

## **Bulletin #72, Reducing Your Liability From the Growing Risk of Mold (November 14, 2003)**

A building is defectively constructed permitting moisture accumulation and mold growth. The owners have become ill and have sued the builders, including you.

Is there anything you can do to reduce your mold risk?

It may depend on the language of your contract.

### **Mold is a 21st Century Claim**

Mold cases have received significant publicity. According to a 2002 article in *The Washington Post*:

- Ed McMahon 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 its mansion.

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 spreads by releasing spores which, when airborne, can cause allergic reactions. Allergic reactions, such as headaches, sinus irritation and asthma, appear to be the most common problems associated with mold.

Beyond the hype, mold has become one of the greatest risk management challenges faced in the construction industry today. Serious mold problems are often traced to a construction defect that allows water intrusion. Because insurers are increasingly excluding mold claims, builders and subcontractors will generally bear the ultimate liability in these situations.

### **Alternate Clauses – Hazardous Materials**

In order to reduce risk, including the risk associated with mold, contractors can change or insert provisions in contracts to limit their exposure to damages. The American Institute of Architects (AIA) and the Associated General Contractors of America (AGC) are the most commonly used construction contracts.

Current provisions in AIA and AGC documents do not directly address the mold issue. Some court decisions have ruled mold is not a “pollutant” in the traditional sense. Mold may also not be considered a “hazardous material” as typically understood under state or federal guidelines. Therefore, relying on standard clauses may expose contractors to potential mold liability.

It is possible to revise AIA and AGC provisions to help reduce risk from mold claims.

### **AIA Alternate Clauses**

The following are the relevant AIA provisions [the proposed new language is printed in italics]:

**“10.3.1** If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance (including but not limited to asbestos, polychlorinated biphenyl (PCB), *mold, mildew, fungi or other similar microbial conditions*), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

**10.3.2** The Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance . . . When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. The Contract Time shall be extended appropriately and the Contract sum shall be increased in the amount of the Contractor’s reasonable additional costs of shutdown, delay and start-up . . .

**10.3.3** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractor, Architect, Architect’s Consultants and agents and employees of any of them from and against claims, damages, losses and expenses, *including any related to or arising from the repair, remediation, replacement or re-performance of Work*, and also including but not limited to attorneys’ fees, arising out of or relating to performance of the Work in the affected area if in fact the material or substance, *including, but not limited to, mold, mildew, fungi or similar microbial conditions*, presents the risk of bodily injury or death . . . and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work) and provided that such damage, loss, or expense is not due to the sole negligence of a party seeking indemnity.”

AIA Document A201 (Ed. 1997).

### **AGC Alternate Clauses**

The following are the relevant AGC “hazardous materials” provisions [the proposed new language is printed in italics]:

**3.13.1** A Hazardous Material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal and/or cleanup. *For purposes of this agreement, the term Hazardous Material shall include mold, mildew, fungi or other similar microbial conditions.* The contractor shall not be obligated to commence or continue work until any Hazardous Material discovered at the Work Site has been removed, rendered, or determined to be harmless by the Owner as certified by an independent testing laboratory and approved by the appropriate government agency.

**3.13.2** If after the commencement of the Work, Hazardous Material is discovered at the Work Site, the Contractor shall be entitled to immediately stop Work in the affected area. The Contractor shall report the condition to the Owner, the Architect/Engineer, and, if required, the government agency with jurisdiction.

**3.13.3** The Contractor shall not be required to perform any Work relating to or in the area of Hazardous Material without written mutual agreement.

**3.13.4** The Owner shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether the material requires corrective measure and/or remedial action. Such measures shall be the sole responsibility of the Owner, and shall be performed in a manner minimizing any adverse effects upon the Work. The Contractor shall resume Work in the area affected by any Hazardous Material only upon written agreement between the parties after the Hazardous Material has been removed or rendered harmless and only after approval, if necessary, of the governmental agency with jurisdiction.

**3.13.5** If the Contractor incurs additional costs and/or is delayed due to the presence or remediation of Hazardous Material, the Contractor shall be entitled to an equitable adjustment in the Contract Price and/or the Contract Time.

**3.13.6** To the extent not caused by the negligent acts or omission of the Contractor, its Subcontractors and Sub-subcontractors, the agents, officers, directors and employees of each of them, the Owner shall defend, indemnify and hold harmless the Contractor, its Subcontractors, and Sub-subcontractors ... from and against any and all direct claims, damages, losses, costs and expenses, *including any related to or arising from the repair, remediation, replacement or re-performance of Work*, and also including but not limited to attorneys' fees, costs, and expenses incurred in connection with any dispute resolution process arising out of or relating to the performance of the work in any area affected by Hazardous Material. To the fullest extent permitted by law, such indemnification shall apply regardless of the fault, negligence, breach of warranty or contract, or strict liability of the Owner."

AGC Document 200 (2000 Edition).

Making the changes discussed above may limit your risk, but you should consult with your attorney to decide whether different or additional clauses are appropriate given your circumstances, including the law of your state.

#### **Other Potential Clauses**

Other new provisions could also be negotiated. For example, in a situation in which an owner accelerates a schedule or orders work out of sequence, which increases the potential for possible mold growth, the following provision may help allocate the risk:

*If the Owner requires or causes the Contractor to accelerate the Schedule of the Work or to change the sequence in which the Work shall be performed, and such acceleration or change requires the Contractor to incorporate materials or equipment in the Work before measures can be undertaken by the Contractor to protect such Work, the Contractor shall give prompt written notice of such to the Owner. Thereafter, should the Owner direct the Contractor to proceed in the absence of appropriate measures to protect the Work, the Owner (1) waives claims for any damages resulting therefrom, and (2) shall defend, indemnify and hold harmless the Contractor, its Subcontractors and Sub-subcontractors and the agents, officers, directors and employees of each of them, from and against any and all direct claims, damages, losses, costs and expenses, including but not limited to attorneys' fees, losses, costs and expenses incurred in connection with any testing, remediation, and dispute resolution process, arising out of or relating to the Owner's acceleration of the Schedule of the Work or change in the sequence of the Work or change in the sequence of the Work.*

J. Dreste, K. Peartree, & M. Perkins, *Contractual Risk Allocations for Mold Conditions*, [www.agc.org/content/public/pdf/Environmental\\_Info/Mold/CONSTRUCTOR\\_Mold\\_Risk.pdf](http://www.agc.org/content/public/pdf/Environmental_Info/Mold/CONSTRUCTOR_Mold_Risk.pdf) (Feb. 2003).

The following is a contract provision that focuses on the owner's responsibility to operate and maintain the project once the contractor has given up control of the site to the owner:

*Upon acceptance by the Owner of the Certificate of Substantial Completion, the Owner shall assume sole responsibility to operate and maintain the Work properly, and waives any claims by the Owner against the Contractor, its Subcontractors and Sub-subcontractors and the agents, officers, directors and employees of each of them, for any damages resulting from improper operation and maintenance, including but not limited to damages arising from mold and other microbial conditions.*

Id.

To protect both the owner and the contractor from mold claims, the following provision would require the owner to obtain a mold testing consultant to inspect and certify the project:

*The Owner acknowledges that moisture and mold prevention requires appropriate design plans and specifications, construction techniques, and building operation and maintenance. The Owner shall be responsible for retaining an independent mold testing consultant to conduct tests and inspect the Work, particularly interior walls, ceilings, and other substrate surfaces, for certification and approval of moisture content and microbial conditions. The Owner shall schedule all such tests, approvals, or inspection so as not to delay the progress of the Work or other Work related to the Project. The Owner shall bear all expenses associated with tests, approvals, or inspections. Such certification and approval shall occur once prior to Substantial Completion of the Work and again prior to the expiration of one year from the date of Substantial Completion of the Work. The certificates of testing, inspection, or approval shall be secured by the Owner and promptly delivered to the Contractor. The Owner and Contractor are entitled to rely on the certifications and approvals of the mold testing consultant. If the Contractor incurs additional costs and/or is delayed due to the presence of moisture or remediation of unacceptable microbial conditions, to the extent not caused by the negligent acts or omissions of the Contractor, its Subcontractors and Sub-subcontractors, and the agents, officers, directors and employees of each of them, the Contractor shall be entitled to an*

*equitable adjustment in the Contract Price and/or the Contract Time.*

Id.

Clauses may also be inserted to limit mold liability in home construction and repair. The following are examples of residential mold disclaimers:

*Whether or not you as a homeowner experience mold growth depends largely on how you manage and maintain your home. Our responsibility as a homebuilder must be limited to things that we can control. As explained in our written warranty, provided by separate instrument, we will repair or replace defects in our construction (defects defined as a failure to comply with reasonable standards of residential construction) for a period of years. We, the builder, will not be responsible for any damages caused by mold, or by some other agent, that may be associated with defects in our construction, to include but not be limited to property damage, personal injury, loss of income, emotional distress, death, loss of use, loss of value, and adverse health effects, or any other effects. Any implied warranties, including an implied warranty of workmanlike construction, an implied warranty of habitability, or an implied warranty of fitness for a particular use, are hereby waived and disclaimed.*

*This notice, disclosure and disclaimer agreement is hereby appended to and made a part of the contract of sale. The consideration for this agreement shall be the same consideration as stated in the contract of sale. Should any term or provision of this agreement be ruled invalid or unenforceable by a court of competent jurisdiction, the remainder of this agreement shall nonetheless stand in full force and effect. I acknowledge receipt of the notice, disclosure and disclaimer agreement. I have carefully read and reviewed its terms, and I agree to its provisions.*

John Baric, *Mold Disclaimer and Waiver*, SH034 ALI-ABA 951 (2003).

An alternate residential mold disclaimer provides:

*Subject to the terms of this Agreement, the homeowners and their agents, heirs, personal representatives, successors and assigns forever release and discharge the Contractor and its present and former officers, directors, shareholders, employees, agents, attorneys, parent corporation(s), divisions, successors, affiliates, and assigns, and all subcontractors involved in the construction of the Residence (hereinafter collectively referred to as the "Contractor Releases") from all actions, causes of action, claims, charges, debts, demands, damages, and all liability of whatever nature whether in law or equity, known or unknown, foreseen or unforeseen, by reason of any facts existing on or before the date hereof, including, without limiting the generality of the foregoing, any and all liability to the homeowners pertaining or relating to the (a) Contract; (b) the construction of the Residence; (c) the matters in controversy in the Litigation; (d) all matters asserted or which might have been asserted in the Litigation; and (e) complaints with local and/or state administrative, licensing or professional agencies, societies and organizations, which the owners have, or may have, against any of Contractor Releases by reason of any contract, agreement, or course of dealing between the parties related to the Residence or the construction thereof.*

Blackward v. Simplex Products Division, 2001 WL 1255924, \*4 (Mich.App.).

### **Conclusion**

Because mold claims will be with us for the foreseeable future, uncertainty persists. It is very important for contractors to modify their contracts to reduce risk. While no contract language can eliminate mold claims, the contract clauses can reduce your exposure.

*(This article contains a general discussion of the law. You should consult with your attorney on the law in your state, as well as the issues regarding your contract. This article does not constitute and should not be treated as legal advice as to any particular situation.)*

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