

OUTSIDE COUNSEL

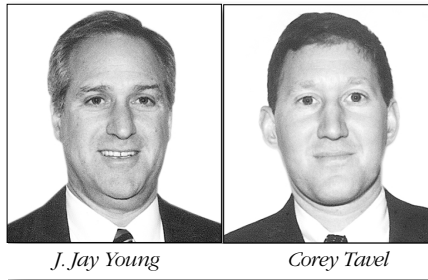
BY J. JAY YOUNG AND COREY TAVEL

Defending Against Mold-Related Personal Injury Actions

In the wake of the \$32 million jury verdict rendered in *Ballard v. Fire Insurance Exchange*¹, numerous mold contamination claims, asserting both property damage and personal injury, have emerged throughout the country in both residential and commercial settings. New York has followed this trend and the explosive potential of these claims is portrayed in *Chenensky v. Glenwood Management Corp.*,² where a family has sued for \$180 million for mold exposure arising from a water leak that management knew of for several years. Further, in *Rivera v. Phipps Houses Services*,³ plaintiffs filed a rent-abatement action with implicit claims of mold contamination and later settled for \$1.8 million.⁴ Dozens of other mold claims have been filed under various guises and appear to be the genesis of an oncoming wave of new “toxic tort” litigation. These claims, however, can be defended by excluding scientific testimony, asserting statute of limitations and establishing alternative causation.

Excluding Scientific Evidence

Excluding expert testimony that relies on unsubstantiated “junk science,” limits plaintiffs’ ability to demonstrate that mold caused their alleged injuries. While it is widely accepted that mold can contribute to allergic and asthmatic conditions, the debate over whether mold can cause more debilitating medical injuries and conditions is still unsettled. It has been hypothesized that certain mold spores contain mycotoxins; a dangerous chemical produced during mold’s reproductive cycle, which has been implicated in causing serious ailments such as pulmonary hemosiderosis, a bleeding of the lungs, which can result in the death.⁵ However, mycotoxins are



J. Jay Young

Corey Tavel

only present in a few mold species, there is no established method of testing for the mycotoxins, and the actual effects of mycotoxin exposure are not yet understood. The lack of existing, consistent scientific testing for exposure to mold and mycotoxins allows the competent counsel to brand any attribution of serious personal injuries to mold exposure as without merit.

Excluding expert testimony that relies on ‘junk science,’ limits plaintiffs’ ability to demonstrate that mold caused their injuries.

Nonetheless, for plaintiff to establish that mold was the causal agent in a personal injury action, expert testimony is imperative. Rule 702 of the Federal Rules of Evidence governs the admission of expert testimony at trial. Under FRE 702 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.” New York also relies on the holdings of *Daubert v. Merrell Dow Pharm.* and *Frye v. U.S.*,⁶ for guidance in treating expert testimony. *Daubert* and its progeny have created additional standards that a judge may incorporate when evaluating a

witness. These factors include the degree of testing done on the theory, whether the theory has been subject to peer review, frequency of error, level of acceptance and expert’s specialization in the field. Similarly, *Frye* provides that a hearing can be held where the “general acceptance” of a scientific theory is measured, relative to the scientific community in which it belongs. Together these standards are used by judges to restrict unsubstantiated scientific theories from being admitted at trial. The application of these combined standards could limit or potentially bar certain expert testimony regarding the presence of toxic mold as well as its effect on one’s health.

Currently, no scientific study has conclusively demonstrated that toxic mold spores can be attributed to the more serious injuries. The combined evidentiary criteria, furnished by FRE 702, *Daubert*, and *Frye* should prohibit much of the expert testimony regarding the debilitating health effects of mold spores from being heard at trial. However, the broad discretion granted under these rules generally permits judges to submit evidence they deem instructional to the fact finder. Nonetheless, the trial court’s evaluation of expert testimony is subject to an abusive discretion standard on review.⁷

“[U]nless the scientific basis for claiming a causal connection between mold and illness ultimately is established, courts should determine that this type of expert testimony on causation does not meet applicable legal standards and should be excluded. That is the lesson of *Daubert* and the trend courts have followed towards excluding baseless science.”⁸ This has been the treatment of other such “fringe” scientific evidence as in regard to “Sick Building Syndrome.”⁹ This should substantially limit the size of future verdicts because of the lack of credible scientific evidence.

Statute of Limitations

A personal injury action asserting exposure to mold can also be limited by asserting statute

J. Jay Young is an executive member of Smith Mazure Director Young Yagerman & Tarallo PC. He is a frequent lecturer on a variety of topics. **Corey Tavel** also is an executive member of Smith Mazure. **Chris Blackman** is a law clerk at the firm.

of limitations as a defense. It has been held that the "injury-in-fact" trigger establishes the dates in which there were actual injuries (there may be numerous dates involved), even if the event is undiscovered at the time.¹⁰ Other toxic torts, such as asbestos, lead paint, and "sick building syndrome" have been governed by CPLR 214-c. Recently, in *Middleton v. Kenny*, a "sick building syndrome" claim, the court explained, "[t]he statute of limitations applicable to this action is CPLR 214-c, which requires that an action be commenced within three years from the date on which plaintiff discovered or should have discovered the injury. All that is necessary to start the limitations is that the plaintiff be aware of the primary condition for which damages are sought."¹¹ Given the longstanding and widespread existence of mold within commercial and residential buildings and the similarity of mold exposure symptoms to other common ailments, it is likely that CPLR 214-c will be found applicable to mold claims and as such the statute of limitations could be a strong defense for limiting mold claims.

Causation Issues

Attacking the causation of alleged mold injuries and illnesses could restrict exposure. This is often done in lead paint claims.¹² Alternate causal agents, alternate causal exposure and concurrent causation can all be asserted to limit or block potential mold claims. The owner of a large commercial building, who is subject to a mold suit, can dissipate or even eliminate liability by attributing the mold contamination to other parties. In a commercial building, the expansive list of potential defendants could include: owners of realty, architects, engineers, designers, general contractors, heating, ventilation and air-conditioning contractors, manufacturers and suppliers of building materials, landscapers, interior designers, real estate brokers, real estate agents, inspectors, testing labs, prior owners, occupants, maintenance contractors, industrial hygienists, remediation contractors and managers of realty. All of these parties can be implicated in contributing to or causing mold contamination.

Since mold requires only water, in the form of moisture or dampness, and food, in the form of organic building materials such as sheetrock, contaminations can be assigned to numerous parties. A party who provides a water source or supplies building material that were exposed to moisture prior to their installation can be held liable as causal agent in the formation of mold within a building. Similarly, any party who has failed to remediate an identified mold contamination or failed of properly waterproof

a structure can similarly have liability attributed to them as causal agents. Based on the multiple parties involved in the construction of a building and the parameters within which mold propagates, there are enormous opportunities to implicate alternative causal agents.

Alternate casual exposure can encompass a variety of forms. This defense appears promising because the symptoms of mold exposure, such as fatigue, nausea, headaches, respiratory discomfort and fever are widespread and can be attributable to other sources.¹³ Factors which could confound or even be mistaken as mold engendered are indoor chemical contaminants, including adhesives, carpeting, upholstery, manufactured wood products, pesticides, cleaning agents and insulation, as well as outdoor chemical contaminants such as car exhaust, plumbing, septic systems, nearby noxious operations and, finally, biological contaminants, which include bacteria, pollen, pet dander, viruses and mites. Each of these factors is abundant in any environment and can elicit the same symptoms and illnesses that claimants are attributing to toxic mold.

Concurrent exposure can also be used to lessen the liability. This would apply where a plaintiff is exposed to mold at his place of employment, but also subject to exposure at his residence. The level of contamination in a claimant's residence can significantly affect, or even nullify, their lawsuit. Further, a detailed investigation into the plaintiff's prior residences and places of employment should be conducted to determine if there was a prior exposure. Similar to a Lead Paint Litigation, all possible modes of exposure must be explored as potential causes of the complained of symptoms. Additionally, personal factors such as smoking, hobbies, pets, a new residence, emotional stress and a weak immune system can either be mistaken for or worsen the effects of mold exposure. This theory as well as the above discussed causation defenses, should allow defense counsel to diminish or even negate the liability alleged in mold lawsuits.

Summary

It is essential that insurers and their counsel have a strategy in place to confront this looming threat. By asserting *Frye* and *Daubert*, speculative scientific evidence can be limited or excluded from testimony at trial. The Statute of Limitations can also be asserted if the date the primary condition is first realized is three years before the date of filing. Lastly, various and alternate theories of causation can be

presented to dissipate or eliminate a claim. These defenses should allow defendants, their insurers and their counsel to lessen the impact of the looming threat of mold litigation as well as blunt the possibility that mold will be the next catastrophic toxic tort.

The genesis of mold litigation has been in California and Texas for the most part. The warm and moist climates of the Southwest, coupled with the relatively new construction have led to a proliferation of potential claims in those areas. Many of the commercial and larger apartment complexes in New York were built with plaster walls rather than sheet rock. Since plaster does not provide mold spores with the food source it needs, we have not seen a large amount of mold litigation. We suggest that is about to change. New construction, remodeling of older buildings and the abatement of buildings with lead paint have led to an increased use of sheetrock in the building process. The new construction using sheetrock and windows that do not open create less ventilation and a mold-friendly environment. These factors, coupled with the success of litigants in the Southwest and the increased success of litigants in New York will only foster the growth of mold litigation in New York.

An unnerving prospect is that, unlike asbestos or lead paint, which can be abated and removed forever, mold can reoccur with the introduction of moisture and a food source. The potential for a renewed exposure to mold and new litigation involving an abated building is a possibility that exists and could lead to a continuous cycle of litigation.

(1) No. 99-05252 (Travis Co., TX Dist. Ct. 2001)

(2) No. 120461/00 (N.Y. Co. July 19, 2001)

(3) 2001 U.S. Dist. Lexis 8939 (S.D.N.Y. June 29, 2001).

(4) New York Daily News, Dec. 12, 2001, p. 34.

(5) "Guidelines on Assessment and Remediation of Fungi in Indoor Environments", New York City Department of Health (January 2002).

(6) 509 US 579 (1993); and 293 F 1013 (D.C. Cir. 1923).

(7) *General Electric Co. v. Joiner*, 522 US 136.

(8) Charlotte Biblow, "Causation Key in Linking Mold to Harm," New York Law Journal, (Dec. 17, 2001) Environmental Law, p. 9.

(9) *Minner v. American Mortgage and Guaranty Co.*, 2000 Del. Super. LEXIS 99 (Del. Super. April 17, 2000).

(10) *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983).

(11) 286 A.D.2d 957, 958 (4th Dept. 2001).

(12) See, Viner Samborn, "Blame it on the Bloodline, Discovery of Nonparties' Medical and Psychiatric Records is Latest Defense Tactic in Disputing Causation," 85 ABA J 28 (1999); Wriggins, "Genetic, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation," 77 BU L. Rev. 1025 (1997).

(13) "Guidelines," Id.