

## **Hotels, High-rises Try Proactive Mold Prevention**

By Indoor Environment Communications and Shelly LeVick, Attorney, Segal McCambridge Singer & Mahoney, Austin, Texas

These days, virtually any building is a possible target for mold-related problems, but hotels and high-rise residential structures face unique challenges with respect to the handling of existing microbial contamination and the prevention of future mold growth.

The risk of litigation is higher for hotels and high-rise residential properties for a variety of reasons. The costs associated with the remediation of mold damage alone can be as high as half of a building's initial construction price. High-profile mold lawsuits involving hotels and high-rise apartments have instilled fear of media attention into the industry.

Because higher stakes are involved, it is no longer enough to engage in reasonable remediation after a claim is filed. These buildings must take preventative measures early on to minimize the potential for mold growth and preclude litigation.

Mold issues impact negotiations and transactions involving hotel chains and commercial residential properties before they are even constructed. Many developers are converting existing apartment units and commercial buildings into high-rise residential dwellings such as town homes and condominium complexes. Hotels are being erected in record time.

This growth has been accompanied by a steady increase in commercial mold and construction defect claims sometimes regardless of immediate mold damage. Construction defect litigation is rapidly growing while the claims for personal injuries caused by mold exposure are on the decline.

As the construction-defect and mold claims continue to rise with respect to these types of property, the potential list of defendants is increasing as well. The list may include the usual suspects such as builders, contractors, subcontractors, design engineers and insurance companies. Newer lawsuits may target HVAC contractors, manufacturers of building components and appliances, installers of windows and siding and Sheetrock, grading subcontractors, real-estate agents, landlords, building associations, and even mold-remediation contractors. The theories for recovery can point toward every aspect and element of building construction.

Generally, any part of the construction process that serves as a breeding ground for microbial contamination or other damage from construction defects may be the subject of future litigation. Items that may contribute to mold growth include but are not limited to speedy construction schedules, substitution of quality materials for cheaper products, chronology and scheduling of trades, failure of the constructed structure to conform to design specifications, and the lack of supervision during construction. The primary aim of litigation is the recovery of remediation and reconstruction damages rather than to prove that the mold exposure caused medical conditions from exposure to affected areas.

### **Hotels**

Hotel chains are currently on the cutting edge of contamination issues. Many major hotels are quietly undertaking mold-related cleanups and renovations and instituting regular maintenance protocols to curb microbial contamination. Mold problems can arise as a result of poor air circulation, high humidity levels, standing water, and bacterial material in air-conditioning systems, just to name a few. Because mold contamination can arise in a variety of ways, the hotel industry has encountered extraordinary costs, including closing or altering the use of the hotel.

The most highly publicized hotel mold case involved the Kalia Tower at the Hilton Hawaiian Village. Hilton closed the newly constructed 453-room guest tower at the \$95 million hotel in 2002 after mold was discovered in a guestroom. Only the hotel's spa, lobby and meeting rooms remained open during the 13-month guestroom closure. Millions of dollars of furniture, bedding, wallpaper and curtains were removed from every guestroom and were completely destroyed. The reported cost of the hotel remediation was \$55 million. From a purely economic perspective, not only did the hotel lose income and millions of dollars in remediation costs but it also sustained a serious reduction in the value of the hotel to its owner.

As a result of the Hilton closure, three high-profile lawsuits were filed:

- In *Moffett v. Hilton Hotels Corporation et al.*, the representative plaintiff, on behalf of a class, alleged unfair and deceptive trade practices and nondisclosure of extensive mold growth. The plaintiff sought the return of all money spent by the class members for rooms rented while they were guests at the Kalia Tower.

- In *Hilton Hotels Corporation et al. v. Wimberly Allison Tong & Goo Inc. et al*, Hilton alleged various planning, design, construction, supervision and installation defects in the Kalia Tower and also made claims for breach of contract, breach of the covenant of good faith and fair dealing, negligence, breach of express and implied warranties, negligent misrepresentation, product defects, and unjust enrichment.
- In *Hilton Hotels Corporation et al. v. Wimberly Allison Tong & Goo Inc. et al*, construction defects were also at issue.

Hotels present unique litigation issues due to the higher standard of care owed by innkeepers to guests. Additionally, hotels face an increased risk of economic loss should the facility be forced to halt operations during a mold remediation. Typically, a mold outbreak triggers a duck-and-run response in hotel management. Owners may attempt to minimize the seriousness of the mold problem to avoid scaring current and future customers. It is important for management to address these issues truthfully in order to protect the hotel employees and the public. The economic interests of the hotel must be balanced with the well being of those with potential mold exposure.

In conducting mold remediation, the hotel owners should retain the services of a reputable and experienced mold remediation contractor. In more serious cases, it may also be beneficial for a hotel to hire an environmental engineering firm capable of conducting project oversight and air monitoring as the work progresses. The engineer can prepare a more global plan to eradicate the mold problem and develop future controls for minimizing the potential of further outbreaks. These types of controls should focus on periodic air sampling, site safety standards, engineering controls, decontamination procedures, compliance with applicable statutory requirements and specific signoff procedures for regular maintenance activities. Management contracts should detail periodic mold inspections and preventive maintenance responsibilities with some particularity in order to minimize future litigation and maximize resale value of the hotel.

The Hilton hotel at Chicago's O'Hare airport piloted a project earlier this year to provide improved air quality for its guests. The project included environmentally friendly room designs for guests with allergy-related sensitivities to certain dusts, molds and chemicals.

Several test hotel rooms were stripped of all floor and wall coverings, drapes, furniture and bedding. A firm that specializes in indoor air quality rebuilt the room with special wood flooring, wall coverings, fabrics, furniture, paints, adhesives and cleaning products. The rooms also include a unique monitoring system that tracks critical information necessary to ensure continuing healthy indoor air quality.

It is foreseeable that this new design and technology may become not only the standard for the protection of hotel guests but also the legal standard for evaluating future exposure claims.

### **High-rise Residential Buildings**

Similar mold remediation practices and procedures should be followed for high-rise buildings such as condominiums, town homes or cooperatives. These types of structures are problematic from a legal perspective due to the multiple ownerships and the division of maintenance and repair responsibilities among the building units. Problems generally arise over the duties of the owners for their individual units versus the duties of the homeowners' association for the common areas. Further, if the mold is discovered in more than one unit, or a combination of units and common areas, then the association and its lawyer may face potential conflicts of interest between the interests of the individual unit owners in avoiding liability and expenses.

The initial legal dispute will focus on who is responsible for the mold-related problems. Generally, the maintenance responsibilities of the association typically end at the unit boundary. The association may be liable to an owner for mold growth in a unit that originated in common areas.

In *Zische vs. Brentwood Sunset Management Inc.*, a condominium owner claimed the association's negligent failure to repair a leaking water pipe caused her damages. This lawsuit was subsequently settled by the parties.

Also, in *Arias v. Katella Townhouse Homeowners Association Inc.*, another condominium owner successfully sued her homeowner's association for failure to maintain the common areas which she alleged caused the development of mold growth in her unit.

On the other hand, the association will not be liable if the mold clearly originates from a condition in an individual unit that is attributable to the unit owner's negligent maintenance of an interior item. In such cases, the homeowner's association may have a claim against the unit owner for damages to the common areas.

In *Busby vs. Groves Homeowners Association Inc.*, the claimant filed a lawsuit against the homeowner's association alleging claims for breach of contract and gross negligence for failure to make

plumbing repairs affecting the hot and cold water supply to her unit and causing the growth of toxic mold. The association was held not to be liable for mold damage to her unit because the damage was caused by the plaintiff's failure to maintain her own plumbing as required by the occupancy agreement.

### **Prevention of Future Mold Claims**

Following front-page headlines of the Hilton Hawaiian Village's battle with mold, many other hotels have begun to focus on attempts at preventing mold growth rather than waiting for the costly mold-remediation process that follows litigation. Sellers of residential or commercial property, particularly multi-occupant space such as a hotel or high-rise residential building, will be faced with having to disclose the presence of mold or even conditions that could lead to mold infestation. Any entity wishing to purchase one of these types of property will want express assurances that no mold problems exist and may even require indemnification for future mold claims. Tenants likewise are demanding that their landlords take measures to prevent mold proliferation.

Certain proactive measures may help minimize potential liability. For example, prospective purchasers should exercise due diligence to identify any mold issues before purchasing any piece of real property. The property owner may wish to retain an independent mold-testing consultant to conduct tests of the property to identify the presence of mold. If insignificant levels of mold are discovered or if the building has a history of mold remediation, then the owner should obtain a certification that insignificant levels of mold exist or that mold remediation has been completed successfully. This may help provide some liability protection.

For buildings that are currently mold-free, the most effective method to prevent mold growth is moisture control. Prior to construction, an owner should obtain a peer review of the building's design to correct any water-intrusion problems in the design phase, to establish quality-control procedures, and to strengthen warranty and guarantee requirements in the construction contracts. Adherence to relevant building, equipment and material standards is increasingly viewed as important in the prevention of mold growth. When possible, a building contractor should use building materials that resist mold growth. Further, the building should be constructed consistent with the state-of-the-art methods in the industry.

After a building is purchased or constructed, a constant inspection should be made to identify any visible mold growth, discoloration or water stains on walls or ceilings, areas of standing water or condensation, evidence of leaks, HVAC problems or musty odors. A calendar of maintenance activities should be developed with a precise schedule and description of maintenance requirements to be conducted on a daily, weekly and monthly basis. An engineer or industrial hygienist may be retained to inspect the building to determine whether it is functioning in accordance with its design. Finally, property owners and contractors should evaluate their current insurance coverage to see if coverage for mold claims exists and, if so, to consider obtaining additional insurance coverage for mold claims.

If prevention methods fail and litigation results, then remediation is the first priority and allocation of responsibility is secondary. It is imperative for owners and managers of these types of buildings to move promptly to identify the source of the mold and the construction defects. The owners should evaluate options to remedy the defects that permit the buildings to operate as fully as possible. All relevant insurance companies should be notified and included in the coordinate of remediation activities.

All mold defendants can take affirmative steps to prepare an effective litigation defense by quickly doing as follows:

- Obtain an assessment of the damage by qualified remediation professionals.
- Determine how to conduct the building remediation in a manner that minimizes lost revenue.
- Determine if the building needs to be evacuated or if the damaged area can be isolated for repair.
- Communicate honestly with building occupants and the media.
- Review leases, maintenance contracts, construction agreements, and real estate agreements for a consideration of who may share responsibility.
- Check all applicable insurance policies to determine if coverage exists and tender the defense to the insurer.
- Secure qualified experts for trial, if necessary.

The removal of structural mold is a wasted effort unless the conditions that facilitated the growth are addressed. There is no comprehensive checklist for building owners or managers to enable them to prevent mold intrusion. Unfortunately, neither prevention procedures nor successful remediation of a structure can guarantee that microbial contamination will not reoccur. The goal is to reduce the uncertainty as to both the techniques and procedures for preventing mold growth and the potential financial costs associated with

mold when it does occur. The expense associated with the prevention of an environmental contamination problem is typically less than the cost to correct it, especially if the ensuing process involves litigation.

*Shelly D. LeVick is a trial attorney with the law firm of Segal McCambridge Singer & Mahoney in Austin, Texas, and her firm has offices in Illinois, Maryland, Michigan, New York and Pennsylvania. She and her firm specialize in representing defendants in commercial cases, consumer litigation, generally liability, products liability and toxic tort/hazardous substances litigation including asbestos, mold, welding rod, silica, mercury and vinyl chloride lawsuits. She can be reached by e-mail at [slevick@smsm.com](mailto:slevick@smsm.com) or by phone at (512) 476-7834.*

*This article appears in Volume 6, Issue 9 (July 2005) of Indoor Environment Connections newspaper and is reprinted here with permission of the publisher. For subscription information, visit [www.ieconnections.com](http://www.ieconnections.com).*