

# Mold Litigation Update: Current Trends in this Once-Emerging Tort

by Stephen J. Henning and Patrick S. Schoenburg



■ **Stephen J. Henning** is recognized by major California developers for both his experience and his consistent delivery of impressive results. He combines the power of persuasion with sharply honed legal skills, and has recently gotten accolades for his groundbreaking work in complex mold litigation, along with his educational seminars on mold for construction professionals.

He has litigated all aspects of construction and toxic mold matters. Henning has won numerous legal awards, but is most proud of the results he delivers to his clients.



■ **Patrick S. Schoenburg** has extensive experience representing clients at trial, arbitration, and in a variety of transactional matters. He has particular expertise in the fields of toxic torts, commercial litigation, products liability, class actions, mass torts, and construction.

Schoenburg is a graduate of the University of Southern California Law School, where he was a member of the Southern California Law Review, and is a former law clerk to the Honorable A. Andrew Hauk of the United States District Court for the Central District of California. His experience includes serving as national counsel for a Fortune 25 corporation in a series of products liability cases filed in California and Texas, representing the prevailing party in one of the 10 largest patent litigation settlements of all time and advising clients across the country regarding mold and water damage issues. Schoenburg also currently serves as outside general counsel for a multi-state commodities brokerage.

While concerns regarding the effects of mold on human health and hygiene have existed for centuries, until recently mold exposure was not a common subject of litigation. But spurred by both plaintiffs' attorneys who sought a new source of business and media interest, mold became a hot topic starting early this decade. More than five years after the first wave of mold litigation began in California and Texas, what is the status of a tort that was once described as the "new asbestos"?

As attorneys who have handled literally hundreds of mold claims, on both a litigated and pre-litigation basis, we have seen a number of trends emerge. Now that the media hype has died down, it is time to examine what has occurred in regard to this once-emerging tort. While mold claims have not become the financial disaster for insurance carriers, property owners, and the construction industry that was once predicted, neither will mold issues disappear. On an individual basis, mold claims still have the potential to be costly. Claims professionals and others involved in evaluating mold cases should avoid the complacency that may be the natural result of mold having failed to have the impact that was initially anticipated. This article analyzes the current trends in mold litigation, with the goal of providing information that will help all professionals faced with this still significant problem.

## **Mold Is Not the New Asbestos, But It's Not Going Away Either**

Starting approximately five years ago, mold claims began receiving significant media attention. Many stories predicted that mold would be the "new asbestos," costing corporations and insurers untold millions in claims. These exaggerated predictions have proven unfounded. A combination of successful defense

strategies in litigated cases, the drafting of mold exclusions in insurance policies and the inherent difficulties plaintiffs have in proving their cases have limited the scope of this problem. That being said, plaintiffs continue to have success. A Michigan homebuilder paid a \$775,000 settlement during trial early in 2007.<sup>1</sup> And as recently as 2005, defendants in the *Gorman* case paid close to \$22.5 million to a Los Angeles family whose young son allegedly suffered brain damage as a result of mold exposure.<sup>2</sup>

### **Mold Is Not a Mass Tort**

Many articles describe mold bodily injury claims as a mass tort. This is a misnomer. Mass torts typically arise from a single catastrophic incident, e.g., a train derailment, or feature a single cause of injury and set of defendants, such that the issues in each case are very similar, e.g., asbestos. In both situations, opportunities exist for plaintiffs' attorneys to make large sums relatively easily; by litigating the same facts and issues for each claim and establishing liability, they may be able to repeatedly use the same evidence and rulings in subsequent cases while incurring minimal expenses. Neither model is applicable to mold cases. Although there have been some multi-plaintiff cases filed by apartment tenants or groups of workers in commercial buildings, the vast majority of cases are filed by individual homeowners, tenants, etc. Each of these cases feature different injuries, differing theories as to the cause of mold growth, and distinct injury-causing agents—there are hundreds of thousands of species of mold. Defendants also differ from case to case—no mold defendant has faced the type of situation that companies such as Dow Corning experienced in regard to breast implants, in which thousands of similar cases were filed nationwide. The result is that plaintiffs' attorneys cannot achieve economies of scale in litigating mold claims. This fact as much as anything has prevented mold from becoming the new asbestos.

### **Mold Is Not a Toxic Problem**

The science in regard to so-called toxic mold continues to favor defendants. Only by demonstrating that molds release toxins in sufficient quantities can plaintiffs prove that mold is responsible for brain damage, cancer, and similar conditions. Several years ago, the Institute of Medicine published a report stating that there was insufficient scientific evidence of the so-called toxic effects of mold.<sup>3</sup> More recently, in June 2006, the American College of Medical Toxicology issued a statement discrediting claims of toxic injuries due to mold exposure, as well as those arising from irritation.<sup>4</sup> Along with other recent studies, defendants now have a significant body of literature supporting their position in regard to claims of exposure to "toxic" mold. When used effectively, these studies have helped prevent many of the more serious mold claims from ever reaching a jury.

### **Mold Claims Have Produced Subsidiary Litigation**

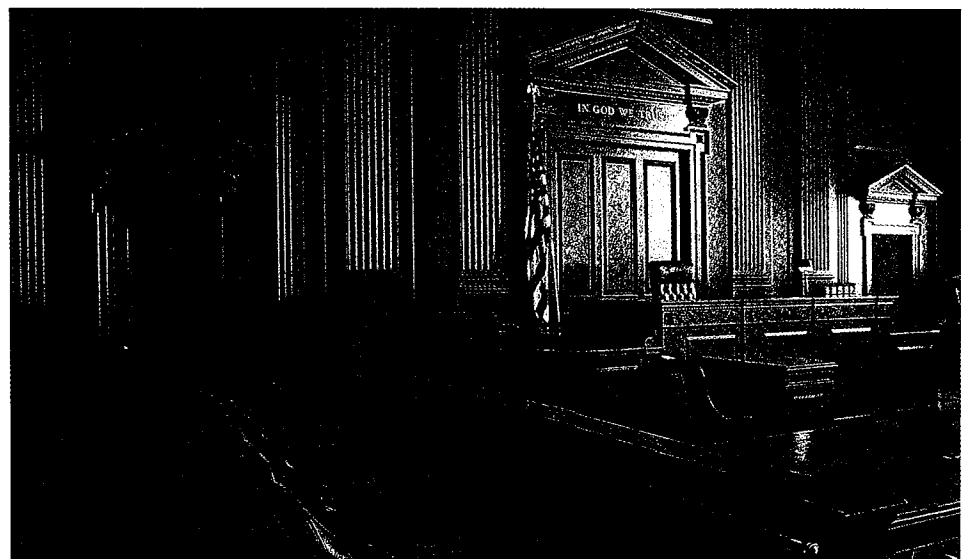
Now that those with an interest in both sides of the mold issue have had years to contest each other's position, some have

decided to sue each other directly. Bruce Kelman, Ph.D., a toxicologist who has testified frequently for defendants, has a libel suit pending in California against Sharon Kramer, an activist on behalf of mold plaintiffs.<sup>5</sup> Kelman alleges that Kramer made false statements regarding his testimony in prior actions, some of it related to a position statement on mold issued by the American College of Occupational and Environmental Medicine (ACOEM).<sup>6</sup> This controversy was alluded to in a recent *Wall Street Journal* article, which repeated allegations that the ACOEM report was drafted by defense experts who failed to disclose their alleged conflict of interests.<sup>7</sup> The preparation of the ACOEM report has become a litigated issue in a number of mold cases.

### **Mold Claims Will Continue to Target Real Property Owners and the Construction Industry**

Although there have been attempts to expand the scope of potential defendants in mold cases—the primary defendant in *Gorman* was a lumberyard that allegedly supplied mold-contaminated products used to construct the plaintiffs'

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home—the target defendants remain those with interests in real property and construction. While this helps prevent mold cases from being filed on a mass basis, it's not likely to comfort the targeted industries. Most “mass” torts are product liability cases filed against manufacturers and suppliers of allegedly defective products. Mold claims focus on residential and commercial landlords, homebuilders, and their contractors. These industries need to remain vigilant in responding to water damage and mold claims, particularly given that any construction defect claim involving water damage can lead to much more costly personal injury claims based upon the presence of mold.

## Handling Mold Cases Today

Defense verdicts and the failure of mold litigation to meet the early predictions of the media may create complacency. This is a mistake, as the *Gorman* case demonstrates. Mold cases are by definition singular. Erroneously assuming that every mold personal injury case will be limited to claims of allergy and asthma can be costly. Experienced counsel will quickly establish the nature of plaintiffs' injuries and then use proven techniques to prevent claims of toxic injury from reaching a jury. There is now sufficient scientific evidence undermining claims of serious toxic injuries from mold, and plaintiffs face such high evidentiary hurdles, that a good defense is available in every case. However, the failure to employ these strategies in every action allows a certain number of claims to reach juries without the strongest defense being made. And each plaintiffs' verdict, even if not as frequent as predicted five years ago, encourages the filing of more cases.

## What Lies Ahead?

We believe that while the number of mold cases being filed in California has stabilized and may decrease, more cases will be filed in other jurisdictions that lack a history of these claims. Each of these areas are likely to experience a

repeat of what occurred in California, i.e., early publicity and success by plaintiffs will cause an increase in filings, which will drop off once defendants begin employing the techniques and strategies that have proven successful in other states.

A few plaintiffs' attorneys will continue to fight the battle to present “toxic” mold claims to juries, but most will limit their cases to claims of asthma and allergy, which have greater scientific credibility. This will decrease the potential value of the claims, but increase the likelihood of some recovery.

It is unlikely that the state of medical science will change in the next several years in a way that will significantly impact mold claims. The same issues that make each mold claim unique, e.g., the hundreds of thousands of species of different molds, the varying circumstances of exposure and the different injuries that are involved, limit the ability of scientists to perform comprehensive studies.

The value of mold testing, both in terms of industrial hygiene and as evidence in court, will face greater scrutiny. For example, a recent publication of the American Industrial Hygiene Association advises most homeowners who suspect that they have a mold problem that testing is not needed.<sup>8</sup>

## Conclusion

Having avoided the predicted onslaught of mold injury claims, those with an interest in real property and their underwriters must now analyze each potential mold injury claim separately, to determine whether it represents an attempt to gain a few more dollars from a construction defect suit or whether the claimants believe they can obtain the next \$20 million settlement. Defendants have done a good job addressing these claims in the courts, and new scientific studies have bolstered the defense position. Knowing when and how to apply these strategies and the scientific data is the current challenge. ■

## Endnotes

1. *Szymczak v A&T Development* (44th Circuit Court, Michigan) as reported by *The Detroit News* (January 17, 2007).
2. *Gorman v Kamich* (Los Angeles County Superior Court Case No. YC043494) (November 2005).
3. *Damp Indoor Spaces and Health*, Institute of Medicine of the National Academies (2004).
4. *American College of Medical Toxicology Comment: Institute of Medicine Report on Damp Indoor Spaces and Health* (June 2006) (available at [www.acmt.net](http://www.acmt.net)).
5. *Kelman v Kramer* (San Diego County Superior Court Case No. D047758).
6. Position Paper: The Medical Effects of Mold Exposure, *Journal of Allergy & Clinical Immunology*, Vol. 117, No. 2 (2006).
7. D. Armstrong, “Amid Suits Over Mold, Experts Wear Two Hats,” *Wall Street Journal* (January 9, 2007), p. 1.
8. “The Facts About Mold,” American Industrial Hygiene Association (October 20, 2006) (available at [www.aiha.org](http://www.aiha.org)).



## Chairman's Corner: "One Little Thing"

by Robert E. McHenry, CPCU, AIC, AIS



■ **Robert E. McHenry, CPCU, AIC, AIS,** is a claims manager with the Westfield Group in Jacksonville, Florida. He earned a bachelor's degree from the University of Akron in 1973, and has served on the Board of Directors of the CPCU Society's Akron-Canton Chapter. He is currently a member of the North Florida Chapter, and in November 2005 began a three-year term as chairman of the Claims Section Committee.

**T**wo past Chairman's Corners dealt with coaching and personal development plans. This article pairs these management tools. I apologize for being a doting father . . . but this is another true sports analogy using my daughter Mac.

Mac plays fast-pitch softball. Some of the pitchers in her league are throwing 45 miles per hour from 40 feet away. That is about the equivalent of a 90-mile-per-hour major league fastball. She could hit a deep fly ball near, yet not over, the fence. Despite practice and encouragement Mac just couldn't hit one out of the park.

*"Trifles make perfection, but perfection itself is no trifle."*

—Michelangelo

I coach her team in batting and hitting skills. One practice Mac said, "I'll never hit a home run." She has a solid swing but there was one little thing missing. I noticed that the grip on her new bat was nearly worn out. Mac was squeezing the bat so tightly she could not turn her wrists over. By not "breaking" her wrists, she was unable to get the snap power plus her stride, hips, and shoulders into and through the ball. I told her to hold the bat "like you would hold a bird by the neck without hurting it." Although she was skeptical, Mac agreed to try that one little thing. Then I said there was a trip to Disney World if she succeeded.

This is annual performance evaluation time. Many managers and supervisors are going through the process while this article is being written. Your company requires its managers to complete a personal development plan for each employee. This becomes the time for you and your staff member to decide what one little thing or things are needed for their success.

Yet how do you know what each employee needs? Here are a few tips:

- Use the current evaluation to help develop your strategy.
- Look for patterns in your own rating system.
- Consult internal and external resources.
- Study quality assurance and compliance reviews, and look for common themes.
- Use psychological profiles such as "Big Five" or "Lominger 360."

- Read *FYI-For Your Improvement* by Michael Lombardo and Robert Eichinger. This resource will help with specific issues.
- Have several one-on-one meetings. Be ready to talk, yet better still to listen.
- Take responsibility for open and honest feedback.
- Use a template including competencies, action statements, completion dates, and status checks.
- Concentrate on two to three key strengths and two or three weaknesses.
- Review and revise the plan often and as necessary.

Personal development is a partnership between you and your employee. Coaching your valued resources by using their development plan helps them achieve their career goals. It also adds to their job satisfaction. As a bonus, it gives you more worth to the company. Remember if you don't develop your people, another company is more than willing to do so.

Managers hold the key to a long-term sustainable relationship. Plain and simple, managers are also accountable for employee retention. People do not quit companies. They quit managers.

This past October, Mac launched a "no doubt" home run into left field of the adjacent baseball park. Her next three hits bounced off the fence in center and left field. That one little thing gave her the extra distance, and cost me a trip to Disney's MGM theme park.

What one little thing will you give your employee so he or she can hit one out of the park? ■