

ONE LAWYERS THOUGHTS ON MOLD LITIGATION

By: Steven B. Loeb

Introduction

So what's the big deal about mold? Money; lots and lots of money. From the perspective of this construction lawyer, the mold has become a huge industry making attorneys and mold "experts" rich. While mold litigation claims have not yet equaled the \$21.6 billion paid to date by the insurance industry for asbestos claims, it is clear that the multi-million dollar jury verdicts around the country are attracting the attention. Mold is a problem of "biblical" proportions. In fact, the Bible provides the first specifications for its detection and removal. Leviticus 14:33 - 14:48:

14:33: Yahweh spoke to Moses and to Aaron, saying,

14:34 "When you have come into the land of Canaan, which I give to you for a possession, and I put a spreading mildew in a house in the land of your possession,

14:35 then he who owns the house shall come and tell the priest, saying, 'There seems to me to be some sort of plague in the house.'

14:36 The priest shall command that they empty the house, before the priest goes in to examine the plague, that all that is in the house not be made unclean: and afterward the priest shall go in to inspect the house.

14:37 He shall examine the plague; and, behold, if the plague is in the walls of the house with hollow streaks, greenish or reddish, and it appears to be deeper than the wall;

14:38 then the priest shall go out of the house to the door of the house, and shut up the house seven days.

14:40 then the priest shall command that they take out the stones in which is the plague, and cast them into an unclean place outside of the city:

14:41 and he shall cause the inside of the house to be scraped round about, and they shall pour out the mortar, that they scraped off, outside of the city into an unclean place.

14:42 They shall take other stones, and put them in the place of those stones; and he shall take other mortar, and shall plaster the house.

14:44 then the priest shall come in and look; and, behold, if the plague has spread in the house, it is a destructive mildew in the house. It is unclean.

14:45 He shall break down the house, its stones, and its timber, and all the house's mortar. He shall carry them out of the city into an unclean place.

14:46 "Moreover he who goes into the house while it is shut up shall be unclean until the evening.

14:48 "If the priest shall come in, and examine it, and, behold, the plague hasn't spread in the house, after the house was plastered, then the priest shall pronounce the house clean, because the plague is healed.

MOLD LITIGATION

The sheer magnitude of the mold-marketing industry and the quantity of litigation regarding mold, coupled with the fact that mold is one of the most prevalent life forms on Earth, should be enough to convince everyone that mold issues are worthy of risk management.. But what is the problem?

From one lawyer's perspective, mold litigation falls into two general categories: 1) design/construction defects; and 2) personal injury. **1**



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The latter is typically a consequence of the former and thus, risk management must focus on the design and construction issues which cause mold to grow in our built environment.

To grow mold, just add water. The water comes generally from leaks in the building envelope, or because the heating ventilating and air conditioning system (HVAC) does not adequately control interior moisture. We humans generate a great deal of moisture through perspiration, bathing and cooking. One can generally determine a problem with the HVAC system if a glass of ice water sweats. This simply indicates that enough humidity exists in the air to condensate at the temperature of the glass (dew point). If the glass sweats, then likely so will the other cool interior surfaces like the un-insulated window frames in Photos 1 and 2.

Photo 1



Photo 2





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The following is a sample of the hot mold cases:

•A Texas jury awarded a homeowner \$32 million against her insurance carrier for, among other things, fraudulent claims handling in connection with a claim for water damage, mold and mold-related illnesses. The Texas Court of Appeals upheld a \$4 million award for actual damages but dismissed the \$17 million awarded for mental anguish and punitive damages. *Ballard v. Farmers Insurance Company*.

In *State Farm Fire and Casualty Company v. M.L.T. Construction Company, Inc.*, a former Louisiana office worker and her husband sued a roofing company, its general-liability insurer, and the office-building owner, alleging that the worker sustained injuries caused by exposure to mold in the building. The Court in New Orleans entered judgment against the insurer and denied the insurance company's argument that coverage was precluded by the "total-pollution exclusion" in the insurance policy.

•In Florida, a jury awarded an owner \$14.2 million against the construction manager on the Martin County Courthouse Project occupied in early 1989. Shortly after occupancy, the County complained about leaking windows, excessive humidity, and mold within the building. An investigation revealed water infiltration through the exterior skin and various problems with the HVAC system. In 1992, the County filed suit and evacuated the entire building. The court concluded that the mold and water problems were caused by construction defects and issued judgment against the construction manager for \$14,211,156.

In Buncombe County, North Carolina, a contractor paid \$6.7 million to an owner for mold in a nearly completed hotel flooded when a pipe burst during construction. The contractor attempted to investigate, but the owner elected to terminate the contractor. The contractor sued the owner for the unpaid contract balance; the owner counter-claimed for the mold-related damages. Ultimately, the contractor settled by paying the owner \$6.7 million.

On September 27, 2006, the Supreme Court, New York County decided the case of *Fraser v. 301-52 Townhouse Corp.* The issue in this case is whether sufficient scientific evidence exists linking mold to health problems. After hearing extensive testimony, the court found that insufficient scientific evidence exists that mold and/or damp indoor environments cause illness. Absent valid scientific evidence, plaintiffs were precluded from introducing testimony demonstrating that mold caused their health complaints and plaintiffs' cause of action based upon personal injury was dismissed. **2**

Insurance Coverage For Mold Claims

Contrary to the divergent opinions found across the country interpreting coverage for mold claims, in the absence of a specific mold exclusion, coverage generally exists if the claim is the result of a covered loss. In *Home Insurance Co. v. McClain*, a Texas court ruled that mold caused by rain damage from a leaking roof was covered by insurance despite the policy exclusion barring "mold or fungi." The court held that since the roof leak was covered by the insurance, the exclusion for fungi and mold damage did not apply.

Most courts tend to analyze coverage issues based upon "efficient proximate cause." This means that if the original cause of damage (what caused the snowball to start rolling down the hill) is covered under the insurance policy, the consequential mold does not negate coverage. This was the topic of the following published by the Commissioner of Insurance in Louisiana: **3**

ADDENDUM TO ADVISORY LETTER NUMBER 01-02 September 16, 2005

What's Covered

Property policies cover damage caused by water if the underlying cause is a covered cause of loss. For example, during a storm a tree branch falls and causes damage to the roof, allowing water into the insured property; or a water pipe cracks or bursts and water escapes and causes property damage including ruined sheetrock and carpet.



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Under the policy, the insurer is obligated to replace and/or repair the damaged property. If mold appears on the wet sheetrock or carpet, the insurer is not relieved of its obligation to make the covered repairs, including, taking the usual and customary steps of treating the damaged area with bleach and thoroughly drying it out. However, in the absence of a specific remediation coverage provision, an insurer does not have a separate obligation to remediate any damage arising directly from mold.

The presence of mold does not convert a covered claim arising from a covered cause of loss to a non-covered claim. On the other hand, the presence of mold does not create new and distinct obligations to remediate, decontaminate or otherwise remove the mold unrelated to the repair or replacement of the water-damaged property.

J. ROBERT WOOLEY
ACTING COMMISSIONER OF INSURANCE

LIABILITY AND RISK MANAGEMENT

Mold has become a serious problem that can destroy a construction company or ruin the reputation of a design professional. Mold risk management requires pro-active policies including:

- 1) a program designed to make all construction personnel aware of the potential for mold and the proper care, as well as testing, of materials to make sure that materials are “dry” when installed or finished;
- 2) quality control during design to specifically address moisture infiltration through the building envelope, and to address insulation of exterior walls to prevent the translation of cold outside temperature to interior surface that may condensate (especially windows);
- 3) proper design and maintenance of HVAC to specifically account for sufficient fresh air and circulation; and
- 4) an action plan if excessive moisture or mold is detected on a project to address any noticed problems immediately.

When you see mold growing on the inside of an exterior wall, how do you know what the moisture is coming from? A simple test is to cut a small patch of drywall and if the mold is observed on the interior surface, moisture is more than likely coming in from the outside. If there is mold only on the interior surface and nothing is on the back side of the drywall, then the problem is more likely the failure of the HVAC system not removing excessive interior humidity.

Photo 3 below shows the drywall cut with mold growth on the exterior side indicating the presence of moisture in the space between the drywall and exterior skin. Photo 4 demonstrates a serious lack of insulation creating ideal conditions for transfer of cold temperatures to interior surfaces.

Photo 3



Photo 4





How do you know when mold remediation is successful? --walls behind furniture (where condensation forms),

1.All building defects that caused water intrusion and moisture accumulation have been repaired

2.All affected materials have been removed;

3.Visible mold and moldy odors should not be present; and

4.Testing shows that the kinds and concentrations of mold inside the building are similar to and not greater than those found outside.

While there are currently no Federal standards for acceptable mold levels, the EPA has published the following “tips” for mold prevention:

1.Fix leaky plumbing and leaks in the building envelope as soon as possible.

2.Watch for condensation and wet spots.

3.Prevent moisture due to condensation by increasing surface temperature or reducing the moisture level in air (humidity).

4.Keep HVAC drip pans clean with overflow and condensate lines unobstructed.

5.Vent moisture-generating appliances, such as dryers, to the outside where possible.

6.Maintain low indoor humidity, below 60% relative humidity (RH), ideally 30-50%.

7.Perform regular building/HVAC inspections and maintenance.

8.Clean and dry wet or damp spots within 48 hours.

9.Provide drainage and slope the ground away from the foundation to prevent ponding.

The EPA also identifies possible locations of hidden mold as:

- the back side of drywall, wallpaper, or paneling,

- the top of ceiling tiles,
- the underside of carpets and pads,
- pipe chases (with leaking or condensing pipes),

- condensate drain pans inside air handling units,
- inside ductwork, or
- behind anything which acts like a vapor barrier.

A vapor barrier is any building component, wall covering, furniture or even a mirror which does not permit moisture to travel through it. If that “vapor barrier” is at the dew point, the trapped water vapor will condensate and provides a moist environment where mold can grow.

CONCLUSION

Mold is an old problem that has plagued mankind from the beginning of time and nothing we do can prevent its presence in the built environment. The key to managing risks and successfully defending litigation is to control water infiltration and exposure to moisture both during the construction process and after occupancy. Moisture control always begins with the roof but, as a wise old architect once said, “If the building element looks at the sky, treat it as if it were a roof.” Treat mold as a real risk management issue and follow two simple rules:

1. Act as quickly as possible to remediate the problem and mitigate damage; and

2. Document thoroughly the problem and the remediation efforts so your lawyer will have ammunition to defend you when the bomb drops.

About the Author

Mr. Loeb’s entire practice is focused upon construction law representing architects, engineers, contractors, owners and sureties. Born New Orleans, Louisiana, January 20, 1956; admitted to bar, 1989, Louisiana. Education: Tulane University (B.A., 1978, B. Arch., 1982, Masters in Architecture 2004); Loyola University (J.D., 1989). Member: National Council of Architectural Review Boards, 1985; President Baton Rouge Chapter Construction Specifications Institute, 1993- 1995; Associate Member, American Institute of Architects since 1990. Member of the Attorney Panel to the American Institute of Architects National Documents Committee, 1995 for drafting of the AIA document A-201 (1997 Edition); Member: Baton Rouge, Louisiana State and American Bar Associations. ADA Mediator through the U.S. Department of Justice. His areas of concentration include Construction Law, Mediation, Arbitration and Public Bid Law.



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