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Proliferating Mold Litigation: Why Mold Is Not the Next "Asbestos"

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In the summer of 2001, a Texas jury awarded Melinda Ballardin excess of $32,000,000 arising out of a mold-related property damage claim.[1] Another Texas case involving mold contamination claims settled for $1.5 million after two weeks of trial.[2] While Texas juries have never been known to be shy about large plaintiff's awards, one can scan recent mold litigation reporters and find other multimillion-dollar awards related to mold claims.[3] For example, in California, a jury awarded Thomas Anderson $18.5 million in a coverage dispute over residential mold contamination.[4]

Many of these cases have striking similarities that help explain why a ubiquitous substance such as mold could be the source of multimillion-dollar damage awards. In a nutshell, three areas should be examined to understand the proliferation of mold litigation: 1) science's current understanding of mold and its effect on human health, including the lack of exposure and investigative standards; 2) mass media coverage of "mold contamination;" and 3) insurer "bad faith."

As is more fully set forth below, the discussion surrounding these three issues leads to the question of whether mold litigation is the next "asbestos litigation," or "lead litigation." This question has been addressed in the mold litigation literature and, if nothing else, has focused attention on the potential growth of mold-related claims. For reasons that will be explained, our answer to this question is no. Asbestos and lead litigation progressed in the direction they did for fundamental reasons which are not present with regard to mold-based claims. We do posit an alternative to the "asbestos" analogy, which might shed light on mold litigations future.

What We Know About Effects on Human Health

The rise of mold litigation has brought with it the attendant proliferation of mold experts pontificating on what, if any, health effects or disease are caused by mold exposure. Not unexpectedly, the answer varies with the Web site visited, the health literature reviewed, or the manner in which the question is asked. While it is fair to say that based on current research a general consensus among "experts" on mold and its possible human health affects has perhaps been reached, there are detractors.

The Centers for Disease Control in recent congressional testimony has attempted to set forth some basic general findings upon which it contends there is general agreement.[5] Science has estimated that there are between 50,000 and 250,000 species of fungi,[6] while fewer than 200 of these have been described as possible causes of human infection. There are more than 1,000 types of indoor molds that have been identified in homes throughout the U.S. Molds reproduce by making spores,[7] which because of their size and light weight are easily spread throughout the indoor and outdoor air. Further, mold spores have been found to resist dry adverse environmental conditions. Mold spores found in ancient tombs and temples thousands of years old have still been found to be viable.[8] The most significant causative agent for molds proliferation is the presence of moisture, warmth, and a food source. These causative factors help to explain, at least in part, why the relatively large portion of mold-related property damage claims occur in Texas, Florida, and California.

The CDC has documented mold infections in immunosuppressed individuals in hospital settings, where some nine percent of hospital-acquired infections are caused by fungi.[9] The predominant source of these infections is from inhalation of the fungus aspergillus by immunocompromised individuals. The mold-produced aflatoxins and ochratoxins have been classified by the National Toxicology Program as human carcinogens when ingested.[10] According to the CDC, there is also a good deal of scientific information validating respiratory illnesses among workers in industrial and agricultural settings commonly known as Farmer's Lung, Woodworker's Lung, and Maltworker's Lung, among others.[11] According to a 1993 report titled "Indoor Allergies," published by the Institute of Medicine (IOM), airborne fungal allergens were most often associated with allergic diseases, such as allergic rhinitis/conjunctivitis, allergic asthma, and hypersensitivity pneumonitis. In its 2000 report, the IOM concluded that there is also sufficient evidence associating mold exposure with asthma outbreaks.[12] In contrast, the IOM found there is insufficient evidence showing a causal connection between mold exposure and the onset of asthma.

Many of the reports of mold-related illness occur in the workplace. According to the latest CDC research, there appears to be sufficient evidence to show: 1) a "significant relationship between reports of work related respiratory disease and visual assessment of water and mold damage in at least two studies; 2) significant relationships between endotoxin and ultra fine particles in the air and work related respiratory symptoms; and 3) significant relationships between indicators of mold in chair and floor dust and work related respiratory symptoms."[13] It is important to note, however, that the CDC research in these areas is ongoing.

Standardless Investigations

Due in large part to the paucity of available scientific evidence to establish a link between personal injury and mold exposure, there is a complete lack of government-imposed standards for determining what constitutes unacceptable levels of mold exposure. Simply put, there are no federal standards, nor any state standards, for determining acceptable levels of mold in the indoor air environment. This is about to change, however. In 2001, California passed the Toxic Mold Protection Act requiring the California Department of Health Services to convene a task force to advise the department on the development of permissible exposure limits to mold and standards for assessment of molds in indoor environments, as well as standards for identification and remediation of mold.[14] To date, none of these standards have been established and in the most recent examination of California's budget, no money has been allocated to establish the task force, despite over 100 individuals volunteering to be on the task force.[15] Many experts are highly skeptical of any standards being able to be set due to the inherent complexities of the issue.

Mold occurs naturally in the outdoor environment. At any given time of year, the concentration of mold spores varies in any given area. Moreover, given the hundreds of different types of molds, and their varying degrees of toxicity, how can multiple or individual standards be set? Couple this with the fact that mold concentrations may vary in significant amounts even from one area of a room to another,[16] and the difficulties with setting exposure standards becomes obvious.

Thus, unlike other areas of environmental investigation where there are very specific standards set for the sampling techniques and exposure limits, as well as quality control and quality assurance sampling criteria, the area of mold investigation is left to the discretion of the individual investigator. Nonetheless, there are certain acceptable ways in which to conduct sampling, even though no established regulatory standards have yet been set. At the present time, it is safe to say that any measure of whether a mold investigation has been "appropriate" will need to be based on a "reasonableness" standard.

What We Do Not Know About the Effects

Many of the complaints brought in mold cases include allegations of memory loss, lethargy, hemorrhaging, and even the development of cancer. It is probably fair to say, and the CDC confirms, that the scientific community does not have sufficient evidence to show that mold causes adverse health effects such as pulmonary hemorrhage, memory loss, lethargy, or cancer when exposure occurs through inhalation. Further, despite the rapid increase in mold-related personal injury claims, the CDC has concluded that it does not "know if the occurrence of mold-related illness is increasing."[17]

There is, of course, much research left to be done on the connection between mold exposure and human illness. It is safe to say that our modern society spends much time in hermetically sealed homes and buildings that can allow for the proliferation and spread of indoor air contaminants, if any are present within the structure or its HVAC system. Some scientists have even speculated that the increase in claimed illness associated with mold exposure is caused by a general decline in health of the human species, as well as the phenomenon of global warming. Indeed, there is some evidence to indicate that the overall increase of the world's ambient air temperature has increased the level of mold and pollen.[18] There is a more obvious culprit responsible for the increased claims of illness associated with mold exposure: our ever-present mass media.

Sensitizing the Public— Spreading the Word on Mold

Surveying major news publications over the last two years uncovers numerous prominent articles covering large jury awards related to mold contamination and related illness. As is typical with the news media, its accuracy when covering legal matters leaves much to be desired, and mold cases are no different. When reviewing many of the articles that have appeared concerning large judgments in mold cases, the focus is on the size of the award, the fact that it involved mold contamination, and the accompanying health-related problems. Of course, the articles typically gloss over or omit the legal niceties of whether the award was for property damage, personal injury, or punitive damages. The message the public hears is "exposure to mold can affect my health."

For example, the *New York Times* ran a 7500-word article in the August 12, 2001 *New York Times Sunday Magazine* titled "Haunted by Mold," focusing on Melinda Ballard's case. Perhaps not unwittingly, the article warns readers that the mere reading of this story "might make you sick." Indeed, the mere awareness that mold can make you sneeze, itch, or come down with sinusitis may in and of itself be a causal factor in the increasing number of mold-related injury claims. The article states that many health-related symptoms caused from mold exposure are documented in the scientific literature, "but [they] can also be spread by suggestion and word of mouth." After reading this article, it is not difficult to imagine many individuals looking around their home for signs of mold and wondering whether their latest bout of itching, rashes, or cold symptoms is not the result of exposure to mold.

The *New York Times* is not alone in highlighting Ms. Ballard's plight. In September 2000, the CBS news program *48 Hours Investigates* ran a show covering Ms. Ballard, as well as other claimed victims of mold contamination titled "An Insidious Mold." The CBS news investigative report stated, "[E]xperts say the [Ballard] family was being poisoned by a black toxic mold called Stachybotrys . . . . Some strains of Stachybotrys cause allergies, asthma and skin rashes. Others produce mycotoxins, released into the air. These toxins can seriously damage the lungs and central nervous system."[19] A similar story was run on the ABC News program *20/20*, titled "Toxic Intruder – Black Mold Panic has Families Fleeing Their Homes."[20]

So now that we have a highly sensitized public with regard to mold exposure and liability claims, coupled with a lack of scientific evidence to support any significant personal injury resulting from mold exposure, we need only one more ingredient to arrive at multimillion-dollar jury awards – "bad faith" on the part of insurance carriers.

The Catalyst for Large Awards — "Bad Faith"

Generally speaking, subject to policy terms and conditions, insurers are contractually bound to defend and indemnify their insurers, as well as owing them a duty of good faith and fair dealing.[21] Failure to abide by these "duties" can result in a bad faith claim against the insurer.

Now that the mass media has sensitized individuals to possible claims for mold exposure, the thousands of individuals that are seeking legal counsel has resulted in more and more mold-exposure-related cases being converted into bad faith claims to overcome the lack of scientific evidence. *Ballard* is probably still the best example of how a bad faith claim can arise in a mold exposure setting. *Ballard* involved a claim against the Fire Insurance Exchange for damages allegedly caused by mold produced by a leak in the downstairs bathroom in the Ballards' 22-room mansion. The Ballards contacted Fire Insurance to replace a subfloor in their house after it became damaged from a plumbing leak. The Ballards' contractor recommended that the floor be replaced due to the possibility for mold contamination. Fire Insurance refused to replace the floor.

Damage from the leak caused all of the downstairs hardwood floors to buckle and eventually caused damage to the walls, doors, and windows throughout the first floor. The couple and their then two-year-old son also claimed to have suffered from serious health ailments such as bleeding lungs, neurological problems, asthma, and fatigue, all as a result of being exposed to the mold. Fire Insurance offered $127,950 to settle the claim, which the Ballards rejected.

The Ballards then hired an air quality company that found severe mold contamination. The Ballards left their home immediately to allow for decontamination and remediation. The house eventually had to be razed, according to the Ballards, because remediation had become infeasible due to the level of mold contamination. The Ballards filed suit for negligence, breach of contract, deceptive trade practices, and the bad faith claim involving insurance code violations.

The trial judge refused to allow the plaintiff's medical expert's testimony on the basis that there was insufficient evidence linking the alleged health problems to the mold exposure. Nonetheless, the jury found that Fire Insurance failed to perform a complete, thorough, or timely investigation of the house, allowing the mold to proliferate and contaminate the house. The jury awarded the Ballards $2,547,000 to replace the home, $1,154,000 to remediate the home, $2,000,000 to replace the contents of the home, $350,000 for past and future additional living expenses, $176,000 for homeowners' cost of appraisal process, $5,000,000 for homeowners' mental anguish, $12 million in punitive damages, and $8,900,000 in attorneys' fees, for a total of $32 million. It is important to note, however, that the jury did not award a single dollar for any personal injury resulting from the mold exposure.

While the Ballards' award was reduced to $4 million on appeal,[22] the case nonetheless demonstrates that a jury will be sympathetic to a family's trials and tribulations when trying to investigate and remediate mold contamination. In many instances, families will have moved out of their homes because of concerns over mold exposure. The lack of exposure and investigative standards encourages people to leave their homes and complicates the

investigation process. Further, remediation techniques have not been standardized, and therefore, the determination of “how clean is clean” that should trigger the move back home is impossible to answer with confidence. All of these factors contribute to the potential for “bad faith” claims in mold exposure cases.

Another aspect of mold cases that will encourage plaintiffs’ lawyers to attempt a recovery based on “bad faith” is the potential cost of trying to prove health impacts from mold exposure. Arguably, at least four experts will be needed for many such cases: a physician, to address the health issues including a diagnosis and prognosis; a toxicologist, to address the epidemiological connection between the mold exposure and bodily impact; a certified industrial hygienist, to develop testing and cleanup protocols; and perhaps a forensic engineer, to establish the exposure pathways. Given the paucity of supporting scientific studies, retaining this stable of experts could be a risky and expensive gamble. A properly developed “bad faith” claim allows an end run around the expense of these experts.

On the other hand, insurance carriers have to confront all these challenges: the mold-sensitized insured, no government-imposed investigative or cleanup standards, a lack of science to demonstrate any risks of significant health impacts, and an aggressive plaintiffs’ bar. If all the insured’s concerns are not addressed thoroughly and documented, a “bad faith” claim could result.

Why Mold is Not the Next Asbestos or Lead Litigation

There are at least three reasons why mold litigation should not be considered the next asbestos or lead litigation. Asbestos and lead litigation were both supported by a relatively well-developed body of scientific knowledge regarding the toxicological effects these substances had on the human body. Accordingly, while exposure standards may not have initially been set at the time those who ultimately recovered from asbestos and lead suffered exposure, there was never any real doubt that standards could ultimately be set because of the availability of epidemiological data.

Second, both asbestos- and lead-related litigation had corporate or industrial targets. We have all heard the stories of asbestos claims bankrupting certain companies. There is no single corporate or industrial culprit when it comes to mold contamination. Mold is naturally occuring, and no corporation or industry is going to be held responsible for releasing mold into the environment, or exposing workers to it, in the manner that corporate lead and asbestos defendants have been.

Third, as this article started out noting, mold is ubiquitous. With the proper ingredients, water, warmth, and a little bit of food, mold will proliferate in virtually any building or housing structure. This is not true with regard to asbestos or lead. Further, the public having been sensitized to mold’s ubiquitous nature, can readily blame common symptoms of itching, rashes, and cold symptoms on exposure to mold and the indoor environment.

Mold litigation does share a common element with another area that has been a hot bed of litigation, and that is breast implant litigation. They both share in common a critical element in the way the cases have evolved, and that is the law has led the science.

In early 1992, when Stanley Chesney, a Cincinnati lawyer, attempted to have breast implant cases treated as a class, there was no generally accepted scientific study connecting breast implants with connective tissue disease.[23] Nonetheless, in 1994, after the appointment of a 17-member steering committee that negotiated the settlement, $4.25 billion was set aside for all women who had received breast implants of any type before June 1, 1993.[24] At the time, it was not lost on the scientific community, and the responsible corporate defendants, that there were still no scientifically accepted epidemiological studies to demonstrate an association between breast implants and connective tissue disease. The first such study was not published until June 16, 1994.[25] The 1994 study did not show a

statistically significant connection between breast implants and connective tissue disease.[26] It will also be remembered that a great deal of mass media coverage presaged the tens of thousands of breast implant claims that were brought in the 1980s and early 1990s. Again, like the current wave of mold claims, the media had sensitized the public to many possible widespread symptoms that could be caused from breast implants.

The breast implant litigation plaintiffs' bar had to overcome the lack of widely accepted scientific evidence to support the claims. This was accomplished in a variety of ways, including through the use of expert testimony. Plaintiff's lawyers also used the perceived "fear" of becoming ill as a tool in overcoming hard scientific proof.[27] This tactic proved effective because the public had been sensitized by the mass media to possible health threats from breast implants.

Conclusion

As public awareness continues to grow, and the construction boom continues, so will the number and type of mold claims. Currently, courts are experiencing an increase in employee actions, construction industry defendants, and architectural defendants, and due to the apparent susceptibility of children to irritation from mold exposure, school districts are increasingly becoming targets of mold litigation. The future of mold litigation is going to be contingent, in large part, upon how the insurance industry handles claims, how governments ultimately regulate mold exposure and contamination, and, most importantly perhaps, how lawyers handle the scientific issues associated with mold exposure claims.

Currently, some of the biggest battles in the mold litigation arena involve issues such as whether the pollution exclusion clause covers mold contamination, as well as insurance companies' inclusion of mold and fungi exclusions in new policies.[28] It is probably safe to say that as the insurance industry races to change its exclusions, and governments race to establish regulatory criteria, that the focus and direction of mold litigation will change, but continue to proliferate. There is even the possibility, albeit slim, that with the advent of government regulation, and progressive research conducted regarding mold-related illnesses, that public hysteria will decrease along with a commensurate reduction in the size of jury verdict awards. It is possible, but don't hold your breath.

[1] *Mary Melinda Ballard and Ronald Allison v. Fire Ins. Exchange, et al.*, No. 99-05252 (Tex. Dist. Ct. Travis County June 1, 2001). The $32 million award was reduced to $4 million on appeal. *Allison v. Fire Ins. Exchange*, Texas Court of Appeals, Austin No. 03-01-007171-CV, Dec. 19, 2002.

[2] *Charles Blum v. Allstate Ins. Co.*, No. 99-3563-E, Texas Dist., Nevces Co.

[3] Mold and fungi make up over 25 percent of the world's total biomass.

[4] *Thomas Anderson v. Allstate Ins. Co.*, 45 Fed. Appx. 754, C.A.9 (Cal.), 2002, decided Sept. 3, 2002.

[5] Stevens C. Redd, M.D., Chief Air Pollution Respiratory Health Branch, National Center for Environmental Health, statement before the Subcommittee on Oversight and Investigations and Housing and Community Opportunity, Committee on Financial Services, U.S. House of Representatives, July 18, 2002. (Hereinafter "Redd, Congressional presentation")

[6] Some suggest it is upward of 1 million. *See* "A Few Facts About Fungi," www.uoguelph.ca/ngbarion/miscellaneous/facts.html.

[7] Some mushrooms produce in excess of 100 million spores an hour. *Id*.

[8] Kystek, 1997.

[9] Redd, *supra* note 5.

[10] *Id*. It is important to note, however, that this evidence is related to studies showing chronic ingestion of these toxins from contaminated foods being associated with liver and kidney tumors in animals and people.

[11] *Id*.; Institute of Medicine, "Clearing the Air: Asthma and Indoor Air Exposure," 2000. There had earlier been a report

that five infants died in a Cleveland hospital from exposure to mold. This conclusion was subsequently withdrawn on the basis of insufficient scientific evidence to support it.

[12] Institute of Medicine, "Clearing the Air: Asthma and Indoor Air Exposure," 2000.

[13] Redd, *supra* note 5.

[14] California, SB 732 (2001).

[15] State of California, Dept. of Health Services, SB 732 Implementation Update, October 22, 2002.

[16] Some experts even contend that it would take in excess of 140 samples in a standard size room to come up with a representative sample of the amount of mold present.

[17] Redd, *supra* note 5.

[18] Russell Nassof, "Understanding Microbial Issues," Defense Research Institute presentation, San Diego, CA, April 2002.

[19] Available at www.cbsnews.com/stories/2000/03/02/48hours/main167069.shtail. The story also briefly mentioned the death of certain infants in Cleveland resulting from mold contamination, without mentioning that the CDC had withdrawn that conclusion for lack of sufficient scientific evidence.

[20] Available at http:11abcnews.go.com/sections/2020-toxicmold021129.html. The mass media's dissemination of mold hysteria is not limited to the U.S. articles about the Ballards and mold related problems can be found in newspapers throughout Europe. *See*, for example, www.theherald.co.uk/living/archive/16-5-19102-20-49-29.html. More recently, claims by celebrities regarding personal injury and property damage caused from mold contamination have been splashed across the headlines. Ed McMahon has filed a lawsuit over his home in Cold Water Canyon claiming that he and his wife have suffered four months of catarrhal congestion, coughing, and sniffling and also the death of their dog, Muffin. The McMahons are seeking some $20 million in damages. Erin Brockovich, the self-made environmental crusader whom Julia Roberts brought to fame in a movie by the same name, has also brought a mold-related claim regarding her home in Texas.

[21] Ostrager and Newman, §12.01 Insurance Coverage Disputes, 11th ed. (Aspen Law and Business 2002).

[22] *Fire Ins. Exchange v. Melinda Ballard, et al.*, No. 03-01-00717-CV (Tex. Ct. App. Austin, TX, Dec. 19, 2002).

[23] **Marsha Angel, M.D., Science on Trial**, 100 (1996).

[24] 62 U.S.L.W. 2640 (April 19, 1994).

[25] Angel, *supra* note 23, at 100.

[26] *Id*. at 101.

[27] *Id*. at 134–38.

[28] This battle is currently going on in Florida. In December 2002, Florida Farm Bureau Ins. and the Florida Department of Insurance reached agreement on limiting mold coverage. Other insurance carriers are either in negotiations or pursuing administrative processes to limit coverage.

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This column is submitted on behalf of the Environmental and Land Use Law Section, Maribel N. Nicholson-Choice, chair, and Robert Manning, editor.
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