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Does SB800 contemplate mold contamination?

By **DOUGLAS H. BARKER** and **JEFFREY T. ORRELL**

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Molds may be spreading throughout the damp, dark crevices of your home, feeding on wood and releasing their spores to dance with your oxygen.

They manifest themselves as symptoms of cold and allergy. They can cause shortness of breath, itchy eyes, skin rashes and fever. They can damage your residential structures.

Unfortunately for builders in San Diego, these molds are simultaneously fueling a homeowner's litigious weaponry. Deemed by many as the next asbestos, residential molds have created a new cause of action.

This article considers residential mold claims in the realm of construction defects. Specifically, whether a builder is susceptible to mold infestation claims under California's new construction defect law, Senate Bill 800 Civil Code § 895 et. seq.

The construction defect arena seems ripe for claims of harmful mold exposure. Mold thrives in conditions that are warm, damp and humid. Clearly, defects such as leaking roofs, tiles, windows and faulty plumbing provide a catalyst for mold growth. SB800, however, specifically limits a plaintiff's causes of action to certain types of defects. Mold is not enumerated. The question then becomes, are mold exposure claims impliedly incorporated into SB800? Arguably, the answer is yes, based on three separate theories.

- First, SB800 requires that a structure be built "so as not to impair the occupants' safety..." A cause of action arises if the structure contains health hazards, as determined by a duly authorized health agency. Civil Code section 896(g)(15).

Many agencies -- notably, the California Department of Health Services and the Environmental Protection Agency -- have issued warnings concerning the risks of moldy indoor environments. Conceivably, if a new structure invited water to accumulate, thereby allowing mold to thrive, the structure would be hazardous and defective under section 896(g)(15). Traditionally, the burden has been on the homeowner to prevent and remove mold accumulation. Even if the homeowner takes the appropriate cleaning steps, mold growth will recur unless the source of moisture is accounted for. Leaky roofs and dripping pipes provide a perpetual breeding ground. The homeowner disturbs the contaminated materials with each cleaning, and is thus placed at a greater risk of exposure.

- Second, SB800 requires certain structural systems -- such as windows, patio and deck doors, foundation slabs, exterior sidings, walls and tiles -- to prevent water from entering and causing damage to other structural components. Civil Code section 896(a)(3)-(18).

Molds feed on organic matter such as wood. DHS has warned that with time, unchecked mold can cause serious damage to the structural elements of homes. Thus, if water leaked through the kitchen tiling system, thereby allowing mold to develop and feed on a wooden foundation beneath, a defective condition would likely exist under SB800. In this instance, the builder might be liable on two counts -- one, for allowing "unintended water" to enter the structure, and two, for causing damage to other structural components. The damage award would likely increase.

- Finally, the Legislature injected a catchall provision. California lawmakers intended to create a comprehensive list of defects to address every function or component of a structure. Civil Code section 897.

In the event that an unanticipated claim arises, section 897 states that any other defect that causes damage is actionable. Clearly then, any defect that allows for wood-consuming mold to propagate and multiply is covered statutorily.

This analysis begs two questions. First, if the Legislature intended mold to be an actionable construction defect, why isn't mold specifically delineated within the protracted list of statutory defects? Second, if the Legislature intended for SB800 to address every possible problem causing damage to a home, why waste ink on a nonexclusive list?

At the end of the day, this is not all grim for the builder. The pre-litigation procedural requirements of SB800 provide advantages, including potential cost savings, and the possibility of avoiding litigation altogether. A homeowner is now required to give notice of a defect to the builder, and the builder has an absolute right to repair before the homeowner can sue. Civil Code section 910-917.

Because mold is a health risk, a homeowner has an incentive to bring an early claim for water infestation, taking advantage of free repairs and preventing mold from reaching unsafe proportions. The builder, in the interest of avoiding construction defect litigation and potential mold-related injuries to the homeowner, has an incentive to make such repairs and stop mold at its source. Furthermore, the builder will only need to spend the dollars necessary to mitigate the defect. If the repair efforts are competently performed, the builder will not be susceptible to unreasonable civil penalties. Thus, as to all construction defects -- menacing mold included -- SB800 could substantially lower the cost of the homeowner/builder relationship.

Barker is the managing partner of Barker Law Group APLC. He can be contacted at doug.barker@sddt.com. The information in this column is intended to be informational only and does not constitute legal advice.