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### MOLD: SEPARATING FACT FROM HYPE - LEGAL ISSUES

*By: D. Robert Ward, Esq.*

This article is written to address the perspective of community managers and homeowners and discusses practical and legal considerations regarding potential mold contamination.

For purposes of this article, mold contamination will be broken down into three categories for discussion. First, the practical and prudent considerations faced when discovering mold for the first time in residential construction; second, the ramifications of mold contamination from a property damage perspective or as a "construction defect;" and third, considerations regarding mold contamination as a health hazard and/or a personal injury claim.

#### **1. So You Discovered Mold - Now What?**

Mold may be found almost everywhere in our environment. Its microscopic spores are present in the air both inside and outside homes. In order for mold to colonize to the extent to be visible and recognizable, it has to have a moist environment. It should appear reasonable that the longer the mold is undisturbed and has a suitable environment, the bigger the colony may be.

Upon discovering mold, a homeowner might simply mix some bleach in a spray bottle of water and wipe it away. This might address the problem, perhaps even permanently, and might not be a bad idea, but it depends on the circumstances. Minimally, two issues should be considered. First, any mold removal should include identifying and rectifying the cause of moisture that allowed the mold to grow in that location in the first place. If that cause of moisture is due to spillage or leakage (aquariums, leaky faucets, pets, plant watering), then eliminating the source of moisture and the colony of mold may be a complete success. If you elect for self-help in dealing with the mold, attempt to remove it in a manner in which the mold will not be released into the air, ventilate the area as well as you can, and avoid inhaling the mold.

Second, a homeowner that has allergies or illness that might be caused or exacerbated by mold spores should not attempt to remove the mold. An attempt to wipe away or kill mold might release thousands of microscopic spores, which can further aggravate the homeowner's adverse reaction. Depending on the circumstances, any number of options can be considered for assistance in mold removal, ranging from removal by another member of the household who did not have a reaction to the mold, to hiring an environmental remediation company.

A note of caution is necessary regarding individuals with suppressed immune systems. These persons can be particularly sensitive to mold, especially the *Stachybotris* genus of mold, which can be toxic. These persons can include the very young or old, persons with immunity disorders or diseases, or persons on medications which weaken the immune system. Strong precautions should be taken to avoid or minimize exposure to mold by these individuals, and in cases where there is widespread mold discovered or suspected, a licensed, experienced remediation professional should be consulted.

Finally, keep in mind that the mold might not be limited to the surface of the wall where it is most visible. If there is mold in one portion of a damp area, such as the wall, it might also be present and colonized in the dark carpeting, or under the carpeting. If mold is present due to moisture emanating from inside a wall or from under a slab, it may be inside the wall or under the slab. If you decide upon self-help, be thorough, so that your chances for eradication are higher.

## **2. When is Mold a "Construction Defect?"**

The answer to this question is straightforward. Mold is not really a construction defect at all. However, mold may constitute damage caused *as a result* of a construction defect. This is the case when moisture or water intrusion that provides the suitable environment for the mold is caused by a construction problem, rather than a situation of the homeowner's own making.

There are numerous examples of these types of situations, and a few of these might be helpful to consider. One situation is a slow plumbing leak inside the walls or under the slab of a home. The slow and constant release of moisture over a long period of time provides a perfect medium for mold, and the colony may grow large without being visible. The manifestation of mold on the outside of the wall may indicate a massive amount of mold inside the wall. In this type of case, self-help might be futile. Even if a plumber repairs the leak and the area dries up, the mold will potentially become airborne, and may cause health problems for the residents.

Where mold damage exists due to improper or defective construction conditions which resulted in water intrusion, there is strong legal support for recovery. Under the California Civil Code and case law, the cost for remediation and elimination of the mold infestation and repair of the defective construction condition which caused water intrusion or dampness are recoverable as damages.

Where caused by a construction defect, claims for repair or remediation of mold damage are limited by the same legal concepts and statutes of limitation, which govern construction defect litigation. Claims must be brought within ten years of the date of substantial completion of the structure. Other statutes of limitation require filing a claim within three or four years of discovery of the defect and others even less time. Whether occurrence of mold triggers knowledge of the defect for purposes of the statutes of limitation is a question of fact. A significant amount of mold in any residence reasonably notifies almost anyone of a serious problem that requires immediate attention. Failure to investigate and pursue some course of action to address the problem may seriously impede the ability to recover damages. The action taken should be reasonable.

For a homeowner, under the facts of that particular circumstance, reasonable action might be cleaning up the mold areas with water and bleach and hiring a plumber to fix a leak. For a homeowners' association, it might entail a review of the Declaration of CC&Rs to determine whether a mold complaint implicates the common area, or is otherwise the duty of the Association to repair.

### **3. When is Mold a Health Hazard and a Potential Personal Injury Claim?**

When mold contamination exists and any number of individuals claim to have had illness due to the presence of mold, there is a possibility of a health hazard. A personal injury claim may exist where mold contamination is caused by a defective product or negligence, reckless, and/or willful behavior and it is shown that the illness is a result of the mold contamination.

Personal injury claims of this nature are not proven easily, because the body of scientific research establishing causation of illness by mold is relatively recent. Environmental and medical testing are probably both necessary to establish the existence of toxic molds in the home and a mold-related illness in the claimant. Investigation and testing may be time-consuming and costly. However, the cost and difficulty in proving these cases should not deter valid claims. A causal connection between the occurrence of the mold and the onset of illness, combined with a demonstrated sensitivity to mold, is fairly persuasive evidence of causation.

For example, a family moves into a home that has had documented mold problems, perhaps unsuccessfully remediated. The family consists of two parents and two children, the youngest of which has had some ongoing health problems, but is stable at time of the move. Suddenly, upon moving into the home, the youngest child becomes severely ill, with respiratory distress, allergic reactions, which lead to infections and hospitalization. Investigation of the home reveals a large amount of mold inside the walls of the child's room, and an analysis of the mold species reveals that it includes *Stachybotris*. This example would comprise a good factual basis for a personal injury claim on behalf of the child, and perhaps an emotional distress claim on behalf of the parents.

Just as in a construction defect action, various statutes of limitations and legal requirements must be complied with to properly file such a claim. California Code of Civil Procedure provides for two years from the time of injury to file a claim for personal injury. Reasonable ignorance of the cause of the illness or injury will stop the statute from running until the claimant discovers or should have discovered the cause of injury. Although a claim for damages due to personal injury caused by defective construction does not have to be filed within ten years of substantial

completion of construction, associated damages for the cost to repair the home are unlikely to be awarded if the ten-year statute has elapsed.

Because mold-related personal injury claims are a relatively new phenomenon, there are not many nationwide verdicts regarding these cases. The handful that exist are promising to the extent that valid claims are recognized and awarded by courts and juries under existing concepts of law.

The merits and success of each potential mold-related claim depend solely on the facts of that case. This article is for the purpose of providing general information, not professional advice. Any person seeking to bring or to defend a mold-related claim is strongly encouraged to seek professional advice from a qualified licensed professional, from both a legal and environmental testing/remediation perspective.

**If you think you have potential construction defects, contact Burdman & Ward for a free, no obligation inspection with a licensed contractor.**

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