

THE LEGAL IMPLICATIONS OF INDOOR ENVIRONMENTAL CONDITIONS

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And [the priest] shall look upon the plague, and, behold, if the plague penetrating the walls of the house streaks, greenish or reddish, and the appearance thereof be lower than [the surface of] the walls; then the priest shall go out of the house to the door of the house, and shut up the house seven days. And the priest shall come again on the seventh day, and shall look; and, behold, if the plague be spread in the walls of the house; then the priest shall command that they take out the stones in which the plague is, and cast them into an unclean place without the city. And they shall cause the house to be scraped within round about, and they shall pour out mortar they scrape off without the city into an unclean place. And they shall take other stones, and put them in place of those stones; and shall take other mortar, and shall plaster the house. And if the plague come again, and break out in the house, after that the stones had been scraped out, and after the house had been scraped, and after its plaster; then the priest shall come in and look; behold if the plague be spread in the house, it is a malignant leprosy in the house; it is unclean. And they shall break down the house, the stones of it and the timber thereof, and all the mortar of the house and it shall carry them forth out of the city into an unclean place.

Leviticus 14:37-45

Although the language of the bible speaks of plague, traditional interpretation provides that the plague may indeed be a fungus that has eaten through to the interior of the walls of the house.¹

While the priests of ancient Israel did not have the benefit of laser particle counters, microbial testing labs, and all of the other high-tech equipment used by industrial hygienists, indoor environmentalists, and other experts in the burgeoning field of indoor environmental testing and remediation, they did understand that there were serious health risks presented by mold. It now appears that these extreme remedies have recently come full circle, with several homeowners involved in litigation over contamination finding the solution to be literally "burning down the house". Whether done for legal tactics, necessary health reasons or to satisfy requirements of a future sale of the property, these draconian measures make clear the public's perception of mold, mildew and other fungus as a serious health threat with the potential for significant economic damages.²

The purpose of this Article is to provide to the non-lawyer with a general understanding of the legal considerations and implications of contaminated buildings and structures, particularly for those involved in the design, construction and maintenance of buildings. The intent of this Article is not to provide legal advice or to be a complete discussion of all aspects of the law as applied to the indoor environmental arena. The reader is urged to consult with counsel before entering into any contract or business arrangement.

¹ Pentateuch and Hafatorahs Second Edition 1965, edited by Dr. J.H. Hertz, C.H.

² "Toxic mold found in San Diego", The San Diego Channel.com, August 8, 2001. This remedy may or may not be more effective than the additional biblical remedy of rendering the house "clean" by sacrificing a bird, and then purifying the house by dipping another bird, a piece of cedar, crimson wood and a hyssop branch into a mixture of water and the blood of the sacrifice and then sprinkling this mixture about the house. Leviticus 14:49-53.

ARTICLE I

INCREASING LITIGATION

There can be no doubt that the number of cases filed in connection with indoor environmental contamination of the buildings in which we work, learn or live, whether through the presence of bioaerosols, chemicals or other contaminants, has increased dramatically; however, less clear are the factors which have spurred these suits. Some of the factors are, in no particular order of importance or chronology, as follows:

1. The advent of energy-efficient "sealed" buildings.
2. Corporate and government downsizing resulting in low-cost design construction and maintenance.
3. Diminished skill of available construction and maintenance labor pool.
4. Increasing knowledge of health risks of indoor environmental problems.
5. Greater publicity of indoor environmental problems and large jury awards.

While the first three items listed above have been on-going since the early 1990's, it is only within the last few years that research into the health effects, particularly as to molds and fungi, has rapidly grown. The large verdicts sought for alleged long-term injuries has resulted in greater television, newspaper and internet news coverage, and thereby caused even more cases and even greater claimed damages.³

Some experts predict that the potential for indoor environmental litigation may far exceed the number of cases and the potential recoveries with respect to asbestos litigation.⁴

³ See "Mold Eyed in 3 Deaths, NY Post, August 20, 2001. "Mold forces family from their new home", The Oakland Press, August 29, 2001; "New York Family seeks more than \$180 million for mold exposure", The Mold Source; "New York Employee seeks \$65 million for mold exposure at work", The Mold Source; "\$32 million verdict in mold case", Realty Times, June 5, 2001.

⁴ "Sexy it's not, but mold is real hot" Bob VanVorhis, The National Law Journal, June 4, 2001.

ARTICLE II

LEGAL PRIMER

In order to better understand how liability may arise in connection with indoor environmental claims in new construction, we must explore the possible bases for liability. These generally include:

1. Claims under a contract.
2. Claims under tort law, such as negligence or product liability.
3. Claims under a statute, code or ordinance.

Let's look at each category in greater detail.

CONTRACTS

As many indoor environmental cases arise in connection with new construction, liability may arise under design, construction, and management contracts.

First, it is important to know the elements of all contracts:

1. Offer and acceptance.
2. Meeting of the minds.
3. Adequate consideration.
4. Statute of Frauds (writing required depending on the statute in the various states).

The primary advantage of having a proper written contract is that the rights and remedies of the parties will, in the best case, be spelled out in sufficient detail so that responsibility and liability of each may be properly assigned and apportioned. Without a properly drafted contract or if a contract is not in writing, significant time and expense must be undertaken in order to prove the terms of the contract by testimony or other indirect evidence. The parties can be expected to act for their own benefit and the true terms of the business arrangement will depend on the believability of one party over that of the other. This "discovery" process will only increase the burden, both in time and money, on the parties in prosecuting or defending their respective positions in the claim.

A clearly drafted contract should detail the remedies that the non-defaulting party may seek. These remedies may include:

1. Specific Performance – the aggrieved party will seek to force the defaulting party to perform its obligations. This is sometimes in the nature of injunctive or mandatory relief. Courts tend to prefer damage remedies due to the inherent difficulty in forcing a party to perform.

2. Damages – the aggrieved party will seek to recover its damages. These damages may include (a) direct damages – those incurred to repair damage or heal an injury, (b) consequential (or economic) damages – those incurred as a consequence of the breach, such as lost rents or profits, or (c) punitive damages – which may be awarded by a court in order to punish extreme wrongdoing by the defaulting party.
3. Termination or rescission – the aggrieved party may seek the termination or rescission of the contract to place the parties in the position they would have been in had no contract been entered into.

TORT

A tort is an injury to a person or property, either physically or financially. A toxic tort is an injury caused by contact with a toxic substance. The basis for tort liability is traditionally in negligence or in product liability. Where a person or persons have been injured due to mold, fungi, or bacterial exposure, but are in contract with the architect, contractor or other party their remedies will lie under the particular contract. Third parties' recovery will generally lie in negligence.

In order to successfully prosecute a claim for negligence, the plaintiff must successfully prove four elements:

1. Duty.
2. Breach.
3. Causation.
4. Damages.

If the plaintiff cannot prove all four elements, then his or her case will fail. An exception would be in the case of product liability where a defect in the manufactured product may inherently satisfy the first two elements.

Proving a duty in a design or construction defect case, or an environmental case, may be shown by the existence of a statute to protect the general public (such as a building code), or by the existence of industry standards, particularly when dealing with design or construction of buildings. If an expert has not followed well-known and adopted industry standards, the breach of the duty may be clearly evidenced.

One of the greatest difficulties in a "sick building case" (particularly those involving mold) is proving the causation element. The ability to prove the causal link between certain injuries resulting from exposure to mold, such as neurotoxic effect, has been hampered by the lack of stringent scientific

evidence⁵. The rules on admissibility of scientific evidence may impose strict pre-conditions on what information may be presented to a jury.⁶

In some states, the recovery for negligence may be limited to direct damages, those designed to compensate a victim or property damage or injury. In such states, no recovery for economic damages may be available except in limited circumstances. This limits the potential recovery for plaintiff's where the bulk of their claim may lie for the consequential damages resulting from the negligent act.

STATUTES, CODES AND ORDINANCES

Environmental laws and building codes may establish the minimum requirements for the design and construction of all types of building and their components. A violation of these codes could require correction of the defective or non-conforming work or may result in penalties. A violation of a code may also evidence of a breach of a duty owed either under the professional standard of care in delivering services pursuant to a contract or under a negligence theory.

The American with Disabilities Act of 1990 (ADA) protects persons with disabilities from discrimination in the use and occupancy of public accommodations and commercial facilities, and in employment. Several cases have arisen in which persons with disabilities, such as HIV, diabetes and other immune-system suppressing conditions, suffered life-threatening reactions to exposure to mold and bacteria, and sought protection under the ADA. The broad protective language of the ADA was found to protect the rights of disabled occupants of buildings from exposure to such conditions.

Some aspects of indoor environment have been successfully regulated, such as maximum quantities of carbon dioxide and other gases, as well as limitations on the use of asbestos, formaldehyde and other chemicals. Bioaerosols have yet to be successfully regulated. It is very difficult for the Environmental Protection Agency or state environmental protection agencies to determine how much of a particular fungi or bacteria may be deemed unsafe for particular occupants. This, in part, results from the view of the medical community of fungi as an allergen rather than a pathogen. Whether governmental agencies may be successful in regulating fungi and bacterial exposure will depend on extensive research. The current standard is to compare the types of fungi or bacteria found inside a building with those found outside. This standard may change, particularly for facilities in which outside air may not be "clean enough", such as hospitals, hospices and nursing homes.

⁵ "An Insidious Mold", CBSNews.com. September 28,2000. Addresses the Ballard case in which evidence presented regarding the neurotoxic effects was not permitted to be presented to the jury.

⁶ *Daubert vs. Merrell Dow Pharmaceuticals*, (509 U.S. 579 1993) established standards for the admissibility of scientific evidence. In *Daubert*, the parties seeking to admit scientific evidence must meet four criteria: (1) Whether the methods upon which the testimony is based are centered upon a testable hypothesis; (2) the known or potential rate of error associated with the method; (3) whether the method has been subject to peer review; and (4) whether the method is generally accepted in the relevant scientific community. The judge acts as the "gatekeeper" in determining whether this test has been met. Many states have adopted the *Daubert* standard for admitting scientific evidence. In Florida, the Court in *Stokes vs. Stake* (548 So. 2nd. 188(FL 1999)), adopted the *Frye* test. In *Frye*, the judge is to decide the admissibility of scientific expert test by deferring to the opinion of scientists in the pertinent field. The judge, therefore, is not responsible for applying the scientific method or determining the applicability of scientific method but only that there is some basis for knowing what scientists recognize.

California is the first state to attempt to regulate the amount of mold that may be present in a building. On October 7, 2001, Governor Gray Davis signed into law the Toxic Mold Protection Act of 2001, which had been originally enrolled as Senate Bill 732. The Act requires that the California Department of Health organize a task force to develop standards for permissible exposure to differing levels of mold and to create guidelines for the identification and remediation of mold. Further, sellers of buildings in which mold is known to exist or suspected to be present in significant amounts must disclose the presence of mold. Testing is not required to determine if mold actually exists.

The California experiment may prove useful to other states in developing similar standards and requirements for identification and control of fungal contamination.

Congressman John Conyers of Detroit has filed legislation in the US House entitled the United States Toxic Mold Safety Act. The Act, also known as the Melina Bill, provides significant requirements for the inspection and testing of both rental residential units as well as housing when sold or refinanced.

ARTICLE III

INSURANCE CONCERNS AND ISSUES

Insurance coverages for mold contamination will vary based upon the policy and the insurance requirements of each applicable state. Insurance policies may also distinguish between first-party and third-party claims.⁷

With respect to first party claims, the claimant must be able to prove direct physical loss during the policy period.⁸ The terms of the policy will be determinative of whether the costs of cleanup of the mold and the cost to correct or redesign of the building or residence is fully covered. An insurer may also rely on the defective design or workmanship exclusion where the cause of the mold results from a pre-existing defect.⁹

Depending on the text of the policy and state law, the insurer may also seek to rely on the "mold exclusion" or a more general "pollution exclusion" in order to avoid payment of a claim.

An insurance policy must be carefully reviewed before a determination of available coverage may be finalized.

⁷ "Mold and You: An Introductory Guide to Mold Claims for Insurance Professionals", William F. Stewart, Mealey's Litigation Report, September 2001.

⁸ Id.

⁹ Id.

ARTICLE IV

CONTRACT AND BUSINESS PRACTICE PROTECTIONS

While no contract, no matter how well drafted, can prevent disputes from arising, certain considerations may impact whether one party will likely be successful in enforcing its rights against a defaulting party or in protecting himself or herself from allegations of breach. The following lists those general concepts that should be in practice by all business persons:

1. The contract should provide for a clear and ambiguous scope of work and method for pricing and payment.
2. The contract should provide for clear definitions of the duties of all parties, and should burden the party best able to carry out that duty.
3. The professional standard of care by the expert, consultant, design professional, or contractor should be specifically addressed, particularly in light of the ever-expanding role of professionals in indoor environmental situations.
4. All parties should hire only skilled, licensed professionals, whether a property owner or a consultant hiring his or her own experts or sub-consultants.
5. A professional should only perform tasks within that professional's skill and experience.
6. All parties should keep an accurate record ("paper trail") of events and agreements during the performance of the contract.
7. The contract should include appropriate disclaimers for work or services not contemplated.
8. Be cautious as to indemnities, which could create liability even without a contract breach.
9. Potential results of services should not be misrepresented, whether in the contract, in advertising and sales solicitations or in sales "pitches" by sales staff.
10. Disclosure to building occupants should be made in order to avoid panic and suspicion, but always with the review of counsel.
11. Do not make the cure worse than the original problem.
12. Keep informed of changing laws and industry standards.