

**Report of the
Mold Working Group of the
Risk Management Committee**

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I. Purpose, Scope and Method of Inquiry

The Mold Working Group of the Risk Management Committee was formed to evaluate the available information on mold and develop recommendations for actions which might be taken by the National Association to assist members of the National Association in addressing the issues raised by mold as it affects the real estate industry. The Charge given to the Working Group is attached as Appendix A. To provide the basis for this discussion the Working Group members and staff collected and considered an extensive amount of information about mold as it relates to real estate, including a paper prepared by the National Association's Government Affairs Division (Appendix B), a resources paper written at NAR's request by Professor L. Zumpano of the University of Alabama (Appendix C), and information about how state Realtor® associations and legislatures have addressed mold issues, provided by representatives of state associations. The Zumpano paper, in particular, was intended to identify: (i) existing resources on the subject of mold; (ii) to the extent possible, ongoing research into the health and any other effects of mold; and (iii) areas of research that still need to be undertaken to completely understand mold.

II. Recommendations

The Mold Working Group recommends that the NATIONAL ASSOCIATION OF REALTORS® adopt and implement the following actions:

- 1. NAR Indoor Air Policy Statement.** The National Association should amend its policy on Indoor Air Quality, attached as Exhibit 1, to address mold specifically. In particular, a new paragraph should be added to address mold in a manner consistent with the language of the second paragraph of the current policy (Exhibit 1A).
- 2. NAR Property Condition Disclosure Policy.** The National Association should amend Appendix A of its policy on Property Condition Disclosure, attached as Exhibit 2, to include a recommendation that disclosure forms include questions regarding mold. It is inadequate, however, for such questions to simply inquire about the presence of mold, since the ubiquitous presence of mold will require an affirmative response in essentially all cases. These questions should ask about known existing or past mold problems as well as information about factors, particularly water intrusion events, which might provide an environment conducive to the growth of mold (Exhibit 2A).
- 3. Consumer Education Brochure.** The National Association should encourage the development of a consumer oriented informational brochure which fairly and accurately portrays the real estate related issues raised by mold, such as information about the conditions which allow for mold growth, methods to minimize and/or remove mold and the need for buyers/tenants to make their own determination of whether further investigation of mold is needed based upon the information available to them and the real estate professionals with whom they are working. The brochure should clearly state the status of the science of testing for mold and the degree of difficulty in determining which tests to recommend and ultimately, how reliable are the tests. The National Association's role is to encourage the development of the information brochure, not to prepare the brochure itself. This brochure should be the product of an authoritative governmental agency (e.g., CDC, EPA) or recognized independent authority (e.g., Harvard,

Johns Hopkins, American Lung Association) that will be accepted by consumers, business and government.

In pursuing this goal the National Association should seek out and develop coalitions among other interested groups who would also encourage and support the development of such a publication, including property inspectors, appraisers, homebuilders, lenders, insurers, and regulators.

4. Broker Liability Protection. The National Association should encourage state associations to advocate the adoption of laws and rules that will provide a defense to claims against real estate brokers and property managers who have truthfully disclosed any known moisture and mold problems or conditions and provided buyers/tenants with specified disclosure information regarding mold.

In addition, to assist real estate professionals where such laws have not been adopted, the National Association should explore measures that can be recommended for use by real estate professionals to minimize their exposure to liability for mold. These should include dissemination by real estate professionals of authoritative information about the implications and effects of mold in real estate. Such measures may also encourage recommending that parties to a real estate transaction (buyers, sellers, lessees and lessors) consult with appropriately qualified experts for any desired advice and guidance about mold, and avoiding conduct that may infer that real estate brokers, managers and appraisers are experts in the field of mold or its effects.

5. Property Insurance Availability. The National Association should investigate current practices and continuously monitor conditions regarding the availability of property insurance coverage and the impact of mold on the availability of that insurance. As may appear necessary, the National Association should also seek, or encourage state Realtor® associations to seek, legislative or regulatory relief to avoid any interruption in the availability of that insurance caused by mold.

6. Professional Liability Insurance. The National Association should review the availability of errors and omissions insurance coverage for real estate professionals for claims based on bodily injury or property damage associated with mold. To the extent such coverage is not available, or that it may appear that it is likely to become unavailable, the National Association should work with carriers and/or seek legislative or regulatory relief to avoid any interruption in the availability of errors and omissions insurance.

7. Remediation Technologies. The National Association should work with other groups to encourage the development and assist in the dissemination of information regarding methods to remediate mold, which may include new construction or materials technology.

8. Broker Education Programs. The National Association should conduct education programs for members related to mold and its impact on real estate and real estate transactions.

9. Health Effects Research. The National Association should continuously monitor ongoing research regarding mold, including health effects, determination of “safe levels” of mold exposure, mold detection and remediation techniques.

10. Additional Unintended Consequences. The National Association should continuously monitor whether moisture and mold disclosures result in pricing and financing constraints for properties including reductions in value, lender requirements for insurance, stigmatized property related to properties that have not had disclosure/testing and affordability of property insurance.

III. Introduction

The presence of mold in real estate is certainly not a new phenomenon. Research identified by the Working Group indicates that many mold species are undoubtedly older than humankind and have been seen as undesirable in human habitations for thousands of years (see Leviticus 14:33-57). Due to widespread media focus and the notable numbers of claims being filed with insurers regarding mold and/or water intrusion, mold has become a public concern and a problem for the real estate industry over the past two or three years. Changes to common construction practices may provide a partial answer, and new materials such as artificial stucco (EIFS), which are susceptible to water retention problems, and some regional building practices, such as are used to deal with expansive soils, may exaggerate the development of mold problems. Closed air circulation systems used in some new commercial buildings may also facilitate the spread of a problem once it emerges in those buildings.

The fact that there is not a clear answer to the question of why mold has become a significant real estate problem is, however, largely unimportant to real estate salespersons, brokers, property managers or appraisers confronting a property which has been or may be affected by mold. For that reason, the Working Group intentionally made no effort to pursue this “Why” question in its deliberations.

The Working Group instead focused its attention on the practical issues raised by mold. This focus was directed to mold-related situations actually confronting members and what can be done to address and manage those problems. The Working Group gathered and carefully reviewed a substantial quantity of material about mold and its impact, including the paper prepared by the National Association’s Government Affairs Division (Appendix B), the resources paper developed by Professor L. Zumpano of the University of Alabama (Appendix C), as well as media reports and additional resources identified from other associations inside and outside of the real estate business, individual business entities, and governmental agencies. All state associations were also asked to provide any resource materials they might have developed or which had been developed in their states. Replies were received from sixteen states, which ranged from “no developments” to description of comprehensive study groups in place to study the issues and/or resolutions for action regarding the issue having been adopted by various associations and their members. Prof. Zumpano’s comprehensive report is intended to identify: (i) existing resources on the subject of mold; (ii) to the extent possible, ongoing research into the affects of

mold; and (iii) the areas of additional research necessary to completely understand mold and its implications and effects for real estate and real estate transactions.

These materials were discussed at length by the Working Group. What follows is a brief overview of the significant issues, facts and conclusions identified by the Group as a result of their review and discussion of those materials, and which form the bases for the Group's recommendations.

IV. Discussion

A. Mold Basics. Mold and mold spores are all around us, including in very air we breath. Mold plays an important role in the ecology of the planet by degrading and recycling biological materials. Mold requires only three elements in order to grow and thrive, and therefore may begin to grow in virtually any property.

First, mold requires a food source of organic matter. This includes many building materials used to construct real property improvements, including wood, insulation, dry wall, ceiling tiles and other cellulose materials. Mold can even find food sources in organic material that may be in accumulations of dirt in a property.

Second, mold grows best in moderate temperature conditions, similar to those at which most people are comfortable. But it should be noted that even extremes of temperature will not kill mold, but only put it into a dormant state where it can remain for years until conditions are more favorable for growth. Mold also prefers low levels of light to grow best.

Third, and perhaps most significantly, mold requires a source of moisture to begin growing from individual cells or spores into colonies, which can then spread and produce more spores.

The Zumpano report (pages 10-16) graphically demonstrates the breadth of the geographic distribution of mold related incidents. Insurance claims have been filed by homeowners in every state, from Alaska to Florida. Colder climates and arid or semi-arid conditions do not seem to affect the ability of mold to impact a property.

Mold colonies can begin growing within 24 to 48 hours after all of the elements for growth are present. Since the first two elements, food source and temperature conditions, are essentially always available in inhabited structures, it is the presence of the third element – moisture - which signals the potential for mold growth. Generally, if a moisture source is eliminated (dried out) within that 24 to 48 hour window, mold growth will be avoided or controlled. If moisture persists for a longer time period, the likelihood that there will be mold growth increases substantially and quickly.

Mold is different from other undesirable environmental hazards in real estate such as asbestos, UFFI or lead. Each of those substances are, or were, introduced intentionally into properties without an awareness of their adverse implications for the well-being of property occupants, and later determined to have particular adverse consequences. Each of those substances can also be readily identified, quantified and, as necessary, contained or eliminated. Although in some cases having such materials removed from or contained in the property may be expensive, doing so can eliminate the problem with a high degree of certainty.

These other environmental hazards also have fairly well-known and understood impacts upon the human populations with which they come into contact. For example, the adverse effects of lead on young children are acknowledged and fairly consistent. The same can be said of many other environmental hazards that have been addressed in homes, multi-family buildings, offices, and commercial structures.

Mold is different. It is a naturally occurring, living organism which already is potentially present virtually everywhere. It is not intentionally added or incorporated as a part of real property, but there is little or no a practical means for keeping it out a property. If a property is seriously impacted by mold (high concentrations of active colonies and/or substantial growth), even a complete remediation of the property may not completely and permanently remove the mold from the property. Remediation may only destroy or remove the active colonies and reduce the levels of mold present to ambient outside levels, and the potential for renewed mold growth always exists and will almost certainly occur unless the problem allowing for the growth (usually water intrusion/accumulation) has been corrected.

B. Health Effects.¹ The uncertainties associated with the effects of mold on human health also distinguishes it from other environmental hazards affecting real estate. Common experience readily

¹ This report describes information provided in studies and reports from apparently credible sources, and primarily cited in the Zumpano report. Neither the Working Group nor NAR staff attempted to evaluate such studies critically to determine the absolute or relative scientific validity of them, however. Research to refine the science regarding mold's effects on human health, and the variety of factors that influence such health effects, is incomplete and

demonstrates that “small” amounts of mold growth in a few discrete locations in the home will have little or no impact on the health of the residents. On the other hand, a number of published studies indicate that some molds may have adverse effects on human health, but the impact of mold on human health is determined by multiple factors. These factors include the particular susceptibility of the people exposed to mold, the type of mold, the concentration of mold, the duration of exposure, and the current stage of the mold’s lifecycle. Some people can live or work in a property in which mold is present with no affect, while other occupants may be adversely affected almost immediately.

The number of different types of molds known to exist is well into the tens of thousands if both the different species and the variations of those species are counted. It is important to note that of those tens of thousands of different molds that exist only a few dozen are actually believed to have a “toxic” effect in human beings and these may only be “toxic” during certain phases of their existence. These toxic effects have been reported to range from neurological impacts, including loss of cognitive abilities, to bleeding in lungs and carcinogenicity. Although several studies link these toxic effects to mold exposure, at present there is no consensus in the scientific community regarding the reasons why “toxic” mold may have these effects on human beings or the “level” or amount of mold exposure required for these effects to be observed.

While molds characterized as “toxic” have received the largest part of the attention in the media and elsewhere, perhaps the largest impact of mold is not from these molds, but rather from the exposure of individuals to elevated levels of mold generally. As noted above, studies concluding that some molds may be “toxic” recognize that almost all molds do not have such effects. Other studies suggest that many, perhaps even most, molds may have *some* “harmful” affects on *certain* human occupants of a property, at *certain* levels of exposure. One study claims to link mold to virtually all chronic sinus infections, a condition affecting as many as 37 million people in the United States.

Although some studies seek to determine whether there are “safe” levels of mold and if so, what those safe levels may be, at present there is no authoritative information regarding what constitutes a safe level for mold. A recently adopted California law directs the California state health department to undertake a review of available information to establish such levels, if possible, but implementation of that effort is

ongoing. The National Academy of Sciences (NAS), at the request of the Centers for Disease Control and Prevention (CDC), has begun a comprehensive review of the scientific literature of the effects of mold on human health. The Committee that will oversee and direct the review is composed of epidemiologists, toxicologists and other public health professionals. The NAS Committee will also make recommendations or suggest guidelines for

dependent upon the department's determination "that funds are available for the implementation of this chapter." The latest information available does not reveal whether funds have been appropriated by the legislature for the efforts called for in the new law, and, in any event, the law does not call upon the department to deliver a report until mid-2003. Additional research regarding the health effects of mold is ongoing but a complete understanding of the issues is not likely for years.

C. Disclosure. Whether or not real estate professionals are obligated to take any action to disclose a particular condition affecting property depends on whether that condition is "material." As noted above, while some studies and experiences conclude that *some* molds, at *some* concentrations, at *some* exposure levels, for *some* people, may have adverse health effects, the science on the health effects of mold remains relatively undeveloped. Real estate professionals may consider taking prudential measures, as described generally herein, to address mold disclosure in order to be better able to defend against claims asserting that they failed to disclose the presence, or possible presence, of mold growth that is asserted to have produced adverse health effects on residents. An independent but scientifically more complex defense to such a claim is, of course, that mold is not the cause of any health effects claimed to have been suffered by residents of the property.

The lack of a "safe" level for mold makes addressing the presence of mold in real estate problematic. In the case of other types of real estate environmental hazards, testing or inspection can be used to determine the existence and nature of any problem. Tests might reveal whether the problem was present at all, and if present whether it was at a level that had the potential to pose a risk to human beings. Testing for airborne mold spores may not offer either of these answers because the pervasive nature of mold means that virtually all such tests will provide positive results for some kinds of spores. Moreover, such tests may not be an accurate measure of the active mold growth in the property, and in any event the amount of mold growth can change quickly, as noted. In addition, the absence of any "safe" standard of mold makes it difficult for a qualified and trained environmental professional, let alone a real estate professional, to provide meaningful interpretation of test results as to the health implications for occupants of the property, except in the most extreme cases. As a result, no authoritative source recommends testing, at least as an initial step.

Rather than testing, most sources recommend an inspection of the property with two particular things in mind. Assuming there is no visible mold growth in a property, a "mold inspection" will look for, first,

public health interventions and for future basic science, clinical, and public health research on this issue. A final report will be issued in April 2003.

any appearance or evidence of water intrusion or accumulation, and second, musty or other odors suggesting the presence mold colonies. An inspection should also ask current owners or occupants for any knowledge of a water intrusion problem, since such problems would also be a signal of the need for further investigation. The inspection should also seek information about secondary affects of mold, such as respiratory, allergic or other adverse health conditions suffered by occupants of the property of the kind attributed to molds.

Any information discovered through this inspection could then be reported to the prospective purchaser/lessee. The information would allow the prospective purchaser/lessee to form their own informed decision regarding the purchase of the property or the need for further inquiry regarding the extent mold may be present in the property.

Notwithstanding the flaws of mold testing, some consumers may have a higher level of concern, or there may be instances where some other indicator of the presence or potential for mold, without any visible sign of mold. In such cases testing may be what that consumer wants and needs to reassure him or herself regarding the purchasing or leasing decision.

The state associations that reported having taken some action in response to the mold issue were unanimous in their adoption of some type of disclosure requirement. Real state professionals will be better equipped to perform disclosure responsibilities associated with mold, if they have readily available information brochures published by authoritative sources that explain mold and its effects to consumers. Real estate professionals will also be assisted by a more definite articulation of their responsibilities, such as is now included in California law. In that state, real estate licensees cannot be held liable for failure to provide disclosures related to mold (as well as other environmental conditions) if they disclose any known mold conditions and provide to prospective purchasers a booklet published by the California Department of Real Estate that has recently been revised to include information on mold.

D. Insurance Issues. Another critically important issue presented by the “mold problem” is the effect on the availability of property insurance. In Texas and California there have been threats of and actual withdrawal by some companies from the market for homeowners insurance due to the dramatic increase in insurance claims related to mold.

This development poses a substantial risk to the entire real estate industry and to the smooth operation of the real estate marketplace, since lenders will not make mortgage loans without the borrowers first having secured property insurance to cover the risk of damage to the property. Unavailability of property insurance would cause the real estate market to grind to a halt.

The same problem also exists with regard to commercial real estate and multi-family housing, although in those cases the problem may be as much one of the cost of the insurance as its availability. There have been reports of large increases in premiums being attributed to this new risk. With these increases on top of the anticipated increases due to the terrorism risk, some owners may be priced out of the ability to insure their properties.

Questions have also been raised regarding the coverage provided by professional liability/errors and omissions insurance now carried by most real estate professionals. Although there was little or no information yet identified regarding mold claims brought against real estate professionals, two areas of concern were identified. First, there is a question as to whether mold claims are subject to any policy exclusions, such as those for claims based on pollutants. Second, even if there is coverage for claims against real estate professionals based on property damage, there is a question as to whether coverage is also available for claims seeking damages based on bodily injury.

V. Conclusions

Mold represents the latest in a line of new risks which have confronted real estate professionals over the last two decades. Although the nature of this new risk may be different than those that came before, the strategies for addressing this new problem need not be new. The real estate professional can reduce his risk by assisting participants to the transaction to have access to the information that is or can be made available, so that they can to make decisions appropriate to their position in the transaction. If that can be achieved, then the risks of the decision properly are left to the party making the decision.

The National Association can assist its members by making them aware of the issue, improving the information available to members regarding mold and its implications for real estate and real estate transactions, and by making them aware of the benefits of making appropriate disclosures to their clients and customers. In doing so, NAR is keenly aware that real estate professionals are not, and nothing done by the National Association should suggest that they are, experts on mold or its effects on building or their occupants.

The National Association can also use its leading position in the real estate industry to attempt to prevent mold from becoming an obstacle to the smooth flow of the real estate transaction, by, for example, assuring the availability of insurance and other services to sellers, lessors, buyers, tenants and real estate professionals involved in the real estate transaction.

Exhibit 1

REALTORS® Positions on Current Issues Indoor Air Quality

We believe that all Americans are entitled to enjoy an indoor living environment where risks to health and welfare from pollution are minimized. Increased efforts by both the private and public sectors should be encouraged to characterize and evaluate the extent of indoor air quality problems and to encourage the development of meaningful and affordable monitoring and mitigation strategies.

We support federal indoor air quality research and information dissemination. We support both efforts to educate homeowners as to their responsibility to identify and disclose to real estate brokers or agents any known environmental hazards presenting a significant risk to health; and efforts by state associations of REALTORS® to determine the desirability of disclosure language in listings and contracts of sale.

We urge all Americans who are in areas identified with high levels of radon to test their homes to determine if elevated levels of radon gas are present. We support increased education of homeowners so that they will become aware of potential radon problems and of their responsibility to disclose to real estate brokers or agents indoor air problems that present a significant risk to health. We oppose nationwide mandatory radon testing at the time of transfer of real property.

Any regulation of asbestos in buildings should be based on scientifically-proven significant levels of exposure and hazard to the public. Such regulations should allow reasonable time periods in which to comply with regulations, provide flexibility in how to comply, require comprehensive training and certification for asbestos abatement contractors and laboratory technicians, and provide for a “prioritization” of regulation with respect to the particular hazard posed by certain building types and classes.

Exhibit 2

The NATIONAL ASSOCIATION OF REALTORS® encourages state Associations to develop and support legislation or regulation requiring mandatory property condition disclosure by the seller which includes some or all of the key components identified in Appendix A.

Appendix A

Key Components of Property Condition Disclosure Legislation

Provisions that specific written disclosure is required for real property with improved 1 to 4 family dwelling units in a sales transaction, lease with an option to purchase, or ground lease coupled with improvements.

Provisions that the obligation to disclose to the buyer is the responsibility of the seller. Also note that sellers without agents have the same obligation to provide prospective buyers with a fully-executed property condition disclosure form.

Provision that the buyer should acknowledge receipt of property condition disclosure statement upon actual receipt of the statement.

Provision that written disclosure should include, but not be limited to, the following areas: water (e.g. source of household water, irrigation, water treatment system, sprinkler system), sewer system, insulation, structure (roof, foundation, fixtures), hazardous materials (e.g. asbestos, lead based paint, radon, underground storage tanks) and other material defects known to the seller.

Provision that the written disclosure statement is not a warranty of any kind by the seller or any agent, and is not a substitute for any inspections or warranties the principals may wish to obtain.

Requirement for disclosure statement to contain notice to prospective buyers in substantially the following language: “The prospective buyer and the owner may wish to obtain professional advice or inspections of the property and to provide for appropriate provisions in a contract between them with respect to any advice, inspections, defects or warranties.”

Requirement for disclosure form to contain notice to prospective purchasers in substantially the following language: “The following are representations made by the seller and are not the representations of the agent, if any. This information is for disclosure only and is not intended to be a part of any contract between the buyer and the seller.”

Provision that neither the seller nor the seller’s agent shall be liable for any error, inaccuracy, or omission if the seller or the seller’s agent had no personal knowledge of that error, inaccuracy or omission, or if the disclosure was based on information provided by public agencies, or by other persons providing information dealing with matters within the scope of their professional license or expertise (e.g. report or opinion delivered by a land surveyor, structural pest control operator, licensed engineer or contractor).

Provision to amend disclosure statement, in writing, if necessary with acceptance and approval of the prospective buyer.

Provision that if information disclosed in accordance with the law is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracies resulting therefrom do not invalidate the statement.

Provision that no transfer of an interest in real property shall be invalidated solely because of the failure of any person to comply with any provisions of the mandated disclosure requirement.

Provision that in no event shall the time for commencement of legal action for breach of duty imposed by the disclosure law exceed (a specific number of years determined by individual state) from the date of possession (date of recordation, date of close of escrow, date of occupancy, whichever occurs first).

Exhibit 1A

Proposed Amendment to NAR Indoor Air Quality Policy

We support federal research on mold and its effects and dissemination of the objective, scientific results of that research. We support both efforts to educate homeowners as to their responsibility to identify and disclose to real estate brokers or agents any known mold hazard presenting a significant risk to health; and efforts by state associations of REALTORS® to determine the desirability of disclosure language in listings and contracts of sale.

Exhibit 2A

Proposed Amendment to NAR Property Condition Disclosure Policy (Appendix A)

Provision that written disclosure should include, but not be limited to the following areas: water (e.g. source of household water, irrigation, water treatment system, sprinkler system), sewer system, insulation, structure (e.g. roof, foundation, water intrusion, fixtures), hazardous materials (e.g., asbestos, lead based paint, radon, underground storage tanks), known existing or past mold presence (other than that which is known not to adversely affect the property or its occupants) and other material defects known to the seller.

(additions to existing language is underscored)