

## **TOXIC MOLD AND CONSTRUCTION DEFECT LITIGATION DO THEY BELONG TOGETHER?**

The classic construction defect case is one in which a residential structure is leaking through the roof, doors and windows. The results of this leakage is deterioration of exterior structural framing and waterproofing paper, while the interior of the home suffers from consequential damages in the form of water stains or cracks in the sheetrock and other hard finishes. Over the years, this type of litigation has developed as a unique area of tort law. Along with this tort has developed a more recent companion claim — Toxic Mold. It makes perfect sense that the two types of claims fit together. With water intrusion comes rotted wood, soggy sheetrock and other such nasty conditions. Mold and mildew are almost always a contributing factor in the building's deterioration. However, it took some large jury verdicts in claims for toxic mold to make attorneys and consultants in construction defect litigation pay attention to the issue. The rest has been history.

With all the media attention focused on these issues, it is now common knowledge among consumers that there is such a thing as toxic mold and that its presence is dictated by the presence of moisture. But it has not been so obvious to litigation attorneys or the teams of forensic experts specializing in the construction defect field. Rather, the whole idea of toxic mold in the very buildings suffering from leaks has been seen rather as an unwelcome intrusion in cases that are already extremely complicated, both legally and factually. As a result, the industry has been reluctant to accept the view that Toxic Mold belongs in a construction defect case. However, media attention on the subject and the attention of courts and the legislature is forcing everyone practicing in the field of construction defect litigation to pay attention. More than anything else, however, jury verdicts are focusing attention on the issue.

Recent jury verdicts from around the country and the local counties of superior courts in California make it clear that there is a case to be made for toxic mold being harmful to occupants of residential structures. While anyone can be critical of a single jury verdict as being an aberration, one cannot ignore the now numerous verdicts that have occurred across the country. Certainly, attorneys and forensic consultants of building owners are doing their clients a disservice if they do not at least recommend testing be done where mold is present in the structure.

### **THE FACTUAL QUESTION — IS THERE TOXIC MOLD PRESENT IN MY BUILDING AND IF THERE IS, SO WHAT?**

Literature on the topic of toxic mold is replete with references to the fact that mold is everywhere, that fungi are the single largest living organism on the planet, and that, even as far back as the biblical book of Leviticus, there are warnings that molds can be harmful to humans. It is also well known for those who keep current on such issues that not all molds are considered "toxic," and that even those that are considered toxic to

humans, only have that effect when the spore count is at a minimum level. There are now fairly standardized tests which are capable of establishing the existence of various types of mold and the amount of that mold in the structure. There is even some consensus amongst experts in the field on the minimum amounts of mold that can cause an allergic reaction in people.

However, there is another level of questioning for the lawyer involved in a construction defect case with water intrusion and mold where the attorney represents the owner of the structure. Is the mold at issue the type which is generated or propagated only with moisture intrusion over time? Does the mold and fungi formation and propagation contribute to framing material, building paper, insulation paper, sheetrock and the like losing its structural integrity? Do the mold and fungi actually deteriorate or destroy interior finishes? Is the mold merely an exacerbation of the stains caused by water intrusion? Is the same mold a cause of allergic reactions in some people such that remediation is necessary, even if the people currently owning or living in the property are not suffering ill effects? Does the presence of a toxic mold, identified as capable of causing allergic reactions in humans and which requires disclosure under the new statutes, form the basis for a cause of action for diminution in value as an economic loss? If the answer to these questions is affirmative, then the mold which might otherwise be considered benign would be the type that would be causing damage sufficient to recover in a claim for construction defects.

The bottom line is that mold and fungi in structures which are also involved in a construction defect lawsuit can no longer just be ignored. Too much attention has been given to the topic and the forensic consultant or attorney may fail the client by not completing some threshold analysis of the issue, especially where molds have been seen or identified in the investigative process. Threshold analysis may consist of no more than testing tape lifts of molds observed on the surface of sheetrock or framing, although some might argue that a representative sample ought to be taken of spore counts through air sampling as well. In either case, once mold has been identified, one should be careful to analyze the situation carefully before rejecting the notion of testing for toxic molds.

**THE LEGAL QUESTION  
CAN I RECOVER DAMAGES FOR THE COST OF  
CLEANING UP THE MOLD FOUND IN MY BUILDING?**

The short answer to this question is, "Yes, but it depends." Mold propagation is a consequence of water intrusion. Water intrusion in a building is an unacceptable condition that is actionable in a court of law against the responsible parties. All damages that flow from an actionable loss are recoverable. However, recovering damages for mold propagation caused by water intrusion is only actionable for a limited amount of time and against certain individuals or entities.

### Common Law Theories

The common law theories of recovery, those theories derived from the development of case law both from custom and practice and prior court decisions, are Negligence, Strict Liability, Breach of Contract, Breach of Express and Implied Warranties. There are other theories of recovery, but these are the primary theories used by attorneys in lawsuits involving water intrusion and mold in structures. These theories are further categorized as tort and contract based. The tort theories of recovery are Negligence and Strict Liability. The contract theories of recovery are contract, and warranty based. These theories are also supported by certain statutes which derive from the legislative process. The most recent and relevant new statutes dealing with water intrusion and mold issues are "Senate Bill 800" and the "Ortiz Bill on Toxic Mold", respectively.

The common law theories based upon tort law provide that a person may recover for physical damage to property caused by a defective condition in a structure as long as the claim is brought timely. Absent physical damage to property, a person cannot recover for construction defects. The most recent case of Aas v. Superior Court decided in December 2000, by the California Supreme Court, clearly articulated that a construction defect must cause damage to another improvement before recovery can be made in tort. Thus, to recover for a defectively installed roof on a tort theory, the roof must leak and cause damage to some portion of the structure.

However, a person may recover damages for construction defects even where there has been no physical damage to property if that person had a contract for the purchase of the structure with the entity that built it. The law provides that a person may recover in contract to recover "the benefit of the bargain" of that purchase. One of the implied benefits of the bargain in the purchase of a structure is the implied condition that the building is constructed correctly, in accord with all building codes and industry standards. If the building does not meet those standards, an owner can recover damages for the cost of repairing the structure to make it conform to the applicable standards of construction.

Toxic mold in a structure surely belongs as part of a construction defect claim for all the reasons stated above. This is primarily true because the development of mold on framing and sheetrock, toxic or not, is damage to the structure. While mold does not act as a deteriorating element, it does discolor and damage finishes such that they have to be cleaned and repainted. However, with mold often comes the development of fungi which are wood destroying organisms. The fungi destroy the wood by feeding off it and this activity constitutes damage to the building. The costs of repairing the situation are recoverable both in tort and contract. Should this same fungi also cause allergic reactions in the occupants of the structure, there is also an action for personal injury in addition to the claim for construction defects. However, the personal injury claim, which goes beyond the purview of this article, is a more complicated case, in that other experts are required to establish a nexus between the existence of toxic mold and the person's ill health.

Generally, these experts are in the medical field and include physicians, toxicologists, microbiologists and allergists.

### **Statutory Laws**

There are two main statutes that have recently come into effect which are relevant for this discussion: the "Ortiz Bill," which is now part of the California Health and Safety Code, and "Senate Bill 800" which will become part of the California Code of Civil Procedure. The Ortiz Bill, which is otherwise known as the Toxic Mold Act, not only asserts that there exist certain molds which may be harmful to human health, but also sets up a statutory scheme to identify the molds which are considered toxic. The act requires the Department of Health Services to set up a task force to establish identification procedures, exposure standards, remediation guidelines and guidelines for certification of contractors to investigate and clean up the mold. Although there appears to be little activity in the Department of Health Services to follow up on this legislative mandate, once it has been completed, it will certainly have an impact on how lawyers litigate these types of cases.

The most recent statute effecting construction defect litigation, and therefore water intrusion and mold, is Senate Bill 800. This bill essentially provides an entire statutory scheme for the process of making a claim for construction defects, and provides statutory definitions of what constitutes a defect. The act also defines new statutes of limitation for recovery of each listed category of defect in the statute. Some of the new time-lines for filing suit on particular defects has been shortened to as little as one year. While the statute does not directly deal with mold, it does state that structures are to be built to keep water out so as to not "impair the occupants' safety because they contain health hazards." The act is only applicable to structures sold after January 1, 2003. The statute provides an extremely complicated process for owners and builders to go through to resolve their differences and almost certainly assures that attorneys will be required to proceed to early resolution.

### **WHAT IS THE MEASURE OF DAMAGES IN A CONSTRUCTION DEFECT CASE WHERE MOLD IS PART OF THE CLAIM?**

Generally, the measure of damages in a construction defect suit is the costs of repairing the claimed defect and any damages consequent to the defect. Recovery under a tort theory is the cost of repair, while under a contract theory, the measure is the "benefit of the bargain" or the difference between what one expected to obtain and what one actually got. This is usually figured by the same methodology that is applied in tort law — the reasonable costs of repair. In cases where mold is involved, the measure of damages is the cost of remediating the mold as well as correcting the defect allowing in the water which causes the mold to propagate. Depending on the findings in the testing of the mold, consultants of the remediation may call for the cleaning of personal items such as clothing, couches, chairs and bedding materials. Obviously, the costs of repairing all conditions responsible for the leaks is recoverable. Should the occupants be required to move out

while repairs take place, this is, as well, a recoverable claim. Finally, the owner is entitled to recover as part of his or her damages the costs incurred from experts analyzing and defining the nature of the problems. These costs are often referred to as "Stearman costs" in reference to a California appellate case, which ruled that the costs of experts investigating and identifying defects and damages consequential to the defects is recoverable as a "damage."

#### CONCLUSION

There is no doubt that construction defect litigation and mold litigation are inextricably bound to one another. Mold and fungi exists where water is found, and water is found inside buildings only if there is a defect in the structure. As the new laws develop and the experts in the fields of toxicology and mold identification establish the standards called for in the current statutes, the nature of litigation will also change. For now, it is clear that the newest child of tort law, "toxic mold", is here to stay.

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