

## **Mitigation of Mold Liability**

Mold related claims are very serious, and potentially catastrophic issues for landlords. In fact, mold issues are so risky, and exposure to losses so great, insurers are either not providing insurance, or the cost of coverage is so high as to make it economically unfeasible to acquire mold coverage. A recent case in Richmond involved a landlord being sued for \$9 million. While the case was settled, the landlord had to spend more than \$100,000 in attorneys' fees and costs to get the case to a point where it could be settled, which cost the landlord more money out of pocket.

In the 2008 General Assembly, legislation was passed that provides some important safe harbors and procedures for the protection of landlords. It is clearly in every landlord's best interest to avail themselves of these safe harbors, as well as the prescribed procedures, in order to protect themselves to the maximum extent possible from potentially catastrophic losses which are not currently covered by insurance.

In the 2009 General Assembly, Virginia Code Section 54.1-517.3 was passed which requires individuals performing mold inspections and remediation to be licensed by the Board for Asbestos, Lead, Mold and Home Inspections, except in limited circumstances. A licensed mold inspector or remediator is now required by Virginia Code Section 54.1-500.1 to be on the Board, and the Board has been charged with promulgating regulations for licensing mold inspectors and remediators. As a landlord, knowing when a licensed mold inspector or remediator is required is critical.

With regard to tenants, at the beginning of the tenancy, the move-in inspection Report should include a provision as to whether or not there is visible evidence of mold. The 2008 legislation provides the landlord a "safe harbor" if there is no visible evidence of mold listed on the move-in report given to the tenant, and the tenant does not discover any visible evidence of mold, or fails to report same within 5 days of move-in. In this case, the "mold immunity" legislation contained in Virginia Code Section 8.01-226.12 creates a rebuttable presumption that no mold existed in the dwelling unit at the time of the move-in.

During the tenancy, Virginia Code Section 55-248.16 now makes it clear that the tenant has a duty to use reasonable efforts to prevent the accumulation of water and the growth of mold, and to notify the landlord of any moisture accumulation or visible evidence of mold after commencement of the tenancy. A good move in report form, coupled with this new legislation, provides a solid basis for a landlord to assert that there was no mold present at move in, and that any subsequent mold accumulation was at least partially due to the tenant's failure to prevent the accumulation of water and the growth of mold, or to timely notify the landlord of such conditions. A tenant who allows such a condition, or who fails to notify the landlord of such a condition, would likely be deemed to have been guilty of contributory negligence and would therefore be completely barred from any recovery from the landlord. Further, the doctrine of assumption of the risk may also be applicable, in that a tenant who knowingly allowed a moisture condition to exist, or allowed visible evidence of mold to exist, would likely be held to have assumed the risk and therefore would be barred from any recovery from the landlord. Finally, the failure

of the tenant to prevent growth of mold or to promptly report a mold condition to the landlord is likely a breach of the lease under its terms and a violation of the Virginia Residential Landlord and Tenant Act (VRLTA).

In the event the tenant discovers mold issues and notifies the landlord, Virginia Code Section 55-248.13 now makes it clear that the landlord must promptly respond to any mold issues raised by the tenant and must otherwise take reasonable steps to prevent the accumulation of moisture in and about the premises. Relocation of the tenant during mold remediation may also be required, and a definition of “mold remediation in accordance with professional standards” establishes a protocol for landlords to address mold conditions when they arise. However, the landlord may now escape liability for the costs of remediation if it is determined the accumulation of mold was the fault of the tenant.

Given the seriousness of mold issues and the lack of available insurance, it is critical that all landlords have a full and complete understanding of the law and recent amendments. In the event of any uncertainty, or if assistance is needed preparing forms, such as the move-in inspection report, please consult counsel knowledgeable in these areas.

Please contact FutureLaw for additional information.