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## Environmental Justice: A Review of State Responses

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## Mold Contamination: Liability and Coverage Issues:

Essential Information You Need to Know for Successfully Handling and Resolving Any Claim Involving Toxic Mold

By Stephen J. Henning<sup>☞</sup> and Daniel A. Berman<sup>☞☞</sup>

With alarming frequency, the media has increasingly focused on stories recounting the ill-effects of toxic mold that may lurk within the home and workplace. Embraced within these sensational reports are bizarre claims of deleterious effects to the health and safety of every individual that steps foot into a mold-infested environment. These reports are further fueled by the internet, which broadcasts, without medical support or citation, claims of babies dying and cancer risks and a battery of other side-effects one can expect if exposed to an environment containing a toxic mold.

Over the past three years, the judiciary has consistently chipped away at the damages individuals can recover for defective construction. Perhaps the greatest coup for the building and insurance industries was the landmark California Supreme Court decision of *Aas v. Superior Court*,<sup>1</sup> which restricted the recovery for construction defects to only those defects that

1. *Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000).

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had already caused damage. While this decision was widely hailed as fatal to the cottage industry surrounding construction defect litigation, this proverbial squeezing of recoverable damages over time has caused the active plaintiff bar to refocus its efforts.

Crystallized within this convergence of a hungry plaintiff bar and sensationalist reporting is the fact that mold can impact every individual. We all live in homes, work in buildings and shop in stores where we are affected by indoor air quality. Claims of allergies have increased in number in recent years, and the symptoms associated with allergies are strikingly similar to media reports of symptoms associated with mold exposure. For whatever reason, the past six months has yielded a measurable increase in the number of claims being filed alleging personal injury and/or property damage caused by the presence of toxic mold.

The bottom line: every individual has potential indoor air quality issues. Every individual is a potential claimant. It is little wonder that the plaintiff bar has seized on this emerging tort with vigor.

## I. Mold is Everywhere

Mold is pervasive. There are more than 100,000 species of mold in our ecosystem.<sup>2</sup> However, only approximately 100 different species of mold are linked to causing a human illness, disease or reaction. Recent lawsuits tend to focus on three types of mold, with *stachybotrys* the most widely recognized "toxic" mold. In short, mold is everywhere.

Unfortunately, media reports about toxic waste tend to be alarmist. This lack of balance is particularly exaggerated on internet sites targeted to potential claimants. Generally, the continuing legal education available focuses heavily on legitimizing the claim of toxic mold. For this reason, it is imperative to bring bal-

ance to the issue.

Not every mold is toxic – most are not. Claimants alleging toxic mold exposure face a huge hurdle in terms of causation issues. Not every case involving mold is cause for alarm or panic. Builders, risk managers and claim professionals can implement protocols for effectively and successfully handling and resolving claims involving toxic mold.

Improper handling of a toxic mold claim can result in staggering expense, a fact validated by a cursory review of the larger verdicts and settlements to date. Testing alone can be a significant dollar item. Exposures to some sensitive populations may give rise to legitimate personal injury claims. For these reasons, it is imperative that builders, risk managers and claim professionals implement protocols for dealing with any claim involving mold-related damages.

What follows is a primer on defending the toxic mold claim. It encompasses what the builder, risk manager and claim professional need to know if presented with a toxic mold claim.

## II. Spotting Emerging Trends: Types of Products Implicated

Before diving into an identification of the emerging trends in toxic mold claims, it is important to recognize that mold needs four essential components to grow — food, water, appropriate temperature and lack of ventilation.<sup>3</sup> Growth can occur within 24 to 48 hours at exponential rates.<sup>4</sup> Many building materials provide a perfect food source for mold, meaning that addition of a water source is all that is necessary to provide the environment for mold growth.

While mold growth can take place in any structure, there are trends emerging in terms of the type of product that is subject to claims of toxic mold. In reviewing national media reports

2. BUREAU OF ENVTL. & OCCUPATIONAL DISEASE EPIDEMIOLOGY, N.Y. CITY DEPT. OF HEALTH, FACTS ABOUT MOLD (2001), at <http://nyc-doitt.ci.nyc.ny.us/html/doh/html/epi/epimold.html> (last visited Nov. 10, 2001).

3. *Id.*

4. *Id.*; see also DEPT. OF ENVTL. HEALTH & SAFETY, UNIV. OF MINN., MANAGING WATER INFILTRATION INTO BUILDINGS (2001), at <http://www.dehs.umn.edu/iaq/flood.html> (last visited Nov. 10, 2001).

over the past year, it has become apparent that each news item falls nicely into one of several categories in terms of the product that is the genesis of the claim. This list is not meant to be exhaustive in nature; however, it does provide some general background in terms of the typical claimant and special concerns that need to be addressed for these individuals.

#### A. Trend: Mold Claims Involving Schools

School-related claims are emerging as a clear trend for the toxic mold claim. Children have decidedly emotional appeal to the trier of fact; news stories recounting the horror of impaired air quality tug at the emotions of the lay person.<sup>5</sup> In addition, many believe that children are more susceptible to deleterious effects of mold exposure due to less-developed immune systems. Children are allegedly unable to withstand exposure to toxic mold due to their developing immune systems which make them a greater cause for concern.<sup>6</sup>

Modular housing, often used as a band-aid for over-crowded schools, is prime for allegations of mold injury, workers' compensation claims, OSHA investigations and varied complaints. Often the materials used for the construction of modular units are nutrients for mold that thrives on carbon-based materials. Aging buildings in need of maintenance or subjected to sloppy renovation also are the basis for a substantial amount of the school related claims.

Responses to the school claims vary depending on the sophistication of the entities. Some move into panic mode and conduct wholesale testing of all areas in order to detect

any toxic mold.<sup>7</sup> Others test, evacuate, remediate and litigate (not necessarily in this order) to recover damages for the costs associated with the claim.<sup>8</sup> Perhaps the most dangerous approach is to do nothing, which later subjects a host of parties to allegations of negligence for this inaction. Parties potentially implicated in school suits include all construction-related trades (design professionals, contractors, subcontractors, consultants), board members and school districts.

#### B. Trend: Mold Claims Involving Apartments

A discernable trend in mold litigation is an increase in the number of claims brought by tenants in apartment housing, particularly lower-end developments. These claims are brought either directly or in response to threatened evictions under the guise of breach of the implied warranty of habitability.<sup>9</sup> This trend involves a large segment of the population with obvious jury appeal. Stories reciting mold complaints to unresponsive property management companies and landlords often ring true to jurors who have had similar complaints. The Delaware Supreme Court recently upheld a one million dollar verdict against a landlord brought by tenants in a toxic mold situation.<sup>10</sup>

Building owners and property managers are slowly becoming more proactive when notified of potential mold issues. Apartments seem to be attractive targets for mold claims since construction is not always of the highest quality and the level of maintenance (both by the landlord and tenant) varies tremendously. Older construction also can play a role as

5. See, e.g., LeAnn Spencer, *Poor Upkeep Cited in Mold Report*, CHICAGO SUN TIMES, June 16, 2001, at <http://www.chicagosuntimes.com>; Linda Bicksler, *Freeman School Next on Mold List*, THE BEACON NEWS, May 26, 2001, at <http://www.suburbanchicagonews.com/top/a26moremold.html>; Lori Hayes, *School Addresses Concerns over Mold*, THE CINCINNATI ENQUIRER, June 14, 2001, at [http://enquirer.com/editions/2001/06/14/loc\\_school\\_addresses.html](http://enquirer.com/editions/2001/06/14/loc_school_addresses.html).

6. See SLACK Inc., *Air Quality Program for Schools Is an Old Idea Whose Time Has Come About 1:5 Americans Occupy a School Building Each Day, They Are at Risk for Several Infections and Chronic Conditions, Infectious Diseases in Children* (2001), at <http://www.idinchildren.com/default.asp?article=idchome.asp> (last visited Nov. 10, 2001).

7. Robert Digitale, *State Will Survey, Test Moldy Classrooms - North Coast Parents and School Officials Say Health Problems Possibly*

*Linked to Poor Indoor Air Quality*, THE PRESS DEMOCRAT (Santa Rosa), May 5, 2001, at <http://www.pressdemocrat.com/search/advanced.html>.

8. *Id.*; see also *Students, Workers Sue for Mold Contamination*, AMARILLO GLOBE-NEWS, June 10, 2001, at [http://www.amarillonet.com/stories/061001/tex\\_students.shtml](http://www.amarillonet.com/stories/061001/tex_students.shtml); Lavinia Hechinger, *Litigation Likely in School's Moldy Dilemma*, THE EXPRESS-TIMES (Pa.), June 13, 2001, at [http://www.pennlive.com/news/expresstimes/index.ssf?news/expresstimes/pa/beth\\_sc4.html](http://www.pennlive.com/news/expresstimes/index.ssf?news/expresstimes/pa/beth_sc4.html).

9. See, e.g., Cassi Feldman, *AIMing Low - Nation's Largest Private Landlord Tries to Oust Low-Income Families*, SAN FRANCISCO BAY GUARDIAN, July 11, 2001, at <http://www.sfbg.com/News/35/41/41hud.html>.

10. *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001).

plumbing and mechanical systems may be outdated. Tenants seeking ways to escape monthly rental obligations may also claim breach of the implied warranty of habitability based on allegations of mold — another strong developing trend. An added appeal to the plaintiff bar of apartment-related suits is the prospect of framing the claim as a class action.

In addition to pure apartment housing, there is also an increase in mold claims submitted in connection with school-related housing. This includes university housing or dormitory housing for students.<sup>11</sup>

### C. Trend: Mold Claims Involving Single Family Homes

Homeowner association or common interest developments were ground zero for construction defect litigation. Over time, defect claims have moved away from condominiums to groupings of single family homes prosecuted together, with the aggregate damages rivaling the damages in condominium claims. Individual claims for mold contamination (both first and third party) are increasing in frequency.<sup>12</sup> For example, high-profile advocate Erin Brockovich is prosecuting her own toxic mold claim for personal injury growing from her single family home<sup>13</sup> while at the same time lobbying the California legislature for implementation of standardized protocols for remediation under the guise of the Toxic Mold Act.<sup>14</sup>

Claims of toxic mold are increasingly being made within the context of a single family home, regardless of whether it falls in the high or low end of the valuation spectrum. This makes sense because damages flowing from bodily injuries are specific to the individuals within a particular home. Stand-single family home cases can involve appreciable monetary amounts claimed as damages for both personal injury and property damage.

Moreover, homeowners are taking unusual actions before litigation. At least two homeowners have burned their homes to the ground believing that it was more reasonable to torch their homes and possessions than to have them professionally remediated.<sup>15</sup> At least one mold expert advised homeowners that this would be the best way to remediate their mold problem.<sup>16</sup> A growing number of homeowners have formally petitioned their local jurisdictions to condemn homes<sup>17</sup> or define mold as a public nuisance,<sup>18</sup> among other unusual remedies.

In these cases, the action of the homeowner generally is followed by a lawsuit against one or more parties who allegedly bear the blame under theories such as defective construction, non-disclosure, fraudulent concealment, and breach of fiduciary duty.<sup>19</sup> The defendants in these suits include contractors, design professionals, realtors, inspectors, remediation experts and lawyers who may have been involved at any juncture in the transaction.

training exercise for the firefighters and to permit them to build a new home on the property. Defense lawyers claimed that the torching of the house was a stunt to win the sympathy of potential jurors).

16. KXTV News10, *Forest Hill Couple Use Ultimate Weapon in War on Toxic Mold* (Feb. 15, 2001), at <http://www.kxtv10.com/news-story/February2001/021501/mold-fire.htm> (last visited Nov. 10, 2001).

17. See, e.g., Annysa Johnson, *Couple Want City to Act on Mold-Filled House - Franklin Family Fled Home After Illnesses; They Want It Condemned*, MILWAUKEE JOURNAL SENTINEL, June 6, 2001, at <http://www.jsonline.com/news/metro/jun01/mold06060601.asp>.

18. See, e.g., S.F., CAL., HEALTH CODE art. 11, § 581 (2001).

19. See, e.g., *Mold Forces Family from Home - Cleanup May Cost as Much as \$50,000*, CONCORD MONITOR, July 9, 2001, at <http://www.concordmonitor.com/stories/news/state/mold0709.shtml> (family without insurance for alleged toxic mold condition brings suit against home inspector for failing to inspect attic).

11. See, e.g., Henry K. Lee, *UC Berkeley Sued over Mold in Housing - Father Files on Behalf of His Suffering Son*, SAN FRANCISCO CHRONICLE, May 24, 2001, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/05/24/MNE183966.DTL>; Matt Flores, *UTSA Evacuees Return Briefly*, SAN ANTONIO EXPRESS-NEWS, May 10, 2001.

12. See, e.g., Terrence Stutz, *Keeping Mold Coverage, State Told - Homeowners Clash with Insurance Firms*, DALLAS MORNING NEWS (Austin), June 27, 2001, at 1A; R.A. Dyer, *Indoor Mold Called Next Health Crisis*, TEXAS STAR-TELEGRAM (Austin), June 27, 2001.

13. *Brockovich v. Morrison Assocs.*, No. 051037 (L.A. County Super. Ct.).

14. Marco R. della Cava, *Being Erin Brockovich These Days, the Famed Crusader Is Battling Mold — and Reports of Being “Broke-ovich”*, USA TODAY, Apr. 16, 2001, at <http://pqasb.pqarchiver.com/USAToday>.

15. *The Fire Cure*, PEOPLE, July 9, 2001; see also *O’Hara v. Cockram*, No. 00-12848 (Lane County, Or. Cir. Ct.) (the O’Haras allowed firefighters to burn the house to the ground, both as a

#### D. Trend: Mold Claims Involving Public Buildings

A growing number of complaints made by state and local officials regarding the quality of construction, as well as claims of mold infestation by occupants of government buildings, are fueling a separate category of claims founded on public buildings.<sup>20</sup> In fact, some of the largest dollar verdicts involved Florida courthouses that were alleged to suffer from pervasive mold (discussed *infra*). Even the Environmental Protection Agency (EPA) is not immune, as it is the subject of litigation brought by workers in its Washington, D.C., office, which ironically has been promulgating remediation protocols for commercial buildings and schools.

Increased awareness of indoor air quality issues on the part of individual governmental authorities may partially explain the growing number of claims made regarding public buildings. Claims of mold problems are not dismissed easily, as evacuation is typically the first protocol followed by testing.<sup>21</sup> Some have theorized that the growing number of mold claims involving public buildings has occurred because such buildings, like schools, are typically mandated by statute to be constructed by the lowest responsible bidder. These economic measures, while ensuring that the public is not overspending on necessary public buildings, often force contractors to provide no-frills construction and creates unnecessary tension between the contractor, design professional and public entity concerning costs and construction delays. Whatever the reason might be, the fact remains that a large number of public structures have been the subject of mold claims in recent months.

20. On March 27, 2000, California Superior Court Judge Elisabeth Krant filed a lawsuit against Tulare County alleging medical problems stemming from mold contamination in her chambers in the county courthouse. Since then, approximately 275 claims by employees in that courthouse have been filed against the county. A second lawsuit on behalf of 101 plaintiffs was recently filed. A number of workers' compensation claims have also been filed. Anastasia Hendrix, *Erin Brockovich Crusades Against Mold – State Lawmakers Told of Potential Health Dangers*, SAN FRANCISCO CHRONICLE, Mar. 8, 2001, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/03/08/MN218240.DTL>.

21. See, e.g., Cindy Van Auken, *City Reopens Offices After Mold Scare Dismissed*, WACO TRIBUNE-HERALD, July 3, 2001.

#### E. Trend: Mold Claims Involving Commercial Buildings

Damages in commercial cases involve not only personal injury, but also potential loss of use and business interruption. One expert openly opined at a recent seminar that claims that would have been brought under the umbrella of "sick building syndrome" if diagnosed years ago actually would fall squarely in the toxic mold arena if brought in today's legal environment. Measures adopted during the energy crisis to make buildings more energy efficient actually mean buildings are unable to breathe.<sup>22</sup> These strict codes and efforts to make the buildings watertight have resulted in structures that trap mold within the building envelope and circulate it throughout the system.

In addition, the utilization of newer products such as Exterior Insulation and Finish Systems ("EIFS") and synthetic stucco effectively traps moisture in the building envelope, providing an environment for mold growth.<sup>23</sup>

Individuals are bringing suits claiming that buildings have caused injuries called Sick Building Syndrome ("SBS") and Building-Related Illness ("BRI"). These illnesses include symptoms such as burning eyes, nose, and throat, sinusitis, dry skin, nausea, headaches, fatigue, and mental confusion. Cases have been brought by employees seeking reasonable accommodations pursuant to the Americans with Disabilities Act ("ADA").<sup>24</sup>

#### F. Trend: Health Care Facilities

Health care facilities are perhaps the less publicized of the trends, but merit recognition because of the presence of immune-compro-

22. See, e.g., Susan Vaughn, *Career Challenge; When the Atmosphere at Work Is Just Unbearable; Building-Related Illnesses Can Be Hard to Spot and Often Go Undiagnosed, but Many Are Preventable*, LOS ANGELES TIMES, July 22, 2001.

23. CTR. FOR DISEASE CONTROL, BLACK MOLD: CREEPING DESTRUCTION • IT DESTROYS HOUSES AND MAKES RESIDENTS SICK (2001); INT'L UNION OF OPERATING ENG'RS, *Indoor Air Quality Solution, Toxic Mold May Be a Silent Killer Perfect Breeding Ground After Water Leaks into Walls, Roofs, Floors* (2001), at [http://iaq.iuoe.org/iaq\\_htmlcode/iaq\\_news\\_clips](http://iaq.iuoe.org/iaq_htmlcode/iaq_news_clips) (last visited Nov. 10, 2001).

24. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12,101 (2000).

mised individuals. Hospitals, physicians' offices, and nursing homes all house individuals with fragile health.<sup>25</sup> In this environment, mold can truly be fatal. However, such facilities have always been proactive in terms of testing and abatement of any issues relating to indoor air quality. Remediation guidelines promulgated for commercial buildings, however, are most likely inappropriate for health care facilities given the presence of the immune-compromised, making them more expensive from a remediation standpoint.

In addition, California has mandated that all hospitals perform seismic evaluation and retrofitting to comply with structural and mechanical standards intended to keep hospitals operational in the wake of severe earthquakes. These requirements must be accomplished under the rigorous time line set by the Alquist Hospital Seismic Safety Act, Cal. Health & Safety Code § 130000 et seq. Consequently, water-related damages and defective construction can arise within this context, given the aggressive schedule of construction under this legislative mandate.

### G. Trend: Second Generation Suits

An increasing number of claims growing from prior claims or suits involving construction defects or mold abatement gone astray can be categorized as "second generation suits."

In the arena of prior construction defect cases, there is a growing trend of plaintiffs coming back for second and third bites at the proverbial apple by bringing claims of improper investigation, identification or remediation of the mold condition in the first instance.<sup>26</sup> Suits are increasingly being filed against board members, experts and lawyers for failing to recognize the scope and gravity of mold conditions, repair protocols and costs associated with eradicating alleged toxic mold. These

suits are driven by the fact that remediation is expensive.

Also falling under the umbrella of second generation suits are claims against remediation contractors and experts for improperly effecting remediation in the first place. Plaintiffs in these suits are alleging that contractors did not properly repair conditions that caused mold, did not properly contain the mold during remediation, or otherwise caused it to spread to other areas of buildings.<sup>27</sup>

### III. Sticker Shock: Verdicts and Settlements Underscore the Serious Nature of Tort Claims of Toxic Mold and Provide Insight for Handling Future Claims.

There is a school of thought that toxic mold claims are nothing more than junk science or a passing fad without basis in the scientific community. For those charged with handling toxic mold claims, a cursory review of recent verdicts and settlements from a nationwide perspective presents a sobering realization that: (1) this is a very serious tort, and; (2) effective handling of the claim upon presentation can truly minimize the exposure.

Consider these recent verdicts and settlements that made headlines throughout the nation:

- In June 2001, a Texas jury handed down a \$32.2 million verdict against Farmers Insurance Group. Plaintiff Melinda Ballard submitted a mold claim to a first party insurer seeking less than \$200,000 to remediate mold in an 11,500 square foot home that replicated Tara from *Gone with the Wind*. Ms. Ballard claimed insurer mishandled the claim by allowing mold to overrun the home, requiring

/flood.html (last visited Nov. 10, 2001).

27. Helen Zukin, Esq., *Legal Ramifications of Indoor Air Pollution*, Law Finance/Group Inc. (2000), at <http://www.lawfinance.com/ARTICLES/Zukin.html> (last visited Nov. 10, 2001) (remediation contractors are increasingly being held liable for reoccurring mold growth due to initial negligence in improper remediation.)

25. Trista Talton, *Southport Nursing Home Plagued by Mold*, WILMINGTON STAR, July 27, 2001, at <http://www.wilmingtonstar.com/news/stories/2198newsstorypage.html>.

26. See David Bierman, *The Dangers of Secondary Mold Growth Caused by Improper Remediation of Flooded Buildings*, Environmental Building News, at <http://www.buildinggreen.com/elists>

complete destruction and rebuilding of the home at a cost of more than \$6 million. Ms. Ballard has gained national recognition as an advocate increasing awareness of mold issues, making appearances before the Texas Department of Insurance hearings and cameos on NBC and other national media.<sup>28</sup> Ms. Ballard's husband, Ron Allison, reportedly had to retire at 33 because he lost much of his cognitive ability due to exposure to toxic mold.<sup>29</sup>

- In 2000, a federal jury in California awarded \$18 million — all but \$500,000 of that amount in punitive damages — to a homeowner against a first party insurer that declined coverage for mold damage. The trial judge reduced the award to \$3 million. The case is on appeal.<sup>30</sup>
- Construction defects at the Martin County Courthouse resulted in a \$14.5 million cumulative payout (original construction cost was \$13 million) to sickened 15 workers.
- A cumulative payout of \$105 million was distributed for Polk County Courthouse, Florida.
- The Delaware Supreme Court upheld a \$1.04 million award to two women against their landlord who failed to address leaks and mold problems in their apartments, resulting in asthma attacks and other health problems.<sup>31</sup>
- In December, 2000, a homeowner settled a mold-related bad-faith lawsuit against his insurer for \$1.5 million.<sup>32</sup>

28. See, e.g., Kelly O'Donnell, *Toxic Mold Devastates Homeowners*, MSNBC News (June 28, 2001), at <http://www.msnbc.com/news/593696.asp>.

29. The jury found that the cost to remediate the home was \$1,154,175; the cost to replace the home was \$2,547,350; the cost of appraisal process was \$176,000. Homeowners for Better Building, *The Verdict in the Ballard/Farmers Insurance Suit* (2001), at [http://www.hobb.org/GOTOBUTTON BM\\_1\\_farmersverdict.shtml](http://www.hobb.org/GOTOBUTTON BM_1_farmersverdict.shtml) (last visited Nov. 10, 2001); see also CBS News Broadcasts, 48 Hours, *Invisible Killers - The Dangerous World of Viruses and Bacteria* (Sept. 28, 2000), at <http://www.cbsnews.com/now/story/0,1597,167089-412,00.shtml> (last visited Nov. 10, 2001); MOLD: A

- In Beverly Hills, California, parties agreed to an undisclosed settlement amount believed to be between \$10-12 million for single family home infested with toxic mold. Dramatic footage of mushrooms growing in the living room coupled with claims of property damage to extremely high-end personal items added to increased settlement value. A local ordinance required complete destruction of the home due to the extensive work required to remediate the home. The loss of use claim was substantial because the homeowners paid approximately \$30,000 a month for alternative residence during pendency of action.

Significantly, the largest verdicts are against insurers for first party allegations of improper claims handling. All these cases could have been resolved for substantially reduced sums if proper protocols had been in place and followed. The bottom line is that the implementation of consistent, proactive and aggressive claim handling strategies will empower the risk manager and claim professional to take control of this emerging tort.

#### IV. Defining "Toxic" Mold.

##### A. Know Your Enemy

Obviously, there is media hype over mold, and there are staggering verdicts and settlements stemming from mold and its remediation. What then is mold? Mold has been around forever; why now is it suddenly a problem?

More specifically, what is "toxic" mold?

*Health Alert*, USA WEEKEND, at [http://www.usaweekend.com/99\\_issues/991205/991205mold.html](http://www.usaweekend.com/99_issues/991205/991205mold.html) (last visited Nov. 10, 2001).

30. Plaintiff, a 96-year-old, brought suit against his insurer for refusal to pay for mold damage caused by burst pipes in his home which led to mold infestation. While the insurer paid \$16,000 to fix the damage, the claimant needed another \$30,000 for mold remediation. It was alleged that the insurer stalled payment due to the advanced age of the plaintiff. *Anderson v. Allstate Ins. Co.*, No. CIV S-00-907 PAN (E.D. Cal. filed 2000).

31. *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001).

32. *Blum v. Chubb Custom Ins. Co.*, No. 99-3563 (Tex. Dist.



After all, there are over 100,000 types of mold. As set out below, over 100 mold species are known to cause infection in humans. Of the 100 species, very few of these are cause for concern to those implicated in a claim involving the “toxic” mold (*stachybotrys*, *penicillium* and *aspergillus*).

### 1. What is Mold?

Molds are simple, microscopic organisms, and are found virtually everywhere, indoors and out. They can be found on plants, foods, dry leaves and other organic material. Mold spores are very tiny and lightweight, allowing them to travel through the air. Mold growths can often cause of discoloration, in a range of colors from white to orange and from green to brown and black. When mold is present in large quantities, it can cause allergic symptoms similar to exposure to pollen.

Certain molds can produce mycotoxins that the mold uses to inhibit or prevent the growth of other organisms. Mycotoxins are found in both living and dead mold spores. Even after being disinfected, materials permeated with mold must be removed. Allergic and toxic effects can remain in dead spores. Mycotoxins are generally not volatile and a disturbance is generally required in order to trigger exposure.<sup>33</sup>

### 2. It is Impossible to Eliminate Mold

Mold spores are almost always present in outdoor and indoor air. Virtually all commonly used construction materials and furnishings provide nutrients supporting mold growth. Dirt on surfaces provides additional nutrients. Cleaning and disinfecting with non-polluting cleaners and antimicrobial agents will provide some protection against mold growth.

### 3. Limit Mold Growth: Reduce Moisture

Mold growth needs food and water. Humid climates may be particularly susceptible to

mold growth; mold needs only a very small amount of moisture to grow. The key then to controlling mold growth is limiting moisture. Standing water is not required for mold growth. Mold can grow when relatively high humidity or hygroscopic properties (the tendency to absorb and retain moisture) of building surfaces allow sufficient accumulation of moisture. The amount of moisture required for fungal growth can vary depending upon the material and the organism. *Stachybotrys chartarum* (also known as *Stachybotrys atra*) requires high levels of moisture (humidity required for *S. atra* growth is 94%) and cellulose containing materials for growth.<sup>34</sup>

### 4. Indications of Mold

Mold can be found on walls, ceilings, floors, basements, crawl spaces and lower rooms. Mold can be found anywhere there has been a spill or water damage — on window frames and outside walls, on carpets, on ceiling tiles, on paper or wood products, behind bubbling paint or stained/peeling wallpaper or sheetrock. The potential presence of mold is indicated by the following: earthy or musty odor, signs of chronic roof or plumbing leaks, wet or dirty carpet, recent spills or flooding, standing water near outside air intakes, slimy or foamy water in drip pans of air-handling or air-conditioning units, extensive exposed soil indoors, over-watered indoor plants, presence of sewage backflow, moisture buildup and in the presence of water intrusion.<sup>35</sup>

Molds naturally grow in an indoor environment and enter a building through open doorways, windows, heating, ventilation, and air conditioning systems. Airborne spores also attach themselves to people and animals, making clothing, shoes, bags and pets convenient vehicles for carrying molds indoors. When mold spores settle in locations where there is excessive moisture, they can grow. Building materials provide suitable nutrients that

Ct. 1999).

33. CAL. DEPT. OF HEALTH SERVICES, INDOOR AIR QUALITY INFO SHEET, MOLD IN MY HOME: WHAT DO I DO? (1998), at <http://www.dhs.cahwnet.gov/org/ps/deodc/ehib/ehib2/topics/Moldhome%20Eng.html>.

34. Indoor Envtl. Mgmt. Branch, Envtl. Prot. Agency, Children's Health Initiative: Toxic Mold (2001), at <http://www.epa.gov/appcd-www/crb/iemb/child.htm>.

35. N.Y. COMM. FOR OCCUPATIONAL SAFETY AND HEALTH, THE FACTS ABOUT MOLD (2001), at <http://www.nycosh.org/>

encourage mold to grow. Wet cellulose materials, including paper and paper products, cardboard ceiling tiles, wood and wood products, are particularly conducive for the growth of some molds. Other materials such as dust, paints, wallpaper, insulation materials, dry-wall, carpet, fabric, and upholstery also support mold growth.

### 5. Forms of Mold

Pathogenic mold can cause irritation, rash, illness or death. The most common species of mold are: *cladosporium*, *pennicillium*, *alternaria*, *aspergillus*, *mucor* and *stachybotrys chartarum* (which produces toxins). The unusual species include: *epicoccum*, *aspergillus versicolor*, *aurebasidium* and *fusarium*.

### 6. Measurement of Mold

Molds are microscopic and only become visible when individual structures or spores accumulate. They are measured and reported as "colony forming units" ("CFU"). There appears to be no consensus on the benchmark to use for potential health effects. Experts typically will compare the indoor versus outdoor CFU levels for specific mold species identified. Other experts quote specific numeric levels (e.g., 250 CFU) as "safe" levels for human inhabitation.

### B. Toxic Mold

"Toxic" mold is a term that has evolved over the past few years to describe a limited grouping of molds that has potential to cause various health problems. In the context of mold claims, one of three molds are claimed to result in deleterious effects to the health and safety of building inhabitants. Toxic mold is not a scientific term, but one widely used by the media to describe mold that is potentially harmful (one national news report went so far as to suggest mold is a weapon of "biological warfare"). The three most common molds

which are generally thought of as "toxic molds" are as follows: *stachybotrys*; *penicillium*; and, *aspergillus*.

#### 1. Toxic Molds — *Stachybotrys*

*Stachybotrys chartarum* (also known as *S. atra*) is the most dangerous of the molds. It is a greenish black fungus that grows in very wet environments. Its spores are found in soil and enter buildings after floods, pipe breaks or other sudden water intrusions. It grows on paper, tile, carpet and general organic debris. Because this mold occurs in ducts or covered surfaces, it may be present but not visible.

*Stachybotrys* generates six types of a class of chemicals called *macrocyclic trichothecenes*. Trichothecenes can cause severe or fatal lung disease and may be neurotoxic, causing behavioral difficulties. This fungus also produces immunotoxins; *spiro lactones* and *cyclosporin*. *Cyclosporin* is the drug which enables heart transplants by suppressing the immune system to prevent rejection of the transplanted tissue. The combination of toxic and immunosuppressive effects creates the potential for significant health risk.

There is a great deal of research on the impact of toxic molds in animals. Veterinarians know the effect on horses and donkeys eating moldy hay. *Stachybotrys*, for example, was first identified as the cause of disease in farm animals in Europe during the 1930s.<sup>36</sup> However, the same amount of research has not been done regarding its effects on humans. The first known human morbidity from it was identified in Chicago in 1986, wherein a family suffered flu symptoms (diarrhea, dermatitis and general fatigue for five years) until the *stachybotrys* was found and removed.<sup>37</sup> Research is proceeding in this area given the heightened level of interest from various governmental and private agencies.

*Stacybotrys* was targeted as the cause of infant deaths in a study commissioned by the

moldfacts.html.

36. In most cases, the animals are exposed to the mold at a very high level to determine what, if any, adverse effects may develop. This data is difficult to extrapolate to humans because the level of exposure for humans is typically significantly lower. ENVTL. HEALTH INVESTIGATION BRANCH, CAL. DEPT. OF HEALTH SERVICES,

STACHYBOTRYS CHARTARUM - A MOLD THAT MAY BE FOUND IN WATER-DAMAGED HOMES (2000).

37. W.A. CROFT, B.B. JARVIS & C.S. YATAWARA, AIRBORNE OUTBREAK OF TRICHOHECENE TOXICOSIS, ATMOSPHERIC ENVIRONMENT 20:549-552 (1986).

Centers for Disease Control (“CDC”), which studied a cluster of infants who died from pulmonary *hemosiderosis*.<sup>38</sup> Common within all the homes was water damage and high levels of fungi. This study fuels tall tales of the ill-effects of mold on immune susceptible people. While the study was rejected years later by the CDC for questionable sampling techniques and other criteria widely criticized by the expert community, the initial study is still widely quoted on the internet and other media as conclusive proof that mold kills.

## 2. Toxic Molds — *Penicillium*

*Penicillium* is associated with allergies, asthma, respiratory infections and hypersensitivity *pneumonitis*. Notably, *penicillium* does not produce *trichothecenes* or immune altering toxins, which make them a less serious threat to health.

## 3. Toxic Molds — *Aspergillus*

*Aspergillus* may cause disease. It also does not produce *trichothecenes* or immune altering toxins making it a lesser threat to health. One of the species of *aspergillus*, *flavus*, produces aflatoxin B, which is one of the most potent carcinogens known to man (and is a frequent contaminant in peanuts). However, people traditionally do not eat household mold and the danger of it is acute toxicity, not carcinogenicity.

## V. Medical Issues: What is Proven and What is Junk Science? What is the Impact of Mold Exposure on the Health of Individuals?

There is no easy answer to the question of how much mold exposure is unhealthy. We examine below what is scientifically proven

38. In lay terms, lung hemorrhaging. MED-WEB OF THE HUDSON VALLEY, INDOOR ENV'TS DIV. PARTNER ALERT: U.S. ENVTL PROT. AGENCY, at <http://www.hvmedweb.com/mw1/updates/moldgrowth.htm>.

39. The ongoing research is both conventional and non-traditional. For example, expert Dr. James Craner recently completed the first human exposure baseline study involving 14 individuals who spent between two to six hours in a toxic mold contaminated Nye County Government Complex. Reportedly, after 20 minutes most people were affected with burning eyes, nausea, itchy skin, bloody noses, headaches and fatigue. Results of this testing sequence have not been released. *County Employees Participate in Baseline Study*, PAHRUMP VALLEY TIMES, July 20, 2001.

and what is unproven regarding exposure to toxic molds. As set out in the causation section of this paper, this area is the weakest link for a claimant alleging a toxic mold injury — rich fuel for pre-trial motions discussed in the causation section *infra*.

There are aggressive ongoing technical and scientific studies focused on developing standards in this area. In fact, there is a tremendous amount of attention and resources dedicated to the study of mold by both governmental and private researchers.<sup>39</sup> In the context of litigation, it is essential that the trial attorney brings home the microbiology to the trier of fact. As the medical science of mold stands now, very few cases of bodily injury should get to a jury if defense counsel properly attacks causation using case authority established through years of toxic tort and bodily injury litigation.

Extraordinary confusion exists among self-proclaimed experts in health departments and remediation companies. The merits of various remediation plans are often the subject of disagreement.

## A. Mold Is Both Helpful and Harmful

Mold runs the gamut of being helpful and harmful. On one hand, the human body is reliant on mold for its proper functioning and mold is one of the essential ingredients in some of our favorite foods, bread, wine and beer. On the other hand, mold can be lethal. Microbial “germ” warfare is responsible for the term “yellow rain” and for thousands of documented deaths from wartime use of mycotoxins from molds as recently as the Iraqi-Kuwait war.<sup>40</sup> The dangers of mold have been documented since the time of the Bible.<sup>41</sup> As identi-

40. In fact, the microtoxins produced by stachybotrys are described as “extremely dangerous,” so dangerous that “it’s listed in a military manual as an agent of ‘biological warfare.’” Kelly O’Donnell, *Toxic Mold Devastates Homeowners*, MSNBC News (2001), at <http://www.msnbc.com/news/593696.asp>.

41. Leviticus, Chapter 14, verses 33-57, mandates evacuation of the home when mold is detected. After a seven day retreat, the home was to be inspected by a priest who determined whether the mildew had spread. If tearing down the infected walls did not remedy the problem, the house was deemed unclean and was to be demolished.” *Leviticus 14:33-57*.

fied above, the “bad” molds fall generally into three categories that the defense team needs to focus upon.

## B. Mold Affects Each Individual Differently

There is tremendous variation among mold species abilities to cause health effects. A similar, almost idiosyncratic, response to mold is found among individuals: some people can withstand huge doses of mold, while others are more susceptible.<sup>42</sup> This is one of the reasons that agencies have such difficulty establishing “safe” levels of mold. These uncertainties are compounded by interaction of mold species. One species might not produce particularly toxic reactions standing alone but might mix with other mold species to concoct a highly toxic soup.

In view of the impact to different individuals, one thing is clear: the defense team should be particularly sensitive to environments where there are immune susceptible individuals. Schools, hospitals and health care facilities immediately come to mind because each environment houses those who potentially have compromised immune systems.

All of us are exposed to molds. The health impact, however, is highly specific to the individual. Depending on the type, exposure and individual, an individual may experience: (a) allergic/immunologic reactions; (b) infections; and (c) toxic effects.

### 1. Allergic Reactions

Perhaps the most common health problem associated with exposure to mold is allergic reactions which range from mildly uncomfortable to life-threatening illness (e.g., severe asthma attack). Common symptoms include:

- Watery eyes
- Runny nose and sneezing
- Nasal congestion
- Itching
- Coughing

42. ENVTL. HEALTH INVESTIGATION BRANCH, CAL. DEPT. OF HEALTH SERVICES, *supra* note 35, at 19.

43. *Cladosporium* is commonly found in the condensation reservoirs of refrigerators. Homes with poor ventilation may also

- Wheezing and impaired breathing
- Headache
- Fatigue

### 2. Infections

While not as common as allergies, there are several types of mold related infections. These include *aspergilloses* in susceptible people and allergic fungal sinusitis. Other fungi, which grow in soil or are carried by birds (e.g., *histoplasmosis*), can cause infections but are rare in indoor exposures. The classifications of infections caused by fungi are systemic, opportunistic and *dermatophytic*.

**Systemic Infections.** Systemic infections include *blastomycosis*, *coccidioidomycosis*, *histoplasmosis*, and *paracoccidioidomycosis*. The majority of the cases involve initiating the infection when spores of the fungi that cause these diseases are inhaled. A large majority of these infections produce minimal or no symptoms. However, immunosuppressed individuals may develop chronic localized infection or the disease may disseminate throughout the body, which generally proves fatal.

**Opportunistic Infections.** Opportunistic infections are generally limited to individuals with impaired immunological defenses. This is a secondary infection to a primary disease or condition. Opportunistic fungi are facultative parasites, meaning they can use both living and dead substrates for nutrients. Common opportunistic species include *aspergillus*, *candida*, *cladosporium*,<sup>43</sup> *cryptococcus*, *muco* and *rhizopus*.

**Dermatophytes.** Dermatophytes are a group of fungi that infect the hair, skin and nails. This infection occurs through direct contact with an infected individual or indirectly by sharing clothing, hair brushes, towels and the like. Transmission to humans from an environmental source is rare; however, outbreaks from the soil have been reported.

serve as a source for this contamination. The general reaction is allergic because this is no mycotoxins are produced. DEPT. OF ENVTL. HEALTH & SAFETY, UNIV. OF MINN., INDOOR FUNGI RESOURCES, FUNGAL GLOSSARY (1996), at <http://www.dehs.umn.edu/iaq/fungus/glossary.html>.

### 3. Toxic Reactions

One of the least studied and understood human health effects in this area is toxic reactions from exposure to molds. This area addresses exposure to toxins on the surface of the mold spores, not with the growth of the mold in the body. There are few case studies that report toxic molds (those containing certain mycotoxins) inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss.

Mold that produces toxins have potential to inhibit the immune response, which has devastating potential for persons with pre-existing disabilities ("immunocompromised" hosts), but also is of concern to healthy people.<sup>44</sup>

Widely inaccurate statements as to toxic reactions can be found on the internet, which points to a series of studies published by the Centers for Disease Control ("CDC") in December 1994 and January 1997, studying the deaths of infants in contiguous zip codes that suffered from pulmonary *hemosiderosis* ("PH") (also referred to as acute idiopathic pulmonary hemorrhage). The studies led the CDC to conclude at the time that PH was associated with major household water damage during the six months before illness and increased levels of measurable household fungi, including the toxin producing mold *stachybotrys chartarum*. These toxins may irritate the lining of the infant's lungs and weaken developing blood vessels, eventually leading to pulmonary bleeding. In addition, the CDC indicates that exposure to tobacco smoke in addition to indoor mold may increase an infant's risk of pulmonary hemorrhage. However, a subsequent study by the CDC, based on outside experts, concluded this possible association was not proven.<sup>45</sup> Three factors, taken together, contributed to the CDC's conclusions that *stachybotrys chartarum* was not clearly associated with PH:

- The reported odds ratio was statist-

cally unstable and potentially inflated;

- Sampling methods were suspect. One investigator correctly inferred the identity of many case homes and wanted to be certain to identify cultural fungi in these homes. This resulted in the collection of twice the number of air samples from case homes as those collected from control homes. Moreover, the sampling technique was aggressive and non-standardized which generated artificial aerosols for sampling. This had the impact of increasing the potential for differential exposure assessments of cases and controls if sampling were conducted in an unblended manner; and
- Among homes classified as water damaged, the presence of any cultural airborne *stachybotrys chartarum* was identified in a similar percentage of case and control homes.

The aggregate effect of these three factors was that the evidence from these studies was not of sufficient quality to support an association between *stachybotrys chartarum* and PH.

### C. Exposure to Mold Does Not Equal Illness

The presence of fungi on building materials, as identified by a visual assessment or by bulk/surface sampling results, does not necessarily mean that people will be exposed or exhibit health effects. In order for humans to be exposed indoors, fungal spores, fragments, or metabolites must be released into the air and inhaled, physically contacted (dermal exposure), or ingested.

Whether or not symptoms develop in people exposed to fungi depends on the nature of the fungal material (e.g., allergenic, toxic, or infectious), the amount of exposure, and susceptibility of exposed persons. Susceptibility

44. These pre-existing disabilities or susceptibilities may form the basis for assertion of an ADA complaint based on the presence of a toxic mold. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 (2000).

45. The Center for Disease Control, *Update: Pulmonary Hemorrhage/Hemosiderosis Among Infants—Cleveland, Ohio, 1993-1996*, Morbidity and Mortality Weekly Report, Mar. 10, 2000, at 180.

varies with genetic predisposition (e.g., allergic reactions do not always occur in all individuals), age, state of health, and concurrent exposures. For these reasons, and because measurements of exposure are not standardized and biological markers of exposure to fungi are largely unknown, it may be difficult to determine “safe” or “unsafe” levels of exposure for people in general.<sup>46</sup>

## VI. Defending the Toxic Mold Claim: Strategies for Consideration by the Defense Team.

Armed with an understanding of what constitutes toxic mold and the health effects of mold exposure together with trends in terms of litigated product subject to the claim and potential settlement and verdict values, we are now ready to examine the strategies for handling any claim involving allegations of toxic mold.

Implementation of protocols for handling mold claims is critical. Having a standardized process of responding to the mold claim in a timely manner is essential.

Actively trying to resolve mold claims as they are presented is key. For claims which are incapable of settlement, the defense team should be prepared to aggressively defend the claim.

This next section will address the essential steps and tasks necessary for defending the toxic mold claim: (A) Expert / Consultant Selection; (B) Contractual Risk Transfer Vehicles; (C) Impact of Jurisdictionally Sensitive Issues; (D) Inspection, Testing and Remediation Issues; (E) Post Remediation Issues / Goals; and (F) Defense Strategies.

### A. Strategy: Early Identification & Selection of Key Experts

Early in the life of the mold claim, one must evaluate and select the necessary experts required to defend the claim. While selection of an expert is dependent on the

facts, there are a number of issues to consider.

The early retention of experts is advisable for a number of reasons. First, it allows the defense the opportunity to select the best qualified expert from the available pool, thereby, removing that individual as a candidate for other parties in the case. Second, it allows the defense time to work with the chosen consultants in order to strategically identify key issues required to defend the case. Last, based on the consultation, it will aid in a focused discovery plan which, in the end, will translate into considerable savings. Based on this attack plan, the defense team will have a strong idea of the costs associated with the defense of a mold claim up front and, as a result, be able to effectively control this component.

Disputes as to causation and appropriate remedial protocol will assuredly create contentious issues. Scientific accuracy will likely be disputed, and where the expert fails to employ methodology acceptable to the scientific community, the defense may exclude the admissibility of the evidence.<sup>47</sup> Courts impose requirements that the opinion of the expert be based on measures generally accepted by the scientific community (See discussion *infra* re causation).

Given the complex causation issues, interdisciplinary approaches may be beneficial not only in determining the nature and extent of the problem but in developing a cohesive strategy and a consistent explanation for causation.

Depending on the type of illnesses claimed, it may be necessary to seek advice from a number of specialties. This list is by no means exhaustive, but is provided so you have a basic understanding of the areas of expertise involved. They are as follows:

### Indoor Air Quality Issues:

1. Industrial Hygienist (always required for sampling of environment)
2. Microbiologist
3. Mycologist (prevalence, growth and toxicity of various molds)

46. BUREAU OF ENVTL. & OCCUPATIONAL DISEASE EPIDEMIOLOGY, N.Y. CITY DEPT. OF HEALTH, GUIDELINES ON ASSESSMENT AND REMEDIATION OF FUNGI IN INDOOR ENVIRONMENTS (2000), at <http://www.ci.nyc.ny.us/html/doh/html/epi/moldrpt1.html>.

47. Uncertain causation conclusions based on uncertain scientific methodology is often fondly referred to as “junk science.” See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

4. Toxicologist (animal studies / human health risks from mold)
5. Ventilation expert

**Medical Issues:**

1. Allergist (clinical effects of mold and relationship to other causes)
2. Dermatologist
3. Gastroenterologist (causes of GI symptoms)
4. Occupational Physician
5. Pulmonary Specialist (clinical effects of mold on the respiratory tract)
6. Treating Physician(s)
7. Rheumatologist (potentially required to evaluate autoimmune disease)

**Mental Health Issues:**

1. Neuro-psychologist (cognitive/ behavioral effects of mold)
2. Psychologist
3. Psychiatrist

**Construction Issues:**

1. Architectural
2. Cost Estimation
3. Concrete
4. General Contracting
5. HVAC
6. Plumbing
7. Roofing
8. Soils
9. Waterproofing
10. Windows
11. Remediation
12. Statistician
13. Valuation

At the same time, the defense team should have a strong working knowledge of the writings and opinions of the leading experts in the emerging tort of toxic mold. This includes Dr. Philip Morey (microbiologist), Dr. Eckard Johannig (occupational physician) and Prof. Bruce Jarvis (researcher on triconthecenes). If counsel does not have a working knowledge of these individuals, it is incumbent to ensure that the chosen defense experts have a working

familiarity with these individuals.

**B. Strategy: Early Factual Analysis of Contractual Risk Transfer**

It is imperative to evaluate at the earliest juncture possible the ability to transfer the risk presented by the toxic mold claim. This requires immediate evaluation of a number of factors which are set out below:

**1. Identification of Potentially Responsible Parties:**

Depending on the genesis of the mechanism allowing for the growth of the toxic mold, a host of parties may be implicated in the claim for which there will be indemnification rights, either express or equitable. To this end, it is imperative to gain an immediate understanding of the parties involved, scope of work performed on the project and cause of the damages alleged. Immediate tenders of defense and indemnity should be sent via certified mail at the earliest juncture in order to preserve arguments regarding early tender dates and the benefits that early tenders provide.

**Joint and Several Liability Analysis.** The defense team should be cognizant of the relationship between the potentially responsible parties. In other words, if responsibility is borne by several parties for the condition which is causing the mold growth, the defense team needs to evaluate the ability to prosecute, or transfer the risk, for this condition as between those parties. This issue is factually dependent on the scope of work of the parties. This requires analysis of the contract language that assigns this responsibility. To the extent this information is missing from contract documents, reference to the jurisdiction and the ability to impose this liability under equitable theories must be explored.

**“Empty Chair” Analysis.** Under the umbrella terms of “empty chair” or “missing parties,” one must take into account those parties which are potentially responsible for the mold growth who are not involved in the claim or litigation.

These parties may have no assets, insurance policies or otherwise, which can be held to answer for the claim. Bankruptcy protection may present a barrier to chasing these parties for theories of contribution. Early in the life of the claim, an analysis of the viability and liability of these parties must be conducted in order to ascertain whether any shortfall presented by the missing parties will impact the exposure to your client. To the extent there are missing parties, theories of joint and several liability come into play and must be carefully considered in an effort to apportion liability to the other parties.

**2. Identification of Potentially Implicated Policies of Insurance.** This task involves an analysis of the policies which could be implicated given the allegations made within the complaint. Be mindful that a toxic mold claim can involve allegations of both property damage and bodily injury. Accordingly, policies that may otherwise exclude the property damage due to exclusions may be implicated for the bodily injury aspect of the claim. As a result, you may have mixed policies defending for different aspects of the damages claimed.

**Exclusions / Endorsements.** It is critical to review the exclusionary language in the policies or endorsements, which may amend the coverage afforded for the incident. Be mindful that the body of law interpreting the exclusions and endorsements has not had the opportunity to develop the breadth and depth of cases with reference to toxic mold claims. By analogy, many insurers may argue the asbestos cases are applicable but, those cases can be distinguished. [Also, for the newer policies, examination of newer endorsements and exclusions which seek to exclude coverage for mold must be examined].

**Co-Insurance Clauses.** This involves examination of the presence of another policy of insurance which may cover the same loss. It may involve overlapping time frames, involve different carriers, and involve a unity of rela-

tionships as between the parties named as the insured on the policy. In short, it involves an aggressive examination of the other policies of insurance which may afford coverage for the claims framed by the toxic mold claim.

**Additional Insured Entitlements.** Immediate attention should be given to whether or not additional insured status is available for the loss and, to the extent it is afforded, tenders should be immediately forwarded.

**3. Identification of Theories of Liability.** Working as a team, counsel, claim professionals and risk managers need to have a strong understanding of the allegations and theories of liability articulated within the claim and relief sought. This is important for ascertaining the potential contractual risk transfer vehicles available in view of the facts framed in the pleadings. Understanding the theories of liability includes not only the claims articulated against your client/insured. It also embraces consideration of the claims and theories of liability for which you will be able to look to the other potentially responsible parties. Accordingly, this factual analysis would include evaluation of the following issues:

- Party making the claim (first versus third party; implication in terms of regulations governing relationships and liability growing from same);
- Notice (which dovetails into the statute of limitations issues discussed *infra*);
- Personal Injury Claims (who is making them; consideration of minors and ability to compromise these claims);
- Property Damage Claims;
- Punitive Damages;
- Causes;
- Continuous nature of the cause of the mold.

**Contractual Analysis.** Analysis of the contractual provisions are essential to determining the risk transfer mechanisms available. This analysis should include consideration of



the following issues:

**Indemnity Analysis.** The defense team needs to immediately analyze the presence of any indemnity agreements within the contract documents, to whom indemnity is owed and characterization of the type of indemnity. Careful consideration should be given to the verbiage of the indemnity agreement in light of the decisions handed down over the past three years, which discuss the impact the wording can have on the duties to defend and indemnify. Tenders under the indemnity should be made early and in an abundance of caution by way of certified mail.

**Insurance Entitlements.** The defense team should analyze the insurance requirements set out within the contractual documents to flush out the obligations of the contracting parties. Often, there is a requirement to name parties as an additional insured on policies of insurance, which may automatically convey this status depending on the insuring policy. While the better practice is to secure the actual endorsements before work is given as opposed to prosecuting an action for breach of contract for failing to name as an additional insured, the analysis nonetheless is vital in the effort to fully maximize the ability of the parties to shift responsibility for the legitimate claim. Again, tenders should be immediately made to all the insurers potentially exposed for the claim.

**Choice of Forum Analysis.** Dependent on the contractual relationships, the forum for dispute resolution may be arbitration which is called for within the contracts. The line of cases discussing arbitration are clear that participation in various forms in the formal litigation may operate as a waiver to the right to arbitrate. Accordingly, early analysis of the choice of forum clauses is necessary. At the same time, the defense team should weigh the pros and cons of arbitration as opposed to allowing the case to proceed before a trial court as there are decided pros and cons to each forum choice.

**ADR Provisions Analysis.** The contractual

analysis may reveal a mechanism for alternative dispute resolution prior to formal litigation. Analysis should be made to ascertain whether there has been a waiver of the rights to attorney fees if litigation is commenced without resorting first to ADR as required by the contract. To the extent the matter is a fresh claim, defense counsel should consider resolving the toxic mold claim at the earliest juncture possible through invocation of this provision.

**Attorney Fee Analysis.** As set out above, the prosecution of a toxic mold complaint can indeed be an expensive endeavor. To that end, early analysis of the ability of the claimant to seek his or her fees associated with the prosecution of the complaint is paramount. At a minimum, this is information that should be extracted early in the life of the case.

### C. Strategy: Early Analysis of Jurisdiction-Specific Issues

Mold claims are increasing in number. However, the number of mold claims that have been tried and appealed are limited. As a result, guidance from the courts is scant.

However, the judiciary has given us clues as to how they will rule on various issues. Courts have ruled on issues which will undoubtedly be presented within the context of the toxic mold claim. Understanding these issues and how the courts are likely to rule is important for early evaluation of the claim.

The defense needs to make an early evaluation regarding the clauses which may afford coverage. Whether the state is traditionally pro insured or pro insurer is certainly a factor which weighs into this consideration. Other policy interpretations made on the issues of environmental or toxic tort claims, releases and damages are certainly persuasive indicators of the direction the court will take.

### D. Strategy: Cost Effective Inspection, Testing & Remediation

After you have selected your experts and evaluated the contractual risk transfer issues, the next battleground you will confront deals with the inspection sequence, testing and

remediation issues. Central to this issue is the question of “how clean is clean enough.” Battles over this issue can be assuredly expensive.

From a litigation standpoint, prompt inspection, testing and remediation can result in capping the potential damages. While this will not necessarily avoid a lawsuit, it will provide some certainty as to the potential exposure faced by plaintiffs making bodily injury claims.

From a claims standpoint, it is important to note that the large verdicts in mold exclusively involve allegations of bad faith and/or poor claims handling. Accordingly, it is imperative to implement protocols to avoid this result. Mold investigation and homeowner complaints should be taken seriously. Delays and ignoring the complaint are fuel for subsequent litigation.

### **1. Time is of the essence.**

As detailed in the “sticker shock” section of this paper, failure to immediately address claims of toxic mold may result in the spread of the mold condition, which serves to increase the cost of the remediation (as well as increase the causes of action to include intentional allegations based on the claim handling).

In the end, both the plaintiff and defense share the same goal of remediation – “to remove or clean the contaminated materials in a way that prevents the emission of fungi and dust contaminated with fungi from leaving a work area and entering an occupied or non-abatement area, while protecting the health of workers performing the abatement.”<sup>48</sup> “In all situations, the underlying cause of water accumulation must be rectified or fungal growth will recur.”<sup>49</sup>

What, then, is the best approach for tackling the inspection, testing and remediation issues? While inspection and testing are variables that are factually driven and should best-

be solidified in concert with the chosen consultant(s).

Mindful that no standards exist for acceptable levels of mold in an indoor environment, our recommendation is to consistently take the most conservative approach. By operating in this manner, you will avoid being open to criticism post remediation of improper handling which has the potential impact of avoiding the second generation lawsuits discussed above. This requires a working familiarity by the defense team as to the standards which have been promulgated.

The EPA is reportedly in the process of working on remediation guidelines for residential housing, the focus of which will be a “how to” guide as opposed to a treatise aimed at those engaging remediation companies to perform this work. However, the EPA has published a protocol for schools and commercial buildings. This guide is clearly the prevailing standard for remediation and ascribes various measures to take depending on the amount of mold identified.

For residential housing, the most conservative guidelines are currently promulgated by New York City Department of Health, which similarly ascribe protocols to follow dependent on the amount of mold identified.<sup>50</sup> With reference to health care facilities, one should be mindful that the remediation guidelines promulgated by the EPA for commercial buildings are most likely not applicable. The presence of immune-compromised individuals require perhaps the strictest protocols for the mold removal.<sup>51</sup> In other words, it is highly unlikely that level I remediation could be accomplished in this environment. Separate protocols for this category of facilities addressing indoor air quality should be consulted.

48. BUREAU OF ENVTL. & OCCUPATIONAL DISEASE EPIDEMIOLOGY, *supra* note 45, at 24.

49. *Id.*

50. New York City Department of Health convened a panel of experts in 1993 to develop policies for medical and environ-

mental evaluation and intervention. Three levels of abatement based upon square footage of contamination were developed: small isolated areas, large isolated areas, and extensive areas. These guidelines were revised in the year 2000 to include five levels of abatement. *Id.*

### E. Strategy: Attack Causation – The Plaintiff's Weakest Link

One of the most significant problems facing plaintiff's counsel in a toxic mold case is proving *causation*. Perhaps more than any other area, this is a circumstance in which vigorous lawyering can knock out much of the bodily injury component at an early stage which can have the aggregate effect of gutting the plaintiff's case in chief.

Plaintiffs seeking to prove a toxic mold case are going to have to establish two causation elements — general and specific causation.<sup>52</sup> *General causation* is the demonstration that a given toxic substance, in the particular location and for a particular duration, *can* cause the type of illness or injuries alleged. *Specific causation* is the proof that the toxic chemical actually did cause the injuries claimed in the particular case in question. Establishment of both types of causation requires expert testimony, which is subject to exclusion or limitation under the Daubert<sup>53</sup> case and comparable rules in various state courts that still follow the Frye<sup>54</sup> line of cases.

#### 1. General Causation

In a federal case, or in a jurisdiction following the federal rule, the Court is required under Daubert and its progeny to be the *gatekeeper* — to keep out unreliable expert testimony in technical scientific areas. It must apply Fed.R.Evid. 702, which limits the admissibility of scientific or technical evidence by assigning to the trial judge the task of ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand. The federal standard determines initially whether the expert's underlying reasoning or methodology is scientifically valid and whether it can properly be applied to the facts at issue.

51. For background information, please see the Draft Guideline for Environmental Infection Control in Healthcare Facilities, 2001.

52. See generally *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200, 1207-9 (6th Cir. 1988).

53. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993)

54. *Frye v. United States*, 293 F.2d 102 (2nd Cir. 1923).

Considerations that bear upon this inquiry are:

1. Whether the theory or technique in question can be tested
2. Whether it has been subjected to peer review and publication
3. Its known or potential error rate (statistical validity), and
4. Whether it has attracted widespread acceptance within a relevant scientific community.

The inquiry is a flexible one, and its focus must be on the principles and methodology, not on the conclusions that they generate. The preferred method for establishing a link between an allegedly toxic substance, such as mold, and a human disease is epidemiological research.<sup>55</sup> Case reports, temporal associations and animal studies are all of questionable value in proving causation.<sup>56</sup>

For those jurisdictions following the Frye line of cases, the standard is even greater than under the Federal Rule. Frye and its progeny *require* that the techniques or methods used are “generally accepted within the scientific community”, one of only several factors to be considered by the Court under the more liberal Federal standard.

The fact that the Court makes these judgments has tremendous value to the defense, as the matter will simply never get to the jury for a decision if the Court does not find that the expert opinions are supportable under the applicable rules.

#### 2. Specific Causation

Both scientific and construction experts will be used in trying to determine the source or reason for the existence of toxic mold expo-

55. See *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 197 (5th Cir. 1996) (“Undoubtedly, the most useful and conclusive type of evidence in a case such as this is epidemiological studies”).

56. *Porter v. Whitehall Laboratories, Inc.*, 791 F. Supp. 1335 (S.D. Ind. 1992); *Casey v. Ohio Med. Prod.*, 877 F. Supp. 1380, 1385 (N.D. Cal. 1995) (case reports); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 278 (5th Cir. 1998) (temporal association); *Lynch v. Merrell National Laboratories*, 830 F.2d 1190 (1st Cir. 1987 (animal studies)).

sure in a particular building. Plaintiffs may argue, expressly or inferentially, that the mere existence of toxic mold in a building for which a defendant may have responsibility (as a developer, contractor, landlord or owner) gives rise to liability for resulting injuries. However, the critical factor necessary for growth of toxic mold is the existence of substantial moisture levels, which can obviously develop from a variety of circumstances. The failure to properly care for the premises or an unusual condition at the premises for which a builder or owner should have no responsibility could well give rise to a complete defense.

Specific causation in a mold case can often be broken down as follows:

1. Identification of type of mold alleged to result in injuries.
2. Specifics relating to exposure, proximity, duration and alleged exposure pathway.
3. Medical issues, such as the onset or absence of symptoms relative to the specific exposure alleged.

These factors must be used by the plaintiff to demonstrate to a reasonable medical probability, based upon competent expert testimony, that exposure to a specific mold is the cause of the injury or illness underlying the complaint.<sup>57</sup> A mere possibility that the illness was caused by exposure is legally insufficient.<sup>58</sup>

Assessment of exposure is often difficult due to the absence of a representative area within which to take a sample. Exposure can occur both through respiratory or dermal absorption pathways. The air flow in the building is rarely consistent, which means that the mold levels will fluctuate with the amount of water in the building. Mold is also found outside of the ambient environment and may vary on interior surfaces.

Is the connection between the exposure and the specific injuries or illness alleged open

to reasonable dispute or other explanation? Mold exposure differs from many toxic exposures in that the defense should be able to make a relatively strong argument that removal of the individual from the site of the toxic mold exposure should result in a fairly rapid reduction in symptomatology.

Often, plaintiff's experts will be able to demonstrate only an association between the exposure and the injury or illness alleged. In 1965, Sir Bradford Hill established specific criteria to evaluate whether a disease was *caused* by chemical exposure as opposed to merely being *associated* with it. Utilization of the Bradford Hill Criteria is one way to attack faulty causation assumptions of the plaintiff's experts. These criteria include: strength of association; consistency; specificity; temporality; dose response; plausibility; coherence; and experiment.

The Bradford Hill Criteria can be utilized to assess whether toxic mold exposure is responsible for a disease. In addition to applying these criteria to liability as well as expert testimony, this weapon should be utilized in and with a *Daubert/Frye* Motion in Limine, motions for summary judgment, and as an outline for cross-examination. Finally, the defendant should consider whether to seek a case management order requiring early disclosure of plaintiff's evidence regarding causation. These orders, often referred to as "Lone Pine" orders after the New Jersey case in which they were conceived, place the burden of making a prima facie showing of causation on the plaintiff prior to the traditional expert witness disclosure deadline.<sup>59</sup>

### 3. Medical Monitoring

It is anticipated that plaintiffs will make every effort to recover damages based on the alleged need for medical monitoring because of the dramatic increase in the value of the case that such monitoring creates, often involving monitoring of a large number of individuals over an extended period of time.

57. *Cottle v. Superior Court (Oxnard Shores)*, 3 Cal. App. 4th 1367 1384, 5 Cal. Rptr. 2d 882 (1992).

58. *Jones v. Ortho Pharmaceutical Corp.*, 163 Cal. App. 3d

396, 402-03, 209 Cal. Rptr. 456 (1985).

59. *Lore v. Lone Pine Corp.*, No. L-33605-85 (N.J. Super. Ct. 1986); *see also Cottle*, 3 Cal. App. 4th at 1382.

However, in a toxic mold case, where damages should not include permanent injuries or diseases, the need for medical monitoring should be diminished. In some cases, plaintiffs have argued that the only way to determine whether a proper remediation has occurred is to conduct medical monitoring of residents. This is a bootstrap argument, however. There are more than adequate means by which to establish that remediation is complete which do not require future medical testing of residents.

#### **F. Defense: Explore the Viability of the Statute of Limitations**

Bodily injury claims typically have a shorter statute than the property damage from latent or patent defects. While this body of law has not developed to the level we expect, this assuredly is going to be an issue which we anticipate seeing decisions handed down over the upcoming decade.<sup>60</sup>

The threshold issue is: when does mold exposure raise itself to the level of concern such that it triggers the knowledge of the individual sufficient to invoke the proverbial clock ticking on the time within which the claim must be presented? Also dovetailing into this issue is whether or not repairs or actions by the potentially culpable parties may operate to equitably toll the statute.

### **VII. CONCLUSION**

Toxic mold claims are the emerging tort of the next decade. Settlement and verdict values to date underscore this is a tort to be taken seriously. However, the big numbers do not mean that there is legitimacy to every claim. Proactive handling of toxic mold claims is imperative. Adoption of protocols for use in every case involving toxic mold is prudent.

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60. *Miller v. Lakeside Village Condominium Assoc.*, 1 Cal. App. 4th 1611, 2 Cal. Rptr. 2d 796 (1991) (limitations period in mold exposure case began running once plaintiff was aware of fungal contamination and its possible association with her allergic reactions and asthma).



