

Mold in the Home: How it Affects REALTORS®

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INTRODUCTION

Mold is the newest environmental scare grabbing the public's attention. Although mold has always been present in schools, homes and office buildings, it has not received the nationwide attention that it is receiving today. Homeowners and apartment residents across the country are filing lawsuits in increasing numbers, claiming that indoor mold has harmed their health. Because this issue keeps growing, REALTORS need to be aware of the concerns surrounding mold and may need to take steps to protect themselves from liability. While this paper is not meant to cover all aspects of the mold issue, it will cover some of the key issues regarding mold -- what mold is, how people are reacting to mold in their homes, how government and industry are responding, and what the disclosure responsibilities and liability of REALTORS® with regard to mold may be.

WHAT IS MOLD

Molds exist everywhere. They can be found both indoors and outdoors. Molds move in and out through open doors and windows, ventilation systems, and by attaching themselves to people and animals. It is impossible to keep mold out of the house. Molds occur naturally and are categorized as a fungus. As part of nature's recycling system, which sustains plant and animal life, molds assist nature by helping to break down dead material in the environment. Numerous types of mold exist, but most are harmless.

In order to grow, mold needs moisture and an organic food source. Food sources include clothing, wood, wallpaper, paint, and carpet. As molds grow and reproduce, they release spores into the air. When these spores settle on a damp surface with a sufficient food source, the process is repeated. Some molds have the ability to produce mycotoxin, a toxic substance which may be harmful to a person's health. *Stachybotrys chartarum*, an example of a toxic mold, has been

the subject of recent media stories.

There is little scientific research on how mold may affect a person's health. As scientists already know, some molds are good, such as those used to make penicillin. However, some people may be more sensitive to mold than others, just as some people are more sensitive to dust, food, or trees. In these people, allergic reactions such as sneezing, itchy eyes, and coughing are possible. Although scientific research on the relationship between mold and health problems is inconclusive, some people have claimed that exposure to mold can result in more serious health problems such as triggering asthma attacks, memory loss, neurological problems or even death. Because different people react in different ways to mold exposure, it is difficult to determine how dangerous mold in the home may be. For this reason, experts still do not know at what level exposure to mold becomes a health risk in any given instance. Currently, there are no established standards for acceptable levels of indoor mold.

IN THE COURTS

In Delaware, two tenants sued their landlord for failing to fix water leaks and cleaning up the resulting mold in their apartment complex. The tenants claimed that exposure to toxic mold caused their respiratory problems. During the time the tenants lived in the complex, water leaks and mold were reoccurring problems. Attempts by both of the tenants to remove the mold by washing the moldy area with bleach failed. Although various bathroom and kitchen water problems were reported to management, the water damage was never completed cleared up. In one of the apartments, water damage eventually caused the bathroom ceiling to collapse, exposing an area covered with mold. One tenant was awarded \$1 million in damages, while the other tenant received \$40,000 for medical expenses and pain and suffering.

In Texas, a jury awarded an Austin family \$32 million after finding that their insurance company failed to adequately cover repairs and generally mishandled the home's mold problem. In 1998, the homeowner found a leak in the bathroom and had it repaired. However, months later, the home's hardwood floors began buckling. An insurance company adjuster determined the cause to be slab settling, a condition not covered under the homeowner's policy. The homeowner's contractor recommended removing the damaged subfloor to prevent mold growth, but the insurance company refused to pay for it. In addition to the bathroom, water damage was also

discovered in the kitchen. Eventually, the family began experiencing health problems, such as dizziness and respiratory problems. After many letters back and forth between the family and the insurance company regarding coverage for the water damage, an insurance investigator discovered mold behind the refrigerator. The family has moved out of their home and plans to demolish it.

In Arizona, a buyer is suing the listing agent after finding mold growing in her recently purchased home. Prior to closing, the seller offered the buyer an inspection report paid for by a previous buyer. Although the buyer was being represented by her own agent, the buyer's agent did not recommend an additional inspection and no other inspection was done. After purchasing the house, the buyer discovered mold while remodeling the kitchen. The estimated cost of removal of the mold was \$50,000 to \$60,000. The buyer filed a claim, which her insurance company denied on the grounds that the mold problem was a preexisting condition. The seller contacted his insurance company, but was also denied coverage. Now the buyer is suing the listing agent. The case has not yet been settled.

In Pennsylvania, recent homebuyers are suing the sellers and their real estate agency for failure to disclose water damage in the home. The \$660,000 lawsuit claims that mold from the water damage caused the buyers severe allergic reactions requiring hospital treatment. As a result, the buyers have moved out of the house while attempts are being made to clean it up. Although the buyers claim that the sellers did not disclose the extensive water damage, the sellers claim that the buyers declined an environmental inspection. In addition, the buyers lived in the house several weeks prior to settlement, which the sellers claim gave them plenty of time to discover any problems. The case is pending.

In California, a homeowner was awarded \$18.5 million in damages from his insurance company when several water pipes in his home burst during remodeling and resulted in mold. Since the homeowner was not living in the home at the time of remodeling, a leaking pipe in the attic went undetected for several days. When his insurance company refused to cover all of the damages, the homeowner sued.

In Illinois, a former student has sued her high school claiming that mold in the school caused her health to deteriorate. The high school has been closed since April 2001, when toxic mold was discovered. Since that time, other students have filed their own lawsuits or joined a class action suit against the school. The school has conducted

environmental tests to determine the seriousness and type of mold in the school. It has also spent \$5.6 million for a new heating and ventilation system.

THE RESPONSE

Insurance companies in Texas are being hit especially hard with claims involving mold. In the past, insurance companies would see one or two claims involving mold in a year. Recently, the number has risen to thousands each year. While policies in many states have specifically excluded mold, insurance policies in Texas cover mold when it is the result of a covered loss. Since the Texas verdict which awarded a family \$32 million in damages, Farmers, State Farm, and Allstate insurance companies have limited or quit selling new policies in Texas that cover water-related damages. Farmers also appealed to the Texas Department of Insurance to allow Farmers to exclude mold coverage from its existing policies. As a result, the Insurance Commissioner issued an order to provide basic coverage for mold remediation with the option to purchase additional coverage. Mold that results from sudden and accidental water damage would be covered in the basic policy. Testing, treating, and measures going beyond the normal repair of water damage would not be covered by the basic policy, although buying additional coverage would cover these procedures. Insurance companies must offer the new coverage by January 1, 2003. A proposal seeking a monetary cap on mold coverage was not approved. In January 2002, the Commissioner of the Texas Department of Insurance appointed a 19-member task force to exam the issue of residential property coverage for mold claims. A brochure, "Effectively Handling Water Damage and Mold Claims: A Consumer Guide," was released in April 2002 by the Department of Insurance with the input of the task force.

The Texas Association of REALTORS (TAR) has submitted a letter to the Commissioner of the Texas Department of Insurance outlining its concerns with mold. TAR's position is that the Texas Department of Insurance should require insurance companies to continue to cover damage from mold in its residential policies. In addition, TAR is compiling general information on mold and making it available to its members, as well as beginning an internal education campaign to inform members of the issues and concerns regarding mold and how mold can affect property transactions. TAR's Seller's Disclosure Notice now lists mold under the question on environmental hazards. The question reads: "Any repairs or treatment, other than routine maintenance, made to the Property to eliminate environmental

hazards such as asbestos, radon, lead-based paint, urea-formaldehyde, or mold?"

Twice, the Texas legislature has passed legislation to develop indoor air quality guidelines. In 1995, the Texas Department of Health was charged with developing voluntary guidelines for schools, effective May 1998. A more recent law, effective September 1, 2001, expands the earlier law to require the Department of Health to develop indoor air quality guidelines for public buildings. Compliance with the guidelines is voluntary.

On October 5, 2001, the "Toxic Mold Protection Act" was signed into law in California. This law requires the California Department of Health Services (DHS) to consider the feasibility of adopting permissible exposure limits to molds; if feasible, DHS would then adopt exposure limits to mold for indoor environments to avoid adverse health effects. This bill requires that any person who sells, transfers, or rents commercial, or industrial real property or a public entity that owns, leases, or operates a building, who knows that mold is present that affects the unit or building, and exceeds permissible exposure limits, is required to provide a written disclosure to potential buyers, prospective tenants, renters, landlords, or occupants, of the mold conditions. Similarly, a residential rental property owner is subject to the same disclosure requirement if he or she has reasonable cause to believe that mold within the property surpasses permissible exposure limits. The commercial, industrial, and residential rental disclosure obligation becomes effective the January 1st or July 1st which occurs six months after DHS establishes the permissible exposure limits. In addition, mold is now included on the state-mandated Transfer Disclosure Statement which sellers must complete in residential real estate transactions. The question reads, "Are you (Seller) aware of any of the following: Substances, material, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, mold, fuel or chemical storage tanks, and contaminated soil or water on the subject property?" DHS has also included a section on mold in their Environmental Hazards Disclosure book. Existing law provides that if this booklet is delivered to a transferee in connection with the transfer of real property, the information in the booklet is deemed adequate and neither the seller nor broker is required to provide additional information concerning the environmental hazards described in the booklet.

The Arizona Association of REALTORS is educating its members about

mold by distributing an information sheet from the Arizona Department of Health Services. In addition, the Association has added questions regarding mold and water damage to its Seller Property Disclosure Statement (SPDS) and its Home Buyer's Checklist. The SPDS asks various questions about dampness, flooding and water damage. A separate question asks, "Are you aware of any past or present mold growth on the Property?"

A new law in Maryland will address exposure to mold in office buildings. Enacted in April 2001, the law establishes a task force on indoor air quality to make recommendations on regulations protecting workers facing health and environmental risks from toxic elements located in heating, ventilation and air conditioning systems in office buildings. The task force will focus on the nature, location and extent of risks resulting from mold or other toxic organisms. A final report of the task force findings and recommendations is due by July 1, 2002. The task force began meeting in October 2001.

A resolution passed by the New Jersey Senate and signed by the Governor provides state residents with information regarding toxic mold. Adopted in May 2001, Senate Resolution 77 urges the Commissioner of Health and Senior Services and the Commissioner of Community Affairs to provide information and assistance to residents discovering stachybotrys mold regarding identification of the mold, strategies for addressing the problem, remediation, as well as investigating the health effects.

In North Dakota, federally subsidized homes on the Turtle Mountain Indian Reservation are infested with mold, and as a result, some will have to be destroyed. Tribal officials believe the mold is causing health problems and may even have led to some deaths. In response, the federal government approved \$5 million in emergency housing assistance to help address the mold problem on the reservation.

At the federal level, the National Academy of Sciences' Institute of Medicine is conducting a review of the scientific literature studying the relationship between indoor mold and adverse health effects. Sponsored by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, this study began in January 2002 and is expected to be complete sometime in 2003. The final report will make recommendations for public health interventions and further research.

WHAT SHOULD REAL ESTATE PROFESSIONALS DO?

There is little or no statutory, regulatory or case law that expressly addresses the duties of real estate professionals specifically related to mold concerns. In the absence of explicit guidance regarding those duties and obligations, real estate professionals should follow existing requirements of state law relating to latent defects and disclosure, including any particular requirements and standards of care set forth by their state licensing authorities. Beyond the requirements of law, real estate professionals may also, strictly as a matter of prudence, wish to consider adopting practices intended to help their clients and customers become aware of and familiar with mold concerns, as follows:

- Listing brokers, buyers' representatives and even transaction brokers should identify publications of the state or local departments of health or other appropriate agencies, if any, for material explaining this issue. While licensees are not microbiologists or mold specialists, they can provide these public educational booklets as a service to their clients and customers. In at least one state, providing this booklet actually gives statutory protection from some liability.

- In some states licensees are required to conduct a reasonably diligent visual inspection, and many licensees conduct such an examination of the property even though not expressly required by law to do so. Although it is not prudent for licensees to opine on the cause of unusual property conditions they may have observed, the conditions that licensees would normally note in the course of a visual inspection may include some conditions that may also lead to mold problems. Examples of such conditions are obvious water stains, such as on carpets or walls, strong or musty odors, leaky roofs or windows, plumbing leaks, overflow from sinks and sewers, or even visible mold growth. A licensee should not speculate whether or not these conditions may in fact indicate a mold problem, however, since licensees are generally untrained in such matters. As in any transaction sellers should be encouraged to disclose any actual knowledge they may have of mold problems on their properties, subject to any state disclosure requirements. Most sellers will not know if their properties have mold problems. If the seller is aware of a mold problem, the seller may elect to ask a competent expert to determine the extent of mold present and to recommend any corrective actions required.

- To the extent publications or materials discussing mold are available from local, state or Federal health or other agencies, licensees may

also find it to be a prudent and helpful service to provide such information to clients and customers. Such information should be provided in response to a buyer's expression of concern about mold. As usual, when a licensee notes red flags indicating the possibility of latent property defects, the buyer should also be advised, in writing, that it may be prudent for him or her to contact a qualified expert to inspect the property and determine the nature of any problems and what options for remediation exist. One state, however, recommends that air sampling not even occur until further standards are developed. Some purchase contracts available in some states already contain such a written advisory to buyers that they should conduct appropriate environmental investigations including any concerning toxic mold.

Armed with this information, the buyer can make an informed decision regarding the purchase of a home that has or may have mold concerns.

CONCLUSION

NAR will continue to work with EPA and other federal entities as appropriate to ensure that federal efforts to protect the public health are also fair and reasonable toward the real estate industry. We will also continue to work with REALTORS and REALTOR associations to monitor legislative, regulatory and judicial developments, disseminate updated information to the NAR membership, and develop policy if necessary.

RESOURCES

California Department of Health Services

<http://www.dhs.ca.gov/ps/deodc/ehib/ehib2/topics/mold.html>

California Department of Health Services Indoor Air Quality Info Sheet

"Mold in My Home: What Do I Do?"

<http://www.cal-iaq.org/mold0107.htm>

Centers for Disease Control and Prevention (CDC)

<http://www.cdc.gov/nceh/asthma/factsheets/molds/molds.htm>

Environmental Protection Agency (EPA)

<http://www.epa.gov/iaq/molds/moldresources.html>

EPA's "A Brief Guide to Mold, Moisture, and Your Home"

<http://www.epa.gov/iaq/molds/moldguide.html>

National Academy of Sciences' Institute of Medicine study

<http://www4.nas.edu/webcr.nsf/5c50571a75df494485256a95007a091e/97afc853da6bd18485256b5100679034?OpenDocument>

National Association of REALTORS

www.Realtor.org

Click on Federal Issues at left, Under Reference Shelf at the bottom
click on Mold in the Home

New York City Department of Health

<http://www.ci.nyc.ny.us/html/doh/html/ei/eimold.html>

<http://www.ci.nyc.ny.us/html/doh/html/epi/moldrpt1.html>

Texas Department of Insurance

<http://www.tdi.state.tx.us>