

## **The Mold Muddle**

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## **I. Where Are the Claims Coming From?**

Mold has been around since the beginning of time, but never has there been such a frenzy of media coverage, claims, litigation and concern about mold and its affects on our buildings and on our health.

Even though millions of types of mold have been around forever, the types we are currently seeing proliferate in our buildings, are different in that they are destructive fungi. The molds, in some cases, are actually eating away at the structure of the building and can compromise the integrity of a building in a very short time. Along with the concerns of property damage, there is also concern for personal injury since many of these molds, even if not specifically “toxic mold” or “black mold” do have health consequences associated with their presence. No one has set specific standards on mold exposure in relationship to health, however, it appears that everyone agrees that certain kinds of mold exposure can affect ones health and present special problems for some children, the elderly and those who have compromised immune systems. There are no current comprehensive studies to lead one through the connections between mold and health and only time will tell how these issues are resolved.

Mold growth is the result of water intrusion and the inability of the structure to “air” itself dry and/or the growth of mold is the result of improper clean up of water intrusion. The rampant growth of mold has also been associated with the building materials we now use in most construction and the methods we have employed in construction. We are building to higher energy codes which results in less air flow through walls to keep materials dry. When the building materials become wet and have no way of drying out, the mold has a perfect atmosphere for growth. Some building owners do not discover the problems until the mold is proliferating out around cracks or around windows and other areas.

The current frenzy over mold has caused numerous insurance claims and has generated significant litigation in terms of the number of cases and the amount of damages being awarded in some cases around the country. No one is exempt.

Insurance companies are being sued over coverage issues, building owners are being sued by tenants for constructive eviction, abatement of rent and personal injuries, and brokers are being sued for misrepresentation or failure to disclose. Employees are suing employers for personal injuries and negligence. Commercial property owners are suing HVAC maintenance companies and, of course, building and general contractors are being sued under numerous theories, including construction defects, breach of contract and breach of warranties and the list goes on and on. The potential liability for property damage, remediation, and personal injury can reach well into the millions even on residential property.

## **II. Who Are the Parties at Risk?**

Mold is about water intrusion because of poor construction, poor design or poor maintenance and the failure to properly handle water intrusion if it was a known problem. Experts, early on, are key to developing the list of suspects for potential liability. Who to sue depends upon who caused the problem. Therefore, the experts will assist in determining the extent of the problem as well as the cause of the water intrusion. These experts should be utilized before the Summons and Complaint is served and the reports and assistance helps with a potential early resolution by clearly defining the problem and its extent. Other not so obvious suspects include maintenance, design, the history of the structure, the development plans and materials used are all important issues in helping to determine potential parties. In most mold cases there will be more than one potential responsible party. Sorting out “who done it” should be considered up front.

A. General Contractor

General contractors are usually a party defendant in a mold case. The owner usually had the contract with the general contractor and the general contractor was responsible for the work of the subcontractors. The mold intrusion problem may be related to poor construction including window flashings, electrical intrusions that were improperly completed or other poor construction practices. The general contractors will usually be named and then will bring a third party action against subcontractors. If you represent a contractor, make sure they tender to their insurance carriers and put all subcontractors on notice early on to give them an opportunity to inspect and get the carriers involved.

Potential causes of action against the contractor include:

1. Contract
2. Negligence (construction)
3. Breach of statutory warranties
4. Breach of express and implied warranties
5. Breach of Minn. Stat. § 327A.02, subd. 1
6. Violation of Minn. Stat. § 325D.44
7. Personal Injury

B. Architect/Designers

1. Design Defect (negligence)

The designers or architects may have a contract with the general contractor or with the property owner. The design of the building may be flawed or the landscaping work may be flawed and causing the water intrusion problem. Evaluate whether it is a design problem or construction defect, sometimes it is both.

2. Breach of contract

- a. Failure to supervise contractor (if provided in a contract)
- b. Design defect

C. General Contractor and/or Architect as Third Party Plaintiffs

If you represent the general contractor, evaluate who needs to be included in the action. Inspect the site. Review all the owner's reports and information. Hire an expert who can evaluate the issues of potential responsible parties for purposes of the third party pleadings. This should be done before remediation is undertaken, if possible. Once remediation has been done, the first hand evidence has been destroyed. Is there a spoliation of evidence argument or did the contractor miss an opportunity after being put on notice?

Other parties the contractor may want to bring into the action by a third party pleading include:

- 1. Subcontractors
  - a. Negligence
  - b. Breach of contract
- 2. Insurance Carriers
  - a. Evaluate
  - b. Tender
  - c. Re-evaluate
  - d. Pursue/Fold
- 3. Architect/Designer

If you are representing the contractor evaluate:

- How clear are the plans and specifications?
- Is it a general plan or very specific?
- Is the plan the problem or the way the plan was interpreted in the construction?

Potential causes of action include:

- a. Design defect
- b. Breach of contract (if appropriate)

D. Sellers

Sellers of property must not misrepresent its condition. A potential fraud action can be brought if the seller tried to "cover up" defects and failed to disclose water

intrusion problems when asked about such on the forms. Potential actions include:

1. Misrepresentation
2. Fraud (Intentional)  
- Cover-up of defects
3. New disclosure rules (January 2003) Minn. Stat. § 513.52, et seq.

As of January 2003 the new disclosures laws are in effect. The law will now require that a property owner disclose significant defects in the condition of the property. If the seller does not, they are at risk of becoming liable for damages or equitable remedies. Even if the buyers do an inspection, the seller must still disclose any information they have which is not addressed by the report or that contradicts the reports conclusions. This new disclosure should also be evaluated in terms of stigma damages. If remediation has been completed, but disclosure must be made, will the price be affected because of the stigma?

E. Inspectors/Consultants

Inspectors and consultants are potential parties. If you represent the purchaser and an inspection or due diligence was performed, evaluate the scope and conclusions of the inspection. Preventative: Make sure if your clients are hiring inspectors/consultants that mold and water intrusion issues are addressed. If you represent inspectors and consultants, make sure your contract is clear and these issues are addressed or are specifically excluded or limited, i.e., make sure everyone understands the obligations, if any, in relationship to mold. (Beware: Many inspectors limit their liability to the cost of the inspection.)

Potential causes of action include:

1. Breach of contract
2. Negligence (professional malpractice)

F. Realtor/Broker

Potential causes of action include:

1. Misrepresentation

What was reported? What discussions with the homeowner/seller/Realtor/Broker about water intrusion and/or mold. If you represent the Realtor/Broker advise on risks of representations and the new disclosure rules. (2003)

G. Developers

Some actions have been brought against developers for excessive flooding of yards and surrounding streets leading to basement flooding, and of course mold growth.

H. Commercial Tenants as Plaintiff

Potential actions against property owners and/or managers:

1. Personal Injury

Landlords are liable for hidden dangerous conditions that they know or should know about and which the tenant does not know about.

2. Property damage

- Water intrusion
- Mold clean-up
- Product clean-up
- Employee claims

3. Constructive eviction

Constructive eviction occurs when the beneficial enjoyment of the premises by the leasee is so interfered with by the landlord as fairly to justify abandonment.

I. Commercial Property owners (as Defendants and Third Party Plaintiffs)

Commercial property owners can be Plaintiffs in actions against contractors, builders, sellers, designers, etc., but can also be defendants in an action by tenants. Insurance coverage, again, is important and must be evaluated. Additionally, potential actions by the commercial property owners include:

1. Property managers – Negligent maintenance

2. Roofing contractors/Roof construction and/or design

Poor roofing design, maintenance or construction can cause water intrusion and lead to mold growth. Make sure your contract spells out the liabilities of the parties.

3. Construction Negligence

4. Brokers – Misrepresentation

Brokers can be brought into the litigation for misrepresentation regarding conditions.

5. Maintenance subs – Negligent maintenance

Commercial property owners may have a cause of action against maintenance subs for poor maintenance leading to water intrusion or for poor clean-up and dry out of water intrusion. Poor rooftop unit maintenance, poor air exchange and moisture issues with roof top units are all potential problems for water intrusion and mold growth.

J. Others.

1. Homeowners Associations and Condominium Associations.

2. Manufacturers of Prefab homes.

### **III. Emerging Theories of Liability.**

A. Basic causes of action

1. Negligence

2. Breach of Contract

3. Warranty claims

4. Fraud

5. Consumer fraud

6. Violation of Minn. Stat. § 513.52, et seq.

### **IV. What Damages Are Available?**

A thorough analysis of damages should be done prior to any consideration of settlement. Many clients do not have an expert opinion on the extent of the real damages and future problems when they first seek legal advice. Many have not had thorough destructive testing and the real extent of remediation is unknown until the remediation is well underway. The best case scenario is to know the extent of the problem before remediation begins so that serious settlement discussions can be had, so that all potential parties can be notified and given an opportunity to do their own testing to avoid a spoliation of evidence argument and so that bookends can be established on the costs associated with correction and remediation. If the costs will exceed value obviously the client will want to know that before entering into a contract with a remediation company.

Potential damages include:

- a. Remediation
- b. Correction
- c. Reconstruction
- d. Loss of Use
- e. Personal Injury
- f. Clean up
- g. Attorney fees and costs (maybe)
- h. Other
  - Stigma
  - Moving costs

Property damages, correction costs, remediation costs and personal injury damages can potentially reach well into the millions even on residential property. However, even on the more common smaller projects, the costs are extremely high and many individuals and companies do not have the resources to absorb such expenses without available insurance coverage. Additionally, insurance coverage is becoming more and more difficult to obtain and in some cases impossible to obtain.

A cost/benefit analysis should be done early on to determine not only who to pursue, but if the pursuit makes financial sense. One should evaluate what is at issue and whether the potential responsible parties have the resources to answer for a significant judgment. A cost/benefit analysis should also be done early on, in relationship to the value of the property vs. remediation/correction. Again, it is important to know these costs before starting to remediate and blindly incurring mounting costs without knowing the total cost for the project. One must evaluate whether the property is worth the costs to correct and remediate.

#### **V. Potential Class Actions.**

The mold muddle has created the real potential for class action lawsuits. Class actions could potentially be tried against material manufacturers such as window manufacturers or other material manufacturers such as Tyvek, Stucco or siding companies. CIC projects and builders should also be concerned. Mold litigation is a new and emerging area; however, class action lawsuits are not.

A few years ago, we saw the phenolic foam insulation class action which involved the manufacturers of roofing insulation -- Beazer and John's Mansville. They manufactured a product that in the presence of moisture ended up corroding metal roof decks. The litigation went on for about five years and ended with a class action settlement.

Even though mold litigation is still developing, what is needed to certify a class action has been extensively litigated.

In order to maintain a class action in Minnesota, a plaintiff must satisfy the four requirements of Minn. R. Civ. P. 23.01 and fall under one of the three categories enumerated in Minn. R. Civ. P. 23.02. Forcier v. State Farm Mut. Auto. Ins. Co., 310 N.W.2d 124, 129 (Minn. 1981). Two preliminary requirements must also exist: the court must find that a precisely defined class exists, and that the plaintiffs are members of that proposed class. Irvin E. Schermer Trust v. Sun Equities Corp., 116 F.R.D. 332, 335 (D. Minn.1987). The class definition itself should be neutrally defined so as not to turn certification into an adjudication on the merits, and the definition should be clear so as to permit easy recognition of who constitutes a class member:

[Class] definitions . . . should avoid criteria that are subjective . . . or that depend on the merits . . . . Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability.

Herr, Ann. Man. for Complex Litigation § 30.14 (3d ed. 2003).

The **four requirements for certifying a class action** under Rule 23.01 are:

1. Numerosity: the class is so numerous that joinder of all members is impracticable;
2. Commonality: there are questions of law or fact common to the class;
3. Typicality: the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. Representivity: the representative parties will fairly and adequately protect the interests of the class.

The term “impracticable” within the meaning of rule 23 does not mean “impossible”, but merely difficult or inconvenient. Jenson v. Continental Fin. Corp., 404 F. Supp. 806, 809 (D. Minn. 1975). There is no absolute number that satisfies the numerosity requirement. Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 664 (D. Minn. 1991). However, “commentators have recognized:

Certainly, where the class is very large—for example, numbering in the hundreds—joinder will be impracticable . . . . In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.

Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 574 (D. Minn. 1995) (citing 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.05 at 3-25 (3d. ed. 1992).

Commonality requires that there be questions of fact or law common to the entire potential class. Streich, 399 N.W.2d at 214; Ario v. Metropolitan Airports Comm'n, 367 N.W.2d 509, 513 (Minn. 1985). The threshold for commonality is not high and requires only that the resolution of the common questions affect the rights and obligations of all or a significant number of class members. Peterson v. BASF, 618 N.W.2d 821, 825 (Minn. Ct. App. 2000). When a claim arises out of the same legal theory, the presence of factual variations among the claims of individual class members is normally not sufficient to preclude class-action treatment. Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir. 1977); State v. Hibbing Taconite Co., 482 N.W.2d 504, 506 (Minn. Ct. App. 1992). Common questions of basic liability are appropriate for class-wide treatment, despite any individual differences in the amount of damages per class member. Id.

Typicality focuses on the representative plaintiffs and examines whether the interests of the class plaintiffs are compatible with the interests of the class they seek to represent. Peterson, 618 N.W.2d at 825; Streich, 399 N.W.2d at 215 (citing Ario, 367 N.W.2d at 513). The typicality requirement seeks to avoid the potential for rivalry and conflict that may arise among class members and thereby jeopardize the interests of the class as a whole. Id. The requirement is not defeated merely because of varying fact patterns among the individual class members, or if there is a disparity in the damages claimed by representative parties and the other members of the class. Jenson, 404 F. Supp. at 811.

Representivity should be satisfied as long as the representative parties' interests coincide with those of the other class members, and the parties and their counsel will competently and vigorously prosecute the lawsuit. Streich, 399 N.W.2d at 215 (citing Ario, 367 N.W.2d at 513).

Once the prerequisites of rule 23.01 are met, the action must then fall within one of the three categories expressed in rule 23.02. An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

(a) the prosecution of separate actions by or against individual members of the class would create a risk of (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Common questions of law or fact must predominate over the issues of the individual members. Gilchrist v. Perl, 387 N.W.2d 412, 417 (Minn. 1986). To establish predominance, the common issues must constitute a significant part of what would be an individual claim. Despite minor differences in the potential plaintiff's allegations or damages, class certification is still warranted when issues of liability are common. Hibbing, 482 N.W.2d at 506. State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 854 (Minn. 1985). But common questions do not predominate where the most significant issue to be determined involves the amount of damages for each class member. Keating v. Philip Morris, Inc., 417 N.W.2d 132, 137 (Minn. Ct. App. 1987); In re Objections and Defenses, 335 N.W.2d at 719. Minnesota courts will refuse to certify a class when proof of damages would result in numerous mini-trials. Keating, 417 N.W.2d at 137. But where the computation of damages is "virtually a mechanical task, capable of mathematical or formula calculation, the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability." Id. (citing Windham v. American Brands, Inc., 565 F.2d 59, 68 (4th Cir. 1977)).

In order to determine whether a class action is superior to other alternatives, the court should consider manageability, fairness, efficiency, and available alternatives. Peterson, 618 N.W.2d at 826; Streich, 399 N.W.2d at 218. The court should consider whether the individual claims would or could be maintained absent the class-action vehicle. Id. Thus, the class action is most necessary when the individual claims are small. Peterson, 618 N.W.2d at 826; Forcier, 310 N.W.2d at 130. "Where the potential recovery is too small to justify individual litigation, a class action is proper." Forcier, 310 N.W.2d at 130 (citing Rathbun v. W.T. Grant Co., 219 N.W.2d 641, 652 (Minn. 1974)). Class certification is warranted with respect to small claims because litigation can be prohibitively expensive and possible claimants may be unaware they were injured. Streich, 399 N.W.2d at 218. Thus, without a class-action suit, the "injuries suffered by many members of the class will go unredressed." Id.

Rule 23.03 governs class-action management, notice, and partial class-actions:

(a) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order hereunder may be conditional, and may be altered or amended before the decision on the merits.

(b) In any class action maintained pursuant to Rule 23.02(c), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (1) the court will exclude from the class any person who so requests by a specified date; (2) the judgment, whether favorable or not, will include all members who do not request exclusion; and (3) any member who does not request exclusion may, but need not, enter an appearance through counsel.

(c) The judgment in an action maintained as a class action pursuant to Rule 23.02(a) or (b), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action pursuant to Rule 23.02(c), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Rule 23.03(b) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class; the provisions of this rule shall then be construed and applied accordingly.

Management issues are inherent in any class action. Forcier, 310 N.W.2d at 130 (citing Klicker v. State, 197 N.W.2d 434 (Minn. 1972)). Rule 24.03 therefore governs trial court management of procedural issues unique to class actions:

In the conduct of actions to which this rules applies, the court may make appropriate orders:

(a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in