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Our Legal Reality

Keeping an Eye on Mold (Part 1) by Kent J. Pagel

Mold contamination is becoming a nationwide concern among homeowners and builders. Mold in homes and mold lawsuits have gained extensive media coverage from talk shows to feature articles in national publications. Even Erin Brockovich is making news in the mold litigation arena. Insurance companies are becoming increasingly concerned as well. They feel that they are unfairly bearing the brunt of the expense in remediating mold, thereby leading to revisions in homeowner and builder/contractor liability policies.

While a great deal of the attention given to mold is spawned by a combination of consumer hysteria and plaintiff lawyer greed, there are good reasons for the component manufacturer and the lumber dealer to exercise caution with respect to mold generally, and with respect to mold on lumber specifically. In fact, there are three good reasons: Stachybotrys chartarum, the Melinda Ballard case and requests on the part of builders for component manufacturers and lumber dealers to take additional responsibility for mold on lumber.

MOLD & IMMUNOLOGY ISSUES RELATING TO MOLD

Mold, and Stachybotrys chartarum in particular, has been around for a long time. Some suggest that mold explains the mystery surrounding the tenth plague mentioned in Exodus. No one really knows how many species of mold there are, but estimates range from tens of thousands to perhaps three hundred thousand or more. Also keep in mind that many molds are vital to our everyday life and are used in the production of everyday items from baked goods to penicillin.

Some believe that certain molds produce toxic compounds inside homes that cause health conditions such as pulmonary hemorrhage or memory loss. Stachybotrys chartarum and a related species—commonly referred to as “black mold” or “killer mold”—have received the most publicity related to claimed health impacts. However, most knowledgeable people have agreed that there has been no proven link established between the presence of toxic mold in a home or building, and the extreme health conditions noted. As it turns out, there is a surprising lack of scientific knowledge about the dangers that molds may present. Thus, the many claims that are being made for personal injury type damages are the subject of great controversy.

Because there is a great deal of confusion over mold and mold on lumber issues from consumers, builders and building officials, WTCA and STCA have developed fact sheets on mold that have been published as part of WTCA's Truss Technology in Building series and STCA's Steel Components in Construction series. These fact sheets can be useful talking pieces for managers and salespeople, and are designed to speak factually to builders and contractors. To understand

the mold on lumber issue more easily, it is important to note the facts as set forth in each document and below:

FACT: Large mold infestations can usually be seen or smelled.

FACT: Constant moisture is required for Stachybotrys chartarum and other molds to grow.

FACT: Mold growing in homes and buildings, whether it is Stachybotrys chartarum or other mold, almost always indicates that there is a water leak or the presence of excessive moisture. The conditions allowing the mold (such as water leaks, excessive condensation, infiltration or flooding) should first be repaired to prevent the mold from growing.

FACT: When mold spores drop on places where there is excessive moisture, such as where leakage may have occurred in roofs, pipes, walls, plant pots, or where there has been flooding, they will grow. Many building materials provide suitable nutrients that encourage mold to grow. Wood and wood products are particularly conducive for the growth of some molds.

FACT: Stachybotrys chartarum is a greenish-black mold. It can grow on material with a high cellulose and low nitrogen content, such as fiberboard, gypsum board, paper, dust and lint. Growth occurs as with other molds when there is moisture from water damage, excessive humidity, water leaks, condensation, water infiltration or flooding. As with other molds, constant moisture is required for its growth. While Stachybotrys chartarum has received a great deal of media attention, the U. S. National Center for Disease Control has stated that it does not believe that anyone needs to take any different precautions with Stachybotrys chartarum than with preventing the growth of any other mold species.

FACT: No scientific studies have been performed to date that establish a direct relationship between mold contamination and health impacts. The Texas Department of Health has stated, "There are over a thousand different [toxic compounds] that various molds produce and there is no way to determine the health effects on people."

FACT: An environmental consultant can sample any area with observed mold growth. However the analysis to determine the species of mold present must be performed by a laboratory specializing in microbiology. These tests are very expensive, ranging anywhere from hundreds to thousands of dollars. There is no simple and inexpensive way to sample the air in a home or building to find out what types of mold are present.

FACT: The most effective way to prevent and treat for mold contamination is to correct the underlying causes of the moisture that is present, which allows the mold to thrive.

FACT: With respect to the issues of mold on lumber, the Southern Pine Inspection Bureau reported in August, 2001:

> *Fungi which causes molds…cannot live if they do not have at least three sustaining requirements of life: food (wood cellulose), oxygen, and water or moisture. If one of the three critical requirements for life are taken away, the organism cannot be sustained. Obviously, we cannot remove the wood cellulose or the oxygen, but the sustaining moisture can be pulled from the lumber by air or kiln drying. If the moisture content is maintained after manufacture to 19 percent or less, then mold and mildew cannot survive on such lumber.*
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> *Most mold…which are observed on lumber…can normally be attributed to*

the transportation, storage, and construction stages. By the time that most wood framed homes are dried-in, it takes only a few weeks for any increase in moisture to dissipate. Any surface mold…can either be wiped off the surface or completely removed with a mixture of water and bleach.

Once the house is completely protected from the elements, there should be no source of moisture to provide regrowth of mold…organisms.

HOMEOWNERS INSURANCE LITIGATION & CONSTRUCTION DEFECT LITIGATION

In the courtrooms, homeowners, renters and office workers are squaring off against builders, contractors and insurance companies in an attempt to assign blame to a problem that can cost tens, if not hundreds of thousands of dollars per building to repair. In some cases, the costs can reach into the millions and may exceed the value of the buildings themselves. Mold is being compared to asbestos in terms of abatement and remediation costs. The big difference between the asbestos issue and the mold issue is the lack of scientific knowledge about the health effects, if any, of mold exposure.

In addition there is no way to determine when people should abandon a mold-contaminated building. Presently, these decisions are being made by many unlicensed mold “experts” and remediators.

Insurance companies are arguing that the civil justice system is being abused and many claims distorted with the numerous mold lawsuits that are being filed. In the process, they are planting the seed that, if current trends are not abated, insurance products and services will become more costly, or even unavailable, to those who need them.

It is my opinion, however, that the insurance industry refuses to acknowledge that the manner in which they have been handling homeowner mold claims has contributed in a big way to the increasing number of mold lawsuits and large dollar settlements and verdicts. While the plaintiff lawyers are having success asserting large personal injury type damages without focusing on the scientific issues, the insurance companies involved are making it easier to prevail as they are too often failing to promptly pay for or adequately repair a mold infestation, even though required under the terms of the policies they issue. They are also too quick to blame builders and contractors for faulty building construction when, in fact, it is a maintenance or repair issue or simply an occurrence of nature.

The increased filing of lawsuits has been influenced significantly by a June 2001 jury verdict in the Melinda Ballard case in Austin, TX, which many of you have either read or heard about. In that case, the Ballard family was awarded $32.1 million on the mold claims they asserted against their homeowners' insurance company. The $32.1 million award represents $6.2 million for replacement of the home and contents, $5.0 million for mental anguish, $12.0 million in punitive damages, and $8.9 million for legal fees. Because of what the trial judge viewed as lack of credible scientific evidence linking their health-related claims to mold, the Ballard family and

their attorneys were not able to present their claims of personal injuries to the jury. Imagine the dollar amount of the verdict if they were able to submit such evidence!

Fred Hagans, the Houston, TX plaintiff lawyer who successfully tried the Ballard case has publicly urged that his success was not necessarily due to the mold that clearly existed, but was due to the bad faith exhibited by the insurance company. While he can provide example after example of how the insurance company in that case essentially "worked over" the Ballard family, the media spin resulting from the case is all mold related and how the justice system erred awarding so much money over a single mold property damage case. And as we see so often, perception becomes reality—especially in the world of litigation.

If a homeowner has a covered loss, insurers are supposed to provide an estimate of the cost of repair or replacement, and make payments as outlined in the homeowner's policy. An investigation of the claim may require calling upon experts to determine the cause, origin and toxicity of the mold. They may also be asked to recommend the appropriate repair method. Each claim should be handled according to its own unique facts and the terms and provisions of the insurance policy. If a covered mold loss makes a dwelling uninhabitable, or if an extended loss investigation and evaluation is required, additional living expenses should be provided to the resident as outlined in the insurance policy.

Not only has the Ballard case set off a flurry of litigation against homeowner insurance companies, suits are being filed against the builders and subcontractors responsible for the defect that allegedly results in the water intrusion or penetration leading to the mold claim in the first place. Lawyers have also gotten quite creative in this process. They may first sue the homeowner's insurance company and obtain a sizable settlement. As part of the settlement they may obtain an assignment of the homeowner insurance company's claims against the builder or contractor actually responsible for the defect(s) that gave rise to the mold—essentially two swings, at different targets, for the same recovery!

Mold Related Claims Filed/Pending Across the United States

Moldupdate.com, a web site hosted by the insurance industry, reports on the many large mold related claims that have been filed and are pending across the United States. Below I have listed a few of the cases cited to give you a flavor of the kinds and types of construction defect claims that are being filed over mold.

Spectrum Community Association v. Bristol House Partnership
A homeowners association sued their condominium project developer and contractor alleging that construction defects caused the growth of toxic mold in walls and ceilings of their housing units. The homeowners claim that exposure to mold also resulted in a variety of adverse health effects experienced by the homeowners.

McCullogh v. USC Real Estate Development Corp.
Another condominium, this time in California, sued the developers, contractors and property

manager for construction defects that they allege were responsible for toxic mold that caused personal injuries and property damage.

Erin Brockovich v. Robert Selleck
According to a Sacramento news article, Erin Brockovich filed a personal injury/construction defect complaint against the former owner of her home and the builder, alleging that each had a role in causing water intrusion that led to the growth of mold. Brockovich alleges that she and members of her family have suffered adverse health effects from exposure to the mold.

Club at Wood Ranch v. Roberts Group
A homeowners group sued builders and contractors, alleging problems due to toxic mold. The group settled for $1.3 million.

O'Hara v. Stangland
A Eugene, Oregon family sued their general contractor and designer for $3.5 million, alleging that faulty construction led to the growth of mold in their home and subsequent adverse health effects. Shortly before the start of the trial, the contractor reached an undisclosed cash settlement paid by its insurance company.

Kent. J. Pagel is the president and senior shareholder of Pagel, Davis & Hill, a Professional Corporation, and serves as outside national counsel for WTCA. Be sure to pick up the June/July issue of SBC Magazine for Part 2 of Kent Pagel's "Keeping an Eye on Mold" series.

SBC HOME PAGE

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