

# MOLD

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An Overview of Remediation  
and Litigation Issues for Consumers



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## An Overview of Remediation and Litigation Issues for Consumers



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by the  
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## FOREWORD

This handbook is intended to provide general guidance only. It is not a substitute for the advice of a lawyer. The Texas Young Lawyers Association hopes, however, that by providing Texas residents with a better understanding of their legal rights and remedies, this handbook will help prevent many legal problems from ever arising.

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## An Overview of Remediation and Litigation Issues for Consumers

### I. INTRODUCTION

In the last few years Texas has experienced its fair share of mold-related damage claims. Since spring 2000, an estimated 44,285 mold-related insurance claims have been filed at an average cost per policyholder of \$205.46 per year.<sup>1</sup> In light of this fact, how does a consumer protect him or herself when buying a house? How can property owners tell if they already have a mold problem? And what precautions should be taken in remediating a mold problem if one is found? This pamphlet will address these questions, discuss how the mold and water damage issue has been litigated in Texas courts and provide guidance on new policy language recently adopted by the Texas Department of Insurance.

### II. WHAT IS MOLD?

While there are over 70,000 identified species of mold, yeasts and mildews, only around 100 species pose a potential health risk to humans.<sup>2</sup> To grow, mold needs suitable temperature conditions (the optimum temperature is between 40 and 100 degrees), moisture and a food source (such as porous construction materials).<sup>3</sup> Controlling one or all of these factors aids in preventing mold growth. For instance, it is advisable to keep a house or building well ventilated; in high-humidity rooms, such as bathrooms, it may be necessary to invest in a fan or dehumidifier to ensure that moisture does not build up in the area.<sup>4</sup> Common places where mold can be found include under carpets, behind wall-paper or ceiling tiles, inside walls around pipes and inside ductwork, and on surfaces that are prone to condensation such as bathroom floors.<sup>5</sup>

### III. SIGNS OF MOLD

Because mold is often hidden under floors or behind walls, it is not always easy to detect. However, some mold grows in visible areas so a consumer or property owner should take care to inspect carpets, bathroom or refrigerator floors and other suspect areas to ensure that mold is not present. "Black mold," or *stachybotrys chartarum*, is a greenish-black mold, while *Trichoderma* is made up of fast-growing white, green and yellow filaments.<sup>6</sup> Depending on the variety, some mold can also be yellow, orange or brown in color. If the mold is in a hard-to-reach area, a mold inspector may need to be retained to investigate and correct the problem.<sup>7</sup> Second, a house or building that has a mold problem may have a musty smell.<sup>8</sup> Buckling walls or ceilings, peeling or cracking paint, excessive condensation on windows or walls or "sweating" pipes might also indicate that a room has excess moisture in it which may spawn mold growth.<sup>9</sup> Finally, while it should be noted that no conclusive relationship between health effects and exposure to mold mycotoxins has been established, a person's physical reaction to an area may indicate that mold is present.<sup>10</sup> Such physical reactions include eye irritation, rashes, respiratory tract infections, pneumonia, severe fatigue, irritability, problems with concentration, skin dryness or rashes, hair loss, stomach ache and diarrhea.<sup>xi</sup> *Stachybotrys chartarum*, or "black mold," has also been suspected as a factor in infant deaths, bleeding lungs and severe neurological disorders.<sup>12</sup> Keep in mind though that whether the presence of mold may affect a person's health depends on the susceptibility of an individual, the dose of mold exposed to, the route of entry, and the environmental variables particular to a case.

### IV. BUYING A HOUSE

Consumers should take a number of precautions when buying a new home or piece of property. First, before buying the property, a buyer should have the home inspected by a reputable mold inspector. Areas that should be checked are hot water heaters, A/C Drain Lines, appliance hoses, showers, tubs, sinks and toilets, pipes under cabinets and sinks, waste/garbage disposal system, caulking around windows and doors, attic insulation, wallpaper, roofs, and sprinkler and irrigation systems. Determine the slope of the landscape, as well, and make sure it slopes away from the house to avoid puddling near the foundation of the house.<sup>13</sup> Currently there are no established licensing standards for mold assessors so it is especially important to

research a company before retaining them and get multiple bids on the cost of the project and what it will entail.<sup>14</sup>

Second, a buyer should also look for signs of excessive moisture in the prospective house or building, such as buckling walls or floorboards, and specifically ask the seller about the condition of the property, inquiring into the moisture conditions of the house, the drainage properties of the house, if mold has previously been found on the property, the results of any mold inspections done on the house, and/or if the property has ever undergone mold remediation. Finally, it is advisable that a consumer discuss the insurability of the property they are interested in with their insurance agent. Given the increase number in claims and recent changes to insurance policy language it is important that a buyer ensure that the property can be reasonably insured before they purchase it.<sup>xv</sup>

## **V. REMEDIATING A MOLD PROBLEM**

How does one go about remediating a mold problem if they discover mold in a home or office building they already own? In this case, the first decision a consumer needs to make is whether the mold problem is severe enough that a professional remediation team/person is needed.

### **A. SHOULD A REMEDIATION EXPERT BE HIRED?**

Whether a remediation expert should be hired often depends on the severity, amount and location of the mold.<sup>16</sup> For instance, if the mold is located in a homeowner's house in small, manageable amounts, then the homeowner may not necessarily have to hire a mold remediation company to take care of the problem. If the mold is in a more delicate area—for instance, an infant health care room—the danger of severe health risks increases and thus it may be more advisable to hire a remediation company to ensure that the mold is removed entirely from the area.<sup>17</sup> As a general rule, you should consider hiring a consultant if any of the following statements are true:

- You cannot solve the problem yourself, either the contamination is too extensive and invasive or you can't locate the source of the moisture.
- Delay will aggravate the problem.
- Tenant-landlord, employer-employee relationships are tense; consultant may bring objectivity and credibility to the investigation.
- Litigation or Workers Compensation claims are likely.

- Specialized skills, equipment or expertise are needed (either for evaluation or repair).

In most cases where mold is present, a consumer should ensure that the following remediation actions are undertaken:<sup>18</sup>

- Identify the source of the water or moisture problem and repair it.
- Determine size of the affected area.
- Select remediation personnel (in-house or contract).
- Select protective clothing and gear (Tyvek coveralls, gloves, eye protection and at least N95 respirators may be required).
- Determine if area needs to be vacated.
- Determine extent of containment required.
- Clean and dry materials.
- Bag and discard contaminated materials.
- Check for return of moisture and mold problem.
- Implement maintenance program to prevent recurrence of water damage or moisture accumulation.

## **B. CHOOSING A REMEDIATION COMPANY**

Should you decide that the best option is to retain a remediation company, the next step is to choose a qualified mold remediation professional.<sup>19</sup> Because the mold remediating industry is a hot area today and currently there are no standards or certification for mold remediation specialists,<sup>20</sup> it is especially advisable to do the same necessary background checks on a company as you would in hiring a mold inspector. If a consumer discovers that their remediation company has not performed services that they represented that they would in his or her mold remediation project, the Texas Deceptive Trade Practices Act may provide the consumer some protection.<sup>21</sup> However, the best defense a consumer can take is to research the company he or she plans to employ. First, the Better Business Bureau should be consulted to determine if the company has a favorable reputation in the industry.<sup>22</sup> Also, as always, request bids from three different companies and request references before contracting with one particular company to do the work to compare cost and scope of work. Be aware that conflict of interest issues are possible for companies that provide multiple services, such as testing, multiple extraction, and build-back.<sup>23</sup> Ask to see the company's operating procedures and make sure that the company is properly insured.<sup>24</sup> A mold remediation company should have worker's compensation insurance, contractor's liability insurance and pollution insurance.<sup>25</sup> In addition, "request documentation of OSHA-mandated safety programs such as respiratory protection

(medicals and fit testing), confined space entry, personal protective equipment, fall protection, haz[ardous]/mat[erial] communication,” among others.<sup>26</sup> Before hiring a mold remediation expert, request a scope of work and work plan in writing for the specific area to be remediated. The plan should identify the specific problem to be remediated, the specific services to be performed on the area, and containment and disposal strategies. It should also indicate how many technicians will be used to address the problem, how long it will take to complete the job, and in what condition the company will leave the property once they have finished the remediating services.<sup>27</sup>

### **C. WHAT GOES INTO A REMEDIATION PROJECT?**

Even if a mold remediation company is hired to correct the mold problem, it is still advisable to know the basics on how to remediate a mold problem so that you can make sure that the company is taking all the necessary steps and doing a proper job. The first step that should be taken in a proper remediation is to determine the source of the mold contamination in the room(s) or building.<sup>28</sup> Be sure to check all potentially moist areas, such as bathrooms, A/C drain lines, and pipes. Any rooms constructed underground should be checked for flooding.

Second, after the source of the contamination has been identified, it must be repaired by a qualified industrial hygienist. Industrial hygienists have fundamental training in indoor air quality, ventilation, environmental health, toxicology, microbiology and other industrial hygiene issues, and can guide your project and determine if other professionals are needed, such as HVAC contractors, architects and drainage specialists, structural or geotechnical engineers, or medical professionals.

Third, having rectified the source of the contamination, the company can then begin their remediation efforts. “The two most important initial principles of mold remediation are to protect the technicians performing the work and to protect the surrounding environment and its occupants. Technicians performing this work should, at a minimum, be equipped with respirators, single use disposable Tyvek suits, eye protection and rubber gloves.”<sup>29</sup> In addition, some level of containment should be done to protect the surrounding environment and its occupants by sealing or tenting off all of the pathways from the work area to the surrounding environment.<sup>30</sup> After this is done, all those surfaces containing mold and all porous building materials should be removed from the property.<sup>31</sup> Note that it is important that the materials be removed from the area, and not simply sprayed with a biocide. “A dead mold spore is still an aller-

gen,”<sup>32</sup> and can be toxic. Next all the surfaces within the contained area should be vacuumed with a hepa vacuum, and wiped with a biocide. Finally, a coating or encapsulant may need to be applied to the porous surface.<sup>33</sup> Be sure to keep a daily logbook of the project while the remediation is being performed. This will help document the mold issues encountered on the property and the work performed to remove that mold. Photographs should also be taken of the area before, during and after the remediation process has been performed.<sup>34</sup>

## VI. RECENT COURT DECISIONS

Generally, whether a claimant will succeed in their mold claim is determined by the facts of the case. For instance, if one is buying or selling property with a contract that contains an “as is” clause, does that fact alone guarantee absolute protection from mold liability? Not entirely. Rather, the Texas Supreme Court has found that whether an “as is” clause defeats a claim depends on the “nature of the transaction, and the totality of the circumstances surrounding the agreement.”<sup>35</sup> In other words, whether an “as is” clause will be upheld in court depends on the particular facts of a case and the particular agreement between the parties. Other courts have agreed, finding that such a clause “does not, as a matter of law, negate causation” of the damages suffered by a party, especially if the seller induced the buyer to make the purchase.<sup>36</sup>

Another important issue in litigating mold claims is what the seller actually “knows” is the condition of the property at the time of the transaction. If the seller has actual knowledge that their property has mold, then the seller must disclose that fact in the sales transaction.<sup>37</sup> However, one Texas court has found that a seller, who disclosed to the buyers that the house had undergone repairs for drainage problems and had been previously inspected, made a sufficient disclosure to the buyers. The court went on to say that the sellers did not have to disclose “general concerns” they may have had concerning drainage defects in the house if the sellers did not know in fact that mold was currently present in the house, nor did the sellers have a greater duty to inspect the house than the buyers.<sup>38</sup> In light of this decision it is especially advisable that buyers take it upon themselves to inspect a property before they buy it rather than rely on a seller’s disclosure at the time of the sale.

What are some proactive measures that can be taken to avoid creating a mold problem in your home or building and incurring such liability?:

1. Respond to complaints immediately.
2. Comply with all applicable legal requirements in construction.

3. Enlist experts to assist in assessing the contamination and developing a defense.
4. Engage a reliable consultant to sample and identify any suspected mold or other substances and conduct a thorough removal.
5. Repair or replace any damp or otherwise damaged buildings materials or furnishings.
6. Develop and follow an effective preventive maintenance plan.
7. Consider available insurance products for IAQ [indoor air quality] claims.<sup>39</sup>

## **VII. INSURANCE ISSUES**

### **A. THE DEBATE**

There is continued debate today over the extent to which a mold problem is covered by a policyholder's insurance policy. On the one hand, policy owners pay on their insurance policy in good faith so that when their property suffers damages they can get the problem rectified. On the other hand, the damage amounts attributable to the mold problem have ballooned. As a result of the debate, the Texas Department of Insurance has recently revised its homeowner policies to ensure that all Texas insurance companies include a provision in their insurance policy which excludes coverage for "loss due to fungi, wet or dry rot, or bacteria" unless the mold was "caused by or result[ed] from "sudden and accidental discharge" or overflow of water or steam if the water loss would otherwise be covered by the policy."<sup>40</sup> The revised language defines "sudden and accidental" as "a physical loss that is hidden or concealed for a period of time until it is detectable ... [A] hidden loss must be reported to the insurer no later than 30 days after the date that the insured detected or should have detected the loss."<sup>41</sup> This language is designed to exclude coverage resulting from leakage that has occurred conspicuously over a period of time. The new language also limits how much of the remediation costs will be covered. The basic HO-A policy generally will not cover mold remediation or any damage caused by sudden and accidental water leaks; however, some companies may allow a consumer to purchase an endorsement for such coverage. Homeowners with a HO-B policy can get additional coverage for remediation costs by buying endorsements on their basic policy in increments of 25 percent, 50 percent and 100 percent.<sup>42</sup> Note, however, consumers who have bought or renewed their HO-B coverage before January 1, 2002 may already be covered for mold remediation under their policy, so purchasing an added endorsement may not be necessary.<sup>43</sup>

## **B. RECENT COURT DECISIONS**

### **1. DUTY OF GOOD FAITH**

The most notable Texas mold case decided to date surrounds the mold claim filed by a Dripping Springs couple, Melinda Ballard and Ronald Allison, after they discovered mold in their 22-room mansion. A Travis County jury awarded over thirty-two million dollars to Mary Melinda Ballard in her claim against Fire Insurance Exchange, a member of the Farmers Insurance Group (“FIE”). The jury decided that FIE had mishandled Ballard’s insurance claims involving mold contamination of the entire house and outbuildings.<sup>44</sup> On December 19, 2002, a Texas appeals court partially overturned the jury’s award for punitive and mental anguish damages; however, finding that the FIE did not “knowingly” commit false and deceptive actions against Ballard.<sup>45</sup> The appeals court agreed that some evidence supported the jury’s finding that the FIE breached its duty of good faith to promptly settle the Ballard’s claims after FIE’s liability became clear, and thus upheld the jury’s actual damage award. In affirming this award, the appeals court wrote “[a]n insurer breaches its duty of good faith and fair dealing by denying or delaying payment of a claim when ‘the insurer’s liability has become reasonably clear.’ ... ‘Liability for payment of a claim is reasonably clear when it is no longer fairly debatable.’”<sup>46</sup> Among other evidence, the appeals court stated that support for this decision could be found in the fact that FIE’s appraisal agent testified that it was reasonably clear to her on February 1, 1999 that FIE was liable for the Ballard’s hardwood floor damage claim; however, the adjuster requested a delay in settlement because she did not have the proper authority to pay the claim. The court held that such evidence supported “the jury’s finding that FIE failed to attempt in good faith to effectuate a prompt, fair and equitable settlement of Ballard’s claim.”<sup>47</sup>

### **2. RELATION TO WATER DAMAGE**

Whether a policy covers a mold problem is often a factual question that turns on whether the mold is related to water damage to the structure. One court has found mold damage to be an “ensuing loss” that resulted as a consequence of the water damage from a leaking roof and thus was covered by the homeowner’s policy.<sup>48</sup> However, other courts, including the Fifth Circuit, have concluded that simply because a damaging constituent occurs due to the presence of water, that fact alone does not mean that the damage constitutes “water damage” per se. The Fifth Circuit made this finding in their analysis of a damage claim that involved rotting from air conditioner condensation. The Fifth Circuit reasoned that the rotting did not consti-

tute “water damage” because if that were not the case, then “the exclusions would become practically meaningless.”<sup>49</sup> The Fifth Circuit stated further that there is a difference between the damage caused by rot from water and “the damage from the direct intrusion of water conveyed by the phrase ‘water damage’.”<sup>50</sup>

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