Client ALERT

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Toxic Mold: The Next Asbestos?

Introduction

So-called "toxic mold" litigation is here, and at least some lawyers claim that it has the litigation potential of asbestos. Thousands of personal injury plaintiffs are currently involved in pending toxic mold cases, an untold number of construction defect cases now center on "mold abatement," and the insurance industry is changing standard homeowners' policies and environmental insurance policies to exclude coverage for mold infestation. This Client Alert describes recent developments in mold litigation; discusses the science and theory behind the rash of recent filings; highlights mold prevention, assessment, and remediation guidelines; identifies general weaknesses in toxic mold personal injury claims; and discusses Paul Hastings' capabilities and experience in this rapidly expanding area.

Recent Developments

Mold is ubiquitous and can be present in any structure – including industrial plants, commercial office complexes, hotels, multi-tenant apartments, nursing homes, and schools. Widespread media and political recognition of the health risks of mold has put the issue firmly in the public eye. Recently, popular newspapers and magazines including *The New York Times*, *The Wall Street Journal*, *USA Today*, *People*, and *Time*, and national television programs such as *48 Hours*, have published articles and segments on homeowners fighting mold, construction and abatement contractors, and their insurers.

Within the past year, there have been a spate of developments suggesting that mold claims need to be taken seriously:

- Mealey's Publications, a barometer and harbinger of litigation activity, began publication of *Mealey's Mold Litigation Report*. Mealey's has also sponsored several "toxic mold" litigation conferences.

- The paralegal portrayed by Julia Roberts in *Erin Brockovich* filed her own lawsuit for personal injuries and property damage arising out of mold in her home. *Brockovich v. Morrison Associates*, No. 051037 (Los Angeles County Superior Court). She subsequently testified before the California Senate Committee on Health and Human Services, urging passage of the new "Toxic Mold Protection Act." This new law calls for the development of standards for mold exposure and cleanup, and requires disclosure of "mold problems" when buildings are sold or leased.

- The Supreme Court of Delaware upheld a $1,045,000 award (minus 22% for contributory negligence) to two tenants whose landlord failed to address water leaks and resulting mold growth in their apartments. Importantly, the Court rejected the landlord's claim on appeal that the "expert" testimony of Dr. Eckardt Johanning and Dr. Wayne Gordon, two experts commonly retained by plaintiffs' counsel, should have been excluded on the basis that the testimony was unreliable.

- A jury in Sacramento, California awarded $2.7 million to a family whose members claimed to have suffered a toxic reaction to mold growing in their apartment.

- *Ballard v. Fire Insurance Exchange* was decided by an Austin, Texas jury that awarded a family $32.1 million against Farmers Insurance Group after the insurance company failed to adequately cover repairs for water damage, which allegedly allowed mold to proliferate in the home. The suit did not include personal injury claims, which plaintiffs promise to bring separately. Separately, Farmers Insurance Group has projected a five-fold increase in residential claims for mold damage this year.

- Approximately 500 tenants of the Henry Phipps Plaza housing complex in New York City filed more than 160 mold-related lawsuits against the building management. These plaintiffs, who initially sought damages of over $12 billion for claims

including physical injuries and wrongful death, settled six weeks into the consolidated trial for a reported $1.2-1.8 million.

These and other developments follow two notable Florida cases involving mold-infested courthouses which many identify as the genesis of the current "toxic mold litigation" trend. The first case, in Polk County, yielded a settlement of $48.5 million; the second, in Martin County, resulted in a verdict of $14 million and a settlement of $8 million.

The Science and Theory Behind Mold Claims

Mold is ubiquitous, but only some varieties of mold ("toxigenic mold") are causing widespread concern – namely, *Apsergillus*, *Penicillium*, and *Stachybotrys*. These fungi are considered dangerous because they release mycotoxins, toxic by-products of fungal metabolism. It is widely accepted that exposure to mold can cause allergies in some people, with symptoms similar to hay fever. However, medical professionals agree that once exposure to mold ends, allergy symptoms disappear. Serious personal injury claims typically involve the alleged toxic effects of molds that produce mycotoxins, which some experts believe can cause, among other things, pulmonary hemorrhage and toxic encephalopathy – *i.e.*, brain damage.

Mold spores are omnipresent and require only three elements to take hold in a building and thrive: moisture, temperatures between 32-100°F, and nutrients in the form of organic matter (wood, wallpaper, carpet, ceiling tile, gypsum board, etc.). It is not surprising that mold litigation is closely tied to the building trades, given that building materials are ample sources of nutrients and that buildings themselves can leak or flood, providing moisture for mold to grow.

Mold Prevention

Prevention of mold growth in buildings requires the elimination of unwanted moisture. Common moisture sources are leaks in a building's envelope, leaking pipes, faulty HVAC systems, and flooding. The keys to elimination of unwanted moisture in a building are high quality construction (with attention paid to waterproofing details), followed by vigorous maintenance of the building's envelope, plumbing, and HVAC systems.

Mold Assessments

There are generally three indicators of possible mold contamination: visible growth, water damage, and odor. Where any of these indicators are present, building owners should consider conducting a preliminary mold assessment, consisting of a visual inspection designed to look for evidence of mold growth and water intrusion. Air monitoring cannot conclusively prove the absence of mold growth in a building, but can help to establish whether there is a current health risk to building occupants. Visual observations can determine existing mold colonies and water-damaged substrate materials that could harbor mold. Also, a distinctive, musty odor caused by the emission of volatile organic compounds (VOCs) may be detected when mold is moist and actively growing.

The mold organism itself complicates the assessment process. The total infiltration of mold is extremely difficult to assess because it is not always visible to the naked eye; mold often spreads inside walls, pipe chases, and other dark, damp areas not readily visible. This fact can necessitate destructive sampling, which should only be performed by experienced contractors to avoid any increased exposure to the mold and/or spreading the condition. Even when dry, dormant mold can still be harmful, despite the fact that it emits no musty odor when it is not actively growing.

Mold Remediation

The remediation techniques for mold are evolving. Techniques for abating extensive contamination resemble those for asbestos abatement. Currently, there are two schools of thought on the appropriate abatement of mold. The conservative view is to remove and replace any contaminated material. A more economical approach is advocated by others who agree that gross contamination must be removed but suggest that treatment and encapsulation may be adequate in certain areas of minor contamination. In either case, certain non-porous building materials like steel and glass, which mold does not infiltrate, can simply be cleaned and left in place.

Most experts seem to agree that extensive mold contamination must be handled using precautions similar to a major asbestos abatement, while localized areas of contamination can be dealt with more discretely. Where mold has spread throughout a wall, room, or building, it typically requires full containment. For the room or building, this "full containment" means enclosing the area in plastic, using negative air pressure and air locks for ingress and egress. For the workers, it means using disposable full-body protection to prevent dermal exposures and powered air purifying respirators to prevent inhalation. Where localized contamination has occurred, it is sufficient to cover the affected building material with plastic and remove it intact. However, contractors and clients should be aware that what starts out as a discrete, localized remediation may turn into a more extensive abatement depending on the thoroughness of the initial investigation and the growth rate of the mold between the assessment and the remediation.

ASTM E-1368, Standard Practice for Visual Inspection of Asbestos Abatement Projects, is considered an acceptable methodology for determining clearance after mold remediations. Air monitoring is also useful for post-abatement clearance purposes, but only to the extent that the results can assess the mold in the indoor air relative to that in the ambient outdoor air.

Standards and Guidelines

There are no government-promulgated safe exposure levels for mold. However, generally-accepted guidance documents do exist for conducting mold investigations and mold remediations. These guidance documents do not differentiate based on either the species of mold (toxic or otherwise) or their concentration. The guidance documents simply state that any and all visible mold must be removed. They include the following:

- EPA, *Mold Remediation in Schools and Commercial Buildings*, March 2001 (EPA 402-K-01-001) <http://www.epa.gov/iaq/molds>;
- New York City Department of Health, Bureau of Environmental & Occupational Disease Epidemiology, *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*, 2000 <http://www.ci.nyc.ny.us/html./doh/html/epi/moldrpt1.html>;
- Washington Industrial Safety & Health Administration, Regional Directive, *Indoor Air Quality*, January 21, 2000 (WISHA WRD 10.10) <http://www.lni.wa.gov/wisha/regs/wrds/wrd1010.htm>; and
- American Conference of Governmental Industrial Hygienists, *Bioaerosols: Assessment and Control*, 1999 (ACGIH. ISBN 1-882417-29-1) <http://www.acgih.org>.

There is a need to manage communication and public relations aspects of the situation, and to weigh potential liability costs against remediation costs in making decisions on what to do with the affected property. For instance, a decision to encapsulate rather than abate mold in multi-dwelling apartments may have short-term economic benefits which are outweighed in the long run by liability risks.

The Scientific Debate Concerning Causation

Mold litigation, like several other kinds of toxic tort lawsuits, presents a situation where the law is ahead of science. As mentioned, there is general scientific consensus concerning mold's role as an allergen and even the ability of mold to act as a toxin if ingested in large quantities. However, there is no consensus with respect to mold's ability to cause serious disease in building occupants.

Claims of personal injuries arising out of mold exposure will stand or fall on the introduction of scientific evidence and testimony linking mold with serious disease. The scientific evidence linking mold exposure to serious disease is either limited or weak, depending on one's perspective. The United States Centers for Disease Control and Prevention, after initially agreeing with research that showed that inhalation of *Stachybotrys chartarum* spores had caused children to die from pulmonary hemorrhage, has since reversed its position and stated that, "There are very few case reports that toxic molds (those containing certain mycotoxins) inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of toxic mold and these conditions has not been proven."

A successful mold personal injury claimant must establish both general causation (*e.g.*, mold can cause brain damage in general) and specific causation (*e.g.*, mold caused the plaintiff's brain damage). So far, mold personal injury plaintiffs have relied on expert witnesses to establish both general and specific causation.

Plaintiffs maintain that they can establish that mold causes brain damage even without significant testing, widespread scientific publication, or general scientific acceptance of the theory. So far, plaintiffs (and their experts) have argued that their causation testimony is reliable because of the process of differential diagnosis. In performing a differential diagnosis, a physician determines which of two or more diseases (*e.g.*, appendicitis vs. hernia) with similar clinical findings (*e.g.*, lower abdominal pain) is the one that the patient is suffering from. The most likely cause of the disease is determined by eliminating all other possible causes of the disease until one is left which cannot be ruled out. *Kannakeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 807 (3d Cir. 1977).

The battle lines in any mold personal injury case will be drawn at the time the defense moves to exclude expert testimony on the basis that differential diagnosis is not a *reliable* means to establish causation. Federal district courts are the gatekeepers of scientific testimony under the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and have been directed to ensure that only reliable and relevant scientific evidence is admitted into evidence. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999). State courts typically follow a *Daubert*-like analysis, or one based on *Frye v. United States*, 293 F. 1031 (D.C. Cir. 1923). Using these analyses, the trial judge must determine that the evidence is relevant, reliable, and helpful to the jury before the scientific evidence is admitted.

For instance, the Delaware Supreme Court in *New Haverford Partnership v. Stroot* admitted the testimony of Drs. Gordon and Johanning regarding the use of differential diagnosis to estab-

lish that mold causes brain damage. 772 A.2d 792 (2001). *See*, *e.g.*, *Westberry v. Gummi*, 178 F.3d 257, 263 (4th Cir. 1999) (differential diagnosis is reliable means of developing medical opinion on causation); *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994) (approving opinion based on differential diagnosis). However, in other courts differential diagnosis has been found to be an unreliable means by which to establish causation. *See*, *e.g.*, *In Re: Breast Implant Litigation*, 11 F.Supp. 2d 1217, 1229 (D. Colo. 1998). Of course, differential diagnosis can be performed poorly, rendering any opinion derived from a faulty analysis unreliable. *See*, *e.g.*, *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387, 1412-1414 (D. Or. 1996) (differential diagnosis flawed because expert did not explain how other potential causes were ruled out).

It is important for defendants to remember that irrespective of the status of the litigation, they must use good faith to investigate, assess, and remediate the condition or they will run the risk of "bad faith" penalties. As illustrated in *Ballard*, such penalties can far exceed the cost of abatement.

Insurance Coverage for Mold

Prior to the World Trade Center tragedy, toxic mold claims threatened to be the latest, largest challenge to property and casualty carriers. In light of the erosion of reserves of major insurers from the September 11 tragedy, however, any previous tolerance for mold coverage is dissipating and carriers are more likely to deny coverage and take their chances in the courts. Several carriers in Texas have stopped issuing new property and casualty policies altogether until new risk rating criteria for mold exposures are in place. Other insurers are instituting sublimits and total exclusions for mold or limiting coverage in geographic areas subject to flooding.

Environmental liability policies generally fall into three categories with respect to mold: they are silent on the issue; they limit mold coverage by excluding "naturally occurring substances;" or they limit coverage by excluding all mold/microbial matter, thus addressing both living and nonliving matter. State insurance superintendents have reported a marked increase in insurers filing mold exclusions. While it is likely that some of these exclusions will be denied for being written too broadly, it is just a matter of time until the insurers find alternative policy modifications to limit mold coverage.

On a going-forward basis, some national insurance brokers are offering risk management programs for mold to policyholders to control loss. In determining a premium cost for coverage, underwriters rate various factors: type of building (commercial, residential, daycare center), geographic location (high humidity, climate, floods), age of the structure, age and condition of the roof, whether or not there is a pool onsite, if there is a written HVAC plan, and health complaints of occupants. Insurers who do offer coverage want to see proactive risk management from owners/operators and generally require the following: the favorable completion of an Indoor Air Quality questionnaire, term restrictions (less than 10 years) for coverage, higher deductibles, sublimits, and co-payment provisions to further limit the insurer's exposures.

Paul Hastings' Mold Capabilities

Over the last few years Paul Hastings has developed expertise in environmental insurance, remedial oversight, and "toxic mold" litigation. We assist clients in the negotiation and purchase of environmental insurance for new construction and post-remediation mold coverage. In addition, we facilitate the handling of insurance claims and coordination of mold assessment and remediation efforts. We currently serve as national coordinating mold counsel for a construction product manufacturer. We are lead defense counsel in twelve personal injury actions arising out of alleged toxic mold exposure at the County of Santa Clara's South County Justice Center, which has been the subject of widespread media coverage. Our lawyers recently defended toxic mold personal injury claims in a high-profile case in South Carolina, which was featured on the television news-magazine *Extra*. We are involved in numerous other mold-related personal injury claims and construction defect and premises liability actions that involve mold contamination and/or remediation claims. To this end, we have enlisted a battery of experts from all over the country including mycologists, industrial hygienists, toxicologists, allergists, and immunologists as well as some of the country's leading authorities in building design, engineering, and maintenance to assist us in advising and defending our clients.

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