

Assessing Mold Claims and Preparing for Trial

By Raymund C. King

The most efficient way for a litigator to assess the value of a mold claim, for plaintiff or defendant, is to adopt a protocol that allows you to evaluate the case systematically. After the essential parties to the claim are identified or named, litigators should follow a careful plan involving the methods discussed below (see sidebar on page 3).

Isolating Damages and/or Personal Injuries

Practice Tip for Plaintiffs

As in most “good” plaintiff cases, the greater the damages, the greater the potential for recovery. However, one must remember that the damages asserted in a mold claim asserting physical injury are usually no better than the scientific or medical evidence that connects the damages to the mold. In the same way, mold claims asserting a construction or design defect are usually no more valuable than the testimony of the qualified architect or builder or any evidence that establishes causation. After one has confirmed the presence of mold infestation, one must carefully differentiate the insurance issues from the construction issues from the personal injury issues. Insurance coverage issues are almost always at the forefront of the case assessment.

Regarding construction issues in the mold claim, it is always tempting for one to assume that the larger or more expensive the property, the greater chance that efforts to recover will be “worthwhile.”

However, the critical issues to the mold claim will typically be on damages and causation. Mold litigation is very expert-intensive, and thus can become very “expert-expensive” very rapidly. The plaintiff’s attorney should therefore make sure that he or she has adequate financial reserves for this, or the client will be greatly disserved.

With the current public sentiment regarding mold and the insurance industry in general, “sympathetic” victims can have a significant impact on the outcome of a mold case. “Sympathetic” plaintiffs include children; young, educated adults with children; nursing home residents; and Appeals Court patients. In any event, your weakest evidence will usually be on causation. Therefore, select your experts carefully, and seek a deep understanding of their opinions regarding the relationship between mold hypersensitivity and disease.

During the initial evaluation of the case, the plaintiff’s attorney should consider questions such as:

1. What treatments/operations/medical bills/remediation bills/inconvenience has my client been confronted with due to mold?

2. What has happened to the property value of my client’s home or building?
3. Has my client had to relocate or move out of his or her home?
4. Has my client been “made whole”? If so, how? If not, how can my client be made whole?
5. Is there a design or construction defect issue with the structure in question?
6. Are there any parties responsible for maintaining or repairing the property?
7. Is the property insured?

Practice Tip for Defendants

The three most common fronts to address in mold claims involve (1) insurance coverage/bad faith, (2) construction defects, and (3) physical or personal injury. Defense attorneys should immediately evaluate the insurance policies involved and their coverage limits. Most defense attorneys are retained by insurance companies to defend the insured, and many insurance companies provide a defense with a reservation of rights stipulation to the insured. Under a reservation of rights, an insurance company may limit coverage to specific issues in litigation—

typically excluding any mold coverage or coverage related to “pollutants.” In addition, defendant attorneys must create a chronology or listing of all the evaluation and remediation instigated by the insurance company or the defendant. Also, if your client is an insurance company, check whether a standing committee handles the mold cases reported for that company.

To properly assess construction defects, you must make every effort to identify not only the parties responsible for designing or building the structure, but also all parties that have maintained or serviced the premises. Moreover, you must investigate the types of building materials employed as well as the specific locations of the mold infestation and the probable causes (i.e., moisture source[s]) responsible for the infestation.

Isolating the Issues

Construction: The following list is by no means comprehensive, as each case will vary because of its unique set of facts, but it does present common construction issues:

- Architects (e.g., was the home designed by one individual or by a group or firm?)
- Concrete/cement (e.g., were there foundation defects or problems with the concrete portions of the structure?)
- General contractors (e.g., who were the contractors in the building process, and what was their degree of involvement in constructing the building?)
- HVAC system (e.g., who purchased, serviced, or installed the HVAC system?)

- Plumbing (e.g., who installed, maintained, and serviced the structure’s plumbing system, and were there any leaks?)
- Roofing (e.g., was a leak responsible for the mold growth, and who last repaired the roof?)
- Windows (e.g., who installed or constructed the structure’s windows, and were window defects responsible for any leakage?)
- Remediation (e.g., was the structure remediated previously, or were recommendations made for remediation?)

Indoor Air Quality: The following experts can assist you with issues of air quality:

- Certified industrial hygienists (CIHs) are almost always required in assessing the value of a mold claim.
- Indoor air quality specialists can address issues of ventilation and air quality if not already addressed by the CIH.
- Microbiologists may be needed if no mycologist is available or if questions arise about whether other contaminating, biohazardous microorganisms are involved.
- Mycologists specialize in fungi of all varieties. (Make sure that your mycologist is conversant with toxic mold.)

Mental Health: More and more often, mold claims are accompanied by claims of emotional distress and mental anguish. The following specialists can be helpful in addressing these issues:

- Neuropsychologists/neuropsychiatrists can address behavioral, cognitive, and psychological/psychiatric aspects of toxic mold

exposure or perceived toxic mold exposure. They are also better able to address neuropathologic issues than are psychologists or psychiatrists.

- Psychologists/psychiatrists can also address the psychological/psychiatric aspects of toxic mold exposure or perceived toxic mold exposure, even though there may be significant overlap with the findings obtained by the experts *supra*.

Medical: The medical specialists whom you recruit into your “stable” of experts to litigate a mold claim asserting physical injury will vary depending upon the facts of each case. Certainly, the stable should be tailored to address the specific body or organ systems affected in the claim. Here are some experts to consider:

- Allergists specialize in allergic conditions.
- Dermatologists specialize in skin conditions and diseases.
- Gastroenterologists specialize in stomach and intestinal disorders.
- Immunologists specialize in immune system disorders; they are usually allergists as well.
- Neurologists specialize in brain senses and behavior.
- Otorhinolaryngologists specialize in ear, nose, and throat disease.
- Physiatrists specialize in musculoskeletal physical medicine and rehabilitation.
- Primary care physicians specialize in general medicine (they are often family practitioners).
- Pulmonologists specialize in lung diseases.
- Radiologists specialize in the interpretation of Xrays and

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other radiographic data to diagnose various diseases.

- Rheumatologists specialize in joint diseases.
- Toxicologists specialize in the diagnosis and treatment of toxin exposure.

Mold Information

When evaluating mold claims, a critical step is to determine certain key facts that will allow you to classify the gravity of the case. These factors can be easily remembered using the mnemonic CLAPS:

- **Cause[s]** of the mold infestations—articulate possible causes for the mold at each specific location identified.
- **Location[s]** of the mold within the structure in question—the location of the mold often provides the biggest clue for determining the moisture source in the structure in question.
- **Airborne** status—most molds are not harmful until they become airborne.
- **Propensity** to become airborne—this can become a critical issue if there are allegations of lung injury.
- **Species** of mold involved—although this may be the least important “mold fact” to determine, the specific species of mold can be instrumental in developing the causation arguments of the case.

Extent of Exposure

The degree of mold exposure is best quantified by answering these questions:

- When was the mold discovered?
- In what manner did exposure occur?
- How often did the injured party enter the mold-infested premises?

- How long did exposure to the mold source occur (try to quantify this)?

Inspection/Testing and Remediation Issues

A frequently recurring issue is the question “How clean is clean?” One recent law journal newsletter notes that, according to Dr. Ronald Gots of the International Center for Toxicology and Medicine in Rockville, Maryland, mold makes up about 25 percent of the world’s biological mass. Dr. Gots’s review of the available literature indicates that in the 600 or so homes and the 60 to 70 commercial buildings reported in the available literature, 800 colony-

forming units of mold were found, on average, per location, with ranges from 200 to 2,000.¹ Outdoors, the average range is 10,000 colony-forming units per unit measure.² Therefore, no one can suggest that someone is at fault if he or she does not maintain a zero mold level because there is—and can be—no such thing.³

From a claims perspective, it is important to note that significant mold verdicts always involve bad faith and/or poor claims-handling issues. It is therefore critical that you closely examine protocols or procedures implemented by the insurance company for handling mold claims. Any delays or dismissals can foster subsequent litiga-

Protocol for Litigators of Mold Claims

1. Identify and isolate all the damages and/or personal injuries claimed
2. Identify specific information about the mold
3. Identify the extent of exposure to the mold for each injured party
4. Identify all inspection/testing and remediation issues
5. Consider retention of carefully selected experts to assist in the preparation of trial strategy and damages assessment
6. Analyze any forum-sensitive issues
7. Identify any contractual risk transfer instruments or possible first-party insurance coverages
8. Identify postremediation issues and/or goals
9. Carefully plan and coordinate the litigation strategy

Please note that the sequence listed above may not necessarily be in the order that needs to be followed in every mold claim. However, including all the elements above is critical in litigating the mold claim.

tion. From a litigation perspective, prompt inspection, testing, abatement, and remediation can effectively cap potential damages. Although a lawsuit or the threat of a lawsuit can never be completely avoided, claims of physical injury can be limited by limiting physical exposure to mold.

From a litigation perspective, prompt inspection, testing, abatement, and remediation may effectively cap potential damages. Although one may never completely avoid a lawsuit or the threat of a lawsuit, claims of physical injury can be limited by limiting physical exposure to mold. If there is sufficient moisture present, mold may proliferate within 24 to 48 hours.

Undoubtedly, timing is critical. Any delay in addressing a mold claim will increase the risk that mold will spread. The increased spread translates into increased remediation costs, increased risk of physical exposure, increased risk of health effects, increased damages, increased number of experts needed, and so on.

Selecting Proper Experts

Each mold claim should be handled on a case-by-case basis. A growing number of individuals and companies, however, are presenting themselves as “mold experts.” In most cases, you will need the opinion of a toxicologist; a microbiologist (or a mycologist); a pulmonologist (if lung involvement is alleged); a dermatologist (for allegations of skin involvement); an otorhinolaryngologist (for ear/nose/throat allegations); a neurologist (for allegations of neurologic involvement); an allergist (for allegations of general allergic symptoms); and/or an internal medicine physician (for allegations of any other systemic complaints).

Expert opinions from an industrial hygienist, a contractor, a builder, and/or any other type of environmental specialist can also be important. Again, it is crucial to tailor the experts used to the needs of each individual case.

Forum-Sensitive Issues

The number of mold claims in this country is on the rise, but the number of cases that have actually been tried is still somewhat limited. In each jurisdiction, previous findings of the court may give you clues as to how it will rule on various issues. Very important to the assessment of the value of a mold claim is an understanding of how the jurisdiction has handled similar claims.

If there is physical injury asserted in the mold claim, the causation burden will be easier to meet in states that have adopted the *Frye* standard. On the other hand, the causation hurdle is more difficult (but not impossible) to overcome in states that have adopted the *Daubert* standard.

Important to note is the fact that some states have even higher evidentiary standards (such as the *Havner* standard in Texas), which is almost impossible to meet for establishing causation. Very important to the assessment of the value of the mold claim is an understanding of how the jurisdiction has handled similar claims.

If there is no precedent on toxic mold cases in your jurisdiction, look to the circuit courts. If you cannot find cases on point, look for sick building syndrome cases. Some asbestos cases will also give you clues as to how the court in a particular jurisdiction will rule. Again, assess and analyze each case individually.

First-Party Coverages and Risk-Transfer Instruments

What follows is a protocol for evaluating first-party coverages and risk-transfer instruments in mold claims:

1. *Identify responsible or potentially responsible parties.* Most critical in this regard is to identify as soon as possible those parties to be given notice of defense and indemnity in order to preserve arguments regarding early notice. This includes an analysis of joint and several liability as well as the identification of parties that may be bankrupt or “missing.”
2. *Identify all insurance coverages and potentially implicated policies.* Because mold claims now commonly assert property damage as well as bodily injury, some policies with property damage exclusions can be “hooked” by claims of bodily injury. Examine all the policies closely. Another coexisting policy may cover the loss. You should also check for any additional insured entitlements. Finally, you may need to reassess the theories of liability in order to make proper pleadings or develop proper defenses to liability.
3. *Identify all contracts that may affect or facilitate risk transfer.* Contract provisions may call for binding arbitration or alternative dispute resolution. Your analysis should identify any indemnity agreements and insurance entitlements. Finally, calculate the feasibility of each party to collect attorneys’ fees when the case is resolved.

Conclusion

Mold claims present unique challenges to litigators as the public

becomes more aware of the potential dangers and medicine works to get a grasp on diagnoses and treatments. The key to handling these claims effectively is in the proper assessment of the case. Litigators should handle these claims with the utmost care and concern for present and future complications. Finally, proper preparation for trial of the

mold claim should impact the resolution of the claim favorably. ■

Notes

1. K.B. Reeg, *Mold Litigation—It's Not Asbestos Deja Vu All Over Again*, ENVTL. COMPLIANCE & LITIG. STRATEGY (Nov. 2001).
2. *Id.*
3. *Id.*