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THE MOLD MENACE: IT'S HERE! ARE YOU READY? STRATEGIES FOR CONSTRUCTION PROFESSIONALS TO RESPOND TO AND AVOID MOLD EXPOSURES

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Stachybotrys, aspergillus, and other members of the mold family have become media darlings of the popular press and sweethearts of plaintiffs' attorneys everywhere. Since early 2000 television, print media, and Internet sources have widely publicized the proliferation and danger of mold in our indoor environments. For example, the cover story of *Time* magazine on July 2, 2001 boldly cried:

BEWARE: TOXIC MOLD *Is the fungus in your floorboards making you sick?*

The predictable result has been a proliferation of property damage and personal injury lawsuits for exposure to "toxic mold". Although the targets of such lawsuits are numerous, architects, engineers, construction managers, interior designers, and other construction professionals are among the most attractive targets for such claims. Already, construction professionals around the country have paid millions of dollars to resolve such claims in settlement and to pay off significant jury awards. If unchecked, the mounting wave of mold claims could substantially undermine the construction industry as a whole and the viability of construction professionals in particular.

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This paper will address several issues relative to the threat of mold as it relates to the construction industry and construction professionals in particular:

- The Mold Threat: Epidemiology and The Litigation Craze.
- Prevention: Responding to Issues of Water Intrusion/Accumulation.
- Responding to the Occurrence of Mold on a Past Project.
- Insurance for Mold Claims: Yesterday, Today, and Tomorrow.
- Protecting Against the Risk of Mold on Future Projects.
- Taking Advantage of Mold Related Services

The Mold Threat: Epidemiology and The Litigation Craze

Mold is not new. In fact, it is as old as dirt. Science has identified over 100,000 naturally occurring species of mold. The human body relies on mold to function properly. We reap the benefits of mold every day. We need it to make bread, wine, and beer. We need it to break down and dispose of waste in our world. It is intrinsic to many medical processes and medications.

However, approximately one hundred species of this very important fungus have been identified as having a potentially toxic effect on humans. These fall under such genus as *Stachybotrys*, *Aspergillus*, *Fusarium* and *Penicillium*. The molds themselves and the materials they inhabit are not the problem. Rather, the health threat is thought to arise from chemicals secreted by the molds in their battle to keep other plants and fungi from competing for their food and water sources. These chemicals are broadly referred to as mycotoxins and/or microbial volatile organic compounds, or MVOCs. The theories allege that these mycotoxins become airborne and then attack the human body through inhalation and absorption through the skin. When this occurs, the claim is that the victim suffers from mycotoxicosis. Experts widely disagree as to the frequency and even existence of mycotoxicosis. However, at a minimum, most experts agree that mold-generated mycotoxins can dramatically impact allergies, asthma, and other respiratory conditions.

The "star" of these toxic molds is *Stachybotrys chartarum*. It is a greenish black fungus that thrives in very wet environments. It is believed to produce over 150 different mycotoxins. These mycotoxins may be so hazardous that they are believed to have been the bases of biological and germ weapons utilized in recent wars in Afghanistan and Iraq.

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In reality, while unpleasant and unsightly, most molds do not pose any threat to human health. As a result and contrary to the popular press, not every (or even most) occurrence of mold is a rational basis for panic. Moreover, most or many of the alleged symptoms of "toxic mold" exposure are associated with and even traceable to other conditions. Many symptoms are also not subject to objective verification. Many experts have opined that the epidemiology linking such conditions and others to mold may be flawed and suspect (*e.g.*, "junk science"). Nevertheless, other "credible" scientists support the claimed impacts of toxic mold. This alone is most often enough to get the claim before a potentially-sympathetic jury. The pervasive nature of such "science", the expense of responding to related claims, and the sheer jury appeal of the claims make the threat very real.

The necessary ingredients for mold growth are really very simple. Generally, all that is required is water and some cellulose-based food source such as paper, wood, insulation, etc. If the temperature is generally above 65 degrees Fahrenheit and the relative humidity is above seventy percent, mold has all it needs to thrive and grow. It will generally continue to grow and expand until one of the essential ingredients (water or food) is removed.

By their very nature, buildings present a prime environment for mold growth. Cellulose material is plentiful in the form of wood, wallpaper, carpet, insulation, drywall, and other products. The relative temperature and humidity are consistent with and more than adequate to support mold growth. All that is missing is the moisture itself. Too frequently, such moisture intrudes into the building by a wide variety of sources. Possible outside sources include flooding, standing water in crawl spaces, leaking windows and doors, leaking cladding systems, leaking roofs, and simple wind driven rain. Inside sources include leaking pipes, bathrooms and kitchens, and inadequate HVAC systems. All of these sources are then exacerbated by increasingly airtight and "energy efficient" structures which do not allow for natural ventilation. The combined effect is at least a perceived increase in mold occurrences in both residential settings and commercial settings such as office buildings.

The perceived increase in such mold occurrences has been greatly fueled by the popular media. The CBS "news program" *48 Hours* is credited with being the first and opening the floodgates. On March 2, 2000, CBS broadcast an episode entitled "The Invisible Killers". This episode chronicled the Ballard family from Texas who had abandoned their 22 room Texas mansion due to mold in the building. On their doctor's advice, they abandoned their home and all of their possessions with the dirty dishes still in the sink and food in the refrigerator. The husband and wife complained of headaches, nausea, an inability to concentrate, and memory loss. The husband claimed to be unable to continue with his career as an investment banker as a result of these symptoms. They claimed their son suffered respiratory and cognitive impairments as well. They attributed all of this to mold which was found in their house. Their claim took on even greater notoriety when they obtained a jury award against their homeowners' insurance company for \$32 million.

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CBS has by no means been alone. For example, on April 18, 2001, ABC's *World News Tonight* broadcast a segment entitled "Moldy Schools: Are Your Kids Getting Sick at School?" The print media has been no less zealous. As indicated above, *Time* magazine's cover story on July 2, 2001 was "BEWARE: TOXIC MOLD. Is the fungus in your floorboards making you sick?" The *New York Times Magazine* ran a cover story on August 12, 2001 entitled "Lurking, Choking, Toxic – Haunted by Mold". There have literally been hundreds of similar articles in other national and local publications, all creating a frenzy of public concern. The Internet has taken the public concern even farther.

Predictably, not far behind the media (or even goading them on) have been the plaintiffs' attorneys seeking to "help" those victimized by toxic mold. Such attorneys are easy to find. The website www.atoxicmoldlawyerforyou.com was created to guide anyone to a "toxic mold" lawyer in their area. Many law firms have their own sites devoted to the "education" of the public as to the dangers of toxic mold.

The media, plaintiffs' lawyers, and prospective juries all find the same attractions in mold. It is extremely ugly and distasteful from a visual and aromatic sense. No one would want to live in the same house with it or share office space with it. It also has "potential" health effects which cannot be readily traced or identified. There are no definitive tests to determine if someone is truly afflicted with mycotoxosis. Most of the symptoms are largely subjective. For example, one recently-successful Alameda County, California plaintiff claimed "depression, anxiety, emotional maladies, vomiting, diarrhea, severe headaches, and lethargy." As described by some claimants and their "experts", the physical and mental impacts are devastating and thereby entitled to tremendous compensation. Finally, the "villains" in this drama are frequently portrayed as "corporate/big business" enterprises with deep pockets. For plaintiffs' purposes, this moniker may be neatly applied to any business with financial resources (e.g., profits or insurance) which seems less sympathetic than their "injured" homeowner or office worker.

The result has been a growing tidal wave of toxic mold claims. What was unheard of a few short years ago has almost now become commonplace. The dubious nature of such claims, and the tremendous exposure associated with them, are highlighted by the forty-nine reported cases which had gone to verdict as of November 1, 2001. Of those 49 cases, 22 had been decided as defense verdicts and 27 had resulted in an award to the plaintiffs. The relatively even split between the outcomes may indicate that the science supporting and disputing the impacts of toxic mold is far from definitive and is highly disputed. However, the high stakes of such cases are illustrated by the \$1,460,000 average judgment in such cases. This figure does not even include the two highest awards of \$25 million and \$32 million which would have skewed the average too far to be considered. Even in settlement, the cases are very expensive. The average settlement value of the twenty reported settlements of toxic mold related cases prior to November 1, 2001 was \$559,000.

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The most frequent targets in such claims are owners, landlords, contractors, suppliers, architects, and engineers. Even where the construction professional is not a direct defendant, others such as owners and contractors will seek to "share the pain" with the construction professionals and their insurance carriers through claims for indemnity and contribution.

Prevention: Responding to Issues of Water Intrusion/Accumulation

As the saying goes, an ounce of prevention is worth a pound of cure. More accurately in the mold world, an ounce of prevention may be worth gallons of bleach. In terms of managing the risk of mold liability on a past project, the most significant risk management tool may well be a prompt and appropriate response to the first notification of moisture intrusion or moisture accumulation.

Design professionals are often made aware of or notified regarding a moisture issue on a project during or after a project. It may come from personal observation. It may come from receipt of a project document identifying the issue (*i.e.*, job interruption due to rain or flooding). It may come from an actual notification or request to investigate the water intrusion. When these issues arise historically, virtually no one has thought about mold. The focus has been on investigating (and perhaps even solving) the moisture intrusion. However, if the moisture has existed for some time or is allowed to continue, the moisture intrusion may quickly become the least expensive of the concerns.

In one recent matter, four years after completion of a high rise office building, the owner's building staff called out contractors, suppliers, manufacturers, **and architects** to "look" at a number of apparent window leaks in the buildings curtain wall system. A single afternoon meeting and walk through took place. Moisture intrusion was confirmed, but no specific cause or solution was identified and no documentation was developed as a result of the meeting. The architect heard nothing more for more than five years as the owner and sometimes the contractor pursued piecemeal repairs to the leaks. When the owner next contacted the architect, it was with a lawsuit. Among other things, the lawsuit alleged that the leaks had caused mold to develop in the building with a cleanup cost of over \$1 million and temporary facility costs of over \$1 million. The owner alleged that during the afternoon meeting five years earlier, the architect had failed to advise it of the significance of the moisture intrusion.

This experience and many like it demonstrate that proactive documentation and advice upon the first notification of moisture intrusion or accumulation may be the design professional's potential responsibility for any mold claim. As will be discussed in more detail below, mold may be appropriately characterized as an owner/maintenance issue since it can develop only if moisture is allowed to remain over a period of time. If the moisture is stopped, mold growth will be prevented or at least halted. The problem is that while a moisture problem

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is analyzed and various parties allege and deny responsibility, the moisture may be allowed to remain and accumulate. The almost inevitable result is mold growth and all of its related damages.

Accordingly, as soon as a design professional becomes aware of a moisture issue on a project, that professional should immediately advise its client and any other appropriate parties that the moisture should be halted as soon as possible, as well as the potential implications (*i.e.*, mold growth) of failing to do so. Most often, the advice need not be complicated. Typically, a statement consistent with the following will suffice:

We have become aware that water and other moisture may have entered into or accumulated onto the Project. This moisture should be removed and halted as soon as possible. Prolonged or repeated exposure to moisture may have many possible impacts on the Project including, but not limited to, structural impairment, aesthetic impairment, and mold/mildew growth.

Such an advisory may be a valuable tool in defending any claim for subsequent mold growth or any other form of damage related to the water intrusion or accumulation.

Responding to the Occurrence of Mold on a Past Project

Many have sought to compare the expected wave of toxic mold related litigation to the asbestos litigation mania of the last twenty years. Some have sarcastically even referred to it as "the Mold Rush". However, mold liability exposure is much less predictable than asbestos exposure related claims. At least with respect to asbestos, construction professionals could determine which projects had incorporated asbestos-containing products and thereby which project posed a risk. Furthermore, once the dangers of asbestos were identified, the construction industry generally stopped using asbestos-containing materials. Therefore, with respect to asbestos, there was a proactive option to stop creating the risk.

Unfortunately, mold offers neither of these advantages. **Any** construction project contains cellulose materials and is subject to water intrusion of some sort. Accordingly, **any** construction project is a potential candidate for mold growth. There is no clear or easy way to identify a subset of projects at risk or to proactively eliminate that risk on future projects.

A further complication is that with the new interest in and legitimization of mycotoxosis, there is often no chronological end to the exposure for such claims. For example, California's Code of Civil Procedure provides that no claim may be asserted against persons involved in construction more than ten years after substantial completion, even for latent or hidden defects. However, even that statute has an exception for personal injury claims. In fact, there is often

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no true outer time limit for claims against construction professionals for personal injuries. Mycotoxosis would represent such a personal injury. For example, an architect who designed a school building fifteen years ago could still be subject to claims from students currently claiming to be affected by toxic mold which has grown due to some alleged error or omission in the original design.

The first consideration or preparation for any construction professional should then be what to do if they are contacted with respect to an alleged mold problem on a past project. Any response, will involve two components.

Construction Related Issues. The first task is nothing new. That is to examine the alleged mold growth, identify its source, identify its impact on the structure and, if appropriate, determine the appropriate corrective or remedial measures. Each project will present unique issues, but a few general guidelines should be considered in most circumstances:

- If in doubt about whether or not to visit the project to observe the alleged mold condition in person, visit the site. If there is a genuine problem and liability exposure, little will be accomplished by avoidance and an opportunity to observe the conditions before they are disturbed might be lost.
- Document site observations with photographs and a written narrative. Include counsel with copies of both to protect the analysis by the attorney/client privilege.
- For analysis purposes, start with the identification of the cause/source of the mold. The major issue here is to identify the water source. This is the key to determining if the mold presents any basis for a liability concern. In doing so, be mindful of other parties (*i.e.*, contractors, suppliers, subconsultants) which should be notified of the condition. If so, suggest that they be notified and absent a commitment in that regard, consider notifying them directly. Also consider if the water source is a product of wear and tear or maintenance issues, and whether the moisture should or could have been detected and addressed in the course of ordinary maintenance.
- Evaluate whether the mold has impaired the integrity of any portion of the project. For example, if the mold has affected a glulam beam, a structural engineer should be directed to review the beam to make certain it has maintained sufficient structural integrity.

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- Avoid any statement or writing which would imply responsibility for the water, the mold, or the remedial steps.
- Recommend that appropriate steps be taken to “clean up” or remove any portion of the property affected by the mold. Such steps should be taken pursuant to a professionally prepared plan of action.
- Where appropriate, consider the most advisable remedial plan. If possible, secure a written Agreement and payment for these services. Such an Agreement may be useful to avoid implications of responsibility and should provide limitations on responsibility for further “damages” arising out of the remedial effort.
- Review all applicable contracts for your scope of work as well as any potentially-applicable indemnity or insurance provisions, such as additional insured endorsements.
- Again, also consider any statutory requirements for warnings or disclosures.

Health & Personal Injury Issues. The second component is tremendously more delicate. That is how to respond to the alleged health risks created by the mold. Frequently, the commercial tenant or the homeowner will ask if they should move out. There is no easy answer. Medically and scientifically speaking, there is no definitive evidence that the presence of mold presents any prolonged health risk. It may be that mold is simply another significant allergen which may impose short term respiratory impacts. However, few (if any) construction professionals are qualified to offer health related advice. Accordingly, the appropriate advice would be to direct any tenant or homeowner to seek the advice of a qualified health professional. Avoid the urge to either downplay or dramatize the potential health risks.

Insurance for Mold Claims: Yesterday, Today, and Tomorrow

To say that the insurance industry is concerned with the potentially devastating economic impact of mold related claims would be an understatement. For example, in 2001, Farmers Insurance paid out approximately \$128.5 million on mold related claims in Texas alone. (This does not even include the \$32.1 million dollar award in the *Ballard* case.) Insurance industry experts predict that unless something is done to control the potential losses, mold related claims could cost the insurance industry **billions** of dollars over the next few years. Accordingly, everyone expects the insurance industry to do something to limit their losses, and they are.

For the construction professional, the concern is two-fold. First, what insurance protection do they possess for mold related claims? Second, what insurance is available to cover other project participants (such as owners, contractors, suppliers, and subconsultants)? This latter concern is critical to avoid or at least anticipate situations whereby the design professional with available insurance coverage may be seen as the only "deep pocket" target for a prospective plaintiff.

Construction Professional Insurance Coverage. Most construction professionals carry at least two types of insurance which may be available to protect them in the event of a toxic mold related claim: professional errors and omissions insurance, and commercial general liability ("CGL") insurance. Whether and to what extent these types of insurance protect the construction professional from a mold claim is obviously important.

A critical distinction between these two policies is the applicable coverage period of each policy. A typical CGL policy covers general liability for bodily injuries and property damage. Typically, such policies are written on an "occurrence" basis such that the applicable insurance is the policy which was in effect at the time the alleged property damage or personal injury arising out of the insured's work occurred. While this is normally a rather straightforward determination in a discrete injury or damage claim, such "occurrence" policies can become much more complicated in the case of continuous or progressive damage claims. Mold is an excellent example of such a claim. For example, mold may arise from a prolonged accumulation of moisture and the mold may grow and expand during the entire duration of the water exposure. Under these circumstances, the "damage" may occur over several policy periods. Many policies seek to exclude coverage for any claim or damage which had its inception prior to the applicable policy period. In California, this is called a *Montrose* exclusion. In the absence of such an exclusion, all occurrence policies issued during the time the damage continues to occur will apply to cover the loss.

Professional errors and omissions insurance by contrast apply only to claims allegedly arising out of the construction professionals' negligence in the course of their professional services. Such policies are universally written on a "claims made" basis. Under this approach, the applicable insurance policy is the one in effect at the time the construction professional receives notice of the claim. For example, where a project was completed in 1998 but the claim was not received until 2000, the applicable professional liability policy would be the one in effect in 2000 when the claim was received. If current predictions are correct and the insurance industry as a whole seeks to exclude liability for mold related claims from coverage, construction professionals should pay particular attention to such exclusions. Such policy exclusions on professional liability policies would mean that the professional might be without some of the coverage it would otherwise have available at the time the services were valued and performed.

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Insurance Coverage for Project Participants. For the reasons stated above, the construction professional should be very concerned with respect to mold related insurance coverage for the remainder of the project team. A number of insurance carriers have engaged in protracted court battles in recent years to argue that property damage and personal injuries related to toxic mold are not covered losses under their policies. They have argued that mold claims are excluded under one of several exclusions, including, but not limited to, the pollution exclusion. However, these efforts have had only limited success. For the most part, the courts have found that so long as the mold arises out of an otherwise covered loss (*i.e.*, water intrusion and damage), the mold related aspects of the damage are also covered as consequential damages.

As indicated above, the insurance industry most likely can not and will not let this trend continue. Already, most new CGL and other policies issued to construction industry participants are incorporating very broad "mold exclusions" which exclude coverage for "all damages caused directly or indirectly, in whole or in part by fungi, mold, mushrooms, or mildew regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that injury or damage." To avoid the regulatory backlash against such exclusions, most carriers will likely offer supplemental (and very expensive) coverage to cover mold related risks. Wherever possible, construction professionals should require other project participants to carry such supplemental coverage.

Protecting Against the Risk of Mold on Future Projects

As discussed above, there is no foolproof method of avoiding the potential for mold in any construction project. So long as wood, paper, insulation, drywall, and other cellulose products are part of the project and water is a part of our environment, mold is a risk. However, there are some strategies which construction professionals may employ to at least control or minimize the chance that they will take on liability for property damage and personal injuries when such mold occurs.

Contract Provisions. The first and greatest protection against any liability concern is the construction professional's service Agreement. This is certainly true with respect to potential liability for mold contamination claims.

- **Scope of Work.** As the most important provision in any professional service Agreement, the scope of work should exclude any description which could imply a comprehensive responsibility which would extend to water intrusion and mold claims. It should also exclude responsibility for any services not expressly identified.

- **Warranties & Guarantees.** The Agreement should not include any warranties or guarantees, especially as they relate to water intrusion, contamination, construction means and methods, inspection, or maintenance.
- **Hazardous Materials & Pollutants.** The Agreement should provide that the construction professional has not created, placed, stored, or transported any hazardous materials or pollutants on the site, and shall not be held responsible therefor.
- **Construction Means & Methods.** The Agreement should provide that the contractor is solely responsible for the construction means and methods, and should provide that any observation or review by the construction professional does not relieve the contractor of that responsibility.
- **Construction Observation.** The Agreement should make clear that the construction professional's observation of the project is intended solely to monitor general conformance with the plans and is not a guarantee that the contractor has properly performed its work.
- **Indemnity.** The Agreement should require the contractor to indemnify the construction professional from all claims arising out of the contractor's (and subcontractor's) work on the project.
- **Insurance.** The Agreement should require the contractor to carry appropriate insurance, including any necessary environmental liability (e.g., mold) endorsements, and to include the construction professional as an additional named insured on such policies.
- **Limitation of Liability.** The construction professional may also seek a limitation of liability clause specifically with respect to mold issues. One successful approach may be to limit the construction professional's liability to the cost of repair of any valid claim and to exclude liability for personal injury issues. Another approach may be to limit the liability to a specific dollar amount, regardless of the basis of the claim.
- **Maintenance/Wear & Tear.** The Agreement should expressly provide that the construction professional is not responsible for maintenance or wear and tear on the project following substantial completion. The Agreement should further provide that if routine inspections and

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maintenance of the project do not occur, damage (*e.g.*, mold) to the structures may occur and the construction professional is not responsible for any such resultant damage.

Design Plans & Specifications. Obviously, the plans and specifications should take appropriate steps to provide a watertight structure and to avoid internal water sources. This is nothing more than what the professional standard of care requires. However, the specifications should also include generic requirements which obligate the contractor to provide a watertight structure. Ideally, such obligations will include an introductory clause indicating that the plans are not intended to be all inclusive and that the contractor as the party in the field is in the best position to verify that all conditions are completed so as to provide a watertight structure.

The construction professional may also consider providing the owner with "maintenance guidelines" which reiterate the need to maintain and monitor the project, especially as they relate to water intrusion issues.

Construction Administration. During the course of construction administration, the contractor's responsibility to provide a watertight structure should be reiterated. Any deviations from the plans and specifications should be noted and documented. The construction professional's services should fulfill, but not exceed, its contractual obligations as set forth above.

Taking Advantage of Mold-Related Services

Finally, the growing epidemic of toxic mold hysteria also may present some new business opportunities to firms brave enough to venture into the field. To date, such opportunities for practice expansion have come in two major fields. Each has its opportunities and its risks. Each should be accounted for.

Construction Phase Services. Many large-scale developers have become sufficiently concerned over potential liability related to water intrusion and subsequent mold issues that they have begun to retain their design team or others to provide expanded services in an effort to avoid such issues. Such services might include peer reviews of the plans for such issues, constructability review for such issues, or expanded construction monitoring and documentation to confirm the plans and specifications were followed. Absent a carefully prepared Agreement, construction professionals providing such services may take on almost unlimited liability as the virtual insurer of the project. Accordingly, the precise nature and scope of the services must be carefully defined with appropriate limitations and disclaimers. Under such circumstances, limitations of liability may be particularly appropriate. Most importantly, the intended beneficiary of such services should be expressly limited to the client. This will likely avoid direct claims by third parties, such as contractors and occupants.

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Mold Investigation & Remediation. On the other end of the spectrum, the tremendous opportunity for construction professionals lies in the investigation and remediation of properties already contaminated with mold. Any firm providing such services should make it clear that they are not responsible for any of the existing contamination or its proliferation, and that they will use appropriate professional standards but cannot guarantee any particular result. Lump sum or guaranteed maximum price contracts for such services should also be avoided since the full extent of the contamination and the effort to fully address it is often not sufficiently contemplated until significant demolition work has been completed.