

HANDLING MOLD CLAIMS IN TEXAS

TABLE OF CONTENTS

INTRODUCTION 1

A. CONSIDERATIONS IN REPRESENTING A MOLD-AFFECTED CLIENT 3

 1. Initial Evaluation, Investigation & Evidence 3

 1a. Mold claims are expensive 7

 1b. Mold claims are complex 9

 1c. Mold claims are elusive 10

 1d. Mold claims are difficult to resolve 11

 2. Plaintiffs’ funds are generally limited and they may be required to move 13

 3. Assessment and remediation must be done immediately; delay can be disastrous 15

 4. There are no clear standards, and recommended solutions often conflict 17

 5. Litigation often takes place after the problem has been solved .. 22

B. POTENTIAL CAUSES OF ACTION AND CLAIMS FOR DAMAGES 26

 1. Breach of Contract 26

 1a. Breach of Contract - Damages 27

 2. Breach of Implied Warranty of Good and Workmanlike Performance - Existing Home 29

 2a. Damages - Implied Warranty of Good and Workmanlike Performance - Existing Home 30

3.	Breach of Implied Warranty of Good and Workmanlike Performance - New Home Construction	31
3a.	Damages - Implied Warranty of Good and Workmanlike Performance - New Home Construction	33
4.	Breach of the Implied Warranty of Habitability	34
4a.	Damages - Implied Warranty of Habitability	35
5.	Breach of the Implied Warranty of Suitability	36
5a.	Damages - Implied Warranty of Suitability	37
6.	Texas Deceptive Trade Practices Act	38
6a.	Damages - Texas Deceptive Trade Practices Act	39
7.	Residential Construction & Liability Act	41
7a.	Damages & Limitations - Residential Construction & Liability Act	44
8.	Negligence	46
9.	Negligent Hiring, Supervision, Training & Retention	48
10.	Negligent Misrepresentation	49
10a.	Damages - Negligent Misrepresentation	51
11.	Fraud – Common Law	51
11a.	Damages – Fraud	51
12.	Fraud in the Sale of Real Estate	52
12a.	Damages – Fraud in the Sale of Real Estate	52
13.	First Party Insurer Claims	52

C.	EVALUATION OF POTENTIAL DEFENDANTS AND LIABILITY	54
D.	EVALUATION OF INSURANCE COVERAGE	57
E.	CONCLUSION	62
APPENDIX	GLOSSARY AND MOLD RELATED INFORMATION	63

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INTRODUCTION

Litigation and insurance claims for homes and commercial buildings contaminated with mold and issues surrounding “sick building syndrome” have been a hot issue in Texas for some time. On June 14, 2002, the Texas Department of Insurance (“TDI”) reported that more than 44,000 mold claims were filed statewide in 2000 and 2001 at an estimated cost of over 1 billion dollars.¹

Despite adoption of the new Homeowner’s policy by TDI, and the recent enactment of the Texas Residential Construction Commission Act² by the Legislature, mold claims are here to stay. So long as builders and contractors are willing to build, repair and modify residential and commercial structures, and as long as these structures suffer leaks, mold and water intrusion claims will continue. In water intrusion and mold cases, defendants have thus far confined mold claims to the realm of property damage. However, it may be only a matter of time before researchers and medical professionals offer the necessary peer reviews, studies and articles to establish general and specific causal connection between specific and definable symptoms and physical injuries due to mold and/or fungal exposure.

In fact, the link between mold exposure and personal health effects is already beginning to occur. A recent article in the journal, Applied Occupational and Environmental Hygiene entitled *Health Effects of Indoor Fungal Bioaerosol Exposure*, analyzes the current data available on the health effects of indoor mold exposure.³ However, until the medical research professionals catch-up with the lawyers on this issue, personal injuries generally are

not recoverable in a mold or water intrusion claim. The discussion regarding medical claims is beyond the scope of this paper.

This article covers the basic, practical issues encountered while analyzing, investigating and litigating a mold, mildew or sick building case. It is important to note this article will hopefully be beneficial to all parties in a water intrusion and mold claim. The focus of this paper is directed to issues encountered after water intrusion is discovered, the subsequent claim process, and the potential litigation issues. In addition to going over the general considerations in representing a client affected by a mold, mildew or sick building syndrome case, this article provides a list of many causes of action and claims commonly asserted against typically targeted parties. The list of causes is by no means exhaustive, as the theories and causes of action a lawyer can bring in a mold case is limited only by the attorney's creativity and the court's willingness to allow cases to proceed to trial.

Finally, this article includes a glossary of terms typically used in a mold case (see Appendix, for website visitors, a separate link is provided). The glossary will hopefully help the mold claim newcomer understand the nomenclature used by mold remediation contractors, testing labs, inspectors, experts, adjusters and lawyers when handling mold related claims. The glossary includes a number of different websites and resources providing information relating to mold, mildew, indoor air quality and water intrusion issues.

A. CONSIDERATIONS IN REPRESENTING A MOLD-AFFECTED CLIENT

1. Initial Evaluation, Investigation & Evidence.

The first thing to remember in any mold case is that just because a structure has mold, does not necessarily mean a claim should be filed or a lawyer should take the case. A mold claim, like any other case or claim, needs to be properly evaluated before suit is filed. Prior to entering into any relationship with a potential claimant, the lawyer should not only conduct a thorough interview of the claimant, but also perform a thorough investigation of the facts surrounding the claim.

Some of the essential information a lawyer is going to need relates to the history of the house. The following facts are essential: 1) when was the building originally built, remodeled or repaired; 2) what work was done if it has been remodeled or repaired; 3) who was the contractor, builder, architect and/or engineer; 4) when was the leak or water intrusion discovered; 5) how long did the original construction, remodel or repair take; 6) what problems or delays were encountered during construction; and 7) before the building was “dried-in,” did any significant or extended period of rainfall or flooding occur.

All contract documents, plans, specifications, change orders, invoices and correspondence between the claimant and any potential defendants must be reviewed. This includes not only the original developer, general contractor, trades and/or craftsmen, architects, engineers, and the like, but also the first-party insurer. To the extent any investigation has been conducted by a professional engineer, certified industrial hygienist, or any other person, such as an independent adjuster, these investigative reports, inspections or repair estimates must also be reviewed and evaluated.

The lawyer must also review the terms, conditions, riders, exclusions and definitions of the potential client's residential homeowner's policy, the warranties afforded under the Residential Construction Commission Act (RCCA), as well as the express warranties under the contract or any material that may be defective. In cases involving commercial ventures or in defending builders, contractors, etc., the lawyer must do the same for any commercial general liability, builder's risk, maintenance bonds, product warranties, completion bonds with warranty coverage, excess or umbrella policies and any other insurance policy that potentially could provide coverage for the claim.

Throughout the evaluation period, it is important to develop a chronology, notes regarding the essential facts relating to the case and a list of people involved in the project. These lists include not only the names of any potential parties and witnesses, but also an ongoing list of questions the lawyer needs to have answered prior to embarking on the claim/litigation process. Although this seems like common sense, many lawyers forget to write even the most basic questions down and later regret this failure after agreeing to take on a case.

Most importantly – visit the site. A complete and comprehensive on-site inspection of the property is essential to obtain the requisite understanding of the problems to be addressed and the information needed to evaluate the nature, extent and severity of the damages. In most, if not all cases, the visual inspection of the premises will: 1) answer many of the lawyer's questions; 2) identify and pare down the issues to a manageable number; 3) identify the potential parties; and 4) help the lawyer identify and understand what the client is dealing with on an everyday basis. Identifying the real problems in a building is especially

essential in a mold case because construction defects (contractual claims) are typically not covered in a commercial general liability policy.

For example, a case we recently arbitrated involving a very expensive home with severe water intrusion and mold issues was able to be favorably resolved because we made a detailed site visit and inspection of the property. The claim was initially evaluated by another lawyer as a simple roof leak case. However, we noticed significant and numerous construction defects not only in the framing and roofing system, but also other parts of the construction. Windows were sticking, doors were not flush, cracks were present in exterior and interior walls, and roof joists and rafters were separating. We commissioned a slab and perimeter grade beam inspection and found significant differential movement as well as a significant under-sizing of the perimeter grade beams. Although the slab was engineered, the contractor undersized the grade beams by more than seven inches, which was a significant factor in the framing and roofing failures. This failure, in turn, caused the water intrusion which led to mold contamination. The contractor's insurer initially refused to settle, contending the construction defects constituted a breach of contract not covered under the CGL policy. However, with the help of expert testimony, we established that the negligent site preparation, supervision and construction of the engineered slab was the real cause of the water intrusion and mold contamination. This testimony resulted in a favorable award and ultimately provided the basis for a post-arbitration settlement.

Once a lawyer has conducted an initial site visit to evaluate the condition of the building and the value of the claim, the client should be advised as to whether the extent of the water intrusion should be reported to their homeowner's insurance company or whether

the claim should be handled without filing a claim. Several factors should be considered in making this decision. First and foremost is the value of the claim and the extent of the damage. If the damage is relatively small, repair costs are minimal and mold contamination, if any, is insignificant, the client may consider undertaking repairs without filing a claim because of the real possibility of the client's future homeowner's insurance policy premium being increased or cancelled altogether.

If the claim is significant, the homeowner's insurance company should be provided with notice of the claim and the first date of discovery. To the extent the water intrusion and the resulting damage is visible, a written and photographic journal and index showing the damage, date and location should be kept to thoroughly document any damages as of the date of making the claim. This record should continue throughout the claim, remediation, and build-back phases to accurately show the fact finder (whether a judge, jury or arbitrator) not only the size of the project, but also the extent of contamination and damage done by the water intrusion and mold contamination. This includes not only the building itself, but also contents, material, furniture, equipment and fixtures.

The next concern is to stop the source of water intrusion. The act of stopping future water intrusion by making essential repairs to the property not only prevents further water intrusion and continued mold growth, but also is essential evidence in any claim or litigation of the client's good faith efforts to mitigate damages and limit the extent of contamination and physical damage to the structure resulting from water intrusion.

1a. Mold claims are expensive.

Many lawyers, reporters and experts have stated mold is the 21st Century's version of asbestos. The mass hysteria behind "toxic mold" has caused more attention to be focused on the residential and commercial construction industry. As a result, the demand for mold related remediation and testing services has skyrocketed in the past five years, and resulted in a substantial increase in the cost associated with the inspection, testing, remediation and build-back of damaged structures.

A typical mold claim involves significant initial costs. The first expense is usually devoted to determining and fixing the source of the water intrusion causing the mold contamination. Once this is handled, the remaining costs are related to the inspection, testing and remediation of the building and contents impacted by water or mold as well as "clean testing" and the construction or build-back costs after remediation. This does not include expert fees, alternative living or litigation costs. Further, many contractors and vendors providing these services often require their services be paid in advance.

Many residential homeowners cannot afford the substantial cost associated with remediating a home. To make matters worse, the cost to eliminate the cause of the water intrusion is not covered under the standard Texas homeowner's policy. Therefore, the client is responsible for curing the source of water intrusion, whether it be a leaky sink, the replacement of the entire roof structure, or replacement of the exterior skin and substrate of a stucco home. If the repairs required to permanently stop the water from entering the home are cost-prohibitive, then consider a temporary patch – caulk, plastic sheeting and roofing tar can effectively stop water on a temporary basis until a claim can be resolved. It doesn't

matter how the water is stopped, but the water must be prevented from furthering entering the home. Once the water intrusion is stopped, a qualified inspector/estimator will need to completely inspect the home to determine the extent of the damage and develop a scope of work outlining where and how much of the home needs to be repaired and/or replaced.

Although most remediation companies provide the initial inspection and estimate to remediate the home, make sure you get at least two other estimates. Additionally, many insurers will volunteer their own claim representative to inspect the home. After checking with the Better Business Bureau and the references provided, review the remediator's contract (be sure there are start and estimated completion dates for each remediation stage), insurance coverages and remediation protocol/procedures. Once reviewed, compare the information received from other remediators.

- * Remember, the mold remediator chosen will often need to testify if the claim isn't resolved. He or she can be your best or worst witness at trial or arbitration. So pick the most qualified, experienced and presentable remediator.

Depending on the location and extent of the water intrusion and/or mold contamination, mold remediation involves sealing off the surrounding area, removing and cleaning all contaminated contents, demolition and removal of all porous contaminated material (drywall, unsealed wood, paper, carpet, upholstered furniture, drapes, etc.), and the cleaning of all non-porous material (glass, sealed wood, stone, plastic and metal). Additionally, the client may be faced with having to find temporary alternative living

quarters and furnishings. If required to leave, the client can expect to be displaced anywhere from a week to as long as a year depending on the extent of remediation work to be done.

1b. Mold claims are complex.

Another factor contributing to the overall expense of a mold and water intrusion claim is the complexity of the issues needing to be addressed. For instance, there are more than 70,000 identified species of mold, yeasts, and mildews. Of the 70,000 species, approximately 100 are presently believed to pose a potential health risk to humans. To locate and identify the different species of mold within a home or commercial building, testing companies utilize a variety of sampling methods. These methods include air, bulk, tape, and swab sampling. In addition to sampling for the types of mold present within the building, testing companies should conduct additional testing to identify areas of high moisture within the building as well as other indoor air contaminants. Other tests include inter-spatial moisture meter readings, relative humidity readings, carbon dioxide, carbon monoxide, radon and oxygen readings.

Further, in dealing with mold, mildew and sick building syndrome related allegations, inspections and testing must be done on the various systems within the building that may cause or contribute to the mold and/or indoor air quality issues within the building. For example, the most basic inspection should include water leak testing of several systems, including the roof, window and wall systems, plumbing systems, heating, ventilation and air conditioning systems, and water sprinkler systems.

1c. Mold claims are elusive.

Mold is often hidden under floors, above ceilings, or within the wall cavities. Mold is not always easy to detect. It is often necessary to inspect carpets, shower pans, bathroom floors and anywhere else there is a potential water source. Every suspect area must be tested for moisture. Without moisture, there can be no mold. Areas adversely affected by mold can often be identified by discoloration in the ceiling or wall, a musty smell, buckling floors, or bubbling, peeling and/or cracking paint or wall paper. In many cases the moisture and mold are completely hidden within the walls, above the ceiling or underneath floor coverings.

To discover, observe and document the location and extent of water intrusion contamination, it used to be necessary to remove counter-tops, cabinets, walls, wood flooring, tubs, and showers. However, this is beginning to change. Recent advances in technology have provided plaintiffs and defendants a cost-effective way to peer within walls, floors and previously unobservable areas. Although not widely used in construction, infrared thermal imaging has been around since the late sixties. However, because of recent advances, smaller, portable and more effective units are capable of being used. The cost associated with this type imaging can range up to \$400.00 per hour. However, considering the cost of destructive testing and removal of some high dollar interior surfaces, infrared thermal imaging can save thousands in inspection, testing and expert fees.

Infrared thermal imaging devices can literally peer into walls and show temperature fluctuations in building materials. Because wet and/or moldy material is either warmer or cooler than dry material, the image will, in most cases, be able to identify water impacted areas. Additionally, thermal imaging can show the presence or absence of insulation, HVAC

leaks and even fastener locations in EIFS applications. Thermal imaging is not yet common, but clearly is the most promising investigative tool available. Although courts have not determined whether this type of evidence is admissible in court, it is an incredibly useful tool in mediation and arbitration because it provides a graphic display of the presence, extent and location of water within the building envelope.

Experts on every facet of construction are coming out of the woodwork (pardon the pun) and are charging anything they can to profit on the recent mold hysteria and press coverage. In fact, a recent Florida report indicates some people have been willing to pay as much as \$6,000 for mold sniffing dogs to find mold within their homes.⁴ Although it is yet too early to tell whether the specially trained canines provide accurate, expert results, it is clear a mold case will require human experts to prove the test results, the costs associated with building and content remediation as well as remediation build-back. Further, a mold claimant needs a professional engineer/construction expert to establish that the contractor failed to construct or repair the premises in a good and workmanlike manner in accordance with the standards of a residential or commercial builder in the geographic area.

Id. Mold claims are difficult to resolve.

When this paper was originally written, mold and water intrusion claims were difficult to resolve, but not impossible. Since the *Ballard*⁵ case, first-party insurers have been reluctant, but have extended coverage on many claims, subject to a reservation of rights and their rights to subrogation.

In fact, in some single claimant cases, a number of home builders and their insurers have been willing to pay reasonable costs to repair a home so long as the claim was valid,

limited to the building envelope, and the damages could be clearly attributed to defective construction. The defense philosophy as late as last year was to deny coverage, dispute the claim and vigorously fight until the claim could be resolved for substantially less than the original demand. This philosophy was the established tactic against plaintiff lawyers making exorbitant, outrageous and baseless demands. However, as plaintiff lawyers have educated themselves about the realities of mold and water intrusion, including claims within CGL coverage, insurers have begun looking at the overall expenses associated with water intrusion and mold claims and have determined settling the claim in the initial stages may make more sense than incurring extensive legal bills as well as the ultimate cost to settle the claim.

To settle claims for water intrusion and mold, the plaintiff's lawyer must tiptoe around the delicate relationship between client and insurer as well as the often contentious relationship between the client and the builder or responsible party. This is difficult because of: 1) the media focus on mold; 2) the reality of how the legal process works (i.e. liability, damages & ability to collect); and 3) the personal nature of the claim. Remember, the client's family, home and/or business is suffering a major disruption and this can overwhelm many people, especially those with small children. However, if you educate your client as to the reality of the claim process and make a reasonable demand, many claims can be resolved.

The most difficult mold claims to resolve are those claims where: 1) the builder or contractor is involved in multiple home and multiple claimant cases; and 2) the builder or contractor is no longer in business or has no assets to satisfy a judgment. In both instances, the insurer has most likely determined to litigate the matter. In the first case, the insurer has

too much at risk to resolve the claim and does not want to encourage future claims. It makes more sense to ride out the storm because litigation costs are significantly less than the total claim risk. In the second case, the insured builder has no motivation to participate in the defense of the claim and has been notified the claim is subject to a reservation of rights. When the insured has no assets, defense counsel can be expected to be more concerned with the insurer's exposure. In a typical case involving a solvent insured, defense counsel wants the claim within coverage because the client doesn't have to pay any judgment within policy limits. However, when the client is defunct, the lawyer's focus shifts to protecting the insurer. Therefore, the focus shifts to admit liability for non-covered claims, dispute the amount of damages, and completely deny liability on covered claims. In these cases, early resolution is much more difficult. Insurers and their counsel realize that to collect, a plaintiff will not only have to obtain a favorable award on a covered claim, but also file a declaratory judgment action to establish coverage.

In an effort to prevent this nightmare, the plaintiff's lawyer must plead a number of different causes of action under different theories of liability to keep the mold and water intrusion case within coverage.

2. Plaintiffs' funds are generally limited and they may be required to move.

As discussed above, mold claims are very expensive and many of the costs associated with the remediation of mold and the removal of the water source are costs incurred prior to the resolution of any claim. Most plaintiffs do not have the financial resources available to bear this cost. Therefore, once potential water damage and mold contamination has been identified and it is determined insurance should be involved, it is of utmost importance the

claimant notify the insurance carrier of the situation as soon as practicable. Preferably, it should be done within 24 to 48 hours of discovery of the water intrusion or mold. Once notified, the claimant should protect all property from further damage by removing it from the water-affected area, to ensure previously unaffected property does not become damaged.

If the extent of the contamination is widespread, the claimant should inquire as to whether the policy allows for additional living expenses (“ALE”). If the policy does provide for ALE, the claimant should request advance payment once the insurer determines ALE is needed. The most common problem associated with leaving the premises when ALE is available revolves around what items are covered within the allowance. The Texas standard residential property insurance policy defines additional living expenses as “any necessary and reasonable increase in living expense you incur so that your household can maintain its normal standard of living.” Therefore, ALE covers expenses associated with substitute living quarters, increase in meals, additional utilities, pet boarding and cleaning expense. For example, if a client has a \$2,000 mortgage and as a result of having to move out of the home has to incur an additional rental expense of \$1,800, the ALE reimbursement under the policy provides the claimant an additional \$1,800 per month. ALE doesn’t pay for everything, but is designed only to pay the increase in expenses associated with living outside the home during remediation and repairs.

Because a claimant’s funds are limited, counsel should assist the client in every way possible to reduce the economic impact upon the client. As an example, many Texas insurance policies do not provide coverage for mold testing. Further, any money spent on testing could reduce the amount available for the home repair and remediation required to

clean the home. If the insurance company suggests air sampling, testing and inspection of the home should be done, counsel should insist the insurer incur these expenses and exclude them from the amount of the policy or any settlement amount. To the extent post-remediation testing is performed, these costs also should be paid by the insurer. Likewise, the claimant can negotiate for the mold remediator to pay for the testing to ensure it has completed the remediation project in a good and workmanlike manner. In most cases, the mold remediator will be willing to incur this expense to prevent future breach of contract or implied warranty claims.

3. Assessment and remediation must be done immediately; delay can be disastrous.

Since molds require moisture to grow and can begin within 24 to 48 hours of a leak, stopping the flow of water and drying out the materials as soon as possible reduces the potential for mold growth. It is common knowledge that water damage claims without mold are far less expensive than water damage claims that include active mold growth. Insurance policies allow an insured to protect the insured's property from further damage without jeopardizing coverage under the policy. Therefore, once an event occurs, it is extremely important for the insured to remove any property that could become damaged. So long as the water-affected material is clean and dry within 24 to 48 hours, all indications are that the affected materials should be free of any mold contamination. If, however, the water intrusion is more than 48 hours old, it is best that the material remain in place and the client wait for a qualified engineer or inspector to assess the conditions. No matter when the damage or contamination is found, the first thing that should be done is repair the water leak to prevent further contamination or water intrusion.

After the water leak is repaired, the client should photograph the area, documenting the extent of the water intrusion and the property that has become wet or damaged. Next, the client should remove any and all standing water and begin drying out the area by removing water-soaked materials and placing them in a secure, dry and well ventilated area. If there is no such area, the material should be removed outdoors to prevent mold growth within the habitable areas of the home. A common mistake made by many claimants is that they throw away removed or damaged materials before the insurer can inspect and evaluate the condition of the damaged material. By doing so, the client may be precluded from reimbursement for those items that can no longer be documented or evaluated.

Once the water intrusion is repaired and the wet and/or damaged material is removed from the occupied areas, it is important to begin the assessment and remediation process. The reason for this is mold is a living and breathing organism. The longer an area is wet the more likelihood the mold will not only grow but spread into other areas of the home or structure. Mold spores can spread through linear growth, contact, or by becoming airborne. Therefore, once mold spores become airborne, they can be carried throughout the home through the HVAC system. Therefore, a quick response is absolutely necessary to prevent further spread of mold in areas of the home previously unaffected.

Additionally, if the claim is not resolved and the case ends up in litigation, the plaintiff has a legal duty to mitigate damages. If a plaintiff does nothing to stop the water intrusion or limit mold exposure within the home, the fact finder may determine the plaintiff failed to mitigate damages and cut off the plaintiff's ability to recover damages resulting from water intrusion and mold contamination. In a recent case, an arbitrator awarded less

than half of the demand because the plaintiff failed to repair the roof leak and took no steps to protect his property once water intrusion and mold were discovered. The house sat unoccupied with no testing or remediation work for six months. Once testing was finally conducted, mold had spread throughout almost every single room and surface within the home. Despite the fact that mold remediation costs exceeded \$150,000, the arbitrator awarded less than \$10,000 for mold remediation because of the plaintiff's failure to simply patch the roof and prevent further water intrusion into the home.

Failure to assess and remediate the property in a timely fashion can not only be disastrous as it relates to the physical damage to the property and contents of the structure, but also legally. Even though mold issues often begin from breach of contract, a defendant may be able to assert the defense of proportionate responsibility because a breach of a common law implied warranty has been considered to be a tort rather than a contract action.⁶ In addition to proportionate responsibility, a defendant may assert the plaintiff did not make reasonable efforts to mitigate damages. In Texas, a plaintiff must exercise reasonable care to minimize damages if the damages can be avoided with only slight expense and reasonable effort.⁷

4. There are no clear standards, and recommended solutions often conflict.

Currently, there are no standards for mold reduction, remediation, or for the performance of interior and exterior components of the home. However, the new Texas Residential Construction Act⁸ has called for the development of standards with the requirement that the standards may not be less stringent than HUD standards for FHA programs.⁹ Although there are presently no definitive standards relating to mold and water

intrusion, the most commonly-cited standards are those published by the New York City Department of Health, entitled “Guidelines on Assessment and Remediation of Fungi in Indoor Environments.”¹⁰ Additionally, the United States Environmental Protection Agency (EPA), released a document entitled “Mold Remediation in Schools and Commercial Buildings,”¹¹ which provides guidelines on preventing, investigating, evaluating and removing or cleaning moisture and mold problems. It is important to note that the EPA Guidelines are not standards. In order for an agency of the federal government, such as the EPA, to promulgate regulations, it must be authorized by Congress to do so. To date, Congress has not authorized the EPA, or any other agency, to promulgate any standards relating to mold. Because of the political hot potato mold has become, it is doubtful the federal government will authorize any federal agency to issue any standards relating to mold testing or mold remediation. Therefore, it appears the federal government will continue issuing only guidelines and recommendations to homeowners, mold remediators and testing laboratories. In an effort to benefit homeowners throughout the country, the EPA posted on its website a new publication, “A Brief Guide to Mold, Moisture and Your Home.”¹² The guide provides information, recommendations and guidance for homeowners on how to clean up residential mold problems and how to prevent mold growth. The guide offers a number of common sense considerations to control moisture within the home. The EPA recommends and emphasizes mold should be cleaned up quickly, and any sources of water into the home should be repaired immediately.

The New York Department of Health guidelines is the most common reference in the construction and insurance industries. These offer recommended levels and methods for

remediation, depending on the type of mold, location and extent of contamination. Typically, the New York City guidelines are expressed in terms of surface area of contamination. The guidelines classify mold contamination on building materials into four levels, with a fifth level being applicable to HVAC systems.

	Description	Area in Sq. Feet	Examples
Level 1	small isolated areas	less than 10 ft.	ceiling tiles, small areas on walls
Level 2	mid-sized, isolated areas	between 10 and 30 sq. ft.	individual wallboard panels
Level 3	large, isolated areas	between 30 and 100 sq. ft.	several wallboard panels
Level 4	extensive contamination	greater than 100 contiguous sq. ft.	
Level 5a	HVAC systems	less than 10 sq. ft	
Level 5b	HVAC systems	greater than 10 sq. ft.	

The EPA and the American Conference of Governmental, Industrial Hygienists (“ACGIH”), proposed three levels of contamination in their remediation guidelines. The EPA classifies mold growth as small (less than 10 sq. feet); medium (10 to 100 sq. feet); or large (greater than 100 sq. feet, or potential for increased occupant or remediator exposure during remediation.) The ACGIH guidelines simply describe the contamination as minimal, moderate or extensive, without giving specific quantities associated with those terms. Despite the different classifications of contamination, all guidelines document that mold

includes at least two aspects: (1) identification and correction of the moisture problem causing mold growth; and (2) mold growth elimination by removal of contaminated materials and/or cleaning of materials and contents. Whether mold contaminated materials should be cleaned or discarded depends on the nature of the materials and the extent of contamination.

The biggest issue plaintiffs are confronted with in regard to any mold or water intrusion claim is what building materials and contents can be repaired or cleaned, and what will have to be replaced. This is especially true when test results indicate that volatile or organic compounds or mold spores are airborne and have contaminated the plaintiff's furniture and personal belongings. Generally, building materials are classified as either non-porous (metal, plastic, glass, sealed surfaces), semi-porous (concrete, wood, unsealed tile), or porous, (e.g., wallboard, ceiling tiles), according to their ability to absorb water. It is widely accepted that non-porous materials can be cleaned using a biocide or detergent solution and re-used. Whether a semi-porous material can be cleaned and re-used depends on the extent of the contamination and whether the mold has penetrated the surface. The most common example in any building environment is wood. Surface contamination on a semi-porous wood surface can generally be removed by refinishing or sanding; however, many lighter woods that are unstained are extremely absorbent and the concern is that mold spores and mycotoxins associated with mold growth actually penetrate the wood and grow within the wood fibers. In such cases, most mold remediators and industrial hygiene associations recommend the wood be removed from the environment and replaced. Semi-

porous materials that have significant surface contamination should generally be discarded rather than being cleaned.

The real dispute within the industry pertains to porous materials. The New York City guidelines generally recommend porous materials be discarded rather than being cleaned and re-used. However, the guidelines do allow for the re-use of contaminated porous materials so long as they are thoroughly cleaned and remain dry and free of surface contamination. The ACGIH recommends that coarse materials that do not support active fungal growth can still be contaminated with fungal spores or particles from other sources, and therefore recommends porous materials be removed and discarded. The EPA does not make recommendations as to whether certain building materials should be removed and discarded or whether they can be sufficiently cleaned for re-use. However, the EPA does make recommendations and discuss various clean-up methods and their use on various building materials and contents. The EPA clean-up and mold prevention recommendations and guidelines for remediating building materials with mold growth caused by clean water can be found within its “Mold Remediation in School and Commercial Buildings” publication.¹³

Whether a client’s furnishings and contents can be properly cleaned depends on whether the property has been subject to direct contamination or indirect contamination. Direct contamination occurs when mold actively grows on items that have sustained water damage or have experienced extended exposure to high humidity. Indirect contamination is the result of fungal contamination spreading from water damaged material. Generally, porous items such as upholstered furniture, books and papers, carpet and backing, drapes, clothes, mattresses, etc., that have been subjected to direct contamination and mold growth

are in most instances unsalvageable. Although the EPA offers recommendation for the cleaning of these materials, the reality is most mold remediators will not clean these items for fear that if the item is returned with some residual contamination, the remediator will be subject to liability. Additionally, because there are no mold cleaning and remediation standards, it is impossible to determine whether “clean” is in fact clean and free of any spores or mycotoxins.

For water intrusion and mold remediation to be successful, the American Industrial Hygiene Association (“AIHA”), the ACGIH and EPA note two criteria must be met: (1) the water or moisture problem leading to promulgation and contamination of mold must be identified and fixed; and (2) all areas within the structure must be inspected and all visible mold and mold damaged materials must be removed. In most cases, air sampling within the structure should be performed and the types and concentrations of mold measured within the structure should be comparable to that found outdoors.

5. Litigation often takes place after the problem has been solved.

In water intrusion and mold cases, even if the mold has been remediated, it is an unfortunate reality that the parties’ failure to settle prior to a lawsuit being filed, typically will result in substantial delay to final resolution. This is unfortunate because in many cases, defendants and their carriers have no motivation to pay a claim prior to the long discovery process. As a result, a water intrusion and mold claim that could have been resolved within a month or two after discovery of the water intrusion, end up causing two or more years of stress and strain on the plaintiff as well as significant discovery and expert fees expended by plaintiff’s counsel. Exacerbating this frustration is that most mold claims, if properly handled

by plaintiff and defendant, often can be resolved for a reasonable sum without incurring significant costs and legal expenses associated with litigation.

In many cases, fear of the unknown and the appearance of being weak have a tendency to interfere with the ordinary claims process and result in the parties refusing to effectively communicate with each other to determine if a claim can be resolved prior to litigation. This, in the long run, causes the testing, remediation, build-back, ALE and legal expenses to escalate to the level where the lines between the cost and the benefit of resolving the claim are no longer easily defined.

Unfortunately, the Texas Legislature's efforts to reduce the number of claims and costs associated with residential construction claims may do nothing but exacerbate the situation because none of the parties involved truly understand the rationale behind the process.¹⁴ The current proposal calls for the creation of the Texas Residential Construction Commission which would consist of nine members (four of whom must be builders registered under the Act, three must be representatives of the general public, one must be a licensed professional engineer practicing in the area of residential construction and one member must be a licensed architect or building inspector practicing in the area of residential construction). All appointees are appointed by the governor without any legislative approval or confirmation. The Act requires that all persons who construct, supervise or manage the construction of a new home, a material improvement to an existing home, or an improvement to the interior of a home exceeding \$20,000 must register under the Act. In addition to the registration of the contractors performing the services defined, the Act also requires builders to register every new home with the commission. Further, if the home becomes subject to

a dispute, the Commission requires that homeowners must submit all defective construction claims and disputes with the builder to the Commission for a state sponsored dispute resolution procedure before any legal action can be commenced against the contractor. The purpose of this requirement is to ferret out many of the frivolous complaints being made against contractors. However, it creates an additional administrative hurdle for homeowners to undertake in bringing a claim against a builder, and because a single nine member Commission will be responsible for reviewing every homeowner dispute in the state of Texas, a probable bottleneck will occur and the Act actually may exacerbate many of the problems it was hoped to resolve.

Possibly the most significant provision within the Act is the directive that the commission adopt limited warranties and building performance standards for residential construction. The warranties are limited and will be exclusive implied warranties for residential construction and will apply as follows: (1) one year for workmanship and materials; (2) two years for plumbing, electrical, heating and air conditioning delivery systems; and (3) ten years for major structural components. In addition to these limited warranties created by the commission, the Act creates a warranty of habitability for new homes and home improvements. The Act states that a defect must have a direct adverse impact on the habitable areas of the home and must not have been discoverable during the period covered by the limited warranties to constitute a breach. Further, the Act provides no other warranties other than express warranties created by contract for new home construction or home improvements.

In addition to the above, the commission is also given the tasks to develop standards for mold reduction, remediation and for the performance of interior and exterior components of the home. This includes standards relating to foundations, floors, ceiling, roofs, draining, landscaping, heating, cooling and electrical and plumbing components. The only limitation on the commission's development and adoption of these standards is that the standards may not be less stringent than HUD standards for FHA building programs.

No matter the intention, the Act as written does nothing to streamline the current process, which already takes too long. Therefore, the unfortunate reality remains the status quo – the expensive and time-consuming litigation of a water intrusion and mold claim often takes place long after the mold problem has been resolved.

B. POTENTIAL CAUSES OF ACTION AND CLAIMS FOR DAMAGES

One of the major problems in presenting and prosecuting a mold claim is plaintiffs too often limit the allegations to only a handful of causes of action recognized in the State of Texas. Additionally, the causes of action alleged by most plaintiff lawyers in mold cases are those which take the general contractor and responsible parties out of coverage with their insurance carrier. This, of course, hampers the ability to either settle the claim or collect any judgment entered in favor of the plaintiff. The practitioner should consider this list a number of the different causes of action that the plaintiff could assert in a mold and water intrusion claim.

1. Breach of Contract.

The essential elements of an action for breach of contract in Texas are (1) the plaintiff and defendant had a valid and enforceable contract; (2) the plaintiff performed, tendered performance, or was excused from performing its contractual obligations; (3) the defendant breached the terms and conditions of the contract; and (4) the defendant's breach of the contract caused the plaintiff's injuries.¹⁵

The biggest problem in alleging breach of contract against any party, whether a contractor, architect or engineer, is that breach of contract is not covered under the standard commercial general liability insurance policy. If the defendant is a small entity with little or no resources to pay a judgment — a big verdict or arbitration award results in little satisfaction. However, in cases where the general contractor, builder or party with whom your client has contracted has sufficient assets, this is the primary cause of action.

In a contract case, it is absolutely essential to read the contract. Contract cases involve standard and non-standard contracts each with idiosyncracies affecting the rights and obligations of the parties. Specifically, form contracts generated through the American Institute of Architects (“AIA”) have changed over the past several years. Further, there are terms within the AIA contract that may expand the typically duties of a general contractor. Because general contractors are comfortable with the AIA contract, they frequently fail to read the details and fine print within some of the terms and conditions. This fact has served many plaintiffs well over the years.

Additionally, many contractors will materially alter the standard AIA contract to suit their needs, but forget to strike the AIA General Terms and Conditions found in Form A-101. This is a mistake many builders and contractors have regretted because the general terms and conditions set out a number of duties many contractors thought they were deleting from Form AIA A-201.

1a. Breach of Contract - Damages.

A plaintiff is generally entitled to all actual damages necessary to put the plaintiff in the same economic position the plaintiff would have been, had the contract not been breached.¹⁶ The type of damages utilized in a breach of contract case involving mold and water intrusion is the plaintiff’s expectation interest in the completion of the contract.

The expectation interest in a breach of contract case involving mold or water intrusion claims is to provide the plaintiff the benefit of the bargain. Therefore, damages usually are measured by the difference between the value of the home without defects versus the value of the home as built. In addition to the benefit of the bargain damages, a plaintiff

may be entitled to recover incidental or consequential damages reasonably foreseen by the parties as a result of the breach. In a residential home case where the roof was improperly constructed resulting in a water leak, the damages reasonably foreseeable could include replacement of the attic insulation or other building materials damaged because of the leak. A logical extension of consequential damages may also include any mold contamination and remediation costs associated with the water leak. However, no reported Texas case carries it as far as to include mold remediation costs. In each case involving claims such as this, defendants contend mold remediation costs, mold testing and sampling costs, alternative living expenses, contents replacement and construction build-back costs are not reasonably foreseeable from a water leak. In response, plaintiffs contend that in today's construction environment, these damages are in fact foreseeable and contemplated by the parties in the performance of the work. Unfortunately, in the mold and water intrusion situation, there has been no clear determination by the courts as to how far consequential damages can be extended.

In addition to benefit of the bargain damages discussed above, a plaintiff can seek to rescind the contract and seek the return of all consideration to the parties, as if no contract had ever existed. However, attorney's fees cannot be awarded when a contract has been rescinded because the law operates as if the contract and breach never happened.¹⁷

Damages not recoverable under a breach of contract theory include damages for personal injury, including mental anguish¹⁸ and exemplary damages.¹⁹

2. Breach of Implied Warranty of Good and Workmanlike Performance - Existing Home.

In Texas, this cause of action specifically applies to the repair and modification of existing homes. There is a separate implied warranty applied to the construction of a new home. The implied warranty of a good and workmanlike performance of services is a common-law warranty, first recognized in *Melody Home Manufacturing v. Barnes*.²⁰ The elements of a cause of action for the breach of the implied warranty of good and workmanlike performance of services and the repair and modification of a home include:

1. The defendant performed services for the plaintiff;
2. The defendant's services consisted of the repair or modification of the plaintiff's existing property;
3. The defendant did not perform the services in a good and workmanlike manner; and
4. The plaintiff suffered injury.²¹

The implied warranty of good and workmanlike performance of services on an existing home is typically an action alleged against contractors for failing to properly make repairs, modifications, or additions to an existing structure. However, this cause of action is also available and necessary in any case against mold remediation companies and contractors for failing to adequately remediate the property and failing to remove the mold contamination and damaged material resulting from water intrusion.

The *Melody Home* case clearly specifies that "good and workmanlike manner" means the quality of work performed by one who has the knowledge, training, or experience

necessary for the successful practice of a trade or occupation, and performed in a manner generally considered proficient by those capable of judging the work.²² This standard is equivalent to a negligence standard and the focus of the claim is not on the failure to obtain adequate results from the work, but the manner in which the work was performed. Therefore, just because a home does not receive a “clean” test, does not mean there has been a breach of the implied warranty.

The key to this cause of action is the evaluation of the actual work and the way it was performed by the contractor. As an example, in many mold claims, mold remediation and build-back work is conducted before the actual cause of the water intrusion and mold contamination is remedied. In this case, it is clear the contractor has inadequately performed the services needed to prevent future water intrusion and mold contamination. To prove a failure in the standard of care, Texas courts do not require plaintiffs to put on expert testimony. However, it is extremely difficult to prove a breach in the standard of care without the use of expert testimony. Therefore, it is vital for the plaintiff to retain a qualified expert to review the entirety of the scope of work and the way the work was performed.

2a. Damages - Implied Warranty of Good and Workmanlike Performance - Existing Home.

The most problematic factor of this cause of action is damages. It is not enough just to show the work was inadequately performed – the plaintiff must show additional costs, expenses and injuries specifically related to the failure of the contractor or mold remediator to perform the services in accordance with the standard of care.

The plaintiff is entitled to recover actual damages measured by the benefit of the bargain – or the difference between the value of the services as warranted and the value of services received. However, in most claims, fixing the damage directly arising from the breach is minimal as compared to the consequential damages proximately caused by the breach. The plaintiff can also recover court costs and interest. However, to recover attorney fees, the plaintiff must plead for fees pursuant to a statute or contractual provision permitting attorney fees (e.g., DTPA).

3. Breach of Implied Warranty of Good and Workmanlike Performance - New Home Construction.

The cause of action for the implied warranty of good and workmanlike performance of services as it applies to the construction of a new residential property is similar to the implied warranty applied in an existing home outlined above. The elements for the breach of the implied warranty of good and workmanlike construction of a residential property are:

1. The defendant built the residential property;
2. The plaintiff purchased the property;
3. The construction was not performed in a good and workmanlike manner;
4. The plaintiff gave the defendant notice of the breach; and
5. The plaintiff suffered injury.²³

This action is closely related to the violation of the Residential Construction Liability Act found in Chapter 27 of the Texas Property Code in that the RCLA requires the plaintiff

to give the defendant notice of the breach and provide the defendant adequate time to remedy the construction defects within the home.

The most significant aspect of this cause of action is that it may only be made against the builder or general contractor. Recent decisions hold this cause of action may not be brought against a subcontractor.²⁴ In *J. M. Krupara Construction Co. v. Rosenberg*, the homeowner sued the general contractor and subcontractor claiming damages under the RCLA, DTPA, negligence and breach of the implied warranty of good and workmanlike services in home construction. The court held a homeowner has no cause of action for breach of implied warranty against a subcontractor.²⁵ Another court recently came to this conclusion in *Codner v. Arellano*.²⁶

Despite their holdings, neither the *Krupara* or *Codner* courts addressed whether a homeowner could pursue a negligence claim directly against a subcontractor. Therefore, if the subcontractor is the only viable defendant in a case, it is important to not only bring the implied warranty cause of action against the builder or general contractor, but also to include a negligence claim against the subcontractor.

It is also important to note that the claimant in a case involving breach of an implied warranty of good and workmanlike services in the construction of a residential home can not only be the original home buyer but also a subsequent buyer of the residential property.²⁷ Much like the previous cause of action, the Plaintiff must establish the Defendant did not construct the residential home in a good and workmanlike manner. Again, “good and workmanlike manner” means the quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation, and

performed in a manner generally considered proficient by those capable of judging the work.²⁸

Although the implied warranty of good workmanship requires a builder to construct a home in the same manner as would a generally proficient builder, it can be disclaimed when the agreement between the parties provides for the manner, performance, or quality of the home construction.²⁹

3a. Damages - Implied Warranty of Good and Workmanlike Performance - New Home Construction.

The damages recoverable for a breach of the implied warranty of good and workmanlike services in new residential construction cases is limited to actual damages and is measured by the benefit of the bargain. The benefit of the bargain is the difference between the value of the services as warranted and the value as received. Courts have not addressed the issue of whether personal injury damages can be recovered in a common law breach of warranty action that is not brought under the RCLA or DTPA. Although a Plaintiff can recover pre-judgment and post-judgment interest as well as court costs, a Plaintiff cannot obtain an award for exemplary damages or for attorney's fees unless allowed by statute or contract. Therefore, it is important to review the actual contract between the parties because in many cases the contract will outline and define the type of damages or limitations of damages that can be awarded.

If the RCLA applies, the damages recoverable for a breach of the implied warranty of good and workmanlike construction are limited to the damages permitted under the RCLA. Under the RCLA, the plaintiff's damages are measured by:

- A. Cost of repairs or the amount of an unreasonably rejected settlement offer, costs and attorney's fees;
- B. The cost of repairs, cost of alternative living expenses, diminution of value and attorney's fees;
- C. The amount of an accepted settlement offer; or
- D. The amount permitted by the underlying cause of action.³⁰

Note that the RCLA provides a significant limitation to the amount of recoverable if the defendant complies with the Act. The cap is limited to the greater of the plaintiff's purchase price or fair market value of the house without the defect.³¹

4. Breach of the Implied Warranty of Habitability.

In mold and water intrusion cases, the breach of the implied warranty of habitability is the most common cause of action brought against home builders and general contractors.

The elements of the implied warranty of habitability are:

1. The defendant built the residential property;
2. The plaintiff purchased the property;
3. The defendant created a defect in the property;
4. The defect was latent;
5. The defect made the residential property uninhabitable;
6. The plaintiff gave the defendant notice of the breach; and
7. The plaintiff suffered injury.³²

To prove breach of the implied warranty of habitability, the plaintiff must establish the defect made the dwelling uninhabitable. To be habitable, the residential property must

be safe, sanitary, and otherwise fit for humans to inhabit.³³ An often-overlooked requirement is the defect must have an effect on the habitable areas of the home.³⁴ For example, a defect that allowed water to enter into the home and resulted in the growth of mold would be covered. However, a construction defect in the detached garage which does not affect any other portion of the house or the homeowner's ability to live within the home, would not be covered under the implied warranty of habitability.

The implied warranty of habitability can be waived, but only to those defects that are adequately disclosed.³⁵

4a. Damages - Implied Warranty of Habitability.

The damages recoverable for a breach of the implied warranty of habitability are the same as those allowed under express warranties. Damages are limited to actual damages measured by the benefit of the bargain. The benefit of the bargain is the difference between the value of the services as warranted and the value as received. Courts have not addressed the issue of whether personal injury damages can be recovered in a common law breach of warranty action that is not brought under the RCLA or DTPA. Although a plaintiff can recover pre-judgment and post-judgment interest as well as court costs, a plaintiff cannot obtain an award for exemplary damages or for attorney's fees unless allowed by statute or contract. Therefore, it is important to review the actual contract between the parties because in many cases the contract will outline and define the type of damages or limitations of damages that can be awarded.

5. Breach of the Implied Warranty of Suitability.

The common law implied warranty of “habitability” applies to residential property. The common law warranty applicable to commercial property is the common law warranty of “suitability.” Therefore, the application of the implied warranty of suitability is not affected by the Residential Construction and Liability Act. The elements of implied warranty of suitability include:

1. The defendant leased property to the plaintiff;
2. The lease covered commercial property;
3. The leased property had a latent defect;
4. The defect was in an area that was vital to the property’s commercial purpose;
5. The defect made the property unsuitable for its intended commercial purpose; and
6. The plaintiff suffered injury.³⁶

Two elements have caused plaintiffs the most trouble in these cases are: 1) the requirement the area containing the defect was vital to the property’s commercial purpose, and 2) the defect made the property unsuitable for the intended commercial purpose. What is vital in whether a landlord has breached the warranty of suitability is usually a fact question to be determined from the particular circumstances of each case, including the nature of the defect. However, in previous cases, a fully functioning roof without leaks water intrusion into a commercial lease space, was considered vital for commercial purposes.³⁷

The element requiring a plaintiff to establish that the latent defect caused the property to be

unsuitable for its commercial purpose requires the plaintiff to evaluate several factors when determining whether there has been a breach. These factors include the nature of the defect, its effect upon the tenant's use of the premises, the length of time the defect persisted, the age of the structure, the amount of the rent, the area where the premises are located, whether the tenant waived the defect, and whether the defect resulted from any unusual or abnormal use by the tenant.³⁸ There are no specific cases other than the *Davidow* case discussing water intrusion, and there are no Texas mold cases relating to the breach of the implied warranty of suitability.

5a. Damages - Implied Warranty of Suitability.

The damages recoverable for a breach of the implied warranty of suitability are the same as those allowed under express warranties. Damages are limited to actual damages measured by the benefit of the bargain. The benefit of the bargain is the difference between the value of the services as warranted and the value as received. Courts have not addressed the issue of whether personal injury damages can be recovered in a common law breach of warranty action that is not brought under the RCLA or DTPA. Although a plaintiff can recover pre-judgment and post-judgment interest as well as court costs, a plaintiff cannot obtain an award for exemplary damages or for attorney's fees unless allowed by statute or contract. Therefore, it is important to review the actual contract between the parties because in many cases the contract will outline and define the type of damages or limitations of damages that can be awarded.

6. *Texas Deceptive Trade Practices Act.*

The elements of a cause of action for violation of the Texas Deceptive Trade Practices Act are as follows:

1. The plaintiff is a consumer;
2. The defendant can be sued under the DTPA;
3. The defendant committed a wrongful act, which consisted of the following:
 - a. A false, misleading or deceptive act or practice that is specifically enumerated in the “laundry list” of Business and Commerce Code § 17.46(b) and that was relied on by the plaintiff to the plaintiff’s detriment;
 - b. A breach of an express or implied warranty;
 - c. Any unconscionable action or course of action;
 - d. The use of an act or practice in violation of Insurance Code Art. 21.21; or
 - e. A violation of one of the many “tie-in” consumer statutes as authorized by the Business and Commerce Code § 17.50(h), which are classified as “false, misleading or deceptive acts or practices”; and
4. The defendant’s action was a producing cause of the plaintiff’s damages.³⁹

The most common laundry list violations alleged by plaintiffs in cases involving water intrusion and mold include (1) knowingly representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantifies which they do not have, TEX. BUS. & COM. CODE § 17.46(b)(5); (2) knowingly representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another, Tex. Bus. & Com. Code § 17.46(b)(7); (3) knowingly representing an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law, TEX. BUS. & COM. CODE § 17.46(b)(12); (4) representing that a guarantee or warranty confers or involves rights or remedies that it does not have or involve. TEX. BUS. & COM. CODE § 17.46(b)(19); (5) representing that work or services have been performed, or parts replaced, when the work or services were not performed or the parts replaced, TEX. BUS. & COM. CODE § 17.46(b)(21); and (6) knowingly failing to disclose information about goods or services known at the time of the transaction if the failure to disclose was intended to induce the consumer into a transaction that the consumer would not have entered into, had the information been disclosed, TEX. BUS. & COM. CODE § 17.46(b)(23).⁴⁰

6a. Damages - Texas Deceptive Trade Practices Act.

A significant factor in alleging a DTPA action in a case involving water intrusion or mold is that under the DTPA, a plaintiff may recover either economic damages under the DTPA or actual damages under a tie-in statute plus mental anguish damages.⁴¹ Plaintiffs may recover economic damages under the DTPA if: 1) the plaintiff relies on the defendant's false, misleading, or deceptive acts or practices; or 2) from the breach of a warranty or

unconscionable act; and 3) the false, misleading or deceptive act or breach of warranty was a producing cause for the damage.⁴² The economic damages defined under the Act include compensatory damages for pecuniary loss, as well as costs for repair and replacement. However, a plaintiff cannot collect damages for physical pain or exemplary damages.⁴³ Nevertheless, the DTPA otherwise allows a plaintiff to recover out-of-pocket damages resulting from the misrepresentation, including but not limited to alternative living expenses, costs to replace and repair building materials and contents, and benefit of the bargain damages which would otherwise include diminution of value.

If a plaintiff is fortunate enough to obtain a finding that the defendant committed a knowing violation by having actual awareness of the falsity, deception, or unfairness, the plaintiff can be awarded up to three times the amount of economic damages as well as damages for mental anguish. These types of damages are ordinarily not available in a breach of contract, breach of warranty, and residential construction liability case.

However, in cases where both the DTPA and RCLA are alleged, if a defendant fails to present a reasonable settlement offer after being notified pursuant to a valid RCLA demand, the defendant waives any and all defenses to the limitations on caps and the causes of action that can be brought against him. Therefore, as far as a plaintiff's pleadings are concerned, the plaintiff should always consider alleging a knowing or intentional violation, just in case the defendant fails to respond to a settlement offer under the RCLA. Further discussion of the RCLA is presented below.

7. *Residential Construction & Liability Act.*

The Residential Construction and Liability Act, commonly referred to as the “RCLA,” is found in Chapter 27 of the Texas Property Code. TEX. PROP. CODE § 27.001, et seq. The RCLA provides a mechanism by which contractors can be furnished with notice of problems in homes they constructed and be given the opportunity to inspect and fix the problems within the home. In order to motivate contractors to resolve residential home disputes, the Texas Legislature gave contractors a number of defenses as well as a cap on damages.

The RCLA is not a separate cause of action.⁴⁴ It is a statutory vehicle to bring suit on a residential construction claim – it provides no elements of a cause of action or description as to what conduct can form the basis for liability.⁴⁵ Defendants in the past have contended the RCLA operated as a bar to any other cause of action. However, in *Sanders v. Construction Equity, Inc.*, the Beaumont Court of Appeals found the RCLA does not operate as a bar to any cause of action, but some causes of action are governed by the RCLA.⁴⁶

Since its original enactment in 1989, the RCLA has been amended twice. These amendments, in 1993 and 1999, were made to address problems in the interpretation and coverage of the RCLA. However, what the Legislature and home builder lobbies thought was a method to protect contractors has actually resulted in a substantial increase in residential home claims. In fact, the RCLA in many instances has favored plaintiff’s lawyers because damages not otherwise allowed under certain causes of action are available under the RCLA if the defendant does not properly follow the requirements of the RCLA.

With that in mind, it is of utmost importance that every plaintiff lawyer become familiar with the provisions of the RCLA. First, the RCLA applies to any claim made against a contractor for a construction defect in a residence, including single-family, detached homes, duplexes, triplexes, quadruplexes and cooperative residences.⁴⁷ A construction defect consists of any claim regarding the design, construction or repair of a new residence or remodeling of existing residence, including swimming pools and detached garages.⁴⁸ It covers all damages arising from the construction defect, except damages for personal injury, death or damages to goods.⁴⁹ Additionally, the RCLA provides for the award of mental anguish damages because it specifically defines mental anguish as not constituting a personal injury claim.⁵⁰

The only entities allowed to assert an RCLA claim are the homeowner or subsequent homeowner and a person or entity contracting with the owner and “risk retention groups” as defined under Article 21.54 of the Texas Insurance Code.⁵¹ Subcontractors are not covered under the RCLA.

Much like the DTPA, the RCLA requires that at least sixty days before filing suit for damages related to a construction defect, the owner must send a certified mail letter setting out in reasonable detail the construction defects that are the subject of the complaint. Further, on the request of the contractor, the claimant must provide any evidence depicting the nature and cause of the defect and the nature and extent of the repairs necessary to remedy the defect, including expert reports, photographs and videotapes. Once the contractor receives the notice, the contractor has thirty-five days to provide a written request to the homeowner for a reasonable opportunity to inspect and have inspected the home that

is the subject of the complaint, to determine the nature and cause of the defect and the nature and extent of the repairs necessary to remedy the defect.⁵²

Within forty-five days of the contractor receiving the notice from the homeowner, the contractor may make a written offer of settlement to the claimant or the claimant's lawyer by certified mail. This offer can include either an agreement by the contractor to repair the construction defects himself, or have an independent contractor, at the contractor's expense, fix the defect. Additionally, this proposal by the contractor shall describe in reasonable detail the kind of repair which will be made. If accepted, the repairs must be made within the forty-five day period after the date the contractor receives written notice of the claimant's acceptance of the settlement offer.⁵³ In the alternative, the contractor can make a cash offer to settle any and all claims relating to the construction defects.⁵⁴

If the homeowner fails to give the required certified mail notice before filing suit or files suit before the expiration of sixty days from giving notice by certified mail, or fails to give the contractor a reasonable opportunity to inspect the construction defects, courts are required to abate the homeowner's suit. This occurs automatically on the eleventh day after filing, without an order from the court if a verified plea in abatement is filed alleging that proper notice was not given prior to the filing of suit and that no controverting affidavit has been filed by the homeowner.⁵⁵ The protections to contractors previously referenced relating to the RCLA provide that if the homeowner unreasonably rejects the contractor's offer, or does not permit the contractor or independent contractor a reasonable opportunity to repair the defect pursuant to an accepted settlement offer, the homeowner's damages are limited to the cost of repairs that are reasonably necessary to correct the construction defect or the

amount of the settlement offer if the builder has made a cash settlement offer, and the reasonable attorney's fees incurred by the homeowner before the rejection of the settlement or before the settlement offer is considered rejected under § 27.004(j).⁵⁶

7a. Damages & Limitations - Residential Construction & Liability Act.

If the homeowner does not unreasonably reject the contractor's offer, the homeowner may recover only the following damages proximately caused by a construction defect: (1) the reasonable cost of repairs necessary to repair the construction defect that the builder failed to cure; (2) the homeowner's reasonable expenses of temporary housing, if necessary, during the period the repairs are taking place; (3) reduction in market value, if any, to the extent reduction is due to a structural failure; and (4) reasonable and necessary attorney's fees.⁵⁷

Further, the total damages awarded under the RCLA are not to exceed the greater of the claimant's purchase price for the residence or the current fair market value of the residence without the construction defect.⁵⁸

Therefore, a plaintiff who owns a home substantially affected by water intrusion with a significant amount of mold in the home's building envelope may be severely limited in the amount of damages that can be recovered. The reason behind this is the limitation on damages up to the purchase price for the residence or the current fair market value does not take into account the significant cost and expense associated with mold remediation, testing and build back of the residence.

In a recent case we litigated, the value of the home was approximately \$600,000. However, the expected repair, remediation and build-back costs exceeded \$1,000,000.00.

Because of the value of the contents of the premises as well as the extent of the water intrusion and mold growth throughout the home, the mold remediation costs alone were \$450,000. Under the RCLA, this left only \$150,000 available to completely reconstruct the exterior and interior building envelope and replace the family's belongings, which could not be cleaned due to the mold infestation. In that case, it was cheaper to tear the building down to the slab and try to rebuild it from scratch. However, the RCLA does not provide for this type of remedy.

As the plaintiff's lawyer, we had to bring several different causes of action outside the RCLA to attach the claim to the contractor's CGL policy, the subcontractors' CGL policies and the homeowner's insurance policy so we could obtain enough money to demolish and rebuild the structure. However, not every RCLA case is this extreme. In fact, the RCLA unwittingly provides the plaintiff's lawyer an incredible opportunity to obtain a substantial verdict if, and only if, the contractor fails to make a reasonable offer under the RCLA, fails to make a reasonable attempt to complete the repairs specified in an accepted offer or fails to complete in a good and workmanlike manner the repairs specified in an accepted offer. If the defendant fails to do any of the above, ***the limitations on damages and defenses to liability provided for under the RCLA do not apply.***⁵⁹

Therefore, if the contractor fails to make a reasonable settlement offer within the prescribed period of time, the plaintiff can seek any and all damages under any theory of liability without limitation. This is especially important since Texas courts have determined the RCLA does not preclude an action for fraud or the award of exemplary damages.⁶⁰

In the last two cases we handled, the defendants never realized this provision could completely destroy any and all defenses under the RCLA. In those cases, once the arbitrator and judge found the defenses and limitations on damages had been waived, the case settled within a very short time frame. This provision is of particular importance in cases where the contractor immediately notifies his insurer of the claim and relies upon the insurer to hire counsel in his defense. In many instances, insurance companies fail to hire counsel in a timely fashion and/or the hired counsel fails to sufficiently respond or make any request for inspection. As a result, many defendants find themselves having waived their RCLA defenses because they treated the demand letter just as any other demand letter in any other type of case.

The following flow chart is attached to assist both plaintiffs and defendants in understanding the deadlines under the RCLA. (*See RCLA Flow Chart*)

8. *Negligence.*

Although often alleged, the negligence cause of action is rarely considered the focus or basis of liability in a mold and water intrusion claim. This is because mold and water intrusion claims generally involve construction defects and thus, are based in contract. Defendants often assert a plaintiff's allegation of negligence is simply a way to get around the economic loss rule and a puerile attempt to state a cause of action covered by insurance carried by a variety of possible defendants. Nevertheless, common law negligence is an extremely valuable tool to be utilized by plaintiff lawyers under appropriate circumstances.

Contractual theories allow recovery for the subject matter of the contract breached. Other than consequential damages, contract claims do not allow recovery for many other

types of damages caused by the breach. Negligence bridges this gap to allow a plaintiff to collect on the other types of damage either caused by or resulting from the breach. For example, a contract claim for a leaking roof will allow for the replacement of the roof and the foreseen consequential damages related thereto. However, the mold testing, remediation, cleaning and/or replacement of the building contents, the alternative living expenses, clean testing and the construction build-back costs after remediation most likely will not be considered a consequential damage foreseen by the parties.

Negligence bridges this gap in most construction cases. However, it also creates problems because of the applicability of the economic loss rule. Defendants typically contend the acts complained of in a construction case are based in contract and the damages relating to any breach are simply economic damages flowing out of the contract. However, in a water intrusion and mold claim the damages may extend beyond mere breach of contract. Texas courts have determined the mere fact an act is done pursuant to a contract does not automatically shield defendants from tort liability.⁶¹ A defendant's acts may breach duties in either tort or contract or simultaneously in both.⁶²

The nature of the injuries suffered generally determines the existence of a cause of action in tort. When the injury consists only of economic loss to the subject of the contract itself, the action sounds in contract alone.⁶³ It is also instructive to examine the duties that the defendant has allegedly breached. If the defendant's conduct would give rise to liability independent of the fact that a contract existed between the parties, the claims may also sound in tort.⁶⁴ Conversely, if the defendant's conduct would give rise to liability only because it breaches the agreement, the claims ordinarily sound only in contract.⁶⁵

The distinction between violating a contractual duty and violating the common law duty of due care is illustrated by *Montgomery Ward & Co. v. Scharrenbeck*.⁶⁶ In *Scharrenbeck*, the defendant was hired to repair a hot water heater in the plaintiff's attic. When the heater subsequently malfunctioned and ignited the roof, destroying the house and its contents, the plaintiff sued in tort. The Supreme Court held the defendant's negligence in repairing the water heater gave rise to a tort claim despite the contractual context, noting that, "contract may create the state of things which furnishes the occasion of a tort."⁶⁷ The subject matter of the "contract" was the water heater – the real damage was to the home.

9. Negligent Hiring, Supervision, Training & Retention.

There are several other types of negligence available in a mold, water intrusion and constructive defect claim. For instance, the causes of action of negligent hiring, supervision, training or retention are common negligence causes of action that should be considered against any general contractor or subcontractor in connection with their failure to construct the residence or commercial property in accordance with the standards accepted within the residential and commercial construction community. The elements are:

1. The employer owed the plaintiff a legal duty to hire, supervise, train or retain competent employees;
2. The employer breached that duty; and
3. The breach proximately caused the plaintiff's injury.⁶⁸

In actions against a contractor for negligent hiring, supervision, training or retention, the allegation is that the contractor failed to hire, train, supervise and retain competent employees in connection with the construction of the home. Typically, these allegations can

form the basis of a breach of contract between the homeowner and the contractor because these allegations are typically required under the standard AIA contract, and are also considered contractual duties depending upon the type of injuries suffered. Because Texas applies the economic loss doctrine in connection with the classification of the type of damages attributable to the cause of action, it is necessary to take the type of damage and characterize it in a way that it is more tort-based than contract-based.

In a recent case involving the construction of a residential home, we successfully argued that the hiring of a mechanical engineer with no previous residential home construction experience as a construction superintendent on a very complex custom home constituted negligence on behalf of the home builder, in that he not only failed to hire a competent superintendent, but he made representations to the superintendent that he would be properly trained on the job. The failure to so train constituted negligent training and negligent supervision. Although a difficult cause of action to maintain, the mere allegation of negligent hiring, training, supervision and retention, usually places the allegations within coverage and establishes the responsibility to defend under the CGL policy.

Therefore, a negligence allegation can logically be extended to include the causes of action for the failure to exercise control over the independent contractors or subcontractors hired by the general contractor.⁶⁹

10. Negligent Misrepresentation.

In addition to the negligence causes of action previously mentioned, a separate cause of action for negligent misrepresentation may be alleged in many water intrusion and mold claims. The elements of a cause of action for negligent misrepresentation include:

1. The defendant made a representation to the plaintiff in the course of the defendant's business, or in a transaction in which the defendant had an interest;
2. The defendant supplied false information for the guidance of others;
3. The defendant did not exercise reasonable care or competence in obtaining or communicating the information;
4. The plaintiff justifiably relied upon the representation by the defendant; and
5. The defendant's negligent misrepresentation proximately caused the plaintiff's injury.⁷⁰

To prove a cause of action for negligent misrepresentation, plaintiff must establish the defendant(s) supplied false information regarding an existing fact. In this context, it is not uncommon to review original advertising materials, references, statements of qualification of building contractor and subcontractors to find false information regarding the contractor's or subcontractor's qualifications and experience. Further, many custom home builders make many representations regarding the quality of the construction and building materials during construction, much of which is done to deflect the homeowner's complaints during construction delays. This information, if untrue, and beyond mere "puffery," is excellent evidence in any case if the plaintiff can prove the homebuilder or subcontractor failed to properly construct the home or perform work.

10a. Damages - Negligent Misrepresentation.

Unlike breach of contract or warranty remedies, a plaintiff can only recover actual damages for pecuniary losses sustained.⁷¹ Pecuniary loss includes: 1) the difference between the value of what the plaintiff has received in a transaction and the purchase price and the other value given for what it received, and 2) loss otherwise suffered as a consequence of the plaintiff's reliance on the misrepresentation.⁷²

11. Fraud – Common Law.

There are other causes of action within the mold and water intrusion context which may be alleged against contractors and subcontractors – including common law fraud. The elements for fraud are: (1) defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, it (a) knew the representation was false; or (b) made the representation recklessly, as a positive assertion, and without knowledge of its truth; (5) defendant made the representation with the intent plaintiff act on it; (6) plaintiff relied on the representation; and (7) the representation caused plaintiff's injuries.⁷³

11a. Damages – Fraud.

Fraud allows a plaintiff to recover actual or compensatory damages along with consequential damages, nominal damages, exemplary damages, interest and court costs.⁷⁴ Common law fraud does not allow for the recovery of attorney's fees. However, if other causes of action allowing the recovery of attorney's fees are being brought against the defendant(s) and they require the same proof, then plaintiff may be entitled to attorney's fees.⁷⁵ The most important information a plaintiff must remember in dealing with an

allegation of fraud is that a case concerning the design, construction, or repair of the home is expressly governed by the RCLA.⁷⁶

12. Fraud in the Sale of Real Estate.

In addition to common law fraud, the cause of action for statutory fraud in the sale of real estate also may be alleged in a transaction involving the sale of a home. The elements for fraud in the sale of real estate are: (1) there was a transaction involving real estate; (2) during the transaction, defendant did one or more of the following: (a) made a false representation of fact; (b) made a false promise; or (c) benefitted by not disclosing that a third party's representation or promise was false; (3) the false representation or promise was made for the purpose of inducing plaintiff to enter into a contract; (4) plaintiff relied on the false representation or promise by entering into the contract; and (5) the reliance caused plaintiff injury.⁷⁷

Fraud in the sale of real estate is essentially the same as common law fraud except in a cause of action for fraud in the sale of real estate, the plaintiff does not have to prove the defendant knew, or acted in a reckless manner, in making the representation of fact.⁷⁸

12a. Damages – Fraud in the Sale of Real Estate.

The remedies and damages available under the theory of fraud in the sale of real estate are the same as those available in common law fraud. However, the significant difference is that statutory fraud expressly allows the recovery of attorney's fees.⁷⁹

13. First Party Insurer Claims.

In addition to the causes of action listed above, a plaintiff may be able to bring claims against its own insurance company. These "first-party" claims against the plaintiff's insurer

are available depending on the facts and circumstances surrounding the denial, investigation, handling and settlement of the claim. The causes of action against a first-party insurer include:

1. Bad faith - breach of the duty of good faith and fair dealing.
2. Violation of Texas Insurance Code Art. 21.55 - Failure to promptly pay claim; and
3. Violation of Texas Insurance Code Art. 21.21 - Misrepresentation.

C. EVALUATION OF POTENTIAL DEFENDANTS AND LIABILITY

The issue of mold contamination has become increasingly complex and intricately interwoven with construction defect and personal injury claims over the past several years.

There are two types of claims in mold cases:

1. First party claims against the insurer; and
2. Third party claims.

First party claims are between the owner of the home or building and its insurance carrier. These claims are typically for denying coverage or failing to promptly pay a claim. However, because insurance coverages and claims are being discussed in greater detail later in this seminar, first party claims are not the focus of this discussion.

Third party claims can and typically do involve many different defendants, each with its own army of attorneys and experts.

Attorneys often fail to identify a number of potential parties in the litigation and therefore, end up with smaller awards and settlements. The typical third party mold claim involves a homeowner suing his or her general contractor under a theory of breach of contract or breach of some express or implied warranty. Violations of the Residential Construction Liability Act (RCLA),⁸⁰ and the Deceptive Trade Practices Act (DTPA)⁸¹ are also common allegations. However, as discussed earlier, there are a number of other claims that can be alleged in an effort not only to obtain coverage, but also to include additional responsible parties. For instance, a general negligence claim against the general contractor for negligently performing work, failing to correct code violations and flaws in the workmanship are viable claims under the right circumstances. Negligence may also include

the failure to properly construct and/or complete the building as designed, as well as failing to properly supervise the construction of the building. Further, many construction contracts require the contractor to hire experienced, competent and otherwise qualified supervisors, subcontractors and workmen to construct the building at issue, as well as to advise a home or building owner of material facts which were known or should have been known to the contractor during construction. Therefore, additional allegations of negligent hiring, negligent supervision, negligent inspection and negligent misrepresentation are causes of action that may be alleged against a general contractor.

In addition to the above, many contractors serve not only as the general contractor, but also as the designer and/or architect of the building. Therefore, additional construction design and defect allegations may be brought against the general contractor as well.

In addition to the general contractor, other parties should be considered. In particular, any subcontractor who has performed work on the building in an area where water intrusion and/or mold or mildew is present could be brought in as an additional party. Specifically, any subcontractor responsible for the plumbing, roofing, framing, installation of windows, insulation, stucco material and application, waterproofing, heating and ventilation and air conditioning systems, should be considered potential parties in any type of litigation involving water intrusion and mold claims.

In addition to the above, any service company and/or subcontractor responsible for work that results in any wall or roof penetration to the structure may be a potential party in any type of mold litigation. (i.e. security companies, cable/satellite installation companies).

In cases involving older buildings, potential parties include any vendors and/or contractors performing services on the property, such as landscaping services, air conditioning, heating, maintenance, and the janitorial services responsible for maintaining and cleaning the building. Obviously, this also includes any contractors or subcontractors performing construction to remodel, and/or repair work at the building. One often overlooked potential party is the HVAC repair and maintenance contractor responsible for the physical equipment associated with the HVAC, as well as its monthly maintenance regarding cleaning of the air handling units, replacement of air filters, and cleaning of the vents, registers and duct work.

Therefore, in assessing who may be a potential party to any litigation where mold and water intrusion claims are the basis of the lawsuit, it is extremely important that the lawyer evaluate every group or entity performing maintenance, construction or remodeling services within the building.

D. EVALUATION OF INSURANCE COVERAGE

Whenever handling a water intrusion or mold claim, it is absolutely necessary to read the applicable policy carefully to determine the extent of coverages available. Not all water intrusion and mold damage is covered by the residential property insurance policy because coverage and limitations vary with individual policies. In fact, most Texas homeowners insurance policies will not cover mold remediation beyond that necessary to repair or replace property damaged by a water loss otherwise covered by the policy.

Most homeowners insurance policies sold in the state of Texas today are known as “HO-A” policies. This type of policy covers problems and situations specifically listed within the policy such as glass breakage, damage from falling trees, theft and vandalism. HO-A policies only cover sudden and accidental water leaks from the structure’s plumbing and heating or air conditioning systems. HO-A policies do not cover damage from continuous or repeated leakage. Those policies that do cover mold remediation generally include coverage caps between \$5,000 and \$10,000. Additionally, HO-A policies, if without a replacement cost endorsement, only pay for the actual cash value of the structure of the home and do not cover replacement costs for contents or furnishings. Further, the actual cash value of the structure is determined by the replacement cost of the home, minus depreciation. As such, there often is not sufficient coverage to cover the damages resulting from water intrusion or mold contamination.

The other type of homeowners insurance policy commonly offered in Texas is referred to as an HO-B policy. This type of policy pays full replacement cost of the home, except for items specifically excluded within the policy. However, very few insurers in

Texas are offering the HO-B policy. If your client is fortunate enough to have an HO-B policy, additional coverage in increments of 25%, 50% and 100% of the policy limits to cover mold remediation can be purchased. However, the cost associated with this increased coverage is significant and for most homeowners is prohibitive.

The biggest concern experienced by homeowners with regard to the insurance coverage available in Texas results from those homeowners who have previously filed claims for mold or water damage. These homeowners typically experience difficulty in renewing or obtaining new insurance coverage for their homes. Because this has become such a widespread problem, the Texas Department of Insurance has developed the Fair Access to Insurance Requirements Plan Association (“FAIR”). This program is essentially a last safe haven for homeowners who have been rejected for coverage by at least two licensed insurance companies and who have not received a valid offer of comparable insurance from any other licensed company. Another option for homeowners who have been denied coverage is a surplus lines policy. This is becoming a viable option to many homeowners because, although the companies are not licensed to sell insurance in Texas, they are considered eligible by the Texas Department of Insurance because the company is licensed in the insurer’s home state or country to sell insurance they offer in Texas. Although surplus lines insurers typically sell commercial liability policies and damage coverage policies, some also offer residential coverage. However, the Texas Department of Insurance warns that surplus lines insurance companies are not governed by the Texas Property & Casualty Insurance Guaranty Association, meaning that if the surplus lines carrier becomes insolvent, there is no guarantee that the claims made against the policy will be paid.

Even though the HO-A policy and the HO-B policy have no, or limited, coverage for water intrusion or mold damage, many insurers do offer endorsements to the policy adding these coverages to the standard residential policy. As with any other financial or insurance product, you pay for what you get. Often, the most affordable policies with low deductibles have limited coverage.

The bottom line is this — in Texas, an insured is not obligated to report mold problems to the insurance company. Therefore, depending on the scope of the problem, the estimated remediation cost, the insured may be better off by paying for the remediation himself. If the estimated remediation and repair costs are less than the insurance deductible, the choice is clear because the insured would be paying for the repair out of pocket, regardless of whether a claim was filed or not. If the estimated repair cost exceeds the deductible, but is relatively inexpensive, the insured may be in a better position to pay for the remediation and repair costs himself without filing a claim to ensure the claim does not appear on any insurance company report, possibly resulting in an increase in insurance premiums or cancellation of the policy. The risk, obviously, is that if a claim is not filed and the contamination and water damage is extensive or if, despite the insured's best efforts, the water intrusion continues after repairs are made, the insurance carrier could claim that it does not have to pay under the policy because most policies require the insured to report water damage to the insurance company within a specific time frame after discovery of the damage. In such a case, the insurance carrier is within its contractual rights to deny the claim, making the insured responsible for some or all of the costs associated with the water intrusion and mold contamination.

As for contents and personal items covered under the policy, the Texas HO-A insurance policy allows reimbursement for the actual cash value of contents within the home. In this instance, actual cash value is determined by the current replacement cost minus depreciation due to age, use or wear.

One concern most homeowners and attorneys handling water intrusion and mold related claims fail to comprehend is the fact that settlements with first party insurers are often issued to both the homeowner and the homeowners' mortgage company. The mortgage company obviously has a significant financial interest in making sure the building is structurally sound and livable. It is of utmost importance for the insured and/or their attorney to contact the mortgage company prior to any settlement to determine whether the mortgage company will endorse the settlement proceeds over to the homeowner to pay for the mold remediation and effect the necessary repair to the home. Although rare, some mortgage companies require they oversee and supervise the remediation process to protect their investment. In these instances, the mortgage company typically takes possession of the insurance check and pays the contractor in installments with an inspector hired by the mortgage company to monitor the progress of the work.

Most Texas homeowner's insurance policies will not cover mold remediation beyond that necessary to repair or replace property damaged by a water loss otherwise covered by the policy. The HO-A policy offers no coverage for mold remediation or for damage caused by sudden and accidental water leaks, although some companies may offer that coverage as an endorsement to the base HO-A policy. If your client has an HO-B policy, additional

coverage in increments of 25 percent, 50 percent, and 100 percent of your policy's limits to cover mold remediation can be purchased.

E. CONCLUSION

The basics of handling a mold and water intrusion claim is no different than handling any other type of case. However, like any area of the law, it helps to have at least an elementary understanding of the jargon and claims process.

The Courts are typically the first reference point for guidance. However, there is little judicial guidance in this area. Although the case law is beginning to develop, there are no mold or water intrusion cases considered to be controlling authority. Therefore, the plaintiff, defendant, claim adjuster or anyone else involved in a water intrusion or mold claim must be diligent in handling the claim. Prepare by: 1) assembling the essential facts; 2) document the issues/problems; 3) marshal the evidence; 4) evaluate the extent of damage and the cause of the damages sustained; 5) consider the insurance policies, coverages and exclusions; 6) retain qualified experts (inspectors, remediators, engineers); and 7) determine the responsible parties.

However, do not lose sight of the fact people are at the heart of every claim. In a residential or commercial case, the plaintiff homeowner or business owner is under an incredible amount of stress and strain. Their home or business is quite often the biggest investment they make and the situation becomes personal if they believe they are being ignored, neglected, taken advantage of or being attacked. Therefore, great care must be taken in identifying with the claimant's position.

There are not many things as satisfying as helping someone protect their home, family or business. Whether representing an individual, business or insurer in a subrogation case, water intrusion and mold claims can be satisfying as well as rewarding.

APPENDIX

GLOSSARY AND MOLD RELATED INFORMATION

Acceptable Indoor Air Quality

Air in which there are no known contaminants at harmful concentrations as determined by cognizant authorities and with which a substantial majority (80% or more) of the people exposed do not express dissatisfaction.

ACGIH

American Conference of Governmental Industrial Hygienists.

ACH

Air changes per hour.

Acute Exposure

A single exposure to a toxic substance which results in biological harm or death; usually characterized as lasting no longer than a day.

Acute Toxicity

The ability of a substance to cause poisonous effects resulting in severe biological harm or death soon after a single exposure or dose. Any severe poisonous effect resulting from a short-term exposure.

Adverse Health Effect (occurrence)

Any abnormal, harmful, or undesirable effect (occurrence) on the physical, biochemical, biological, or behavioral well-being of a person that results from being exposed to pollutants in the environment.

Aerosol

A suspended liquid or solid particle in a gaseous medium.

AHU

Air handling unit; a component of an HVAC system that includes the fan(s), filters, and coils to condition the air.

Air

A mixture of gasses constituting a compressed fluid tied to the planet by gravitational attraction. Air is 79.0% nitrogen, 20.9% oxygen, and less than 0.1% a mixture of carbon dioxide, argon, helium, and hundreds of other gasses originating from natural and man-made sources.

Air Changes Per Hour (ACH)

Volume of air moved in one hour. One air change per hour in a room, home, or building means that all the air in that environment will be replaced in one hour.

Air Cleaning

An IAQ control strategy to remove various airborne particulates and/or gases from the air. The three types of air cleaning most commonly used are particulate filtration, electrostatic precipitation, and gas sorption.

Air Cleaning System

A device or combination of devices applied to reduce the concentration of airborne contaminants, such as microorganisms, dusts, fumes, respirable particles, other particulate matter, gases, and/or vapors in air.

Air-Conditioning (AC)

The process of treating air to meet the requirements of a conditioned space by controlling its temperature, humidity, cleanliness, and distribution.

Air Exchange Rate

Used in two ways: 1) the number of times that the outdoor air replaces the volume of air in a building per unit time, typically expressed as air changes per hour; 2) the number of times that the ventilation system replaces the air within a room or area within the building.

Air Handling Unit

For purposes of this program refers to equipment that includes a blower or fan, heating and/or cooling coils, and related equipment such as controls, condensate drain pans, and air filters. Does not include ductwork, registers or grilles, or boilers and chillers.

Air Pollutant

Any unwanted substance in air.

Algae

Simple rootless plants that grow in sunlit waters in proportion to how many nutrients are available.

Allergen

An allergen is a substance that elicits an antibody response and is responsible for producing allergic reactions. (e.g., pollen, animal dander, or house dust mite proteins)

Chemicals are released when certain cells come into contact with an allergen. These

chemicals can cause injury to surrounding tissue - the visible signs of an allergy. Only a few fungal allergens have been characterized but all fungi are thought to be potentially allergenic.

Alternaria

Alternaria is a genus comprising approximately 50 species of which most are plant pathogens. *Alternaria alternata* is extremely common and found on plants, wood, wood pulp, textiles and food. It grows worldwide typically on the surfaces of leaves and occurs in outdoor air at modest levels peaking in July or August depending on the location (reaching perhaps 500 spores/m³). The allergens of *Alternata* can induce reactions at very low concentrations in sensitized individuals. Strains of *Alternata* i.e. those found in air, do not produce AAL toxin. Some produce the phytotoxin [compound toxic to plants] alternariol and related metabolites.

Annoyance

A general feeling of displeasure or adverse psychological reaction toward a source. Associated with disturbance, distress and frustration.

ANSI

American National Standard Institute

Antimicrobial

Agent that kills microbial growth. See "disinfectant," "sanitizer," and "sterilizer."

ASHRAE

American Society of Heating, Refrigerating, and Air-Conditioning Engineers.

Aspergillus

Aspergillus is the asexual stage of a number of ascomycetes. Species of *Aspergillus* are distributed worldwide although they are more common in warmer climates like Texas. These species grow on a vast array of organic materials. Many species are cosmopolitan. There are 182 accepted species although only 40 occur with any frequency. Species of *Aspergillus* include several of considerable economic importance: *A. flavus* is the main producer of the potent carcinogen aflatoxin and *A. fumigatus* is an important cause of the invasive disease aspergillosis. Several species are common on building materials including *A. versicolor*. *A. fumigatus* is common in outdoor air in some regions in the fall, occurring on composting leaves and other materials.

Asthma

A condition marked by recurrent attacks of difficult or labored breathing and wheezing resulting from spasmodic contraction and hypersecretion of the bronchi. It is caused by exposure to allergens such as drugs, foods, environmental pollutants, or intrinsic factors.

ASTM

American Society for Testing and Materials.

Bacteria

Microscopic living organism.

Baghouse Filter

A large fabric bag used to eliminate intermediate and large particles. It operates like a vacuum cleaner bag, allowing air and smaller particles to pass through it, while entrapping larger particles.

Biocide/Fungicide

Biocides and fungicides are chemicals that limit the growth of or kill microorganisms such as fungi.

Biological Contaminants

Agents derived from or that are living organisms (e.g., viruses, bacteria, fungi, and mammal and bird antigens) that can be inhaled and can cause many types of health effects including allergic reactions, respiratory disorders, hypersensitivity diseases, and infectious diseases. Also referred to as "microbiologicals" or "microbials."

Bioremediation

The management of microorganisms.

"Black mold"

The poorly defined term "black mold" or "toxic black mold" has usually been associated with the mold *Stachybotrys chartarum*. While there are only a few molds that are truly black, there are many that can appear black. Not all mold that appears to be black is *Stachybotrys*.

Blower Door Test

A blower door is used to both find and measure air leakage. The blower door test places a home under a known pressure and then measures how much airflow is

required to maintain the pressure difference between indoors and outdoors. The tighter the house, the less air the blower door must move to maintain a given pressure. Besides measuring the airtightness of the house, it also helps to pinpoint specific air leaks. The number of air changes per hour (ACH) at a standard pressure differential (pressure inside the house minus pressure outside the house, measured in Pascals) tells us how the house is performing, and where problems are.

BOCA

Building Officials and Code Administrators.

BOMA

Building Owners Management Association.

BRI

See “Building-Related Illness.”

Breathing Zone

Area of a room in which occupants breathe as they stand, sit, or lie down.

Buffer Action

A substance's resistance to a change in pH.

Building Envelope

Elements of the building, including all external building materials, windows, and walls, that enclose the internal space.

Building-Related Illness

Diagnosable illness whose symptoms can be identified and whose cause can be directly attributed to airborne building pollutants (e.g., Legionnaire's disease, hypersensitivity pneumonitis).

Carbon Dioxide (CO₂)

A colorless, odorless, nonpoisonous gas which results from fuel combustion and human activity indoors. Elevated levels of CO₂ indicate ineffective ventilation indoors.

Carbon Monoxide (CO)

A colorless, odorless, poisonous gas which results from incomplete combustion.

CAV

See constant air volume.

Ceiling Plenum

Space below the flooring and above the suspended ceiling that accommodates the mechanical and electrical equipment and that is used as part of the air distribution system. The space is kept under negative pressure.

Central Air Handling Unit

For purposes of this document, this is the same as an AHU, but serves more than one area.

CFM

Cubic feet per minute The amount of air, in cubic feet, that flows through a given space in one minute.

Chemisorb

To take up and hold, usually irreversibly, by chemical forces.

Chronic Exposure

Long-term exposure lasting several weeks to a lifetime.

Chronic Toxicity

The ability of a substance to cause long-term poisonous human health effects.

Cladosporium

Cladosporium is a genus comprising approximately 500 species most of which are plant pathogens of which perhaps 20 are common. *Cladosporium sphaerospermum*, *C. cladosporioides* and *C. herbarum* are the most common species. All are found on plants, wood, wood pulp, textiles and food. Of the three, *C. sphaerospermum* is the species typically found on building materials. The other two are species that occur in outdoor air at high levels, peaking in June, July or August depending on the location (reaching perhaps 10,000 spores/m³). *Cladosporium herbarum* produces a wide variety of allergens and approximately 10% of the population is sensitized to *Cladosporium*.

CO

Carbon monoxide. a colorless odorless very toxic gas CO that burns to carbon dioxide with a blue flame and is formed as a product of the incomplete combustion of carbon.

CO2

Carbon dioxide. a heavy colorless gas CO [2] that does not support combustion, dissolves in water to form carbonic acid, is formed especially in animal respiration and in the decay or combustion of animal and vegetable matter, is absorbed from the air by plants in photosynthesis, and is used in the carbonation of beverages.

Commissioning

Start-up of a building that includes testing and adjusting HVAC, electrical, plumbing, and other systems to assure proper functioning and adherence to design criteria. Commissioning also includes the instruction of building representatives in the use of the building systems.

Conditioned Air

Air that has been heated, cooled, humidified, or dehumidified to maintain an interior space within the "comfort zone." (Sometimes referred to as "tempered" air.)

Constant Air Volume System

Air handling system that provides a constant air flow while varying the temperature to meet heating and cooling needs.

Contaminant

Any physical, chemical, biological, or radioactive substance that can adversely affect air, water or soil.

Crawl Space

The area beneath floors that provides access to utilities and other services. Other options are basements and slabs on grade.

Cubic Feet per Minute (CFM)

A measure of the volume of a substance flowing through air within a fixed period of time. Indoors, it is the amount of air measured in cubic feet that is delivered and exchanged in one minute.

DA

Distribution apportionment; the relationship between the proportion of the outside air (OA) quantity being delivered to portion a building and the proportion of the people in the building that are actually located in that portion of the building.

Dampers

Controls that vary airflow through an air outlet, inlet, or duct. A damper position may be immovable, manually adjustable, or part of an automated control system.

Decomposition

The breakdown of matter by bacteria and fungi.

Dessicant

A chemical agent that absorbs moisture.

Detergent

Synthetic washing agent that helps remove dirt and oil. Some contain compounds that kill bacteria or encourage algae growth. 2. A chemical composition that cleans.

DI

DI distribution integrity; the relationship between the outside air (OA) quantity entering the HVAC equipment and the OA that actually gets delivered to the building occupants.

Diffusers and Grilles

Components of the ventilation system that distribute and diffuse air to promote air circulation in the occupied space. Diffusers supply air and grilles return air.

Dilution Ventilation

Dilution of contaminated air with uncontaminated air in a general area, room, or building for the purpose of health hazard or nuisance control.

Disinfectants

One of three groups of antimicrobials registered by EPA for public health uses. EPA considers an antimicrobial to be a disinfectant when it destroys or irreversibly inactivates infectious or other undesirable organisms, but not necessarily their spores. EPA registers three types of disinfectant products based upon submitted efficacy data: limited, general or broad spectrum, and hospital disinfectant.

EIFS

Exterior Insulation and Finish System. A popular exterior building finish such as stucco.

Electrostatic Precipitator (ESP)

An air-pollution control device that removes particles from an air stream. The ESP imparts an electrical charge to particles causing them to adhere to metal plates inside the precipitator.

Endotoxin

A toxin of internal origin; specifically, a poisonous substance present in bacteria (as the causative agent of typhoid fever) but separable from the cell body only on its disintegration.

Energy Recovery Ventilation System

A device or combination of devices applied to provide the outdoor air for ventilation in which energy is transferred between the intake and exhaust airstreams.

Environmental Factors

Conditions other than indoor air contaminants that cause stress, comfort, and/or health problems (e.g., humidity extremes, drafts, lack of air circulation, noise, and overcrowding).

Epidemiology

1. A branch of medical science that deals with the incidence, distribution and control of disease in a population. 2. The sum of the factors controlling the presence or absence of a disease or pathogen.

ETS

Environmental tobacco smoke.

EVR

Effective ventilation rate; the ventilation rate based on the actual quantity of outdoor air delivered to the occupied areas of a building or space.

Exfiltration

Air leakage outward through cracks and interstices and through ceilings, floors, and walls of a space or building.

Exhaust Air

Air removed from a space and not used therein.

Exhaust Ventilation

Mechanical removal of air from a portion of a building (e.g., piece of equipment, room, or general area).

Exposure

An event in which an organism comes in contact with a chemical or biological agent.

Exposure Assessment

Measurement or estimation of the magnitude, frequency, duration, and route of exposure of humans, animals, materials, or ecological components to substances in the environment. The assessment also describes the size and nature of the exposed population.

Fabric Filter

A cloth that catches dust particles.

Fungi

A group of organisms that lack chlorophyll, including molds, mildews, yeasts, mushrooms. They receive their nutrition from decomposing organic matter. Some cause disease in humans. Fungi are neither animals nor plants. There are more than 100,000 accepted fungal species but current estimates range to 1.5 million species. Mycologists (people who study fungi) have grouped fungi into four large groups according to their method of reproduction.

Fungicide

Biocides used to control, prevent, or kill fungi.

Gas Sorption

Devices used to reduce levels of airborne gaseous compounds by passing the air through materials that extract the gases. The performance of solid sorbents is dependent on the airflow rate, concentration of the pollutants, presence of other gases or vapors, and other factors.

Hazardous Waste

By-products of society that can pose a substantial or potential hazard to human health or the environment when improperly managed. They have at least one of four characteristics: they are ignitable, corrosive, reactive, or toxic.

Hedonic Tone

The degree to which an odor is perceived as pleasant or unpleasant. Expressed in terms of preference by phrases such as "dislike very much" or "like slightly" or by facial expressions such as smiling or frowning.

HEPA

High efficiency particulate arrestance (filters). The HEPA acronym is from 'High Efficiency Particulate Air Filter', used in earlier US military specifications. By definition, a HEPA filter must remove at least 99.97% of all airborne particles by particle count at a size of 0.3 microns which is one-300th the diameter of a human hair.

Hematologic

Of or relating to blood or to hematology, which is a medical science that deals with the blood and blood-forming organs.

Hidden mold

This refers to visible mold growth on building structures not easily seen, including the areas above drop ceilings, within a wall cavity, inside air handlers or within air ducts. Visible mold within a ventilation duct is in immediate contact with the occupied space and release of spores from such growth are known to be affected by air-movement and air relative humidity. Spores of mold growth in wall cavities are released as a function of air exchange between the wall cavity and the occupied space. The rate of spore movement between such spaces is typically slow. Volatile gases produced by visible mold growth in wall cavities is also known to occur including through air barriers.

HOESA

Home and Office Environmental Systems Association.

Humidity

The measure of moisture in the atmosphere.

HVAC

Heating, ventilation, and air-conditioning system.

Hydrocarbons (HC)

Chemical compounds made up entirely of carbon and hydrogen.

Hypersensitivity

The immune system's exaggerated response to an allergen.

Hypersensitivity Diseases

Diseases characterized by allergic responses to animal antigens. The hypersensitivity diseases most clearly associated with indoor air quality are asthma, rhinitis, and hypersensitivity pneumonitis. Hypersensitivity pneumonitis is a rare but serious disease that involves progressive lung damage as long as there is exposure to the causative agent.

IAP

Indoor air pollution.

IAQ

IAQ Indoor air quality.

IAQ Coordinator

An individual at the school and/or school district level who provides leadership and coordination of IAQ activities.

IAQ Management Plan

A set of flexible and specific steps for preventing and resolving IAQ problems.

Immune System

All internal structures and processes providing defense against disease-causing organisms such as viruses, bacteria, fungi, and parasites.

Indicator Compounds

Chemical compounds, such as carbon dioxide, whose presence at certain concentrations may be used to estimate certain building conditions (e.g., airflow, presence of sources).

Indoor Air Pollutant

Particles of dust, fibers, mists, bioaerosols, and gases or vapors.

Infiltration

Air leakage inward through cracks and interstices and through ceilings, floors, and walls of a space or building.

Isosatratoxin

One of the trichothecene mycotoxins produced by *Stachybotrys*.

Makeup Air

Outdoor air brought into a building through the ventilation system that is used to replace exhaust air and exfiltration. Also referred to as Make-up Air.

MCLs

Maximum Contaminant Levels.

MCS

See "Multiple Chemical Sensitivity."

Microbes

Microscopic organisms such as algae, insects, viruses, bacteria, fungi, and protozoa, some of which cause diseases.

Microbial Volatile Organic Compounds (MVOCs)

Fungi produce chemicals as a result of their metabolism. Some of these chemicals, MVOCs, are responsible for the characteristic moldy, musty, or earthy smell of fungi, whether mushrooms or molds. Some MVOCs are considered offensive or annoying. Specific MVOCs are thought to be characteristic of wood rot and mold growth on building materials. The human nose is very sensitive to mold odors and sometimes more so than current analytical instruments.

Microenvironment

A particular part of the large environment that is in some way whole by itself. Used to describe a subset of the global environment such as the indoor environment.

Microorganism

A microscopic organism, especially a bacterium, fungus, or protozoan.

Mold

Molds are a group of organisms within the Kingdom of Fungi. Even though the terms mold and fungi had been commonly referred to interchangeably, all molds are fungi, but not all fungi are molds.

Multiple Chemical Sensitivity

A term used by some people to refer to a condition in which a person is considered to be sensitive to a number of chemicals at very low concentrations. There are a number of views about the existence, potential causes, and possible remedial actions regarding this phenomenon.

Mycelium

A mass of hyphae (individual fungal filaments of connected cells); not in the form of large spore producing parts such as mushroom.

Mycotoxin

Mycotoxins are compounds produced by some fungi and are toxic to humans or animals. By convention, the term “mycotoxin” excludes mushroom toxins. Fungi producing mycotoxins are called “toxigenic fungi”

Natural Ventilation

The movement of outdoor air into a space through intentionally provided openings, such as windows and doors, or through nonpowered ventilators or by infiltration.

OA

Outdoor air. NO₂ produced by and photochemical

Occupied Zone

The region within an occupied space between planes 3 and 72 in. (75 and 1800 mm) above the floor and more than 2 ft (600mm) from the walls or fixed air-conditioning equipment.

Outdoor Air

Air taken from the external atmosphere and, therefore, not previously circulated through the system.

Particulates

Fine liquid or solid particles such as dust, smoke, mist, fumes, and fog found in air and emissions.

Pathogenic

Capable of causing disease.

Pathogens

Microorganisms that can cause disease in other organisms, humans, animals, or plants.

PELs

Permissible Exposure Limits (standards set by OSHA).

Penicillium

Penicillium is the asexual stage of a number of species of *Penicillium* are distributed worldwide. Species grow on a vast array of organic materials. There are 225 accepted species although only 70 occur with any frequency. Species of *Penicillium* include several of considerable economic importance: *P. verrucosum* produces ochratoxin on cereals and *P. chrysogenum* produces penicillin. Many *Penicillium* species cause damage in damp building materials including the toxigenic species *P. aurantiogriseum*.

Persistence

Length of time a compound remains in the environment once introduced.

PICs

Products of incomplete combustion. All particles and gases that are emitted from an object at the time it is burning.

Plenum

Air compartment connected to a duct or ducts.

Plug Flow

A flow regime where the flow is predominately in one direction and contaminants are swept along with the flow.

Pollutant Pathways

Avenues for distribution of pollutants in a building. HVAC systems are the primary pathways in most building, however all building components interact to affect how air movement distributes pollutants.

Pollution

Unwanted by-product of human activity. the presence of matter or energy whose nature, location, or quantity produces undesired environmental effects.

Positive Pressure

Condition that exists when more air is supplied to a space than is exhausted, so the air pressure within that space is greater than that in surrounding areas.

PPB

Parts per billion.

PPM

Parts per million.

Pressure, Total

In flowing air, the sum of the static pressure and the velocity pressure.

Pressure, Velocity

In flowing air, the pressure due to the velocity and density of the air.

Psychological Factors

Psychological, organizational, and personal stressors that could produce symptoms similar to poor indoor air quality.

Qualitative Analysis

Chemical analysis design to identify the components of a substance or mixture.

RA

Return air.

Radiant Heat Transfer

Radiant heat transfer occurs when there is a large difference between the temperatures of two surfaces that are exposed to each other, but are not touching.

Re-entrainment

Situation that occurs when the air being exhausted from a building is immediately brought back into the system through the air intake and other openings in the building envelope.

Re-entry

Situation that occurs when the air being exhausted from a building is immediately brought back into the system through the air intake and other openings in the building envelope.

Recirculated Air

Air removed from the conditioned space and used for ventilation, heating, cooling, humidification, or dehumidification.

Relative Humidity

The amount of water vapor actually in the air divided by the amount of water vapor the air can hold; relative humidity decreases as the temperature increases because although the amount of water vapor in the air (humidity) remains the same, the amount of water vapor the air can hold increases with the temperature.

RELs

Recommended Exposure Limits (recommendations made by NIOSH).

Remediate

The term “remediate” simply means to fix a problem. Related to mold contamination, remediation includes fixing the water/moisture problem, and the cleaning, removal and/or replacement of damaged or contaminated materials.

Respirable Particles

Respirable particles are those that penetrate into and are deposited in the nonciliated portion of the lung. Particles greater than 10 micrometers aerodynamic diameter are not respirable.

Return Air

Air removed from a space to be then recirculated or exhausted.

RH

Relative humidity.

RSP

Respirable suspended particles.

Risk

The probability of injury, disease, or death under specific circumstances. In quantitative terms, risk is expressed in values ranging from zero, which represents the certainty that harm will not occur, to one, which represents the certainty that harm will occur.

Risk Assessment

The use of factual information to define the nature and impact of an adverse effect on individuals or populations who have been exposed to hazardous materials and situations. A risk assessment is also used to describe the quantitative or qualitative evaluation to determine the probability of an adverse effect to human health or the environment by exposure to specific pollutants.

Risk Communication

Exchange of information about health or environmental risks between risk assessors, risk managers, the general public, and other interest groups such as the news media.

Risk Management

The process of evaluating alternative responses to risks and selecting among them. Includes consideration of technical, scientific, social, economic, and political information.

Route of Exposure

The means by which toxic agents gain access to an organism such as ingestion, inhalation, dermal exposures; and intravenous, subcutaneous, intermuscular administrations.

RTU

Roof top unit; a packaged AHU unit on the roof.

SA

Supply air.

Sanitizer

One of three groups of antimicrobials registered by EPA for public health uses. EPA considers an antimicrobial to be a sanitizer when it reduces but does not necessarily eliminate all the microorganisms on a treated surface. To be a registered sanitizer, the test results for a product must show a reduction of at least 99.9% in the number of each test microorganism over the parallel control.

SBS

See "Sick Building Syndrome."

Sensitization

An allergic condition that usually affects the skin or lungs. Once exposure to a substance has caused a reaction, the individual may be sensitized to it, and further exposure may elicit an adverse reaction even at low levels.

Sick-Building Syndrome

A term sometimes used to describe situations in which building occupants experience acute health and/or comfort effects that appear to be linked to time spent in a particular building, but where no specific illness or cause can be identified. The complaints may be localized in a particular room or zone, or may be spread throughout the building.

Sick-Office Syndrome

A term sometimes used to describe situations in which office or building occupants experience acute health and/or comfort effects that appear to be linked to time spent in a particular office environment, but where no specific illness or cause can be identified. The complaints may be localized in a particular room or zone, or may be spread throughout the building.

Soil Gases

Gases that enter a building from the surrounding ground (e.g., radon, volatile organics, pesticides).

Sources

Sources of indoor air pollutants. Indoor air pollutants can originate within the building or be drawn in from outdoors. Common sources include people, room furnishings such as carpeting, photocopiers, art supplies, etc.

Spore

General term for a reproductive structure in fungi, bacteria and some plants. In fungi, the spore is the structure which may be used for dissemination and may be resistant to adverse environmental conditions.

Stachybotrys

Stachybotrys chartarum (atra) is commonly called “Black Mold” or “Stachy.” Stachy is actually one of ten (10) different varieties of *stachybotrys* and is a greenish-black, slimy mold. It colonizes particularly well in high-cellulose material, such as straw, hay, paper, wood, and cellulose-containing building material that have been wet for several days or more. The mold does not grow on concrete, linoleum or tile. This is a toxigenic mold.

Stack Effect

Pressure-driven airflow produced by convection as heated air rises, creating a positive pressure area at the top of a building and a negative pressure area at the bottom of a building. The stack effect can overpower the mechanical system and disrupt ventilation and circulation in a building. a.k.a.: "chimney effect."

Static Pressure

Condition that exists when an equal amount of air is supplied to and exhausted from a space. At static pressure, equilibrium has been reached.

Sterilizer

One of three groups of antimicrobials registered by EPA for public health uses. EPA considers an antimicrobial to be a sterilizer when it destroys or eliminates all forms of bacteria, fungi, viruses, and their spores. Because spores are considered the most difficult form of a microorganism to destroy, EPA considers the term sporicide to be synonymous with "sterilizer."

Supply Air

Air delivered to the conditioned space and used for ventilation, heating, cooling, humidification, or dehumidification.

Threshold Limit Value

Air concentration of chemical substances to which healthy workers can be exposed for 8-hour work days during a 40-hour work week without suffering an adverse effect.

TLVs

Threshold Limit Values (guidelines recommended by ACGIH).

Total Suspended Particulate Matter

The mass of particles suspended in a unit volume of air when collected by a high-volume air sampler.

Toxic

Of; affected by, or caused by a toxin; to cause a poisonous reaction.

“Toxic mold”

The term “toxic mold” has no scientific meaning since the mold itself is not toxic.

However, the metabolic byproducts of some molds may be toxic (see mycotoxin).

Toxigenic fungi

Fungi that can produce mycotoxins (see above).

Tracer Gases

Compounds, such as sulfur hexafluoride, which are used to identify suspected pollutant pathways and to quantify ventilation rates. Tracer gases may be detected qualitatively by their odor or quantitatively by air monitoring equipment.

Transfer Air

The movement of indoor air from one space to another.

Trichothecene

Any of the several mycotoxins that are produced by imperfect fungi (genera *Fusarium* and *Trichothecium*) and that include some contaminants of livestock feed and some held to be found in yellow rain.

TSP

Total suspended particulate concentration.

Turbidity

Haziness in air caused by particles, or cloudy condition in water caused by suspended silt or organic matter.

TVOCs

Total Volatile Organic Compounds.

Ulocladium

A rapidly growing, dark brown or black fungus that is a potential allergen. Its spores are unusually large and is typically found in soil. It is also frequently encountered at low levels indoors.

Variable Air Volume System

Air handling system that conditions the air to a constant temperature and varies the outside airflow to ensure thermal comfort. Ventilation Air-Defined as the total air, which is a combination of the air brought into the system from the outdoors and the air that is being recirculated within the building. Sometimes, however, used in reference only to the air brought into the system from the outdoors.

VAV

Variable Air Volume.

Ventilation

The process of supplying and removing air by natural or mechanical means to and from any space. Such air may or may not be conditioned.

VOCs

See "Volatile Organic Compounds."

Volatile Organic Compounds (VOCs)

Compounds that evaporate from the many housekeeping, maintenance, and building products made with organic chemicals. These compounds are released from products that are being used and that are in storage. In sufficient quantities, VOCs can cause eye, nose, and throat irritations, headaches, dizziness, visual disorders, memory impairment; some are known to cause cancer in animals; some are suspected of causing, or are known to cause, cancer in humans. At present, not much is known about what health effects occur at the levels of VOCs typically found in public and commercial buildings.

Vapor

A substance in gas form, particularly one near equilibrium with its condensed phase, which does not obey the ideal gas laws; in general, any gas below its critical temperature.

Mold, Mildew & Water Intrusion Websites & Contacts

An Office Building Occupant's Guide to IAQ

<http://www.epa.gov/iaq/pubs/occupgd.html>

Biological Contaminants

http://www.epa.gov/iaq/pubs/bio_1.html

Building Air Quality Action Plan (for Commercial Buildings)

<http://www.epa.gov/iaq/largebldgs/actionpl.html>

Doctor Fungus

www.doctorfungus.org/thefungi/Stachybotrys.htm

Floods/Flooding

<http://www.epa.gov/iaq/pubs/flood.html>

Indoor Air Quality (IAQ) Home Page

<http://www.epa.gov/iaq>

IAQ in Schools

<http://www.epa.gov/iaq/schools/>

Mold Resources

<http://www.epa.gov/iaq/molds/moldresources.html>

U.S. EPA IAQ Information Clearinghouse (IAQINFO)

Phone: (800) 438-4318 or (703) 356-4020

Fax: (703) 356-5386

Email: iaqinfo@aol.com

Indoor air-related documents, answers to Indoor Air Quality (IAQ) questions, maintains listing of state IAQ contacts, and regional EPA contacts.

American College of Occupational and Environmental Medicine (ACOEM)

(847) 818-1800

Referrals to physicians who have experience with environmental exposures.

American Conference of Governmental Industrial Hygienists, Inc. (ACGIH)

(513) 742-2020

<http://www.acgih.org>

Occupational and environmental health and safety information.

American Industrial Hygiene Association (AIHA)

(703) 849-8888

<http://www.aiha.org>

Information on industrial hygiene and indoor air quality issues including mold hazards and legal issues.

American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE)

(800) 527-4723

<http://www.ashrae.org>

Information on engineering issues and indoor air quality.

Association of Occupational and Environmental Clinics (AOEC)

(202) 347-4976

<http://www.aoec.org>

Referrals to clinics with physicians who have experience with environmental exposures, including exposure to mold; maintains a database of occupational and environmental cases.

American Academy of Allergy, Asthma & Immunology (AAAAI)

(800) 822-2762

<http://www.aaaai.org>

Physician referral directory, information on allergies and asthma.

University of Minnesota, Department of Environmental Health and Safety

(612) 626-5804

<http://www.dehs.umn.edu/iaq/flood.html>

Managing water infiltration into buildings.

Indoor Environmental Remediation Board (IERB)

(215) 387-4097

<http://www.ierb.org>

Information on best practices in building remediation.

National Institute of Building Sciences (NIBS)

(202) 289-7800

<http://www.nibs.org>

Information on building regulations, science and technology.

New York Department of Health, Bureau of Environmental and Occupational Disease

<http://home.nyc.gov/html/doh/html/epi/moldrpt1.html>

Epidemiology

(212) 788-4290

Guidelines on Assessment and Remediation of Fungi in Indoor Environments.

Other Resources

Bioaerosols: Assessment and Control, (Janet Macher, Sc.D., M.P.H. et al. eds., American Conference of Governmental Industrial Hygienists 1999).

Environmental Protection Agency, A Brief Guide to Mold, Moisture, and Your Home, Pub. EPA 402-K-02-003.

Occupational Safety and Health Administration, U.S. Department of Labor, A Brief Guide to Mold in the Workplace, Pub. SHIB 02-12-09.

Texas Department of Health & Texas Department of Insurance, Protecting Your Home from Mold.

Texas Department of Insurance, Effectively Handling Water Damage and Mold Claims: A Consumer Guide (2002).

Glossary Acknowledgments & References

The definitions and information contained within this Glossary were obtained from many different sources over a number of years. This information was compiled primarily as a reference of industry terms typically used in mold cases and has been modified over time as needed. No one source provided this information. However, several sources were invaluable and should be acknowledged, including: the U.S. Environmental Protection Agency - Office of Air and Radiation; the American Conference of Governmental Industrial Hygienists; the Texas Department of Health; and the American Society of Heating, Refrigerating, and Air-Conditioning Engineers.

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16. *Abraxas Petrol. Corp. v. Hornburg*, 20 S.W.3d 741, 761 (Tex. App.—El Paso 2000, no pet.).

17. *See Ferguson v. DRG/Colony N., Ltd.*, 764 S.W.2d 874, 887 (Tex. App. –Austin 1989, writ denied).
18. *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex. 1997).
19. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).
20. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987).
21. *Id.*; *see also Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995).
22. *Melody Home*, 741 S.W.2d at 354.
23. *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985).
24. *J. M. Krupara Construction Co. v. Rosenberg*, 95 S.W.3d 322 (Tex. App.–Houston [1st Dist.] 2002, no pet. h.).
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28. *Melody Home*, 741 S.W.2d at 354.
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30. *See* TEX. PROP. CODE ANN. § 27.004(f), (g), (h) (West 2000).
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32. *Gupta*, 646 S.W.2d at 169.
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56. TEX. PROP. CODE ANN. § 27.004(f).
57. TEX. PROP. CODE ANN. § 27.004(h).
58. TEX. PROP. CODE ANN. § 27.004(i).
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60. *Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 371-373 (Tex. App.-- Beaumont, 2001).

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62. *Id.* citing *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).
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66. *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508 (Tex. 1947).
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77. TEX. BUS. & COM. CODE ANN., § 27.01 (West 2000).
78. *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 726 (Tex. App.– Waco 1998, pet. denied).
79. TEX. BUS. & COM. CODE ANN., § 27.01(e).

80. TEX. PROP. CODE ANN., § 27.001, *et seq.* (West 2000).
81. TEX. BUS & COM. CODE ANN., § 17.41, *et seq.* (West 2000).