

Got Mold? A Brief Guide to Liability and Notice Requirements

By Steve Jones

Thousands of mold-related lawsuits have been filed in the United States during the last decade.^[1] Prior to 2000, most mold claims were routinely settled for relatively nominal amounts of \$5,000 or less. Today, mold claims by commercial developers and homeowners routinely exceed \$100,000, and some are resolved for much higher amounts.

In 1994, the Centers for Disease Control and Prevention was alerted to a "cluster" of infants who had died from acute pulmonary hemorrhage in Cleveland, Ohio.^[2] A study conducted among those cases determined that there was a relationship between water damage in homes, the presence of mold, and the incidence of acute pulmonary hemorrhage.^[3] These studies alarmed the public health community, and triggered investigations by government agencies.^[4]

Since that time, evidence has emerged calling into question the causal relationship between exposure to mold and the most serious lung injuries.^[5] In addition, independent review bodies have backed away from the most troubling of the studies' conclusions, advising government agencies to adopt the position that the current science does not support a causal link between exposure to stachybotrys chartarum and lung injury. Notwithstanding these statements, mold litigation continues to explode, and a discovery of mold often leads to costly remediation projects.

Insurance Exclusions Since 2003

From 2001 to 2003, the cost of mold claims more than doubled. U.S. insurers paid out \$1.3 billion in mold-related claims in 2001, and more than \$3 billion in mold-related claims in 2002. As a result of a sharp increase in mold claims, in 2003 the insurance industry

adopted a universal mold exclusion and began inserting language implementing that exclusion into form policies. Since 2003, virtually all property and liability policies have contained mold, microbial matter or fungus exclusions.^[6] In addition, some companies have attempted to deny mold claims based on the absolute pollution exclusion that became prevalent in 1986, though there are strong arguments why mold does not fall within this exclusion.^[7]

Based on the ongoing prevalence of mold claims and litigation and the significant amount expended on mold remediation, this article collects some of the applicable law on mold and makes some recommendations for parties who are facing mold issues or the need for mold and microbial remediation.

General Background on Mold

Mold spores are ubiquitous; however, not all varieties of mold are toxic.^[8] The term "toxic mold" refers to molds that produce mycotoxins, which are chemicals that produce allergic reactions in humans.^[9] The most recognized variety of toxic mold is stachybotrys chartarum.

"Sick Building Syndrome" is generally attributed to airborne exposure to mold byproducts and is most widely associated with stachybotrys, though other molds can produce the mycotoxins that cause the condition.^[10] Typical allergic reactions are sinus irritation, hay fever or asthma, though more serious reactions have been reported at elevated exposure levels.^[11]

There Are Currently No Legally Enforceable Standards for Exposure to Mold

There are currently no federal standards establishing limits for mold exposure, nor do most states expressly regulate mold exposure. For example, while the Washington State Department of Health has mold information on its website,^[12] and makes specific reference to the potential health effects of exposure to stachybotrys chartarum,^[13] there are currently no Washington state standards establishing limits for mold exposure. The State of Oregon has not adopted exposure levels for any type of mold, and the Oregon OSHA website confirms that it "doesn't have regulations that address mold or the quality of indoor air."^[14] The lack of enforceable standards makes the area ripe for litigation, with some plaintiffs claiming personal injury at very low exposure levels.

Notice Issues Regarding Mold

Even without established exposure limits, some states have adopted notice requirements when mold is discovered in commercial buildings. In Washington state, for example, landlords are required to notify tenants about mold and supply them with information. Washington State Residential Landlord-Tenant Act, RCW 59.18. The relevant portion of the statute was codified at RCW 59.18.060(12), which requires landlords to

(12) Provide tenants with information provided or approved by the department of health about the health hazards associated with exposure to indoor mold. Information may be provided in written format individually to each tenant, or may be posted in



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(13) a visible, public location at the dwelling unit property. The information must detail how tenants can control mold growth in their dwelling units to minimize the health risks associated with indoor mold. Landlords may obtain the information from the department's web site, or, if requested by the landlord, the department must mail the information to the landlord in a printed format. ... The information must be provided by the landlord to new tenants at the time the lease or rental agreement is signed, and must be provided to current tenants no later than January 1, 2006, or must be posted in a visible, public location at the dwelling unit property beginning July 24, 2005.

RCW 59.18.060(12). The statute provides that landlords are immune from civil liability for the notice requirements, "except where the landlord and his or her agents and employees knowingly and intentionally do not comply." RCW 59.18.060(13).

Case law interpreting Washington's Landlord-Tenant Act limits a landlord's liability for damages arising from actions covered by the Act to those caused by latent or hidden defects of which the landlord had knowledge at the commencement of the lease, and of which the landlord failed to inform the tenant.^[15] Leased premises are not considered "untenable" if they can be restored by ordinary repairs without an unreasonable interruption of the tenancy.^[16] A tenant's remedies under the Landlord-Tenant Act are limited to (1) the tenant's right to repair and deduct the cost from the rent; (2) a decrease in rent based on the diminished market value of the premises; (3) payment of rent into a trust account; or (4) termination of the tenancy.^[17] While the tenant may pursue

damages under other laws if they are caused by inhabitable conditions, the specific notice requirement in the statute does not provide for any damages, and other cases have held that a breach of the Landlord-Tenant Act would not support an award of damages for personal injuries which allegedly resulted from a violation of the Landlord-Tenant Act.^[18]

California has requirements that commercial or industrial tenants who become aware of mold are required to inform their landlord, Cal. Health & Safety Code §§ 26142, 26145, and that commercial and industrial landlords who have notice of the existence of mold have "an affirmative duty, within a reasonable period of time, to assess the presence of mold or condition likely to result in the presence of mold and conduct any necessary remedial action." Cal. Health & Safety Code § 26143. Oregon has no similar statute requiring notice of mold or exposure.

Implied Warranty of Habitability

Traditional property law did not grant a tenant a right to "habitable premises." However, since the 1970s, some jurisdictions have implied a warranty of habitability in residential property, and such a warranty is included in both Washington's and Oregon's Residential Landlord-Tenant Acts.^[19] This warranty requires the landlord to assure adequate water, heat, weatherproofing, electrical service, and that "buildings and grounds and appurtenances" must be kept "safe for normal and reasonably foreseeable uses, clean [and] sanitary."^[20]

The implied warranty of habitability has generally not been extended to commercial leases, and a majority of cases have held that there is no implied warranty of fitness or suitability in leases for commercial purposes.^[21] While there is no Oregon case law

specifically addressing an implied warranty of habitability to commercial leases, the Oregon Supreme Court refused to extend the implied warranty of habitability to residential leases, apart from the protections afforded under the Residential Landlord Tenant Act.^[22] By contrast, Washington case law has recognized an implied warranty of habitability running to the buyer of a residential structure.^[23]

Recommendations on Remediation

The Washington Department of Health has a number of different webpages with information regarding mold, potential health effects, and the remediation of mold, for example, "Got Mold? Frequently Asked Questions About Mold,"^[24] a page with general information on *stachybotrys chartarum*,^[25] and the Washington Department of Health's page on notification requirements under the Landlord-Tenant Act.^[26] Oregon OSHA has prepared a "Fact Sheet" on mold, which gives recommendations for the evaluation and remediation of mold in buildings.^[27]

The Centers for Disease Control has prepared "Facts About *Stachybotrys Chartarum* and Other Molds"^[28] and EPA has prepared "A Brief Guide to Mold, Moisture and Your Home."^[29] EPA's most extensive recommendations regarding remediation in commercial structures are contained in its pamphlet, "Mold Remediation in Schools and Commercial Buildings,"^[30] which provides extensive guidance on the evaluation and remediation of mold in commercial structures.

