

RISK MANAGERS AND RECOVERY OPPORTUNITIES IN MOLD LOSSES

For the past several years, risk managers and virtually everyone else actively involved in property insurance and other risk transfer mechanisms have been bombarded by articles, newsletters, seminars and conferences focusing on toxic mold. Mold and mold claims have been regularly trumpeted as “the next asbestos.” And, even as the discussion of the insurance and risk management considerations of 9/11 settle into a pattern of lawsuits, claims and counterclaims, mold issues still garner enormous attention.

Significant amounts of information have appeared in both the general press and in the insurance and claims press on those conditions that give rise to mold. All of us have been educated and now understand that mold organisms are virtually omnipresent and simply require a food source, a temperature of anywhere between 40 degrees and 100 degrees F, and moisture. Once mold begins growing, it can continue to grow undetected inside partitions, roofing systems, suspended ceilings, HVAC ducts and virtually every other building component. And, while most molds are relatively benign, a relatively small percentage are toxic to human beings giving rise to a wide variety of symptoms, typically akin to allergic reactions. Severe reactions are known to occur and, particularly, in newborns and infants, toxic mold is claimed to lead to serious health complications.

Risk managers of all types of commercial, industrial and residential properties have been sensitized to identify mold losses) notify their property insurers (depending upon the size of property deductibles), and then, to move ahead, with or without the property insurance carrier, towards remediation.

With the “hardening” of the insurance market over the past eighteen to twenty-four months, particularly in the year since September 11, 2001, most policyholders are utilizing increasingly larger property deductibles, frequently between \$100,000.00 and \$500,000.00.

Once a significant mold loss is reported to the risk manager, the risk manager will typically focus, understandably, on damage issues. The loss must be measured and quantified; repairs must be estimated; contractors must be contacted and bids solicited; and, in most instances, remediation steps then begin with an eye towards solving the problem.

When dealing with mold losses, a single critical step is regularly overlooked i.e. third party responsibility for the damages sustained. More and more frequently, situations are encountered where because of a significant deductible, the loss will be borne either entirely or principally by your company directly. In those instances, the failure to investigate, identify, pursue and collect recoveries from responsible third parties results in a direct financial loss to your business enterprise.

When considering third party liability arising from mold damage, it is essential to focus upon the single key factor typically giving rise to mold: moisture. As previously discussed, mold spores are present, on a continuous basis, in virtually every indoor environment. Similarly, food sources for mold are readily available as are the requisite temperatures of between 40 degrees and 100 degrees F, especially when dealing with indoor environments.

It is the addition of moisture that triggers the initial growth and then the spread of active mold. Accordingly, the prevention of mold in indoor areas hinges, almost entirely, upon controlling moisture. And, that control must be effective within all aspects of a structure: control moisture and you control mold.

The facilities manager and risk manager confronting mold growth typically focus upon fully identifying the scope of the problem for the purposes of remediation. However, in cases of

serious or pervasive mold growth requiring extensive or expensive mold remediation activities, the risk manager should also focus on understanding what external factors may have given rise to the mold condition.

Frequently, the acts and omissions of third parties are responsible for the appearance of mold, generally, as a result of allowing moisture into a structure. While it is impossible to accurately identify each and every circumstance by which third parties may cause the incursion of moisture and, thereafter, the development of mold, there are a series of typical scenarios.

These include:

1. With regard to new construction, a construction manager/general contractor is responsible to make certain that a building is erected consistent with all applicable drawings, specifications and plans and pursuant to applicable building codes. Because building materials frequently reside on a job site for days, weeks or even months before being incorporated into the structure, and because these building materials are thereby exposed to the elements, it is not unusual for damp or wet construction materials to find their way into a building. As a result, in the relatively early life of a structure, mold can appear and become a serious problem. Before the owner or developer accepts a new structure or an addition or extension to an existing structure, care should be taken to make certain that mold infestation and spread is not an ongoing process that will require remediation. Where identified, the building should not be formally accepted until such time as all remediation has been completed. In those instances where a structure is accepted by the owner/corporation, and there follows a significant mold infestation issue, the risk manager should see to it that the appropriate claims are made against the construction manager/general contractor so as to recover monies required for remediation.

2. Frequently, the risk manager will be employed by a corporation which enjoys either the status of a landlord or a tenant in a particular structure. In those instances where the

risk manager is employed by the landlord, he or she must be sensitive to the potential activities of the tenant which can give rise to mold infestation. Conversely, where the risk manager is employed by the tenant, he or she should be mindful of the acts and omissions of the landlord which similarly can give rise to mold infestation. Recovery opportunities necessarily will be dependent upon risk allocation under the lease agreement.

3. Heating, ventilating and air conditioning systems are prime sources of mold growth and propagation. To the extent that an outside HVAC maintenance contractor is actively involved in designing, installing or maintaining a structure's ventilation system, that contractor will be responsible for avoiding environmental conditions which can create an ambient atmosphere conducive to mold growth. Several typical areas in which improperly designed or maintained HVAC equipment maintenance can result in serious mold infestations include defective drip pans; improperly sized humidifiers and dehumidifiers; leaking cooling towers; and, all sorts of duct systems.

4. Plumbers, sheet metal workers and a wide variety of other tradesman working on-site can, through their negligent actions and omissions, give rise to a scenario where moisture is not properly removed from the building environment thereby providing the key element for the propagation of mold.

5. Architects and other design professionals also may be responsible for mold, should there be a failure to consider the local climate and weather conditions when selecting building materials and designing specifications for structure.

In each of the above scenarios, remediation of mold may fall within the deductible amounts of the applicable property insurance policy. Each such scenario will require the risk

manager, in addition to quantifying the loss, to investigate, identify and pursue claims to recover reimbursement from the responsible entity. These claims should be viewed as a property entitlement or an inchoate asset of the corporation. Only by vigorously pursuing such rights can the risk manager be satisfied that the company's rights have been fully protected and preserved.

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