

A/E RISK REVIEW

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Getting a Hold on Mold

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Today, more and more clients are demanding energy efficient buildings that combine green building materials with more airtight structures. Design firms worldwide are responding to this demand by developing innovative plans that increase energy efficiencies and thereby reduce the ongoing costs of building operations.

Unfortunately, this move to green design has an unintentional consequence: it can increase the chances of significant mold problems. In an attempt to seal out the external weather, green design may inadvertently seal in any internal moisture present due to leaks, condensation, wet building materials or other factors. Combine the trapped moisture with an increased use in organic materials and mold can grow and spread undetected until it presents a huge liability for all parties involved.

Clearly, mold remains a significant hazard to all design firms, whether working on green projects or not. Indeed, virtually all members of the building industry – architect, engineer, contractor, owner and material supplier – face exposure to mold-related claims. Design professionals face the prospect of defending claims charging failure to incorporate mold prevention into their designs and material specifications, or failure to identify the presence of mold during renovation or construction.

Mold Isn't Going Away

According to the Insurance Information Institute, there are more than 100,000 species of mold and at least 1,000 types of indoor mold. Mold thrives in warm, humid environments and spreads by releasing airborne spores.

Some molds are toxic. For example, there are proven cases of livestock dying from eating mold-laden grain. However, it remains debatable whether the types of mold typically found inside homes and commercial buildings can – by themselves – cause chronic or life-threatening health problems.

That is not to say that indoor mold is not a viable health hazard, however. A number of molds are “allergenic” and trigger serious health conditions such as asthma, chronic respiratory disease and sinus infections. Individuals with compromised immune systems are particularly susceptible to lung congestion and infection caused by inhaling mold spores.

So, if mold has been around forever, why has it only recently become such an important issue within the design and environmental industry? Some say it's because plaintiffs' lawyers and the media have created a frenzy surrounding big jury awards and cases involving high profile clients like Ed McMahon and Erin Brockovich. In addition, as mold cases have increased, cottage industries have sprung up surrounding mold litigation and remediation. Mold testing, inspection and extraction have become big business, as have industrial hygiene and other mold-related consulting services.

Architects and engineers often point to building owners as a cause of the growing mold problem. Older and poorly maintained buildings with leaky roofs, deteriorating plumbing, drafty windows and doors, poor ventilation or improperly maintained HVAC systems are major contributors to the mold problem. Design firms that undertake major renovation projects often have horror stories regarding mold discovered under floorboards and inside walls.

Another culprit, say designers, are contractors who use cheap materials or fail to provide proper water barriers due to poor workmanship. Today's fast-track projects can

lead to faulty workmanship and insufficient time for interior materials to thoroughly dry before sealing them into an airtight environment.

But ask building owners about mold, and they often point to the design industry as the primary cause. They complain about designs that lead to radical roof, window and wall angles, increasing the chances of gaps and water intrusion. They point to inadequately designed or faulty HVAC systems as a cause of mold. And they blame designers who specify building materials such as paper-covered drywall and certain adhesives that provide an excellent food source for mold.

A Continuing Cause for Concern

Regardless of the cause, mold continues to present a significant liability for the design and build industries. And, unfortunately, architects and engineers will not find clear-cut guidance regarding design standards, allowable limits of mold, or insurability. Various governmental bodies have passed or proposed legislation regarding mold, but to date, design and construction standards and regulations are neither clear nor complete.

A major liability concern for design firms is that mold-related problems can quickly evolve into construction defect claims that trigger class-action lawsuits alleging bodily injury due to long-term exposure to mold. Often, statutes of limitation and repose do not apply to these bodily-injury claims. What's more, bodily-injury claims can be accompanied by other claims from project owners and tenants for breach of contract, property damage, delays, business interruption and lost profits.

Should you be faced with these charges, will your insurance company be there to protect you? More and more, mold exclusions are being added to homeowners and commercial-property insurance policies. With many of these exclusions, mold contamination is covered only if it is the result of a covered peril such as a burst water pipe or if covered by a specific policy endorsement.

Even where specific mold exclusions are not included in a policy's language, some property insurers may try to exclude mold claims under existing pollution, contamination, seepage, or deterioration/wear-and-tear exclusions. Courts have ruled both for and against the denial of mold claims based on the standard pollution exclusion.

Fortunately, blanket mold exclusions have yet to appear in standard professional liability policies for design firms. But consider this: If your professional liability insurance is the only policy that *doesn't* have a mold exclusion, the odds increase that a plaintiff's lawyer will file a claim against you!

Reducing Your Mold Risks

Designing a mold-proof building is impossible. However, there are steps design professionals can take to help prevent mold problems and reduce the chances of expensive claims. Here's what you can do to fight mold:

1. **Educate the project owner.** Early design decisions will have a huge impact on the risk of mold. Discuss with your client the intended use of the building, the potential for mold problems and the need to design remedies into the structure, rather than deal with problems after they occur. Point out that the owner could be liable for such problems should tenants, clients, customers or other third parties allege that they have suffered bodily injury due to mold. Impress upon the owner the contractor's critical role in mold prevention. Suggest developing, with the contractor, a mold-prevention plan that covers material specifications, construction techniques and project phasing.
2. **Know your locale and site.** Mold is not a problem restricted to hot, humid climates. British Columbia, for example, faced a rash of million-dollar mold claims due to envelope failure and water intrusion involving poorly designed condominiums. Therefore, thoroughly investigate the history of mold problems in your locale. Consider year-round temperatures, humidity, dew points, winds, precipitation and other climate factors. Check for any standards that may come into play in your area. Also consider site-specific conditions such as subsurface water tables and building orientation to the topography. If you are working on a project outside of your territory, consider peer reviews of your HVAC design and other humidity control measures by local consultants familiar with that environment.
3. **Design with mold in mind.** Water intrusion is the primary cause of mold. Therefore, don't skimp on envelope detailing and other mold-prevention measures. Pay particular attention to plumbing, sprinkler systems, landscape design, HVAC

equipment and humidity-control systems. Strive for proper ventilation and filtration, including adequate attics, crawl spaces and exhaust fans and ducts. Consider installing humidistats and dehumidifiers. Specify leak-proof window and door installations and mold-resistant materials and products such as drywall. Elevator shafts, decks and balconies can present problem areas for water intrusion. Design adequate drainage and runoff controls so water doesn't collect underneath structures. Roofing and envelope systems are perhaps the most critical water barrier. Provide complete details for flashings and stress the need for adequate caulking. Consider: How will you dry out the building's interior if it does get wet? On renovation projects, examine the existing building for signs of water damage or mold and bring any problems to the owner's attention. Document all of your efforts to avoid mold and water intrusion and condensation. If the owner refuses your recommended mold-control items, document that fact in your contract or project files. Additional information can be found in *Managing the Risk of Mold in the Construction of Buildings*, published by the Associated General Contractors of America (www.agc.org/galleries/conrm/may03_mold.pdf).

4. **Draft protective contract language.** A clear and accurate scope of services specifying your responsibilities and those of the owner and contractor is essential. Press for indemnity language that allocates liability for mold-related claims to those in the best position to control the building environment. Seek a general limitation of liability for all claims that result from the project, including personal injury claims. Avoid guarantees, warranties and other such language concerning the absence of mold. Make it clear that means and methods of construction are the sole responsibility of the contractor.
5. **Hold regular meetings during construction.** Suggest that the project owner call for the regular inspection, testing and disclosure of existing mold and conditions that could lead to mold. The owner should pay particular attention to the storage of building materials on site and the need for the contractor to keep them clean and dry. Report any water damage or intrusion. When necessary, qualified industrial hygienists, envelope engineers, or other expert engineers should be retained to

provide inspection and remediation services. Document all observations and findings, changes in project scope, project upsets and other information that could be used in your defense of a subsequent mold claim.

6. **Provide maintenance guidelines.** Building occupants should be fully trained on operating all HVAC and other mold control systems. Stress the need for the owner, contractor or manufacturer to provide ongoing equipment inspection and maintenance programs for HVAC, ventilation and other humidity-control systems. Discuss housekeeping guidelines such as carpet cleaning and water cleanup. Suggest that the building owner or manager regularly inspect all structures and foundations for signs of water and moisture intrusion; immediately fix any plumbing and envelope leaks and clean up and dry any liquid spills; keep HVAC units inspected and maintained according to manufacturer specifications; provide proper venting of any installed moisture-generating appliances or machinery; and immediately respond to any employee complaints about indoor air quality. Include in your recommendations an overall guideline to maintain low indoor humidity (generally 30-60 percent relative humidity). For more guidelines, see the EPA's *Mold Remediation in Schools and Commercial Buildings*, available at www.epa.gov/mold/mold_remediation.html.

Check your insurance coverage. We'll be happy to help you check for mold exclusions on your policies. We'll also help you determine whether special endorsements for mold or other environmental coverages are needed and available.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.