



LEGIONNAIRES' DISEASE AND PREMISES LIABILITY

Claims Investigation and Defense Strategies for an Emerging Trend

By Thomas P. Bernier and Susan E. Smith


What is Legionnaires' disease? Legionnaires' disease, or legionellosis, is a serious, potentially lethal type of pneumonia that is caused by bacteria of the genus *Legionella*. The Centers for Disease Control and Prevention (CDC) estimates that 8,000 to 18,000

persons are hospitalized each year with the disease. There were 3,522 reported cases in 2009, the most since 1976 when the CDC first required case reporting. The incidence of reported Legionnaires' disease cases in the United States tripled between 2000 and 2009, with medical costs estimated at \$321 million per year.

As investigation and reporting have

become more sophisticated, public awareness of this disease is growing, and legal action by those alleging to have contracted the disease is definitely on the rise. Claims are typically made by individuals who develop flu-like symptoms or pneumonia after staying at an apartment building, hotel, or hospital.

Legionellae are waterborne bacteria



that are found in many different water sources. They have proven to be more tolerant of normal chlorine levels than other bacteria and are often present in municipal water supplies and potable water distribution systems. Interestingly, physical contact with or even consumption of water that contains these bacteria does not put a person at risk of infection. Rather, the affected water must become aerosolized into fine droplets, mist, or spray. Only then is a person who inhales sufficient amounts of aerosolized water containing virulent forms of legionellae at risk of infection. Certain individuals, such as the elderly, smokers, and those with lung or kidney disease, diabetes, cancer, or compromised immune systems, are more vulnerable to infection and are at a high risk of contracting the disease after exposure. Legionellosis is not a contagious disease and cannot be passed from one infected host to another.

Where Are Legionellae Bacteria Found?

The levels of legionellae typically found in water, including chlorinated municipal water, are generally not sufficient to make even susceptible persons ill. However, certain conditions, including stagnation and water temperatures in the range of 68 F to 126 F, allow the background levels of the bacteria in water to rapidly amplify to levels sufficient to constitute a health risk. The presence of sediment or other foreign material in water also promotes the development of biofilm, a primary legionellae food source, thus enhancing the risk of colonization. When amplification occurs within a building water system, the bacteria can be distributed throughout the system and aerosolized at distribution points such as faucets, showerheads, decorative fountains, swimming pools, whirlpool spas, humidifiers, misting

equipment, evaporative condensers, and medical respiratory devices.

Legionnaires' disease is commonly associated with cooling towers because the first outbreak in 1976 was traced to a cooling tower in the air-conditioning system at the Bellevue-Stratford Hotel in Philadelphia during an American Legion convention celebrating the Bicentennial. This colonization caused 221 cases of pneumonia and the death of 34 Legionnaires, thereby giving this infection its name. Subsequent outbreaks have been traced to building water systems, hot water heaters, indoor spas and pools, humidifiers, and ventilation and cooling systems. Decorative water fountains, including wall-type fountains, were implicated in two recent outbreaks, even though regular cleaning, flushing, and disinfection protocols were in place.

The owners and managers of premises where outbreaks occur, because of



HANDLING LEGIONELLOSIS

Implementing the following checklist will focus the approach when dealing with legionellosis cases:

- Investigate the potential number of claims.
- Consult the policy for possible exclusions.
- Research jurisdictional rulings on policy exclusions.
- Obtain all CDC/Health Department investigative reports, including all available water sample test results.
- Obtain all medical records (including pre-exposure records), confirming the symptoms, date of onset, and diagnosis.
- Compare the strain of bacteria in the building with diagnostic cultures.
- Investigate other potential exposure sources.
- Understand and apply the latency period of legionellosis.
- Confirm the insured's role with respect to the building water system or other suspected sources.
- Identify other potential parties for possible contribution.
- Determine whether there is a state or local statute that creates a duty of care.
- Consult experienced counsel to oversee pre-suit investigation, engage necessary experts, and develop factual and legal defenses.

their association with the structure, are frequently the targets of legal action by those alleging to have contracted the disease. Persons or entities responsible for the development, design, engineering, construction, manufacture, installation, maintenance, and repair of building systems identified as the source of an outbreak also have potential legal liability. Those involved with

the ownership, operation, management, and maintenance of hotels, hospitals, senior housing facilities, and condominiums increasingly have faced legal action associated with Legionnaires' disease outbreaks.

What Is the Legal Exposure?

The legal exposure associated with Legionnaires' disease can be substan-

tial. The CDC has reported death rates between 20 and 40 percent. A single outbreak can affect dozens or even hundreds of people. Many of those infected who do survive still spend weeks, if not months, in the hospital and are often left with severe permanent impairment and six-figure medical bills. In addition to the contraction of pneumonia, claimants often allege a wide variety of injuries and ailments, including coma, stroke, sepsis, hypotension, lactic acidosis, acute renal failure, heart failure, brain damage, and neurological dysfunction such as tremors or paralysis, dysphagia, and dysphonia. The serious personal injury or death caused by this disease makes proof of extensive compensatory damages simple. Reported settlements and jury awards range from \$255,000 to \$5.2 million. Reports of settlements are rare as most agreements include stipulations that payout amounts remain confidential.

In addition to potential exposure to a multimillion-dollar legal action, the investigation and remediation of a Legionnaires' disease outbreak often results in temporary closure of the affected building, leading to substantial first-party business interruption losses along with irreparable negative publicity. An outbreak at the EPIC hotel in Miami, Fla., in 2009 reportedly resulted in revenue losses of \$200,000 per day. In 2006, a jury returned a \$193 million verdict in a subrogation action against a manufacturer of equipment used for indoor spas aboard a cruise ship implicated in several Legionnaires' disease cases. The largest component of this damage award, by far, was for the cruise line's business interruption and lost bookings as a result of the ship being taken out of service.

Are There Applicable Policy Exclusions?

When faced with a loss arising out of a Legionnaires' disease case or outbreak, the claims professional's instinctive first line of defense is the policy exclusions. Two standard ISO exclusions that may be invoked are the total pollution exclusion and the bacteria or fungi exclusion.

Unfortunately, the scant appellate review of this issue indicates that courts appear reluctant to enforce either

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exclusion—e.g., *Westport Insurance Corp. v. VN Hotel Group* and *Nationwide Mutual Fire Insurance Co. v. Dillard House Inc.* Any claims professional operating within a jurisdiction in which courts have not ruled squarely on whether these exclusions apply to water contaminated with legionellae must proceed under a carefully crafted reservation of rights to preserve the issue.

What Should an Investigation Entail?

Investigation of a Legionnaires' disease claim must begin immediately, especially if there is no formal investigation conducted by the local health department or CDC. This will require engaging the appropriate experts in *Legionella* risk prevention and, if necessary, remediation. This process can be expedited and damages mitigated if defense counsel with experience in Legionnaires' disease litigation is consulted early, before a lawsuit is filed.

It is equally important not to overreact upon receipt of a potentially serious legionellosis claim, even when the bacteria are found within the insured's building. In many cases, the diagnosis may not have been confirmed. There are no physical findings that substantiate the diagnosis and the differential diagnosis is broad, so clinical confirmation using specific laboratory testing and other criteria is necessary. Even when there is medical confirmation, lab work often is not detailed enough to establish a link between the bacteria found in the claimant to the specific serogroup of bacteria—microorganisms distinguished by a common set of antigens—found in the suspect premises. (There are over 40 legionellae serogroups.)

Further, the presence of the bacteria in the water supply of a building that is suspected to be an exposure source does not always mean that the claimant was exposed. The proper interpretation of water sampling test results requires careful analysis by a qualified professional. A confirmed exposure does not prove that the claimant contracted an infection associated with the bacteria. The infection rate among persons exposed to the bacteria is estimated to be as low as 5 percent in healthy nonsmokers. Under-

standing the alleged exposure timeline is also crucial. The latency period for developing first symptoms of legionellosis following exposure is two to 14 days, with the average latency being 10 days. If a claimant's symptoms did not manifest within the appropriate latency, they are not related to an exposure.

What Are the Elements of Proof?

These are not strict liability claims. There are four elements that any Legionnaires' disease claimant must prove: (1) exposure to the bacteria; (2) at the insured's premises; (3) due to the negligence of the insured; (4) resulting in a disease caused by the exposure. Even in a case where the disease is medically diagnosed, the bacteria are found, and the latency for onset of the illness is appropriate, it does not mean that the insured was negligent. A viable claim for negligence always requires proof that the insured breached the requisite standard of care. Thus far, courts have rejected application of *res ipsa loquitur*, ruling instead that putative plaintiffs must establish a specific standard of care for the targeted insured. This standard will vary depending on the relationship of the insured to the subject property. Owners and operators of hotels may have different duties than owners and operators of office buildings or apartment complexes. The duty owed by

an architect will differ from that owed by a general contractor, plumbing engineer, or plumbing contractor. These specific duties must be established by qualified expert witness testimony.

Currently, there are no federal, state, or local statutes, codes, or regulations that establish a duty of care specific to the control of legionellae for any structure or industry outside of health-care. Government agencies such as the CDC, U.S. Environmental Protection Agency (EPA), United States Occupational Health and Safety Administration (OSHA), the Department of Veteran Affairs and numerous industry groups such as The Association of Water Technologies (AWT) and American Society of Plumbing Engineers (ASPE), and the Joint Commission on Accreditation of Health Care Organizations (JCAHCO) have published guidelines, position statements, and articles relating to legionellae control and prevention. However, these publications are advisory in nature. They do not specifically impose requirements on building owners, property managers, or facility maintenance professionals.

This uncertainty regarding the applicable standard of care relating to the operation and maintenance of building water systems may change soon because the American Society of Heating, Refrigeration and Air Conditioning Engineers

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It will be crucial that underwriters, risk managers, and claims professionals understand the ramifications that 188P will have on Legionnaires' disease litigation.

(ASHRAE), considered by many to be an industry leader in legionellosis control and prevention, is expected to adopt a new standard—Standard 188P, *Prevention of Legionellosis Associated With Building Water Systems*—sometime in 2013. It is predicted that some states may actually codify this new standard into law.

Standard 188P attempts to establish clear guidelines as to what constitutes proper maintenance of a building's water system to control legionellae. ASHRAE is touting 188P as the first U.S. risk management standard that sets forth specific requirements for the control of legionellae in all building water systems. It can be ex-

pected that plaintiff's counsel will quickly seize upon the opportunity to argue that lack of or improper compliance with 188P is evidence of negligence, thereby exposing owners, managers, and maintenance contractors associated with a building identified as an exposure source to significant legal liability. Upon its adoption, it will be crucial that underwriters, risk managers, and claims professionals understand the ramifications that 188P will have on Legionnaires' disease litigation.

What Does the Future Hold?

Unfortunately, experts predict that the number of legionellosis cases will con-

tinue to rise. Recent national flooding disasters, a deteriorating urban water main infrastructure, and the push for energy efficient, low temperature "green" technology perpetuate conditions conducive to legionellae colonization. The development of faster and less-expensive diagnostic testing for the disease will further increase case identification and reporting by treating medical professionals. Insurance underwriters and risk managers who understand the science, medicine, and legal issues associated with this emerging trend will be in a stronger position to mitigate the risk of such events and the associated legal exposure. Further, well prepared claims professionals will be in a stronger position to react quickly and effectively when these claims present. **CM**

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