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INDOOR ENVIRONMENTAL ISSUES AND INFORMATION . . . TODAY

PREVENTING MOLD-RELATED NONDISCLOSURE CLAIMS



Property owners and managers are increasingly faced with claims due to actual and potential indoor mold problems, raising the dilemma of what needs to be disclosed when leasing and selling properties. Although the Toxic Mold Protection Act, signed into law on October 1, 2001, includes mold disclosure requirements for building owners, the requirements do not go into effect unless and until a California Department of Health Services taskforce first determines objective "permissible exposure levels," which has not yet been done.

The Department of Health Services cites a lack of funding to explain its inability to convene the taskforce and address the threshold question of whether permissible exposure levels for indoor molds are feasible. Despite the lack of regulations mandating mold-related disclosures, the California Association of Realtors recently added a specific question to its standard CAR disclosure form to inquire about the presence of mold. Moreover, given the media attention and substantial jury awards, the number of real estate non-disclosure actions involving mold has increased substantially.

Under California law, buyers and tenants of commercial property are traditionally deemed to be sophisticated and able to freely negotiate contracts with owners. As long as there are no material or fraudulent misrepresentations, commercial owners generally only need to be concerned with disclosing any "known material facts" that affect the value or desirability of the property, and there is no obligation to repair defective conditions.

Residential sellers and landlords generally need to be more wary of rendering complete written disclosures because even if they have no actual knowledge, residential owners are also required to disclose any condition that they “should have known.” [See, *California Civil Code* §§ 1102, et seq. for more information.] Therefore, when in doubt, disclose, disclose, disclose!

For example, Owner X wants to sell his single family residence and is not aware of having any mold problems during the ten years he occupied the home. However, five years earlier, a pipe had burst; the kitchen had flooded; and water had leaked into the crawl space and other parts of the home. Professional contractors repaired the damage, and Owner X had no further problems. Now that Owner X is selling his home, should he disclose the prior flood? Yes. Should he disclose the repairs and subsequent inspections that were done? Yes. Should he disclose any reports he obtained? Yes. Should he even disclose the minor flooring defect he discovered when repairing the flood damage? Yes. And in the mold context, these same answers would also generally apply to a commercial property transaction.

The tricky question is whether to disclose the “potential” for mold due to the extensive water intrusion into the crawl space, wall cavities, etc. Although the parties in a *commercial* setting typically would be deemed to be equally aware that water intrusion can lead to mold growth, buyers and tenants may nonetheless claim ignorance and pursue a claim for non-disclosure. In the *residential* context, plaintiffs often claim ignorance as to the connection between water intrusion and indoor mold growth. Such plaintiffs may sue based on the lack of disclosure of water intrusion and/or mold and seek damages such as remediation and repair of personal and real property, bodily injuries, fraudulent concealment and misrepresentation claims, “stigma” and resultant “diminution of the home’s value and/or breach of contract. These cases can be quite expensive to defend, and owners and/or realtors may not have applicable or adequate insurance to cover the costs of defense or judgments. Therefore, it is typically advisable to err on the side of disclosing all past water intrusion and mold-related events as well as the investigation and repairs made, if any, when selling either commercial or residential property.



COURT REJECTS EMPLOYEE’S CLAIM AGAINST EMPLOYER FOR FRAUDULENT CONCEALMENT OF MOLD

The California Appellate Court (2nd Dist.) recently affirmed the trial court’s summary adjudication of an employee’s tort action brought against her employer. *Jensen v. Amgen, Inc.* (2003) 105 Cal. App. 4th 1322. An employee injured during the course of employment is generally limited to remedies available under the Worker’s Compensation Act. However, there is a narrow exception to this exclusivity rule where the employee’s injury is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the employment.

The narrow exception was first articulated in the asbestos context. The employee alleged that his employer learned that he had an asbestos-related disease through routine screening and fraudulently concealed this condition from him, thereby preventing him from receiving treatment for the disease and inducing him to continue working under hazardous conditions. *John Mansville Products Corp v. Sup. Ct.* (1980) 27 Cal.3d 465.

Here, plaintiff complained to a company nurse of having sinus headaches, skin rashes and fatigue. At the time, plaintiff attributed her symptoms to allergies to the laboratory animals present and was transferred. A few months later, a mushroom was discovered in the building. Subsequent air testing revealed the presence of “toxic mold” but in concentrations that were lower indoors than outdoors. The employer informed building occupants of the mold and removed and repaired the water intrusion and mold. Plaintiff subsequently learned that mold had also been discovered and cleaned five years prior in the air delivery system of the building.

Plaintiff took a medical leave of absence and filed a lawsuit for fraudulent concealment against her employer alleging that her injuries were mold-

related and her employer knew of the presence of the “toxic mold” in the building, knew that plaintiff’s symptoms were related to the “toxic mold” and concealed this information from her.

The court rejected plaintiff’s arguments and confirmed the extremely narrow exception to the worker’s compensation exclusivity rule. The court held that the threshold issue was whether the employer knew of plaintiff’s symptoms before she knew of her own symptoms. The court noted that the exceptions to the worker’s compensation exclusion are intended to be extremely limited. The court also noted that plaintiff was the first person to associate her symptoms with mold in the building. There was no evidence that the employer was aware of any such connection. Rather, the employee had told the employer that her symptoms were caused by animal allergies. Moreover, the employer relocated plaintiff after learning of her allegedly building-related symptoms. Therefore, plaintiff failed to establish the elements of fraudulent concealment and the court affirmed the summary judgment in favor of the employer.



SACRAMENTO DEFENSE VERDICT IN MOLD-RELATED BAD FAITH LAWSUIT

After 3 hours of deliberation, a Sacramento jury delivered a defense verdict in favor of an insurance company in a \$25 million dollar bad faith lawsuit filed by plaintiffs. Plaintiffs claimed that wind damage to their roof resulted in water intrusion to their patio and bedroom closet allowing mold to grow. Plaintiffs claimed that the insurance company acted in bad faith in addressing their claim. The case was bifurcated to first address whether wind damage was the proximate cause of the water intrusion into the patio and bedroom closet. The jury found 12-0 that wind damage was not the proximate cause of the water intrusion. The jury also found 11-1 that the mold found in other parts of the house were not proximately caused by the water intrusion in the patio and bedroom closet. *Jelicich v. Safeco*

Ins. Co. Sacramento Superior Court Case No. 00AS07108.



HOW TO CHOOSE A “QUALIFIED” EXPERT TO INVESTIGATE AND REMEDIATE INDOOR MOLD

How does one select a qualified expert to investigate and remediate indoor mold without an applicable standard for permissible exposure levels nor established remediation protocols? Despite the lack of governmental licensing requirements and any national criteria for qualifications for mold-related “experts,” there are a number of professional associations, certifications and guidelines that can help weed out the “wheat from the chaff” when choosing a professional to assist you in addressing indoor mold issues.

Type of Mold-Related Professional	Applicable Certification/Professional Associations
Industrial Hygienist	American Industrial Hygiene Association (AIHA) membership available American Board of Industrial Hygiene (ABIH) – two professional accreditation available: (1) Certified Industrial Hygienist and (2) Certified Associate Industrial Hygienist National Environmental Health Association – designation of “Registered Environmental Health Specialist” American Biological Safety Association – designations (1) “Registered Biosafety Professional and (2) Certified Biological Safety Professional National Registry of Microbiologists – designation of “Registered Microbiologist” and “Specialist Microbiologists.”

Remediation Contractors	Institute of Inspection, Cleaning and Restoration Certification (IICRC) Association of Specialists in Cleaning and Restoration (ASCR)
Mold Analysis Laboratories	AIHA has two certifications available: (1) Environmental Microbiology Proficiency Analytical Testing (EMPAT) program and (2) Environmental Microbiology Laboratory Accreditation Program (EMLAP) The Environmental Protection Agency has authorized only three labs in the country to use the "gold standard" of mold detection and identification called the PCR technique: Forensic Analytical, Aerotech, and P&K.

Accreditation alone does not necessarily ensure that a professional is competent nor reliable, nor is this an exhaustive list of the accreditations available. Care should always be taken to investigate the organization conferring the accreditation and nothing substitutes for checking a professional's business references. Gordon & Rees is available to provide additional information on the professional requirements and training involved in earning the designations above and can assist you in selecting a qualified expert tailored to the work required.

MOLD OF THE MONTH



Aspergillus niger cultured in a Petri dish

Aspergillus niger is a sub-species of Aspergillus, a common indoor mold associated with water intrusion. The particular subspecies cannot be determined by a visual inspection under a microscope. Rather, to determine which

particular subspecies of Aspergillus is present, a lab must grow "viable" mold spores present from a sample in a Petri dish. Some consider the subspecies important because only certain subspecies are known to be capable of creating mycotoxins. There is currently no test to determine whether a particular colony is producing or releasing mycotoxins within the indoor environment, nor is there any established link between such production and health consequences of inhalation exposure. Various health effects that have been associated with this subspecies include: "swimmer's ear," and allergic reactions in susceptible individuals.



Aspergillus found behind wall baseboards

INCIDENT REPORTS ARE HELD TO BE PRIVILEGED

A California Court of Appeals held earlier this month that incident reports are protected by the attorney-client privilege when certain criteria are met. *Scripps Health v. Superior Court (Reynolds)*, 2003 D.A.R. 6059 (filed June 6, 2003) This case is particularly instructive to companies, such as property owners and managers, which regularly confront mold claims and have established protocols requiring the completion of report forms when water intrusion complaints are received. This case sets forth criteria for maintaining the privileged nature of this material.

In this wrongful death case against a hospital, plaintiffs filed a motion compelling production of internal incident reports. In opposition to the motion to compel, the hospital submitted evidence that (1) the reports were marked confidential, (2) the reports were used by the hospital's attorneys to assess internal risks and create a claims profile and (3) access to the reports was limited to risk managers, in-house or outside counsel and third

party claims administrators. To the extent that information from the reports was needed by other departments at the hospital, it was extracted from the documents and then circulated in another format.

The trial court granted plaintiffs' motion to compel, but the Court of Appeals reversed, holding that the reports were protected by the attorney-client privilege. The court reasoned that the existence of the privilege depends more upon the intended and actual use of the document than its contents. The court emphasized the significance of forwarding the reports to the Legal Department, risk managers or outside counsel. If copies are kept only by the initiating department, there is a stronger argument that the primary purpose of the reports is not communication with attorneys, but customer service or other administrative purposes.

Significantly, the court did not limit its holding to hospital settings, but rather on application of the attorney-client privilege to the corporate setting in general. Accordingly, any company that creates confidential records involving incidents which may result in litigation may be able to classify the documents under attorney-client privilege if the above-listed criteria is followed.



APPELLATE COURT FINDS SUSPICION OF CONSTRUCTION DEFECTS INSUFFICIENT FOR STATUTE OF LIMITATIONS TRIGGER

In an unpublished opinion, a California Appellate Court in Los Angeles rejected a subcontractor's demurrer finding that mere suspicion of roof construction defects is not sufficient for triggering the statute of limitations period.

The property owner of a 600 unit apartment complex built in 1989 reported 450 water intrusion and roof leaks in 1992. Roof repairs were made in 1993 and there were virtually no additional leaks until December 1997 when a number of

new leaks appeared. A consultant hired by the owner in 1998 determined that the roofing construction was defective including improper waterproofing, cracking and staining of the stucco, ventilation deficiencies and interior mold.

The owner alleged that an inspection in 1992 would not have disclosed the complex-wide defects because the defects were obscured by the completed construction and weather patterns. The court found that the complaint alleged sufficient facts to excuse the failure to have made an earlier discovery of the latent defects. Moreover, the court determined that whether the roof leaks in 1992 required an inspection of the entire complex was an issue of fact for a jury to decide. *Lincoln Malibu Meadows et al. v. Hughes Roofing et al.* 2003 Cal. 2nd App. Dist., Div. Seven Unpub. Lexis No. 3276.

MOLD SEMINARS

Mike Pietrykowski, Esq., partner, and Molly McKay, Esq., Gordon & Rees, Environmental and Toxic Tort Practice Group, TMrecently presented a seminar entitled "Regulatory Update Pertaining to Indoor Air Quality and Mold Indoor Air Quality Workshop and Regulatory Update" at Hewlett Packard in Palo Alto sponsored by PIBA.

Mike Pietrykowski and Linda Moin, Esq. will be presenters at the Bridgeport Sponsored Mold Seminar, "From Construction to Trial." Mike is also the co-chair of the conference which will be held in San Francisco on July 16 and 17.

Contributions to Mold Matters made by Mike Pietrykowski, Linda Moin, Traci Lagasse and Molly McKay.

The information contained in Mold Matters is general and while it is intended to present useful background material to our clients and friends, it is not legal advice and should not be relied upon in any specific instance or for any specific matter. Please consult with counsel prior to making any decisions or taking any action in respect of the matters discussed herein.