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Protecting against toxic mold lawsuits. (Insiders Outlook).(Brief Article)

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In the early 1990s Elizabeth Stroot and Joletta Watson resided at the Haverford Place Apartments in Wilmington, Delaware. The tenancies of both women were marred by persistent water leaks and mold. A kitchen sink leaked onto a bedroom ceiling, causing discoloration and foul odors. A leaky bathroom ceiling developed dark-rimmed holes that ran with "black water" whenever the upstairs neighbor showered. Despite repeated complaints, building management was slow to respond and the health of both Stroot and Watson deteriorated.

Stroot sued the landlord, demonstrating at trial that the owners had rarely performed any repairs beyond cosmetic patchwork. After two weeks of testimony, the jury awarded \$1.04 million to Stroot and Watson for personal injuries. The case of *New Haverford Partnership v. Stroot* (2001 Del. Lexis 201 [May 7, 2001]) went all the way to the Delaware Supreme Court, which upheld the award.

In the past three years alone, nearly 10,000 new toxic mold cases were filed in the U.S. and Canada, with damages in some cases running into the tens of millions of dollars. How can building owners, buyers, sellers, and managers protect themselves--and their buildings' occupants--in such a litigious climate? The best strategy is a combination of science, law, management, and common sense.

The science first. Despite a good deal of overheated media coverage, molds are a natural, nearly universal and usually harmless part of our natural environment. At the same time, however, mycologists (biologists specializing in the study of molds and fungi) and medical researchers have come to realize that as many as 100 to 300 species of mold may potentially be injurious to human health if inhaled or ingested.

potentially be injurious to human health if inhaled or ingested. Infants, children, the elderly, and those with compromised immune systems are at greatest risk.

Anyone involved in real estate today should be prepared to deal with mold claims. Building owners and managers may find themselves being sued--even for conditions that developed before or after they owned a property. Contractors may face claims for construction defects, homeowners' associations may be accused of improper maintenance, insurers may be sued for bad faith and negligence in the adjustment of claims. And to make matters worse, traditional property and casualty insurance may not cover mold claims.

One of the most frustrating aspects of the situation is the dubious science involved. Many symptoms associated with mold exposure can also be caused by colds, influenza, other (non-mold-related) allergies and other ailments. Most medical researchers acknowledge that the permanent effects of mold exposure, if any, have yet to be determined.

Unfortunately, this may not matter, since juries can still award large sums to plaintiffs who claim damaged health from exposure. In fact, in almost every reported case in which the plaintiff has claimed medical injury from mold exposure, the court has refused to allow medical testimony, largely due to the lack of an established methodology or a sufficiently reliable empirical basis for the experts' theories of medical causation.

The Stroot case, one of the very few in which expert medical testimony has been permitted, suggests how important it is for the defense to be well-briefed on the medical issues. There, the plaintiffs brought a virtual SWAT team of medical specialists to court--a toxicologist, a pulmonologist, and an epidemiologist--while the defense chose to present not a single expert in rebuttal. Had the defendants put their own experts on the stand, the outcome might have been very different.

Mold claims must not only be taken seriously--they must be seen to be taken seriously. When the Ballard jury decided to award \$32 million to the owner of a 22-room mansion, the single most important factor was the insurance company's apparent bad faith and refusal to take seriously the plaintiffs claim that her home was being rendered uninhabitable by extensive mold damage. The message: Owners and managers need to show that they care, not only to protect businesses and their property and employees, but also to prevent detrimental publicity and possible legal fallout.

We advise owner/managers and clients to develop and publish a written policy to address moisture and leak concerns, spelling out potential problems and the steps that will be taken to address them. This document should include full contact information, including up-to-date day and night phone, fax, and email numbers for maintenance and supervisory personnel. In addition, have a responsible person check the property regularly, and speak to the occupants so problems don't go unaddressed.

At the same time, you should make it clear that the building occupants themselves have the critical responsibility to report any leaks, water damage, or mold problems promptly. Their failure to do so could provide an owner or manager with a strong defense, since a delay of even a few days can make it difficult or impossible to protect the property against mold damage. Occupants must also permit inspection by the owner and his agents and specialists.

The best way to handle a problem, of course, is to prevent it. With mold, the best prevention is to keep things dry, since every claim of water damage is also a potential mold claim. Whether the claim progresses from water damage to toxic mold damage depends large part on the timeliness and thoroughness of the response. This is where common sense comes in. Some obvious (but often-overlooked) pointers are:

- * Fix plumbing leaks and leaks in the building envelope immediately; watch for interior condensation and damp or wet spots; correct the source of any moisture problem within 48 hours or sooner.
- * Adjust heating, ventilation, and air conditioning (HVAC) settings and if necessary alter or replace ductwork to prevent condensation-related moisture. Keep drip pans clean and unobstructed.
- * Check air conditioning systems carefully if they have been turned off for an extended time (during a cold spell, or for maintenance or repair); mold can grow prolifically during these "down times."
- * Try to keep indoor relative humidity low: Ideally in the 30-50% range but in any case below 60%.
- * Keep foundations as dry as possible. Provide drainage and make sure the ground surface slopes away from the foundation.
- * Increase ventilation--stagnant air facilitates the migration of indoor humidity into hidden wall cavities.
- * Employ dehumidification to remove moisture from air spaces and building materials. Refrigerant or desiccant dehumidification can be used, depending on the circumstances.
- * Be alert for hidden mold contamination. A musty odor may be a sign that molds are active and growing behind visible surfaces or inside wall cavities.

Finally, think teamwork. Where mold is concerned, an owner or manager simply cannot do it all himself. To prepare for an ever emergency, the prudent owner will develop a list of reliable contacts to provide the various essential services required to address claims of water and/or mold damage.

Your team should include a law firm with experience in both real estate and environmental litigation; a certified industrial hygienist to oversee sampling and inspection of any suspect premises; a qualified environmental laboratory for testing and analysis; and a professional restoration consultant--or, in major cases, a specialized environmental engineer and/or contractor to handle any necessary cleanup.

At the same time, your own maintenance personnel should receive the necessary training to ensure that they understand and can carry out their part in your mold action and prevention plan--if necessary, by bringing in a professional training team for the purpose.

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