VOLUME I ISSUE I

DecPage

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

A PUBLICATION OF THE INSURANCE LITIGATION GROUP

COVERAGES THIS ISSUE

CASE LAW: MOLD EXCLUSION UPHELD

Eleventh Circuit affirms grant of summary judgment to insurer based on policy's Fungi Exclusion.

Insured's claim alleged direct physical damage as a result of "humidity and moisture."

Arguments seeking to escape mold exclusions because of moisture characterized as nothing more than "sleight of hand."

More on Page 2

INSURANCE ACADEMY: NFPA 921 Q &A WITH DAVID EVINGER

NFPA 921: *Guide for Fire and Explosion Investigations* covers basic fire and explosions science as well as legal considerations, investigation planning, origin and fire cause determination.

Adherence to NFPA 921 increases admissibility of expert testimony in fire loss cases under Rule 702 and the Daubert line of cases.

Review of relevant case law decisions demonstrates the value associated with following the NFPA 921 standard and the perils of failing to do so.

More on Page 3

E-DISCOVERY: IMPLEMENTING CALIFORNIA'S NEW LAW

California Electronic Discovery Act conforms state court ESI practices to Federal law.

With certain limitations, Act allows parties to request discovery of data in a particular format.

Act addresses standards necessary to discover data that is "not reasonably accessible" and creates a limited safe harbor for deleted data.

More on Page 4

OUR RECENT RESULTS

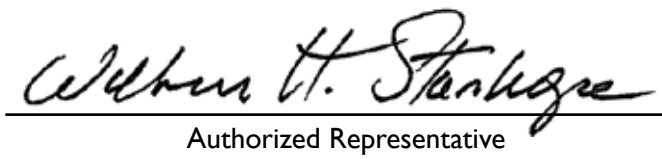
Insured claiming a $40 million business loss inadvertently produces attorney-client privileged document during e-discovery.

Insured's privileged document reveals potential insurance fraud against our client.

Given its massive e-discovery overproduction, insured's request for claw-back denied by district court for failure to demonstrate necessary reasonable precautions.

More on Page 4

Date Fall 2010 By



Authorized Representative

CASE LAW: MOLD EXCLUSION UPHELD

The Eleventh Circuit has affirmed a District Court grant of summary judgment in favor of the insurer in a case seeking coverage for the costs associated with remediating and repairing mold damage in a Southern Florida luxury high-rise condominium complex. The Court of Appeals based its decision on "the well-reasoned and thorough order" of the District Court. *Residences at Ocean Grande Inc. v. Allianz Global Risks U.S. Insurance Co. f.k.a. Allianz Insurance Co.*, No. 09-15145, 2010 U.S. App. LEXIS 10108 (11th Cir. May 18, 2010).

Our client, Allianz Global Risks U.S. Insurance Company, issued builders risk coverage to the property owner. The policy's Fungi Exclusion precluded all costs associated with cleaning, remediating or testing for any fungi, including mold.

While the building was under construction, a project manager discovered "visible fungal growth" on drywall. Multiple technical consultants revealed the presence of mold in 273 of the 278 units.

The property owner made a claim to Allianz for costs to investigate, clean and prevent mold. As presented, the claim alleged "direct physical damage . . . as a result of humidity and moisture" and sought $11 million water damage and mold remediation. Allianz denied the claim, and the insured filed suit.

The property owner first argued that the Fungi Exclusion only applied to mold present at the time the policy issued or that the exclusion was ambiguous as to mold that developed after issuance. The district court disagreed. It found that the Allianz exclusion clearly and unambiguously states that "Fungi shall mean *any form of fungus* . . ." and declined to read any temporal requirement into the exclusion.

Allianz subsequently moved for full summary judgment on the Fungi Exclusion. Allianz argued that the evidence indisputably showed that *all* of the costs associated with the insured's claim directly arose from or related to mold. The insured argued that the mold damage was "caused by" moisture and humidity, a non-excluded cause of loss.

The District Court found this causation argument missed the mark. The Fungi Exclusion applied to costs or expense incurred to test for and clean up the existence, concentration or effects of any fungi – regardless of the cause of the fungi. The court, therefore, did not need to determine what "caused" the mold damage in order to apply the exclusion.

The District Court next found that Allianz correctly denied the claim. The policy Allianz issued excluded costs associated with mold and mold was at the center of the insured's entire claim for damages. The court found no evidence that any of the insured's claimed costs were incurred for anything other than mold.

The District Court rejected the insured's attempt to fix causation for the property's physical damage on "moisture and humidity," observing:

> Under [the insured's] theory of the cause of damage, every time there is damage to a building due to mold, the damage should be considered caused by both mold and moisture. [The insured's] theory of moisture damage invites an infinite regression backwards to antecedent causes; i.e., the Court might as well say that human error caused the damage, because the contractor failed to properly control environmental conditions during construction, which led to excessive moisture, which led to the mold growth, and so on and so forth. Every claim for mold damage would automatically be attributable to both moisture and mold. This is too broad, as parties would be able to circumvent exclusions for mold damage by pointing to the myriad circumstances leading up the growth of mold. At its core, [the insured's] argument is simply a **sleight of hand** – the equivalent of blaming a house fire on the oxygen that allowed the flames to rage. (Emphasis added).

Allianz also argued, and the District Court also ruled, that the insured's claimed damages were excluded by the policy's Faulty Materials Exclusion.

Heidi H. Raschke

Heidi Raschke represents business insurers in complex first party property coverage, liability coverage, and defense of bad faith litigation. She received her J.D. from Emory Law School. Contact Heidi at hhraschke@rkmc.com.

InsuranceAcademy

NFPA 921 Q &A WITH DAVID EVINGER

As long as we can remember, Minneapolis partner David Evinger has served as lead counsel on numerous complex fire, explosion and other catastrophic loss litigations. David has represented insurers, businesses and individuals and tackled cases involving national and international property and energy coverage and loss measurement matters, crime and fidelity coverage, and comprehensive general liability coverage matters. He is also a principal and voting member of the NFPA 921 Technical Committee and knows first-hand the importance of the NFPA 921 in fire and explosion investigations. Contact David at dsevinger@rkmc.com.

Q: What is NFPA 921?

A: NFPA 921: *Guide for Fire & Explosion Investigations* is a set of standards designed to assist individuals who have responsibility for investigating and analyzing fires and explosions and giving opinions on the origin, cause, responsibility or prevention of such incidents.

Q: Why is mastering the intricacies of NFPA 921 important for attorneys and adjusters handling fire and explosion loss cases?

A: NFPA 921 often sets the standard for determining the admissibility of evidence in those kinds of cases. Most courts hold that NFPA 921 represents good science and methodology for conducting a fire or explosion investigation—some even call it "the gold standard." It is filled with detailed information and guidelines on explosions, basic fire science, legal considerations, investigation planning, origin determination and fire cause determination.

Q: Where does an understanding of NFPA 921 most affect a fire loss or explosion claim?

A: Following NFPA 921 really impacts expert testimony. You can help ensure that your expert's conclusions will be admissible under Rule 702 and the *Daubert* line of cases by demonstrating that the investigation methodology followed by an expert adhered to the methodology established in NFPA 921.

Q: Any specific cases where adherence to the standards made a difference?

A: Numerous courts cite NFPA 921 and base their decisions on adherence to it. Look at *Gilmore v. Village Green Management Company,* No. 90387, 2008 Ohio App. LEXIS 3850 (Ohio Ct. App. Sept. 11, 2008). There, a trial court was reversed for excluding the testimony of an expert who applied the methodology of NFPA 921 in determining the cause and origin of a fire. The appellate court found that, because the expert followed NFPA 921, his conclusions and testimony were of a reasonable degree of scientific certainty.

Q: How else can NFPA 921 help in the fire or explosion investigation?

A: NFPA 921 can serve as a source of common understanding to ensure that an investigator or expert is using proper methods, and that the conclusions and opinions reached are reliable and admissible. Keep in mind that an opposing counsel, or perhaps even the court, might use NFPA 921 for such a purpose. Keeping this possibility of later examination in mind, verifying an expert's compliance with NFPA 921 during an investigation can advance the primary goals—finding the truth and having admissible evidence to prove it.

Q: Have you ever seen failure to follow NFPA standards make a difference?

A: You bet. Take *Presley v. Lakewood Engineering,* 553 F.3d 638 (8th Cir. 2009). *Presley* involved a space heater fire in a home. The insurer hired a fire expert to investigate and formulate a theory of causation. Though the expert stated that he relied on NFPA 921, the trial court found that the expert had failed to reliably apply its standards during the investigation and in forming his opinion. Accordingly, the trial court excluded the expert's opinion and the Eighth Circuit affirmed that ruling.

Q: Where should lawyers who work on fire and explosion investigations start exploring NFPA 921?

A: Chapter 11, Legal Considerations and Chapter 27, Management of Complex Investigations.

What Do You Need?

We created the Insurance Academy to meet your professional education needs. We bring our best-of-practice knowledge to you with articles and on-site presentations and seminars. Please contact James Chin at 404.760.3809 to see a list of past presentations or to discuss creating a custom Insurance Academy event for your team.

VOLUME I ISSUE I

DecPage

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

A PUBLICATION OF THE INSURANCE LITIGATION GROUP

THE ELECTRONIC DISCOVERY ACT: CALIFORNIA WEIGHS IN ON E-DISCOVERY

The State of California recently passed the Electronic Discovery Act. The Act brings California state court practice in line with Federal practice concerning electronically stored information ("ESI"). While the California Act does not alter the scope of documents subject to discovery it does establish detailed procedures that all California state court litigants must follow to request, object to, and produce ESI.

Under the Act, format matters. Some "native" ESI formats can be expensive to review or work with, but are more likely to retain full functionality. Conversion formats (such as Adobe PDF) are generally less costly to manage, but may not fully reflect the document as stored by the producing party. The Act allows a requesting party to specify a particular format. A responding party may object to production in the requested format. If so, the responding party must specify the format in which it will produce. If a demand for production of ESI does not specify a format, the responding party has a choice—it may produce either in the form in which it is ordinarily maintained or in a form that is "reasonably usable."

Some ESI can be difficult to access, such as backup tapes on reels. If a request seeks ESI that is "not reasonably accessible" due to "undue burden or expense" the Act allows the producing party to object on that ground but it must then prove facts supporting the objection. The Act allows a court to order production even if there is significant burden or expense, but only if the requesting party can show why it must have discovery of that specific information from that specific source.

The Act also provides a limited "safe harbor" for deleted ESI. Under the Act, sanctions should not be imposed for failure to produce ESI deleted due to routine, good faith operation of an electronic information system. This provision, however, must be read together with regulatory requirements, company procedures, and any case-specific litigation hold or other document preservations obligations.

Jonathan D. Mutch

Jonathan Mutch has more than a decade of experience representing clients in large loss insurance cases. He attended Boston University School of Law. Contact Jon at jdmutch@rkmc.com.

OUR RECENT RESULTS

Our clients Industrial Risk Insurers, Westport Insurance Company, and Swiss Reinsurance America Corporation recently prevailed in an important e-discovery dispute in the Southern District of West Virginia against insured Felman Production, Inc.

Felman claimed it suffered nearly $40 million in "lost sales" business interruption losses after the breakdown of a production furnace. During e-discovery, Felman inadvertently produced an attorney-client privileged document. The document revealed Felman's attempt to commit insurance fraud by fabricating evidence to support its business loss claim. The district court denied Felman's motion to "claw-back" the document. The court found Felman's e-discovery produced a "ridiculously high" number of irrelevant materials and a large volume of privileged communications. As a result, the court concluded that Felman had failed to undertake sufficient "reasonable precautions" necessary to achieve a claw-back. The court also granted our clients leave to file a counterclaim against Felman for fraud and breach of the insurance policy.

William H. Stanhope

William Stanhope is Chair of the firm's Insurance Department and a member of the firm's Executive Board. He has over 30 years of trial and appellate experience in business interruption issues, property insurance coverage and subrogation, fire litigation, and inspection defense; commercial litigation experience with the Unfair Trade Practice Act, copyright infringement and franchise termination cases; and reinsurance experience. Contact Bill at whstanhope@rkmc.com.

ATLANTA	LOS ANGELES	BOSTON	MINNEAPOLIS	NAPLES	NEW YORK
950 E Paces Ferry Rd NE 2600 One Atlanta Plaza Atlanta, GA 30326 404.760.4300 Contact: James Chin JVChin@rkmc.com	2049 Century Park East Suite 3400 Los Angeles, CA 90067 310.552.0130 Contact: William Webster WAWebster@rkmc.com	800 Boylston Street 25th Floor, Prudential Tower Boston, MA 02199 617.267.2300 Contact: William Erickson WNErickson@rkmc.com	800 LaSalle Avenue 2800 LaSalle Plaza Minneapolis, MN 55402 612.349.8500 Contact: Scott Johnson SGJohnson@rkmc.com	711 5th Avenue South Suite 201 Naples, FL 34102 239.430.7070	499 Park Avenue 12th Floor New York, NY 10022 212.980.7400