

COMMERCIAL LEASE LAW INSIDER®

www.CommercialLeaseLawInsider.com

Make Tenant That Controls Its Space Responsible for Mold Issues

Responsibility for mold-related damage in commercial and residential properties has become a hot-button issue in the past decade, as major storms like Hurricane Sandy have increased the potential for flooding and subsequent mold growth, and as tenants have become more aware of environmental issues. Things like indoor air quality (IAQ) that previously weren't on tenants' radar may play a role in whether they choose a certain space over another. After all, tenants don't want to risk their employees' or customers' health by working in hazardous conditions.

Conscientious owners should be aware of mold and other hazards and do their best to avoid or eliminate them. For example, if you're responsible for the outside of the building, then you would be required to fix, say, a leaky facade.

However, if your tenant "controls" its space—that is, the tenant is solely responsible for repairs and maintenance—it's not appropriate to blame you for mold and the conditions that could cause it to grow. But if your lease with a tenant that controls its own space doesn't include provisions that protect you from the threat of this type of lawsuit, you could be on the hook when you could've made the tenant responsible for keeping its space free of mold growth and mold-inducing conditions.

To plug this loophole, consider adding the following mold-related requirements to your leases, and ask your attorney about adapting our Model Lease Clause: Shift Mold Responsibility to Tenant, to protect your interests.

Responsibility to Monitor Space, Pay Costs

The tenant's effective monitoring of its space can help prevent conditions that will lead to mold

growth. Your tenant should be required to regularly monitor its space (including periodic and thorough inspections of the heating, ventilation, and air conditioning (HVAC) system) for mold growth and mold-inducing conditions, such as moisture and water intrusion.

You should make it clear that this means not just actual or suspected mold growth but also actual or suspected water intrusion/damage, repeated complaints of respiratory ailments or eye irritations by the tenants' employees or any other occupants in the space, and any complaints the tenant is aware of by government agencies about indoor air quality at the space [Clause, par. a(i)].

The tenant has a strong incentive to monitor the space because monitoring can protect its wallet—if the tenant can prevent mold or mold-inducing conditions, it won't need to take any further steps, such as paying for a mold inspection and remediation. At the least, by catching problems early, it may be able to keep its remediation costs down and avoid liability for mold-related claims.

Since the tenant controls the space, require it to pay for all costs of monitoring the space [Clause, par. a]. That should reduce the likelihood that the tenant will come after you for payment.

Tenant Must Provide Notice of Suspected Mold

Make the tenant promptly notify you in writing if, after monitoring its space, it suspects mold or mold-inducing conditions [Clause, par. a(ii)]. This way, you'll know about the problem and can check up on the tenant or other building areas that may be affected by the same mold problem (for example, the common areas adjacent to the tenant's space or an adjacent tenant's space) to

REPRINT – NON-COMMERCIAL USE ONLY

© 2014 by Vendome Real Estate Media

ensure that the tenant promptly carries out its inspection and remediation requirements.

Don't commit yourself to sending the tenant a written acknowledgment within a fixed time after you get this notice. Because if you make the commitment but forget to send the acknowledgment, the tenant might argue that you've waived your rights under the lease, so it's no longer required to carry out its inspection and remediation obligations.

Professional Mold Inspection Is a Necessity

If the tenant's monitoring suggests that mold or mold-inducing conditions may be present, a mold inspection by a qualified indoor air quality/industrial hygiene consultant will be necessary. The inspection's results will confirm or deny their presence. So make sure your lease covers these points:

Prompt inspection. If the tenant suspects mold or mold-inducing conditions, require the tenant to promptly arrange for an inspection of the space [Clause, par. b]. Any delay by the tenant could worsen a potentially hazardous situation.

This is also an opportunity to contribute to the scope of the mold inspection. You want to be sure the job is done right, but you don't want to appear to be taking control of the mold inspection (or any mold remediation needed). The space is still under the tenant's control, so any mold problem should remain the tenant's responsibility.

Inspection notice. Require the tenant to send you advance written notice of the inspection date and which portion of the space will be inspected. Make sure the tenant is required to send its notice at least three business days before the inspection date [Clause, par. b(i)]. Although you want the tenant to act promptly on its suspicions of mold or mold-inducing conditions, you don't want to be notified of an inspection at the last minute. You want to be able to keep tabs on the tenant's inspection efforts.

Inspection costs. Require the tenant to pay all the inspection costs [Clause, par. b]. If you don't address these costs in the lease, the tenant may later claim—and a court may agree—that you're responsible for footing the bill for them.

Mold inspection specialist. Require the tenant to use only qualified and experienced mold consultants—such as a certified industrial hygien-

ist (CIH) with mold experience—for the inspection [Clause, par. b(ii)]. Deciding who is qualified can be tricky. There are no national standards/licensing requirements/certification programs for companies performing mold services (inspections or remediation), but there are industry certifications, such as the Certified Microbial Consultant (CMC) and Council-Certified Microbial Remediator (CMR) designations issued by the American Council of Accredited Certification. Some states, such as New York and New Jersey, offer only guidelines for mold inspection, while other states, such as Texas, Louisiana, Maryland, Arkansas, and Florida, do have licensing requirements for mold assessments/inspectors. The CIH designation is more general and not mold specific, but is the “top” certified credential, and the area of industrial hygiene clearly covers airborne microbial/mold issues.

In any event, make sure the CIH or other consultant you hire has extensive mold experience. Otherwise, the tenant might hire a novice, who might miss a problem, misidentify the type of mold, or damage the space.

Insurance and legal reliance. Require the tenant to have the consultant/mold inspector provide you with legal reliance on its work and reports, to carry appropriate insurance, including “contractors pollution liability” and “errors and omissions” insurance with appropriate terms and limits, to add you as an additional insured on these policies, and to provide you with evidence of the coverage and a copy of the endorsements naming you as an additional insured [Clause, par. b(iii) (A)].

Such insurance will protect you if you and the consultant/mold inspector get sued because the inspector didn't adequately perform his or her inspection and the provision of legal reliance on the consultant's/mold inspector's work/reports will give you direct contractual access to the consultant/mold inspector in the event of a problem.

Times for inspection. Get the right to limit when the inspection can occur [Clause, par. b]. Because of the negative publicity generated by mold and indoor air quality lawsuits, you may want to allow a mold inspection only when your building is closed—even if you have to pay for overtime to staff and security costs. This will minimize the risk that existing tenants will draw premature conclusions about mold contamination in the building.

Shift Mold Responsibility to Tenant

Consider using the following clause to make a tenant that controls its space responsible for monitoring, inspecting, and remediating mold-related hazards. Show this clause to your attorney before tailoring it to reflect your particular situation.

MONITORING, INSPECTING & REMEDIATING MOLD

a. Monitoring of Premises. Tenant, at its sole cost and expense, shall:

- (i) Regularly monitor the Premises for the presence of mold or for any conditions that reasonably can be expected to give rise to mold (the "Mold Conditions"), including, but not limited to, observed or suspected instances of water intrusion or damage, mold growth, repeated complaints of respiratory ailment or eye irritation by Tenant's employees or any other occupants in the Premises, or any notice from a governmental agency of complaints regarding the indoor air quality at the Premises; and
- (ii) Promptly notify Landlord in writing if it suspects mold or Mold Conditions at the Premises.

b. Inspection of Premises. In the event of suspected mold or Mold Conditions at the Premises, Tenant, at its sole cost and expense, shall promptly cause an inspection of the Premises to be conducted, during such time as Landlord may designate, to determine if mold or Mold Conditions are present at the Premises, and shall:

- (i) Notify Landlord, in writing, at least [*insert #, e.g., 3*] days prior to the inspection, of the date on which the inspection shall occur, and which portion of the Premises shall be subject to the inspection;
- (ii) Retain an industrial hygienist certified by the American Board of Industrial Hygienists ("CIH") with mold experience or an otherwise qualified mold consultant (generally, "Mold Inspector") to conduct the inspection; and
- (iii) Cause such Mold Inspector to:
 - (A) Obtain and maintain contractors pollution liability and errors and omissions insurance coverage with terms and limits customarily maintained by Mold Inspectors, adding Landlord as an additional insured with respect to Landlord's vicarious liability, and provide to Landlord evidence of such coverage and a copy of the endorsement granting Landlord additional insured status;
 - (B) Perform the inspection in a manner that is strictly confidential and consistent with the duty of care exercised by a Mold Inspector;
 - (C) Prepare an inspection report, keep the results of the inspection report confidential, and promptly provide a copy to Landlord; and
 - (D) Provide Landlord with a legal reliance letter for the Mold Inspector's work/report, on the same terms and conditions provided to Tenant.

c. Remediation of Mold. In the event the inspection required by Paragraph b hereof determines that mold or Mold Conditions are present at the Premises, then

- (i) Tenant, at its sole cost and expense, shall promptly:
 - (A) Hire trained and experienced mold remediation contractors to prepare a remediation plan and to remediate the mold or Mold Conditions at the Premises;
 - (B) Send Landlord notice, in writing, with a copy of the remediation plan, at least [*insert #, e.g., 3 to 5*] days prior to the mold remediation, stating:
 - (1) The date on which the mold remediation shall start;
 - (2) Which portion of the Premises shall be subject to the remediation;
 - (3) The name, address, and telephone number of the certified mold remediation contractors performing the remediation;
 - (4) The remediation procedures and standards to be used at the Premises;
 - (5) The clearance criteria to be employed at the conclusion of the remediation; and
 - (6) The date the remediation will conclude;
 - (C) Notify, in accordance with any applicable state or local environmental, health, or safety requirements, any regulatory authorities with jurisdiction, as well as its employees, occupants, and visitors of the Premises of the nature, location, and schedule for the planned mold remediation;
 - (D) Provide Landlord with a draft of the mold remediation report and give Landlord a reasonable opportunity to review and comment thereon, and when such report is finalized, promptly provide Landlord with a copy of the final remediation report;
 - (E) Obtain and maintain contractors pollution liability and errors and omissions insurance coverage with terms and limits customarily maintained by Mold Remediation Contractors, adding Landlord as an additional insured with respect to Landlord's vicarious liability, and provide to Landlord evidence of such coverage and a copy of the endorsement granting Landlord additional insured status; and
 - (F) Provide Landlord with a legal reliance letter for the Mold Remediation Contractors' work/report, on the same terms and conditions provided to Tenant.

d. Post-Remediation Inspection. Tenant acknowledges and agrees that Landlord shall have a reasonable opportunity to inspect the remediated portion of the Premises after the conclusion of the mold remediation. If the results of Landlord's inspection indicate that the remediation does not comply with the final remediation report or any other applicable federal, state, or local laws, regulatory standards or guidelines, including, without limitation, the EPA Guidelines, then Tenant, at its sole cost and expense, shall immediately take all further actions necessary to ensure such compliance.

Discretion. Require the tenant to have the inspection performed discreetly and confidentially [Clause, par. b(iii)(B)]. This is important because even if you limit the allowable inspection times, other tenants may be in the building during the inspection. You don't want the inspector to reveal his purpose to other tenants or nonessential personnel or, for example, to appear in conspicuous vehicles or uniforms.

Confidential inspection report. Require the tenant to have the inspector prepare a report after the inspection and promptly give you a copy of it [Clause, par. b(iii)(C)]. If the inspector conducts an oral report for the tenant or prepares a draft of the report, ask to participate in the discussion and/or review the draft. This way, you'll know early on if there's mold or a mold-inducing condition in the space, and the extent of it.

Require both the tenant and its inspector to keep the inspection report and its results confidential [Clause, par. b(iii)(C)]. The inspection report contains technical information that can be easily misinterpreted by nonprofessionals, especially given the widespread negative publicity generated by toxic mold cases. You want the mold remediation plan, if needed, to be developed on the basis of sound scientific, technical, health, and safety considerations—not in an emotionally charged atmosphere. Also, keeping the inspection report confidential reduces the incentive for mold consultants to solicit business from other tenants in your building.

Immediate Remediation Required

If the inspection results confirm the presence of mold or a mold-inducing condition in the space, mold remediation will be necessary. It's crucial to set these specifications:

Promptness. Require the tenant to promptly hire contractors to remediate any mold or mold-inducing conditions at the space [Clause, par. c(i) A]. Any delay by the tenant could cause the situation to worsen. And it could put you and the tenant at risk of getting sued by employees, occupants, or visitors who were exposed to the mold and became ill from it.

Remediation notice. Require the tenant to send you advance written notice of the remediation. The notice must tell you when the remediation will start, which portion of the space will be remediated, who will perform the remediation,

and when the remediation will end. Make sure you get the notice at least three to five days before the remediation's start date [Clause, par. c(i)(B)]. This will give you some time to prepare your building staff and alert other tenants, since you may have to evacuate some areas of the building during the remediation.

Also, say in your lease that the tenant has the responsibility of notifying its employees, occupants, and visitors of the mold remediation [Clause, par. c(i)(C)].

Remediation costs. Make sure the tenant is solely responsible for paying all remediation costs [Clause, par. c(i)]. If you don't address this in the lease, the tenant may later claim—and a court may agree—that you're responsible for paying those costs.

Experienced contractors. Require the tenant to hire experienced mold remediation contractors [Clause, par. c(i)(A)]. Impose the same insurance and legal reliance obligations on the remediation contractor as required for the consultant/mold inspector. Given the absence of uniform licensing requirements for mold remediators, you want to ensure only well-trained and experienced contractors are hired, to reduce the risk of needless damage to the space and a less than thorough job.

Also make sure the contractor will not implicate or disturb any other hazardous materials, such as asbestos, lead, or polychlorinated biphenyls (PCBs) in its work that could require compliance with other laws and regulations imposing notification and procedural obligations.

Remediation plan. Require the tenant to have its mold remediation contractors prepare a "remediation plan" before the remediation starts [Clause, par. c(i)(A)].

The remediation plan should describe the remediation standards and "clearance criteria"—that is, the level of remediation that you and the tenant agree the contractors must reach. This is critical given that there are no regulatory specified clearance criteria for mold or bacteria. And the remediation plan should describe the procedures that will be taken to: remediate the mold or mold-inducing conditions; properly dispose of the moldy materials; and protect workers, tenants, and occupants while the remediation is ongoing. Also, require the tenant to attach a copy of the remediation plan to its remediation notice [Clause,

par. c(i)(B)]. This way, you'll have time to review its contents with your own expert to see what the remediation involves.

Remediation report. After a remediation ends, the mold remediation contractors will prepare a remediation report, which discusses the results. Make sure that the tenant is required to give you—or have the contractors give you—a draft of the remediation report so you can comment on it. Also require that you get a copy of the final remediation report [Clause, par. c(i)(D)].

Post-remediation inspection. Get the right to bring your own inspector into the space after you get the final remediation report. Your inspector can check the space to confirm that the remediation was done as the report indicates and that it followed any applicable requirements or guidelines. And if this turns out not to be the case, have the right to require the tenant to fix the problem [Clause, par. d].

Cover Mold in Other Lease Clauses

Besides adding a clause to your lease to make the tenant responsible for mold and mold-causing conditions, also take a look at your standard lease clauses and increase the protection they give you against mold-related lawsuits and other problems.

Alterations. Bar the tenant from using materials that are susceptible to mold growth—such as rubber foam—when making alterations.

Insurance. Add mold coverage to the tenant's insurance obligations.

Waiver. Require the tenant to waive all rights to sue you for mold-related claims.

Indemnification. Require the tenant to indemnify you if you're sued by third parties because of mold in the tenant's space. That is, you want the tenant to agree to pay for your defense and not to seek any reimbursement from you for any damages and penalties that may be assessed.

Self-help. Your lease may give you a self-help right—that is, let you enter the space and make repairs the tenant was supposed to make but didn't. If it does, make sure this right includes the right to remediate mold in the space. If it doesn't, make sure you negotiate such a provision. ♦

Insider Source

Andrew N. Davis, Ph.D, Esq: Partner, Shipman & Goodwin, LLP, One Constitution Plaza, Hartford, CT 06103; www.shipmangoodwin.com.