

LEGAL ISSUES INVOLVING MOLD CONTAMINATION

By Robert B. Casarona, Esq.
Aaron E. McQueen, Esq.

INTRODUCTION

Mold has been around for millions of years. Floods, leaking roofs, broken water pipes, and sewage backups have also been around for what seems like eternity. So why is mold increasingly being seen as a problem with large liability and potential damage claims?

Some would blame it on our litigious society. Others could point to the fact that people are simply more educated with respect to airborne contaminants, including mold. Publicized cases by celebrities such as Ed McMahon are also cited as justification for the increased attention placed upon mold. Still others point to a change in construction, citing airtight structures that have created a uniquely receptive environment for the development of mold. In reality, it is probably all of these things that have had an influence. Regardless of the reason, lawsuits and damage claims are increasingly being filed. Mold has been called today's "asbestos." While this is probably an exaggeration, recent large court awards and a surge in claims has this issue front and center for environmental practitioners, risk managers and toxic tort lawyers alike.

GENERAL INFORMATION ABOUT MOLD

Mold belongs in the group of unicellular or multicellular organisms known as fungi.¹ Fungi that is found indoors growing as branched filaments are what we are concerned about as "mold." The most common toxic tort molds include *Stachybotrys*, *Aspergillus*, *Penicillium*, *Fusarium*, *Trichoderma* and *Memnoniella*. The most notable toxic mold, referred to as "black mold," is *Stachybotrys*. It is believed that these black molds generate volatile vapors known as mycotoxins. For this reason, it is of greatest concern in the context of this paper.

Mold spores become airborne, land on a moist food source, germinate and grow. Hyphae (roots) can penetrate into substrate materials. Though the surface of contaminated porous material can be cleaned off, the roots are mainly in the substrate and can continue to grow depending upon the conditions present.

The key factors affecting mold growth are moisture, temperature, and food sources. Mold requires a nutrient source in order to grow and multiply. Unfortunately, common building materials such as wood, drywall paper and adhesives provide excellent food sources. Almost any object containing carbon-based matter, including insulation, drywall, textiles and glue can act as a food source.

¹ There are more than 100,000 species of mold. Most types are not hazardous to healthy individuals though prolonged exposure may cause or exacerbate asthma or other allergies.

Most mold problems occur when improper construction or a water intrusion episode allows moisture into a building. Molds need a moist environment, oxygen, and organic material to establish themselves and grow. Unfortunately, the moisture may not always be obvious thus, it may allow mold to grow unnoticed. Some mold can grow in as little as 72 hours.

Children are particularly susceptible to mold because their immune systems are developing. Individuals whose immune systems are already impacted by other diseases or conditions are also particularly vulnerable. The degree of impact one experiences from mold exposure varies by the type of mold involved, the concentration and duration of exposure, and the metabolic products being produced by the mold. The most common response to mold exposure is an allergic reaction. Infections from mold are possible, but are not common. Some common signs of mold irritations are the aggravation of asthma, a runny nose, itching, burning, headaches, dizziness, cough, skin irritation and the inability to concentrate. For those who are susceptible to respiratory ailments the health impacts are of much greater concern.

LEGAL ISSUES: AN OVERVIEW

The legal issues that arise with respect to mold typically involve several scenarios. First, there are breach of warranties, negligence, fraud and construction defect lawsuits involving builders, architects, contractors, sellers and landlords. It is often alleged that the moisture generating the mold growth was caused by inadequate or faulty construction. Architects could also be subject to mold litigation for improper building design. Landlords are subject to suit for failure to maintain the leasehold and sometimes for fraud.

Another common scenario where mold litigation occurs is in a situation where there has been a sale or transfer of mold contaminated property. In those cases, there are usually allegations of a failure to disclose where such a duty exists, or for fraud.

Finally, most mold litigation to date involves insurance coverage for mold problems. A body of law is developing with respect to the management of the claim, timeliness and/or scope of remediation of the mold problem by the insurance companies. These claims typically involve claims for bad faith and punitive damages.

Regardless of the scenario involved, the cases are usually complex because the number of parties typically involved, the scientific nature of many of the issues, causation and the damage issues involved.

REGULATORY DEVELOPMENTS

Currently, there are no state or federal regulatory standards establishing safe levels of molds or mold spores in indoor air. Governmental entities are developing guidelines for testing and remediating mold contamination and for conducting scientifically acceptable studies on the human health effects of mold exposure.²

² Wolfson & Eversole, "An Overview of Legal, Regulatory Developments Prompted by Mold," TXLR, Vol. 17, No. 8 (Feb. 21, 2002).

The U.S. Environmental Protection Agency has developed guidance documents regarding the management of indoor air quality in schools and public buildings.³ This publication provides guidance on prevention, remediation and protection of health.

The following states also have indoor air quality guidelines dealing with mold:⁴

- i. New Jersey
- ii. Massachusetts
- iii. Texas
- iv. California
- v. New York

The fact that scientific research linking mold exposure to human health effects is in its infancy is largely the reason that none of the guidelines discuss what threshold level of mold may be considered safe.

Generally, the guidelines available are precautionary and non-specific. For instance, New York provides that any mold level above background, as established by outdoor air sampling, should be investigated further and, in some cases remediated.⁵

Clearly, these guidelines are not particularly helpful and as a subcommittee chairperson for the U.S. House of Representatives recently stated at the opening of a hearing on mold, “a major problem is the lack of scientific evidence as to mold damage and its adverse health effects.”⁶

MOLD AND CAUSATION FOR PERSONAL INJURY

The most prevalent cause of action in toxic tort litigation is “negligence.” Negligent conduct in this context is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.

Not unlike any other toxic tort, causation involves demonstrating a redressable injury and determining who caused it. It is these simple words that belie the arduous task facing a toxic tort victim confronted with mold exposure. Consider that the exposure to mold does not produce an immediate injury. By the time the injury is manifest, multiple potential causes may have intervened. Moreover, etiology always must consider dose. What dose is sufficient to cause the disease or injury?

³ EPA, Mold Remediation in Schools and Commercial Buildings, Office of Air and Radiation, EPA 402-K-01-0001 (March 2001) (www.epa.gov/iag/molds/index.html.)

⁴ Wolfson & Eversole, at p. 184.

⁵ *Id.*; New York City Dept. of Health, Guidelines on Assessment and Remediation of Fungi in Indoor Environments, Bureau of Environmental & Occupational Disease Epidemiology (Nov. 2000).

⁶ Hoffman, “Hearing Precedes Legislation on Health Hazards of Mold,” *The Akron Beacon Journal*, July 22, 2002.

Unlike asbestos or other toxic substances, there are no validated biomarkers of exposure to mold (i.e., blood or urine tests). Therefore, one cannot definitively assess if an individual was exposed to mold.

An industrial hygienist must identify the mold and its airborne concentration, then a qualified medical expert, such as an allergist, mycologist or toxicologist must then conclude within a reasonable degree of medical certainty that the injury was caused by exposure to the toxic mold. Further, the isolation of myriad symptoms that overlap with other common ailments is complex. Injuries such as headaches, fatigue, depression, allergies, etc. are common and are associated with multiple varying causes. Given the status of the science on the health impacts of mold and the difficulty of timely obtaining this evidence, it is easy to see why claims pursued for property damage are easier to pursue than those for personal injury. Property damage is readily quantifiable and are often part of a mold induced claim.

Regardless, like many toxic torts, a mold case will turn on the admissibility of expert testimony and the credibility of that testimony. In most jurisdictions, the admissibility of that evidence will be decided by application of Daubert v. Merrell Dow Pharmaceuticals, Inc.⁷ The judge as “gatekeeper” is required to admit only relevant and reliable scientific expert testimony. The standard for evidentiary reliability in this context is appropriate validation.⁸ The following factors determine whether expert testimony constitutes scientific knowledge:

- (1) Whether the theory has been subjected to peer review or publication;
- (2) Whether the theory can be or has been tested;
- (3) Whether there is a known, acceptable rate of error; and
- (4) Whether the theory is generally accepted.⁹

Since a causal link between mold and human health effects based upon inhalation has not been established, surviving a Daubert challenge based upon reliability is difficult in a mold case.

This has not deterred a plaintiffs bar from pursuing personal injuries¹⁰ allegedly caused by mold and despite causation hurdles, creative lawyers are likely to continue to attempt to get their sympathetic clients’ plights before a jury.

In the case of Mazza, et al. v. Schurtz, et al.¹¹, a judge entered a \$2.7 million jury verdict for a family for personal injuries related to mold exposure. The plaintiffs successfully introduced evidence of headaches, respiratory problems, joint pain, skin rashes, repeated colds,

⁷ Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); As of the writer’s research on this issue, 19 states adhere to the “general acceptance” standard for admission of scientific evidence set out in Frye v. United States, 293 F.1013 (D.C. Cir. 1923). Twenty-six states have either expressly adopted Daubert or employ an admissibility standard which is substantially similar. Special Report, “States move to Daubert, even when they are stuck on Frye,” TXLR, Vol. 17, No. 16, April 18, 2002. Ohio uses the Daubert test. See Miller v. Bike Athletic Co., 687 N.E.2d 735 (Ohio 1998).

⁸ Id.

⁹ Id. at 590.

¹⁰ The most prominent suit, filed earlier this year, is the case brought by entertainer Ed McMahon who claims mold sickened he, his wife and housekeepers and killed his dog.

¹¹ No. 00ASO4795 (Calf. Super. Sacramento Co.) (Nov. 8, 2001).

gastrointestinal ailments and other health issues to the jury. Similarly, the Delaware Supreme Court upheld a \$1 million jury award to plaintiffs who alleged mold related problems because their landlord failed to repair leaks.¹² This case was significant because it recognized the use of “differential diagnosis” as acceptable expert methodology in a mold case.¹³ This is a process whereby a physician examines a patient, takes a medical history of the patient, conducts laboratory tests as indicated from the exam and history and considers and eliminates alternative causes of illness.¹⁴

In Florida, expert testimony was also admitted based upon testimony that numerous publications accepted by the scientific community recognized a link between toxic mold exposure and adverse health effects.¹⁵

OTHER CLAIMS AND POTENTIALLY LIABLE PARTIES

As the science and law develop with respect to mold, the potential for liability and the risks involved will come into better focus. It may also prompt legislation and regulation that will impact the duties of various businesses and individuals. Until then, it is not hard to use common law principals to identify likely targets with increased exposure due to mold contamination.

A. Manufacturers

Defective construction products are susceptible to product liability claims. Manufacturers can be sued where the product does not comply with the contract drawings and specifications. For instance, if a product permitted moisture to accumulate in an environment suitable for mold growth, a contract or tort theory could be pursued. Consider a scenario where a building product is made for use in what is commonly a damp “mold growth” environment. It is not hard to envision a lawsuit claiming the product was defective for its intended use.¹⁶

B. Contractors

General contractors, subcontractors and construction managers could be found liable based upon contract, warranty, and negligence theories. These cases typically involve an allegation of a defect in construction leading to water intrusion and ultimately mold. In 1997, a building owner was awarded \$11.5 million plus attorney fees for mold damage to a county courthouse.¹⁷ The county in that case sued the architect and contractors for construction defects. The verdict exceeded the entire cost to construct the courthouse.

¹² Newhaverford Partnership v. Elizabeth Stroot, 772 A.2d 792 (Del. 1999).

¹³ Id.

¹⁴ Wolfson & Eversole, supra, at p. 186, fn. 39.

¹⁵ Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20 (Fla. Dist. Ct. App. 1997) (Florida uses the Frye “general acceptance test” for admissibility of scientific evidence.)

¹⁶ The plaintiffs’ class action bar has become increasingly aggressive and creative in pursuit of industries and products over the last decade. Tobacco, guns, lead paint, fast food and breast implants have all been recent targets.

¹⁷ Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20 (Fla. 4th Dist. Ct. App. 1997). Also see, Tahoma School District No. 409 v. Burr Lawrence Rising & Bates, WL 1360423 (Wash. App. 2002) (construction mold claim barred by statute of limitations).

C. Architect & Engineers

The designers of a building can be found liable based upon contract, negligence and/or warranty theories. These cases occur when the design of the building creates a condition which is conducive to mold growth (e.g., accumulation of moisture).

D. Owners

Owners typically warrant that the construction plans are free from defect. If the plans are followed and a defect occurs, it is not uncommon for a contractor to file a claim against the owner. Further, the owner is responsible for maintenance. Failure to maintain the building, causing mold growth is another potential liability for the owner (i.e., broken pipes, backed up sewers, plumbing leaks, etc.).

E. Landlords

Office and residential leaseholds can conjure up terrible nightmares when it comes to mold contamination. Shared walls and boundaries can create blurred responsibilities. Is negligent maintenance the cause of the mold growth? Does the landlord have a duty to police adjoining uses? The battleground here will be the lease, however, the landlord tenant law with respect to the warranty of habitability, nuisance, trespass and negligence may all be applicable theories pursued in this context. In the commercial context the lost profit damages resulting from business interruption could be extreme.

F. Hotels

Hotels present unique issues because the potential economic loss involved due to the higher standards of care owed by innkeepers to guests. The hotel owner could be liable for negligence to all its guests or for an intentional tort by its workers if the problem is not disclosed and handled properly. These scenarios are very difficult because the hotel will be extremely reluctant to shut down to remediate a major mold problem due to the stigma associated with the issue. Aside from the moral obligations involved, failure to responsibly remediate the problem, however, may open the door to a toxic tort lawsuit with large punitive damage exposure.

G. Condominium Association/Homeowners Group

Maintenance typically ends at the unit boundary in a condominium. Mold growth may grow into a unit from a common area. This will place the Association itself in jeopardy. Indeed at least one condominium association was sued for mold growth that originated in a common area and spread to a unit owner.¹⁸ A homeowners group also settled a \$1.3 million mold lawsuit against builders and contractors in California.¹⁹

¹⁸ Zieshe v. Brentwood Sunset Management, Inc., No. SC053952 Calif. Super., Los Angeles Co. (Condo owner settled with Association for \$295,000 for Association negligent failure to repair a leaking water pipe that caused mold damage.)

¹⁹ Club at Wood Ranch v. Roberts Group, No. 21522 (Ventura Cty., Cal. Super. Ct. 2001).

INSURANCE ISSUES AND MOLD

Mold was responsible for the insurance industry paying \$1.3 billion in claims in 2001. The state of Texas accounted for 70% of all mold claims last year. On July 21, 2002, the House Financial Services Committee's subcommittees on Oversight and Investigation called hearings on the two health hazards of mold in buildings. The mold issue has become crucial for property/casualty insurers which have been facing skyrocketing mold-related claims in recent years.

On August 8, 2002, The Wall Street Journal reported that State Farm Mutual Automobile Insurance, the largest home insurer, has eliminated coverage for mold in 33 states. This exclusion applies even if mold is the result of storm damage covered by the State Farm policy.²⁰ Moreover, the number two home insurer, Allstate has added language to clarify that it doesn't cover "mold, fungus, wet rot, dry rot or bacteria" unless the problems arise from events already covered by the policy. Even in those cases, cleanup costs are now limited to \$5,000 – an amount likely to fall short of most claims.²¹

Other insurers are seeking approval from regulators to impose similar restrictions. The California Insurance Department has already approved 247 mold-exclusion filings that will allow insurers to drop or limit mold coverage on new policies. It has another 115 filings pending.²²

Recent exclusions aside, insurance coverage for mold damages depends upon the facts of each individual case. While mold exclusions appear to automatically exclude coverage for damages for mold, they have generally been interpreted to mean that if mold damage has occurred naturally over time as a result of climatic conditions, such as high humidity, rather than a core event such as a pipe burst, the absolute pollution exclusion applies to bar coverage.²³ The typical commercial general liability policy precludes the recovery of damages for personal injuries or property damage arising out of actual, alleged or threatened discharge, dispersal, release or escape of pollutants. Insurance policies define pollutants broadly, however, the definition may not encompass mold. At least some courts have held that way.

There has not been a wealth of case law interpreting the applicability of the pollution exclusion to mold claims. One such case, however, upheld coverage based upon the fact that the insurance policy was ambiguous since it did not expressly define "pollutant."²⁴

Moreover, cases dealing with the applicability of the pollution exclusion to other types of indoor air contamination have been non-uniform in their decisions. For instance, the Fourth Circuit Court of Appeals has held that the pollution exclusion applies so as to bar coverage for claims resulting from carbon monoxide poisoning of hotel guests.²⁵ However, the Eleventh Circuit Court of Appeals has held that the pollution exclusion was unambiguous and barred

²⁰ "Oster, Insurance Companies Just Say No to Covering Mold," The Wall Street Journal (August 8, 2002).

²¹ Id.

²² Id.

²³ Wolfson & Eversole, *supra*, at p. 187.

²⁴ Stillman v. Charter Oak Fire Insurance Co., No. 1949-CV-Highsmith (S.D. Fla., June 18, 1993).

²⁵ Assicurazioni Generali Spa. v. Neil, 160 F.3d 997 (4th Cir. 1998).

coverage for a claim of indoor air pollution.²⁶ In the Second Circuit Court of Appeals the release of carbon monoxide into an apartment was not an excluded claim based upon the pollution exclusion because the exclusion was ambiguous as applied to the facts.²⁷ Courts have also examined whether lead paint constitutes a “pollutant” excluded by the pollution exclusion. A Maryland court of appeals held that the pollution exclusion did not permit an insurance carrier to bar coverage in a case involving exposure to lead paint because the insurance industry intended the pollution exclusion to apply only to environmental pollution and that it was ambiguous as to flaking lead paint.²⁸

Finally, court of appeals in Arizona held that the pollution exclusion does not apply to water contaminated with bacteria because bacteria did not constitute a “pollutant.”²⁹ Since mold is similarly organic as opposed to manmade, this case might be used to argue that mold is not a pollutant in the context of the pollution exclusion.

There is also wide latitude for argument with respect to whether a discharge or dispersal is involved with mold contamination. Mold is stationary and is not discharged or dispersed. Of course, mold spores are dispersed into the air. Mold may also be a naturally occurring allergen so it is not your typical pollutant. However, a great many pollutants are also naturally occurring in the environment. Due to the arguments on both sides of the issue with respect to the absolute pollution exclusion, it is clear why the insurance industry continues to seek to exclude mold from coverage in their policies.

PUNITIVE DAMAGES FOR BAD FAITH

The well-published Ballard case is a good illustration of the justification, even if antidotal, for the great concern that insurance companies have with respect to punitive damages involving mold claims.³⁰ In Ballard, a jury returned a verdict that awarded homeowners over \$32 million in connection with damage to the family’s home caused by mold.³¹ In that case, the jury found that the insurer committed fraud in its dealings under the insurance policy and awarded \$12 million in punitive damages. While \$32 million was awarded, the jury did not award any personal injury damages due to the fact that no evidence of the health effects of mold was permitted to be introduced because the plaintiff experts did not survive a Daubert challenge.³²

In a similar case, a jury awarded a plaintiff \$18 million in punitive damages.³³ Recently, another insurer settled a bad faith case involving mold for \$1.5 million.³⁴ Finally, a California

²⁶ West American Insurance Co. v. Band & Desenberg, 138 F.3d 1428 (11th Cir. 1998) (Allegation was building’s error caused a series of symptoms collectively referred to as sick building syndrome.)

²⁷ Stoney Run Company v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995).

²⁸ Sullins v. Allstate Insurance Co., 340 MD. 503, 667 A.2d 617, (1995); see Wolfson & Everson, supra, at p. 188.

²⁹ Keggi v. Northbrook Property & Casualty Insurance Co. (Arizona Ct. App. 2000).

³⁰ See Ballard, et al. v. Fire Insurance Exchange, et al., No. 99-05252 (TX. Travis Cty. Dist. Ct. June 1, 2001).

³¹ Id.

³² Id.

³³ Thomas Anderson v. Allstate Insurance Co., No. 00-907 (E.D. Cal.) (On appeal to the 9th Cir.)

federal jury awarded \$18 million to a homeowner against an insurer who had denied coverage. All but \$500,000 was for punitive damages.³⁵

CONCLUSION

Mold remediation and the potential health problems associated with mold will continue to expand the liability and risk associated with water management and moisture in homes and buildings. Understanding the risks, the law and the science surrounding mold will allow for mitigation of these risks and for better prevention.

99810_1

³⁴ Blum v. Chubb Custom Insurance Co., No. 99-3563 (Nueces Co. Texas Dist. Ct. 2001)

³⁵ Anderson v. Allstate Insurance Co., No. 00-907 (E.D. Cal.) (award reduced by judge to \$3 million).