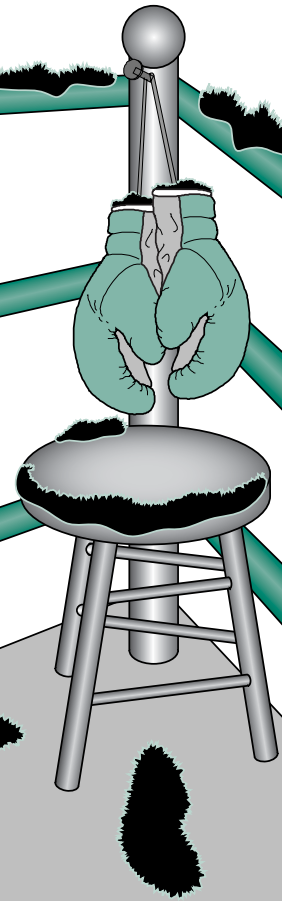


AND IN THIS CORNER — MOLD



By Brad E. Brewer

I. MOLD PROBLEMS

Mold is an unusual problem because it can occur under so many different circumstances. A small amount of mold can result in extensive property damage, extra expense, and possibly bodily injury. The effects of mold look and sound like a malingerer's complaint, but science has not precluded the possibility that serious health problems can arise from exposure to concentrated levels of certain types of mold. The issue is being smeared over every media outlet, from the most respected to the most dishonored.

II. THE TYPICAL MOLD SCENARIO

First, there is some type of water intrusion, whether it be by plumbing leaks, a construction defect, or the extinguishing of fire. Next, there is some type of adjustment when a company prepares an estimate for the loss. The building owner wants what appears to be a great deal more money than necessary, and the adjusting company and the building owner finally negotiate a compromise that is mutually unappealing to each party. Then, because all of the water damage is not found or addressed, mold begins to grow in the area that is not addressed. Additionally mold can then spread throughout a building as it "blooms" and settles in moist areas not related to the original incident.

The alleged mold loss process begins with the building owner finding blue/green, green/black, or black mold in the walls or in sub-flooring. The building owner then logs onto the Internet, punches in the word "mold," and reads horror stories of the effects of mold in buildings and the millions of dollars that

have been awarded by jurors when insurance companies have not adequately responded to mold problems.

The result: mold litigation.

III. RELEVANT LOSSES

There are two types of relevant losses. The first is a simple water damage loss. The second is a loss where mold is already present.

A. Water Intrusion Losses

There are infinite causes of water intrusion. Some of the more common are: 1) leaking roof; 2) sewer backup; 3) shower pan leakage; 4) plumbing leaks; 5) extinguishing of a fire; 6) weather; 7) defective construction; and 8) poor maintenance.

The initial steps in addressing water intrusion losses are:

1. Terminating the source of the moisture.
2. Immediate and thorough investigation by a competent contractor
3. Thorough cleaning and/or drying of the affected area.

Contractors should be careful to investigate all areas that could have been affected by the water event. This may include water that has moved underneath walls, soaked into wall studs, flooring, floor joists, pooled under the house, or saturated wall-board and insulation. Saving small amounts of time and/or money on the initial investigation may cause great pain and expense in the future.

During water intrusion evaluations, one should be energetic in taking notes and photographing the affected and unaffected

areas. Document all the areas investigated, showing that the investigation went well beyond what could be seen. It also makes sense to have very thorough notes on which areas need to be addressed or investigated further.

B. Mold Losses

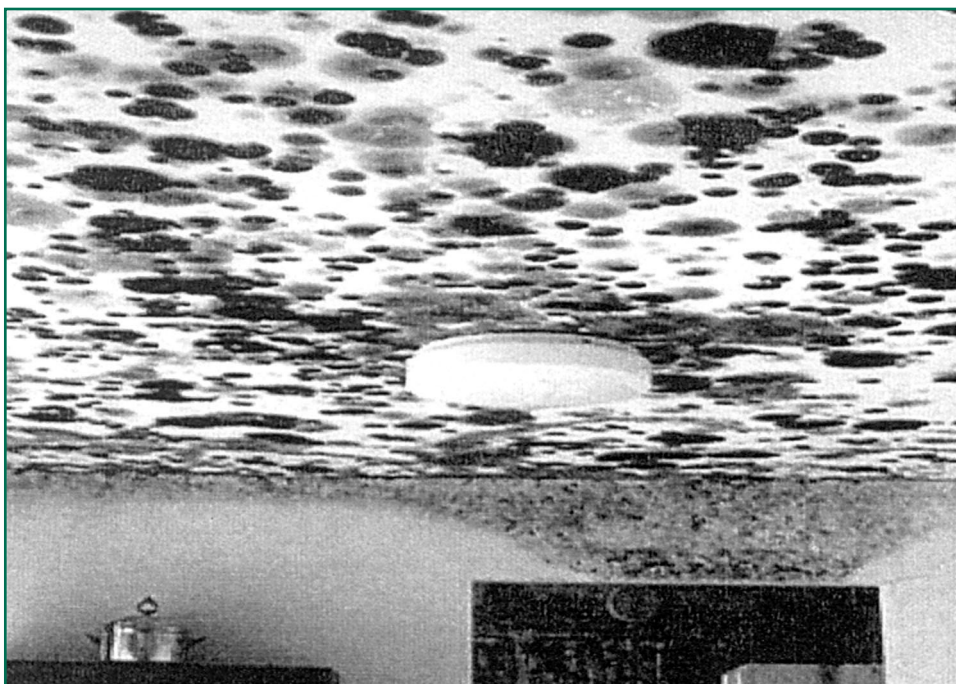
The second type of loss is where mold already exists. Finding the existence and extent of the water intrusion that precipitated the mold growth is probably the most important function of the initial investigation. If it appears mold is present, call a testing contractor who can: (1) confirm whether abnormal levels of mold are present; and (2) prepare a remediation plan if necessary.

If a biological expert and report are necessary, the report must document the concentration, the type, and the current stage of the mold. These experts customarily are also responsible for the preparation of a mold remediation plan. Such experts (CIH or microbiologists) may also be valuable for opinions on the possible causes of the moisture prompting the mold. The size of the loss may warrant inspections by construction and/or HVAC experts to verify the causes of the moisture necessary for mold growth. Consider testing cloth furniture and clothing immediately.

It is important to find mold experts who have some sense of reason when it comes to mold remediation. This type of reasoning is most valuable in the initial testing/remedial planning expert since he or she controls the overall response. An expert who is overly interested in an inexpensive fix may be more expensive than someone who will panic and tear the building down.

IV. IDENTITY OF QUALIFIED CONTRACTORS

Depending on recognized names in the steam cleaning business probably is not a good plan. The best way to qualify mold remediation contractors is to seek help from mold investigation experts. Here are some guidelines for someone hiring remediation contractors:



Mold has taken over the ceiling and walls of this room, someone will be blamed.

Qualifications

1. Obtain a statement of qualifications.
2. Obtain a list of previous projects and the corresponding clients.
3. Request a certificate of insurance.
4. Inquire as to certification of workers and the company. There are numerous organizations in the industry that certify professionals, such as The Institute of Inspection, Cleaning, and Restoration Certification (www.iicrc.org). Research the certification and the certifying body.
5. Inquire which other companies the contractor is working for and obtain contacts at those companies.

Procedures

6. Inquire about the company's approach to inspection of water losses and mold contamination claims in order to confirm the viability of the biological expert's remedial plan.
7. Ask about the types of containment procedures/guidelines that are in place.
8. Inquire about the company's philosophy and approach to source control.
9. Inquire how the company will assure there will not be a reoccurrence of mold.

Equipment/materials

10. Determine which instruments are used to evaluate or monitor water damage.
11. Ask the company to describe the performance capabilities of the equipment being recommended.
12. Discuss how the restoration program incorporates available resources, such as existing HVAC systems.
13. Obtain lists of which chemicals will be used on the project.
14. Obtain MSDS material safety data sheets for all chemicals to be used on the project.

Communication/responsiveness

15. Ask how progress of the contractor's work will be communicated to the building owner and the adjuster.
16. Inquire which documentation is routinely maintained and provided to property owners and insurance carriers.

It seems that every contractor who owns a van and a carpet cleaner thinks he is a mold remediation expert. It is imperative that his credentials, experience, and knowledge be questioned before he can be relied upon.

V. COMMUNICATION WITH BUILDING OWNERS

Communication among the expert, the contractor, and the building owner is key to managing a serious mold investigation. Communication to the building owner as to what is found, the seriousness of the type of mold found, and which remediation steps will be taken is imperative. Contractors, as always, should be honest with their building owners. Mold can be very scary for building owners and for good reason. Ongoing, well written and informative reports to the building owner that are created with the help of the expert will go a long way toward maintaining control in these cases.

VI. TEXAS LAW ON INSURANCE COVERAGE FOR MOLD PROBLEMS

While this writer is most familiar with Texas, laws and cases in one state are often used as precedents or cited in other states.

There is very little case law in Texas on insurance coverage for mold claims outside of the homeowner's context. Whether mold is covered under a Texas homeowner's policy (Form B) became a little more interesting after the Dallas Court of Appeals issued *Home Insurance Co. v. McClain*, 2000 WL144115 (Tex. App – Dallas 2000) and the Austin Court of Appeals issued *Harrison v. USAA Ins. Co.*, 2001 WL 391539 (Tex. App – Austin 2001). As these two cases point out, the most fertile area for controversy is the ensuing loss provision found in most "mold exclusions" contained in property or first party policies. A quick look at the terms of a standard Texas homeowner's policy is necessary for the discussion.

A. Granting Language

HOB Form B insures "against all risks of physical loss to the property" that are not excluded.

B. The Exclusion

The relevant exclusion found in the Exclusions section of the policy is section (f), which states that:

(f) We do not cover loss caused by:

1. Wear and tear, deterioration, or loss caused by any quality in property that causes it to damage or destroy itself.
2. Rust, rot, mold, or other fungi.
3. Dampness of atmosphere, extremes of temperature.
4. Contamination.
5. Rats, mice, termites, moths, or other insects.

We do cover ensuing loss caused by collapse of the building or any part of the building, water damage, or breakage of glass which is part of the building if the loss would otherwise be covered under this policy.

C. The Ensnuing Loss Provision

The paragraph shown above (that immediately follows the enumerated list of causes of loss not covered in that section) is the "ensuing loss provision," and is the subject of great disagreement.

Texas case law has defined "ensuing loss" to mean a "loss which follows as a consequence of some preceding event or circumstance." *McKool v. Reliance Ins. Co.* 386 S.W.2d 344, 345 (Tex. App – Dallas, 1965, writ dismissed). The issues relating to this provision will be explored below.



Mold permeates the ceiling, walls, and floor of this room. Can it be cleaned, and who is going to pay?

1. *The majority view in Texas on the application of the ensuing loss provision.*

Texas Courts have held that for the ensuing loss provision to provide coverage, the insured's loss must be the result of water damage caused by the uncovered losses enumerated in subsection (f).

It appears that the first time this issue was ruled upon in a mold setting was in *Aetna Casualty Insurety Co. v. Yates*, 344 F.2d 939 (5th Cir. [Tex] 1965). *Yates* is consistent with the idea that the ensuing loss must be caused by water damage. The analysis seems to track the majority analysis, despite a few sentences in the opinion that make the court's logic questionable. The facts in *Yates* were that the insured's flooring rotted because the air trapped in the crawl space under the flooring was constantly cooled by their air conditioning system, which caused condensate to form on the floor materials.

The plaintiffs argued that the damage was really water damage, and not "rot." The court stated that "[w]e do not think that a single phenomenon that is clearly an excluded risk under the policy [rot] was meant to become comprehensible because in a philosophical sense it can also be classified as water damage."

This answered the question of whether "rot" (and presumably mold) was to be considered water damage. But it did not address the fact that the water damage needed to follow or ensue from one of the excluded causes of loss enumerated in the exclusion.

The court in *Daniell vs. Fire Ins. Exchange*, 1995 WL 612405 (Tex. App. – San Antonio 1995) puts a fine point on the issue. In the Daniel case, water found its way between aluminum siding and wood siding, eventually causing the wood siding to rot. The court held that since the Plaintiffs pleaded that the rot was caused by water damage, and not that the loss was water damage caused by (and thereby after) rot, there was no coverage. *Id.* at *2.

The same reading of the ensuing loss provision was last announced in *Harrison v. USAA Ins. Co.*, 2001 WL 391539 (Tex. App. – Austin 2001). The loss in that case was that the wood around the insured's bathtub was rotted. The court pointed out that the rot followed the water damage, which is the reverse of the causation required by the ensuing loss provision. *Id.* at *2. "In other words, the ensuing loss provision covers water damage that results from, rather than causes, rotting." *Id.* citing *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138, 139 (Tex. Civ. App. – San Antonio 1975, writ ref'd.).

2. The minority view in Texas on the ensuing loss provision.

The Dallas Court of Appeals had issued earlier rulings in *McKool and Merrimack Mutual Fire Ins. Co. v. McCaffree*, 486 S.W.2d 616 (Tex. Civ. App. – Dallas 1972) consistent with the majority position just discussed. The court appears to have abandoned consistency in *Home Insurance Co. v. McClain*, 2000 WL144115 (Tex. App – Dallas 2000).

In *McClain*, the insured's roof leaked, causing framing members to become wet and the pooling of water in the crawl space under the house. The mold exclusion and the ensuing loss provision were the policy terms at issue.

The carrier argued what seemed to be the holdings in *McKool and McCaffree . . . i.e.*, "the ensuing loss exception covers only water damage which (sic) follows or results from mold or fungus damage." *McClain*, 2000 WL 144115 at 1. The seemingly incongruent result of the *McClain* case is foreshadowed by the second paragraph of the opinion where the court states:

"Home ignores that the ensuing loss provision is not limited by the mold and fungi exclusion and, although the water damage was not the result of the mold and fungi, it was the result of the defective and deteriorated roof. Thus, the application of the mold and fungi exclusion is dependent on the application of the ensuing loss provision."

In other words, the court seems to be saying that the ensuing loss provision is not giving back coverage taken away by the mold exclusion, but is actually an oddly placed granting provision for coverage for water damage. The court ignores the physical placement of the ensuing loss provision.

For the first time in Texas, the *McClain* court determines that mold and fungi are the ensuing loss caused by water damage. This can be seen in the court's description that to "be an ensuing loss caused by water damage, the mold and fungi would necessarily have to follow or come afterward as a consequence of the water damage." *Id.* at 3. The *McClain* Court held that "the water from the leaking roof pooling in the crawl spaces caused the

mold and fungi." *McClain*, 2000 WL 144115 at 1.

So was the water damage from the pooling of water? Is the moist environment (air or framing members) what caused the mold? All mold requires a moist environment. Therefore, it seems the *McClain* court has interpreted the ensuing loss provision to swallow the mold exclusion completely.

The *McClain* Court acknowledges *McCaffree* and *McKool*, while ignoring the holdings. It is not possible to distinguish the *McClain* case from the *McCaffree* case, an earlier opinion from this same court holding that a claim arising from wood rot around a shower pan was caused by fungi and not water damage and, therefore, not covered. *McCaffree*, 486 S.W.2d at 619. The Court tries to explain the lack of conflict in the holdings by stating that the facts in *McCaffree* did not support the conclusion that the fungi were caused by water damage. That is a hard argument or justification to believe.

I agree with the *McClain* court that there could be a set of facts in which mold-damaged property was covered, but the facts in *McClain* do not support that, in my opinion.

VII. UNANSWERED QUESTIONS

There are several unanswered issues. First, is mold "water damage"? It is not clear whether the *McClain* court believes it is. The Fifth Circuit in *Yates* says it is not. If it is, the mold exclusion becomes even more confusing.

Second, is the mere existence of mold "physical loss or damage"? The mold exclusion in the HOB defines mold or fungus as an excluded cause of loss, a destructive force like rot and rust, and does not exclude mold as a damage in itself. Surely nobody believes that the existence of a small amount of rust on a pipe is a loss covered under a property policy. Why should the existence of mold be covered?

Third, does "ensuing loss" mean the water damage and all damage that is in the unbroken chain of causation from the water damage, including mold? The *McClain* Court seems to make this conclusion.

Fourth, is the ensuing loss provision an exception to the exclusion, or is it new granting language unlimited by the enumerated excluded causes of loss directly above it? Why would the underwriters place the same provision in more than one exclusion if it is not directly related only to the subject matter of the exclusion?

Fifth, if covered water damage is followed by mold, is the mold covered? This seems to be the position of the Texas Department of Insurance as stated in the recently filed Petition for Adoption of Amendatory Mandatory Endorsements, Mandatory Offer Endorsements, and Amendments to the Texas Personal Lines Manual Rules to Modify Coverage for Mold and other Fungi, and Amendments to the Texas Statistical Plan for Residential Risks.

VIII. CONCLUSION

Mold is just one more reason to make sure property investigations are very thorough and well documented. Holding oneself as a mold expert if he or she is not is foolish. In a report to the owner, accurately: 1) state a lack of expertise concerning mold; 2) note that mold could be present at the site; and 3) if

mold is present in the building, advise the owner to seek the services of a qualified mold expert.

Mold losses are very common and will continue to be a problem. Unlike asbestos, the world will not run out of buildings that contain mold. The insurance industry and the courts are currently struggling with issues concerning insurance coverage, so there will be a great deal of litigation involving insurance coverage for mold. ■

Footnotes

¹ There are opinions out there that once furniture is contaminated, it is not possible to restore it. I doubt this is true.

² Three non-mold cases are also instructive on the proper application of the same ensuing loss provision found in other exclusions in the policy.

Sources

1. *McKool v. Reliance Ins. Co.*, 386 S.W.2d 344 (Tex.Civ. App. 1965) Damage to pool caused by excluded condition of "extremes of temperature." If water had entered the cracks caused by extreme temperature and caused damage, it would be covered.
2. *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138 (Tex. App. – San Antonio, 1975, writ granted, order set aside, April 21, 1976, writ ref'd, April 21, 1976 on other issues). Ensuing loss provision did not provide coverage because the structural damage (excluded and enumerated event) was caused by the water damage, not the opposite.
3. *Jiminez v. State Farm Lloyds*, 968 F. Supp. 330 (W.D. Tex. 1997) Similar to Lambros.

ABOUT THE AUTHOR

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