

**SOMETHING STINKS!  
MOLD ISSUES  
FROM A LANDLORD PERSPECTIVE**

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# Something Stinks! Mold Issues from a Landlord Perspective

*“And he shall look at the plague;<sup>1</sup> and indeed if the plague is on the walls of the house with ingrained streaks, greenish or reddish, which appear to be deep in the wall... and he shall cause the house to be scraped inside, all around, and the dust that they scrape off they shall pour out in an unclean place outside the city... and if the plague comes back and breaks out in the house, after he has taken away the stones, after he has scraped the house and after it is plastered... and he shall break down the house, its stones, its timber and all the plaster of the house and he shall carry them outside the city to an unclean place.”* Leviticus 14:37, 41, 43, 45.

## **I. Introduction<sup>2</sup>**

Mold, it seems, has been considered a plague of sorts since the time of Moses. The quote from Leviticus suggests that, even in ancient times, mold and mildew were a problem for homeowners.

Mold as a “plague” may serve as an apt metaphor, especially from the viewpoint of homeowners, builders, landlords, tenants and insurers.

Why are mold claims so prevalent now? Are homes, apartments and office buildings more susceptible to mold today than in the past? Is the rise in mold-related litigation due, in part, to hype, given the apparent lack of scientific standards for mold exposure?

## **II. Mold Achieves Celebrity Status**

According to the Insurance Information Institute, insurers paid out more than \$1.2 billion in mold related claims in 2001, and it is estimated that there are currently 10,000 mold related lawsuits pending which represent a 300% increase since 1999. Farmers Insurance Group estimated that it incurred more than \$85 million in mold damage claims in 2001, due, in large part, to a \$32 million jury verdict in Texas.

A number of recent mold cases have received significant publicity, making mold the toxic *tort du jure*. According to a recent article in *The Washington Post*<sup>3</sup>:

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<sup>1</sup> The “plague” is defined in the New King James version of the Bible as, “[d]ecomposition by mildew, mold, dryrot, etc.”

<sup>2</sup> Sections I, II, and III have been liberally borrowed from the “Why Mold? Why Now?” seminar taught by my partner, Timothy J. Hassett, Felhaber, Larson, Fenlon & Vogt, P.A., (651) 312-6006, thassett@felhaber.com.

- Ed McMahon recently filed a \$20 million lawsuit against his insurance company and home builder after a broken pipe in his Beverly Hills mansion left widespread mold growth that allegedly sickened him and his wife, and killed his dog.
- Erin Brockovich's new home allegedly sustained \$600,000 worth of damage due to mold growth and Ms. Brockovich lobbied the California legislature which recently passed the Toxic Mold Protection Act.
- A jury awarded \$32 million in damages to a family in Dripping Springs, Texas who claimed mold took over their mansion.

The case that started the toxic mold scare involved eight infants hospitalized with bleeding lungs in 1994 in Cleveland, Ohio. Doctors initially concluded that the infants' condition was caused by exposure to toxic mold. That diagnosis is now in doubt. According to the Centers for Disease Control and Prevention (CDC), there were questions about the mold sampling and there is new evidence that the internal bleeding may have been caused by other factors, such as a viral infection. A review by both internal and external experts for the CDC concluded that the facts of the case did not prove an association between acute pulmonary hemorrhage in infants and exposure to molds.<sup>4</sup>

Coreen Robbins, an industrial hygienist who participated in the CDC study, is quoted in *The Washington Post* article as stating that mold toxins are not readily airborne and are not likely to be inhaled in quantities large enough to cause illness. Ms. Robbins pointed out that there are no exposure standards for mold and mold toxins, so the point at which mold exposure becomes a health threat is unknown. This is a fairly complex topic which, Ms. Robbins told *The Washington Post*, she believes can lead to a "bit of bamboozelery."

According to *The Washington Post*, three independently funded reviews of medical literature found no support for the claim that toxic mold levels led to chronic or life threatening health problems. A fourth study is now underway by the Institute of Medicine (IOM) for the CDC.

An article in the October 5, 2002, issue of *Time* magazine quotes a 1999 Mayo Clinic study in which researchers concluded that mold may be the cause of most chronic sinus infections. The article also cites two researchers at Mount Sinai School of Medicine who believe there may be a relationship between so-called black mold and memory, learning and concentration problems, although they concede more research is needed.

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<sup>3</sup> "It's Everywhere. Tales About Rampant Toxic Mold Get Plenty of Attention But Science Tells a Less Dramatic Story," by Christopher Wanjek, September 17, 2002, *The Washington Post*.

<sup>4</sup> CDC. March 2000 MMWR(3).

The CDC's most recent report on mold concludes that common illnesses caused by mold include allergic conditions such as hay fever and asthma. The CDC report notes that a link between indoor air exposure to molds and other health effects, such as bleeding from the lungs or memory loss have not been scientifically substantiated. However, the CDC concurs with the Environmental Protection Agency's recommendations to remedy mold contamination in indoor environments to prevent negative health effects.<sup>5</sup>

### **III. Mold - The Basics**

Mold is a member of the fungus family and is a cousin to mildew. Mold is everywhere—it is truly the “fungus among us.” Mold can spread by releasing spores which, when airborne, can cause allergic reactions in persons who react to mold. Allergic reactions, such as headaches, sinus irritation and asthma, appear to be the most common problems associated with mold.

The most common environmental molds are Penicillium, Aspergillus, Cladosporium and Stachybotris Chartarum (the “black mold”). The black mold is in a category of molds that can produce toxic substances known as mycotoxins.

### **IV. Checklist for Landlords**

We are currently in a tough leasing market. Mold is often used by insolvent tenants as an excuse to exit space, or as a justification for non-payment of rent. In those cases, or in situations where mold is actually present, a landlord should be prepared to refute the claims of mold.

Due to the high publicity and the increasing number of mold-related lawsuits, landlords should: be aware of the risk associated with mold, be prepared to limit their liability on mold and understand their responsibility to remediate mold problems. The following checklist provides tips, although not exhaustive, for the mold-savvy landlord.

#### **1. Evaluate and Understand your Mold Insurance Coverage.**

Insurance companies are quickly dropping coverage for mold and mold-related damages. Many commercial general liability (CGL) insurers have introduced endorsements excluding coverage for mold claims. Insurance in Minnesota is becoming increasingly difficult to obtain.

Landlords should review all insurance policies to determine whether their policies provide coverage for mold claims. If mold claims are made, it is important to know policy limitations and exclusions to determine whether the policy provides coverage.

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<sup>5</sup> “State of the Science on Molds and Human Health,” by Stephen C. Redd, M.D., Chief, Air Pollution and Respiratory Health Branch, National Center for Environmental Health, Centers for Disease Control and Prevention, dated July 8, 2002.

Whether or not the policies provide coverage, it is crucial to inform the insurance company as soon as possible if a mold claim is made. Failure to provide immediate notice may cause an insurance carrier to refuse coverage.

Don't wait for a mold problem to occur before you determine coverage issues. Know what policies you have, who carries them, what is covered, what is not covered, and who to contact if a mold problem occurs.

## 2. Deal with Mold in the Lease Itself.

Protect yourself from mold liability by incorporating contractual requirements and disclaimer language in the lease agreement.

### A. Pre-Move-In Inspection Clause

Some savvy landlords are asking tenants to conduct a mold inspection before move-in. If the landlord has a great deal of negotiating power, it may require the tenant perform a pre-move-in mold inspection.

If you are able to require the tenant to do an inspection, make sure the lease properly protects your interests by including a pre-move-in inspection clause in the Lease. An example pre-move-in inspection clause is attached as Appendix A.<sup>6</sup>

A pre-move-in inspection clause should include the following items:<sup>7</sup>

- Require advance notice from the tenant of the scheduled inspection date;
- Require the tenant pay the inspection costs;
- Require the tenant to use only a “certified industrial hygienist” (CIH) for the inspection;
- Require the tenant to use a CIH who carries adequate “errors and omissions” insurance and adds the landlord as an additional insured under the policy;
- Require the inspection to be “non-invasive,” limiting the inspection to activity that will not damage the leased premises;
- Obtain a copy of the inspection report;
- If mold is not found on the lease premises, require the tenant to provide a written acknowledgment that the leased premises do not pose any mold-

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<sup>6</sup> Every situation requires special consideration. The Sample Pre-Move-In Inspection Clause serves only as an example, and is not intended to address every situation. Contact your attorney to obtain a Pre-Move-In Inspection Clause that meets your needs.

<sup>7</sup> “Control Tenant’s Pre-Move-In Inspection for Toxic Mold,” by Andres N. Davis and Catherine K. Lin, Commercial Lease Law Insider, dated February 2002.

related health hazards, and releasing the landlord from all mold-related liabilities and obligations arising from conditions existing on or before the date the tenant occupies the leased premises; and

- If mold is found on the lease premises, the lease should either terminate the lease or remediate the mold problem.

While many tenants may be unwilling to perform a pre-move-in inspection, be prepared by drafting a pre-move-in clause that incorporates the above items to adequately protect your interests. It may not be possible for every tenant, but it will protect you in the event a tenant has performed an inspection and mold is later discovered.

In the current “tough” leasing environment, a landlord may be unable to enforce these types of clauses or require an inspection. Indeed, if you do not believe such a clause would “fly” you may be better off refraining from demanding an inspection. The more appropriate approach may be to seek the insertion of a “Mold Disclaimer” in the language of the lease (see discussion immediately below).

#### B. Mold Disclaimers in the Lease

We believe it is worthwhile to at least propose disclaimers which limit damages resulting from mold. By proactively addressing the mold issue in the lease itself, landlords are protecting themselves from the risk of mold liability. Sample clauses are included in Appendix B.<sup>8</sup> The presence of these clauses may not preclude a lawsuit (or even liability) in the case of true negligence in maintaining a property, but it will provide some additional protection in responding to claims. Put another way, it can’t hurt, and it might bar a tenant’s claim.

### 3. **Maintain a Proactive Approach to Managing Leased Space**

Maintain a proactive approach to mold infestation by using preventative maintenance and management. Hire responsible property managers who will regularly inspect the property for the growth of mold and/or fungus. Conduct a training session for property managers on how to handle mold issues. The training session should include information on how to record mold complaints, a management inspection form and a tenant complaint follow-up letter.

The property manager should conduct regular inspections for:

- Window and roof leaks;
- Water stains;
- Excessive moisture;
- HVAC condensation; and

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<sup>8</sup> Every situation requires special consideration. The Sample Mold Clauses serve only as an example, and assume the tenant is responsible to clean and maintain its space. Contact your attorney to obtain mold clauses that meet your needs.

- Smell or appearance of mold and/or fungus.

#### 4. **A Tenant has Reported a Problem - Promptly Remediate**

If a tenant has reported a mold/moisture/fungus problem, take the report seriously. Act promptly to determine whether an actual mold problem exists. Immediately hire a reputable inspection company.

The inspection company should be a “certified industrial hygienist” (CIH) and should carry adequate “errors and omissions” insurance, adding you as an additional insured under the policy.

After you have conducted a mold inspection, obtain a copy of the inspection report. To remediate the mold problem, hire a CIH that will follow the mold remediation guidelines published by the U.S. Environmental Protection Agency in April 2001.<sup>9</sup> Develop a remediation plan with your CIH that properly follows these guidelines. Be sure to photograph the remediation process. To maintain a good relationship with the tenant, frequently communicate with tenants throughout the remediation process.

Once remediation has been completed, provide the tenant with a copy of the remediation report stating the mold-related hazards have been eliminated. Then require the tenant to provide a written acknowledgment stating that the tenant is satisfied that the leased premises no longer poses a mold-related health hazard, and releasing you from all liabilities relating to the mold contamination.

#### 5. **Contact your Attorney**

If you suspect your building has a mold problem, or if you are contacted by a tenant with a mold claim, contact your attorney as soon as possible to quickly and adequately protect your interests.

If the problem is serious, you may contact an attorney before remediation to allow counsel to retain an expert to maintain “privilege” from disclosure under the attorney work-product doctrine.

In any event, act promptly!

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<sup>9</sup> “Mold Remediation in Schools and Commercial Buildings,” U.S. Environmental Protection Agency, dated April 2, 2001.

## APPENDIX A

### Sample

#### Pre-Move-In Inspection Clause<sup>10</sup>

- A. **Pre-Move-In Inspection.** Tenant, at its sole cost and expense, may conduct a non-invasive inspection of the Leased Premises (the “Pre-Move-In Inspection”) during such time as Landlord may designate, for the purpose of assessing the Leased Premises for the presence of mold, *provided that*:
- (1) Tenant notifies Landlord, in writing, \_\_\_\_\_ days prior to the Pre-Move-In-Inspection, of the date on which the Pre-Move-In Inspection shall occur;
  - (2) Tenant retains an industrial hygienist certified by the American Board of Industrial Hygienists (“CIH”) to conduct the Pre-Move-In Inspection; and
  - (3) Tenant causes the CIH to obtain and maintain adequate errors and omissions insurance coverage and include Landlord as an additional insured under such policy.

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<sup>10</sup> “Control Tenant’s Pre-Move-In Inspection for Toxic Mold,” by Andres N. Davis and Catherine K. Lin, Commercial Lease Law Insider, dated February 2002.

B. **Results.** Within \_\_\_\_\_ days of such Pre-Move-In Inspection, Tenant shall provide Landlord with the following items:

- (1) A copy of the Pre-Move-In Inspection Report; and
- (2) In the event that mold is not observed on the Leased Premises, a written acknowledgment stating that Tenant is satisfied that the condition of the Leased Premises does not pose any mold-related hazards and expressly releasing Landlord from liability, warranty, or any other obligation with respect to the condition of the Leased Premises on or before the commencement of Tenant's occupation of the Leased Premises.

C. **Remedies.** If mold is observed during Tenant's Pre-Move-In Inspection, the parties agree that their sole and exclusive remedy shall be as set forth in this Paragraph.

- (1) Within \_\_\_\_\_ days of such Pre-Move-In Inspection, Tenant shall send Landlord written notice of mold at the Leased Premises ("Mold Notice"), which shall include a copy of the Pre-Move-In Inspection Report, including the underlying analytical data.
- (2) Within \_\_\_\_\_ days of receipt of the Mold Notice, Landlord, in its sole discretion, shall either:
  - (a) Terminate the Lease by sending written notice to Tenant within \_\_\_\_\_ days following Landlord's receipt of the Mold Notice. The parties agree that this Lease shall become null and void on the \_\_\_\_\_ day after Landlord's written notice is given, without indemnity or penalty payable or any other recourse by either party. In the event that the Lease termination is triggered after the commencement of Tenant's occupation of the Leased Premises, Tenant, at its sole cost and expense, shall, within \_\_\_\_\_-day period, vacate the Leased Premises and surrender same to Landlord, with Landlord having the right to reenter and repossess the Premises discharged of this Lease and to expel all persons and remove all property therefrom; or
  - (b) Within \_\_\_\_\_ days remediate the mold at the Leased Premises in accordance with Paragraph D hereto, at Landlord's sole cost and expense.

D. **Mold Remediation by Landlord.** If Landlord elects to remediate the mold at the Leased Premises pursuant to Paragraph C(2)(b) above, then:

- (1) Landlord shall retain a CIH to conduct the remediation. Such remediation shall be carried out in accordance with the relevant provisions of the document *Mold Remediation in Schools and Commercial Buildings* (EPA 402-K-001, April 2001), published by the U.S. Environmental Protection Agency, as may be

amended or revised from time to time, or any other applicable, legally binding regulatory standards or guidelines;

- (2) Upon completion of the mold remediation;
  - (a) Landlord shall provide Tenant with a copy of the Remediation Report;
  - (b) Within \_\_\_\_\_ business days of Tenant's receipt of the Remediation Report, Tenant shall provide Landlord with a written acknowledgment stating that Tenant is satisfied that the condition of the Leased Premises does not pose any mold-related hazards and expressly releasing Landlord from liability, warranty, or any other obligation with respect to the condition of the Leased Premises on or before the later of: (i) the completion of the remediation of the mold; or (ii) the commencement of Tenant's occupation of the Leased Premises; and
  - (c) If the mold remediation cannot be completed prior to the commencement of Tenant's occupation of the Leased Premises, Landlord, in its sole discretion, shall permit Tenant to receive a pro rata reduction in Minimum Rent for either that portion of the Leased Premises affected by the mold or that period of time during which Tenant could not occupy the Leased Premises solely due to Landlord's mold remediation.

## APPENDIX B

### Sample Mold Clauses

#### **INSERT FOR “Tenant Responsibilities” SECTION OF THE LEASE:**

a. Limiting Mold: Tenant should take positive steps to reduce or eliminate the occurrence of mold growth in the Leased Premises, and thereby minimize any possible adverse effects which may be caused by mold. These steps shall include the following:

- 1) Regular vacuuming and cleaning of the Leased Premises will help reduce mold and bacteria levels. Mild bleach solutions or most tile cleaners are effective in eliminating or preventing mold and bacteria growth;
- 2) Keep the humidity in the Leased Premises low. Vent clothes dryers to the outdoors. Ventilate kitchens and bathrooms by opening windows, by using exhaust fans, or by running the air conditioning to remove excess moisture in the air and to facilitate evaporation of water from wet surfaces;
- 3) Promptly clean up spills, condensation and other sources of moisture;
- 4) Thoroughly dry any wet surfaces or materials. Do not let water pool or stand;
- 5) Inspect for leaks on a regular basis, look for discolorations or wet spots. Take notice of musty odors, and any visible signs of mold or bacteria growth;
- 6) Should mold or bacteria develop, thoroughly clean the affected area with a mild solution of bleach. First, test to see if the affected material or surface is color safe. Porous materials, such as fabric, upholstery or carpet should be discarded; and
- 7) Promptly provide Landlord with written notification of any evidence of mold or mildew-like growth that cannot be removed by simply applying a common household cleaner and wiping the area.

#### **INSERT FOR “Non-Liability of Landlord” SECTION OF THE LEASE:**

a. Mold and/or Bacteria: In order to prevent mold or bacteria growth in Leased Premises it is up to the Tenant to properly manage and maintain the Leased Premises. The responsibility of a Landlord is limited to things within its control. The Landlord cannot eliminate the possibility that mold, bacteria and other fungi may grow in the Leased Premises after occupation by the Tenant. The Landlord shall not be liable for any damages caused by mold, bacteria, or by some other fungus or agent, that may be associated with alleged defects, including but not limited to property damage, personal injury, loss of income, emotional distress, death, loss of use, loss of value, adverse health effects, or any other effects. Implied warranties, including the implied warranty of workmanlike construction, the implied warranty of

habitability, and the implied warranty of fitness for a particular use, do not apply to the prevention of mold, bacteria, or other fungal growth. The Tenant hereby waives all claims and causes of action against the Landlord in connection with mold, bacteria, or other fungal growth, and any damages related thereto.