

Issues & Answers

REAL ESTATE ALERT

Mold Contamination – Litigation on the Rise

By Christopher L. Callahan

Fennemore Craig has extensive experience in various types of environmental and toxic tort litigation ranging from groundwater contamination cases to sick building cases. Over recent months, we have noticed a rising trend in one particular area of litigation – mold contamination. Increasingly, homeowners are suing previous property owners, real estate developers, realtors, contractors and homebuilders because of alleged damages resulting from mold contamination. The claimed damages include both property devaluation and personal injuries.

This type of claim has resulted in staggering claims, substantial verdicts and large settlements throughout the country:

- A \$32 million verdict in Florida for homeowners who sued their insurer;
- A \$13.5 million settlement against a contractor and a \$35 million settlement against a performance bond surety in Florida;
- A \$100 million claim in Texas for homeowners who sued their insurer; and
- \$10 billion in claims in New York involving 300 apartment tenants against the building owners.

This litigation has now reached Arizona. There have been settlements in excess of \$5 million each at Liberty Elementary School and Yuma High School. In late November 2001, a Maricopa County jury returned a verdict of approximately \$680,000 against a homebuilder on the basis of alleged design and construction defects that allowed water infiltration and mold growth. Another jury awarded punitive damages of \$4 million against an insurer on a bad faith claim arising out of its initial failure to acknowledge coverage for mold claims. Many other claims involving residential mold contamination are pending.

In general, the growth of mold results from a combination of favorable temperature and moisture conditions. Flooding, frozen and broken water pipes, construction defects, or inadequate maintenance may lead to conditions that are conducive to the growth of mold. Frequently, the water source may be on or behind walls, ceiling tiles, carpeting, or insulation. If the problem is not quickly remedied, it can grow exponentially worse. Accordingly, the prompt elimination of mold following its discovery is paramount.

The failure to eliminate mold in a prompt manner often leads to the filing of a suit. Such lawsuits are defensible. The appropriate defense

will obviously depend upon the specific facts surrounding the claim. In many cases, the best defense will involve the use of medical practitioners, toxicologists, construction experts and environmental engineers.

Because this type of claim requires experience in both construction defect litigation and toxic torts, Fennemore Craig is uniquely situated to defend developers and homebuilders in lawsuits involving mold contamination. The firm's attorneys have handled similar lawsuits involving various toxic exposures, indoor air pollution, sick building syndrome, groundwater contamination and other toxic torts. Fennemore Craig also has extensive experience in defending all types of construction defect claims, in both residential and commercial contexts.

In addressing mold claims, prompt action is imperative. First, the problem must be defined and contained. This requires the retention of experts qualified to perform exposure assessments. Once the nature and extent of the contamination has been defined, a remedial strategy must be devised. If litigation is brought, many defenses may be potentially available. Statutes of limitation, which requires that claims be brought within a specified

period of time after they accrue, may provide a defense. A critical question in the viability of such a defense will often be when the claimant knew or should have known of the mold contamination. In order to prevail on a mold contamination claim, a plaintiff must establish that the contamination was caused by the dereliction of the

defendant and that the property damage or personal injuries for which redress is sought are, in fact, attributable to the mold. The latter aspect of this causation inquiry requires proof on the cutting edge of toxicology, medicine and environmental science and often presents a significant hurdle for plaintiffs.

While mold contamination claims are proliferating and present a real spectre of liability, they are often quite defensible if properly handled. If you have any concerns or questions about potential liability related to mold contamination or other environmental tort issues, please feel free to call your regular contact with the firm or one of the following attorneys. ■

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