

A Reprint from *Tierra Grande*

PROTECTING RENTAL PROPERTY

By Judon Fambrough

Compared with homeowners, landlords and property managers are at a disadvantage when it comes to fighting mold. They do not visit rental properties daily and, therefore, cannot always react promptly to potential problems. Unfortunately, mold flourishes in wet places and may spread within 24 hours under optimum conditions.

Property managers rely on tenants to tell them about water leaks. Some tenants may not readily report leaks, fearing they may be financially responsible for the resulting damage. Others simply may not care that mold damage can adversely affect the property owner's insurance coverage and premiums. If leaks go unreported, mold may grow and spread through adjoining units.

What legal liability do property managers, which here refers to both owners and landlords of rental property, have to disclose, remove and remediate the presence of mold in rental units? The Texas Deceptive Trade Practices Act (DTPA), the Texas Property Code and common law hold answers.

Obligations Under DTPA

The DTPA, delineated in Chapter 17 of the Texas Business and Commerce Code, requires property managers to disclose known facts about the property that may

influence a prospective tenant's decision to rent or not. This includes disclosing present water leaks and mold infestations.

Debate continues over whether the DTPA requires disclosing prior water leaks that were quickly repaired or mold infestations that were properly and promptly remediated. A truthful response is required when a prospective tenant makes a direct inquiry regarding these matters. According to information from the State Bar of Texas and a state report from the Council on Scientific Affairs, as much as 10 percent of the population may have an allergic reaction to mold. These people might not rent a unit if they knew of prior water leaks or remediated mold, it is best to disclose this information. Disclosing all facts, whether required by the DTPA or not, may avoid future conflicts and lawsuits.

Can property managers avoid the disclosures by simply renting the property "as-is"? Texas courts have not addressed this specific issue. However, Texas appellate courts, not the Texas Supreme Court, have held that residential dwellings may be sold "as-is," assuming the correct procedure is followed. Even if rentals could be "as-is," property managers would not be relieved of the obligation

to disclose known relevant facts and allow complete preleasing inspections. For more information on disclosure, see Center publication 1114, "DTPA Protects Consumers and Defendants" (<http://recenter.tamu.edu/pdf/1114.pdf>).

Obligations Under Texas Property Code

The Texas Property Code requires property managers to remedy and repair certain conditions after being informed by the tenant. The rules, described in Chapter 92 of the code, supersede the former common law doctrine of implied warranty of habitability. As detailed in Center publication 866, *Landlords and Tenants Guide*, property managers must make a diligent effort to repair or remedy certain conditions when all the following requirements are met (TPC Section 92.052).

- The tenant gives notice of the condition to the person to whom or to the place where the rent is normally paid.
- The tenant is not delinquent in rent payments at the time.
- The condition materially affects the physical health or safety of an ordinary tenant.
- The tenant, a member of the tenant's family, a guest or invitee of the tenant or a lawful occupant of the dwelling did not cause the condition.

Legally speaking, property managers are not responsible for remediating mold damage if the tenant, a member of the tenant's family, a guest or an invitee of the tenant or a lawful occupant caused the water leak that resulted in mold or if the resulting mold growth did not or does not materially affect the health of an ordinary tenant. However, protecting the property by preventing or stopping moisture penetration should take precedence over affixing blame.

To avoid the repair-and-remedy issue entirely, can property managers get waivers releasing them from the obligation? Absolutely not. The statutory duty to make repairs and remedy certain conditions cannot be waived.

However, the property code gives three alternatives for transferring the duty to repair and remedy to the tenant. The code permits the *obligation* to repair, but not the *expense*, to be shifted to

the tenant (TPC Section 92.0561[9]). The statute allows a landlord and tenant to “mutually agree for the tenant to repair or remedy, **at the landlord’s expense**, any condition of the dwelling regardless of whether it materially affects the health or safety of an ordinary tenant.”

Both the obligation and expense to repair or remedy conditions affecting the health and safety of an ordinary tenant may be transferred to the tenant in two limited situations. The tenant must repair or remedy **any condition** if the following seven conditions are met (TPC Section 92.006 [e]).

- The landlord owns only one rental dwelling at the beginning of the lease term.
- The dwelling is free from any condition that would materially affect the physical health or safety of an ordinary tenant when the lease commences.
- The landlord has no reason to believe that any condition that would materially affect the physical health or safety of an ordinary tenant is likely to occur or recur during the tenant’s lease term or during a renewal or extension.
- The landlord and tenant have a written lease.
- The agreement for the tenant to make the repairs is underlined or placed in boldface print in the lease or on a separate written addendum.
- The agreement for the tenant to make the repairs is specific and clear.
- The agreement for the tenant to make the repairs is entered knowingly, voluntarily and for consideration.

The other statute provides that the landlord and tenant may agree that, except for conditions caused by the landlord’s negligence during the lease term or during a renewal or extension of the lease, the tenant has the duty and expense to repair damages:

- from wastewater stoppage caused by foreign or improper objects in lines that exclusively serve the tenant’s dwelling,



COMMERCIAL REMEDIATION teams follow protocols to remove extensive mold infestations. Most outbreaks can be cleaned using bleach and water.

- to doors, windows or screens and
- from windows or doors left open (TPC Section 92.006[f]).

Obligations Under Common Law

Even if the blame or obligation to remedy can be shifted, property managers are still at risk for personal injuries and property damage under the common law. Chapter 92 does not supersede recoveries under the common law for negligence.

If property managers “knew or should have known” of a water leak in an apartment, they could be liable for personal injuries (health claims) and the tenant’s property damages from the resulting mold infestation. This is true even if the property managers are not liable for repairing the water leak or remediating the mold infestation under Chapter 92. For this reason, property managers should make periodic inspections of rental units even if the obligation to disclose water leaks has been placed on the tenant.

TAA Recommendations

Although the Texas statutes offer several ways to lessen or avoid liability for mold caused by moisture leaks, the law does little to protect the property. Consequently, property managers must distinguish between what is legal (to avoid liability) and what is prudent (to protect the property). In many cases, both objectives can be accomplished simultaneously. The key is getting the tenant to report or repair water leaks as soon as possible. Larry Niemann, general counsel for the

Texas Apartment Association (TAA), has these tips for property managers.

- In the lease, require the tenant to promptly report any water leaks, mold and other conditions that pose a hazard to the property or a risk to the tenant’s health or safety. Indicate that failure to do so subjects the tenant to possible lease termination, eviction and liability for the ensuing property damage regardless of the cause.
- Give the tenant an alternate person and phone number to contact in the event the property manager is unavailable when a moisture leak occurs. Ideally, this would be a 24-hour repair service.
- In the lease or in some other document, give detailed instructions on how to turn off the water or other utilities. Permit the tenant to turn off equipment and interrupt utilities to avoid property damage or to perform repairs.
- Make sure someone checks all rental units periodically, especially if the tenants are away for prolonged periods. College students may be gone as long as a month during holiday breaks. Pipes may freeze and burst, windows may break or storms may damage the roof. Make sure the lease grants the property manager the right to enter on a regular basis to perform water-leak inspections and conduct preventive maintenance tasks.
- Tie the eviction policy to the basic care and maintenance of the dwelling. Be

Managing Mold

- "Guidelines on Assessment and Remediation of Fungi in Indoor Environments" published by the New York City Department of Health at www.nyc.gov/html/doh/html/epi/moldrptl.html
- "How to Clean up the Mold: Light Growth, Heavy Growth, Flooding," published by the General Clinical Research Center for the University Hospitals of Cleveland at <http://gcr.cwru.edu/stachy/cleanup.htm>
- "Managing Water Infiltration into Buildings," published by the University of Minnesota at www.dehs.umn.edu/iaq/flood.html
- "Mold Remediation in Schools and Commercial Buildings," published by the U.S. Environmental Protection Agency at www.epa.gov/iaq/molds/toc.html

prepared to take swift action against tenants whose living habits generate unhealthy conditions or who appear unwilling to report water leaks.

- Inform tenants about mold, what causes it and how to eliminate it. Make cleaning kits with the appropriate tools and chemicals to eradi-

Mold Information and Prevention Addendum requires tenants to keep their dwellings clean and to promptly report any leaks or water accumulation. It instructs residents on how to clean and apply biocides (products that can kill mold) to nonporous surfaces covered with mold.

cate mold growth readily available.

According to Niemann, educating tenants is "the biggest weapon you have in the war against mold."

To help meet this objective, the National Apartment Association prepared a "Mold Action Kit" that is available to all TAA members. TAA also drafted a mold addendum for use with its lease form. The

Neimann further recommends that property managers maintain a positive attitude and respond promptly when tenants report moisture leaks. "How you handle mold complaints has a significant bearing on whether lawsuits are filed," he says. Consequently, property managers should do the following.

- Take all mold complaints seriously. Do not act indifferently or callously. Empathize with the resident.
- Express a willingness to do whatever is necessary under the circumstances. It is seldom necessary to test for mold. It is more important to detect and remedy the source of the moisture to eliminate mold growth.
- Treat each moisture complaint as a potentially serious matter and respond promptly.
- If unsure about the best course of action, consult knowledgeable persons. ➤

Fambrough (judon@recenter.tamu.edu) is a member of the State Bar of Texas and a lawyer with the Real Estate Center at Texas A&M University.



MAYS BUSINESS SCHOOL

Texas A&M University
2115 TAMU
College Station, TX 77843-2115

<http://recenter.tamu.edu>
979-845-2031
800-244-2144 orders only

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