

Chapter XVI

MICHIGAN CONSTRUCTION DEFECT AND MOLD LITIGATION

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Introduction

To understand liability and litigation regarding mold, you really need to have a basic understanding as to what mold is. Mold and mold related symptoms are often confused with dust mites and animal dander, as well as many other things, which makes litigation for a plaintiff's attorney very difficult.

There are many varied forms of mold. All molds are fungi. These fungi reproduce by sending out into the air tiny seeds which are called spores. These spores are then inhaled by people. If these individuals already have an existing allergic reaction to these types of mold spores, the introduction of these additional mold spores will cause an allergic reaction. This allergic reaction is sometimes called "hayfever" and is typified by a runny nose or itchy eyes. It does not appear at this point that an allergy is "caused" by the introduction of mold. Rather, the allergy has to exist in the body and then be triggered by the existence of mold spores in the atmosphere.

Generally speaking, mold likes to live in warm, damp areas. This could be behind walls, inside closets, in bathrooms, refrigerators, carpet, mattresses, or anywhere you might find a warm damp location. The growth of mold will also be assisted by improperly ventilated areas.

Since the existence of mold spores is not what triggers the "hayfever" reaction, in order to defend mold litigation, you should be aware that heredity plays a very large role in who will develop an allergy. It is generally known that if both parents have an allergic reaction to mold, there is at least a 70% chance that the child will have an allergic reaction to mold. If only one parent has an allergic reaction, the child's chance of having an allergy to mold is approximately 50%.

It is also very difficult to determine which allergen caused an allergic reaction. Even though plaintiff's attorneys like to assert that mold is the problem, the allergic reaction could equally be caused by dust mites, cockroach allergens, animal dander, other pets, and even food. In order to determine what allergen is actually causing an allergic reaction, medical testing is required.

It is also relatively undisputed in the medical field that the mold which cause allergic reactions exist outdoors as well as indoors. The allergic responses to molds are likely initiated outdoors first, and then carried indoors during the winter months.

WHO ARE THE TARGET DEFENDANTS?

When comprehensive mold litigation begins, the litigation is not unlike most other construction litigation cases, or even environmental superfund cases. In short, anyone who is remotely related to the project will likely be sued. This brings in a lot of parties who have little or no liability. Nevertheless, if they so much as walk by a wall where mold is growing, they are likely going to be named as a defendant in the litigation. Further, any contractor who comes in to make repairs to a building containing mold should be extremely wary. Repair contractors are equally likely to be sued, and perhaps even more likely so than the original contractors. The repair contractors face liability to the party with whom they contract, even though there can be significant limitations on that liability. However, repair contractors cannot limit their liability to third parties. If third parties come into court raising mold litigation issues, repair contractors are very vulnerable.

THEORIES OF LIABILITY

The theories of liability in mold litigation are only limited by the creativity of the plaintiff's attorneys. This section will deal principally with recognized theories of liability.

A. DESIGN LIABILITY

The first and perhaps most obvious theory of liability would be against the designers of the building. If the building is constructed in the traditional design-bid-build scenario, this design liability will be focused towards the architects, engineers, and perhaps the heating, ventilating and air-conditioning contractors who may have provided design input. By and large however, in the traditional design-bid-build scenario, the liability for design work would be limited to the architects and engineers.

The theory of liability against the architects and engineers would be simply a breach of contract, asserted by the owner of the building, potentially a negligence action by the owner of the building, and perhaps a negligence action by an inhabitant of the building who contracted an ailment of some type. Upon being served with a complaint labeling these theories, a design professional should immediately notify his or her insurance company.

B. BREACH OF CONTRACT THEORIES

Perhaps the most ready source of liability theories against contractors relates to breach of contract. The owner and the contractor have a contract for construction of a particular building. Ordinarily, the mold issues relate to either some leak in the building or the inability of the HVAC system to intake and exhaust an appropriate airflow. There are other potential sources of construction liability, including failure to waterproof the building below grade, failure to properly seal windows, constructing the building before substrates have fully cured or dried, as well as a host of other construction related issues. These construction related issues will form the basis of a typical breach of contract case. They will rely upon the warranty language, the coordination language, and many other provisions in the contract.

SAMPLE CONTRACT LANGUAGE

There are a variety of contract sections upon which a claim for mold may be based. The claim will depend upon who is asserting the claim and for what. Nevertheless, here is a sampling of various contract sections which potentially provide liability.

A. PROTECTION OF WORK

One area which may provide a source of liability would be for a contractor or subcontractor's responsibility for protecting its own work. For example, you may find language in a contract as follows:

“Subcontractors shall be responsible for and shall protect its work in place from the elements and other causes of damage until completion and final acceptance and shall adequately store and protect its own materials furnished by contractor and/or others...”

If circumstances arise on a project where water or moisture is allowed to infiltrate the building during the construction process, and where such infiltration damages a contractor or subcontractor's work, this provision may provide a basis for liability.

B. COORDINATION OF WORK

A standard provision in most construction contracts deals with coordination of work. If an owner requires a contractor to coordinate the work, or if a contractor requires its subcontractors to participate in the

coordination process, the failure to suitably enclose a building, which in turn allows moisture to enter the property, may be a source of liability under the failure to coordinate.

Examples of coordination language are as follows:

“The subcontractor shall coordinate his work with all of the other work which must be performed on the project. To facilitate this coordination, there shall be coordination sessions, the attendance at which shall be mandatory for this subcontractor. These coordination sessions shall not be construed as the full discharge of the subcontractor’s coordination responsibility. Rather, these sessions shall be a forum for communication among subcontractors and the general contractor.”

In a traditional design-bid-build scenario, the enforceability of such provision may be somewhat in question. Nevertheless, the contract clause provides a basis for the failure to coordinate work. If that failure to coordinate work resulted in moisture or water intrusion into the building during construction, which in turn caused mold to build up, there may be an argument for liability.

C. WITHHOLDING OF MONEY

There is also the ability of a contractor or owner to withhold money in the event of defective work. Obviously, this defective work would have to exhibit itself prior to substantial completion and final payment. If that were the case, then there may be a withholding of contract funds. For example, you might find language in a contract which reads:

“Contractor may withhold for monthly progress payments an amount sufficient to protect contractor because defective work has not been remedied, materials have not been furnished,…”

In other words, if subcontractors fail to suitably enclose a building which results in moisture penetration, the contractor, and the owner, may have contractual remedies to hold payment.

D. WARRANTY AND GUARANTEE PROVISIONS

Perhaps the most significant and obvious method under which a contract will provide liability for moisture intrusion deals with the warranty provisions. Warranty language may read something as follows:

“Subcontractor warrants to owner, architect, and general contractor that all materials and equipment furnished under this agreement will be new, unless otherwise specified, and that all work will be of good quality, free from false and defects in the conformance with the Contract Documents. For all work not conforming to these requirements, including substitutions not properly approved by the architect or general contractor, the subcontractor shall furnish satisfactory evidence as to the kind and quality of the materials and equipment.”

You may have other similar language as follows:

“Guarantees and warranties of the work as defined in the Specifications and further described in this agreement are included in this agreement. Unless a longer period of time is provided in the Contract Documents, or by law, subcontractor shall repair or replace at its own expense and at the convenience of owner, any defects in workmanship or materials

discovered within one year from the date of written acceptance of the work by the owner, architect, or contractor.”

If a contractor has failed to adequately seal the building, these types of warranty provisions will give rise to a cause of action. On the other hand, if water is intruding into the building through no fault of a particular subcontractor, there may be questions about whether the warranty provisions apply. For example, if drywall is ruined as a result of failure to properly seal windows, caulk joints, or even properly construct the roof, certainly the drywall contractor would not be responsible under its warranty. Nevertheless, the contractor performing the work which ultimately caused the leak would potentially be liable. This would be a basis for a cause of action for anyone in direct contract with the party not properly sealing the building.

E. INDEMNIFICATION

Another fertile source of liability would be that of indemnification. Under an indemnification clause, one party agrees to stand in the shoes of another and defend that other party in the event of a claim caused by the first party. Most contracts these days have those types of provisions. A sample indemnification provision would be as follows:

A. To the fullest extent permitted by law Subcontractor and its Surety, if any, covenant and agree to indemnify and hold Contractor harmless of and from any and all claims, losses, demand, causes of action and the like, including but not limited to, attorneys’ fees and court costs which may be asserted against Contractor by anyone other than Subcontractor resulting from, arising out of, or occurring in connection with the failure of Subcontractor or any subcontractor or supplier of Subcontractor to perform all Work required within the scope of this Subcontract in strict accordance with the Contract Documents.

B. To the fullest extent permitted by law Subcontractor hereby agrees to defend and indemnify, protect and hold harmless Contractor and/or Owner, their agents, employees, servants and sureties (individually the “Indemnified Party” and collectively the “Indemnified Parties”) of and from any loss or damage and to reimburse the Indemnified Parties Contractor for any and all expenses, including legal fees, expert witness fees and other litigation costs to which the Indemnified Parties may be put because of:

(4) any personal injury, loss, damage or death to any person or persons (including employees, officers or agents of Contractor, Subcontractor and lower tier subcontractors) and any property damage arising out of, resulting from, or in connection with (in whole or in part) the performance or nonperformance of Work required in this Subcontract or by reason of any act, omission, fault or negligence, whether active or passive, of Subcontractor, whether on the Project or proceeding to or from the site, including, without limitation, any personal injury, loss, damage, death or property damage caused (or alleged to be caused) by any negligent or grossly negligent act, error or omission of any person or entity, including any Indemnified Party whether such Indemnified Party’s or the person’s or entity’s negligence be joint or concurrent, however,

Subcontractor shall not be required to indemnify an Indemnified Party for its sole negligence.

C. To the full extent permitted by law, in addition to the express duty to indemnify Contractor when there is any causal connection between Subcontractor's work and any injury, loss, damage, death or property damage, Subcontractor expressly undertakes a duty to defend Contractor as a separate duty, independent of and broader than the duty to indemnify. The duty to defend agreed to by Subcontractor herein expressly includes all costs of litigation, attorney's fees, settlement costs and reasonable expenses in connection with the litigation, whether or not the claims made for loss, injury, damage or property damage are valid or groundless and regardless of whether the defense Contractor is maintained by the Contractor or assumed by Subcontractor as long as the claims made could be causally connected to Subcontractor as reasonably determined by Contractor (Claims). Subcontractor's duty to defend Contractor is as follows:

(1) Contractor, in its sole discretion and at its sole option, may defend any or all of the Claims or tender to Subcontractor the defense of any or all of the Claims. Upon such tender by Contractor to Subcontractor, Subcontractor shall be bound and obligated to assume the defense of Contractor in the Claims, including the settlement negotiations, and shall pay, liquidate, discharge and satisfy any and all settlements, judgments, awards or expenses resulting from or arising out of the Claims without reimbursement from Contractor.

(2) It is understood and agreed by Subcontractor that if Contractor tenders the defense of a Claim to Subcontractor and Subcontractor fails or neglects to assume the defense thereof, Contractor may compromise and settle or defend any such suit or action, and Subcontractor shall be bound and obligated to reimburse Contractor for the amount expended by it in settling or compromising any such claim, or in the amount expended by Contractor in paying any judgment rendered therein, together with all reasonable attorneys' fees and cost of litigation incurred by Contractor by reason of its defense, settlement or compromise of such indemnified Claims."

Indemnification is perhaps one of the most fertile sources of liability in a direct contract scenario.

THIRD PARTY BENEFICIARY

Under some circumstances, a party for whom a contract was procured may be able to assert that contract on the basis that such party is a third party beneficiary to the agreement. If the contract was intended for the benefit of that other person, such an argument may be created. Third party beneficiary theory is somewhat limited.

TORT LIABILITY

Tort liability arises out of causes of action which do not deal with contracts between the parties. For example, there may be a cause of action for negligence against a design professional who fails to design a

building in accordance with the standards in the industry. There may be a battery claim for someone who gets hit from a piece of a building which falls down for whatever reason. The tort theories available in mold litigation have not been clearly identified. Negligence is certainly a theory. Negligence involves a duty owed by one person to another, a breach of that duty, the breach proximately causing harm, and damages reasonably associated with that harm. A claimant would be required to prove each and every one of those elements.

One of the most significant defenses available to contractors and subcontractors arising out of this type of litigation would be the Economic Loss Doctrine. For example, an owner may try to sue a contractor for either indemnity or under the contract directly for damages associated with a claim against it in personal injury. However, there is an emerging theory in Michigan as well as in many other States that a party is not entitled to mix theories of contract and tort. If the contract theory is the primary basis for the cause of action, that party will likely not be able to bring in tort theories as well.

On the other hand, if the cause of action is based on facts which give rise to an independent duty owed by the contractor to either the general contractor, the owner, or the public at large, this rule precluding tort liability in contract actions may not apply.

Besides this defense, there is a full complement of defenses in mold litigation to all tort actions. Further, a tort claimant must establish each and every element of the causation in order to prevail.

One of the most difficult elements for a tort claimant to prove will be the “causation”, in other words establishing that the mold in the building actually caused the sickness or injury. The reason this is significant is because there are a host of other possibilities that could be the causing factor. For example, the plaintiff will have to establish first of all that it is the mold that the plaintiff is allergic to as opposed to dust mites, dog dander, or some other cause. Then, if the plaintiff can establish proof of the mold causing damage, the plaintiff is going to have to establish that it was this mold as opposed to other mold in other buildings or even naturally occurring in the outdoors. This again is a very difficult test to meet.

Perhaps the most significant problem with the causation issue deals with how a plaintiff is going to prove it at all. Ordinarily, a plaintiff would have to call an expert witness on the subject of mold. However, mold causing allergies is a relatively new theory with very little written about it. Under those circumstances, there are various rules before the Court today which preclude an “expert” from testifying about theories which are not firmly established. Since the mold litigation issues are not firmly established, many cases have precluded expert testimony. Without expert testimony, all of the issues on “causation” disappear. Accordingly, there are significant proof issues for a plaintiff in going to court on a mold case.

MAJOR CAUSES OF ACTION

A. STRICT LIABILITY

Strict liability basically means that if you commit a violation of a certain law, you will be perceived to be liable regardless of any other consideration. While that is over generalized, it places the concept of strict liability in context.

Under MCL 600.2957(1), a trier of facts such as a jury or judge in a tort based action must allocate liability among those at fault. MCL 600.6304(1)(b) further provides that in a personal injury action involving fault of more than one person, the trier of fact must specifically determine a Plaintiff’s total damages and the percentage of fault attributed to all persons involved, regardless of whether the person was or could have been named to the action. MCL 600.6304(a) includes fault as an act, omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is the proximate cause of damage sustained by a party.

The use of the doctrine of strict liability is common where a party has violated a law. Unfortunately, there are no environmental guidelines as of this point regarding mold and air quality related to mold. As a result, it may be difficult for a mold claimant to assert a claim based upon strict liability.

B. PRODUCT LIABILITY BY MANUFACTURERS AND SUPPLIERS

The product liability cases were very common prior to tort reform. In essence, a manufacturer would create or construct something which was inherently dangerous causing damages. To successfully utilize various product liability claims and defenses in the mold setting, a party will need to establish that all of the tort reform requirements have been satisfied, and that the mold was a condition which was created during the manufacturing process.

C. BREACH OF WARRANTY

There are a variety of breach of warranty causes of action. These potential causes of action include the following:

- Contractual breach of warranty.
- Implied warranty of merchantability.
- Implied warranty of fitness for a particular purpose.
- Implied warranty of construction.
- Implied warranty of habitability.

D. FRAUD

Fraud is a very difficult cause of action to prove. It requires a false statement, knowingly made, with the intent that the other party rely upon, actual reliance, and damages. It is not typically utilized in the mold setting. In addition, it is a “tort” claim which means that if a party has a direct contract with the individual or company it is suing, it will be precluded by the Economic Loss Doctrine. Nevertheless, it could conceivably come into mold litigation where facts justify satisfaction of the above-referenced elements. Particularly in a construction or remediation process where the party sued is aware of mold conditions and makes statements to the contrary.

Another way the fraud issues could come into play in mold and mold litigation cases involves the failure to properly disclose the mold in a real estate property transaction.

POTENTIAL DAMAGES

A. **ECONOMIC LOSS – PROPERTY DAMAGE** - As in any litigation, a party will recover only if all of the elements of the cause of action can be satisfied. One element of most, if not all causes of action includes damages. If a party suffers no damages, they cannot have a cause of action even under the worse possible scenario.

The damages that are available to a party will depend upon the relationship of the parties before the litigation. If one party has a direct contract with another party, then the damages will most likely be limited to those damages recoverable under the contract, and contract law, as opposed to other non-economic damages such as pain and suffering. This is because, Michigan, as well as many other states, adopts a rule called the Economic Loss Doctrine. This means that if two parties have a direct contract with each other, they will be required to sue on the contract and enforce only those damages contemplated by the contract. On the other hand, if a cause of action for personal injury or property damage develops where individuals are not in contractual privity with each other, the Economic Loss Doctrine does not apply. Assuming that the Economic Loss Doctrine is not applicable, here are a variety of possible damages;

- Cost of investigation.
- Cost of abating or taking care of all of the mold.

- Loss of any use of the facility.
- Cost of the repair of the facility to remove the mold.
- Change in value due to the mold conditions.
- Change in value due to real estate disclosure forms.
- Testing and investigation costs.
- Medical expenses.
- Emotional distress.
- Other costs relative to preserving the evidence.

There is also a doctrine called Mitigation of Damages. This means that a party is required to take steps to reduce the damages that it will eventually suffer. Accordingly, if a party notices mold growing in one particular part of the house, the party is required to take steps to cure or remediate that problem. A party cannot simply stand by, do nothing, let the problem get out of hand, and they sue for damages associated with all of the problems.

B. ATTORNEYS FEES

One of the biggest impediments to proceeding with litigation is the cost of getting to the end result. In mold and mold related litigation, there will be many costs. This includes the cost of retaining an attorney, the cost of retaining an expert, various investigation costs, aside from the standard discovery costs that party could incur during the course of litigation. Whenever a party is anticipating whether to prosecute a mold claim, an economic analysis needs to be performed in advanced to make sure that the amount of the claim is worthy of expending the sums necessary to retain an attorney as well as a series of experts.

In most states, including Michigan, in order to recover attorney fees as part of the litigation, there must either be a contractual provision allowing a party to recover attorney fees in the event of litigation, or the party seeking the fees is the prevailing party, or there must be a statute given rise to the payment of those attorney fees. As it relates to the mold and mold litigation, there is really no direct statute that gives rise to a cause of action or claim for attorney fees in litigation. As a result, any claimant seeking attorney fees will likely have to pay those attorney fees out of any proceeds from the recovery.

HANDLING THE CONSTUCTION DEFECT AND MOLD CASE

Once a party has come to a decision that he or she will prosecute a mold case, the party needs to consider various aspects of litigation to evaluate how to proceed. Some of these considers are as follows:

A. STATUTE OF LIMITATIONS

A statute of limitations is a code section passed by the legislature which specifically references a time bar to pursuing litigation. There are different time bars for different causes of action. Here are some examples:

- Under MCL 600.5805, there is a limitation on a person bringing an action to recover damages for injuries to persons or property unless the action is brought within three years after the time of a death or injury to a person or property or three years for a products liability action.
- MCL 600.5807 provides a statute of limitations for a breach of contract such that no person may bring or maintain any action to recover damages or sums due for breach of contract for a period of six years. There are other statutes based upon written instruments which are not particularly applicable.
- Under MCL 600.5815, there is also a legal defense called “laches” which specifically says that the statutes of limitations shall apply equally to all actions whether equitable or legally sought. The section also specifically indicates that the equitable doctrine of laches shall also apply to actions where equitable relief is sought.

- Under 600.5827, a period of limitations runs from the time the claim accrues. At the time of the wrong regardless of when the damages result.
- Under MCL 600.5833, a breach of warranty of quality or fitness cause of action accrues at the time the breach of the warranty is discovered or reasonably should have been discovered.
- Under MCL 600.5839, there is a statute of limitations against professional engineers, architects, and contractors arising out of improvements to real property. Under that section no person may maintain an action to recover damages for any injury to property, real or personal, based upon a defective or unsafe condition of an improvement to real property more than six years after the time of occupancy or the completed improvement, or one year after the defect is discovered or should have been discovered, but in not event more than ten years after the time of occupancy.

B. SPOILATION OF EVIDENCE

Every party has a duty to preserve evidence. If evidence is lost or destroyed, there is a defense called “spoliation of evidence” which gives certain presumptions in favor of the party who did not destroy the evidence. In mold litigation, a party has an obligation to preserve the evidence. This can be done through sampling, photographing, video, and a variety of other ways. The parties need to make sure however in the remediation of their mold conditions that the evidence is not lost or destroyed.

C. EXPERT DEPOSITIONS

Mold litigation will most certainly involve the retention of experts. These experts will involve indoor quality sampling procedures, results of various indoor tests, and the providing of expert opinions. Expert depositions will undoubtedly take place during the course of litigation. These depositions are expensive, but are usually required.

There are also various theories on who should produce their expert first and in what order should depositions be taken. In most circumstances, a Plaintiff who asserts a mold claim will be required to name their expert and have their expert testify on all of his or her opinions so that the Defendants can go out and retain experts to properly defend the case.

D. PROCEDURAL ISSUES

There are a variety of procedural issues in any litigation. A party must first file a complaint, there are answers or motions dealing with the complaint, there is discovery, and there a host of other procedural devices that need to be taken into consideration during the course of the litigation. As it relates to mold and mold litigation, there are some other specific procedures which should be followed, independent of any procedures provided in any of the court rules. For example:

- Obtain indoor air quality sampling. One of the early steps a party should take is indoor air sampling. In order to do so, the party will have to retain an expert or some environmental consultant who is capable of doing indoor air quality tests. That experts must also be qualified in reviewing and understanding the results.

One of the most significant things about expert testimony and expert testing in the mold litigation area is that there are currently no real protocols from conducting the tests. There are no standard guidelines for what types of mold is excessive, what type of mold is permissible, what type of mold needs to be remediated, and so forth. Consequently, when there is a “battle of the experts” in any claim, the experts will in essence be creating their own perimeters for what their test analysis and results will be. This is very problematic for a Plaintiff in particular because a Plaintiff is going to need to show that the expert used recognized standards in coming to his or her review. However, without any standards, it will be up

to the particular expert to determine whether standards are met, as opposed to the following of any guidelines.

Another procedural step which should be taken is the careful documentation of the location, type, and kind of mold growing within the facility. This can be done using a copy of a floor plan, taking video, using photographs, and any other means of accurately recording or depicting the types and kinds of mold in the facility.

E. JOINT AND SEVERAL LIABILITY

Joint and several liability means that two parties who are sued on the same claim may be both liable for that claim up to 100%. So, if Mr. Jones and Mr. Smith were both sued in a mold litigation case, and there were tort theories entitling joint and several liability, Mr. Jones would be obligated to pay 100% of the judgment, and Mr. Smith would be obligated to pay 100% of the judgment. The only caveat to that is that they are only required to pay once. So, if Mr. Jones pays the full \$100.00, then no more money needs to be paid. There is also a claim that can be filed between Mr. Jones and Mr. Smith.

F. SETTLEMENT

As in any litigation, settlement should always be considered as an option. The true winner of any litigation is the party who has the most money at the time the smoke clears. If you spend a lot of money in your litigation and end up getting a result which is less than the amount of money you spent, you are clearly the losers.

There are several options available to facilitate settlement. One is called alternate dispute resolutions or "ADR". There are a variety of different ADR mechanisms including:

- Facilitative mediation.
- Mini trials.
- Mini jury trials.
- Case evaluation.

CONCLUSION

Mold litigation is certainly an up and coming theory of liability in American jurisprudence. While some mold and mildew may grow as a result of faulty construction, even if faulty construction existed, there are still significant proof problems for a plaintiff in the event a plaintiff would like to pursue such litigation. In the event that you are sued for any mold or mildew litigation, you should first contact your insurance company to determine eligible coverage.