

Mold and the Law

By Gerry D. Abel Lozano

If you have not heard about "toxic mold," "black mold," or "stachybotrys," then you have not watched TV, seen newspapers, or read magazines in the last two years. Frequent news about "mold" has increased public awareness about the economic and health consequences of allowing mold to grow in indoor environments. "Mold" experts and lawyers are struggling with determining the "cause" of the mold growth, the extent of damage, the cost of "correct" repairs, and who should pay for the economic damages, while doctors and lawyers are trying to determine causes of illnesses reported by occupants of moldy buildings.

Although we are living in the 21st century in the most technologically advanced nation in the history of man, mother nature's "mold" has everyone in a panic, abandoning mansions, high-rise condominiums, schools, courthouses, and office buildings, while experts decide what to do and who should pay. This challenge has created both a business "opportunity" and unexpected devastation for both businesses and individuals.

This paper is written to discuss how water damage and ensuing mold contamination have and will create liability for the roofing industry and to provide general guidance and information for roofing professionals evaluating mold claims.

To begin this discussion, the writer would like to make a few general statements about "mold" claims. Mold is just one possible cause of indoor air complaints. To evaluate an indoor air space strictly for mold can result in the expenditure of large sums of



Obvious damage has been done by moisture and mold in this gymnasium.

money that do not solve the problem. The best reference for evaluating indoor air problems was published by the EPA in 1991, updated in 1998, and is entitled, *Building Air Quality: A Guide for Building Owners and Facility Managers*. This is a practical guide that all who evaluate indoor air quality complaints should review. For example, the lack of a proper amount of ventilation or mix of outside air in a facility can cause occupant discomfort. This situation could then become worse if the pest control practice in the building further contaminates the indoor air. The whole picture must be reviewed to determine if mold is the problem, one of several problems, or merely a small maintenance or repair issue.

If there are occupant complaints and visible mold, the logical initial approach is to determine the cause of the mold. Mold cannot thrive without moisture. Mold is everywhere in the environment; however, the goal is to keep it from growing in indoor spaces. Therefore, the investigator first must find the source of the moisture. Is the HVAC system properly sized and designed for the space? If not, the humidity levels may be too high, and moisture will form on interior surfaces and provide an opportunity for mold to grow.

The more likely scenario is that there has been a water leak into the living space, the building envelope, or the interstitial building spaces. If the water does not dry out and leave the building through drains, weepholes, or other escape routes, then it will wet the building materials around it and allow the growth of mold. Many building materials used today are like sponges, and they absorb and retain moisture. Simultaneously, they contain materials, such as cellulose, that provide great food for the mold. All mold needs to grow is food, moisture, and the right temperature. Molds can grow in a wide range of temperatures; mold problems exist in Canada and Florida. If you don't believe this is true, just surf the Internet, and it will become immediately apparent that Canada, as well as numerous areas in the U.S., are dealing with mold-contaminated buildings.

Also, while most reported information about mold claims discusses how much "mold" or "black mold" or "stachybotrys" has been discovered in a building, this is just part of the evaluation that should be done. Where there is water damage, bacterial contamination may also be present, and it can be as harmful as mold if left to grow and prosper. A microbial examination will, therefore, test for bacteria and mold. This information should be known in order to prepare an effective remediation plan.

Once the cause of the water intrusion has been discovered (such as leaking pipes, leaking roofs, foundation seepage, or site drainage), a remediation plan must be written to correct the cause. After the cause has been established, the contaminated and/or deteriorated building materials must be cleaned and/or replaced, and the rest of the building that has been contaminated by the circulation of the mold throughout the air must be cleaned in accordance with recognized guidelines. The accepted guidelines currently available as of December 2001 are:

New York City Department of Health: *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*. This was first issued in May 1993 and updated in November 2000.

EPA's *Mold Remediation in Schools and Commercial Buildings* – This was published in March 2001 and contains numerous resources and checklists.

Institute of Inspection, Cleaning, Restoration and Certification's *IICRC S500 Standard and Reference Guide for Professional Water Damage Restoration*, Second Edition, published in 1999. The first edition was published in 1994.

All work should be supervised by the environmental specialist who wrote the remediation plan. Supervision ensures that (1) all specified work is done correctly using the proper personal protective equipment; (2) modifications to the plan are done as needed once tear down has begun and hidden areas can be clearly seen and inspected; and (3) clearance testing is done before areas are built back and closed.

With this background of the general approach to evaluation of indoor air and mold problems, we will now discuss the potential for roofing professionals to be defendants in mold cases. According to the Council of Better Business Bureaus, building-related complaints for 2000 were categorized into the following areas:

Roof/Gutter	4,093
Homebuilder	4,071
Home Remodeler	3,721
Plumbing	3,251
Swimming Pool	2,598
HVAC	2,244
Painting	1,466
Electrical	909
Concrete	592

As can be seen from this survey, roof and gutter complaints were at the top of the list. The California Department of Real Estate recently reported that construction defect complaints were divided as follows:

Plumbing and drainage leaks	21%
Building structure (foundation, walls, roofing, floors)	19%
Site development	17%
Roof defects	12%
Electrical, HVAC	10%
Miscellaneous	21%

According to this survey, roofing-related issues were reported in two categories. As would be expected, the exact cause of a building problem is not always clearly reported. Consequently, there could be other roof complaints that were not specifically reported. In any case, it is clear that the roofing industry is a prime target in construction defect cases, especially those involving water intrusion and ensuing mold and bacterial contamination.

Additionally, the EPA has estimated that 50% of all homes have the necessary moisture present to grow mold. Based upon this, it is reasonable to estimate that a significant percentage of non-residential buildings has similar conditions. A 1990 report by the American Lung Association and the U.S. Consumer Product Safety Commission found that one third to one half of all structures have damp conditions sufficient for mold to grow.

Once these problems are identified and the costs of repairs are determined, the damaged parties look around for who will pay. This is when roofers and roof consultants can get involved with their lawyers to either assert claims or defend against claims. Recent cases that involved roofing-related issues and their resulting jury verdicts or settlement amounts are listed below to give an idea of what has occurred:

1. 1996: \$2.4 million settlement, *Candelerio Maintenance Corp. v. Century American Corp.*, Case No. 722599, Orange County, California (leaking roofs in condominiums).
2. 1995: \$13.3 million verdict, *City Scene Owners Assoc. vs. Brehm Communities*, Case No. 655288, California (334 condominium projects with leaking roofs).
3. 1996: Confidential \$584,500 settlement in California by homeowner against builder due to several successive roof leaks.
4. 1997: Confidential \$1.3 million settlement of Malibu home owner due in part to leaky roof.
5. 1998: Confidential \$900,000 settlement in custom home where a ceiling caved in on a brand new home in California.
6. 1988: \$30,000 verdict in Orange County, California home where roof leaked. *Holbrook, et al v. Barrett Construction Co.*
7. 1999: \$484,910 verdict in California, *Jim Francis v. W.L. Connale Roofing* (construction defects in 31 single family homes with leaky roofs).
8. 1998: Confidential \$1.5 million settlement in California for tenant when rental property had roof defects involv-

ing the surfacing and storm water collection channel.

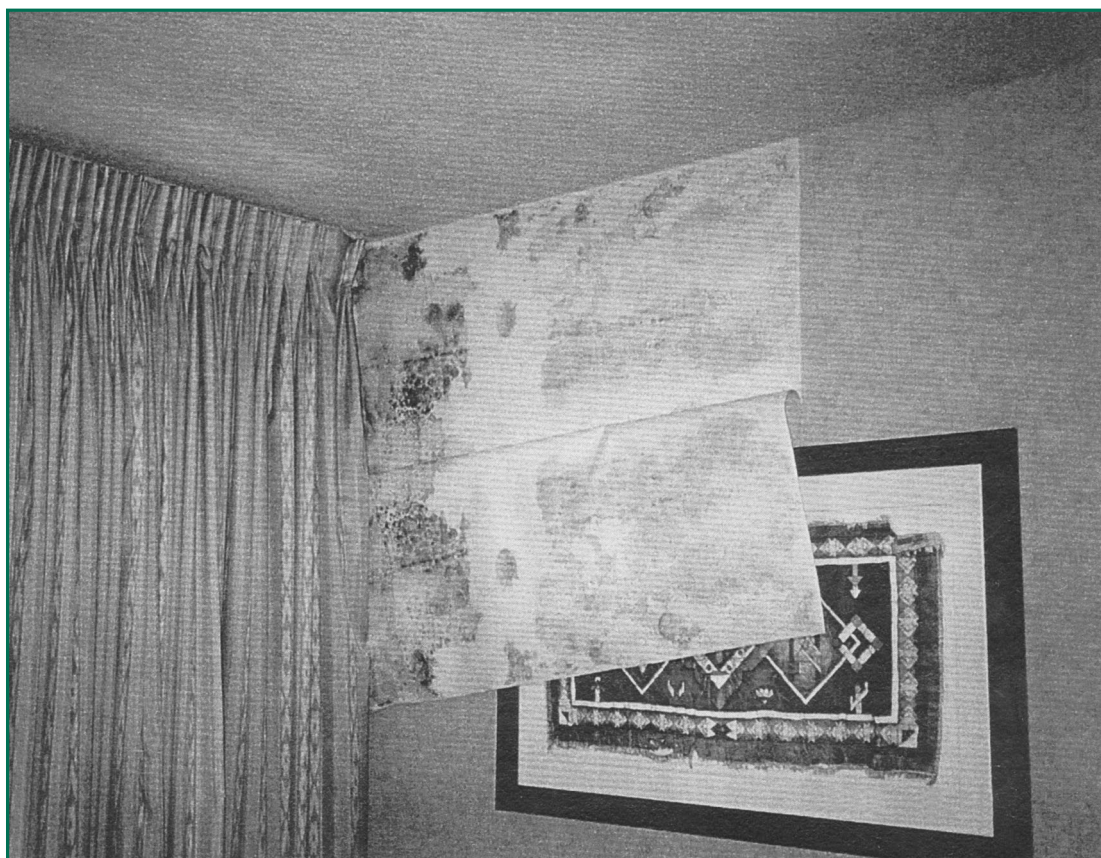
9. 1995: \$3.1 million verdict, *Las Costa Alta Community Associates v. Newport Pacific Development Corp. in California* (defective construction and leaky roofs).
10. 1998: \$495,000 verdict in California condominium unit; *Mary Jamison Moller v. The Atherton Homeowners Assoc.* (defective construction, water coming in through the roof).
11. 2001: \$2.2 million settlement at condominium in California; *Terra Vista I Community Assoc. v. Parder Construction Co.* (defective construction, roof leaks).

These and other cases alleged, in part, that improperly-built roofs allowed water into the roof decking and interior walls cavities and caused building deterioration and mold growth. Such cases allege defects in the following roof areas:

- Roof drains
- Roof vents
- Chimney caps
- Roof flashings
- Roof-mounted A/C units
- Roof sealants, coatings, paint

Legal Claims

There are no federal or state standards for permissible amounts of mold in indoor environments, for identification of mold, or for safe exposure limits. Therefore, mold claims caused by roofing defects resulting in property and personal injury damages will be based upon legal duties that are created by state and federal statutes, contracts between parties, and/or court decisions, which are known as the "common law."



Wallpaper peeled from this wall to show underlying mold colonies.

Statutory Law

Numerous federal statutes govern federal government construction projects. Such statutes are incorporated into the federal government contract. Additionally, some federal statutes, such as the "Americans with Disability Act" (ADA) are being used by plaintiffs to assert claims. For example, employees who claim illness and other damages caused by a mold-contaminated work environment are asserting claims against their employers under this federal statute. The first trial of an ADA claim did not result in a verdict of liability against the employer; however, there are many more such claims now, and their results are pending.

Each state has its own statutes that create rights and remedies for damaged parties. For example, California has a construction defect statute, and it also has a 10-year statute of limitations on construction defect claims. Many states have statutes of repose that specify time limits for filing claims against builders and/or manufacturers.

Usually, states and cities have adopted specific building codes and have created ordinances that apply to the roofing trade. Violations of these codes and ordinances may create a basis for legal claims.

Several states have deceptive trade statutes that give consumers additional rights. In Texas, the law is called the "Texas Deceptive Trade Practice – Consumer Protection Act." Some states have statutes that govern how to divide responsibility for personal injury claims among several responsible parties, usually referred to as comparative negligence or contributory negligence statutes.

Most states have adopted the "Uniform Commercial Code" ("UCC") into their state statutes, and some parts of the UCC may support additional claims by aggrieved parties. State laws provide remedies for landlords and tenants. Claims such as wrongful eviction and constructive eviction are based upon such statutes. State worker's compensation statutes may be used by employees to assert mold-related illness claims against their employers. State statutes that prohibit the fraudulent transfer of real property can be the basis for claims by buyers of concealed, contaminated property.

On October 7, 2001, California's Governor Davis signed the Toxic Mold Protection Act (SB 732), which became effective January 1, 2002. This law requires: (1) the California Department of Health Services to establish permissible exposure limits (PELs) of mold; (2) requires disclosure in the sale and rental of property by an owner when mold has caused adverse health conditions; and (3) requires the licensing of persons involved in the investigation and abatement of mold. This bill requires DHS to report its progress in developing the PELs by July 1, 2003. Owners and landlords will be required to disclose the presence of excessive mold six months after the health department adopts standards.

Governor Davis signed another mold law, Public Health: Fungal Contamination in Indoor Environments (AB 284), which requires the California Health Department to establish a toxic surveillance and monitoring program, study the health effects of mold, and report its findings to the legislature by 2003.

At this time, California is the only state that has enacted mold-related laws.

Contract

When there is a contract, the parties may assert breach of contract claims and, possibly, fraud and misrepresentation claims. Also, where agreements contain express written warranties, parties may claim there has been a breach of these warranties or a failure to perform in accordance with the express warranties stated in the contract. The interpretation of contracts and enforcement of contract provisions is done by the courts of each state. These decisions fall under the next section, "common law."

Common Law — Court Decisions

The court decisions of each state establish rules of law regarding the rights and remedies for aggrieved parties, as well as defenses for defendants in addition to those allowed by the state statutes and private contracts between parties. Some of the claims usually asserted as common law claims in mold cases are negligence, gross negligence, negligence *per se*, breach of the implied warranty to construct and/or repair in a good and workmanlike manner, breach of the implied warranty of habitability, nuisance, intentional infliction of emotional distress, negligent infliction of emotional distress, strict product liability, professional malpractice (architects and engineers), and fraudulent concealment.

In June 2001, San Francisco, California enacted an ordinance declaring mold a nuisance under the state health code. Violations of ordinances create the basis for a negligence *per se* claim. The writer believes this to be the first state to have passed such an ordinance.

Damages

The types of damages that an aggrieved party may recover in a mold case include economic and personal injury damages. The economic or property damage aspect of these cases is familiar to anyone who has been involved with a roofing defect case. The only new angle to economic damages is determining the correct scope and cost of the mold remediation. In some cases, these estimates have exceeded the market value of the contaminated structure. With all the attention that "toxic mold" has received, companies performing mold remediation must observe "reasonable" industry standards to protect their workers and the occupants of buildings where remedial work is being done. The "mold remediation" protocol in both the NYC and EPA Guidelines, mentioned previously in this article, usually adds significant additional costs to the repair estimate.

The more unpredictable damages that the roofing industry may face are personal injury liability damages for construction defects that cause mold contamination. Each state has its own common law regarding the type of "expert" testimony and evidence that is required to prove such allegations; however, this is a moving target, since the science of these claims is relatively new.

For example, as far as this writer has been able to determine, the first scientific study of the relationship between indoor mold growth and human illness (or "sick building syndrome") that examined more than one structure was published in 1984 in a British medical journal. Articles in American journals addressing these issues were almost non-existent until the early 1990s, with an increasing number since 1997. Such articles include "Correlation Between the Prevalence of Certain Fungi and Sick Building Syndrome" in *Occupational Environmental Medicine*, Vol. 55 (1998), pp. 579-584, and "Continually Measured Fungal Profiles in Sick Building Syndrome" in *Current Microbiology*, Vol. 38 (1999), pp. 33-36.

While a Texas Court in May 2001 disallowed the expert medical testimony of personal injury claims to be considered by the jury in the *Ballard* case tried in Austin, Texas (the first mold trial in Texas), courts in California and Delaware have allowed such testimony and claims to go to the jury. This area must be carefully monitored, therefore, to keep up with the personal

injury damage exposure defendants may face in mold cases in different venues. ■

Conclusion

In conclusion, lawsuits and claims with mold allegations are an increasing source of potentially significant liability for the roofing industry that should be taken very seriously. They should be handled by experienced counsel with the help of appropriately credentialed experts who know how to thoroughly and correctly evaluate these claims.

ABOUT THE AUTHOR

Gerry Lozano is a litigation partner in the San Antonio, Texas office of Strasburger & Price, L.L.P., an established Texas law firm specializing in litigation. Ms. Lozano has been a trial attorney for over 20 years, and is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization. Her primary area of expertise has been with business and construction contract disputes. For the last six years, she has represented numerous businesses and governmental entities in cases involving indoor air quality and microbial (mold and bacteria) contamination. Ms. Lozano has spoken to various groups concerning these topics. Her pro-active approach focuses on a fact-intensive investigation of the construction, design, maintenance, and operation of buildings and their HVAC systems to determine how these factors affect indoor air quality and the corresponding rights and remedies of the various parties impacted by the contamination. Ms. Lozano may be reached at gerry.lozano@strasburger.com



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International Construction

The worldwide construction market declined from \$3.6 to \$3.4 trillion in 2000. The top 10 countries, ranked by total construction dollars in 2000, are listed below, and account for 72% of the world's market. The U.S. alone accounts for 24% of the total world market, at \$819.3 billion. Number two Japan spent \$617.9 billion. Canada fell from 10th to 11th. In 2000, the U.S. also exported \$4 billion in construction, engineering, architectural, and mining services.

Country

- | | |
|-------------------|-----------|
| 1. United States | 6. Brazil |
| 2. Japan | 7. France |
| 3. Germany | 8. Italy |
| 4. China | 9. Spain |
| 5. United Kingdom | 10. Korea |

—U.S. Markets Construction Update, FMI

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IRS Broadens Cash Accounting Threshold

On Dec. 10, the Internal Revenue Service announced a broad expansion of the cash method of accounting that puts an end to the sticky "cash versus accrual" accounting question that has plagued smaller companies over the last 10 years.

Under the new guidance, the IRS will allow most smaller service providers with annual revenues under \$10 million to be on the cash method of accounting rather than the accrual method. The cash method of accounting recognizes income and expenses when the cash is actually paid to the company or by the company. Prior to this, the IRS tax code allowed the cash method for businesses with average annual gross receipts of \$5 million or less, but largely ignored that exception, while aggressively seeking to force the accrual method on small companies by applying a test to determine whether the company maintained inventories. The new policy will not require inventory tests to be applied and will also increase the cash accounting "safe harbor" to \$10 million.

The revenue procedure is still in proposed form, but the IRS says businesses can rely on it for taxable years ending on or after December 31, 2001. A comment period is open until March 2, 2002.