

Investigating and Litigating Mold Claims

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Mold...it's everywhere!

Molds are earth's essential decomposers and have been around since humanity. There is no way to escape from mold; it is constantly around us.

Now before you become alarmed, there is a big difference between your run-of-the-mill daily mold exposure, which is mostly harmless, and the type of exposure that can cause significant health issues in built environments. Mold cases can become a big source of liability for landlords and property owners if the suspected presence of mold is properly investigated. This can lead to potential claims for property damage, medical and health damages, breach of contract and breach of the warranty of habitability.

This article will explore the basics of properly investigating the presence of mold, what hired hygienists should look for, the information their investigation should reveal, and, if litigation occurs, the information that would be helpful to the litigator to gain a better understanding of the process.

Mold: Friend or Foe?

To begin, it will be instructive to provide some general information about mold as many practitioners (and the public in general) are not familiar with simple fungal biology. Mold belongs in the Kingdom Fungi and reproduces through microscopic spores. The fungal group includes molds, mildew, yeasts, and mushrooms. Some fungi obtain their nutrients from a living host (plant or animal) and others obtain their nutrients from dead plants or animals. Some fungi infect a living host, but kill host



cells in order to obtain their nutrients. Fungi can grow almost anywhere in a building if conditions (moisture, temperature, and substrate) are favorable for their growth and activities.

Fungi are ubiquitous outdoors and exist naturally in indoor environments due to air exchange which occurs with the outside world. Fungi can also be tracked indoors by occupants, pets, and insects. Contents in an indoor environment become subject to fungal growth once they get wet. Spores are very small, but have a large surface for their mass. They fall with surprising slowness in still air and travel great distances on indoor air currents.

Fungal spores settling on wet surfaces can germinate and grow rapidly into colonies which can be observed in as few as 24 hours. As mold colonies form they become visible and continue to destroy the surface they grow on. Spores will begin to

form within five to ten days. The presence of outside air is important as it dilutes the concentration of indoor pollutants. Structures with poor air circulation are more susceptible to fungal growth when wet conditions are present.

Mold Exposure's Adverse Effects on Health

Fungi contain allergens, irritants, and pathogens. To protect the substrate for its own use, fungi can release mycotoxins to inhibit or eliminate competition from bacteria or other microorganisms. Mycotoxins can be present in the cell wall of the hyphae (root like structures) and the spore even if the organism is dead. Mycotoxins can cause adverse effects at very low concentrations.

Common symptoms of mold exposure can include dry or watery, itchy and/or red eyes; sneezing; cough; congestion; runny nose; headaches; rashes; fatigue; sore throat; difficulty breathing or shortness of breath; sinus pressure; difficulty sleeping and gastrointestinal problems. It is common for individuals exposed to mold to suffer from multiple common symptoms over an extended period. Given that these symptoms are commonly experienced at some point in most people's lives, these are usually not associated with any specific event (including mold exposure) until an extended period of time when the symptoms have persisted.

Common diagnoses due to mold exposure include allergic rhinitis, bronchitis, pneumonia, asthma, sinusitis, allergic broncho-pulmonary aspergillosis, invasive pulmonary aspergillosis, fungal sinusitis, urticaria, immune suppression, cognitive dysfunction and pleural aspergillosis. Some chronic or severe

conditions can cause loss or diminution of the ability to smell odors. Some people are more sensitive to mold than others. Individuals with allergies, compromised immune systems, or chronic lung illnesses (such as asthma) generally will have more severe reactions to mold exposure including serious lung infections.

Various studies have been commissioned over the past 25 years which have come to varying conclusions about the causal links between mold and its adverse health impact. A detailed discussion about such studies is not possible given the scope of this article. However, the following links are helpful to review to obtain additional information about prior studies and the prevailing understanding of mold exposure and its impact on health:

www.epa.gov/mold/index.html

www.ncbi.nlm.nih.gov/pubmed/19296408

www.ncbi.nlm.nih.gov/pubmed/20557376

www.cdc.gov/mold/hemorrhage_infants.htm

www.cdc.gov/mold/dampness_facts.htm

The California Department of Public Health has determined that the presence of water, dampness, visible mold, or mold odor is unhealthy. The California Department of Public Health also has stated that scientists and medical experts have reached a consensus that the presence of water, dampness, visible mold, or mold odor creates an increased risk of respiratory disease for occupants, with children being more sensitive to such exposure.

A thorough medical history of the client should be obtained to determine the nature and extent of the conditions, whether the conditions or symptoms are consistent with fungal exposure, whether the medical conditions are likely to be permanent (e.g., asthma), and whether the client had any preexisting conditions which increased their susceptibility to fungal exposure. Determining whether there are other occupants of the structure with similar conditions (e.g., family members, neighbors) may reveal a systemic issue that is not isolated to a single residential unit. A request to the landlord or property manager should

be made to preserve any evidence they have of communications, maintenance requests, and repairs performed at the property.

Investigation of Potential Mold Exposure

As in any investigation, conducting a visual inspection and recording field data (moisture, temperature, and humidity) is vital and may be the only thing required. However, if sampling becomes necessary, the representative data obtained during the visual inspection is extremely important as it is closely linked to the sampling design, which involves consideration of the scale and frequency at which samples are collected.

A big issue in today's "Mold is Gold" milieu is investigator qualifications. While vetting testifying experts is very important, counsel should take special note that many field investigators do not collect evidence (samples) correctly or, worse, collect them with an intentional bias. Bias in sampling can exert a profound influence on test results. It is not unusual to encounter investigations that were conducted with inappropriate methodology, sloppy technique, or intentional misconduct. Your well-vetted expert can be prevented from testifying if she relies upon others' work and that work was improperly done.

Which brings us to the subject of the investigator's qualifications.

The investigator should have training, knowledge, and field experience in the assessment of fungi and water damage in buildings and personal property, and an understanding of the forces that influence the distribution of fungi spores. In addition, the investigator should have training, knowledge, and field experience in the sampling methods, principles, and laboratory analytical procedures to be employed. Further, the investigator had better understand the quantification methods used by the laboratory and be prepared to accurately interpret the laboratory report during deposition and, if necessary, in court. In addition, investigators must be able to intelligently and persuasively communicate the fundamental principles of mold

remediation.

Beware: one of the best ways to impugn a testifying expert or discredit an investigator is to expose their lack of a related academic degree or of a widely-recognized certification or accreditation. With a multitude of "mold certification" organizations offering two- or three-day get-rich-quick courses, it's very easy to become a so called "Mold Expert" or "Certified Mold Consultant" in less time than a weekend cruise to Mexico! Generally speaking, there are only two quality, widely-recognized certifying organizations related to mold in the industry: American Board of Industrial Hygiene (ABIH) which administers the Certified Industrial Hygienist (CIH) credential and the American Council for Accredited Certification (ACAC) which administers several mold related credentials, many of which are accredited by the Council of Engineering and Scientific Specialty Boards (CESB), which requires verifiable field experience.

In addition, having some knowledge of building construction will certainly help the visual inspection. Understanding the physics of building layout and air movement will help steer the inspection toward specific areas where properly performed sampling can confirm or discount fungal growth and/or aerosolized fungal spores.

Following proper investigative procedures will help ensure vital evidence is not lost or red flags over-looked when processing and analyzing a mold damage claim. The investigator should arrive on site with clear, specific purpose and objectives. The investigation should begin with information gathering and occupant interviews. The collection of relevant data, including the statements of building occupants and other observers, is a basic requirement of mold investigations. Building occupants can provide a plethora of information that will supplement the sample evidence and investigator's observations.

The inspection of the building interior should include all potentially affected areas,

with emphasis on any visible fungi staining, water staining/damage, and elevated moisture. Where relevant, the inspection may extend to personal property and contents. The investigator should document all conditions and red flags that may have resulted from or may have contributed to suspect mold growth or mold related health issues, such as elevated surface moisture and relative humidity, visible observations of suspected fungi growth, musty odors, and water staining and damage.

Samples are collected to answer questions. The questions that need to be answered are determined by the information gathered at the scene and the interviews with the participants. There are two basic types of samples that need to be collected: those that characterize the environment and those that don't. Sampling recently cleaned surfaces is a waste of time and budget. Collecting samples which actually represent the exposure will ensure a successful sampling plan. Random samples are useless except as background data – point-of-exposure is all that matters. In the case of occupant health complaints, the most important samples are samples of settled particles on surfaces in the micro-environments with which the affected individual interacts. The data collected through sampling, if collected and analyzed properly, will speak for itself and bring enormous information to the investigation.

Budget is always a factor in sampling strategies. Confidence levels in the outcome of the investigation are linked to appropriate sampling strategies. An environmental sampling plan cannot disassociate the environment, sampling, and analytical variances from the cost of the project. So, investigators need to carefully choose the correct test for the desired result. Even with sampling limitations, it remains the single most critical part of assessing environmental quality, characterizing the exposure, or accessing potential mold damage.

When developing a sampling strategy, keep in mind that sampling surfaces presents several problems including (1) the problem of collection efficiency from the

surface and (2) the problem of recovering for analysis the particles from the agent used for collection. After consulting with your laboratory, the investigator should request the type of analysis which meets the objectives of the investigation. Instructions should accompany laboratory samples that describe the objective of the investigation and recommend a specific test or tests appropriate to that objective.

The investigator should create a permanent, documented record of observations to refresh recollections and to support the investigator's opinions and conclusions. These should include supportive photographic documentation. While photographic evidence may or may not be admissible in court, it's always a good idea for an investigator to collect photographic evidence of key observations as a means to preserve an accurate visual record of the scene and the evidence prior to disturbing the scene. This written report should be assembled by the investigator and not the analytical laboratory. While the laboratory may be the eyes into the world at the level of the microscopic evidence, they are far removed from the actual subject site where evidence is observed and collected.

A well-written investigator's report should contain some or all of the following elements:

Introduction: Details of the assignment, including the assignment date, the identity of the party making the assignment, name and address of the subject property, and the purpose of the investigation.

Background: Relevant details of the property and owner(s) as well as any contributing factors.

Sampling Methodology: Sampling method employed in collecting samples. Include standards or published materials to support the sampling process or technique used.

Methodology: Include a description of the laboratory procedure(s) used in analyzing the samples. Explain the basis for any conclusion(s) and the relevance of any

laboratory results to the case at hand.

Visual Observations & Measurements: Record and summarize relevant observations and analytical data (e.g., temperature, relative humidity, moisture content, etc.) collected in the course of the investigation.

Analytical & Assessment Findings: Detail the investigative and laboratory findings, their bases, and relevance to the investigation.

Discussion Points: Describe any conflicting opinions relating to the investigation. Present reasoning or data that helps to support the findings.

Summary: This should be a brief statement of the question/objective and the investigator's findings. Major supporting points may be stated.

Conclusions & Recommendations: Conclusions reached and subsequent recommendations should be based on established industry guidelines and best practices. In the field of water damage and mold remediation, the Institute of Inspection, Cleaning and Restoration Certification (IICRC) S500 Professional Standard for Water Damage Restoration and the IICRC S520 Professional Standard for Mold Remediation are the resources to be referenced.

Appendices: Relevant photographs, lab analyses, and other reports and documentation should be attached to the report and listed on an Appendix cover sheet preceding the section.

Investigators must allow for alternative explanations, but not permit that possibility to prevent them from putting forward the best scenario to fit the facts. The facts are the properly collected samples and the recorded data and observations. Consultants are the finder of facts and must be faithful to the facts.

It should be noted here that no destruction of evidence should occur absent advance notice to potentially liable parties and providing them an opportunity to conduct their own investigation and, if desired, testing of the infected areas.

Failure to do so may result in an adverse spoliation instruction.

Notice to Property Owner & Their Agents

Notice of potential fungal exposure (particularly well-documented conditions) should be provided to the property owner(s) and their agents as soon as possible. While a landlord has an obligation to maintain residential property in a habitable condition (discussed more below), this duty is limited when a tenant knows or should know about a habitable condition and fails to notify the landlord about the condition. Landlords are only liable for conditions of which they have actual or constructive knowledge. Landlords and their agents should endeavor to remain available to tenants both through verbal and written communications (including text messages and email) so that if any issues arise they can be notified and promptly address them before they become more significant problems.

Tenants should request insurance information or request that the landlord submit the matter to their insurance carrier. It is very common for injuries and damages caused from mold or fungus to be excluded from an insurance policy and courts have frequently interpreted such exclusions to be unambiguous. To the extent there is coverage for a loss caused by fungus or mold, policy sublimits are frequently encountered for such losses. To the extent insurance coverage is not applicable, which may worry some practitioners, the parties should be mindful of the fact that the property carries a value and there may be enough equity to cover losses sustained by a tenant from fungal exposure. Some large apartment complexes may carry a substantially high dollar value insurance exclusion which, in and of itself, should not always act as a deterrent to bringing claims based upon fungal exposure.

Litigating Mold Cases

Potential Causes of Action

Commonly available causes of action

when mold exposure has caused injuries to property or individuals include breach of contract, breach of the warranty of habitability, breach of the covenant of quiet enjoyment, constructive eviction, negligence, negligence per se, nuisance, retaliation (in circumstances when a tenant is evicted for complaints of the conditions or for reporting the landlord to local government agencies), failure to return security deposit or properly account for

amounts charged against the deposit (if applicable), fraud/misrepresentation about the condition of the property, and rescission of any applicable agreement.

Breach of contract causes of action are commonly combined with a breach of the warranty of habitability in these circumstances. Many leases include prevailing party attorney fees which can provide an incentive for either party in an action to try and resolve the action

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early whether due to concerns about legal exposure or about having to pay attorney fees if the action is unsuccessful. To the extent there are any exculpatory clauses (i.e., clauses that seek to limit liability) in the lease agreements, they will be closely examined and strictly construed against the party seeking to limit its liability (generally the landlord who drafts or prepares the lease agreement).

The breach of the warranty of habitability is a hallmark of mold actions. Landlords have an obligation under California Civil Code sections 1941 to 1941.1 to keep a residential building fit for human occupation including: providing effective waterproofing and weather protection of roof and exterior walls; maintaining all plumbing and heating appliances in good working order; maintaining a water supply connected to a sewage disposal system under applicable law; and keeping all areas under control of the landlord clean, sanitary and free from

debris, filth, rubbish, garbage, rodents and vermin. Evidence of failure to inspect the premises, inadequate maintenance of the premises, or inadequate/cosmetic repairs are all indicative of a failure to fulfill the landlord's obligations under the warranty of habitability.

Landlords have a nondelegable duty to keep and maintain their premises in a safe and habitable condition, so the presence of third parties who are hired or tasked with handling the landlord's responsibilities will present no defense for the landlord other than a potential right to seek contractual or equitable contribution/indemnity from the third party. The most common third parties you will find here are property managers and maintenance companies hired by the landlord to handle day-to-day matters at the property such as tenant maintenance requests, collecting rent, and re-letting units to new tenants. With larger properties this is common, as a property owner is required to have an on-site manager or other

responsible person when an apartment complex has sixteen (16) or more units.

It should be noted that some causes of action are unavailable in commercial tenancies as there is no statutory or implied warranty of habitability in commercial tenancies. The parties in a commercial tenancy situation may agree to include a warranty of habitability in their lease or other contractual agreement but this is very rare. It is common in nearly all instances where the warranty of habitability is referenced in a commercial lease agreement to do so in order to clarify that such a warranty is expressly waived.

Another potential area of liability stemming from mold exposure includes developers, builders, general contractors, subcontractors, and suppliers under a construction defect cause of action. Construction defects can cause such professionals involved in the building of the property (and resulting defects causing fungal growth) to be subject to strict liability

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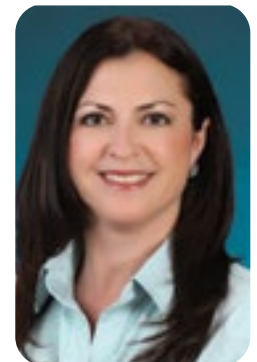
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provided the defect is discovered and suit is commenced within the applicable statutory timeframes. An expert should inspect the property to determine whether any party involved in the construction of the property departed from industry standards, did not comply with applicable building codes, utilized defective materials, or installed the materials improperly. Lawsuits predicated upon developer or contractor liability for construction defects may be subject to mandatory prelitigation ADR procedures under the Right to Repair Act (Civ. Code, §§ 895-945.5) so it should be evaluated whether those procedures are applicable before commencing a construction defect cause of action or the complaint could be subject to demurrer.

One other area that is worth considering is first party insurance bad faith. The typical insurance exclusions for fungal growth rarely apply to property damage caused by water intrusion. If an insurance carrier becomes involved in the repair of property, they have to hire professionals who are capable of repairing the property. If an insurance carrier decides that it is best to hire a professional who can conduct the work quicker and at a reduced expense, there is the potential that the work will not be performed in a manner that completely abates the problem. If the insurance carrier tries to cut corners to save on costs, this may only mask the problem for the unknowing insured who trusts their insurance carrier to perform the job right. For an example of the extensive damages and losses that can occur in such circumstances, the writers will be happy to provide a case study upon request.

This list is not exhaustive and the particular circumstances of each matter should be reviewed to evaluate whether other potential causes of action could be asserted and which third parties should be named in any potential action.

Discovery

Discovery should be aimed at exploring the particular elements of any

causes of action that have been asserted or any viable defenses. The areas of focus in mold litigation will be those that assist in establishing the history of the tenancy, history of any maintenance requests for the particular property, any previous mold issues in the property, history of water intrusion events, history of repairs to the property, knowledge of the landlord (including any knowledge imputed through on-site agents), medical causation of any injuries (property and personal damage), and the conditions of the property at relevant time periods (focusing on the time period when exposure is believed to have occurred).

Any discovery involving indoor air quality professionals should focus on experience level, background, any standard operating procedures, and whether such procedures are consistent with accepted industry standards. Accepted industry standards for indoor air quality investigations can be found in the American Industrial Hygiene Association (AIHA) publication Recognition, Evaluation, and Control of Indoor Mold (Prezant et al. (2008)) commonly referred to as the “Green Book.” This publication has a wealth of helpful information prepared by many industry professionals and is frequently referred to as a benchmark against which investigations should be evaluated. Once discovery has been conducted in the areas described herein, the party can consult with their experts regarding the conditions of the property and any claimed medical injuries to evaluate potential liability and damages.

Expert Witnesses

From an environmental standpoint, you may already have an expert who is capable of testifying about the conditions of the property. The individual who inspected the property initially may be able and willing to provide expert testimony about their findings when the initial inspection(s) occurred. Some experts may prefer to avoid handling both the initial inspection(s) and handling the expert work to weed out any potential claims of bias. This should

be discussed with the indoor air quality investigator at the outset to determine if they are willing to act as an expert or if there is a mutual agreement that another expert should be hired to handle the other aspects of litigation.

From a medical standpoint when evaluating injuries, a physician with a general background may work from the outset, particularly if they have any training or experience as an allergist or occupational and environmental health physician. From there, you can determine with the assistance of the physician whether any particularly specialist should be brought in such as a medical toxicologist or someone with a specialty diagnosing and treating pulmonary and respiratory injuries. Diagnostic tests should include skin prick and other appropriate testing for allergies, blood tests to determine antibodies to mold, pulmonary function tests and scans of the lungs and sinus cavities. Medical experts should seek to rule out potential causes other than fungal exposure and perform all tests necessary to make the appropriate diagnosis so that their opinion is not subject to challenge at the time of trial.

The following cases are instructive on scenarios where expert testimony can be excluded in fungal exposure cases: *Geffcken v. D’Andrea* (2006) 137 Cal. App. 4th 1298; *Dee v. PCS Prop. Mgmt.* (2009) 174 Cal. App. 4th 390.



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