



HOW TO MOUNT A SUCCESSFUL DEFENSE AGAINST

Mold litigation doesn't have to be a plaintiff slam-dunk. Defense attorneys can fight back—and they should. This article gives some hard-hitting advice.

TOXIC MOLD CLAIMS

RICHARD MORGAN AND CHARLES SCHOENWETTER

Toxic mold lawsuits are proliferating across the country—with general contractors and subcontractors a favorite target. 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 because scientific research does not yet support any causal relationship between mold and ill-health effects. Defense counsel experienced in mold litigation can

increase the probability 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

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 with us since the dawn of mankind. But why then has there only recently been a prolifera-

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tion of litigation concerning toxic mold infestations? Could it be that we have fostered an environment where astronomical damages claims based upon alleged mold damages have spiraled out of control?

Sadly, the answer is a qualified “yes.” Mold cases that are actually litigated are relatively few in number compared to the over 10,000 mold cases currently estimated to be pending in state courts across the country.¹ Defense victories denying recovery are never publicized to the same extent as are runaway jury verdicts or huge damages claims (which are later settled silently).

The legendary *Ballard* case—a \$32 million mold verdict in Texas in June of 2001—started an avalanche of litigation and fear-based settlement.² The *Ballard* case was an insurance dispute involving claims of bad faith denial of coverage and fraud. It is not typical of most cases and the robust defenses available in most mold and IAQ (Indoor Air Quality) 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.³

Reports in 1994 from Cleveland, Ohio that a type of mold known as stachybotrys had caused the death of 10 infants by acute pulmonary hemorrhaging also contributed to the current mold hysteria, although the Centers for Disease Control and Prevention and other professionals have subsequently concluded there was no evidence of any association between exposure to toxic mold and the death of these 10 infants.⁴

Prior to 2000, there were relatively few mold claims filed either in court or with insurance companies. Claims could be, and were, routinely settled for relatively nominal amounts—\$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 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 2002.⁵ In Texas alone, it is estimated that insur-

ance companies have paid out over \$4 billion in mold claims.⁶ The cost of mold continues to escalate across the country. “Toxic mold” claims are unfortunately a reality that general contractors and others in the building trades need to understand.

Problematic but not without solutions

Mold is unlike asbestos or lead paint. It is not a product that a manufacturer can stop producing or that government can effectively regulate. Mold has existed forever; it is an integral part of our environment that plays an important role in our ecosystems.⁷ There is no way to avoid it.

Current mold litigation strategy appears predominantly geared toward settlement of all—or nearly all—claims. But this means chronically targeted defendants (builders, subcontractors and certain manufacturers) will never enjoy 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 IAQ. What should these chronic defendants 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.

Estimates by the Insurance Information Institute indicate there are currently over 10,000 lawsuits pending across the country in state courts alone alleging injuries based upon exposure to mold.⁸ This reflects a three hundred percent (300%) increase in mold litigation nationwide since 1999.⁹ Mold and IAQ claims can be expensive to defend. But they are also expensive and difficult for plaintiffs to successfully litigate. The difficulty and expense 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;

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- the large number of claimants (*e.g.*, in cases involving schools or office buildings) and defendants (*e.g.*, contractors, subcontractors, material suppliers, insurers, property owners, etc.) who must be deposed and (if claimants) subjected to one or more physical examination; and
- the complex subject matter requiring the use of numerous expensive expert witnesses (*e.g.*, 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 their 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 greater numbers of mold and IAQ claims are filed. Scores of settlements for such claims have been reported that exceed the \$1,000,000 mark.

Settlements involving millions of dollars are almost commonplace. For example, in 2003 former Tonight Show side-kick, Ed McMahon, and his wife settled a \$20 million suit involving alleged toxic mold in their California home for \$7.2 million.¹⁰ The McMahons claimed physical injuries and intentional infliction of emotional distress. They also blamed toxic mold for the death of their family dog, 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.¹³ 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 mold claims in the construction industry

Robust defenses are available for nearly all lawsuits involving alleged mold damage and mold-related IAQ claims. Causation is one of the largest and most hotly disputed

issues. 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 this cottage industry of plaintiffs’ lawyers that has made sport of bringing weak (and sometimes frivolous) claims against defendants with the expectation of quick settlements based upon minimal efforts. Settlement amounts would decrease. Favorable precedents could be established. Perhaps media attention could be gathered to offset years of sensationalized mold coverage that portrayed the wrong paradigm.

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 that reflect the nature of the claims in dispute. For example, a list of affirmative defenses for such cases may likely include the following:

- wrongful acts and/or omissions of others
- failure to join necessary and/or indispensable parties
- risks known and voluntarily assumed,
- the *Spearin* doctrine¹²
- spoliation
- work approved by 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 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.¹³ Similarly, there are no limits established by the American Conference of Governmental Industrial Hygienists (ACGIH) for either total mold spore counts or for specific mold genera or species.

ELEVEN WAYS TO DEFEND SUCCESSFULLY AGAINST “TOXIC MOLD” CLAIMS

1. Hire lawyers with a track record of success in defending mold claims, who are knowledgeable about construction law and possess a rapport with the experts you will need to retain.
2. Hire the right mold experts. There are lots of fly-by-night experts who are recent entrants in the mold arena and do not possess either the skills or experience necessary to fully serve you.
3. Avoid, shift and minimize liability for “toxic mold” claims by using appropriate contracts and contract language with your subcontractors and building owners.
4. Use motion practice to educate the judge and opposing counsel regarding the complexities of trying a “toxic mold” case and to ensure that plaintiffs’ counsel provides you with the required information on pain of disqualification of plaintiffs’ experts.
5. Aggressively defend “toxic mold” claims or be prepared to be a favorite target. Let the plaintiffs’ bar target your competitors instead of you.
6. Focus on the facts rather than the fiction. Underneath the thin veneer of many “toxic mold” claims there is little substance. Be a stickler for the details and make sure these are brought out during the discovery process.
7. Force plaintiffs’ experts to admit that there are no published exposure levels of mold deemed unacceptable by OSHA, the EPA, NIOSH and the ACGIH.
8. Pressure plaintiffs’ experts to clearly define the protocols they used for collecting and analyzing the “toxic mold” allegedly at issue. Then vigorously cross-examine them on the deficiencies of those protocols.
9. Require plaintiffs to produce medical studies performed pursuant to accepted scientific methods concluding that the personal injuries claimed by plaintiffs are a direct cause of the particular personal injuries being claimed.
10. Provide alternative exposure scenarios. Mold is everywhere: Plaintiffs’ injuries may be caused by exposure to mold at their work, in their cars or in their mattresses. Perhaps off-gassing from other construction material caused plaintiffs’ [alleged] maladies.
11. Moisture is necessary for mold to grow. Provide alternative sources of moisture that may have caused the mold, such as humidifiers, hot tubs or saunas, over which plaintiffs had exclusive control.

There are no standards for exposure limits because the dose or concentration of mold spore exposure necessary to cause symptoms in individuals is not known and cannot be measured due to the nature of the allergic responses in individuals.¹⁴ Any alleged ill-health effects necessarily vary from one mold genera to another.¹⁵ Identification of mold genera and/or species is a critical burden that must be satisfied by plaintiffs. Moreover, there is a critical lack of meaningful epidemiological data because of limitations on sampling mold and indoor air quality.

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 Insti-

tute 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.¹⁶ These reports were based upon comprehensive reviews of existing scientific literature—notably, the publications of the Institute of Medicine, a non-partisan group of the leading medical scientists in the world.

In particular, the report published by the Institute of Medicine concluded that there was a lack of “sufficient evidence of a causal relationship” in their research of relevant scientific literature.¹⁷ The report specifically noted that “many of the health effects attributed to the presence of mold . . . have also been attributed to



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other factors.”¹⁸ 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 fertile grounds for potentially dismissing plaintiffs’ claims or perhaps striking their expert witnesses.

There are more than 100,000,000 species of mold, of which at least 1,000 are common in the United States.¹⁹ However, only a few mold species can arguably be considered toxic. Vague references to mold are virtually meaningless in attempting to prove that mold has caused personal injuries.²⁰ After all, some molds like penicillin are actually beneficial to humans, while other molds like the kind found in blue cheese are food. Accordingly, proper and accurate testing and inspection for mold is critical in the context of litigating damages claims.

Inspecting, testing and measuring mold

Observations with the naked eye—particularly by lay people—are unreliable. They cannot accurately identify the 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 to establish a damages claim must be conducted and documented by a well-trained professional.

The proliferation of lucrative mold litigation also means the field of mold and IAQ testing and associated expert witness services have become inundated with “hired guns” who do not apply exacting standards and lack experience. Defendants need to be careful in retaining an expert and 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 sterling credentials may be unsatisfactory if the staff actually performing the services is over-worked or under-trained.

Mold measurement protocols

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.²¹ Counting cultured mold colonies and identifying and counting mold spores are two of the most common methods for measuring and assessing mold and its possible effects on humans. They are also 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, “[m]icrobial exposure assessment in the indoor environment is . . . associated with large uncertainties, which potentially result in large measurement errors and biased exposure-response relationships.”²²

Indoor assessment of mold is often accomplished through either air or surface sampling or both. Each has its peculiar drawbacks that make the sampling susceptible to errors. Such errors should be exploited in vigorously defending against mold and IAQ claims.

Surface sampling. Surface sampling is often done by taking swab samples. Although such sampling can be accomplished quickly, easily and without great expense, such samples have a limited usefulness in determining the amount of mold to which individuals have been exposed. Swab samples are most useful in identifying mold genera, rather than mold species, because this collection technique often destroys or fails to collect the structural components necessary for more accurate identification. Moreover, to the extent swab samples are cultured, such cultures risk both the misidentification of the dominant species of mold present, and may completely miss other species that are present, depending upon the choice of culture media used and the artificial growing conditions to which the samples are subjected. In order to reduce such risks, it may be advisable to culture a sample in multiple media.

Tape-lift sampling. 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 is typically less helpful in identifying the species of mold at issue. Similar to swab sampling, tape-lift sampling is a qualitative testing mechanism and provides extremely limited quantitative data. Moreover, *all* surface sampling for mold should be accompanied by photographs demonstrating the specific area(s) sampled in order to confirm that sampling either was random, or that sampling purposefully avoided itself of obvious mold growths.

Air sampling. Air sampling is also often conducted in mold and IAQ cases. However, indoor air sampling results may be misleading for several reasons. Similar to the surface sampling techniques, air samples are also cultured and, therefore, may provide grossly inaccurate reports regarding the levels of particular molds. Particle levels in indoor air vary continuously as a function of temperature, humidity, mechanical disturbance (by fans, HVACs, and vacuum cleaners), whether windows are open, and many other factors. Certain types of molds bloom sporadically—i.e., larger doses of the mold may be located in the air at irregular intervals. Because particle levels in air samples may vary by a factor of 10,000, a sample of indoor air at any given point in time likely is not representative of the air to which an individual was (or may in the future) actually be exposed.²³ Scientific research indicates that 27 to 36 samples of air per home are required to reliably estimate the average mold exposure for purposes of an epidemiologic study with no more than a 10% bias in the relationship between health effects and exposure to mold.²⁴ Accordingly, if air sampling is to be meaningfully used by plaintiffs, results must be collected and analyzed on many occasions.

Air sampling uses equipment that must be carefully calibrated and disinfected between samples. Placement of the equipment during sampling also plays a key role in accurately testing for mold. In addition, 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. Moreover, one or more outdoor air samples

should also be taken and used as a control sample or point of reference. Failure to abide by each of these factors may result in the indoor air sample tests providing unreliable, skewed or misleading data subjecting plaintiffs' experts to exclusion of their opinions from evidence altogether.²⁵

Does a zealous defense reap benefits?

Defending against mold claims can be expensive. Not defending properly against mold claims can be even more expensive since plaintiffs demonstrate no shame in asking for millions of dollars. A good example is an ongoing case involving a newly constructed school that opened in the fall a few years ago but closed within months due to allegations of toxic mold. Originally, there were more than 46 plaintiffs. As the case progressed, the numbers of plaintiffs started to dwindle and they showed more interest in settling. Interestingly, although this "toxic mold" suit involved an elementary school and garnered significant attention by the local media, only a handful of plaintiffs were children. Most of the plaintiffs consisted of adult teachers, administrative staff or parent-volunteers.

Over 15 defendants were brought into this toxic mold case. Some defendants, including the general contractor, chose to defend against these personal injury mold claims in a conservative manner that would result in defense costs being kept to a bare minimum. Other defendants chose to mount an aggressive, hard-hitting defense.

All of the parties agreed mediation would be beneficial. On the eve of mediation, however, plaintiffs served a supplemental expert report that for the first time provided a glimpse of the damages they would seek at trial. Plaintiffs claimed—as a component of damages—the cost of future prescription medications. Using an 11.8% assumed rate of annual inflation, plaintiffs' experts created a spreadsheet of nine different prescription medications and their associated annualized costs over the next 70 years. The annualized costs of these individual medications ranged from \$107 to \$1,920, with the average cost being \$991.66. The cumulative annual average cost of just one of these prescription drugs after 20 years was

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\$39,873 per plaintiff and after 50 years the cumulative annual average cost was \$3,217,011 per plaintiff. However, most of the approximately 30 remaining plaintiffs allegedly required multiple medications to control the maladies they claimed arose as a result of being exposed to “toxic mold” in the school. It was clear that plaintiffs would claim damages over \$20 million at trial.

Mediation came and passed. Plaintiffs settled their claims with those defendants who demonstrated the determination to defend zealously, (as well as with a number of other, peripheral defendants) in order to stream-line their case. Settlement amounts were nominal. Settling defendants who were providing a robust defense explained that plaintiffs’ claims would be dismissed based upon the most current, exhaustive scientific review of medical literature that has concluded that mold does not cause personal injuries. They further educated plaintiffs by explaining that although plaintiffs’ damages experts might assume an annual 11.8% rate of inflation in calculating the future cost of prescription drugs, the Consumer Price Index for prescription drugs and medical supplies had risen at an annual average rate of only 3.5% over the past 69 years. Non-settling defendants left the mediation early. They did not engage the plaintiffs. Non-settling defendants reasoned the plaintiffs were asking for too much and that more time would have to pass before plaintiffs came to their senses.

The non-settling defendants continued defending against plaintiffs’ “toxic mold” claims. In addition to the over 30 fact depositions of various plaintiffs and defendants that had occurred prior to mediation, the remaining defendants’ continued defense costs have included over 20 depositions of treating physicians, eight depositions of plaintiffs’ expert witnesses and a myriad of motion practice surrounding insurance coverage issues and discovery disputes. Depositions of the defendants’ experts have not yet started, but trial is scheduled for May of 2006 and will likely take at least two weeks. The general contractor is now one of the few remaining defendants. The general contractor has been forced into receivership, closed its doors after over 50 years of

business, released more than 100 employees, and sold all its equipment at auction. The litigation continues and is being funded on the defense side, primarily by the general contractor’s insurance carrier. A victory at trial will be a hollow victory indeed for the now defunct general contractor.

What is the lesson from this case example? If you defend a case vigorously, as though you are taking it to trial, then your chances of leveraging a favorable settlement increase exponentially. The mediator in the above case confided that plaintiffs wanted certain defendants they labeled as “troublemakers” out of the case. Plaintiffs would rather prosecute a case against defendants who are not going to put up a fight. Plaintiffs’ attorneys would rather bring claims against defendants who will not make them work as hard to prove their case. If you defend a case as though you are going to trial, then you will be prepared for trial. If you are brought into a “toxic mold” suit and defend it with a laissez-faire attitude, then you will not be prepared adequately for trial and the cost of settlement will skyrocket.

Conclusion.

We are at a crossroads. Mold litigation and associated IAQ claims have run rampant for the past five years. Their costs are stilling. Mold is not going away. Nor are the plaintiffs’ lawyers who are asserting such claims. Defending against these mold and IAQ claims can be expensive, but fertile grounds exist for obtaining defense verdicts and minimizing settlement amounts. Continuing down the same road of fear-based settlement is a path that will continue to lead to the filing of more and more claims. Unless defendants change course and vigorously defend against mold and IAQ claims, the floodgates of fear-based settlement will remain open, exposing countless defendants and their insurers to the “mold is gold” mentality that has been prevalent for the past five years. ■

NOTES

¹New York Times, J. Romano, *Managing Mold, and Lawsuits* (Jan. 26, 2003).

²*Ballard v. Fire Insurance Exchange*, No. 99-05252 (Dist. Ct. Travis Co., Texas, verdict rendered June 1, 2001).

PLAINTIFFS WOULD RATHER PROSECUTE A CASE AGAINST DEFENDANTS WHO ARE NOT GOING TO PUT UP A FIGHT.

- ³ New York Times, Associated Press, *Appeals Court Cuts Verdict Against Insurer Over Mold in House* (Dec. 20, 2002), also available at <http://www.nytimes.com/2002/12/20/national/20MOLD.html?ex=1131685200&en=1f6e2940fa4f7c83&ei=070>
- ⁴ Center for Disease Control, Morbidity and Mortality Weekly Report 49(09), 180-184, *Update: Pulmonary Hemorrhage/Hemosiderosis Among Infants—Cleveland, Ohio, 1993-1996*, (March 10, 2000), also available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/m4909a3.htm>.
- ⁵ Insurance Information Institute, "Mold and Insurance" by Robert P. Hartwig and Claire Wilkinson at 3, Insurance Issues Series, Volume 1, Number 4 (2003). See also Lawrence R. Moelmann and Eric J. Strobel, "The Exposure of the Surety and Insurance Carrier to Mold Claims," 24 *The Construction Lawyer* 19 (Spring 2004).
- ⁶ Insurance Information Institute, "Mold and Insurance," by Robert P. Hartwig and Claire Wilkinson at 3, Insurance Issues Series, Volume 1, Number 4 (2003).
- ⁷ J. Chapman and E. Bardana, et al., *Toxic Mold: Phantom Risk vs. Science*, 91 *Annals of Allergy, Asthma & Immunology* 223 (Sept. 2003).
- ⁸ Insurance Information Institute, "Mold and Insurance," by Robert P. Hartwig and Claire Wilkinson at 2, Insurance Issues Series, Volume 1, Number 4 (2003).
- ⁹ See The Detroit News, Marisa Schultz, *Black Mold Damage Hikes Michigan Home Costs*, (May 15, 2003); Center for Legal Policy at the Manhattan Institute, *The Growing Hazard of Mold* at 36 (July 17, 2003) also available at http://www.uschamber.com/NR/rdon-lyres/eguxe34k6h5cqqjbgodwb635xa6rpfhn7ijzamin2bru7ycedrbvinwsazpsj2npsaalwbgllk4etpe3hibprqueqh/ilr_mold.pdf.
- ¹⁰ See *Settlement of Ed McMahon Mold Lawsuit Now at \$7 Million*, HarrisMartin Pub. Rep. (May 7, 2003). See also David Alpert, *Ed McMahon: 'Death Mold' Killed My Dog*, ABCNews.com (April 11, 2002), <http://abcnews.go.com/sections/entertainment/DailyNews/mcmahon020411.html>.
- ¹¹ *Christopher J. Colon, et al. v. Trinity Homes LLC, et al. and Trinity Homes LLC v. Jeff Wease Masonry Inc., et al.*, No. 29D02-0404-PL-374, (Ind. Super., Hamilton Co. October 20, 2004) (court order approving class settlement and limiting attorney's fees to under \$2.0 million and providing for additional amounts to be paid by the builder for temporary relocation of the plaintiffs while repair work is completed).
- ¹² *U.S. v. Spearin*, 248 U.S. 132, 135-136, 39 S. Ct. 59 (1918) (recognizing a cause of action for a breach of the implied warranty that plans and specifications provided by an owner to a contractor are accurate).
- ¹³ U.S. Department of Labor, Occupational Safety & Health Administration, *A Brief Guide to Mold in the Workplace*, Safety and Health Information Bulletins 03-10-10, available at <http://www.osha.gov/dts/shib/shib101003.html> ("Currently, there are no federal standards or recommendations (e.g., OSHA, NIOSH, EPA) for airborne concentrations of mold or mold spores."). See also United States Environmental Protection Agency, *Indoor Air Quality—Mold*, available at <http://www.epa.gov/mold/moldresources.html> ("Standards or Threshold Limit Values (TLVs) for airborne concentrations of mold, or mold spores, have not been set. Currently, there are no EPA regulations or standards for airborne mold contaminants."); Coreen Robbins and Jeff Morrell, *Mold, Housing and Wood*, Western Wood Products Association (Nov. 9, 2005) also available at <http://www.wvpa.org/lumberandmold.htm>.
- ¹⁴ Al-Doory, Y. and Domson, J.F., *Mould Allergy* Lea & Febiger (Phil. PA 1984); Burge, Harriet, *Bioaerosols*, CRC Press (Boca Raton, FL, 1995); Macher, J., *Health Effects of Bioaerosols*, ACGIH, *Bioaerosols: Assessment and Control*, American Conference of Governmental Industrial Hygienists (Cincinnati, OH 1999).
- ¹⁵ American Conference of Governmental Industrial Hygienists: *Documentation of Threshold Limits Values and Biological Exposure Indices* (Cincinnati, OH, 1989).
- ¹⁶ See Institute of Medicine, Committee on Damp Indoor Spaces and Health, *Damp Indoor Spaces and Health* (Nat'l Academies Press 2004); National Association of Builders, *Scientific Literature Review of Mold: A Report on the Health Effects of Indoor Mold* (BuilderBooks.com 2003).
- ¹⁷ Institute of Medicine, Committee on Damp Indoor Spaces and Health, *Damp Indoor Spaces and Health* at 254 (Nat'l Academies Press 2004).
- ¹⁸ *Id.* at 184.
- ¹⁹ *Id.* at 186.
- ²⁰ *Id.* at 115. ("Part of the difficulty [of assessing human exposure to fungal agents] is related to the large number of fungal species that are measurable indoors and the fact that fungal allergen content and toxic potential varies among species and among morphologic forms within species.").
- ²¹ *Id.* at 96.
- ²² *Id.* at 91.
- ²³ Daniel Friedman, *Mold "Testing"—Examining the Validity of Current Indoor Mold Sampling Techniques*, 15th Annual North Carolina/South Carolina Environmental Information Association Technical Conference (Sept. 23, 2005).
- ²⁴ Institute of Medicine, *Damp Indoor Spaces and Health*, at 99 (The National Academies Press, 2004).
- ²⁵ See, e.g., *Minner v. American Mort. & Guar. Co.*, 791 A.2d 826, 851-57 (Del. Super. Ct. 2000) (excluding expert testimony concerning relationship between poor indoor air quality caused by mold and multiple chemical sensitivity, sick building syndrome, chronic fatigue syndrome and fibromyalgia); *Roche v. Lincoln Property Co.*, 278 F.Supp. 2d 744, 750 (E.D. Va. 2003) (granting summary judgment because expert's opinions on mold were not scientifically reliable), *vacated on other grounds*, 373 F.3d 610 (4th Cir. 2004), *cert. granted on other grounds*, 125 S.Ct. 1398 (2005).