

# Defending Toxic Mold Cases

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Just when insurance carriers thought it was safe to go back into the water after a fifteen year onslaught of asbestos litigation, toxic mold claims have now burst onto the scene with the ferociousness of the great white shark.

Over the past few years, courts have been overwhelmed by mold litigation in the context of first party insurance claims for property damage and third party personal injury claims. In the past several years, the number of toxic mold lawsuits nationwide has grown to about 10,000. Prospective defendants in these lawsuits are insurance companies, architects, engineers, builders, remediation companies, landlords, manufacturers, repair services, and home sellers. The causes of action set forth in these lawsuits include premises liability, negligence, strict liability, breach of warranty, breach of contract, workers compensation, construction defects, constructive eviction, fraud, professional malpractice, and failure to disclose. Plaintiffs seek damages for investigation, testing, remediation, mitigation, direct damage (repair or replacement), loss of use, relocation, diminution of value, medical expenses, loss of earnings potential, and emotional distress/mental anguish/pain and suffering.

Notwithstanding this broad array of causes of action and damages set forth in mold litigation, the courts around the country have begun to develop common denominator defenses which are applicable in all mold cases. Most, if not all, of these defenses require an inquiry by the defense attorney into causation, that is, what caused the loss. Of equal importance is to identify what the loss is. Although these questions on their face appear to be a relatively simple inquiry, they are not. Before the defense attorney can build a causation model which demonstrates

to the court or the trier of fact that his or her client cannot be held legally responsible for a mold related loss, the attorney must be well versed not only in the basics of the law of causation, but also in the science of mold.

## **I. Current State of Mold Safety Standards**

In any proceeding involving issues of negligence, the defense attorney can get a lot of mileage out of the argument that his client violated no state or federal regulation or standard, and therefore, could not have breached any legal "duty" with respect to the plaintiff. Unfortunately, in the area of mold litigation, no federal standards currently exist governing acceptable mold spore counts. For this reason, organizations existing at the state and national levels that have developed certain standards with respect to mold issues are often cited as authority for establishing a standard.

One such organization is the Texas Medical Association Counsel on Scientific Affairs (CSA). In September of 2002, the CSA released a report which looked into the "state of the medical science" with respect to black mold.

One very important finding of the CSA report was that "adverse health effects from inhalation of *Stachybotrys* spores in water-damaged buildings is not supported by available peer-reviewed reports in medical literature" and that the probability or possibility of causation or exacerbation of a medical condition due to exposure to mold in indoor environments" is limited.

Another important organization with respect to the development of standards concerning mold spores is the American College of Occupational and Environmental Medicine (ACOEM). The recommendations by the ACOEM provide an excellent checklist for cross-examination of the plaintiff's medical expert in a mold exposure case.

The U.S. Environmental Protection Agency (EPA) has set forth certain standards for mold remediation in schools and commercial buildings. These standards come into play when mold has been identified and remediation efforts are set in motion to reduce, or eliminate the mold spore count. These EPA standards include protocol for investigation, evaluating, and remediating moisture and mold problems. One of the issues addressed by the EPA standards is the notion that mold spore counts should be reduced to virtually zero in order for a building,

residence, or school to be "safe". The EPA standards make it clear that this is not the case and, depending upon the type of mold involved, mediation efforts should be aimed at mold reduction as opposed to mold elimination which is a much costlier process.

## **II. Selecting Effective Defense Experts**

With terms such as air exchange rate, air handling unit, breathing zone, combination foundations, chemical sensitization, ergonomics, and hypersensitivity pneumonitis, it is no wonder a jury's eyes can quickly glaze over in a toxic mold lawsuit. One of the challenges in defending a toxic mold case is to be able to educate a lay jury on the applicable science and medicine in understandable lingo. Selection of expert witnesses to help in this endeavor is a critical element in successfully defending a mold case. On the medical side, experts a defense attorney may consider are:

1. Allergists who specialize in allergic conditions.
2. Dermatologists who specialize in skin conditions and diseases.
3. Gastroenterologists who specialize in stomach and intestinal disorders.
4. Immunologists who specialize in immune system disorders.
5. Neurologists who specialize in brain senses and behavior.
6. Otorhinolaryngologists who specialize in ear, nose and throat disease.
7. Physiatrists who specialize in musculoskeletal physical medicine and rehabilitation.
8. Pulmonologists who specialize in lung diseases.
9. Radiologists who specialize in the interpretation of x-rays and other radiographic data to diagnosis various diseases.
10. Rheumatologists who specialize in joint diseases.
11. Toxicologists who specialize in the diagnosis and treatment of toxin exposure.

One or more of these experts can help the defense attorney give enough information to the jury which will allow the jury to assess the significance, or lack thereof, of mold spore counts, and in addition, keep the jury focused on the issue of causation.

## **III. Dismantling Plaintiff's Experts**

A powerful weapon which the defense attorney has at his or her disposal in defending a toxic mold case is to exclude one or more of the plaintiff's experts under Daubert v. Merrell Dow Pharmaceuticals,

Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under Daubert, a showing must be made that the expert retained by a party is basing his or her opinion on tested and proven scientific or medical data.

The defense attorney in deposing the plaintiff's expert witnesses in a toxic mold case should ask questions at the deposition not only to determine what the expert's opinions are, but also Daubert questions with an eye towards excluding the expert from testifying. Suggestions for questions the defense attorney may want to ask of plaintiff's expert include an inquiry as to whether the expert failed to consider, or is unable to rule out, alternative conclusions or explanations as to causation issues.

Another important issue for the defense attorney to keep in mind when deposing plaintiff's experts is to carefully examine the expert's qualifications. Although this would seem to be a rather automatic process at the deposition, in the area of toxic mold litigation, many times the plaintiff's "expert" involved in gathering mold spore counts, air quality assessments, etc., does not possess what the courts require in terms of expert qualifications. For instance, is a "mold remediator" who advertises his or her services qualified to address causation issues? What is important from a Daubert standpoint is to make sure that experts do not overstep their particular expertise as to their opinions.

#### **IV. Statute of Limitations Defense**

A critical area in which the defense lawyer in a toxic mold case will almost always have to consider is whether a claim is time barred. Resolution of statute of limitations issues in mold cases requires an understanding of whether the "discovery rule" will apply to a particular claim. In Georgia, the courts have differentiated the applicability of the discovery rule depending on the nature of the plaintiff's claim. For example, in King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981), plaintiff was diagnosed with lead poisoning and later was told that it had resulted from his exposure to lead fumes at his workplace years earlier. The plaintiff filed suit more than two years after being informed of his diagnosis, but within two years of being told of the causal connection between the diagnosis and his workplace exposure. The Court of Appeals in King held that it was a "logical extension of the existing Georgia law" to adopt the rule that the plaintiff's cause of action would not accrue and the statute of limitations would not run against him until he knew or through the

exercise of reasonable diligence should have discovered not only the nature of his injury, but also the causal link between the injury and the alleged negligent conduct of the defendant.

However, if a plaintiff seeks recovery for property damage as opposed to personal injury, the Georgia courts have refused to apply the discovery rule so that the statute of limitations begins to run at the time the alleged negligent act causing the property damage occurred notwithstanding the fact that the plaintiff may not have discovered the causation element until some time later. See Griffin v. Kangaroo, Inc., 208 Ga. App. 190, 430 S.E.2d 82 (1993).

Therefore, it is important for the defense attorney at the beginning of a toxic mold case to carefully assess the statute of limitations issues and what impact the discovery rule might have as to a possible tolling of the statute.

## **V. Conclusion**

Toxic mold litigation is here to stay. Over the next several years, this litigation will take on somewhat of a wild and woolly nature because the science is still trying to catch up with the claims which are being presented in these cases. Lawyers called on to defend toxic mold cases have to be aware of the dangerous propensity of these cases. In January 2001, a federal jury awarded nearly five hundred thousand dollars in damages and eighteen million dollars in punitive damages against an insurance company that declined to pay a mold claim in alleged bad faith. In June 2001, a Texas jury awarded thirty-two million (\$32,000,000.00) to a family for damages to their home allegedly caused by mold. Therefore, it is imperative that the defense lawyer, at an early stage in the litigation, road map all possible defenses which might be available.