



STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

The Office of General Counsel issued the following opinion on April 1, 2003, representing the position of the New York State Insurance Department.

Re: Enforceability of mold exclusions in New York policies

Questions Presented:

1. May a mold exclusion be included in a property/casualty insurance policy written in New York, regardless of where the property or risk is located?
2. May a mold exclusion be included in a property/casualty insurance policy issued to a New York policyholder, regardless of where the policy is issued or delivered?
3. Is a mold exclusion unenforceable with respect to any risk located in New York, regardless of where the policy was issued or delivered, or where the policyholder is domiciled?

Conclusion:

Nothing in the Insurance Law or regulations thereunder specifically prohibit a mold exclusion in an insurance policy. However, in a policy issued by an authorized insurer written on risks or operations in this State, an exclusion that is misleading or violative of public policy is not permissible. The Superintendent has not approved any mold-related exclusions.

Facts:

This was a general inquiry and no specific facts were provided. The inquiry does not indicate whether it pertained to property or liability exposures, but the Department will address both. The inquirer also did not indicate whether the question pertained only to authorized insurers or also to excess line insurers, so the Department will address both also.

Analysis:

There is nothing in the Insurance Law or regulations promulgated thereunder that specifically restricts or otherwise addresses mold exclusions in either a property or liability insurance policy, whether issued by an authorized insurer or on an excess line basis. However, there are certain statutorily mandated coverages, such as certain types of motor vehicle insurance (including statutory automobile liability, no-fault insurance and uninsured motorist coverage) and workers' compensation insurance, where a mold exclusion is not permitted because such an exclusion is not specifically authorized.

Authorized insurers

Authorized property/casualty insurers are subject to Article 23 of the Insurance Law, in regard to "all kinds of insurance written on risks or operations in this state," subject to certain exceptions contained in N.Y. Ins. Law § 2302(a) (McKinney 2000), which are not relevant to this inquiry. Article 23, therefore, applies regardless of where the authorized insurer issues or delivers the policy, but only in regard to a policy insuring a New York risk or operation.

Subject to certain exceptions (such as for special risk insurance policies issued pursuant to Article 63 of the Insurance Law), all policy forms must be filed with, and approved by, the Superintendent, before they may be used. However, whether or not the policy form must be filed, the insurer is subject to the compliance and standards requirements of Article 23 and the Insurance Law, and regulations promulgated thereunder, including the requirement in N.Y. Ins. Law § 2307(b) (McKinney 2000) that a policy may not be misleading or violative of public policy.

While the Insurance Department has received over one hundred filings restricting mold coverage, the Department has not approved any of them. As the Superintendent stated on May 3, 2002, in testimony before the Joint Senate Committees on Health and Environmental Conservation Regarding the Issue of Toxic Mold, in light of the scientific uncertainty concerning mold-related damages, the Department has not yet formulated a policy position but will proceed in such a manner as to ensure that New Yorkers continue to have access to affordable and meaningful insurance coverage. In the meantime, the Superintendent has stated that the Department will not approve any limitations or exclusions for mold-related coverages until it receives information sufficient to warrant such exclusions or limitations.

Unauthorized insurers

While New York authorized insurers are generally required to obtain the Superintendent's approval to use their insurance policy forms in this state (special risk insurance being a notable exception), insurance policy forms for policies issued by unauthorized insurers through a New York licensed excess line broker, in accordance with the provisions of N.Y. Ins. Law § 2105 (McKinney 2000 & Supp. 2003), N.Y. Ins. Law § 2118 (McKinney 2000 & Supp. 2003) and N.Y.

Comp. Codes R. & Regs. tit. 11, Part 27 (1999) (Regulation 41), are not approved by the Superintendent of Insurance and are not subject to the standards or requirements of Article 23.

This does not mean that excess line policies may provide any kinds of terms and conditions that the insurer wants since a particular statute or regulation may be applicable to such policies. For example, N.Y. Comp. Codes R. & Regs. tit. 11, § 27.11(a) (1999) of Regulation 41 provides:

(a) No excess line broker shall procure coverage from an unauthorized insurer if such coverage is prohibited by law, including if such coverage:

(1) does not constitute insurance within the meaning of section 1101 or other sections of the Insurance Law;

(2) involves a kind of insurance not authorized under section 1113 or other sections of the Insurance Law;

(3) is not within the scope of section 2105 of the Insurance Law;

(4) is determined by any Appellate Division of the New York State Supreme Court or the New York State Court of Appeals to be against public policy in this State; or

(5) has been otherwise proscribed by law.

In regard to mold, there is nothing in the Insurance Law that specifically restricts or otherwise limits the exclusions that may be contained in an excess line insurance policy or that would otherwise require an excess line insurer to provide coverage for damage or loss resulting from mold. Hence, absent an amendment to the law or regulations, a mold exclusion would be permissible in an excess line policy.

Enforceability of exclusion

In all respects in which a provision of an insurance policy violates the requirements or prohibitions of the Insurance Law, the policy is enforceable as if it conformed to such requirements or prohibitions. N.Y. Ins. Law § 3103 (McKinney 2000); *Bersani v. General Accident Fire & Life Assurance Corp.*, 36 N.Y.2d 457, N.Y.S.2d 108 (1975). Accordingly, an authorized insurer that used an unapproved policy form for a New York risk or operation containing a mold exclusion (where prior approval was required) may not enforce the exclusion against the insured.

This Department offers no opinion as to whether a court would conclude that a mold exclusion is unenforceable on public policy or other grounds in the absence of a statute or regulation governing such an exclusion.

This opinion should not be construed to limit the Superintendent's authority to determine that a mold exclusion would be misleading or against public policy or otherwise be prohibited.

For further information one may contact Principal Attorney Paul Zuckerman at the New York City Office.

¹ In a July 23, 2002 letter, which is available on the Department's website, the Department fully addressed mold exclusions in special risk insurance policies.