

## TOXIC MOLD: WHAT YOU SHOULD KNOW ABOUT IT AND WHAT YOU CAN DO ABOUT IT

by Kerri L. Barsh

The past eighteen months have seen a plethora of toxic mold lawsuits rivaling the asbestos and lead-based paint tort claims for litigation potential. This article discusses this recent phenomenon; the measures that can be taken to protect against such claims; and the prospects for future mold-specific governmental regulation.

### WHAT IS "TOXIC MOLD" AND WHY IS IT A CONCERN?

Mold is a fungus that is naturally occurring and found both indoors and outdoors. To survive, mold requires only a source of food, warmth, and moisture. Its food sources are many, including building materials such as wood, carpet, ceiling tiles, drywall, upholstery, wallpaper, and sheetrock. Warmth and moisture are plentiful, especially in humid climates. The United States Environmental Protection Agency (EPA) estimates that more than 20,000 species of mold exist, many of which are harmless. Nevertheless, molds such as *stachybotrys*, *aspergillus*, *cladosporium*, and *penicillium* may be potentially harmful to health, especially when present in high dosages.

Exposure to mold spores or mold may cause, in sensitive individuals, allergic reactions such as dermatitis, runny nose, sneezing, and red eyes and may exacerbate asthmatic conditions in those who have asthma. Inhaling or touching mold may also irritate one's eyes, skin, throat, and lungs or cause hypersensitivity pneumonitis. For those molds that produce mycotoxins (potentially toxic substances), the symptoms of such exposure include liver cancer, toxicosis, infant pulmonary (lung) hemorrhage, and kidney disease. Although scientific research of the long-term health impacts of mold has not been exhaustive or conclusive, claims for damages for personal injuries have not abated. According to an independent insurance associa-

tion, toxic mold lawsuits against building owners and managers, building product manufacturers, builders, architects, engineers, contractors, and insurance carriers "are beginning to rival 'construction defect' claims in their number and magnitude." Examples of such litigation include:

1. Recovery of a \$14 million verdict by Martin County, Florida, which was upheld on appeal, against the builders of the County courthouse.
2. A verdict of \$32 million by a Texas jury against an insurance carrier for acting in an unfair, deceptive, and fraudulent manner when evaluating the homeowner's property damage claim.
3. Recovery by Polk County, Florida, of \$47.8 million in settlements against various companies involved in the construction of the Polk County courthouse (including \$35 million from the general contractors' builder's risk insurer).
4. Award of \$6.7 million against a North Carolina motel owner for construction defects that resulted in water intrusion and mold accumulation.

Pending litigation includes the purported filing of two class action suits against the owners of a number of California apartment buildings and a reported lawsuit by tenants of a subsidized housing project in New York against the building owners and managing agent seeking over \$12 billion in damages for cancer and multiple organ failure alleged caused by fungal contamination. The lack of definitive governmental regulations establishing safe exposure levels and the dearth of conclusive scientific data on the health impacts of mold will only foster the proliferation of mold-related litigation and concerns.

### WHAT CAN YOU DO ABOUT MOLD?

Given this emerging mold problem, possibly driven by modern energy-efficient building practices and the increased use of new building materials, building owners and operators, contractors, insurance carriers, and property managers are inquiring as to the steps, if any, that can be taken to avoid or minimize liability for mold-related claims. Protection comes in a variety of forms: legal, technical, insurance-related, or a combination of each.

On the legal front, many building owners and managers are incorporating into their purchase and sale agreements and leases, disclosures or similar language acknowledging that mold is "naturally occurring" and that the builder owner or man-

ager is not responsible for mold-related impacts. The reasoning underlying such language is similar to that of the radon disclosures—namely, to provide notice to the buyer or lessee of the potential for mold and avoid any claim based upon a failure to disclose an environmental problem. Because these disclosures have not been the subject of extensive litigation, their effectiveness has yet to be determined. In addition, condominium developers are including in condominium documents certain language restricting the use by owners of building materials such as non-breathable wall coverings on exterior walls, low-permeability paints, and vinyl wall paper, which trap moisture in gypsum wallboard.

To no great surprise, the extent to which current or pre-existing insurance policies provide coverage for mold-related damage is the subject of increasing dispute. Coverage under general liability policies often revolves around the insured's ability to show that the damage resulted from a "covered" cause of loss such as a ruptured pipe. Insurance carriers themselves have responded to the wave of mold litigation by modifying new policy language to clarify that mold-related damages are excluded from coverage or canceling policies thought to have provided mold coverage. Although certain insurance companies will insure against mold-related risk, the cost for such coverage is market-driven and reflective of recent monetary settlements and verdicts.

As noted in one EPA publication, "[t]he key to mold control is moisture control." The initial step to moisture control is the performance of physical inspections by competent and experienced environmental consultants or industrial hygienists. Common indicia of mold are musty, mildewy odors, and discoloration of walls and ceilings. The objective of the inspection is to confirm the presence, extent, and origins of suspected mold contamination and sources of moisture such as leaking roofs of windows, malfunctioning or poorly designed ventilation systems, and plumbing failures. Bulk sampling or surface sampling may be necessary as part of the assessment to verify the existence of mold or identify specific fungal contaminants.

Somewhat surprisingly, neither the New York Guidelines nor the EPA guidelines recommend air

monitoring as part of a routine assessment unless the visual reconnaissance reveals a contaminated HVAC system; the presence of mold cannot be confirmed visually (behind walls) but is suggested; or health-related symptoms have been diagnosed. If air monitoring is conducted, the monitoring should include concurrent outdoor testing, for comparative purposes. Ultimately, however, the scope of the inspection also depends upon a number of non-scientific factors: whether health impacts are being asserted; whether significant potential liability exists; and whether a lawsuit has been filed. One significant benefit of a comprehensive assessment is that it may reveal the party or parties responsible for any mold infestation.

Upon learning of a mold problem or a prospective fungal source, the New York Guidelines recommend that "[b]uilding materials supporting fungal growth must be remediated as rapidly as possible . . ." and similarly recommend the removal of mold "as soon as it appears." The guidance document sets forth five different types of abatement, varying with the size of the mold-infested area. Typical remediation efforts include, without limitation, cleaning with a detergent solution; removal of porous materials that have been infected; abrasive cleaning of contaminated surfaces; demolition of plaster walls; air monitoring; hazard communication to building occupants in the affected area; and post-remediation inspections. The primary emphasis of abatement is the elimination or remedy of the source of water accumulation through proper maintenance and expeditious repair, to prevent the reoccurrence of fungal growth.

#### FUTURE REGULATION

Until specific quantitative standards regulating the presence of mold-related toxins are developed and enacted, this area of the law will remain murky. Common-law case law will help refine the respective obligations of the affected parties but given the stare decisis effect of such cases, the protracted nature of such litigation and the potential for settlement, such refinement is expected to be slow and incremental, putting a premium on prevention and expedient, comprehensive remediation. REI

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