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INDOOR ENVIRONMENTAL ISSUES AND INFORMATION . . . TODAY

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CAN RESIDENTIAL MOLD TRIGGER A PROP 65 VIOLATION?

The California plaintiffs' bar continues to explore potential theories of liability in mold litigation as they try to expand damages. One new angle involves assertion of Proposition 65 violations. Prop. 65 provides a private cause of action against a landlord who employs more than ten employees and who in the course of doing business, "knowingly and intentionally," exposes individuals to chemicals which are known to cause cancer or birth defects without first giving a "clear and reasonable" warning (e.g. asbestos). See Health & Safety Code section 25249.6.

The California Office of Environmental Health Hazard Assessment (OEHHA) maintains the list of chemicals known to cause cancer and birth defects and determines the "no significant risk level," as well as the "maximum allowable daily level" for each chemical. This agency lists several hundred chemicals that have been identified as cancerous or potentially causing reproductive toxicity.

Recently, plaintiffs have begun asserting that some of the molds and fungi commonly found in water damaged buildings emit chemicals listed under Prop. 65. For example, plaintiffs charge that some commonly found molds emit mycotoxins such as aflatoxins and sterigmatocystin, both of which are listed by the OEHHA. For example, sterigmatocystin has an allowable threshold exposure of only .01 (ug/cubic meter) inhalation unit risk.

Although Prop. 65 does not distinguish between man-made and naturally occurring chemicals, a recent California case upheld an agency regulation which barred the application of Prop. 65 to carcinogenic chemicals naturally occurring in food and granting food processors an exception to Prop. 65 requirements. See *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652. In doing so, the court indicated that Prop. 65 may not apply to naturally occurring chemicals. However, the court narrowly limits the definition of "naturally occurring" chemicals and explained that:

...even if a chemical occurs naturally in food, it is not

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deemed to be 'naturally occurring' under the regulation, to the extent it is avoidable by good agricultural or manufacturing techniques. Natural chemical contaminants must be reduced to the 'lowest level currently feasible.'

See *Nicolle-Wagner v. Deukmejian*, *supra*, at 661.

Mold plaintiffs applying this same principle argue that though mold and fungi occur naturally in the environment, a defendant (e.g. landlord) is liable for failing to avoid the excess production of such toxins through good property management techniques that reduce such exposure to the lowest level currently feasible.

Moreover, under Prop. 65, once a listed chemical is found to be present at a business (e.g. a landlord's property), it is defendant's burden to prove that the chemical is not found in sufficient quantity to be harmful. (See, *Consumer Cause, Inc. v. Smile Care*, 00 D.D.O.S. 6929 where the California Court of Appeals held that defendant, a dental group, has the burden to affirmatively prove that the mercury in dental amalgams falls below the requisite threshold.) This burden is governed by OEHHA guidelines. Defendants can be assessed civil penalties not to exceed \$2,500 per day and damages including plaintiff's ongoing lifetime medical monitoring for cancer or reproductive harm if found in violation of Prop. 65.

San Francisco Passes Tough Mold Ordinance

The San Francisco Board of Supervisors added "any visible or otherwise demonstrable growth of mold or mildew in the interiors of any buildings or facilities" to the list of public nuisances. See Ordinance No. 125-01, approved on June 15, 2001.

If the "nuisance" is not abated to the Department of Public Health's satisfaction, the Department may make the repairs themselves and charge owners for reimbursement and administrative costs. A lien may also be placed on the property for failing to reimburse the city for the

Did You Know . . . ? All molds are fungi, but not all fungi are mold. Fungi are non-photosynthesizing organisms. This separates them from the plant kingdom. Fungi are multicellular with the exception of yeasts. All fungi are capable of asexual reproduction by cell division, budding, fragmentation or spores. Find this and other technical definitions at encyclopedia.com.

Remediation: No "Standards," But Several Guidelines

Pending legislation in California would authorize the Department of Health and Safety to study the feasibility of statewide remediation measures for mold contamination in California. However, to date, no standards or Threshold Limit Values (TLVs) for airborne concentrations of mold, or mold spores, have been established in any state, or nationally.

Nonetheless, familiarity with the available guidelines can be useful in evaluating the extent of contamination and creating a remediation plan. Contractors and other vendors involved in remediation plans should be familiar with these guidelines.



Figure 1: Remediation of an office building

Apartment and commercial landlords now have an official U.S. government resource to look to for advice on cleaning up mold contamination. The E.P.A. has recently provided guidance for identifying, remediating and preventing mold, though it does not discuss specific mold exposure limits or standards for health purposes. The publication can be obtained at www.epa.gov/iaq/molds or call 1-800-438-4318.

Perhaps the most widely recognized guidelines are the New York City Department of Health Bureau of Environmental & Occupational Disease Epidemiology ("DOH") Guidelines on Assessment and Remediation of Fungi in Indoor Environments. These guidelines were developed by the DOH in coordination with the New York Human Resources Administration and Mt. Sinai Occupational Health Clinic to address visible mold growth problems in several New York City buildings in 1993. The

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guidelines originally addressed only the effects of *Stachybotrys atra*, but have since been revised and expanded to address all fungi.

The New York Guidelines contain information on the potential health effects of mold exposure, medical evaluations, environmental assessments and protocols for remediation. The Guidelines can be downloaded for free from the DOH website: www.ci.nyc.ny.us.

The Institute of Inspection Cleaning and Restoration Certification's ("IICRC") Standard and Reference Guide for Professional Water Damage Restoration is also a useful resource. It provides a procedural road map ("standard") for remediation which includes loss assessment and evaluation, identification of categories of water in water damage, utilization of proper principles of drying, structural and contents restoration, monitoring, final inspection and completion. This Guide also provides a supplemental reference guide with specific technical and procedural information. The Guide is available for a fee at: www.iicrc.org.

Another widely used resource is the ACGIH: Bioaerosols: Assessment and Control publication which provides classification for the extent of fungal colonization in buildings, as well as procedures for "negative pressurization" during extensive remediation. This publication is also available for a fee at: www.acgih.org.

A more general, but helpful resource for homeowners is available from the California Department of Health Services at www.cal-iag.org, *Mold in My Home: What Do I Do?* This article provides homeowners with general information about health concerns and clean-up procedures.

Mandatory Disclosure of Mold; A Step Closer in California

California State Senator Debra Ortiz's bill, SB 732, is pending in the Appropriations Committee and is expected to pass later this month. This "toxic mold" legislation was drafted in response to public concern regarding the adverse health effects of indoor mold in both commercial and residential settings. The bill attempts to go beyond guidelines and create mandatory regulations and standards for indoor mold with agency enforcement capabilities. Similar legislation is being considered in other states

such as New York, Maryland and Texas.

Under one of the provisions of the proposed law, the California Department of Health and Safety (DHS) will create public education materials on residential mold and potential health effects. Commercial and residential landlords are then required to distribute the DHS's materials to tenants regardless of whether there is mold present on the property. This general disclosure requirement is akin to the current obligation to give tenants the federally approved pamphlet on lead poisoning prevention. There is no deadline on when this material is to be created, nor does the bill, in its current form, have any penalty for failing to distribute this material.

The original version of the bill required the DHS to establish statewide remediation standards and "permissible exposure limits" for mold. Opponents argued that requiring "permissible exposure limits" is premature given the lack of credible scientific evidence supporting the conclusion that mold causes health effects. Concerns were also raised over whether it is scientifically possible to establish standard "permissible exposure limits" for the general population, given the indication that some people are more susceptible to mold than others.

In response to this concern, the bill now requires DHS to first convene an advisory taskforce comprised of public health officials, environmental experts, medical professionals and affected industry representatives to investigate the feasibility of creating remediation standards and permissible exposure limits. If the task force determines that standards and "permissible exposure limits" are indeed feasible, DHS is then instructed to adopt and implement them.

If and when DHS adopts standards and permissible exposure limits, there are a number of additional requirements that will go into effect for residential and commercial landlords. First, once the permissible exposure limits are established, commercial and residential landlords are required by law to disclose to a prospective buyer, tenant or current tenant the presence of mold that exceeds adopted exposure limits. The amended bill only requires an owner to specifically disclose information about the presence of mold when the owner "knows or has reasonable cause to believe that there is mold that affects the unit and that exceeds permissible exposure limits." Second, if DHS does adopt permissible exposure limits, public code enforcement agencies will be empowered to respond to consumer complaints about mold and

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enforce the standards adopted by DHS.

The bill does not require an owner to test for the presence of mold and does not require the retention of a specialist to remediate the mold. Property owners are left with the discretion to determine what actions are appropriate to rid the property of mold. No disclosure is required if the property has been remediated according to DHS standards.

In addition to SB 732, there are two other mold bills being considered in California. AB 284 adds an additional public education component to SB 732 and establishes a website to be maintained as an available resource for consumers. AB 178 has been shelved for this session but may be considered next year. AB 178 makes visible mold a substandard housing condition under California law. This bill was moved to next year's legislative session after criticism that it was premature. Opponents argued it was unfair to define mold as a substandard housing condition prior to the development of statewide remediation standards and permissible exposure limits. However, if and when DHS establishes the standards and permissible exposure limits, this bill has a very good chance of passing into law.

For more information on these bills, stay tuned for future updates or go to www.leginfo.ca.gov/bilinfo.html.

Texas Mold Bills Clear House

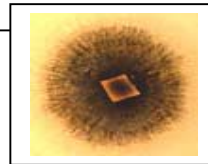
Legislation requiring mandatory state guidelines for indoor air quality has passed the House and moves to the Senate for consideration.

The House also passed a bill requiring all newly constructed or renovated schools to undergo indoor air quality testing.

The bills were forged in the heat of the mold controversy and recent \$32.1 million Ballard verdict in a mold related bad faith case against an insurer.

The Department of Insurance plans to hold hearings in the fall on insurance coverage issues and exclusions in the wake of a record number of mold related claims filed in the state.

Mold of the Month: The Villain: *Stachybotrys*



Stachybotrys chartarum or *Stachybotrys atra* (often referred to as "Stachy") has received a lot of attention recently because of the concern regarding its possible association with health effects. As a result, when mold is present, there is often a question whether it is Stachy.

Stachy is most often seen as a greenish-black mold. It is a "saprophytic fungus," which means it grows on non-living organic material, such as drywall sheetrock, ceiling tiles, and wood which is moist or water-damaged. Like all fungi, Stachy needs water.

Stachy is a relatively uncommon mold. Its spores do not become easily airborne or "aerosolized." Stachy is easily overgrown by other molds or bacteria. As a result, contamination of indoor air by Stachy is unusual. Determining whether Stachy is present requires professional testing as many molds are black and similar in appearance.

As with other types of mold, exposure to large quantities of Stachy may cause health effects including allergic rhinitis (cold like symptoms), dermatitis (rashes), sinusitis (inflammation of sinus membrane), conjunctivitis (eye infection), and aggravation of asthma. Some related symptoms are more general, such as inability to concentrate and fatigue. Usually symptoms disappear after the fungi are removed.

Just For Fun:

Take a visit
to the *Fungal Jungle*

Mushroom Menagerie @

<http://www.uslink.net/~mrickrak/index.htm>

to test your knowledge of the good,
the bad and the ugly mushrooms.



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