

## **CONDOS, WATER DAMAGE AND TOXIC MOLD**

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### **1. BOUNDARIES OF COMMUNITY LIVING**

Since 1984 and the birth of the Davis-Stirling Act, laws governing common interest developments have changed several times over and they keep changing. In the beginning condominiums were simply recognized as a structure. Today the many forms of condominiums are statutorily defined as "boundaries of which are described on a recorded final map, parcel map, or condominium plan." [Civil Code 1351 (f)] The statute goes on to state that the area within these boundaries can be filled with air, earth, water, or any combination thereof. Unfortunately for some, controlling what enters into or invades that "space" may be next to impossible especially when there are shared infrastructures, such as adjoining walls, plumbing, HVAC systems, and much more. One of the problems that can involve this space is water intrusion and toxic molds such as *Stachybotrys*. Known as the "black mold", this is only one of a number of toxic types of mold that have been linked to illness in humans.

The challenges of community living with adjoining walls and ceilings can turn common areas into common nightmares. With the laws that once identified a condominium as a structure, now identifying it simply as "space", many residents are left in a quandary. Only when it is too late do condo owners realize just how little control they actually do have over their own "space". Since an owner does not own their "common" area walls, conflicts over this do arise. When a condo has water damage and or mold resulting from the common areas the issue of repair can become problematic. This can result in disputes that spiral out of control and can end up in litigation. Dealing with water damage and or a mold problem can be difficult enough in of itself. When you throw into the mix a homeowner association, with a board of directors, a property manager, a management company, as well as an association law firm, along with adjoining walls, you can end up in serious trouble and hardship. Water damage and mold in condominiums is like the Rubik's cube of countless nightmare possibilities.

The problems specific to condominiums concerning water damage and mold can and do become convoluted. Leaks resulting from plumbing within common walls affecting individual and adjoining units are just one of the problems for condominium structures. Unlike an apartment where a landlord would be responsible for repairs, water damage in condos can become a no mans land of responsibility. Certainly there are landlords as well that may ignore a tenant's report of leaks and mold, however the difference in a condominium is obvious-you own it and are responsible. Though you own the condo you oftentimes have little to no control over many aspects including repairs.

Condo owners are dependent upon the whims of an association whose board of directors may or may not be diligent in their duties and or even ethical. Boards of directors have a fiduciary duty to maintain and

repair common areas. Unfortunately for many condo owners, board members may not even know what their fiduciary duties are or worse yet simply disregard their obligations. Homeowners should also realize just because they employ a property manager with certification, this is no guarantee that the manager will be diligent or attentive to necessary repairs either. This may continue to be the case with the management company as well.

Further complicating the mold issue is for those that purchase recent condo conversions only to find that some of these apartment/condos have serious problems with toxic mold. What may look like an appealing renovated apartment converted into a condo for a good deal may end up becoming some ones worst nightmare.

## **2. WATER AND MOLD DAMAGE**

In day-to-day living in a condominium, any water damage resulting from problems with adjoining units and or from any common area presents a unique set of problems. When water intrusions occur from an adjoining unit due to overflowing sinks or tubs, dishwashers, washing machines, toilets, icemakers, and or watering on decks, owners are often told by the association that it is a unit to unit problem. Most associations will not intervene in such matters. In other words, it is a civil matter to be dealt with between those owners affected by the problem.

Other problems may consist of unidentifiable sources of water damage between units; because their complications are vast, these types of problems usually present an even greater challenge. It is not unusual for an association to never find the source of a leak and so it just simply is not dealt with. An association can then refuse to deal with the water damage stating it was not a result of a problem from the common area. Battles over who is ultimately responsible for repairs are commonplace in many HOAs.

When owners find themselves dependent upon intervention by their association to remedy common area water damage, the homeowners may be in for a rude awakening. Leaks and or mold may go unattended while the issue is placed on hold by the board and or management and possibly not resolved at all. Condo associations are notorious for delays in dealing with problems of water intrusion and or mold damage. In the meantime mold can begin to grow in the wall due to an ongoing leak. Mold occurs as a result of moisture and can grow in 48-72 hours. More and more often dwellings registering with elevated levels of mold are showing up with elevated levels of toxic types of mold.

Oftentimes an owner's report of leaks from their common area walls is met with the association stating that the leak is coming from a part of the plumbing that is the owner's responsibility. Just because the plumbing may be inside of the common wall does not automatically mean that the part of the plumbing affected is considered common area-thus being the responsibility of the associations. There are many nuances to this. The only means an owner has of confirming the cause and location of the leak is to bring in their own outside licensed plumber to evaluate the situation. Associations know that most owners are not willing to go to this trouble and expense. Owners often just accept what they are told and pay the cost to have employees and or vendors from the association make repairs.

When the repair involves the common area to an owners unit, who makes the repair is considered to be within the purview of the associations. Though the owner may still end up getting billed for this, they usually do not have a choice over who makes these repairs. Another pervasive problem unique to common interest developments is in the use of specific vendors that may not be in the best interest of the homeowners. Associations often use vendors that have waivers of liability to any of the work they perform. In addition a problem can occur in the use of an association employee and or vendor who does not have the proper training in dealing with mold. This can result in further contamination of areas. Worse still is when an association refuses to address common area water and or mold issues delaying repairs,

causing the mold infestation to increase.

Most unfortunate is when condo associations in a misguided attempt to protect property values conceal extensive problems of toxic mold. By attempting to conceal these problems inadvertently causes the problems to worsen. Most homeowners not even realizing that a serious problem is taking place within the building need to be notified and educated in what to look for and report. If mold is growing inside of the walls due to a moisture problem and is not dealt with it continues to grow and grow right into adjoining units. What owners of condominiums do not understand is that once the mold begins to grow in adjoining walls the air they breathe in their own unit can become affected without anything ever being visible. Even if an association and or owner remediates one unit, problems in adjoining units may cause recontamination.

Most harmful is when a structure becomes riddled with toxic mold causing it's residents to become ill as a result of this. The tragedy is for those who become sick and have no idea that their symptoms stem from a problem resulting from elevated levels of toxic types of indoor molds. Mold can grow inside of the walls and not be visible while still creating a serious health problem. Mold spores are microscopic and can easily move through any openings such as vents and outlets out into the ambient air within the dwelling. The lesson being just because you cannot see the mold growing does not mean you do not have a mold problem.

### **3. TOXIC MOLD AND RELATED ILLNESS**

Sick building syndrome is a term that came about in the eighties as a result of fundamental changes in how structures were being built in the seventies. Buildings most prone to water damage and toxic mold are those built around this time period though all structures can be prone to problems. Many of the newer buildings have also become extremely problematic for mold as well. In addition since the advent of the HVAC system built into our dwellings an increase in problems of mold proliferation continues. We are continuing to see an increase in problems with toxic mold in general due to how our buildings are being constructed today. In spite of the increasing amount of construction defect lawsuits, the building industry has been slow to respond with improvements that address mold prevention. When it comes to building high end expensive structures or the lesser priced buildings, leaks and toxic mold are non-discriminatory. Individuals from all walks of life both rich and poor have reported health problems as a result of exposure to toxic molds within their environments.

Not everyone becomes ill who is exposed to toxic mold. Sometimes only one family member in a household may become sick or an entire family can become ill. Children are often most vulnerable as well as those with compromised immune systems. Length of time exposed, the levels and types of molds one is exposed to can affect this. Not all molds are toxic. Mold spores that contain mycotoxins create the toxicity to the mold. What is unique to mold exposure when there are symptoms involved is that it creates a multi-level system of illness. Most often those exposed do not just develop one symptom but rather multiple symptoms affecting many different systems in the body. It is often due to this that makes diagnoses so challenging.

Signs and symptoms of mold exposure can range from allergies-runny nose, itchy eyes and ears, coughing and sneezing. Asthma can develop and or respiratory infections. Chronic bronchitis, laryngitis, pneumonia, and or chronic colds and flu can occur. Another common grouping of symptoms can be chronic headaches, dizziness and fatigue. Other symptoms frequently reported are rashes, muscle aches and pains, hair loss, excessive sleepiness, and urinary tract infections. Cognitive deficits consisting of short term memory loss, word finding problems, difficulty concentrating and disorganization are common. Sleep disturbance can also occur. Gastrointestinal problems with stomach cramping and diarrhea are often part of the presenting complaints. These are only a few of the many symptoms that can

affect individuals made ill from exposure to toxic molds.

Once an individual removes themselves from the contaminated environment most symptoms will subside. However for some individuals the physical damage they sustain may become permanent. Some may develop life long problems with lung ailments and or neurological difficulties. A certain number will go on to develop multiple chemical sensitivities [MCS] unable to tolerate certain smells such as some types of perfumes and or cleaning fluids. MCS can involve extreme sensitivity to any number of chemicals, odors and smells. Others especially if they experienced a secondary exposure can remain highly sensitized to even the slightest elevations of certain types of molds. Like those allergic to beesstings this can worsen over time creating lifetime problems with a constant reactive reoccurrence of symptoms.

When the connection is made to symptoms experienced as a result of mold exposure there then becomes the navigational system through the nightmare of finding the right medical help. Aside from the enormous costs involved with this, the physicians who have the expertise in mold exposure are few and far in between. Worse still are for those then having to battle ruthless homeowner associations, board members, property managers, association attorneys, management companies and their vendors with disputes over testing and repairs. The combination of all of this together can take a huge toll on an individual already suffering the ill effects from mold exposure. For those that pursue litigation, this adds additional stressors. Litigation though sometimes necessary can become overwhelmingly terrifying and a nightmare in of itself, especially when dealing with a vindictive homeowner association.

#### **4. SOME PRECAUTIONS AND TIPS IN DEALING WITH AN HOA**

Upon realizing that the cause of damage was likely the result of association related negligence, some boards mishandle the matter to the extent litigation results. More often than not, such battles can begin when a board fails to recognize and treat the problem when they first learn of it. A board's resistance to correct the problem, let alone acknowledge that a serious problem even exists, often results in the creation of a board's mode of operandi through denial, delay and intimidation.

In dealing with damages that result from the common areas it is important to first thoroughly understand what is meant by the term "common." There are many complexities to this in a condominium structure. Each owner should familiarize themselves with their own associations governing documents, specifically their CC&Rs regarding the sections concerning "common" and "common area". To better understand the legal terms pertaining to the specific codes this can be found in the California Administrative Codes and the Davis-Stirling Act Civil Codes sec.1350-1378. If you are in another state you will need to check the applicable codes for that individual state.

If you think you have a mold problem as a result of water damage from the common area you will need to carefully document this. Owners often verbally communicate problems and requests for repairs without placing this in writing. It is essential to back up all verbal communication of this type in a letter. Since those responsible are the board of directors, letters should be addressed directly to the board members. You can initially fax the letter addressed to the board. However if you do not get a written response [within 10 days] that acknowledges your letter, you will need to resend it through sign returned receipt such as certified mail. Ideally letters reporting damage [especially regarding water and or mold damage] and or requesting repairs should be sent through signed returned receipt as proof the letter was sent. It is not unheard of for associations to claim they never received letters, let alone a phone call reporting problems. Never use e-mail to communicate.

It is important to ensure that the problems you are experiencing become part of the record in the minutes of the next board meeting. After you have sent your letter to the board members, be sure to make a written request to place your issue on the agenda for the next upcoming meeting. Take your letter to the board

meeting and address this on the record. According to the Davis-Stirling Act Civil Code sec.1363.05 (d) open meeting minutes shall be available to homeowners within 30 days. Each homeowner that presents an issue in a board meeting needs to review these minutes for accuracy. If there are inaccuracies you will need to let this be known for the record in the next meeting. It is important to attend all open board meetings. If your association attempts to prevent you from discussing [in an open meeting] common area problems affecting your unit, then this may be a red flag to a history of more serious problems.

Be aware that the board may invite you to an executive session to discuss your situation. Executive sessions are used to avoid issues from becoming known within the open meetings and or ending up in the open minutes. Executive session minutes can only be obtained through court order. In addition, if a board is abusive to you and or makes non factual statements in executive session, there are usually no witnesses present on your behalf. Always make it known that you are willing to cooperate and accept your associations invitation to meet. Request that this take place in an open meeting.

Be sure to photograph any damages within your unit as well as all surrounding areas. A video camera includes options for the date however for still photographs you will need to include the date within the area photographed when taken. It is always a good idea for all residents for insurance purposes regarding any type of property loss or damage to maintain a photographic log of all belongings of value.

Owners are reminded not to "offset" damages or alleged losses by withholding an assessment [association dues] payment. Falling behind and or withholding payment of assessments provides your association an opportunity to foreclose on your property. Even if an owners unit becomes uninhabitable due to problems created by the association, assessments must still be paid. Missing payments for any reason is a fatal error made by many who have lost their homes over this. An association can levy fines, penalties, interest, collection costs, and legal fees to a late or missing payment with the end result of foreclosure by that association.

Each owner should have a full copy of the association insurance policy that has been mailed to individual owners. It is the right of each owner to request and receive this information pursuant to Civil Code Sec 1365 (E4). Many associations have a history of withholding this information from owners who request this.

In addition every condo owner should ask for and receive a copy of their association policy and procedure for water damage and mold. And if no such policy exists be sure to have the association put this in writing. Associations with something to hide can become vicious at the mere mention of toxic mold, which is one reason you should already have a policy for this on hand prior to a problem occurring. It is not uncommon for an association to deny or withheld a policy for water damage and or mold only to later produce this using it against the owner.

In essence, the integrity of your condominium can depend upon the integrity of your association-its board of directors-property manager- association attorneys- management company- maintenance employees and vendors. In an age where condos with their community living have become more notorious for the problems that are taking place, then for their so called free and easy life style, integrity is not something routinely found today amongst those running homeowner associations.

With all the problems of adjoining walls, difficult and sometimes vindictive boards, ruthless association attorneys, along with few individual homeowner rights, many condo owners are packing it in and moving on. Until legislation changes to better protect the homeowner, leaving an HOA may not be such a bad idea.