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RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

Mold is a Four-Letter Word

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It seems you can't open a trade publication or industry Web site these days without reading a horror story about toxic mold. The recent rash of litigation involving this lowly life form is certainly enough to scare the socks off of any design professional:

- Farmer's Insurance Group paid a \$32 million dollar judgment to a Houston-area homeowner who claimed her insurance company failed to identify and remedy a mold problem in her home.
- Celebrity Ed McMahon filed a \$20 million lawsuit after mold caused by a water pipe leak allegedly killed his dog and made he and his wife ill.
- Erin Brockovich, the activist portrayed on screen by Julia Roberts, filed a \$600,000 homeowner's claim and became an active crusader against the danger of "toxic mold."
- A \$400 million class-action lawsuit has been filed against the New Museum of Contemporary Art of New York alleging that several workers were exposed to mold and are suffering exposure-dependent immune dysfunction.
- The Hilton Hawaiian Village, one of the largest hotels in the world, closed down more than 450 guest rooms in the newest of its six towers and is spending \$10 million to eliminate potentially dangerous mold – even though not a single guest reported health problems.

In all, The Insurance Information Institute (I.I.I.) estimated that mold claims cost insurance companies more than \$1.2 billion in 2001 – and that figure has been rising rapidly. The I.I.I. claims that 10,000 mold-related lawsuits were pending in 2002, representing a 300% increase over 1999 numbers. And 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 for failing to incorporate mold prevention into their designs or failing to identify the presence of mold during renovation or construction.

What Is All the Fuss About?

Obviously, mold is nothing new. The Centers for Disease Control (CDC) estimates that there are up to 300,000 species of mold and they exist virtually everywhere in North America. A type of 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 or buildings can cause serious human health problems. According to the CDC, most documented cases of such health problems involve people who ate moldy food. Other studies have concluded that there is no evidence that toxic 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 more serious health conditions such as asthma and sinus infections. And individuals with compromised immune systems are particularly susceptible to lung infections that can be caused by inhaling mold spores.

So why is mold, which has been around throughout history, 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 the \$32 million jury award in Texas and the celebrity cases of Ed McMahon and Erin Brockovich. Mold is already being called the "next asbestos" in some legal circles, with the favorite slogan of many plaintiff attorneys now being "mold is gold." Indeed, there is money to be made from mold and cottage industries have already sprung up surrounding mold litigation. Testing, inspection and extraction has become big business, as have industrial hygienists and other mold consultant services.

Designers will also point to building owners as a source of the problem. Older buildings with leaky plumbing or poorly inspected and maintained HVAC systems are major contributors to the problem. Ask any design firm that has undertaken major renovation projects and they will likely have some horror stories regarding the black slime they have discovered under floorboards and inside walls. Another major culprit, say designers, are contractors who use cheap, cost-cutting 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 point to the modern day design and construction industry as the cause. The advent of so-called "airtight" buildings that 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, lawyers say, are designers who specify building materials, such as paper-covered drywall and certain adhesives, that provide an excellent breeding ground 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, the fact is that mold now presents a significant liability concern for design professionals. It is a highly unsteady area where designers will not find a lot of guidance regarding standards, allowable limits of mold, or insurability.

Currently, there are no exposure standards regarding mold and related toxins. In response to the recent spate of claims, however, some states are beginning to address this issue. California, for example, recently passed the Toxic Mold Protection Act with directives to set indoor mold exposure limits and establish standards for detection and removal. We'll now have to wait and see how legislative bodies react to the current litigation trends and whether workable guidelines can be established.

A major concern for design firms is that mold-related problems frequently involve construction defect claims that evolve into class-action lawsuits alleging personal injury due to long-term exposure to hidden mold. Often, statutes of limitation do not apply to these bodily injury claims. What's more, these 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.

And 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 general contractors' insurance policies. State departments of insurance have received hundreds of filings from insurance companies seeking to limit or exclude mold claims. 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.

To date, we have yet to see a professional liability policy that includes a blanket mold exclusion. However, insurers are considering such exclusions and applying them to specific circumstances. If your professional liability policy is the only policy covering a problem building that doesn't have a mold exclusion, the odds that the plaintiff's lawyer will file a claim against you dramatically increase.

Recommended Actions

Designing a mold-proof building is impossible. However, there are steps that design professionals can take to help avoid extensive mold problems and thereby reduce the chances of expensive claims. Following are some helpful loss prevention ideas:

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 will be liable for such problems should tenants, clients, customers or other third

parties allege that they have suffered bodily injury due to mold.

Know your locale. Although the \$32 million dollar claim near Houston got the biggest headlines, mold is not a problem restricted to hot, humid climates like the Gulf Coast and the Southeastern United States. British Columbia, for example, recently 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 state. 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.

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 HVAC and humidity-control systems. Ensure there is proper ventilation, including adequate crawl spaces, exhaust fans and dehumidifiers. Specify leak-proof window and door installations and mold-resistant materials. Ensure proper drainage and runoff controls so water doesn't collect underneath structures. Provide complete details for flashings. If the owner refuses your recommended mold-control items, document that fact in your contract or project files.

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.

Hold regular meetings during construction. In your working agreement, call for regular inspection, testing and disclosure for existing mold as

well as 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.

Provide maintenance guidelines. Require that the contractor or manufacturer provide equipment maintenance programs for HVAC and other humidity-control systems. Call upon the building owner or manager to 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/.

Check your insurance coverage. Ask your insurance broker to check for mold exclusions on any of your policies.

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.