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TOXIC MOLD - NO TIME TO PANIC

REALTORS® who have been involved in the sale of real estate for a number of years are well aware of the occasional "crisis" which occurs when a new, unknown danger appears upon the scene. Many years ago, in response to the energy crisis in the 80's, urea formaldehyde foam ("uffi") was pumped into walls of homes. When cases began being filed based on the alleged dangerous effects of uffii, millions was spent on litigation related to the existence of uffii in homes. This crisis was then followed by the radon gas scare. Again, millions of dollars in resources were expended in litigation and remediation prior to any scientific determination as to the exact dangers posed by radon gas. Finally, tens of millions were spent on asbestos removal due to the very real dangers posed by asbestos, only to learn, after the fact, that in many instances the dangers could have been eliminated by simply encapsulating or wrapping the asbestos.

It would appear that the real estate industry is now in the initial stages of another, similar crisis. There is reportedly extensive litigation pending in Texas and California over the existence and alleged dangers posed by "toxic mold" in houses. Also, MAR is aware of the fact that similar litigation is now pending in at least two circuit courts in the State of Michigan. It would appear that we are again headed down a path of expending millions of dollars in litigation and remediation well prior to determining the real danger and the best means of minimizing that danger.

REALTORS® need to be acquainted with the toxic mold controversy in order to effectively deal with sellers and buyers on the issue. Obviously, REALTORS® should not attempt to become experts on the subject. This article will provide a brief overview of the toxic mold issue. A more complete article will soon be available on MAR's website.

Molds are found everywhere, and occur naturally, serving a useful purpose in breaking down and decomposing organic matter. They are microbial organisms which reproduce and spread by emitting spores into the air, which land on other surfaces and generate additional mold. Mold growing in indoor environments has been suspected of causing adverse health effects.

Molds found indoors grow as a result of the presence of moisture inside indoor environments, and can also enter from outdoors through doors, windows and ventilation systems. When mold spores attach to an area of excessive moisture (*e.g.* from a leaky roof or wall system), many cellulose-based building materials provide nutrients for mold growth (such as ceiling tiles, paper-backed sheetrock, insulation materials, and wood/wood products).

The most common types of mold found indoors include:

- i. Aspergillus and its subspecies (*A. flavus*, *A. versicolor*);
- ii. Cladosporium;
- iii. Penicillium;
- iv. Alternaria; and
- v. *Stachybotrys atra* ("*S. atra*"), also known as *stachybotrys chartarum*, a greenish-black mold commonly referred to as "Black Mold."

Often, mold spores, whether dead or alive, have been suspected in causing adverse health effects, primarily of a respiratory nature, including hay fever-like allergic symptoms. The molds may also adversely affect persons with pre-existing respiratory illnesses, such as asthma and chronic obstructive pulmonary disorder.

Many of these molds, primarily *S. atra*, also produce chemical toxins known as “mycotoxins,” which are generated and released into the air within the mold spores, perhaps leading to the “toxic mold” designation. Exposure to these toxins can occur through inhalation, ingestion, or skin contact, and can result in symptoms including dermatitis, cough, rhinitis, nose bleeds, cold and flu symptoms, headache, general malaise, and fever.

Initial awareness of adverse health effects from *S. atra* exposure was raised by a mid-1990’s study from Cleveland, Ohio, involving infants who had died from sudden and unexplained pulmonary hemorrhage (bleeding of the lungs). Upon investigation, researchers found that the infants resided in homes with high levels of *S. atra*, as well as tobacco smoke, leading to a possible hypothesis linking *S. atra* exposure to serious health effects, in addition to mere allergy-like symptoms. However, the Centers for Disease Control has noted that further studies are needed to determine the causes of unexplained acute hemorrhage. These studies have now been authorized by the U.S. Environmental Protection Agency (“EPA”) and will evaluate mold growth, emission of mold spores, and mold's impact on indoor air quality.

At the present time, no official standards or guidelines exist to determine acceptable or unacceptable limits for mold in the indoor environment. Nevertheless, a cottage industry of mold testing companies, consultants, and remediators has sprung up to meet public demand for mold response services. The EPA has developed a new test using DNA technology, which can rapidly identify and quantify 50 to 100 common indoor mold

types in a matter of hours, including *S. atra*. The EPA's test has been licensed for use by private companies, at costs ranging from \$30.00 to \$50.00 per test. Numerous Michigan firms and consultants now offer mold testing and analysis services. Testing can also include air sampling, which involves obtaining and culturing air samples for microbiological growth, followed by microscopic examination after incubation.

As in the case of mold testing, no recognized federal or state guidelines exist to govern remediation efforts. The New York City Department of Public Health has promulgated guidelines for assessment and remediation of indoor mold and fungi, which appear to be the only published remediation standards currently in existence.

Depending on the amount of mold contamination observed on visual inspection, remediation proposed by the New York guidelines can range from simple cleanups performed by custodial or maintenance staff to full-blown cleanups involving airlocks, decontamination suits and respiratory protection similar to asbestos abatement activities. It remains to be seen whether the New York guidelines are adopted as a model by the EPA or state regulatory agencies. In any event, implementation of these guidelines would entail substantial expense in all but the most minor mold growth situations, due to the guidelines' requirements for trained personnel and protective equipment. Mold remediation generally is also expensive, for the reason that demolition and replacement of portions of a structure are often required.

From the standpoint of Michigan REALTORS®, the normal defenses available in a real estate/property defect case should be available, including reliance on "as is" and property inspection clauses, releases of brokers/agents executed by purchasers at closing, and disclaimers of property inspection, knowledge of condition and construction expertise

contained in purchase and agency agreements. Courts in other states have declined to impute to REALTORS® knowledge of drainage or water problems which result in mold contamination, where REALTORS® simply acted as a conduit for information or inquiries and did not engage in any misrepresentation.

In summer, 2001, mold contamination caused the destruction of a single family residence in Southfield, Michigan, when mold contamination detected by a testing company rendered the home uninhabitable. According to news reports of the situation, state representative Samuel Thomas (D-Detroit), is "considering introducing legislation in the upcoming session that would mandate mold testing any time a house is sold in Michigan." The bill is to be named "Melina's Bill," after the family's eight-year old daughter whose asthma became seriously exacerbated after the family moved in, causing a loss of lung function.

From the public's perspective, hysteria concerning purported health hazards from "black mold" (*St. atra*) and other molds is at an all-time high, driven by media reporting not unlike the attention paid to previous health-related controversies such as asbestos. However, from a scientific perspective, research on mold hazards, analysis, and remediation remains in relative dispute, although well-organized attorneys, environmental consultants, and others with vested interests appear to be leading the way at present toward increased litigation, investigation and remedial action. Governmental agencies have been relatively slow to respond, although current developments suggest that new legislation and regulation is foreseeable in the near future.

In conclusion, all of these legal, regulatory and scientific developments bear watching from the perspective of real estate and building professionals, as the costs of

litigation and remediation of mold contamination can prove to be disastrous.

OPTIONS TO PURCHASE - HOW LONG DO THEY LASH

It does not seem possible that a court would be asked to decide how long an option to purchase real estate exists where the seller and buyer have put no outside time limit on the buyer's exercise of the option. If a seller granted a buyer an option to purchase the seller's property without any time limit on the buyer's exercise of the option, the seller would, in essence, grant the buyer a semi-permanent cloud on the title to the seller's property. Nonetheless, such an option to purchase was granted by a seller to a buyer in Michigan, and the Michigan Court of Appeals was asked to answer this question.

In 1992, Shirley Klint ("Klint"), as buyer, entered into an option agreement with Elaine Carlson ("Carlson"), as seller. In 1997, Klint sued Carlson to enforce Klint's right to purchase the property pursuant to the terms of the option agreement. Carlson claimed that the option to purchase was void because it did not establish any specific time in which the option agreement could be exercised by Klint. Instead, the option agreement provided that it was open for an indefinite period of time.

The trial court and the Court of Appeals analyzed the facts in this case using a well established general rule in Michigan. Generally, where no time deadlines for performance are established in a document calling for a conditional transfer of real estate (including options), the agreements are deemed to be valid for a "reasonable period of time." The trial court and the Court of Appeals were then required to determine whether Klint's attempt to exercise the option after five (5) years constituted performance within a "reasonable period of time." Carlson claimed that Klint's attempt to exercise the option after five (5) years was beyond any reasonable time of validity for the option agreement. However,

Carlson could only point to the lapse of time (five (5) years), and no other circumstances which would make that period of time an unreasonable length of time for the continued validity of the option. The Court of Appeals found that Carlson could not point to any other factual circumstances, such as Carlson's reliance on Klint's failure to exercise the option or increased land values, to support her claim that the five (5) year delay was unreasonable.

Carlson also contended that the option agreement should be rescinded because both Klint and Carlson were mutually mistaken about a basic assumption. Apparently, both Klint and Carlson testified that they originally believed that the option agreement only gave Klint a right of first refusal to purchase the property (*i.e.*, to match another third party's offer) and not the right to exercise an option to require Carlson to sell the property to Klint. Both the trial court and the Court of Appeals rejected Carlson's argument for rescission of the option agreement. Carlson apparently conceded in testimony that she did not read the option agreement prior to signing it and, in addition, she was well aware of the problem with the contract language a few weeks after entering into the agreement. The Court of Appeals found, in essence, that Carlson's inaction over a five- year period prevented her from successfully claiming that the option agreement should be rescinded based on any mutual mistake.

The next time a REALTOR® calls the MAR legal hotline and asks a question about the continued validity of a buy/sell agreement that has no closing date or end date, they will be either very happy or unhappy to hear that there is at least one Michigan Court of Appeals case that says that such an agreement can remain valid for at least five years. A REALTOR® will be unhappy if he represents the seller and happy if he represents a very slow acting buyer. The lesson of this case is absolutely clear - all agreements to convey any

interest in real estate should have a beginning date and an outside end date.

DOCUMENT PREPARATION FEES – LEGAL OR ILLEGAL?

Any REALTOR® who recently attended a closing is well aware of the numerous processing and administrative fees being collected by various service providers at closings. Typically, these fees are charged to reimburse a REALTOR®, mortgage broker, title insurer and/or lender for actual costs in processing information and preparing various documents for the transaction. However, a recent decision by the Michigan Court of Appeals indicates that there are limits to the types of fees that can be charged by certain service providers in connection with a closing.

The Dressels obtained a loan from Ameribank on November 7, 1997. In conjunction with the Dressels' closing, the bank prepared a note and a mortgage for the Dressels. The bank then prepared a settlement statement which indicated that the Dressels were being charged \$400.00 for "document preparation." The bank provided the Dressels with documentation that described the document preparation fee as "a separate fee that some lenders or title companies charge to cover the costs of preparation of final legal papers, such as a mortgage, deed of trust, note or deed."

In December, 1998, the Dressels sued Ameribank claiming that the bank's charge for preparing documents constituted the unauthorized practice of law. The Dressels also claimed that this charge by Ameribank violated state banking laws and the Michigan Consumer Protection Act (the "MCPA"). Ameribank was granted summary disposition of the Dressels' claims. The Michigan Court of Appeals reversed the trial court's decision and found in favor of the Dressels.

The Court of Appeals was required to determine whether a bank's preparation of legal documents for a separate fee or charge constituted the unauthorized practice of law. The Court of Appeals closely reviewed prior decisions involving the preparation of real estate documents by real estate licensees in deciding this case. In 1955, the Michigan Supreme Court was required to determine whether a licensed real estate broker who filled in printed forms of various legal significance that were incidental to real estate transactions in which they were involved, constituted the unauthorized practice of law. These real estate brokers had not charged any extra fees for the service of filling out real estate forms. The Michigan Supreme Court concluded that the real estate brokers were not engaged in the unauthorized practice of law, as they were preparing the real estate documents without additional compensation and only as an incidental activity to their main, lawful business, *i.e.*, the marketing and sale of real estate. The Michigan Supreme Court held that "there cannot be any objection to a licensed broker doing such work [filling in standardized forms of agreements of purchase or sale, land contracts, deeds and mortgages] without compensation when it is incidental to his business."

The Court of Appeals noted further that about fifteen years later, the Michigan Supreme Court was again asked to review a situation in which a real estate broker was preparing legal documents. In this case, the real estate broker charged a separate fee for the preparation of legal documents. In addition, he was preparing legal documents for a transaction in which he otherwise had no involvement. The Michigan Supreme Court affirmed an injunction entered by the trial court which enjoined the real estate broker from performing legal services and giving legal advice, but allowing him to fill out real estate forms incidental to his business so long as he did not charge an additional fee for that service.

The Michigan Court of Appeals then looked to the actions of Ameribank in this case. Ameribank was justified in its position that the preparation of the mortgage documents for the Dressels was certainly incidental to the bank's business. However, the Court of Appeals followed the majority opinion of the states in finding that the charge of a separate fee can turn an incidental activity, such as the preparation of the Dressels' promissory note and mortgage, into the unauthorized practice of law. The Court of Appeals held:

However, we believe that the separate fee for the preparation of mortgage documents by a bank crosses the threshold of providing services for the bank's own benefit and engaging in a business where a profit is made from manufacturing legal documents without the requirement of licensure from the state bar. If the preparation of the mortgage documents for defendant's [Ameribank's] customers was not a service, but rather incidental to its business as defendant [Ameribank] claims, then there would be no basis for the separate charge to defendant's [Ameribank's] customers. Thus, the trial court erred when it concluded that the preparation of legal documents by an interested party, where a fee is charged, is not the unauthorized practice of law.

The Court of Appeals went on to find that the bank's separate charge for preparation of the Dressels' loan documents was not permitted under Michigan banking law. In addition, the Court of Appeals also found that the separate charge by Ameribank could constitute a violation of the MCPA.

This case was certified as a class action on behalf of any borrowers of Ameribank who had also been charged a separate document preparation fee. Thus, one can almost be certain of two (2) outcomes in the future from this case. First, Ameribank will attempt to appeal the case to the Michigan Supreme Court. Second, at least for the time being, there will no longer be references on closing statements to "document preparation fees." Instead, it seems likely that there will be an increase in "administrative and processing

fees.”

REALTORS® should also take great care to make certain that they do not inadvertently end up in the same position as the bank in this case. It is perfectly lawful for REALTORS® to charge agreed upon fees with sellers or buyers in addition to the payment of a commission. REALTORS® cannot, however, charge any separate fee over and above their commission for preparation of buy/sell agreements or other documents which are necessary to facilitate and close a transaction.

LIMITATIONS ON DAMAGES

Based on the present law of Michigan, we should generally make certain that any offer to purchase residential real estate is conditioned upon the performance of an inspection to the satisfaction of their client, the buyer. The legislature, in enacting the seller's disclosure law, has directed buyers to obtain professional expertise in determining the condition of property prior to purchasing the property. The seller's disclosure form contains the following warning in bold type:

**BUYER SHOULD OBTAIN PROFESSIONAL ADVICE
AND INSPECTIONS OF THE PROPERTY TO MORE
FULLY DETERMINE THE CONDITION OF THE
PROPERTY.**

In relying upon the expertise of various types of property inspectors to determine the condition of a residence, most buyers are presumably doing so with the understanding that if the professional inspectors are negligent or otherwise fail to properly discover defects or problems with the property, the buyers will be able to look to the professional inspectors to obtain damages to make them whole. It is not surprising that many buyers form this belief, as many inspectors indicate in their marketing literature that they are

insured.

Many property inspectors require buyers to enter into agreements which specifically limit any future damage claims by the buyers against the property inspectors. Typically, these provisions limit the buyer's damages to the amounts paid by the buyers to the professional inspectors, or some other irrational limitation which will not even remotely approach the damages suffered by the buyers if the property inspector fails to uncover a reasonably discoverable major defect in the home. REALTORS® should know that Michigan courts have generally been unwilling to permit buyers to obtain damages in excess of the agreed upon limits in the inspection contract.

A recent Michigan Court of Appeals case demonstrates this situation. In this case, the O'Briants hired Orkin Exterminating Company, Inc. to treat a termite infestation in the O'Briants' home. Although Orkin tried to eliminate the termites for two (2) years, it was unsuccessful. The O'Briants then sued Orkin for its breach of its contractual warranty.

The O'Briants had signed a contract limiting the warranty to:

. . .any necessary additional treatment to my building if an infestation of Subterranean Termites is found during the effective period of my Guarantee. I understand that ORKIN's obligation under this Guarantee is limited to retreatment only. I expressly release ORKIN from any obligations to repair any damage to my building or its contents caused by an infestation of Subterranean Termites or caused by ORKIN's negligence or breach of any other obligations arising hereunder. . .

The trial court found that the enforcement of this contract provision would be unconscionable. The Michigan Court of Appeals reversed the trial court. It found this contract provision to be clear and unambiguous and, thus, enforceable. The O'Briants could not avoid the terms of the contract's limitation based on the fact that they allegedly failed to read

the agreement. Further, the O'Briants had submitted no evidence that they were forced or intentionally misled into entering into this contractual limitation.

Obviously, there is absolutely nothing unethical or illegal involved in a property inspector or similar service provider requesting that a buyer enter into an agreement that severely limits the damages available to a buyer in the event of negligence or breach of contract by the property inspector. On the other hand, a competent property inspector who provided these services without such a contractual limitation could be deemed to have a significant competitive advantage over those who use these types of contractual provisions. REALTORS® representing buyers may wish to point out the distinction to their clients.