

MOLD LIABILITY - A GROWING CONCERN

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Real Estate professionals should be aware of a relatively new basis for premises and product liability and associated hazard abatement expense: mold. Of course, mold is literally nothing "new," and it is ubiquitous in the outdoor environment; however, it is a growing concern for building owners, managers and purchasers as the number and size of mold-related claims and judgments has grown significantly in the last few years. A good example is the very recent closure of a high school near Chicago over concern about "toxic mold" in the building. A class action lawsuit was filed the day after the school was closed. "Student's Lawsuit Says School Mold Caused Ailments," Chicago Tribune, April 4, 2001, WestFinal Edition, p. 3, Zone D. Such developments underscore the need to understand and manage the risk of indoor exposure to molds in much the same way as radon, asbestos and lead-based paint risks are now addressed by prudent real estate professionals.

Given the proper conditions, molds may thrive in an indoor setting, as anyone who's dealt with a water-damaged building knows first-hand. Because Americans spend 75% to 90% of their time indoors, they are exposed to molds that have colonized the buildings in which they work and live. Molds readily enter indoor environments by air circulation through doorways, windows and HVAC systems. They also settle on people and animals, making clothing, shoes, and pets common conveyors of mold spores to indoor environments. Molds grow from these dispersed spores in excessively moist environments, such as buildings that suffer from leaking roofs or plumbing, conductive condensation or periodic flooding. Even water leaking from indoor plants can provide a place for mold to grow, so it doesn't take a significant amount of moisture to start a mold problem.

Many common building materials are suitable as substrates for the growth of molds. Cellulose materials such as wood, paper, cardboard and ceiling tiles are good hosts for mold when moistened. Also, some paints, wallpaper, insulation materials and, of course, carpets and fabric commonly support mold growth. Naturally, mold problems involving these materials can potentially be traced to construction defects and/or deferred maintenance which lets water get inside a building.

While not all mold is necessarily toxic, different people will react to mold exposure in very different ways. For some people, a relatively small number of mold spores can cause health problems. Infants, children, pregnant women, the elderly, and people with respiratory disorders or weakened immune systems are more likely to experience adverse effects at lower levels of exposure to mold. Allergic reactions are the most common health effect.

According to the Centers for Disease Control, there are approximately six varieties of household molds in the U.S. Most appear as black or grey patches at first, but their exposure-related health effects can be quite varied. Some of these molds have the ability to produce "mycotoxins," human exposure to which can cause a variety of adverse effects including respiratory problems, eye and skin irritation, chronic fatigue, diarrhea and even immune system suppression. The strain of mold at the center of many recent lawsuits is known as *Stachybotrys atra* (S.atra), a mold which typically requires water-saturated cellulose-based materials for significant growth in buildings.

While a number of government agencies and professional associations have acknowledged the problem of indoor exposure to toxic molds, not a lot is known about the environmental conditions which promote the growth of these molds, their prevalence in the indoor environment or whether there are safe levels of exposure to them. The U.S. Environmental Protection Agency (EPA) has recognized the hazards of exposure to S.atra spores, especially when a building's HVAC system is involved, and EPA is conducting research on S.atra, but there are currently no EPA regulations or guidelines for evaluating the potential health risks of S.atra exposure. The Federal Emergency Management Agency (FEMA) has also recognized the potential for mold-related illness in the aftermath of significant flood events, but recent lawsuits demonstrate that a mold liability can arise from far less moisture than that associated with a major flood.

Molds like S.atra are also problematic because their presence cannot be confirmed by visual inspection. Only a qualified laboratory may properly confirm the presence of a toxic mold, and because it may be thriving on the back-side of water-

damaged sheet rock, even finding it is something that should involve a trained technician. Also, because fungal spores are so difficult to remove from non-impervious materials, the likelihood of recurring growth will remain high, and simply requires the reintroduction of sufficient moisture.

A related and equally important concern about mold liability is the availability of coverage and defense under existing insurance. Because there are no separate insurance products developed for mold liability, coverage will depend upon what caused the mold. For example, if flooding caused S. atra contamination, flood insurance would probably cover the mold exposure and abatement liability. Other types of insurance may not, and there will likely be some litigation over whether it should. One such lawsuit last year in California resulted in an \$18 million bad faith judgment against Allstate Insurance Co. over mold contamination of a home caused by a burst pipe. "Unease About Mold Problems Grows," Sacramento Business Journal, October 27, 2000.

In light of these mold liability developments, real estate professionals may wish to reevaluate their approach to seller disclosures. Owner awareness of water damage should probably be emphasized, whether from flooding, plumbing leaks, HVAC condensation or even fire response. If such awareness is disclosed, information concerning any insurance notices or claims should also be requested. Of course, if evidence of water damage exists, confirmatory sampling of building materials should follow. If S. atra or another toxic mold is identified, the affected material should be removed by a qualified professional abatement firm. Such work is similar in nature to asbestos removal, with EPA/AHERA adherence to negative pressure containment, HEPA filtration of exhaust air, high-level personal protective equipment, etc.

Recognition and avoidance of potential mold liability may be as simple as emphasizing the importance of good housekeeping and maintenance as a factor in one's pre-closing due diligence. Given the difficulty and expense of detecting and abating an indoor mold problem, the avoidance of run-down or poorly maintained buildings in one's property acquisitions may be the ounce of prevention that's worth a pound of mold-liability cure.

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