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Defense Key to Surviving Mold Wars

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Two men were hiking in Yellowstone National Park. Suddenly, a grizzly bear charged, roaring out of the brush. One hiker immediately began to take off his hiking boots and put on his running shoes. The other man exclaimed, "You fool, nobody can outrun a grizzly!" The first hiker replied, "I don't have to outrun the *bear*. I just have to outrun *you*."

Unfortunately, this old story is highly relevant for those involved in water-damage restoration and mold remediation. As discussed in my *IE Connections* article in April ("Could Our Mold Wars Be the Fungal Menace?"), I believe we are presently in the middle of Mold War I, fought over whether mold growth in buildings is a problem that must be solved. If, as I predict, Mold War I settles this issue in the affirmative, it will be immediately followed by the much bloodier Mold War II, fought over who will have to pay to fix the problem. Remediation and water-damage contractors are at great risk of being caught in the crossfire during the Mold Wars.

They are prime targets for two main reasons: 1.) They do work involving moisture and/or mold in buildings, and 2.) most have liability insurance and therefore qualify as "deep pockets."

While always a potential target, restoration and remediation contractors can make their firms less attractive targets. Implementing possible defensive measures involves complex legal issues that may vary by state. Defensive measures effective for one firm might not work at all for another, so competent legal counsel is desirable.

Some of the accusations that might be leveled against a firm include:

- It performed work improperly, thus causing workers or occupants to develop illness.
- Its improper procedures caused, allowed or contributed to growth of mold in the building.
- It caused or allowed the spread of contaminants.
- It behaved recklessly, carelessly or negligently.

Some accusations made against contractors are valid; there are water-damage restoration and mold remediation firms who do cause these problems. This article assumes the contractor is doing work properly, and so any accusations would not be valid.

Insurance

Contractors should carry adequate comprehensive general liability insurance. CGL insurance usually has a pollution exclusion, generally interpreted by the courts as excluding coverage for accidental release or spread of pollutants, even indoors.

Many remediation and restoration contractors do, and I think all should, carry a pollution rider or policy that provides coverage for these risks that are excluded from their CGL policy. Although a pollution policy can be to the contractor's advantage, a few potential problems must be addressed.

• The legal system has not definitively settled the issue of whether mold can be considered a pollutant covered by pollution insurance. A pollution policy therefore may not cover mold unless the policy specifically states that it includes coverage for such biological contaminants. This could theoretically lead to the situation of one insurer denying coverage under a CGL policy because it claims mold falls under the pollution exclusion, while another denies coverage for the same claim under the same pollution policy because it does not classify mold as a pollutant!

• Coverage is becoming very difficult to find, and the cost of such insurance is increasing by as much as 1,000 percent per year!

Restoration contractors have been sued for causing mold growth by failing to properly dry a building. Even if a pollution coverage specifically includes mold, it may not provide coverage against accusations of improper drying that resulted in mold growth. Restoration companies doing water damage work may actually be at greater risk of being sued than mold remediation firms.

Expert insurance brokers should understand this industry and the pitfalls of the mold issue. If a broker does not, then the restoration or remediation contractor may discover that the expensive insurance being funded doesn't provide full protection.

Contracts

Many contractors don't have a real contract for the work they do, especially for emergencies. Instead, they use a work authorization. But depending on state requirements and how an authorization is written, it may have little or no legal validity. It may even be illegal to do work without a properly drawn contract. If so, the property owner may be able to sue the contractor for doing the work without a contract, and the state may decide to pursue civil or even criminal penalties.

The wording of a contract should be plain, simple, easy to understand and fair to both sides. An egregiously unfair contract stands a good chance of being tossed by the court, especially when the other party signed it under emergency circumstances, often construed as limiting freedom of action.

A contract should spell out the realities of the case. For instance, one may be doing mold remediation without a pre-remediation investigation by a qualified indoor environmental consultant. This practice is quite common. Before starting such a project – in the words of Dirty Harry – "…you've got to ask yourself a question: Do I feel lucky? Well, do you, punk?"

A contract should also spell out the fact that, without an appropriate pre-remediation investigation, nobody can know how far contaminants have spread from the areas of visible mold growth in the form of microscopic spores and fragments. A waiver, designed by an attorney, whereby the customer agrees not to sue if other areas are later found to be contaminated (perhaps in a post-remediation investigation) might be appropriate.

In other words, if the property owner wants the contractor to take responsibility for the condition of the property at the completion of work, then its pre-work condition should be documented with a thorough pre-remediation investigation including appropriate sampling. The contractor should consider whether the contract should state which parties are accountable for the possible consequences of a decision not to investigate thoroughly before remediation begins.

For those doing water-damage and similar emergency work, an analogy might be helpful. When firefighters arrive at a fire, they don't know everything they need to know about the building, such as: Are there any people still in the building? Does the structure contain explosive materials? Which sections are about to collapse? They cannot wait to gather all the data that might be useful. By the time they are sure they have all the information they might need, the building may not be there anymore and anybody trapped inside may have already expired. In fire emergencies, firefighters must take reasonable action based on logical assumptions extrapolated from limited available data.

Emergency restoration personnel deal with situations that are similar in some ways. When they arrive at a water-damaged building that does not show obvious signs of possible microbial amplification, they must take appropriate steps to prevent further damage by accelerating drying. Some of these steps can spread any existing contamination.

Restorers do not have complete information about the condition of such a building on

arrival or even after a thorough visual inspection, especially with regard to whether microscopic contaminants such as mold are present. Receiving such information may take several days or a couple of weeks, and the information may end up being valid for the date the samples were taken but not for the date of receipt.

Meanwhile, if the structure stays wet, microbial growth will continue. To prevent this, immediate restorative drying must be initiated. Contractors should not be held liable if unknowable factors create problems, as long as they take reasonable action based on logical assumptions extrapolated from the limited available data about building conditions. Of course, this does not excuse contractors from ignoring indicators that there might be microbial problems or from making reasonable efforts to acquire as much information as they can.

I have no idea how to get all that into a water damage restoration contract! Consult an expert. But it is the truth, and a contract ought to reflect reality.

A serious problem that a mold remediation contract should address is the issue of "failing clearance." Many property owners and insurers assume that if the project fails to pass the post-remediation investigation it can only be because the contractor did not do the work correctly. This is one possible reason but not necessarily the only one why the project could fail. Contractors should have a clear understanding of the cleaning criteria that will be used, as well as who is responsible for paying for additional work or other resulting expenses if the project fails to pass the post-remediation evaluation.

Workmanship

Most of the time, property owners who file lawsuits do so because they feel they have been taken advantage of or cheated by the contractor. When customers believe they have been wronged, they may feel fully justified in doing whatever is necessary to get compensation.

Maintaining good customer relations is an effective way of preventing lawsuits and making the job more pleasant. The only way to build a relationship with a customer is through effective communication, which is, of course, sometimes quite difficult.

Remediation contractors should also consider the following questions: Is your work in compliance with published industry standards, such as IICRC S500 for water damage restoration? For remediation, do you comply with ACGIH Bioaerosols: Assessment and Control and EPA's Mold Remediation in Schools and Commercial Buildings? The upcoming IICRC S520 Mold Remediation Standard will be an incredible resource for remediators.

Remember the "reasonable and prudent person" rule. The law does not require you to be psychic and know what is inside a wall without looking. But if there are indications on the outside of a wall that a moisture problem exists inside it, a reasonable and prudent person will not open that wall without adequate provision to prevent the escape of any contaminants.

Disclosure

A principal reason contractors are sued is "failure to warn" or "failure to disclose." The law may require a contractor to inform certain parties, such as property owners, of any information to which they have a right. This might include information affecting the value of the property or involving possible hazards.

Occasionally, some parties involved may expressly or implicitly communicate that they don't want the contractor to disclose certain information to other parties. This is a complex issue with both legal and ethical implications; when this happens, contractors should learn their legal obligations and carefully implement them. They must also follow their consciences regarding ethical issues.

Documentation

Contractors' attempts at self-defense are worthless if they aren't documented contemporaneously and adequately. In the cleaning, restoration and remediation industries, documentation has traditionally varied from poor to nonexistent. In the litigious climate of the Mold Wars, this is a great way to destroy a contracting business.

It would be impossible to list all the documentation a contractor might need. However, the principle regarding documentation is to be able to reconstruct important events involving the project at a later date.

Conclusion

I believe that when the Mold Wars are over, procedures (financial and otherwise) will be in place for fixing moisture/mold problems in buildings. Billions of dollars of work will begin. Those now learning how to do remediation in a safe, cost-effective manner will get most of this business.

Contractors cannot stop being targets but can make their companies difficult targets. They must put on their running shoes and obtain proper insurance, structure their corporations appropriately, use good contracts, communicate more effectively with customers, do all work in compliance with industry standards, disclose everything they should, and document everything they do.

Predatory attorneys are likely to pursue companies that are not difficult targets. Contractors who implement defensive procedures for their businesses now can be among those surviving the Mold Wars and profiting greatly in the post-war world.