

# “And In This Corner - MOLD”

An Excerpt from *The Mold Manual*

By:

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## I. MOLD PROBLEMS

Mold is an unusual problem because it can occur under so many different circumstances. A small amount of mold can result in large amounts of property damage, extra expense, and possibly bodily injury. The effects of mold look and sound like a malingerer's complaint, but science has not precluded the possibility that serious health problems can arise from exposure to highly concentrated levels of certain types of mold. The issue is smeared over every media outlet from the most respected to the most dishonored.

## II. THE TYPICAL MOLD SCENARIO

First, there is some type of water intrusion, whether it be by plumbing, construction defect, or the extinguishment of fire. Next, there is some type of adjustment where a company prepares an estimate for the loss. The building owner wants what appears to be a great deal more money than what is necessary, so the adjusting company and the building owner finally negotiate a compromise which is mutually unappealing to each party. Then because all of the water damage is not found or addressed, mold begins to grow in the area that is not addressed. Additionally, it may be possible that mold can then spread throughout a building as the mold "blooms" and settles in moist areas not related to the original incident.

The alleged mold loss process begins with the building owner finding blue/green, green/black,

or black mold in the walls or in sub-flooring. The building owner then logs onto the internet and punches in the word "mold" and has the opportunity to read horror stories of the effects of mold in buildings and the millions of dollars that have been awarded by jurors when insurance companies have not adequately responded to mold problems.

The result - mold litigation.

## III. RELEVANT LOSSES

There are two types of losses that are relevant. The first is a simple water damage loss. The second is a loss where mold is already present.

### A. Water Intrusion Losses

There are infinite causes of water intrusion. Some of the more common are: 1) leaking roof; 2) sewer backup; 3) shower pan leakage; 4) plumbing leaks; 5) fire extinguishment; 6) weather; 7) defective construction; and 8) poor maintenance.

The initial steps in addressing water intrusion losses are terminating the source of the moisture, an immediate and thorough investigation by a competent contractor, and thorough cleaning and/or drying of the affected area. Contractors should be careful to investigate all areas that could have been affected by the water event. This may include water that has moved underneath walls, soaked into studs, flooring, floor joists, pooled under the house, or saturated wallboard and insulation. Saving small amounts of time and/or

money on the initial investigation may cause great pain and expense in the future.

During water intrusion evaluations, one should be very energetic in taking notes and photographing the affected and unaffected areas. Document all the areas investigated, showing that the investigation went well beyond what could be seen. It also makes sense to have very thorough notes on which areas need to be addressed or investigated further.

#### B. Mold Losses

The second type of loss is where mold already exists. Finding the existence and extent of the water intrusion that precipitated the mold growth is probably the most important function of the initial investigation. If it appears mold is truly present, depending on the amount of visible mold, you should probably call a testing contractor who can: 1) confirm whether abnormal levels of mold are present; and (2) prepare a remediation plan if necessary.

If a biological expert and report is necessary, the report must document the concentration, the type, and the current stage of the mold. These experts customarily are also responsible for the development and preparation of a mold remediation plan. These experts (CIH or microbiologists) are also valuable for opinions on the possible causes of the moisture prompting the mold. The size of the loss may warrant inspections by construction and/or HVAC experts to verify the causes of the moisture necessary

for mold growth. One must at least consider testing cloth furniture<sup>1</sup> and clothing immediately.

It is important to find mold experts who have some sense of reason when it comes to a response to mold problems. This type of reasoning is most valuable in the initial testing/remedial planning expert since he controls the overall response. An expert overly interested in an inexpensive fix may be more expensive than someone who will panic and tear the building down.

#### IV.

#### IDENTITY OF QUALIFIED CONTRACTORS

Depending on recognized names in the steam cleaning business is probably not a good plan. The best way to qualify mold remediation contractors is to seek help from mold investigation experts. Here are some guidelines for someone hiring remediation contractors:

#### Qualifications

1. Obtain a statement of qualifications.
2. Obtain a list of previous projects and the corresponding employers.
3. Request a certificate of insurance.
4. Inquire as to certification of workers and the company. There are numerous organizations in the industry that certify professionals such as The Institute of Inspection, Cleaning and Restoration Certification ([www.iicrc.org](http://www.iicrc.org)). Research the certification and the certifying body.

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<sup>1</sup> There are opinions out there that once furniture is contaminated it is not possible to restore it. I doubt this is true.

5. Inquire as to other companies they are working for and their contacts at those companies.

### Procedures

6. Inquire into their systematic approach to inspection of water losses and mold contamination claims in order to confirm the viability of the biological expert's remedial plan.
7. Inquire as to what type of containment procedures/guidelines they have in place.
8. Inquire as to their philosophy and approach to source control.
9. Inquire into how they will assure there will not be a reoccurrence of mold.

### Equipment/materials

10. Inquire into which instruments they use to evaluate or monitor water damage.
11. Have them describe the performance capabilities of the equipment they are recommending.
12. Discuss how their restoration program incorporates available resources such as existing HVAC systems.
13. Obtain lists of chemicals they are going to use on the project.
14. Obtain MSDS material safety data sheets for all chemicals to be used on the project.

### Communication/responsiveness

15. Inquire into how often they will communicate the progress of their work to the building owner and the adjuster.
16. Inquire into the kind of documentation routinely maintained and provided to property owners and insurance carriers.

Every contractor who owns a van and a carpet cleaner thinks he is a mold remediation expert. I strongly suggest that you thoroughly research any contractor upon which you must depend or with whom you must work.

## V.

### COMMUNICATION WITH BUILDING OWNERS

Communication between the expert, the contractor, and the building owner is key to managing a serious mold investigation. Communication to the building owner as to what is found, the seriousness of the type of mold found, and which remediation steps will be taken is imperative. Contractors, as always, should be very honest with their building owners. Mold can be very scary for building owners and possibly for good reason. Constant well written and informative reports to the building owner that are created with the help of the expert will go a long way toward maintaining control in these cases.

## VI.

### TEXAS LAW ON INSURANCE COVERAGE FOR MOLD PROBLEMS

There is very little case law on insurance coverage for mold claims outside of the homeowner's context. Whether mold is covered under a Texas homeowners policy (Form B) became a little more interesting after the Dallas Court of Appeals issued *Home Insurance Co. v. McClain*, 2000 WL144115 (Tex. App -- Dallas 2000) and the Austin Court of Appeals issued *Harrison v. USAA Ins. Co.*, 2001 WL 391539 (Tex. App.-Austin 2001).

As these two cases point out, the most fertile area for controversy is the ensuing loss provision found in most "mold exclusions" contained in property or first party policies. A quick look at the policy terms of a standard Texas homeowner's policy are necessary for the discussion.

A. Granting Language

HOB Form B insures "against all risks of physical loss to the property" that are not excluded.

B. The Exclusion

The relevant exclusion found in the Exclusions section of the policy is section (f), which states that:

- (f) We do not cover loss caused by:
1. Wear and tear, deterioration or loss caused by any quality in property that causes it to damage or destroy itself.
  2. Rust, rot, mold or other fungi
  3. Dampness of atmosphere, extremes of temperature
  4. Contamination
  5. Rats, mice, termites, moths or other insects.

**We do cover ensuing loss caused by collapse of the building or any part of the building, water damage, or breakage of glass which is part of the building if the loss would otherwise be covered under this policy.**

C. The Ensnuing Loss Provision

The paragraph shown above (that immediately follows the enumerated list of causes of loss not covered in that section) is the ensuing loss provision, and is the subject of great disagreement.

Texas case law has defined "ensuing loss" to mean a "loss which follows as a consequence of some preceding event or circumstance" *McKool v. Reliance Ins. Co.* 386 S.W.2d 344, 345 (Tex. App --

Dallas, 1965, writ dismissed). The issues relating to this provision will be explored below.

1. *The majority view in Texas on the application of the ensuing loss provision.*

Texas Courts have held that for the ensuing loss provision to provide coverage, the insured's loss must be the result of water damage caused by the uncovered losses enumerated in subsection (f).

It appears the first time this issue was ruled upon in a mold setting was in *Aetna Casualty Insurance Co. v. Yates*, 344 F.2d 939 (5<sup>th</sup> Cir. [Tex] 1965). *Yates* is consistent with the idea that the ensuing loss must be caused by water damage. And the analysis seems to track the majority analysis, despite a few sentences in the opinion that make the Court's logic questionable. The facts in *Yates* were that the insured's flooring rotted because the air trapped in the crawl space under the flooring was constantly cooled by their air conditioning system, which caused condensate to form on the floor materials.

The plaintiffs argued that the damage was really water damage, and not "rot." The court stated that "[w]e do not think that a single phenomenon that is clearly an excluded risk under the policy [rot] was meant to become comprehensible because in a philosophical sense it can also be classified as water damage." This answered the question of whether "rot" (and presumably mold) were to be considered water damage. But it did not address the fact that the water damage needed to follow or ensue one of

the excluded causes of loss enumerated in the exclusion.

The court in *Daniell vs. Fire Ins. Exchange*, 1995 WL 612405 (Tex. App. - - San Antonio 1995) puts a fine point on the issue. In the *Daniel* case, water found its way between aluminum siding and wood siding, eventually causing the wood siding to rot. The court held that since the Plaintiffs pled that the rot was caused by water damage, and not that the loss was water damage caused by (and thereby after) rot, there was no coverage. *Id.* at \*2.

The same reading of the ensuing loss provision was last announced in *Harrison v. USAA Ins. Co.*, 2001 WL 391539 (Tex.App.–Austin 2001).<sup>2</sup> The loss in that case was that the wood around the insured's bath tub was rotted. The Court pointed out that the rot followed the water damage, which is the reverse of the causation required by the ensuing loss provision. *Id.* at \*2. "In other words, the ensuing loss provision covers water damage that results from, rather than causes, rotting." *Id.* citing *Lambros v.*

*Standard Fire Ins. Co.*, 530 S.W.2d 138, 139 (Tex.Civ.App. - -San Antonio 1975, writ ref'd.).

2. *The minority view in Texas on the ensuing loss provision.*

The Dallas Court of Appeals had issued earlier rulings in *McKool* and *Merrimack Mutual Fire Ins. Co. v. McCaffree*, 486 S.W.2d 616 (Tex.Civ.App. - -Dallas 1972) consistent with the majority position just discussed. The court appears to have abandoned consistency in *Home Insurance Co. v. McClain*, 2000 WL144115 (Tex. App -- Dallas 2000).

In *McClain*, the insured's roof leaked causing framing members to become wet and the pooling of water in the crawl space under the house. The mold exclusion and the ensuing loss provision were the policy terms at issue.

The carrier argued what seemed to be the holdings in *McKool* and *McCaffree* . . . i.e. "the ensuing loss exception covers only water damage which follows or results from mold or fungus damage". *McClain*, 2000 WL 144115 at 1. The seemingly incongruent result of the *McClain* case is foreshadowed by the second paragraph of the opinion where the court states:

"Home ignores that the ensuing loss provision is not limited by the mold and fungi exclusion and, although the water damage was not the result of the mold and fungi, it was the result of the defective and deteriorated roof. Thus the application of the mold and fungi exclusion is dependent on the

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<sup>2</sup> Three non-mold cases are also instructive on the proper application of the same ensuing loss provision found in other exclusions in the policy. *McKool v. Reliance Ins. Co.*, 386 S.W.2d 344 (Tex.Civ. App. 1965)(damage to pool caused by excluded condition of "extremes of temperature", if water had entered the cracks caused by extreme temperature and caused damage it would be covered); *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138 (Tex. App. -- San Antonio, 1975, writ granted, order set aside, April 21, 1976, writ ref'd, (April 21, 1976 on other issues)(ensuing loss provision did not provide coverage because the structural damage (excluded and enumerated event) was caused by the water damage, not the opposite). ; *Jiminez v. State Farm Lloyds*, 968 F.Supp. 330 (W.D. Tex. 1997)(similar to *Lambros*).

application of the ensuing loss provision.”

In other words the Court seems to be saying that the ensuing loss provision is not giving back coverage taken away by the mold exclusion, but is actually an oddly placed granting provision for coverage for water damage. The court ignores the physical placement of the ensuing loss provision.

For the first time in Texas, the *McClain* court determines that mold and fungi are the ensuing loss caused by water damage. This can be seen in the Courts description that to “be an ensuing loss caused by water damage, the mold and fungi would necessarily have to follow or come afterward as a consequence of the water damage”. *Id.* at 3. The *McClain* Court held that “the water from the leaking roof pooling in the crawl spaces caused the mold and fungi.” *McClain*, 2000 WL 144115 at 1. So was the water damage the pooling of water? So is the moist environment (air or framing members) what caused the mold? All mold requires a moist environment. Therefore it seems the *McClain* court has interpreted the ensuing loss provision to swallow the mold exclusion completely.

The *McClain* Court acknowledges *McCaffree* and *McKool*, while ignoring the holdings. It is not possible to distinguish the *McClain* case from the *McCaffree* case, an earlier opinion from this same court holding that a claim arising from wood rot around a shower pan was caused by fungi and not water damage and, therefore, not covered. *McCaffree*, 486 S.W.2d at 619. The Court tries to

explain the lack of conflict in the holdings by stating that the facts in *McCaffree* did not support the conclusion that the fungi was caused by water damage. That is a hard argument or justification to believe.

I agree with the *McClain* court that there could be a set of facts where mold damaged property was covered, just not the facts in *McClain*.

## VII.

### UNANSWERED QUESTIONS

Unanswered issues abound.

First, is mold “water damage”? It is not clear whether the *McClain* court believes it is. The Fifth Circuit in *Yates* says it is not. If it is, the mold exclusion becomes even more confusing.

Second, is the mere existence of mold “physical loss or damage”? The mold exclusion in the HOB defines mold or fungus as an excluded cause of loss, a destructive force like rot and rust, and does not exclude mold as a damage itself. Surely nobody believes that the existence of a small amount of rust on a pipe is a loss covered under a property policy. Why should the existence of mold be covered?

Third, does “ensuing loss” mean the water damage and all damage that is in the unbroken chain of causation from the water damage, including mold? The *McClain* Court seems to make this conclusion.

Fourth, is the ensuing loss provision an exception to the exclusion, or new granting language unlimited by the enumerated excluded

causes of loss directly above it? Why would the underwriters place the same provision in more than one exclusion if it is not directly related only to the subject matter of the exclusion?

Fifth, if covered water damage is followed by mold, is the mold covered? This seems to be the position of the Texas Department of Insurance as stated in the recently filed Petition for Adoption of Amendatory Mandatory Endorsements, Mandatory Offer Endorsements, and Amendments to the Texas Personal Lines Manual Rules to Modify Coverage for Mold and other Fungi; and Amendments to the Texas Statistical Plan for Residential Risks.

### **VIII.**

#### **CONCLUSION**

Mold is just one more reason to make sure investigations are very thorough and well documented. Do not hold yourself out as a mold expert if you are not. In the next report you write, you should at least consider mentioning that: 1) you are not a mold expert; 2) mold could be present at the site; and 3) if mold is present in the building, the owner should seek the services of a qualified mold expert.

Mold losses are very common and will continue to be a problem. Unlike asbestos, we will not run out of buildings that contain mold. The insurance industry and the courts are currently struggling with issues concerning insurance coverage, so there will be a great deal of litigation involving insurance coverage for mold.