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The Legal Implications of “Toxic” Mold Exposure

Editor's note: From April 2001 to March 2004, the Journal featured a Legal Briefs column that presented short case studies about legal issues important to environmental health professionals. Vincent Sikora, the author of Legal Briefs during that time, passed away in December 2003. Because his columns were well received by many of our readers and provided practical and relevant legal information, we decided to search for a committed columnist with the appropriate knowledge and experience to restore Legal Briefs. We are happy to announce that we found several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, Patti Waller, and David W. Babcock, all of the law firm Marler Clark. Their columns will appear in every other issue of the Journal.

The attorneys at Seattle-based Marler Clark, LLP, PS (www.marlerclark.com) have developed a nationally known practice in the field of food safety. Marler Clark represents people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers. The attorneys have litigated thousands of food contamination cases throughout the United States, many of them high-profile, including the Jack in the Box and Odwalla E. coli outbreaks; the Malt-O-Meal, Sun Orchard, and Chili's Salmonella outbreaks; the Senor Felix Shigella outbreak; and the Subway and Chi-Chi's hepatitis A outbreaks.

David W. Babcock, the author of this month's installment of our newly restored Legal Briefs column, joined Marler Clark as the firm's senior litigation associate in 2001. Representing children and the elderly has been central to Mr. Babcock's practice at Marler Clark, where he focuses on litigation resulting from foodborne-illness outbreaks.

Run an Internet search on the subject of “toxic mold,” and you are likely to find quickly that there is little middle ground on this controversial subject. Depending on where your mouse clicks take you, you will be told of the frightening, potentially fatal health effects of exposure to an underestimated menace—or you will be told of a scourge of money-grubbing lawyers and clients perverting science in the name of financial gain. Wherever the truth lies, there can be no disputing that mold litigation is a growing facet of the legal landscape that is not going away anytime soon. One commentator estimated that more than 10,000 mold cases were pending in the United States in the early part of this decade.¹

Toxic Mold

The Centers for Disease Control and Prevention (CDC) currently offers information about so-called “toxic molds” on its Web site. First CDC points out that the term “toxic mold” is inaccurate, but that certain molds are toxigenic, in that they can produce mycotoxins.² CDC further states:

At present there is no test that proves an association between *Stachybotrys chartarum* [a mold commonly cited in “toxic mold” cases] and particular symptoms. Individuals with persistent symptoms should see their physician. However, if *Stachybotrys chartarum* (*Stachybotrys atra*) or other molds are found in a building, prudent practice recommends that they be removed.³

The Institute of Medicine (IOM), at the behest of CDC, prepared a report titled *Damp*

Indoor Spaces and Health that also addresses human health risks from mold exposure.⁴ IOM concluded that the microbial toxins associated with mold can cause both allergic and nonallergic reactions in humans.⁵ The report states:

In vitro and in vivo studies have demonstrated adverse effects—including immunotoxic, neurologic, respiratory, and dermal responses—after exposure to specific toxins, bacteria, molds, or their products. Such studies have established that exposure to microbial toxins can occur via inhalation and dermal exposure...⁶

The IOM report assessed a number of reported adverse health effects allegedly associated with mold exposure. IOM found “sufficient evidence of an association” between exposure to “damp indoor environments” and the following health effects: upper-respiratory-tract (nasal and throat) symptoms, cough, wheeze, and asthma symptoms in sensitized asthmatic people.⁷ IOM also reported “limited or suggestive evidence of association” with the following symptoms: Dyspnea (shortness of breath), lower-respiratory illness in otherwise healthy children, and asthma development. For many of the adverse health effects that are often claimed to be associated with mold exposure, the IOM report did not find sufficient evidence of association. These health effects included inhalation fevers, pulmonary hemorrhage in infants, fatigue, gastrointestinal symptoms, and cancer.⁸ IOM concluded that excessive indoor dampness is a public health problem.⁹

Where and How Are Mold Exposures Occurring?

Practically any structure is susceptible to mold growth, provided there is moisture to foster growth. Mold spores may enter indoor environments through open doorways; windows; and heating, ventilation, and air-conditioning systems.¹⁰ According to CDC, areas that have been subject to water leakage, such as areas adjacent to roofs, pipes, walls, plant pots, or flooding sites, are particularly susceptible to mold growth.¹¹ Certain building materials are also more likely to be the site for mold growth: wet cellulose materials, including paper products; cardboard; ceiling tiles; and wood products.¹²

Mold in the Legal System

Claimants have brought mold exposure cases in a variety of contexts, with mixed results. One scenario is the individual homeowner claiming personal injuries, property damage, or both as a result of the presence of mold in the home. Often, these claims are presented against the injured party's own homeowner's insurance policy.¹³ In one such case, a Texas homeowner was awarded in excess of \$32 million, later reduced to \$4 million on appeal, in a property damage claim.¹⁴ In another residential mold claim, a California jury awarded an individual \$18.5 million in an insurance coverage dispute that arose out of mold contamination.¹⁵

The burgeoning number of mold claims has, in turn, had an impact on the insurance industry, since that industry is most often expected to bear the financial burden of damages and remediation, whoever is found legally responsible. Many mold cases turn, in part if not entirely, on whether insurance coverage is available and, if so, to what extent. Many insurance policies now contain exclusions for damage and injuries resulting from mold and rot.¹⁶

Mold litigation also arises in the context of construction defect litigation. For example, Martin County, Florida, was awarded more than \$11 million after a Florida Court determined that faulty construction of the county courthouse and the resulting mold caused health problems among the buildings' occupants.¹⁷


Proving Mold Exposure

While it may appear from these results that defendants in mold cases are in the cross-hairs, proving a mold exposure case can be

difficult. The crucial element in a plaintiff's case is often causation.¹⁸ In fact, causation has been referred to as "the Achilles heel" of a mold claim.¹⁹ To establish his or her case, a plaintiff will likely have to show each of the following: 1) the presence of mold, 2) the cause of the mold (to demonstrate who is responsible), 3) actual exposure to the mold, 4) an exposure dose that was significant enough to cause health effects,²⁰ and 5) a medical link between the type of mold and the claimed injury. In some instances, the experts used by plaintiffs to establish these links have come under scrutiny. At least one court has disallowed a plaintiff's medical expert in a mold case on the basis of legal rules governing the use of scientific evidence at trial.²¹

Addressing Mold Concerns

So against this backdrop of sharply conflicting viewpoints, how does one determine the best way to plan for and respond to mold concerns? Depending on your role in approaching the matter, there do appear to be some prudent steps to take. For homeowners, CDC makes several recommendations for limiting the likelihood of developing a mold problem in the first place. These include keeping humidity between 40 and 60 percent indoors and ensuring adequate ventilation.²² CDC also provides recommendations on the best ways to remove mold from a home when it does appear.²³ Homeowners should know whether their homeowner's policy covers mold-related claims.

Prudent actions on the "other side" of the fence are much the same. Landlords, building managers, and contractors should be aware of the risks presented by mold. Common sense would seem to dictate designing and constructing buildings with reduction of the likelihood of mold infiltration in mind. When mold does appear, early removal efforts are more likely to be the least costly in the long term. And, like homeowners, those responsible for the building and its inhabitants should know where they stand with respect to insurance coverage for mold-related claims. 

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20. *Id.*
21. See *Flores v. Allstate Texas Lloyd's CO.*, 229 F. Supp 2d 697 (S.D. Texas 2002).
22. See CDC Web site, n. 10 *supra*.
23. *Id.*

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