

Contractors and "Toxic Mold" Claims

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On a somewhat regular basis, we hear about a new mold claim, either a report on the news or a story from a fellow contractor. Wherever you hear it from, you are left with the impression that mold is everywhere, people are getting sick from it, and juries are awarding large amounts of money to the victims of "toxic" mold. While it is true that mold is everywhere – its in the air, most food, and all buildings, not all mold is toxic. Are people getting sick from it? Maybe, but there is little scientific evidence to support such claims. Are juries awarding large damages to victims? Sometimes.

UNDERSTANDING MOLD

Mold is and has been prevalent in our environment for millions of years, so why is it a problem now? There are many factors which contribute to the problem and many reasons why mold infestation has caused an explosion in lawsuits. One of the primary factors is the nature of modern construction codes. The evolution of construction code standards creates a situation where a contractor must, for the most part, make a structure impervious to sources of moisture from our external environment. Unfortunately, making a structure impervious to exterior moisture makes it difficult for interior moisture to find a way to escape. Another factor is the new materials used in construction, many of which are possible sources of mold when they become wet.

Mold needs very little to grow and proliferate throughout a structure. Typically, if a structure has a temperature above 45°F, has a moisture source and something organic like wood or cellulose to sustain itself, mold will grow and thrive. The problem isn't with mold itself but there are some species of mold which have potentially toxic properties. Every individual has a different sensitivity to mold so there is very little in the form of toxicology or health standards for what levels of exposure to toxic mold are "safe".

Probably the most frequent area of litigation is construction defects alleged by a building owner. Any construction problem which allows for the infiltration or intrusion of water can manifest itself in a mold or toxic mold claim. Frequently, the underlying responsibility for a construction defect lies with a subcontractor and just as frequently there is more than just one area which exhibits water intrusion. Because of the nature of the business, the building owner often sues the general contractor, who then sues the subcontractor responsible for the construction or installation of the defect material.

INSURANCE COVERAGE AND OTHER PROTECTION

A review of your insurance policy is likely to reveal that mold caused by a construction or design defect is specifically excluded (this is sometimes called the "your work" exclusion). In some instances, clean-up of the mold or other consequential damages may be covered but the cost to repair the defect is not. Moreover, even if you are insured, the alleged damages are often far greater than the coverage amounts.

There are several areas where preventive measures will be beneficial should a claim arise. The first area involves your construction contract and warranty information. You should make building owners aware that you cannot guarantee the absence of mold and that you will not warranty damage caused by mold. You should also advise building owners of where to obtain information on the proper maintenance of the building and how to prevent mold growth. Lastly, you should also include a provision in your contract that, if mold is discovered, you are granted access to the building to conduct your own investigation and repair.

Second, you should revise your subcontractor agreements to include a provision that subcontractors responsible for the construction defect will indemnify you if you are sued. You should also require proof of insurance from your subcontractors.

Third, educate your employees on the conditions that can lead to mold growth and make sure they know how to eliminate those conditions if they arise. Employees should be instructed to watch for the presence of mold on materials delivered to the site and to recognize that mold may grow on materials after delivery due to storage conditions.

Fourth, you should document construction or remodeling with notes and photographs, including each phase of construction, weather conditions, and proper drying of any wet materials and other appropriate actions used to minimize or eliminate the introduction of moisture into the building.

FACING A MOLD CLAIM

Should you be faced with a mold claim, don't ignore it. First, gain access to the building to investigate the situation, take pictures, and, if possible, remedy the source of the mold. Second, notify your insurance company, even if you have a mold exclusion, since there may be other damages involved that are covered. Third, seek expert advice. You might want to enlist the assistance of an attorney experienced with toxic mold claims, as they are often able to choose the experts best suited for the job.

Should a lawsuit be filed against you, you can expect the claims to be based on, at a minimum, breach of contract and negligence. No matter what the claim, the building owner must prove that your actions or inactions caused the mold and its resulting damages. Science has not conclusively shown that mold causes personal injuries, although there is some evidence that it may exacerbate pre-existing conditions like allergies and asthma. Many courts recognize the limited applicability of the scientific data and will likely limit expert testimony on such issues. However, ongoing scientific research may eventually conclude that mold may, in some instances, cause physical injury.

CONCLUSION

The mold stories that you hear are a wake-up call. Mold litigation in the construction industry will continue for many years. Soon, science might even conclude that mold can cause permanent physical injury and, if that happens, jury awards will be astronomical. If you haven't done so already, now is the time to review your practices and take steps to insulate you from liability.

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