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**CALIFORNIA MOLD LITIGATION**

**Expanded Claims, New Parties and Higher Stakes**

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**Forensic Analytical Presents  
Microbial Contamination Workshop:  
Sampling, Laboratory, Remediation  
and Legal Aspects**

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# **CALIFORNIA MOLD LITIGATION**

## **Expanded Claims, New Parties and Higher Stakes**

### **I. INTRODUCTION**

California mold lawsuits are not a novelty. To the contrary, for years, construction cases have included claims to eliminate the water source and to remediate the resulting mold. These damages, however, were never the driving force of the litigation, and very little time and money were expended in the prosecution and defense of the mold-related construction claims.

Prompted primarily by recent mold health concerns and heavy media attention, the mold litigation has gone through several meaningful changes. First, mold claims no longer concern just construction defect issues. Within the last several years, there has been a significant increase in claims and cases involving mold-related personal injuries. The personal injury claims are either brought separately or, as supported by facts, are included with property damage claims.

Secondly, the mold personal injury claims have greatly expanded the different types of claims along with the potential for damages. Negligence, concealment, breach of contract, fraud, emotional distress and professional liability are just a few examples of the emerging types of legal claims which are now part of the mold litigation.

Finally, with the advent of the personal injury claims, the scope and type of parties involved in the mold litigation have grown. In California, as well as across the country, mold cases are being prosecuted by property owners, renters, students, teachers, office workers, judges, etc. Defendants are no longer just the developers or subcontractors involved with building projects. Rather, defendants now include property managers, industrial hygienists, homeowner's associations, abatement contractors, insurance companies and their representatives and, yes, even lawyers!

Not surprisingly, with this great expansion in the types of claims and parties, there has been an increase in settlements and verdicts in California mold-related cases. Spurred on by these results, and a sensationalistic media (which includes the unedited information on the internet), the personal injury and construction mold litigation will continue to "spread and grow."

## **II. HISTORICAL OVERVIEW OF INDOOR AIR POLLUTION LAWSUITS**

Various estimates indicate that Americans spend between 75% to 90% of their time indoors and usually in sealed environments. Moreover, various studies have found that indoor pollutants are between 100 to 200 times greater than the amount of outdoor pollutants. Given these findings, it is not surprising that indoor air pollution lawsuits have increased over time.

The indoor air pollution lawsuits are categorized as follows:

1. **Building-related injuries (BRI)**

This is a term of art used when a particular building has been linked to a particular illness (e.g. – Legionnaires Disease). Mold claims are arguably within this classification.

2. **Multiple Chemical Sensitivity (MCS)**

This is not a recognized medical condition. Rather, MCS claims involve cumulative exposures to toxic substances within a building, allegedly inducing susceptibility to one's immune system.

3. **Sick Building Syndrome (SBS)**

SBS is also not a recognized medical condition; it is a description of typical complaints that occur through occupancy of a particular building. It is most often viewed as a definition of exclusion; if no cause can be associated with the complaints, the complaints are then put into the SBS category. A common argument has been that many of the past SBS complaints were linked to mold issues.

## **III. PRE-LITIGATION ISSUES**

A mold remediation plan should be developed not by the building owner, property manager, architect or even a lawyer. Rather, it should be prepared and implemented by a consultant who specializes in mold-related claims. It is never too early to retain the proper consultants. Similarly, it is imperative that the proper consultants be retained. Mold is not asbestos, and entities familiar with asbestos abatement are not necessarily qualified to establish an appropriate mold remediation protocol.

The task of choosing the proper consultants for developing a cost-efficient and effective remediation protocol is particularly challenging given the undeveloped nature of the related science. Although consideration is underway in several states including California, there are no present standards or Threshold Limits Values (TLVs) for airborne concentrations of mold, or mold spores. Nor are there Environmental Protection Agency regulations or standards for airborne mold contamination.

Nevertheless, there are resources and guidelines available to assist in remediation efforts. Any consultant retained to develop the remediation plan should be familiar with such guidelines. [See, for example, the EPA guidance for identifying, remediating and preventing mold. ([www.epa.gov/iag/molds](http://www.epa.gov/iag/molds)). See also, the *New York City Department of Health Bureau of Environmental and Occupational Disease Epidemiology Guidelines on Assessment and Remediation of Fungi in Indoor Environments*. ([www.ci.nyc.ny.us](http://www.ci.nyc.ny.us).) See also, [www.iicrc.org](http://www.iicrc.org) and [www.acgih.org](http://www.acgih.org) as other sources of suggested guidelines.]

An early response has the potential to prevent costly litigation. However, be warned, the “what’s, how’s and why’s” of the remediation protocol might also serve as evidence in the subsequent lawsuit to support claims such as concealment, fraud and aggravation of existing injuries. Additionally, new claims may arise if the remediation is not done safely and thoroughly. Many pending lawsuits are based on the exposure to mold spores produced as a result of improper remediation and inadequate safety procedures. The need to establish and implement the proper protocol is even more critical when the subject building is occupied by those with high susceptibility (e.g., children in schools, patients in hospitals, senior citizens in retirement homes, etc.).

Other pre-litigation issues that need to be considered include:

1. What information (e.g. – test results) will be provided to the building’s occupants;
2. Is it necessary to temporarily relocate occupants;
3. Is it necessary to retain medical consultants and, if so, what should be the scope of their duties;
4. What type of testing (air sample, destructive testing, etc.) should be done;
5. Make sure the consultants, as well as the attorney, understand their respective roles;
6. Are other entities/individuals (e.g., developer, contractors) culpable and should they be involved in the remediation decisions and cost; and
7. Beware that not all communications between the consultant, building owner and attorney will be deemed privileged if litigation ensues.

Once a claim is reported, and even prior to litigation, it is imperative that there be an early and proper investigation of the nature of the mold claim. If done quickly and properly, the investigation can greatly reduce the chance that litigation will result.

The first goal of such investigation must be to locate and eliminate the source of the water intrusion. Once this is accomplished, corrective actions may be taken to decontaminate the property and to address any personal injury claims.

#### **IV. MOLD LITIGATION: WHO'S DOING WHAT TO WHOM?**

- A. Common Plaintiffs – students, office workers, tenants (commercial and residential), buyers of alleged mold-contaminated property, property owners, etc.
- B. Common Causes of Action – negligence, breach of contract, private nuisance, breach of implied warranty of habitability, fraud, negligent infliction of emotional distress, conversion, property damage claims, personal injury claims, professional liability, American Disability Act claims, breach of lease, attorneys' fees under contract, etc.
- C. Potential Defendants – buildings owners, property management companies, sellers, real estate agents and brokers, remediation and abatement contractors, roofers, architects, maintenance contractors, industrial hygienist, homeowners associations, claims adjusters, lawyers, insurance companies, etc.

#### **V. LEGAL THEMES AND STRATEGIES**

##### **A. Plaintiffs' Perspective**

If the mold case involves personal injury claims, plaintiffs will undoubtedly focus on the injuries and most likely, will seek damages from a variety of defendants. To create significant economic leverage against defendants who are faced with the risk and costs associated with litigation, a skilled plaintiffs' attorney will try to join a number of plaintiffs (e.g. – tenants) in a single lawsuit. Although California courts are not receptive to establishing class actions for toxic tort claims like mold, the courts are very eager to consolidate cases in order to minimize the economic hardship on the courts.

Recent developments in mold cases have seen new theories pursued by creative plaintiffs' counsel. In recognition of potential problems associated with causation, talented plaintiffs' attorneys build up the damage claim and play on the fears and sympathies of the public and the jury. In this context, the natural ally of plaintiffs and their counsel is the media. The media (national, local, internet and even Hollywood) is constantly reporting, and often exaggerating, about the "killing mold" in our homes, schools, work places, etc.

Moreover, in efforts to bolster damages, plaintiffs have been focusing on fraud claims. In this setting, plaintiffs' counsel assert that the building owner or property manager knew, or should have known, that there was mold in the building and failed to advise the residents of the existence of mold and the corresponding health-related issues. Instead of a simple case with temporary exposure, general symptoms and relatively minimal damages, the case becomes the classic tale of big defendant jeopardizing the health of the young and old for the purpose of economic gain.

##### **B. Defendants' Perspective**

The need to develop simple and appealing themes is as critical to defendants' case as it is to that of plaintiff. A threshold decision for defendants is whether to accept

the alleged damages as “real.” In mold cases brought by the building owner, an expenditure by the owner most likely precludes defendants from challenging the reality of the loss. On the other hand, even when mold is present, defendants may choose to challenge the personal injury claims on the basis of causation.

## 1. Causation

Mold has been blamed in the media for everything from basic allergic reactions to death. However, to date, there is very little scientific data to support a causal connection between mold exposure and many of the alleged injuries. Though research and studies are currently underway, there are few published and peer reviewed epidemiologic studies to support majority of plaintiffs’ medical claims. Therefore, the real battle ground is causation.

In most cases, plaintiffs will make a showing of a temporal relationship between exposure and illness. However, this showing of exposure and subjective symptoms is insufficient evidence to establish a prima facie case of causation.

California courts require expert testimony to establish causation in toxic tort cases. It is not sufficient to submit evidence of an alleged injury and exposure. Plaintiffs, as a matter of law, are not entitled to proceed without competent expert testimony to establish the causal link. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384-1385.)

Moreover, California follows the *Kelly/Frye* standard, which requires that plaintiffs’ claims be supported by acceptable medical and scientific evidence. (See, *People v. Kelly* (1976) 17 Cal.3d 24; see also, *People v. Leahy* (1994) 8 Cal.4th 587, 599.) Under the *Kelly/Frye* test, a court is required to ascertain an expert’s methodology and determine whether the methodology has been generally accepted within the expert’s scientific discipline. (*Id.*) In short, the connection between plaintiffs’ exposure and the alleged injury must be supported by acceptable medical and scientific evidence.<sup>1</sup> Moreover, California courts can require plaintiffs to establish this causal link in an evidentiary hearing before trial. (*Cottle, supra* at 1383-1384.) Therefore, once defendants can establish that plaintiffs do not have the necessary expert testimony or that the expert’s opinion is unfounded, an evidentiary hearing may be requested. If plaintiffs cannot establish these necessary causation elements, the case must be dismissed. (*Id.* at 1387-1389.)

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<sup>1</sup> Similarly, the United States Supreme Court recognizes that the judge serves as the “gatekeeper” of such claims, and the court shall preclude conclusions based on uncertain scientific methodology. (See, *Daubert v. Merrell Dow Pharmaceutical, Inc.* (1993) 509 U.S. 579, 592-595.)

## 2. Statute of Limitations

Another significant defense involves the statute of limitations. Generally, a mold personal injury case will be limited by the one year statute of limitations. (CCP §340.) However, California courts have held that the accrual date for the cause of action does not occur until plaintiff is aware of her injury and its negligent cause. (See, *Miller v. Lakeside Village Condominium Association* (1991) 1 Cal.App.4th 16.) Likewise, California courts have held that in mold property damage cases, the statute does not begin to run until there is an appreciable and actual harm. (See, *Northcoast Business Park v. Nielsen Construction* (1993) 17 Cal.App.4th 22.)

## 3. Indemnity/Additional Insured Endorsements

Finally, a means of shifting responsibility for litigation expense and liability is through indemnity agreements and/or additional insured provisions. Construction contracts commonly include indemnity provisions and insurance requirements. Indemnity agreements are often significant in determining ultimate payment responsibility and, in some instances, defense responsibility.

## **VI. WHO IS GOING TO PAY FOR ALL OF THIS?**

In most circumstances, defendants (and even plaintiffs' attorney) will look to insurance as the source of payment for remediation, defense costs, settlements and verdicts. The threshold question, of course, is whether these claims are covered.

### A. What Are the First Party Coverage Issues on a Mold Claim?

Most of the "coverage" issues relating to mold claims involve the handling of the claim. That is, the issues involve: responding timely to the claim; identifying and retaining the appropriate consultants, contractors and experts to handle the problem; and implementing the appropriate remedy to rid the place of not only the mold but the water source which feeds the mold as well.

The major coverage issue is causation. Most jurisdictions will find insurance coverage if an efficient or "dominant" cause of the loss or damage is a covered cause of the loss. (See, e.g., *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395. If there are several causes of the loss, including some that are not covered under the policy (e.g., negligent repairs and maintenance, long term seepage) but some that are covered (e.g., a broken water line) and the covered loss is an efficient cause of the loss, the loss will be covered. That is not to say that this means all the mold damage in the home or building is covered. The building may have sustained more than one loss which contributed to the mold problem. Fixing the covered cause of loss may not rid the place of mold if there are, for instance, other ongoing sources of water. Thus, all sources of water resulting in loss, need to be examined to determine if they are covered causes of loss.

Also, many policies have a specific exclusion that lists mold and/or fungus, such as the following:

We will not pay for loss or damage caused by or resulting from any of the following:

. . .

(2) Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself . . .

This exclusion is intended to except from coverage long term, ongoing types of damages. In the limited opinions that have addressed the terms “mold” or “fungus,” the courts have applied the exclusion literally.

Other possible exclusions include:

- (a) An exclusion for continuous or repeated water damage,
- (b) An exclusion for water damage due to a backup of water, and
- (c) An exclusion for loss or damage due to negligent work, including maintenance, repair, and remodeling.

**B. Does the “Pollution Exclusion” Include Mold?**

Many first party property and third party liability policies contain “pollution exclusions” in varying forms. “Pollutant” is defined in many policies as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials.” Mold is not specifically listed. Mold is certainly an irritant for some people as well as a contaminant. However, courts have not yet decided the issue.

The only reported appellate case applying the pollution exclusion to mold is *Leverence v. United States Fidelity & Guaranty* (Wisc.App. 1990) 462 N.W.2d 218. In that case, the Wisconsin Appellate Court held that the pollution exclusion did not apply to a claim for bodily injuries and property damage due to the presence of mold. However, the decision was not based upon whether mold was a “pollutant” (the court assumed it was a “contaminant”). Rather, the court’s decision was based upon there not being a “release” and on how that court interpreted the words “sudden and accidental” in the exclusion.

### C. Are Third Party Claims Covered?

Although third party property damage and bodily injury mold claims may pose coverage issues, none are necessarily unique to mold claims. Such general issues include the appropriate trigger of coverage for a bodily injury mold claim. If a person gets better once they are removed from the mold and mold is not a progressive ongoing injury like asbestos, a continuous trigger is not appropriate. See, e.g., *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1 (continuous trigger used in determining what policies may provide coverage for bodily injury due to asbestos exposure).

However, property damage caused by mold may be a continuing loss because the mold continues to exist and grow until the water source is removed. See, e.g., *Pepperelle v. Scottsdale Ins. Co.* (1998) 62 Cal.App.4th 1045, 1054 (continuous trigger applied to construction defect case that included allegations of leaking and moisture seepage from date of construction).

Another issue is the application of personal injury coverage to mold claims where individuals may have left the building or home because of health concerns about the mold. Many policies that have personal injury coverage do not have pollution exclusions that are applicable. Even if there is no property damage and no manifest bodily injury, there may be a personal injury claim.

## VII. CONCLUSION

With the advent of personal injury mold claims, mold litigation has entered into a new phase which involves more claims, more parties and more money. As the scientific and medical issues associated with mold evolve, so will the strategies in the mold litigation. For today, those battlegrounds focus on appropriate remediation and causation issues. Although it is uncertain how jurors and courts will respond to the many issues presented in the mold cases, it appears certain that mold litigation is here to stay and will continue to expand as to the number of claims, number of parties involved and, most significantly, the money involved.