

A Builder's Guide to Handling Mold Claims and Litigation



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OF HOME BUILDERS



A BUILDER'S GUIDE TO HANDLING MOLD CLAIMS AND LITIGATION

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I. INTRODUCTION

Mold has existed for millions of years in relative obscurity. This is no longer the case. In the last several years – fueled by large jury verdicts and intense media attention – mold has taken center stage in construction defect litigation. Cases are being filed against large and small-scale builders across the nation. Newspapers and television stations are reporting on new claims and new cases. Health officials are studying the medical issues and certain legislators are attempting to create standards.

Where moisture and a food source exist, mold is likely to be found. In certain circumstances, new homes offer the perfect environment for mold growth. For example, where poor construction practices result in roof leaks or window leaks, moisture will enter the home. This moisture is likely to drip onto ceiling tiles and drywall (a perfect food source) and mold is likely to grow. Although the health effects are not certain, some molds can make people sick. This possibility has been enough to attract widespread attention and encourage the filing of numerous lawsuits.

Knowing that such claims might be made, there are numerous things you can do to minimize your potential liability in advance. As discussed in the first part of this guide (minimizing mold claims at pages 3-5), you can minimize your potential liability by constructing homes that manage water and moisture effectively. You can also minimize your potential liability by educating the homeowner and making sure that he or she knows that proper maintenance is the key to moisture control and prevention. Finally, you can minimize your potential liability through well-drafted contracts.

Of course, you will still have to deal with mold claims by concerned homeowners. Having a response plan will prove invaluable. As discussed in the second part of this guide (investigating mold claims at pages 5-8), a well-planned response includes data collection, site investigation, and possible sampling and testing. By promptly investigating each claim, you will quickly determine whether a mold problem exists, whether the mold problem is severe, and whether you are in any way responsible.

Once your investigation is done, you will be in a position to determine whether mold remediation is necessary and whether you should participate in the process (remediation refers to the process by which mold is cleaned-up and removed from the home). As discussed in the third part of this guide (cleaning up water-damaged materials and mold at pages 9-14), there currently are no official standards for mold remediation. Nevertheless, recognized guidelines concerning the remediation process do exist and are identified and summarized for your review and consideration.

There are instances where you simply cannot avoid a lawsuit. To better defend yourself, you need to understand the litigation process. The fourth part of this guide (litigation issues at pages 14-20) discusses the types of legal claims that plaintiffs are likely to bring (like negligent construction of the home) and the types of damages that plaintiffs are likely to seek (like the cost to repair mold damaged property). It also provides guidance on: (1) retaining qualified attorneys

and experts; (2) investigating a litigated case; (3) recognizing and asserting various legal defenses; (4) challenging the plaintiff's medical case; and (5) filing claims against other potentially responsible parties (like the landscaper who failed to direct water away from the home's foundation).

Finally, you must always consider insurance coverage. As discussed in the last part of this guide (insurance coverage for mold claims at pages 20-21), you should always put potentially responsible insurance carriers on notice of a claim. By doing so, you will preserve whatever coverage rights you might have. By failing to do so, you might lose coverage altogether.

II. ALLEGED HEALTH EFFECTS

Everyone is exposed to molds. Exposure is through inhalation of mold spores or skin contact with mold contaminants. Currently, there are no standards concerning "safe" or "unsafe" levels of exposure. The effects on health – if any – depend on the type of mold, the level of mold exposure, and the sensitivity of the person exposed. Some individuals experience no reaction after mold exposure, while others feel ill. The most common reaction is allergic. Allergic reactions include: watery eyes, runny nose, sneezing, nasal congestion, skin irritation, coughing, wheezing, sore throat, and headache. In addition to allergic reactions, some people complain about more subjective symptoms like chronic fatigue and memory loss. Others claim to suffer from serious infections and life threatening disease. For more detailed information on the alleged health effects of mold, consult the websites identified in the Appendix.

III. CAUSES OF MOLD GROWTH

You cannot prepare yourself for claims handling or litigation without first understanding the causes of mold growth. Mold growth occurs when the following elements are present:

- **Moisture.** Moisture can result from roof leaks, window leaks, broken pipes, high humidity, condensation, and other causes. Moisture is the key requirement for mold growth.
- **Nutrients.** Organic nutrients serve as a food source for mold. Building materials like drywall, ceiling tiles, wallpaper, and lumber may supply the necessary organic nutrients. Paint, insulation materials, carpet, fabric, and upholstery also support mold growth.
- **Mold spores.** Mold spores are everywhere. They exist indoors as well as outdoors and can never be eliminated entirely.
- **Temperature.** The best temperature for mold growth is between 40°F and 100°F. This temperature is given in most homes.

- **Time.** If the foregoing elements exist, mold will begin to grow in 24 to 48 hours.

The only factor that can be controlled is moisture. If the home is kept dry, mold will not grow. Accordingly, all efforts should be focused on: (1) constructing a home that manages water and moisture effectively; and (2) notifying homeowners about the need to keep their homes dry.

IV. PRE-LITIGATION ISSUES: THINGS YOU CAN DO TO MINIMIZE YOUR LIABILITY FOR MOLD CLAIMS

A. Proper Construction

Common sources of moisture include: water leaks through roofs and windows; water leaks from faulty piping; water leaks through basement foundations; water associated with poor ventilation practices; water associated with condensation; and water associated with wet building products. To prevent moisture problems from occurring, builders should:

- Use quality building products: especially with respect to siding, shingles, windows, and pipes.
- Carefully install roofs and windows and make sure that roofs and windows are properly flashed.
- Reduce the possibility of condensation on cold surfaces (like windows, pipes, and exterior walls) by adding proper insulation.
- Make sure that rain water drains away from the building through proper landscaping and adequate downspouts.
- Make sure that building materials like wall board are dry at the time of installation.
- Make sure that HVAC systems are properly designed and working.
- Make sure that moisture-generating activities like showers, dryers, and cooking appliances are vented to the outside.

In addition to building a home that manages water and moisture effectively, you should document your efforts to do so. For example:

- Your project manager should keep a log that describes generally the efforts taken to build a home that manages water

and moisture effectively (e.g., foreman could note that all windows were properly flashed before siding was put up).

- Your project manager should keep a log that describes generally the precautions taken during construction to keep building materials dry (e.g., foreman could note that drywall was stored indoors until it was ready for use and the roof and exterior walls were up before the drywall was installed).

By documenting your efforts to build a home that manages water and moisture effectively, you will be better prepared to defend yourself in the event of future litigation.

B. Information Disclosure Statement

Where homeowners fail to maintain their premises, moisture problems can occur. To avoid responsibility for homeowner neglect, builders should develop and provide homeowners with an information disclosure statement. By providing homeowners with information about the relationship between proper maintenance and mold growth, homeowners will better understand their environment and their own obligations. An information disclosure statement should be given to homeowners before the sale and should be incorporated by reference into each sales agreement. Although the wording can vary, disclosure statements should contain the following:

- General information about mold and the potential for mold growth in homes (like the fact that moisture is the key to mold growth).
- General information about potential moisture sources (like the water in air conditioner and refrigerator drip pans).
- Recommendations for controlling and preventing moisture and mold growth in homes (like the need to fix leaky pipes, fix roof leaks, and check around sinks and bathtubs for signs of standing water).
- Recommendations concerning other sources of information (like the Environmental Protection Agency or local health agencies).
- A waiver of liability for mold growth caused by the homeowner's failure to follow the builder's recommendations.

To draft an effective information disclosure statement, consult an attorney with knowledge of mold claims and mold litigation. For your reference, a sample information disclosure statement is included in the Appendix.

C. Contractual Limitations of Liability

Where mold growth occurs, property owners will seek a variety of monetary damages. In addition to property damage claims, homeowners might seek recovery for "consequential damages" like moving costs, hotel costs, lost wages, lost opportunities, etc. To avoid these types of claims, each sales agreement should contain provisions that minimize the builder's liability for these costs. Experienced counsel can help you draft such provisions.

D. Indemnity Agreements

Builders typically work with subcontractors. Every time a builder does so, the builder should insist upon an indemnity agreement in which the subcontractor agrees to defend and indemnify the builder for mold problems arising out of the subcontractor's work. Experienced counsel can draft such agreements.

E. Subcontractor's Insurance

If you employ subcontractors, obtain a copy of their insurance policies to make sure they are adequately insured and to determine whether the policies contain any relevant coverage exclusions (like a mold exclusion). In addition, ask your subcontractors to list you as an "additional insured" on their policies. This will give you an extra level of protection if their work is defective. If you need help with these issues, contact experienced counsel.

V. PRE-LITIGATION ISSUES: RESPONDING TO HOMEOWNERS AND INVESTIGATING CLAIMS

Homeowners will often call to report a leak or moisture problem. Because moisture is the key to mold growth, all such calls should be taken seriously and dealt with promptly. Although not all moisture problems will result in mold growth, the failure to respond promptly might cause a problem where none exists or make a bad situation worse.

A. Speaking With Homeowners – Think Before You Speak

In most cases, the homeowner will call you directly to report a moisture or mold problem. For most homeowners, this will be a stressful situation. The more organized you are, the more effective you will be. If you anticipate numerous calls, you should designate one person to handle the situation. This person should take all of the calls seriously and employ a consistent approach to each matter. In every instance, your designated representative must think before speaking or writing. Hasty statements concerning causation and fault will constitute admissions that can be used against you (even if your representative is wrong). Accordingly, if you are called to investigate a homeowner's complaint, it is better to simply investigate the situation and let the homeowner know that you will get back to them after you have had the opportunity to think about what you saw and formulate a proper and reasoned response. Similarly, always assume that your files will be discoverable and admissible in any potential court action. As such, make sure that your documents are thoughtful and accurate.

B. Investigation of A Mold Claim

1. "Spoliation of Evidence" Issues

After receiving notice of a possible mold claim, you should immediately request an opportunity to inspect the property. In addition, you should tell the homeowner to preserve the condition of the property and to refrain from remediation until you have completed your inspection. If the owner ignores your request and remediates before you inspect, you may have a "spoliation of evidence claim" in any subsequent lawsuit (spoliation of evidence refers to the destruction of evidence needed for trial before the defendant has the chance to inspect it). In some cases, courts will dismiss cases where plaintiffs have destroyed evidence in the face of a request to inspect. In other cases, courts will refuse to dismiss the case, but will limit the evidence that plaintiff is permitted to introduce at trial. Still, it is impossible for homeowners to preserve evidence for long periods of time, especially if there is a chance of further contamination. Accordingly, you should inspect the property immediately.

Significantly, these same rules apply to you. If you are going to inspect the property, you should notify other potentially responsible parties and insurance carriers. If evidence is destroyed before other parties have the opportunity to inspect and investigate, courts will often preclude you from introducing that evidence in a subsequent trial. In some cases, courts may even dismiss your claims. Accordingly, put other potentially responsible parties and insurance carriers on notice of a moisture or mold claim as soon as possible and tell them to conduct their inspection before remediation occurs. By putting other potentially responsible parties and insurance carriers on notice before remediation occurs, they cannot complain if they fail to act.

2. Methods of Investigation

After receiving notice of a mold claim, you must investigate as soon as possible to determine whether a mold problem actually exists, whether it can be remedied, and whether you are in any way responsible. The intensity of the investigation will depend upon the scope of the moisture or mold problem and the severity of the homeowner's alleged illness (if any). A proper investigation involves the following steps: (a) site investigation; (b) data collection; and (c) sampling and testing.

(a) Site Investigation

You should immediately inspect the home. A thorough visual inspection of the home is critical. During the inspection, you should be looking for visual signs of mold and visual sources of moisture. By investigating the site, you should be able to identify the moisture problem and suggest an appropriate remedy. If you cannot, you should consider hiring an expert. If you elect to hire an expert, you should have your attorney do the hiring in order to protect your communications (if your attorney hires the expert, your communications should remain confidential and subject to the attorney-client privilege). Your site investigation can include:

- A description of the building and the environmental conditions.

- A description of all water/moisture problems (e.g., roof leak, window leak, broken pipe, etc.).
- A description of the HVAC system and the identification of any problems.
- A description of any construction defects or building material defects associated with moisture intrusion and mold growth.
- A description of all non-construction related sources of moisture (like moisture associated with improper homeowner maintenance).
- A description of other possible contaminants (e.g., emissions from a nearby factory or insect droppings).
- The identification of all water damaged materials (e.g., wallboard, floorboards, ceiling tiles, etc.)
- The identification of all areas where mold is present.
- The identification of all living spaces where the relative humidity exceeds 60%.
- The identification of all persons who provided information.

It is also necessary to look for and identify non-construction related sources of moisture. Although moisture can be caused by construction deficiencies like improperly constructed roofs or improperly flashed windows, moisture can also be caused by inadequate homeowner maintenance or other interior sources like houseplants, leaky faucets, and overflowing drip pans. Because these sources are not the responsibility of the builder, they should be looked for in every case and properly documented where they exist.

During the site inspection, your employees should take precautions to protect themselves from exposure to potentially toxic mold spores. To do so, your employees should consider wearing protective gear such as dust masks, rubber gloves and goggles (more detailed information on precautionary measures can be found in the website information identified in the Appendix). Employees with allergies, respiratory problems, or other health concerns should not be used to investigate mold claims. If your inspection reveals that mold growth is extensive or especially severe, you should think about hiring a certified industrial hygienist to complete the inspection (a certified industrial hygienist is trained to recognize, evaluate, control and/or eliminate health hazards).

Also, never tear apart walls, ceilings, or floors during an inspection. If you do, you could expose yourself and others to excessive levels of spores and spread those spores to other parts of

the home. If you need to look behind walls, above ceilings, or underneath floors, carefully remove a small portion of the material and use a "boroscope" (which allows you to look into hard to reach places). If you have concerns about the extent or severity of the growth, you should hire a certified industrial hygienist.

(b) Data Collection

The next step in any moisture or mold investigation is data collection. Data collection should focus on any personal injury component and any property damage component.

(i) Personal injury component

In cases involving personal injury, immediately contact your insurance carrier and demand an investigation. Among other things, your insurance carrier should conduct a thorough investigation of the homeowner's own background. Exposure to mold and other irritants can and does occur in numerous settings. Accordingly, it is important for your insurance carrier to ask about the homeowner's living and working conditions to determine whether the homeowner's alleged injury is related to mold or some other irritant in or outside the home.

(ii) Property damage component

In cases involving property damage, you also should contact your insurance carrier and demand an investigation. A proper investigation requires you or your insurance carrier to: (1) review the original design plans; (2) find out everything you can about water intrusion and moisture problems (both past and current problems); (3) obtain the homeowner's version of the alleged moisture and mold problem; and (4) obtain copies of any studies or tests done by any experts or inspectors.

(c) Sampling and Testing

Sampling is done primarily to determine whether mold is present, the type or types of mold present, and the amount of mold present. In most cases, if visible mold growth exists there is no need to sample it. Just remove it. However, if mold growth is suspected but cannot be seen, the homeowner is sick, or litigation is imminent, sampling should be considered. In these instances, sampling might reveal that allegedly dangerous mold toxins are not even present or that indoor mold concentrations are no higher than outdoor mold concentrations (and thus not related to the builder's construction practices).

Sample types include air samples (collected by using an air sampling machine), surface samples (collected by wiping a cotton swap across building surfaces), and bulk samples (collected by removing chunks of building materials). Proper sampling requires training and experience. To make sure that your sampling is done correctly, you should retain a certified industrial hygienist. Testing by an inexperienced person will likely result in useless data.

If sampling is done, the samples should be tested by a qualified microbiological laboratory. An unqualified laboratory can produce inaccurate results. For more detailed information on sampling and testing, consult the websites identified in the Appendix.

VI. PRE-LITIGATION ISSUES: CLEANING UP WATER DAMAGED MATERIALS AND MOLD

A. Resolving Claims

After your initial investigation, you should consider whether the claim can be resolved on favorable terms. Often times, it is less expensive to resolve a claim than fight about it. If the homeowner requires remediation only (*i.e.*, clean-up), it is better to resolve the claim by agreeing to get rid of the mold. However, if you are not responsible or the claim is substantial, you might not be able to reach an agreement. Each claim will depend on its own facts.

If you decide that remediation is necessary and that you will assume responsibility for the job, you should try to minimize your liability before taking on the obligation. If possible, enter into a settlement and release agreement with the homeowner. Experienced counsel can help you draft such agreements.

B. Identifying and Repairing the Moisture Source

The *first step* in any remediation plan is to identify and repair the moisture source. If you fail to do so, mold will either grow or continue to grow. Typically, moisture problems are associated with window leaks, roof leaks, broken pipes, improper drainage, and ventilation problems. Once the moisture source has been eliminated, remediation can begin.

C. Dealing With Water Damage Before Mold Begins To Grow

If building materials get wet, it typically takes 24 to 48 hours before mold begins to grow. Accordingly, if a homeowner complains about water damage, you should immediately find out when the damage occurred. If the 24 to 48 hour time period has not yet run, you probably can prevent mold growth. To do so, follow these steps:

- Remove all standing water - or water in carpets or furniture - with a water extraction vacuum.
- Accelerate the drying process with dehumidifiers and fans.
- Discard and replace all porous materials that cannot be dried quickly and completely (like insulation, ceiling tiles and wallboard).

These recommendations apply to clean water only. If the water is contaminated with sewage or other pollutants, you should consult a professional remediation firm. In addition, if you have any doubts about the existence of mold, you should consider contacting a professional. For more

detailed information on dealing with water damage, refer to the websites identified in the Appendix.

D. Remediation of Mold Damaged Materials and Furnishings

The goal of remediation is to remove the mold without contaminating other parts of the home. Currently, there are no state or federal standards for mold remediation. Nevertheless, certain guidelines do exist. Most experts rely on written guidelines issued by the New York City Department of Health and the United States Environmental Protection Agency (“EPA”). This section is based on those guidelines, which are identified in the Appendix. In many instances, the homeowner will call you after mold growth has already occurred. Determining whether to clean-up the problem yourself or call a professional is a difficult issue. In general, the decision should focus on the amount and severity of the mold. The EPA suggests that where mold growth is between 10 and 30 square feet, your own staff should be able to handle the job as long as they are properly trained with respect to clean-up methods, personal protection, and potential health hazards. The EPA further suggests that where mold growth exceeds 30 square feet or is otherwise severe, a remediation professional should be consulted to provide information and oversight (or actually do the work). Of course, if you have any doubts about your ability to handle the job, contact a professional remediation company.

Notwithstanding the size of the job, most remediation projects employ four clean-up methods. The actual method or combination of methods used will depend on the contaminated materials at issue and the severity of the contamination. The four clean-up methods generally employed are:

- (a) **Wet Vacuum:** Where water has accumulated on floors, on carpets, or on hard (non-porous) surfaces, a wet vacuum should be used to remove it.
- (b) **Damp Wipe:** Non-porous materials (like metal, glass and plastic) and semi-porous materials (like wood and concrete) should be wiped down with water and detergent and then dried.
- (c) **Remove Damaged Materials From the Premises:** Porous building materials (like ceiling tiles, insulation and wallboard) that are contaminated and cannot be saved must be removed and discarded. To avoid contaminating the entire house, these items should be wrapped in plastic before being removed from the room where they were found. The debris can be thrown in the garbage. (No special precautions are necessary once the debris has been removed from the home).
- (d) **HEPA (High-Efficiency Particulate Air) Vacuum:** After wet or contaminated materials have been dried or removed, the entire area should be thoroughly vacuumed. The debris should be placed in a sealed plastic bag and removed from the premises. The

debris can be thrown in the garbage (no special precautions are necessary once the debris has been removed from the home).

For more detailed information concerning remediation techniques, refer to the Environmental Protection Agency' s Guide to "Mold Remediation in Schools and Commercial Buildings" and the New York City Department of Health's "Guidelines on Assessment and Remediation of Fungi in Indoor Environments," which are both identified in the Appendix.

No matter what size remediation project is involved, you must always consider the safety of your employees. Employees with allergies, respiratory problems, or other health concerns should not perform remediation work. When employees do perform remediation work, they should protect themselves. To do so, all employees should be trained in the use of "personal protective equipment." Personal protective equipment consists of: rubber gloves; goggles; respiratory gear; and disposable protective clothing. The level of protection necessary will depend on the severity of the problem. For more detailed information concerning the proper use of personal protective equipment, refer to the Environmental Protection Agency' s Guide to "Mold Remediation in Schools and Commercial Buildings," which is identified in the Appendix.

Finally, the size of the job will determine whether the work area must be contained (*i.e.*, segregated by plastic sheeting and pressurized air chambers). Containment prevents mold spores from spreading to other parts of the home and protects the occupants from further exposure. The need for or level of containment will depend on the severity of the contamination. The EPA has made the following suggestions:

(a) Areas involving less than 10 square feet of contamination: Unless the mold growth is severe, containment generally is not required.

(b) Areas involving 10 to 100 square feet of contamination (or any situation in which greater containment appears necessary): In such cases, the contaminated area should be enclosed by a single layer of plastic sheeting and a slit opening should be used to enter and exit the contaminated area. The contaminated area must be maintained under negative pressure, which is accomplished through the use of exhaust fans ducted to the outside of the building. All air vents in the contaminated area should be covered with plastic to prevent the spread of mold spores. All materials to be discarded should be wrapped in plastic before they are removed from the contaminated area.

(c) Areas involving 100 square feet or more of contamination (or any situation in which greater containment appears necessary): In such cases, the contaminated area and a directly adjacent area (the decontamination chamber) should be enclosed by a double layer of plastic sheeting. Slit openings should be used to enter the decontamination chamber and the

contamination area. The contaminated area and the decontamination chamber must be maintained under negative pressure, which is accomplished through the use of exhaust fans ducted to the outside. All air vents in the contaminated area and the decontamination chamber should be covered with plastic to prevent the spread of mold spores. All materials to be discarded should be wrapped in plastic before they are removed from the contaminated area. Workers should use the decontamination chamber to put on and take off their protective clothing, except for respirators, which should be removed only after leaving the decontamination chamber.

For more detailed information concerning containment, contact a professional or consult the Environmental Protection Agency's Guide to "Mold Remediation in Schools and Commercial Buildings," which is identified in the Appendix.

E. Remediation of HVAC Systems and Hidden Mold

If the HVAC system contains mold or you suspect that it does, turn it off. If it needs to be cleaned, it is best to consult a professional remediation firm. For detailed information, refer to the Environmental Protection Agency's guide: "Should You Have the Air Ducts in Your Home Cleaned?"

Mold growth is not always obvious. In many cases, mold grows behind walls, under floors and above ceilings. When looking for hidden mold, you must use caution. If you are not careful, you could make the situation worse by releasing previously enclosed mold spores into the home. If you suspect that a problem with hidden mold might exist (like in cases involving a burst pipe), you should consult a professional.

F. Relocation of Homeowners During Remediation

Homeowners must be protected during the remediation process. Although there are no hard and fast rules, you should relocate homeowners during the course of the remediation project if: (1) large areas of the home are contaminated; (2) the homeowner is allergic, has respiratory problems, or has other health related problems; or (3) the disruption is not likely to be acceptable. If you need help with this decision, contact a certified industrial hygienist.

G. How Do You Know When the Job is Done

It is often difficult to know when the remediation project is complete. Ultimately, this is a judgment call that should be made by a professional. Among other things, the following factors should be considered:

- The moisture source should have been identified and fixed.

- The mold removal process should be complete (i.e., mold damaged materials and furnishings should have been removed, mold should no longer be visible, and moldy odors should be gone).
- The types and concentrations of mold in the home should be similar to the types and concentrations of mold found outdoors.
- The homeowners should be feeling better.

VII. PRE-LITIGATION ISSUES: RETAINING REMEDIATION EXPERTS

Sloppy investigation of a mold claim and improper clean-up of mold contamination can make the situation worse. Not only can you spread mold spores throughout the home, you might unknowingly expose homeowners and your employees to potentially dangerous toxins. If serious problems appear to exist or you have doubts or concerns, consult a professional. To determine whether an expert is qualified, you should consider:

- **Education, Training and Certification.** Although you should look for someone with a technical degree in building science or construction management, it is critical that the person retained have training and certifications related to mold remediation.
- **Relevant Experience and Reputation.** In addition to education and training, you should look for a remediation specialist with prior experience in mold remediation and a good reputation. Get a list of past jobs and check references.
- **Continuing Education and Professional Activity.** Make sure the potential expert keeps abreast of new developments through continuing education and involvement with professional remediation organizations.

If the selected firm recommends remediation, make sure they provide you with a written plan so you know exactly what will be done. Because a poor remediation job can make matters worse, make sure that: (1) the remediation firm has adequate insurance coverage (including pollution coverage) and (2) the remediation firm names you as an “additional insured” on their policy. Finally, try to get the remediation firm to sign a “hold harmless and indemnity agreement,” whereby they agree to defend and indemnify you in the event of a problem. Experienced counsel can help you with these issues.

NOTE: If you employ experts to inspect and remediate, make sure that you employ separate companies for each task. By employing independent firms, there is no conflict of interest and you can be relatively sure that the job is done right.

VIII. PRE-LITIGATION ISSUES: KEEPING DETAILED DOCUMENTATION

In many cases, investigation and remediation must occur quickly. Nevertheless, it is critical that relevant evidence be preserved in the event that a lawsuit is filed. Accordingly, if inspections are done, all findings should be written down in detail and photographs should be taken. If remediation takes place, the remediation process should be well documented and photographed (photographs and videotape should be taken before, during, and after remediation to show exactly what was done). If samples are taken, they must be properly labeled and identified (e.g., date taken, location taken, etc.). If samples are collected and transported to a laboratory for analysis, the chain of custody must be maintained. This means that you must be able to track a sample from the time and place of its removal through the time and place of its analysis. Failure to properly document the samples and failure to maintain a proper chain of custody, could result in exclusion of the evidence at the time of the trial. When the analysis is done, a detailed laboratory report should be completed and sent to counsel for safe keeping.

IX. LITIGATION ISSUES: LEGAL CLAIMS AND TYPES OF DAMAGES

A. Common Legal Claims

If water or moisture infiltrates a home, the potential for mold growth exists. If mold growth occurs, a lawsuit may be filed. With respect to builders, the homeowner will claim that the builder failed to design or construct the home properly, used shoddy materials, or failed to disclose a known problem. The following legal theories are most likely to be used in lawsuits against builders:

- **Negligence:** Negligence claims will be the most common. Plaintiffs might claim that the builder failed to use reasonable care in building the home, used substandard or defective building materials, or allowed cellulose-based building materials to get wet prior to installation. Plaintiffs might also claim that the builder negligently hired or supervised its subcontractors.
- **Breach of Contract or Breach of Express Warranty:** Plaintiffs might claim that the builder breached a contract to build the home as expressly promised or expressly warranted.
- **Breach of Implied Warranty:** Plaintiffs might claim that the builder breached minimum standards that are implied in most building contracts as a matter of law.
- **Strict Liability:** Plaintiffs might claim that the builder is strictly liable for selling a defective “product” (i.e., the home).

- **Fraud and Negligent Misrepresentation:** Plaintiffs might claim that the builder knowingly concealed defects or negligently made misrepresentations about the property.
- **Deceptive Trade Practices:** Plaintiffs might claim that the builder made false or misleading statements in order to sell the home.
- **Emotional Distress:** Plaintiffs might claim that extreme or outrageous conduct by the builder caused emotional distress.
- **Constructive Eviction:** Plaintiffs might claim that they were forced to leave their homes because of a mold problem. (Constructive eviction claims are most likely to be brought in cases involving landlords and tenants).
- **Real Estate Seller Disclosure Acts:** Many states require that certain information be disclosed as part of a sale. Plaintiffs might claim that failure to disclose defects creates liability under various state statutes.
- **Criminal Actions:** Although not typical, some plaintiffs might pursue criminal actions on the grounds that the builder knowingly subjected the homeowner to dangerous mold toxins and failed to disclose the danger.

Among other things, every one of these claims requires plaintiffs to prove: (1) the builder is responsible for the moisture that caused the mold; and (2) the mold is the cause of plaintiff's alleged injury. A vigorous defense is needed to defeat these claims.

B. Common Damage Claims

In every mold case, plaintiffs will seek a variety of damages. You should expect the following types of damage claims:

- **Investigation costs:** Plaintiffs might seek to recover the costs associated with investigating their claim and determining the cause of their problems.
- **Repair costs:** Plaintiffs might seek compensation for all repair costs; e.g., the cost to fix a leaky roof, the cost to fix improperly flashed windows, and the cost to fix defective piping.
- **Remediation costs:** Plaintiffs might seek the costs associated with having to remove mold damaged property.

- **Loss of use:** Plaintiffs might seek compensation for losing the full use of their home during the repair and remediation process.
- **Temporary relocation costs:** Plaintiffs might seek compensation for the costs associated with moving out of their homes as a result of mold.
- **Diminished value of property:** Plaintiffs might seek compensation for an alleged reduction in the value of their home as a result of mold growth.
- **Personal injury damages:** Plaintiffs might seek compensation for the pain and suffering they have allegedly endured as a result of their mold exposure.
- **Medical expenses:** Plaintiffs might seek compensation for all medical expenses associated with their alleged illness.
- **Medical monitoring:** Plaintiffs might seek compensation for the costs of future medical tests associated with their exposure to mold.
- **Lost wages:** Plaintiffs might seek lost wages as a result of having to miss work because of their alleged illness.
- **Emotional distress and mental anguish:** Plaintiffs might seek compensation for the emotional distress allegedly endured as a result of their exposure to mold.

X. LITIGATION ISSUES: DEFENDING YOURSELF IN A LAWSUIT

A. Retain Qualified Experts

If you are sued, the first thing to do is hire a qualified attorney and contact your insurance carrier. Counsel with experience in both construction defect litigation and toxic tort litigation should be considered. If it appears that you might be sued in more than one state, you should retain "national counsel" to coordinate the litigation and maintain a consistent approach. It is also advisable to engage defense counsel early. By doing so, counsel can retain the other experts needed to defend the claim. By having your attorney hire these experts, the communications between you and your experts should remain confidential and subject to the attorney-client privilege.

A multi-disciplinary approach is necessary to defend mold claims. In conducting a building investigation, you are looking for construction defects, building product defects, design

defects and other sources of moisture. To properly investigate these issues for trial, your insurance carrier or attorney should consider hiring the following types of experts: builders; structural engineers; architects; HVAC contractors; plumbing contractors; and/or roofers. These experts should be able to identify construction defects, design defects, or building product defects and should also be able to identify other potentially responsible parties.

To determine whether mold or mold toxins are actually present (and to identify the source of such toxins), your insurance carrier or attorney should retain a certified industrial hygienist. The certified industrial hygienist should work with a qualified microbiological laboratory to identify the type or types and amount of mold present (if any).

To determine whether the homeowner is ill and whether the illness is related to mold, your insurance carrier or attorney should hire a qualified medical doctor or doctors and a qualified epidemiologist (an epidemiologist studies the relationship – if any - between risk factors like exposure to mold and certain illnesses like asthma and fatigue). These experts should be able to determine whether the particular mold or molds at issue caused or were sufficient to cause the plaintiff's alleged illness.

In selecting a qualified expert in each of the foregoing fields, your insurance carrier or attorney should focus on the following: (1) education and training; (2) reputation; (3) professional credentials; (4) relevant experience; (5) references; and (6) professional activities.

B. Investigate The Claims

In every litigated case, an investigation must be done as soon as possible to determine whether a mold problem exists and whether you are responsible. Once a lawsuit has been filed, your insurance carrier or attorney will direct the investigation (and should be able to rely – in part – on any pre-litigation investigation done by you). As discussed in detail above (at pages 5 to 8), a proper investigation involves: (1) data collection; (2) site investigation; and (3) sampling and testing.

These steps remain the same in a litigated case. However, if the case involves a personal injury claim, your insurance carrier or attorney should also collect plaintiff's medical and employment records. A review of the plaintiff's medical and employment records will help determine: (1) the date that plaintiff's symptoms first occurred; (2) whether any objective signs of illness exist; (3) whether a family history of allergies and respiratory problems exists; (4) whether plaintiff's symptoms previously existed or developed only after moving into the new home; and (5) whether plaintiff has been exposed to toxins or other environmental contaminants outside the home.

Once the foregoing information has been gathered, your insurance carrier or attorney should consider sending it to a qualified physician for review (a physician board certified in occupational medicine is recommended). The physician should be able to determine whether any possible connection exists between plaintiff's alleged exposure to mold and plaintiff's alleged illness. In addition, in serious cases, your insurance carrier or attorney should consider having the plaintiff examined by your own doctors.

Your insurance carrier or attorney should also consider whether sampling or testing should be done (if not previously done). In addition to sampling and testing for mold, your insurance carrier or attorney should think about determining whether other contaminants are present and whether these other contaminants might be responsible for plaintiff's alleged illness. For example, many homes contain adhesive, carpeting, upholstery, manufactured wood products, pesticides, and cleaning agents. These products contain various levels of irritants that have nothing to do with mold, but which might have contributed to or caused plaintiff's alleged illness. Other biological contaminants like bacteria, pollen, and viruses might also be present in the home and might have contributed to or caused plaintiff's alleged illness. Finally, outdoor contaminants like car exhaust, septic tanks, or nearby industrial pollutants might have contributed to or caused plaintiff's alleged illness. Consideration of alternative sources is especially important where the plaintiff's symptoms are vague and non-specific and where the level of mold is not excessive.

C. Consider Common Legal Defenses

In any mold case, your attorney must consider whether certain legal defenses are applicable. First, your attorney should consider whether the plaintiff's claim is barred by the relevant statute of limitations or the relevant statute of repose (which will vary from state to state). Statutes of limitations give the plaintiff a specified number of years within which to file suit after discovering the existence of a possible claim. If suit is not brought within that time period, the claim is generally barred. Statutes of repose -- on the other hand -- require a plaintiff to file suit within a specified period of time after construction is complete, regardless of whether a claim has been discovered or not. Generally, once this period has passed, no claims can be brought.

Another legal defense to a homeowner's claim is the homeowner's failure to properly mitigate its damages by timely remediation of a known mold problem. This defense is useful where the plaintiff has ignored mold growth and mold then spreads throughout the house.

Similarly, where homeowners permit moisture buildup through poor maintenance, your attorney should assert a defense of "contributory negligence" (*i.e.*, the homeowner is responsible in whole or in part for his or her own damages).

In cases involving property damage, you should always consider the applicability of what has been referred to as the "economic loss rule." Although not applicable to personal injury claims, the economic loss rule holds that plaintiffs cannot sue in tort (*i.e.*, negligence and strict liability) for economic loss damages (*i.e.*, the costs of repair and remediation). Rather, such plaintiffs must sue in contract. Simply put, if the plaintiff is suing for damage to his home as a result of mold growth, his rights will be governed by the parties' contract. Because most construction contracts contain contractual limitations concerning remedies, a contract claim is easier to defend than a tort claim. For a more detailed discussion of the economic loss rule, consult the United States Supreme Court's opinion in East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).

D. Challenge The Plaintiff's Medical Case

Plaintiffs will claim that exposure to mold has made them sick. Typically, plaintiffs will claim respiratory problems, allergic reactions, headaches, fatigue and similar such maladies. Other plaintiffs may claim more serious maladies including cognitive disorders. The presence of mold in a home does not mean that the plaintiff's alleged illness is related. Causation must still be proved. To prove causation, plaintiffs must prove: (1) that exposure to the type of mold at issue can generally cause the type of illness at issue; and (2) that exposure to the type of mold at issue specifically caused the illness at issue.

Currently, there are no authoritative studies establishing a reliable, scientific connection between mold exposure and the types of illnesses at issue in mold litigation. As such, you should always challenge the medical connection between plaintiff's alleged exposure to mold and plaintiff's alleged injury. To properly attack plaintiff's medical case, your attorney must retain qualified medical experts to challenge the plaintiff's evidence in what are referred to as Daubert or Frye hearings. At such hearings, the court will determine whether plaintiff's medical evidence is reliable and can be admitted into evidence. Such challenges already have been successful in certain mold litigation cases and should never be ignored.

XI. LITIGATION ISSUES: FILING CLAIMS AGAINST OTHER PARTIES

Although homeowners will often blame the builder for their problems, the builder may not be responsible for the moisture problem that led to the mold. Accordingly, every investigation should consider whether other potentially responsible parties exist. Other potentially responsible parties include:

- Architects, Engineers, and Design Professionals: failure to properly design the premises or failure to select suitable building materials
- Subcontractors: failure to build the home in a workman-like manner.
- Heating, Ventilation and Air Conditioning Personnel: failure to properly design or install heating, ventilation and air conditioning systems.
- Manufacturers and Suppliers of Building Materials: failure to manufacture and sell quality products suitable for use in construction.
- Landscapers: failure to direct water away from the home.
- Real Estate Brokers: failure to report known defects/problems.

- Inspection Services: failure to discover or report known defects/problems.
- Remediation Contractors: failure to properly remediate.

A thorough investigation will reveal whether other potentially responsible parties exist. If they do, you must consult with your attorney to determine whether to bring them into the suit as "third-party defendants" or file cross-claims against them if they are already parties to the suit. This decision will depend on the facts of your case and the law in your jurisdiction. Although other potentially responsible parties might exist, it is often best to work together to defeat plaintiff's claims. Accordingly, your attorney should speak with counsel for other possible defendants and should consider the feasibility of a "joint defense agreement." A joint defense agreement permits parties to litigation to exchange confidential information informally pursuant to the attorney-client privilege. If such an agreement is entered into, it is best to put it in writing. This will help protect the privilege if confidential information is sought by plaintiff's counsel. To the extent that liability must be apportioned among the various defendants, the parties might agree to resolve these issues later through mediation, arbitration, or separate suits.

XII. INSURANCE COVERAGE FOR MOLD CLAIMS

Whenever a mold claim is filed, you should think about insurance coverage. The first thing to do is gather your insurance policies and determine which ones apply. You should also determine whether subcontractors or other potentially responsible parties have named you as an "additional insured" under their policies. Experienced insurance coverage counsel can assist you with this task. The next thing to do is put all potentially responsible insurance carriers on notice of the claim. Failure to do so might void coverage based on the "late notice" defense. Again, experienced insurance coverage counsel can assist you.

The standard commercial general liability ("CGL") policy is the policy at issue in most instances. CGL policies provide coverage for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury and property damage" subject to numerous exclusions. Most insurers will deny coverage based on the "pollution exclusion" and the "business risk exclusion."

The pollution exclusion has generally been applied in cases involving traditional industrial sources of pollution. Numerous courts have held that it does not apply in situations involving non-traditional, naturally occurring "pollutants" released in an indoor environment like mold.

The ‘business risk exclusion’ generally bars coverage for defects in your "own work" or product. Whether the business risk exclusion bars coverage for mold claims depends on claim-specific facts. The business risk exclusion, however, applies only to property damage claims and does not generally bar coverage for defense and indemnity costs associated with bodily injury claims.

With the current rash of mold litigation, insurance companies are moving to eliminate mold coverage from their policies. Although this trend is likely to continue, you should still be able to obtain potential coverage. If possible, work with your insurance broker to define mold as an exception to the ‘pollution’ and ‘business risk’ exclusions. In addition, although it might be harder to get, seek affirmative coverage for mold claims involving personal injury and property damage.

XIII. CONCLUSION

Mold litigation has arrived. To prepare yourself for it, you must develop a protocol for claims handling and litigation. By following this guide, you should be able to minimize your potential liability and achieve fair results.

APPENDIX

WEBSITE INFORMATION

1. EPA: Mold Remediation in Schools and Commercial Buildings
<http://www.epa.gov/iaq/molds/graphics/moldremediation.pdf>
2. New York City Department of Health ‘Guidelines on Assessment and Remediation of Fungi in Indoor Environments’
<http://www.ci.nyc.us/html/doh/html/epi/moldrpt1.html>
3. EPA: Healthy Indoor Air for America’s Homes
<http://www.epa.gov/iaq>
4. EPA: Mold Resources
<http://www.epa.gov/iaq/pubs/moldresources.html/>
5. American Board of Industrial Hygiene: Certified Associate Industrial Hygienist
<http://www.abih.org/>
6. Centers for Disease Control and Prevention (CDC), National Center for Environmental Health
www.cdc.gov/nceh
7. CDC Environmental Health Services: Water Damage
www.cdc.gov/nceh/dhserv/ehsa/hottopics/waterdamage/htm
8. United States Environmental Protection Agency/Indoor Air Quality/Mold Resources
www.epa.gov/iaq/pubs/moldresources.html
9. Minnesota Department of Health: Mold in Homes
www.health.state.mn.us/divs/eh/aialr/iair/moldfs.html
10. American Indoor Air Quality Council
www.iaqcouncil.org
11. American Mold Abatement
www.american-management.com
12. Environmental Hazards
www.environmentalhazards.com
13. The Mold Source
www.themoldsource.com

NOTICE, DISCLOSURE and DISCLAIMER

What Homeowners Should Know about Mold

Mold. Lately, mold has been in the news. Mold is a type of fungus. It occurs naturally in the environment, and it is necessary for the natural decomposition of plant and other organic material. It spreads by means of microscopic spores borne on the wind, and is found everywhere life can be supported. Residential home construction is not, and cannot be, designed to exclude mold spores. If the growing conditions are right, mold can grow in your home. Most homeowners are familiar with mold growth in the form of bread mold, and mold that may grow on bathroom tile.

In order to grow, mold requires a food source. This might be supplied by items found in the home, such as fabric, carpet or even wallpaper, or by building materials, such as drywall, wood and insulation, to name a few. Also, mold growth requires a temperate climate. The best growth occurs at temperatures between 40* F and 100* F. Finally, mold growth requires moisture. Moisture is the only mold growth factor that can be controlled in a residential setting. By minimizing moisture, a homeowner can reduce or eliminate mold growth.

Moisture in the home can have many causes. Spills, leaks, overflows, condensation, and high humidity are common sources of home moisture. Good housekeeping and home maintenance practices are essential in the effort to prevent or eliminate mold growth. If moisture is allowed to remain on the growth medium, mold can develop within 24 to 48 hours.

Consequences of mold. All mold is not necessarily harmful, but certain strains of mold have been shown to have adverse health effects in susceptible persons. The most common effects are allergic reactions, including skin irritation, watery eyes, runny nose, coughing, sneezing, congestion, sore throat and headache. Individuals with suppressed immune systems may risk infections. Some experts contend that mold causes serious symptoms and diseases which may even be life threatening. However, experts disagree about the level of mold exposure that may cause health problems, and about the exact nature and extent of the health problems that may be caused by mold. The Center for Disease Control states that a causal link between the presence of toxic mold and serious health conditions has not been proven.

What the Homeowner can do. The homeowner can take positive steps to reduce or eliminate the occurrence of mold growth in the home, and thereby minimize any possible adverse effects that may be caused by mold. These steps include the following:

1. Before bringing items into the home, check for signs of mold. Potted plants (roots and soil), furnishings, or stored clothing and bedding material, as well as many other household goods, could already contain mold growth.
2. Regular vacuuming and cleaning will help reduce mold levels. Mild bleach solutions and most tile cleaners are effective in eliminating or preventing mold growth.

3. Keep the humidity in the home low. Vent clothes dryers to the outdoors. Ventilate kitchens and bathrooms by opening the windows, by using exhaust fans, or by running the air conditioning to remove excess moisture in the air, and to facilitate evaporation of water from wet surfaces.
4. Promptly clean up spills, condensation and other sources of moisture. Thoroughly dry any wet surfaces or material. Do not let water pool or stand in your home. Promptly replace any materials that cannot be thoroughly dried, such as drywall or insulation.
5. Inspect for leaks on a regular basis. Look for discolorations or wet spots. Repair any leaks promptly. Inspect condensation pans (refrigerators and air conditioners) for mold growth. Take notice of musty odors, and any visible signs of mold.
6. Should mold develop, thoroughly clean the affected area with a mild solution of bleach. First, test to see if the affected material or surface is color safe. Porous materials, such as fabric, upholstery or carpet should be discarded. Should the mold growth be severe, call on the services of a qualified professional cleaner.

Disclaimer and Waiver.

Whether or not you as a homeowner experience mold growth depends largely on how you manage and maintain your home. Our responsibility as a homebuilder must be limited to things that we can control. As explained in our written warranty, provided by separate instrument, we will repair or replace defects in our construction (defects defined as a failure to comply with reasonable standards of residential construction) for a period of _____ years. We, the builder, will not be responsible for any damages caused by mold, or by some other agent, that may be associated with defects in our construction, to include but not be limited to property damage, personal injury, loss of income, emotional distress, death, loss of use, loss of value, and adverse health effects, or any other effects. Any implied warranties, including an implied warranty of workmanlike construction, an implied warranty of habitability, or an implied warranty of fitness for a particular use, are hereby waived and disclaimed.

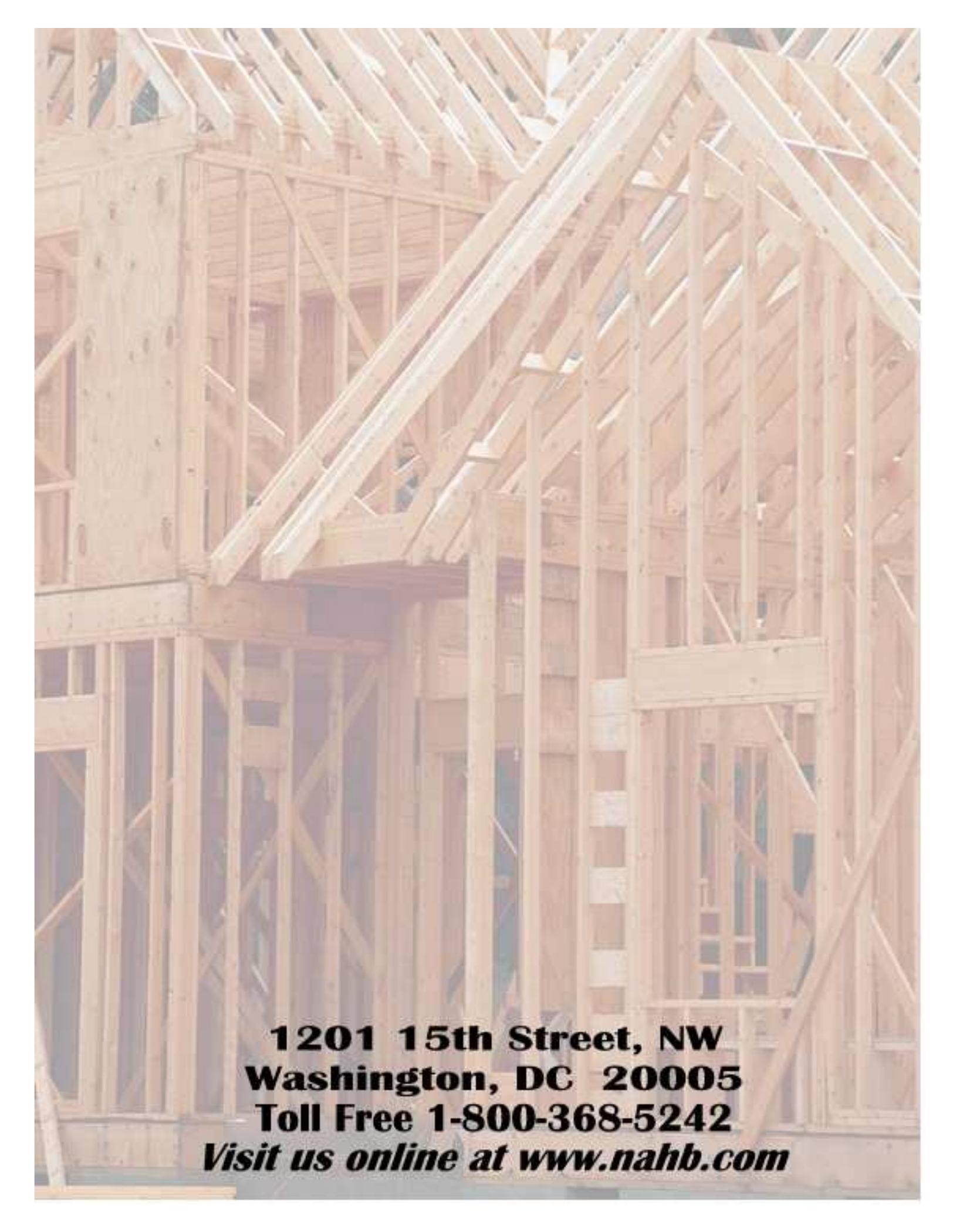
This notice, disclosure and disclaimer agreement is hereby appended to and made a part of the contract of sale. The consideration for this agreement shall be the same consideration as stated in the contract of sale. Should any term or provision of this agreement be ruled invalid or unenforceable by a court of competent jurisdiction, the remainder of this agreement shall nonetheless stand in full force and effect.

I acknowledge receipt of the notice, disclosure and disclaimer agreement. I have carefully read and reviewed its terms, and I agree to its provisions.

BUYER	DATE	SELLER	DATE
BUYER	DATE	SELLER	DATE

CAUTION

The sample language in this disclaimer is provided for educational purposes, and may not necessarily be compatible with the laws of each state. Some states may require disclaimers to contain specific language, may require a specific type size, and/or may require a specific location in the contract document. Some states may not consider disclaimers for new home sales to be valid under any circumstances. Builders and remodelers should consult with their local attorney concerning the validity of disclaimers in their jurisdiction, and concerning the appropriate language and form of disclaimer instruments.



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