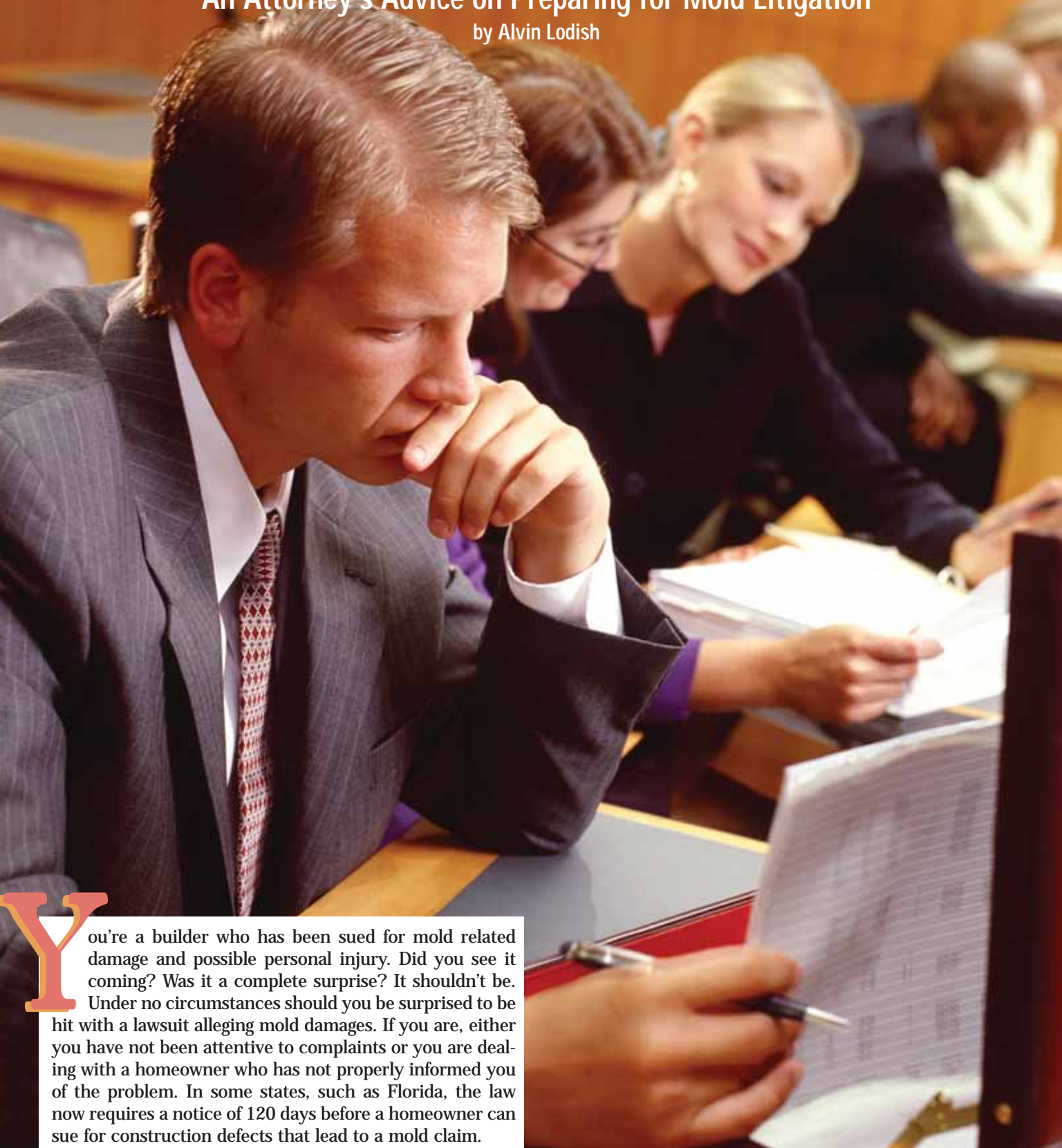


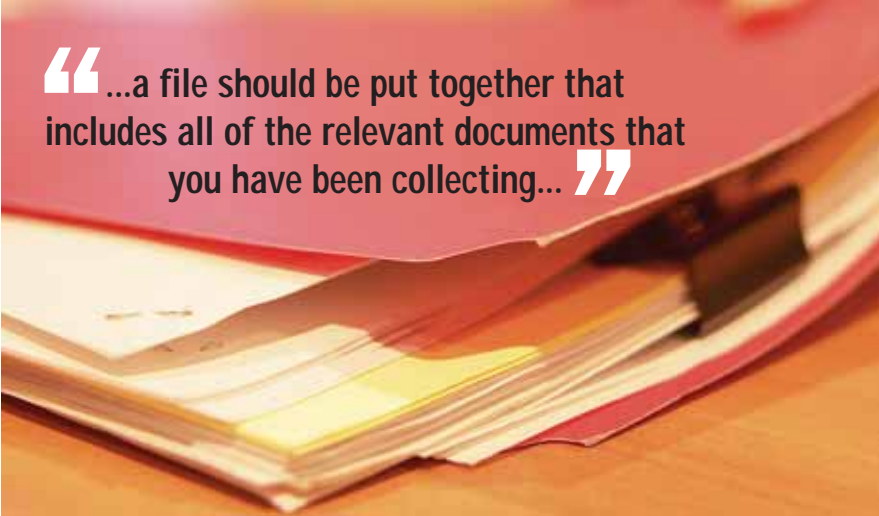
I've Been Sued ... Now What?

An Attorney's Advice on Preparing for Mold Litigation

by Alvin Lodish



You're a builder who has been sued for mold related damage and possible personal injury. Did you see it coming? Was it a complete surprise? It shouldn't be. Under no circumstances should you be surprised to be hit with a lawsuit alleging mold damages. If you are, either you have not been attentive to complaints or you are dealing with a homeowner who has not properly informed you of the problem. In some states, such as Florida, the law now requires a notice of 120 days before a homeowner can sue for construction defects that lead to a mold claim.



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Before You Reach “The Last Resort”

Certainly, the filing of a lawsuit should be the last resort in a mold dispute. There should have been reasonable efforts made to resolve the problems so that litigation would not be necessary. What did you do to minimize the chance of a lawsuit? Did you promptly respond to the homeowners' concerns? Did you take any steps to identify the cause of the mold or attempt to remediate?

Responsiveness is a key issue for homeowners, particularly of recently built homes, and failure to respond in a timely manner to homeowners' concerns can lead to a lawsuit.

In the event that something does go wrong, be sure that you have a mold protocol to call upon. If you do not have a protocol in place now, put one together promptly. The protocol should list the steps to be taken if a mold problem arises and identify a “team” to handle the problem. The team should include a reputable environmental consultant who is experienced in indoor air quality or water intrusion investigations and a mold remediation company that is certified by the American Indoor Air Quality Council (AIAQ), the Institute of Inspection, Cleaning and Restoration Certification (IICRC) or the Indoor Air Quality Association (IAQA).

Having an established protocol is helpful in litigation. It shows that you're prepared and conscientious.

Documentation is the Key to Preparation

Perhaps the most important aspect of preparing for and successfully defending a lawsuit is to make sure that the problems and attempted solutions are well documented. This should start with the first contact by a customer service representative documenting the time, date and nature of the problem. Photographs are very important and should be dated. The documentation should also include any comments made by the homeowner as to any alleged personal injuries and any observations made by your staff. Employees should be instructed to assume that their notes and comments will be made public. In that way, their comments will be kept factual and specific. Memos are helpful if they are kept factual, contemporaneous and do not contain editorial comments that can be used to try and show some bias by the employee or the builder. It is a good business practice to keep complete notes and information for each of your homeowners.

Also, any physical evidence that was gathered and removed from the home, such as wood, insulation or portions of the HVAC system, should be saved in a sanitary environment. Keep in mind that it is not unusual for a case to take four to five years to go to

trial and attempting to piece together what happened without contemporaneous notes or documentation will be very difficult.

After the Lawsuit Is Filed

The first thing to determine once a lawsuit is filed is whether or not you have insurance coverage and whether the claims made by the homeowner are a covered event. Reading and understanding the insurance policy is not easy and contacting your attorney for a coverage opinion may be necessary.

Clearly, it is also critical that you retain competent counsel who is experienced in dealing with mold issues and construction defects. To make the attorney's job easier and less expensive for you, a file should be put together that includes all of the relevant documents that you have been collecting concerning the homeowner, including the purchase and sale contract, any warranties, customer service documents, notes or memos concerning the mold problem and a list of employees who have interacted with the homeowner on behalf of the company.

The next step should be to determine who the relevant witnesses are and what expert witnesses may be necessary. Depending on the area of the country in which you live, retaining the best experts early can be important. Lawsuits, you will discover, are one reason why you should try to maintain good relationships with former employees. It is very common, due to the length of time it may take a case to be tried, that employees who have worked on a homeowner's mold problem may no longer be with the company. It may be appropriate to have employees who are no longer with the company sign an affidavit so that there is no confusion as to the employee's recollection. The affidavit can be referred to before deposition or trial.

Inspection of the home is important at this point. There may be strategic reasons why your attorney wants to wait to have an inspection, but generally it is better to have it sooner rather than later, and make sure your expert or consultant attends. Pictures and/or videotapes should be made at the time of the

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inspection. If you wait too long for an inspection, the homeowner may remediate the problem, make repairs and thus change the condition of the home.


In addition, it is important to determine whether personal injuries are being claimed by the homeowner. If medical issues arise, records from the relevant doctors or hospitals should be obtained. It is important to know what steps the homeowner has taken to protect his own health. Obtaining a medical history of the homeowner is important if there is a claim of any personal injury since allergies and sinus conditions are the primary known side effects of exposure to certain kinds of molds.


Also, find out if the homeowner has insurance that may cover the damage and whether he made a claim. You need to see the policy to know whether the insurance company has subrogation rights against you if it settles with the homeowner.

It is important to review any contracts with the homeowner to determine your contractual and warranty obligations and to see if there is an attorney fee provision. Many contracts have attorney fee provi-

sions that allow the prevailing party to collect fees. In order for a builder to analyze his risk and exposure properly, attorney's fees should be considered. In many states, such as Florida, attorney fee provisions are interpreted to be reciprocal even if the language appears to be one-sided.

An Ounce of Prevention

As with most things in life, preparation is the key to defending a lawsuit successfully. You cannot control whether you get sued, but you do control the documentation and preparation. Too often builders are not prepared for the inevitable. If you are involved in any facet of the building industry and have not been a party in a lawsuit, it could be simply a matter of time. As the saying goes, an ounce of prevention is better than a pound of cure. 

 **Alvin Lodish** is a partner in the Litigation Department with the Miami law firm of Bilzin Sumberg Baena Price & Axelrod. He is currently handling numerous mold related cases throughout the State of Florida.