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Legionnaires disease and real estate premises liability

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The recent outbreak of legionnaires disease in New York City has heightened awareness of this water borne bacterium. The disease was named after a large outbreak over 30 years ago in Philadelphia at a legionnaires convention. The illness causes severe pneumonia like illness and in some cases death. In New York this summer an outbreak caused over 100 confirmed cases and 10 fatalities. The Center for Disease Control and Prevention (CDC) estimates that between 8,000 and 18,000 are hospitalized each year with legionnaires disease and the number of cases has tripled in the last five years with medical costs exceeding \$300 million annually.

The bacteria typically emanates from waterborne sources and has proven to be resistant to normal chlorine levels. Physical contact or ingestion of the bacteria does not necessarily put person at risk of infection. However, inhalation of the bacteria through water droplets, mist or spray can cause widespread infection. The bacterium thrives in stagnant warm water that can amplify the levels sufficient to create a health risk. Cooling towers, building humidifiers, hot water tanks, pools and spas are known sources which promote conditions of expanded risk. Certain groups are more susceptible to contracting the illness. The elderly, smokers, those with lung disease, diabetes or poor immune systems are most vulnerable.

Owners and managers of real estate must use utmost caution to test stagnant water sources for the bacteria to avoid widespread infections. Real estate professionals responsible for the design, construction, repair or maintenance of building systems associated with an outbreak have potential legal liability. The legal liability exposure to these operators and contractors can be substantial. The extent of personal injury or death makes the potential damages significant. Settlements and jury awards of up to \$5 million have been reported. In addition to personal injury awards, substantial business interruption exposures exist.

Owners and managers must review and consult with their insurance professionals to protect against the possibility of uninsured loss due to legionnaires disease. There are two common exclusions in a general liability policy that could void coverage if invoked by the carrier. The standard ISO exclusions are the Total Pollution Exclusion and the Bacteria or Fungi Exclusion. Fortunately for owners and managers the courts have thus far been reluctant to enforce these exclusions. In *Westport Insurance Corp v. VN Hotel Group* and *Nationwide Mutual Fire Insurance Co v. Dillard House Inc.* the courts upheld the coverage afforded under the policies. In addition, proactive risk managers, owners and property managers can purchase Environmental Insurance products that will respond to claims from exposure to legionnaires disease. Coverage can include protection against bodily injury claims as well as coverage for investigation, cleanup and restoration costs. In the event of a claim alleging injury due to contracting legionnaires disease the claimant must prove the following:

* Proven exposure to the bacteria;

- * Exposure proven to emanate from the insured premises;
- * Exposure due to negligence of the insured; and
- * Injury attributable to exposure.

Local, state and federal authorities are beginning to mandate the registration, inspection and maintenance of cooling towers in urban settings. Rules governing the maintenance and prevention of future outbreaks are in the legislative process. Owners and managers must take extra care to understand and apply a higher standard such as those being established by the American Society of Heating Refrigeration and Air Conditioning Engineers (ASHRAE), the industry leader in legionnaires control and prevention (Prevention of Legionellosis Associated With Building Water Systems, <http://spc188.ashraepcs.org/>).

Real estate owners and managers can certainly procure insurance coverage to protect against the financial impact of a legionnaires outbreak at their premises. However we strongly recommend the following loss prevention checklist to avoid exposure as the number of circumstances that could give rise to an outbreak rise.

- * Consult with your insurance professional to make sure the coverage and policy language address this exposure.
- * Obtain regular water samples of cooling towers and other sources where the bacteria can grow.
- * Seek third party indemnification from subcontractors who are involved with the maintenance and repair of heating, cooling, spas or pools at your facilities.

The current outbreak of legionnaires in New York should serve as a warning to real estate owners and managers to take steps toward prevention of the spread of the bacteria, as well as adding a pollution legal liability policy to make sure there are no gaps in insurance coverage.

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