

# A MOLD CLAIMS PRIMER

MICROBIAL CONTAMINATION ISSUES

BY: STEPHEN J. HENNING  
AND DANIEL A. BERMAN

**T**he evolution of mold claims during the past five years has surprised even those on the cutting edge of handling microbial risks. Mold claims are now a distinct cottage industry, and as a consequence, we are facing a first- and third-party insurance crisis for homeowners, contractors, property owners/managers, and others impacted by microbial exposures.<sup>1</sup> Ultimately, every individual has potential indoor air quality issues, and every individual is a potential claimant. It is little wonder that the plaintiff bar has seized on this emerging tort with vigor.

## Mold Is Everywhere

Our ecosystem is home to well over 100,000 species of mold, but only about 100 of them are linked to causing human health problems. Mold is everywhere. Unfortunately, media reports about mold issues tend to be alarmist—not every mold is toxic. In fact, most are not. Claimants alleging toxic mold exposure face a huge hurdle in terms of causation issues; and builders, risk managers, and claim

professionals can implement protocols for successfully handling and resolving any claim involving mold-related damages.

Mold needs four essential components to grow—food, water, appropriate temperature, and lack of ventilation. Growth can occur within 24 to 48 hours at exponential rates.<sup>2</sup> Many building materials provide a perfect food source for mold—water is all that is necessary to provide an environment for mold growth.

Although mold growth can take place in any structure, claims are increasing for virtually all classifications of structures.

## Schools

School-related mold claims are a clear trend. Children have decided emotional appeal for the trier-of-fact and for the public. In addition, children may be more susceptible to deleterious effects of mold exposure because of their immature immune systems, which make them a greater cause for concern.<sup>3</sup> In addition, modular units that commonly supplement overcrowded classrooms usually are made of carbon-based materials that help molds thrive.

Aging buildings in need of maintenance or subject to sloppy renovation also are the basis for a substantial number of claims.

Responses to school claims vary depending on the sophistication of the entities. Some move into panic mode and conduct wholesale testing of all areas in order to detect any microbial concerns.<sup>4</sup> Others test, evacuate, remediate, and litigate (not necessarily in this order) to recover damages for the costs associated with the claim.<sup>5</sup> The most dangerous approach for a school system is to do nothing, which later subjects a host of parties to allegations of negligence for the inaction. Parties potentially implicated in school suits include all construction-related trades (design professionals, contractors, subcontractors, consultants), board members, and school districts.

## Apartments

The number of claims brought by tenants in apartment housing, particularly low-end developments, is rising. These claims are brought either directly or in response to threatened evictions under the guise of breach of the implied warranty of

habitability.<sup>6</sup> This trend involves a large segment of the population with obvious jury appeal: Stories reciting mold complaints to unresponsive property management companies and landlords often ring true to jurors who have had similar experiences. The Delaware Supreme Court recently upheld a \$1 million verdict against a landlord brought by tenants due to a mold-infested apartment.<sup>7</sup> This verdict was eclipsed by a California verdict of \$2.7 million awarded to a family of four against an apartment owner and property manager.<sup>8</sup>

As a result, building owners and property managers are becoming more proactive about water intrusion issues that might give rise to mold claims. Apartments seem to be attractive products for the mold claims because construction often uses low-quality materials, and maintenance (by both the landlord and tenant) varies tremendously. An added appeal for the plaintiff bar is that apartment-related suits may be framed as class actions. In addition to the apartment situation, there is also an increase in mold claims submitted in connection with school-related housing, including university or dormitory housing for students.<sup>9</sup>

### Single Family Homes

Over time defect claims have moved away from condominiums to single-family home groupings that can be prosecuted in one case, with the aggregate damages rivaling the damages in condominium claims. Individual claims for mold contamination (both first- and third-party)

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**Stephen J. Henning and Daniel A. Berman** are senior partners with Wood, Smith, Henning & Berman LLP, in Los Angeles, California.

are increasing in frequency,<sup>10</sup> regardless whether the home falls in the high or low end of the valuation spectrum. In these cases, the action of the homeowner is generally followed by a lawsuit against one or more parties that allegedly bear the blame under theories of defective construction, nondisclosure, fraudulent concealment, breach of fiduciary duties, and the like.<sup>11</sup> The defendants include contractors, design professionals, realtors, inspectors, remediation consultants, and lawyers who may have been involved in the transaction. Skeptics, however, point out that mold is a ubiquitous, naturally occurring organism found behind the walls of over 70 percent of homes.

### Public Buildings

A growing number of complaints made by state and local officials regarding the construction quality of public buildings, as well as claims of mold infestation by occupants of government facilities, are fueling a category of claims founded on public buildings. Increased awareness of indoor air quality issues on the part of individual governmental authorities may partially explain the growing number of claims made regarding public buildings. Claims of mold problems are not dismissed easily because evacuation typically is the first protocol, followed by testing. Even the Environmental Protection Agency (EPA) is not immune—litigation has been brought by workers in its Washington, D.C., office (which ironically has been promulgating remediation protocols for commercial buildings and schools).

### Commercial Buildings

Damages in commercial cases involve not only personal injury but also potential loss of use and business interruption. Measures adopted

during the energy crisis to make buildings more energy efficient actually resulted in buildings that are unable to breathe,<sup>12</sup> trapping mold within the building envelope and circulating it throughout the system. In addition, newer products such as exterior insulation and finish systems and synthetic stucco effectively trap moisture in the building envelope as well.

### Health Care Facilities

Infections in hospitalized patients have increased as a result of construction and renovation activities in health care facilities.<sup>13</sup> Infections that were not present at the time of a patient's admission (nosocomial infections) are caused by mold spores released into hospital air during periods of construction or renovation and account for 88,000 deaths and \$4.5 billion in costs each year.<sup>14</sup> Hospitals, physician offices, and nursing homes all house individuals with fragile health. In this environment, mold can truly be fatal.

### Second-Generation Suits

An increasing number of claims are the result of previous claims involving construction gone astray and are characterized as second generation suits. In prior construction defect cases, plaintiffs are returning for second and third bites of the proverbial apple by bringing claims of improper investigation, identification, or remediation of the mold condition in the first instance.<sup>15</sup> Suits are being filed against board members, experts, and lawyers for failing to recognize the scope and gravity of mold conditions, repair protocols, and costs associated with eradicating the alleged mold. Also falling under the umbrella of second generation suits are claims against

remediation contractors and experts for improperly effecting the remediation in the first place.

### Verdicts and Settlements

For those charged with handling mold claims, recent verdicts and settlements from a nationwide perspective present sobering realizations that (1) this is a very serious tort and (2) effective handling of the claim upon presentation truly can minimize the exposure.

Two multimillion-dollar verdicts, *Ballard* and *Anderson v. Allstate*, blazed headlines and caught the attention of plaintiff lawyers around the nation. Although the verdicts were slashed on appeal, the media coverage of this emerging tort and resulting public awareness is incapable of quantification. In *Allison v. Fire Insurance Exchange*, a Texas jury handed down a \$32.2 million verdict against the insurer in June 2001. The plaintiffs submitted a mold claim to a first-party insurer, seeking less than \$200,000 to remediate mold in an 11,500 square-foot home. Mold eventually overran the home, requiring complete destruction and rebuilding—at a cost of more than \$6 million. The plaintiffs sued, claiming mishandling of the initial claim. On appeal, the Third District Court of Appeal reduced the award to \$4 million plus interest and attorneys' fees.<sup>16</sup>

The year before, a federal jury in California had awarded \$18 million—all but \$500,000 in punitive damages—to a homeowner against a first-party insurer that declined coverage for mold damage, in *Anderson v. Allstate Insurance Co.*<sup>17</sup> The trial judge reduced the award to \$3 million. The Ninth Circuit Court of Appeals affirmed the compensatory damage award and reversed the punitive damages.

## LOOKING FOR AN EXPERT?

Mold exposure may affect individuals in a variety of ways, and the defense may find it necessary to seek advice from a number of specialties. The following lists provide a basic overview of areas of expertise that may be consulted for a claim.

### INDOOR AIR QUALITY ISSUES

1. Certified industrial hygienist (always required for sampling of environment). Always check credentials, and be wary of individuals whose training occurred only on the Internet or in seminars with open book examinations and such.
2. Microbiologist
3. Mycologist (prevalence, growth, and toxicity of various molds)
4. Toxicologist (animal studies/human health risks from mold)
5. Ventilation specialist

### MEDICAL ISSUES

1. Allergist (clinical effects of mold and relationship to other causes)
2. Dermatologist
3. Gastroenterologist (GI symptoms)
4. Occupational physician
5. Pulmonary specialist (respiratory tract)
6. Treating physician(s)
7. Rheumatologist (autoimmune disease)

### MENTAL HEALTH ISSUES

1. Neuropsychologist (cognitive/behavioral effects of mold)
2. Psychologist
3. Psychiatrist

### CONSTRUCTION ISSUES

1. Architect
2. Cost estimator
3. Concrete specialist
4. General contractor
5. HVAC specialist
6. Plumber
7. Roofer
8. Soil specialist
9. Waterproofer
10. Window installer
11. Remediation specialist
12. Statistician
13. Valuator

Other cases in Texas, Delaware, and California support this trend.

Significantly, the largest verdicts are against insurers for first party allegations of improper claims handling. All of these cases could have been resolved for substantially reduced sums if proper protocols had been in place and been followed. The bottom line is that the implementation of consistent, proactive, and aggressive claims-handling strategies will empower the risk manager and claim professional to take control of this emerging tort. (See sidebar on page 9 for additional case settlement information.)

### What Is Mold?

Mold has been around forever; why is it suddenly a problem?

Molds are simple, microscopic organisms found virtually everywhere, indoors and out. They exist on plants, foods, dry leaves, and other organic material. Mold spores are tiny and lightweight and are easily airborne. Mold growth often appears as discoloration, in colors as varied as white, orange, green, brown, and black. When mold is present in large quantities, it can cause allergic symptoms similar to those from pollen. Certain types of molds can produce toxins called mycotoxins, which the mold uses to inhibit or prevent the growth of other organisms. Mycotoxins are found in both living and dead mold spores and, even after being disinfected, may continue to cause toxic or allergic effects. Mycotoxins are generally not volatile and a disturbance generally is required to trigger exposure.<sup>18</sup>

Mold growth requires food and water, and humid climates may be particularly susceptible to mold growth. Mold can grow when relatively high humidity or hygroscopic

properties (the tendency to absorb and retain moisture) of building surfaces allow sufficient accumulation of moisture. The amount of moisture required for fungal growth can vary depending upon the material and the organism. Almost all commonly used construction materials and furnishings provide nutrients that support mold growth; surface dirt provides additional nutrients. Cleaning and disinfecting with nonpolluting cleaners and antimicrobial agents provide some protection against mold growth; but it is virtually impossible to eliminate all nutrients.

Mold can be found in homes on walls, ceilings, floors, basements, crawl spaces, and lower rooms—and anywhere there has been a spill or water damage. The presence of mold or potential presence for mold is indicated by earthy or musty odor, chronic roof or plumbing leaks, wet or dirty carpet, recent spills or flooding, standing water near outside air intakes, slimy or foamy water in drip pans of air-handling or air-conditioning units, extensive exposed soil indoors, overwatered indoor plants, sewage backflow, and moisture buildup.<sup>19</sup> Airborne spores outdoors also attach themselves to people and animals, making clothing, shoes, bags, and pets convenient vehicles for carrying molds indoors. Building materials provide suitable nutrients that encourage mold to grow. Wet cellulose materials, including paper and paper products, cardboard ceiling tiles, and wood and wood products, are particularly conducive to the growth of some molds. Other materials such as dust, paints, wallpaper, insulation materials, drywall, carpet, fabric, and upholstery commonly support mold growth.

Molds are microscopic and become visible only when individual structures or spores accumulate; there are no universal standards for how much mold is enough or too much.

More than 100,000 species of molds exist in the environment; approximately 100 of these are pathogenic and can cause irritation, rash, illness, or death.

“Toxic” mold is a term that over the past few years is used to describe a limited group of molds that have potential health consequences. Most courts recognize the alarmist nature of the term and have banned its use in the courtroom. In the context of mold claims, it generally describes one of three mold species: (1) *Stachybotrys chartarum* (also known as *S. atra*), the most publicized mold, is a greenish-black fungus that grows in very wet environments. Spores are carried in soil and enter buildings after floods, pipe breaks, or other sudden water intrusions. It grows on paper, tile, carpet, and general organic debris. Because this mold occurs in ducts and covered surfaces, it may be present but not visible. (2) *Penicillium* is associated with allergies, asthma, respiratory infections and hypersensitivity pneumonitis. Notably, *Penicillium* does not produce trichothecenes, which can cause deadly lung disease, or immune-altering toxins; this makes them a less serious threat to health. (3) *Aspergillus* may cause disease but does not produce trichothecenes or immune altering toxins.

### Medical Issues

There are no easy answers to questions like what type of mold is dangerous or how much exposure is unhealthy. Scientific facts regarding exposure to molds exist, as does much information about their unproved health impacts. Because

the issue of causation is the weakest link for a claimant alleging mold-related health problems, it is essential that the trial attorney bring home the microbiology to the trier-of-fact. As the medical science of mold stands now, very few cases of bodily injury should get to a jury as long as defense counsel properly attack the causation issue, using the case authority established through years of toxic tort and bodily injury litigation. Extraordinary confusion exists among self-proclaimed experts in health departments and remediation companies, and aggressive ongoing technical and scientific studies are focused on developing standards in this area.

Mold is both helpful and harmful. On one hand, the human body uses molds for proper functioning, and mold is one of the essential ingredients in some of our favorite foods like bread, cheese, and beer. On the other hand, mold can be lethal. Microbial “germ” warfare is responsible for the term “yellow rain” and for thousands of documented deaths from wartime use of mycotoxins from molds as recently as the Iraq-Kuwait war. In addition, mold impacts each individual differently. There is tremendous variation among the hundreds of thousands of mold species; some people can withstand huge doses of certain ones, but other individuals are more susceptible.<sup>20</sup> This is one of the reasons that agencies have such difficulty establishing standards of “safe” levels of mold exposure—and these uncertainties are compounded because mold species that might not produce particularly toxic reactions by themselves might turn into a highly toxic soup when combined with other mold species.

In view of this individual impact, the defense team should be

particularly sensitive to environments that house immunocompromised individuals, such as schools, hospitals, and health care facilities.

### Defending the Mold Claim

The best defense strategy, of course, is to avoid a claim. This means taking proactive steps before the claim arises, which may eliminate the claim entirely or minimize liability if it proceeds to litigation. Some companies have a standardized process of responding to mold claims in a timely manner and enjoy great success in claim restoration.

Actively trying to resolve mold claims as they are presented is key. For claims that are incapable of settlement, the defense team should be prepared to aggressively defend the claim. Here are five essential strategies to implement in defending the mold claim:

#### Strategy 1: Key Experts

Early in the life of the mold claim, one primary step should be to evaluate and select experts required to defend the claim. Early retention of experts is critical because counsel can then select the best qualified experts from the available pool (and eliminate their availability to other parties). This also allows the defense time to work with the consultants and estimate the scope of the testimony.

Determining causation and appropriate remedial protocols create controversy, and methods and facts regarding scientific accuracy often are disputed or even excluded. The defense team should have a strong working knowledge of the writings and opinions of the leading experts in the emerging tort of toxic mold. Acknowledged experts include microbiologist Philip Morey, occupational physi-

cian Eckard Johannig, and professor and researcher Bruce Jarvis.

#### Strategy 2: Analyze Contractual Risk Transfer

One initial evaluation will be whether or not the risk presented by the mold claim can be transferred. This should involve assessing the following factors:

**Responsible parties.** A host of parties may be implicated in the claim for which there will be indemnification rights, either express or equitable. Immediate tenders of defense and indemnity should be sent via certified mail at the earliest juncture in order to preserve arguments regarding early tender dates and benefits.

- Joint and several liability analysis: If responsibility for the condition causing the mold growth is borne by several parties, the defense team should evaluate the ability to transfer the risk for this condition among the parties. This is determined by the policies and contract that imposed the responsibility. If the information is missing from the contract documents, jurisdictional ability to impose this liability under equitable theories must be explored.
- Empty chair analysis: Under the umbrella terms of “empty chair” or “missing parties,” parties potentially responsible for the mold growth but not involved in the claim must be explored to ascertain whether any shortfall presented by them will impact the exposure to your client. Theories of joint and several liability may come into play and must be carefully considered in an effort to apportion liability to the other parties.

## PHYSICAL REACTIONS TO MOLD

All of us are exposed to molds. Their potential impact upon overall health, however, is highly specific to the individual. Depending on the type of mold, the extent and medium of exposure, and the affected person's general health status, the individual will experience symptoms in one of three general areas: allergic/immunologic reactions, infections, and toxic effects from microbial exposure.

- **ALLERGIC REACTIONS.** Perhaps the most common health problem associated with exposure to mold, allergic reactions range from mildly uncomfortable to life-threatening (e.g., severe asthma attack). Common signs or symptoms of an allergic reaction to mold include watery eyes, runny nose and sneezing, nasal congestion, itching, coughing, wheezing and impaired breathing, headache, and fatigue.
- **INFECTIONS.** Although not as common as allergies, mold-related infections can affect humans. Mold can cause three classifications of infection: systemic, opportunistic, and dermatophytic.

*Systemic:* The majority of systemic infections begin when a susceptible person inhales spores of the fungi that cause the diseases. Most of these infections produce minimal or no symptoms; however, immunosuppressed individuals may develop chronic localized infection. If the infection spreads throughout the body, it is generally fatal. Fungal infections include blastomycosis, coccidioidomycosis, histoplasmosis, and paracoccidioidomycosis.

*Opportunistic:* These infections are secondary illnesses that occur in a person who already has a primary disease or condition and, thus, already suffers from impaired immunological defenses. Opportunistic fungi are facultative parasites, meaning they can use both living and dead substrates for nutrients. Common opportunistic species include *Aspergillus*, *Candida*, *Cladosporium*, *Cryptococcus*, *Muco*, and *Rhizopus*.

*Dermatophytes* are a group of fungi that infect hair, skin, and nails. This infection occurs through direct contact with an infected individual or through indirect sharing of clothing, hair brushes, towels, and the like. Transmission to humans from an environmental source is rare, but outbreaks from soil have been reported.

- **MICROBIAL EXPOSURE.** One of the areas least studied and understood is the effect of mold exposure on human health. These cases relate to toxins on the surface of the mold spores, not to the growth of the mold in the body. Mold that produces toxins has the potential to inhibit immune response, which has devastating implications for people with preexisting disabilities ("immunocompromised" hosts), but is also of concern to healthy people.

Whether or not symptoms develop in people exposed to fungi depends on the nature of the fungal material (allergenic, toxic, or infectious); the amount of exposure; and the susceptibility of the exposed individual. Susceptibility varies with genetic predisposition, age, state of health, and concurrent exposures. For these reasons and because exposure has no form of standardized measure and biological markers of exposure to fungi are largely unknown, it is not possible at this time to determine "safe" or "unsafe" levels of mold exposure in general.

### **Implicated insurance policies.**

This involves analyzing policies that might be implicated given allegations made within the complaint. Mold claims can involve allegations of both property damage and bodily injury, and policies that may otherwise exclude property damage may be implicated for the bodily injury aspect of the claim. As a result, different policies may defend different aspects of the damages.

- **Exclusions/endorsements:** The body of law interpreting the exclusions and endorsements has not yet developed a solid body of cases involving mold claims. Many insurers argue that asbestos cases are applicable; however, those cases can be distinguished. For newer policies, endorsements that seek to exclude coverage or other established sublimits for mold must be examined.
- **Coinsurance clauses:** Another insurance policy may cover the same loss, possibly involving overlapping time frames, different carriers, or a unity of relationships among the parties named as the insured.
- **Additional insured entitlements:** Immediate attention should be given to whether or not additional insured status is available for the loss; to the extent it is afforded, tenders should immediately be effected in order to transfer the risk.

**Identifying theories of liability.** Working as a team, counsel, claim professionals, and risk managers must have a strong understanding of the allegations and theories of liability articulated within both the claim and the relief sought. This is important to assess the potential contractual risk

transfer vehicles available with regard to facts framed in the pleadings. Understanding the theories of liability includes not only the claims articulated against the client/insured but also claims and theories of liability for which you will be able to look to other parties. This factual analysis should cover the following issues: party making the claim (first versus third party, implication of regulations governing relationships and liability growing from same); notice (may dovetail with statute of limitations issues); personal injury claims (who is making them; consideration of minors and ability to compromise the claims); property damage claims; punitive damage claims; causes; and continuing origin and nature of the mold.

Analyzing contractual provisions is essential to determining the risk transfer mechanisms available. This analysis should include consideration of the following issues:

- **Indemnity analysis:** Review all indemnity agreements within the contract documents, to whom indemnity is owed, and how the indemnity is characterized. Give careful consideration to the language of the indemnity agreement in light of decisions handed down during the past three years that discuss the impact wording can have on the duties to defend and indemnify. Tendere under the indemnity should be made early, by certified mail.
- **Insurance entitlements:** Analyze the insurance requirements set out within the contractual documents to flush out the obligations of the contracting parties. Parties often must be named as additional insureds on policies; if this has

been done, this status may automatically convey, depending on the insuring policy. Although the better practice is to secure the actual endorsements before work is given, as opposed to prosecuting an action for breach of contract for failing to name an additional insured, the analysis nonetheless is vital to fully maximizing the parties' ability to shift responsibility for the legitimate claim. Again, tenders immediately should be made to all the insurers potentially exposed for the claim.

- **Choice of forum analysis:** Depending on the contractual relationships, the forum for dispute resolution may be arbitration mandated by the contracts. The line of cases discussing arbitration makes clear that participation in various forms in the formal litigation may operate as a waiver to the right to arbitrate. Accordingly, early analysis of choice of forum clauses is necessary. At the same time, the defense team should weigh the pros and cons of arbitration and not simply allow the case to proceed before a trial court; there are decided pros and cons within each forum.
- **ADR provision analysis:** The contractual analysis may reveal a mechanism for alternative dispute resolution prior to formal litigation. Analysis should review whether the right to attorneys' fees is waived in this policy if litigation is commenced without first utilizing ADR, as required by the contract. If the claim is new, defense counsel should take advantage of the opportu-

nity to resolve the mold claim at the earliest juncture by using this provision.

- Attorney fee analysis: As set out above, prosecution of a mold complaint can focus on bodily injury claims and turn into an expensive endeavor. Review early on whether the claimant can seek fees associated with prosecuting the complaint.

### Strategy 3: Specific Jurisdiction Issues

Mold claims are increasing in number, but the total of tried and appealed cases truly is limited. As a result, guidance from the courts in terms of case law interpretation is scant at best. The judiciary has given us clues, however, about how courts may rule on various issues. We also know how courts have ruled on issues that are presented within the context of the mold claim. Understanding these issues and how the courts are likely to rule is important in terms of early evaluation of the claim. Whether the state traditionally is pro insured or pro insurer is certainly a factor that weighs in such a consideration. Other policy interpretations made on the issues of environmental or toxic tort claims, releases, and damages also are persuasive indicators of the direction the court may take.

### Strategy 4: Inspection, Testing, and Remediation

After selecting experts and evaluating the contractual risk transfer issues, the next battleground the lawyer will confront deals with the inspection sequence, testing, and remediation issues. Central here is the question “how clean is clean?” Battles over this type of issue can be expensive. From a litigation

standpoint, prompt inspection, testing, and remediation can result in capping potential damages early on. Although this may not necessarily avoid a lawsuit, it will provide some certainty about the potential exposure faced by plaintiffs making bodily injury claims.

From a claims standpoint it is important to note that large verdicts in mold cases exclusively involve allegations of bad faith and/or poor claims handling. Implementing protocols to avoid this result is vital. All mold investigations and homeowner complaints should be taken seriously. Delaying response and/or ignoring the complaint provide fuel for subsequent litigation. Keep in mind that failure to promptly address claims of mold may result in spread of the mold condition, which serves to increase the cost of the remediation (as well as increase the causes of action to include intentional allegations based on the claim handling).

In the end, all parties share the same goal of remediation, which New York City guidelines cite as “to remove or clean the contaminated materials in a way that prevents the emission of fungi and dust contaminated with fungi from leaving a work area and entering an occupied or non-abatement area, while protecting the health of workers performing the abatement.”<sup>21</sup> The guidelines also stress, as this article has mentioned several times, that underlying causes of water accumulation must be rectified or fungal growth will recur.

Although inspection and testing are variables that are factually driven and are best solidified using input from the chosen consultant(s), remediation is an issue in which the battle of how clean is clean can be won. Because no standards exist for acceptable

levels of mold in an indoor environment, our recommendation is to consistently take the most conservative approach. This is the safest way to avoid being left open to post-remediation criticisms of improper handling that have the potential to avoid the second-generation lawsuits discussed above. This requires that the defense team has a working familiarity with standards that have been promulgated.

The EPA reportedly is in the process of developing remediation guidelines for residential housing, with the focus being “how to” rather than information for those who will engage a remediation company to do the work. The EPA, however, has published a protocol for schools and commercial buildings that clearly is the prevailing standard for remediation, describing steps to take depending on the type and amount of mold identified.

For residential housing, the most conservative guidelines currently are those promulgated quoted previously from the New York City Department of Health. These also detail protocols that are dependent on mold properties. For claims involving health care facilities, an important fact is that remediation guidelines promulgated by the EPA for commercial buildings most likely are not applicable. The presence of immune-compromised individuals implies using perhaps the strictest protocols for the mold removal.<sup>22</sup> It is highly unlikely that Level 1 remediation could be accomplished in this environment. Separate protocols for such facilities that address indoor air quality should be consulted.

### Strategy 5: Attack Causation

As this article repeatedly states, the most significant task facing

plaintiff's counsel in a mold case is *proving causation*. More than any other area, this is where vigorous lawyering can knock out much of the bodily injury component at an early stage—which can have the aggregate effect of gutting the plaintiff's case-in-chief.

Plaintiffs seeking to prove a toxic mold case will have to establish both general and specific causation elements. General causation is the demonstration that a given toxic substance in a particular location for a particular duration *can* cause the type of illness or injuries alleged. Specific causation is the proof that the toxic chemical actually *did* cause the injuries claimed in the particular case in question. Establishing both types of causation requires expert testimony, which is subject to exclusion or limitation under *Daubert*<sup>23</sup> and comparable rules in various state courts that still follow *Frye*.<sup>24</sup>

**General causation.** In a federal case or in jurisdictions following the federal rule, the court is required under *Daubert* and its progeny to be the gatekeeper—to keep out unreliable expert testimony in technical, scientific areas. It must apply Federal Rule of Evidence 702, which limits the admissibility of scientific or technical evidence by assigning to the trial judge the task of ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand. The federal standard determines initially whether the expert's underlying reasoning or methodology is scientifically valid and whether it can properly be applied to the facts at issue. Considerations in such an inquiry include the following: whether the theory or technique in question can be tested; whether it

was subjected to peer review and publication; its known or potential error rate (statistical validity); and whether it has attracted widespread acceptance within a relevant scientific community.

The inquiry is a flexible one, and its focus must be on the principles and methodology, not on the

conclusions they generate. The preferred method for establishing a link between an allegedly toxic substance like mold and a human disease is epidemiological research.<sup>25</sup> Case reports, temporal associations, and animal studies are all of questionable value in proving causation.<sup>26</sup>

## RECENT CASE HISTORY

For those charged with handling mold claims, a cursory review of recent verdicts and settlements from a nationwide perspective presents two sobering realizations: This is a very serious tort, and effective handling of a claim upon presentation truly can minimize exposure. The following case results graphically indicate just what may be at stake:

- In November 2001, a jury in a Sacramento Superior Court case awarded \$2.7 million to a family in a local apartment complex for failure of the landlord to respond to complaints of mold in the apartment. This is the largest jury verdict in a mold case based on personal injury. *Mazza v. Schurtz*, No. 00AS04795 (2001 Sacramento Super. Ct.).
- Construction defects at the Martin County Courthouse resulted in a \$14.5 million cumulative payout (original construction cost was \$13 million) due to construction defects that sickened 15 workers.
- A cumulative payout of \$105 million was distributed for the Polk County Courthouse, Florida.
- The Delaware Supreme Court upheld a \$1.04 million award to two women against their landlord who failed to address leaks and mold problems in their apartments, resulting in asthma attacks and other health problems. *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001).
- In December 2000, a homeowner settled a mold-related bad-faith lawsuit against his insurer for \$1.5 million. *Blum v. Chubb Custom Ins. Co.*, No. 99-3563 (Tex. Dist. Ct.).
- In Beverly Hills, California, parties agreed to an undisclosed settlement amount believed to be between \$10 million and \$12 million for a single family home. Dramatic footage of mushrooms growing in the living room, coupled with claims of property damage to extremely high-end personal items, added to the high settlement. A local ordinance required complete destruction of the home due to the extent of work required to remediate the home. The loss of use claim was substantial—the homeowners paid approximately \$30,000 a month for alternative residence during pendency of the action.

For those jurisdictions following the *Frye* line of cases, the standard is even greater than under the federal rule. *Frye* and its progeny require that the techniques or methods used are “generally accepted within the scientific community”—one of only several factors to be considered by the court under the more liberal federal standard.

The fact that the court makes such judgments has tremendous value to the defense because the matter will simply never get to the jury for a decision if the court does not find that the expert opinions are supportable under the applicable rules.

**Specific causation.** Both scientific and construction experts generally are used to determine the source of or reason for mold exposure in a particular building. Plaintiffs may argue, expressly or inferentially, that the mere existence of mold in a building for which a defendant may have responsibility (as a developer, contractor, landlord, or owner) gives rise to liability for resulting injuries. The critical factor necessary for mold growth, however, is the existence of substantial moisture levels, which obviously develop from a variety of circumstances. The failure to properly care for the premises, or an unusual condition at the premises for which a builder or owner should have no responsibility, could well give rise to a complete defense.

Specific causation in a mold case often can be divided into the following steps: identifying the mold alleged to cause injuries; establishing specifics relating to exposure, proximity, duration, and alleged exposure pathway; and evaluating medical issues such as the onset or absence of symptoms related to the specific exposure.

These factors must be used by the plaintiff to demonstrate to a reasonable medical probability, based upon competent expert testimony, that exposure to a specific mold is the cause of injury or illness underlying the complaint.<sup>27</sup> A mere possibility that the illness was caused by exposure is legally insufficient.<sup>28</sup>

Assessment of exposure is often difficult due to the absence of a representative area to use for sampling. Exposure can occur through both respiratory and dermal absorption pathways. Airflow in buildings rarely is consistent, which means that the mold levels fluctuate with the amount of water in the building. Mold also may be found outside the ambient environment and may vary on interior surfaces.

The connection between the exposure and the specific alleged injuries or illness may be open to reasonable dispute or other explanations. Mold exposure differs from many toxic exposures in that the defense should be able to make a relatively strong argument that removing the individual from the site of the toxic mold exposure should result in a fairly rapid reduction in symptomatology. Often, plaintiff’s experts will be able to demonstrate only an association between the exposure and the alleged injury or illness. In 1965 Sir Bradford Hill established specific criteria to evaluate whether a disease was *caused by* chemical exposure as opposed to merely being *associated with* it. The Bradford Hill criteria—strength of association, consistency, specificity, temporality, dose response, plausibility, coherence, and experiment—provide one way to attack faulty causation assumptions made by the plaintiff’s experts.

The Bradford Hill criteria also

can help assess whether toxic mold exposure is responsible for a disease. In addition to applying these criteria to liability as well as expert testimony, the lawyer should utilize them in a *Daubert/Frye* motion in limine, in motions for summary judgment, and as an outline for cross-examination. Finally, the defendant should consider whether to seek a case management order requiring early disclosure of the plaintiff’s evidence regarding causation. Often referred to as “Lone Pine orders,” after the New Jersey case in which they originated, these place the burden of making a prima facie showing of causation on the plaintiff prior to the traditional expert witness disclosure deadline.<sup>29</sup>

**Medical monitoring.** It should be anticipated that the plaintiffs will make every effort to recover damages based on the alleged need for medical monitoring, because it creates a dramatic increase in the value of the case (often from monitoring a large number of individuals over an extended period of time). In a mold case where damages should not include permanent injuries or diseases, however, the need for medical monitoring should be diminished. In some cases, plaintiffs have argued that the only way to determine whether a proper remediation occurred is to conduct medical monitoring of residents. This is a bootstrap argument; more than adequate means exist that do not require future medical testing of residents to establish that remediation is complete.

### **Defense: Statute of Limitations**

Bodily injury claims typically have a shorter statute than property damage from latent or patent defects. Although this body of law has not

yet developed to a reliable level, the issue surely will generate decisions during the next decade.<sup>30</sup> The threshold issue is to determine when mold exposure becomes such a level of concern that it triggers in an individual knowledge sufficient to invoke the clock on the time limits for presenting the claim. Also dovetailing into this issue is whether or not repairs or actions by the potentially culpable parties may operate to equitably toll the statute.

### Conclusion

Hailed as the emerging tort of the decade, mold claims clearly have the potential to cost insurers and policyholders billions for associated investigations, abatements, repairs, and litigation over microbial exposures. Development of case law will continue to flush out seminal issues. In the interim, insurance coverage for this risk is virtually nonexistent.

This absence of coverage, even through mold exclusions of subliminals, does not mean mold claims will go away. Viable entities now more than ever must awaken to the serious nature of this emerging tort. Proactive handling of mold claims is imperative, and adopting protocols to use in addressing claims of water intrusion or mold contamination is critical. ■

### Notes

1. For example, the Insurance Information Institute issued a not-so-veiled threat, declaring in effect that massive mold awards in the courts could bring the entire economy to its knees.

2. N.Y. City Dep't of Health, *Facts about Mold* (2001).

3. See SLACK, Inc., *Air Quality program for schools is an old idea whose time has come*, Infectious Diseases in

Children (2001), [www.idinchildren.com/199709/schools.asp](http://www.idinchildren.com/199709/schools.asp).

4. See *State Will Survey, Test Moldy Classrooms*, THE PRESS DEMOCRAT (May 5, 2001).

5. See *id.*; see also *Students, Workers Sue for Mold Contamination*, AMARILLO GLOBE NEWS (June 10, 2001).

6. See, e.g., Cassi Feldman, *AIMing low*, S.F. BAY GUARDIAN (July 11, 2001).

7. See *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001).

8. See *Mazza v. Schurtz*, No. 00AS04795, (Sacramento Super. Ct. 2001).

9. See, e.g., Shelvia Dancy, *For a number of NCCU students, there's no room in the dorm*, News14 (Aug. 13, 2003), <http://rdu.news14.com/content/headlines/?ArID=34065&SecID=2>.

10. See Terrence Stutz, *Keeping mold coverage, state told*, DALLAS MORNING NEWS (June 27, 2001), at 1A; R.A. Dyer, *Indoor Mold Called Next Health Crisis*, TEX. STAR TELEGRAM (June 27, 2001).

11. See, e.g., *Mold forces family from home*, CONCORD MONITOR, July 9, 2001 (family without insurance for alleged toxic mold condition brings suit against home inspector for failing to inspect attic where mold originated).

12. See, e.g., *When the Atmosphere at Work Is Just Unbearable*, L.A. TIMES (July 22, 2001).

13. *Construction-Related Nosocomial Infections in Patients in Health Care Facilities*, Health Canada (July 2001); Draft Guideline for Environmental Infection Control in Healthcare Facilities, Centers for Disease Control (2001).

14. Ennis, *Nosocomial Infections in Healthcare Facilities* (2001), The Reciprocal Group Risk Management Services.

15. See David Bierman, *Dangers of Secondary Mold Growth*, ENVTL. BLDG. NEWS, [www.buildinggreen.com/elists/flood.html](http://www.buildinggreen.com/elists/flood.html).

16. 98 S.W.3d 227 (Tex. App.—Austin 2002).

17. *Anderson v. Allstate Ins. Co.*, No. CIV-00-907 (E.D. Cal. Oct. 4., 2000). 2000 WL 33914116 (unpublished opinion). It was alleged the insurer stalled payment due to the advanced age of the plaintiff, who was 96.

18. See CAL. DEP'T OF HEALTH SERVS., *Mold in My Home: What Do I Do?* (1998).

19. See N.Y. COMM. FOR OCCUPATIONAL SAFETY AND HEALTH, *The Facts about Mold*, [www.nycosh.org/moldfacts.html](http://www.nycosh.org/moldfacts.html).

20. See CAL. DEP'T OF HEALTH SERVS., *Stachybotrys Chartarum* (2000).

21. See N.Y. CITY DEP'T OF HEALTH, *Guidelines on Assessment and Remediation of Fungi in Indoor Environments* (2000), [www.ci.nyc.ny.us/html/doh/html/epi/moldrpt1.html](http://www.ci.nyc.ny.us/html/doh/html/epi/moldrpt1.html).

22. For background information, please see the Draft Guideline for Environmental Infection Control in Healthcare Facilities (2001), [www.cdc.gov/ncidod/hip/enviro/env\\_guide\\_draft.pdf](http://www.cdc.gov/ncidod/hip/enviro/env_guide_draft.pdf).

23. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 580 (1993).

24. See *Frye v. United States*, 530 U.S. 1245 (June 19, 2000).

25. See *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996).

26. See *Porter v. Whitehall Labs, Inc.*, 791 F. Supp. 1335 (S.D. Ind. 1992); *Casey v. Ohio Med. Prod.*, 877 F. Supp. 1380, 1385 (N.D. Cal. 1995) (case reports); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 278 (5th Cir. 1998) (temporal association); *Lynch v. Merrell-*

Nat'l Labs, 830 F.2d 1190 (1st Cir. 1987) (animal studies).

27. See *Cottle v. Superior Court (Oxnard Shores)*, 3 Cal. App. 4th 1367, 1384 (1992).

28. See *Jones v. Ortho Pharm.*

*Corp.*, 163 Cal. App. 3d, 396, 402-03 (1985).

29. *Lore v. Lone Pine Corp.*, No. L-33605-85 (N.J. Super. Ct. 1986).

30. See *Miller v. Lakeside Village Condo. Ass'n*, 1 Cal. App. 4th

1611 (1991) (limitations period in mold exposure case began running once plaintiff was aware of fungal contamination and its possible association with her allergic reactions and asthma).