

MOLD: COMMON QUESTIONS AND ANSWERS

By

Edward A. Cohen
Thompson Coburn LLP
One U.S. Bank Plaza
St. Louis, Missouri 63101

Phone: 314-552-6019

Fax: 314-552-7019

E-mail: ecohen@thompsoncoburn.com

Litigation involving mold problems is on the rise. Until recently, such suits were so rare they seemed nonexistent. Now, in publications of all kinds, problems and lawsuits are being reported with increasing frequency. Some of the reported verdicts for injury claims related to mold exposure are astonishingly high.

As a frequent speaker on mold-related issues and in working with our clients, I have found that many people have similar questions. This article sets out some of the more common questions and provides answers. Every case is different so these are general answers and are not intended to be relied upon as legal advice.

Who is being sued? There is a wide range of potential defendants, depending largely on the specific facts involved in a given situation. However, reported cases (and matters we are handling for clients) generally seem to focus on a few categories, including: employers, commercial and residential property owners, commercial tenants, insurance companies, architects and builders. In a number of cases, property owners are sued and they, in turn, look to others for indemnity or contribution.

Do all of the claims or cases involve personal injury? No. Many cases or claims involve significant property damage issues. Fixing a mold problem may involve remediation in the form of removal of affected materials from a building, spraying a biocide on certain building materials (such as pipes, ducts or hard surfaces), or both removal and spray of a biocide. In addition to taking steps to get rid of the problem, the underlying cause must also be addressed; this may be as simple as fixing a roof leak or as complicated as putting in a new HVAC system.

Are there laws that regulate mold or abatement of mold? Basically, no. At this time, there are no laws that specify how much mold or how many mold spores are allowed in a building. However, that does not mean that property owners have no potential for liability; there is literature in the scientific community that provides a basis for knowing that excess exposure to mold spores may cause problems for some people. There is believed to be differing susceptibility among people. Also, some molds are viewed as having the potential to cause

more problems than others. These factors cause mold to be difficult to regulate; setting reasonable and appropriate standards would be challenging and may prove impossible. There are, however, some guidelines that may be pertinent. For example, New York City has promulgated guidelines for remediating buildings with mold problems. The United States Environmental Protection Agency has published more general guidelines. California recently developed guidelines as well. The various guidelines at least provide some assistance in addressing questions such as whether to keep employees out of a building (or part of a building) when remediating.

What can a property owner or manager do to avoid or minimize such problems? The best thing is prevention. The EPA has user-friendly publications with building maintenance suggestions. Once a problem surfaces, or a complaint by a tenant or employee is made, it is important – if not critical – to respond appropriately. It is a mistake to under-react or over-react. A plan will need to be developed to address the complaint or problem. The plan should be well thought out and based on good science and reliable, appropriate testing. Not every building needs to be gutted because of mold growth; the correct and appropriate plan must be case specific. A “cookie cutter” approach does not work. Hysteria has surrounded some mold cases; certainly, there are consultants or lawyers who may want to turn a modest mold issue into a big one. Again, good science based on good testing is fundamental to resolving any mold issue in an appropriate manner. Finally, the ASHRAE standards or guides for HVAC systems can be pertinent in preventing problems.

Will I have insurance coverage if my company's building has a mold problem? Maybe or maybe not. This depends on the facts and circumstances, and on the type of policy or policies that may be pertinent. Also, if there is insurance coverage, it may be limited. Although there is no way to provide a general answer to this important question, it is critical to address this issue early in the management of such matters. Depending on the circumstances, the carrier may need to be given notice.

Will counsel handle all of my mold problems? Probably not. As with many other environmental issues, a “team” approach will often prove best for the client. The author believes that having counsel work closely with appropriate environmental consultants will generally lead to the most cost effective resolution of mold or other indoor air quality problems for clients. If the matter is not in litigation and there are no adverse parties, and particularly if the only step presently needed is an assessment of the mold situation, counsel may not even be need at this juncture.