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Mold
Wanted! Dead or Alive
Part Two

By Bart Mendel and Jacklyn Wolf, Santa Barbara Building Associates

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In our first article we explored in general what mold is, its causes and diagnosis. In this second article we will discuss the potential health effects of mold on humans and the lack of industry wide standards for mold remediation. Most importantly, we will address the establishment of a reasonable standard of care in mold remediation projects. Look for the final article in this series in the May 2002 newsletter in which we will present suggestions for developing board policies and procedures regarding mold and water infiltration issues as well as discuss approaches for cost control.

There are many misconceptions with regards to the effects of mold spores on humans. It is a widely held misconception that molds are exclusively allergens, meaning that only certain people with special sensitivities react to them. Conversely, some people believe that all molds are toxic. In reality, the health effects of molds can be both allergenic and pathogenic. Certain mold species, notably *Stachybotrys chartarum* and some species of *Aspergillus* and *Penicillium* and others, create a toxic response in humans through the production of

mycotoxins. Mold spores can infect a person through inhalation, ingestion or through skin contact.

Mold has two distinct aspects of its life cycle that can adversely affect humans. During its active growth phase in the presence of water, mold can give off volatile organic compounds (VOCs). VOCs are often responsible for “moldy odors”. When the water source dries up, molds respond by reproducing. During this process, called sporulation, the mold throws off spores into the air. These airborne spores can then find a new growth site or can be inhaled.

The potential health effects from mold spores, mycotoxins and VOCs is varied and extensive, including such symptoms as: irritation of mucous membranes, eyes, nose and throat, dermatitis, exacerbation of asthma, respiratory distress, headaches, dizziness, inability to concentrate, fever, flu-like symptoms, fatigue, nose bleeds, diarrhea, vomiting, and many others. *Needless to say, not everyone who exhibits these symptoms has been exposed to mold*. There are many other indoor air contaminants that can cause health problems besides mold, such as VOCs from carpet and paint and many other sources. People in high-risk groups such newborns, young children, the elderly, smokers, as well as persons with various conditions as heart trouble, bronchitis, asthma, hay fever, emphysema, and other diseases are much more likely to experience an allergic response. According to an EPA study in 1989, the total number of high-risk persons is staggering. Probably over one hundred million people in the USA are in at least one of the high-risk categories. To confuse matters further, many physicians upon whom homeowners rely do not have specific experience in mold related illness, which is truly becoming its own field of specialization.

Adding to the complexity of the vast array of potential health effects and the variable allergenic responses in humans is the fact that there is no clear legislation, universally accepted trade organization or governing body, and no standards set in the industry with regard to mold diagnosis, remediation, testing, or permissible exposure levels (PELs). California’s recently adopted SB 732 Toxic Mold Act requires the State Department of Health to *consider the feasibility of adopting* PELs to molds in indoor environments in a report due by July 1, 2003.

Given the wide and varying health concerns and lack of standardization, how do Associations responsible for multiple homeowners relate with these problems? The absence of clear established guidelines does not mean that Association boards should disregard issues of mold nor does it mean that they should over react. Rather, associations should carefully follow a *standard of care* in decision making for mold remediation projects. Standard of care is a constantly evolving legal notion, loosely based on precedent in previous litigation and defined in terms of reasonableness. In other words, how would knowledgeable industry professionals act given the same set of factors? Clearly, reliance on experts is critical in any mold remediation. In general, the Association’s board members are protected by the California Civil Code’s business judgment rule whereby their liability is minimized by retention of a suitable expert whose advice is followed.

Much can be said about the lack of standards in the industry; however, certain practices are becoming recognized by a majority of experts:

- Visual evaluation of a home is the first step in diagnosis. Wholesale air testing for mold is not indicated where no sources of water infiltration or active mold growth are found.

- Air sampling is recommended to confirm the initial diagnosis of mold contamination and also at the end of the remediation to confirm the absence of elevated levels or abnormal distribution of molds (clearance testing). Air sampling is a relative measure between the concentration of mold spores in the outside or ambient air and that within the home. The indoor air should have less total spores than ambient air and the distribution of the specific species should mirror that outside.

- Biocides (such as Clorox) should not be used to kill mold in remediation projects. As noted above, mold can be allergenic whether alive or dead. The removal of mold spores is the goal of remediation because even dead spores can cause health problems.

- For significant surface mold or in-wall mold reservoirs, hiring an experienced mold remediation firm is critical. Mold remediation bases many of its workplace practices on similar standards such as asbestos abatement. An experienced contractor and their workers are specially trained in remediation techniques. They must wear proper personal protective equipment (PPE) such as respirators, gloves and disposable clothing. Mold reservoirs within a home must be remediated in a proper *containment*, generally constructed with double layer plastic barriers. Negative air equipment is placed within the containment to produce artificial vacuum pressure that prohibits the dissemination of mold spores out of the immediate work area. Correct and faithful adherence to these practices can minimize an Association's liability of mold escaping and spreading and potentially contaminating the rest of the home and even neighboring homes.

In a condominium association, additional problems arise due to the definition of property ownership. For example, let's say there is a leak on the second floor unit of a condo from the angle stops under the bathroom sink. This sink leaks for some time and water travels through the vanity cabinet into the floor framing and damages the ceiling of the unit below, creating mold damage in both units and the common area in between. If detected promptly, the leak and the drywall damage could have been repaired but it was not. Time passes and mold grows which necessitates mold remediation. Typically, most governing documents specify that individual homeowners are responsible for the repair of out of the wall plumbing valves. However, once the problem spread into the common area, the Association must get involved. In the ensuing foray of who pays for what and to what extent, it is not hard to envision multiple cross-claims between the Association and the two homeowners, particularly if perceived health issues are involved. If, during the course of repair, other building defects such as incomplete firewalls between units are discovered, the problems become even worse, through cross contamination. Unfortunately, mold does not differentiate between property lines between units and the cause of mold conditions in one unit can be from an adjacent unit or even a unit distant from the point of the complaint.

Both legal and technical difficulties arise regarding the effects of mold on personal contents. At this point, there is no standard that addresses the cleaning of personal contents. In homes

where mold has grown for some time, active mold growth on soft personal contents such as mattresses, heavily upholstered furniture and stuffed toys may indicate the disposal of such items. Again, who bears responsibility to diagnose and clean personal contents? Visit the website for the Environmental Protection Agency at www.epa.gov/iaq/mold regarding further information on mold remediation and guidelines for cleaning of furniture and personal contents. For many useful industry links on mold and mold remediation, visit Santa Barbara Building Associates' web site at www.sbbldg.com and click on "mold".

Addressing mold contamination, particularly when multiple homes are involved, can truly feel like swimming in shark-infested waters. In summary, every Association should be proactive in relating to water infiltration and mold remediation issues. Reliance on experts to establish a reasonable standard of care that is specific to the problems in your Association will go a long way to establishing that due diligence was taken and to protect your liability.

COMMON INTEREST DEVELOPMENT INSURANCE

Protecting the association and its manager from risk

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Declarations of Covenants, Conditions and Restrictions (CC&Rs) of Common Interest Developments include the parameters of required and optional insurance coverage for an association.
Additionally, two sections of the California Civil Code, § 1365.7 and 1365.9 require that Common Interest Developments obtain specific amounts of insurance coverage to protect individual homeowners and volunteer directors and officers from personal liability in excess of the coverage of insurance if certain criteria are met. 1365.7 (4) (A) requires an association to carry a minimum of five hundred thousand dollars ($500,000) of general liability insurance and at least that amount of directors and officers insurance if the CID consists of 100 or fewer separate interests. 1365.7 (4) (B) requires an association to carry a minimum of one million dollars ($1,000,000) of general liability insurance and at least that amount of directors and officers insurance if the CID consists of more than 100 separate units. This section of the Civil Code addresses insurance to protect the volunteer directors and officers. In addition to the monetary requirements, other criteria are stipulated in 1365.7 that must be met in order to protect the volunteer directors and officers.

Civil Code §1365.9 (a) states:
"It Is the intent of the Legislature to offer civil liability protection to owners of the separate interests in a common interest development that have common areas owned in tenancy-in-common, if the association carries a certain level of prescribed insurance that covers a cause of action in tort." In order to protect the individual separate interest owner under this Civil Code section the following subsections must be adhered to:

(1) -"The association maintained and has in effect for this cause of action one or more policies of insurance which include coverage for general liability .of the association.

(2) The coverage described in paragraph (1) is in the following minimum amounts; (A) At least two million dollars ($2,000,000) If the common interest development consists of 100 or fewer separate interests. (B) At least three million dollars ($3,000,000) if the common interest development consists of more than 100 separate Interests."

The required dollar amounts of coverage in Civil Code § 1365.7 and § 1365.9 differ. This is a confusing issue for board of director's members and managers. It is prudent for boards of directors to discuss an assoclation's insurance needs with an agent who is knowledgeable in coverage needed to properly protect an association and its members.

CC&Rs require an association to purchase insurance to cover damage to property owned in common by the association members or owned by the association. The amount of property insurance to purchase is difficult to determine. An association may want to hire an independent real estate appraiser to evaluate the value of the property in the association as a measure of how much insurance to buy. An insurance agent may calculate the value of the property based on estimated square footage and the locally accepted cost for replacement of equivalent or like construction per square foot. It is prudent for a board of directors to review the calculation of property values yearly at policy renewal to determine if the amount of property coverage is adequate for the association's property.

Associations are required to carry general liability insurance, adequate property insurance and directors and officers insurance to cover negligent acts or omissions by members of the board of directors (there are some exceptions to this coverage). Some CC&Rs also require that the association obtain earthquake insurance coverage for common area property, flood insurance if the property is located in a designated flood plain, and fidelity bonds (often called employee dishonesty insurance) to protect the association in case of theft or embezzlement. If CC&Rs are silent on the issue of fidelity bonds, it is recommended that an association carry this type of insurance. If an association employs personnel, workers compensation insurance is required. Even if an association has no employees, it is prudent for the association to carry a minimum workers compensation policy as additional protection in the event a contracted vendor allows his workers compensation policy to lapse and the vendor's employee is hurt on the association's property. While this scenario is unlikely, in our current litigious society, purchasing the insurance is a precautionary tactic.

When hiring contractors for an association such as a landscaper or pool service, an association should request a certificate of insurance from the contractor and ask to be named as an additional insured on the vendor's policy. The association's management company may ask to be named as an additional insured on all of the association's insurance policies. This

affords the management company protection should the manager or the management company be named as a defendant in any legal action. In most cases, the manager or management company Is acting at the instruction of the board of directors and should be protected by the association's insurance policies. There are exceptions to this general rule. For example, a manager or management company performs an act without the authority of the board of directors thereby resulting in legal action being filed against the manager or management company by the board of directors or a homeowner. Many management companies' contracts with associations contain language relating to indemnification of the managing agent in case of legal action against the association and the management company. Language regarding how a legal action between the association and the management company will be handled including payment of legal fees is often part of the management contract as well.

An association does not eliminate the risk of suit even if it has obtained the proper insurance. However, with the proper insurance coverage in place, an association is better protected in case of legal action. With the proper coverage, an association's liability policy will cover suit brought in the case of personal injury or death to an individual as well as damage to real property. Directors and Officers Insurance will protect boards of directors members in case of a tortuous act or emission by a volunteer director (there are exceptions).

Settlement of insurance claims - bad faith cases

When an association has a proper loss as a result of earthquake, fire, or other covered peril, the association will become thoroughly involved with the insurance company in the settlement of the claim. The claims adjuster assigned to the association's loss may be an employee of the insurance company, or may be an independent adjuster hired by the insurance company. Associations often feel confident that the insurance carrier will settle the claim and enable it to restore the property to its pre-disaster condition. This may not always be the case.

There are instances where insurance companies may implement methodologies in estimating repair costs and deductibles that may not be advantageous to the association. Insurance companies may view certain damages as not related to the disaster but caused by other circumstances. In these circumstances, associations already faced with the need for funds to cover the policy's deductible may be faced with the problem of raising the balance of the money needed to properly repair or replace the damaged areas of the property. Such funds have to come from special assessments levied upon the owners, bank loans and/or SBA loans that also would have to be paid back from special assessment funds and/or reserve funds. When disaster strikes and an assoclation is faced with severe property loss, it is prudent to contract with experts to assist the association in preparing loss estimates and specifications for the repairs. Experts can Include engineers, architects, and construction managers. Additionally, in the event an association discovers that its insurance claim may not have been properly handled, there are legal steps that can be taken to help the association obtain the necessary funding to properly repair the damages.

Summary

Associations need to carry the proper types and amounts of insurance as required by their documents and the Civil Code. The board of directors should review the coverage with the insurance agent and managing agent annually to determine if changes in coverage or increases in policy limits are needed. Managing agents may be named as additional insured

on the association's policies. Management companies should review their insurance annually as well. Contractors' insurance policies should be reviewed to be sure the contractor's insurance is in effect. When a loss occurs at an association, the board of directors should consider contracting with experts to help the association obtain the funds needed to properly restore the association's property to its former condition. Associations should purchase insurance through an agent whose expertise is in providing insurance for common interest developments. A board of directors may want to have the insurance agent attend a meeting annually to explain the insurance coverage to the members of the association. Civil Code.§ 1365 requires associations to distribute insurance information to the membership each year outlining the coverage in effect for the association. The information is typically distributed along with the annual budget information.

The contents of this article are for general information purposes only and are not intended nor represented to replace professional, specialized, legal advice. If you are confronted with a specific legal issue, you should consult an attorney specializing in common interest development law.

LEGISLATIVE UPDATE - 2002

There are several new bills that directly affect homeowner association operations that were introduced last month in the California legislature. A brief summary of some of these bills follows:

AB 2289 (Kehoe) – Nonjudicial Foreclosure Restriction – Current California law provides several approaches for associations to collect their assessments. These include the levying of late fees and interest on delinquent accounts and imposing a lien on the property to secure the assessments once proper notice is given and collection procedures are followed. Should the assessments remain unpaid, the association has the ability to use foreclosure proceedings to collect the debt. While it is rare that an association will foreclose a lien in order to collect past due assessment, the ability for an association to foreclose will usually compel a member to search for other ways to satisfy the debt.

In its current form, this bill would not allow associations to use nonjudicial foreclosure to collect the past due assessments until the past due assessments exceed $5,000 (Five thousand dollars). If your association assessments are $250 per month, you would have to wait 20 months to start nonjudicial foreclosure. If your assessments are $100 per month, you would have to wait over 4 years to use this method of collection. For most associations, that would negate the lien process to collect a past due assessment quickly.

AB 2417 (La Suer) – Executive Session Meetings – Current law requires that associations conduct their meetings in public and allow members to attend board meetings and provide notice to members regarding the time and place of board meetings. An exception to the open meeting law is when the board adjourns to executive session. Executive sessions are limited to considering litigation, personnel matters, member discipline or matters relating to the formation of contracts with third parties (e.g. landscape contracts, building repairs, professional services, etc.)

This bill would remove the formation of contracts with third parties exception and require that those topics be discussed in open session.

AB 643 (Lowenthal) – Special assessment clarification – This bill number originally dealt with the definition of fireman in the City of Long Beach for retirement benefits (don't ask!). Now the bill has been gutted and replaced with a bill dealing with HOAs. The bill clarifies language with respect to a 5% or less special assessment imposed by the board to confirm that the limit is 5% of the gross budgeted expenses for the current fiscal year that the assessment is being imposed.

AB 2546 (Nation) – Marketing/sales restrictions – This bill would emphasize that an association would not be able to enforce a rule that arbitrarily restricts an owner's or his agent's ability to market his unit. Arbitrary rules would include limits on when or how a unit can be shown for sale, collecting a fee in connection with the marketing, sale or escrow of the unit that exceeds the association's actual or direct costs or establishing an exclusive relationship with one or more entities through which sales and marketing would be required to occur.

AB 2757 (Calderon) – Construction Defects – The entire text of this bill – "Section 1377 It is the intent of the Legislature to protect the interests of common interest development homeowners against construction defects, and to require comprehensive insurance coverage for construction defects." That's it!

SB 1571 (Ackerman) – Condominium Plan – This bill would change the requirement from 100% to 2/3rds to amend or revoke a recorded condominium plan. (This is not the CC&Rs)

SB 355 (Escutia) – Liability – Construction Defects – "The Legislature finds and declares that a divided California Supreme Court is Aas vs Superior Court recently held that developers who violate building codes and breach fiduciary duty of care by failing to install safety protections such as fireproofing, seismic restraints, or proper electrical wiring **may not be held liable for negligence** (emphasis added) unless the building code violation has caused death, bodily injury or property damage." Passed State Senate 22-15 – On to the Assembly.

These bills will be scheduled for committee hearing during the next few weeks. We can only hope that the nonjudicial foreclosure bill dies a quick death and that boards can consider contracts in executive session if they deem it necessary.

You may track emerging legislation yourself and obtain copies of any of these bills via the internet at www.leginfo.ca.gov.

PLEASE FEEL FREE TO MAKE COPIES FOR YOUR BOARD MEMBERS
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