



Making a Case for a Rise in Toxic Mold Litigation

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Mold is ubiquitous. It is in our food, in our mattresses and in the air we breathe. Mold is in our homes, in our schools and in the places where we work. Mold spores are likely in the air surrounding you as you read this article.

Mold has been a part of the environment since the dawn of mankind. But why then has there only recently been a proliferation of litigation concerning toxic mold infestations? Could it be that astronomical claims based on alleged mold damages have spiraled out of control?

Toxic mold lawsuits are proliferating across the country. More than 10,000 mold cases are estimated to be pending in state courts across the country. Personal injuries based on mold claims are replacing soft tissue injuries from car accidents as plaintiffs' favorite excuse 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.

Scientific research does not yet support any causal relationship between mold and ill-health effects. Defense counsel experienced in mold litigation can increase the probabilities of resolving cases in a manner favorable to defendants and insurers by holding plaintiffs accountable through the use of cutting-edge scientific research and basic principles relating to the sampling and testing for the presence of mold.

BACKGROUND AND CURRENT STATUS OF MOLD LITIGATION

The legendary *Ballard* case—a \$32-million mold verdict in Texas—started an avalanche of litigation in June 2001. The *Ballard* case was an insurance dispute involving claims of bad faith denial of coverage and fraud and is not typical of most cases. The defenses available in most mold and Indoor Air

Quality (IAQ) litigation simply were not raised or were not available in the *Ballard* case. Moreover, the fact that the \$32-million verdict was later reduced to \$4 million (plus interest and attorneys fees) never received the media attention necessary to offset the avalanche of litigation it had already spurred across the country.

Reports in 1994 from Cleveland, Ohio, that a type of mold known as stachybotrys caused the deaths of 10 infants by acute pulmonary hemorrhaging also contributed to the current mold hysteria. The Centers for Disease Control and Prevention subsequently concluded there is no evidence of association between exposure to toxic mold and the deaths of these 10 infants.

Prior to 2000, relatively few mold claims were filed either in court or with insurance companies. Claims could be, and were, routinely settled for relatively nominal amounts involving \$5,000 or less on a per-claim basis. Today, mold claims by homeowners routinely exceed \$100,000 and mold claims in the commercial setting often exceed the \$1 million mark. From 2001 to 2003, the cost of mold claims 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. In Texas alone, it is estimated that insurance companies have paid out more than \$4 billion in mold claims. The cost of mold continues to escalate across the country.

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MOLD LITIGATION: PROBLEMATIC BUT NOT WITHOUT SOLUTIONS

Current mold litigation strategy appears predominantly geared toward settlement of all—or nearly all—claims. But this means insurers, builders and certain manufacturers will be chronic defendants unless active steps are taken to drastically reduce the occurrence of frivolous suits alleging personal injuries based on toxic mold and poor IAQ.

Inspecting, Testing and Measuring Mold

Observations with the naked eye—particularly by lay people—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 on in court to establish a damages claim must be conducted and documented by a well-trained professional.

But the field of mold and IAQ testing has become inundated with expert witnesses who do not always apply exacting standards and sometimes lack experience. One needs to be careful in retaining an expert and also in reviewing the mold assessment work performed by other so-called experts. A mold-testing laboratory with high credentials may be unsatisfactory if the staff actually performing the services are over-worked or under-trained.

Adding to the confusion in this area is the lack of any standard protocols for measuring mold or interpreting the measurements after collecting the mold samples.

Counting cultured mold colonies and identifying and counting mold spores are the most common methods for measuring and assessing mold and its possible effects on humans. These methods are proven to have variable and uncertain results. 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, “microbial exposure assessment in the indoor environment is . . . associated with large uncertainties, which potentially result in large measurement errors and biased exposure-response relationships.”

Indoor assessment of mold is often accomplished through either air or surface sampling or both. Each has its peculiar drawbacks, which make the sampling susceptible to errors.

Surface sampling is often done by taking swab samples. Such

samples, though, have a limited usefulness in determining the amount of mold to which individuals have been exposed—although such sampling can be accomplished quickly, easily and without great expense.

Tape-lift sampling is also a common technique for assessing surface mold. These samples also can be cultured to obtain additional information about the type of mold present in a sample. Although tape-lift sampling can assist in determining the genus of the mold present in a particular sample, it typically is less helpful in identifying the species of mold at issue.

Air sampling is also often conducted in mold and IAQ cases. However, indoor air sampling results may be misleading for numerous reasons.

Particle levels in indoor air vary continuously as a function of temperature, humidity, mechanical disturbance (by fans, HVAC units and vacuum cleaners), open windows and a myriad of other factors. Certain types of molds bloom sporadically—meaning larger doses of the mold may be located in the air at irregular intervals.

Air sampling uses equipment that must be carefully calibrated and disinfected between taking samples. Placement of the equipment during sampling also plays a role in accurately testing for mold. Additionally, air samples should be collected both before and after potential sources of contamination are disturbed, and investigators should account for both the effect samplers and inspection personnel might have on the samples being taken. One or more outdoor air samples should be taken and used as a control sample or point of reference. Failure to consider each of these factors may result in the indoor air sample tests providing unreliable, skewed or misleading data, subjecting plaintiffs’ experts to having their opinions excluded from evidence altogether. —*Morgan and Schoenwetter*

Mold and IAQ claims can be expensive to defend. But they are also expensive and difficult for plaintiffs to successfully litigate. The difficulty and expenses associated with actually litigating mold and IAQ claims include:

- the high costs of inspecting the building at issue and documenting the existence and cause of the alleged mold and/or poor IAQ;
- the large number of claimants (for example, in cases involving schools or offices buildings) and defendants (for example, contractors, subcontractors, material suppliers, insurers, property owners, etc.) who must be deposed and, if they are a claimant, subjected to one or more physical examination; and
- the complex subject matter requiring the use of numerous expensive expert witnesses (for example, industrial hygienists, architects, engineers, allergists, neurologists, toxicologists, epidemiologists, contractors, etc.) to address the issue of

who caused the mold and whether the mold caused any physical injuries.

Each of these costs represents a hurdle that must be cleared by plaintiffs in order to establish liability. These hurdles and the associated expenses, which also must be faced by defendants, have too frequently resulted in fear-based settlements that further churn the litigation mills and ensure that higher numbers of mold and IAQ claims are filed.

Settlements involving millions of dollars are almost commonplace. For example, in 2003, former “Tonight Show” sidekick, Ed McMahon, and his wife settled a suit involving alleged toxic mold in their California home for \$7.2 million. The McMahons claimed physical injuries and intentional infliction of emotional distress in their lawsuit. They also blamed toxic mold for the death of their family pet, a dog named Muffin.

More recently, a trial court judge in Indiana approved a \$24-million class action settlement against a builder, Trinity Homes, on behalf of more than 2,000 homeowners. The settlement included nearly \$2 million for attorneys’ fees. Settlements such as these reinforce the “mold-is-gold” mentality that perpetuates an ever-escalating stream of litigation.

DEFENDING AGAINST MOLD CLAIMS

A systematic and zealous defense approach within a particular industry, or even by a particular defendant, would likely reap enormous benefits with respect to mold and mold-related IAQ litigation. It would put a damper on claims against defendants with the expectation of quick settlements based on minimal efforts. Settlement amounts would decrease. Favorable precedents would be established. Perhaps media attention could be gathered to offset years of sensationalized mold coverage that portrayed the wrong information.

The defenses commonly raised in mold and IAQ defense litigation range from the practical to the pragmatic, from the ordinary to the extraordinary, and should actively include specific defenses unique to the construction industry.

Causation is frequently the biggest battlefield in mold and IAQ litigation. No where is this more evident than in cases asserting claims for personal injury. As a

threshold issue, plaintiffs must demonstrate exposure to mold at levels sufficient to cause personal injuries. Notably, however, exposure limits for mold spore concentration have not been established by the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), the National Institute of Occupational Safety and Health (NIOSH) or most states. Similarly, no limits are established by the American Conference of Governmental Industrial Hygienists (ACGIH) for either total mold spore counts or for specific mold genera or species.

The dose or concentration of mold spores that causes 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 vary from one mold genera to another. Identification of mold genera and species is a burden that must be satisfied by plaintiffs, who lack meaningful epidemiological data due to limitations on sampling mold and IAQ.

This critical lack of data supporting the connection between exposure to mold or damp spaces and alleged ill-health effects is a fatal blow to most claims for personal injuries. Recent reports from both the Institute of Medicine and the National Association of Home Builders (NAHB) unequivocally conclude that there is no causal connection between damp or moldy indoor environments and the manifestation of adverse health effects. These reports are based upon comprehensive reviews of existing scientific literature.

In particular, the report published by the Institute of Medicine concluded that for the myriad of health effects considered in relevant scientific literature, there was a lack of "sufficient evidence of a causal relationship." It specifically noted that "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 for defendants to exploit the weaknesses in claims brought by plaintiffs. It provides solid grounds for lowering settlement amounts and potentially dismissing plaintiffs' claims or perhaps striking expert witnesses.

Of more than 100,000 species of mold, at least 1,000 are common in the United States. However, only a few mold species

arguably can be considered toxic. Vague references to mold are virtually meaningless in attempting to prove that mold has caused personal injuries. After all, some molds like penicillin are actually beneficial to humans, while other molds, like the kind in blue cheese, are food. Accordingly, proper and accurate testing and inspection for mold is critical in the context of litigating damages claims.

Unless defendants change course and vigorously defend against mold and IAQ

claims, the flood gates of fear-based settlement will remain open, exposing countless defendants and their insurers to the "mold is gold" mentality prevalent for the past five years.

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