

PROPERTY INSURANCE:
COVERED CAUSES OF LOSS AND EXCLUDED PERILS

By

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I. Introduction

Dominant features of property insurance are the covered causes of loss and the excluded perils. This is true for commercial property policies including builders risk, as well as homeowners policies. These features are the focus of this chapter. Other aspects of property insurance such as the types of property covered, business interruption, conditions, duties in the event of loss, valuation, and mortgagee interest are for another day.

II. Covered Causes of Loss

Property insurance is first party coverage that compensates the policyholder for damage to its property. The goal is to provide financial protection against damage to property. The cause of the loss is often the deciding factor for coverage. Property insurance is subject to the general rules of construction for insurance contracts. It is the intention of the parties that governs, with intent gathered from the language employed in the policy in connection with the character of the insurance, its object and purpose, and the surrounding facts and circumstances.¹ The policy is subject to judicial construction in favor of the insured, however, when the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation.²

A. Fire Policy

The standard fire policy insures against the hazard of fire and lightning. Most states have adopted the standard policy by statute. Determining coverage for a fire or lightning loss often involves statutory construction. The coverage is written into property policies which insure far more than just fire and lightning.

B. All-Risk Policy

An all-risk property policy provides coverage for losses caused by fortuitous hazards not excluded thereunder. The typical all-risk policy insures against “all risks of direct physical loss or damage to Covered Property described herein except as hereafter excluded.” All-risk insurance is not as prevalent as it once was due to courts construing the insuring language in very broad terms and many insurers withdrawing the coverage from the market. But quite often large construction projects require the purchase of all-risk coverage in order for the projects to have the broadest protection possible. As a consequence, litigation battles will continue to rage over all-risk policies. In fact, many all-risk homeowners’ policies are at issue in the Hurricane Katrina coverage disputes.

All-risk insurance coverage is a type of coverage that traditionally provides indemnification for “fortuitous and extraneous” events.³ A fortuitous event is an event “happening by chance or accident,”⁴ or “occurring unexpectedly or without known cause.”⁵ Insurance is not available for losses that the policyholder knows of, planned, intended, or is aware are substantially certain to occur.⁶ The fortuity doctrine prevents insurers from having to pay for losses arising from undisclosed events that existed prior to coverage, as well as events caused by the manifestation during the policy period of inherent defects in the insured property that existed prior to coverage.⁷ Losses which are not fortuitous are not covered because the risk feature inherent in insurance is lacking.⁸ The fortuity requirement was designed to assure that an insurance company would not be required to reimburse its insured for certain and inevitable losses.⁹

The first party property policies such as all-risk policies are intended to cover direct losses to the policyholder and not to third-parties.¹⁰ Damages sustained by third parties are dealt with in third party liability insurance.

“Direct physical loss” under the policy exists with physical injury to the property and can exist also without actual injury or destruction of property or structural damage to property. It is sufficient to show that the insured property is injured in some way, such as the presence of asbestos fibers or odors from a methamphetamine laboratory.¹¹ But this does not mean coverage exists for intangible and economic losses.¹²

As noted by the Fifth Circuit in *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, the language “physical loss or damage” “strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state – for example, the car was undamaged before a collision dented the bumper.”¹³ Courts have found that “physical loss or damage” is not ordinarily thought to encompass faulty initial construction.¹⁴ “When an insured has made claims for the collapse of the insured subject matter because of faulty design, district courts have awarded as damages the cost to rebuild the structure in its defective state [but] have not awarded as damages the cost to redesign or rebuild the structure so as to eliminate the defect.”¹⁵ “Physical loss or damage” also does not exist for the mere presence of intact asbestos- and lead-containing materials in an insured building, but it does exist for the contamination condition caused by asbestos and lead in a building.¹⁶ According to a Massachusetts court in *Pirie v. Federal Ins. Co.*, an internal defect in a building such as lead paint does not rise to the level of a physical loss.¹⁷

The term “all-risk” does not stand for the proposition that an “all-risk” policy permits an insured to recover for *all* losses or damages resulting from the accident.¹⁸ All-risk policies contain express written exclusions that greatly limit the scope of coverage.¹⁹ Exclusionary clauses are strictly construed against the insurer.²⁰ The burden is on the policyholder to demonstrate that the loss falls within the terms of the policy, and thereafter the burden is on the insurer to prove the applicability of any exclusions.²¹

C. Named Peril Policy

Unlike all-risk policies, named peril policies provide coverage only for losses specifically enumerated therein. They insure against direct physical loss or damage by, among other things, fire, lightning, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, smoke, leakage from fire protection systems, vandalism and malicious mischief, except as excluded elsewhere in the policy.²² Another

policy form contains the enumerated peril of “water damage, meaning accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance containing water or steam,” subject to certain limitations such as “continuous or repeated seepage that occurs over a period of 14 days or more.”²³ Unnamed hazards are not covered. Under the typical insuring language, the “insurer will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss,”²⁴ or the policy insures against “risks of direct physical loss or damage unless the loss or damage is excluded or limited as described.”²⁵

One such specified peril is windstorm coverage. The policy insures against “Windstorm or hail, but not including: Loss or damage to the interior of any building or structure, or the property inside the building or structure caused by rain, snow, sand or dirt, whether driven by wind or not, unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dirt enters.”²⁶ As noted by a Pennsylvania court in *Adams Apple Prods. Corp. v. National Union Fire Ins. Co.*, courts have construed the policy term “windstorm” to mean “wind, strong and sustained enough to damage the insured property,” as used in the policies and within the contemplation of the parties.²⁷ In the absence of a definition or further limitation in the policy, a “windstorm” is a wind of sufficient violence to be capable of damaging insured property “either by impact of its own force or by projecting some object against the property.”²⁸

D. Collapse Coverage

Property policies typically exclude collapse of covered property (*e.g.*, a building) but then provide separate additional coverage for collapse in another section of the policy. The coverage states that the insurer “will pay for direct physical loss or damage to Covered Property caused by collapse of a building or any part of a building insured under this Coverage Form, if the collapse is caused by one or more of the following: . . . b. [h]idden decay; c. [h]idden insect or vermin damage....”

Courts have not uniformly agreed on what constitutes the collapse of a building under the collapse coverage of a casualty insurance policy.²⁹ Some courts have adopted the traditional “narrow” interpretation, requiring coverage only where a building has fallen down or caved in.³⁰ The actual collapse standard has been criticized as encouraging an insured to neglect repairs and allow a building to fall, a standard which is economically unsound and contrary to the insured’s duty to mitigate damages and which does not comport with the expectation and intent of the insured, or advance the best interests of the insured, the public, or even the insurer.³¹

The modern majority rule does not require actual collapse but instead requires something less - serious impairment of structural integrity making the support system no longer capable of supporting the house’s structure.³² Focusing on the word “imminent,” a South Carolina court in *Hilton Head Resort v. General Star Indemnity Co.*, held that the definition of a collapse “must be taken to cover any serious impairment of structural integrity that connotes imminent collapse threatening the preservation of the building as a structure or the health and safety of occupants and passers-by.”³³ Some courts construe “imminent” as meaning collapse is “likely to happen without delay; impending or threatening” and require a showing of more than substantial impairment; other courts rule that substantial impairment is sufficient.³⁴ The substantial impairment standard has been

criticized as tending to convert collapse coverage into a maintenance agreement by allowing recovery for damage which, while substantial, does not threaten collapse.³⁵

Other collapse coverage insures against “direct physical loss or damage to Covered Property *caused by* collapse of a building or any part of a building”. This policy language requires not just the threat of collapse, and not just collapse itself, but actual loss or damage caused by a collapse.³⁶

E. Causation

Coverage under property policies is established in large part by the cause of loss. To be covered, the policyholder must sustain a loss caused by a covered hazard (per the specified peril policy) or a loss not caused by an excluded hazard (per an all-risk policy).

When there appear different causes of damage, the proximate cause to which the loss is to be attributed is the “dominant, the efficient one, that sets the other causes in operation, and causes which are incidental are not proximate, though they may be nearer in time and place to the loss.”³⁷ This is the efficient proximate cause doctrine and is generally recognized as the universal method for resolving coverage issues involving the occurrence of covered and excluded perils.³⁸ As aptly put by a West Virginia court in *Murray v. State Farm Fire & Casualty Co.*, the doctrine “looks to the quality of the links in the chain of causation.”³⁹ Under the doctrine, a loss that is caused by a combination of covered and excluded risks is covered if the covered risk is the efficient proximate cause of the loss.⁴⁰ The essence of the rule is that when an insured cause sets in motion other causes which may not be insured, the loss is covered.⁴¹

The rule is applied after there is a determination of which single act or event is the efficient proximate cause of the loss and there is a determination that the efficient proximate cause of the loss is a covered peril.⁴² “When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application.”⁴³

Another doctrine - the concurrent cause doctrine - should not be confused with the efficient proximate cause doctrine. The concurrent cause doctrine applies when multiple causes of loss are independent, whereas the efficient proximate cause doctrine applies when the causes of loss are dependent.⁴⁴ Causes are independent when they are unrelated such as an earthquake and a lightning strike, or a windstorm and wood rot.⁴⁵ Causes are dependent when one peril instigates or sets in motion the other, such as an earthquake which breaks a gas main that starts a fire.⁴⁶ The Ninth Circuit in *Safeco Ins. Co. v. Guyton*, applied the concurrent cause doctrine to find coverage when heavy rains from a hurricane broke a levee system and homes sustained water damage due to the broken levees. Though the loss was excluded by the flood exclusion, it was covered by the peril of negligent design and maintenance of the levees, and thus the court allowed the homeowners to recover.⁴⁷

As a way to combat the effects of the efficient proximate cause and concurrent cause doctrines, property policies have added a clause as a lead-in to the exclusions and thus have attempted to avoid the limiting nature of those doctrines. The standard lead-in states: “We do not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.”⁴⁸ In the Alabama case of *State Farm Fire & Casualty Co. v. Slade*, lightning (a covered peril) had caused earth movement (an excluded peril) which led to cracks in an insured’s property. Because of

the above lead-in clause in the earth movement exclusion, the court applied the exclusion to bar coverage.⁴⁹

F. Ensuing Loss

An ensuing loss provision “does not cover loss caused by the excluded peril but rather covers loss caused to other property wholly separate from the defective property itself.”⁵⁰ An example of an ensuing loss provision is: inherent vices are not covered “unless loss or damage from a peril insured herein ensues and then this policy shall cover for such ensuing loss or damage.” Thus, the cost of correcting design defects cannot be covered under the ensuing loss provision where the cost was incurred to correct an excluded peril.⁵¹ The Third Circuit in *GTE Corporation v. Allendale Mutual Ins. Co.*, viewed the following illustration helpful in understanding the coverage: “[I]f defectively installed roof flashing allows water to leak into the wall cavity, then subsequent damage caused by water, such as dry rot or mold, to the interior of the house is caused by the faulty workmanship and not covered. If, however, the water migrates into an electrical box and causes an electrical short which in turn causes a fire, then the fire damage is a covered ‘ensuing loss.’ [That is,] ... mold, unlike fire, is not an ‘ensuing loss’ due to the lack of any intervening cause other than time beyond the initial water damage.”⁵² In the Texas case of *Allstate Ins. Co. v. Smith*, a water pipe within a concrete slab burst resulting in water damage to the insureds’ home. The cost of tearing out the wall and floor to find defective pipe and repairing the wall and floor was a covered “ensuing loss,” although the replacement of the defective pipe was excluded by the inherent vice exclusion.⁵³

G. Ordinance Enforcement

Similar to the ensuing loss provision is the ordinance deficiency provision, which states that the insurer “shall be liable also for the loss occasioned by the enforcement of any state or municipal law, ordinance or code, which necessitates, in repairing or rebuilding, replacement of material to meet such requirements.” A North Carolina court in *John S. Clark Company, Inc. v. United National Ins. Co.*, concluded that this provision does not cover the costs incurred by an insured to correct defectively built portions of the construction project in the absence of a covered loss under the policy. Accordingly, the provision provides coverage after a covered loss has already occurred such as when an insured repaired or rebuilt the damaged or destroyed property and incurred additional costs because the insured necessarily used replacement materials to comply with any state or municipal law, ordinance or code.⁵⁴ A Tennessee court also refused to allow ordinance deficiency coverage for the costs of upgrading code violations which were discovered in areas of the insured building not affected by the fire.⁵⁵

The converse of this coverage is the ordinance or law exclusion, which excludes coverage for loss “resulting from the enforcement of any ordinance or law: (1) regulating the construction, use or repair of any property; or (2) requiring the tearing down of any property, including the cost of removing this debris.”⁵⁶

III. Excluded Perils

The reach of property insurance is narrowed by exclusions. In insurance parlance, “‘all-risk’ does not mean ‘every risk.’”⁵⁷ Exclusionary clauses are strictly construed against the insurance company.

A. Faulty Workmanship Exclusion

The faulty workmanship exclusion provides that damages resulting from the faulty, inadequate, defective or negligent construction of part or all of any property on or

off the premises described in the policy is excluded from coverage.⁵⁸ As the exclusion reads: “We will not pay for loss or damage caused by or resulting from ... [f]aulty, inadequate, defective or negligent: ... [d]esign, testing, specifications, workmanship, repair, construction, renovation, remodeling, grading or earth compaction; ... of part or all of any property on or off the described premises.” The dictionary definition of “construction” is “something built or erected.”⁵⁹ The construction process includes multiple phases or parts, and faulty workmanship signifies a component of the building process leading up to a finished product.⁶⁰ The Illinois court in *El Rincon Supportive Services Organization, Inc. v. First Nonprofit Mutual Ins. Co.*, has extended the reach of the exclusion to exclude property damage resulting from the construction excavation operations on the adjacent property – “it is commonly understood that excavating activities are necessary to lay the foundation in the construction of a building.”⁶¹ A more common application of the exclusion is a subcontractor’s defective execution of waterproofing.⁶²

However, the exclusion is not bullet proof. The Ninth Circuit in *Allstate Insurance Co. v. Smith*, construed an all-risk business property insurance policy on a doctor’s office, where equipment was rain damaged when a roofing contractor removed a portion of the roof but failed to put a cover over the resulting opening. The court concluded that the exclusion for “faulty workmanship,” as applied to the subcontractor’s failure to cover the exposed premises, was ambiguous because the term “faulty workmanship” was susceptible to at least two reasonable interpretations: “flawed process,” and a “flawed product.” The “flawed product” interpretation was found reasonable, and the property damage caused by the roofer’s dereliction was not deemed faulty workmanship since the roofer had not completed any portion of the new roof and thus there was no flawed product.⁶³ Similarly, negligence occurring after the built product has been properly completed – as when its electronic controls are being tested to confirm their compliance – has been found by a court not to come within the bar of the faulty workmanship exclusion.⁶⁴

B. Wear and Tear Exclusion

Wear and tear exclusions have long been a feature of all-risk insurance contracts.⁶⁵ Courts frequently interpret wear and tear exclusions to connote the popular meaning of the expression, and infer such adjectives as ordinary and natural to limit the breadth of exclusions.⁶⁶ In the context of building collapse coverage, wear and tear is also an exclusion: a policy does not cover the collapse of a building if the collapse was due to, among other things, wear and tear.⁶⁷

C. Inherent Vice/Latent Defect Exclusions

The property policy also typically does not insure against loss “caused directly or indirectly by ... inherent vice, latent defect.” A Washington court in *Port of Seattle v. Lexington Ins. Co.*, described “inherent vice” succinctly: “An inherent vice is defined by various courts as “any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time.”” The court also defined it “as a cause of loss not covered by the policy, does not relate to an extraneous cause but to a loss entirely from internal decomposition or some quality which brings about its own injury or destruction. The vice must be inherent in the property for which recovery is sought.”⁶⁸ In other words, the question is whether the insured property “contain[s] its own seeds of destruction ... [or whether it] was threatened by an outside

natural force.”⁶⁹ If it is the former, the exclusion applies to bar coverage. In one of the few Year 2000 cases litigated in previous years, *GTE Corporation v. Allendale Mutual Ins. Co.*, the Third Circuit found the insured’s Y2K problem to be an excluded inherent vice because the date field is an internal quality that brought about its own problem – the insured was not threatened by any external force; the threat is entirely internal.⁷⁰

A close cousin to inherent vice is latent defect. No definition is usually given in the policy for the term “latent defect.” Courts have defined it as follows: “a defect that is hidden, or which could not have been discovered by any known or customary test or examination.”⁷¹ In other words, where a defect is “not discoverable upon known and customary inspection,” the loss is excluded from coverage.⁷² The Second Circuit in *City of Burlington v. Indemnity Ins. Co. of North America*, applied the latent defect and inherent vice exclusions to damage caused by leaking welds in a boiler unit of an electric generating facility because the damage was intrinsically caused -- the cause of the leaking welds was a lack of full penetration in the welds themselves, rather than any external cause.⁷³

D. Dampness Exclusion

A property policy may also exclude “loss caused by or resulting from ... dampness.” In *40 Gardenville, LLC v. Travelers Property Casualty of America*, a New York court ruled that the exclusion was clear and unambiguous in the context of mold contamination in a building. The court concluded that the plain and ordinary meaning of the term “dampness,” as noted in a dictionary, was “wetness” and “moistness.”⁷⁴ The Court found the water or dampness present in the building was the proximate cause of the mold contamination, and the exclusion operated as a bar to the insured’s recovery for mold loss.⁷⁵

E. Water Exclusion

The water exclusion has long been in use with little or no change and courts have usually found it clear and unambiguous,⁷⁶ although the flood portion below was recently declared ambiguous in the Hurricane Katrina litigation.⁷⁷

One variation of the water exclusion states, “We will not pay for loss or damage caused directly or indirectly by ... Water. (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.”⁷⁸

1. Surface Water. Where “surface water” is at issue, the policy does not define the term “surface water”. However, under the widely accepted definition, “surface water” means: “water which is derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such diffused state, and which follows no defined course or channel, which does not gather into or form a natural body of water, and which is lost by evaporation, percolation, or natural drainage.”⁷⁹ A variation on this definition of surface water is water that “(1) derives from natural precipitation such as rain or melting snow; (2) flows over or accumulates on the surface of the ground; and (3) does not form a definite body of water or follow a defined watercourse.”⁸⁰

It is not always easy to determine whether certain facts fit within the exclusion for surface water. A North Dakota court in *State Fire and Tornado Fund v. North Dakota State University*, upheld the exclusion where water from a heavy rainstorm entered a tunnel from a sports stadium and then entered the insured’s plant and building at the other

end of the tunnel. The water being “altered ... by paved surfaces, buildings, or other structures” and “being artificially channeled underground” still maintained its surface water character such that the loss was excluded.⁸¹ But then a Georgia court in *Selective Way Ins. Co. v. Litigation Technology, Inc.*, viewed similar facts differently and found the exclusion inapplicable. The rain water lost its character as “surface water” under the well-recognized definition of that term when it flowed into a 13-foot-deep pit which the City had dug under a road adjacent to the insured’s building. As the rain water rose in the pit, it entered an uncapped pipe, flowed through the pipe under the street and sidewalk and into the basement of the insured’s building. The court concluded that the water “is no longer diffused, is no longer on the surface of the ground, has gathered into a body, and has followed a defined course through the pipe and into the building.”⁸²

2. Flood. The flood portion of the water exclusion is presently being litigated in the many claims involving Hurricane Katrina – whether the storm surges and water flowing through levees constitute a “flood” in the exclusion and whether the damages were caused by flood or a covered peril such as windstorm. One dictionary definition of flood is “an overflowing of water in an area normally dry; inundation; deluge.”⁸³ In *Valley Forge Ins. Co. v. Hicks, Thomas & Lilienstarn, L.L.P.*, a Texas court enforced the flood exclusion where a tropical storm caused a bayou to overflow and water rushed into a convention center through its basement wall into a parking garage into a pedestrian tunnel and into a bank building where the insured tenant’s premises became damaged. The exclusion was applied to bar coverage because the water “flowed onward, as flood and surface water is wont to do, obeying the law of gravity and flowing into man-made underground structures.”⁸⁴ The flood exclusion reflects that the property insurance industry has not wanted to insure property against flood and hence Congress enacted the federal flood insurance program in 1968.⁸⁵

On November 27, 2006, a Louisiana court in *In re Katrina Canal Breaches Consolidated Litigation*,⁸⁶ issued a monumental decision concerning damages arising from flooding resulting from breaches or overtopping of the 17th Street Canal wall. Plaintiffs alleged their water damage was not the result of natural flooding but was caused by the Orleans Levee District’s failure to correct the break in the canal wall or warn others of impending water intrusion. A key issue was whether the flood exclusion applied to only natural events or to natural and man-made events. The district court ruled that the flood exclusion in some policies at issue is ambiguous because the term “flood” is susceptible to two reasonable interpretations – one which limits itself only to a flood which occurs solely because of natural causes and one which encompasses both a flood which occurs solely because of natural causes and a flood which occurs because of the negligent or intentional act of man.⁸⁷ However, State Farm’s flood exclusion escaped the “ambiguous” label because it precisely stated there is no coverage provided for any flooding “regardless of the cause” and because Louisiana’s state courts would enforce such an anti-concurrent cause clause despite the efficient proximate cause doctrine.⁸⁸ Additionally, as respects Hartford’s policy, the court concluded that the policy clearly excluded flood damage caused by negligently maintained levees – the insurer does not “insure against loss or damage directly or indirectly caused by ... acts, errors, omissions by ... others in ... the design, specifications, workmanship, repair, construction, renovation, ... of ... levees, dams, or other facilities ... or the maintenance of any such property....”⁸⁹

3. **Groundwater.** The groundwater portion of the water exclusion states, “We will not pay for loss or damage caused directly or indirectly by ... Water. ... (4) Water seeping under the ground surface pressing on, or flowing or seeping through: (a) Foundations, walls, floors or paved surfaces.” The Sixth Circuit in *AKG Holdings, Inc. v. Essex Ins. Co.*, considered whether this groundwater exclusion applied to damage to an empty in-ground swimming pool that partially raised out of the ground over the winter. The court ruled the damage was excluded because the groundwater pressing on the pool caused at least part of the buoyancy that led to the eruption of the pool from the concrete deck and because a “floor” or “paved surface” in the exclusion can be applied respectively to the bottom or interior surface of the swimming pool.⁹⁰

4. **Seepage/Leakage.** A different water exclusion comes into play in the property policy’s coverage for collapse. Collapse coverage is barred for “loss or damage caused by or resulting from ... wear and tear, ... decay, deterioration, ... continuous or repeated seepage or leakage of water that occurs over a period of 14 days, ... faulty, inadequate or defective maintenance.” In one case, the roof collapsed as a result of lack of maintenance and water seepage, which caused decay and weakened the wood structures. As such, the causes of the roof collapse fit squarely within the exclusion of the policy.⁹¹

5. **Rain.** Another form of water exclusion is the rain exclusion. As stated, the policy “will not pay for loss of or damage to ... the interior of any building or structure caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by rain or not....” A loss attributed to rainwater which enters the building through the roof is barred by this exclusion, according to a Nebraska court in *Einspahr v. United Fire & Casualty Co.*: it is a “tortured reading” of the exclusion to argue that once rain water enters a building it loses its nature as rain.⁹² A flooded basement from a severe rainstorm can be the basis for applying the exclusion, the damage having been caused by or resulted from rain.⁹³

F. Earth Movement Exclusion

The standard property coverage form excludes “earth movement, defined as: any earth movement (other than sinkhole collapse) such as an earthquake; landslide; mine subsidence; or earth sinking, rising, or shifting.”⁹⁴ Courts are not in agreement over whether this exclusion applies to just naturally occurring events or also to man-made events. The majority of courts that have considered earth movement exclusions in the context of contractor negligence have found them to be ambiguous.⁹⁵ According to the West Virginia court in *Murray v. State Farm Fire & Cas. Co.*, the exclusion could bar coverage for solely natural events such as earthquakes, but it could also be interpreted to bar coverage for man-made events such as earth movement caused by equipment. Because the policy language is reasonably susceptible to different meanings, the court ruled that the earth movement exclusion is ambiguous, and must have a more limited meaning than that assigned to it by the insurer. In determining the limited meaning of the exclusion, the *Murray* court applied the rule that “in an ambiguous phrase mixing general words with specific words, the general words are not construed broadly but are restricted to a sense analogous to the specific words.”⁹⁶ Other jurisdictions take the opposite approach and enforce the exclusion when man-made activities such as faulty construction cause earth movement and a resulting loss.⁹⁷

G. Pollution Exclusion

The standard property policy contains a pollution exclusion. The policy excludes “loss or damage caused directly or indirectly by ... [d]ischarge, dispersal, seepage, migration, release or escape of ‘pollutants’ unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the ‘specified causes of loss.’” The policy defines “pollutants” as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” The exclusion was enforced by an Alabama court in *Haman, Inc. v. St. Paul Fire & Marine Ins. Co.*, where the insured’s premises became uninhabitable because of the release of a chemical whose use was restricted by federal regulations for only uninhabited open fields.⁹⁸

A Wisconsin court in *Richland Valley Prods., Inc. v. St. Paul Fire Cas. Co.*, has stated that the term “contamination” connotes “a condition of impurity resulting from mixture or contact with a foreign substance, and that it means to make inferior or impure by mixture; an impairment of impurity; loss of purity resulting from mixture or contact, ...”⁹⁹ As such, taking a literal approach to the exclusion, the court ruled that a contaminant in a pollution exclusion included bacteria, and thus the insurance policy excluded coverage for any losses resulting from bacterial outbreak at the insured’s food processing facility.¹⁰⁰ However, other jurisdictions such as New York in *Pepsico, Inc. v. Winterthur International America Ins. Co.*, reject this literal approach and favor a “commonsense” approach, which recognizes that the general purpose of a pollution exclusion is to exclude coverage for environmental pollution, environmental-type harms.¹⁰¹ To the extent the exclusion could be read to have two reasonable interpretations – contamination includes only environmental-type harm or it includes both environmental and product contamination - the courts deem the exclusion ambiguous and construe it in favor of the insured.¹⁰² Rejecting the insurer’s argument that lead paint dust from repairs in a building comes within the pollution exclusion, another court spoke to the overbroad language of the exclusion: reading the clause broadly would bar coverage for one who slips and falls on a bottle of spilled Drano or who sustains injury from chlorine in a pool.¹⁰³

In the context of mold damage, the pollution exclusion was found by a Wisconsin court not to apply to mold caused by water vapors trapped in the building’s walls because the damage was not seen as involving a release of contaminants.¹⁰⁴ On the other hand, other courts have found the mycotoxins from mold to constitute “pollutants” under the exclusion and that the release of mycotoxins into the air is a discharge, dispersal or release of pollutants.¹⁰⁵

H. Mold Exclusion

Property policies usually exclude loss caused by mold. Yet when mold and a covered hazard combine to cause mold damage, questions of fact arise as to which is the dominant efficient cause of loss. If a covered peril such as vandalism or a water leak is the efficient proximate cause, the mold damage is not subject to the mold exclusion.¹⁰⁶ Mold presents a unique problem in insurance coverage disputes because the nature of the damage is not always clear.¹⁰⁷ Property policies usually exclude coverage for “loss caused by or resulting from ... corrosion, rust, fungus, mold, rot.” The intent of the exclusion is to eliminate coverage for conditions associated with the property’s normal aging process.¹⁰⁸ One court in Arizona in *Cooper v. American Family Mutual Ins. Co.*, enforced the mold exclusion where a plumbing leak had damaged flooring and drywall in

a closet and bedroom and had caused mold damage. The reason for the ruling: the exclusion specifically barred coverage for mold, regardless of the cause.¹⁰⁹

IV. Practice Tips

Understanding property insurance in the context of a claim for loss can be a daunting task. Having a copy of the entire policy is an absolute must, as is reading and understanding the policy provisions pertinent to the claim. The facts of property claims are usually complicated and extensive and require a thorough investigation – given the different potential causes of loss involved and exclusions in play. Often it is the discovery of a particular material fact that will determine whether the peril is a covered or excluded one. Applying the known facts to the language of the property policy should result in a clear picture of whether the claim is covered or not. Unfortunately, one person's coverage is another person's lack thereof, where creative interpretations of the policy terms can sometimes seem endless and mind-numbing. Some jurisdictions may view the exclusion ambiguous and in the insured's favor and other jurisdictions may view it as being crystal clear in the insurer's favor. Then your own jurisdiction has yet to address the issue and you have to use your best judgment as to how the courts may decide the issue. In the end a claim on a property policy is an exercise in patience. A rush to judgment does no one any good.

V. Conclusion

Property insurance is a critical piece of nearly all business ventures and is a must for most homeowners. More often than not it is the cause of a loss which will determine whether the insurance is tapped to protect the insured or is unavailable because of an exclusion.

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¹ See 10A Couch on Insurance § 148:6 (3d ed. 2006).

² See *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

³ Andrew C. Hecker and M. Jane Goode, *Wear and Tear, Inherent Vice, Deterioration, etc.: The Multi-Faceted All-Risk Exclusions*, 21 *Tort & Ins. L.J.* 634, 634 (1986); see also *Meridian Leasing, Inc. v. Associated Aviation Underwriters, Inc.*, 409 F.3d 342, 350 (6th Cir. 2005); *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002); *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146, 195 S.E.2d 545, 547 (1973); *John S. Clark Company, Inc. v. United National Ins. Co.*, 304 F.Supp.2d 758 (M.D.N.C. 2004).

⁴ *80 Broad Street Co. v. United States Fire Ins. Co.*, 88 Misc.2d 706, 389 N.Y.S.2d 214, 215 (1975); see also *525 Fulton St. Holding Corp. v. Mission Nat'l Ins. Co.* 256 A.D.2d 243, 682 N.Y.S.2d 166, 166 (1st Dep't 1998).

⁵ *Black's Law Dictionary* 664 (7th ed. 1999); *Restatement of Contracts* § 291, Comment A (1932).

⁶ See *Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Companies, Inc.*, 265 F.3d 97, 106 (2d Cir. 2001); see also *40 Gardenville, LLC v. Travelers Property Casualty of America*, 387 F. Supp.2d 205, 211 (W.D.N.Y. 2005); *Mattis v. State Farm Fire & Casualty Co.*, 118 Ill.App.3d 612, 621, 73 Ill.Dec. 907, 454 N.E.2d 1156 (1983).

⁷ See *80 Broad Street Co.*, 389 N.Y.S.2d at 215 (*citing* *Greene v. Cheetham*, 293 F.2d 933, 936-37 (2d Cir.1961)).

⁸ See *Kilroy Indus v. United Pacific Ins. Co.*, 608 F.Supp. 847, 857 (C.D.Cal. 1985).

⁹ See *Hecker & Goode, supra*, at 635; see also *Johnson Press of America, Inc. v. Northern Ins. Co. of New York*, 339 Ill.App.3d 864, 791 N.E.2d 1291 (2003).

¹⁰ See *Tower Automotive, Inc. v. American Protection Ins. Co.*, 266 F.Supp.2d 664 (W.D.Mich. 2003).

¹¹ See *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn.App. 1997); see also *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or.App. 6, 9-11, 858 P.2d 1332, 1334-35 (1993); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 151-52, (Minn.App. 2001).

¹² See *Best Friends Pet Care, Inc. v. Design Learned, Inc.*, 77 Conn.App. 167, 181-83, 823 A.2d 329, 338-39 (2003).

¹³ 916 F.2d 267, 270-71 (5th Cir. 1990), *rehearing denied*, 923 F.2d 851 (5th Cir. 1991).

¹⁴ See *id.*; accord *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 45 (2d Cir. 2003); *Whitaker v. Nationwide Mut. Fire Ins. Co.*, 115 F.Supp.2d 612, 617 (E.D.Va. 1999); *Bethesda Place Ltd. P'ship v. Reliance Ins. Co.*, 1992 WL 97342 (D.Md.1992); *Wolstein v. Yorkshire Ins. Co. Ltd.*, 97 Wash.App. 201, 211-13, 985 P.2d 400, 407-08 (1999); *North Am. Shipbuilding Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 835 (Tex.App. 1996).

¹⁵ *Trinity Indus.*, 916 F.2d at 271.

¹⁶ See *e.g.*, *Yale University v. Cigna Ins. Co.*, 224 F.Supp.2d 402, 413 (D.Conn. 2002); *BellSouth Telecommunications, Inc. v. W.R. Grace & Co.*, 77 F.3d 603 (2d Cir. 1996); *Port Authority of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002).

¹⁷ 45 Mass.App. 907, 908, 696 N.E.2d 553 (1998).

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- ¹⁸ See *Fireman's Fund Ins. Co. v. Tropical Shipping and Const. Co., Ltd.*, 254 F.3d 987, 1008 (11th Cir. 2001).
- ¹⁹ See *Yale University*, 224 F.Supp.2d at 411.
- ²⁰ See *Fragner v. American Community Mut. Ins. Co.*, 199 Mich.App. 537, 540, 502 N.W.2d 350, 352 (1993).
- ²¹ See *id.*.
- ²² See *e.g.*, *Yale University*, 224 F.Supp.2d at 413.
- ²³ ISO CP 10 20 06 95.
- ²⁴ ISO CP 00 10 04 02.
- ²⁵ *Assurance Co. of America v. Wall & Associates LLC of Olympia*, 379 F.3d 557 (9th Cir. 2004).
- ²⁶ ISO CP 10 20 06 96.
- ²⁷ 85 A.2d 702, 705 (Pa. Super. Ct. 1952); see also *Gerhard v. Travelers Fire Ins. Co.*, 18 N.W. 2d 336 (Wis. 1945).
- ²⁸ *Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533, 534 (5th Cir. 1968).
- ²⁹ See *e.g.*, *Buczek v. Continental Casualty Ins. Co.*, 378 F.3d 284 (3d Cir. 2004); *Ocean Winds Council of Co-Owners Inc. v. Auto-Owner Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002).
- ³⁰ See *e.g.*, *Buczek*, 378 F.3d 284; *Fidelity and Casualty Co. of New York v. Mitchell*, 503 So.2d 870 (Ala.App. 1987); *Heintz v. United States Fidelity and Guaranty Co.*, 730 S.W.2d 268 (Mo.App. 1987).
- ³¹ See *e.g.*, *Hilton Head Resort v. General Star Indemnity Co.*, 357 F.Supp.2d 885 (D.S.C.2005); *Assurance Company*, 379 F.3d 557.
- ³² See *e.g.*, *Whispering Creek Condominium Owner Association v. Alaska National Insurance Company*, 774 P.2d 176 (Alaska 1989); *Doheny West Homeowner's Association v. American Guarantee and Liability Insurance Company*, 60 Cal.App. 4th 400, 70 Cal.Rptr.2d 260 (1997).
- ³³ *Hilton Head*, 357 F.Supp.2d 885.
- ³⁴ *Id.*; *Island Breakers v. Highland Underwriters Ins. Co.*, 665 So.2d 1084 (Fla.App. 1995); *Ocean Winds*, 350 S.C. at 271, 565 S.E.2d at 308.
- ³⁵ See *Hilton Head*, 357 F.Supp.2d 885.
- ³⁶ See *id.*
- ³⁷ *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 201 F.617, 626 (7th Cir. 1912); see also *Garvey v. State Farm Fire & Casualty Co.* 48 Cal.3d 395, 403, 257 Cal.Rptr. 292, 770 (1989).
- ³⁸ See *e.g.* *Western National Mut. Ins. Co. v. University of North Dakota*, 643 N.W.2d 4, 12 (N.D. 2002).
- ³⁹ 203 W.Va. 477, 488, 509 S.E.2d 1, 12 (1998).
- ⁴⁰ See *e.g.*, *Penn-America Ins. Co. v. Mike's Tailoring*, 125 Cal. App. 4th 884, 897, 22 Cal. Rptr.3d 918, 923 (2005); *Pieper v. Commercial Underwriters Ins. Co.*, 59 Cal.App.4th 1008, 1012, 69 Cal.Rptr.2d 551 (1997).
- ⁴¹ See *e.g.*, *American States Ins. Co. v. Rancho San Marcos Properties, LLC*, 123 Wash.App. 205, 97 P.3d 775 (2004); *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wash.2d 533, 656 P.2d 1077 (1983).

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- ⁴² See e.g., *McDonald v. State Farm Fire & Casualty Co.*, 119 Wash.2d 724, 732, 837 P.2d 1000 (1992).
- ⁴³ *Kish v. v. Ins. Co. of North America*, 125 Wash.2d 164, 170, 883 P.2d 308 (1994) (quoting *Chadwick v. Fire Ins. Exch.*, 17 Cal. App.4th 1112, 1117, 21 Cal. Rptr.2d 871 (1993)).
- ⁴⁴ See e.g., *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F.Supp. 2d 1312, 1319 (M.D.Fla. 2002).
- ⁴⁵ See *id.*
- ⁴⁶ See *id.*
- ⁴⁷ 692 F.2d 551, (9th Cir. 1982); *but see Garvey*, 770 P.2d at 713.
- ⁴⁸ ISO CP 10 20 (6-95).
- ⁴⁹ 747 So.2d 293 (Ala. 1999); *see also Boteler v. State Farm Casualty Ins. Co.*, 876 So.2d 1067 (Miss.App. 2004).
- ⁵⁰ *Montefiore Med. Center v. Am. Protect. Ins.*, 226 F.Supp.2d 470, 479 (S.D.N.Y. 2002).
- ⁵¹ See e.g., *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 284 F.3d 1228, 1231 (11th Cir. 2002); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161 (Fla. 2003); *Laquila Construction, Inc. v. Travelers Indem. Co. of Illinois*, 66 F.Supp.2d 543 (S.D.N.Y. 1999); *Schloss v. Cincinnati Ins. Co.*, 54 F.Supp.2d 1090 (M.D.Ala. 1999).
- ⁵² 372 F.3d 598 (3d Cir. 2004), *quoting Prudential Property Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830, at 10 (D.Or. 2002).
- ⁵³ 450 S.W.2d 957, 961 (Tex.App. 1970).
- ⁵⁴ 304 F.Supp.2d 758 (M.D.N.C. 2004); *see also Commonwealth Ins. Co. v. Benihana of Tokyo, Inc.*, 1997 WL 361617 (N.D.Tex. 1997); *Davidson Hotel Co. v. St. Paul Fire and Marine Ins. Co.*, 136 F.Supp.2d 901 (W.D.Tenn. 2001). *But see St. Paul Fire and Marine Ins. Co. v. Darlak Motor Inns, Inc.*, 1999 U.S. Dist. LEXIS 23283 (M.D.Pa.1999), *affirmed without opinion*, 205 F.3d 1330 (3d Cir. 1999).
- ⁵⁵ *Chattanooga Bank Associates v. Fidelity and Deposit Company of Maryland*, 301 F.Supp.2d 774 (E.D.Tenn.2004).
- ⁵⁶ ISO CP 10 30 10 91; *see also Sentinel Mgmt.*, 563 N.W.2d at 300.
- ⁵⁷ *Port Authority*, 311 F.3d at 234.
- ⁵⁸ See *El Rincon Supportive Services Organization, Inc. v. First Nonprofit Mutual Ins. Co.*, 346 Ill.App. 3d 96, 803 N.E.2d 532 (2004).
- ⁵⁹ *Webster's Third New International Dictionary* 498 (1993).
- ⁶⁰ See e.g., *Capelouto v. Valley Forge Insurance Co.*, 98 Wash.App. 7, 990 P.2d 414 (1999); *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338 (9th Cir. 1989); *Schultz v. Erie Insurance Group*, 754 N.E.2d 971, 976-77 (Ind.Ct.App. 2001).
- ⁶¹ 346 Ill.App. 3d 96, 803 N.E.2d 532 (2004).
- ⁶² *Kroll Construction Co. v. Great American Insurance Co.*, 594 F.Supp. 304, 305 (N.D.Ga. 1984).
- ⁶³ 929 F.2d 447, 450 (9th Cir. 1991).
- ⁶⁴ See, *Otis Elevator Co. v. Factory Mutual Ins. Co.*, 353 F. Supp. 2d 274, 280-281 (D. Conn. 2005); *see also City of Burlington v. Hartford Steam Boiler Inspection and Ins. Co.*, 190 F. Supp. 2d 663, 672 (D.Vt. 2002); *Dow Chem. Co. v. Royal Indemnity Co.*, 635 F.2d 379, 387 (5th Cir. 1981).

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- ⁶⁵ See e.g., *Meridian Leasing*, 409 F.3d at 350; *Mellon v. Fed. Ins. Co.*, 14 F.2d 997, 1002 (D.C.N.Y. 1926).
- ⁶⁶ See e.g., *Meridian Leasing*, 409 F.3d at 350; see also *Cyclops Corp. v. Home Ins. Co.*, 352 F.Supp. 931, 936 (W.D.Pa. 1973).
- ⁶⁷ See e.g., *Johnson Press*, 339 Ill.App.3d 864, 791 N.E.2d 1291.
- ⁶⁸ 111 Wash.App. 901, 48 P.3d 334, 338-39 (2002), quoting *Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 136, 84 S.Ct. 1142 (1964); see also *Employers Cas. Co. v. Holm*, 393 S.W.2d 363, 367 (Tex.App. 1965).
- ⁶⁹ *American Home Assurance Co. v. J.F. Shea Co., Inc.*, 445 F.Supp. 365, 368 (D.D.C. 1978).
- ⁷⁰ 372 F.3d 598 (3d Cir. 2004).
- ⁷¹ *City of Burlington*, 190 F.Supp.2d at 688-89.
- ⁷² *Id.*; see also *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F.Supp. 978, 992 (S.D. Ohio 1975). *General American Transportation Corp. v. Sun Ins. Office, Ltd.* 369 F.2d 906 (6th Cir. 1966).
- ⁷³ 346 F.3d 70, 74 (2d Cir. 2003).
- ⁷⁴ 387 F. Supp.2d 205, 211 (W.D.N.Y. 2005), quoting *The American Heritage Dictionary of the English Language* (4th Ed. 2000).
- ⁷⁵ *Id.* at 211.
- ⁷⁶ See e.g., *Newark Trust Co. v. Agric. Ins. Co.*, 237 F. 788 (3d Cir. 1916); *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309, 313 (Tex. 1965).
- ⁷⁷ *In re Katrina Canal Breaches Consolidated Litigation*, ____ F. Supp.2d ____, 2006 WL 3421012 (E.D.La.).
- ⁷⁸ ISO CP 00 10 06 95 and CP 10 20 06 95.
- ⁷⁹ *State Fire ad Tornado Fund v. North Dakota State University*, 694 N.W.2d 225 (N.D. 2005); see also *Selective Way Ins. Co. v. Litigation Technology, Inc.*, 270 Ga.App. 38, 606 S.E.2d 68 (2005).
- ⁸⁰ *Smith v. Union Auto Indem. Co.*, 323 Ill.App.3d 741, 257 Ill.Dec. 81, 752 N.E.2d 1261, 1267 (2001).
- ⁸¹ 694 N.W.2d 225 (N.D. 2005).
- ⁸² 270 Ga.App. 38, 606 S.E.2d 68 (2005). See also *Heller v. Fire Ins. Exchange*, 800 P.2d 1006, 1009 (Colo. 1990).
- ⁸³ *Webster's New World Dictionary* 535 (2d ed. 1974).
- ⁸⁴ 174 S.W.3d 254, 259 (Tex.App. 2004). See also *Wallis v. Country Mut. Ins. Co.*, 723 N.E.2d 376 (Ill.App. 2000); *E.B. Metal & Rubber Industries, Inc. v. Federal Ins. Co.*, 444 N.Y.S.2d 321 (App.Div. 1981); *Kane v. Royal Ins. Co. of America*, 768 P.2d 678 (Colo. 1989).
- ⁸⁵ National Flood Insurance Act of 1968. 42 U.S.C. §§ 4001-4129 (2000).
- ⁸⁶ ____ F. Supp.2d ____, 2006 WL 3421012 (E.D.La.).
- ⁸⁷ *Id.* at 14-15, 23-25.
- ⁸⁸ *Id.* at 30-31.
- ⁸⁹ *Id.* at 31-32.
- ⁹⁰ 2005 WL 1869514 (6th Cir. 2005).
- ⁹¹ *Johnson Press*, 339 Ill.App.3d 864, 791 N.E.2d 1291.
- ⁹² 2000 WL 758654 (Neb.App. 2000).

⁹³ See *Horizon III Real Estate v. Hartford Fire Ins. Co.*, 186 F.Supp.2d 1000 (D.Minn. 2002).

⁹⁴ IOS CF 00 11.

⁹⁵ See e.g., *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 9 (1998); *Cox v. State Farm Fire & Casualty Co.*, 217 Ga.App. 796, 796-97, 459 S.E.2d 446, 447-48 (1995); *Peters Township School District v. Hartford Accid. & Indem. Co.*, 833 F.2d 32, 35-36 (3d Cir. 1987).

⁹⁶ *Murray*, 509 S.E.2d at 9.

⁹⁷ See e.g., *State Farm Fire & Casualty Co. v. Bongen*, 925 P.2d 1042, 1045-47 (Alaska 1996); *Toumayan v. State Farm General Ins. Co.*, 970 S.W.2d 822, 825-26 (Mo.App. 1998); *McDonald*, 119 Wash.2d at 735-36, 837 P.2d at 1006.

⁹⁸ 18 F.Supp.2d 1306, 1308-08 (N.D.Ala. 1998).

⁹⁹ 201 Wis.2d 161, 167-68, 548 N.W.2d 127 (Ct.App. 1996).

¹⁰⁰ *Id.*; see also *Yale University*, 224 F.Supp.2d at 413.

¹⁰¹ 788 N.Y.S.2d 142 (App.Div. 2004).

¹⁰² See *id.*; *Herald Square Loft Corp. v. Merrimack Mutual Fire Insurance*, 344 F.Supp.2d 915 (S.D.N.Y. 2004).

¹⁰³ *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992).

¹⁰⁴ *Leverence v. U.S. Fidelity & Guaranty Co.*, 462 N.W.2d 218, 222 (Wisc.App. 1990).

¹⁰⁵ See e.g., *Reliance Ins. Co. v. Moessner*, 121 F.3d 895 (3d Cir. 1997); *Western American Ins. Co. v. Band & Desenberg*, 925 F.Supp 758 (M.D.Fla. 1996), *aff'd* 138 F.3d 1428 (11th Cir. 1998).

¹⁰⁶ See e.g., *Shelter Mutual Ins. Co. v. Maples*, 309 F.3d 1068, 1070-71 (8th Cir. 2002); *Bowers v. Farmers Ins. Exchange*, 99 Wash.App. 41, 46-48, 991 P.2d 734, 737-38 (2000).

¹⁰⁷ See *Raymund C. King, Toxic Mold Litigation*, p. 68 (2003).

¹⁰⁸ *Id.* at 75; see also *Aetna Casualty & Surety Co. v. Yates*, 344 F.2d 939 (5th Cir. 1965).

¹⁰⁹ 184 F.Supp. 960 (D.Ariz. 2002).