



The Florida Senate

Interim Project Report 2004-158

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Committee on Regulated Industries

James E. "Jim" King, Jr., President

REVIEW OF MOLD REGULATION

SUMMARY

This report discusses the reasons behind the heightened awareness regarding mold and mold related issues. It discusses the science of how mold is formed, and how different states and the U.S. Congress have addressed these issues in the form of legislation. It makes recommendations on how Florida should address these issues, including recommending the consideration of licensure of mold remediators and assessors, and formation of a task force to develop standards for these services.

BACKGROUND

There is no regulation of mold related activities in Florida. The 2003 legislative session saw the introduction of three bills related to mold remediation. None of the bills passed. However, concerns over the increase in mold litigation, the insurance industry's response to mold claims, and the numerous companies that have sprouted up throughout Florida and the alleged national certifications from "qualified mold remediation programs" have raised concerns as to how best to address the mold issues in Florida.

METHODOLOGY

In preparation of this report, committee staff met with representatives of the Department of Health and the Department of Agriculture. Staff attended a continuing legal education seminar on mold litigation, reviewed articles and periodicals on the science of mold, and reviewed the variety of approaches to the remediation of mold infestations. Many private citizens, with and without expertise, provided e-mail commentary which described experiences with mold infestations and made recommendations for how Florida should approach mold remediation legislation. Additionally, private industry companies who are engaged in mold

remediation offered their assistance and expertise in any legislation that may be recommended for the 2004 regular session.

FINDINGS

There has been a heightened awareness of the effects of exposure to mold. There are web sites for hundreds of businesses touting their services as mold remediators in South Florida. There are also news media accounts of a new industry for mold inspections for people purchasing homes and of mold remediation firms that use dogs for mold detection. The insurance industry is also responding to the increase in mold related claims, jury awards, and settlements for mold remediation by limiting coverage. These varied responses to the age old problem of mold have caused state legislatures as well as Congress to respond.

What is Mold?

According to a report issued by the Centers for Disease Control and Prevention (CDC), molds are ubiquitous in nature and grow almost anywhere indoors and outdoors.¹ The report states that more than 1,000 different kinds of indoor molds have been found in U.S. homes. Mold spores are easily spread because they are small, light-weight and able to survive a long time and under most conditions. Mold growth is stimulated by warm, damp, and humid conditions.

The CDC report also states that people who are exposed to molds may experience a variety of illnesses. There are infections caused by certain molds in hospitals, illnesses caused by ingestion of food contaminated with mold, respiratory illnesses, and allergic reactions due to mold exposures.

¹ *State of the Science on Molds and Human Health, Statement of Stephen C. Redd, M.D., Chief, Air Pollution and Respiratory Health Branch National Center for Environmental Health, July 18, 2002.*

The CDC is currently working with federal, state, local, and tribal governments to investigate and respond to mold-related problems. It has assisted the U.S. Environmental Protection Agency (EPA) Indoor Environments Division in the development of a guide for mold remediation in schools and large buildings and is developing a brief guide to mold for homeowners.

Litigation

Possible health related illnesses and property damage due to mold exposure have caused a significant increase in the number of lawsuits filed throughout the country. In 2001, a Texas jury awarded \$32 million to a homeowner for a property damage claim which the appellate court later reduced to \$4 million.² According to the May 2003 edition of *State Legislatures* magazine, this lawsuit created an insurance frenzy, and resulted in a 1300 percent increase in residential mold insurance claims over a one-year period. The article further states that, according to the Insurance Information Institute, the rise in claims helped propel \$9 billion in losses for homeowners' insurers in 2001.

Responsibility for mold related claims can include almost anyone involved in construction and maintenance of a building including general contractors, home builders, building subcontractors, architects, engineers, HVAC companies, real estate agents, prior owners, and management companies. Insurance companies become a source of recovery in breach of contract and alleged bad faith law suits.³ The ability to recover damages depends in a large part on the cause of the mold contamination. The individual affected must be able to obtain proof of actual damages.⁴

The increase in mold related claims in Florida has also caused the Florida Insurance Industry to respond. Historically, homeowners' insurance policies issued in Florida have covered mold that results from a covered peril, such as a covered water loss. For example, the costs of eradicating mold would be covered if caused by rain blown into a house during a hurricane, or mold caused by a broken water pipe. This coverage would be

provided up to the policy limits for the value of the home. However, in 2002, the Office of Insurance Regulation (OIR) approved policy form changes that limit coverage for mold to a specified dollar amount; there is a pending legal challenge by State Farm Florida Insurance Company (State Farm) to the denial by OIR of State Farm's proposed total exclusion of mold coverage.

The state insurance laws do not specifically address mold coverage. However, all insurance policy forms and changes must be filed for approval with the Office of Insurance Regulation pursuant to s. 627.410, F.S., and are subject to disapproval by OIR for the grounds listed in s. 627.411, F.S. Among other grounds, a policy form must be disapproved if it does not comport with the Florida Insurance Code, or if it contains any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.

In the fall of 2001, the Department of Insurance (now the OIR) began receiving a large influx of policy form filings by insurance companies seeking to exclude or limit coverage for mold. From October 1, 2001, through the end of 2002, the Department received between 400 and 450 filings representing between 200 and 250 insurers. On December 17, 2002, the Department entered into a settlement with Florida Farm Bureau General Insurance Company approving its policy endorsement to limit mold coverage to \$10,000 per occurrence, with a \$20,000 annual aggregate limitation. This became the standard endorsement that the Department approved for other insurers.

In November, 2001, State Farm filed for approval of policy forms that totally excluded coverage for mold, which forms were initially approved by operation of law. On June 28, 2002, the Department notified State Farm that the approval was withdrawn as being in violation of specified statutes. State Farm requested a formal administrative hearing, which resulted in a Recommended Order on June 5, 2003, by an Administrative Law Judge for the Division of Administrative Hearings.⁵

The recommended order stated that the department did not have the statutory authority to deny State Farm's

² *Mary Melinda Ballard and Ronald Allison v Fire Ins. Exchange, et al*, No. 99-05252 (Tex Dist. Ct. Travis County June 1, 2001).

³ CLE International on Mold & Fungus Litigation, October 15, 2003. *Mold Claims: A Quagmire for the Unwary*, Jean Frances Niven

⁴ *Ibid.* Introduction to Mold Claims, Ronald L. Weaver

⁵ Recommended Order by Division of Administrative Hearings in *State Farm Florida Insurance Company v. Department of Insurance*, Case No. 02-3107 (June 5, 2003).

policy endorsements to exclude mold coverage. It rejected the various department arguments for its statutory authority to deny the exclusion, including its argument based on the policyholders' "bill of rights" in s. 626.9641(1)(b), F.S., which states, "Policyholders shall have the right to obtain comprehensive coverage." The recommended order also rejected the department's argument that the endorsement excluded coverage that through custom and usage had become a standard or uniform provision in Florida and, therefore, violated s. 627.412(2), F.S., which prohibits any policy from containing any provision "inconsistent with or contradictory to any standard or uniform provision used or required to be used."

On September 3, 2003, the OIR issued a Final Order that substituted its conclusions of law for those contained in the recommended order.⁶ The OIR concluded that a policy endorsement that excludes coverage for mold is inconsistent with standard or uniform provisions used in homeowners' policies issued by State Farm in violation of s. 627.412(2), F.S., and results in a policy which does not provide comprehensive coverage as required by s. 626.9641(1)(b), F.S. However, since State Farm agreed to make available mold coverage as optional endorsements to the policy, providing mold coverage of \$15,000, \$25,000, \$50,000 and policy limits, thereby making available comprehensive coverage to the policyholder, the mold exclusion endorsement was approved conditioned upon the filing and approval of the buyback endorsement forms,⁷ and their respective rates.

As of the date of this report, the OIR has not approved the buyback endorsement forms and their respective rates filed by State Farm. Meanwhile, State Farm has filed an appeal of the Department's Final Order to the First District Court of Appeals. Both parties are hopeful that a resolution to the endorsement filings will be reached and that the appeal will be withdrawn.

Legislation in the United States

Response to the mold problem has also come in the form of new legislation throughout the United States.

Six states have passed laws in the last three years relating to mold and mold remediation. Congress is also considering the United States Toxic Mold Safety and Protection Act of 2002.⁸ The bill, in part, directs the CDC, the EPA, and the National Institutes of Health (NIH) to jointly study the health effects of indoor mold growth and toxic mold.

California passed the Toxic Mold Protection Act in 2001⁹. The Act requires the California State Department of Health to convene a task force composed in part of health and science experts, representatives from school districts, affected consumers, commercial and industrial tenants, insurers, and builders to advise the department on the development of permissible exposure limits to mold, standards for assessment of molds in indoor environments (including alternative standards for hospitals, child care facilities, and nursing homes), standards for identification, and remediation of mold. The implementation of this law depends on when the California State Department of Health determines funds are available for its implementation. To date, California's budget has not allocated any money to establish the task force to establish the standards.

Montana passed a law in 2003¹⁰ that provides for the disclosure of the potential for mold in inhabitable property with agreements for the sale and purchase of inhabitable property.

New Jersey passed a resolution in 2001¹¹ urging the New Jersey Commissioner of Health and Senior Services and the Commissioner of Community Affairs to develop methods to help residents facing an infestation of *Stachybotrys atra*, a variety of mold, to identify the mold, and develop the best strategies to address the infestation. This resolution also urged the investigation of the health effects of, and effective clean-up methods for, *Stachybotrys atra*.

Oklahoma enacted a concurrent resolution in 2003¹² that creates the Joint Task Force on Mold and Mold Remediation. The purpose of the task force is to determine how best to educate the residents of the state about mold and mold remediation, determine what standards should be applied to mold remediation, and

⁶ Final Order by Office of Insurance Regulation, *In the Matter of: State Farm Florida Insurance Company*, OIR Case No. 61873-02-CO; DOAH Case No. 02-3107 (Sept. 3, 2003).

⁷ An "endorsement" refers to the additional coverage that a policyholder buys to supplement the basic coverage in the policy.

⁸ HR 1268

⁹ SB 732, enacted October 2001, Chapter 584, Statutes of 2001.

¹⁰ H.B. 536, enacted May 2003, 2003 Mont. Laws 584

¹¹ S.R. 77, enacted May 2001

¹² H.C.R. 1011 enacted May 2003

determine how the issue of liability should be addressed for mold damage in the state. The task force is to report its findings and recommendations to the Legislature no later than February 3, 2004.

Tennessee also passed a law in 2003¹³ creating a special joint committee of the legislature to study mold abatement in public schools. The committee is to report its findings and recommendations, including any proposed legislation, to the Tennessee General Assembly no later than March 1, 2004.

Finally, Texas passed legislation in 2003¹⁴ that regulates mold assessors and remediators. It includes provisions for civil liability for mold remediation, insurance coverage on mold claims, and civil and administrative penalties.

Mold Legislation in Florida

The Florida legislature addressed concerns with mold claims and the influx of companies holding themselves out as “qualified” mold remediators by introducing three bills relating to mold remediation during the 2003 regular session.

Senate Bill 2746, introduced by Senator Bennett and cosponsored by Senator Argenziano, was referenced as the Mold Remediation Registration Act. The bill would have regulated individuals and companies who hold themselves out to the public as qualified to perform mold-related assessments and remediation. The bill provided registration requirements, training, and disciplinary guidelines for mold assessment companies, mold assessment consultants, mold remediation companies and mold training providers. Engineers, persons engaging in the business of pest control, and contractors, who were already licensed in Florida, were exempt from the provisions of the act when acting within the scope of their respective licenses. The bill passed the Senate and died in messages.

A similar bill, House Bill 1659, introduced by Representative Hogan, was also referred to as the Mold Remediation Registration Act. The bill died in the House Committee on Business Regulation.

House Bill 1433, introduced by Representatives Reagan and Rivera, would have established a task force to investigate toxic mold in structures in the state and

related potential health hazards. The bill died in the House Committee on Health Care.

Should Florida Regulate Mold and Mold Remediators?

Since mold and mold remediation are unregulated functions in Florida, it is necessary to review s. 11.62, F.S., which provides direction for the legislative review of proposed regulation of unregulated functions. In determining whether to regulate a profession or occupation, it provides that the Legislature consider the following factors:

- (a) Whether the unregulated practice of the profession or occupation will substantially harm or endanger the public health, safety, or welfare, and whether the potential for harm is recognizable and not remote;
- (b) Whether the practice of the profession or occupation requires specialized skill or training, and whether that skill or training is readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability;
- (c) Whether the regulation will have an unreasonable effect on job creation or job retention in the state or will place unreasonable restrictions on the ability of individuals who seek to practice or who are practicing a given profession or occupation to find employment;
- (d) Whether the public is or can be effectively protected by other means; and
- (e) Whether the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, will be favorable.

There have been a variety of media accounts detailing homeowners’ problems with persons holding themselves out as mold remediators and using unorthodox methods and charging exorbitant sums for testing. Without some sort of regulation or established standards, the consumer has no way to determine if the services received, or the costs paid, are reasonable. E-mails addressed to the committee have voiced concern over the lack of certification by persons holding themselves out as professional remediators. Some have expressed concern that there are individuals touting

¹³ H.B. 891, enacted May 2003, 2003 Tenn. Pub. Acts 381

¹⁴ H.B. 329, enacted June 2003

themselves as “professionals” when they have no scientific, industrial hygiene, indoor air quality, or microbiology credentials.

An internet search on mold remediation listed over 38,000 sites dealing with the subject. There are various competing interests in what the qualification and performance standards should be for mold remediators and assessors. The Florida Department of Health reports that at a recent Mold Remediation Symposium in Orlando, Florida,¹⁵ there were eight organizations providing opinions on what the qualification and performance standards should be for mold assessment and remediation.

The disputed standards relate to educational requirements, what testing and documentation needs to be conducted for the initial assessment of a possible mold infestation, the conditions under which mold should be remediated, and the licensure requirements for mold assessors and remediators.

Mold assessing and remediation regulation could provide definitive standards for assessment and remediation, qualifications for the assessors and remediators, and improved consumer protection. The formation of a task force of experts could assist regulators in establishing the qualification and performance standards for the mold assessors and remediators.

Determining which agency should license assessors and remediators is an issue that needs to be considered. It appears from professional literature, that a mold remediator can be a contractor with additional educational requirements related to how to safely and properly remediate mold. Contractors are already licensed by the Department of Business and Professional Regulation (DBPR) and any additional requirements for the contractor could easily be addressed in ch. 489, F.S.

Mold assessors might be more easily regulated by the Department of Health (DOH). The DOH and its county health departments have responded to indoor air quality issues since the early 1970's. Representatives from DOH have also expressed an interest in licensing the assessors. However, at the July 9-11, 2003 Construction Industry Licensing Board meeting, the board voted to request that any legislation requiring the

registration of mold assessment and remediation specialists assign jurisdiction to the board.

The cost of regulation and whether the overall cost effectiveness and economic impact of the proposed regulation will be favorable is difficult to determine at this point. Using the estimates from the 2003 Regular Session for SB 2746, the DBPR estimated \$1 million for the first year of implementation and \$649,857 and \$616,979 the second and third years, respectively. The DBPR stated that registration and application fees would need to be set at a level to cover the cost of regulation. However, this estimate did not account for the licensees to be divided into two different agencies nor did it account for a task force.

If the legislation were to include a task force, some indication of its cost may be derived from HB 1433, which required the DOH to appoint members to a toxic mold task force. The estimate from the DOH for the establishment of that task force was \$87,668 for non-recurring and recurring expenses.

RECOMMENDATIONS

The Legislature should consider regulation for mold assessors and remediators.

The Legislature should also consider establishing a task force to develop standards for the licensees that address educational requirements, necessary testing and documentation for the initial assessment of mold infestation, the conditions under which mold should be remediated, and the licensure requirements for mold assessors and remediators.

The task force should also possess homeowners' insurance expertise in order to address the insurance needs of Florida homeowners.

¹⁵ ACGIH and the ACGIH Bioaerosols Committee Mold Remediation Symposium: A Quest for Uniformity, November 3-5, 2003 in Orlando, Florida.