

## **Do Adjusters Have a Duty to Warn of the Risks of Mold Contamination?**

By: Everette Lee Herndon, Jr.

The issue of whether an adjuster has a duty to warn building occupants of the potential dangers of mold has arisen in a number of cases recently. While some may still question the duty of the insurance company and the adjuster to warn the first party insured of mold contamination and the possibility of health risks, most insurance companies and adjusters seem to be coming to the realization that the duty of good faith and fair dealing obligate some warnings be given to the insured. The issue of any duty owed to third party claimants has been given less attention but such a duty exists nonetheless.

For purposes of this article, the underlying premise is that the adjuster is dealing with a covered loss (or potentially covered loss) that has resulted in the contamination of the property by mold. In working to resolve the claim and damages, the issues of causation and ensuing damages will be resolved dependant on the facts, the policy and the peril involved.

### **First-Party Duty**

In the Texas case of Melinda Ballard v. Fire Insurance Exchange (a member of the Farmers Insurance Group), the insurance company personnel had reports of and knew of the presence of Stachybotrys mold in the home but failed to advise the insured or recommend that the family move out of the property during repairs and cleanup. The resulting health problems of the family and mold contamination of the entire property prompted a \$100 million lawsuit and the filing of criminal charges of child endangerment against the insurance company personnel by the District Attorney.

The jury verdict in late May 2001 was for \$32.1 million, even after the evidence of bodily injury was excluded from the trial for technical reasons. The damages were: Actual Property - \$6.2 million, Mental Anguish - \$5 million, Punitive Damages - \$12 million and Legal Fees - \$8.9 million.

The jury found the following: Farmers engaged in an unfair or deceptive act(s) or practice(s) that caused damage. Farmers engaged in a false, misleading or deceptive act(s) or practice(s) that Melinda Ballard relied on to her detriment and that was a producing cause of damages. Farmers engaged in an unconscionable action(s) or course(s) of action that was a producing cause of damages. Farmers committed fraud. Farmers engaged in such conduct knowingly.

The Farmers verdict will probably be appealed.

In the fall of 2000 in the case of Anderson v. Allstate, a federal jury in Sacramento, CA returned a verdict of \$500,000 general and special damages and \$18 million punitive damages in another homeowner mold/property damage case. The Anderson verdict is up on appeal.

The insurance industry has long recognized the duty of the adjuster to promptly and properly investigate the first-party loss, determine the scope of damage, attempt to find any coverage available under the policy and to extend to the insured all benefits available under the policy. The adjuster should be well enough trained to know when there is a possibility of mold and to check for possible mold contamination when warranted. The adjuster must then include covered mold remediation in the scope of damages, advise the insured of the damages found and offer to the insured any available Additional Living Expense necessary for the duration of the mold remediation.

It appears that the Ballard case and the Anderson case represent a failure of the insurance companies to live up to these long recognized obligations. Similar cases abound even though the standards have been fairly clearly defined and recognized for some time.

### **A Developing Concern**

Meanwhile, in a number of cases around the country, the question has been brought to the forefront concerning the duty of the insurance company and the adjuster to warn third party liability claimants, e.g., apartment occupants, of the health risks of mold when the adjuster has knowledge of the mold and the occupant has little or no knowledge of the mold or the risks involved.

Traditionally the insurance industry has taken the position in liability cases that it was the responsibility of the third party claimant to prove both liability and damages. While the adjuster often investigated the claim and took the appropriate steps to protect the interest of the policy holder, including documenting the case completely and taking the initiative in settling the claim, it was not seen as the responsibility of the adjuster to prove the claim of a third party claimant. Damages in normal cases were generally set by the time the adjuster became involved and there was no continuing danger or exposure to the claimant.

In these type cases, it was seldom or never the situation where the adjuster was in possession of information that the claimant was in current or future danger and where the claimant was not aware of the danger. The adjuster's possession of information concerning ongoing hazards and the failure of the adjuster to advise the claimant of such information puts the adjuster-claimant relationship in an entirely different light from that normally encountered.

A duty to advise third party claimants of such dangers has long existed but has seldom been discussed in the insurance industry. This duty arises from a number of sources, some of which are discussed below.

The rise of so many cases involving mold contamination of condominiums, apartment complexes, office buildings and schools has demonstrated that the insurance industry needs to define in clear and understandable standards its responsibility in these types of cases. The industry has an obligation to recognize the need for the formulation of a better enunciation of

such standards to meet the situation.

## **Water Intrusion And Mold**

Often the building owner has been beset with a long continuing problem of water intrusion from a variety of possible sources. These problems may include worn out roofs, defective construction, leaking pipes or just poor maintenance. In many cases, the persistent water intrusion has resulted in mold contamination with the attendant health problems for the building occupants. While the owner's property policy may or may not cover the damage to the building, both water and mold, it is the area of liability that presents a concern here.

The adjuster may also be representing parties other than the building owner. Liability claims may also be made against product suppliers, property managers, contractors and maintenance companies where these insurance policies may be required to respond.

The adjuster may find himself handling water damage liability claims presented by the building tenants. A long-standing water intrusion problem may have triggered the growth and spread of hidden mold. Or a sudden bursting of a hot water heater or water softener may cause mold growth. Many times the liability adjuster is dealing with claimants who know little to nothing about mold contamination or the health problems that often accompany exposure to mold.

In the course of handling the 'water damage' of the tenant, the question arises concerning whether the adjuster should take any pro-active steps concerning mold. Should the adjuster investigate the possibility of mold if the situation warrants it? If mold is found, should the adjuster disclose the mold hazard? The issue is particularly pertinent when the adjuster is questioned by the building occupants concerning mold, the possibility of mold, test results (if any) and hazards involved?

The adjuster may also be faced with the situation where he learns that the occupants are experiencing recurring medical problems which the occupants have yet to associate with the mold that the adjuster knows, suspects or should suspect to be present.

One school of thought is that the adjuster does not owe any responsibility to disclose anything to the claimant concerning the presence of the mold or the health risks. This school of thought considers the tenants to be adverse parties in a potentially adversarial setting.

The better reasoned position, consistent with good claims adjusting practices, is that, in cases like these, the adjuster does have a responsibility to fully advise the claimants, even in an adversarial setting, of the known or suspected presence of mold, the hazards involved and the health risks that seem to routinely accompany exposure to mold. At the very least, the adjuster should give the mold information to the claimant so that the claimant can then seek guidance from someone else.

The adjuster's responsibility is based not only in the sense of duty of one human being to another, but also in the insurance industry claims practices, the codes of professionalism and

ethics, the Unfair Claims Practice regulations and the possible risk of separate independent tort liability or criminal charges.

### **Professionalism - Ethics**

Adjusters are subject to standards of conduct within the insurance industry. These standards may be codified by the company he works for or may just be custom and practice in the industry.

In order to do one's job as an adjuster, certain levels of knowledge, training and education are required, as is a sense of professionalism and ethics. Many companies recognize these requirements and have minimum training and education requirements as well as a Code of Conduct or Professionalism. Many companies provide in-house training or at least sponsor education courses from recognized training programs.

While not all adjusters are members of such honored organizations as The American Institute for Chartered Property Casualty Underwriters (AICPCU) or The Society of Claims Law Associates (SCLA), many are members of organizations or companies that have similar standards and professional goals. All adjusters should adhere to and uphold decent and reasonable standards.

As an example, some of the American Institute for Chartered Property Casualty Underwriters (AICPCU) Code of Professional Ethics standards are:

*CANON 1 - CPCUs should endeavor at all times to place the public interest above their own.*

*CANON 3 - CPCUs should obey all laws and regulations, and should avoid any conduct or activity which would cause unjust harm to others.*

The Society of Claims Law Associates (SCLA) Code of Ethics states that:

*1. Members of the Society shall adhere to the highest standards in their dealings with the public and other professionals both within and outside of the industry.*

*This includes, but is not limited to, claim professionals, physicians, attorneys, insureds, claimants, and experts.*

Codes like these are indicative of the industry standard and expectation that adjusters will behave in an ethical manner and refrain from harming others. Adjusters who have knowledge of mold and its dangers, are ethically obligated to advise claimants of the potential dangers so that all parties can at least deal from a position of shared and common information. To withhold such information from a claimant is to act in an unethical manner that may cause harm to the claimant, not just financially, but in the area of health.

### **Professionalism - Training**

The public's reasonable expectation of an educated and trained adjuster handling claims properly cannot be met unless the adjuster is properly trained to handle the claims assigned to him. An

insurance company that assigns a mold contamination claim to an adjuster that is unfamiliar with mold or how to handle mold contamination has breached the implicit promise made specifically to the policy holder and to the public in general of having a properly trained and experienced adjuster handle the claim.

The concept of good faith and fair dealing implicitly carries with it the promise that the adjuster is trained to handle the claim and protect the interests of the insured, both in first party claims and liability claims made by others. Failure of the adjuster to properly handle the third party liability claims may expose the insured to excess liability or worse.

Most insurance organizations or societies have a code encouraging and promoting education. The insurance company/employer has a responsibility to properly train and educate their personnel. The individual adjuster should also strive to educate himself.

The applicable American Institute for Chartered Property Casualty Underwriters (AICPCU) Code of Professional Ethics standard is:

*CANON 2 - CPCUs should seek continually to maintain and improve their professional knowledge, skills and competence.*

The Society of Claims Law Associates (SCLA) Code of Ethics states that:

*4. Members of the Society shall remain current on the laws and regulations affecting their professional responsibilities by attending such classes, seminars and training as necessary.*

An adjuster or an insurance company should never be allowed to hide behind the excuse of ignorance or lack of training. Information about mold and the hazards of mold contamination has been available to the insurance industry for many years. Many government, scientific and vendor organizations have made the information available. Lack of an appropriate level of knowledge and competence concerning mold contamination, health hazards and remediation is not an acceptable excuse for a company that impliedly and expressly promises competent claims handling and adjusting in exchange for insurance premiums.

Part of the training of an adjuster concerns the proper use of experts. An adjuster is taught to call in experts as needed on a claim. An adjuster has a duty to obtain expert assistance when the situation warrants. The expert is to provide the adjuster with information, assistance and guidance in cases requiring specialized knowledge. Mold contamination is such a situation. The adjuster has the responsibility to investigate and then the adjuster/company must make the decisions. The expert is only to advise and provide guidance. The responsibility rests with the adjuster. The adjuster can delegate authority but not responsibility.

While the adjuster may occasionally see or smell mold, mold may also be hidden behind walls and in other inaccessible locations. The presence of mold may be indicated by unexplained illnesses. For an adjuster to properly assess the damage and liability exposure, he must know if

there is mold present and how and when to look for hidden mold. The adjuster must determine how much mold there is and whether it poses health risks to the occupants of the building. Absent testing, the only viable option for the adjuster is to assume that any mold present is potentially toxic and must act accordingly.

When the situation warrants, the adjuster has an obligation to seek out the damages and liability exposures in order to properly evaluate the claim. If mold is present, the adjuster must then advise the occupants of the presence of mold in order to fulfill his duties and to properly handle the claim without incurring additional liability exposure to himself, his employer or his insured.

In this constantly evolving world with new technology, new policies, and new causes of action being constantly created by an inventive plaintiff's bar, the adjuster must continually strive to at least stay even.

When assigned a claim involving an issue previously unknown to the adjuster, such as mold contamination, the adjuster and the insurance company must educate themselves in order to deliver the service promised to and expected by the policy holder and general public.

### **Unfair Claims Practice**

Many states have adopted Unfair Claims Settlement Practices regulations modeled on the proposal of the National Association of Insurance Commissioners.

As an example, the California Insurance Code §790.03(h), prior to listing 16 unfair practices, prefaces them by prohibiting the insurance company from:

*790.03(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:*

California Insurance Code 790.03(h) then proceeds to list 16 unfair practices. The first item is:

*790.03(h)(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.*

If an adjuster has knowledge or should have knowledge of mold contamination and fails to advise the claimant of the mold, the adjuster is Misrepresenting to claimants pertinent facts by withholding the information. (The term claimant includes both first and third party.)

The contamination of the real or personal property by mold, not to mention the health risks the mold contamination poses, is pertinent to the adjustment of the claim. The physical contamination and/or any resulting injury are very pertinent to the value of the claim. It is not possible to successfully conclude a claim or reach a meaningful or binding settlement with either a first party Proof of Loss or a third party Release when one party (the adjuster) has knowledge of damages or injuries unknown to the other party. Without a meeting of the minds, the settlement

will be subject to attack and likely will be overturned in most states.

If the adjuster knowingly withholds information about mold from the claimant, the adjuster may face the accusation of fraud, negligence or some other independent tort, in addition to bad faith.

California Insurance Code §790.35 gives the Insurance Commissioner the authority to fine the insurance company \$5,000.00 for each such act; \$10,000 for each act if the act was wilful. Many other states have similar statutes.

Additionally, the California Code of Regulations also has sections that may apply. One such is:

*TITLE 10. Investment,*

*Chapter 5. Insurance Commissioner,*

*Subchapter 7.5. Unfair or Deceptive Acts or Practices in the Business of Insurance, Article 1. Fair Claims Settlement Practices Regulations,*

*2695.7. Standards for Prompt, Fair and Equitable Settlements.*

*. . .*

*(g) No insurer shall attempt to settle a claim by making a settlement offer that is unreasonably low. The Commissioner shall consider any admissible evidence offered regarding the following factors in determining whether or not a settlement offer is unreasonably low;*

*(1) the extent to which the insurer considered evidence submitted by the claimant to support the value of the claim;*

*(2) the extent to which the insurer considered evidence made known to it or reasonably available;*

*(3) the extent to which the insurer considered the advice of its claims adjuster as to the amount of damages;*

*(4) the extent to which the insurer considered the advice of its counsel that there was a substantial likelihood of recovery in excess of policy limits;*

*(5) the procedures used by the insurer in determining the dollar amount of property damage;*

*(6) the extent to which the insurer considered the probable liability of the insured and the likely jury verdict or other final determination of the matter;*

*(7) any other credible evidence presented to the Commissioner that demonstrates that the final amount offered in settlement of the claim by the insurer is below the*

*amount that a reasonable person with knowledge of the facts and circumstances would have offered in settlement of the claim.*

Many of the items in the section quoted above may be called into play if the adjuster knows of mold, does not convey the mold contamination information to the claimant, and attempts to settle the claim without advising the claimant of the dangers of mold contamination.

The adjuster is operating from a position of superior knowledge. Any attempt to settle a claim without the claimant being advised of the presence or potential dangers of mold, may invalidate any offers made by the adjuster or any settlement reached.

In some states, bad faith actions are allowed against the insurance company for breach of the duty of good faith and fair dealing. Some states allow only first party bad faith while a few states allow third party bad faith actions. In other states which do not allow bad faith actions, the claimant may pursue other avenues to collect damages. In almost all states, the claimant has some recourse against the adjuster if the adjuster withholds information.

Full disclosure of information possessed by the adjuster to involved parties concerning the potential health risks to which the claimant is being exposed is one way to avoid these type problems.

Many apartment and building owners, contractors, etc., and many insurance companies, may not want this information released to the claimants for fear that it may result in more costly claims. While the insurance company may claim that it is protecting the insured from exposure to liability, just the opposite may be true. As public knowledge of the dangers of mold spreads, more and more tenant's and plaintiff's attorneys will find new and creative ways to bring in more and more defendants.

The failure of the insurance company to fully disclose potential mold dangers to a third party claimant may result in the claimant suffering additional injury or damages. Such additional injuries may result in the building owner/policyholder being sued for damages in excess of the available policy limits. This result may end in a successful bad faith suit by the policyholder against the insurance company because the insurance company not only failed to properly protect the policyholder but caused additional damages.

Besides being both ethical and professional, as a practical matter full disclosure may be cheaper in the long run. No adjuster should be in the position of being accused of playing God or at least Russian Roulette with a person's life and health, by withholding information about mold contamination.

### **Criminal Liability**

In addition to the possibility of facing civil liability for failing to advise the claimant of the presence of mold and the potential dangers to health and property from the mold, the adjuster may conceivably face criminal charges.

In the Ballard v. Farmers case, criminal charges of Child Endangerment were brought against some insurance company personnel. A criminal grand jury investigated and may still bring an indictment. While the laws vary from state to state, as they do with the possible civil liability, any adjuster that knows (or should know) of the dangers mold poses, especially to the very young and the ill or infirm, may expose himself to criminal charges if he fails to advise the claimant of the presence of mold and the potential health risks. Knowing of the danger and not warning those most vulnerable may indeed be criminal as well as unethical and unprofessional.

## **Conclusion**

Many adjusters and insurance companies may claim to be ignorant of the effects and dangers of mold, but that may not be acceptable as an excuse for their actions, or inactions. The insurance industry standards of ethics and professionalism require that adjusters act ethically and be prepared to properly and competently handle those claims assigned to them.

State laws as well as industry custom and practice set standards for claims handling that require avoiding unfair claims settlement practices such as misrepresenting facts or attempting low-ball settlements.

An adjuster who acts ethically, is well trained and adjusts claims in a fair and professional manner should not have a problem.

*Everette Lee Herndon, Jr., is a Claims Consultant and Expert Witness working primarily in insurance bad faith cases. He is currently working on a number of mold related cases nationwide. Mr. Herndon was the plaintiff's bad faith expert in the mold related case of Anderson v. Allstate. He has been a speaker at Mealey's Mold Conference on insurance coverage and mold. Mr. Herndon was an adjuster for over 25 years. He is a member of the California Bar and is based in Rancho Murieta, Calif. Copyright 2001*

*Originally published in: Mealey's Litigation Report: Mold, Vol. 1, # 10 October 2001*