

MOLD -- A GROWING LITIGATION AND INSURANCE RISK

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A. What Is “Toxic Mold”?

Stachybotrys is a greenish-black mold, a fungal growth found in wet or damp conditions. It can grow on material with a high cellulose and low nitrogen content, such as fiberboard, gypsum board, paper, dust, and lint. Growth occurs when there is moisture from water damage, excessive humidity, water leaks, condensation, water infiltration, or flooding. Constant moisture is required for its growth.

Molds naturally grow in the indoor environment. Mold spores can enter through open doorways, windows, heating, ventilation, and air conditioning systems. Spores in the air outside can also attach themselves to people and animals, making clothing, shoes, bags, and pets convenient vehicles for carrying mold indoors. When mold spores drop on places where there is excessive moisture, such as where leakage may have occurred in roofs, pipes, exterior walls, or where there has been flooding, they will grow. Many building materials provide suitable nutrients that encourage mold to grow. Wet cellulose materials, including paper and paper products, cardboard, ceiling tiles, wood, and wood products, are particularly conducive for the growth of some molds. Other materials such as dust, paints, wallpaper, insulation materials, drywall, carpet, fabric, and upholstery, commonly support mold growth.¹

• How the “Toxic Mold” Controversy Began

Between 1993 and 1996, some 34 Cleveland area infants were purportedly made ill by exposure to *stachybotrys*; the infants were coughing up blood, among other symptoms. Several developed pulmonary hemorrhage and 10 died. The U.S. Center for Disease Control and Prevention (CDC) conducted tests and initially suggested a causal connection between

stachybotrys and pulmonary hemosiderosis. However, in 1999, the CDC admitted that its study was flawed and retracted its initial suggestion.ⁱⁱ

- **What Does the United States Center for Disease Control and Prevention (CDC) Say About “Toxic Mold Today”?**

“[A] causal link between the presence of the toxic mold and health conditions such as pulmonary hemorrhage or memory loss has not been proven.”

“At present, there is no test that proves an association between Stachybotrys ... and particular health symptoms.”ⁱⁱⁱ

- **What do the New York City Department of Health Guidelines Say?**

“Fungi in buildings may cause or exacerbate symptoms of allergies (such as wheezing, chest tightness, shortness of breath, nasal congestion, and eye irritation), especially in persons who have a history of allergic diseases (such as asthma and rhinitis).”^{iv}

- **What Research is Being Done to Study the Health Effects of Mold?**

The CDC has commissioned the National Academy of Sciences’ Institute of Medicine to Study the health effects from exposure to mold in damp indoor spaces; the study should be completed in late summer/early fall of 2003.

A bill is pending in Congress calling for joint research between the EPA and National Institutes of Health and the Center for Disease Control and Prevention to set standards for acceptable levels of mold.^v

B. Prevention And Remediation

- Speedy action is critical to avoid escalating mold damage
- New York City Department of Health’s Bureau of Environmental and Occupational Disease Epidemiology – “Guidelines on Assessment and Remediation of Fungi in Indoor

Environments" – urges that the presence of mold, water damage or musty odors must be addressed immediately.^{vi}

- Good building maintenance practices can prevent, reduce or control the introduction of water into indoor environments and significantly reduce the potential for mold growth and may such a program be required by insurers:
 - A preventive maintenance and inspection program, including inspection of pipes, exterior walls, roofs and drainage systems.
 - A response plan that is immediately implemented upon discovery of a water-incursion event and includes the removal (optimally, within 24-48 hours) or drying out of water-damaged materials.
 - Reinspections of the affected area, to rule out (or treat) recurrence.
 - Reconstruction with mold-retardent materials.
 - Clearance Testing by experienced remediation expert.^{vii}
- Alteration Agreements should require the use of mold-unfriendly or mold-retarding materials, and contractors (particularly plumbers and waterproofing contractors) should carry mold insurance.
- Warranty of Habitability and Alternative Housing Arrangements

C. Insurance

- **Mold Related Property Damage: Is It Covered Under First Party Property Insurance?**
 - Mold damage is covered if it is the direct result or the consequence of a covered peril, unless excluded

- Increased use of the fungus exclusion
- Pollution Legal Liability Real Estate Application – from AIG Companies
- Indoor Air Quality and Mold Questionnaire - from AIG companies
- Microbial Matter Coverage Endorsement – from AIG companies^{viii}

D. Defending The Personal Injury Lawsuit

- The New York Experience
 - Samaris S. Davis, et al. v. Henry Phipps Plaza South, et al., No. 116331/98 (Sup. Ct., N.Y. Co.)^{ix}
 - Kramer v. 515 Park Avenue Condominium, et al., No. 128014/02 (Sup. Ct., N.Y. Co.)
 - Board of Managers of 515 Park Avenue Condominium v. W10Z/515 Real Estate Limited Partnership, et al., No. 604629/02 (Sup.Ct., N.Y. Co.)
- Causation
 - The “Frye” Rule/the “general acceptance” test – expert testimony based on “scientific principles” is admissible only after such principles have gained “general acceptance.” Frye v. United States, 293 F. 1013 (D.C. Cir 1923); People v. Wesley, 83 N.Y. 2d 417, 611 N.Y. 2d 97 (1994); Selig v. Pfizer, 209 A.D. 2d 319, 735 N.Y.S. 2d 549 (2002)^x
- Rule 702 of the Federal Rules of Evidence. Expert testimony will only be permitted if: “(1) the testimony is based upon sufficient facts or data, (2) the

testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

- [Allison v. Fire Insurance Exchange, 2002 WL 31833440 \(Tex. App. - Austin 2002\)](#). Texas Court of Appeals in the “Ballard” case rejects causation/expert scientific testimony.^{xi}
- There are no federal or local standards for what constitutes a “dangerous” level of exposure^{xii}
- Statute of Limitations
 - CPLR § 214-c(2) – three-year period to commence lawsuit caused by the latent effect of exposure to substances is computed from “the date of the discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.”
- [Searle v. City of New Rochelle, 293 A.D.2d 735, 742 N.Y.S.2d 314 \(2d Dept. 2002\); Harley v. 135 East 83rd Owners Corp., 238 A.D.2d 136, 655 N.Y.S.2d 507 \(1st Dept. 1997\)](#).^{xiii}
- Alternate or Concurrent Causal Exposure
- Third-Party Claims - - Potential Defendants
Architects, engineers, general contractors, heating, ventilation and air conditioning contractors, manufacturers and suppliers of building materials, maintenance contractors, industrial hygienists and waterproofing contractors.

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ⁱ Center for Environmental Health, "Questions and Answers on Stachybotrys Chartarum and Other Molds", available at <<http://www.cdc.gov/nech/airpollution/mold/stachy.htm>> -- Attached

ⁱⁱ Mark Moran, Answers Prove Elusive in Mold-Linked Deaths (July 26, 2002), available at, <http://www.ehw.org/Healthy_House/HH_Toxic_Mold.htm>

ⁱⁱⁱ See, supra, note (i).

^{iv} The guidelines can be found at <<http://www.nyc.gov/htm//doh/html/moldrptl.html>> -- Attached

^v The Wall Street Journal, 12/4/02, 2002 WL-WSJ 103127776.

^{vi} See supra, note iv.

^{vii} "Mold in Commercial Buildings – Prevention, Remediation, and Risk Management Implications (2002)," AON Risk Management Services of New York, Inc. – Attached.

^{viii} Copy of AIG companies forms, attached.

^{ix} "Confidential Settlement Reached in New York Apartment Case", Mealey's Litig. Rep.: Mold, Vol. 1, No. 12 (December 2001).

^x Copies of decisions attached.

^{xi} Copies of decisions attached.

^{xii} See, supra, note (i).

^{xiii} Copies of decisions attached.