



## RA&MCO QUARTERLY

### The Design and Construction Newsletter

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#### **“Sick Building Syndrome”: Contractors and Design Professional's Legal Liability - Part II**

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In the immediately preceding edition of our newsletter we discussed very broadly the general nature of the “Sick Building Syndrome” and in particular issues of indoor air quality within a building envelope. In this current issue we shall focus even more specifically upon probably the fastest growing and most popularly recognized issue involving indoor air quality, that of “toxic mold”.

In the energy crisis of the 1970s, heightened public concern about energy resources in general and in particular, those necessary to operate indoor climate control and ventilation systems, the United States Department of Energy instituted standards that induced a reduction in ventilation. This reduction of ventilation of fresh outdoor air led to an increase of indoor air pollution and the proliferation of the so-called Sick Building Syndrome.

The specific area of indoor air quality that is very much in the media and in the public mind nowadays concerns “toxic mold”, when in reality, multiple contaminants are usually involved in indoor air quality contamination. These include volatile organic compounds (VOCs), tobacco smoke, dust, radon gas, mineral fibers, carbon monoxide, asbestos and bacteria. However, the public, and in consequence the plaintiff's bar, have identified “mold as gold” for the recovery of third party liability claims. The legal bases for recovery of damages from both contractors and design and consulting professionals was discussed in the immediate preceding issue of this newsletter.

Mold growth simply requires moisture, a food source and a relatively warm temperature environment. Sources of moisture may include improper “drying in” during construction; improper design, construction or maintenance of the building envelope, HVAC system or both. Compounding the problem is the fact that the building may have both microbial and chemical contamination with multiple causes for each type so that the cause of indoor air pollution may be manifold and difficult to remediate, not necessarily being from a single source.

At this point in time liability insurance coverage for claims based upon indoor air pollution, or more specifically “toxic mold”, may exist for contractors under their Commercial General Liability insurance policies. For the design and consulting professionals coverage would normally be found under their professional liability insurance policies. It is important to be aware, however, that while mold is generally not considered to be a pollutant and therefore is not generally subject to exclusion under either of these coverages, in the near future, insurers may be forced to apply specific limitations or exclusions of coverage to their policies. This may happen if the risk is not perceived to be sufficiently quantifiable as to be able to continue to provide coverage in the face of great uncertainty and lack of historic

precedent.

Liability claims arising from mold infestation are extremely difficult and costly to defend and lay juries are usually highly sympathetic. This is made especially difficult because medical and other forensic sciences relevant to expert investigation and testimony may be ambiguous or highly controversial on issues of causal relationships with claimed health problems, for example, or upon the extent of required remediation.

Of course, better than any need to remediate or defend a claim for mold contamination, or indoor air quality issues in general, would be to take loss prevention measures. At least one expert has listed preventative measures that should be used to avoid the most common types of indoor air quality problems to include: 1) provide proper ventilation air in accordance with ASHRAE standards, 2) maintain HVAC systems; 3) exhaust building contaminants such as cigarette smoke and chemical fumes; 4) keep out unwanted pollutants; 5) do not allow excessive amounts of mold to grow and accumulate in a building; 6) design and construct buildings to eliminate external water or vapor intrusion.

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