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## Real Estate Title Insurance & Construction Law

### Address Mold and Fuzzy Exposure Issues in Commercial Leases

Be proactive in preventing and remediating this insidious problem before contamination spreads

By Kenneth M. Morgan

**M**old disputes have returned to the forefront in New Jersey following Superstorm Sandy, which caused massive flooding and water intrusion in properties throughout the state. Sandy was nearly a perfect storm for feeding mold growth and related claims. Commercial landlords and tenants should proactively develop and implement risk management strategies to address rising mold contamination problems and related exposure issues.

#### Mold—A Not So Latent Problem

Mold is a type of abundant fungus that produces microscopic spores to repro-

duce and can be evidenced by discoloration, staining and odor. Visible mold can appear brown, yellow, green or black in color. No one knows how many species of mold exist; estimates range from thousands to hundreds of thousands. Molds need moisture to grow. This helps explain why mold infestation is often found in damp, dark hidden spaces; light and air circulation dry areas out, making them less hospitable for mold.

There are currently no federal or state standards for acceptable levels of mold or mold spores in the air. The failure to adopt standards is evidence of the complexity of the issues involved. Most molds are harmless to humans, but some can be toxic. Exposure to certain species may produce minimal to extreme physical reactions. Some individuals may be allergic and/or hypersensitive to mold-related illnesses, while others will have no symptoms. Individuals with compromised immune systems, infants and the elderly are most susceptible.

Molds gradually damage the surfaces they grow on and may affect the structural integrity of buildings. Structural damage can be a costly headache to repair and may cause personal injuries if, for example, a ceiling, floor or wall gives way. If ignored, mold can cause major damage to both the premises and the landlord-tenant relationship.

#### Risk Management—An Effective Way To Manage Property and Tenancies

Landlords and tenants should develop and implement risk management strategies to quickly and efficiently address mold issues. Otherwise, the occupants may face increased risks of personal injury and the parties may face growing problems and unnecessary liability. The parties should regularly inspect for mold, watch out for risk factors that can fuel mold growth and promptly respond to reports of water leakage or infiltration, or unusual or musty odors. When a problem is detected, the parties should identify the source of the problem and develop an action plan for promptly eliminating or mitigating that source.

Many lenders require that owners, and especially multifamily owners, maintain operations and maintenance (O&M) plans to ensure that their collateral value is preserved. Lenders will typically obligate borrowers to address moisture prevention and management issues in their O&M

*Morgan is a partner and transactional lawyer with Hyland Levin LLP in Marlton and represents landlords and tenants in negotiating leases. He has also participated in resolving multiple disputes regarding mold and mold-related damages.*

plans. A number of O&M plans are readily available, including those offered by industry groups such as the National Multi-Family Council.

The key to mold prevention is moisture management and control. While major weather events such as Superstorm Sandy may cause water infiltration that can dramatically accelerate mold growth, mold is more commonly impacted by day-to-day maintenance and structural issues, such as poorly sealed windows and doors, improper insulation, leaking roofs, gutters and plumbing, and deferred or improper HVAC maintenance. Proper steps need to be taken if mold growth is detected. For example, the parties may deny access until the mold is remediated. However, if the mold is found to be harmless to humans, the parties may want to assure that confidentiality is maintained to avoid hysteria.

The parties should also review their property, liability and business interruption insurance policies to determine if they have adequate coverage. Most insurance policies contain exclusions for molds and other microbials. Landlords and tenants should weigh the costs and benefits of obtaining appropriate endorsements to their insurance policies. These endorsements are available, especially where an applicant demonstrates that it is proactively managing mold risks.

#### **Causation—Don't Let It Distract from the Main Priority of Remediation**

There may be multiple sources of a mold problem; some within a landlord's contractual responsibility and others within the tenant's. For example, a tenant may assert that mold proliferation was caused by latent or patent structural defects (e.g., a leaking roof, improperly installed waterproof wrapping or dirt floor), whereas a landlord may point to a tenant's alleged failure to properly perform its repair and maintenance obligations. Proving causation may be difficult and is often the subject of heated debate. Where both parties' actions, negligence or omissions are a contributing factor to mold growth, it is extremely challenging to allocate responsibility and costs.

No matter how tricky it is to determine liability, both parties should be aware that mold remediation must occur quickly. If a responsible landlord allows mold to continue to grow, not only will the landlord

increase its liability to the existing tenant, but it will also expose other tenants in the building to mold damage. Landlords have an incentive to control the remediation process and proceed quickly to prevent additional damage to its property. Thus, even in cases where liability may be "fuzzy," landlords may wish to proceed with the remediation and subsequently seek reimbursement from the tenant for all or a portion of the cost. A quick response by the responsible landlord may negate a tenant's constructive eviction claim, thereby decreasing rent abatement and lease termination risks. Causation, while a difficult issue, should not distract from the goals of correcting the conditions that permit mold growth and safely and effectively removing mold-damaged materials.

#### **Leasing Issues**

Landlords and tenants are addressing mold prevention and remediation issues following a surge in mold claims. Certain landlords are investigating air quality issues before purchasing a property. Air quality issues have become a hot button topic because increased regulatory requirements, such as those applicable to vapor intrusion, have boosted overall awareness and increased concern. Some tenants are conducting their own air quality due diligence prior to entering into a leasing transaction. Others are trying to obligate their landlords to deliver premises free of mold, fungus, bacteria or other microbials in excessive or harmful levels. They also are now requesting a representation from the landlord regarding such levels and corresponding obligations to indemnify, defend and hold harmless. Landlords would prefer not to provide any representation or indemnity.

Regardless of who bears responsibility, it is typically in both parties' interest to make sure that the lease is clear regarding repair, maintenance and replacement obligations and that such allocation of responsibility is followed. Lease remedies and inspection rights help ensure compliance. Each party also typically desires self-help rights in the event of noncompliance, and each wants to be held harmless, indemnified and provided with a defense.

Some leases require tenants to promptly provide notice of any leaks, damp conditions, evidence of mold, fungus, bacteria or other microbials and any fail-

ure or malfunction in the HVAC system. Landlord-friendly leases typically impose 100 percent of the liability upon tenants for damages caused by the applicable tenant's failure to promptly report. Such leases also prohibit tenants from bringing mold, fungus, bacteria or other microbials into the premises in excessive or harmful levels, in excess of outdoor levels or in excess of levels required by any future law or regulation. Other lease provisions recognize that mold is naturally occurring and that no premises can be made completely mold free. In those leases, tenants are obligated to prevent situations that allow mold to proliferate (including blocking or covering any of the HVAC ducts). Some tenants assume all responsibility related to moisture or mold growth related to deficient maintenance and waive all mold-related claims against their landlords.

Many landlords are demanding rights to approve HVAC contractors and to receive service records. Both parties should review these service records on an ongoing basis to make sure that the contractor is actually performing all of the contracted services. Landlords also frequently require the right to approve tenants' work because water intrusion issues may result if the work is improperly performed. Prudent landlords cause their own experienced professionals to review and approve the plans for tenants' work and inspect as work proceeds. To the extent a landlord is performing any work, it should select its contractors and professionals with due care.

Addressing mold issues and maintenance obligations in leases is a good strategy to mitigate dispute risks. Landlords and tenants should carefully negotiate these provisions before problems arise, and the leases should clearly indicate who bears the burdens of mold prevention, investigation, inspection, testing and remediation. Required tasks to be completed before, during and after remediation should also be specified to avoid uncertainty and unnecessary delays. An objective remediation standard should also be specified because no state standards presently exist. In addition, the parties should approve environmental specialists with certifications from reputable associations that set industry guidelines in advance, or provide an approval standard to avoid future disputes over who may provide services and a battle of professionals.

Mold issues can be complex and

nebulous. Landlords and tenants should proactively implement strategies to prevent, identify and remediate mold and remove mold-damaged materials in order to minimize personal injuries and property damage while avoiding or minimizing disputes and potential liability. The parties should also aggressively negotiate leases to address mold issues and ensure that their leases are clear about the parties' respective repair, maintenance, replacement and remediation obligations and that such allocation of responsibility is carried out in practice. Lease remedies and inspection rights are important tools that can help ensure compliance. Mold exposure is a growing concern that should not be ignored by landlords or tenants who should allocate responsibility for and proactively implement appropriate risk mitigation strategies. ■