

Mold: Personal Injury Claims and Causation

by Jason R. Garrot

To effectively prosecute a toxic mold action for personal injuries the plaintiff must prove causation. In this regard, causation refers to the proof of the nexus between exposure to toxic mold and resulting personal injury. There must be (1) proof of general causation as to whether a toxic substance can cause a particular injury or condition in the general population, as well as (2) proof of specific causation whether or not the toxic substance actually caused plaintiff's injury. Therefore, the plaintiff must come forward and prove he or she was actually exposed to toxic mold mycotoxins, and that there is a causal link between the plaintiff's exposure and the alleged injuries.

Claimants in toxic mold cases often seek damages resulting from skin rash and irritation, eye irritation, sore throat, nausea, fatigue, headache, asthma, and allergic symptoms. Some suits also allege pulmonary hemorrhage and a variety of neuropsychological ailments. There are very few scientific studies that discuss the causal link between these alleged ailments and exposure to toxic mold. In 2004, the Institute of Medicine (IOM) completed a comprehensive scientific literature review of all studies, including both animal and epidemiological studies, that attempted to assess the causal link between personal injury and exposure to toxic mold.¹ Epidemiological studies are studies that attempt to analyze associations between an alleged cause and an effect. Epidemiological studies can prove general causation, *i.e.*, establishing whether the toxic substance is capable of causing a particular injury. Epidemiological studies, however, cannot prove specific causation.

The IOM concluded with regard to animal studies, it has been shown certain mold mycotoxins can cause specific injuries in animals, such as immunotoxic, neurological, respiratory, and dermal responses after exposure to specific mold mycotoxins. The IOM concluded *Stachybotrys Chartarum* effects in humans may be biologically plausible, but these observations require much more validation and more extensive research before conclusions may be drawn. After examining epidemiological studies consisting of self-report findings of individuals who live in homes or buildings containing mold, the IOM concluded there is insufficient evidence of a causal relationship between any particular health symptom and the presence of mold. The IOM did find sufficient evidence of an association between the presence of mold and upper respiratory tract symptoms, asthma symptoms in sensitized asthmatic persons, and wheeze and cough symptoms. The IOM also concluded there was limited or suggestive evidence of an association between lower respiratory illness in otherwise healthy children and the presence of mold. Finally, the IOM concluded there was inadequate or insufficient evidence to determine whether an association exists between shortness of breath, skin symptoms, asthma developments, fatigue, neuropsychiatric symptoms, and mold exposure.

¹Institute of Medicine, Damp Indoor Spaces and Health (2004). See www.iom.edu/cms/3793/4703/20223.aspx.

To establish causation in mold cases, it is very likely that all parties will have numerous expert witnesses. Because mold claims are fact intensive, experts will be called upon to give specific testimony regarding causation. Furthermore, any attempt to specifically relate mold to a plaintiff's illness will be highly contested. Therefore, it is important for the court to serve as a judicial gatekeeper to limit the testimony a jury may be allowed to consider.

Under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,² courts now serve as gatekeepers to exclude scientific testimony that is not relevant or reliable. To prevent the jury from hearing inappropriate non-relevant testimony, the judge must perform a preliminary assessment on whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning or methodology properly can be applied to the facts at issue. The standards or guidelines the Judge will use include (a) whether the expert's theory has been subjected to peer review; (b) whether the expert's theory has been or can be tested; (c) whether there is a known, acceptable rate of error; and (d) whether the expert's theory is generally accepted. Another important factor is whether the scientific opinion has been developed for litigation or scientific purposes.

Courts around the country have applied the standards set out in *Daubert* to limit, or prohibit entirely, plaintiff's experts who have attempted to provide opinions on the causation between the health effects alleged and mold exposure.³

² 509 U.S. 79 (1993)

³ See the following cases for a complete analysis on the difference between general versus specific causation, and the reliability of expert testimony provided by plaintiffs' experts who attempt to causally relate alleged personal injuries and toxic mold exposure. *Flores v. Allstate Texas Lloyd's Co.*, 229 F.Supp. 2d 697 (S.D. Tx. 2002); *Allison v. Fire Insurance Exchange*, 98 S.W. 3d 227 (Tex.C.T. App. 2002); *Kilian v. Equity Residential Trust*, 2004 W.L. 3606894 (D.Ariz.).

UPDATE

The Louisiana Third Circuit in the case of *Morgan v. Auto Club Family Ins. Co.*, 899 So.2d 135 (La.App. 3 Cir. 2005) upheld a mold insurance exclusion in a homeowner's insurance policy. In this first-party case, the trial court granted summary judgment in favor of the property insurer based on the exclusion for property damage caused by mold. The policy contained the following mold exclusion: "We do not, however, insure for loss:...(2) caused by:...(e) any of the following:...(3) smog, rust or other corrosion, mold, wet or dry rot;...." The plaintiffs in this case argued that the accumulation of condensation was the "ensuing loss" which was not excepted or excluded in the policy. The court held that the loss of property was caused by the mold damage which was specifically excluded from coverage under the policy even though the mold damage may have resulted from the lack of ventilation in the attic. It is not clear yet how this decision will be applied in third-party mold cases.

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