

# TOXIC MOLD: A LEGAL PRIMER

*Legal Issues Arising Out of Mold and Water Problems that every community association lawyer should understand*

**By:**

**Daniel K. Bryson**

**Lewis & Roberts, PLLC**

**Suite 400**

**1305 Navaho Drive**

**Raleigh, NC 27609**

**Telephone: (919) 981-0191**

**Fax: (919) 981-0431**

**[danbryson@lewis-roberts.com](mailto:danbryson@lewis-roberts.com)**

## I. INTRODUCTION

Mold grows...quickly, and as it grows issues need to be spotted immediately and action must be taken. If you fail to act promptly and properly, your clients could be hurt financially and physically.

Community association lawyers typically get thrust into the mold wars by ambush. The authors of this paper deal with dozens of community association lawyers throughout the country. Our first conversation typically begins with the lawyer describing a recent call from the Board's President, who was and has been confronted by a group of angry owners who believe that their homes are dangerous mold infested disasters. The President is in disbelief and cannot imagine that the horror stories are true. Instead, he/she believes that the ringleader is out to cause trouble and that the lawyer needs to come up with a simple solution by tomorrow. The lawyer simply

cannot deliver, as these issues are among the most complex any practitioner or litigator can deal with.

The purpose of this paper and our presentation is to provide you, the community association lawyer with a basic framework of understanding so that you can answer HOA's questions about their rights and remedies and know what type help you need and where to look for it. In addition, we hope to impart some suggestions on how to assist the litigation process and how to avoid future problems when you HOA's members begin to bicker amongst themselves. A survey of the few appellate decisions and reported decisions dealing specifically with mold reveal hard fought legal battles and no quick solution. We also include sections setting forth the legal authorities surrounding claims against builders and manufacturers of defective building products, as these claims are almost always involved in these cases.

## **II. A SUMMARY OF WHAT YOU SHOULD DO WHEN CONFRONTED WITH MOLD ISSUES**

We like to get right to the point. When confronted with the Board member in denial, who has just been accosted by an angry unit owner, we suggest that you do the following:<sup>1</sup>

Ask these questions:

1. Mold questions
  - A. What exactly has been discovered?
  - B. How long has it been around?
  - C. Who discovered it?
  - D. How long has the Board known about it?

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<sup>1</sup>A copy of a Toxic Mold Client Intake Checklist is included in the appendix.

- E. Is it in common areas?
  - F. Have any inspections/tests been performed on the mold?
2. Water questions
- A. What is the source of water intrusion that is feeding the mold?
  - B. Who discovered it?
  - C. How long has the Board known about it?
  - D. Is it in common areas?
  - E. Has any inspections/tests been performed on the area?
  - F. Was the source caused by original construction? If not, what caused the water intrusion?
3. What maintenance has been performed?
4. What repairs have been performed?
5. How old are the units?
6. What insurance is available and have they been notified of a claim?
7. Who are the potentially responsible persons?
8. Who are the potential plaintiffs?

Once you have this basic information, you should notify insurance companies of the mold and begin you search for a mold expert and a mold attorney to help advise you as you try to surmount the various obstacles that are in your way. As for Mold experts, a Certified Industrial Hygienist (CIH) or the like should be immediately consulted and queried on how to mitigate damages and prevent mold exposure and growth. A forensic engineer may also be necessary. All sick owners should be directed to a medical professional. Simply put, call in those who do this

stuff all the time and have them tell your client what is needed to take care of the property and people.

Spoilation of Evidence must be on the forefront of your mind. All activities should be memorialized in many ways, including photographs and video. The potentially responsible parties and insurance companies should be notified prior to any destruction of evidence. Its not a perfect world and your admonitions about this will fade in the mind of your clients over time, but keep on them. They (and you) simply cannot afford to be sloppy at this time.

The next steps you take will be based upon the circumstances of your case. This takes more analysis, which begins with a general overview of the Mold Wars.

### **III. OVERVIEW**

Indoor mold infestation problems are likely to exist in buildings and homes suffering from chronic water intrusion. The presence of molds indoors has been a problem since Biblical times.<sup>2</sup> It has grown to reach epidemic proportions, however, over the past decade. The culprit is thought to be the emergence of energy-efficient, airtight buildings.<sup>3</sup> These structures, often constructed of synthetic building materials, are tightly sealed making it easy for water to become trapped behind interior walls, creating ideal breeding grounds for mold.<sup>4</sup> Because these structures are so airtight, the only entering air comes through the structure's ventilation system.<sup>5</sup>

As a result, indoor air problems are worsened because the contamination is spread throughout the

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<sup>2</sup> Leviticus Chapter 14 Verses 37. And he shall look on the plague, and, behold, if the plague be in the walls of the house with hollow strakes, greenish or reddish, which in sight are lower than the wall; 38. Then the priest shall go out of the house to the door of the house, and shut up the house seven days; 39. And the priest shall come again the seventh day, and shall look: and, behold, if the plague be spread in the walls of the house; 40. Then the priest shall command that they take away the stones in which the plague is, and they shall cast them into an unclean place without the city.

<sup>3</sup> See, David F. Blundell, *Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?* 8 *Envtl. Law.* 389. February, 2002

<sup>4</sup> David W. Mockbee, *The History of Problems Caused by Mold and Mildew Growth in Buildings.* *Mold and Mildew Problems in Buildings*, 55 (2002).

<sup>5</sup> *Id.*

entire structure.<sup>6</sup> Mold infestations not only cause physical damage to host buildings, often rendering them unusable, but also pose serious health risks to the occupants. The adverse health effects are especially serious considering that Americans spend between 75 and 90 percent of their time indoors.<sup>7</sup>

Although there are over 100,000 different molds, some experts assert that only approximately fifty are toxic to human health.<sup>8</sup> Toxic molds are unique because they can produce nonvolatile chemicals known as mycotoxins.<sup>9</sup> Mycotoxins can enter the body via inhalation, the most probable rout, or through skin contact.<sup>10</sup> The impact molds have on human health depends upon the species involved, the metabolic products being produced, the amount and duration of exposure to the mold, and the specific susceptibility of the person exposed.<sup>11</sup> The most frequent toxigenic molds to be found indoors are *Aspergillus*, *Cladosporium*, *Penicillium*, and *Stachybotrys*.<sup>12</sup> *Stachybotrys*, the most publicized toxic mold, is a greenish-black mold that grows on materials with a high cellulose and low nitrogen content, such as fiberboard and gypsum board.<sup>13</sup> One study of a family exposed to *Stachybotrys* through their home's leaky roof complained of headaches, sore throats, hair loss, flu symptoms, diarrhea, fatigue, dermatitis, general malaise, and psychological depression.<sup>14</sup> As discussed below,

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6 *Id.*

7 Alexander Robertson, Jr., *Mold: An Emerging Construction Defect*, 18 GPSOLO 44, (2001).

8 Blundell, *supra* note 1, at 391.

9 Robertson, *supra* note 5.

10 *Id.*

11 Harriet Ammann, *Is Indoor Mold Contamination a Threat to Health?*, at <http://www.doh.wa.gov/ehp/oehas/mold.html> (Department of Health Report from Washington State)(on File with the Environmental Lawyer).

12 *Id.*

13 EPA's Indoor Air Quality Home Page ([www.epa.gov/iaq](http://www.epa.gov/iaq)).

14 Amman, *supra* note 9.

however, there are still difficulties and limitations in establishing links between toxic mold in contaminated buildings and illness.<sup>15</sup>

Despite the problem of proving causation, water intrusion and toxic mold claims can be brought using a variety of legal claims. The causes of action available include: negligence, professional malpractice, strict liability, breach of implied and express warranties, constructive eviction, workers' compensation, violations of the American's with Disabilities Act, breach of contract, fraud, and failure to disclose in sale of property.<sup>16</sup> Potential defendants include builders, architects, plumbers, HVAC manufacturers, landscape contractors, apartment owners, property managers, insurance companies, repair contractors, real estate agents, manufacturers, and sellers of property. Claims are frequently brought against insurers for bad faith, homeowner associations for improper maintenance, and builders for construction defects.<sup>17</sup>

The basic element of a mold contamination case is the plaintiff's demonstration that the defendant's acts or omissions proximately caused the injuries.<sup>18</sup> An important fact in achieving this end is that "[m]old growth in buildings (in contrast to mold contamination from the outside) always occurs because of unaddressed moisture problems."<sup>19</sup> In a mold contamination case, the plaintiff must prove that exposure to the toxic mold was both the proximate and actual cause of the alleged injuries.<sup>20</sup> Proximate cause, the easier of the two, can generally be established by merely proving the structure is infested with mold.<sup>21</sup> Actual cause, however, requires proof that the mold is capable of causing the plaintiff's injury (general causation), and proof that mold

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15 *Id.*

16 Robertson, *supra* note 2.

17 See, Michael Capozzi, *Mold Claims Growing in Number and Size*, Risk & Ins. March, 2002.

18 *Id.* at 394.

19 Ammann, *supra* note 9.

20 Blundell, *supra* note 1, at 394.

21 *Id.* at 395.

contaminants did enter the plaintiff's body causing the injury (specific causation).<sup>22</sup> General causation can be established through medical evidence linking "x" mold to "y" injury. Proving specific causation, however, is difficult because there is little agreement as to what is a safe level of exposure to molds.<sup>23</sup> Thus, as discussed in this paper, having expert testimony admitted into trial is the most crucial factor in winning a toxic mold suit from the plaintiffs' perspective.

Although permissible exposure limits have not yet been established, "there are three basic propositions regarding indoor fungi: (1) fungi should not be growing indoors; (2) levels of fungi in indoor air should not be greater than outdoor air; and (3) there should not be different species of fungi in indoor air from those in outdoor air."<sup>24</sup> Until permissible exposure limits are established through scientific testing, plaintiffs will have to continue to rely on circumstantial evidence coupled with symptomology to link toxic mold exposure to health problems.<sup>25</sup>

#### **IV. COMMON CLAIMS OF PLAINTIFFS IN MOLD AND WATER INTRUSION CASES**

In order to advise your clients what to do when they find mold, you should know what type claims are typically involved in mold litigation, which can involve quite a variety of defendants and causes of action. Common defendants in mold cases include manufacturers of building components, appliance manufacturers, general contractors, HVAC, roofing, and plumbing contractors, grading subcontractors, architects, engineers, home building inspectors, sellers of real estate, real estate agents, landlords, homeowners and condominium owners associations, mold remediators, insurance carriers, and employers. Typical causes of action in mold cases are breach of contract, breach of express warranty, breach of various implied

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 395-96; see also *Mondelli v. Kendall Homes Corp.*, 631 N.W.2d 846, 855, 262 Neb. 263, 272 (2001) (holding admissible expert's testimony that different types of molds indoors and outdoors is a potential hazard).

<sup>25</sup> Blundell, *supra* note 1, at 396.

warranties, negligence, negligent misrepresentation, unfair and deceptive trade practices, fraud, breach of implied warranty of habitability, product liability, bad faith, and workers' compensation claims. Which causes of action are appropriate for you will be dependent upon the source of the water intrusion causing the mold proliferation, as well as your relationship with the potential responsible party. This paper will discuss the possible causes of action against the more common potential responsible parties.<sup>1</sup> Specifically, this paper will address typical claims asserted by plaintiffs in mold and water intrusion cases in the following circumstances: A) homeowner versus contractor; B) homeowner versus seller; C) homeowner versus insurance company; and D) tenant versus landlord.

**A. Homeowner vs. Contractor**

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<sup>1</sup> Unless stated to the contrary the case and statutory law used as the foundational basis of this paper is North Carolina Law. We have found, however, that these same claims are typically available in the various jurisdiction in which we prosecute cases. Should you have a specific question about your State, please feel free to call us and we will try to help.



Perhaps the most common type of mold case is when a homeowner sues his/her contractor (or subcontractor) for defective construction of his/her home. Plumbing leaks, improper window/roof flashing, improper roof construction, installation/application of an inherently defective exterior wall cladding (i.e. barrier Exterior Insulation and Finish System ( EIFS )), improper/defective installation of an otherwise appropriate wall cladding, defective windows, improper and/or over-sized HVAC installation, and improper/defective crawlspace construction or design are all prime examples of how improper/defective construction may cause moisture to intrude into the building envelope resulting in mold proliferation. When faced with mold loss as a result of improper/defective construction by the contractor you will have several causes of action at your disposal to seek recovery.

### **1. Plaintiffs' Claim for Breach of Contract**

Everyone remembers the elements of this cause of action from law school as being: (a) a contract; (b) a breach; (c) causation; and (d) damages. Plaintiffs should only assert this claim against parties with whom they are in privity of contract. Thus, you will have no breach of contract claims against subcontractors, unless your state allows a third-party beneficiary claim. Standard contracts, such as those promulgated by the American Institute of Architects ( AIA ) and the Association of General Contractors ( AGC ), as well as custom contracts, often contain representations that the materials being utilized on the construction project are of good quality, new or similar representations.<sup>2</sup> These representations are often

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<sup>2</sup> See, i.e., Section 3.5.1 AIA A201 (1997) which provides that:

the contractor warrants to the owner and architect that materials and equipment furnished under the contract will be of good quality and new unless otherwise required or permitted by the contract documents, that the work will be free from defects not inherent in the quality required or permitted, and that the work will conform to the requirements of the contracted documents. Work not

contained in provisions outside the typical warranty provisions of the contract. The addenda of the contract, specifications, and architectural drawings are also useful documents to determine what representations have been made regarding the quality and types of components and products to be used on the project. Accordingly, pleading this claim is simply a brief description of the provision in the contract which requires quality or new or a certain type of component, along with an allegation asserting that the said component has failed.<sup>3</sup>

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conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the contractor, improper or insufficient maintenance, improper operation, or normal usage. If required by the architect, the contractor shall furnish satisfactory evidence as to the kind and quality of materials

<sup>3</sup> A sampling of cases which hold the general contractor responsible to the owner for construction defects and workmanship deficiencies are as follows: Earls v. Link, Inc., 38 N.C. App. 204, 247 S.E.2d 617, 619 (1978) (general contractor liable for fireplace and attached chimney which failed to adequately remove smoke); Lyon v. Ward, 28 N.C. App. 446, 221 S.E.2d 727 (1976) (general contractor liable for failure to provide useable water supply); Sims v. Lewis, 374 So.2d 298 (Ala. 1979) (contractor responsible for defective septic tank); Carpenter v. Donahoe, 154 Colo. 78, 388 P.2d 399 (1964) (contractor responsible for cracks in basement wall); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *affirmed*, 384 Mich. 257, 181 N.W.2d 271 (1970) (contractor responsible for leaky roof); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (contractor responsible for failure to install boiler valve which regulated temperature for water used for domestic purposes); Waggoner v. Midwestern Development, Inc., 83, S.D. 57, 154 N.W.2d 803 (1967) (contractor responsible for water seepage in basement); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (contractor responsible for fireplace and chimney defects); Langley v. Helms, 12 N.C. App. 620, 184 S.E.2d 393 (1971) (the court held that an agreement to construct a house in a good and workmanlike manner did not exclude undertaking to protect the purchaser against the use of bad and unsuitable material in doing the work undertaken); Delly v. Lehtonen, 21 Ohio App.3d 90, 486 N.E.2d 251 (1984) (the court upheld an owner's suit against the general contractor based on the subcontractor's improper installation of drain tile, which resulted in water damage in the basement. The contractor chose the subcontractor and was responsible for the poor workmanship of the sub.); Shaw v. Bridges-Gallagher, Inc., 174 Ill. App.3d 680, 528 N.E.2d 1349 (1988) (The general contractor was responsible for the work of the roofing contractor.); Rivnor Properties v. Herbert O. Donnell, Inc., 633 So.2d 735, 744 (La. Ct. App. 1994) (court held against the general contractor who was charged by contract with the sole responsibility for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the contract. Thus, his duty to the owner was to conduct periodic inspections as needed to assure all work was performed properly, resulting in a building free from defects); Point East Condominium v. Cedar House, 663 N.E.2d 343 (Ohio App. 1995) (the contractor was responsible for the work of his subcontractor); Brooks v. Hayes, 395 N.W.2d 167 (Wis. 1986) (delegation of performance of masonry work did not relieve general contractor of liability for breach of construction contract when mason, and independent contractor, negligently performed that part of general contractor's contractual obligation).

## 2. Plaintiffs' Claim for Breach of Express Warranties

In any mold or water intrusion case against a contractor, plaintiffs' counsel should immediately and carefully review the contract, contract specifications and architectural drawings for *any reference* about the quality of the construction materials and components being utilized. Too often general contractors naively think that a specific express warranty provision in the contract, such as, "one year," is the only express warranty made. Typically these types of express warranty provisions pertain to a contractor's obligation to correct or perform repair work itself, which is separate from other express warranties within the contract. However, a careful review of the construction contract will reveal other express warranties, not just those related to the contractor's obligation to correct or repair work. Courts have held that repair warranties are in addition to, and not in lieu of, defect-free warranty obligations.<sup>4</sup>

Generally, in the construction industry, an express warranty is a promise, statement, or representation in reference to the character or quality of work, goods, or services which becomes a part of the bargain.<sup>5</sup> These express warranties may arise in the contract documents, by oral statements, or by statute. Look at your states's statute. For example, in North Carolina we often cite N.C. Gen. Stat. § 25-2-313, which provides:

- (1) Express warranties by the seller are created as follows:
  - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - (b) Any description of the goods which is made part of the basis

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<sup>4</sup> See McDevitt & Street Co. v. K-C Air Conditioning Serv., 203 Ga. App. 640, 418 S.E.2d 87 (Ga. App. 1992); All Seasons Water Users Ass'n v. Northern Improvement Co., 399 N.W.2d 278 (N.D. 1987).

<sup>5</sup> Burke County Public Schools Board of Education v. Juno Constr. Corp., 50 N.C. App. 238, See J. Acret Construction of Litigation Handbook, Section 14/01 (1986); Daniel L. Brawley, Pleading Considerations-Claims, Cross-Claims and Counterclaims that arise in Construction Litigation.

of the bargain creates an express warranty that the goods shall conform to the description.

- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as warrant or guarantee or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Although this UCC statute typically only applies to goods, it has also been applied to construction projects.<sup>6</sup>

Generally, the essential elements of a claim for breach of express warranty are:

- (1) Existence of a warranty to the damaged party;
- (2) Breach of the warranty; and
- (3) Damage caused thereby.

13 Am Jur.2d, Building and Construction Contracts, 115.<sup>7</sup> Plaintiffs should think very broadly when alleging breach of express warranties. If a particular building material or component failed within the applicable statutory limitations period, an express warranty was breached. The builder's counsel will attempt to narrowly construe any alleged express warranty. It is important

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<sup>6</sup> Westover Products, Inc. v. Gateway Roofing Co., 94 N.C. App. 63, 380 S.E.2d 369 (1989); Russell v. Baity, 95 N.C. App. 422, 382 S.E.2d 217 (1989).

<sup>7</sup> A sampling of relevant cases include: Elmore v. Blume, 31 Ill. App.3d 643, 334 N.E.2d 431. (Builder-vendor's oral assurance to purchasers that after rainy season basement would be dry constituted express warranty and subsequent water problems in basement resulted in breach of express warranty as well as breach of implied warranty of habitability); Leggette v. Pittman, 268 N.C. 292, 150 S.E.2d 420 (1966) (failure to correct cracks and squeaks in flooring violated express warranty) Salem Towne Apartments, Inc. v. McDaniel & Sons Roofing Co., 330 F. Supp 906 (E.D.N.C. 1970) (roofing contractor's failure to obtain uniform color in violation of express warranty to do so); Russell v. Baity, 95 N.C. App. 422, 382 S.E.2d 217 (1978) (failure of heating system to meet state and local codes is a breach of express warranty); Haywood Street Redevelopment Corp., Inc. v. Peterson, 120 N.C. App. 832, 463 S.E. 2d 564 (1995), *cert. denied*, 342 N.C. 655 (1996) (a breach of warranty continues as a new breach every day that the work fails to comply with the express warranty).

to carefully review the contract documents in this regard. Moreover, oral representations made by the builder about the quality of construction provide a basis to assert this course of action.

### **3. Plaintiff's Claim of Breach of Implied Warranties**

In residential construction, the implied warranty of habitability that accompanies new dwellings is harsh for builders. For example, in Medlin v. FYCO, Inc., 139 N.C. App. 534, 541, 534 S.E.2d 622, 627 (2000), North Carolina's appellate courts held a builder to strict liability for a construction defect. The court held irrelevant the fact that the builder did not know of the product defect at the time of installation. In North Carolina, as in many states, it has long been recognized that a contractor impliedly warrants the quality of his work:

It is the duty of the builder to perform his work in a proper and workmanlike manner . . . This means that the work shall be done in an ordinarily skillful manner, as a skilled workman should do it . . . . There is an implied agreement such skill as is customary will be used. In order to meet this requirement, the law exacts ordinary care and skill only.

Moss v. Best Knitting Mills, 190 N.C. 644, 130 S.E. 635, 637 (1925); see also Cantrell v. Woodhill Enterprises, Inc., 273 N.C. 490, 160 S.E.2d 476 (1968) (The elements for this claim are (1) a construction contract; (2) failure to perform in a workmanlike way or failure to possess the skills necessary to perform the work; and (3) damage resulting from the failure). The contractor's duty to construct in a workmanlike manner extends to materials used in the construction. Langley v. Helms, 12 N.C. App. 620, 184 S.E.2d 393, 397 (1971). Accordingly, an owner may assert a warranty claim against a contractor for defects in workmanship or

materials even though the contract may not contain an express warranty to that effect. Id. In addition, a contractor is responsible for any actions of his subcontractors either in failing to use good quality materials or to construct in a workmanlike manner, or any negligent conduct on their part, if the general contractor knew or reasonably should have known of those conditions. Lindstrom v. Chestnut, 15 N.C. App. 15, 189 S.E.2d 749, 754 (1972).

It is important for Community Association lawyers to determine whether their jurisdiction has extended the scope of the implied warranties to include condominiums and apartments. For example, in Antigua Condominium Association v. Melba Investors Atlantic, Inc., 517 A.2d 75 (Md. Ct. App. 1986), the Maryland Court of Appeals construed Maryland Condominium Act as providing an implied warranty against defects in condominium common areas. In California, it appears that an implied warranty exists protecting purchasers from defective construction and this has been extended to sellers of new construction, including apartment buildings. Pollard v. Saxe & Yolles Dev. Co., 525 P2d 88 (Cal. Ct. App 1974)

Some jurisdictions have statutory provisions, which provide for implied warranties flowing from a contractor of a new dwelling to the homeowner. However, it is important to note that certain jurisdictions may not impose implied warranties where the home is already constructed.<sup>8</sup> Also, bear in mind that in many jurisdictions an implied warranty may only apply

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8 Maryland Real Property Article 10-203. Creation of implied warranties

(a) Except as provided in subsection (b) or unless excluded or modified pursuant to subsection (d), in every sale, warranties are implied that, at the time of the delivery of the deed to a completed improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

- (1) Free from faulty materials;
- (2) Constructed according to sound engineering standards;
- (3) Constructed in a workmanlike manner; and
- (4) Fit for habitation.

to latent defects and protections afforded by implied warranties will not apply if the defect is readily apparent.

Manufacturers are subject to UCC implied warranties for all products they supply to the project.<sup>9</sup> However, manufacturers will argue that owners do not satisfy the definition of a buyer under the UCC.<sup>10</sup> In addition, manufacturers will argue that the defective product or “good” becomes realty once installed on the project, and that the UCC no longer applies.<sup>11</sup>

#### **4. Plaintiffs’ Claim for Negligence**

Plaintiffs’ preference, in any construction defect case, is to assert a negligence claim against the general contractor, responsible subcontractor, and manufacturer of the defective building component, where appropriate. However, the “economic loss rule” is often an impediment in that regard. The economic loss rule developed, in large part, from Seely v. White Motor Company, 403 P.2d 145, 63 Cal.2d 9, 45 Cal. Rptr. 17 (1965)<sup>12</sup> It acts as a dividing line between tort and contract law by limiting damages recoverable under tort liability to those causing injury to person or property. The defense argument is that parties to a construction project ought to be able to allocate risk via contractual provisions and warranties without fear of the broad liability that can be asserted in a tort action. However, the economic loss rule may not apply if there is damage to “other property” or “personal injury.” Application of the economic loss rule varies from state to state. As a general guide, an actionable personal injury claim may lie if the illness was caused by exposure to toxic mold, which was caused by water intrusion resulting from defective workmanship or materials. Likewise, if the construction contract

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(b) The warranties of subsection (a) do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed .

<sup>9</sup> See N.C. Gen. Stat., Section 25-2-314.

<sup>10</sup> See N.C. Gen. Stat., Section 25-2-103.

<sup>11</sup> See N.C. Gen. Stat., Section 25-2-105(1) for a definition of goods.

<sup>12</sup> holding that “purely economic losses are not ordinarily recoverable under tort law”

involves constructing a dormitory, plaintiffs may have an actionable negligence claim to recover replacement costs or costs of remediating all personal property damaged by mold as above.

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other.<sup>13</sup> A duty of care may arise out of a contractual relationship, “the theory being that accompanying every contract is a common law duty to perform with ordinary care, the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.”<sup>14</sup> Thus, if a defective product is used, the argument can be made against the contractor that the contract has been “negligently performed.”

In addition, there is ample case law in many jurisdictions, as there is in North Carolina, that a violation of the Building Code constitutes negligence *per se*.<sup>15</sup> Therefore, in any water intrusion case, plaintiffs should seek out building code provisions which are applicable to the failed or defective building components. Some jurisdictions such as Virginia and North Carolina have adopted building codes effective throughout the entire state. However, even if there is a statewide building code, often times the local municipality or county may have adopted specific provisions, which also must be considered. In other jurisdictions, such as Maryland, at least until recently, each county was responsible for adopting its own building code. In addition to searching for prescriptive provisions, the building code often has performance-based provisions which may be applicable. For example, a contractor under the building code has the responsibility to construct a building which prevents the harmful intrusion of water. If the

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13 Pinnex v. Toomey, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955).

14 Olympic Products v. Roof Systems, Inc., 88 N.C. App. 315, 363 S.E.2d 367, 371 (1988) (citing Pinnex, 242 N.C. at 362, 87 S.E.2d at 898).

15 Olympic Products, *supra*.; see also Lindstrom v. Chesnutt, 15 N.C. App. 15, 189 S.E.2d 749, 754 (1972) (Court held that violation of building code is negligence *per se* and that purpose is to establish **minimum** standards, materials, designs, and construction of buildings for the safety of the occupants . . . ); Oates v. JAG, Inc., 314 N.C. 276, 333 S.E.2d 222, 225 (1985); Drum v. Bisaner, 252 N.C. 305, 113 S.E.2d 560 (1960); Sullivan v. Smith, 56 N.C. App. 525, 289 S.E.2d 870, cert. denied, 306 N.C. 392, 294 S.E.2d 220 (1982) and cases cited therein.



building leaks, from whatever failed or defective building component, the building code has been violated. Thus, while contractor negligence claims are relatively simple, manufacturers are more difficult because of the typical lack of contractual privity. Manufacturers argue that owners' injuries constitute "economic loss," and that the "economic loss rule" bars homeowners from recovering in tort.

In North Carolina, as well as most jurisdictions that follow the "economic loss rule," plaintiffs are barred from recovering for losses due to a product defect, if the damage suffered is to the product itself.<sup>16</sup> Therefore, manufacturers will typically contend that the plaintiffs' damages are purely economic because the "product" which was damaged was the entire project, and that the allegedly defective product lost its identity as a separate product when it was integrated into the project. In short, the argument is that the project damaged itself. However, keep in mind that different jurisdictions have separate rules as to what is actually considered the "product." Therefore, plaintiffs can deflect this argument by the manufacturer by alleging damage to property other than the allegedly defective products. For example, the defective windows caused water intrusion problems with the walls.

### **5. Plaintiffs' Claim for Negligent Misrepresentation**

In a nutshell, this claim can be effective if a plaintiff can prove that one of the parties involved with the water intrusion problem, knew or should have known, of the problem, and failed to inform the plaintiffs. Focused discovery of the manufacturer's file may reveal a past history of problems with the defective component, or perhaps a general contractor that has experienced problems on earlier projects.

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<sup>16</sup> See Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771, 36 UCC Rep. Serv. 2d 680 (No. 5:97-CV-683-BR(2)(E.D.N.C.1998).

Under the Restatement (Second) of Torts §552(1) (1977), as applied by the North Carolina Supreme Court, a defendant who (1) during the course of a business, profession or employment, or in any other transaction in which the defendant has a pecuniary interest, (2) supplies false information for the guidance of others, in their business transaction, (3) is subject to liability for pecuniary loss caused to them, (4) by their justifiable reliance upon the information, (5) if the defendant fails to exercise reasonable care or competence in obtaining or communicating information. Restatement (Second) of Torts § 552(1) (1977). The plaintiffs need to prove defendants knowledge of reckless falsity. Id.<sup>17</sup> The issue of negligent misrepresentation is generally a question for the jury.<sup>18</sup>

Both a corporation and its agents may be held liable for negligent misrepresentation. A corporation is liable for negligence through the doctrine of respondeat superior if its agents are negligent. Id. “A corporation is liable for the torts and wrongful acts or omissions of its agents or employees acting within the scope of their authority or the course of their employment.”<sup>19</sup>

## **6. Plaintiffs’ Claim for Unfair and Deceptive Trade Practices**

This statutory action is *sui generis*, apparently sounding in tort, but neither wholly tortious or wholly contractual in nature.<sup>20</sup> Consumer protection acts have been enacted in most jurisdictions out of a desire to establish new rights that encourage ethical behavior in the marketplace and provide redress to those wronged by unscrupulous behavior. Although most

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17 In accepting the Restatement (Second) of Torts, the North Carolina Supreme Court in Raritan River Steel Company rejected three other tests. One of these tests restricted liability to those in privity with the contract, which the court rejected as too restrictive. A test of liability to anyone who was reasonably foreseeable was rejected as being too expansive. A third test, which had been applied by the Court of Appeals, was also rejected because it required an assessment of moral blame and a policy of preventing future harm, which the Supreme Court thought would be too difficult to apply. See Day and Morris, 27.50, fn. 72.

18 Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 595, 394 S.E.2d 643, 648 (1990).

19 Raper v. McCrory-McLellan Corp., 259 N.C. 199, 205, 130 S.E.2d 281, 285 (1963).

20 See Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 230, 314, S.E.2d 582, 584 (1984).

jurisdictions have enacted such legislation there are major differences between the actual protections afforded in the different jurisdictions. Claims for unfair and deceptive trade practices in water intrusion or mold claims, as with any litigation, can be potent given the broad scope of the statute. The key will be showing knowledge of the defective product prior to its installation.

## **7. Plaintiff's Claim for Fraud**

Plaintiffs may find recourse for mold damage as a result of defective construction in fraud cause of action. However, an owner/plaintiff is only entitled to recover for fraud when he/she can establish the following elements: (1) false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which does, in fact, deceive; and (5) resulting in damage to the injured party.<sup>21</sup>

### **B. Homeowner vs. Seller**

A seller of a dwelling may be subject to liability to a subsequent purchaser if the seller deceived the current homeowner about the actual condition of the dwelling. This may arise in situations where the seller knew or should have known of water damage or mold proliferation and failed to disclose these conditions to the prospective home buyer. In fact, many jurisdictions require a seller to disclose any previous water-damage/mold damage to any prospective buyer. The failure of a seller to make any such disclosure would subject the seller to liability under fraud-based causes of action, consumer protection acts, also under any violation of statutory disclosure requirements. These various causes of action likely will provide for recovery of multiple damages, attorney fees/expenses as well as the possible recovery of punitive damages.

### **C. Homeowner vs. Homeowners' Insurance Carrier**

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<sup>21</sup> Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674, 677 (1981).

The standard HO3 homeowners insurance policy covers leaks that are “sudden and accidental” or result from wind blown rain. Mold contamination resulting from such leaks is an “ensuing loss.” However, insurance carriers are now seeking to exclude mold coverage or place caps on the amount to be paid on mold claims.<sup>22</sup> Undoubtedly, plaintiffs’ attorneys will challenge the enforceability of these caps.

Mold lawsuits against the homeowners insurance carrier focus on the misconduct of representatives of the insurance carrier. The misconduct may be as simple as failing to pay a covered claim (breach of contract) to purposely delaying settlement of a valid claim while, knowing the mold infestation worsens by the day. Depending on the circumstances, homeowners may have the following causes of action against the insurance carrier 1) breach of contract, 2) consumer fraud (or, unfair and deceptive trade practices), 3) bad faith, 4) negligence; and 5) injunctive relief

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<sup>22</sup> For example, North Carolina policies now contain a \$5,000 cap; Virginia policies contain a \$2,500 cap.

### **1. Plaintiffs' Claim for Breach of Contract**

The homeowners insurance policy is a contract between the homeowner and the insurer. The elements of this cause of action are: (a) a contract; (b) a breach; (c) causation; and (d) damages. When the insurer fails to perform its contractual obligation, it subjects itself to a breach of contract claim. A typical scenario occurs when the insurer denies a claim for water damage or mold damage which it is obligated to pay under the terms of the policy. Additionally, if the insurer fails to make a decision whether to pay a claim within a reasonable period of time, the insurer may have breached the insurance contract.

### **2. Plaintiffs Claim for Consumer Fraud**

Most states have laws that protect consumers against fraud, unfair claims practices, unfair and deceptive trade practices, unfair competition. Therefore, plaintiffs should consider whether the acts or omissions of the insurance carrier have run afoul of their state's consumer fraud laws. For example, did the adjuster misrepresent pertinent facts or insurance policy provisions relating to the coverage at issue? Did the adjuster fail to effectuate a prompt, fair, and equitable settlement of plaintiffs' claim in which liability had become reasonably clear? Any unfair or deceptive act or omission on the part of the insurer's representatives that resulted in damages could constitute grounds for bringing a consumer fraud action.

### **3. Plaintiffs' Claim for Bad Faith**

Bad faith claims are usually based upon contract or tort theory. Most states recognize bad faith claims on tort theory. Some states recognize bad faith claims on contract theory. The law imposes a duty of "good faith and fair dealing" upon the parties to a contract. An example of grounds for a bad faith claim is an insurer's groundless refusal to pay an insurance claim. However, ordinary negligence or mistake is not enough. Bad faith can trigger punitive damages,

and juries often do not hesitate to punish bad faith insurers. In the Ballard v. Fire Ins. Exchange<sup>23</sup> case, the jury was appalled at the bad faith exercised by adjusters for two different insurance companies, which grossly mishandled the insured's mold claim. The jury awarded the plaintiff \$32 million.<sup>24</sup> It is important to document the substance of every contact with adjusters, in the unfortunate event that the adjuster exercises bad faith. This documentation could prove to be valuable evidence supporting your claims of bad faith.

#### **4. Plaintiffs' Claim for Negligence**

Negligence is a common law tort. The elements of negligence are: 1) duty, 2) breach of duty, 3) proximate cause, and 4) damages. Plaintiffs must prove that the insurer was under some duty and that the insurer breached that duty. Plaintiffs must also prove that the damages they sustained were directly caused by the breach of duty. An example would be that the adjuster was under a duty to fully investigate and remediate plaintiffs' claim after being notified of mold contamination in the plaintiffs' home. Plaintiffs should also consider the negligent conduct of others who are under the control or supervision of the insurance carrier. They may be acting as agents of the carrier. One possible scenario is where the carrier directs and supervises the work of one of its "preferred remediators." If the remediators are negligent in performing the remediation of mold, the negligence may pass to the carrier, since the remediator was acting as an agent of the principal, the insurance carrier.

#### **5. Plaintiffs' Claim for Injunctive Relief**

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23 No. 99-05252, Tex. D. Travis Co.

24 The award was later reduced to \$4 million by a judge.

An injunction is a court order prohibiting someone or commanding someone to undo some wrong or remedy.<sup>25</sup> It is an equitable remedy directed to a defendant forbidding the defendant from doing some act which he is threatening or attempting to commit, such act being unjust, inequitable, injurious to the plaintiff, and not such as can adequately be redressed by an action at law.<sup>26</sup> The courts will not grant an injunction unless the threat of irreparable harm is both real and immediate.<sup>27</sup> One scenario that could constitute grounds for injunctive relief is when a lengthy mold remediation is far from complete, and the adjuster states that he will stop paying for alternative living expenses for the homeowners, who cannot afford to pay for their own accommodations. However, the courts regard injunctive relief as an extraordinary and drastic remedy.<sup>28</sup> No injunction will issue if there is an adequate remedy at law.<sup>29</sup>

#### **D. Tenant vs. Landlord**

Most states have adopted the Uniform Residential Landlord Tenant Act ( Act ) in one form or another. The Act requires landlords to provide and maintain the premises in fit and habitable condition. If the premises contain significant levels of toxigenic mold, the premises are not fit and habitable. In many states, the duty the to provide fit and habitable premises is implied by law into every residential lease agreement. Also, most states impose a common law negligence standard of care (as described *supra*) both under the common law and the Act.

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25 BLACK'S LAW DICTIONARY 784 (6<sup>th</sup> ed. 1990).

26 *Id.*

27 See, e.g., Duke Power v. High Point, 69 N.C. App. 335, 317 S.E.2d 699 (1984).

28 Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974).

29 See Matthews v. Rodgers, 284 U.S. 521, 525 (1932); Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947); Porto Rico Telephone Co. v. Puerto Rico Communications Auth., 189 F.2d 39 (1st Cir.), cert. denied, 342 U.S. 830 (1951).

In a Delaware case,<sup>30</sup> two tenants, Stroot and Watson, brought a negligence suit against the landlord of the apartments for health problems caused by mold contamination. While living at the apartments, Stroot made seven emergency room visits for asthma attacks, logged nine days of inpatient care, and required intravenous steroids twelve times. Although Stroot suffered from allergies and asthma since childhood, the severity and frequency of her medical problems increased while living at the apartment complex. Watson lived in the apartments for four years, but was rarely there during the first two years of the tenancy. Despite repeated attempts to rid the apartment of mold, it continued to reappear. Upon spending more time at the apartment, Watson began to suffer a number of ailments including: fatigue, frequent headaches, sinus problems, chest pains and body aches. Prescription medicine did not help, and it was not until six months after moving out did her health begin to improve. At trial, Stroot received a \$1,000,000 jury verdict for personal injuries and a \$5,000 verdict for property damage, which was reduced by 22% for contributory negligence. Watson was awarded \$40,000 for personal injuries, which was also reduced by 22% for contributory negligence. The Uniform Landlord Tenant Act is a formidable ally to residential tenants.

#### **E. Arbitration**

Arbitration clauses and demands for arbitration are common issues that must be dealt with in multi-family mold cases. The association's attorney will be intricately involved in the decision to fight arbitration or, if some pressing need or egregious jury trial issue exists (like everyone in the county hates your client), to invoke arbitration. Because these issues are so common, we provide the following discussion.

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<sup>30</sup> New Haverford Partnership v. Stroot, 772 A.2d 792 (2001).



Often arbitration clauses can be found hidden in the many paragraphs of a general construction agreements. In the wake of recent litigation involving such clauses, some drafters are beginning to make arbitration agreements a more prominent part of the larger contract because the parties to these agreements must clearly understand they are subjecting themselves to an arbitration agreement. And further, parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate. A party cannot be forced to submit to arbitration of any dispute unless he has agreed to do so. In North Carolina, the determination of whether a dispute is subject to arbitration involves a two-pronged analysis, requiring the court to ascertain (1) whether the parties had a valid arbitration agreement; and (2) whether the specific dispute falls within the substantive scope of that agreement. Raspet v. Buck, 147 N.C.App. 133, 554 S.E.2d 676 (2001).

The North Carolina Court of Appeals addressed the arbitrability of claims based on tortious conduct, unfair and deceptive trade practices, and claims for punitive damages. The contract in the case before the court stated that all claims or disputes between the parties to the contract “arising out of, or relating to, the Contract Documents or the breach thereof would be resolved through arbitration. As the project neared completion, a dispute arose over the timeliness of the completion and a failure to pay a draw request. Rodgers Builders v. McQueen, 76 N.C.App. 16, 331 S.E.2d 726 (1985)(Plaintiff sued for money owed under the contract, fraud, unfair and deceptive trade practices, and negligent misrepresentation).

The court held that N.C. Gen. Stat. § 1-567.2(a) allowed the parties to include an arbitration provision in a written contract so long as any controversy subject to the arbitration clause was related to the contract or the failure or refusal to perform the whole or any part

thereof. Whether or not the parties agreed to submit a particular dispute or claim to arbitration is determined by looking at the language in the agreement to ascertain whether the claims fall within its scope. And whether a claim falls within the scope of an arbitration clause depends on the relationship of the claim to the subject matter of the arbitration clause, not whether it is characterized as a tort or contract. In its analysis the Court concluded that the language of the arbitration clause was sufficiently broad to include all claims which may arise out of or are related to the contract or its breach.

This case did not, however, discuss whether a personal injury claim would be related to or have a sufficiently strong relationship to an underlying breach of contract claim so as to fall within the scope of an arbitration clause. While no North Carolina cases have discussed this issue directly, other jurisdictions have addressed whether personal injury claims fall within the scope of an arbitration clause.

### **1. Arbitration Clauses and Personal Injury Claims**

The Florida Supreme Court specifically addressed whether the terms of an arbitration provision in a contract for the sale and purchase of a house required the claim for personal injury to be arbitrated. The Court held that such a claim was not arbitrable. Seifert v. U.S. Home Corp., 24 Fla.L.Weekly S 540, 750 So.2d 633, 635 (1999).

In Seifert, the owner of a newly constructed home was killed as a result of construction deficiencies in the house. The deceased's wife sued the contractor alleging claims for strict liability, negligence and breach of express and implied warranties. Defendant moved to compel arbitration invoking the arbitration clause in the construction contract. Defendant's position was that the arbitration clause mandated that Plaintiff's personal injury claims be arbitrated. The

arbitration clause read, “Any controversy or claim arising under or related to this agreement or to this property, or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller’s representatives shall be settled and finally determined by mediation or binding arbitration.”

The Court in its analysis stated:

[I]t is fair to presume that not every dispute that arises between contracting parties should be subject to arbitration. As the prevailing case law illustrates, even in contracts containing broad arbitration provisions, the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause. Disputes arise in many and varied contexts and the mere coincidence that the parties in dispute have a contractual relationship will ordinarily not be enough to mandate arbitration of the dispute. In other words, the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one arising out of or relating to an agreement. For a tort claim to be considered arising out of or relating to an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself.

Id.

The Court’s evaluation looked at whether the tort claim arose from the contract and bore a significant enough relationship to the contract as to mandate application of the arbitration clause. Plaintiff conceded that her claims for breach of contract or of any of the warranties or other rights under the contract were subject to arbitration. However, because the wrongful death claim was predicated upon common law negligence unrelated to the rights and obligation under the contract, plaintiff argued that the claim was not contemplated by the parties when the contract was made, and therefore should not be subject to arbitration. The court agreed.

[T]he absence of any mention of the parties’ rights in the event of personal injuries or death arising out of any alleged tortious conduct such

as that which allegedly occurred in this case creates an ambiguity and uncertainty as to the intent of the parties. Under the well established rule of construction, we are constrained to construe the provisions of the contract against its drafter, U.S. Home (defendant) . . . . There is nothing within these provisions to indicate that either party intended to include tort claims for personal injuries arising under the common law within the scope of either the contract in general or the arbitration provision in particular. In fact, the only reference to casualties relates solely to damages to the property itself and not to personal injuries suffered by either party as a consequence of the tortious conduct of the other.

Id.

In another Florida case, plaintiff sued her employer for invasion of privacy, battery and negligence after a fellow employee made numerous offensive sexually-oriented statements to her concerning her physical appearance, groped her and propositioned her. Defendant employer attempted to invoke the arbitration clause in plaintiff's employment contract which stated, "all disputes, claims and questions regarding the rights and obligations of the parties under the terms of this agreement were to be resolved through arbitration." The court refused to compel arbitration stating that "there is nothing in the agreement to indicate that either party intended to include sexual harassment litigation of tort claims for personal injuries arising under the common law within the scope of either the contract in general or the arbitration provision in particular." Boone v. Etkin, 25 Fla.L. Weekly D2275, 771 So.2d 559 (2000).

Louisiana courts have also faced this issue with a similar result. In one Louisiana case, plaintiffs purchased a mobile home from defendants. Subsequent to their purchase, plaintiffs began to experience trouble with their air conditioner, which had rusted and caused water to accumulate in the duct work of the mobile home. In spite of numerous efforts to correct the problems, the air conditioner continued to leak causing mold and algae to grow in

the duct work and insulation. Plaintiffs and their children began to experience respiratory health problems, which they alleged were caused by the mold and algae growth. Plaintiffs also alleged mental anguish and emotional distress. Dennis v. CMH Manufacturing, Inc., 773 So.2d 818, 819, 1999-1626 (La.App. 3 Cir. 11/2/00).

Defendant argued that plaintiffs agreed to arbitrate all claims when they signed the contract to purchase the mobile home. The arbitration clause read, any and all claims for liability, damages or expenses arising out of or in connection with the home, the contract, or any warranties, representations, or agreements relating thereto shall be resolved through binding arbitration.

The court stated it was clear that the clause covered any and all claims regarding defects in the mobile home, but that:

[A]ny personal injury claim the plaintiffs might have is not subject to the arbitration agreement contained in the contract . . . . The only disputes subject to arbitration are those arising out of the contract or those disputes which exist between the parties who agree to submit said disputes to arbitration which are existing between them at the time of the agreement to arbitrate . . . . Certainly, a personal injury claim is not a claim arising out of the contract.

The injury suffered by plaintiffs which gave rise to their personal injury claims clearly arose after signing the contract and did not exist when the contract was signed.

These cases provide insight and guidance on how courts in different jurisdictions may generally see arbitration clauses as they relate to personal injury. As the Louisiana court stated, certainly, a personal injury claim is not a claim arising out of the contract. Dennis, 773 So.2d at 819. Plaintiffs' personal injury claims, in that case

arose subsequent to the signing of the contract and did not exist at the time the contract was signed.

The North Carolina Court of Appeals stated that to determine whether a particular dispute or claim is subject to arbitration, it is necessary to look at the language in the agreement and ascertain whether the claims fall within its scope. Whether a claim falls within the scope of an arbitration clause depends on the relationship of the claim to the subject matter of the arbitration clause. The determination of whether a particular claim must be submitted to arbitration depends on the existence of a nexus between the dispute and the contract containing the arbitration clause.

## **2. Selection of the Arbitration Company**

When faced with an arbitration clause and a personal injury claim, parties must review how the arbiter is to be selected. It was never anticipated that this company would arbitrate personal injury claims.

A Pennsylvania court addressed this issue in McDonnell Douglas v. Pennsylvania Power & Light Company, 858 F.2d 825 (1988). This was a case in which a power company issued shares of stock, the issuance of which was governed by a purchase agreement containing an arbitration provision. The arbitration clause stated that if any disagreement arose between the power company and the shareholders, then they would together appoint an independent tax counsel to resolve the dispute. Ultimately a dispute arose, but the basis of the disagreement was bad faith, not valuation.

The court, while stating that while the parties had agreed to submit **some** disputes to arbitration, the parties had not agreed to submit questions of whether the power

company had acted in good faith. Additionally, the court stated, “we rely on the plain language of the arbitral clause, and its import within the context of the paragraph.” The fact that parties agreed to choose tax counsel rather than an arbitrator also swayed the court. “This supports our conclusion that the effect of the clause should be limited to tax law questions and computation disagreements. Had the parties intended to submit all issues regarding good faith to an arbitrator, we do not believe they would have chosen a tax counsel.”

### **3. Potential Bias in Selection of Arbitration Company**

The Federal Arbitration Act, 9 U.S.C. §10 allows for an arbitration award to be vacated if, among other reasons, “there was evident partiality or corruption in the arbitrators” or “where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.” 9 U.S.C. § 10(a)(2) and (3). North Carolina’s Uniform Arbitration Act, N.C.G.S. §1-567, has similar provisions. If the proposed process for selecting the arbiter is one-sided or based toward the drafting party, the court may consider disqualifying the based arbiter or the entire clause..

The U. S. Supreme Court has addressed what is acceptable in terms of bias or partiality on the part of an arbitrator. The Court in this case was addressing the issue of bias of an arbitrator after an award had been rendered and was on appeal, but by implication arbitration service providers failing to meet these criteria are suspect. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991.)

The characteristics enumerated by the Court are whether the parties have been informed of the arbitrator's employment history, whether parties are allowed to make further inquiries into the arbitrators background, whether parties are allowed challenges to the selection of arbitrator, and that the arbitrator must disclose and circumstances which might preclude them from rendering an impartial decision. Additionally, the North Carolina Court of Appeals has stated that, "It is, of course, true that public policy generally requires that arbitrators be impartial and that they have no connection with the parties involved or the subject matter of the dispute." Thomas v. Howard, 51 N.C. App. 350, 353, 276 S.E.2d 743, 745 (1981). These cases are just two of many; it is common knowledge that an impartial and unbiased decision maker is prerequisite to effective and useful arbitration.

Therefore it is critical when evaluating an arbitration clause contained within a contract or other written agreement that the intent of the parties<sup>31</sup> be clearly understood and the method by which the arbitration company is selected be completely neutral. The simple presence of an arbitration agreement in a written contract does not automatically mean that all subsequent disputes between parties to the contract are therefore subject to the arbitration provision.

### **III. FEDERAL AND STATE LEGISLATIVE DEVELOPMENTS**

We have been hoping for some positive federal and state legislation. Congress and the State Legislatures are beginning to weigh-in on the mold issues. In 2003, 56

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<sup>31</sup> The parties' intent as to which disputes are to be sent to arbitration is especially critical.



mold-related bills have been introduced in 21 states. The following is a summary of notable legislative developments:<sup>32</sup>

#### **A. Federal Legislation Status**

In response to the mounting evidence of the harmful physical effects and catastrophic property damage losses experienced by homeowners and tenants connected with mold infestation, Representative John Conyers (D-MI) introduced a bill entitled "United States Toxic Mold Safety and Protection Act of 2002" (H.R. 5040). The Bill has languished in various committees. On March 13, 2003, Representative Conyers again introduced the United States Toxic Mold Safety and Protection Act. (H.R. 1268). The Bill is commonly known as the "Melina Bill."

The nickname comes from the tragic story of a young girl, named Melina Walker, who suffered uncontrollable attacks that eventually led the girl to lose 70 percent of her lung capacity. The other family members also suffered less severe reactions. After an arduous search for the cause, a team of environmental specialists determined that *Stachybotrys chartarum*, a mycotoxin producing mold was the cause.

The highlights of the Melina Bill are mandates for comprehensive research into mold growth, inspections prior to the sale or lease of residential real estate, standards for mold remediation professional, changes in construction techniques, creation of federal catastrophic-loss insurance pool, and the study of the health effects of mold.

If enacted, the comprehensive legislation would direct the Environmental Protection Agency and U.S. Department of Housing and Urban Development to establish

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<sup>32</sup>Also see, legislative tracking summaries in the appendix.

guidelines that identify conditions that facilitate indoor mold growth and measures that can be implemented to prevent such growth.

Additionally, the legislation would require mold inspections for multi-unit residential property and for all property purchased using funds guaranteed by the Federal Government.

Because many homeowners are finding that insurance companies will not offer adequate coverage for mold, the bill would provide for federal mold insurance to protect homeowners from catastrophic losses.

The Melina Bill directs the EPA to set standards and guidelines on toxic mold. It would also require a mold inspection before the sale or lease of residential property, and provides for civil penalties for non-compliance. Other components of the bill require a new model building code to prevent mold, tax credits for toxic mold inspections and remediation, and a “National Toxic Mold Hazard Insurance Program” fund to be established. Finally, the bill directs the Center for Disease Control and the National Institute of Health to undertake a long term study on mold.

After being introduced to the 108<sup>th</sup> Congress, the Melina Bill languished in committee until it was cleared from the books at the end of Congress’ session on March 14, 2005. Representative Conyers reintroduced the Melina Bill to the 109<sup>th</sup> Congress, yet it also languished in committees until it was cleared from the books at the end of Congress’ session.

**B. State Legislative Status**

**1. Groundbreaking States: California and New York**

California and New York were the first states to pass legislation that will eventually create permissible exposure limits for indoor toxic mold. California's Toxic Mold Protection Act of 2001<sup>33</sup>, which became effective January 1, 2002, is undoubtedly the model for Congress' Toxic Mold Act. Both acts use the same statutory language and structure for the creation of Permissible Exposure Limits (PELs). New York enacted its Toxic Mold Protection Act in March 2002 and is similar to California's Act. In justifying the new bill, the New York Assembly said that toxic mold is a recognized health problem the extent of which must be recognized so appropriate action may be taken to eliminate the risks.<sup>34</sup> These acts are not conclusive. Rather, they call for research to be conducted and the findings to be reported to the legislatures.

What follows is copy of the California Department of Health Services' implementation update relating to California's Toxic Mold Protection Act:

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33 California Toxic Mold Protection Act, SB 732 (enacted October 7, 2001).

34 Id.

**SB 732 (Toxic Mold Protection Act of 2001)  
Implementation Update  
March 2003**

Many people have contacted the California Department of Health Services (DHS) asking about the status of implementation of the Toxic Mold Protection Act of 2001 (SB 732). This statute, enacted January 1, 2002, charges DHS, assisted by a task force of volunteer stakeholders, to undertake a series of complex tasks. These include determining the feasibility of adopting permissible exposure limits for indoor molds and the development of new standards or guidelines to

assess the health threat posed by the presence of indoor molds,  
determine valid methods for fungal sampling and identification,  
provide practical guidance for mold removal and abatement of water intrusion,  
disclose the presence of mold growth in real property at rental or sale, and  
assess the need for standards for mold assessment and remediation professionals.

However, the implementation of this statute depends on the provision of funding to accomplish these tasks.

**Fund for voluntary contributions**

The Public Health Protection from Indoor Mold Hazards Fund, authorized by AB 442 (budget trailer bill, 2002) has been established and is ready to accept contributions to help support DHS indoor mold-related activities, including, but not limited to, those mandated by SB 732. Donations can be made by sending a check payable to the California Department of Health Services (with notation for "Mold Fund") to:

**Michele Sabel**  
**Environmental Health Investigations Branch**  
**Department of Health Services**  
**1515 Clay Street, Suite 1700**  
**Oakland, CA 94612**

We look forward to contributions from many sources that will provide the necessary funds (currently estimated to be \$964,000) for DHS to initiate and complete the tasks set forth in the proposed work plan below. DHS will proceed with implementation when contributions have been received to fully fund the bill requirements.

**Task Force information**

Department of Health Services staff are currently collecting contact information for those who are interested in serving on the task force. As of March 13, 2003, there are 187 individuals who have volunteered for the task force. If funding becomes available to convene this group, we will contact those on our volunteer list regarding the process to choose those who will actually serve on the task force.

Anyone wishing to volunteer to serve may send his or her contact information (name, mailing address, email address, phone number, fax number) to [dpaniagu@dhs.ca.gov](mailto:dpaniagu@dhs.ca.gov). Please indicate any professional affiliation or whether you are a member of a group whose participation on the task force is required by SB 732 (such as homeowners, residential tenants, or others – see SB 732 Section 27101.7 for the complete list).

SB 732 also requires DHS to develop public education materials and resources with information about mold health effects, cleanup/removal methods and prevention techniques. DHS staff routinely review, update and supplement mold documents and links on this website ([www.cal-iaq.org/iaqsheet.htm#Mold](http://www.cal-iaq.org/iaqsheet.htm#Mold)) to supply readers with reliable information on these topics.

**Proposed Work Plan for Implementation of SB 732**

DHS proposes to implement this work plan provided sufficient donations are made to the Fund. It anticipates a need for \$964,000 to operate its two phases of overlapping tasks covering a 2.5 year period. Although the plan utilizes the task force as advisory, as required by SB 732, and proposes contract staff and consultants to implement some of its tasks, this plan is not dependent upon the source(s) of voluntary donations for direction. For an outline of the proposed work plan for implementation of SB 732, click on [SB732\\_2003Mar\\_workplan.htm](#).

[end of implementation update]

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## Maryland and New Jersey Address Mold

### Issues

Maryland and New Jersey are two other states that have initiated steps to study the effects of toxic mold. In Senate Bill 283, Maryland created the twenty member Task Force on Indoor Air Quality to “study the nature, location, and extent of health and environmental risks posed to workers as a result of molds, spores, and other toxic organisms located in the HVAC systems of office buildings.”<sup>35</sup> The Task Force must make specific recommendations to the Governor and General Assembly regarding: (i) the prevention of workers’ HVAC-related illnesses, (ii) the institution of appropriate remedies and controls in office buildings, (iii) an educational plan on health and environmental risks, and (iv) needed regulatory and legislative measures on HVAC-borne toxins.<sup>36</sup> The last recommendation is a precursor to setting a PEL.<sup>37</sup>

New Jersey SR 77 seeks to provide information and assistance for infestations of *Stachybotrys atra*.<sup>38</sup> The resolution directs a state agency “to develop methods to help State residents facing an infestation of *Stachybotrys atra* to identify the mold and develop the best strategies to address such infestations, and to investigate the health effects of and effective cleanup methods for infestations” of the mold.<sup>39</sup> Although Maryland and New Jersey’s initiatives are not as comprehensive as those enacted in California and proposed federally, they do reflect the need for legislation and regulation to answer the current mold problem.<sup>40</sup>

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35 Task Force on Indoor Air Quality, 2001 Md. Laws ch. 591.

36 *Id.*

37 Blundell, *supra* note 1, at 402-03.

38 S.Res. 77, 209<sup>th</sup> Leg. (N.J. 2001) (enacted).

39 *Id.*

40 See Blundell, *supra* note 1, at 403.

**Connecticut**

(HB 5638)

Requires Department of Public Health to study mold in public schools and to develop remediation plans.

(Referred to joint committee on Appropriations February 5, 2003)

(SB 173)

Concerns remediation costs associated with indoor air quality in schools.

(Failed joint favorable deadline April 11, 2003)

**Florida**

(HB 1433)

Establishes task force to investigate toxic mold in structures and potential health hazards.

(Referred to committee May 2, 2003; died in committee)

(HB 1659)

Licensing act for regulation of mold remediation.

(Referred to committee April 15, 2003; died in committee)

(SB 2746)

Registration requirements for mold remediation companies.

(Died May 2, 2003)

**Georgia**

(HR 52)

Creates committee to study mold standards and health effects.

(Referred to committee January 27, 2003)

**Illinois:**

(HJR 12)

Establishes a "Joint Task Force on Mold in Indoor Environments" to examine the mold issue and make recommendations to the General Assembly pertaining to the regulation of mold in indoor environments.

(Passed: June 2, 2003)

**Indiana**

Requires Department of Health, along with task force, to make recommendations re: PELs.

(Referred to committee on January 23, 2003)

**Louisiana:**

(HB 1328)

Requires mold assessors and mold remediators to be licensed.

(Effective: August 15, 2003)

(HB 1681)

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<sup>41</sup> Included in the appendix is a package of "Bill Tracking" reports for many states.

Requires that the Louisiana Real Estate Commission produce pamphlets containing mold information to be distributed by realtors to home buyers by July 1, 2004.

(Effective July 2, 2003)

(HB 943)

Exempts mold damage from New Home Warranty Act.

(Passed June 3, 2003)

### **Massachusetts**

(SB 657)

Authorizes the study of the health effects from indoor exposure to toxic mold.

(Sent to Joint Committee on Health Care: July 16, 2003)

(HD 4143)

Relates to toxic mold health protection.

(Filed April 17, 2003)

### **Michigan**

(SB 185)

Requires Department of Community Health to establish standards for PELs and assessment of mold health threats.

(Senate, second reading, May 5, 2003)

(House; sent to committee on Health Policy)

(SB 172; HB 4094)

Requires property seller disclosure of toxic mold.

(Sent to committee: February 11, 2003)

### **Montana**

(HB 536)

This law permits, but does not require, a seller, landlord, seller's agent, buyer's agent or property manager to provide a mold disclosure statement on at least one document, form, or application executed prior to or contemporaneously with an offer for the purchase and sale, rental, or lease of inhabitable real property.

(Effective May,5, 2003)

(MD 684)

Limits liability for mold.

(Draft)

### **Nevada**

(SB 132)

Requires licensure of persons engaged in certain activities relating the control of mold.

(Introduced Senate, February 13, 2003; failed to pass June 2 2003)

(SB 131)

Requires certain insures to disclose coverage for control of mold in property insurance policies and to offer coverage for control of mold.

(Referred to committee April 22, 2003; no further action taken June 3, 2003)

**New Jersey**

(A.B. 3760)

Requires inspection and remediation of mold hazards)

(Referred to committee June 9, 2003)

(A.B. 3561)

Concerns mold hazards in indoor environments.

(Referred to committee May 8, 2003)

**Oklahoma**

(HCR 1011)

Creates a Joint Task Force on Mold and Mold Remediation.

(Adopted May 23, 2003)

**Oregon**

(SB 557)

Modifies a seller's obligation to disclose information about real property to a prospective buyer to include disclosures related to mold and health-related problems potentially related to mold.

(Referred committee; Legislature adjourned August 27, 2003)

(SB 562)

Requires persons selling property to disclose knowledge of health problems related to mold or other contaminants experienced while residing on the property and any testing for mold or other contaminants conducted on the property.

(Referred to committee February 26, 2003; Legislature adjourned August 27, 2003)

**Pennsylvania**

HB 1187

Requires the Department of Health to establish a task force on toxic mold in homes, schools, and other buildings, and to study the potential health hazards. Provides for PELs..

(Referred to committee on April 16, 2003)

(SB 218)

Establishes public information and education programs to inform public about health effects of molds, and methods of prevention, identification, and remediation of mold growth.

(Referred to Appropriations Comm. April 21, 2003)

**Rhode Island**

(SB 983)

Creates a Senate commission to study the health effects of toxic mold.

(Adopted by Senate May 8, 2003)

**Tennessee**

Creates task force to establish guidelines for mold abatement in public schools.

(Adopted June 23 2003)

**Texas**

(HB 329)



Requires licensing of mold assessors and remediators.

(Enacted June 11, 2003)

(SB 243)

Relates to the regulation of mold assessors and remediators; providing civil and administrative penalties.

(Referred to committee February 5, 2003)

(SB 129)

Relates to the regulation of mold remediation; provides for civil penalties)

Referred to committee January 29, 2003)

(SB 114)

Relates to insurance issues regarding the use of mold, fire, and water resistant materials in residential building and repairs.

(Referred to committee January, 29, 2003)

### **Virginia**

Establishes presumption that mold is an occupational disease with the meaning of the Workers' Compensation Act, if claimant's building was mold contaminated.

(Referred to committee February 3, 2003; passed by indefinitely)

### **Washington**

(SB 5798)

Requires disclosure of mold in residential dwelling units.

(Referred to committee March 3, 2003; indefinitely postponed March 31, 2003)

## V. CASE OVERVIEW AND LEGAL STRATEGY

Construction defect litigation has gained much notoriety over the last decade. While many attorneys spend their entire careers handling construction litigation, a few practitioners have narrowed their field of legal concentration to the representation of owners in water intrusion construction defect cases. The authors of this paper are two such attorneys. We have found that, during the normal course of our investigations, mold damage is emerging into the forefront of our practice. This manuscript will now explain our thoughts on evaluating an owners' water intrusion/mold claim.<sup>42</sup>

We have learned over the last several years that the only way for a Plaintiffs' lawyer to be successful in this area of the law is to be very careful when choosing your cases. Please understand, that when venturing into this area, the issues are complex, the parties are many, the experts are expensive, the hours are long, and the pressure is immense. However, Plaintiffs' lawyers can win big and can have a profound effect on the lives of real people. It might sound corny, but the satisfaction of giving someone back control of the financial aspects of their lives is something you will never forget. Unfortunately, you will also never forget the case you accepted with good intentions but found to be riddled with defenses, insurance issues, unreasonable clients, and inept "inherited" experts. On the other hand, the defense bar seems to truly enjoy these cases. The more complex the issues, the greater the need for their high priced expertise spending many billable hours shooting holes in the Plaintiff's case. The only drawback appears to be the jury's ability to relate to the Owners. Therefore, it is critical for defense attorneys to be

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<sup>42</sup>While the authors primarily represent Owners and although much of this manuscript is written from a Plaintiffs lawyer's viewpoint, the issues presented are same for the defense bar.

able to evaluate the case in its early stages so as to avoid the incursion of unnecessary expenses or even worse, a large adverse verdict with their clients facing coverage issues.

You, as the community association attorney, need to be able to see the entire picture and advise your client accordingly. For example, is the litigation advice you are receiving from your Plaintiffs' lawyer realistic? Will the Defendant's insurance company really react in the manner the lawyer anticipates? Should you hire all the experts? Are you pleading yourselves out of coverage when your Complaint contains fraud allegations? Should your client accept the settlement offer or should they take a chance at trial? In order to answer these questions, you must understand how the litigants, their insurers, their lawyers and the Courts address at these cases.

#### **A. The Initial Considerations for a Litigator**

When we meet with a potential client for the first time, we initially focus on size, defenses and "collectability." Simply put, we typically work on a contingency fee and therefore we are sharing the risk of litigation. Our willingness to accept risk is directly proportional to the size of the potential verdict and the chance the case could settle. Our willingness to accept small cases is related in some part to the absence of potential defenses. Thus, when you see a Plaintiffs' lawyer prosecuting a smaller case, you can assume he or she thinks it is a lay down.

For your purposes, you should advise your client that, depending on the case, they can hire mold litigators on a contingency fee basis and that it is important for you to remain intimately involved. You should develop a trial team who has sufficient lawyers to cover the

case demands. Also, the team must include experts and your lawyers must be able to evaluate and recommend competent experts for your case.

Of course, you should not waste the Associations' money on cases that they will lose. With respect to defenses, the typical focus is limitation periods. We generally steer away from Statute of Repose cases but will fight a Statute of Limitation defense to the death. As shown in the case law *infra.*, Repose issues are simply too harsh and unbending to risk a lot of time and expense. There are exceptions, of course. For example, we are beginning to push the "control exception" found in many Statutes in cases where the developer had control of the homeowner's association at a time when it knew that the common areas had problems.

We have found other "defenses" such as maintenance and mitigation to actually hurt the defense in many cases. Unless the Plaintiffs are arrogantly rich and acted in a brazen manner based upon their ability not to have to worry about the costs of repair, our jury research indicates that these defenses can really backfire. However, with wealthy owners, these defenses can have a profound effect, especially if the jury doesn't like the Plaintiffs. As an aside, we learned in the Pepper<sup>43</sup> trial that the jury actually considered the Pepper's wealth and decided, as a person, that they liked the Peppers and wanted to help them regardless of the Pepper's ability to shoulder the loss. Thus, wealth is an issue but "likability" is the determining factor. If the jury does not like the plaintiffs, then this is a great way to let them set out their resentment in an indirect manner.

Causation is fact intensive and must always be considered. In a coastal environment, we always face "the hurricane defense", i.e. "these problems were caused by six hurricanes not my clients little flashing mistake." Nobody seems to know how successful the defense will be because all the close cases have settled. We can report that the Pepper jury and the Judge in

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43 Pepper v. Lancaster Homes, Inc., Sto Corp., et al. (New Hanover County Superior Court, 96 CVS 3992)

Baypoint v. Dryvit<sup>44</sup> appeared unconcerned with the storm evidence. Those cases are likely not dispositive on the effectiveness of the issue, however, because the hurricane exposure was relatively light in both instances.

The third initial consideration is insurance coverage and Defendant assets. No Plaintiff can spend a paper judgment so their must be a solvent target or covered claims. **This analysis must be made before drafting the Complaint or Plaintiffs can easily plead themselves out of coverage.** Simply put, do your best to plead covered claims and name dates that you know will trigger coverage. Basically, there exist four theories on when an occurrence is within a period of coverage for a CGL policy. The first is the Exposure theory. This theory holds that all policies periods during which the property has been exposed to the harm are triggered. This trigger is most frequently found in claims involving long-term bodily injury claims such as asbestos. The second is Injury-in-fact (actual injury) theory which finds that all policies in effect when the injury can in fact be demonstrated are triggered, irrespective of when the property damage is discovered. The third is the Manifestation theory, where the date of occurrence is when the property damage manifests itself or becomes apparent. Finally, the fourth theory is the Multiple or Continuous theory, where all policies in effect from the date of exposure through manifestation are triggered. Recently, this theory has been reformulated to state that coverage is provided as long a bodily injury or property damage actually occurs during the policy period. In cases of continuous or progressively deteriorating property damage, all CGL policies in effect during the period of injury or damage have potential liability. This includes all relevant policies from the first exposure to the installation or construction until discovery, or even beyond, so long as damage occurs during these policy periods. You need to research your jurisdictions trigger theory and plead accordingly. Further, because defense lawyers love to confuse “manifestation” for purposes of an insurance trigger and “discovery”

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44 Board of Directors of the Bay Point Condominiums Assoc., Inc., et al. v. RML Corp., Dryvit Systems, Inc., Bishop Wall Systems, et al. (Circuit Court of Norfolk, VA CL99-475)

which causes the accrual of Statutes of Limitation periods. A Complaint should specifically differentiate the two concepts and set forth different dates.

### **B. The Owner's Expectations and Unity**

Representing owners in construction cases is very similar to representing parties in domestic disputes. No asset is more important financially and emotionally than one's home. Also, the homeowners live with the problems every day and night. When others sleep soundly during rain storms, these plaintiffs are up, with leaking homes, thinking about why their case is taking so long. Another difficult feature of water intrusion cases is that most owners will never be made whole through the litigation process, unless they also have a personal injury claim for mold illness. Very few claims allow the award of attorney's fees and, absent physical illness, damages for pain and suffering and other intangible losses typically are unavailable. Punitive and treble damages are rarely covered by insurance and, instead, often must be collected by selling broken down trucks and old equipment. In a nutshell, the Owners must start the process knowing that they will rarely be made whole or they will never be made happy (or reasonably unhappy). Instead, these owners, who have likely experienced years of agonizing communications with general contractors, should be told the truth, without sugar coating, so they can make appropriate plans and make decisions with full knowledge of the likelihood of obtaining various verdict amounts.

A Homeowner Association's Board of Directors needs help and the legal team needs to understand this. The Board will be under fire from those whose homes are damaged. However, it is simply imperative that you keep the membership and the Board united in their goal of obtaining as much money as possible to fix their problems. How to spend that money and other thorny issues can be resolved later but the focus must be on the litigation and everyone needs to help with information and testimony.

We always try to get control of the claims in the hands of the Board. Simply put, although standing issues may require you to file individual claims on behalf of certain individuals in addition to the Board, we like to have the Board control the litigation. This allows us to report directly to one group, who owe the others fiduciary duties. Mediation and negotiation is tough work. It is impossible if you have to get the consent of hundreds or even dozens of people. Instead, we prepare and have executed limited powers of attorney and assignments of claims and proceeds to the Board prior to filing any individual claims.

Finally, it is your job to begin thinking about how you and your association will use the money that you receive. Look at your bylaws and controlling documents and determine whether a revision is needed in order to equitably spend the money to fix everyone's property. We recently saw an imaginative allocation where the controlling documents were revised to give each owner the option of choosing either of two repairs. The first repair required an owner contribution, while the second was repaired from settlement proceeds only. The owners agreed to an HOA waiver if they chose option 2. As the authors of this paper do not get involved in such matters and instead limit ourselves to litigation, we can make no suggestions. We will only say that you will be hassled unless you have all the options ready for the Board.

In summary, your clients need to be told the truth and not just what they want to hear and they must stay united or they will fall divided. You have to think ahead and be prepared to act quickly.

### **C. Communication.**

Nothing will destroy a relationship or a case as quickly as a failure to communicate. These cases are not "cookie-cutter" cases. Instead, each case must be thoroughly analyzed as the discovery continues. Your client will prove to be an excellent resource when you prepare responses to the other parties' position and/or discovery. Further, spoliation of evidence can and will occur unless someone tells a homeowner that the other side must be notified of repairs and

be given a chance to examine the project before the process begins. Finally, while you may know that you are working on the case, your client only knows what you tell them. We use secure websites where we post bulletins that can only be read by our clients by using confidential passwords. Of course, we sanitize these reports because of fear that the other side will somehow get their hands on the material but our clients at least know what stage the litigation is in and what is coming up next. In an effort to maintain open communications and good relations, we go to homeowner meetings and meet with our clients face-to-face. These meetings are long, often occur on weekends and holidays, but they are crucial. Anytime you can speak with a group of clients, you have a chance of learning something new and you will always be given the chance to diffuse any dissension in the ranks.

**D. Construction Deficiency Experts.**



The concepts, analyses and opinions required to successfully prove a moisture intrusion (and mold) claim are, by their nature, issues which few jurors (or lawyers) address in their daily lives. As such, these cases are expert driven. In addition, the approach to these cases must be such that you establish the underlying moisture intrusion claims before you move into the mold and mildew facets of the case. Your attack with moisture intrusion experts must be solid before you bring mold experts into the picture since the expertise of a mold specialist can be worthless unless liability for the moisture intrusion is firmly rooted. Further, evidentiary issues must weigh heavily in your decisions on whom to hire as an expert. If you are unsuccessful in presenting an alleged expert's opinions to the jury, then you have surely wasted thousands of dollars in time and expert fees. Finally, you must be ever cognizant of the "digestibility" of the concepts, analyses and opinions presented by the expert witness. The greatest expert testimony available will go unheard in the jury is unable to grasp and understand the fundamental concepts being discussed. For this reason, your experts must be prepared to offer their testimony in creative ways to both instruct and persuade the jury (and judge).

Regardless of the various theories that can be asserted against construction participants, and the dryness of scientific analyses, we have found that you can successfully present expert witness testimony. We prefer using Reports for three reasons. First, it focuses the lawyer and expert witness and prevents lapses in memory. Second, it makes a great exhibit at trial and is the most read document in mediations. Our experience indicates that adjusters will not read deposition transcripts but will study experts reports at length. Our job is to convince the adjuster that the case has value and we find expert reports to be more important than anything else we can say or do. Finally, the report is the single best way to respond to discovery requests.

As referenced above, an understandable presentation to a jury is a paramount consideration of every trial lawyer and expert witness. For this reason we have insisted that our experts "give no oral testimony alone." By this, we mean that rather than have an expert witness

simply tell a jury (or judge) what the expert saw, the expert should find, remove, save and present physical evidence which illustrates their testimony, stands for their opinions and propositions and gives the jury something to hold onto. How wonderfully effective it is to have a construction expert talking about defective flashing while holding a piece of that defective flashing, taken from the residence or project in question, and comparing the defective piece with the correct type of flashing which should have been used. Surely the jury will remember seeing, holding and comparing the “wrong” piece of flashing with the “right” piece. Bags of mold are also very effective. In a recent bench trial, we placed bags of mold and insects on the Judge’s bench. We were immediately instructed to remove the evidence from the court room. Moreover, copious pictures or videos of the residence or project illustrating the defects and damages will get untold use demonstrating to the adjusters, opposing attorneys and finally, the jury why the case has merit and value for which your client should recover. Whatever approach you may choose, realize that you are presenting difficult concepts which, at the end of the day, must be credible and persuasive to the jury or judge.

With respect to water intrusion issues, our experts must be prepared to present five (5) elements of opinion and fact testimony. We prefer this be set forth in a “matrix” which quickly becomes the most often used and effective document in a case. On the left side of the matrix is the list of issues and deficiencies. Then, for each issue, five topics are discussed. The first topic is set forth as the “Requirements.” The Requirements section includes reference to the State Building Code (establishing negligence *per se* and insurance coverage), manufacturers’ specifications, specific contract provisions, plans, and, if all else fails, the standard of workmanship then prevailing at the time and place of construction.

Next, for each item, the second topic is set for as “What was done” (done wrong) or “deviations from the requirements.” In this instance, the breach of warranty or negligence is specifically delineated. This is accomplished by comparing what was observed at the project or

residence with what should have been done as specified under the “Requirements” section. In this respect, the expert must be well versed in every possible requirement, including the applicable building codes, the applicable manufacturer specifications or instruction, the plans and specification for the particular project and, of course, the prevailing standard of workmanship for the area in which the project or residence is constructed. Clearly knowing the construction dates, material manufacturers and particular needs of the project location are crucial in determining applicable building codes, applicable instructions and specifications and applicable standards prevailing at the site. You can see that the proper investigation of the requirements and “as built” conditions are very time intensive and critical in forming the foundation of your case.

The third topic is “Damage.” Damage is important for, at least, two reasons. First, damage obviously triggers insurance. Second, damage triggers big verdicts. In this facet of the case, the experts relay to the jury how the conditions found in the “as built” project or residence are affecting the proper function of the same. Again, pictures and physical evidence should be prepared and presented to assist the jury in their understanding of the conditions which your clients are forced to live through and eventually incur substantial costs to repair.

The fourth matrix topic is the “Necessary Repair.” Typically, an engineer will defer to a remedial contractor on this topic after having provided the remedial contractor with the proper scope of repair. As this is a typical battle ground, much attention is placed on this topic. Typical attacks include types of repair (i.e., removal vs. replacement), amount of materials needed, unit costs, labor costs, profit, etc... Care must be taken to ensure that both experts, the remedial contractor and the engineering expert, agree as to damages, the required repairs as well as the methods and means to be employed to that end. Additionally, the attorney and the experts should be sure that the agreed upon repairs put the Plaintiffs back to the position they should have been, owning a properly constructed residence, without affording them what defense counsel loves to call “upgrades.”

Finally, the cost of the repair is established. We have found that breaking out the costs of the repair is especially helpful at mediation because the adjusters can easily tally up the amount of money the plaintiffs will be seeking to recover from their client, and will be able to quantify the amounts of the total repairs which are the “responsibility of others.”

#### **E. Mold Experts**

With respect to mold claims, you probably will have, at least, three experts. First, in order to identify the mold in a manner which will satisfy a Daubert or Frye challenge,<sup>45</sup> a qualified industrial hygienist or qualified and experienced microbiologist must perform an investigation of the structure as well as the interior air quality of the project. As with any scientific field, the expert must use methodologies and materials that pass muster in that particular field. In addition, the interpretation of the raw data and issuing of opinions should be made cautiously and with due consideration of the accepted arenas of thought and conclusions. Finally, the particular fauna or type of mold present must be ascertained with certainty so that the correct course of action can be followed. In this regard, we have often used the services of qualified microbiologists for the initial threshold testing and investigation as to the presence of mold or mildew. Alternatively, we have also used the services of companies with on-staff industrial hygienists. The primary consideration with the services of either a biologist or industrial hygienist, as stated above, is that their methods, materials and analysis are sufficient, complete and generally accepted in the field (Daubert/Frye requirements). Finally, their reports, conclusions and/or opinions must be presented in a manner that clearly identifies the presence (or absence) of harmful mold and a proper repair/remediation process.

After the hygienist has establish, as the threshold of your mold claim, the presence of the mold in and affecting the structure and/or interior air quality, a qualified mold remediation contractor must issue a bid for the proper containment and removal of the mold organisms

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<sup>45</sup> See footnote number 35, supra for an explanation of each standard.

without spreading the infestation to other parts of the structure. This bid is established through coordination with the industrial hygienist as to proper scope and protocol to follow, for example the New York City protocol.

Finally, should personal injury be an issue, a medical doctor with expertise or specialized training in diagnosing and treating mold related ailments must be employed. This doctor must be prepared to discuss the following:

1. The known physical ramifications of exposure to different types of mold, especially those types found by the hygienist at the project;
2. The types of mold present in the project and to which the Plaintiff has been exposed;
3. The physical ailments presented by the particular Plaintiff and how those are congruent with the known effects of the mold found at the project;
4. The treatment which the Plaintiff requires as a result of the exposure to the mold;
5. The long term effects of the mold exposure;
6. Whether this particular Plaintiff has any particularly acute reactions to mold; and
7. The costs which the Plaintiff will incur as a result of the mold exposure.

The most critical aspect of the medical expert's testimony is drawing the causal link between the moisture intrusion related presence of mold and the physical injuries which form the basis of the personal injury claim.

As a final word on experts and expert opinions, credibility is everything. To that end, there is no substitute for preparation and attention to detail. Where most experts and the attorneys falter, is by stretching to reach an opinion or to find viable issues. The preliminary evaluation of the potential claims should mitigate this problem by sufficiently establishing the core of your case and therefore the focus of your experts' investigations and analyses. The

greatest disservice to your client is to instill them with unrealistic expectations and thus present an unrealistic case by stretching that core and focus. If the core of the case is strong, the preparation of experts complete and the presentation understandable, these cases can be profitable for the attorney and literally, a Plaintiff's saving grace.

## **VI. STRATEGIES AND DEVELOPMENTS REGARDING THE ADMISSIBILITY OF MEDICAL EVIDENCE**

“The art of medicine consists in amusing the patient while nature cures the disease.” –  
Voltaire

As with most personal injury cases, the battleground for similar damages in mold cases is the admissibility and credibility of physician's expert opinions. Plaintiffs seek to have each of their treating doctors testify in detail about the devastating impact of the mold exposure on their health and lives, and defendants seek to exclude or diminish the testimony with a variety of arguments. There already exist a number of mold related cases and appellate decisions which examine these issues. In general, Courts allow testimony about asthmatic type injuries and exclude allegations that the mold has caused the patient to develop life threatening injuries, such as cancer. However, the cases offer an interesting analysis of the admissibility of a variety of other mold related injuries.

Often the Court's initial analysis begins with a ruling on the *Daubert* or *Frye* challenge made by the defendant's to exclude the testimony. Under the *Frye* standard, the party proposing the expert testimony must show that the basic underlying principles of the scientific evidence are well recognized and generally accepted in the relevant scientific community.<sup>46</sup> *Daubert*, however, replaced *Frye*'s general acceptance standard with a reliability requirement. *Daubert*

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<sup>46</sup> *Frye v. United States*, 293 F. 1013, 1014.

created a “gatekeeping” role for the district judge where “under the rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”<sup>47</sup> *Daubert* is controlling law for the admissibility of expert testimony on the federal level (See Federal Rule of Evidence 702). State Courts, however, apply whichever evidentiary standard its highest court has chosen. In our home state of North Carolina, recent commentators have concluded that North Carolina courts should follow the *Daubert* standard.<sup>48</sup>

For your trial teams purposes, assume that the Court’s will be strict. Tailor your expert presentation to meet the highest standard, even if it costs more money. As trial attorneys who work on a contingency fee, we will not skimp on expert testimony.

## VII SIGNIFICANT APPELLATE DECISIONS

There are a number of reported appellate decisions dealing with mold related issues. The most prevalent issue on appeal is the admissibility of numerous experts seeking to opine on various mold induced health problems. In general, as more data becomes available the trend appears to be allowing qualified experts to testify about causation related issues. Attorneys have already successfully litigated mold cases where the plaintiffs have more easily proven injuries such as asthma.<sup>49</sup> Injuries that are more difficult to prove include chronic fatigue syndrome and

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47 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

48 Broun, Kenneth, *Daubert is Alive and Well in North Carolina- In Fact, We Beat the Feds to the Punch*, North Carolina Bar Journal, Fall 2002.

49 See *New Haverford Partnership v. Stroot*, 772 A.2d 792 (2001) (holding expert testimony establishing causal relationship between mold exposure and asthma admissible); *Mondelli v. Kendel Homes Corporation*, 631 N.W.2d 864, 262 Neb. 263, per curiam 641 N.W.2d 624, 262 Neb. 663 (2001) (allowing causation testimony on adult onset asthma); *Miner v. American Mortgage & Guaranty Co.*, 791 A.2d 826 (Del. Sup. 2000) (holding expert testimony on reactive airways dysfunction syndrome admissible). See also; *Traub v. Crawford & Company, et al.* (No 1995-C-153(Pa. Comm. Pls. Lehigh City)) utilizing a *Frye* standard (see FN.35 *Infra*) this Pennsylvania Court rules in late June 2002 that it will allow the testimony of medical experts in the casual connection between brain damage and mold exposure in a case filed by homeowners against their insurer and the adjuster hired to inspect their storm-damaged home. The experts apparently were allowed to testify regarding respiratory problems and cognitive problems and cognitive injuries suffered during a nine month period of exposure. The authors of *Columns*, a Harris Martin publication, reports that this decision marks the first time testimony regarding an alleged link between a

fibromyalgia, which is characterized by muscle pain.<sup>50</sup> It appears that the growth of recoverable mold claims will be directly related to the scientific advances made in the field of causation.

**A. New Haverford Partnership v. Stroot.**<sup>51</sup>

In this 2001 Delaware case, two tenants, Stroot and Watson, brought a negligence suit against the landlord of the apartments for health problems allegedly caused by mold contamination. Stroot, whose health problems were more severe, lived in two different mold infested Haverford Place apartments over a twenty-one month period. While living at the apartments, Stroot made seven emergency room visits for asthma attacks, logged nine days of inpatient care, and required intravenous steroids twelve times. Although Stroot suffered from allergies and asthma since childhood, the severity and frequency of her medical problems increased while living at the apartment complex.

Watson lived in Haverford place four years, but was rarely there during the first two years of the tenancy. Despite repeated attempts to rid the apartment of mold, it continued to reappear. Upon spending more time at the apartment, Watson began to suffer a number of ailments including: fatigue, frequent headaches, sinus problems, chest pains and body aches. Prescription medicine did not help, and it was not until six months after moving out did her health begin to improve.

At trial Stroot received a \$1,000,000 jury verdict for personal injuries and a \$5,000 verdict for property damage, which were reduced by 22% for contributory negligence. Watson

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plaintiff's mold exposure and impaired cognitive function has survived defendant challenged in mold litigation. See [www.harrismartin.com](http://www.harrismartin.com).

<sup>50</sup> See Stephanie F. Cahill, *For Some Lawyers Mold is Gold: Toxic Troubles Translate into Millions of Dollars for a Practice that's Bound to Grow*, 87 A.B.A. J. 22 (2001); *Miner v. American Mortgage & Guaranty Co.*, 791 A.2d 826 (Del. Sup. 2000) (holding expert testimony on sick building syndrome, chronic fatigue syndrome, and fibromyalgia inadmissible).

<sup>51</sup> *New Haverford Partnership v. Stroot*, 772 A.2d 792 (2001).



was awarded \$40,000 for personal injuries, which was also reduced by 22% for contributory negligence. The Superior Court of Delaware denied the defendant's motion to alter or amend the judgment. On appeal, the decision was affirmed by the Supreme Court of Delaware. The critical issue before the Supreme Court was whether or not the expert testimony relating to excessive mold in the apartment building and causation of tenants' health problems was properly admitted. The defense argued that none of the expert's opinions were reliable because no extensive baseline testing was conducted to determine the normal mold level, and because other possible causes of the injuries were not excluded.<sup>52</sup> The Court held that although there was no testing to establish a baseline, one of the plaintiffs' experts did find the mold level inside the apartments to be ten times higher than outside.<sup>53</sup> In ruling, the Court said that "the failure to conduct extensive baseline testing goes to the weight of the expert's opinion, not their admissibility."<sup>54</sup> The Court applied this same principle to the experts' failure to exclude other possible causes of the plaintiffs' health problems.<sup>55</sup>

The defense also argued that the opinions of the plaintiffs' experts were deficient for a number of reasons. The Delaware Supreme Court, reciting the *Daubert* guidelines, stated that when making a determination on the admissibility of expert testimony, the trial court may consider whether the scientific method has been tested and subjected to peer review; whether it is governed by standards; and whether it is generally accepted in the relevant scientific community.<sup>56</sup> Applying these guidelines, the Court found that the experts' methodologies were

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52 *Id.* at 799.

53 *Id.* at 800.

54 *Id.*

55 *Id.*

56 *Id.* at 799.

reliable because they had undergone peer review and were generally accepted by the scientific community.<sup>57</sup>

**B. Centex-Rooney Construction Co., Inc., v. Martin County.**<sup>58</sup>

In this 1998 Florida case, the plaintiff, Martin County, moved into a new courthouse complex built under the management of defendant Centex. Shortly after occupancy, the County filed several complaints about window and exterior wall leaks, mold growth, and excessive humidity. Occupants and visitors also complained of health problems. An advisory committee voted to evacuate the complex on December 8, 1992 following testing that revealed a significant presence of two highly unusual and toxic molds.

The County sued Centex, the sureties, the architect, and the concrete and masonry company. During the trial, the court held a *Frye*<sup>59</sup> hearing for the purpose of determining if the testimony of the plaintiff's expert was based on a generally accepted scientific principle.<sup>60</sup> From this hearing the trial court determined the plaintiff's expert testimony was admissible. The County ultimately obtained a jury verdict and was awarded a final judgment in excess of \$14 million.

On appeal, the Fourth District Court of Appeals affirmed the trial court's admittance of the plaintiff's expert testimony under the *Frye* test. The defense assigned error to the court's

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<sup>57</sup> *Id.*

<sup>58</sup> *Centex-Rooney Construction Co., Inc. v. Martin County*, 706 So.2d 20 (Fla. 4<sup>th</sup> DCA 1997), rev. denied 718 So.2d 1233 (Fla. 1998).

<sup>59</sup> Under the *Frye* standard, the party proposing the expert testimony must show that the basic underlying principles of the scientific evidence are well recognized and generally accepted by the relevant scientific community. See, *Frye V. United States*, 293 F. 1013, 1014. *Daubert*, however, replaced *Frye*'s general acceptance standard with the reliability requirement. *Daubert* created a "gatekeeping" role for the district court judge where "under the rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). *Daubert* is controlling law for the admissibility of expert testimony on the federal level. State courts, however, apply whichever evidentiary standard its highest court has chosen.

<sup>60</sup> *Id.* at 26.

admittance of expert testimony linking health risks to the toxic molds found in the buildings. The defense argued that the *Frye* test had not been satisfied because the underlying principles of the experts' causation testimony were not generally accepted in the scientific community. The appellate court, however, noted that the experts' testified to a number of publications accepted within the field that recognize a causal relationship between exposure to molds and adverse health effects. The appellate court agreed that these publications supported that plaintiff's experts' theories had been tested and generally accepted.

C. **Mondelli v. Kendel Homes Corporation**.<sup>61</sup>

In this 2001 Nebraska case, the plaintiffs sued their homebuilder and municipality for mold contamination caused by the shoddy construction of their new home. After suffering from persistent health problems such as asthma, the plaintiffs were forced to abandon the house.

At trial, judgment was entered against both defendants. A separate trial, however, was ordered to make specific determinations on causation and damages. At trial, the defense successfully excluded the plaintiffs' expert witnesses on the grounds that causation could not be testified to because no standards existed in the scientific community concerning a permissible level of indoor mold. Following the close of evidence, the district court granted the defendants' motion for a directed verdict on the grounds that causation had not been proven.<sup>62</sup> On appeal, the Supreme Court of Nebraska held that the District Court's exclusion of testimony to be an abuse of discretion.

The critical issue on appeal was whether the district court erred in excluding the testimony of the plaintiffs' expert witnesses. In reversing the district court, the Nebraska

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61 *Mondelli v. Kendel Homes Corporation*, 631 N.W.2d 864, 262 Neb. 263, per curiam 641 N.W.2d 624, 262 Neb. 663 (2001).

62 *Id.* at 853.

Supreme Court thoroughly reviewed the expert's qualifications, and the scientific publications relied upon by the expert in forming his opinions. The Court held that the extensive list of publications demonstrated "[t]hat the scientific community has generally accepted the principle that a connection exists between the presence of mold and health."<sup>63</sup> Thus, the Supreme Court concluded that because the expert's opinion was built upon accepted scientific principle, as evidenced by the publications, it should have been presented to the jury to aid in deliberation.

**D. Miner v. American Mortgage & Guaranty Co.**<sup>64</sup>

In this Delaware case, the plaintiffs sued the owner and property manager of a commercial office building for negligent control of the building's internal environment. The plaintiffs alleged various medical and psychological illnesses, caused by the building's contaminated HVAC system. The plaintiffs argued that although no specific toxins could be identified, their long-term exposure to a contaminated environment supported the causation analysis.

At trial, the defense filed a motion in limine to prevent the plaintiffs' causation experts from testifying that the injuries were caused by exposure to mold. The Superior Court held that the expert testimony on sick building syndrome, chronic fatigue syndrome, and fibromyalgia could not be validly diagnosed and therefore could not be presented to the jury. The court did find, however, that in regards to the reactive airways dysfunction syndrome and toxic encephalopathy, the scientific principle underlying the expert's opinion on causation was sufficient. Miner v. American Mortgage & Guaranty Co., 791 A.2d 826 (Del. Sup. 2000)

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<sup>63</sup> Id. at 856; Blundell supra note 1, at 400.

<sup>64</sup> Miner v. American Mortgage & Guaranty Co., 791 A.2d 826 (Del. Sup. 2000).

**E. Dobb v. Gottula.**<sup>65</sup>

In this unpublished 1996 Colorado opinion, the plaintiff, as a prisoner was required to retrieve tools from a storage building contaminated with airborne fungi. The plaintiff was diagnosed with mold allergies and subsequently brought a civil rights claim for the alleged violations of his Eighth Amendment rights.

At trial, the case was dismissed with prejudice because the claim did not rise to the level of a Constitutional rights violation. The plaintiff was required to show that the prison official knowingly disregarded an excessive risk to the plaintiff's health.<sup>66</sup> The prison guard, however, testified that he believed that only long term exposure to the contaminated air posed a risk. A medical expert testified that there was a negligible chance that brief exposures to the contaminated building would have caused the plaintiff's health problems. The appellate court agreed with the district court's analysis, and affirmed the dismissal.

**F. Searle v. City of New Rochelle.**<sup>67</sup>

In this 2002 New York case, a family leasing a house from the defendant sued to recover damages for personal injuries stemming from the presence of toxic mold in the home. The plaintiffs first noticed the growth of mold in the fall of 1995 and began to experience chronic health problems thereafter. The plaintiffs filed a notice of claim in the spring of 1998, after learning that their health problems were related to mold exposure. At trial the defendants were awarded summary judgment because the time for the cause of action had expired. On appeal, the Supreme Court, of the Appellate Division, affirmed the lower court's grant of summary judgment. The court held that "[a] plaintiff's cause of action for damages resulting from

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<sup>65</sup> Dodd v. Gottula, No. 95-1458, 1996 U.S. App. Lexis 15438 (10<sup>th</sup> Cir. June 26, 1996) (unpublished opinion).

<sup>66</sup> Id.

<sup>67</sup> Searle v. City of New Rochelle, N.Y.A.D. 2 Dept. (2002).

exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e. when the injury is apparent, not when the specific cause of the injury is identified.”<sup>68</sup> Thus, the plaintiffs’ time for cause of action began to accrue in 1995 when the mold was discovered and the health problems began. Thus, the notice of claim filed in 1998 was untimely.

**G. Ballard v. Fire Insurance Exchange**<sup>69</sup>

Perhaps the most famous mold case involving the exclusion of personal injury damages is Ballard v. Fire Ins. Exchange. The facts and result of this case are well known for those familiar with mold related litigation. As discussed in this paper, a simple plumbing leak resulted in wide spread mold contamination. A jury awarded \$32 million against the insurance company.<sup>70</sup> What many may not know is that the Court excluded any evidence of personal injuries. The ultimate award was based solely on property damage, punitive damages, emotional distress, and attorney fees.

In granting the defendant’s motion to exclude evidence of personal injuries, the Court agreed that the evidence was not sufficiently reliable to establish that molds can cause personal injury. The Court reasoned that the underlying scientific data were not reliable as required by the Texas Supreme Court case of Merrell Dow Pharmaceuticals Inc. v. Havner.<sup>71</sup> Havner addressed the admissibility of evidence from epidemiological studies, which examine existing populations to attempt to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition.”<sup>72</sup> Epidemiological studies provide statistical

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68 Id. at 1.

69 No. 99-05252 (Tex. Dist. Ct., Travis County, June 1, 2001).

70 Recently the Texas Court of Appeals significantly reduced the award to \$4,006,320 plus attorneys’ fees.

71 953 S.W.2d 706 (Tex. 1997), cert. Denied, 523 U.S. 1119 (1998).

72 Havner, 953 S.W.2d at 715.

information and do not establish the actual cause of a *particular* individual's disease or condition. In other words, if medical examinations demonstrated that 100 people got sick from exposure to a certain toxic substance in a certain environment, then it is reasonable to assume without further medical examination that additional sick people exposed to the same toxic substance in the same environment became ill in the same manner as the 100 people in the original medical study. *Havner* held that evidence from such studies is generally admissible in toxic tort cases if it shows that there is a doubling of the risk of injury when exposed to the substance at issue and there is a high probability that if the pertinent studies were repeated, they would produce the same results 95 percent of the time. In *Ballard*, the court concluded that the evidence proffered by the experts did not meet the *Havner* standard and was therefore inadmissible.

Since *Ballard*, a number of experts are at work performing studies that would not run afoul of jurisdictions that follow *Havner*. For example, Dr. Kaye Kilburn has recently published a paper entitled "Inhalation of Molds and Mycotoxins." Dr. Kilburn studied 20 patients exposed to mold and noted neurobehavioural impairment, such as impaired balance, reaction time, and verbal recall. Longer exposures resulted in visual deficits and pulmonary impairment. Hopefully, courts will allow studies such as these so that exposed plaintiffs will not have to become deathly ill before being able to present a claim for personal injuries. Dr. Eckardt Johanning has recently published a similar paper entitled "Airborn Mycotoxin Sampling and Screening Analysis."<sup>73</sup> Contrary recent reports include the Texas Medical Association's Council on Scientific Affairs conclusion that "public concern for adverse health effects from inhalation of *Stachybotrys* spores

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73 Johanning, E., *Airborne Mycotoxin Sampling and Screening Analysis*, Proceedings: Indoor Air 2002.

in water-damaged buildings is generally not supported by published reports in medical literature.”<sup>74</sup>

In an effort to simplify the admissibility of medical evidence, plaintiffs seek to elicit a differential diagnosis from the treating physician.<sup>75</sup> In essence, the physician determines the pre-morbid or health of the patient prior to the mold exposure, versus the post-morbid or health of the patient after the exposure. Thus, if a patient was healthy prior to the exposure and is very ill following proven exposure to toxic mold, the causal factor is the mold. Among other things, defense counsel attack this argument with dose response arguments. In other words, defense counsel argues that plaintiffs must prove that the patient/plaintiff ingested a sufficient “dose” of toxic mold/mycotoxins to cause the complained of health problems. Plaintiffs counter the dose response argument with an analogy from tobacco litigation; namely, how many cigarettes does one have to smoke to develop cancer? How much asbestos must one be exposed to before developing health problems. No one knows. Likewise, no one knows how much “mycotoxins” must be ingested to cause problems, and similar to tobacco and asbestos, no one may ever know due to the various genetic predispositions of human beings. Some heavy smokers don’t get cancer; likewise, some people exposed to toxic mold don’t develop the severe problems that others develop.

It appears that more definitive evidence will be forthcoming. The Center For Disease Control and Prevention has commissioned the Institute of Medicine, a division of the National Academy of Sciences to study the health effects from exposure to mold in damp indoor spaces.

Meanwhile, the battleground over the admissibility of medical evidence is not likely to end in the

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<sup>74</sup> *Black Mold and Human Illness*, Sept. 2002, Texas Report on Scientific Affairs, CSA Report 1-I-02.

<sup>75</sup> Stedmans defines Differential Diagnosis as “the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings.



near future. Litigants and counsel should keep close tabs with breaking medical reports and studies that support their positions.

#### **H. Miscellaneous Cases.**

In an effort to provide you with some flavor of the type cases which have had some type disposition or ruling in the last year, we offer the follow case summaries from cases from around the country. We found these cases to be interesting and the topics timely. We hope that we chose well.

**John and Kathy Firlein v. Sta-Dry Waterproofing Co., Inc.,  
No. 01C-12-060 (JRJ) (Del. Super. Ct., New Castle Cty.). (September 10, 2003)**

Facts:

Plaintiffs hired Sta-Dry to waterproof their basement in September of 2000. Plaintiffs allege that Sta-Dry did its waterproofing job negligently by failing to seal an outlet pipe and failing to seal or patch another hole drilled through the basement wall. A rainstorm subsequently flooded their home, causing damage to the home and personal property. Sta-Dry re-waterproofed at no additional charge; however, Plaintiffs soon noticed that there was “pervasive and severe mold contamination” in the basement. Plaintiffs allege that the condition was particularly dangerous for John Firlein, who was already receiving Social Security disability payments for advanced lung disease.

Medical Testimony/Proof:

The Firleins’ long time family physician signed a series of affidavits in which he stated that John Firlein had a severe form of asthma. He also stated, “his pulmonary condition had worsened due to a mold infestation in his basement.” He indicated that Mr. Firlein’s symptoms were consistent with a mold infestation and that the mold “will inevitably cause pulmonary

problems and exacerbate John Firlein's already serious condition." He then signed another affidavit stating that the mold in the home was "the proximate cause of an exacerbation of John Firlein's serious pulmonary problems." He also stated that the mold and its consequences were the proximate cause of John Firlein's increased anxiety and stress.

Defense/Expert Attack:

The defense's expert contested the conclusion that those with chronic obstructive pulmonary disease were sensitive to mold and would automatically develop an exacerbation of their condition with exposure. In addition, the defense's expert contended, "there is no comparison between the established irritant and toxic effects of cigarette smoke on the bronchopulmonary tree versus the claim of such effects of mold spores." He further suggested that since elevated levels of mold spores were found only in the basement, Mr. Firlein could simply avoid going in the basement. In addition, he pointed out that the Firleins' doctor had run no tests to support his theory.

Holding/Reasoning:

Defendant moved to preclude the Firleins' doctor's testimony concerning any causal connection between the mold contamination of the home and any exacerbation of Mr. Firlein's lung condition. Plaintiffs failed to file a response, and the court granted the motion because of Plaintiffs' failure to rebut the contentions of the *Daubert* motion.

**Kari Kilian, et al., v. JWE Management Co., et al.,**  
**No. CV2000-014108 (Ariz. Super. Ct., Maricopa Cty.). (September 19, 2003)**

Facts:

Plaintiffs who lived in apartments are suing their former landlord for health problems related to the mold-growth in their apartments, based largely upon the Arizona Landlord/Tenant

Act. The former tenants allege that the premises were not fit and habitable because of the presence of toxigenic mold and associated mycotoxins in the apartments. Plaintiffs have experienced a variety of neurological and immune problems, which are allegedly related to mold exposure.

Medical Testimony/Proof:

The Defendant's medical expert testified that the immunophenotyping testing conducted had no clinical significance. However, he later admitted that it is widely used, that he uses it, and that he had helped to develop part of the technique.

Holding:

Defendant filed a motion to strike the Plaintiffs' medical experts or, in the alternative, for a *Frye* hearing. The Court held that *Frye* does not apply in this case because the experts' testimony does not rely on new scientific tests or techniques, and the two medical doctors appeared to be qualified in the areas in which they were offering opinions.

**Allstate Insurance Company v. Alvin F. Hicks,**  
**No. 07-02-0399-CV (Texas App. Ct., 7<sup>th</sup> Dist., Amarillo, Panel B). (September 10, 2003)**

Facts:

Purchasers of a home filed suit against the prior owner alleging that the prior owner concealed various construction defects and, therefore, induced them to buy a home they would not otherwise have purchased. In addition, they filed claims for property damage and personal injury as a result of mold. The seller tendered defense claims under the liability coverage in his homeowners' insurance policy, which was in effect at the time of the sale of the house. Upon the previous owner's motion for partial summary judgment on his counterclaim against his insurance

company, the trial court found that the insurance company had a duty to defend. The insurance company appealed.

Holding:

The Court ruled that the insurance company had no duty to defend the seller. The Court held that the mold related injuries were not an “occurrence” within the meaning of the policy and did not occur within the policy period, and thus no duty to defend arose. The purchasers did not allege that the mold was growing in the home at the time of purchase, nor did they allege when the mold formed. Therefore, because the purchasers did not suffer a bodily injury within the policy period, the alleged injuries were not an occurrence under the policy. In addition, the property damage claim was outside of the policy period. The court continued that misrepresentations and failure to disclose were not accidents and thus any resulting damage could not be an occurrence. Therefore, because the purchasers did not allege a cause of action against the seller caused by an occurrence under the policy, the insurance company had no duty to defend.

**Christopher and Juanita Roche v. Lincoln Property Co. and S.W.I.B. Investment Co.,**  
**No. 02-1390-A (E.D. Va.) (September 4, 2003)**

Facts:

Plaintiffs lived in an apartment complex for approximately one year. During this period, they noticed numerous leaks and mold growing in their apartment. Defendant came in several times to do repairs, but plaintiffs continued to complain. Plaintiffs hired an industrial hygienist to test the apartment. Said hygienist tested the apartment and, based on his findings, recommended that Plaintiffs vacate the apartment immediately. Defendant moved the Plaintiffs into a hotel and

then another apartment and hired a mold remediation company to remidiate Plaintiffs' personal property with Plaintiffs' consent. Plaintiffs subsequently withdrew that consent and demanded reimbursement for the value of the property. Nine months after they vacated the apartment, Plaintiffs went to see a doctor who tested them for allergies. One of the plaintiffs was allergic to mold, but the other was not shown to be allergic to the molds found in the apartment and neither was tested for an allergic reaction to one of the molds found in the apartment.

Procedural Posture:

The trial court held that there were no genuine issues of material fact regarding the plaintiffs' claim that the defendants' actions caused the loss of their belongings and damage to their health. The trial court also ruled that Plaintiffs' expert did not satisfy the requirements of *Daubert*. It specified that the doctor did not follow established medical methodology by not "ruling in" the suspected causes and by not "ruling out" other causes. The court also found that the doctor failed to establish why the medical literature correlating mold with adverse health effects showed that the mold was the cause of Plaintiffs' injuries.

Holding:

The Court rejected Plaintiffs' challenges to the previous decisions granting defendant's motion for summary judgment and defendant's motion to bar Plaintiffs' expert's testimony.

**State Farm Fire and Casualty Co. v. M.L.T. Construction Co. Inc., et al., Bouma v. HH&K Realty**, Nos. 2002-CA-1811, 2002-CA-1812 (La. App. Ct., 4<sup>th</sup> Cir.). (June 4, 2003)

Facts:

During the period Plaintiff worked for a law firm, the owner of the building had the roof replaced. However, during the roof replacement, water poured into the building and caused

extensive damage and later mold growth. As a result of the mold, Plaintiff experienced an exacerbation of respiratory symptoms. Plaintiff filed suit against the law firm, the building owner, the roofing contractor, the designer/intermediary of the new roof and the insurer of the designer. State Farm, the insurer of the law firm, paid the claim and then, through subrogation, filed claims against the roofing contractor, the designer and the designer's insurance carrier. Plaintiff dismissed claims against all except the roofing contractor and the designer's insurance company (however, proceedings against the roofing contractor were stayed because it was found to be insolvent by the bankruptcy court). Plaintiff, her husband, and State Farm were awarded damages at trial.

Procedural Posture:

The designer's insurance appealed, arguing that the trial court erred by finding that the plaintiff's damages were caused by the roofing contractor and its failure to assign secondary blame to another party. Additionally, it argued that the court erred in ruling that the insurance policy covered plaintiff's injuries. Lastly, it argued that the trial erred in applying the doctrine of *contra non valentum agere nulla currit praescriptio* to the facts of this case, and finding that the plaintiff's claims had not been prescribed as a matter of law.

Holding:

The Appeals Court found that Plaintiff was not contributorily negligent. It did not find that she acted unreasonably or negligently in her investigation and treatment of her illness or that any negligence on her part actually caused the illness. The Court further found that the facts of the case were not sufficient to trigger the total pollution exclusion found in the policy, and hence there is coverage under the general liability policy. The court further found that based on

Plaintiff's prior respiratory problems, Plaintiff's delay in discovering the cause of her illness and not immediately linking it to her work environment was reasonable.

**Town of Fairfield v. Commercial Roofing, et al.**  
**No. (X02) CV020175746S (Conn. Super. Ct., Waterbury Jud. Dist., Complex Lit. Docket at Waterbury). (June 5, 2003)**

Facts:

Town of Fairfield, CT sued the roofing contractor and architect after reaching a settlement with an insurance company over water and mold damage at an elementary school. The suit alleges that they failed to protect the school from water intrusion and humidity which led to mold growth.

Analysis:

The architect argued that it was entitled to summary judgment regarding the town's property damage claims under a waiver of subrogation in the contract between the town and the roofing contractor. The Court found that the architect was an intended beneficiary of the clause. The Court also rejected the town's argument that there was a factual issue as to whether the entire amount of damages sought in the lawsuit were covered by the subrogation clause, since the waiver only covered the parties' recovery to property loss to the extent that it was covered by the insurance policy. In addition, the architect argued that it should not be responsible for reimbursing workers' compensation under a statute which prohibits design professionals working on construction projects from being liable for injuries which are covered by workers compensation.

Holding:

The court granted the architect's motion for summary judgment to the extent that the town was attempting to hold the architect responsible for the amount of damages which were covered by property insurance and relief for workers' compensation claims. The court denied the architect's motion that it did not have any contractual or tort duties, which the town was alleging it had breached on the basis that it was not properly raised.

**Sherry Watters, et al. v. Department of Social Services, et al.,**  
**No. 01-17775 (La. Civ. Dist. Ct., Orleans Parish Ct., Div. C.) c/w Kristen M. Rhodes, et al.**  
**v. BG Real Estate Services, Inc., No. 01-18355 (La. Civ. Dist. Ct., Orleans Parish Ct.,**  
**Div. J.) c/w Mary Johnson, et al. v. Department of Social Services, et al., No. 02-**  
**14043 (La. Civ. Dist. Ct., Orleans Parish Ct., Div. N.) (July 16, 2003)**

Facts:

Over 1000 city and state employees who worked in a single office building alleging that they were harmed by molds, mold spores and other toxins in the building. The trial court previously granted summary judgment for defendants on the issue of the asbestos exclusion, holding that it applies to all of the plaintiffs' asbestos related claims. Defendants also moved for summary judgment on the basis that the organic pathogen and absorption/inhalation precluded any recovery by plaintiffs.

Argument:

Plaintiffs opposed defendants' motion for summary judgment on two bases: (1) Defendants had not posted the bond which is required under statute and (2) Plaintiffs argue that the exclusions are unenforceable due to ambiguity, unapproved status and lack of compliance with the policy.

Holding:



The court denied the insurance company's motion for summary judgment based on the organic pathogen exclusion on the basis that the exclusion is vague and ambiguous and does not preclude coverage for the plaintiffs' claims in this case.

**Richard and Stephanie Fiess v. State Farm Lloyds,**  
**No. H-02-1912 (D. Texas, S. Dist.). (June 4, 2003)**

Facts:

Plaintiffs suffered flooding in their home from a hurricane. Their flood insurance paid for the flood damage; however, as they removed sheetrock to repair the damage, they discovered a mold infestation. There were 5 causes of water intrusion in addition to the flood damage from the hurricane, which led to the mold growth: leaks from the roof, plumbing, HVAC System, exterior doors and windows. Following the discovery of the mold, the insurance company paid plaintiffs a sum for "non-covered mold remediation," but not the full amount of the damage. Plaintiffs alleged claims for unfair and deceptive trade practices, breach of contract, fraud/intentional misrepresentation, violations of the Texas Insurance Code and breach of warranty.

Argument:

Plaintiffs contended that the mold damage was an "ensuing loss" and was thus covered under the policy. The insurance company argued that the cause of the mold was irrelevant and that the mold was automatically excluded under the mold exclusion. The insurance company contended that the plaintiffs were unable to recover under the doctrine of concurrent causation, as they were unable to distinguish which portion of the mold damage was caused by the flooding and which occurred as a result of other causes.

Holding:

The court granted the insurer's motion for summary judgment on the basis that the mold damage alleged in the complaint could not be considered an "ensuing loss" under the terms of the policy and that the mold damage policy exclusion applied to the mold damage in this case, regardless of the cause of the mold. The Court further found that the insurer's investigation of the mold was adequate and reasonable and that there was no breach of express or implied warranties. Lastly, the court found that Plaintiffs were unable to meet the requirements of a fraud claim.

**Chad E. Hebert and Shelly Herbert, Individually and on Behalf of Their Minor**  
**No. 37,208-CA (La. Ct. App., 2<sup>nd</sup> Cir.) (May 14, 2003)**

**Children v. W**

Facts:

Plaintiffs filed suit against the owner of their rental house and his insurance company after mold began growing in the home following a water heater leaked and moistened the carpet and sheetrock in part of the home. The insurer was slow to respond and the owner never replaced the water damaged carpet. Plaintiffs' children were diagnosed with neurological hearing loss and required surgery, and everyone in the family experienced some symptoms consistent with mold exposure. After their children were diagnosed with medical problems, Plaintiffs had the home tested for mold and, upon learning of the contamination, immediately vacated the home. The trial court granted the insurance company's motion for summary judgment seeking dismissal of the penalty claim against them for failure to timely respond.

Holding:

The Appeals Court held that the Plaintiffs did state a right of action under the Louisiana statutes for penalties. The court refused to read into the statute a limitation that 3<sup>rd</sup> parties should not be able to bring claims under same.

## VIII VERDICTS AND SETTLEMENTS

There have been a number of recent verdicts and settlements involving toxic mold. In general, juries seem impatient with any party responsible in causing contamination, and willing to punish those seeking to deny their liability. Numerous jury verdicts, large and small, have validated droves of claimants who have been driven from their homes because of mold infestation. A sampling of these cases are as follows:

### A. Breakers at Bear Brand HOA v. Shea Homes.

Santa Ana, California

HOA prevails in mold case against builder: \$7.8 million verdict

180 unit condo w/construction defects

water intrusion and mold infestation

Defendants refused plaintiffs' offer of \$4 million to settle before trial

(reported Harris Martin 7/15/2003)

### B. Greater Boca Raton Beach & Park v. Paul Twitty and Steven Feller, PE.

Boca Raton, Florida

Designer settles with Sugar Sand Park for \$1 million

Designer/Engineers designed park facility with grading/drainage and HVAC problems

Flooding and HVAC problems resulted in mold

No personal injury because park closed

(Settlement date: 6/13/2003: Westlaw)

### C. Tyler Lester, et. Al. V. George Golden, et. al.

Ventura, California

Tenants settle mold landlord dispute for \$430,000-single family

Family developed asthma-like symptoms

Tenant lawsuit alleged landlords concealed water and mold problems prior to tenants signing lease

Settlement after trial date set

Landlord policy limits: \$300,000

Mold remediator (alleged cross contamination) to put up \$130,000

(reported by Harris Martin 6/2003)

**D. McMahon v. America Equity Ins. Co.**

Los Angeles, California

Ed McMahon settlement now over \$7 million-single family

McMahon sued several parties, including homeowners carrier for failing to adequately handle remediation

Alleged mold-related injuries

More parties expected to add to settlement

(reported 6/2003: Harris Martin)

**E. Katayama Internation, Inc. and mayatek Corp. v. Republic Western Ins.**

**Co.**

Sacramento, California

Insurance company settles suit prior to jury award of punitive damages

Republic Ins. Refused to pay for water and mold damage (bad faith)

Jury assessed compensatory damages at \$2.9 million

Jury found malice, fraud, and oppression

Settled prior to jury assessment of punitives

(reported 6/22/2002: Harris Martin)

**F. Davis v. Henry Phipps Plaza South, et. al.**

Davis case settles at \$1.17 million

Apartment residents sued building's property management company, owners and others alleging personal injuries, property damage and death from toxic mold

Case settled for \$1.17 million after defense successful in excluding evidence of neurological injuries

Plaintiffs were allowed to offer evidence of respiratory and fatigue problems

**G. Ballard v. Fire Insurance Exchange.**

In this now infamous 2001 Texas case, Melinda Ballard and her family filed a claim with their insurance company to pay for the removal of a hardwood floor, which had become damaged due to a bathroom plumbing leak in the family's twenty-two-room mansion.<sup>76</sup> The moisture allowed a toxic mold to spread throughout the house rendering it uninhabitable. The Ballards' allegedly began to suffer from nose bleeds, toxic encephalopathy (brain damage), lung disease, respiratory illness, and memory loss.

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<sup>76</sup> Ballard v. Fire Insurance Exchange. No. 99-5252, Tex. Dist Ct., 345<sup>th</sup> Dist. (2001).

At trial, the jury awarded the plaintiffs \$32 million for the insurance company's failure to quickly pay for the water damaged floor. The bad faith verdict ordered against the insurer was composed of \$6 million for the house and its contents, \$12 million in punitive damages, \$5 million for emotional distress, and close to \$9 million for attorney's fees.<sup>77</sup> This award did not include damages for the personal injury claims which were effectively dismissed following the defense's successful *Daubert* challenge to the plaintiff's seven causation experts. On appeal, the verdict was subsequently reduced to \$4 million, plus attorneys' fees..

#### **H. Mazza, et. al., v. Shurtz, et. al.**

In this 2002 California case, the plaintiffs, Darren Mazza and his family, allege to have been repeatedly hospitalized for injuries caused by mold after moving into their apartment.<sup>78</sup> The defendants in the action were the owners of the apartments, the managers and general partners. The plaintiff's alleged breathing problems, severe headaches, and gastrointestinal problems caused by exposure to the toxic molds. Mr. Mazza missed twenty-six days of work and his eight year old son missed thirty-nine days of school due to his multiple injuries, which included thousands of oral canker sores, body aches, and weight loss. The jury rendered a \$2.7 million verdict in favor of the plaintiffs' claims for negligence, nuisance, breach of contract, constructive eviction, and breach of implied warranty of habitability. The Sacramento County Superior Court judge denied the defendants' requests for a new trial and JNOV.

#### **I. Davis v. Henry Phipps Plaza South, et. al.**

In this New York case, between 1996 and 2001, over 500 apartment residents sued the building's property management company, owners, and owners' limited partners alleging

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<sup>77</sup> Mockbee, *supra* note 2.

<sup>78</sup> Darren Mazza, et. al., v. Raymond Shurtz, et. al., Calif. Super. Court. 2 Mealey's Mold Litigation (2002)

property damage, personal injuries, and deaths caused by the building's mold contamination.<sup>79</sup> Chronic interior water leaks and exterior water penetration led to mold infestation that included *Stachybotrys* and *Aspergillus*. The plaintiffs sought compensatory and punitive damages totaling over \$12 billion. However, on November 21, 2001, plaintiffs settled for less than \$1.17 million.

At trial, a motion for class certification was denied because each claim required a separate causation inquiry. The plaintiffs' injuries included: headaches, fatigue, joint pain, weakness, respiratory problems, and asthma. The judge noted that different people may have been exposed to different molds for different lengths of time.

The defendants, in a *Frye* motion, were successful in excluding all expert testimony on the cause of the plaintiffs' neurological injuries. The plaintiffs' causation experts on respiratory and fatigue problems, however, did survive the motion. The case settled before the plaintiff rested at trial. **J. Nicholson, et. al., v. Metro Property Management Inc., et. al.**

On December 19, 2001, a Maryland judge denied a motion for remittitur and new trial in a case in which the jury awarded a family over \$200 thousand for personal injuries and property damage caused by toxic mold.<sup>80</sup> The plaintiffs' apartment became contaminated with airborne mold spores from the vacant apartment below. Air tests revealed a higher level of airborne spores inside the apartment than outdoors. The plaintiffs' son developed asthma, and suffered complications to a liver transplant that was performed when he was a year old. The child was five when exposed to the mold.

The plaintiffs' experts, a toxicologist and a pediatrician, both testified that mold could create toxins in the body that cause liver problems. The defendants' expert, however, the chief

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79 *Davis v. Henry Phipps Plaza South, et. al.*, N.Y. County Super. Court (2001).

80 *Kathryn Nicholson, et. al., v. Metro Property Management Inc., et. al.*, Md. Cir., Baltimore County

of pediatric surgery at John Hopkins and the performing surgeon of the child's transplant, testified that the complications were not caused by the child's exposure to mold. The jury awarded the child \$20,000 in non-economic for the liver, and \$25,000 in non-economic loss for the asthmatic injury. The parents received \$154,000 in economic loss for the injury resulting to the property, and \$20,000 in economic loss for the child's medical expenses.

**K. Baypoint v. RML Corp. and Dryvit Systems, Inc., et al.**<sup>81</sup>

The authors of this paper recently received a verdict in a mold infested EIFS condominium case. After settling with the builders for a confidential amount, the homeowners of this condominium project took an assignment of the builder's implied indemnity claims against the EIFS manufacturer. The judge issued a letter opinion finding for the plaintiffs and awarding \$2.65 million. The case subsequently settled for \$1,375,000.00 before any appeal could be taken.

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<sup>81</sup>Board of Directors of the Bay Point Condominiums Assoc., Inc., et al. v. RML Corp., Dryvit Systems, Inc., Bishop Wall Systems, et al. (Circuit Court of Norfolk, VA CL99-475)



## IX. MOLD INSURANCE ISSUES

### A. Homeowners' Insurance

The spread of toxic mold has sparked a crisis in the insurance industry in numerous states, including Texas and California. From 1991 to 2001, there were about 9,000 mold and mildew related claims in the U.S. and Canada.<sup>82</sup> The recent mold phenomenon, however, has dwarfed that number. For example, Farmer's Insurance had 10,150 mold related claims during the first ten months of 2001.<sup>83</sup> In Texas, the three largest insurers reported that mold related claims jumped from \$9.1 million in the first quarter of 2000 to \$79.5 million in the first quarter of 2001.<sup>84</sup> Mold related claims are also primarily responsible for the 800 percent increase in the average cost per policyholder in Texas between 2000 and 2001.<sup>85</sup> In response, the insurance industry has taken a number of actions including not issuing new homeowners policies and capping the amount that can be recovered for mold related claims.

Homeowners insurance provides coverage to individuals and families who rent or own a residence, such as a house, an apartment, or a condominium. All homeowners policies provide a combination of property and liability coverage. The standard homeowners policy is typically patterned after the policies developed by the Insurance Services Office ("ISO") which routinely submits drafted homeowners policies to its member insurance companies for approval and use. The ISO revised its homeowners policies in 1984, 1991 and 2000.

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<sup>82</sup> Del Williams, *Insurers Look to Wipe Clean Toxic Mold Claims*, available at <http://www.insurancejournal.com/html/ijweb/publications/ijwest/w061002/insurerslook.htm>

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

While all homeowners policies contain property and liability coverage, there are different types of policy forms which vary only in the type of property coverage provided to an insured's residence, other structures or personal property. Liability coverage is contained in each of the policy forms with no variation. There are several standard homeowners policies offered by the ISO. Common ISO homeowners policies are:

- HO 00 01 (HO-1) provides very limited coverage on buildings and personal property for owner-occupants of homes and is no longer in use in most states;
- HO 00 02 (HO-2) provides coverage on buildings and personal property for owner-occupants of homes against specifically named causes of loss; and
- HO 00 03 (HO-3) provides coverage for owner-occupants of homes

The HO 00 03 ("HO-3") is the most common homeowners policy and provides coverage for homeowner-occupants for all losses to buildings unless otherwise excluded. Additionally, the HO-3 provides coverage for personal property against named causes of loss. Copies of the HO-3, including recent revisions, appear at the end of this section.

Property loss is covered under Section I of the HO-3. There are four categories of coverage: Coverage A – Dwelling, Coverage B - Other Structures, Coverage C - Personal Property, and Coverage D - Loss of Use. Section I governs how losses will be valued and identifies the insured's obligations under the policy. Appearing below are some excerpts of the HO-3 provisions of primary interest.

A. Coverage A - Dwelling

*1. We cover:*

a. *The dwelling on the “residence premises” shown in the Declarations, including structures attached to the dwelling; and*

b. *Materials and supplies located on or next to the “residence premises” used to construct, alter or repair the dwelling or other structures on the “residence premises”.*

2. *We do not cover land, including land on which the dwelling is located.*

The definition of “residence premises” should be read in conjunction with Coverage A’s language. A “residence premises” may consist of a one family dwelling, a single unit of a two family dwelling, or a part of any other building. The dwelling must be located on the premises listed in the Declarations.

### C. Coverage C – Personal Property

#### 1. Covered Property:

*We cover personal property owned or used by an “insured” while it is anywhere in the world. At your request, we will cover personal property owned by:*

a. *Others while the property is on the part of the “residence premises” occupied by an “insured”; or*

b. *A guest or a “residence employee, “while the property is in any residence occupied by an “insured”.*

Coverage C covers both items of personal property that generally remain at home, such as furniture and stereo equipment, and items that may accompany the insured away from home, such as clothes. Optionally, the insured may request coverage of personal property that belongs to another, but is being stored at the “residence premises.”

The HO-3 is considered an “all risk” policy, which insures against direct physical loss to covered property. The dramatic increase in mold claims has been an area of concern for the

insurance industry. Coverage issues abound. The policy first states the coverage, then states the exclusions, and finally states the exceptions to the exclusions. The policy specifically lists a number of perils excluded from coverage, including mold. However the policy also provides exceptions to the exclusion:

Section I – Perils Insured Against

*A. 2. We do not insure however, for loss: [c.] Caused by: [(5)] Mold, fungus, or wet rot. However, we do insure for loss caused by mold, fungus or wet rot hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam within: [(a)] A plumbing, heating, air conditioning or automatic fire protective sprinkler system, or a household appliance, on the “residence premises”; or [(b)] A storm drain, or water, steam, or sewer pipes, off the residence premises”.*

Another exception provides coverage for “any ensuing loss.” This is commonly referred to as the “ensuing loss” exception. Common interpretation of the “ensuing loss” exception holds that upon the occurrence of a covered peril, an ensuing loss from the covered peril will be covered, unless it is specifically excluded. Under this exclusion, homeowners could not expect coverage from mold growth that develops, for example, due solely to the fact that the dwelling is located in a hot, humid environment ideal for mold growth. The more common scenario is the wide array of events or occurrences that cause water intrusion which leads to mold growth.

North Carolina Courts have yet to address whether damages from mold would be covered under the “ensuing loss” exception. However, other appellate cases provide guidance on this issue. The North Carolina Court of Appeals first addressed the applicability of the “ensuing loss” exception in Smith v. State Farm Fire And Cas. Co., 109 N.C.App. 77, 425 S.E.2d 719 (1993), rev, denied, 333 N.C. 575, 429 S.E.2d 572 (1993). The plaintiffs had suffered property damage when they sanded a plywood floor that was embedded with asbestos fibers. State Farm

denied their claim citing the “defective workmanship” exclusion in the policy. The plaintiffs filed a declaratory judgment action, arguing that the “defective workmanship” exclusion did not apply because they were seeking to recover only for ensuing losses, and not for loss attributable to the defective workmanship. The trial court granted summary judgment for State Farm. The Court of Appeals affirmed the trial court, holding that defective workmanship was not covered as an “ensuing loss” because the defective workmanship exclusion does not only encompass defective workmanship, but all damages resulting or ensuing from the defective workmanship. The court stated that the defective workmanship exclusion did “not make a distinction between losses directly due to defective workmanship and those losses ensuing from defective workmanship. . . .” Id. at 82, 425 S.E.2d at 721. The court reasoned that the individual or entity performing the defective construction should be the party ultimately responsible for any resulting damage.

Following Smith, the Court of Appeals addressed the “ensuing loss exception” once again, in Alwart v. State Farm Fire And Cas. Co., 131 N.C.App.538, 508 S.E.2d 531 (1998), rev. denied, 350 N.C. 307, 534 S.E.2d 587 (1999). The exterior wall of the plaintiffs’ synthetic stucco clad home buckled. State Farm denied the plaintiffs claim on the grounds that the claim was excluded as a non-covered peril. The trial court granted summary judgment for State Farm, and the Court of Appeals affirmed. In Alwart, plaintiffs argued that their claim was distinguishable from Smith because the Smith loss involved “ensuing loss,” resulting from indirect damages, while the loss in this case was one of direct damages. In rejecting this argument, the court simply cited its Smith decision, reiterating that the defective workmanship

exclusion does not “make a distinction between losses directly due to defective workmanship and those losses ensuing from such defective workmanship.” *Id.* at 542, 508 S.E.2d at 534.

**B. Home Insurance Co. v. McClain.**<sup>86</sup>

In this unpublished 2000 Texas case, the plaintiffs sued their insurance company seeking coverage under the standard homeowners insurance policy for mold infestation. The plaintiffs’ home became uninhabitable after water leaked in through the roof of a new addition.

At trial, the insurance company denied liability because the homeowners policy covered all losses except those specifically excluded. Among the excluded losses were those caused by “rust, rot, mold, or other fungi.” The exclusion section of the policy, however, also said “[w]e do cover ensuing loss caused by ... water damage ... if the loss would otherwise be covered under this policy.” In granting the plaintiffs’ motion for summary judgment, the district court held that event though the mold damage was excluded from the policy, the insurance company was still liable for the mold which was a loss ensuing from the water damage.

The main issue on appeal was whether or not the trial court erred in finding that the mold contamination was covered under the policy. The appellate court upheld the summary judgment on the basis that the district court properly defined the mold contamination as an ensuing loss. The appellate court reasoned that the mold followed and was caused by the water damage, which made the exclusion inapplicable.

The “ensuing loss” provision should easily apply to mold claims. For example, suppose a plumbing pipe suddenly ruptures and floods a house, causing water damage. Thereafter, mold proliferates, necessitating extensive mold remediation. In that event, mold remediation should be

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<sup>86</sup> Home Insurance Co., v. McClain, 2000 WL 144115 (Tex.App.-Dallas) (unpublished).

covered under the homeowners policy. The mold damage would be an ensuing loss from the covered peril of the plumbing leak.

In 2002, the North Carolina, the Department of Insurance issued a new Amendatory Endorsement designed to drastically limit liability due to mold.<sup>87</sup> The purpose of the new amendment is “to provide and more specifically describe the intended mold and fungus coverage for the benefit of policyholders and to help companies better manage coverage for mold and fungus subject to certain limits.”<sup>88</sup> The endorsement is mandatory on all homeowners policies in North Carolina written on or after May 1, 2002 through April 31, 2003.<sup>89</sup>

The Amendatory Endorsement defines fungi to mean “*any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or by products produced or released by fungi.*” The endorsement also includes an additional coverage where the insurer agrees to pay up to \$5,000 for direct physical loss to the property caused by fungi, and costs incurred to maintain a normal standard of living. There is also a liability exclusion section that applies to Personal Liability and Coverage (Coverage E), and Medical Payments to Others (Coverage F). In this section, the insurer disclaims liability for any injuries, real or alleged, stemming from fungi exposure. The authors are not aware of any case law or decision in any jurisdiction which discusses the validity of these limitations.

### **C. Commercial General Liability Policy**

#### **1. The Standard CGL Pollution Exclusion**

The commercial general liability (“CGL”) policy provides coverage to the contractor for property damage or personal injury. However, a number of exclusions may apply to any given

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<sup>87</sup> See copy of Amendatory Endorsement in appendix.

<sup>88</sup> North Carolina Rate Bureau, Circular Letter to All Member Companies (2002).

<sup>89</sup> Id.

claim. Many construction claims commonly result in damages limited to the cost of repair. However, the personal injury component involved in many mold-related claims may elevate the damages. Even if a contractor's CGL policy does not have a specific mold exclusion, there are several other policy exclusions that may be used to attempt exclusion of mold-related damages. The standard CGL policy from the Insurance Services Office ("ISO") states that the insurance does not apply to the following:

*"Bodily Injury" or "Property Damage" arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants ..."* (emphasis added).

"Pollutant" is defined as any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

CGL carriers may characterize mold as a "pollutant" to exclude coverage. Whether mold falls within the definition of "pollutant" is a key question. Another key question is whether the exposure to the mold resulted from a "discharge, dispersal, release or escape" as defined by the CGL policy. Unfortunately, there is precious little case law to provide guidance in this somewhat novel area. However, the cases listed below provide some guidance:

## **2. Pollution Exclusion Does Not Apply:**

In Leverance v. USF&G, 462 N.W.2d 218 (Wis. App. 1990), the court held that the pollution exclusion did not apply because the mold resulted from water vapor trapped within the walls, and thus did not constitute a "release" of contaminants, but rather was formed over time by environmental conditions.



In West America Ins. Co. v. Tufco. Flooring East, Inc., 104 N.C App. 312, 409 S.E.2d 692 (1991), chicken in a processing plant were damaged as a result of styrene fumes from a floor resurfacing job. The Court held that the pollution exclusion did not apply because it was ambiguous and not sufficient to exclude coverage from an insured's normal business activities.

In Donald v. Urban Land Interests, Inc., 564 N.W.2d 728 (Wis. 1997), plaintiffs suffered headaches, sinus problems, fatigue, eye irritation, stomach upset, asthma, sore throat, nausea and pounding ears when an HVAC system caused the accumulation of carbon dioxide. The Court held that the pollution exclusion was ambiguous when applied to the everyday activity such as breathing carbon dioxide.

When dealing with this issue, you should also consult these cases: Keggi v. Northbrook Property and Cas Ins. Co., 13 P3d 785(Az Ct App 2000); Stillman v. Charter Oak Fire Ins. Co., No. 92-1949-CIV Highsmith (S.D.Fla); Stoney Run Co., v. Prudential-LMI Commercial Ins. Co., 687 N.E. 2d 72 (Ill 1997); Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co., 779 F.2d 1037 (7<sup>th</sup> Cir 1992); Western alliance Ins. Co. v. Gill, 686 N.E. 2d 997 (Mass 1997); Sullins v. Allstate Ins. Co., 667 A2d 617 (Md. Ct. App 1995). We have others, just call and we would be happy to help.

### **3. Defense Cases:**

The following cases are cited by the defense.

In Bernhardt v. Hartford Fire. Ins. Co., 648 A.2d 1047 (1994), the court held that carbon monoxide from a furnace that backed up and dispersed through a building was a pollutant and coverage was therefore excluded under the pollution exclusion.

In Peace v. Northwestern National Ins. Co., 596 N.W.2d 429 (1999), the court held that damages resulting from lead paint chips were excluded by the pollution exclusion.

In Madison Construction Co. v. The Harleysville Mut. Ins. Co., 735 A.2d 100 (1999), the court held that damages resulting from fumes from concrete curing chemicals were excluded by the pollution exclusion.

#### **4. Products-Completed Operations Coverage**

Mold proliferation, resulting from leaks, often occurs over some period of time, often after the job is completed. Many contractors obtain “completed operations” coverage as part of their CGL policy. This coverage provides protection for personal injury and property damage arising after work has been completed. However, the pollution exclusion may not apply to completed operations scenarios.

In West American Ins. Co. v. Tufco Flooring East, Inc., 104 N.C.App. 312, 409 S.E.2d 692 (1991), the Court of Appeals analyzed a CGL policy containing a pollution exclusion clause to determine whether coverage was available for damage to chicken stored in a cooler and contaminated with styrene released during floor resurfacing work. The Court of Appeals affirmed the trial court's ruling that the pollution exclusion clause did not exclude coverage. The finding was based on the court's conclusion that, “the pollution exclusion clause of the floor resurfacer's commercial liability policy did not exclude coverage for damages to chicken processor's chicken caused by infiltration of styrene used by a resurfacer on processor's floors, and that any ambiguity in the interrelationship between completed operations coverage and the pollution exclusion clause was required to be resolved in favor of resurfacer, and that a reasonable person in position of resurfacer would have understood claims such as processor's to

be covered.” It was also indicated by the court that, “exclusions from coverage are not favored by courts and are to be strictly construed against insurer.” Also, a finding that could be of significant importance was made, in that, “any discharge, dispersal, release, or escape of a pollutant must be into the environment in order to trigger the pollution exclusion clause of a commercial liability policy (CGL) and deny coverage to insured.” Id. at 313, 409 S.E.2d 692 at 693. Additionally, the court stated:

*An exception for pollution liability falling within the products-completed operations hazard is inferred by the exclusion, and the ISO has stated that the exception is intended. This exception does have important coverage consequences. If a pollution release causing bodily injury or property damage results from the insured’s product or completed operation, the insured’s liability to injured parties is covered.*

Id. at 320, 409 S.E.2d at 697.

Therefore, contractors may wish to obtain product-completed operation coverage as added protection from mold-related claims which may arise after work is completed.

### **SUMMARY**

In summary, we hope that this paper provides a basic framework to prepare you for your next foray into the Mold Wars. If you ever need any assistance or wish for us to consult with you about your case or issues, please feel free to call either of us.

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# **APPENDIX**

**Amendatory Endorsement: Fungi**

**Kilburn Study**

**Johanning Study**

**Conyers Bill**

**Toxic Mold Client Intake Checklist**

# Insurance Bulletins