



# Solutions for Mold and Indoor Air Quality for Durable and Sustainable Buildings

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Legal and Insurance Issues

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# Overview of Presentation

- Why do Mold Claims Exist in Residential Buildings
- Response to Mold Claims
- Engrossed House Bill (EHB) 1848
- Insurance Exclusions
- Washington Case Law
- Web Sites

# Why do Water Intrusion and Mold Problems Exist?

- Distinction between residential and commercial plans
- Inspections: public vs private
- Required inspections under codes
- Incentive for quality
- Quality & experience of general or sub
- Other

# Consequences of Water Intrusion

- Negative appearance & staining
- Deteriorating sheet rock needs repair
- Interior water will cause other damage
- Damage will lead to investigation
- Investigation show construction defects
- Owner's fault vs fault of another
- Substantial prospect of claim

# Constructive Responses to Mold Claim

1. Carefully evaluate complaints
2. Tender claim to insurance carrier
3. Evaluate subcontractor obligations & performance
4. Retain counsel for independent insurance coverage analysis & defense
5. If counsel is appointed by insurance carrier, who is he representing?

# Further Constructive Responses to Mold Claim

1. Treat the matter seriously
2. Initiate immediate remedial action
3. Litigation cost may exceed remediation cost
4. Mold and Mildew: A Creeping Catastrophe by Everett L. Herndon, Jr. & Chin S. Yang;
  - General rule of thumb- remove mold, **all of it.**

# EHB 1848 Summary

- Applies to multi unit resident buildings
- Permit applicants must submit building enclosure design by qualified designer
- Unaccountable qualified, independent building inspection report for envelope
- One who timely demands arbitration or neutral expert advances costs
- Mediation within 7 months of filing
- Provision for offers of judgment may shift attorneys fee and cost responsibility

- Effective date of act: August 1, 2005
- Copy of entire act available at <http://www.leg.wa.gov/pub/billinfo/2005-06/>
- Information provided in this presentation is overview, and is not intended to cover all applications and/or exceptions
- What can this mean for
  - Architects
  - Owner's representatives
  - Building owners

# New Design Documents Required

- Any person applying for a building permit for construction of a multiunit residential building or rehabilitative construction **shall submit building enclosure design** documents to the appropriate building department prior to the start of construction or rehabilitative construction of the building enclosure.
- The building department **shall not issue a building permit** for construction of the building enclosure of a multiunit residential building or for rehabilitative construction **unless** the building enclosure design documents contain a stamped statement by the person stamping the building enclosure design documents in substantially the following form: **"The undersigned has provided building enclosure documents that in my professional judgment are appropriate to satisfy the requirements of sections 1 through 10 of this act."**

# New Inspections Required

- **All multiunit residential buildings shall have the building enclosure inspected by a qualified inspector during the course of initial construction and during rehabilitative construction (emphasis added)**

# Inspection Certification

- **Upon completion of an inspection** required by this chapter, the qualified inspector shall prepare and submit to the appropriate building department a **signed letter certifying** that the building enclosure has been inspected during the course of construction or rehabilitative construction and that it has been constructed or reconstructed **in substantial compliance with the building enclosure design documents**, as updated pursuant to section 3 of this act.

# Problem: Lack of Quality Assurance

- (1) Nothing in this act is intended to, or does:

(a) Create a private right of action against any inspector, architect, or engineer based upon compliance or noncompliance with its provisions; or

(b) Create any independent basis for liability against an inspector, architect, or engineer.

# May Contract for Liability Limits

- The qualified inspector, architect, or engineer and the developer that retained the inspector, architect, or engineer may contractually agree to the amount of their liability to the developer.
- However - - -
  - Is the consumer protected
  - Is consumer protection important

# Compliance with Act Mandatory

- no declarant may convey a condominium unit that may be occupied for residential use in a multiunit residential building without first complying with the requirements of sections 1 through 9 of this act unless the building enclosure of the building in which such unit is included is inspected by a qualified building enclosure inspector, and . . . :

# Mandatory Arbitration

- If the declarant, an association, or a party unit owner demands an arbitration by filing such demand with the court not less than thirty and not more than ninety days after filing or service of the complaint, whichever is later, the parties shall participate in a private arbitration hearing.

# Mandatory Mediation

- The parties to an action subject to this act shall engage in mediation. Unless the parties agree otherwise, the mediation required by this section shall commence within seven months of the later of the filing or service of the complaint. If the parties cannot agree upon a mediator, the court shall appoint a mediator.

# Neutral Expert

■ . . . a party may file a motion . . . requesting the appointment of a neutral expert to address any or all of the disputed issues. . . . Upon such a request, the court or arbitrator shall decide whether or not to appoint a neutral expert or experts. . . .

(2) The neutral expert shall be a licensed architect or engineer, or any other person, with substantial experience relevant to the issue or issues in dispute. The neutral expert shall not have been employed as an expert by a party to the present action within three years before the commencement of the present action, unless the parties agree otherwise.

# Work of Neutral Expert

- A neutral expert's report or testimony is not entitled to any evidentiary presumption in any arbitration or court proceeding. Nothing in this act restricts the admissibility of such a report or testimony, provided it is within the scope of the neutral expert's assigned duties, and questions of the admissibility of such a report or testimony shall be determined under the rules of evidence.

# New Public Offering Statement Requirements

- A public offering statement shall contain. . . : A statement that the building enclosure has been designed and inspected as required by sections 2 through 10 of this act, and, if required, repaired in accordance with the requirements of section 10 of this act. [and] and the inspection and repair report or reports prepared in accordance with the requirements of section 10 of this act.

# Insurance Issues

- Typical exclusion in CGL policies
- Typical property insurance exclusion
- Instruct insurance agent in writing to obtain competitive quotes for full coverage
- **REVIEW INSURANCE POLICY**

# CGL Fungus Exclusion

- “This insurance does not apply to ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ caused directly or indirectly, in whole or in part, by:
  - Any ‘fungus(es)’ or ‘spores’, or
  - Any ... building ... that contains ... any ‘fungus(es)’ or ‘spores’ ....

# Property Damage Exclusion

- We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause of event that contributes concurrently or in any sequence to the loss.

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–d. Other Types of Loss

- 2. . . . . Fungus, decay

# How do you protect yourself

- Insurance may not be an option.
- Build it right.
- Shift risks by contract.
- Devious methods (corporate dissolution or supermajority vote to sue) probably will not be effective.

# Mold Litigation in Washington

- **Yeater v Commonwealth Ins. Co**, 124 W App. 1020 (2004)
- **Kelsey Lane HOA v Kelsey Land LLC**, 125 W App. 227 (2005)
- **McMickle v Lawson**, 130 W App. 1032 (2005)
- **Le v Mark Phillip Homes, Inc.**, 133 W App. 1027 (2006).
- **Smith v Behr**, 113 W App 306 (2004).
- **Haynes v Adair Homes**, Oregon case by Washington attorney **Kelly Vance**. **\$400,000 recovery for personal injury for mold exposure.**<sup>25</sup>

# Web Sites

1. <http://www.policyholdersofamerica.org>
2. <http://www.iii.org>
3. <http://www.triallawyersinc.com>
4. <http://www.mold-help.org>
5. <http://www.ontariotenants.ca>
6. <http://www.cdc.gov/mold/pdfs/moldsci.pdf>
7. [http://www.lamold.com/printables/dr\\_klein.htm](http://www.lamold.com/printables/dr_klein.htm)

# Q&A

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