverage even in the absence of CGL exclusions for mold, lead, or asbestos. Part II briefly reviews the history of mold, lead, and asbestos claims. Part III details the various approaches taken by carriers to disclaim coverage for mold, lead, and asbestos under CGL policies.

II. Background

A. *Background and history of mold claims*

Mold is a multicellular organism of the Kingdom Fungi that grows in a tubular network of structures called hyphae.[7] Certain types of mold can cause allergic reactions, asthma, and other respiratory complications.[8] Mold can also damage properties by penetrating building materials, such as wood, brick, concrete block, and stucco.[9] Mold can grow on any material exposed to moisture under suitable temperatures.[10] If mold growth is extensive, the contaminated material has to be discarded and replaced to prevent the further spread of mold. In some cases, entire portions

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[3] See e.g., *Aubris Res. LP v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483, 486 (5th Cir. 2009) ("Under Texas law, the same general rules apply to the interpretation of contracts and insurance policies"); *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006) ("[A]n insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract"). Cf. *Kelly v. Farmers Ins. Co.*, 281 F. Supp. 2d 1290, 1298 (W.D. Okla. 2003), with *Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract No. 242/99*, 930 So. 2d 756, 758 (Fla. Dist. Ct. App. 2006) (the Oklahoma court decided that the mold exclusion provision does not preclude coverage for damages jointly contributed by mold and other factors, whereas Florida court held that mold damages caused by water leakage is within the exclusion of mold damages).

[4] Commercial real estate owners often purchase a site pollution legal liability policy, which provides on-site and off-site cleanup costs and expansive third-party liability, bioterrorism, and business interruption coverage. Contractors should obtain coverage under a contractors pollution liability policy, which covers claims arising out of the operations performed by the insured contractor on a third-party's property. Manufacturers and environmental contractors can avail themselves to combined form general liability/pollution liability policies, which cover, among other things, general liability claims, site pollution claims, products pollution claims, and contractors pollution liability claims. See Howard M. Tollin, "Environmental Insurance for a New Wave of Claims," *Environmental Claims Journal* 16 (2004): 203, 210–211.

[5] See Charles M. North, James R. Garven, Carl R. Gwin, "Rainfall or Rainmaking? Lawyers, Courts, and the Price of Mold Insurance in Texas," *The Journal of Risk and Insurance*, http://garven.com/papers/mold_insurance.pdf

[6] See "Environmental Services," SterlingRisk Insurance, http://www.sterlingrisk.com/business-insurance/specialties-by-industry/environmental-services/green/ (accessed, November 5, 2015); See also Frank Piccininni, "The Evolving 'Nature' of Environmental Risk: A Responsible Approach for Residential and Commercial Real Estate," *Environmental Claims Journal* 26 (2014): 308, 313 (discussing the GREEN environmental insurance program).

[7] Madigan, M. T., et al. (eds.). *Brock Biology of Microorganisms*, 14th ed. (Boston, MA: Benjamin Cummings, 2014).

[8] Plaintiffs usually bear the burden to prove that mold is the proximate cause of their symptoms. Battles between experts will determine whether alleged personal injuries are attributable to mold. See *Roche v. Lincoln Property Co.*, 278 F. Supp. 2d 744, 746 (E.D. Vir. 2003).

[9] "Mold and Moisture," USEPA, http://www.epa.gov/mold/moldresources.html (accessed June 18, 2015).

[10] "Facts about Mold and Dampness," Centers for Disease Control and Prevention, http://www.cdc.gov/mold/dampness_facts.htm (accessed June 25, 2015).

of the buildings have to be rebuilt, which is more common for wood framed buildings.[11]

The deleterious effects of mold continues to be studied by regulatory and health agencies. Mold is not yet listed by USEPA as a contaminant regulated by airborne concentrations threshold limit values (TLV), but studies may lead to such regulations.[12] Currently, only some state and municipal governments regulate mold.[13] Due to such lack of regulation, insurance companies generally view mold as a maintenance problem rather than an accidental occurrence.[14] Mold claim denials, while common, do not regularly lead to published court decisions, or media news stories.[15] One significant news story heightened attention to mold in around 2001 when a Texas federal jury awarded $18 million punitive damages against an insurance carrier for a homeowner mold case.[16] In another 2001 mold case, the jury verdict was $32 million.[17] In response to these lawsuits, insurance carriers added policy limitations for mold.[18]

B. *Background and history of lead claims*

Lead is another common and expensive claim brought against commercial and habitational real estate owners. Lead-based paint was widely used before its toxicity was finally documented and banned.[19] If lead is ingested or inhaled by children, it can permanently damage their kidneys and nervous system.[20] In addition to paint, lead is a widely used industrial substance, and is often released into soil, groundwater, and lead dust in the air. Lead has been regulated by the Toxic Substances Control Act (TSCA), Residential Lead-Based Paint Hazard Reduction Act of 1992, Clean Air Act (CAA), and Clean Water Act (CWA).[21]

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[11] See *Galle, Inc. v. Pool*, 262 S.W.3d 564, 567 (Tex. App. 2008).

[12] "Mold Remediation in Schools and Commercial Buildings," USEPA, http://www.epa.gov/mold/i-e-r.html (accessed June 25, 2015) ("Standards or Threshold Limit Values (TLVs) for airborne concentrations of mold, or mold spores, have not been set. As of December 2000, there are no EPA regulations or standards for airborne mold concentrations").

[13] See e.g., "Texas Mold Assessment and Remediation Rules" Texas Dept. of State Health Services, http://www.dshs.state.tx.us/mold/pdf/MoldRules.pdf.

[14] Mike Kreidler, "Fact Sheet: Mold and Homeowner Insurance," Washington State Office of the Insurance Commissioner, http:// www.insurance.wa.gov/others/mold.htm.

[15] Some consider a 1997 Florida case, *Centex-Rooney Const. Co. v. Martin Cnty.*, 706 So. 2d 20, 25 (Fla. Dist. Ct. App. 1997), to be the first groundbreaking case in toxic mold litigation.

[16] See *Anderson v. Allstate Ins. Co.*, 45 F. App'x 754, 756 (9th Cir. 2002). Note that the punitive damages were later reversed by the court of appeals, holding that there was no malice, oppression, or fraud in insurer's conduct. This nevertheless still indicated that mold litigation could result in tremendous costs for insurers.

[17] *Ballard v. Fire Ins. Exch.*, No. 99-05252, 2001 WL 883550 (Tex. Dist. August 1, 2001).

[18] See John T. Waldron III, Timothy P. Palmer, "Insurance Coverage for Mold and Fungi Claims: The Next Battleground?," *Tort Trial & Insurance Practice Law Journal* 38 (2002): 49. A typical mold exclusion contains three parts: (i) Total exclusion of all mold related damages; (ii) Partial exclusion for resulting mold loss; and (iii) Full coverage if caused by a covered loss. See also David J. Dybdahl, "Toxic Mold: Managing the Risk in the Post Insurance Exclusion Era," http://www.erraonline.org/cpcuannual.pdf (accessed July 10, 2015); See also Suzanne M. Avena, "Insurance Recovery for Mold-Related Claims in New York," *Environmental Claims Journal* 16 (2004): 135 (discussing coverage for mold related loss in New York).

[19] David Bryan, "EPA Inspectors to Focus on Lead Paint Safety in St. Louis," USEPA, http://yosemite.epa.gov/opa/admpress.nsf/beebc0b489d357e08525735900400c2f/d6d6da33bfe077d385257e9a006d37e5!opendocument.

[20] See generally Mark E. Miller, "Lead-based Paint Insurance Coverage: Courts Mandate Coverage Despite Insurance Industry Opposition," *Environmental Claims Journal* 9 (1997): 23; See also *Ethyl Corp. v. Environmental Protection Agcy.*, 541 F. 2d 1, 116 (D.C. Cir. App. 1976) (rejecting challenges to the administrative findings regarding the health effects of exposure to lead).

[21] See "Lead Laws and Regulations," USEPA, http://www2.epa.gov/lead/lead-laws-and-regulations

Tenants, particularly in low-income residential properties, have sued their landlords alleging their children suffered personal injuries by ingesting lead paint chips. Juries are often sympathetic to the victims, especially to children, and have awarded large verdicts against landlords.[22] Landlords will often seek defense and indemnification from their CGL carriers. Due to the risks inherent to lead poisoning exposure and pollution, insurance companies have express lead exclusions and/or rely on absolute and total pollution exclusions that became standard in the mid 1980s. Thus, landlords are left pursing earlier CGL policies; yet these policies may not be triggered if the exposure to the lead paint did not take place during the earlier policy period.[23]

C. *Background and history of asbestos claims*

Asbestos is the most recognized and litigated contaminant among the three excluded contaminants discussed in this article. Asbestos is a mineral fiber that occurs in rock and soil.[24] For many years, asbestos was widely used for thermal insulation, fireproofing, acoustic insulation, roofing, and flooring, because it is a strong, fire-resistant and thermal-insulating material.[25] Many buildings used asbestos as insulation, and asbestos often still exists in paint and patching compounds used in wall and ceiling joints.[26] Asbestos was banned in the 1970s after regulators understood asbestos causes asbestosis, mesothelioma, lung cancer, and other diseases when it is inhaled by humans.[27] Many asbestos injuries are seriously debilitative and some are ultimately fatal. Soon after the discovery of its toxicity, many asbestos lawsuits were filed against manufacturers, property, and business owners who used asbestos.[28] The universe of potentially liable parties continues to expand to include property owners and manager who maintain asbestos within the buildings.[29] Expansive litigation continues over the scope of coverage available for asbestos in older CGL policies.[30] Insurance companies quickly adopted various asbestos exclusions in the late 1970s and 1980s as a standard exclusion in CGL and property insurance policies.

III. Coverage denials

Mold, lead, and asbestos are all commonly existing hazards that are a threat to human health and the environment. All three have been heavily litigated for coverage claims because of the high stakes and costs and due to specific exclusions

[22] See *Peguero v. 601 Realty Corp.*, 58 AD 3d 556, 558 (App. Div. N. Y. 2009) (the jury awarded a total of $6.9 million to lead poisoning plaintiffs).

[23] For an example of a typical policy provision disclaiming lead poisoning coverage, see http://insurance.mo.gov/consumers/home/documents/FMHO9760612-Lead.pdf

[24] "Learn About Asbestos," USEPA, http://www2.epa.gov/asbestos/learn-about-asbestos#asbestos

[25] *Michigan Construction Law Manual* § 11:23.

[26] *Id*.

[27] 40 *CFR* 61; 16 *CFR* 1305.

[28] See Sallie B. Kraus, "Looking Back and Forward on Asbestos Claims," *Environmental Claims Journal* 27 (2015):149.

[29] Asbestos may not be hazardous unless disturbed and fibers become airborne.

[30] See Jeffrey W. Stempel, "Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute," *Connecticut Insurance Law Journal* 12 (2006): 349, 476 ([m]ore than 6,000 companies named as asbestos defendants and "litigation has spread far beyond the asbestos and building products industries"; annual filing of claims "has risen sharply"; claims against nonmanufacturer defendants "are growing most rapidly").

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in CGL policies. Disputes and lawsuits between the insurers and insureds over the intended scope of coverage will continue. Often, a compromise settlement may be reached where a small portion of the claim is paid by the CGL policy.

Insured will bear the initial burden of proof to show that it has a claim that triggers coverage under the insurance agreement. An insured continues to bear the burden after receiving a denial of coverage from its insurer.[31] In litigation, the insurer has the burden of proof that an exclusion applies, and the insured may prove that an exception to that exclusion is applicable.[32] The party bearing the burden of proof has to provide evidence to support its claim, which includes the often-difficult task of coverage trigger causation and proximate cause.[33] For example, if there is mold exclusion, the insured may argue that the mold was not the proximate cause to avoid the exclusion. This section reviews some of the approaches taken by insurers to disclaim coverage for mold, lead, and asbestos claims under CGL policies.

A. *Whether a CGL policy is triggered*

There are at least three different theories of what triggers coverage: injury in fact, exposure, and manifestation. The insured's general goal is to argue for a longer policy period to cover when the injury occurred.[34] Under the injury in fact theory, liability is triggered if the claimant was actually injured during the policy period, rather than the time of discovery.[35] New York, for example, has adopted an injury in fact trigger, also known as *actual injury* theory.[36] Under the actual injury theory, there must be allegations that the plaintiff was injured during the policy period. Under the exposure trigger, the triggering dates are the dates of exposure to the injury-producing agent, and may include all dates when the victim is exposed. Under the manifestation trigger, claims are identified to the policy in effect when the injury became reasonably apparent or known to be apparent.[37] Manifestation trigger dates are typically narrower than exposure trigger theories. Courts have interpreted manifestation as "capable of being perceived, recognized or understood" by the injured party.[38]

There are also two types of CGL policies that may impact trigger of coverage, occurrence and claims-made. In an occurrence CGL policy, coverage is triggered

[31] At times, insurers may choose to file a declaratory judgment, or sue the insured for fraud. See e.g., *Am. Eagle Ins. Co. v. Thompson*, 85 F.3d 327, 330 (8th Cir. 1996).

[32] See *RSUI Indem. Co. v. RCG Grp. (USA)*, 890 F. Supp. 2d 315, 325 (S.D.N.Y. 2012); *Am. Med. Response Nw., Inc. v. ACE Am. Ins. Co.*, 31 F. Supp. 3d 1087, 1091 (D. Or. 2014). In some jurisdictions, however, the burden of proof on application of the exclusion applies is on the insured. See *Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 231 (1997).

[33] *Id.*

[34] See, e.g., *Marcinkowski v. Castle*, 57 A.D.3d 1413, 1414 (N.Y. App. Div. 2008) (holding that mold bodily injury claim is time-barred because the plaintiff failed to commence an action within three-year statute of limitations, denying the "manifestation" theory proposed by the plaintiff).

[35] See, e.g., *Royal Globe Ins. Co. v. Great Am. Ins. Corp.*, 325 N.W.2d 556, 558 (Mich. Ct. App. 1982).

[36] See *Am. Home Products Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1513 (S.D.N.Y. 1983) (holding that neither exposure or manifestation rule applies, but only the actual time period of injury is relevant).

[37] See *Sapiro v. Encompass Ins.*, 221 F.R.D. 513, 518 (N.D. Cal. 2004) ("[U]nder this manifestation rule, liability in first party progressive property loss cases falls completely on the insurer of the property at the time the loss manifests—that is, at that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." (internal quotes omitted)).

[38] *Allstate Ins. Co. v. Hunter*, 242 S.W.3d 137, 143 (Tex. App. 2007).

when the bodily injury or property damage is deemed to have occurred, regardless of when the claim is made or suit is brought.[39] Under the claims-made policy, the event triggering carrier's liability is the making of a claim against the policyholder, and the reporting of the claim must take place during the policy period or extended reporting period.[40]

1. ***Triggering mold coverage.*** Often, it will be unclear when the mold occurred or if mold is an occurrence. A denial of coverage will assert that the insured cannot demonstrate that the mold occurred during the policy period. For example, in *Hritz v. Saco*, the First Department Appellate Division of New York held that the condition of mold and rot itself is not an insurable cause of loss, because it is a "condition [that] occurs over time" and cannot be viewed as proximate cause of the loss.[41] Further, in *QBE Ins. Corp. v. Adjo Contr. Corp.*,[42] the court held that mold growth and resulting sickness and property damages are not fortuitous, but rather a reasonable foreseeable consequence of faulty workmanship which allowed water to infiltrate the building. Thus, mold conditions may not be considered an "occurrence" under the CGL policy and coverage is not triggered. In contrast, a Connecticut court has held that mold damage to portions of insured's project, beyond the defective work itself, qualifies as "physical injury to tangible property" as defined in the policy and certain damages may be sought.[43]

2. ***Triggering lead coverage.*** There are many potential sources of lead in our environment, such as batteries, pottery, and glass. Many lead-based claims and lawsuits arise from lead-based paint, lead-containing fumes or dust, and residential lead-based paint chips or industrial lead waste spread throughout the soil, groundwater, and air.[44] Lead can cause irreversible, long-term health problems to a child's nervous system as asserted in personal injury claims.[45] Many claims are against property owners by tenants or are levied against contractors for negligently causing lead contamination during construction.[46]

When a lead claim is alleged, it is often difficult to determine when the lead injury occured because of the latent nature of lead symptoms. Uncertainty is also involved with whether the jurisdiction will apply the exposure, actual injury, or manifestation trigger of coverage theory. For example, in *Mount Vernon Fire Ins. Co. v. Abesol*

[39] James M. Fischer, "Insurance Coverage for Mass Exposure Tort Claims: The Debate over the Appropriate Trigger Rule," *Drake Law Review* 45 (1997): 625, 633.

[40] See also John N. Ellison et al., "Recent Developments in the Law Regarding the 'Absolute' and 'Total' Pollution Exclusion, the 'Sudden and Accidental' Pollution Exclusion, and Treatment of the 'Occurrence' Definition," ALI–ABA Course of Study Materials, *Environmental Insurance: Past, Present, and Future* (June 14–15, 2001).

[41] 18 A.D.3d 377 (App. Div. N.Y., 2005).

[42] 112 A.D.3d 686 (App. Div. N.Y., 2013).

[43] *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760 (Supr. Ct. of Conn., 2013).

[44] Mark P. Gagliardi, "Stirring Up the Debate in Rhode Island: Should Lead Paint Manufacturers Be Held Liable for the Harm Caused by Lead Paint?," *Roger Williams University Law Review* 7 (2002): 341, 346.

[45] *Id.*

[46] Daniel G. LeVan, "Landlord Liability for Lead Poisoning of Tenant Children Caused by Defects in the Premises," *University of Detroit Mercy Law Review* 70 (1993): 429.

Realty Corp.,[47] a New York court held that actual exposure to lead must take place during the policy period to constitute an occurrence, even if the physical injury was not a confirmed diagnosis.[48] Thus, the date of diagnosis was not as significant as the dates of the exposure.[49] In *Hanover Ins. Co. v. Vermont Mut. Ins. Co.*, the court did not require a diagnosed actual injury during the policy period.[50] Other jurisdictions, however, required an actual injury or only triggered coverage on the date the injury became manifested.[51]

3. ***Triggering asbestos coverage.*** Similar to lead and mold, the latent health effects of asbestos make it difficult to elucidate whether or not the exposure, and subsequent bodily injury, took place during the policy period such that coverage is triggered. For example, in *Keene Corp. v. Ins. Co. of North America*,[52] the insurer disclaimed coverage claiming that coverage is triggered only when bodily injury manifests itself during the policy period. In contrast, the claimant relied on medical evidence that lung tissue was continuously damaged as each asbestos fiber became lodged in their lungs. Ultimately, the court rejected the insurer's argument, finding that the immediate and discrete injury caused by asbestos inhalation constitutes a bodily injury under the policy.

B. *Specific mold, lead, and asbestos exclusions*

If the insured is able to demonstrate a claim is an occurrence under the policy, it will still face exclusionary language. The most common asserted exclusions by insurers include specific exclusions, absolute pollution exclusions, preexisting condition exclusions, defective design exclusions, faulty workmanship exclusions, business risk exclusions, owned property and custody exclusions, and late notice.

Specific exclusions are those tailored to exclude coverage for certain types of claims.[53] They are an indispensable part in every insurance policy, because no insurance carrier will cover every kind of damage sustained by the insured. Certain types of exclusions, such as *Act of God*, have been long used by insurance companies.[54] If an express exclusion becomes an issue in litigation, the court will usually review whether the language of the exclusion is clear and unambiguous.

1. ***Mold exclusions.*** Most states recognize and uphold express mold exclusions if the language is clear and unambiguous. However, some states have distinguished

[47] 288 F. Supp. 2d 302, 308 (E.D.N.Y. 2003).
[48] *Id.*
[49] *Id.*
[50] 2014 WL 6387061, 7 (N.D.N.Y. Nov. 14, 2014).
[51] See *Scottsdale Ins. Co. v. Am. Empire Surplus Lines Ins. Co.*, 811 F. Supp. 210, 215 (D. Md. 1993) (holding that only injury plus exposure is enough to trigger occurrence under the policy, and manifestation of injury is not required to be shown; see also, *St. Leger v. Am. Fire & Cas. Ins. Co.*, 870 F. Supp. 641, 642 (E.D. Pa. 1994); *Kaytes v. Imperial Casualty & Indemnity Co.*, 1994 WL 780901 (E.D.Pa. 1994).
[52] 667 F.3d 1034, (D.C. Cir. 1981).
[53] 31 N.Y. Prac., New York Insurance Law § 16:44, 2014–2015 ed. ("Where the exclusion is expressly stated, it will be applied to preclude recovery under appropriate factual circumstances").
[54] Jill M. Fraley, "Re-Examining Acts of God," *Pace Environmental Law Review* 27 (2010): 669.

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"exclusion of mold damage" from "exclusion of damage *caused* by mold." In those states, the courts have ruled that if the language of the policy only excludes mold itself, the insurer may still be responsible for any consequential damage caused by mold. This rule was adopted in only a minority of states. Moreover, many insurers have modified their exclusions to address mold damages and mold-related damages. Thus, an insured should not expect coverage if a policy contains specific mold exclusions.

New York recognizes express mold exclusions, but requires mold to be proximate cause of the alleged damage. In *Hritz v. Saco*, the insured brought an action against its insurer seeking coverage for complete loss of the property allegedly caused by mold.[55] The court recognized that a policy that excludes "any loss that is contributed to, made worse by, or in any way results from …fungi [or] mold" will not cover any damages caused by mold and mycotoxins.[56] The court further held that once the policy exclusion applies, the burden of proof shifts to insured to prove that the mold is not the proximate cause of the loss. [57] Other New York courts have confirmed this requirement of proximate cause. In *Siegel v. Chubb Corp.*,[58] the insured was forced to vacate his condominium due to high levels of toxins in the air caused by mold, and sued his insurer for recovery.[59] The policy excluded "any loss caused by …mold," and the term "caused by" was defined by the policy as "any loss contributed to, made worse by, or in any way results from that peril."[60] The insured argued that the loss was proximately caused by toxins, not mold, but the court rejected this argument and held that mold was the proximate cause of the insured's loss.[61]

If mold is not the primary cause of the damage, but rather a companion loss, some of the water damage may be covered. In *Clark Moving & Storage, Inc. v. Selective Ins. Co. of Am.*, the insured's property had a leak in the roof, and his goods were damaged by water as well as subsequent mold contamination.[62] The policy excluded "dampness, gradual deterioration and/or wear and tear."[63] The court found that insurer failed to demonstrate that the policy intended to exclude mold damages resulting from accidental exposure to water.[64] The result might have been different if the insurer had used the precise exclusionary words such as "water damages" or "damages caused by mold" instead of using "dampness."[65]

New York recognizes insurance carriers' use of the term *fungus* to include all mold claims in express exclusions. This means an insurer can use a general exclusion for all fungus-related claims. In *Bd. of Educ. of the Liverpool Cent. School Dist. v.*

[55] 18 A.D.3d 377 (App. Div. N.Y., 2005).
[56] *Id.*
[57] *Id.*
[58] 33 A.D.3d 565 (App. Div. N.Y., 2006).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] 2010 U.S. Dist. LEXIS 88699.
[63] *Id.*
[64] *Id.*
[65] *Id.*

Utica Mut. Ins. Co.,[66] a school district board sued its insurer because a mold damage claim in a high school library was denied.[67] The mold damage was caused by humidity through the HVAC system, and was widely spread in carpets, furnishings, and books.[68] The insurer based its disclaimer on the exclusion of "rust, corrosion, fungus, decay and deterioration" and "dampness or dryness of atmosphere."[69] The plaintiff asserted that the term "fungus" did not include "mold."[70] The court applied the policy language's "plain and ordinary meaning," citing Webster's dictionary's definition of "fungus," which includes "mold," and held that "mold" and "fungus" are interchangeable terms.[71]

In a New Jersey case, *Petrick v. State Farm Fire & Cas. Co.*, the insurance policy excluded coverage for "mold, fungus or wet or dry rot."[72] The insured purchased a separate mold coverage limit of $50,000.[73] The insured's house was later damaged by mold and needed to be rebuilt.[74] The insured alleged the total policy amount should be available because the severe mold damage constituted an "opening" to the structure under the windstorm coverage of the policy.[75] The court rejected this argument and held that only the $50,000 sublimit for mold was applicable.[76]

Similarly, in a Pennsylvania case, *Alea London Ltd. v. Rudley*, [77] the district court granted summary judgment for the insurer because the policy exclusion barred insured's claims for mold damages.[78] In *Alea*, the insured was sued by occupants of the property where water leaked and resulted in mold growth.[79] The mold exclusion on the insurance policy was clear as it provided that "any loss or damage involving in any way the actual or potential presence of mold, mildew or fungi of any kind whatsoever, whether or not directly or indirectly caused by or resulting from any peril insured under the policy."[80]

2. *Lead exclusions.* Express lead exclusions are also generally recognized by courts. For example, in *Preferred Mut. Ins. Co. v. Donnelly*, the New York Appellate Division held that an express lead exclusion later added into the insurance policy is proper.[81] The insured was sued by his tenant for bodily injury arising from lead poisoning.[82] The policy at issue did not originally contain a lead exclusion, and the

[66] 14 Misc. 3d 1224(A) (2007).
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] 2010 N.J. Super. Unpub. LEXIS 1964 (N.J. Super., 2010).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] See also *Lititz Mut. Ins. Co. v. Steely*, 746 A.2d 607 (Pa. Super. Ct. 1999).
[78] 2004 U.S. Dist. LEXIS 13259 (E.D. Penn. 2004); See also *Smith v. Westfield Ins. Co.*, 2007 U.S. Dist. LEXIS 43996 (E.D. Penn. 2007).
[79] *Alea*, 2004 U.S. Dist. LEXIS 13259.
[80] *Id.*
[81] 111 A.D.3d 1242, 1243 (N.Y. App. Div. 2013).
[82] *Id.*

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exclusion was endorsed onto the policy before the tenant moved in. The exclusion provided that the insurer would not pay for loss "[r]esulting directly or indirectly from bodily injury resulting from inhalation or ingestion of dust, chips or other residues of lead or lead based materials"[83] The court held that exclusion barred any lead coverage under the policy.[84]

3. ***Asbestos exclusions.*** Insurance companies have had asbestos exclusions in CGL policies since the mid-1980s, and these exclusions have effectively barred insured's' claims even if the insured intended to pay for such coverage.[85] An example of a court applying the asbestos exclusion is *Stonewall Insurance Co. v. Asbestos Claims Management Corp*.[86] In that case, the plaintiff, a building material manufacturer was sued by 100,000 claimants for bodily injury caused by its asbestos-containing products. The exclusionary language was located in the "definitions" part of the policy, and excluded any asbestos damages.[87] The plaintiff argued that because the language was located in definitions rather than exclusions section of the policy, the plaintiff never intended for asbestos to be excluded from the coverage.[88] The court rejected such argument, and held that the language was clear that asbestos damage was to be excluded.[89]

C. *Absolute and total pollution exclusions (PE)*

Even if a CGL policy does not contain an express mold, lead, or asbestos exclusion, the insurer may still bar coverage under other provisions. Perhaps one most widely used is the absolute pollution exclusion. Absolute and total pollution exclusions (PE) were developed in response to costly environmental claims.[90] Typically, these exclusions will exclude liabilities arising from any "discharge, dispersal, seepage, migration, release or escape of pollutants."[91] The definition of *pollutants* usually includes "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[92] While a

[83] *Id.*, 1243.

[84] The insured argued that (i) he did not receive notice of the amendment of the policy, (ii) the exclusion violated public policy, (iii) the exclusion was ambiguous, and (iv) the insurer waived its right to assert exclusion by settling claim with the tenant. The court rejected these arguments. First, the court held that insurer's evidence of "standard office practice of procedure designed to ensure items are properly addressed and mailed" are sufficient to establish the presumption that the insured received notice. Second, the court held that the lead exclusion did not violate public policy, because (i) there is no statutory requirement for full coverage and no prohibition against insurer limiting their liability; (ii) the requirement for landlord to provide a habitable condition pursuant to Real Property Law section 235-b does not obligate insurer to provide lead coverage; and (iii) no local building code provisions were violated. The court further found that the exclusion was not ambiguous. All lead-based paint was excluded from coverage through interpretation of common speech and reasonable expectations of the average insured.

[85] Jeffrey W. Stempel, "Domtar Baby: Misplaced Notions of Equitable Apportionment Create A Thicket of Potential Unfairness for Insurance Policyholders," *William Mitchell Law Review* 25 (1999): 769, 912.

[86] 73 F.3d 1178 (2d Cir. 1995).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See* Tollin and Strogach, *supra* note 2.

[91] Kathryn M. Knight, "The Total and Absolute Pollution Exclusions Are Neither Total Nor Absolute, at Least for Now: *Doerr v. Mobil Oil Corporation*," 47 *Loyola Law Review* 47 (2001): 1153, 1155.

[92] *Cooper v. Am. Family Mut. Ins. Co.*, 184 F. Supp. 2d 960 (D. Ariz. 2002).

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minority of courts have required more specific language, especially for mold claims, the majority have held that such language is broad enough to exclude mold, lead, or asbestos claims.

1. *PE application to mold claims.* Insurers often disclaim coverage asserting that mold is a contaminant, pollutant, or irritant. Many courts accept this argument by interpreting the term *pollutant* to include mold, particularly toxic mold.[93] One litigated issue is whether mold can satisfy the "discharge" requirement of the exclusion.[94] Some courts have found that mold within a building may not have been discharged into the environment, but most courts will focus on the resulting damage.[95] For example, in *Am. W. Home Ins. Co. v. Utopia Acquisition L.P.*,[96] the insured owned and operated an apartment complex, and was sued for personal injuries caused by indoor airborne contaminants characterized as serious moisture, mold and other contaminants.[97] The court determined that the substances at issue in the residential property fell into the precise definition of the pollution exclusion.[98]

2. *PE application to lead claims.* Insurers similarly seek to disclaim coverage for lead as a pollutant by asserting the absolute pollution exclusion. Courts have been inconsistent in the decisions to apply exclusion to lead claims. In *U.S. Liab. Ins. Co. v. Bourbeau*,[99] the insured entered into a painting contract with a municipality to paint two town buildings.[100] During the painting work process, a Massachusetts state agency found environmental violation because lead-containing paint chips were contaminating the surrounding soil.[101] The owner of the buildings subsequently brought an action against its insurer.[102] The court relied on the absolute pollution exclusion in finding that insurer did not have duty to defend or indemnify insured's claim.[103]

Similarly, in *Shalimar Contractors, Inc. v. Am. States Ins. Co.*, [104] the court held that lead was a "pollutant" within the meaning of an absolute pollution exclusion in CGL policies. In this case, the insured was a subcontractor who entered into a subcontract to perform lead abatement for a general contractor working for a local housing authority.[105] A neighboring resident sued the contractors for performing dangerous work, and alleged that the insured left lead debris at the work site, causing

[93] See, e.g., *American Western Home Ins. Co. v. Utopia Acquisition L.P.,* 2009 WL 792483 (W.D. Mo. 2009) (finding that "The pollution exclusion clearly and unambiguously excludes from coverage bodily injury resulting from [mold]").
[94] See *Belt Painting Corp. v. TIG Ins. Co.*, 293 A.D.2d 206, 207 (N.Y. App. Div. 2002).
[95] *Leverence v. United States Fidelity & Guaranty*, 462 N.W.2d 218 (Wis. Ct. App. 1990).
[96] 2009 WL 792483 (W.D. Mo. Mar. 24, 2009).
[97] *Id.*
[98] *Id.*
[99] 49 F.3d 786 (1st Cir. 1995).
[100] *Id.*
[101] *Id.*
[102] *Id.*, 786–787.
[103] *Id.*, 790.
[104] 975 F. Supp. 1450, 1458 (M.D. Ala. 1997).
[105] *Id.*

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bodily injuries to her children.[106] The insurance policy contained an absolute pollution exclusion providing that the policy does not apply to any loss, cost, or expense arising out of damages "because of testing, monitoring, cleaning up, removing …or assessing the effect of pollutants."[107] The court held that "it cannot be seriously contended that lead is not a pollutant within the meaning of the pollution exclusion" because "both the State of Alabama and the federal government recognize that lead is a hazardous, toxic substance that requires strict regulation."[108] Accordingly, the court agreed with the insurer and held that the insured was barred from seeking coverage or defense for its lead-poisoning lawsuit.[109]

Another example is *Auto-Owners Ins. Co. v. Hous. Auth. of City of Tampa*, [110] the court held that lead is excluded by absolute pollution exclusion. The insurer sought declaratory relief excluding coverage for lead related damages.[111] The insured Housing Authority of City of Tampa was alleged to have violated Lead-Based Paint Poisoning Prevention Act, the United States Housing Act, and the Residential Lead-Based Hazard Reduction Act of 1992, among other statutes, because the walls built were covered with crumbling paint containing lead.[112] The court concluded that lead was a pollutant under the policy exclusion, and again found in favor of the CGL insurer.[113]

3. *PE application in asbestos cases.* Courts have held that asbestos was clearly a "thermal irritant" within the meaning of the exclusions.[114] Since most pollution exclusions today define *pollutants* as "any solid, liquid, gaseous or thermal irritant or contaminant." Moreover, asbestos is very likely to be excluded by absolute pollution exclusions. In *Yale Univ. v. CIGNA Ins. Co.,*[115] the insured sought coverage for bodily injury associated with asbestos exposure. The court held that the absolute pollution exclusion barred coverage for asbestos, which was unambiguously excluded as a "contaminant" or a "pollutant". Other published decisions similarly held that asbestos clearly is a pollutant[116]

D. *Mold, lead, and asbestos are not sudden and accidental*

The pollution exclusion, if not absolute, may contain a "sudden and accidental" discharge exception.[117] If a policy does contain such exception, the insured must prove

[106] *Id*.
[107] *Id*., 1452.
[108] *Id*., 1457.
[109] *Id*., 1458.
[110] 121 F. Supp. 2d 1365 (M.D. Fla. 1999).
[111] *Id*.
[112] *Id*., 1366.
[113] *Id*.
[114] *Am. Heritage Realty P'ship v. La Voy*, 209 A.D.2d 749, 750 (N.Y. App. Div. 1994); *Kosich v. Metro. Prop. & Cas. Ins. Co.*, 214 A.D.2d 992, 992 (N.Y. App. Div. 1995).
[115] 224 F. Supp. 2d 402 (D. Conn. 2002)
[116] See *Sunset-Vine Tower, Ltd. v. Committee & Indus. Ins. Co.,* No. C 738, 874 (Cal. Super. Ct. Apr. 12, 1993); *Edwards & Caldwell LLC v. Gulf Ins. Co.,* 2005 WL 2090636 (D.N.J. 2005); *American States Ins. Co. v. Zippro Constr. Co.*, 455 S.E.2d 133 (Ga. Ct. App. 1995); *Kosich v. Metropolitan Prop. & Cas. Ins. Co.,* 626 N.Y.S.2d 618 (N.Y. App. Div. 1995).
[117] See Timothy M. Gebhart, "A;'Timeless' Interpretation of the 'Sudden and Accidental' Exception to the Pollution Exclusion?," *South Dakota Law Review* 41 (1996): 314, 315–316.

that the claimed damages are "sudden and accidental."[118] Many states have determined that mold is not sudden and accidental.[119] For example, California courts hold that the growth of mold that formed over a period of time cannot be sudden and accidental. In *De Bruyn v. Superior Court*, the California Court of Appeals found an insured cannot claim mold was suddenly caused by a water pipe.[120] Similarly, in *Brown v. Mid-Century Ins. Co.*, the court held that mold damages are not sudden and accidental even though the mold was caused by a sudden and accidental release of water from a broken pipe. [121] This is because the mold was caused by the constant leakage after the pipe was broken.[122]

Sudden and accidental exceptions to pollution exclusions do not usually apply to lead cases, because most lead injuries are latent and chronic, rather than sudden and accidental. As the Court of Appeals of Second Circuit noted in *Maryland Cas. Co. v. Cont'l Cas. Co.*,[123] New York requires the discharge to be both "sudden" and "accidental."[124] The term "accidental" is usually interpreted to describe those discharges that occur "abruptly, or unexpectedly and [are] unintended."[125]

E. *Preexisting conditions are excluded*

A preexisting condition known to the insured that proximately causes an insured's loss may be excluded from the policy. For example, in *40 Gardenville, LLC v. Travelers Prop. Cas. of Am.*, [126] the court held that if the insured knew about the mold condition prior to purchase of the property, he is not covered by later purchased insurance. The court also held even if the mold condition w1as not preexisting, it is still barred by the exclusion of damages resulting from "corrosion, rust or dampness."[127]

F. *Defective design exclusion and ensuing loss exception*

If the loss is attributable to a design defect, coverage may be precluded. For example, if the mold-related loss is attributable to a design error, such as a roof or deck pitch, indemnity should be sought under the architect or engineers professional errors and omissions policy.[128] An ensuing loss exception provides coverage for a covered peril resulting from an excluded peril.[129] Ensuing loss exception is often raised as

[118] See *Aeroquip Corp. v. Aetna Cas. & Sur. Co.,* 26 F3d 893, 895 (9th Cir. 1994) (finding that if the insurer has the burden of proof, "the property owner would have an incentive to avoid finding out whether pollutants are being gradually discharged, because preservation of ignorance would increase the likelihood of insurance coverage").

[119] See *Leverence v. United States Fidelity & Guaranty*, 462 N.W.2d 218, 232 (Wis. Ct. App. 1990). See also *Churchill v. Factory Mutual Ins. Co.*, 234 F. Supp. 2d 1182 (W.D. Wash. 2002) (mold from water leak over time, even though gradually occurring, is loss covered under insurance policy; unless expressly excluded from coverage, mold damage is covered by policy notwithstanding exclusions for "deterioration" or "contamination").

[120] 158 Cal. App. 4th 1213.

[121] 215 Cal. App. 4th 841, 855-56 (2013).

[122] *Id.*

[123] 332 F.3d 145, 151 (2d Cir. 2003).

[124] See *New York Insurance Law*, § 46(13)-(14).

[125] *Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am.*, 134 N.J. 1, 29 (1993).

[126] 387 F. Supp. 2d 205 (WDNY 2005).

[127] *Id.*, 213.

[128] See, e.g., *Vermont Elec. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 72 F. Supp. 2d 441, 445 (D. Vt. 1999).

[129] William H. Howard and Margaret A. Mackowsky, Defending Claims for Environmental Damage Under First-Party Property Insurance Policies, *Tort & Insurance Law Journal* 37 (2002): 883, 910.

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a defense against the defective design exclusion because although the damage may be caused by the design, there still may be a portion of the loss considered a covered peril notwithstanding the exclusion.[130]

In *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*[131] the court held that mold is not an "ensuing loss" due to lack of intervening cause other than beyond the initial water damage. The court found the ensuing loss clause does not reinstate coverage for excluded losses, but reaffirms coverage for "secondary" loss ultimately caused by excluded perils.[132] The court held that mold is a natural event that often manifests itself after, and as a direct result of, entry of water. Thus, it is not a surprise, but rather "natural and expected," and cannot be ensuing loss.[133]

In *Cooper v. Am. Family Mut. Ins. Co.*, [134] the insured asserted that the toxins released by mold was a separate peril from the mold itself, and therefore satisfied the ensuing loss exception to the mold exclusion. The Arizona district court rejected this argument, finding that because toxins are naturally produced and released by mold, they are not a separate and independent loss.[135]

G. *Faulty workmanship or construction*

Many policies have exclusions for faulty workmanship or construction, which specifically exclude defects caused by the builder.[136] Under this exclusion, the cost to repair the defect in the building would be excluded.[137] In *Dorchester Mut. Fire Ins. Co. v. First Kostas Corp.*,[138] a painter-insured brought an action alleging a duty to defend claims for dispersal of lead-based paint chips and dust. The dispersal was alleged to be caused by faulty workmanship by the painters.[139] The court ruled that a CGL policy is not intended as a guarantee of the insured's work.[140] The court further concluded that an insured did not have reasonable expectations for the policy to cover paint chips and dust created by scraping and sanding activities.[141]

[130] *Fiess v. State Farm Lloyds*, 202 SW 3d 744 - Tex: Supreme Court (2006). In Connecticut, absent an express exclusion in policy language, mold and water damages caused by defective designs are generally included in property damage under CGL policies. In *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760, 782 (Conn. 2013), the insured were general contractor and project developer of a student housing complex for the University of Connecticut, who brought suit against insurer for indemnification of mold damages of the building. The issue was whether the defect work itself would qualify as a physical injury to the property. The court held that under the plain language of the policy, water and mold damages did qualify as "property damage."

[131] 2002 U.S. Dist. LEXIS 20387.

[132] *Id*.

[133] *Id*.

[134] 184 F. Supp. 2d 960, 964 (2002).

[135] See *Lundstrom v. United Servs. Auto. Ass'n - CIC*, 192 S.W.3d 78, 94-95 (2006); *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 275, 109 P.3d 1, 7, 2004 Wash. App. LEXIS 2176, ∗16 (Wash. Ct. App. 2004) ("But if an ensuing loss that is not specifically excluded occurred, or if there were a supervening cause that breaks the chain of causation between the construction defect and the final result, coverage would be available under the ensuing loss provision").

[136] See *Dow Chem. Co. v. Royal Indem. Co.*, 635 F.2d 379, 387 (5th Cir. 1981); *Factory Mut. Ins. Co. as Successor in Interest to Arkwright Mut. Ins. Co. v. Estate of James Campbell*, 81 F. App'x 918, 919-20 (9th Cir. 2003).

[137] For example, in *Smith v. Westfield*, the district court held that mold damage is covered by faulty construction provision. The exception provides that losses that are faulty construction are not covered, but losses that result from faulty construction are covered. Because the mold exclusion expressly excludes all mold coverage, the court concluded that the policy only covers ensuing loss to interior of the house that is not mold or wet rot (due to faulty construction).

[138] 49 Mass. App. Ct. 651, 654 (2000).

[139] *Id*.

[140] *Id*.

[141] *Id*., 655.

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H. *Business risk exclusion*

Business risk exclusions apply to the services or products provided by the insured.[142] Inadvertent exposure to asbestos during construction activities is a claim commonly denied. In mold cases, if the mold was associated with the insured's contractor's work, such mold damage may be excluded by the business risk exclusion.[143] In *Hathaway Dev. Co. v. Ill. Union Ins. Co.*,[144] the court held that the business risk exclusion, among other exclusions, applies to deny the coverage for the mold claim. The policy did not cover "[r]eal property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations".[145] The trial court determined that the mold was caused by faulty operations.[146]

I. *Care, custody, and control exclusion*

Care, custody, and control exclusions are also common in many CGL policies.[147] This exclusion applies to property in insured's care custody and control, and applies to personal property.[148] The disputed issue arising from this exclusion will often be whether there is control over the personal property.[149] The insurer may seek to argue the scope of "control" and "property" to exclude coverage.[150] Courts have decided that mere access, or temporary access, does not amount to control and does not raise the application of the exclusion.[151] For mold cases, this exclusion has been applied to insured's controlled personal property.[152]

J. *Owned property exclusion*

CGL policies often contain owned property exclusion to bar insured's first party damages.[153] A typical owned property exclusion contains language such as "this policy does not apply to property damage to property owned by the insured,"[154] or "property owned, occupied by or rented to the insured, or property in the care, custody or control of the insured."[155]

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[142] See *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis. 2d 16, 54 (2004); See also Keith A. Dotseth *et al.*, "Evolution or Revolution: Thommes' Role in the Development of the Business Risk Doctrine," *William Mitchell Law Review* 29 (2002): 597, 599.

[143] See Gregory G. Schultz, "Commercial General Liability Coverage of Faulty Construction Claims," *Tort & Insurance Law Journal* 33 (1997): 257, 263.

[144] *Federal Appendix* 274 (2008): 787, 792.

[145] *Id*.

[146] *Id*.

[147] F. Malcolm Cunningham Jr. and Amy L. Fischer, "Insurance Coverage in Construction—the Unansewered Question, *Tort & Insurance Law Journal* 33 (1998) 1063, 1096. See also Eugene I. Annis, "The Owned Property and Care Custody and Control Exclusions of the Comprehensive General Liability Policy," *Gonzaga Law Review* 28 (1993): 439, 439–440.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Id*.

[154] *Morrone v. Harleysville Mut. Ins. Co.*, 283 N.J. Super. 411, 416-17 (App. Div. 1995).

[155] See, e.g., *Genesis Ins. Co. v. BRE Properties*, 916 F. Supp. 2d 1058, 1065-66 (N.D. Cal. 2013); see also Robert A. Whitney, "Environmental Contamination and the Application of the Owned Property Exclusion to Insurance Coverage Claims: Can the Threat of Harm to the Property of Others Ever Get Real?," *Northern Kentucky Law Review 0*27 (2000): 505, 545.

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In *Yale Univ. v. Cigna Ins. Co.*, the insured Yale University argued that the policy's owned property exclusion did not apply because the lead-based paint was causing third-party damage by spreading into air, ground, and the water supply/ground water.[156] The court rejected this argument, because there was no evidence of migration, and the loss was Yale's own property.[157] The court further concluded that the absence of a specific mold exclusion does not create coverage.[158] This finding highlights the point that mere absence of exclusion does not provide affirmative coverage.

K. *Late notice*

The late notice rule applies to insurance claims in general, including mold, lead, and asbestos claims. CGL and other policies usually require the insured to provide notice of loss "immediately" or "as soon as practicable."[159] Numerous litigated cases involve a factual dispute about the timing of insured's knowledge of a claims or circumstances that lead to the loss. If a landlord has constructive or actual notice of a water leak and mold, and does not notify the carrier until after his tenant becomes ill, the delay could justify the insurers late notice defense.[160]

Many jurisdictions will preclude coverage if the insured knew or should have known about the possibility of a claim but failed to provide timely notice, even where the insurer has not demonstrated that it was prejudiced by the untimely notice.[161] Often, the insured bears burden of proof to prove that the notice was timely given to the insurer.

IV. Conclusion

Insurers will often disclaim coverage for mold, lead, and asbestos claims made under a CGL policy because environmental insurance policies are the correct product designed to cover such losses. Unfortunately, insureds, and often insurance brokers, rely on the absence of a specific mold, lead, or asbestos exclusion as evidence of the carrier's intent to cover such a claim. Such an approach, however, is misguided and can lead to uncovered losses for the insured. Most claims adjusters and coverage counsel will rely on the inability of the CGL policy to be triggered for the loss and/or several applicable exclusions addressed in this article. Thus, environmental insurance is strongly recommended to fill the gap in coverage that exists in CGL policies for environmental loss that includes, but is not limited to, mold, lead, and asbestos.

[156] 224 F. Supp. 2d 402, 408-09 (D. Conn. 2002).
[157] *Id.*
[158] *Id.*
[159] See, e.g., *1500 Coral Towers Condo. Ass'n, Inc. v. Citizens Prop. Ins. Corp.*, 112 So. 3d 541, 543-44 (Fla. Dist. Ct. App. 2013).
[160] See *Stark v. State Farm Florida Ins. Co.*, 95 So. 3d 285, 288 (Fla. Dist. Ct. App. 2012).
[161] See *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (Ct. App. N. Y., 2005); *Brakeman v. Potomac Ins. Co.*, 236 Pa. Super. 320, 328 (Sup. Penn. 1975); *Nat'l Publ'g. Co. v. Hartford Fire Ins. Co.*, 287 Conn. 664 (2008); but see *Dunn v. Am. Family Ins.*, 251 P.3d 1232, 1235 (Colo. App. 2010).

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