



Protecting Against ...

a Rise in Toxic Mold Litigation

By Richard Morgan and Charles Schoenwetter

Toxic mold lawsuits are proliferating across the country. Personal injuries based upon mold claims are replacing soft tissue injuries from car accidents as a favorite tool used by plaintiffs to extract money from defendants. The dollar value of claims for property damages to buildings and personal items in mold cases also continues to escalate.

The time has come to vigorously defend against these claims. Traditional legal defenses can be effective in this fight. Scientific research does not yet support any causal relationship between mold and ill health. Defense counsel experienced in mold litigation can increase the probabilities of resolving cases in a favorable manner by holding plaintiffs accountable through the use of cutting-edge scientific research and basic principles of mold sampling and testing.

Mold Litigation: Where We Were, Where We Are

Mold has been with us since the dawn of mankind. Why then has there only recently been a proliferation of litigation concerning toxic mold infestations? Could it be that we have fostered an environment where astronomical damages claims based upon mold have spiraled out of control?

Sadly, the answer is a qualified "yes." Mold cases that are actually litigated are relatively

few compared to the over 10,000 mold cases currently pending in state courts across the country. Defense victories are never publicized to the same extent as runaway jury verdicts or huge damages claims (which are later settled silently).

The legendary *Ballard* case – a \$32-million mold verdict in Texas – started an avalanche of litigation and fear-based settlement starting in 2001. The *Ballard* case was an insurance dispute involving claims of bad faith denial of coverage relating to mold in a 7,400-square-foot house. The fact that the \$32-million verdict was later reduced to \$4 million never received the media attention necessary to offset

the avalanche of litigation it had already spurred across the country.

Prior to 2000, there were relatively few mold claims filed. Claims could be, and were, routinely settled for relatively nominal amounts involving \$5,000 or less. Today, mold claims by homeowners routinely exceed \$100,000, and mold claims in the commercial setting often exceed \$1 million. From 2001 to 2003, the cost of mold claims has more than doubled. U.S. insurers paid out \$1.3 billion in mold-related claims in 2001, and more than \$3 billion in mold-related claims in 2002. The cost of mold continues to escalate across the country. In particular, there appears to be an ever-increasing rise of high-dollar mold claims associated with office buildings, schools, and commercial properties.

According to a recent poll of real estate lenders and developers, mold-related remediation costs in affected commercial buildings average \$11 million. This provides a powerful incentive for litigation and helps explain the escalation in mold lawsuits relating to these commercial properties.

Problematic, But Not Without Solutions

Mold is unlike asbestos or lead paint. It is not a product that manufacturers can stop producing, or which the government can effectively regulate. Mold

Facts About Mold

- Many mold spores are less than 4 microns in size.
- As many as 250,000 mold spores can fit on the head of a pin.
- Mold is a fungus. Twenty-five (25) percent of the earth's biomass is comprised of fungus.
- Mold spores can begin growing within 48 hours of being exposed to water.
- Mold spore concentrations of more than 100,000 mold spores per cubic meter are not exceptional.
- Mold grows best between 77 degrees F. and 86 degrees F., with the lower and upper temperature limits being roughly 50 degrees F. and 104 degrees F.
- Mold can grow on any carbon-based material.

has existed forever; it is an integral part of our environment that plays an important role in our ecosystems. There is no way to avoid mold. Current mold litigation strategy appears predominantly geared toward settlement of all - or nearly all - claims. But this means that chronic defendants (insurers, builders, and property management companies) will never thrive in an environment free from mold litigation unless active steps are taken to drastically reduce the occurrence of frivolous suits alleging personal injuries based upon toxic mold and poor indoor air quality (IAQ).

What are these chronic defendants willing to do in order to free their balance sheets from the drag placed on them by perennial reserves dog-eared for mold litigation and settlements? Litigation mills driven by plaintiffs' lawyers are springing up across the nation. With the cost of litigation so low and the prospects of settlement so high, there is little to discourage even frivolous claims.

The Insurance Information Institute, New York City, estimates that over 10,000 lawsuits are currently pending across the country alleging mold-related injuries. This reflects a 300-percent increase since 1999. The targets of these suits are divided roughly as follows: 5,000 bad-faith claims against insurance companies; 2,000 claims against property management companies and homeowner associations; 2,000 claims against designers and contractors; and 1,000 claims against sellers of single-family residences.

Mold and IAQ claims can be expensive to defend. But they are also expensive and difficult for plaintiffs to successfully litigate due to:

- The high costs of mold inspections and documenting the existence and cause of the alleged mold and/or poor IAQ.
- The large number of claimants (e.g. in cases involving schools or offices buildings) and defendants who must be deposed and (if they are a claimant) subjected to one or more physical examination.
- The complex subject matter requiring numerous expert witnesses (e.g. industrial hygienists, architects, engineers, allergists, neurologists, toxicologists, epidemiologists, contractors) to address who caused the mold and whether the

mold caused physical injuries.

Each of these costs represents a hurdle that must be cleared by plaintiffs to establish liability. These hurdles, which also must be faced by defendants, have too frequently resulted in fear-based settlements that further churn the litigation mills and ensure that greater numbers of mold and IAQ claims are filed. Scores of settlements for such claims have been reported exceeding the \$1-million mark.

Robust defenses are available for nearly all mold and IAQ lawsuits. Causation is one of the largest and most hotly disputed issues. A systematic and zealous defense approach would likely reap enormous benefits with respect to mold litigation.

Defending Against Mold Claims

Defenses commonly raised in mold and IAQ litigation should actively include specific defenses unique to the construction industry. For example, a list of affirmative defenses that may be asserted in such cases includes: wrongful acts and/or omissions of others, failure to join necessary and/or indispensable parties, risks known and voluntarily assumed, the Spearin doctrine, spoliation, work approved by the general contractor and local Building Code Inspector, and Acts of God.

Causation is frequently the biggest battlefield in mold and IAQ litigation. Nowhere is this more evident than in personal injury cases. As a threshold issue, plaintiffs must demonstrate exposure to mold levels sufficient to cause personal injuries. However, exposure limits for mold spore concentration have not been established by OSHA, the EPA, NIOSH, or most states.

Lack of any exposure standards exists because the concentration of mold spore exposure causing symptoms in individuals is not known and cannot be measured due to the nature of the allergic responses in individuals. Any alleged ill-health effects necessarily vary from one mold genera to another. Identification of mold genera and species is a significant burden that plaintiffs must satisfy.

There is a critical lack of meaningful epidemiological data due to limitations on sampling mold and indoor air quality. This critical lack of data supporting the

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connection between exposure to mold and alleged ill-health effects is a fatal blow to most claims for personal injuries. Recent reports from the Institute of Medicine and the National Association of Home Builders (NAHB) unequivocally conclude there is no causal connection between moldy indoor environments and the manifestation of adverse health effects. Notably, these reports were based upon comprehensive reviews of existing scientific literature.

In particular, the Institute of Medicine's report concluded that, for the myriad of health effects considered in their research of scientific literature, there was a lack of "sufficient evidence of a causal relationship" and noted "many of the health effects attributed to the presence of mold ... have also been attributed to other factors." Recognition of these facts creates robust opportunities to exploit the weaknesses in claims brought by plaintiffs. It provides solid grounds for lowering set-

tlement amounts and fertile grounds for potentially dismissing plaintiffs' claims.

What Can You Do About Mold?

Observations with the naked eye - particularly by laypeople - are unreliable. They cannot accurately identify mold genera or species, an important step in determining whether the observed substance may be a potential health hazard. All inspections and testing that will be relied upon in court must be conducted by a well-trained professional. Although do-it-yourself mold test kits are sold, their accuracy and reliability are questionable. If the presence of toxic mold is suspected in a building, then a professional inspector should be contacted at the earliest opportunity.

Property owners can help protect themselves - and hopefully avoid litigation - by periodically inspecting their buildings for indications toxic mold may be present. Warning signs of mold include:

signs of water infiltration, leaks, drips, or flooding; damp, musty odors; stains on ceiling tiles and walls, below windows, and in corners; and visible mold growth. Proper building maintenance (e.g. caulking around windows), maintaining indoor relative humidity levels below 50 percent, and allowing adequate ventilation are key factors in avoiding mold. Landlord and tenants in commercial properties can protect themselves by retaining a certified industrial hygienist (CIH) to conduct mold inspections and testing before a space is leased. This establishes benchmarks for the quantity and species of acceptable mold. It also prevents subsequent disputes whether mold and IAQ issues pre-existed a lease.

The proliferation of lucrative mold litigation means the field of mold and IAQ testing and associated expert witness services is inundated with hired guns who do not apply exacting standards and lack experience. One needs to be careful in

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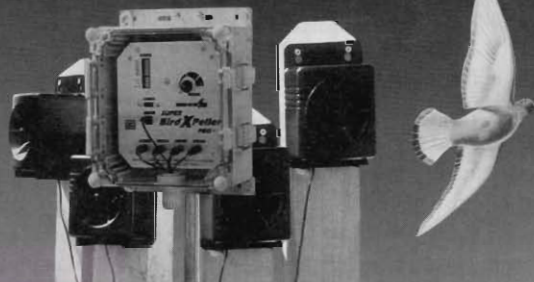


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retaining an expert and also in reviewing the mold assessment work performed by other so-called experts. There are no substitutes for years of experience and certifications from reputable institutions. Equally important are the qualifications of the individuals actually performing the work. A mold testing laboratory with high credentials may be unsatisfactory if the staff actually performing the services is over-worked or under-trained. The type and scope of the inspection and testing are also essential as they bear on the ultimate usefulness of the data collected. These issues and others should be addressed prior to retaining a mold inspector.

Inspecting, Testing, and Measuring Mold

There are more than 100,000 species of mold, of which at least 1,000 are common in the United States. However, relatively few mold species are considered toxic. Vague references to mold are virtually meaningless in attempting to prove mold, has caused personal injuries. After all, some molds like penicillin are actually beneficial to humans, while others - like the kind in blue cheese - are food. Accordingly, proper and accurate testing and inspection is critical in the context of mold litigation.

Adding to the confusion associated with mold testing is the lack of any standard protocols for measuring mold or interpreting the measurements after collecting samples. Same-building historic test data are excellent sources for demonstrating relative mold and IAQ levels have not increased. Outdoor air samples taken simultaneously with indoor air samples provide a benchmark for determining what may be acceptable levels of mold located indoors. Generally, indoor levels of airborne fungi should be approximately 40- to 80-percent of outdoor levels.

Indoor assessment of mold is often accomplished through either air or surface sampling. Each has its peculiar drawbacks, which makes them susceptible to errors. As a consequence, many of the reported accounts purporting to relate mold to adverse health effects cannot withstand scientific scrutiny. According to the Institute of Medicine, "[m]icrobial exposure assessment in the indoor envi-

ronment is ... associated with large uncertainties, which potentially result in large measurement errors and biased exposure-response relationships."

Mold samples are often cultured in an effort to further assess the mold exposure within a building. However, culturing mold samples risks both the mis-identification of the dominant species of mold, and may completely miss other species, due to the choice of culture media used and artificial growing conditions.

Common mold sampling techniques include swab sampling and tape-lift sampling surfaces. These are relatively inexpensive and quick testing mechanisms, but their usefulness is limited. Such tests provide qualitative data regarding the mold present, but provide extremely limited quantitative data concerning the amount of mold to which individuals may have been exposed.

Air sampling is also often conducted in mold and IAQ cases. However, indoor air sampling results may be misleading for numerous reasons and, therefore, may report grossly inaccurate mold levels. Particle levels in air samples may vary by a factor of 10,000. Particle levels in indoor air also vary continuously as a function of temperature, humidity, mechanical disturbance (e.g. by fans), whether windows are open, and a myriad of other factors. Certain types of molds bloom sporadically. Accordingly, a sample of indoor air at any given point in time likely is not representative of the air to which an individual actually was (or will be) exposed. If air sampling is to be meaningful, results must be collected and analyzed on multiple occasions.

We are at a crossroads: Mold litigation and associated IAQ claims have run rampant for the past 5 years. Their costs are stifling. Mold is not going away. Neither are the plaintiffs asserting such claims. Defending against these claims can be expensive, but fertile grounds exist for obtaining defense verdicts and minimizing settlement amounts. **B**

Richard Morgan and Charles Schoenwetter are lawyers at the product liability law firm Bowman and Brooke (www.bowmanandbrooke.com), based in Minneapolis.



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