

Legislation and Regulations

Federal Legislation

The "United States Toxic Mold Safety and Protection Act" was reintroduced in the Congress this session (2003) by Representative John Conyers (D-Michigan) as H.R. 1268. That measure, which mirrors a bill that failed to pass in the last Congress, is extremely broad in scope and would: (1) create national standards for preventing, detecting and remediating mold, (2) establish a national "toxic mold" hazard insurance program, (3) impose numerous mold-related requirements upon those who sell, lease and inspect residential property, and (4) offer tax credits for mold inspection and mediation. NAA/NMHC Joint Legislative Staff has been urging Congress to refrain from setting any mold standards until better science is available.

Congress also addressed the mold issue in the Native American Housing Act (P.L. 107-292) by requiring that HUD complete a study on mold infestation in Native American housing. That study, due in August of 2003, has been delayed, according to HUD sources, over cost estimates involved for mold remediation.

NAA/NMHC staff, testifying at a recent hearing on the HUD 2004 spending bill, urged HUD to fund research on building materials, building technologies, and mold remediation technologies. Additionally, they urged HUD to work cooperatively with the housing industry to disseminate credible information to the public on these and other topics related to mold.

State and Local Law and Regulation

Rather than waiting for Congress to act, many states are considering legislation to address mold. The need for mold legislation in Virginia was studied by the Virginia Housing Study Commission during the fall of 2003, and the Commission recommended that no further action be taken because of the inadequate science issue. However, at the 2004 session of the General Assembly, H.B 824 was enacted and provides landlords, who disclose the presence of mold on their properties to tenants as a part of a move-in inspection, with certain "safe harbor" protections.

In 2003, mold legislation was introduced in at least 29 states. California passed comprehensive mold legislation in 2001; other states and local governments, in general, are considering legislation to earmark funds for mold research, to establish permissible exposure levels, and to establish guidelines for disclosure and remediation of mold, certification of workers, and insurance matters. Information on state mold legislation for 2003 can be found in Mealey's Litigation Report at www.MEALEYS.COM

In addition, NAA/NMHC recently published a second white paper on mold entitled *Model Mold Precepts for Potential State or Local Legislative Initiatives*. This guidance document highlights numerous key points and issues that state and local legislators should consider when drafting legislation addressing mold in the built environment. This document is available at www.naahq.org/government/government.aspx.

NAA/NMHC Guidance and Resources

The NAA/NMHC Joint Legislative staff has prepared several guidance documents this past year:

1. A "white paper on mold in apartments" that includes general information on assessing and remediating mold; steps to protect property/owner managers from liability; an explanation of possible legal causes of action that may be brought against a property owner; and a list of recent litigation, verdicts and settlements. This paper has been updated several times to reflect new developments since it was first published in January 2001. NAA/NMHC strongly recommend that all service requests from residents about possible mold contamination be acted upon promptly and that all actions and interviews are documented.

2. An Operations and Maintenance (O & M) Plan for Mold and Moisture Control that has been held by insurers and lenders as one of the best sources available of operational practices related to mold. Fannie Mae recently referred to the NAA/NMHC O & M Plan in its informational document, *What Every Multifamily Lender Should Know About Mold*. HUD's Office of Native Americans Programs also recommended the O & M Plan as a resource reference for mold and mildew: www.codetalk.fed.us.

3. Finally, NMHC has also collaborated with NAA to produce a video (Mold O & M Training Program for Multifamily Professionals) offering on-site staff and maintenance technicians practical information dealing with moisture and mold issues on premises. All three NMHC/NAA resources are at NAA's web site: www.naa.org/government/government.aspx.

Mold Research Studies and Documents

The U.S. Centers for Disease Control, through the Institute of Medicine of the National Academy of Science (NAS-IOM), recently completed the first-ever comprehensive review of the health effects of mold. The report, entitled "Damp Indoor Spaces and Health", was conducted by leading international environmental, health and building scientists over a two-year period and represents the first comprehensive analysis of the health effects associated with damp environments. The 380-page report essentially concludes that while mold is linked to allergies and may possibly be linked to asthma and upper respiratory problems, no evidence exists to support a link to more cancer, fatigue, neuro-psychiatric disorders or other serious health claims. Even though the report rejects the most sensational mold-related claims, it echoes NMHC/NAA's long-held advice to property owners to deal promptly and effectively with indoor dampness.

This study can be purchased from the NAS Press.

Other mold research and studies recently published include the following:

1. The Texas Medical Association's Council on Scientific Affairs has issued a report analyzing the current medical literature on mold and human health. The report supports NAA/NMHC's claim that more research is needed to document adverse health effects from mold. It states: "After reviewing the available data, the (scientific affairs) council has concluded that public concerns about the adverse health effects from inhalation of *Stachybotrys* spores in water-damaged buildings is generally not supported by published reports in the medical literature."

2. The American College of Occupational and Environmental Medicine (ACOEM) has issued an evidence-based statement discussing the state of scientific knowledge as to the nature of alleged mold-related illnesses and the possible relationships between mold and indoor environments. ACOEM's statement concludes that the "[c]urrent scientific evidence does not support the proposition that human health has been adversely affected by inhaled mycotoxins in the home, school, or office environment." ACOEM's statement also noted that "[r]ecent critical reviews of the literature concluded that indoor airborne levels of microorganisms are only weakly correlated with human disease or building-related symptoms and that a causal relationship has not been established between these complaints and indoor exposures to *S. chartarum*." In addition, the statement emphasizes that the phrase "toxic mold" is "meaningless" and what could potentially constitute a "toxic" dose of mold exposure to humans is not known at the present time.

3. The U.S. Chamber of Commerce has issued two papers on the growing hazard of mold litigation and the lack of scientific evidence linking mold to health problems. *Mold Litigation: How Hysteria and Junk Science Built a Cottage Industry* concludes that the serious health claims that pervade mold litigation - brain damage, lung hemorrhage, and cancer - cannot withstand scrutiny under the "reliable science" standard set by a 1993 U.S. Supreme Court ruling. Meanwhile, in *A Scientific View of the Health Effects of Mold*, a team of scientists found that mold-caused infections are rare, except in individuals with compromised immune systems, and that, "there is no sound scientific evidence that mold causes 'toxicity' in doses found in home environments." The Chamber's studies are available at www.legalreformnow.com.

4. The National Association of Home Builders (NAHB) recently convened a panel of experts in the fields of mycology, industrial hygiene, immunology, and toxicology. The panel reviewed the existing English-language scientific literature to determine whether it provides a reasonable and reliable scientific basis for one to conclude a causal link between indoor molds and serious medical health effects. The report confirms that molds are known to be a significant cause of allergic reactions in sensitized individuals. However, the panel concluded that while various studies on humans have attempted to link molds and their components to a variety of non-specific problems (e.g., fatigue, nausea, and depression), the evidence suggesting this link is weak, and there is no evidence of causation. NAHB's report is available at www.nahb.org/mold.

5. HUD has conducted its own study on mold in Native American housing, in response to a congressional directive (see Federal Legislation above).

6. The American Conference of Government Industrial Hygienists (ACGIH) has announced that it would soon publish a "best practices" guide for mold remediators, which NAA/NMHC is reviewing.

7. The Institute of Inspection, Cleaning and Restoration Certification (IICRC) recently has issued a draft mold remediation standard (S520) which NAA/NMHC also is reviewing.

Federal Agency Guidance

EPA Guidance

EPA has issued two guidance documents on mold infestation. The first is a guidebook targeted at managers, custodians and other building maintenance personnel entitled *Mold Remediation in Schools and Commercial Buildings*, the document provides remediation/cleanup guidelines for commercial properties as well as measures property owners/managers can take to protect occupant health. A more readable version of the EPA remediation guide is available in a pamphlet titled *A Brief Guide to Mold, Moisture, and Your Home*. multifamily owners/managers may wish to consider adding this latter (and freely available) publication to their move-in packets. Both documents are available at www.epa.gov/iaq/molds/.

OSHA Guidance

The Occupational Safety and Health Administration (OSHA) released on October 14, 2003 a non-binding, advisory guidance document titled *A Brief Guide to Mold in the Workplace*. This informational document, which specifically references NAA and NMHC on its Mold Resources List, discusses how to prevent indoor mold growth and how to protect workers involved in the prevention and cleanup of molds. The bulletin, which is not a standard or a regulation, includes checklists, mold prevention tips, and mold remediation guidelines. It also addresses personal protective equipment, sampling methods, and remediation equipment. NAA/NMHC submitted comments on a draft version of the document, arguing that the draft version: (1) contained misleading statements about mold; (2) employed an overly general tone; (3) tendered suggestions that were inappropriate or beyond the scope of the intended audience; and (4) failed to adequately represent the uncertain science surrounding mold or the fact that there are no existing federal standards for mold exposure or remediation. NAA/NMHC will be conducting a more thorough review of OSHA's final document, which is available at www.osha.gov/dts/shib/shib101003.html.

HUD Guidance

HUD's Office of Native American Programs published in April 2003 a number of guidance documents related to mold in the residential context. These plain-language documents cover the basics about mold and the common causes of mold occurrence in houses. They also include a pamphlet titled *Mold and Mildew: Frequently Asked Questions*. In its recommended resource section, HUD specifically references NAA/NMHC's O&M Plan for Mold & Moisture Control as identifying "best practices" that apartment owners and managers can use to manage mold growth and moisture problems on their properties. These documents are available at www.codetalk.fed.us/Mold_and_Mildew_Information_Basics.htm.

ASTM Mold Task Force

NAA/NMHC continues to participate in a Mold Task Force, hosted by the well-respected standards-setting organization, ASTM. NAA/NMHC provided comments on ASTM's draft Standard Guide for Mold in Commercial Buildings: Transaction Screen Process. NAA/NMHC participated in a second Task Force meeting in October 2003 to discuss a newly released draft of the document. When published, ASTM's guide is expected to provide the general parameters for conducting a screen, as part of the due diligence process of a real estate transaction, for "readily observable mold." NAA/NMHC believes that if narrowly-tailored and widely-implemented, this guide could help to reduce the occurrence of excessive mold growth in the built environment and give lenders a higher level of comfort.

NIBS Mold Alliance

NAA/NMHC recently attended an organizational Board of Directors meeting for the Building and Mold Alliance, a coalition put together by the National Institute of Building Sciences (NIBS). While the Alliance's ultimate project scope and direction remain unclear, NAA/NMHC believe that this group could produce non-mandatory, voluntary guidelines that could help to reduce the occurrence of excessive mold in the built environment. The Alliance has discussed putting forth guidelines for condition assessment at the time of real estate transaction, as well as for design, construction, and remediation standards.

Mold Litigation

Recent Mold Lawsuits

NAA/NMHC are monitoring the more than 10,000 mold-related lawsuits pending across the country to alert members to trends and precedents. Most of the cases involve insurance coverage disputes. Of particular note is the fact that several states have allowed testimony about the health effects of mold exposure, even though the question of medical consequences from mold remains largely unsettled. Apartment management firms should be aware that suits involving rental housing also are raising issues regarding appropriate maintenance standards. Members are urged to formalize response plans for dealing with moisture intrusion and implement appropriate documentation for staff activities. NAA/NMHC's Mold Operations and Maintenance Plan is a good resource (see NAA/NMHC Guidance and Resources above).

Mold Class Action Case

A Miami-Dade County, Florida trial court in January 2003 certified the first-ever class action rental housing mold suit. The plaintiffs allege personal injuries and property damage from mold exposure in an apartment property. If allowed to stand, this class certification could expose property owners/managers to potential litigation not just from their residents, but also from any guest, worker, or delivery person who visited the property, however briefly. NAA/NMHC and led a broad coalition of organizations, in filing a "friend of the court" brief supporting the apartment owner. The brief argued that class certification: (1) deprives the property owner of his due process right to defend against the claims being made and to pursue alternative theories of causation and contributory negligence, and (2) creates a composite plaintiff with potentially stronger claims than any particular individual. Most importantly, NAA/NMHC maintain that class actions are not a fair means of resolving mold-related health and property claims, largely because the question of whether the individual's losses are allegedly caused by mold exposure from an apartment property cannot be resolved without a detailed examination of individualized facts.

Personal Injury Claims

Courts have generally excluded personal injury claims in mold-related suits, ruling that the science has not reached the level required to prove that mold causes health problems.

In August 2003, a federal district court in Virginia (Christopher Roche et al. v. Lincoln Property Co., et al., No. 02-1390, E.D. Va.) dismissed a case brought against apartment owners and managers in which the plaintiffs alleged bodily injuries from mold exposure, including brain damage. The court held that plaintiffs' expert could not establish a causal connection between the alleged mold and their claimed injuries under the well-established Dauber standard. However, on June 30, 2004, upon appeal, The U.S. Court of Appeals for the 4th Federal Circuit (Christopher Roche, et al. v. Lincoln Property Co., et al., No. CA-02-1390-A) reversed the federal District

Court with respect to its judgment on the matter of subject matter jurisdiction (diversity of citizenship), vacated the remainder of the lower court's judgment, and remanded the case back to the Circuit Court of Fairfax County, Virginia.

In *Kilian v. Equity Residential Trust*, U.S. District Court for the District of Arizona (No. CV-02-1272-PHX - FJM ORDER) the court, in a case involving a resident's claim that exposure to mold in her apartment caused her to develop a brain injury, a movement disorder, a neurocognitive disorder and an immune system disorder, ruled against the resident on the basis of the recent Institute of Medicine's study cited above. The court stated that "we agree with the conclusion of the National Institute of Medicine of the National academy of Sciences that there is insufficient evidence of an association between neuropsychiatric symptoms and the presence of mold We thus exclude the expert testimony in this case that sought to establish causation between the presence of mold and plaintiff's symptoms."

However, at least two other courts have allowed personal injury claims: (1) *Darren Mazza v. Raymond Schurtz*, Sacramento County Superior Court (No. 00AS04795) California on November 7, 2001 and (2) *Daniel Hatley et al. v. Century National Insurance Co.* (No. CV-2000-006713), Ariz. Super., Maricopa Co.) on April 10, 2000.

Mixed Personal Injury and Property Damage Claims

Another recent case, *Shapiroholland v. Equity* (Orange Co. CA Superior Court. No. 03-03767), the court reaffirmed the importance of developing a mold operations and maintenance plan for dealing with moisture intrusion into an apartment. The plaintiffs alleged that the property manager was negligent in dealing with a leak in a water heater closet and that the resultant mold caused physical harm to the occupants and their possessions. The sole issue decided at the trial was whether the property manager had acted negligently when alerted to the problem. Following the NAA/NMHC's long-established advice to property owners to deal promptly and effectively with indoor dampness, the leak had been repaired promptly. After the trial, the jury noted that they were impressed with the rapid response of the management company and the extraordinary lengths taken to relocate and address resident concerns.

Construction Defects Claims

In another recent local case, *Gonella v. Lumbermens Residential Property Management, Mutual Casualty Co.* (No. 216138, Circuit Court of Fairfax County, Virginia, 2004 Va. Cir. LEXIS 68; March 15, 2004), the court held that negligence claims (for mold damage, among other things) from construction defects against a roof contractor were not barred by a contract's existence where the insureds' alleged existence of a duty, existing apart from contractual expectations, to perform work without creating an unreasonably dangerous condition on property.