

SMSM Toxic Tort Newsletter

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Edward J. McCambridge and William F. Mahoney, Editors

Segal McCambridge Singer and Mahoney
330 N. Wabash Suite 200
Chicago, IL 60611
312-645-7800 Phone
312-645-7711 Fax

Welcome.

Toxic tort litigation presents difficult and interesting new challenges. It is a field that changes at an ever-increasing rate and requires specialized knowledge to manage it effectively. We recognize it is difficult to stay abreast of the latest medical and scientific issues on a national basis. The purpose of this newsletter is to alert you to the new developments and trends in asbestos litigation and other toxic tort matters and to outline strategies and tactical options in managing the litigation. Please provide us with your comments or suggested topics that you might want discussed in future issues. We thank you for reviewing this material for us.

Mold Litigation

By: John Kohnke

MOLD LITIGATION

In a quest for the next lucrative toxic tort, the plaintiff's bar has focused attention on indoor air quality and its relationship with human health. Particular attention has been directed to mold and its effect on the indoor environment. Initially, insurers covered mold damages that were the consequence of a covered peril. As litigation in this area increases, many are rethinking their position and issuing policies which expressly eliminate coverage for any type of fungus, including mold. It remains to be seen whether these exclusions will effectively allow insurers to deny defense and indemnity. History has shown that when there is a potential source of funds, the plaintiff's bar will be inventive in fashioning claims which alleviate or circumvent coverage exclusions. Thus, in spite of the exclusions, the defense and indemnity issues remain a concern.

The explosion in mold litigation initially began with first party claims brought by policy holders against their insurance companies. In *Ballard v. Farmers Insurance Co.*, a Texas jury found the insurance company had engaged in an unfair, deceptive act or practice and awarded the plaintiffs \$32 million.

Indoor air quality litigation continues to grow at a dramatic pace for several reasons. In large part, this growth is due to the success of attorneys in collecting multi-million dollar verdicts in Texas, Delaware and California. Another reason is the seemingly unlimited potential for claims. A key element for the creation of mold and other indoor "toxins" is water seepage or moisture. The trend toward air-tight construction of buildings provides the ideal conditions for moisture retention. Mold claims are also driven by the unlimited

and vast number of potential defendants, which are viable and have not yet declared bankruptcy due to the infancy of this toxic tort. Further, disagreements in the medical community about the toxicity of mold and the lack of standards concerning how much exposure may be toxic to humans have contributed to the increase in claims.

Essentially, mold claims have been brought in two key areas. Some lawsuits center on first party claims involving bad faith and failure to respond quickly to a claim. Others seek compensation for property damage and personal injury as a result of alleged indoor pollution or more specifically mold damage. This article will focus upon the second area of lawsuits—those that concern property damage and personal injury. Specifically, the various causes of action, potential defendants, and possible defenses will be addressed.

I. BACKGROUND

It is estimated that there are 300,000 species of mold, mildew and other fungi in the environment. By definition, molds are a type of fungi located both indoor and in outdoor environments. In its proper setting mold is useful in decomposing organic waste. It is actually used in certain manufacturing processes, including the culture of certain cheeses and the development of antibiotics.

Further, under ordinary environmental conditions, mold does not pose any serious health risk. Yet, indoor environments can provide the ideal conditions for mold to grow and thrive. Mold has become a more prominent focus of attention because of the health and legal concerns stemming from indoor air quality.

Mold grows on any organic material that has a cellulose composition. Said composition can be made up of wood,

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cardboard, carpets, insulation, wallpaper, plastic, metals, ceiling tiles, concrete, cinder blocks, fiberglass insulation, ceramic tile, vinyl siding, vinyl floor tiles, linoleum, upholstered furniture, wall boards, drapes, and other material. Factors necessary for mold growth are:

- (1) Mold spores
- (2) A nutrient source (food)
- (3) Moisture
- (4) Air temperature between 40° Fahrenheit and 100° Fahrenheit.

The most critical element, for litigation purposes, is moisture. Lawsuits tend to involve defective construction or design, inadequate maintenance or specific products which allow moisture to enter and collect on a suitable nutrient source. This process is actually enhanced by today's highly-sealed and energy efficient buildings.

In general, physiological reactions are a response to three separate mold qualities: allergenic, infectious and toxigenic.

First, mold spores, or fragments of mold bodies, are allergenic; they can cause sensitization and subsequent allergic reactions to certain individuals who are susceptible. Once disturbed, mold spores become airborne. Aerosols, or small particles, of mold can be distributed by air conditioners, humidifiers or other air moving equipment located throughout a building.

Mold spores and metabolites can fragment, regardless of whether the spores are alive, and pass throughout a building. Some medical literature suggests that individuals can convert to a "sensitized state" following one or more episodes of mold exposure. In other words, repeated exposure can cause a person to develop allergic reaction to mold and be more sensitive to its presence.

Molds are frequently associated with allergic diseases such as allergic rhinitis (hay fever or asthma). They can also cause some individuals to develop various allergic respiratory diseases. Usually, those who develop respiratory problems, have a genetic history reflecting that this is an area of risk. Allergic reactions to mold can be as minor as a runny nose. Reactions can also be as severe as a life-threatening asthmatic attack. It has also been suggested that mold can worsen asthma in non-allergic individuals.

Other allergic reactions can include hypersensitivity, pneumonitis, difficulty breathing, fever, cough, chills, nausea, vomiting and loss of appetite. Some claim that mold is also capable of producing allergic dermatitis.

In addition to being allergenic, molds are also infectious. Generally those at risk of infection are individuals who have a compromised, weakened or immature immune system. Special attention is given to the pathogenic/infectious situation involving hospitalized individuals, small children and the elderly. Individuals receiving chemotherapy or other drugs which would lower their immune system may also be more susceptible to development of mold related symptoms.

Aspergillus is a type of mold that can affect an individual with a compromised immune system. Susceptible individuals can develop Aspergillus sinusitis or Aspergillus infection of the skin.

Finally, Mold is toxigenic. In other words, molds can produce toxins or poisons. Mycotoxins are toxic compounds produced by fungi. These can illicit symptoms such as fatigue, headache, eye and respiratory irritation, nausea, headaches and inability to concentrate. Fusarium Penicillium and Aspergillus are indoor molds that can develop Mycotoxin. The molds which are specifically associated with toxins include: Aspergillus, Penicillium, Cladosporium, and Stachybotrys (black mold).

Stachybotrys has gained considerable attention because it has been isolated in the indoor environment. This mold grows readily on ceiling tiles; it is also found in the air, insulation and in water-damaged buildings. Persons handling material that had been heavily contaminated with stachybotrys have been found to have symptoms of cough, nasal secretions, mouth, eye and inner nose burning and skin irritation which occurs within two or three days of handling the contaminated materials.

Other possible associations with Stachybotrys include symptoms such as sore throat, diarrhea headaches, fatigue, hair loss and leg pain. The association between Stachybotrys with any of the aforementioned symptoms, however, has not been scientifically proven.

The classification and causation of the aforementioned physiological responses is the topic and battlefield of experts. The typical plaintiff will allege a wide spectrum of physical and psychological ailments ranging from memory loss, coughing up blood, skin irritation, sore throat and various degrees of respiratory ailments. Whether or not these various ailments can or should be attributed to mold is the subject of recent controversy.

II. Claims and Litigation

Theories of Recovery

The most common third party actions brought by plaintiffs with respect to mold are for negligence, breach of contract, defective design and workmanship, professional malpractice, failure to maintain the property, strict liability, breach of warranty, workmen compensation, general products liability, fraud and statutory fraud. Plaintiffs seek compensation for property damage, personal injury, both mental and physical, infliction of emotional distress and loss of consortium.

The basis for all these claims is the allegation that some physical characteristic of the building caused higher levels of mold. Some possible allegations include water leaks, bursting pipes, improper ventilation or improper window sealing. Failing to maintain common areas on property to prevent water seepage or leakage into a building may also be alleged. Mold has been alleged to exist as a result of improper construction work or improper products resulting from gutter ice dams, roofing, flashing, pipe manufacturing and various products.

A breach of contract action is available if the insured failed to perform its contractual obligations from initial construction, maintenance, or any work on a particular building. Additional recovery theories which are contractual in nature include: warranty, breach of implied warranty and breach of an express written warranty. These theories of recovery can be brought against direct manufacturers for roofing shingles, siding, stucco, windows, doors, etc. The aforementioned theories can be utilized against any product manufacturer or distributor with respect to consumer products utilized as building material.

Negligence actions would be available due to improper construction, supervision, maintenance or any work on a structure. Negligence actions are also available in mold cases if the remediation was undertaken and not done properly. Such claims are generally brought on a third party basis after the original claim has been brought for the creation of the mold.

Common law fraud and fraud pursuant to various statutes including the Illinois Consumer Fraud & Deceptive Business Practices Act are alleged if any representations had been made with respect to the work to be performed by the insured. This Act was designed to protect consumers against fraud, unfair methods of competition, and unfair or deceptive acts or practices in a trade or business. The statute encompasses all areas of products liability and sales with regard to construction products. These theories allow for punitive damages as well as contain a legal fee shifting provision.

Potential Defendants

There are many potential defendants in mold litigation. Construction trades, such as architects, plumbers, roofers, window installers, insulators and various levels of contractors will be accused of faulty design and workmanship. All theories of recovery against the aforementioned defendants will allege that their conduct allowed for growth of mold in an indoor environment which was in close proximity to plaintiffs; they were injured and the defendants' conduct/product/breach was the proximate cause of plaintiffs' injuries.

Premises owners, as well as premises managers, will be accused of negligent maintenance of the property in failing to identify the problem, properly maintain the premises or remedy an existing problem. Generally, it is claimed that this negligence led to the initial creation or growth of mold, thereby exposing plaintiffs to the mold condition.

Newspapers and magazines frequently run stories about schools, colleges and universities indicating mold was discovered in the dormitories, hallways or other areas of education. Public school districts, colleges and universities may be held liable for failure to maintain the schools in a manner which would avoid exposing students to potential toxins. The school districts, universities and colleges, in turn, will look to contractors, architects and other tradesmen for initial causation of the mold on the premises.

Manufacturers of building components, including heating and ventilation systems, windows, doors, siding, stucco and environmental barriers will be named as defendants. It can be alleged that the equipment or manufacturing process was responsible for releasing mold spores into the atmosphere or enhancing the creation of mold spores in the indoor environment. Manufacturers can also be accused of failing to provide adequate warnings about products that allegedly increase the risk of mold.

With respect to remediation or employment situations the list of defendants extends to protective equipment worn by plaintiffs even when the existence of mold had been known by plaintiff or the property owner. A plaintiff can demonstrate that the breathing equipment or other safety equipment utilized by an individual failed to protect individuals from breathing in mold spores.

Finally, the list of potential defendants extends to prior owners of buildings, real estate agents involved in the sales transaction, home inspectors or any other individuals involved in the sale of a home or commercial building. These potential defendants may be subject to liability for failing to discover or disclose a defect in the property, such as the existence or potential for the existence of mold spores. Every school, hotel, health club, gymnasium, resort, theater, restaurant, convention center, casino, or guest facility could be a potential target—as long as it can be shown that mold existed within the facility and the plaintiff was in proximity to the mold for a sufficient length of time to become overly exposed to mold spores.

As you can see, there is a striking resemblance to the list of potential defendants as seen in existing asbestos litigation. Fortunately, there are many defenses available to the aforementioned potential defendants, including the absence of evidence proving the causal connection between mold exposure and people becoming sick. At the present time there is no known test, blood test, x-ray, pathology study or evidence to demonstrate an individual's exposure to mold spores. Absence of scientific evidence in support, however, has not deterred the plaintiff's bar. While a scientific standard of proof is considered to be greater than 95%, the legal standard to present such evidence to a jury is a mere preponderance of the evidence. Therefore, significant defenses should be raised by motion before the court rather than a factual defense before a jury.

III. DEFENSES

Typically, a plaintiff's claim in a mold lawsuit can be fought on two fronts. The first front involves the facts relating to construction, construction, maintenance, and product condition. The second front is medical causation. The medical causation issues tend to be unique to mold litigation and are often the subject of courtroom battles. If causation is not shown, the court can dispose of plaintiffs' entire suit during the motion stage of a lawsuit rather than at trial.

Factual Issues

With respect to the factual issues, buildings should be viewed as an environmental envelope designed to keep out moisture and maintain a constant dry environment. As addressed earlier, mold spores need four elements to flourish within the building environment: mold spores, a nutrient source, moisture and an air temperature within a specified range. Of the four elements, the most common cause for the excessive creation of mold, as well as its remediation, is moisture. Investigation must be undertaken to determine how humidity/moisture breached the building envelope, thereby allowing the creation of excessive mold. Remember, mold is a natural element and has existed both inside and outside of buildings since the beginning of time. Plaintiff's counsel must prove excessive toxic mold existed within a particular structure, the product or conduct of the defendant created excessive toxic mold, the mold was in close proximity to plaintiff and it actually caused the claimed injuries or property damage.

Initial Discovery

Typically, plaintiffs will seek compensation for physical injuries, inconvenience and property damages. Written interrogatories, document production and questions through depositions should be tailored to determine the physical structure of the building, as well as the history of the building's construction, renovation, and maintenance.

Basic concepts including geographic locations must be explored. Mold spores need moisture to grow and any home located in a flood plain or near a body of water would be more likely to spawn mold than a home located in a dry climate. With respect to home exposure, relevant inquiries include when the home was built, who designed and constructed the home, and who occupied the home from its construction up through plaintiffs first notice of any alleged symptoms or discovery of property damage. Questions should be asked with respect to use of equipment in the homes such as sump pumps, drains, dehumidifiers, air filters, heating and

cooling systems. These areas need to be explored, not only with respect to the source of the moisture, but also to determine the delivery system by which mold spores potentially became airborne and spread throughout the home or building.

Discovery should also concern the condition and age of windows, roofs, insulation, and basement leakage.

Further, any remodeling or renovation work performed in the building, when the work was done and whether the home was inspected for water leaks needs to be explored. Frequently, both commercial and residential property purchasers retain a home inspector or building inspector prior to the purchase of the property. Inquiries should be made with respect to all inspections to determine whether any evidence of moisture or mold spores was discovered when plaintiff originally purchased the property. Such evidence would be relevant to several issues: statute of limitations, statute of repose, and possible evidentiary information concerning plaintiff's attempts to remediate moisture problems.

If facts demonstrate a prior pipe burst, roof leak, or water in the basement, questions should be raised as to whether these areas were carpeted and who performed any clean-up subsequent to the flooding or water damage. Frequently, hot water heaters burst, a toilet overflows or a home may experience a sewer back-up. It is important to determine whether landlords, homeowners and commercial property owners took appropriate measures to adequately remedy moisture problems. If these individuals are the claimants in an action, this information will prove critical to demonstrating their comparative negligence or their conduct as the sole proximate cause of the mold.

With respect to commercial property it is imperative that an inquiry be made with respect to the history of the building, including obtaining a complete copy of the building's blueprints and the "as built" plans. These plans must include the heating, ventilation/air conditioning system (HVAC), as well as any type of maintenance indoor environmental air zoning. All documents concerning maintenance and operation of records must be preserved, reviewed and compared to the HVAC's zones.

In cases involving commercial or multi-residential dwelling, it is also important to investigate prior complaints by tenants or building workers.

Significantly, mold can actually begin forming on products prior to construction. This can occur when dry wall is stored in high humidity or exposed to rain prior to installation. Therefore, a review of the building's history should include information about products and how they were stored before installation.

On-site Inspections

Invariably, a personal inspection of the premises is necessary and will require retention of consulting experts. The initial background investigation will determine the type of consulting expert which should be retained for on-site investigations, sampling or testing.

Initially, the cause of the alleged mold problem should be identified. Mold can grow in buildings due to unplanned moisture intrusion. This is caused by architectural design problems--improper gutter design, HVAC system, vapor barriers, or air zoning. A second way moisture can enter a building is through a mechanical pathway. This could include construction and material failures, aging, missing or defective seals, thermal bridges, or any material which promotes excessive moisture.

Mold is also caused by humidity which is not being removed from a building or humidity which is actually being forced into a building through unplanned air flow. Unplanned pathways can include electrical sockets and light switches. Exterior moisture barriers like stucco, aluminum siding, roofing, flashing can allow moisture to enter a building, but prohibit its escape.

Generally, an investigation would include retaining a ventilation engineer or HVAC expert. Industrial hygienists are frequently used for non-residential settings, including commercial facilities and multiple residential units. These individuals are multi-faceted with respect to examination of the structure, review of complaints and utilization of historic documents relative to the building in question.

With respect to smaller units, an industrial hygienist could be used. Depending upon the nature of the problem, however, a properly certified home inspector can be used in the investigative process to assist in the detection and possible remediation of any mold problems.

Once the possible causes have been identified, the presence of mold, past or present, needs to be confirmed. Additional experts that may be used in this phase of discovery include architects or experts on design and utilization of windows. Soil, plumbing and mechanical engineers can also be used in the preparation of a defense.

Physical probes may be necessary in order to ascertain the existence of mold and mold spores behind dry wall in air handlers or air conveyance systems, garbage chutes or plumbing facilities. Evidence may demonstrate the existence of mold in a particular area. Physical probing, however, may be needed to determine the exact nature and extent of the mold situation.

If mold is found, this investigation will also assist in determining the precise cause of the excess moisture and assessing responsibility for the actual problem. As in most lawsuits, many are sued but few may have actual responsibility for the mold condition.

A determination must be made with respect to documentation. Should photographs be taken and should sampling be performed? As with other litigation, a good rule of thumb is whether what is depicted in the photograph will assist or harm the situation. If the items depicted in the photograph will not be helpful with respect to any claim or litigation, then it is recommended that no photographs be taken.

Sampling or Testing

Generally, sampling is recommended when there is a definite mold source and mold which is readily observable and prominent. This process assists in determining the source, type of mold, the amount of moisture in a particular area and the possible duration of the mold problem. It is also a potential tool for assessing of health risks.

Unfortunately, there is no medical consensus on what is considered a “safe” level of mold. The absence of definitive standards means that sampling can’t prove the safety of a given situation. Realistically, this process will always reveal some level of mold and mold spores in the air; no building or area tested will be “safe” per se. Lab measurements taken through sampling will confirm the existence of mold and mold spores. But, they will not provide direct support for the defendant’s position.

Sampling can assist in identifying the type of mold present in a building. There is, however, a great deal of controversy about the accuracy of mold identification. There are sound arguments which seriously question the accuracy of mold identification. These arguments are particularly effective when the plaintiff’s sample demonstrates the existence of *Aspergillus*, *Penicillium* and other “harmful” mold species.

Sampling should be done by a properly certified technician and in more areas than those complained of by the plaintiff. Samples should be taken in other areas of the building, including outdoor areas. This allows for comparison between the areas which are the subject of the lawsuit and the immediate “natural” area.

Additionally, sufficient sampling must be taken in order to ascertain or eliminate intermittent and natural mold which may occur in a particular building. Mold has a growth period and can become dormant at various points in time. If a sampling is done during a non-dormant period, or when some activity is occurring in the building which would make the mold spores more prominent in the sampled area, the sample would not reflect accurate results of possible exposure to the plaintiff.

Various methods which are utilized in sampling include the general category of bulk material samples. This can be done through a tape lift, a swab, a dust/vacuum or the actual taking of the growth material which contains the mold sample. Air samples include ambient or wall cavity air where an air sample taken of the general and particular area where plaintiff may have been exposed.

With any form of sampling, extra care must be taken with respect to spoliation of evidence. Additionally, in litigation circumstances it can be difficult to obtain samples without first notifying plaintiff’s counsel or a co-defendant of your presence and testing of a particular area. Therefore, the utilization of a “consulting expert” would be difficult without disclosure.

Regulatory Guidelines

Presently, few regulatory guidelines exist which set forth the types or levels of mold which are considered safe or acceptable in an indoor environment. Several states and governmental agencies are in the process of creating such guidelines.

Standards and guidelines, however, have been developed with respect to remediation of mold conditions. These guidelines, however, are vague and are in their developmental stage. For example, the Center for Disease Control & Prevention in Atlanta states

that most molds can be removed by cleaning thoroughly with bleach and water. Further, they suggest removing carpets where mold is growing and once mold starts to grow in insulation or wallboard it should be removed.

The New York City Health Department has developed more extensive governmental guidelines for mold remediation. The New York City Health Department suggests that anyone who cleans mold should be free of symptoms and allergies prior to mold remediation. Further, it states that the area of ten square feet or less could be cleaned by individuals without specialized training. Said individuals, however, should be wearing a disposable respirator and eye protection. In addition to the general reference regarding remediation the New York City Health Department also created a document entitled *Guidelines on the Assessment and Remediation of Fungi in Indoor Environments* published in 2000 which does address mold contamination of building components.

The Environmental Protection Agency has recently issued guidelines with respect to mold remediation. Its most recent guideline, *Mold Remediation in Schools & Public Buildings*, was published in March 2001 and deals with the prevention and evaluation of mold problems. This guideline discusses remediation approaches based upon the size of the area and location of the mold. Further, this particular guideline deals with sampling and monitoring of air quality and discusses the situations where health professionals may need to be contacted. One EPA publication, entitled *Indoor Air Quality Tools for Schools*, contains a section dealing with professional assistance and evaluating potential consultants. There are additional documents not authored by a governmental body which can be utilized by experts in regard to mold evaluation. *Bioaerosols-Assessment & Control*, published in 1999 by the American Conference of Governmental Industrial Hygienists, sets forth guidelines for assessing mold conditions.

Additionally, remediation contractors have developed a trade association which is developing standards for remediation: The Institute of Inspection, Cleaning & Restoration Certification published in 1999 in the S-500 Standard & Professional Water Damage Restoration, Second Edition.

The American Society of Heating, Refrigerating & Air Conditioning Engineers developed a standard in 1989 addressing air management and cleaning which was intended to be used to achieve acceptable indoor air quality. This Society also defines acceptable air quality, which is dependent upon the minimum indoor air-quality standard set by governmental agencies.

In 1994 the Occupational Safety & Health Administration proposed regulations addressed indoor air quality in the workplace. These particular provisions, however, have not been finalized at this time.

Finally, this particular area of occupational health and safety is developing at a rapid rate. All local and state codes with respect to indoor air quality should be checked on a regular basis to determine if any standards or thresholds are being considered or have passed. These standards may relate to mold claims in a general fashion or may specifically address mold levels.

The absence of such standards has proven frustrating to schools and school districts with respect to remediation. No one is quite sure what level must be achieved before students are let back into a school. The U.S. Environmental Protection Agency has not set forth any standards outlining the safe levels of mold exposure, but it does state that any mold should be eliminated particularly in school buildings. As of this writing, such determinations are generally left to a health inspector retained by the state and consulted with by the mold and remediation company.

The following includes information available on the web with respect to various governmental agencies and indoor air quality.

- The California Department of Health has published guidelines and indoor air quality at www.cal-iaq.org.
- The Department's Indoor Air Quality Info Sheet can be found at www.dhs.ca.gov/dcdc/disb/pdf/mldfaqpp.pdf
- ASHRAE Standard 62-1989
- EPA, Building Air Quality: A Guide for Building Owners and Facility Managers.
- Federal Register, Vol. 56 No. 185
- World Health Organization Committee Report
- ISIAQ 1996- Control of Moisture Problems Affecting Biological Indoor Quality.
- ACGIH 1999- Bioaerosols: Assessment and Control
- EPA "Mold Remediation in Schools and Commercial Buildings" (March 2001)
- New York City Department of Health. Guidelines on Assessment and Remediation of Fungi in Indoor Environments. Available at: www.nyc.gov/html/doh/html/epi/moldrpt.html

The Minnesota Department of Health has facts sheets addressing mold issues including one on managing water infiltration into buildings and remediation: www.health.state.mn.us/divs/eh/indoorair/index.html.

The Environmental Protection Agency has developed guidelines that address mold problems in schools, commercial buildings and homes. For more information see *Mold Remediation in Schools & Public Buildings* (www.epa.gov/iaq/molds/index.html), *Biological Pollutants in Your Home* (www.epa.gov/iaq/pubs/bio_1.html); *Tools for Schools* (www.epa.gov/iaq/schools); and *Indoor Air Quality in Large Buildings* (www.epa.gov/iaq/largebllds).

The New York City Department of Health & The City's Human Resources Administration had published *Guidelines on the Assessment & Remediation of Fungi in Indoor Environments* (www.ci.nyc.ny.us/html/doh/html/epi/moldrpt1.html).

In an attempt to deal with the increase in mold issues and claims, various states and governmental entities have undertaken studies and appointed committees to investigate and set standards. In California, the state legislator passed the California Toxic Mold Protection Act of 2001. This Act empowered a task force to deal with several topics including creation of permissible exposure limits to mold; standards for hospitals, childcare facilities and nursing homes as well as standards for identification of mold and mold remediation.

At the federal level, a bill called the US Toxic Mold Safety Protection Act of 2002 may result in thresholds for mold exposure and a recording system for mold complaints. This federal bill attempts to create a threshold for mold exposure, tracking mold reported exposures and adding mold inspections to the list of other items which are required for multi-use residential properties using federal funds for lease or purchase.

Medical Causation

Assuming plaintiff's counsel can prove the existence of mold, that the plaintiff was working or living in an area in close proximity to the mold, and that any conduct or product by the defendant may have caused or contributed to the existence of said mold, plaintiff has the additional burden proving causation of a physical injury.

There are few medical reports actually linking a claimed exposure in an occupational or residential setting to a permanent illness. This link has only been found in situations involving very high levels of exposure.

Most plaintiffs in mold exposure cases do not have symptoms which are uniquely caused by mold. Therefore, plaintiff must rule out other causes such as mites, pollen or other allergens. Additionally, as mold is common in the environment, plaintiff must demonstrate that the mold found at the home or building where plaintiff had worked was of a type and at such a level as to rule out other causes.

A typical approach used by the plaintiff's bar is to find a group of individuals who have not had any major symptoms prior to exposure. However, after this group had been exposed to a particular building, home or area, a majority or significant number have experienced allergic responses to a particular identified contaminant.

There are twenty thousand species of mold and mold spores present in virtually every breath an individual takes. Usually, it does not pose any problem, as they are harmless. As with other exposures, however, an excessive quantity of mold spores can produce an allergic reaction in a person with allergies. Evidence from the National Heart Lung & Blood Institute demonstrates that one out of five Americans suffer from an allergic disease. Allergic responses from excessive quantity of mold can typically include mucous membrane irritation or upper respiratory congestion. Again, there are no known tools to diagnose mold exposure in an individual. Reports have been prepared concerning hypersensitivity pneumonitis subsequent to exposure to particular types of mold, including *Penicillium* and *Aspergillus fumigatus*. Yet, these reports involve exposures at high levels.

In an attempt to get around the absence of scientific evidence, experts utilized by plaintiff's bar rely upon presentations involving reports from other countries addressing military use of any urotoxin developed from several mold species.

It is difficult in an individual case to present evidence about a particular species of mycotoxin existing in a residential or commercial environment. Further, in an individual case it is rare that there is evidence as to actual exposure to a mycotoxin. It would be unusual or unexpected for plaintiff to produce testimony about the existence of mycotoxins and its threshold levels for the claimed injury. Based upon the aforementioned, the primary defense is based upon the application of *Daubert v. Merrell Dow Pharmaceuticals* and its state-related decisions and exclude plaintiff's attempt to scientifically link specific symptoms to the existence of mold.

Despite the absence of solid scientific research, many treating physicians will render an opinion that mold and mold spores played some role in causing a particular physical condition based solely upon the history given by plaintiff. In a typical fact situation, the physician will find the plaintiff had limited or no symptoms before being exposed to a building where the mold was subsequently discovered. Prior to the discovery of said mold, plaintiff, along with a group of others, developed symptoms which had not previously existed. Therefore, treating physicians generally opine that they believe the mold or mold spores may have caused or contributed to the condition complained of by plaintiff. Alleged cardiopulmonary injuries claimed to have been brought on by exposure to mold have included asthma, cough, dyspnea (difficulty breathing), hemoptysis, nasal stiffness, nose bleed, pulmonary hemorrhaging, sensitivity to odors or chemicals, sinusitis, shortness of breath, sore throat, wheezing, as well as hay fever or cold or “flu-like” symptoms.

The evaluation of the aforementioned systems can be difficult as these complaints are common, vague and non-specific. A key to evaluating a plaintiff or a group of plaintiff's is the history and physical examination set forth in the plaintiff's medical records. Additionally, questions asked during a plaintiff's discovery deposition are crucial in revealing the history of the same or similar medical problems. This can demonstrate that the source of plaintiff's symptoms is not the result of exposure to mold. Rather, the records can a history of sensitivity to a particular substance.

In dealing with a group of individuals it is best to categorize all plaintiffs by the type of complaints. The complaint should be categorized by severity, ranging from mild reactions--mild allergies, runny nose, or a mild skin rash to severe reactions—psychiatric problems or memory loss. Each group of plaintiffs then can be dealt with in a similar fashion with respect to retention of independent medical or psychological experts. It is not uncommon to find that individuals claiming memory loss or psychiatric disorders have a history of similar complaints made prior to the alleged exposure. Additionally, individuals with mild symptoms generally have a history of allergies or sensitivity to environmental conditions which may or may not have included mold.

For defense counsel, the history and physical examination set forth in the medical records represents a starting point for medical discovery. Interrogatories should be directed to the plaintiff listing all health care providers who have performed medical evaluations and rendered treatment. Follow-up investigation should be conducted concerning relevant hospital admission and discharge summaries, tests and other medical examinations.

Defense counsel cannot rely upon medical records provided by plaintiff's counsel. Rather, it is necessary to subpoena medical records from every treating physician or doctor identified in the records for several years prior to the incident which is the subject of the complaint. Information may be contained in those records which indicate a problem that plaintiff failed to mention or had forgotten.

A chronological list of events should be assembled regarding each mold-associated medical allegation tracing exposure to symptom manifestation. This list is necessary to depose plaintiff and plaintiff's expert in testing or contradicting direct relationship theories between the present mold exposure and the onset of medical symptoms.

These medical records are important in determining whether the complaints made by plaintiff reveal a chronic or acute problem. An acute condition will manifest itself in 4 to 6 hours after exposure. An exception is asthma, which generally manifests itself immediately upon exposure to mold/mold spores. A chronic condition, however, is not related to any acute episodes and is considered more of a permanent condition. A history of acute episodes would reflect that particular symptoms manifest themselves in certain, specific situations. For instance, the plaintiff would experience symptoms at home, but not when they are on vacation or visiting someone else's home for an extended period of time.

A history should also be obtained from plaintiff, through medical records or through deposition concerning plaintiff's exposure to pets, carpeting, and past allergic tests or complaints of past symptoms described as flu or cold-like symptoms. Frequently, individuals are allergic to pets, dander, or hair in general; these allergies manifest themselves in a similar fashion to allergies to fungi or mold spores. Mold and other fungi are also commonly associated with soil, wet leaves, hay or landscaping. Thus, it is important to ask about gardening, farming or other outdoor activities that might have exposed the plaintiff to these conditions.

Additional questions to ask the plaintiff might involve past complaints or any testing for allergies. Relevant inquiries may also include the types of allergies when he or she became symptomatic, the specific symptoms and prior treatment.

It is important to determine if plaintiffs ever underwent tests to determine the source of their allergies. What reactions occurred as a result of prior allergies, including the physical manifestations? Further, questions should be asked regarding any medical history of past infections, irritations, pulmonary disorders or respiratory problems.

Complaints are frequently made to treating physicians that have no basis in the medical history provided by plaintiff. Treating physicians will note the complaint, but indicate they are not aware of any known cause. Even if the plaintiff was asymptomatic prior to mold exposure, a treating physician would have a difficult time linking some of the symptoms to mold, while claiming that several of the others resulted from an unknown cause. This is evidence of hypersensitivity or imagination rather than scientific causation.

Finally, investigation should be made concerning any family members, co-workers, or other individuals exposed to the alleged mold and whether they complained of the same disorders as plaintiff. If others do not complain of similar symptoms, defense counsel may wish to question these individuals further and attempt to utilize this evidence at trial. Plaintiff's counsel will normally need to allege exposure to a high level of mold in order to meet his burden of proof. However, the extreme level would scientifically cause all individuals to experience problems. If evidence demonstrates others are not experiencing problems, it would support the contention that levels may not be sufficiently extreme.

CONCLUSION

Mold litigation is the next attempt by plaintiff's bar to recreate "asbestos-like" litigation in the toxic tort area. It is rapidly evolving on several fronts, including policy coverage, federal and state standards for safe level of exposure, as well as on the medical front with respect to diagnosis and cause. Mold litigation involves elements of classic personal injury and property claims based upon theories of negligence, strict liability, contract and warranty. Mold litigation also has many elements which had previously been addressed in asbestos litigation and latex glove litigation, relating to exposure, species, and causation based upon the exposure.

The initial handling of these claims and lawsuits will determine whether it becomes an unprofitable venture for the plaintiff's bar or whether it will become the next mass toxic tort.

John J. Kohnke, received his Juris Doctor degree from Drake University Law School in 1984, after receiving a Bachelor of Arts degree, with honors, from Drake University in 1981. During law school, he served on the Law Review, the Moot Court Board, and as a legal assistant for Iowa Appellate Court Justice, Alan Donielson.

Mr. Kohnke practiced with Knight, Hoppe, Fanning & Knight, Ltd., for 15 years. He became a partner with this firm in 1992 and served as the Managing Partner of its Glen Ellyn office. In 1999, Mr. Kohnke joined Segal McCambridge Singer & Mahoney, Ltd.

Mr. Kohnke specializes in insurance and defense litigation matters. He has substantial experience in the defense of cases involving premises liability, automobile liability municipal liability and products liability. He also handles matters involving construction claims, and general tort cases. Many of his cases have involved claims for significant damages resulting from death, brain damage, neurological injury, paralysis and other serious injuries.

Mr. Kohnke has authored several articles in his area of practice including: "*The Abolishment of Joint Liability and its Effect on the Right of Contribution*", published in the October 1996 issue of D.C.B.A., Brief, Journal of the DuPage County Bar Association, "*The Contributory Negligence Doctrine and Maintenance of Municipal Property*" appeared in the July 1994 issue of The Illinois Bar Journal.

Mr. Kohnke is a member of the American Bar Association, the DuPage County Bar Association and the Defense Research Institute. He is also a member of the Illinois Bar Association, where he is an insurance law committee member. Additionally, he serves as an arbitrator in both Cook and DuPage Counties.

Mr. Kohnke is currently a trustee on the Glen Ellyn Village Board. He is also the board liaison for several village committees. He resides in Glen Ellyn, Illinois with his wife and two children.

Segal McCambridge Singer & Mahoney, Ltd. was founded in 1986 and has grown to having offices in Chicago, Illinois, Austin, Texas, Philadelphia, Pennsylvania, Princeton, New Jersey, Brighton, Michigan, New York, New York and Baltimore, Maryland. It represents a wide variety of clients in products liability, medical malpractice, professional liability, municipal and public officer liability, construction litigation, general defense and toxic tort defense. The founding partners' experience in toxic tort cases dates back to the 1970's in pesticide and asbestos litigation. Today, the firm acts as national coordinating counsel in asbestos litigation to numerous companies including Garlock, Anchor Packing, Congoleum, Weil-McLain, Durametall, DAP and Chicago Fire Brick. The firm also acts as national trial counsel for these and others in asbestos litigation. The philosophy of Segal McCambridge Singer & Mahoney, Ltd. has remained the same since its inception: provide state-of-the-art legal services with an extraordinary level of responsiveness and personalized attention to each client and each case.

ANNOUNCEMENT

Effective May 1, 2003 Segal McCambridge Singer & Mahoney LTD has expanded its presence in the East. David Weinberg (admitted in New Jersey, Pennsylvania, Maryland and numerous U.S. district courts) John Turlik (admitted in Pennsylvania, Ohio, Maryland, and numerous U.S. district courts and Bob Connor (admitted in Pennsylvania, New Jersey, New York, Maryland and numerous other U.S. district courts) have joined SMSM as Partners. Ted Eder (Admitted New York) Thomas Bernier (admitted Maryland, numerous U.S. district courts) Bob Coleman (admitted Pennsylvania and numerous U.S. district courts) Lisa Wildstein (admitted in New Jersey, Florida and numerous U.S. district courts) and Bud Sullivan (admitted Maryland) have joined the firm as associates. These experienced trial attorneys in toxic tort litigation strengthen the SMSM offices in Philadelphia and New Jersey and add offices in New York City and Baltimore to the SMSM presence in the East.