



Commercial Real Estate and The Dangers of Hidden Mold

By Tom Alleman

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They come in a variety of sizes, colors and patterns. They thrive in warm, moist environments. I'm not talking about tropical flowers . . . I'm speaking of molds. Fungi. Spores.

Molds and mold losses create increasingly difficult issues in the commercial real estate market. Even stars like Ed McMahon, Erin Brockovich, and Bianca Jagger all making some form of mold claim, pushing molds to center stage in commercial real estate litigation.

The 25-story Kalia Tower at Waikiki's Hilton Hawaiian Village opened in 2001 at a price of \$95 million, and Hilton closed the Tower less than a year later because of persistent mold problems. After spending \$55 million on clean up, the hotel giant sued two-dozen architects, contractors and engineers, alleging that they were responsible for creating conditions allowing mold to grow.

Real Losses For Property Owners.

According to the Insurance Industry Institute, losses for mold-related property damage claims have risen from \$700 million in 2000 to \$ 2.5-3 billion in 2002. Jury awards remain high despite growing evidence that the average cost of mold-remediation is \$34,000 in residential construction and \$200,000 in commercial construction. Case in point, Melinda Ballard, a Texas homeowner was awarded \$32 million in compensatory and punitive damages from a jury because of her insurer's alleged unwillingness to pay a mold claim (the award was later reduced on appeal to \$4 million with all punitive damages removed). The insurance industry has severely limited coverage for mold-related losses because of a flood of mold-related claims in California and Texas, although coverage is beginning to emerge in environmental insurance at a significant price.

Commercial Litigation.

Even with this growing array of data, those in commercial real estate should remember the lesson of the Kalia Tower: *commercial mold litigation is not over injuries but over breached warranties and alleged failures to disclose.*

Mold awareness must be constant from the first sketch of a new building to the last day of an owner or manager's involvement with it. The American Society for Testing and Materials has created a screening process that can be used to help determine whether mold is present in a structure. Other trade associations and industry groups such as the Mortgage Bankers Association of America are deeply involved in efforts to ensure accurate identification, monitoring and remediation of mold problems. Governmental agencies ranging from EPA and OSHA to the New York City Department of Health and Mental Hygiene have published valuable

guidance documents on mold that are available on-line to guide those in commercial real estate in the pitfalls of mold

Materials Matter.

During design and construction, use materials that are not conducive to the growth of mold when and wherever possible. Select engineers and contractors familiar with mold issues and prevention. Don't assume the knowledge is there; ask questions and check references. Inventory areas that could produce mold problems in advance. While broken pipes and roof leaks from hail storms may not be anticipated, knowing the location of such things as air conditioners, moisture-generating appliances, steam or exhaust pipes, drains and other equipment that generates dampness can save time and trouble later.

After construction, conduct regular inspections with emphasis on areas that produce mold-friendly conditions. Pipes, roofs, gutter and drain pipes, air conditioners and a host of other locations, appliances and equipment that can produce moisture must be checked, and checked regularly. A formal operations and maintenance plan – (OMP) should be developed and followed rigorously. Inspection should be documented and pictures taken as necessary. If repairs to structures or roofs become necessary, ensuring that any entering moisture has been removed . . . it is just as important as stopping future leakage.

If mold is discovered, act promptly. Mold grows. It will continue to grow as long as it has access to food and warmth. Leaving moldy conditions in place increases problems and the costs of repair. Select remediation contractors carefully; check experience, credentials and references. Having a couple of maintenance workers pour bleach on an affected area may kill the mold, but it will not fix the root cause and will not remove the perception that the problem is fixed.

Document all phases of your OMP. Leave a record of what happened and how it was remedied. Pictures are an important adjunct to any remediation project and when the time comes to sell. Buyers should and will inspect. Having records is essential to answer the inevitable questions.

With mold, as with so many other issues, there is no substitute for common sense and quick, persistent, directed action. Vigilance is and the first line of defense against this eternal problem.

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