

DROWNING

— IN —

BLACK
WATER

DEAN S. RAUCHWERGER



Entry of errant water into a building or other structure can lead to serious mold problems, physical damages and substantial property and business interruption losses. This article provides a roadmap on developing viable recovery claims against restorative drying contractors who were involved in improper and careless restoration and remediation of water damaged property. As in any garden-variety tort claim, it is imperative that your counsel appreciate the critical importance of identifying the target contractor's vulnerable liability exposures. When a water damage restoration contractor fails to promptly address and immediately commence removal of water from a building or structure, it can lead to devastating results, such as further destruction of property or setting the groundwork for the growth and spread of mold and bacteria. Below is a discussion of the primary industry good practices and standards of care for water restoration contractors. Deviations from these good practices and standards trigger significant liability "hot buttons." Further provided is a practical checklist for evaluating your target contractor's conduct, real-life lawsuit examples and reference sources for industry good practices and standards of care.

I. Industry's Good Practices & Standards of Care

The water restoration industry's good practices and standards of care for safe and effective removal of water are reflected in many sources, one of which is published by the Institute of Inspection, Cleaning, and Restoration Certification

(IICRC). The IICRC is a non-profit organization, certifying firms specializing in restorative drying and water damage restoration. The IICRC's *Standard and Reference Guide for Professional Water Damage Restoration* was first published in 1994 and its Third Edition, ANSI-approved, was recently issued in May 2006.

The IICRC website¹ contains informative industry literature, industry standards and contact information for restoration firms that have been certified by the IICRC. Established in 1972, IICRC has registered certified inspection, cleaning and disaster restoration professionals in 30 countries, comprised of about 5,000 Certified Firms and more than 45,000 Certified Technicians.

II. Six Critical Steps for Water Damage Restoration

To adequately perform appropriate water restoration, the contractor must meet the following six criteria: 1) Evaluate and assess the water damage; 2) Determine the type of "water" involved; 3) Determine appropriate drying method; 4) Inspect and remove water; 5) Monitor restoration; and 6) Inspect and complete restoration.

1) Evaluating & Assessing the Water Damage

Prior to implementing restoration, the recovery target contractor is expected to have collected relevant information about the nature and extent of the water damage. Armed with this information, the restorative drying contractor should have established an appropriate restoration plan to not only remedy the problem at hand, but also to

ensure that subsequent damage does not occur once restoration is completed. To gather this information, the contractor should have conducted interviews with pertinent witnesses, inspected the water damaged structure and taken pertinent objective measurements of the physical structure and contents. The contractor should have a working knowledge of construction materials and building techniques, as they pertain to the structure being restored.

2) Determining the Type of "Water" Involved

After an initial assessment, a water restoration contractor should have determined the type of "water" involved. This identification provides key information on the dangers posed by the water as to its source and makeup and leads to the appropriate restoration procedures required. There are three categories of "water:"

Category One, or "clean water:" evidenced by broken water supply lines, rain or snow melt, or overflow of water supply lines, without contamination, from appliances such as tubs, sinks or appliances. Although "clean water" by itself is not contaminated, it can degrade over time as it interacts with other materials, such as floors, walls and carpets and contaminants that are contained within each of those materials.

Category Two, or "gray water:" heavily contaminated water that can cause human sickness if consumed or prolonged exposure occurs. Generally found from water

discharged from appliances like a dishwasher, sump pump and toilet bowls. The potency dangers posed by microorganisms in “gray water” increase when left standing more than 48 hours after discharge.

Category Three, or “black water:” contains pathogens and is unsanitary and harmful. This type of water is typically from seawater or river flooding and sewage.

3) *Determining the Appropriate Drying Method*

Four drying principles exist: 1) removal of excess standing water through vacuum extraction, mops or other specialized equipment; 2) evaporation of remaining water through use of fans; 3) dehumidification of the affected areas to ensure secondary damage, such as promotion of mold growth, is eliminated; and 4) temperature control for optimized drying conditions.

4) *Inspecting & Removing Water*

After removal of standing water, the contractor should have inspected and removed any remaining water contained in the structure, such as in basements, crawl spaces, heating and air conditioning systems, ceilings, walls and in contents. The contractor should identify the contents and structural components that contain elevated moisture content and determine whether those components can be successfully dried or must be discarded.

5) *Monitoring Restoration*

During the course of restoration, the contractor should have continually monitored the progress of the drying process. Methods include periodic temperature and humidity levels and moisture content readings from affected structure components and contents.

6) *Inspecting & Completing Restoration*

During this final phase, the contractor should have ensured that the predetermined drying goals were met and that structural components and contents were returned to a pre-loss moisture condition.

III. Evaluating Your Recovery Target Contractor’s Work

Below is a practical checklist for evaluating whether the target contractor deviated from industry good practices and standards of care:

- Did the contractor fail to respond rapidly and begin restoration immediately?
- Did the contractor fail to adequately identify the source of the water?
- Did the contractor fail to adequately document the scope of the water damage and the appropriate restoration plan?
- Did the contractor fail to ensure that all excess water was collected and removed?
- Did the contractor fail to use adequately trained and qualified restoration technicians?

- Did the contractor fail to inspect all structural components and contents to identify all residual water or secondary water damage?
- Did the contractor fail to use proper containment methods to keep damage from spreading to non-affected areas?
- Did the contractor fail to meet the pre-determined drying goals?
- Did the contractor fail to give adequate warnings regarding health, safety and drying issues, including possible mold growth?
- Did the contractor fail to completely dry out the structural components and contents to avoid contamination and degradation?
- Did the contractor fail to identify and document pre-existing mold growth or contamination and modify the restoration plan accordingly?
- Did the contractor fail to use the appropriate number and size of drying equipment?
- Did the contractor fail to properly monitor and document the surface and air conditions?

IV. CASE LAW REVEALS BIG LIABILITIES

The recovery potential against restorative drying contractors for careless, inadequate and shoddy workmanship, under tort and/or contract principles, is sizeable, as reflected below:

Allison v. Fire Insurance Exchange, 98 S.W.3d 227 (Tex. Ct. App. 2002).

In 1998, homeowner filed suit for water damages due to multiple leaks.² After failing to properly remediate, homeowner sued her insurer on multiple theories, including breach of contract, negligence, deceptive trade practices and breach of duty of good faith and fair dealing in the claims process. Although her expert opined that the cost of restoration would cost \$1 million, a jury in 2001 awarded her more than \$32 million, including \$2.5 million to replace the home, \$1.2 million for restoration, \$2 million for content damage, \$5 million for mental anguish, and \$12 million in punitive damages - all after the insurer had already paid \$2 million in restoration efforts before suit was filed.

Amica Mutual Insurance Co. v. Henderson, No. 02 C 5193, 2003 U.S. Dist. LEXIS 322 (N.D. Ill. Jan. 9, 2003).

Insurer assumed responsibility for repairing water and mold damage to the insured’s home and retained specialized service companies to perform investigations and microbial testing as well as companies to repair and remediate the damage. The contractors allegedly performed the repair work negligently, and thus, water was able to seep into the home, causing toxic mold to grow and spread throughout the home. Homeowner’s third-party claims against contractors included negligence and failure to properly complete the repair/restoration work. One of the contractors filed a dismissal motion, but the court found that homeowner stated a viable claim, allowing the case to proceed.

Salerno v. Servpro of Hockessin/Elsmere, Inc., C.A. No. 02C-09-021 WLW, 2003 Del. Super. LEXIS 207 (Super. Ct. Del. May 19, 2003).

Home was damaged by flooding during a hurricane. The insurer provided coverage and recommended that the homeowner retain a particular company to dry the water. Homeowner retained that contractor, who removed the rugs, put fans out to dry the water for a few days and sprayed the floor perimeter in the rooms on the ground floor, but did not spray the unfinished areas or closets. The contractor assured the insured that no further mold problems would arise from the flooding; however, on a subsequent inspection, mold was found in those areas not sprayed, forcing the homeowner to move out of her home. The homeowner sued both the insurer and the retained remediation contractor. The insurer's motion for summary judgment was granted based on the application of a one-year policy suit limitation provision.

Forester v. Allstate Insurance Co., No. 260914, 2005 Mich. App. LEXIS 1781 (Mich. App. Ct. July 26, 2005).

Home suffered extensive water damage from an over-flowing toilet tank. Insurer contracted with the remediation company to begin rehabilitation. Another contractor was also chosen by the insured from a list of the insurer's approved contractors. Homeowner sold his home to plaintiffs, and the new homeowners filed suit against the seller. Settlement was reached, wherein the seller paid plaintiffs \$35,000 in exchange for a release of all claims against him and for assignment of all claims against the insurer and the remediation contractors. Plaintiffs' breach of contract claims against all parties were dismissed, the negligence claim against the insurer was dismissed, but Plaintiffs' negligence claims against the remediation contractors were remanded for further consideration. Insurer was not held liable because the court found that it generally could not be held liable for the negligence of independent contractors.

McMahon v. American Equity Insurance Co., No. BC 271423 (Cal. Super. Ct. 2003).

TV-personality Ed McMahon sued his insurer and several cleanup contractors, for handling his mold remediation in bad faith, after a burst pipe caused water damage to the entertainer's home, leading to the growth of toxic mold. McMahon claimed that his insurer failed to hire qualified remediation and testing experts to get rid of the mold, and that the environmental cleanup contractors simply painted over the mold, instead of completely removing it. The recorded settlement was over \$7 million, including sizeable recoveries from the remediation contractors and consultants. This case represents a good example of how fault can be apportioned amongst defendants who played various roles in the mold infestation problem.

V. Sources For Additional Information

Many resources exist that identify industry good practices and standards of care. Below are some informative resources to consider when developing your recovery claims.

- The **Institute of Inspection, Cleaning and Restoration Certification (IICRC)** publishes the definitive "S500" industry standard for water damage restoration. Their website, www.iicrc.org, contains industry literature, information, review of industry standards and a listing of restoration firms certified by the IICRC.
- The **New York City Department of Health, Bureau of Environmental & Occupational Disease Epidemiology** published *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*, available at <http://home2.nyc.gov/html/doh/html/epi/moldrpt1.shtml>. The guidelines discuss remediation and identify five different levels of abatement.
- The **U.S. Department of Labor, Occupational Safety & Health Administration (OSHA)**, SHIB 03-10-10 has issued a safety and health information bulletin entitled, *A Brief Guide to Mold in the Workplace*, found at www.osha.gov/dts/shib/shib101003.html. The bulletin notes it is not a standard or regulation and creates no new legal obligations, but is merely advisory in nature and informational in content to assist building managers, custodians and others responsible for building maintenance; however, contractors who respond to mold and moisture situations may also want to refer to the guidelines.
- The **Indoor Environmental Standards Organization (IESO)** provides voluntary consensus standards for the assessment of indoor environments related to mold growth. Their website, www.iestandards.org, contains literature, information, their standards and contract information for certified vendors.
- The **Carpet and Rug Institute (CRI)** provides general information on carpet-related matters, including handling restoration after water infiltration at www.carpet-rug.com.
- The **University of Minnesota, Department of Environmental Health & Safety** provides a general checklist and logic tree to help determine appropriate steps in determining scope of damage from water infiltration and appropriate restoration activities at www.dehs.umn.edu/iaq/flood.html.
- The **International Sanitary Supply Association (ISSA)** is an international trade association of more than 4,500 cleaning industry professionals. ISSA's website, www.issa.com, provides access to general information, guidelines, educational products and restoration periodicals.
- The **Association of Specialists in Cleaning & Restoration, Inc. (ASCR)** is a trade association representing 1,300 restoration professionals. Their website, www.ascr.org, provides access to technical research, their Code of Ethics, monthly trade journals and referrals to members.

- **Dri-Eaz Products, Inc.** (Dri-Eaz) is a provider of products and solutions for the drying industry. Their website, www.dri-eaz.com, provides technical research, general information and educational literature. The past-president of Dri-Eaz, Claude Blackburn, authored a comprehensive guidebook, *Restorative Drying - The Complete Guide to Restorative Drying*, which is considered to be a respected industry treatise. Dri-Eaz recently released, *New Guide to Restorative Drying*, authored by Brandon Burton and Kevin Fisher.
- **Cleanfax Magazine** addresses various issues of the restoration industry. Their website, www.cleanfax.com, contains general information and a variety of restoration articles.
- **ICS Cleaning Specialist Magazine** provides information on various issues of the restoration industry at www.icsmag.com. The site contains general information, a variety of restoration articles, a trade directory and a listing of industry links.
- **Mold & Moisture Management Magazine** includes information about all aspects of mold and moisture - including remediation, science and research, litigation and legislation. Visit their website, www.moldmag.com, and industry professionals and attorneys may qualify for a free subscription to this magazine.

- As a catchall, consider your recovery target's own website, where you may find internal policies, procedures, practices and promotional advertising. Often, contractors will publicly promote their services and expertise - consider whether the services provided met those touted representations.

VI. THE BOTTOM LINE

Where mold exists in the wake of water damage, there is a recovery potential against the restorative drying contractor if your counsel is mindful of the liability trigger points and able to garner the necessary factual and technical evidence to establish liability, whether contractual or tortious in nature. Depending upon the loss, the scope of property and business interruption damages, as well as other losses, may be quite large. Accordingly, you will want to ensure that you have assembled the right litigation team, including industry experts, to prosecute your recovery claims.

ENDNOTES

¹ <http://www.certifiedcleaners.org>.

² See *Ballard v. Farmers Insurance Exchange*, No. 99-05252 (Travis Co., Texas, Dist. Ct.).