

By Daniel R. Lavoie

Introduction

After a period of favorable mold litigation and commercial lines underwriting trends, Hurricane Katrina has cast a new spotlight on the environmental insurance coverage of mold, particularly as applied to personal homeowners policies.

While insurers had become increasingly comfortable with the science associated with the risk and treatment of mold before Katrina, cleanup and rebuilding efforts in the aftermath of hurricanes raise new questions and teach new lessons about coverage for underwriters and brokers.

Still, in spite of some recent complications presented by the unprecedented levels of hurricane activity, the insurance industry—having obtained a greater understanding of mold science and treatment—is now well equipped to address the underwriting of mold within the broader environmental risk arena. Indeed, as the understanding of mold risk exposure matured over the last few years, even the more conservative of insurance underwriters joined the fold with coverage offerings.

Injury Link

This was not the case in the early years of the present decade, when the mold issue threatened to rival asbestos, and the number of claims and lawsuits grew at astronomical rates. At that time, the influence of the legal community affected insurers' ability and willingness to underwrite against mold. In addition, several high-profile court proceedings and insurance bad faith judgments fueled the fire.

However, as insurers began to take water damage and mold claims more seriously, and case law gradually matured, trends began to change. An inconclusive causal link between ingestion or prolonged exposure to mold and serious personal injury meant fewer personal injury awards. While mold in some cases can cause respiratory distress and allergic reactions, the plaintiffs' bar has been unable to demonstrate unequivocally that the risk leads to cancer and other neurological conditions.

In the absence of case law to substantiate the validity of such personal injury claims, the number of plaintiffs' actions citing mold's effects declined accordingly. As such, despite Katrina's wrath, the risk of mold emerging as the next asbestos scare has subsided considerably.

Katrina Complications

For insurers, underwriting mold exposure has followed different paths in the personal and commercial lines sectors. In personal lines (hardest hit by mold

losses) the coverage debate several years ago was whether mold damage was the result of a "covered peril" or was otherwise not covered. Since then, personal lines underwriters in many states have sought to exclude all coverage for mold-related losses. In the commercial sector, coverage for mold is commonly offered in the specialty marketplace of environmental insurers.

The excessive hurricane damage of the past two years, particularly in the aftermath of Katrina, has caused the issue of mold coverage to re-emerge. The so-called "toxic gumbo" that remained in affected areas created considerable mold concerns, especially in the residential housing sector.

Katrina is recognized as the largest-ever environmental disaster on U.S. soil, and the insurance coverage issues of mold from an environmental perspective are difficult to assess. There will be ongoing debates over many questions: who is responsible, which insurance policies will pay, and for what damages. The apportionment of liability and damages resulting from the hurricane may become a litigation nightmare, pitting personal lines against commercial insurers.

In the aftermath of the Hurricane Katrina disaster, many so-called experts used ineffective or improper treatment methods to "clean up" mold-infected properties. Further, there are questions whether each mold-affected property is in fact insured for mold and related damage-and, more important, whether there are personal, longer-term health implications. The "Katrina cough" that many workers and remaining homeowners are now experiencing has raised concern that direct exposure to mold and other pollutants may be linked to long-term illness.

Management and Prevention

The commercial insurance sector views mold as an environmental exposure that has become an underwriting specialty. More environmental underwriters have become comfortable with the issue from both a risk management and insurance perspective.

These underwriters, along with specialty environmental insurance brokers, have been educating their clients on this topic for several years. As a result, commercial real estate owners and managers, industrial manufacturers and building contractors have become more prepared and sophisticated about addressing operational concerns that may lead to severe mold damage.

These industries are now beginning to employ risk management methods and procedures designed to prevent and eliminate the effects of mold resulting from an incident.

From an underwriting and risk management perspective, the key to adequate mold prevention is controlling the water and moisture in the aftermath of an event. Underwriting prerequisites therefore call upon industrial and commercial concerns to establish adequate training in the handling of materials exposed to the effects of water and moisture.

Mold Operational and Maintenance (O&M) plans outline robust guidelines and procedures to be followed in the case of a water intrusion incident. Sound underwriting decisions for the commercial sector can thus be driven by preventive prerequisites and a commitment to the ongoing training and education of building managers, manufacturers and operators.

On the other hand, personal residential underwriting of mold exposure as an environmental risk is less precise. In the past several years, some state legislators have established disclosure requirements during the home purchasing process in areas likely to face greater exposure to moisture and water problems. In addition, some state legislators have passed or introduced bills requiring experts to be licensed in the effective treatment of water and moisture damage.

The need for comprehensive legislation regarding exposure, testing and treatment standards began to stall over time, but Katrina's effects have brought the issue to the fore once again. The problem has been exacerbated by the prevalence of so-called mold treatment experts in New Orleans, in particular, whose use of junk-science in hurricane-ravaged areas served only to inflame the hysteria and spread misinformation regarding the issues.

Conclusion

With Hurricane Katrina casting a new spotlight on the environmental insurance coverage of mold, the end result will hopefully be a renewed focus on the risk management aspect of this issue — establishing proven, standardized methods of mold prevention, treatment and containment, rather than an abrupt industry reaction involving an adjustment to the coverage being offered.

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