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MOLD CLAIMS

Hurricane Sandy left a highly visible path of destruction in her wake. While we all saw vivid pictures of the devastation, some of the damage she caused is less obvious and may even escape notice for an extended period of time. Chief among these unseen problems is mold. While some evidence of its presence may be readily observable, it is often hidden behind walls and beams and other hard to detect locations.

Many shore communities were evacuated before the storm and still others were quarantined after the storm because of problems with the community infrastructure or because homes were simply no longer in habitable condition. Consequently, mold was given a more fertile breeding ground than would be present following an ordinary storm.

The Occupational Safety and Health Administration (“OSHA”) prepared a Fact Sheet entitled “Mold Hazards during Hurricane Sandy Clean-up.” It warns that mold can penetrate porous materials and remediation is often necessary before property is suitable for re-occupancy. OSHA’s definition of porous materials includes drywall, carpets, insulation, ceiling tiles, and similar products and recommends removing and replacing them if exposed to moisture for over 48 hours.

Most insurance policies exclude coverage for mold-related claims. This is not, however, the end of the discussion. Coverage for mold will likely exist where it is not the cause of the loss, but rather the byproduct of a specific peril for which the policy provides coverage. In Simonetti v. Selective Insurance Co., 372 N.J. Super. 421 (App. Div. 2004), the Appellate Division found this distinction consistent with the long standing view of the New Jersey Courts that exclusions are to be narrowly construed, while coverage provisions are to be viewed through a broad prism. A careful analysis of the particular insurance policy and a complete understanding of the facts that led to mold growth are required to determine if coverage may exist for a Sandy claim.

Some newer policy forms contain a Fungi or Bacterial Exclusion, the application of which has not yet been interpreted in a published decision by the New Jersey Courts. This exclusion removes coverage for mold “regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.” Courts in other jurisdictions have found this exclusion to be unambiguous and granted summary judgment to insurers relying upon it. In Hathaway Development Co., Inc. v. Illinois Union Ins. Co., 2008 WL 1773307, slip op. at 4 (11th Cir. April 18, 2008), the 11th Circuit affirmed a District Court ruling that the Fungi or Bacteria Exclusion barred coverage for costs to clean up, remove and remediate mold caused by the insured contractor’s faulty workmanship. It is certainly possible that courts may have a different view of the exclusion when applied to a first party claim.

Other coverage issues may arise such as claims that mold contamination resulted from the carrier's failure to promptly pay the claim so that repairs could be affected or where the adjuster failed to properly diagnose damage so that mold was permitted to grow. In King v. Liberty Mut. Fire Ins. Co., 2011 U.S. Dist. LEXIS 65538 (E.D. La. June 21, 2011), a homeowner contended following Hurricane Gustav that the mold growth accumulated in her home as a result of the insurance company's failure in adjusting her claim, to pay the proper amount for the necessary repairs.

Schenck, Price, Smith & King's Hurricane Sandy Insurance Advisory Group has prepared a presentation on a wide range of topics which are likely to arise from Sandy-related insurance claims. Please feel free to contact any member of the Group with any questions which you may have at 973-539-1000.

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