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Mold Continues to Grow as Liability Threat

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The media hysteria regarding “toxic mold” and its threat to human health has died down somewhat. Multi-million dollar judgments, celebrity lawsuits and staggering class action lawsuits no longer fill the headlines. But does that mean that mold and related claims of personal injury and property damage are no longer a threat to design professionals? Hardly. Mold remains a significant potential hazard to the health of any design firm, regardless of size, type or location.

Virtually any member of the building industry – architect, engineer, contractor, owner and material supplier – faces exposure to mold-related claims. Design professionals face the prospect of defending claims charging failure to incorporate mold prevention into their designs or failure to identify the presence of mold during renovation or construction.

Mold Is Nothing New

Mold is an ancient life form. According to the Insurance Information Institute, there are more than 100,000 species of mold and at least 1,000 types of indoor mold. A fungus, mold thrives in warm, humid environments and spreads by releasing airborne spores, similar to a plant spreading its seeds.

Some molds are considered toxic. Indeed, there are demonstrated cases of livestock dying after eating quantities of mold-laden grain. However, there is much debate whether toxic molds inside homes and buildings can – by themselves – cause serious human health problems. According to the Centers for Disease Control, most documented cases of such health problems involve people who ate moldy food. Other studies have concluded that there is no evidence that mold in levels found in homes and offices can cause chronic or life-threatening health problems.

Still, that is not to say that mold is not a viable health hazard. It’s just that the so-called toxic molds are typically not the culprit. A large number of molds are “allergenic.” That is, they release spores that cause allergic reactions and can trigger serious health conditions such as asthma, chronic respiratory disease and sinus infections. In addition, individuals with compromised immune systems are particularly susceptible to lung congestion and infection that can be caused by inhaling mold spores.

So why is mold, which has been around forever, suddenly such an issue within the design and environmental industry? The answer depends on whom you ask.

Ask a fellow design professional and he or she will likely point to plaintiffs’ lawyers and the media frenzy surrounding big jury awards and the high profile cases of celebrities like Ed McMahon and Erin Brockovich. Mold has been called the “next asbestos” in some legal circles, while “mold is gold” is a favorite slogan of some plaintiff attorneys. Indeed, there is money to be made from mold and cottage

industries have sprung up surrounding mold litigation and remediation. Testing, inspection and extraction has become big business, as have industrial hygiene and other mold consultant services.

Designers will also point to building owners as a source of the mold problem. Older buildings with leaky roofs and plumbing, drafty windows and doors, poor ventilation or improperly maintained HVAC systems are major contributors to the problem. Ask any design firm that has undertaken major renovation projects and it will likely have horror stories regarding the black slime discovered under floorboards and inside walls.

Another culprit, say designers, are contractors who use cheap materials or who fail to provide proper water barriers due to poor workmanship.

Ask plaintiffs about mold, and you get an entirely different story. They often point to the design industry as the cause. The advent of so-called “airtight” buildings designed to enhance energy conservation has contributed greatly to the problem, they say. Should moisture get into the interior of such a building, it can’t get out. Complicating the problem, plaintiffs say, are designers who specify building materials such as paper-covered drywall and certain adhesives that provide an excellent food source for mold.

Complex designs for many of today’s high-style buildings can lead to radical roof, window and wall angles, increasing the chances of gaps and water intrusion. Inadequate or faulty HVAC systems are also pointed to as a cause of excess humidity. Finally, today’s fast-track projects lead to faulty workmanship and insufficient time for materials to thoroughly dry before sealing them into an airtight environment.

A Cause for Concern

Regardless of the cause, mold presents a significant liability concern for design professionals. What’s more, architects and engineers will not find a lot of guidance regarding design standards, allowable limits of mold, or insurability. States and even the federal government have passed or proposed legislation regarding toxic mold, but to date, design and construction standards and regulations are neither clear nor complete.

A major concern for design firms is that mold-related problems can evolve into construction defect claims that trigger class-action lawsuits alleging bodily injury due to long-term exposure to toxic mold. Often, statutes of limitation do not apply to these bodily injury claims. What’s more, bodily-injury claims can be accompanied by other claims from project owners and tenants for breach of contract, property damage, delays, business interruption and loss profits.

Should you be faced with these charges, will your insurance company be there to protect you? More and more, we are seeing mold exclusions added to homeowners’ and commercial property insurance policies. According to the latest estimates, 46 states and the District of Columbia have adopted mold exclusions in such policies. With these exclusions, mold contamination is covered only if it is the result of a covered peril such as a burst water pipe or if covered by a specific policy endorsement.

Even where specific mold exclusions are not included in policy language, some insurers may try to exclude mold claims under existing pollution, contamination, seepage, or deterioration/wear-and-tear exclusions. Courts have ruled both for and against the denial of mold claims based on the standard pollution exclusion.

Blanket mold exclusions have yet to appear in most professional liability policies. However, as mold claims mount for insurers, exclusions may begin to be applied to perceived high risks. And consider this: If your professional liability insurance is the only policy covering a problem building that doesn't have a mold exclusion, the odds increase that the plaintiff's lawyer will file a claim against you.

Get Bold with Mold

Designing a mold-proof building is impossible. However, there are steps that design professionals can take to help prevent mold problems and reduce the chances of expensive claims. Here are seven steps you can take to fight mold:

1. **Educate the owner.** Discuss with your client the potential for mold problems and the need to design remedies into the structure, rather than deal with the problem somewhere down the road. Point out that the owner could be liable for such problems should tenants, clients, customers or other third parties allege that they have suffered bodily injury due to mold.
2. **Know your locale.** Mold is not a problem restricted to hot, humid climates like the Gulf Coast and the Southeastern United States. British Columbia, for example, faced a rash of million-dollar mold claims due to envelope failure and water intrusion involving poorly designed condominiums. Therefore, thoroughly investigate the history of mold problems in your locale. Check for any standards that may come into play in your area. If you are working on a project outside of your normal territory, consider peer reviews of your HVAC design and other humidity control measures by local consultants familiar with that environment.
3. **Design with mold in mind.** Don't skimp on mold-control measures, particularly in locales where it is a proven problem. Pay particular attention to plumbing, HVAC equipment and humidity-control systems. Ensure there is proper ventilation and filtration, including adequate crawl spaces, exhaust fans and dehumidifiers. Specify leak-proof window and door installations and mold-resistant materials and products. Ensure proper drainage and runoff controls so water doesn't collect underneath structures. Roofing and envelope systems are perhaps the most critical water barrier. Provide complete details for flashings. Document your efforts to avoid mold and water intrusion. If the owner refuses your recommended mold-control items, document that fact in your contract or project files. Additional information can be found in *Managing the Risk of Mold in the Construction of Buildings*, published by the Associated General Contractors of America (www.agc.org/content/public/PDF/Safety/may03_mold.pdf).
4. **Draft protective contract language.** A clear and accurate scope of services specifying your responsibilities and those of the owner and contractor is essential. Press for indemnity language that allocates liability for mold-related claims to those in the best position to control the building environment. Seek a general limitation of liability for all claims that result from the project, including personal injury claims. Avoid guarantees, warranties and other such language concerning the absence of mold.
5. **Hold regular meetings during construction.** In your working agreement, call for regular inspection, testing and disclosure of existing mold and conditions that could lead to mold. When necessary, retain qualified industrial hygienists or other expert engineers to provide inspection and remediation services. Document all findings, changes in project scope, project upsets and other information that could be used in your defense of a subsequent claim.

6. **Provide maintenance guidelines.** Require that the contractor or manufacturer provide equipment inspection and maintenance programs for HVAC and other humidity-control systems. Call upon the building owner or manager to regularly inspect all structures for signs of water and moisture intrusion; fix plumbing leaks and clean up and dry any water spills within 48 hours; keep HVAC units inspected and maintained according to manufacturer specifications and provide proper venting of any installed moisture-generating appliances or machinery. Include in your recommendations an overall guideline to maintain low indoor humidity (generally below 60 percent). For more guidelines, see the EPA's *Mold Remediation in Schools and Commercial Buildings*, available at www.epa.gov/iaq/molds/.
7. **Check your insurance coverage.** We'll be happy to help you check for mold exclusions on your policies. We'll help you determine whether special endorsements for mold or other environmental coverages are needed and available.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.