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Dealing with Mold: Component Manufacturers Address Customer Concerns by Kent J. Pagel, WTCA Legal Counsel

[See also: [Summary of Crucial Facts on Mold for the Structural Components Manufacturer from Jan/Feb 2003 "Our Legal Reality, "Whose Mold Is It?"](#)]

Review four real world case examples experienced by component manufacturers where customers address mold on structural building components.

Builder complaints regarding the growth of surface mold on the lumber contained within wood structural components, while not as frequently encountered as in the past, continue to pose a dilemma in some markets. The dilemma comes in the form of builders either demanding mold-free wood based products, or when mold appears on a component at the jobsite, they are demanding that suppliers provide an immediate remediation (e.g., removal) of the mold, regardless of the cause or the cost. And, where structures are improperly designed or constructed and mold growth appears years later, component manufacturers (CMs) have found themselves into construction defect litigation with various types of complaints being asserted.

Unfortunately, few answers exist that will guarantee a successful outcome in most circumstances. Reacting to a builder's request or complaint with speed and diligence is certainly important. However, no "one size fits all" approach will work. Another fact that has become relevant to the discussion: Mold exclusions are now being written into most CM general liability insurance policies.

To follow are four real world case studies in which mold on lumber contained within structural components had to be dealt with by a CM. The analysis that follows each example will hopefully provide some guidance for the reader in how to deal with the example cited or a similar situation.

CASE EXAMPLE 1

Trusses are free of any visible mold at the time the CM pulls up to the jobsite on the day the customer asked that they be delivered. However, the customer refuses delivery and the trusses end up sitting in the CM's yard for two weeks, a period where there is a great deal of rainfall. Since a moisture content above 19 percent for approximately one week is all that is required to support mold growth (see WTCA's Truss Technology in Building document, Facts Regarding Mold on Wood Structural Building Components), surface mold appears on the trusses. The customer ultimately refuses delivery of the trusses heeding the recommendation of a group counseling the local homebuilders' association that any trusses, lumber or I-joists that visually indicate the presence of mold or that have been subjected to moisture through rain or other means prior to

delivery shall be rejected and returned.

DISCUSSION. From a legal perspective, our CM most likely has an enforceable claim against his customer as he fully performed and never agreed to store the trusses in such a way so as to prevent moisture accumulation. Our CM's claim would be a "lay-down" if the following language was included in his written customer contract: Any mold growth on products manufactured by [Truss Manufacturer] that meet the Purchaser's delivery schedule, but where deliveries were not timely accepted by Purchaser and if remediation is required, shall be at a cost borne by Purchaser.

Of course, suing is not the preferred alternative. Instead, the CM may choose, at least this one time, to clean and remove any visible sign of mold. While some may suggest that a bleach solution be used, WTCA follows the recommendations of others to scrub with detergent and water, rinse and allow for drying. While undertaking to clean is most likely less expensive than for the builder to hire a contractor and back-charge the CM, remember one caveat. To the extent CM employees are working at the jobsite to remediate the mold, the role of the CM has now shifted from that of a supplier to subcontractor.

A document the CM may find useful in these circumstances is WTCA's TTB document, *Builder Advisory—Checklist for Minimizing Mold on Structural Building Components*. This guide recognizes that the wetting of framing lumber is inevitable. The advisory states that framing will dry out after the structure is put under roof, sheathed and sided AND that such drying must occur before the framing is closed in or covered up with insulation and drywall. As the framing dries, without moisture the mold can no longer grow. Another way of explaining this approach—the most efficient approach in dealing with mold on lumber given the chain of distribution of lumber through the point a truss is manufactured and delivered to a jobsite—is for the builder to allow for framing lumber to adequately dry once properly installed and protected from the elements and to then remediate any mold at the jobsite with detergent and water.

Note that mold is not directly addressed in BCSI or in the B1 through B10 pamphlets which may be included in the CM's jobsite package. The only indirect reference to mold is found in B1 where it states: (a) if trusses are stored horizontally for more than one week, blocking should be used to lessen moisture gain from the ground, (b) during long term storage, trusses must be protected from the environment in a manner that provides for adequate ventilation of the trusses, and (c) if tarps or other protective covers are used (with plastic not being recommended, as it can trap moisture), proper ventilation must be provided.

CASE EXAMPLE 2

Project specifications contain any one of the following provisions:

- Lumber in trusses and wall panels shall have a moisture content of 19 percent or less.
- Lumber shall have no visible signs of mold and shall be free of any water damage.
- [Truss manufacturer] shall monitor lumber shipments when received from the mill and adhere to a policy of stock rotation; buy lumber that is wrapped or otherwise protected from the moisture on deliveries; store lumber in closed or roofed area make visual inspections and not

deliver with mold. Trusses and wall panels shall be manufactured no more than five days in advance of original scheduled delivery date.

DISCUSSION. If agreed to, the first two provisions essentially amount to a warranty from the CM that when delivered, trusses will not have a high enough moisture content to allow for surface mold growth. Thus, if surface mold appears on the trusses at time of delivery, you can expect any remediation cost will be borne by the CM. Further, if a provision like this is agreed to, how does the truss manufacturer assure itself that all of the trusses have a moisture content of 19 percent or less—especially if they sit in the yard for a few days before delivery? The third provision is far more detailed and imposes a great deal of responsibility on the CM.

While provisions like those listed above are likely to remain in specifications, in fact we may begin seeing more of these types of specifications to the extent builders continue to become entangled in mold litigation. If the CM cannot effectively eliminate such specification language, he may have no choice but to address how to minimize the moisture content in the trusses and related products it manufactures and delivers. Some suggestions include:

- Checking the moisture content on each load of lumber received and refusing lumber that is wet or discolored.
- Storing under cover or providing sufficient protection of any lumber that will be kept for any prolonged period of time (e.g., ten days to two weeks).
- Culling out boards during the manufacturing process, taking pictures of defective boards and placing calls to your lumber supplier seeking redress.
- Increasing the emphasis on just-in-time manufacturing, because the biggest problem with surface mold for truss manufacturers is the growth of mold after the trusses are manufactured. The trusses are banded (which allows moisture to be trapped), stored outside, and customers will invariably delay deliveries.
- If the CM must agree to some specification or warranty regarding mold, avoid language like “mold-free” with no limit on duration and instead consider language such as no “visible signs of mold” for a limited period after delivery to the jobsite. Some CMs take pictures of the trusses at time of delivery to verify that no visible signs of mold exist (an added benefit is to verify, also through pictures, that the jobsite package was attached to the trusses at time of delivery).
- Continually emphasize with your customer that wetting of framing lumber is unavoidable given the chain of distribution that lumber goes through. Lumber that is manufactured then dried to less than 19 percent moisture content, can easily get wet during shipping and storage along the way to the truss plant and then when stored at the truss plant. Assuming it remains mold free at the time of truss manufacture, there is inevitable exposure to moisture when the trusses are stored at the manufacturing plant, during the shipment to the builder’s jobsite, storage at the jobsite, during installation and then depending on how quickly “dry-in” takes place even while properly installed. The most efficient and effective means to deal with mold is for the builder to allow for framing lumber to adequately dry and to then remediate any mold at the jobsite with detergent and water.

CASE EXAMPLE 3

Visible signs of mold appear on trusses and/or wall panels stored at a jobsite. Not surprisingly,

the builder wants the mold removed at the CM's expense, but goes one step further asking that the following provision be agreed on: [Manufacturer] agrees that it shall be fully responsible for and shall indemnify and hold [Customer] harmless from any claims, losses, damages and expenses arising out of or relating in any way to any mold growth or infestation occurring [at the Project] to the extent that such mold growth or infestation is caused or contributed to by any negligent acts, errors or omissions, defective or improper construction or workmanship by [Manufacturer].

DISCUSSION. Before I discuss the indemnification language, keep in mind that the costs to remove mold in an occupied structure are far greater than remediation during the construction stage. Costs may include moving and housing the occupants, getting to the mold, testing (substrate and air), remediating the mold, repair, and attorneys fees for the claimant's lawyer. With respect to this indemnification provision, remember one thing: The object of contractual indemnity is to shift risk from one contracting party to another. Even with the limiting language (...to the extent that such mold growth or infestation is caused or contributed to by any negligent acts, errors or omissions, defective or improper construction or workmanship by [Manufacturer]...) that is contained in this indemnity provision (contrast that with a broad indemnity provision), if mold appears years later regardless of cause, your customer will demand that you defend and resolve any claim. And, if you are required to defend a lawsuit, if your general liability policy contains a mold exclusion, your insurance company will most likely insist that you defend the claim on your own—without their help and money. The only solution is to refuse to agree to such indemnification provisions or work really hard to limit the indemnity as much as possible.

CASE EXAMPLE 4

An improper roof design allows moisture penetration into the walls of the house and mold grows. Since the CM agreed to review plans and advise of any problems and cannot prove that the manufactured products were mold-free at time of delivery, the CM is named as a defendant and asked to pay costs of repair and the costs to remediate the mold growth.

DISCUSSION. This case study emphasizes the importance of reviewing customer contract forms and project specifications. Further, having some means to verify that structural components either had a moisture content of less than 19 percent at time of delivery or had no visible signs of mold can be very important in litigation filed years later. An alternative is to specifically disclaim any obligations with regard to mold with a provision in your customer contract:

Seller's warranty shall exclude and Buyer assumes all risks and liabilities caused by mold and stain on the materials supplied by Seller; OR

Seller disclaims any liability for the negative effects of the emergence of mold or stain, and disclaims any duty to undertake any action to inspect, mitigate or remove mold and stain from the materials supplied by Seller.

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