



Insuring Legionella Risks

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In 1976, the first identified outbreak of Legionnaires' disease sickened over 220 and killed 34 American Legionnaires attending a convention in Philadelphia. Caused by *Legionella pneumophila* bacteria, the disease is a severe form of pneumonia that results in cough, high fever, nausea, vomiting, diarrhea and shortness of breath. It has an average mortality rate of 10% and even those who survive can sustain serious permanent injury from prolonged sepsis and organ failure. A less severe form of *legionella* infection called Pontiac fever does not result in pneumonia and usually resolves without medical intervention. Collectively, both Legionnaires' disease and Pontiac fever are called Legionellosis.

Legionnaires' disease continues to make headlines today. Between June and August of 2018, the disease sickened 18 hotel guests and caused one death at a popular beach resort in Hampton, New Hampshire. In July, an outbreak in an apartment complex in New York City left 25 tenants hospitalized and one dead. Two months later, another 15 cases including a fatality were diagnosed in Sioux Falls, South Dakota. On Nov. 28 yet another outbreak was confirmed at a hospital in Madison, Wisconsin, sickening 11 and killing one person. These are but a snapshot of the cases reported



each month to local health departments around the United States.

Legionella bacteria is common in all forms of water. In most circumstances, it exists at such low concentrations that it will not cause disease. However, certain conditions allow bacteria to amplify rapidly, such as stagnation and water temperatures in the range of 90° to 115°F. But even at high concentrations, *legio-*

nella does not threaten human health until it is aerosolized within a mist of water droplets fine enough to be inhaled into the lungs, where it gains an infectious foothold. Recognized sources of aerosolization include cooling towers, showerheads, faucets, fountains, swimming pools, hot tubs, humidifiers, misters and medical respiratory devices. Hotels, condominiums, restaurants, grocery

stores, hospitals, senior living facilities, health spas, fitness centers and any large building with a centralized potable water system are potential sites for amplification of *legionella*. In fact, a review of Legionnaires' disease outbreaks between 2000 and 2014 revealed that 34% were associated with hospitals or long-term care facilities.

The number of Legionnaires' cases reported to the CDC has been on the rise in recent years. In 2009, for example, doctors reported 3,500 cases. By 2016, that number jumped to 6,100. The CDC also reports that between 8,000 and 18,000 people are hospitalized each year. These rising numbers have caught the attention of public health officials and private industry associations, notably with the 2015 publication of the American Society of Heating, Refrigerating & Air Conditioning Engineers' (ASHRAE) Standard 188, which establishes minimum Legionellosis risk management requirements for building water systems. In June of 2017, the CDC also released a toolkit for "Developing a Water Management Program to Reduce *Legionella* Growth and Spread in Buildings," stating that "*legionella* water management programs are now an industry standard for large buildings in the United States."

Given the incidence of Legionellosis and its associated harm, personal injury claims and litigation are also becoming more frequent. Property owners and facility managers often first become aware of a potential *legionella* outbreak when they are notified by the health department. They are then required to issue a public health notice to potentially affected individuals. Not surprisingly, this type of notice often inspires third-party claims. With the growing number of standards and regulations, plaintiffs'

attorneys may find it easier to establish a "standard of care" in the prevention of *legionella* amplification. Reported settlements and jury awards range from \$255,000 to \$5.2 million. In addition, public health notices and negative media attention can also lead to business interruption and reputation damage.

Insurers have responded to the risks arising from *legionella* amplification by adapting existing coverages and providing new products. Insurance purchasers in the health care, long-term care, multi-family real estate, and hospitality businesses, in particular, must consider those risks when insuring their businesses. The courts remain divided, however, on many issues surrounding insurability of *legionella* contamination and related liability exposure. A traditional commercial general liability (CGL) policy may not respond to claims by third parties who allege that they developed Legionnaires' disease or to claims by those who fear that they were exposed to *legionella* because courts have treated exclusionary language differently. The standard pollution exclusion precludes coverage for "bodily injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants." Many courts disagree on whether *legionella* bacteria would be considered a "pollutant."

Further, many CGL policies contain exclusions for mold, fungus and bacteria that preclude coverage for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any fungi or bacteria on or within a building or structure. If the *legionella* exposure occurs in a pool or hot tub, it may not be determined to be "on or within the building structure." There is an exception to this

exclusion for cases where the fungi or bacteria are contained in a good or product intended for "bodily consumption," however. This has led to court decisions applying the exclusion to cooling towers and decorative fountains but allowing coverage in cases involving potable water and hot tubs. The CGL policy's definition of "bodily injury" may not include medical monitoring by potentially affected individuals who seek testing for exposure in response to a public health notice. Coverage for third-party claims under a CGL policy therefore remains uncertain. With respect to a party's own loss related to testing and remediation of *legionella* contamination and related business interruption, a traditional commercial property policy would not likely respond to claims for remediation of *legionella* contamination on the insured's property.

The pollution legal liability market has developed coverage that is specifically intended to provide coverage for claims for remediation of a *legionella* condition on the insured's property, claims for bodily injury to exposed or potentially exposed individuals, and business interruption that may arise from either event. The severity of third-party claims ranges from claims for medical monitoring or fear of exposure to those for severe injury and wrongful death. Insurers will consider the likelihood of those claims when selecting and pricing its risks.

Insurers may also consider whether the prospective policyholder has adopted the relevant practices set forth in ASHRAE 188. Mitigating factors include the existence of a water management plan to determine the insured's risk of developing *legionella* contamination, as well as a contingency response plan to evaluate the applicant's ability to respond in the event of a *legionella* incident or

outbreak. Overall loss history is relevant to potential exposure, as is the overall quality of the applicant's risk management program. A policyholder should be able to demonstrate a maintenance program that quantitatively monitors the building's water systems.

While insurance carriers and property owners have become increasingly aware of Legionnaire's disease outbreaks due to new reporting requirements, little data exists to determine accurately if this

increased scrutiny—coupled with implementation of the latest guidelines and regulations—is making a meaningful difference in the number of reported cases. In fact, recent data may suggest that it is not. With eight weeks remaining in 2018, provisional data tallied by the CDC through November 3 showed 7,104 reported cases, strongly suggesting that, despite all of the recent attempts to reduce the incidence of Legionnaires' disease, 2018 will exceed the previous

record for reported cases set in 2017. Accordingly, insurers will likely be carefully monitoring the effectiveness of the measures considered in their underwriting, meaning that policyholders will need to be equally diligent in their prevention efforts. ■

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