

Protect Yourself From Mold Liability

By Everett Lee Herndon, Jr.

The improper handling of a water damage loss with mold contamination may result in a claim or a lawsuit against you. As cleaning and restoration experts, you encounter water damage and mold much more frequently than the average individual. Whether it is a single homeowner, a tenant or the owner of a major business or office complex, they will look to you as the expert on the water problem and expect you to fix it. Mold should be one of your concerns in a water damage loss. You may also encounter mold on any job site, whether it is related to the loss or not.

Some water damage losses will be covered by insurance, either as first party insurance or under third party liability, and you may have an insurance adjuster coordinating activities. Other losses will not involve insurance and you may be dealing directly with the property owner. In either case, if mold is involved in the loss, you must take the proper steps to try and avoid any liability exposure on your part.

As an expert or at least as a knowledgeable vendor, you will be expected to recognize when and where mold may occur and what needs to be done, even if it is only to advise the adjuster or property owner to call in a mold expert.

Whether you are dealing with an insurance adjuster or the property owner, if there is visible mold or a reasonable chance of mold contamination, you must exercise caution in how you proceed with your job.

According to the New York City "Guidelines on Assessment and Remediation of Fungi in Indoor Environments," a small isolated area of mold, 10 square feet or less, may be cleaned if done properly. Larger areas may require professional help. However, even a small area of mold, if not handled properly, may contaminate the entire area or structure with potentially hazardous mold spores and mycotoxins, and expose you to liability claims from the occupants and owners.

Use good judgment and discretion. Err on the side of caution, for your own safety and the safety of others.

If you are called on by an insurance company to do emergency clean up or drying, or to assist the adjuster in evaluating the loss or determining damage, you may feel that your loyalties at that point are to the adjuster. But you should always remember that if you make a mistake and underestimate the mold danger, or fail to take the proper steps in dealing with the mold, you may expose yourself to liability.

When you are dealing with an insurance adjuster, do not just assume that the adjuster is cognizant of the hazards of mold contamination or that he will automatically authorize you or others to do what needs to be done. The adjuster may not be aware of the hazard or recognize the dangers. Many adjusters lack the necessary training and many insurance companies are failing to educate their adjusters about mold. When an adjuster overlooks or ignores a mold problem, point it out to him and make him aware of the potential dangers involved. A good conscientious adjuster will appreciate your help and expertise. Beware of the rest.

If the mold is not covered, the adjuster should advise the building owner that the mold is not covered and why it is not covered under the policy. Sometimes the adjuster or the insurance company may incorrectly conclude that mold is not covered and refuse to pay for remediation. Or the adjuster or company may improperly ignore or refuse to consider mold that really should be covered and remediated under the policy.

At this point, you should evaluate the situation and decide whether you wish to remain silent and go along with the adjuster. However, you should realize that silence could possibly expose you to a lawsuit by the owner if you do not at least make the owner aware of the mold problem.

There are a number of lawsuits ongoing against insurance companies and/or their vendors and experts, (remediation, cleaning, restoration, etc.) where the adjuster ignored the mold problem and the "experts" remained silent. You may have some ethical, professional or legal duty to advise the occupants or owners concerning the potential mold hazard even if the adjuster remains silent and tries to ignore the mold. The adjuster will have his own problems.

Whether insurance is involved or not, once you contract with the owner to do the work you should be cautious and not expose yourself to unnecessary liability.

Don't take a chance. If there is mold or if you have reason to suspect mold, initial testing to determine the extent of the mold contamination may be in order, as well as the immediate use of containment and protective equipment.

You may wish to recommend testing before removing contaminated materials or opening up suspected contaminated areas. Testing prior to remediation would show whether the mold has already spread throughout the structure prior to your beginning work, and demonstrate that any work you may do did not cause the mold to spread.

If you suspect mold in wall cavities, behind cabinets, under a wet carpet, etc., take the necessary steps to contain and prevent the spread of mold spores and mycotoxins before proceeding. Failure to do so may expose you, your workers and the occupants of the building to mold, expensive extra remediation or lawsuits.

Even the removal of small items contaminated by mold may spread the mold spores if the item is not properly removed, bagged and disposed of or properly cleaned. The spreading of mold during removal will show up during final clearance testing and you may be blamed.

After any significant amount of mold contamination and removal, clean up and clearance testing prior to repairs will be necessary to ensure that the area is clear of mold and that it has not spread to other areas. Such testing will insure that the structure is clear of contamination and that repairs and re-occupancy can proceed.

Without initial testing, if mold is found during clearance testing, the adjuster or the building owner may blame you for the spread of mold, even though you used all necessary containment procedures.

Failure to use proper protective and respiration equipment may expose you and your workers to health hazards. Injured workers are entitled to workers' compensation and you could be faced with a depleted work force and higher insurance premiums. As workers become more aware of the symptoms of mold exposure, the frequency of your workers' compensation claims may rise.

Some states may even allow the injured worker to collect a penalty amount or possibly even file a civil lawsuit if it can be proved that the employer was willful and wanton in placing the worker or forcing the worker into a situation that the employer knew or should have known to be hazardous, such as an environment filled with toxic mold.

Most liability insurance policies contain a pollution exclusion clause. Many of the newer policies contain what is termed an "absolute pollution exclusion." Under the pollution exclusion clause, some companies may conclude that if you accidentally spread the mold beyond its initial spot of contamination, your actions may constitute pollution and you may not be covered under your policy. This would mean that without coverage under your liability policy, you may become personally liable for the clean up and remediation of a much larger area at greater expense.

One primary source of policy coverage interpretation, the *FC&S* Bulletins, indicates that while the pollution exclusion may not absolutely exclude coverage for products and completed operations hazards, the issue will probably have to be settled in the courts on a case by case basis and the decisions could go either way.

Check with your insurance agent or broker to make sure you have coverage that will protect you in cases like this. Your agent or broker may be able to recommend or secure a special endorsement to protect you. Don't take the risk of a costly lawsuit and long delayed judicial interpretation of the policy. Policies and judicial interpretations may vary from state to state, so you should check your policy and coverage before you need to rely on it.

The mistake of not properly handling mold contamination could be costly, both in terms of money and health.

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