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The Creeping Case of Mold

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Mold, a type of fungi, has been attacking the world since its inception and helping recycle organic materials. More than 100,000 types have been identified, of which 1,000 are common in the United States. Only recently has mold been identified as a culprit behind sick buildings, causing health threats that can range from mild to life-threatening.

Mold grows in moist areas, both indoors and out. By themselves, mold may cause allergic reactions and infections in those individuals with sensitivities to the particular mold. Mold testing by an allergist may be negative for one type of mold while the individual may be allergic to other molds. Molds generally can cause the following impacts depending on a person's sensitivities: allergies, infections, irritations and toxicities.

There are countless different types of mold, some of which offer medicinal value, such as penicillin. According to the Center for Disease Control, there are six fairly common molds found in households and buildings, of which three can pose significant dangers.----- Those toxic molds which industrial hygienists are commonly finding in buildings are Penicillium, Stachybotrys Charturum (atra), Aspergillus niger. These molds are thought to have severe impacts on people, although how they do so, and their exact impacts, is not clearly understood.

The true dangers, however, occur after mold produces secondary metabolites, known as mycotoxins, which can be responsible for toxic health results. Each mold can produce many mycotoxins. The nature and number of mycotoxins are not well known or understood. Mold testing usually counts the mold's spores, which serve as an indicator of the vastly more populous mycotoxins. Unfortunately, a zero spore count can fail to reveal a dangerous accumulation of mycotoxins. As an illustration, there are 140 known mycotoxins of Stachybotrys. If such mold dries, the mycotoxin production is believed to increase up to 40,000 times!

Mold thrives on water. Hence, people typically encounter mold problems after improper construction which allows moisture to remain in enclosed spaces, HVAC leaks, plumbing leaks or breaks, flooding, sewer backups and rain storms that force water into walls. Mold takes time to grow and may go undetected for lengthy periods of time. Mold often grows between wallboards and spreads within the building's interior walls. The symptoms are often experienced before the mold is discovered or the causal effect appreciated.

People can get home mold tests for around a hundred dollars to determine if there is mold.

Formal testing can easily cost a couple thousand dollars. Diluted bleach can be used to remove mold from nonporous surfaces. Disposal of previously soaked materials is the only way to remove inner mold.

Mold claims for property damage and personal injury are rising in the construction defect, landlord-tenant, personal injury and insurance context. There are generally two kinds of lawsuits brought: those against parties causing the problem and those against insurance companies for coverage. The field is so new that there is very case law specifically addressing mold to guide the practitioner. Much of the guiding principles, however, has been developed in the environmental and environmental insurance coverage fields.

Borrowing from these and other fields, mold cases will raise many of the following issues:

Personal injury: As a pure legal matter, proving personal injury was a consequence of negligent exposure to mold could be extremely formidable. The equities of each case could be more instrumental in predicting the appeal and outcome of a case.

Causation: Consider the expense and difficulty of an industrial hygienist timely identifying the mold and its airborne concentration, on one hand, and a *qualified* medical expert, such as a mycologist or toxicologist, concluding the symptoms are caused by such exposure. Junk science will be excluded from evidence.

Damages: For personal injuries, consider the complexity of isolating the myriad symptoms that can overlap between mold-related and other ailments (e.g., headaches, dizziness, fatigue, confusion, depression, allergies, asthma, nausea, respiratory tract infections). People with suppressed immune systems are more vulnerable to mold sensitivities. Unlike personal injury claims, property which has mold contamination can be identified and linked to a cause. Damages can be readily quantified. Hence, property damage claims make the best mold cases today.

The traditional causes of action for **negligence, breach of contract, fraud** can be used to seek compensatory damages. For instance, if a party fails to exercise due care in preventing mold's outgrowth, or fails to disclose that during a property transfer, he may have exposure for property damages as well as personal injury.

Claims for **design defect** and negligence by architects and builders will arise when they allow areas in which moisture can accumulate or get trapped.

Landlord/Tenant law will likely consider breach of contract, breach of warranties of habitability and quiet enjoyment, constructive eviction for mold claims.

Naturally, insurers will be asked to bear the brunt of mold litigation. **Property (first party) insurance:** Mold, wear and tear, and rot are all excluded under typical property policies. Wind and sudden water damage (e.g., burst pipe) is usually covered and should include coverage for damages flowing therefrom, including mold. **Liability (third party) insurance:** Defendants

may be defended at the expense of the insurer where the allegations and extrinsic evidence create a possibility of coverage. Many insurers are trying to bootstrap their pollution exclusion onto the mold, with limited success.

A major irony is that the insurers' actions in responding to water damage and mold claims will come under intense scrutiny in a new hybrid of bad faith actions. In these cases, insurers fail to properly respond to water damage claims in a variety of ways: delays, hiring deflooding companies with no mold remediation understanding or experience, making superficial cures, or generally providing half-measures to resolve the problem. Such cost-saving measures can haunt the insurer when a claim for mold remediation, personal injury, temporary housing, and extra-contractual damages, which is far more serious and expensive to resolve than the initial property damage claim, is spawned.