

§ 10.04 Repairs Necessitated by Preexisting Conditions

[4]—Potential Landlord/Tenant Issues Involving Mold^{7.1}

[a]—Introduction

Among experienced practitioners, there is a tendency to downplay the significance of mold in today's leasing situations. After all, many practitioners with twenty or more years experience, have had to contend with asbestos, PCBs, sick building syndrome and a variety of maladies, which would seem to make mold mundane and somewhat trivial. However, a proliferation of mold-related situations and building owners' inability to remedy the problems adequately have caused many office professional to look seriously at relocation and developing constructive eviction claims. Additionally, in light of the potential damage claims and resulting potential liability, it is advisable for landlords to address mold-related issues specifically in their leases.⁸

The lease should assign "responsibilities for preventing potentially harmful mold and allocating the costs associated with mold remediation in the event harmful mold growth does occur."⁹ Among the issues that can be addressed in a so-called "mold clause" are: "construction, warranty, and compliance with present and future laws."¹⁰

Specific provisions should be included in the lease addressing:

- Maintenance obligations
- Reporting requirements
- Assessment of damage and remediation responsibilities
- Indemnification
- Insurance coverage¹¹

Each of these provisions is discussed below.

[b]—Maintenance and Reporting Requirements

Of course the most efficient and cost-effective way to deal with mold growth is prevention and quick remediation.¹² Both the landlord

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⁸ Jones and Weinberg, "Using Lease Provisions to Address Mold Growth," 16 Commercial Leasing Law & Strategy 1 (Law Journal Newsletters Jan. 2004).

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

and the tenant should be mindful of the damage that can result from excess moisture and water leaks. Both should use all reasonable efforts to prevent such leaks and the potential damage that resulting mold can cause. If, in fact, mold does begin to grow, the parties need to take swift action to remediate. Therefore, the lease should address the parties' preventive maintenance responsibilities. It should also address the allocation of costs for remediation. The tenant should be responsible for keeping its premises free from excess moisture, notifying the landlord of any leaks or suspected leaks, and be sure to arrange for the regular inspection and maintenance of HVAC equipment.¹³ Since the tenant is in a better position to notice problems on its premises, it should be required to notify the landlord when a problem arises. A twenty-four hour notice provision seems reasonable. Failure to notify the landlord should shift some of the potential liability from the landlord to the tenant. Mold grows rapidly, so quick notification can make a big difference in the damage and costs associated with remediation.

[c]—Assessment and Remediation

“No governmental standards exist regulating mold growth. Therefore, no baseline exists regarding acceptable levels of mold.”¹⁴ However, the EPA Web site contains some suggestions for remediating mold in commercial buildings.¹⁵ Who should bear the costs involved in maintenance and remediation depends on factors such as access, fault, and ability to detect and rectify the problem, etc.

In terms of assessment, the landlord can require the tenant to conduct an assessment if the landlord believes mold growth is occurring. If in fact mold is discovered, the tenant should bear the cost of the assessment. If mold is not discovered, the landlord should bear the assessment costs.¹⁶

[d]—Indemnification

The landlord should seek indemnification from the tenant for “any damage, cost, or liability arising out of the tenant’s actions, omissions, or negligence, including any construction undertaken by or on behalf

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 4. See <http://www.epa.gov/iaq/molds/index.html> (last visited Nov. 16, 2004), which provides helpful guidance. See generally, http://oaspub.epa.gov/webi/meta_first_new2.try_these_first (last visited Nov. 16, 2004) for a listing on other EPA guidance.

¹⁶ *Id.* at 2, 4.

of the tenant, that causes water leaks leading to mold growth, or arising out of the tenant's failure to adhere to its reporting or maintenance responsibilities under the lease."¹⁷ The landlord will want this indemnification obligation to survive the term of the lease.

[e]—Insurance

Due to the fact that most insurance companies have specific mold exclusions in their commercial generally liability policies, it is important to seek a mold coverage endorsement or specialty coverage.¹⁸ Specialty coverage can be a separate policy or it could be a modified policy -covering environmental damage.¹⁹ While coverage may be available, it can be very costly. Due to the high cost, it may not be cost-effective to obtain such a policy, in which case, risk allocation becomes that much more important.²⁰

[f]—Tenant's Perspective

The tenant will want to receive a representation from the landlord that there are no current leaks, no mold growth for a given period of time and there have not been any material water leaks during the past several years.²¹ Note, however, that the landlord will want to "limit such a warranty by including a 'knowledge' qualification, which the tenant should only accept if the landlord had conducted due investigation."²²

[g]—Establishing a Checklist for Mold Detection, Evaluation and Remediation

In addition to addressing mold-related issues in the lease, the parties need a plan of action to detect mold, evaluate the dangers and remedy the problems. Both landlords and tenants should have a checklist to identify possible mold growth issues and means of prevention.²³ They should be prepared to allocate responsibility for clean

¹⁷ Jones and Weinberg, "Using Lease Provisions to Address Mold Growth," 16 Commercial Leasing Law & Strategy 1, 4 (Law Journal Newsletters Jan. 2004).

¹⁸ See § 25.02[8] *infra* for a discussion of insurance issues.

¹⁹ Jones and Weinberg, N.11 *supra*, at 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See also: http://www.epa.gov/seahome/child/airq/mold/mcheck_m.htm (last visited Nov. 4, 2004); <http://www.nonprofitrisk.org/ws-ps/topics/mm/mold-ps.htm> (last visited Nov. 4, 2004) for further discussion of issues relating to mold and moisture damage as well as remediation advice.

up as well as damages resulting from the presence of mold. Any plan should include:

- Investigating and evaluating evidence of water leaks or excessive moisture in the office, storage rooms or common areas.
- Investigating and evaluating evidence of mold or mildew growth. Make sure to consider the possibility that there is hidden mold.
- Identifying causes or sources of moisture and water.
- Fixing inoperative or damaged windows and/or doors. In a net lease situation chimney flashings and siding should be inspected as well. Gaps in the siding may harbor mold and mildew problems.
- Being aware of molds in electrical rooms, communication rooms and kitchen facilities
- Noting that bulging behind wallpaper is a sign of damage due to mold.
- Remediating persistent mildew and mold in bathrooms, slop cabinets, refrigerators, drain pipes, etc.
- Addressing failures of/or malfunctioning of the heating/ventilating or air conditioning systems and the adequacy of the units for the space.
- Controlling the relative humidity levels in the building.
- Watching for seepage through carpets or reoccurring water issues.
- Using dehumidifiers when needed. A continual musty smell indicates the presence of mold and mildew.
- Making sure there is proper ventilation.

**[h]—Assessing the Cause and Extent of the Mold and
Moisture Damage and Tips for Proper Maintenance**

Much of the damage associated with mold can be limited and liability avoided by taking the following steps:

- Take preventive action—conduct periodic inspections of the heating, cooling, ventilating and plumbing systems. Clean the equipment regularly.
- Keep windows and doors closed in damp or rainy weather, and make sure they are properly insulated.
- Do not run air conditioning when doors or windows are open.
- Treat all unpainted surfaces (e.g., plywood) with a coating or paint to prevent mold from adhering to the surface. An adequate coat of paint can help prevent accumulation of surface mold.

- Keep air conditioning and ventilation systems on in humid climates. Mold grows when humid, stagnant and damp conditions are allowed to fester and air conditioning.
- Maintain general temperature of 68-72 F.
- Use dehumidifier or air filtration systems to cleanse the systems of bacteria, fungi and other contaminants.
- Regularly clean office and vacuum carpets. Mold settles in carpets and gets carried by shoes and air to other parts of the premises.
- Wipe and dry areas where moisture can accumulate, such as windows, entrances, pipes, refrigerators and other water systems.
- Limit plants. Over-watering creates conditions which can generate mold.
- Recognize that mold can build up rapidly in damp, humid climates. The rash of hurricanes in Florida in the fall of 2004 created a number of mold situations that literally sprung up within a matter of days both because of the wet humid conditions created by the storms and the exposure of offices to the humid Florida conditions outside. In many instances, building air conditioning and ventilating systems were turned off or knocked out due to the storms and the resulting humid conditions combined with the absence of cooler, drying conditions in the premises resulted in the buildup of moisture and growth of mold in these facilities.
- Use exhaust fans in bathrooms and kitchen area to vent excess moisture from these areas.
- Store cleaning materials properly and hang up wet cloths to make sure they completely dry out.
- Dry excess moisture that has gathered in fixtures to ensure a clean and dry environment.
- Determine causes of excess moisture and condensation. Repair them immediately.
- See if there are specific leaks or a specific cause or event that created the damage. Check for hidden damage. Check under carpets, within a wall or the ceiling if hidden problems are suspected or if damage exists externally. An internal examination is warranted if there is extensive external damage.
- Use a moisture meter to test dampness within suspect walls or surfaces.
- Check for peeling paint, stains on or bulges in the walls or ceilings. They are indicative of moisture damage.
- Check for duct leaks and uninsulated ducts.

Storage areas are particularly vulnerable to mold. However, the following steps will help limit mold growth:

- Do not overfill storage areas with boxes and other materials.
- Do not allow or retain any damp materials in the storage area.
- Keep stored materials off any floor areas with racks or blocks to allow air circulation under the materials and to prevent damage due to moisture or possible flooding.
- Inspect the storage area periodically to assure that there are no moisture buildups or possible area where moisture can enter the storage area.
- Fix crack, leaks and other potential moisture areas.
- Dehumidify and cool the storage areas to prevent warm damp buildups in these areas.
- Installing a ventilation system to prevent buildup of stale, stagnant or damp buildup of containments in the air.

[i]—A Checklist of Leases Issues—A Mold Addendum

As previously noted mold-related issues should be addressed in the lease. They can be handled in much the same way that other maladies such as sick building syndrome, repairs, compliance with law and hazardous wastes are already addressed. Indeed the clause may be structured the same way as other clauses so long as it does the following:

- Defines the party with primary responsibility for keeping the building and premises free of mold.
- Identifies the possible contributors to mold buildup and allocates the responsibilities for keeping these causes and areas free from the potential buildup of mold
- Identifies a procedure for parties to be able to notify the other of mold problems.
- Creates a protocol for cleanup and remedying the mold source issues.
- Identifies a process by which the party charged with the responsibility of fixing the mold problem can access the space. If the responsible party is the landlord, as is usually the case, he will need to gain access to the tenant's premises. Such access may disrupt the tenant's operation. While the tenant should be willing to give the owner access to fix the mold problem properly and prevent further intrusions, the landlord should be willing to do such repairs and replacements around the tenant's operating schedule. Oftentimes, access may be necessary to replace leaky windows, replace damp and infested carpets, and do necessary structural and plumbing work to eliminate the future buildup of moisture in the building.

- Determining whether the costs of cleaning up mild damage and remedying source issues are operating expenses or capital expenses or such expenses to be determined, upon considered to be discovery and investigation, capital or ordinary costs. Examples of capital costs are the cost of replacing defective drainage system or opening a concrete floor to install a vapor barrier that was not properly installed when the building was first constructed. Examples of ordinary operating expenses would be the costs to dry a moist area, which could later become the source of mold infestation if ignored,
- Creating short- and long-term remedies, including the option to terminate the lease with damages if the mold issues are so serious that they require extensive structural repairs.
- Assigning the responsibility for purchasing insurance for mold damage. If insurance is not available, the lease should indicate how responsibility for damage and injury will be allocated.

Before entering into a lease it is important to address the insurance issues and conduct a proper due diligence investigation to determine the presence of mold and any existing damage. Further, note that proper verification of mold levels and damage must be done by a qualified technician and assessed by a certified laboratory. Throughout the process, it is important to consult qualified professionals when necessary.

[j]—Sample Mold-Related Clauses

Whenever possible, a tenant should try to obtain a warranty from the landlord that the property is presently free and clear of mold as per the example below.

“Landlord warrants and represents that the premises are free from mold and the symptoms commonly associated with mold. To assure that the premises shall be free from such contamination during the term of this lease, landlord shall periodically test the premises and building for the possible sources of mold, including, drainage piping and the presence of mold spores above usual levels.

Landlord shall have the responsibility of removing any mold in the building or premises, except in the instances where such contamination is caused solely by Tenant.

To this end, Tenant shall notify Landlord as soon as possible following its discovery of any mold and shall give Landlord access to the Premises, at reasonable times and with minimal inconvenience

to Tenant's operation, for Landlord to remediate such mold problems and to correct any existing conditions which caused the mold conditions or which can cause later mold buildup.

Landlord shall maintain heating, ventilating and air conditioning systems, drainage and other systems in good condition and repair, at its sole costs and expense, to prevent the existence and buildup of mold in the Building and Premises."

The following is a pro-landlord clauses addressing mold-related issues:

"Landlord and Tenant realize that molds and mildew are microscopic organisms ground virtually everywhere, both indoors and outside. One of the possible reasons for indoor mold growth is excess moisture. The parties also realize that humid conditions which have existed in [the city where the Premises are located] during [2005], has led to mold growth in the Premises, common area and other portions of the Building. While the Landlord has undertaken extensive measures to remediate mold from [the Building], including the Premises, the Landlord cannot guarantee tenant that [the Building] is, or ever will be, a "mold-free" environment. Landlord agrees that it will be responsible for cleaning and remediation of any mold conditions and correcting any conditions which may give rise to future mold conditions in the Building and Premises, except for those conditions caused by the Tenant. Tenant agrees to inform Landlord immediately in the event that mold growth, water leakage or infiltration, and/or HVAC problems develop in the Premises. Tenant further agrees to reduce moisture from running into the Premises by closing all windows and doors whenever the HVAC is running in the Premises and wiping down visible moisture accumulation on windows and walls as soon as it appears."

A triple net situation has its own, unique issues. The following clause shifts a great deal of responsibility to the tenant.

"Tenant in taking the premises in an "as is" condition, is aware that mold and other organisms may be present in the Building and Premises. Tenant understands that heat and humid conditions, particularly in the State of [] where the Building is located, may contribute to the growth of mold and mildew. Tenant agrees to take all steps to reduce the growth of mold and mildew in the premises and shall, after notifying the Landlord, remediate any such conditions in the premises and shall take all necessary steps, at its own cost and expense, to correct the conditions which gave rise to such mold

condition including replacing all pipes, drains or other structural conditions.

[k]—Devising a Policy and Program to Deal with Mold-Related Issues

The following is a suggested approach for a corporate tenant to consider taking when devising an indoor air quality policy and program to deal with mold-related issues:

- The company should be committed to providing a work environment that is free of recognized hazards and will investigate any complaints that are related to indoor air quality (IAQ) issues.
- When necessary, the company will turn to recognized experts and consultants in IAQ to assist the company to meet Environmental Protection Agency (EPA) and OSHA guidelines that are generally accepted by industrial hygiene and engineering communities.
- EPA guidelines recognize that IAQ is influenced by concentrations of certain substances, temperature and humidity conditions. Acceptable IAQ is air in which there no known contaminants at harmful concentrations.
- OSHA has acknowledged that IAQ rarely identify any harmful levels of specific toxic substances, but the company should make ever effort to address an employee's complaint and identify the cause of the complaint with reasonable certainty and try to associate the complaint with known causes, such as odors, low-level containments, air circulation, temperature differences, humidity, job pressures, lighting, workstation design or noise.
- Complaints should first be directed through the company's human resources department which should coordinate with its the company's law department to determine if there are real estate related causes of the problem. If the problems are real estate related, the necessary consultants and experts should be called in to remedy the problem. All workplace mold issues have an OSHA component that places legal obligations upon the employer and not necessarily upon the employer's landlord. Unless the lease specifically makes the landlord responsible, the landlord will not necessarily bear responsibility for remediation. In fact, a building may be in compliance with laws pertaining to the building's safety, etc. and the landlord may have fulfilled his own legal obligations while the tenant will still run afoul of his obligations to his employees under federal and state OSHA requirements.

- The tenant should commit to having a suitable investigation conducted by the company's professions and outside consultants to determine the extent of any mold-related problems and their cause(s). The company's risk management group should also be consulted to determine if the calamity is covered by the company's property or commercial general liability policies. The risk management group can also employ various assessment resources when conducting an on-premises inspection of the extent of mold, nature of any mold and the possible causes of the problem. The report should be addressed to counsel to preserve its confidentiality under the attorney-client privilege.
- Once possible causes are found, company counsel should review the lease with respect to each party's obligation to clean up the mold and correct the underlying problems. Communication should be established with opposing counsel to place the party on notice and to try to find amicable solutions to the problems.
- Input from structural and engineering consultants should be sought to try to establish the sources for the current problem as well as find adequate solutions to prevent further occurrences. Throughout the process, qualified professionals should be consulted when necessary.