

402 Mold and Indoor Air Quality Concerns: Coverage and Litigation

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Mr. Busch serves as president of the United States Law Firm Group, Inc. and is vice chair of the Civil Litigation Section of the Virginia Bar Association. He is also a member of the Defense Research Institute and the Virginia Association of Defense Attorneys. He is a member of the Board of Trustees and is immediate past chairman of the Delta Waterfowl Foundation, an international conservation organization.

Mr. Busch received his BA from the University of Virginia and his JD from the University of Richmond's T.C. Williams School of Law.

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Marilyn Fagan Damelio is the managing trial attorney for the Nationwide Insurance Trial Division in Northeast Ohio. Her responsibilities include managing three staff counsel offices and defending Nationwide and its insureds in a variety of lawsuits in state and federal courts. She has been employed by Nationwide for 13 years and has tried over 75 jury trials.

Prior to joining the Nationwide Trial Division, Mrs. Damelio served 10 years with the Cuyahoga County Public Defender's Office in both the Appellate and Major Felony Divisions, focusing on defending persons charged with capital offenses.

Mrs. Damelio is a member of Ohio State Bar Association, Lorain County Bar Association, Ohio Association of Civil Trial Attorneys, and DRI. She also serves on the Board of Trustees of the Avon Lake Public Library.

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Sharon R. Ryan is general counsel of the consumer packaging group of International Paper in Memphis, Tennessee. She joined International Paper as an attorney in the land and timber/forest products division in Dallas. She was then transferred to Masonite Corporation, a subsidiary company with headquarters in Chicago, to serve as vice president and general counsel. She then became the general counsel—building materials group for International Paper with responsibility for Masonite Corporation, decorative products group, and the wood products businesses.

Prior to joining International Paper, she was an associate at the Dallas law firm of Baker, Smith & Mills, where she practiced in its real estate section.

She received her undergraduate degree from George Washington University and her JD from Boston College Law School and was a member of the Boston College Law Review.

Toxic Mold Litigation The Plaintiff's Side:



The image contains four black and white photographs illustrating mold damage:

- Top-left: A close-up of mold growing on a wall surface.
- Top-right: Mold growth in a corner or crevice of a wall.
- Bottom-left: A large photograph showing mold on a wall near a window and ceiling.
- Bottom-right: A close-up of mold in a corner of a room.

**DEFENSE OF MOLD CLAIMS:
*DOES IT SMELL IN HERE TO YOU?***

PRESENTATION TO
AMERICAN CORPORATE COUNSEL ASSOCIATION

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DEFENSE OF MOLD CLAIMS

Table of Contents

- I. Introduction.....
- II. Common Defenses

 - A. Is there a legal duty to the plaintiff?
 - B. Limitations on rights or remedies

 - 1. Statutes of limitations
 - 2. Statutes of repose
 - 3. Workers' compensation bar.....

 - C. Exposure

 - 1. Mold 101
 - 2. Was there a hazardous exposure?

 - D. Spoliation of evidence.....

 - 1. Effect.....
 - 2. Concerns
 - 3. Representative cases

 - E. Causation.....

 - 1. Daubert motions.....
 - 2. General causation.....
 - 3. Specific causation
 - 4. Alternative causation
 - 5. Comparative fault.....

 - F. Damages.....

 - 1. Medical monitoring claims

 - G. Procedural Issues

 - 1. Removal to federal court.....
 - 2. Opposition to consolidation
 - 3. Opposition to class certification.....

- III. Defenses Specific to Certain Defendants.....
 - A. Premises Owners.....
 - 1. Generally.....
 - 2. Status of plaintiff.....
 - 3. Lack of notice
 - B. Architects/Engineers.....
 - 1. General duty.....
 - 2. Representative Cases
 - C. Contractors.....
 - 1. General duty.....
 - 2. Liability.....
 - 3. Rule of non-liability.....
 - 4. Compliance with standards/building codes
 - 5. Compliance with owner's plans
(including product selection)
 - 6. Plaintiff's improper maintenance
 - 7. Structural alterations by plaintiff
 - 8. Duty to mitigate damages
 - 9. Representative Case
 - D. Product Manufacturers.....
 - 1. Products liability generally
 - 2. Definitions of defect
 - 3. Representative Cases
 - E. Conclusion

DEFENSE OF MOLD CLAIMS

I. Introduction

On June 1, 2001, a jury in Austin, Texas (Mary Ballard et al. v. Fire Insurance Exchange, et al, Case No. 99-05252, Texas Dist., Travis Co.), Texas, awarded a homeowner \$32 million against an insurance carrier after concluding that the carrier had acted improperly in handling a property damage claim caused by mold.¹ Verdicts of this magnitude, even in Texas, tend to cause concern in American industry. Perhaps even more significantly, verdicts such as this draw the attention and resources of the plaintiffs' bar like bees to nectar.

The increased focus of the plaintiffs' bar on mold-related claims is well demonstrated by reference to the June issue of Mealey's Litigation Report: Mold, which lists a number of recently filed mold claims seeking damages for personal injury:

- New Jersey residents sue over faulty sealants, allege mildew growth
- Oregon renter sues landlord, alleges mold exposure
- Oregon homeowner alleges construction defects caused property damage, injuries
- California apartment resident sues over mold exposure
- Illinois student seeks \$50,000 for injuries allegedly caused by mold exposure
- California condo owner sues over mold exposure

Every month during the last year seems to have brought more filings in a growing number of jurisdictions throughout the United States. Mold-related litigation is not a problem that is confined to those states closest to the equator. This litigation trend is sure to continue. At least one plaintiffs' firm in California is reported to have signed on not less than 1000 clients with mold claims.

This outline will provide an overview of defenses that are available in personal injury claims arising from exposure to mold. In addressing specific defenses, we have cited cases in personal injury litigation involving mold exposure whenever possible. Several of the cases cited in the outline were recently filed, and have not been tried as of the date this outline was prepared. Because mold litigation is yet in a developing mode, we were unable to cite past or ongoing cases for some of the defenses set forth in this outline. With these disclaimers, this outline and the related presentation should provide a good overview of defenses that should be considered when persons claiming personal injuries due to exposure to mold sue your clients.

¹ Mr. Busch wishes to acknowledge and thank Mason Lee Byrd, a summer associate with McGuireWoods' Richmond office for his extensive efforts in the preparation of this outline.

II. COMMON DEFENSES

A. Is there a legal duty to the plaintiff?

Generally, negligence claims require the plaintiff to prove that the defendant was at fault and failed to perform some duty of care required by law. The nature of the duty owed to the plaintiff depends on the relationship between the plaintiff and the defendant. Is the plaintiff an occupant of a building? If so, is your client the manufacturer of a product, used in the building, the building's architect, the contractor who built the structure, or the premises owner? The legal duty owed to a given plaintiff depends upon the relationship between the parties. This issue is addressed in Section II below.

B. Limitations on rights or remedies

1. Statutes of limitations

a. Effect: After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.

b. Variation: Statutes of limitation vary by state and by the type of damages claimed. Many states impose a two-year limit to bring suits for personal injuries. So-called "discovery" statutes of limitations provide for the accrual of claims when the plaintiff knows, or should know of a *causal connection* between the symptoms and the wrongful act. In many cases, the plaintiff may have sought treatment for these symptoms years before filing suit. Hence, a detailed medical history of the plaintiff is important.

c. Representative case:

(1) Miller v. Lakeside Village Condominium Assn., 1 Cal. App. 4th 1611, 1991 Cal. App. LEXIS 1461 (1991).

- Miller moved into her future husband's condominium in January 1983. The unit and adjacent hallways were flooded several times from mid-1981 through February 1983. Miller's husband notified the homeowners association in February 1983 of problems caused by the flooding. In September 1983, Miller began experiencing asthma, which she had never suffered before.
- In July 1984, Miller noticed a musty smell in the unit. Subsequent testing by an environmental science company found mold in the condominium.

- In October 1984, the Millers moved out citing the plumbing problems in the common area and resulting mold growth. They notified their homeowners association that Ms. Miller had experienced extreme allergies since the summer of 1983.
- Miller filed her action on August 27, 1986. Her amended complaint stated that she was diagnosed with "immune dysregulation" in December 1986. Her symptoms included fungal infections, blurred vision, numbness and tingling of her arms and legs, rashes, and mental confusion.
- The court held that Miller's action was time barred because she had notified the defendant that she was suffering extreme allergic reactions from mold beginning in 1983, which was outside of the statute of limitations. The Court rejected plaintiff's argument that a later diagnosis of "immune dysregulation" within the statutory period stated a separate cause of action, that the Court should find was timely filed.

(2) Kolnick v. Fountainview Association, Inc., 737 So. 2d 1192 (Fla., Ct. App., 1999)

- Plaintiff sued his condominium association alleging negligence for its failure to maintain the roof of the building, resulting in water intrusion into his apartment. He claimed that this caused mold and mildew growth which in turn caused him personal injury.
- The defendant moved for summary judgment arguing that the statute of limitations had expired. Plaintiff filed an affidavit in opposition acknowledging that although he had adverse health effects on August 17, 1993 when he sent a letter to the Dade County Health Department, he was not aware of the causal effect of the mildew and mold until a later date, which was within the statute of limitations.
- The Court rejected plaintiff's argument and granted summary judgment on the basis that his letter to the Health Department and subsequent deposition testimony acknowledging at least some health effects as of August 17, had triggered plaintiff's cause of action for personal injuries.

2. Statutes of repose

- a. **Effect:** Statutes of repose limit potential liability by extinguishing a cause of action as of a date certain, and without regard to when plaintiff's injury occurred.

b. Examples:

- (1) **Virginia:** Virginia law provides for a five-year statute of repose limited to damages arising out of the defective or unsafe condition of improvements to real property. Persons performing or furnishing the design, planning, surveying, supervision of construction or construction are covered. Va. Code § 8.01-250.
- (2) **North Carolina:** Suits are limited to a six-year statute of repose for claims involving improvements to real property. N.C. Gen. Stat. § 1-50(a)(5)(a).

c. Representative case: Virginia Military Institute v. King, 232 S.E.2d 895 (Va. 1977).

- VMI filed suit against King and his architect partners for negligent and improper design. Property damage was caused by moisture seeping into the building and "pondage" of water.
- The court held that the appropriate period of limitation begins to run from the moment the cause of action arises rather than from the time of discovery. In this case the time began to run when the architects' plans were finally approved. The Court held that the action was filed within the five-year statutory period.

3. Workers' compensation bar

- a. Coverage:** Workers' compensation statutes cover injuries and occupational diseases. Some statutes allow recovery for ordinary diseases of life if there is a causal relationship between the employee's work and the disabling condition. However, many statutes exclude "ordinary diseases of life," from coverage. Some of the illnesses related to mold exposure may be viewed as "ordinary diseases of life" in certain jurisdictions.
- b. Exclusivity:** State workers' compensation laws are intended to supplant tort actions for "accidental" injury or illness. Many of the statutes make workers' compensation benefits the "exclusive remedy" for workers with some exceptions. Intentional torts are not barred by workers' compensation statutes.
- c.** Some jurisdictions have created an exception that allows direct tort actions by employees when their injuries were caused by

the employer's willful, wanton, and reckless misconduct, or under similar circumstances. See, e.g., Mandolidis v. Elkins Industries, Inc., 246 S.E.2d 907 (W.Va. 1978) (employee injured by table saw). It is possible that the future will bring employee third-party claims alleging the employers knew about mold contamination and concealed its presence, or the failure to abate amounted to willful, wanton and reckless misconduct.

d. Representative case:

(1) Third-Party Litigation: Brenda Minner, et al. v. American Mortgage and Guaranty Company, C.A. No. 96C-09-263-WTQ, 2000 Del. Super. LEXIS 99 (Sup. Ct. of Del., New Castle, Apr. 17, 2000).

- Employees of a trust company suffered various illnesses they claimed had resulted from conditions of their building.
- The employees sued their employer, the building owner and the manager.
- The employer was dismissed as a defendant because the plaintiffs were prohibited from suing the employer directly under Delaware's workers' compensation statute. See: 19 Del. C. § 2304. Id. at page 2.

C. Exposure

1. Mold 101. Mold can be found virtually anywhere because it occurs naturally in the environment.

- Fungi and Mold

Interchangeable terms referring to organisms that produce enzymes that are used to breakdown organic materials upon which they live.

Molds can be found almost anywhere. They can grow on virtually any type of organic substance, as long as moisture and oxygen are present.

Molds reproduce by making spores, which then circulate through the air.

Molds are capable of producing toxic substances that can inhibit or prevent growth of other organisms.

It is estimated that 1.5 million species of fungi exist.

- Types of Mold

There are over 20,000 species of mold. Several molds that are often mentioned in litigation are:

Stachybotrys chartarum (aka *Stachybotrys atra*) - Greenish-black mold linked to serious health effects. As discussed below, the Center for Disease Control has criticized studies linking this mold to hemorrhaging in infants.

Penicillium - Well-known fungi valued as an antibiotic. It also produces a number of mycotoxins, some of which can cause serious health effects.

Aspergillus - Genus with over 100 species, many of which are documented producers of mycotoxins. Mycotoxins produced by *Aspergillus* have been the subject of extensive research because they are potent liver toxins and are carcinogenic by ingestion.

- Other terms:

Mycotoxins - Toxins that usually are found in spores produced by the mold. In certain circumstances Mycotoxins can be injurious to humans.

Spores - Microscopic and produced by fungi colonies in the millions. Spores are spread through air, people and animals, both indoors and outside in the environment.

- How do molds grow?

Molds grow naturally after having entered buildings through doors, windows and HVAC systems. Spores causing mold to grow also become attached to the clothing people wear, animals and other objects that serve as a means of transmission indoors.

Molds can grow on wood, paper, carpet, foods and insulation.

- How is the problem first identified?

Usually large mold growths can be seen or are detected as a result of the odors they produce.

- Can a building owner eliminate all molds?

It is impossible to eliminate all molds and mold spores from a building. However, the growth of mold and mold spores can be reduced by controlling moisture.

- What is the biggest contributor to mold contamination?

As indicated above, mold requires moisture in order to grow. Hence, the prevention of moisture intrusion is the single most effective way to avoid mold contamination. Effective maintenance of HVAC systems also is important.

- Is there a standard for mold?

Currently, there are no state or federal regulations governing mold. The feasibility of such regulation was studied in 1999 by the American Conference of Governmental Industrial Hygienists, and by OSHA in 1994. The ACGIH concluded that the creation of exposure guidelines was not scientifically supportable because there is no single type of mold, or standard method to measure mold, or known dose-response data regarding exposure and adverse health effects. Legislative efforts are underway in California at this time to set standards.

- Is exposure to Mycotoxins serious?

There are thousands of mycotoxins, and people are exposed to mycotoxins virtually everyday. However, the mere presence of a mycotoxin does not mean there was any adverse exposure or even the potential for an adverse health effect. Similarly, the detection of a toxigenic mold does not establish that it has produced a mycotoxin, or caused exposure.

2. **Was there a hazardous exposure?** As in virtually all toxic tort litigation, one of the major battlegrounds in mold litigation involving personal injuries is whether the plaintiff was exposed to a hazardous mold and mycotoxins from the mold that were a proximate cause of the injuries claimed in the lawsuit.

- The presence of mold often will not be at issue in mold litigation.
- Instead, the parties will litigate about the type of mold that was present, whether the mold produced dangerous mycotoxins, and whether the plaintiff was exposed to mycotoxins that were capable of producing an adverse health effect.
- The range of health effects can be allergic, infectious and potentially toxic.

D. Spoliation of evidence

1. **Effect:** In many states, a court may dismiss the plaintiff's complaint if it finds that the plaintiff has intentionally destroyed evidence. In other states, the party spoiling evidence would be entitled to an instruction allowing the fact-finder to draw an inference that the evidence destroyed was unfavorable to the party responsible for its spoliation.
2. **Concerns:** Timely remediation of mold may limit damages because of the growth rates of certain molds. However, testing for mold presence, and remediation methods may destroy potential evidence. Usually, the testing has occurred, and mediation has been completed before suit is filed.
3. **Representative cases:**
 - a. Dr. Mark O'Hara, et al. v. Michael Cockram, et al., (Case No. 16-00-12848, Ore. Cir., Lane Co.).
 - O'Hara filed suit for mold exposure resulting from remodeling work performed on his home seeking damages for property damage and personal injuries.
 - Among other defenses, the contractor asserts that O'Hara spoliated evidence by burning down his house as part of a "media blitz designed to inflame and prejudice the entire jury community. . . ." The defendant has requested a dismissal of the case on this basis. This case is ongoing.
 - b. Marina Eddy, et al. v. CB Richard Ellis Inc., et al., (Case No. 03-C-00-010616, Md. Cir., Baltimore Co.).
 - Eddy and other employees claimed that they were exposed to toxic mold in the workplace. Their claims include negligence, misrepresentation, and loss of consortium.
 - The plaintiffs state that the defendants performed partial testing and discovered mold above ceiling tiles. The defense later contacted the plaintiffs and informed them that they would be vacuuming mold from all of the building's ceiling tiles.
 - The plaintiffs alleged that the defendants refused to allow them to observe the process or to have access to the removed substances. The plaintiffs have sought an order preventing the defendants from disposing of

vacuuming debris and other materials without allowing testing by the plaintiffs.

- The plaintiffs stated that this would hamper them in obtaining proper, timely medical treatment because they would otherwise be unaware of the specific mold to which they were exposed. The case is ongoing.

E. Causation

1. Daubert motions

a. Rule 702:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts and data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

- b.** The Daubert standard requires that expert testimony must be reliable as well as relevant. Courts applying Daubert serve a "gate keepers" to assume that the evidence received is scientifically reliable. The use of Daubert motions in mold litigation already has proven to be a fertile ground for defendants.
- c.** Daubert sets forth four non-exclusive factors the courts should consider when deciding whether expert testimony is relevant and reliable:
 - (1) whether the technique or scientific knowledge is capable of testing or has been tested;
 - (2) whether the theory or technique has been subjected to peer review and publication;
 - (3) the known or potential error rate and the standards for controlling the technique's operation; and
 - (4) whether the technique has gained general acceptance.
- d.** The range of potential expert witnesses is directly related to the injury/illness alleged and the location and type of mold at

issue. Potential fields for expert testimony includes; neuropsychology, allergy, pulmonology, gastroenterology, occupational health, industrial hygiene, structural engineering, architecture, geotechnical engineering, roofing, forensic economy, HVAC, and others.

- e. Daubert motions to challenge the admissibility of the plaintiff's expert opinions on causation have been where much of the "trench warfare" has taken place in mold litigation to date. Challenges have focused on the reliability of opinions relating to both general and specific causation.

2. General causation

- a. General causation concerns whether mold is capable of causing a particular illness in general.
- b. Courts consider epidemiology the most relevant evidence because it may link exposure to a particular substance to an increased risk to a specific illness. Epidemiology uses studies to observe the effect of exposure to a single factor upon the incidence of disease in two otherwise identical populations. An epidemiological study would address the question, "Does exposure to mold toxins increase the incidence of memory loss in a population?" It would not address, "Did exposure to the mold toxins in this building cause the plaintiff's memory loss in this case?"
- c. **Epidemiological studies on mold are limited.**

As frequently occurs in toxic tort litigation, the state of the scientific community's knowledge of hazards caused by exposure to mold, has been outstripped by mold litigation and related media attention. On a comparative basis, there are few epidemiological studies regarding mycotoxin inhalation and disease in indoor settings. "Although some [studies] purport to show association between inhaled mycotoxins and health effects, none has had sufficient data or experimental design to support this claim." Ronald E. Gots, M.D., Ph. D., "Mold and Mold Toxins: The Newest Toxic Tort," Journal of Controversial Medical Claims, Vol. 8, No. 1, February 2001.

According to the EPA, "little information is available" on the health effects of many mold toxins. See Mold Remediation in Schools and Commercial Buildings, Appendix B – Introduction to Molds, EPA website, available at http://www.epa.gov/iaq/molds/append_b_3.html. The EPA

also has stated that "More studies are needed to get a clear picture of the health effects related to mycotoxins." Id.

Mold has even generated an element of hysteria, when heavily publicized initial reports raised concerns as to whether mold causes pulmonary hemorrhage in infants. The CDC has since stated that a causal association has not been established between mold exposure and infant deaths. Id.

d. Representative cases:

(1) Mary Ballard, et al., v. Fire Insurance Exchange, et al., No. 99-05252 (Texas Dist., Travis Co., May 9, 2001).

- In December 1998, Ballard reported a claim to her insurance company for damage to her hardwood floor caused by a water leak. Ballard had repaired the leak months before turning in the claim. Ballard's contractor told her that the floor was not drying out and suggested that she contact her insurance company due to the extent of damage.
- In the months to follow, the insurance company delayed action while deciding whether the claim was a "foundation claim" which would be exempt from coverage. The insurance company retained plumbers to examine the problem, and they reported no ongoing leaks. At that time, no mold was visible.
- Ballard's contractor told her that it was necessary to remove the wood flooring to allow the sub-floor to dry. He cautioned of the potential for mold growth.
- The insurance company wanted to take out only the damaged boards despite Ballard's request to remove almost two-thirds of the flooring to allow the sub-floor to dry.
- By February, Ballard notified the insurance company of additional damage such as cracks around window frames and door frames. The insurance company then offered \$108,316.50 to repair the damage.
- This offer was below the bids Ballard had received. She refused the offer.
- In her subsequent lawsuit, Ballard alleged that while the experts from the insurance company continued to assess the damage, she and her family developed various medical and

psychological conditions including inability to concentrate and loss of memory. Ballard's expert stated that the problems were caused by mold exposure.

- Ballard's expert's opinion was based upon limited studies finding that mold exposure causes "toxic encephalopathy" (brain damage).
- The defense attacked the scientific reliability of these studies and correspondingly the expert's opinion by questioning the underlying data upon which they were based. For instance, the dosage of mold exposure in the study participants could not be quantified. Likewise, the mold exposure of the plaintiffs themselves could not be quantified. Furthermore, no biological marker exists to determine if a person has been exposed to a mold toxin. In addition, other plausible causes of illness for the study participants were not ruled out.
- The trial judge granted the defense motion to exclude the causation testimony regarding the personal injury claims. The case proceeded to trial on the property damage and insurance related claims. Ballard was awarded \$32 million by the jury.

(2) Brenda Minner, et al. v. American Mortgage and Guaranty Company, C.A. No. 96C-09-263-WTQ, 2000 Del. Super. LEXIS 99 (Sup. Ct. of Del., New Castle, Apr. 17, 2000).

- The plaintiffs worked for a trust company in the Discover Card building in New Castle, Delaware. They claimed that they were exposed to a building with a chronic moisture problem "which [led] to mold contamination and the release of mold-generated toxins into the working environment." Additionally the plaintiffs' experts asserted that cleaning chemicals used in the HVAC system to treat the mold contamination could have been an additional contributing factor in the plaintiffs' alleged symptoms.
- The plaintiffs' experts' proffered testimony was that a "sick building" caused, "Multiple Chemical Sensitivity," "Sick Building Syndrome," "Chronic Fatigue Syndrome," "Fibromyalgia," "Reactive Airway Dysfunction Syndrome," and "Toxic Encephalopathy."

- The plaintiffs (building occupants) and the defendants (building lessee, owner, and manager) filed motions in limine to exclude each other's experts.
- The court considered the motions based upon the experts' reports and affidavits.
- The trial judge prepared a detailed (63-page) opinion reviewing each expert's opinions as to each specific illness, and rejecting many of the opinions offered by plaintiffs' experts.
- The court adopted the holdings of Daubert and Kumho Tire as providing the proper frame work for applying Rule 702 of the Delaware Rules of Evidence. Among the specific rulings made by the court were the following:
 - The court disallowed opinions from Dr. Marilyn Howarth as to the cause of plaintiffs' Fibromyalgia ("FM") and Chronic Fatigue Syndrome ("CFS") because these conditions have no known cause, and Dr. Howarth's temporal analysis that the working conditions in the Discover Card building were "egregious" and caused the conditions was insufficient because she failed to follow a careful scientific methodology to exclude other possible causes of plaintiffs' CFS and FM.
 - The court concluded that a treating physician, Dr. Ziem, would be allowed to testify as to her diagnosis and theories of causation of plaintiffs' Reactive Airway Dysfunction Syndrome ("RADS") and Toxic Encephalopathy ("TE"). However, she would not be permitted to testify as to her diagnosis of Sick Building Syndrome ("SBS") and Multiple Chemical Sensitivity ("MCS"). As to MCS, the court concluded that it is "not a scientifically valid diagnosis," and to allow Dr. Ziem's testimony that the Discover Card building some how caused plaintiffs' MCS "seems to be based on nothing other than speculation."

As to Dr. Ziem's opinions relating to SBS, the court was "convinced that a general diagnosis of SBS is not yet a medically valid diagnosis." Finding that the medical community has not yet accepted SBS as a valid diagnosis, the court concluded that Dr.

Ziem's diagnosis of SBS lacks the pertinent characteristics of "sound scientific methodology to be put before the jury."

- The court's decision further analyzes in great detail the reasons for rejecting the opinions of a variety of other experts, as well as reasons why some of the opinions would be admissible at trial.

3. Specific causation

- a. Specific causation is whether a substance caused a particular individual's injury.
- b. Generally, the plaintiff must show: (1) reliable scientific knowledge of the harmful level of exposure to a toxin; and (2) knowledge that she was exposed to such quantities. See, e.g., Wright v. Willamette Industries, Inc., 91 F.3d 1105 (8th Cir. 1996); Abuan v. General Elec. Co., 3 F.3d 329 (9th Cir. 1993), cert. denied, 510 U.S. 1116 (1994).
- c. Mold can produce mycotoxins, which are the toxic by-products that allegedly cause the various illnesses for which plaintiffs seek damages. However, the mere presence of potentially toxigenic mold does not indicate that mycotoxins have been produced. See Mold Remediation in Schools and Commercial Buildings, Appendix B – Introduction to Molds, EPA website, available at http://www.epa.gov/iaq/molds/append_b_3.html.
- d. No biological marker currently exists to indicate whether a person has inhaled, ingested, or absorbed mycotoxins.
- e. Usually, plaintiffs use air monitoring to establish the presence of mold. Defendants should always determine the testing methodology used, because certain testing activities can stir up mold spores to which a plaintiff may not have been exposed. Aggressive sampling occurs when walls or carpets are ripped up and an air sample is then taken. This type of procedure would create different conditions than experienced by the plaintiff. Such methods may create false positive results compared to the building's normal state. Furthermore, the time lag between the plaintiff's exposure and testing may affect the results due to the growth rate of mold as well as changes in the environment such as lack of climate control after a plaintiff vacates a building.

- f. There are no standards for mold levels in residential or commercial buildings. Furthermore, mold is present at some level in almost all buildings and outdoors.
- g. Brenda Minner v. American Mortgage and Guaranty Company, Id.
 - In addition to granting motions in limine to exclude certain opinions of experts for failure to satisfy Daubert standards on general causation (Sick Building Syndrome and Multiple Chemical Sensitivity), the Court denied certain motions in limine seeking to exclude specific causation opinions.
 - The Court noted that "the parties to this suit do not dispute that TE (toxic encephalopathy) is a valid, scientifically diagnosable condition."
 - The Defendants claimed that Dr. Ziem's opinion that "cognitive defects in each plaintiff are organic and caused by the chemicals present at the Discover Card Building," should be excluded because she "did not know of the diagnostic criteria for TE."
 - In rejecting the defense motion, the Court ruled that "by a bare showing, the plaintiffs have demonstrated that the methodology employed by Dr. Ziem in making the medically valid diagnosis of TE meets the threshold of relevance and reliability as required by *Daubert*."

4. **Alternative causation**

- a. In mold litigation plaintiffs claim a variety of generalized symptoms, including headache, sore throat, fatigue, difficulty concentrating, asthma, gastrointestinal problems, loss of memory, inability to concentrate, brain damage, and others.
- b. Some reports have linked *Stachybotrys atra* exposure to pulmonary hemorrhaging in infants. The CDC reviewed many cases and states that no causal link is proven by the data. See, Questions and Answers on Stachybotrys chartarum and other molds, available at <http://www.cdc.gov/ncch/asthma/factsheets/molds/default.htm>.
- c. The typical symptoms mentioned above also have other causes, including exposure to tobacco smoke, air pollution, pesticides, and chemicals. Other historical and environmental factors such as medications taken, alcohol consumption, documented

illnesses, obesity, and depression can also account for such symptoms. It also is clear that these symptoms can be exacerbated by stress.

d. Representative Case: New Haverford Partnership, et al. v. Elizabeth Stroot, et al., No. 549, 1999, Del. Sup., 2001 Del. LEXIS 201 (Del. 2001).

- Elizabeth Stroot was an apartment tenant in the early 1990's. She had continuing problems with water leaks and mold in her apartment.
- Stroot complained to the management, and was told that the tenants above her took "sloppy" showers. Management did not repair Stroot's bathroom ceiling which kept getting worse. The ceiling eventually collapsed revealing mold of various colors, with a nauseating odor. Stroot notified the apartment's management immediately, but was told that nothing could be done until the next morning. Stroot could not breathe by the next morning, and required hospitalization for nine days.
- In support of their causation defense, evidence was presented by the defendants that plaintiff had suffered from asthma and allergies since childhood, and had previously been hospitalized and treated with strong medications, such as prednisone. In addition, Stroot smoked and lived with a dog. The court held that the failure of the plaintiff's experts to eliminate these other possible causes of Stroot's health problems went to the weight and not the admissibility of the evidence on causation.
- Stroot's experts also failed to establish a "baseline" mold level from which to opine that Stroot's apartment contained "excessive" mold. The court also held that this went to the weight and not the admissibility of the evidence on causation.
- The jury found the landlord liable for Stroot's injuries. The Supreme Court of Delaware upheld the jury's \$1 million award to Stroot, and a \$40,000 verdict to Watson, another former tenant.

5. Comparative fault

- a. Effect:** A well-established defense in many jurisdictions is comparative fault. The effect of this defense is to permit a jury to find, when the evidence exists, that the plaintiff's conduct

contributed along with the defendants' conduct to cause plaintiff's injuries and damages. The jury's verdict is then reduced based upon the amount of the plaintiff's comparative fault. Such a situation may arise where a tenant negligently fails to notify the defendant landlord of water damage and continues to live in potentially unhealthy conditions, particularly after experiencing symptoms.

b. Representative case: Tarp v. E&W Associates III, et al., No. 59-656-03 (Ca. Sup. Ct., Fresno Co. 1999).

- The plaintiffs, a married couple, entered into a lease for commercial property. The wife used the location for an interior design studio. The plaintiffs asserted that the water intrusion was caused by the landlord's failure to properly maintain the roof.
- The building experienced multiple flooding events within months after the plaintiffs moved in. The plaintiffs had made various improvements to the property. They used unlicensed contractors to install windows, skylights, and below-ground planter boxes.
- The defense asserted that improper installation and plastering around the newly installed windows caused the water intrusion.
- There was no dispute that the building experienced mold growth as a result of the water intrusion. The plaintiff, however, used the same towels repeatedly to soak up water. The plaintiff continued to use this towel even after smelling a "mildew-like" odor. The towels were left inside the leasehold for over a month, and fans were used to blow air in the same area.
- The defense claimed that the dirty towels "reactivated" the mold spores and created more mold than would have been in the building otherwise.
- The jury verdict was for the defense.

F. Damages

1. Medical monitoring claims

- a. Generally:** Some jurisdictions allow recovery for the future cost of monitoring for certain diseases due to certain toxic exposures. In medical monitoring claims, Plaintiffs argue that

due to their exposure, there is an enhanced risk of developing a particular disease. Thus far, medical monitoring claims have not been at the forefront of mold litigation.

- b.** Several states have refused to recognize medical monitoring. Kentucky (Erma Rae Wood v. Wyetn – Ayerst Laboratories, Supreme Court of Kentucky, Case No. 99-CA-001717), and Alabama (Newton v. Monsanto Company, Supreme Court of Alabama, Case No. 1000599), are presently considering whether to allow medical monitoring claims.
- c.** The United States Supreme Court rejected medical monitoring in Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997). Metro-North involved a pipe fitter who sued his employer under FELA for occupational exposure to asbestos.
- d.** West Virginia has allowed medical monitoring claims. See Bower v. Westinghouse Electric Corp., 522 S.E.2d 424 (W. Va. 1999).

 - In Bower, the plaintiffs alleged that they were exposed to toxic substances as a result of the defendants maintaining a pile of debris from the manufacture of light bulbs. None of the plaintiffs exhibited symptoms of any disease at the time of the suit which was brought in federal court.
 - The U.S. District Court certified a question to the Supreme Court of Appeals of West Virginia. The question answered by the court was, "In a case of negligent infliction of emotional distress absent physical injury, may a party assert a claim for expenses related to future medical monitoring necessitated solely by fear of contracting a disease from exposure to toxic chemicals?"
 - The Supreme Court of Appeals of West Virginia held that a cause of action existed for the recovery of medical monitoring costs. The Court defined the elements necessary to sustain a claim of medical monitoring expenses: (1) a significant exposure; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in

the absence of exposure; and (6) monitoring procedures exist that make early detection of disease possible.

- Federal courts previously interpreting West Virginia law had held that there was no basis for a claim of medical monitoring absent an accompanying physical injury.
- e. **Medical monitoring in mold litigation:** Applying the factors cited by the West Virginia Supreme Court, medical monitoring would not be appropriate in mold claims due to the nature of the multitude of conditions that plaintiffs seek to attribute to mold exposure, the fact that many of these symptoms have alternative causes, latency is yet a major issue and monitoring must allow for early detection of something that may happen in the future.

G. Procedural Issues

1. **Removal to federal court:** Generally, the defendants may remove any action brought in state court to federal court if the federal court would have had original jurisdiction. Original jurisdiction in mold cases is based on diversity of citizenship. Subject matter jurisdiction cannot be waived by the parties.

Diversity suits require an amount in controversy in excess of \$75,000. Complete diversity is required; no plaintiff may be a citizen of the same state as any defendant. See 28 U.S.C. § 1332.

The defendant must file for removal within 30 days of the time he receives the notice. A case may not be removed more than one year after commencement. The defendant submits a "notice of removal" to the district court detailing the facts supporting removal. The state court may take no further action unless the district court finds no removal jurisdiction exists. All defendants must join in the notice of removal. See 28 U.S.C. §§ 1446-50.

In most cases involving toxic exposures, defendants generally find it advisable to remove cases to federal court whenever possible. Mold litigation presents no novel issues that would suggest departing from a traditional analysis in deciding whether to remove a particular case to federal court.

2. **Opposition to consolidation**

- a. **Burden:** The party seeking consolidation has the burden of persuading the court that consolidation is desirable. A party

opposing consolidation has the burden of demonstrating prejudice to a substantial right.

- b. Standard:** Generally, it is sufficient to consolidate if evidence admissible in one action is admissible or relevant in another. The relevant question is whether the matters may conveniently be tried together.
- c. Mold claims:** Mold plaintiffs present a variety of subjective, non-specific symptoms such as headache, inability to concentrate, eye irritation, fatigue, and others. Some plaintiffs allege asthma, Multiple Chemical Sensitivity, Reactive Airway Dysfunction Syndrome, and Toxic Encephalopathy. Plaintiffs in mold litigation assert a wide variety of complaints with differing levels of intensity and duration.

In addition to the multitude of injuries claims, plaintiffs often work in different locations within the subject buildings and consequently experience varying levels of mold exposure. Furthermore, plaintiffs' backgrounds differ regarding potential alternative causes of symptoms such as heredity, medical history, and lifestyle. In many cases these idiosyncratic differences would make one trial inconvenient. Hence, it is expected that defendants commonly will oppose consolidation of the claims of multiple plaintiffs for a common trial in personal injury claims in mold litigation.

3. **Opposition to class certification**

- a.** A growing number of class actions have been filed in mold litigation. A number of these suits have involved schools, or other commercial buildings in which large numbers of people claim exposure.
- b. Federal Rule of Civil Procedure Rule 23 prerequisites:**
 - (1) The class must be so large that joinder of all the members is not feasible;
 - (2) There must be common questions of law or fact common to the class;
 - (3) The claims or defenses of the representatives must be typical of those of the class; and
 - (4) The representatives must fairly and adequately represent the interests of the class.

c. Mass tort claims often are unsuitable for class action resolution:

In Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997), the Supreme Court struck down certification in an asbestos case because of the following factors:

- (1) claimants had been exposed to asbestos in different ways, for different amounts of time, and over different periods,
- (2) some claimants were already physically ill and others had no symptoms, and
- (3) each claimant had a different history of cigarette smoking complicating causation issues.

d. Applicability to mold claims: The factors considered in Amchem would apply equally to mold claims. Plaintiffs often have a wide range of symptom severity and claimants' exposures differ widely depending on where their workplace is located within the exposure site. Furthermore, claimants have significantly different environmental and historical factors that relate to causation.

e. Representative case: Kathleen Ferguson, et. al. v. Riverside School District Number 416, No. CS-00-0097-FVS, (E.D. Wash).

- The complaint in this ongoing case was filed on behalf of students and teachers of the Riverside School District in Spokane, Washington. The plaintiffs allege that mold spores in a newly constructed addition to their school caused chronic symptoms associated with exposure such as headaches, allergy-like symptoms, and asthma.
- The defendants are the architect and contractor.
- In support of their motion for class certification, the plaintiffs state that 700 people occupied a school building and were exposed to toxic mold. They state that the commonality test is satisfied out of the school community's exposure to toxins. They also state that the proposed class

representatives are typical of the class they seek to represent.²

- f. Represses Beck v. A&D Ltd. P'ship, No. A-91-06574 (Ohio, County of Hamilton).
- The plaintiffs filed suit on behalf of hundreds of county employees who worked in a building owned by the defendant. The plaintiffs alleged that the building had an inadequate and improperly maintained HVAC system. The plaintiffs claimed various respiratory, skin, and central nervous system disorders as a result of working in the building.
 - The plaintiffs claimed that the HVAC system was inadequate because it had been designed for fewer occupants.
 - In the initial trial, the jury returned a defense verdict. The judge granted the plaintiffs' motion for JNOV stating that there was overwhelming evidence that the building was unsanitary due to the defendant's negligence. Furthermore, the judge found that the symptoms experienced by the plaintiffs were caused by exposure to noxious substances. The judge stated that a new trial was only necessary to determine damages.
 - During the second trial on damages, the plaintiffs introduced medical testimony that the plaintiffs' symptoms abated after they stopped working in the building. The plaintiffs could not demonstrate any excess toxic chemicals in the building's air. Blood tests were also unable to indicate heightened levels of chemicals in the plaintiffs' blood.
 - The plaintiffs settled for \$1.6 million in August 1997 before it was decided whether the trial judge's JNOV was proper.

² By the date of the ACCA presentation it is expected that a ruling on the certification will have been made.

III. Defenses Specific To Certain Defendants

A. Premises Owners

1. **Generally:** Land occupiers (owners and tenants) are accorded a special status that limits their liability for injuries to others arising from conditions on their property. In most states, land occupiers do not have to conduct themselves under the general duty of a "reasonable person."
2. **Status of plaintiff**
 - a. **Invitees:** An invitee is a person who enters the property with the express or implied permission of the land occupier for some material or commercial benefit of the land occupier. Business visitors are included in this group. Workers who come to perform work at the location are considered business visitors. The land occupier owes invitees the duty to use due care to inspect and discover dangerous conditions and warn invitees of such dangers or make them safe.
 - b. **Licensees:** Generally, a licensee is one who enters onto the property of another with express or implied permission for the licensee's own purposes and includes persons such as social guests. It also includes business visitors who have strayed from that part of the premises to which they were invited. The land occupier owes a duty to exercise due care to warn or make safe any risk of harm known to the land occupier which are not obvious to those coming on the property. The land occupier is under no duty to discover dangers of which she is not actually aware.
 - c. **Minority view:** A limited number of jurisdictions reject the common law rules regarding entrant's status and require the land occupier to act as a reasonable person in the management of the property. The entrants status may be a factor regarding the defendant's duty, but it is not dispositive.
 - d. **Representative case:** Brenda Minner, et al. v. American Mortgage and Guaranty Company, C.A. No. 96C-09-263-WTQ, 2000 Del. Super. LEXIS 99 (Sup. Ct. of Del., New Castle, Apr. 17, 2000).
 - As indicated in Section I.D.(2), above, the three plaintiffs were building occupants at the "Discovery Card" building.

- Their claims against the premises owners were grounded in the negligence based upon legal duties that the premises owners owed to them as occupants of the building.

3. Lack of notice

a. Generally, a negligence claim requires the plaintiff to prove that the defendant was at fault and failed to perform some duty that the law required. The duty owed may be the standard duty of due care or a special standard imposed by law. As stated above, the duty of care and notice requirements differ regarding the status of a plaintiff upon the land. However, before a legal duty to warn of or to repair a defective condition arises, the landowner or occupant usually must have *notice* of the condition. In the absence of such notice, there typically is no duty, and hence no liability.

b. Representative Case:

(1) Leslie v. Caldwell, 1999 WL 218179 (Tenn. App. April 13, 1999).

- The buyer of a single family home sued the seller for failure to disclose construction defects. The buyer alleged that the house had defects in the windows, roof, and basement that caused water intrusion.
- The water intrusion caused mold and mildew to develop on the ceilings. Water was visibly dripping from the light fixtures.
- The defendants claimed that they had no knowledge of any prior water intrusion problems.
- The trial court entered a judgment for the defense. The Court of Appeals refused to reverse stating that sufficient evidence was presented to support the trial court's decision as the finder of fact. The plaintiff provided only circumstantial evidence that sellers had knowledge of water intrusion defects.

B. Architects/Engineers

1. **General duty:** An architect or engineer can be liable for design defects, negligent supervision of construction, and other actions causing foreseeable harm. The duty is to exercise a reasonable degree of skill and care, as determined by the degree of skill and

care ordinarily employed by their respective professions under similar conditions and like surrounding circumstances. The standard of care is established by expert testimony.

- a. Compliance with approved standards of practice: If an architect's or engineer's conduct conforms to recognized standards of practice there is no breach of the professional duty owed.
- b. Liability limited to latent design defects: Some courts have held that an architect's liability is limited to damages resulting from latent design defects. Obvious design defects under this theory are exempt from liability. Whether a condition is latent or patent is a question of fact for the jury.
- c. Statute of limitations: In an architectural design case, the statute of limitations may begin to run when the design is submitted to and accepted by the owner or upon substantial completion of the building. However, in certain jurisdictions the statute is tolled until discovery of the injury or when the professional relationship between the architect and owner ends.

2. Representative cases:

- a. Northern Mont. Hosp. v. Knight, 811 P.2d 1276 (Mont. 1991). The defendant architect asserted that the three-year statute of limitation had run based on the time the plans were submitted and accepted by the owner. The court held that in this case the "continuing relationship doctrine" applied, and the statute was tolled. The owner had contacted the architect within the statutory period and notified him of problems with the HVAC system. Because the owner relied upon the architect's assurances and advice in an attempt to repair the problem, the suit was not time barred.
- b. Suffolk City School Board v. Conrad Brothers, Inc., 495 S.E.2d 470 (Va. 1998). The school board sued the architect for improperly designing and supervising the installation of a defective roof. Under Virginia law, there is a five-year statute of repose for improvements to real property. The construction contract stated that for purposes of determining the architect's obligations, the date of a final "certificate for payment" controlled. The roof was completed more than five years before the suit was filed. The suit was filed 4 years and 11 months after the "certificate for payment" was submitted. The court held that the suit was filed in a timely manner.

C. Contractors

1. **General duty:** A contractor has the duty to exercise that degree of care and skill as is ordinarily employed by other contractors under similar conditions and like circumstances. The standard of care is established by expert testimony.
2. **Liability:** A contractor is liable for breach of the construction contract or in tort for negligent performance of the contract. A contractee, or a member of his household who expects to enjoy the benefits of the work, has a cause of action for negligent performance of the contract.
3. **Rule of non-liability:** Generally, one must be a party to the contract to maintain an action in tort for the contractor's negligent performance of the contract after the contractee accepts the completed work. Various states recognize exceptions to this rule extending third party liability. Exceptions may include:
 - a. Defects concealed by the contractor;
 - b. Latent construction defects unknown to the owner;
 - c. Invitees of the contractor to the completed construction;
 - d. When the completed construction constitutes a nuisance; and
 - e. When the completed work is negligently performed and reasonably certain to endanger third persons.
4. **Compliance with standards/building codes:** Generally, whether the defendant has complied with applicable standards or codes governing his conduct is admissible but is not conclusive. The question remains whether the defendant has complied with the duty of care as is ordinarily performed by other contractors under similar conditions and like circumstances. Even where a violation of a duty imposed by a code can be established, the plaintiff still must show that such violation caused his injury.
5. **Compliance with owner's plans (including product selection):** Where a contractor merely follows the owner's plans without any discretion, he is not liable to third parties unless the plans were so obviously dangerous that an ordinary contractor of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury.
6. **Plaintiff's improper maintenance:** The plaintiff's improper maintenance of the structure may constitute

contributory negligence and reduce or completely bar recovery.

7. **Structural alterations by plaintiff:** Where structural alterations contribute to mold growth, the plaintiff's actions may constitute contributory negligence.
8. **Duty to mitigate damages:** An injured party has the duty to mitigate his damages. This is also known as the "avoidable consequences" rule. Factors courts consider include: the risk of mitigating the damages, the probability of success, and whether the plaintiff could afford the course of action.
9. **Representative case:**
 - a. Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20 (Fla. Dist. Ct. of App. 4th Dist. 1994).
 - The County entered into a contract with Centrex-Rooney to build a new courthouse. Building occupants noticed mold growth in the building. An initial investigation revealed defects in the construction of the HVAC system. During the mold remediation, hidden structural and electrical defects were also discovered.
 - The building suffered water intrusion as the result of defective installation of the exterior synthetic hardcoat system. This intrusion, coupled with the defective HVAC system, caused the mold growth.
 - The County received asthma-related health complaints from building occupants and visitors. Within four years after completion, the building had been 25% evacuated. Despite numerous attempts by the County to solve the moisture problems, the humidity problems persisted.
 - The County retained medical experts to evaluate the health problems. They conducted air and bulk sample testing that indicated the presence of toxigenic molds. The County elected to evacuate the entire building. The employees were sent to alternate work sites.
 - The County sued Centrex-Rooney for breach of contract and negligence, alleging improper design and construction.

- The jury returned a verdict for the county in the amount of \$11,550,000. The trial court subsequently entered an amended final judgment for \$14,211,156.
- On appeal, Centex-Rooney argued that the trial court erred in denying evidence from an environmental testing firm that the fungal and bacterial levels inside the courthouse were two to ten times lower than outside the courthouse. The appellate court stated that the trial court erred in denying the admission of this evidence. The court stated however that the error was harmless.
- Centex-Rooney also claimed that the court should have rejected the opinions of plaintiffs' experts because the underlying scientific principles upon which they relied were not generally accepted in the scientific community. (Florida uses the Frye test.)
- The appellate court rejected Centex-Rooney's argument, holding that the basic underlying principles used were scientifically tested and accepted in the relevant scientific community. The County's experts had relied on numerous publications recognizing a "link" between exposure to toxigenic molds and adverse health effects.
- The judgment was affirmed.

D. Product Manufacturers

- 1. Products liability generally:** There are generally three types of product defects: 1) manufacturing defects, 2) design defects, and 3) defective warnings (including instructions). Manufacturing defects are atypical flaws in products that are not intended in their design. Jurisdictions vary as to whether strict liability and/or negligence are available causes of action for a particular form of defect. Products liability claims may also be contract-based claims such as breach of an express or implied warranty. See Restatement 3d of Torts: Products Liability.
- 2. Definitions of defect:** Most mold litigation to date has been against premises owners. However, product manufacturers should expect to be sued in increasing numbers of cases. At this time, standard product liability defenses would be employed in defending mold claims. Some of these defenses would be:
 - No defect in the product.

- Alteration/abnormal use of equipment.
- State of the art.
- Sophisticated user.
- Adequate warning/warning provided to purchaser.
- Notice of defect.
- Privity.
- Warranty.

3. Representative cases:

- a. Cybill Shepherd v. Weather Shield Manufacturing, Inc., No. W1999-00508-COA-R3-CV, 2000 Tenn. App. LEXIS 559 (Tenn. Ct. App. 2000).
 - Shepherd sued the manufacturer of the doors and windows installed in her house alleging numerous defects. She claimed that as a result of the product defects, water leaked in the house and caused wood to rot around the doors and windows.
 - The trial court awarded Shepherd a judgment against the manufacturer for \$108,882.00 including consequential damages.
 - The defendant argued that Shepherd was not entitled to consequential damages based upon the defendant's failure to satisfy requirements of the warranty. The defendant asserted that Shepherd failed to notify them of the defective product within one year of the date of sale. The defense also argued that the warranty disallowed consequential damages resulting from any alleged defect in the windows.
 - Shepherd contended that timely notice was given. Furthermore, she argued that the contractual exclusion of consequential damages was unconscionable and that the circumstances surrounding the transaction involved unequal bargaining power.
 - The court held that the facts of the case did not indicate that the contractual terms were unconscionable. The product was selected by Shepherd's architect who received his

degree from Yale, practiced architecture for 45 years, and taught architectural design for the prior five years.

- The appellate court reversed the trial court's finding that Shepherd was entitled to recover consequential damages.
- b. Jill Miller, et al. v. Behr Process Corp., et al., (N.J. Super., Atlantic County 2001)
- Miller sued Behr on behalf of all New Jersey consumers in a proposed class. Action to include all persons who used certain water sealants manufactured by the defendants. The suit alleges a breach of implied warranty because the sealants are not suitable for their intended purpose – resisting the growth of mold and mildew.
 - Miller also alleges that the defendants misled consumers by using deceptive marketing and labeling. She claims that the defendant's exterior stains and sealants are not reasonably resistant to ultraviolet degradation thereby making them defective.

E. Conclusion

This outline ends with the opening thought. The plaintiffs' bar is very adept at finding new sources of liability. Litigation for mold-related exposure involving personal injuries is on an exponential growth curve. Time will establish the intensity with which the litigation will progress, and whether it will be of long duration.

Toxic Mold

I. Introduction

Leviticus 14: *" If [the priest] finds greenish streaks in the walls which seem to be beneath the surface of the wall, he shall close up the house seven days, and return... If the spots have spread in the wall, then the priest shall order the removal of the spotted section of the wall. Then he shall order the inside of the house scraped thoroughly and the scrapings dumped in a defiled place without the city...But if the spots appear again...the house is defiled [and] he shall order the destruction of the house..."*

" Mold is where asbestos was 30 years ago" –Alexander Robertson IV,
Representative for Erin Brockovich in the National Law Journal June 4, 2001.

Legally, mold presents a blend of construction defect, real property, environmental, personal injury, toxic exposure and insurance issues. However, it is a special area unique unto itself and is not for the unwary or under capitalized lawyer.

II. Potential Target Defendants

Building owners, insurance companies, paint companies, carpet companies, carpet manufacturers and construction companies. In addition, the building owners may initiate cross claims against the carpet, construction and paint companies.

III. Overview of Plaintiffs Theories of Recovery

- a. Breach of Contract or Express Warranty- *A contract is breached upon a party's "failure, without legal excuse to perform any promise, which forms the whole or part of the contract." In addition, any non-performance of a duty under a contract when performance is due under the contract is a breach. In cases involving defective construction, the proper measure of damages is the cost of making the work conform to the contract (cost of cure). When the cost of remedying the defects is grossly disproportionate to the benefits to be derived therefrom, the owner is entitled to recover only the difference between the value of the property if the contract had been performed according to its terms and the value as constructed (diminution of value). Damages for breach of express warranties are the same as those for breach of contract. **
- b. Breach of Implied Warranties- *An implied warranty may be proper in some sick building syndrome cases. An implied warranty of merchantability is breached when the product is defective to a normal buyer making ordinary*

use of the product. To establish a claim for breach of an implied warranty of fitness for a particular purpose, a buyer must prove: (1) that the seller had reason to know of the buyer's particular purpose; (2) that the seller had reason to know that the buyer was relying on the seller's skill or judgement to furnish the particular goods; (3) that the buyer actually relied; and (4) a causal link between the breach and the alleged harm.

- c. *Strict liability- In some product liability cases, it may be appropriate to assert strict product liability claims. A strict product liability plaintiff must prove: (1) that the product was defective and unreasonably dangerous; (2) that the defect existed when the product left the defendant's hands; and that the defect caused the plaintiff's injuries. To recover the plaintiff need not prove the defendant's actual negligence.*
- d. *Negligence- It is well established that the elements of a cause of action for negligence are: (1) duty (the defendant's conduct proposed an unreasonable risk of harm to the plaintiff); (2) the breach of that duty (the defendant did not use reasonable care); (3) the breach was a substantial factor causing the plaintiff's harm; and (4) damages (the plaintiff must have suffered a loss) In addition, the plaintiff must prove that the defendant was the negligent party.*
- e. *Fraudulent Concealment – The hiding or suppression of a material fact or circumstance which the party is legally or morally bound to disclose. The test of whether failure to disclose material facts constitutes fraud is the existence of a duty, legal or equitable, arising from the relation of the parties; failure to disclose a material fact with intent to mislead or defraud under such circumstances being equivalent to "fraudulent concealment".*
- f. *Intentional or Negligent misrepresentation- Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.*
- g. *Nuisance- " Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that the law will presume resulting damage."*
- h. *Assault- Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault.*

- i. Battery- *Criminal battery, defined as the unlawful application of force to the person of another, may be divided into its' three basic elements: (1) the defendant's conduct (act or omission); (2) his "mental state," which may be to kill or injure, or criminal negligence or perhaps the doing of an illegal act; and (3) the harmful result to the victim, which may be either a bodily injury or an offensive touching.*

- j. Intentional or negligent infliction of emotional distress- *Emotional distress is fairly common in sick building syndrome cases. Therefore, plaintiffs need to consider the fact that, absent specific statutes, the law in many states does not allow for recovery of emotional distress damages in contract-based actions, unless the breach is accompanied by an independent tort. The accompanying tort must involve willful conduct and must support the extra-contractual damages in its own right. A malicious motive in breaking a contract will not convert a contract action into a tort action.*

*Because of the different statute of limitations on contract and tort claims, there have been increased efforts to turn breach of contract claims into tort claims

IV. Obstacles to Succeeding in a Cause of Action:

- a. Causation

There is a lack of 100% scientific certainty on some of the scientific sub-issues. But a plaintiff in a California toxic tort case need not establish medical causation to a "reasonable degree of medical certainty". The plaintiff's burden is to establish causation to a reasonable degree of medical "probability". *Cottle v. Superior Court*, 3 Cal.App.4th 1367; 5 Cal. Rptr. 2d 882(1992). This case says that a possible cause becomes a probable cause when, in the absence of other reasonable casual explanations, it becomes more likely than not that the injury was the result of its action.

Similarly, physicians do not wait for 100% certain conclusions before rendering diagnosis and formulating treatment plans-nor should they.

In *Deluca v. Merrell Dow*, the court stated that "the standard of statistical proof required in science may be higher than the law should require." *Deluca v. Merrell Dow*, 911 F.2d 941(1990)

b. Admissibility of Scientific Evidence

1. In a Frye jurisdiction, the court determines whether the expert's testimony is based upon a scientific principle that has gained "general acceptance" in the particular field. However, the proponent is not required to prove that the expert's entire opinion has gained general acceptance. In Centex v. Marion County, the court held that the plaintiff had met his burden by producing "evidence of numerous publications accepted in the scientific community recognizing the link between exposure to the highly unusual toxigenic molds and adverse health effects." Centex v. Martin County, 706 S. 2d 20,26 (1997)
2. In a Daubert jurisdiction the standard is less stringent than in a Frye jurisdiction. The proponent need not show general acceptance, but only "scientific validity". The court examines the reliability of underlying principles, as well as the application, and the proponent must show that the evidence sufficiently fits the facts of the case. Arguably, if mold can withstand a Frye hearing, it can withstand a Daubert hearing.



MOLD LITIGATION : DOES IT SMELL IN HERE?

Presentation to
American Corporate Counsel Association

October 16, 2001

Presenters

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OVERVIEW

- Introduction
- Mold 101
- Plaintiffs' Claims
- Defense of Mold Claims
- Insurance Issues related to mold claims
- Questions and answers, audience comments

INTRODUCTION

On June 1, 2001, a jury in Travis County (Austin), Texas, awarded a homeowner \$32 million against an insurance carrier after concluding that the carrier had acted improperly in handling an insurance claim for property damage caused by mold.

BALLARD VERDICT

- Replace home - \$ 2,547,350
- Remediate home - \$ 1,154,175
- Replace contents - \$ 2,000,000
- Living expenses - \$ 350,000
- Appraisal expenses - \$ 176,000
- Punitive damages - \$12,000,000
- Mental anguish - \$ 5,000,000
- Attorneys' fees - \$ 8,891,000

April, 2001

\$1.35 million awarded to 2 Newport Beach women who claimed their landlord did nothing to fix mold problems in their apartment resulting in fungal illness in both women.

OTHER DEVELOPMENTS

- October, 2000 - Ventura County - \$1.3 million settlement in case of homeowner's group suing builders and contractors.
- October, 2000 - \$18.5 million awarded to 96 year old man (reduced to \$2.4 million on appeal) against insurer that declined coverage for mold damage caused by broken water pipes.
- Almost \$60 million paid due to toxic mold infestation in a Florida courthouse for repairs, fees, relocation expenses and workers' claims.
- North Carolina motel owner awarded \$6.7 million from contractors after construction defects led to water intrusion and mold infestation.

MORE NEWS

- Erin Brockovich - activist turned celebrity is now crusading on mold!
- Brockovich is suing the builder of her million dollar home near Los Angeles - she's claiming faulty construction caused leaks which led to the growth of stachybotrys in her home. The price of the remediation of her claim is \$600,000.
- Irony: "I do a major toxic case, I get a bonus for that toxic case, and I bought a toxic home!"
- Testified before California Legislature for legislation that would establish the country's first statewide policy to protect the public from adverse health effects of mold.

TOXIC MOLD PROTECTION ACT OF 2001

- Governor signs California legislation.
- State Department of Health would determine feasible standards for exposure to molds,
- Requires establishment of permissible exposure limits: How much is too much? (May be impossible since everyone reacts differently.)
- Requires disclosure of existing or past mold infestation in real estate transactions.
- Supports public education about mold.
- Requires State Department of Health Services to establish licensing standards for professionals who measure mold levels and remediation of toxic mold.

WHO IS AFFECTED?

- Homeowners:
 - Toxic mold has forced people to desert and even burn their homes.
 - Eugene, Oregon. O'Hara family home so infested with mold they asked fire department to burn it down - cheaper to rebuild than to eradicate the contamination.
 - Foresthill, California. Porath family gave their house to local firefighters to burn down to get rid of their mold problem.
- Homeowners are filing insurance claims and lawsuits over toxic mold.
- Homeowner premiums nationwide have risen 25% in the past 10 years. One factor is damage caused by black mold. Texas is the "mold claim king." California is second.

INSURANCE COMPANIES

- Very worried the volume of mold claims will overwhelm the insurance industry. This year, Farmers Insurance, which holds 7% of homeowner's market, is expected to pay almost \$85 million in mold claims.
 - Premiums have not kept-up with the growing cost of mold-related claims, which have increased 135% since 1999 (Insurance Council of Texas).
 - Even where there may not be coverage for mold damage, the claims and lawsuits are costing insurance companies.

REAL ESTATE MARKET

- Disclosure required by California by statute.
- Sales of some homes may be delayed or put off indefinitely due to moratorium on new HO policies in Texas.
- Home buyers are unable to secure homeowner's insurance on homes that have had water damage.
- Some estimate 3 out of 4 homes have had some water damage in the past.

HVAC AND ARCHITECTS

- Air conditioning units need to be accurately sized - bigger is not better.
- They run in short cycles and fail to remove sufficient humidity from the building.
- Drainage systems near windows and doors - water needs to be channeled so it does not get inside!

CONTRACTORS

- Lawsuits are primarily the result of shoddy construction work or poorly done repairs after water damage.
- Oceanside, California homeowners filed suit and contend improper construction of slabs and windows allowed water to seep into homes for entire subdivision. Builders allege mold came from over-watering by the homeowners.
- California builders supported California Legislature.

LITIGATION AGAINST BUILDERS

- Texas Department of Health - IAQ Specialist - Some mold problems originate with construction flaws. Builders stress the role of the property owner in preventing and eliminating mold.
- Other claims against builders include:
 - Failure to keep interior of structure dry.
 - Failure to properly select and install the HVAC system.
- Various breaches relating to workmanlike manner causing moisture to be drawn into the structure facilitating growth of toxic mold and bacteria.

CONSUMERS v. INSURERS

- Are insurance company delays in responding to water damage claims contributing to the growth of toxic molds?
- Are new building materials fostering the growth of molds?
- Are insurance companies and contractors cleaning-up mold in a cost-effective manner?
- Are there technologies that could prevent the development of toxic molds?
- Are mold claims a growing trend, or a dilemma that will resolve once claims adjusters and contractors get a better handle on how to deal with the problem?

INSURANCE NEWS

- Insurance losses from water and mold damage in Texas homes are expected to reach \$780 million this year.
 - 60% increase from a year ago.
 - 1999 - \$330 million.
 - 2000 - \$480 million (fueled by new mold claims).
- State Farm reported mold-related claims jumped five-fold in the first six months of 2001 (compared to first six months of 2000).
- State Farm had nearly 1,200 claims in the first half of 2001, averaging \$50,000 per claim.

MORE INSURANCE NEWS

- After asking state regulators to exclude mold coverage from the State's standard homeowner's policy, insurance companies have decided to stop selling new homeowner's policies in Texas covering water damage *of any kind*.
 - Farmers Insurance Group: Self-imposed moratorium on new policies 8/15/01.
 - Progressive Insurance Company: Stopped writing homeowner's policies.
 - Allstate: Third largest insurer in Texas. Stopped writing new homeowner's policies.
 - State Farm: Announced 9/17 it would quit selling new homeowner's policies because of soaring losses related to mold damage.
 - Safeco: Imposed a moratorium on all new homeowner's policies in Texas and told agents based in Texas to stop writing new policies with exception of renter's insurance.

EFFECT OF DECISION TO CURTAIL COVERAGE

- Insurance industry representatives said these decisions to restrict sales of homeowner's policies show the urgency of the situation:
 - *“Our industry is in the business of selling insurance, but they cannot do so when our ability to pay outrageously high mold claims threatens the financial stability of the companies.”*
(Jerry Johns, Southwestern Insurance Information Services.)
- Trickle-down effect to:
 - * Lenders
 - * Homebuilders
 - * Real estate agents

TEXAS REACTION

- Texas State Insurance Commission held hearings.
Proposal:
 - Cap mold coverage at \$5,000 in all policies, while allowing homeowners to purchase more protection at extra cost.
 - No final decision has been made.
 - Industry representatives were generally unhappy with the proposal saying they could still face huge losses as the volume of mold claims continues rising.
 - In a 10/5/01 opinion column in the Houston Chronicle, the Texas State Insurance Commission begs both sides to reach a compromise!

POSSIBLE INVESTIGATION BY TEXAS AG

- Texas Department of Insurance asked the Attorney General to investigate mold-remediation practices.
- Issues:
 - Some entities are taking advantage of consumers' fears of mold by charging excessive prices.
 - Multiple claims for remediation of the same houses.
- Hearing to be held by Department of Insurance on 10/16/01 re: residential property insurance coverage for mold.

MEALEY'S LITIGATION REPORT: MOLD

September issue lists a number of other recently filed mold claims seeking damages for personal injury:

- Illinois student alleges School district knew of mold contamination but failed to remediate.
- Ohio tenant sues landlords over mold.
- Louisiana school employees sue for exposure to fumes and toxins in buildings.
- Texas students allege mold caused injuries.
- Indiana Homeowner sues Contractor for failure to fix leaks.
- California homeowners allege construction defects leading to mold growth.

MEALEY'S LITIGATION REPORT: MOLD

No less significant are developments related to insurance:

- U.S. Ninth Circuit - carrier seeking reversal of \$500,000 compensatory and \$18m punitives awarded to homeowner with mold damage.
- Indiana homeowner sues for bad faith for mold damage claim.
- Texas Insurance Commissioner urges restraint by carriers after 4 insurers announce they will stop selling new policies to building owners with water damage during past three years

MOLD 101

Leviticus 14:

“ If [the priest] finds greenish streaks in the walls which seem to be beneath the surface of the wall, he shall close up the house seven days, and return... If the spots have spread in the wall, then the priest shall order the removal of the spotted section of the wall. Then he shall order the inside of the house scraped thoroughly and the scrapings dumped in a defiled place without the city... But if the spots appear again... the house is defiled [and] he shall order the destruction of the house... ”

WHAT IS MOLD?

- Mold and Fungi are interchangeable terms referring to organisms that produce enzymes that are used to breakdown organic materials upon which they live.
- Mold can be found virtually anywhere because it occurs naturally in the environment.
- Mold can grow on virtually any type of organic substance, as long as moisture and oxygen are present.
- Molds reproduce by making spores, which then circulate through the air.
- Molds are capable of producing toxic substances that can inhibit or prevent growth of other organisms.

HOW DO MOLDS GROW?

- Molds grow naturally after having entered buildings through doors, windows and HVAC systems.
- Spores causing mold become attached to the clothing people wear, animals and other objects that serve as a means of transmission indoors.
- Molds can grow on wood, paper, carpet, foods and insulation.

MOLD TERMINOLOGY

- *Mycotoxins* - Toxins that usually are found in spores produced by the mold. In certain circumstances Mycotoxins can be injurious to humans.
- *Spores* - Microscopic and produced by fungi colonies in the millions. Spores are spread through air, people and animals, both indoors and outside in the environment.

MYCOTOXINS

- A toxic gas that some types of mold create to inhibit the growth of other organisms.
- Mycotoxins are found in both living and dead mold spores.
- Some experts believe that exposure to mycotoxins is more dangerous than exposure to the mold itself.
- Some mycotoxins have been linked to chemical warfare agents, and others may be carcinogens.
- Exposure to the mycotoxins comes through:
 - * Inhalation
 - * Skin contact
 - * Ingesting contaminated items.

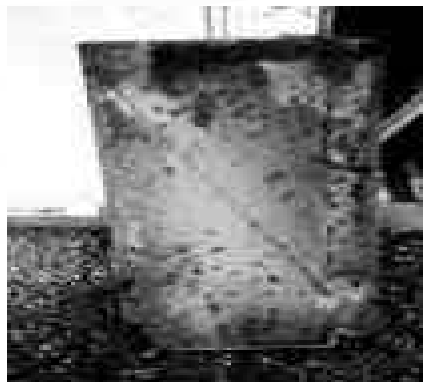
IS ALL MOLD THE SAME?

There are over 20,000 species of mold. Several molds that are often mentioned in litigation are:

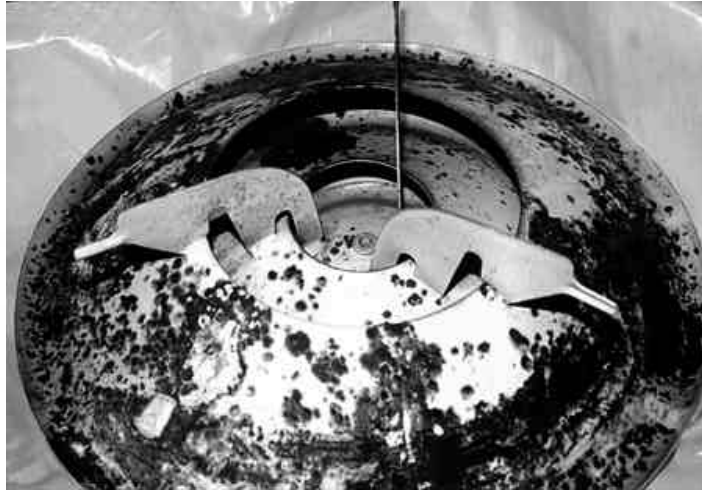
- *Stachybotrys chartarum* (aka *Stachybotrys atra*) - Greenish-black mold linked to serious health effects.
- *Penicillium* - Well-known fungi valued as an antibiotic. It also produces a number of mycotoxins, some of which can cause serious health effects.
- *Aspergillus* - Genus with over 100 species, many of which are documented producers of mycotoxins. Mycotoxins produced by *Aspergillus* have been the subject of extensive research because they are potent liver toxins and are carcinogenic by ingestion.

STACHYBOTRYS

- While alive and growing, it is covered by a wet slime layer.
- When it dies or dries up, it is capable of releasing spores into the air.
- The transported spores may become attached to new organic matter and begin the cycle anew.
- There is no known test to establish exposure to *Stachybotrys*. Tests can detect antibodies resulting from exposure to mold generally.
- Skin tests can determine an allergic response to mold generally.



Air Duct



Insulation of Air Handler Cover



Wall Paper



Mold on Ceiling



Basement Wallboard



Air Diffuser



Crawl Space



Closet

WHAT DO THESE PHOTOS HAVE IN COMMON?

They all depict areas where:

- Lack of natural sunlight.
- Susceptible to humidity.
- Availability of organic matter.
- Out of direct vision in normal course of daily living.

HOW IS MOLD DETECTED?

- First sign is usually an odor - “earthy smell”
- Humidity
- Discoloration to building contents (drapes, rugs)
- Discoloration to wall board, ceiling
- Rot at baseboards, or wall to wall carpeting
- Warping of flooring material
- Surface sampling and air sampling used to detect mold.
- Tests cannot detect the level of mycotoxins.

HOW CAN MOLD BE PREVENTED?

Elimination of one or more of the following can reduce and even prevent mold growth :

- Spores (They are always present)
- Temperature (Mold likes warmer temperature)
- Food (Mold must have organic material to sustain itself)
- Moisture (greater than 15% humidity)

IS THERE A MOLD STANDARD?

- Currently no state or federal regulations governing mold.
- Feasibility of a standard was studied in 1999 by the American Conference of Governmental Industrial Hygienists, and by OSHA in 1994.
- ACGIH concluded exposure guidelines not scientifically supportable because no single type of mold, no standard method to measure, and no known dose-response data regarding exposure and adverse health effects.
- Legislative efforts to set standards are underway in California at this time.

SIGNIFICANCE OF EXPOSURE

- There are thousands of mycotoxins, and people are exposed to them every day.
- Mere presence of a mycotoxin does not mean there was any adverse exposure or even the potential for an adverse health effect.
- Detection of a toxigenic mold does not establish that it has produced a mycotoxin, or caused exposure to anyone who was in the vicinity.

WAS THERE A HAZARDOUS EXPOSURE?

- The presence of mold often will not be at issue in mold litigation.
- Parties litigate about
 - the type of mold that was present,
 - whether the mold produced dangerous mycotoxins, and
 - whether the plaintiff was exposed to mycotoxins that were capable of producing an adverse health effect.
- The range of health effects can be allergic, infectious and potentially toxic.

HEALTH EFFECTS

ALLERGENIC REACTIONS:

- Skin rashes
- Eye problems
- “Hay fever”
- Coughing, and other respiratory complaints
- Headaches

HEALTH EFFECTS

“Exposure to any of a variety of molds and their by-products is associated with a wide range of physical, cognitive and psychiatric symptoms. Onset of symptoms is often insidious and they are often nonspecific or ill defined, such as fatigue, respiratory difficulties, skin irritation, aches and pains, burning eyes, insomnia, dizziness, poor concentration, memory difficulties, and headaches.”

Arnold D. Purisch, Ph.D., Neuropsychiatric Evaluation of Neurological and Psychiatric Disorders and Malingering Related to Mold Toxicity.

PLAINTIFFS' CLAIMS

“Mold is where asbestos was 30 years ago”

–Alexander Robertson IV,
Representative for Erin Brockovich in the
National Law Journal June 4, 2001.

THEORIES OF RECOVERY

- Breach of Contract
 - Express Warranty
 - Implied Warranty
- Strict liability
- Negligence
- Fraudulent Concealment
- Intentional/Negligent Misrepresentation
- Nuisance
- Assault/Battery
- Intentional/Negligent Infliction of Emotional Distress

WHO DO PLAINTIFFS SUE?

- Insurance Companies - Property and Liability
- Property owners, managers, maintenance companies
- Architects, engineers, developers, contractors
 - General
 - Plumbing
 - Roofing
 - Drywall
 - HVAC
- Product manufacturers, distributors and suppliers (Construction materials)
- Testers, remediation contractors, cleaning contractors (for professional liability claims)

OBSTACLES TO RECOVERY

- Causation
- Statute of limitations
- Workers' comp bar

CAUSATION

- There is a lack of 100% scientific certainty on some of the scientific sub-issues.
- The battleground is whether plaintiff was exposed to the hazardous mold and/or mycotoxin and whether this was the proximate cause of plaintiff's injuries.
- The plaintiff's burden is to establish causation to a reasonable degree of medical "probability". *Cottle v. Superior Court*, 3 Cal.App.4th 1367; 5 Cal. Rptr. 2d 882(1992).

STATUTE OF LIMITATIONS

- Varies by jurisdiction.
- Varies based upon cause of action.
- The key issue is what triggers the accrual of the cause of action.
- Symptoms in personal injury claims are common to other conditions, e.g. Hay fever, asthma, thereby creating statute problems.

WORKERS' COMP BAR

- Injuries “arising out of and in the course of employment,” are covered by comp laws.
- Key issue is whether the condition arose out of the employment. If not, plaintiffs may have a right to sue.
- Example: Kittok case (Jefferson Parish, LA), two school employees claim superintendent and regional supervisor engaged in deliberate indifference as exception to comp bar.

DEFENSE OF MOLD CLAIMS

MOST SIGNIFICANT DEFENSE ISSUES

Substantive issues:

- Was the claim timely filed?
- What is the legal duty to the plaintiff?
- Was the plaintiff exposed to a hazardous condition?
- Did the alleged exposure cause plaintiffs' condition?
- Did plaintiff's conduct contribute to the condition
- What damages has the plaintiff sustained.

OTHER SIGNIFICANT DEFENSE ISSUES

- Class action litigation
- Spoliation of evidence

WAS THE CLAIM TIMELY FILED?

- Statutes of limitation
 - Bars claim within a time certain after the cause of action accrues.
 - There are two general types:
 - Date of injury.
 - Date of Discovery: Accrual of claims when the plaintiff knows or should know of a causal connection between symptoms and the wrongful act.
 - No special statutes of limitation have yet been passed for mold exposure claims.

KOLNICK CASE

- Claim against condominium association.
- Failure to maintain roof, resulting in water intrusion that caused mold growth.
- On MFSJ, plaintiff unsuccessfully argued that although he had adverse health effects when he sent the letter (outside of limitations period) to local health department, he was not aware of the causal effects of mold exposure until much later.

See: Kolnick v. Fountainview Association, Inc., 737 So. 2d 1192 (Fla., Ct. App., 1999)

STATUTE OF REPOSE

- Differ from a statute of limitations because they eliminate both the right to sue and the remedy.
- 38 states enacted “architects and engineers” statutes of repose. Many have been repealed.
- Example: *Virginia law provides for a five-year statute of repose for damages arising out of the defective or unsafe condition of improvements to real property. Va. Code § 8.01-250.*

STATUTE OF REPOSE

- *Persons performing or furnishing the design, planning, surveying, supervision of construction or construction are covered.*
- *The period of repose begins to run as of the date of “substantial completion” of the project.*
- See: Virginia Military Institute v. King, 232 S.E.2d 895 (Va. 1977).

LEGAL DUTY TO THE PLAINTIFF?

Litigation to date has involved:

- Premises owners
- Building managers
- Contractors
- Product manufacturers
- Employers as premises owners
- Each case requires a careful examination of the duty owed to the plaintiff, which varies depending upon the defendant's business.
- What did you know and when?

WAS THERE HAZARDOUS EXPOSURE?

Litigation to date has involved experts from a wide variety of scientific fields to answer this question.

Indoor Air quality:

- Industrial Hygienist
- Microbiologist
- Toxicologist
- Ventilation expert
- Mycologist

OTHER EXPERTS

Health Experts:

- Treating Physicians
- Allergist
- Pulmonologist
- Gastroenterologist
- Dermatologist
- Occupational Specialist

WHAT CAUSED PLAINTIFFS' CONDITION?

- Was there an elevated level of mold in the indoor air versus the outside environment?
- Is there expert testimony that the plaintiff's condition was caused by exposure to mold?
- Were other potential causes ruled out?
- Mold litigation typically involves *Daubert* challenges that plaintiff's expert testimony is not reliable.
- Courts applying Daubert serve a "gate keepers" to assure that the evidence received is scientifically reliable.

Rule 702

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- (1) the testimony is based upon sufficient facts and data,*
- (2) the testimony is the product of reliable principles and methods, and*
- (3) the witness has applied the principles and methods reliably to the facts of the case.”*

DAUBERT v. MERRILL DOW

- 1993 decision in which the U.S. Supreme Court held that the trial judge has a “gatekeeping obligation.”
- The obligation is to ensure that “an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”
- Court articulated four non-exclusive factors to be considered in assessing the reliability of proffered expert opinion



FOUR NONEXCLUSIVE FACTORS

- Whether the theory or technique can or has been *tested*
- Whether the theory or technique has been *subject to peer review and publication*
- The technique's known or potential *error rate*
- Whether the theory or technique is *generally accepted in the relevant scientific community*

MINNER CASE

- Plaintiffs worked in the Discover Card building in New Castle, Delaware (Del. Super. Ct.)
- Claimed chronic moisture problem caused “mold contamination and the release of mold-generated toxins into the working environment.”
- The plaintiffs’ experts’ proffered testimony was that a “sick building” caused:
 - “Multiple Chemical Sensitivity,”
 - “Sick Building Syndrome,”
 - “Chronic Fatigue Syndrome,”
 - “Fibromyalgia,”
 - “Reactive Airway Dysfunction Syndrome,” and
 - “Toxic Encephalopathy.”

MINNER CONTINUED

- Court considered cross motions *in limine* based upon the experts’ reports and affidavits.
- 63-page opinion reviewing each expert’s opinions as to each specific illness, and rejecting many of the opinions offered by plaintiffs’ experts.
- The court adopted Daubert and Kumho Tire for applying Rule 702 of the Delaware Rules of Evidence.
- Court disallowed opinions as to the cause of plaintiffs’ Fibromyalgia (“FM”) and Chronic Fatigue Syndrome (“CFS”) because:
 - Conditions have no known cause, and
 - Experts failed to follow a careful scientific methodology to exclude other possible causes of plaintiffs’ CFS and FM.

MINNER CONTINUED

- Court rejected plaintiffs' expert opinions as to Sick Building Syndrome ("SBS") and Multiple Chemical Sensitivity ("MCS").
- As to MCS, the court concluded that it is "*not a scientifically valid diagnosis,*" and to allow testimony "*seems to be based on nothing other than speculation.*"
- As to SBS, the court was "*convinced that a general diagnosis of SBS is not yet a medically valid diagnosis,*" and the diagnosis of SBS lacks the pertinent characteristics of "*sound scientific methodology to be put before the jury.*"

WHAT DAMAGES HAS PLAINTIFF SUSTAINED?

- Plaintiffs' injuries vary from relatively minor claims such as headaches and skin rashes, to more serious claims such as toxic encephalopathy and cancer.
- Medical monitoring has not yet been a hotly contested area of the litigation, but probably will be.
- This perhaps due to general requirement of establishing the risk of developing a particular disease in the future.

COMPARATIVE FAULT

- Did the plaintiff's conduct contribute to the injuries? See: Tarp v. E&W Associates III, et al., No. 59-656-03 (Ca. Sup. Ct., Fresno Co. 1999).
- Plaintiffs leased commercial property which the wife used as a design studio. They claimed water intrusion was caused by the landlord's failure to properly maintain the roof.
- Studio was flooded several times. No dispute that the building experienced mold growth.
- The wife used the same towels repeatedly to soak up water, even after smelling a "mildew-like" odor. Towels were left inside for over a month in area where fans were used. The defense claimed that the dirty towels "reactivated" the mold spores and created more mold than would have been in the building otherwise.
- Jury verdict was for the defense.

CLASS ACTION LITIGATION

- Most hotly contested issue in the litigation thus far.
- Rule 23 of the FRCP:
 - (1) The class must be so large that joinder of all the members is not feasible;
 - (2) There must be common questions of law or fact common to the class;
 - (3) The claims or defenses of the representatives must be typical of those of the class; and
 - (4) The representatives must fairly and adequately represent the interests of the class.

SAMARIS DAVIS CASE

- Decision Aug. 8, 2001, New York Supreme Court.
- Plaintiff moved for certification for 495 apartment residents who claim to have suffered personal injuries and emotional distress.
- Court denied class certification motion, holding:
“...while Plaintiffs claims present common issues of law and fact, those questions do not predominate over questions affecting only individual members, and, that there is a high risk if certification were granted that the need for individualized inquiries would defeat the class action’s attribute of superiority, with its goal of saving judicial time and resources.”

SAMARIS DAVIS CASE cont’d

- Court ruled, however, that a joint trial for 7 plaintiffs would be permitted.
- Common issues of law and fact were found as a basis for the joint trial, including:
 - Whether the defendants were negligent in allowing the penetration of water causing mold to grow; and
 - whether the resulting mold was capable of causing the types of injuries alleged.

WHEELER CASE

- Los Angeles Superior Court denied class certification to residents of apartment units owned by Avalonbay, and other exposed on the premises.
- Plaintiffs sought medical monitoring fund due to exposure to toxic mold and asbestos.
- Court found that:
“While individual proof of damages does not necessarily defeat class certification, individualized proof of elements of liability and damages does.”

SPOLIATION OF EVIDENCE

- Court may dismiss claim if plaintiff has intentionally destroyed evidence.
- What if the defendant spoliates evidence?
- In some states, a finding that a party spoliated evidence would entitle the other party to an instruction that the jury may draw an inference that the evidence destroyed was unfavorable.
- In Dr. Mark O’Hara, et al. v. Michael Cockram, et al., (Case No. 16-00-12848, Ore. Cir., Lane Co.), defendant asserts that O’Hara spoliated evidence by burning down his house as part of a “media blitz designed to inflame and prejudice the entire jury community. . . .” The defendant has requested a dismissal.

INSURANCE COVERAGE ISSUES

- * Stachybotrys
 - * Aspergillus
 - * Cladosporium
 - * Penicillium
 - * Fusarium
 - * Acremonium
 - * Alternaria
 - * Chaetomium
 - * Cladosporium
 - * Paecilomyces
 - * Trichoderma

These are all forms of mold that are causing delight to plaintiffs' lawyers and concern in the insurance industry.

Hot Issue:

Toxic mold claims under both personal and commercial line policies.

Homeowner's Policies: Coverage or lack of it.

Commercial Exposure:

- * Standard commercial property
- * Standard commercial liability
- * Other commercial policies

Costs:

Cost of inspection and toxicology testing.

Homes: \$1,500-\$3,500 each

Large commercial structures - multiply

With extensive infestation: constructive total loss plus additional clean-up expenses (\$30,000-\$300,000 or more)

Claims: Dramatically increasing.

Lawsuits: Very expensive.

Potential Damages Include:

- * Investigation expenses
- * Testing costs
- * Containment and remediation expenses
- * Abatement and mitigation expenses
- * Direct damage claims, incl. repair and replacement
- * Loss of Use claims
- * Relocation expenses
- * Diminution of value
- * Medical expenses
- * Loss of earnings potential
- * Emotional distress and mental anguish

FYI - The problem may be significantly greater in newer buildings.

- * Poor construction practices?
- * Increased use of substandard materials?
- * Increased insulation/tightness of structures (moisture grows)?
- * Prevalence of HVAC systems increases spread and recirculation of mold spores?

Personal Lines Coverage

Issue: Will the homeowner's policy cover direct damage to property.

Look at both 1991 and 2000 ISO homeowner's program.

1991 ISO Homeowner's Program

The 1991 HO-3 form provides "all risks" coverage for damage under Coverages A & B. However, there is no coverage for loss:

2. Caused by:
 - e. Any of the following:
 - (3) Smog, rust or other corrosion, mold, wet or dry rot;
 - (5) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against under Coverage C of this policy.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Two possible exclusions:

2.e.(3) - precludes coverage for any loss caused by mold.

Issue: Is mold the cause of some damage or was mold caused by something else (which is not excluded)?

Purpose of Exclusion 2.e.(3) is to preclude coverage for mold that arises due to high humidity or an excluded loss (flooding, defective construction, etc.).

Purpose of Exclusion 2.e.(3) is NOT to preclude coverage for mold due to a covered loss (burst pipe, etc.)

Basically, if a covered peril is the proximate cause of mold, the damage is covered.

See, Home Ins. Co. v. McClain. Mold from a leaky roof is covered. Merrimack Mut. Fire Ins. v. McCaffree. Mold damage not covered - did not arise from covered damage loss.

2000 ISO Homeowner's Program

HO 2000 HO-3 form places mold and wet rot, along with a new word "fungus," into their own exclusionary category:

2. We do not insure, however, for loss:

c. Caused by:

(5) Mold, fungus or wet rot. However, we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within:

(a) A plumbing, heating, air conditioning or automatic fire protective sprinkler system, or a household appliance, on the "residence premise4s"; or

(b) A storm drain, or water, steam or sewer pipes, off the "residence premises."

For purposes of this provision, a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment.

Note: 2000 ISO provides an explicit exception to the exclusion - so mold damage resulting from an accidental discharge of a heating, air conditioning, or sprinkler system is COVERED - even if hidden.

Pollution Exclusion:

Exclusion 2.e.(5) is the pollution exclusion.

Issues:

Is mold a pollutant? If so, has there been any “discharge, dispersal, seepage, migration, release or escape?”

IF both are met, then coverage depends on whether such discharge was caused by a Coverage C peril.

IF mold resulted from a covered peril (leaking water pipe), then pollution exclusion does not apply.

IF mold resulted from something else (atmospheric humidity, however caused), insurer must prove mold is a pollutant AND damage resulted from the discharge of mold.

Is Mold a Pollutant?

Some courts say no because it is not environmental or industrial pollution.

Problems for insurance companies:

- * Mold is not specifically listed in the pollution exclusion.
- * Courts find the pollution exclusion ambiguous.

Even if it can be proven that mold (and its toxic by-products) is a pollutant, was it discharged, dispersed, seeped, migrated, released or escaped?

Board of Regents of *Minn. v. Royal Ins. Co.*, 517 N.W.2d 888 (Minn. 1994):

Pollution exclusion (asbestos) does NOT apply to indoor pollution.

Many pollution exclusions find this sudden and accidental language from 1973 ISO CGL policy:

This insurance does not apply ... to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Courts reject this exclusion's applicability to indoor environments because:

- * Atmosphere means natural environment.
- * When indoor environment is contaminated, it is only harmful to controlled environment within the building.
- * "Discharge and dispersal" reference damage or injury caused by disposal or containment of hazardous waste.

Analogize to asbestos, lead paint, carbon dioxide.

Difficulty with mold cases and the pollution exclusion:

Good News for insurers:

Some courts have found that chemical products and the fumes emanating from them are pollutants and can cause hazardous injuries by migrating.

Like chemicals, mold releases spores that can cause injuries.

Bad News for insurers:

Public Policy. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*,
199 Ariz. 43 (Ariz. App.2000)

Waterborne total and fecal chloroform were NOT pollutants
subject to pollution exclusion.

“Public Policy supports a narrow interpretation of the
exclusion so that it does not eviscerate coverage otherwise
reasonably expected by the insured.”

The Future of Mold Exclusion:

Some carriers are attempting to introduce more absolute mold
or fungus exclusionary endorsements in the homeowner's
program.

“Such loss is excluded regardless of any other cause or event
contributing concurrently or in any sequence to the loss.”

Commercial Lines Coverages

Commercial Property and BOP Policies:

The applicable exclusion in the ISO Commercial Property Coverage is broader than HO 2000.

There is no coverage for damage “caused or RESULTING FROM ... fungus ...”.

But, look at excluded perils since they largely involve long term wear and tear-type losses. And, the same arguments dealing with covered causes still apply - burst water pipes.

Bottom Line:

Carefully review all policies to individually determine their applicability to each mold claim!

Some Policies:

- * Limit damage to personal property due to dampness of atmosphere.
- * Exclude damage for continuous or repeated seepage or leakage that occurs over a period of 14 days or more.
- * Have a “neglect” exclusion where coverage exists for long term leakage as long as insured takes action upon discovery.
- * Limit interior damage that arises from a leaky roof unless the roof is first damaged by a covered cause of loss.

General Commercial Liability:

The current ISO GCL policy provides broad coverage for liability.

Two sets of exclusions could arguable apply:

- * Pollution exclusion (?)
- * Some property damage exclusions

Courts are divided and law is not well developed on the pollution exclusion as it relates to mold!

Issues will include:

- * Mold is a natural, not man-made substance
- * It is the intent of the pollution exclusion to exclude coverage for a naturally occurring substance.

Expect to see carriers filing for endorsements to CGL and umbrella programs that will exclude coverage for all damages “caused directly or indirectly, in whole or in part” by fungi (mold, mushrooms and mildew) “regardless of any other cause, event, material, product and/or building component that contributed concurrently or in sequence to that injury or damage.”

Other Commercial Policies:

Workers' compensation policies - if workers claim BI or sickness!

Employee mold issues should be addressed by:

- * Insurance companies' claims handlers working in the field.
- * Clean-up and remediation companies, etc.

NEED MORE INFORMATION??

Websites-

www.epa.gov/iaq/pubs/moldresources.html

Moldupdate.com

www.aiadc.org

www.iiaa.org

www.dri.org and (Toxic Tort & Environmental Law Committee/chair: morrisp@jbltd.com)

www.mealeys.com

www.mmi-inv.com/ToxicMold Overview

www.themoldsource.com/litigation

www.irmi.com/expert/articles

www.siisnfo.org

www.insurancejournal.com

Publications-

Mealey's Litigation Report-MOLD (Launched 1/2001)

"For the Defense" Vol.. 43 No. 8 (August, 2001) Series of articles by the Toxic Tort & Environmental Law Committee) published by DRI

