NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
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Unraveling first-party mold claims

BY: TOM MARJERISON

The dramatic increase in the volume and cost of mold claims has caught the insurance industry by surprise. Despite medical evidence refuting a causal link between indoor mold and serious medical conditions, many insurers have declared that mold will bring ruination on the entire industry. Mold is not the "black asbestos," but insurers do need to understand the complex coverage and liability issues posed by these claims.

Mold is everywhere, and for thousands of years people have been exposed to mold without serious side effects. Nevertheless, media coverage has created a perception that indoor mold is deadly. Unfortunately, this perception has fueled the plaintiff's bar, and has infected the general public.

As a result of media coverage and a concerted effort by the plaintiff's bar to capitalize on these cases, the insurance industry is facing a tremendous increase in first-party and third-party mold litigation. Because of the lack of case law on this issue and anticipated changes in coverage forms, insurers need to keep abreast of new developments in this new field. To assist clients, Norman, Hanson & DeTroy held a seminar on mold on January 17, 2003 for Claims Managers, Examiners, and Senior Adjusters to assist insurers in predicting how the Maine courts will likely handle these claims and related issues.

First-party mold claims

The coverage issues presented in first-party mold claims are complex and uncertain. As a result of the hysteria surrounding mold claims, many routine water claims are blossoming into expensive mold remediation cases. On a case-by-case basis, the transformation of a $4,000 water claim into a $30,000 water and mold remediation claim is not overwhelming. However, insurers presented with thousands of claims following a water or ice event may see a significant impact on their loss ratio.

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Despite the volume of small cases, the recent multi-million dollar verdicts in Texas, Florida, and California on routine mold claims has caused insurers the most concern. Although these cases present a primer on how not to handle a mold claim, it is important to carefully analyze the grounds for these verdicts. The $32.1 million award in *Ballard v. Fire Insurance Exchange*, Texas District Court No. 99-05252 (6/1/01), and the $18 million verdict, later reduced to $3 million, in *Anderson v. Allstate Ins. Co.*, CIV-00-907 (E.D. Cal. 10/3/00) have attracted significant attention from the insurance industry and plaintiff's bar. Nevertheless, the verdicts in these cases are based primarily on bad faith, rather than mold. Fortunately, the Maine courts have not adopted the tort of bad faith, and these decisions do not reflect Maine law.

Under Maine law, insurers are unlikely to face multi-million dollar exposures for routine mold claims. Nevertheless, it is important for companies to follow strict protocols in adjusting

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claims to properly determine coverage, and to limit any extra-contractual liability.

Coverage for first-party mold claims

Court decisions on mold coverage are evolving on a daily basis, and it is difficult to predict how the courts will interpret these coverages. In addition to new court decisions, the insurance industry is also in the process of adopting new endorsements and forms to deal with this issue. The Maine Bureau of Insurance recently approved new mold exclusion endorsements for homeowners' and commercial property policies. The adoption of new coverage forms and the evolving law on mold coverage will present insurers with a number of future challenges.

The first step in analyzing first-party coverage for property damage is to determine whether the mold "damage" constitutes "property damage" under the policy. The 1991 HO-3 form and most ISO standard policies state: "'Property damage' means physical injury to, destruction of, or loss of use of tangible property."

Many mold claims do not result in physical injury to, destruction of, or loss of use of tangible property. For instance, mold infestation of an HVAC system may pose health dangers to occupants of a building, but the HVAC system itself is not damaged. In fact, mold in a metal vent is no different in character than mold on a shower stall. Generally, mere diminution of the value of a building is not enough to constitute property damage. See *State Farm Insurance v. Superior Court*, 214 Cal.App.3d 1435 (1989).

On the other hand, the concurrent damage caused by water intrusion and resulting mold will often constitute covered property damage. Insulation and sheet rock tend to absorb moisture, and provide convenient breeding grounds for mold. When a covered water loss to property occurs, and leads to mold growth, insurers should anticipate that a court would find that the water and mold damage falls within coverage. Coverage for these mold claims is possible through two avenues 1) mold damage to organic materials such as wood, wallboard, and insulation causes some organic degradation and therefore constitutes property damages; and, 2) the mold growth resulted from a covered cause of loss, and constitutes an ensuing loss under the ensuing loss exception.

Analyzing coverage exclusions

The mold exclusion

Most policies contain standard exclusions for damages caused by mold. Nevertheless, the ensuing loss exception to the exclusion will often create coverage when a covered loss results in the growth of mold. The standard ensuing loss exception provides coverage where the excluded damage was caused by a covered cause of loss—i.e. water intrusion. If the growth of mold results from a covered water loss, then any mold remediation will likely fall within the ensuing loss exception to the mold exclusion.

In addition to the standard leaky roof cases, insurers are seeing an increasing number of mold claims resulting from improper ventilation resulting in mold growth. In assessing these claims, insurers must take into account not only the mold exclusion, but also the workmanship exclusion.

The desire to construct energy efficient houses often conflicts with the need to provide proper ventilation to prevent the accumulation of moisture. As a result of a failure to provide sufficient venting, condensation often accumulates and provides the proper environment for mold growth. Under these circumstances, insurers may deny claims under both the workmanship and mold exclusions. The failure to provide sufficient venting constitutes faulty workmanship, and the resulting mold falls with the mold exclusion, but does not fit within the ensuing loss exception due to the lack of a covered cause of loss.

Pollution exclusion

Many insurers have also relied upon the pollution exclusion to deny mold claims. Although one court has held that mold constitutes a pollutant, reliance on this exclusion may be misplaced. See *Lexington Insurance Co. v. Waterford-Fair Oaks, Ltd.*, 2002 U.S. Dist. Lexis 3594 (N.D. Texas 2002) (pollution exclusion applicable where exclusion specifically included "fungi").

Despite the clear language of the pollution exclusion, many courts have limited its impact. Various decisions have limited the exclusion to environmental pollution claims, and others have strictly defined the term "pollutant" to exclude lead paint, carbon monoxide, and other naturally-occurring substances. It is a fair argument that if lead paint is not a "pollutant," then discharged mold spores also do not constitute "discharge" of a "pollutant."

There is a lack of case law on this issue in Maine, and the central issues to be decided are: 1) Whether mold is a "pollutant"; 2) Whether the growth and release of mold spores constitutes a "discharge"; and, 3) Whether the pollution exclusion applies to indoor discharges. A plain reading of the stan-

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newsletter
is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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Maine courts exclude disability claims of post-traumatic fibromyalgia

BY JONATHAN BROGAN

Fibromyalgia was first officially recognized by the American College of Rheumatology in February, 1990. Described as a condition of persistent muscle pain throughout the body, the pain is often accompanied by severe fatigue, insomnia, diarrhea and abdominal bloating, bladder irritation and headache. Since this official recognition, nearly six million Americans are said to be suffering from fibromyalgia, more than four times as many as will develop cancer this year, and six times as many as those living with HIV. Ninety percent of the sufferers are women and the majority are Caucasian.

With these vast numbers of people complaining of fibromyalgia symptoms, the syndrome has become a matter of national concern. Newspaper and magazine articles, TV documentaries, as well as hundreds of internet sites, have dealt with the illness. Specialized clinics have been established, and drug companies, realizing the illness is chronic, market to the afflicted.

But what causes fibromyalgia? The scientific community has not reached a consensus either regarding its genesis, or even whether it truly exists as a physical syndrome. Patients diagnosed with fibromyalgia complain of diffuse muscle pain but upon physical examination show no evidence of inflammation. Subsequent laboratory tests, x-rays and tissue biopsies fail to show any muscle pathology. Basically, fibromyalgia patients have complaints of pain but no demonstrable physical symptoms.

To diagnose fibromyalgia, the doctor uses criteria established by the American Society of Rheumatology. The criteria consist of a doctor firmly pressing on 18 designated points where muscle, tendon, and ligament attach to bone. A patient who feels pain in 11 or more of those points is diagnosed with fibromyalgia. Not coincidentally, since fibromyalgia was officially recognized as a medical disorder, disability claims for social security and other health insurers have increased dramatically. In one study, it was shown that fibromyalgia-like symptoms accounted for 46 percent of the social security claims in one large city. Numerous articles, scientific and popular, have been written regarding whether or not fibromyalgia actually exists. However at this point, a diagnosis of fibromyalgia is generally accepted in the scientific and medical community.

The question now being faced in the courts, among accident victims, their lawyers, and those defending the claims, is whether fibromyalgia can be traumatically induced. In Maine, two cases in the Superior Court demonstrate conclusively that fibromyalgia is not recognized as a trauma-induced injury.

In the case of ***Trask v. Automobile Insurance Company***, CV-94-379 (York), Justice Andrew Mead undertook a thoughtful analysis of his role as "gatekeeper" of evidence to be introduced at trial, including the plaintiff's proffered testimony from three separate medical witnesses, that she was suffering from fibromyalgia caused by an automobile accident. Justice Mead used both Maine law and federal law in explaining his role as gatekeeper in evaluating the evidence to be presented. Using Maine Rule of Evidence 702, and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, Justice Mead determined that a trial court must exercise discretion in determining what evidence will be submitted to the jury.

In *Trask*, doctors testifying for the plaintiff all stated that the plaintiff did not have fibromyalgia before the accident and was struck with it following the accident. None of the doctors could point

JONATHAN BROGAN

to scientific evidence or any peer-reviewed article that accepted trauma as a cause of fibromyalgia. All of the doctors agreed that fibromyalgia's cause is basically unknown in the medical community. No scientific or medical opinion was offered to show that science or medicine had concluded that fibromyalgia could be induced by trauma.

The plaintiff's doctors essentially argued that the plaintiff did not have fibromyalgia before the accident, she had it afterwards, therefore the accident must have caused her fibromyalgia. Justice Mead rejected this argument as a logical fallacy referred to in Latin terms as *post hoc ergo propter hoc* [loosely translated – after this, therefore because of this]. The concept is also referred to as a temporal congruity. There is no science in a physician testifying that an event and an occurrence took place in sequence and therefore are related. As Justice Mead stated, "there is no medical theory or science to this conclusion. It is simply based on human experience and common sense." The doctors in Trask admitted that their concept of temporal congruity is an intuitive process, not a scientific or medical one. The court, rejecting the plaintiff's doctors' testimony as unreliable, excluded the plaintiff's expert wit-

nesses on trauma-caused fibromyalgia.

Five years later, in York County Superior Court, another plaintiff presented her claim of trauma-induced fibromyalgia. Justice Paul Fritzsche also analyzed the evidence pursuant to Daubert and the Maine Rules of Evidence. (As an aside, many plaintiffs' attorneys are expanding the view that *Daubert* is not accepted in Maine and should not be the test for the admission of scientific and/or medical evidence. Both *Trask* and *Schofield* belie this contention.) In ***Schofield v. Laboscam, Inc.***, CV-00-197, Justice Fritzsche recognized the medical community still does not know the cause of fibromyalgia. Again the plaintiff's doctors argued that the plaintiff did not have fibromyalgia before the accident, but had it afterwards, therefore the accident must have caused it.

The court rejected this testimony as both simplistic and not scientifically based. The best the plaintiff's expert could state is that he recognized more and more doctors believed that trauma could be one of the causes of fibromyalgia, but is not the only cause. Justice Fritzsche pointed out that as of 2002, if doctors are only at the point that they believe fibromyalgia could be caused by trauma rather than know it is caused by trauma, then the testimony and diagnosis are not reliable and could not be offered as evidence.

Justice Fritzsche did thoughtfully go on to state, however, that in five, ten or even twenty years, evidence of post-traumatic fibromyalgia may be routinely submitted to juries in proper cases and everyone may be bemused by the historical oddity that testimony regarding post-traumatic fibromyalgia was once excluded. He also observed that science could progress to the point in determining that post-traumatic fibromyalgia does not exist and cannot be scientifically proved.

Clearly, in 2002, testimony regarding "post-traumatic" fibromyalgia is not reliable and should be excluded. The law in the Maine Superior Court regarding this issue is remarkably clear. With no scientific or medical evidence to bolster the plaintiffs' attorneys' claims that trauma can cause illness, judges will not allow such evidence to be admitted. However, both plaintiffs' attorneys and their doctors are becoming more ingenious in avoiding the label of fibromyalgia. Now the diagnosis may be myofascial pain or facet dysfunction or some other non-objective syndrome.

Cases of chronic pain following auto accidents require a lot of diligence, and a lot of work to determine whether the plaintiff's basis for claims of disability are or are not caused by non-anatomically based pain syndromes. The label of fibromyalgia has helped courts recognize that these syndromes cannot be determined by science but are in fact "garbage pail" diagnoses based almost solely on subjective complaints of pain. □

Emily Bloch receives Caroline Duby Glassman Award

Attorney Emily Bloch has just received the 2002 Maine State Bar Association's Caroline Duby Glassman Award. It is presented annually to an attorney for promoting greater understanding among the bench, the bar, and the public on the status of women attorneys, and for outstanding achievement in the advancement of women in the legal profession.

Emily joined Norman Hanson & DeTroy in 1997. She was a member of the Edward T. Gignoux Inn of Court from 1995-96, served as co-chair of the Women's Law Section of the Maine Bar, 1996-98, and has served on the Board of Maine Businesses for Social Responsibility since 2000.

Emily Bloch is the twelfth attorney to receive this award, which honors the achievements of the first woman member of the Maine Supreme Judicial Court, Caroline Duby Glassman. Emily is a graduate of Connecticut College and Cornell University Law School. Her law practice concentrates on medical malpractice defense and general litigation. She lives in Falmouth with her husband and two children. □

EMILY BLOCH

Congress aware of mold threat

A bill calling for the federal government to research and set standards on toxic mold stagnated in the House of Representative committees last session, but the author of the U.S. Toxic Mold Safety and Protection Act is determined the bill will return in the first session of the 2003 Congress.

John Conyers, Jr., D. Michigan, is a fervent advocate for government research into toxic mold's effects on human health. Conyers' strong stance was prompted by seeing his Detroit office manager and her daughters made very ill by it. At the Melina Bill's introduction last summer, 40,000 signers of a support petition had been received and 30 co-signers were on the bill. The Senate has not yet adopted its version of the bill on mold health research. □

Three NH&D Attorneys view the change in Court procedure

Mandatory alternative dispute resolution – the first year in Maine courts

By Mark E. Dunlap

As of January 1, 2002, for nearly all civil cases filed in Superior Court, the procedure of alternative dispute resolution became mandatory, as prescribed by the Maine Supreme Judicial Court in Rule 16B of the Maine Rules of Civil Procedure.

A look at this requirement after a year may offer some insight on how ADR is serving the justice system.

The most often used ADR procedure is mediation, though non-binding arbitration and early neutral evaluation may be chosen.

After an answer to the complaint is filed, the parties choose whomever they wish as a third party neutral, and if they cannot agree, the court will designate a neutral with experience appropriate to the case. The conference date and neutral selection must be made within 60 days of the court's scheduling order, and the mediation conference completed within 120 days.

Who should attend

Certain participants are required to attend. In an insurance case, the defendant is ordinarily excused unless there are unusual issues which, with attendance, would make the case more likely to resolve. Others may include a management officer in a corporate party, a government agency designated representative, an adjuster from an insurer providing potentially applicable coverage, attorneys for all parties, and any essential non-parties, such as a lienholder, without whom the mediation is not likely to settle. However, if the neutral approves, a party or insurance adjuster may attend by telephone. All must have settlement authority to participate meaningfully in the mediation.

The conference's only requirement is to conduct the ADR process that the parties have selected, and that the parties put in "serious effort" in their pursuit of agreement.

If the case is not settled, the neutral will help them agree on identifying, clarifying or limiting the related issues, stipulation and discovery-related questions.

How the mediation conference proceeds

Regardless of the type of case and type of defendant – corporate, governmental, or insurance coverage – the process is similar. At the beginning of the conference, plaintiff or its counsel lays out its best case. The defendant then offers its case as to whether it is a liability defense or a defense on damages. Following this, the parties separate and the mediator shuttles back and forth between them in an effort to bridge the gap on their positions and try to bring about a settlement.

I have participated in approximately 30 mediations to date, and the only issue addressed in all of them has been whether the case will settle, without agreement on discovery-related questions or stipulations.

Is mediation working?

When the Law Court passed Rule 16B of the Maine Rules of Civil Procedure, it did so with the prime purpose being to reduce the number of cases in the court system and resolve them earlier in the process.

Rule 16B imposes deadlines of scheduling the mediation conference within 60 days of the court's scheduling order, and completing the mediation conferences within 120 days of the scheduling order. The mediation, therefore, must be held at or before the discovery period is halfway over. As you can see, cases that settle at mediation are out of the court system within four months and do not languish for the entire discovery period, only to settle sometime before trial, eight months, ten months or even a year into the litigation process.

MARK E. DUNLAP

To the extent any cases are resolved by alternative dispute resolution under this Rule, is it a successful Rule from the court's perspective. The case load in the system has been reduced by whatever number of cases that have settled at mediation, and they have settled earlier in the process.

Let us explore whether reduction of the caseload should be the main purpose of Maine's court system.

What happens if mediation is unsuccessful?

Whether the case settles or not, at the end of the conference the mediator must file a report to the court, signed by

all participants. If the case settles, the paperwork is exchanged, filed with the court, and the matter is concluded. Should it not settle, the case will then continue as it would have previously, to trial or to a later settlement.

However, because the mediation must proceed so early in the process, there is often discovery remaining that may affect the evaluation of the case. Just as before, a case can settle after mediation, in the ordinary course of events such as new discovery information, or a renewed evaluation of the risk of trial, or any of the other myriad reasons why cases settle.

Should the case not settle at mediation, nor through the end of discovery, it will make its way to a trial list, sooner or later, depending on the county in which the case is filed. The trial list contains filing deadlines for all pretrial paperwork, and the court will schedule a pretrial management conference. Previously, the pretrial management conference would be held, the trial date set, and the trial would proceed. That procedure has been changing, however.

The next likely step, prior to the trial management conference, will be the court's review of its trial list. It will then set up a new settlement conference with a Superior Court justice who is not assigned to try the case. Therefore all the participants in the original mediation conference will be forced into a court-run settlement conference (essentially a second mediation with more teeth), wherein the judge will try to convince the parties to settle. Only after withstanding this intense pressure can a case move forward to trial.

Some shortcomings of required mediation

To the extent that a significant minority of cases are settling at mediation, the court's purpose in reducing its workload is being accomplished. The court, in many cases, has thus become an extension of the claims handling process where the primary goal is to "move" cases. The adversarial process in the courtroom as a way of obtaining justice is being subjugated to the idea that settlement is the highest ideal in the judicial system. Jury trials have become increasing unusual, even rare in civil cases, and are destined to decrease as more disputes are cut from the system though the required mediation of Rule 16B. Judges will be able to concentrate more and more on "judicial mediation" as a way of settling controversies that cannot be resolved through the original mediation process. □

BY TED KIRCHNER

The court's goal for early mandatory ADR was to help it efficiently "process" cases by forcing the parties to analyze their disputes, consider the range of ultimate results, and settle them. Requiring an early dialogue between the parties early was considered useful to the desired outcome. The contrary view was that it imposed another – and unnecessary – layer of cost and effort on all of us, and further eroded the civil trial system. Many trial lawyers and claims professionals anticipated that, as a practical matter, it would not be effective in resolving cases, particularly because it came too early in the process.

So what has been the experience over the first year?

My personal experience has been that mediation (which seems to be the ADR preference of most) has been successful in the majority of cases. "Success" meaning that a case actually resolved at mediation, or in negotiations sufficiently soon thereafter to avoid any additional expense. The success rate soars when one party has something other than dollars that it can contribute to resolution.

A recent example was a suit by a very unhappy modular home purchaser, who sued the manufacturer, the seller/dealer/site preparer, and the financing bank. Going into the mediation, the parties were far apart in their positions, there was significant hostility, and it appeared the mediation would serve no purpose other than for the parties to jump through the required hoop to move the case forward. A surprising settlement occurred because the bank was able to creatively rewrite the plaintiff's financing. The bank paid no money in settlement, but likely obtained less of a return on its loan than it initially anticipated. The plaintiff obtained something of value – less debt – and the other two parties contributed less money than otherwise would have been necessary.

A second recent example was a home buyer who sued the seller, the broker, and the Town in which the transaction occurred. The Town was involved because there was a misunderstanding about the location and scope of a Town right-of-way, both of which were important to plaintiff buyer. Plaintiff claimed that the pricey property was of no value due to the misrepresentations. All defendants disagreed, believed they had no liability and did not want to undo the transaction. Settlement prospects looked bleak approaching mediation. Because the Town made an accommodation regarding its use of the right of way, (which cost the Town no money, but was of benefit to the

plaintiff), the other parties were able to settle with plaintiff for less than if the settlement was for cash only.

Other cases that involve non-cash components, for example, employment cases, business disputes, and cases concerning professionals, seem to enjoy a higher rate of success at mediation than personal injury cases, where generally the resolution currency is money only. The higher success rate for non-PI cases than PI cases is ironic given the court's apparent view that PI cases were most in need of the "fix" of early settlement attempts because they constitute a large percentage of the docket.

In the PI cases I have handled, the criticisms of the concept – too early and unnecessary – are more often borne out. Despite claims professionals and counsels' best efforts, it is sometimes simply too early to value a case. Even when the liability picture is clear enough to permit a reasonable evaluation of risk, a plaintiff's medical condition may not have stabilized, there may have been insufficient time to obtain a fair assessment of permanent impairment or obtain a necessary independent medical evaluation. I have seen this problem addressed successfully by the court's willingness to extend the ADR deadline when the request is reasonable. Sometimes a modest extension still doesn't solve the problem, and the system should have an option for parties to elect ADR later than currently required, perhaps with court approval to alleviate any concern that litigants will return to their old bad habits.

Many lawyers believe that mandatory ADR is not necessary, that the civil justice system is for the benefit of the citizenry (even insurance companies) and that we should be able to choose when to attempt ADR or elect not to use it at all, and that the court should not be so heavy-handed about forcing settlements. That battle may be lost, so in the meantime we have to make the system work to our benefit.

Sometimes it is not fair to ask a claims professional to be ready to address a case at the time the system demands it, due to the press of other business or the legitimate need for additional information. Based on the success rate I have experienced, it seems worth the effort to do what it takes to be prepared to make a reasonable attempt at settlement whenever possible. None of us has a long enough track record with this system to produce meaningful statistical data yet. My impression is that the benefit gained by wiping out some significant number of cases early on, justifies the effort to do what it takes to be prepared to evaluate a case sooner than we might like.

Alternative Dispute Resolution does, however, succeed sufficiently often to offset the additional costs and the effort to be ready for it, and likely reduces the total cost of all cases filed with the court. □

BY JAMES D. POLIQUIN

Coverage issues in declaratory judgment actions are not exempt from mandatory ADR. Most DJ actions relate to a pending civil case likely subject to its own ADR requirement. Rarely is a coverage issue amenable to mediation outside the resolution of the related civil case. It then makes sense to coordinate as much as possible the declaratory judgment action addressing coverage with the civil action brought against an insured.

Rule 16B does provide an exemption if the parties certify they have already engaged in formal alternative dispute resolution before a neutral third party. Often a mandatory ADR conference may have been held prior to the conference scheduled for the subsequently begun DJ action. However, the fact that the insurer may have been involved in earlier mediation through its claims representative handling the underlying case may not be sufficient to exempt the insurer from the ADR requirement in the declaratory judgment action.

If a different adjuster handles the coverage issue, or it has been referred to outside counsel, that adjuster or counsel should be looped into the mandatory ADR process in the underlying case. Thus a stronger claim to exempt the ADR requirement on the coverage issue may be made. If the DJ action is filed at nearly the same time as the civil action, an effort should be made to coordinate the two suits so that only one is necessary, and all representatives are present at the first mediation.

Since a plaintiff must take the initiative in scheduling the ADR, the plaintiff in the underlying case often may not bring individuals connected to the coverage issue into the process. In my experience , the failure to communicate with all potentially interested parties has resulted in the need to conduct relatively meaningless additional ADR.

Whenever a case has a coverage issue, its adjuster, and any defense counsel retained to defend the insured should make sure that the adjuster and/or counsel involved in the coverage issues are aware of the scheduled mandatory ADR meeting. If all meet, then this initial ADR may satisfy any ADR requirement in a future declaratory judgment action.

Rule 16B likely needs tinkering to deal more efficiently with DJ actions concerning insurance coverage issues. Until then, many of the problems, costs, and time spent can be reduced by early communication with all potentially interested parties.. □

Briefs/Kudos

DAVE VERY was a co-faculty member leading an all-day seminar in December on recent developments in insurance. Given by the National Business Institute and eligible for Continuing Legal Education credits, the seminar topics included first and third party coverage, environmental, fire, auto, homeowners, bad faith, and the Unfair Claims Practices Act, and punitive damages.

JONATHAN BROGAN has been appointed head of the new Insurance Practice Litigation Group at Norman, Hanson & DeTroy. Jonathan has also been elected to serve on the firm's management committee.

The Cumberland County Bar Association recently named **DAN CUMMINGS** to the governing arm of the Association, the General Committee.

A seminar on Commercial Real Estate Acquisition Financing and Leasing was offered by the Maine Bar Association in Portland last October, and **ROD ROVZAR** served as a member of the faculty.

The firm marked with special enthusiasm two marriages last fall: Attorney **DORIS VAN RIGALSKY**, who practices primarily in our workers' compensation group, was married to Roger Champagne, and is now known as **DORIS V.R. CHAMPAGNE**. The couple is living in Biddeford. Our indefatigable Assistant Administrator of fifteen years, **LORRI PETERLIN**, was married to Shad Hall, and **LORRI HALL** and husband make their home in Gray.

Paralegal **MARGE PERKINS**, who works with Mark Lavoie in medical malpractice matters, will be a seminar leader in Medical Records Management on February 7 in Portland. The day-long program is sponsored by the Institute for Paralegal Education.

On a recent trip to Germany, **ADRIAN KENDALL** visited two clients, the Dept. for Restitution for the state of Rheinland-Pfalz, and the Restitution Office for the State of Baden-Wurttemburg. Pictured from the left, State's Attorney Sabine Reddig, Adrian Kendall, Dept. Director Jurgen Pauly and State's Attorney Hans-Ulrich Moog. Also present was Departmental Assistant Johanna Klein (not pictured).

The Rheinland-Pfalz Department has invited Norman Hanson & DeTroy to serve as its national counsel in the United States. Adrian will continue to serve the Baden-Wurttemberg office in the New England area.

FROM THE LEFT, STATE'S ATTORNEY SABINE REDDIG, ADRIAN KENDALL, DEPT. DIRECTOR JURGEN PAULY AND STATE'S ATTORNEY HANS-ULRICH MOOG.

Some children are lucky enough to learn the importance of giving of themselves early in life. **SPENCER DUNZIK**, son of our staff member **RENEE DUNZIK**, has been recognized as the YMCA youth volunteer of the year. Maine Representative Tom Allen acknowledged Spencer's volunteerism at an awards ceremony in October.

The web site of the Maine Credit Union League was judged the best in the country of all the credit unions by the Credit Union National Association, calling it "user-friendly and an outstanding site." Judges were public relations and communications professionals from non-credit union fields. Features of the site, www.mainecul.org, include locations of all CUs in the state. For members, some sections are password-protected.

NH&D held a seminar for insurance adjusters on January 17, 2003 on Current Legal and Medical Issues in Mold Litigation. Many in-depth issues regarding mold and toxic mold claims were explored, including an address by Dr. David Kern of the Penobscot Bay Medical Center on Medical Causation and Indoor Mold Exposure.

Add another delightful daughter to the **AARON BALTES** household. Aaron and his wife Kathy gave their daughter Ellie a baby sister, Meg Elizabeth, in November.

The Board of Bar Overseers has appointed attorney **JOHN KING** Chair of the Portland panel of the Fee Arbitration Commission. John has previously served for three years as a member of the commission. He will act as chair until December, 2005. □

Workers' compensation – Law Court decisions

By Stephen W. Moriarty

Coordination of benefits

In ***Ricci v. Mercy Hospital***, 2002 ME 173 (December 13, 2002), the employee's average weekly wage was high enough that fringe benefits would have produced a benefit level greater than 2/3 of the state average weekly wage. As a result, the value of fringe benefits was excluded from the wage initially. At some point thereafter the employee began to receive social security old age benefits, and the employer took the 50% to which it was entitled by virtue of §221(3)(A)(1). Following the offset, the employee's weekly entitlement was less than 2/3 of the average weekly wage, and she filed a petition to increase her weekly benefit level.

The presiding hearing officer granted the petition and ruled that because the benefit level had been reduced to less than 2/3 of the state average weekly wage, the employee was entitled to the inclusion of the fringe benefits in the calculation of the wage. The employer appealed, and the Law Court vacated the decision of the Board. While the Court recognized a legislative interest in including fringe benefits in the income of low wage earners, the Court was concerned that including the fringes in these circumstances negated the statutory offset to which the employer was entitled. The Court found no evidence of a legislative intent to permit workers' compensation benefits to be combined with other benefits for which coordination is possible under §221, and ruled that fringe benefits cannot be included in the wage after coordination of benefits produces a level of entitlement below the threshold.

STEPHEN W. MORIARTY

Although *Ricci* dealt with old age social security benefits, the rationale of the decision is fully applicable to other types of benefits for which coordination is possible. This includes payments made pursuant to a wage continuation plan, as well as short-term or long-term disability benefits.

Post-injury fringe benefits

In ***Coulombe v. Anthem Blue Cross/Blue Shield of Maine, Inc.***, 2002 ME 163 (November 1, 2002), the value of employer-paid fringe benefits at the time of the injury was $121.97. The employee secured post-injury work with a different employer and earned less money per week, but received increased fringe benefits from the new employer in the amount of $188.81. The pre-injury employer argued that the full value of the fringe benefits with the new employer should be considered in comparing the differential in pay and in establishing the resulting entitlement to partial incapacity.

Chapter 1, §5(3)(A) of the WCB rules provides that fringe benefits received from a subsequent employer must be included in the calculation of the average weekly wage "to the same extent" that such benefits are included in the pre-injury average weekly wage. The presiding hearing officer interpreted the rule to permit consideration of post-injury fringe benefit to the extent of $121.97, but nothing further. In other words, the hearing officer ruled that post-injury fringe benefits in excess of pre-injury fringe benefits must be disregarded when calculating entitlement to partial.

The Court initially noted that the statute was silent on the appropriate treatment of post-injury fringe benefits, but observed that the Board had properly exercised its rule-making authority in enacting §5(3)(A) of the rules. However, without any further elaboration, the Court held that the hearing officer had correctly interpreted the rule by limiting consideration of post-injury fringe benefits.

As a result, under the language of the current rule, post-injury fringe benefits can be considered only to the extent that they do not exceed the value of pre-injury fringe benefits. In order for the full value of post-injury fringe benefits to be considered, the Board must either modify its rule or the Legislature must amend the statute. □

Workers' compensation and fringe benefits: Ten years after

By Stephen W. Moriarty

In the late 1980s there was considerable ebb and flow within the workers' compensation system on the proper treatment of fringe benefits in calculating the average weekly wage. Different panels of the former Appellate Division split on the issue, and in ***Ashby v. Rust Engineering Company***, 559 A.2d 774 (Me. 1989), the Law Court pushed open the door and held that employer payments to certain union-established benefit funds were part of the average weekly wage. In 1991 the Legislature ultimately intervened and placed Maine squarely among the majority of jurisdictions that do not permit fringe benefits to be included in the wage. Former 39 M.R.S.A. §2(2)(G), which took effect on October 17, 1991, excluded fringe benefits from the average weekly wage and as examples listed such items as "retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan." At that point, therefore, fringe benefits had been clearly and firmly removed from the definition of the average weekly wage.

However, within less than a year the Legislature reversed direction and restored fringe benefits, in part. As we know, current §102(4)(H) provides that the value of employer-paid fringe or other benefits which have been discontinued by the employer must be included in the average weekly wage "to the extent that the inclusion will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury." The reintroduction of fringe benefits was one of the more curious features of the Workers' Compensation Act of 1992. Although the key objective of legislative reform was to achieve savings within the system and streamline the litigation process, the restoration of fringes created greater complexity in claims administration. At the time the Legislature did not set forth a rationale for its change of heart.

In retrospect the Legislature's intent may seem more clear. It has been frequently held that the purpose of calculating the average weekly wage "is to arrive at an estimate of the employee's future earning capacity as fairly as possible." ***Frank v. Manpower Temporary Services***, 687 A.2d 623, 625 (Me. 1996). With the escalation of the cost of health insurance and other benefits in recent years, the package of fringe benefits provided by an employer has become an increasingly important part of the "bargained-for" compensation in the employment relationship. As the Law Court ultimately observed, the legislative decision to include fringe benefits was based on "the practical reality that in some circumstances the money received in an employee's weekly pay envelope will not accurately reflect the employee's actual earning capacity." ***Ciampi v. Hannaford Brothers Co.***, 681 A.2d 4, 8 (Me. 1996). Legislative recognition of fringe benefits is limited, however, and the net effect of §102(4)(H) is to provide a slightly higher benefit level to workers at the lower end of the pay scale.

Significantly, §102(4)(H) applies retroactively to all dates of injury. ***Beaulieu v. Maine Medical Center***, 675 A.2d 110 (Me. 1996). If, however, the average weekly wage has been established for any date of injury preceding January 1, 1993, res judicata should be raised as a defense to any attempt to add fringe benefits. In all other cases, information of the value of fringe benefits on the date of injury must be disclosed, regardless of whether an employee may ultimately qualify for total or partial incapacity. ***O'Neal v. City of Augusta***, 1998 ME 48, 706 A.2d 1042 (Me. 1998).

What are fringe benefits?

The distinction between fringe benefits and regular earnings is clear in most cases. For example, vacation pay is not a fringe benefit but part of the average weekly wage itself, ***Nielsen v. Burnham & Morrill, Inc.***, 600 A.2d 1111 (Me. 1991), as are annual bonuses or bonuses related to productivity or similar employment goals. ***McAdam v. United Parcel Service***, 2001 ME 4, 763 A.2d 1173. Similarly, employee-authorized payroll deductions for purposes such as the purchase of health insurance are not fringe benefits, but are part of regular earnings. ***Fletcher v. Hanington Brothers, Inc.***, 647 A.2d 800 (Me. 1994).

Fringe benefits are defined in Chapter 1, §5(1) of the WCB rules as "anything of value to an employee and dependents paid by the employer, which is not included in the average weekly wage." The Law Court has observed that "fringe benefits consist of something other than direct monetary payments to the employee," and commonly such benefits "take the form of some benefit other than an immediate payment of cash, for example, employer contributions specifically earmarked for the purchase of health, disability, or retirement insurance." McAdam, supra, ¶21, 1179. Where circumstances are not clear-cut, employees will argue that benefits should be included as part of the wage itself, as there is no statutory cap on the average weekly wage. As an example, in ***Clukey v. Piscataquis Sheriff's Department***, 1997 ME 124, 696 A.2d 428 the Law Court held that military meal and housing allowances were a part of regular military pay, based

upon Congressional intent to include such items within the overall compensation package. However, more traditional employer-paid benefits, such as payments to health, pension, and annuity funds, are to be treated as fringe benefits within the meaning of the statute. ***Hincks v. Robert Mitchell Co.***, 1999 ME 172, 740 A.2d 992.

Chapter 1, §5 of the WCB rules contains a non-exclusive list of fringe benefits, which includes the following:

1. Health, dental, disability and life insurance benefits;
2. Pension benefits, including 401(k) matching funds;
3. Employer-provided meals, housing, and utilities or other costs associated with housing;
4. An employer vehicle for personal purposes.

The rule also contains a helpful list of items which shall not be considered "fringe or other benefits" within the meaning of the statute. These items include:

1. Travel and parking reimbursement;
2. Employer-provided uniforms;
3. Contributions to social security plus payment of unemployment and workers' compensation insurance;
4. Charitable contributions or matching gifts;
5. Employer-sponsored social events.

No list can be fully comprehensive, and if a benefit has not been specifically identified in the rule employers will generally argue that it should be treated as a fringe benefit, while employees will argue that it should be considered as part of regular pay.

What are "other benefits"?

Section 102(4)(H) refers to "fringe or other benefits," but neither the statute nor the Board rules define what an "other" benefit may be. At this point, it can only be said that "other benefits" are not precisely fringe benefits, and yet do not qualify for inclusion in regular pay. For example, in McAdam, the employee was a member of a labor union and received a one-time signing bonus after his union had successfully negotiated a collective bargaining agreement. Because the bonus was not related to work performance, the Court concluded that, by exclusion, it must be considered as an "other" benefit within the meaning of §102(4)(H).

The "other" benefit language is essentially a catch-all provision, designed to capture unique employer payments, if only in a limited way. The full scope of the definition will only be determined on a case by case basis.

Post-injury fringes

When individuals return to work after an injury and earn less than previously, benefits for partial incapacity are calculated on the difference between current earnings and the pre-injury average weekly wage. The differential will obviously be exaggerated if fringe benefits are added to the pre-injury wage but excluded from current earnings. The statute is silent on the treatment of post-injury fringes, but after perceiving the obvious problem the Board adopted Chapter 1, §5(3)(A) of the WCB rules requiring the inclusion of post-injury fringe benefits "to the same extent" that they are included in the pre-injury average weekly wage.

In ***Coulombe v. Anthem Blue Cross/Blue Shield of Maine***, 2002 ME 163 (November 1, 2002), the Law Court upheld the Board's exercise of its rule-making authority, but held that the dollar value of post-injury fringes in excess of pre-injury fringes may not be added to the wage. As a result, post-injury fringes may be included in the wage comparison process only to the extent that they are less than or equal to pre-injury fringes.

Coordination issues

Since a worker's level of disability may fluctuate over time, pre-injury fringe benefits may or may not be included, depending on whether the resulting benefit level exceeds 2/3 of the state average weekly wage at the time of the injury. When compensation benefits are coordinated with other benefits under §221, and where the weekly compensation rate is reduced as a result, the possibility for including fringe benefits arises. However, in ***Ricci v. Mercy Hospital***, 2002 ME 173 (December 13, 2002), the Court recently held that if weekly benefits are reduced to reflect the offset for old age social security benefits, and if the resulting benefit level is less than 2/3 of the state average weekly wage, fringe benefits cannot at that point be included in the average weekly wage. The Court examined the conflicting legislative policies behind §102(4)(H) and §221, and concluded that the Legislature did not intend that the statutory offset should be lost by including fringe benefits after coordination. A reduction in the benefit level due to statutory offsets will not permit the inclusion of fringe benefits.

Conclusion

The package of fringe benefits offered by an employer, most notably health insurance, has become an increasingly important component of the overall compensation package. Section 102(4)(H) of the Act reflects a legislative compromise to recognize the value of fringe benefits for those at the lower income level. As compensation packages become more innovative, we can anticipate further disputes in the effort to distinguish fringe benefits from regular pay. □

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dard ISO pollution exclusion suggests that the exclusion should apply to mold. Nevertheless, the trend in other jurisdictions does not support this plain meaning interpretation, and insurers should be careful when relying on the pollution exclusion in mold cases.

Extra-contractual and tort damages

As demonstrated by the *Ballard* case, bad faith and extra-contractual damages represent the biggest danger in mold cases. The Maine courts have not recognized the tort of bad faith, but the medical issues presented in mold cases present an unusual risk of tort liability for carriers. Nevertheless, a careful and prudent response to these claims will avoid these pitfalls.

Although there is a lack of scientific evidence supporting a causal relationship between mold exposure and significant medical illnesses, insurers must still take steps to avoid exposing their insureds to dangerous conditions. Despite the lack of medical evidence, many mold remediation vendors emphasize the medical dangers of mold in selling their services.

In light of the public's perception of the dangers of mold, it is prudent for insurers to warn their first-party insureds of the possible risks if mold is discovered in their home. Although the issue has not yet been considered by the Maine courts, insurers may expose themselves to unnecessary liability when an insurer is aware of the presence of mold, but does not warn an insured of the possibility of danger. If a jury accepts a causal link between a medical condition and mold exposure, an insurer may incur significant extra-contractual liability.

Conclusion

Mold is not the next asbestos and will not destroy the insurance industry. The majority of mold cases attracting media attention have been bad faith cases based upon ineffective claims handling by homeowners' carriers. To avoid these pitfalls, insurers need to understand the unique coverage and liability issues in mold claims and should have a protocol for handling these cases. The course of mold litigation will be determined by future court rulings, and it will be those insurers not prepared for these unique issues who will be the victims of any future, adverse decisions. □

This is Part I of a two-part article on the unique issues presented in mold claims. In our next issue, we will examine third-party mold litigation, and effective responses to those claims.

President signs Terrorism Insurance Bill into Law

A new law, the Terrorism Risk Protection Act, was signed by President Bush in November, 2002, establishing a program in which the federal government would share with the insurance industry the risk of loss from future terrorist attacks.

The law creates an exclusive federal cause of action, under applicable state law, for all suits for property loss, personal injury or death arising out of a terrorist event. It will consolidate claims into a single Federal district court assigned by the Judicial Panel on Multi-District Litigation. While the program will require a financial commitment from insurers, it is expected to provide a critical backstop to help defray the catastrophic costs of future attacks. Insurers will again have the opportunity to offer coverage to their insureds without risking insolvency from a future terrorist attack.

Companies providing commercial property/casualty insurance are required to participate in the program, however, commercial policyholders have the choice of declining the terrorism coverage. □

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