Just Add Water: Growing Mold Claims

By Matthew King

Just add water. This is no longer the simple instruction for instant-noodle dinners or a packet of sea-monkeys; it is now the dangerous recipe for the "asbestos of the new millennium"[1]—mold.

Molds have been around since the beginning of time. The Bible even references mold remediation.[2] Today, however, mold is more than just a nuisance; it can be a significant legal claim.

Science of Mold

Molds are microscopic organisms found virtually everywhere in the environment. There are over 100,000 species of mold on the Earth; of those, 200 are allergenic and approximately 50 are allegedly toxic to human health.[3] Mold spores are lightweight and can be transmitted through the air.

Virtually all construction materials and furnishings can provide nutrients supporting mold growth. In order to grow, mold needs food and water. However, only a small amount of moisture is necessary for mold growth. Further, mold spores are almost always present in both indoor and outdoor air.

Once a particular mold grows indoors, its spores spread into the indoor atmosphere. Four factors govern a mold's impact on human health: (1) the species involved; (2) the metabolic products that species produces; (3) the quantity and duration of an individual's exposure to the mold; and (4) the specific susceptibility of the exposed individual.[4]

All molds can cause as allergy-like symptoms, however certain types of mold produce mycotoxins.[5] These are the so-called toxic molds that may cause more severe health effects.[6] Mycotoxins give the molds a competitive advantage over other mold species and bacteria.

Mycotoxins are nearly all cytologic, disrupting various cellular structures such as membranes, and interfering with vital cellular processes such as protein, RNA, and DNA synthesis. Mycotoxins are fungal metabolites with potential toxic effects that range from short-term irritation to immunosuppression and possibly cancer.[7] But, mycotoxins are generally not volatile and a disturbance is normally required to trigger exposure.[8] Exposure to mycotoxins can occur by mold spores entering the body through the respiratory tract or by direct skin contact with toxic mold.[9]

Some molds have been linked to human illness and other health effects.[10] These effects can include skin rashes, running noses, eye irritation, cough, congestion, and aggravation of asthma.[11]

At present, no scientific evidence supports the premise that exposure to mold can cause more severe health effects, such as hemorrhages or brain damage.[12]

There are three main indictors for proving elevated mold levels in indoor air:

(1) Different mold species identified in outdoor verses indoor samples;

(2) variation in mold species between indoor and outdoor samples;

(3) a significant increase in the concentration of one or more species of mold found in indoor samples, compared to outdoor samples.[13]

Mold Claims from the Plaintiff's Perspective

Mold cases present themselves in a variety of guises, including: personal injury,[14] contractual disputes between owners and contractors in a building,[15] products liability,[16] landlord-tenant disputes,[17] class action rent abatement actions,[18] and fraud for failure to disclose mold in real estate disclosure documents.[19] Many of these lawsuits have resulted in large damage awards.[20]

Other causes of action are available to mold victims. The most common is a construction defect claim, but other claims, such as negligence, breach of contract, constructive eviction, worker's compensation claims, warranty claims, and/or breach of the implied warranty of quality are possible. Further, negligence claims may also be available against repair professionals where faulty repairs cause a water leak that started the mold.

However, plaintiffs have a large burden regarding causation and the admissibility of expert opinion. In order to prevail on a mold exposure claim, plaintiffs must show that their health has been adversely impacted by the mold. In *Gifford v. Matejka*, [21] the court held that expert testimony regarding both the presence of mold in the home, and the plaintiff suffering health effects while in that home, is sufficient evidence of causation to defeat a summary judgment motion.

Currently there is no test that can definitively prove or disprove fungal syndrome and false negative tests are not unusual.[22] In addition, the data related on mold-related illnesses is inconclusive.[23]

Further, no standards for the safe level of mold exposure exist in Washington. Other states are in the process of developing mold standards. This means that most cases turn on expert testimony regarding "excessive" mold levels.[24]

It appears that the more specific the illness/injury alleged, the less likely that a court will admit the evidence.[25] But courts have allowed testimony establishing a link between mold exposure and the aggravation of asthma and allergies[26] or headaches, nasal congestion and asthma.[27]

However, a plaintiff often has a very sympathetic claim. The case usually involves latent defects allowing water intrusion that ultimately results in mold. Photos of the mold are generally compelling. Further, a plaintiff's allergic symptoms are common to most people and are easily understood.

Defending a Mold Claim

The most obvious defense to a mold claim is to attack the science of mold. Any expert's testimony must be relevant to an issue in the case.[28] The scientific theory that an expert relies upon should be generally accepted in the scientific community.[29] As discussed above, the scientific community has not reached a conclusion regarding mold exposure causing severe adverse health effects. Therefore, experts should not be allowed to testify about a correlation between significant injuries and exposure to mold.

Note, however, that a causal link can likely be established where the plaintiff alleges allergic symptoms as a result of mold exposure. Also note that the methodology may also be attacked because there are no universally accepted standard sampling procedures for testing for mold indoors.[30]

Another common defense is the statute of limitations. Washington requires a personal injury action be brought within three years of discovery that the plaintiff was injured.[31] Assuming that a plaintiff suffers from allergic reactions to the presence of mold, the plaintiff may have suffered allergic symptoms for many years.

A third defense depends on a plaintiff's environment and goes to causation. Plaintiffs have the burden of showing that mold caused by the defendant's negligence caused their injuries. If the court allows evidence of mold testing, testing of other environments, such as work places and gyms, may show higher levels of mold in those places. Therefore, plaintiffs cannot say, that they are suffering, more likely than not, from mold exposure at their home. Further, if a plaintiff is allergic to other environmental allergens, such as pet dander, pollen, or dust mites, a doctor may not be able to testify that their symptoms are, more likely than not, caused by the mold exposure.

Finally, the failure to mitigate is often a viable defense. Once a person is no longer exposed to mold, their allergenic symptoms generally cease. This is in large part because mold spores produce an acute and not a chronic illness.

Remediation of Mold

So what needs to be done when you have a client who has mold? Don Yamamoto of Long Services, a local contractor, explained that remediating mold is becoming a common solution. It is likely that mold remediation will continue to be an important aspect of his work as more people become aware of the molds in their indoor environment.

Currently there is no standardized cleanup protocol in industry. Further, no safe levels of mold spores have been established. The most important aspect of eliminating mold exposure is to stop the water. A thorough cleanup, drying, and removal of water-damaged materials will usually limit or prevent mold growth.[32]

Once the water source is stopped, remediation can occur. New York's Department of Health has established four cleanup standards for mold, depending on the size and type of the mold and the type of area that needs cleanup.[33]

Conclusion

While mold is a growing concern to Washington residents, building owners, and construction professionals, the lack of clear scientific evidence about mold exposure and its health effects, combined with judicial reluctance to allow "novel" scientific theories, may stunt development of this new cause of action. Therefore, it may be some time, if ever, before mold challenges asbestos as a legal concern. ■

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2 Lev.14:45.

3 *Toxic Mold: A Growing Risk?*, Zimmer, Harry C., Excerpts of Seminar Presentations Made on the Subject of Mold and Mildew. *See also, Got Mold? Frequently Asked Questions About Mold*, Washington Department of Health, Office of Environmental Health and Safety, http://www.doh.wa.gov/ehp/ts/IAQ/Got_mold.html.

4 *Is Indoor Mold Contamination a Threat to Health?* Ammann, Harriet, Washington State Department of Health

5 A mycotoxin is a product of secondary metabolism of molds

6 *Is Indoor Mold Contamination a Threat to Health?* Ammann, Harriet, Washington State Department of Health.

7 *Id.*

8 *Indoor Air Quality Information Sheet*, California Department of Health Services.

9 *Id.*

10 *Got Mold? Frequently Asked Questions About Mold*, Washington Department of Health, Office of Environmental Health and Safety, http://www.doh.wa.gov/ehp/ts/IAQ/Got_mold.html.

11 *Id.*

12 *State of the Science on Molds and Human Health*, Stephen Redd, M.D., Chief, Air Pollution and Respiratory Health Branch, Center for Disease Control and Prevention (July 15, 2002).

13 American Society of Safety Engineers Position Statement Regarding Mold in the Indoor Working Environment.

14 *Mondelli v. Kendall Homes*, 631 N.W.2d 846 (Neb. 2001)(exposure of mold in new construction).

15 *RCDI Construction v. Spaceplan/Architecture, Planning and Interiors, Inc*, 2001 U.S. Dist. Lexis 13202, 2001 WL 1013241, (W.D. No. Carolina, 2001), 148 F. Supp.2d 607 (2001).

16 *Shasta Beverages, Inc. v. Tetley USA, Inc.*, 546 S.E.2d 900 (Ga. App. 2001).

17 *New Haverford Partnership v. Stroot*, 772 A.2d 792 (Del. 2001).

18 *Rivera v. Phipps Houses Services*, 2001 U.S. Dist. Lexis 8939 (2001).

19 *Gropper v. STO Corporation*, 250 Ga.App. 820 (2001).

20 *Allison v. Fire Insurance Exchange*, No. 03-01-00717-CV (3rd Dist, Texas Court of Appeals 2001)(affirming a $4 million verdict).

21 107 Wn. App. 1014 (2001).

22 *Toxic Mold: The Fourth Wave of Construction Defect Litigation?*, Cross, Edward H, 40 Orange County Law. 26 (1998).

23 *Toxic Mold: The Fourth Wave of Construction Defect Litigation?*, Cross, Edward H, 40 Orange County Law. 26 (1998).

24 *Mondelli v. Kendall Homes Corp*. 631 N.W.2d 846 (Neb. 2001), S*ee Also New Haverford Partnership v. Stroot*, 722 A.2d 792 (Del. 2001).

25 *National Bank of Commerce v. Assoc. Milk Producers*, 22 F.Supp.2d 942 (E.D. Ark. 1998)(rejecting testimony linking mold and/or mycotoxins to laryngeal cancer). *See also David v. Henry Phipps Plaza South et al.*, No. 116331/98 (N.Y. Sup. Ct. Oct 11, 2001.)(rejecting testimony connecting mold to brain injuries).

26 *New Haverford Partnership v. Stroot*, 772 A.2d 792 (Del 2001).

27 *Mondelli v. Kendall Homes*, 631 N.W.2d 846 (Neb. 2001).

28 *Medcalf v. Department of Licensing*, 83 Wn. App. 8, 920 P.2d 228 (1996).

29 *State v. Gore*, 143 Wn.2d 288, 21 P.3d 262 (2001) (holding that if there is a significant dispute among qualified scientists in the relevant scientific community, then the evidence may not be admitted).

30 American Society of Safety Engineers Position Statement Regarding Mold in the Indoor Working Environment.

31 RCWA 4.16.080. Under discovery rule, cause of action accrues when plaintiff knows or, through exercise of due diligence, should know factual, but not necessarily legal, basis for cause of action. *Allen v. State* 118 Wash.2d 753, 826 P.2d 200 (1992).

32 ASHRA Standard (ANSI/ASHRAE 55-1992).

33 *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*, New York City Department of Health and Mental Hygiene, Bureau of Environmental and Occupational Disease Epidemiology.