



THE LARGEST REGIONAL BUILDING TRADE MAGAZINE IN THE NATION



[HOME](#) [ABOUT US](#) [ADVERTISE](#) [SUBSCRIBE](#) [CONTACT US](#)

Aug 24, 2006

- [SPOTLIGHT: IN THIS ISSUE](#)
- [PRODUCT / TECH FOCUS](#)
- [ALL CURRENT ARTICLES](#)
- [BEST PRODUCTS 2005](#)
- [WEB POLLS](#)
- [ARCHIVES / REPRINTS](#)
- [ADVERTISER PROFILES](#)
- [ADVERTISER LINKS](#)
- [INDUSTRY LINKS](#)
- [PRESS RELEASES](#)
- [BRANDING TOOLS](#)
- [SURVEYS](#)
- [CALENDAR](#)
- [JOB BANK](#)
- [READER FORUM](#)
- [MARKETPLACE](#)

## Archived Articles | Go To Reprints

View [Current Articles](#) Only

Published May 2005

[RSS](#) v 0.9 | [RSS](#) v 1.0

By: Vicki L. Smith

### Mold: A Four-Letter Word

#### Hidden dangers can add up in court

"Black mold, that stuff can kill you," said one of our firm's paralegals about five years ago as I was showing her the photographs in a mold lawsuit we were defending. These were not the words of some sue-happy person looking for a free ride, but from a paralegal in a major Pacific Northwest law firm who had been involved for more than 20 years in assisting in the defense of litigation matters for businesses. The paralegal proceeded to explain to me the parade of horrors that she "knew" could be caused by "toxic" mold.

Despite the lack of any government or other standards concerning "unsafe" levels of mold and despite the lack of peer reviewed and verified scientific literature to support major injury causation from inhaling household mold, it has become increasingly clear that the defense of any litigation matter involving mold must contend with the incredible media-induced bias of jurors. Jurors now start out assuming that mold is toxic, and that whoever caused it will be legally responsible for the consequences. This may be, in part, what happened to a Beaverton, Ore., homebuilder in March 2005, when a jury in a fairly conservative county outside Portland concluded that the homeowners and their two young children were entitled to mold-related personal injury damages of nearly \$575,000, not to mention \$114,995 in breach of contract damages. (Haynes v. Adair Homes, Clackamas County [Oregon] Circuit Court Case No. CCV 0211573.) .

Facts of interest from the court files in that case indicate that the homeowners were contractually responsible for the site preparation, including the excavation, grading and drainage work, which can be significant issues in structures with moisture or mold problems. The jury did find the homeowners 33 percent negligent for their own damages, which will reduce the ultimate amount of the award against the homebuilder. The contract price for the home was just under \$65,000, since much of the traditional site preparation work normally performed by a homebuilder was done by the homeowner. And the homeowners lived in the house for only four to five months. They moved out due to mold they say was discovered when a backhoe struck the house, enabling them to see inside one area of the wall cavity, which they say was filled with moisture and black mold. .

The homebuilder's physician and toxicology experts expressed the views in court documents that there is no medical evidence that the homeowners reacted to mold in an immunologic, infectious, or toxic fashion and that there could not have been sufficient amounts of mycotoxin present at the subject property to cause any injuries to the homeowners. In contrast, the homeowners' attorney explained to the court that in his opinion "there is a general consensus among all scientists and doctors who do not make a living testifying for the defense, that toxic mold does cause illness, neurological damage, pulmonary bleeding, and other health problems, [and] certain mold and mycotoxins have been proven to cause cancer." .

Regardless of the true state of legitimate science (which is beyond the scope of this brief

article) concerning whether mold can scientifically cause some of the maladies being attributed to it in court cases, the media has certainly led ordinary citizens, that is, potential jurors, to believe that dramatic and devastating health effects are caused by inhaling mold. Recognizing that the average juror is now literally frightened by a belief that mold is "toxic", the following are some suggestions for: (a) avoiding having your fate on mold claims decided by such jurors; or (b) having ammunition for trying to undo juror bias. .

**Evidence in a mold case starts long before the lawsuit** Because of juror paranoia about mold, if you have a business susceptible to mold claims, you should be thinking about ways to reduce juror bias when a mold claim comes your way. These include things that demonstrate your knowledge of the cause of mold issues, your efforts to avoid them, and your efforts to deal with them when they arise. Common sense things like making sure the design is proper to avoid moisture issues; that the construction process was done in a way to avoid moisture issues (for example, proper material storage); that your company used quality materials, performed a quality job, and performed quality inspections; that your company addressed any moisture issues promptly, was honest and forthright in your dealings with the potential claimants, and helped assess and solve the problem. Good customer service can go a long way in preventing claims or providing evidence to defend against such claims. And, of course, document, document, document when dealing with moisture problems or mold issues, as all the good things your company did might be evidence to use in your favor in the future. .

**Try to avoid a jury or, at least, try to avoid paying the attorney fees** You may be able to avoid having your fate in a mold claim decided by a jury by having enforceable arbitration provisions in your contract documents. But, beware that some courts in consumer matters are critical of arbitration as more costly than a jury trial for individual consumers (as the arbitrator is typically paid hourly by the parties, and a judge is not) and potentially deprives consumers of their right to a jury trial. Thus, arbitration provisions should be carefully drafted and highlighted in the documents, not buried in the fine print. Some companies agree to pay the entire cost of arbitration, believing that expense to be more palatable than having their fate decided by a jury. Much litigation in consumer cases can take place over whether an arbitration clause is enforceable. Carefully drafted provisions can go a long way in avoiding expenses involved with such arguments. .

Mediation is a semiformal process of dispute resolution, with a neutral person selected as a mediator to facilitate settlement between the parties. This process often takes place during litigation, but can be after the parties have expended considerable sums in the lawsuit battle. To avoid those expenses, consider including mandatory mediation provisions in your contracts to require mediation prior to instituting arbitration or litigation, so your company can at least assess whether an early settlement without complete information is a more acceptable result than settling after significant attorney fees have been expended. .

Make sure to check your insurance coverage for mold claims and lawsuits. Not surprisingly, most insurers now exclude coverage for mold. From a risk management standpoint, you should know where you stand and whether you have options for such coverage and at what cost. .

Check to make sure indemnity provisions in your contracts are appropriate concerning those to whom risk might appropriately be transferred if they were responsible for the moisture/mold problem. Make sure you are entitled to both a defense in potential mold lawsuits and indemnity for the outcome of such litigation. State laws vary on indemnity provisions in such contracts, so seek advice about what works for your company. .

Consider whether you really want a contract provision concerning the-party-that-wins-gets-to-recover-attorney-fees. It is a standard provision and can be powerful leverage for all parties to settle. However, in consumer cases attorney fee recovery provisions, as a practical matter, benefit primarily the consumer even though on paper they appear to benefit whoever prevails. This is because most companies involved in litigation can afford to pay the consumer's attorney fees even though that may involve many thousands of dollars, but the average consumer does not typically have assets to pay the company's fees in those cases that the company wins. There are various statutes that allow for attorney fees under certain circumstances, and this should be considered in assessing whether or not you truly want that attorney fee provision in your contract documents. .

#### **Learn the basics of mold**

Mold is not a mystery and a general understanding of it will assist in dealing with it. There are numerous species of mold. Folks called mycologists study mold (techni-cally called

"fungi"). Molds are made up of microscopic particles. When you see the fuzzy matter that we commonly call mold, you are looking at massive colonies of the microscopic particles. Molds typically reproduce through the formation of spores. These microscopic mold spores are present everywhere and are a normal part of the atmosphere. .

Mold spores are easily distributed by air movement, people, pets and the ordinary activities of living. Mold testing often includes testing air samples to determine the number of spores found in a given sample of air so understanding how spores get disbursed helps understand seemingly odd test results. For example, after you discover a visible mold problem and diligently clean it up by removing the moldy material, it is entirely possible to have made the spore counts in the clean building worse because the microscopic particles have been disturbed and therefore disbursed, analogous to blowing on the dandelion seeds to disburse them to the winds. .

Mold needs food and water to grow. Food is easy for it to find, as it consumes most any organic matter—carpet, sheetrock, wood, paper, clothing, dust particles, etc. Depriving it of food under normal circumstances is not possible. Taking away its water source is the primary way to control mold. Water leaks are obvious sources to control. Less obvious are issues that contribute to potential moisture buildup, including inadequate flashing, moisture-laden building materials, poor grading, inadequate landscaping, excessive humidity and condensation. .

Microscopic mold spores are everywhere, and giving them water allows them to grow and flourish. A not so obvious example of this is mold that is present on windowsills or window frames that are not kept clean. The ordinary household dust is a source of food for the microscopic mold; the windows are subject to condensation and moisture production (sweaty windows) with temperature differential. The water drips to the frames or sills and the mold spores begin to "drink" and grow, feeding off the dust particles. Thus, if any visible mold problem arises, the key to solving it is to assess and eliminate or control the source of moisture (or on the dirty vinyl windows, for example, take away its food by cleaning away the dust on which it is feeding). .

#### **Educate key employees**

Company personnel should understand that moisture or mold problems are things that can seriously impact a company's bottom line, regardless of what the scientists say about whether mold can cause the maladies currently being attributed to it. The costs of getting rid of the mold, dealing with the customer, dealing with a claim and dealing with lawyers should be sufficient motivation to try to prevent the moisture and mold issue from arising in the first place. .

#### **Consider having a key "mold person"**

Depending on your business and the frequency of mold issues involved in that business, you might consider having one key person be responsible for assessing and dealing with mold claims. Resolution opportunities are often lost with consumers when they feel they are "getting the run-around" and getting different information from different people about what is being done or what should be done to deal with a mold issue. This feeds into their "mold paranoia." Having one key contact also means there is one key witness for the arbitrator or jury to hear from later if the matter ends up in litigation, and it tends to be easier to show a thoughtful and coordinated approach to deal with a problem. .

#### **Take the complaint of mold seriously**

A surprising number of lawsuits in the consumer arena are sparked by perceived poor customer service. A common complaint is that the company either "lied" to the customer or did not believe what they were being told by the customer. It is true that science is unsettled about the health effects of mold and whether serious health effects can arise in an ordinary healthy individual from inhalation of ordinary mold spores found in residences and commercial buildings. However, customers (and potential jurors) currently believe there are such serious health effects and therefore telling them otherwise, even if you are right, starts things off on a bad footing. Most consumers will have seen or heard some media about "toxic mold," or will search the Internet and find the myriad of questionable resources that discuss "toxic mold" and the ailments it allegedly causes. To convince consumers otherwise will be nearly impossible. It is often better and less expensive to listen carefully to their concerns and try to address their mold issues. .

#### **Have a plan in place**

If you are in the design/build business, the likelihood of being exposed to a mold issue of some type is probable. Be prepared. Move quickly. Mold grows quickly, depending on the

food and water available to it. Personnel should take the complaint seriously and address it promptly, the key being to stop the moisture and get the area of concern dry. Documentation of your promptness and actions should be maintained, as it may be evidence if litigation ensues. .

#### **To test or not to test**

If a mold complaint is made and if the mold is visible, authorities agree that it should be removed. But then do you test after the removal to determine if the cleaning was successful? Many issues arise and unless you test before the cleaning and test the outdoors as well, you will not have a baseline for assessment since mold spores exist throughout the atmosphere. Do not test randomly. If you intend to test, it should be to assess or prove a particular point, and informed counsel can discuss whether testing helps or hurts under the facts of each particular case and who should test if testing is done. .

**Professional remediators or your own clean-up crew.** Mold remediation has become big business. There are many types of remediators from the "wash it with bleach and it will be fine" to the "burn the structure down as there is no other way to rid it of mold." Use common sense and get advice, depending on the size of the moldy area. For small areas, remediation can be done by your own personnel. Sources in the materials referenced below have various views of what is a "small area." The key is to get rid of visible mold in a way that does not allow its return. And care needs to be taken to avoid discharging the microscopic mold particles throughout the entire structure.

#### **More sources of information**

With the prevalence of mold claims there are, of course, a myriad of Internet information sources available. One such source of general information is the web site of the Wisconsin Department of Health and Human Resources ([www.dhfs.wisconsin.gov/eh/hlthhaz/fs/moldfaqs.htm](http://www.dhfs.wisconsin.gov/eh/hlthhaz/fs/moldfaqs.htm)). In the footnotes to the "Frequently Asked Questions" section it contains links to publications of major organizations that have addressed mold issues, including the American Industrial Hygiene Association, OSHA, the EPA, the Centers for Disease Control, and others. .

Vicki L. Smith is a partner at Lane Powell PC. She defends businesses in litigation matters. She is an experienced trial lawyer and has handled and tried a variety of cases, including those involving mold, products liability, and construction defects. Vicki can be reached at [smithv@lanepowell.com](mailto:smithv@lanepowell.com) or (503) 778-2138.