

Defending mold claims

Keys to successful mold claim resolution are expediency, cooperation and documentation

By Dan Berman and Steve Henning

Most builders and architects have received a customer call describing “killer” mold in a new home. These calls were a frequent occurrence early this decade before builders wrapped their hands around them. Builder victories in heated court battles seemed to stem the tide of complaints.

However, today’s homeowners are quick to point out issues both real and imagined. Homeowners with declining home values and increased construction costs are quicker to pull triggers on filing litigation in an effort to somehow compensate for lost equity.

Drastic cuts in builders’ customer service departments left fewer people to physically respond to these types of issues. Money is tight and mold investigations can be expensive. Can you afford to ignore this phone call? No.

Since the advent of mold claims that peaked between 2001 and 2003, insurance companies used powerful language to exclude coverage for mold. This means there is absolutely no insurance coverage for claims that someone was physically injured due to exposure to elevated levels of mold in indoor air. These lawsuits are expensive to defend. With savvy lawyers on your side, you will be vindicated, but at a price.

How a builder responds to a mold call will determine if he has minimized his risk, eliminated lawsuit potential, and protected your assets and reputation.

Quick response. Builder victories typically have as the common thread an immediate response. This gives him a chance to eliminate the issue before it grows, and increases abatement costs.

Watch for the “representation” trap. The new breed of lawsuits focuses more on (mis)representing those responding to a claim rather than the mold itself. Avoid making opinions without support, promises you cannot keep and providing legal advice.

Involve potentially responsible trades. If the issue is a plumbing leak, involve the plumber in your investigation.

More often than not the trade responsible for the issue was never consulted. Notify trades early in the life of the claim, put it in writing and remind them of contractual obligations. There is clear value in involving the trade partner:

- They can best determine if the issue is a result of defective construction, failed products or homeowner maintenance (or lack thereof).
- They may be able to repair the problem.
- They, too, have a bleak insurance picture.
- They should be under contract with you to respond to these issues, and to defend and indemnify you in claims arising from their negligence during construction.

Document, document, document. In the chance litigation ensues, documentation generated simultaneously with the claim will save you. Be factual, professional and avoid opinions. Documentation should help a jury understand you responded timely, professionally and completely.

Take responsibility. All too often, a water and mold claim goes unresolved due to infighting and finger-pointing. Experience shows that delay leads to more damage, more mold and more hostility from homeowners. Agreeing to disagree can be the best move; then fix the problem.

Consider videotape. Not only will video capture the attention of a juror in an otherwise tedious trial, it can diffuse claims that mold was rampant and overgrown. Jurors in one trial who saw videotape of overloaded bookshelves lost trust with homeowners who claimed mold made their bookshelves weak and useless. Video is powerful.

Pick up the phone. If in doubt, call another builder or customer care representative you know. And at the risk of sounding self-serving, call your lawyer. The benefit is the cloaking of your communication with privilege. ▀

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