

# LEGAL ALERT

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## CLIENT ALERT: TOXIC MOLD CLAIMS

*Edited by: Douglas G. Powe, RN, JD and Gary A. Rowe, JR*

Claims resulting in toxic mold litigation are being made by individuals who, following exposure to molds, assert that they have been personally injured. Such injuries may take the form of an allergic reaction, hypersensitivity or respiratory ailments such as asthma or pneumonitis. Others may claim injury to their central nervous system which in turn leads to memory loss, headaches, cognitive changes and mood swings. Still others, with an already weakened immune system, may allege that mold exposures have made them even more susceptible to certain infections such as *Aspergillus fumigatus* or *trichoderma*. In addition to the personal injury claims, a number of claims are being made as a result of damage to property and against insurance companies for alleged "bad faith" in declining coverage for damages that stem from mold exposure.

Molds are part of the fungi family that live on plant or animal matter. The number of different species of fungi (or mold) is estimated to range from tens of thousands to perhaps three hundred thousand or more.<sup>1</sup> Molds produce spores in order to reproduce. Molds are found in nearly every environment, both indoors and outdoors, and the growth of molds is encouraged by warm, moist conditions.<sup>2</sup> When mold spores are situated on a damp surface, they may grow and digest whatever they are growing on in order to survive. Molds commonly grow on wood, paper, carpet and food, especially in the presence of excessive moisture.<sup>3</sup> Molds can produce allergens that in turn can cause allergic reactions and health problems to sensitive individuals.

The more common claims for toxic mold injury include the following:

<sup>1</sup> Taken from the National Center for Environmental Health, Centers for Disease Control and Prevention, Air and Respiratory Health Branch, p. 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> U.S. Environmental Protection Agency, Indoor Environments Division, p. 1.

- Property owners (including individual owners, apartment owners, commercial building owners, school districts, governmental entities) against building contractors (who oftentimes then sue their sub-contractors, architects, landscape engineers, etc.) for construction defects when moisture accumulates in the building as a result of poor moisture sealing and/or poor drainage;
- Tenants against landlords for personal injury and damage to personal property;
- Condominium owners against condominium associations, developers and builders; and
- Insureds against insurance companies for alleged failure to provide coverage or "insurance bad faith."

The more common defendants to these actions include property owners, construction builders, landlords, architects, landscape engineers, real estate brokers and agents, property inspectors and insurance companies.

In general, a party to a toxic mold case or potential case will want to address whether a statute of limitations is applicable. This, of course, will depend on the theory of liability (*i.e.*, breach of contract, breach of warranty, negligence, etc.) that is being alleged by the plaintiff. In addition, a causation must be evaluated with regard to a defendant or potential defendant, *i.e.*, a particular defendant is not the cause for moisture accumulation in a building or the plaintiff's symptoms are unrelated to the presence of mold. It should also be noted that there may be difficulty in qualifying an expert to testify that an individual's personal injuries are or are not causally related to the presence of mold in a particular setting. This is especially true in light of the requirements set forth by the Michigan Rules of Evidence (702) and/or the Federal Rules of Evidence (702), as such rules pertain to expert witness qualifications.

## CASE SUMMARIES

In *New Haverford Partnership v Stroot*, 772 A.2d 792 (2001), the Delaware Supreme Court upheld a \$1.04 million award to two women who claimed that their landlord failed to address water leaks and mold problems which in turn caused them to experience asthma attacks and other health problems. Allegedly, one tenant was forced to seek emergency room treatment on seven occasions for asthmatic attacks while living in the apartment in question which had a "strong, nauseating odor" and a ceiling that was covered with "black, green, orange and white mold".

In *Freeman v Massachusetts Institute of Technology*, 2000 WL 1473577, Mass. Super., 2000, the plaintiff brought a wrongful death action after her son died from respiratory complications secondary to severe asthma. The plaintiff alleged that said respiratory problems were directly related to the presence of mold and bacteria in her apartment following "numerous episodes of severe flooding".

In *Club at Wood Ranch v Roberts Group*, No. 21522 (Ventura County, California, Superior Court), a homeowners group settled a toxic mold case against

builders and contractors for \$1.3 million. (October, 2001).

In *Gifford v Matejka*, Wash. App. Div. 2, 2001, the appellate court reversed the trial court's decision for summary judgment in defendants' favor. In summary, the plaintiff alleged that the defendants falsely misrepresented that bleach stains on the walls and carpeting of the house sold by the defendants were from children's markings and not mold or mildew. The court further stated that the plaintiff presented sufficient evidence that her flu-like symptoms, cognitive problems, and her inability to perform simple daily tasks were related to mold exposure in her home.

## CONCLUSION

Toxic mold claims involve a number of strategic, complex processes that range from the retention of specific experts identifying all potentially responsible persons or entities. As a firm with experienced litigators who have handled and are handling complex litigation, Smith Haughey Rice & Roegge is prepared to defend the interests of those clients who may find themselves on the receiving end of a toxic mold case.

## MOLD: WHAT A MESS

*By: Aileen M. Leipprandt*

What's the fuss about? Water intrusion can cause insidious damage far beyond the annoyance of wet drywall or carpeting -- the growth of mold. Some indoor molds produce extremely potent toxins and have been the basis for prolific lawsuits. "Sick building" claims are likened to asbestos litigation, the longest-running mass litigation in U.S. history. Unlike asbestos, mold is a natural toxin and is not going away. Personal injury claims by occupants of government buildings, schools and apartments are growing. In fact, Kent County's 63rd District Court was forced to abandon its building because of airborne toxins. Owners are renovating that building at a cost of \$700,000.

How is the construction industry affected? Mold requires two things to grow: moisture and food. Construction materials, such as OSB, ceiling tiles, carpet, insulation and gypsum wallboard, contain the type of "food" that cultivates mold. During construction, moisture can penetrate a structure if the structure is not properly protected or work is not properly sequenced. Construction defects such as drainage problems, unsealed brickwork, flashing defects at windows,

exterior doors, and roofs, improperly adjusted underground sprinkler systems, poorly designed ventilation systems, and inadequate roof drains, can cause moisture problems. Plaintiff attorneys argue that today's tightly-constructed buildings prevent effective drying of wet building materials.

What are the insurance ramifications? The insurance industry and courts are struggling with insurance coverage issues. Insurance carriers have argued that various exclusions in commercial general liability policies provide a basis to deny coverage for mold related personal injury claims and remediation costs. Courts have reached inconsistent conclusions. To conclusively eliminate coverage, insurers are now adopting "mold exclusion" endorsements. While some carriers may develop new insurance products to provide coverage, that coverage may be limited or may come with a dramatic impact upon premium.

Will the risk be shifted elsewhere? Associated General Contractors Mold Litigation Task Force is preparing a position paper to address owner expectations and contractual requirements. Not surprisingly, owners may

require contractors to indemnify owners for mold-related claims and remediation costs, and, similarly, contractors may require the same of subcontractors. Renovation contracts, previously silent on mold, may now assign responsibility for inspection and remediation of mold.

What's coming down the pike? The U.S. Toxic Mold Safety and Protection Act, introduced by John Conyers (D-Michigan), is in committee. The Bill directs the EPA to report on its progress developing mold exposure limits and remediation guidelines. The Bill requires mold inspections for multi-unit residential property and for all property that is purchased or leased using federally guaranteed funds. The Bill also requires mold inspections in public housing and requires, to the extent possible, that local jurisdictions modify building codes to minimize mold hazards in new construction.

Michigan has joined the regulatory fray. Earlier this year Senator Thomas introduced a Bill amending the Seller's Disclosure Act and a Bill creating the Toxic Mold Disclosure Act. These Bills require sellers to disclose the presence of mold. In January, representatives introduced a Bill amending the Public Health Code to create the "Toxic Mold Protection Act." This Bill creates a task force to establish permissible exposure limits to mold, adopt standards to assess health threats posed by mold, and adopt guidelines for identifying and remediating mold. The Bill applies to residential, commercial and industrial buildings.

Mold is a prolific building pest. Large jury verdicts, costly remediation and public awareness will likely compel improvement in the design of building products and the design, construction and maintenance of buildings. While proposed legislation attempts to address mold panic, it may be a long and bumpy ride.

## MOLD AND THE LANDLORD-TENANT RELATIONSHIP

*By: Robert W. Parker*

*The presence of toxic molds in rental property is not an uncommon occurrence. However upon the discovery of mold, each parties' rights and responsibilities are significantly different depending upon whether the leased property is residential or commercial.*

### COMMERCIAL LEASES

In the commercial lease setting, the landlord has no implied duty to repair or maintain the premises. As a result, the tenant's obligation to pay rent is not dependent upon the premises being fit for occupancy. Translation: If mold is discovered, the landlord generally has no duty to remedy the situation and the tenant must continue to pay rent, even if the premises may, in the tenant's opinion, be unfit. This can present a real dilemma for the commercial tenant. What about the tenant's obligations to its employees and customers? The tenant is faced with two courses of action, neither of which is acceptable; clean up the contamination itself, at considerable expense, or move from the property and face the prospect of having to continue to pay rent.

The only exceptions to this general rule occur when the landlord has retained possession or control over a portion of the premises or if the lease agreement obligates the landlord to keep the premises fit. Where the landlord has retained control of a portion of the premises, there is an implied obligation to employ reasonable diligence to keep the portions over which it has retained control in good condition and repair. Let's hope that portion is the basement, where the mold is located. Additionally the landlord may have obligated

itself maintain and repair common areas in the lease. In that instance, if the mold is located in those areas, it's the landlord's obligation to clean things up. Although the promise to pay rent is not dependent upon the landlords promise to maintain the premises, (the legal term is that the covenants are not *mutually dependent*), the landlord does promise, provided the rent is paid, to provide the tenant with *quiet enjoyment* of the premises. Acts of the landlord which might constitute *constructive eviction*, will constitute a breach of the *covenant of quiet enjoyment*.

The moral of the story is that both the landlord and the tenant are well served by an attorney's review of their commercial leases, prior to execution.

### RESIDENTIAL LEASES

The rules in the residential setting are different. Implied within each residential lease is a covenant to keep the property in reasonable repair and to comply with applicable health and safety laws during the term of the lease. MCLA 554.139 This covenant is mutually dependent with the covenant to pay rent, meaning that if the premises are not kept fit, the tenant is excused from paying rent. The covenant may also form the basis for a cause of action for damages or injuries suffered as a result of toxic molds on the premises. In some

communities, there also may be ordinances imposing similar obligations.

Even so, the landlord's obligation to keep the premises fit, may be modified by the parties in their lease agreement, provided that the lease has a current term of at least 1 year. MCLA 554.139(3) That this statute directly conflicts with Michigan's Truth in Renting Act (MCLA 554.631 et seq.) which specifically prohibits a lease provision which would tend to exculpate a landlord from liability for its failure to perform or negligent performance of a duty imposed by law, (MCLA

554.633(1)(e) was the topic of a recent Michigan Court of Appeals decision. (*Calef v West*, 8/9/02, No. 226873) The Court reconciled the two apparently conflicting provisions by holding that the landlord may in its lease relieve itself from the obligation to make repairs, but it may not relieve itself from the obligation to warn the tenant of latent defects of which it is aware or should be aware.

With the rise of toxic mold litigation, it's a good time for every residential landlord to have their lease agreement thoroughly examined.

## **MOLD ALERT: WHAT, WHY, HOW, AND WHO**

*By Robert C. Rabeler, PE and James M. Less, CIH  
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Almost daily, the news media reports another toxic mold problem, and concerns regarding people's health. For example:

- In June, 2001, Texas homeowner Melinda Ballard won a \$32-million judgment against Farmers Insurance Group for allegedly mishandling a water leak claim which caused mold to grow throughout her house, causing health problems. This case inspired a CBS 48-Hour news broadcast "Invisible Killers".
- The McKinley Elementary School in Fairfield, Connecticut made the CBS evening news on June 5, 2002 because of mold problems. Forty to 60 students got sick from the mold, and two cases were serious enough to require hospitalization. In the same newscast, Whitaker Middle School in Portland, Oregon had similar problems. Students and teachers complained of fatigue, headaches, and flu-like symptoms. After testing, they found mold due to moisture problems.
- A June 10, 2002 Fortune magazine article describes a 40-story skyscraper near Ground Zero in New York City that may no longer be habitable due to mold.
- In the USA Weekend magazine dated July 19, 2002, the cover story was entitled "Mold: is Your Apartment Building Infected? Memory loss. Dizziness. Asthma. Those are just some of the ailments renters are experiencing as they join the battle against this toxic, microscopic enemy."

- The Wall Street Journal on August 8, 2002 ran an article headlined "Insurance Companies Just Say 'No' to Covering Mold".
- The August 19, 2002 Engineering News Record indicated that a \$95-million hotel tower on Hawaii's Waikiki Beach was closed for investigation and remediation of mold. The 453 guest rooms were closed just 15 months after its opening in May, 2001.

What is mold? Mold is a general term used to describe visible fungal growth. Molds are abundant in nature. They reproduce by releasing microscopic spores into the air, and grow under certain environmental conditions.

Moisture is the most important factor controlling indoor mold growth. Mold can grow on moderately wet materials, such as damp wallboard, window sills, and fabrics. Some fungal species require very wet conditions, while others can colonize on relatively dry materials.

Mold also needs proper nutrients, temperature, and light. Carbon nutrients are available in indoor environments from starchy pastes on wallpaper, cellulose in paper and fabrics, and lignin in wood. Most fungi have an optimum temperature range between 60°F and 85°F. However, some fungi can grow at temperatures both above and below this range. Light influences reproduction. Many fungi require some exposure to light to stimulate spore production. It is a myth that mold requires dark environments to grow.

Why is mold a health concern? Some fungi have no apparent health effects and are actually used in foods or

are sources of drugs. Other fungi however produce highly allergenic proteins which can trigger allergic reactions. Symptoms commonly include upper respiratory effects (coughing, sneezing, sinusitis) and watery, itchy eyes.

Hypersensitivity pneumonitis may also result from exposure to fungi. Symptoms include pneumonia/lung disease with fever, cough, chest tightness, shortness of breath, and fatigue. Hypersensitivity pneumonitis generally requires significant exposure to fungi to develop.

How can you determine if you have a mold problem? For one thing, it may be visible. However, evaluation by a trained professional may be appropriate, as mold can sometimes occur in areas that are not visible, such as behind wallpaper. If you can see there is a mold problem, sampling to identify the fungi species is usually not required because the mold should be addressed regardless of the species. It is more important to identify and fix the cause of the mold growth and to clean up the mold. However, sampling may be necessary when there is litigation involved, to help in diagnosis and treat an illness, or for clearance assessment following remediation.

Once you know you have mold, how can it be remediated? The factors responsible for mold growth must first be identified and corrected. For example, if the roof or water pipes are leaking, these need to be fixed. Porous materials (such as carpeting, upholstery, insulation, wallboard, ceiling tiles, etc.) with visible mold contamination need to be removed and discarded. Specialized cleaning procedures need to be used to remove the fungi from other surfaces. Workers who conduct these repairs need to be properly trained and protected.

Who can help you with mold issues? A team of professionals with industrial hygiene, engineering, construction, and remediation backgrounds may be needed to properly address the cause, extent and remediation of mold issues. Soil and Materials Engineers, Inc. (SME) has the professionals on staff to address technical issues. Your environmental attorney can assist you with legal issues. SME has been involved in over 150 mold cases in the last several years. SME has offices in Grand Rapids, Lansing, Kalamazoo, Bay City, Detroit, and Toledo, Ohio. Mr. Rabeler can be contacted at 517/887-9181 or by e-mail at [rabeler@sme-usa.com](mailto:rabeler@sme-usa.com).

## MOLD, MOLD EVERYWHERE...

*By: Mark P. Bickel*

Mold is a member of the fungi family whose members include mildews, yeasts, and mushrooms. Molds require organic materials in order to form and expand, and are able to grow on diverse materials when damp conditions are present. Molds typically reproduce through spores which are released into the air. These spores then germinate and begin expanding in elaborate networks. The rate of growth depends on the amount of moisture, temperature and organic material present. Most types of molds are harmless to humans but a few have been identified a potentially harmful. These include *Penicillium*, *Aspergillus*, *Stachybotrys*, *Paecilomyces* and *Fusarium*. The most noteworthy, and the one receiving most publicity, is *Stachybotrys*. It is sometimes known as "toxic mold." It is called toxic because it contains mycotoxins and portions of the medical community believe that mycotoxins can produce symptoms in humans which include:

- Sore throat
- Nose and throat irritation
- Shortness of breath and lung disease

- Chronic fatigue
- Skin irritation
- Central nervous system problems (headache, loss of memory, mood change)
- Aches and pains
- Fever
- Diarrhea
- Immune suppression

The Center for Disease Control (CDC) and the U.S. Environmental Protection Agency (EPA) are actively investigating the effects of toxic mold on humans. It is commonly believed that a significant infestation of toxic mold (2 square feet or greater) must exist before a "danger level" occurs. Such a large infestation can readily be seen and smelled.

It was originally felt that toxic mold could cause pulmonary hemorrhage in young children but no scientific link has been established. However, both the CDC and the EPA acknowledge that toxic mold could cause health concerns for individuals with chronic respiratory disease and individuals with immune system suppression.

Similarly, workers exposed to large amount of mold in their daily work environment are at greater risk to experience nasal stuffiness, eye irritation and wheezing. But, scientifically confirmed cases where causation has been established are rare indeed and there is almost no medical literature supporting a causal relationship between toxic mold and significant symptoms in otherwise healthy individuals. Nevertheless, the CDC and EPA recommend the removal of mold when it is found in homes, schools and office buildings. This can usually be accomplished by cleaning with a weak bleach solution.

Mold litigation is on the rise, partly induced by a few large jury awards. The most notorious of those is Ballard v Fire Insurance Exchange, No. 99-05252, filed in the 250th

District Court in Travis County, Texas. In May of 2001, the jury awarded 32 million dollars to the Ballards because their insurance company refused to remove and replace a hardwood floor that had buckled due to a bathroom plumbing leak. The Ballards contended that "dangerous mold" had developed because of the leak and alleged that family members suffered personal injury because of exposure to the mold. In some quarters it is felt that a "mold scare" has developed because of media hysteria. Regardless of the cause, it is clear that insurance companies, general contractors, subcontractors and perhaps even material suppliers run the risk of mold litigation.

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