

IAQ & The Law

What the Mold Rush of 2002 Means For You

By Michael S. Greene

Reproduced with permission from Indoor Environment Connections™, Volume 4, Issue 2, December 2002

This year has become a watershed year for indoor environmental matters involving mold and fungal contamination. Just as the 49ers raced to California seeking that shiny metal, health professionals, homeowners, insurance companies, tenants, landlords, builders and experts are racing to determine the risks of mold contamination to themselves, both physically and economically.

Once again, California has become a key player, this time with cutting-edge regulation, in the form of the landmark California Toxic Mold Act of 2001, or the "California Act." While 2001 saw this significant legislation being enacted, and while large judgements were handed down in Texas, on a nationwide basis, the effects are only truly being felt this year.

This year, regularly repeated media coverage has played a large part in educating the public as to the risks of exposure to mold. Of course, the general media have also been leading culprits in creating many misperceptions among the public as to those risks. Also, insurance companies have seen a significant increase in claims and damages paid out due to water intrusion and the resulting damages incurred in remediating mold. A battle over mold coverage in Texas between the largest homeowner insurance companies and the Texas government has made the Alamo seem like a street fight, as several large insurers have pulled out of Texas entirely. The issue has become so "hot," that several exasperated homeowners resorted to taking literally that hit song of the 1980s, by the rock group the Talking Heads, "Burning Down the House."

What do the events of the Mold Rush of 2002 mean to homeowners, insurance companies, tenants, landlords and builders? In order to prognosticate the next round of the Mold Rush, we must examine in greater detail some of the cases and legislation that will shape the law over the next few years.

The concern of homeowners and victims of exposure to mold contamination has resulted in a panalogy of legislation filed in many states and at the federal level. As noted above, the first legislation of significance to be successfully enacted was the California Act. A more detailed analysis of the legislation can be found in the May 2002 issue of *IE Connections*.

The first step under the California Act was to have been the establishment of a task force to study, analyze and adopt permissible exposure limits and guidelines for assessment and methods of remediation. Unfortunately, under California's

mode of governance, unless a law is funded by the legislature no enforcement is possible. As of the writing of this article, the task force has not been funded and therefore is not yet formed.

Some progress was made, however, in an amendment passed this year, which permits voluntary contributions. Far fetched, you say? Politics, as they say, creates strange bedfellows, and it appears that there may be some willingness by landlord industry groups and builders to fund portions of the estimated \$700,000 necessary for the task force to perform.

While the California Act has received most of the press, another bill has been circulating during the past California legislative session seeking to address the insurance issues associated with mold. Senate Bill 1763 made it through several committee reviews but was pulled and tabled until next year when it is expected to be reintroduced. This bill would direct the Department of Insurance to study the effects on the insurance industry and homeowners of the current Mold Rush.

The California Act has become a model for legislation in other states and at the federal level. The most important legislative action in 2002 has been the filing of the United States Toxic Mold Act (also known as the "Melina Bill") by Rep. John Conyers. The bill moved fairly quickly to its first round of committee hearings and has picked up 29 co-sponsors.

The bill generally contains several very significant requirements in connection with toxic mold. It creates mandatory inspections for rental units and for-sale housing, creates mandatory disclosures, creates licensing requirements for mold assessors and remediators, creates a tax credit for offsetting mold assessment and remediation, and creates a federal mold insurance guaranty program. A more detailed analysis of the Melina Bill may be found in my article in the October 2002 issue of *IE Connections*.

As to the states, New York and Massachusetts have circulated in their respective legislatures proposed laws that are similar in content and organization to the California Act. In Massachusetts, Senate Bill 2353 would authorize a task force to consider toxic mold exposure limits in indoor environments, assess public health risks and adopt protections, among other things.

The bill has been through several committee reviews but was replaced by Senate Bill 2406, which has been referred to the Senate Committee on Ways and Means. The bill follows

much of the content and incorporates many of the goals of the California Act but is significant in that it would render government liable for defective inspections on buildings that lead to toxic mold contamination. While many rail against the effectiveness of local building inspectors, this provision, particularly given the rapid growth of mold cases, will result in the bankruptcy of numerous municipalities.

In New York, Senate Bill 5799 and Assembly Bill 10610 would create the Toxic Mold Protection Act and, like the California Act, would create a task force to advise the department of health on exposure limits, assessment standards and remediation. The bills are similar in content and goals as the California Act and are currently in committee.

Other states are not to be left out.

- In Arizona, Senate Bill 1432 would create a legislative study group to consider the financial, environmental and health-related effects of indoor commercial and residential mold contamination.

- In Maryland, Senate Bill 283, establishing a Task Force on Indoor Air Quality, has been adopted.

- The New Jersey Senate passed Senate Resolution 77, which "urges" the state to develop methods to help residents identify mold and to develop strategies that would address it. For those not familiar with this type of resolution, it is the legislative equivalent of "kissing your sister."

- Pennsylvania adopted Senate Resolution 171, which, along with House Resolution 434, directs the Department of Insurance to create a task force to study the effects of toxic mold.

- Connecticut sought to adopt a far-reaching statute governing mold in schools, but the bill was defeated in the legislature.

While legislatures discussed regulating mold, the lobbying continues in many states between the insurance industry and the respective insurance commissioners with respect to the exclusion of mold coverage from standard homeowner insurance policies. In Texas, several large insurers left the state as a result of failing to achieve the premium rate structure and protections from mold claims that they had sought.

The Florida insurance commissioner has held several public forums around the state to address the concerns of the public and the insurance industry as a result of mold claims. It is expected that resultant legislation will address the risks to the insurance industry.

Cases involving mold have been increasing in number throughout the country, not just in areas known for high humidity such as the Sun Belt and the Pacific Northwest. Unfortunately, the cases do not present a picture of consistency and, as such, there is no body of "toxic mold law." The cases consist of a hodgepodge of bad faith claims against insurance companies, disputes over coverage under homeowner policies, design and construction defect cases, and classic tort claims by those injured by exposure to mold. Until legislation has been enacted that creates specific standards for mold exposure limits or assessment and remediation guidelines or, perhaps, results in mold as a

new claim in its own right, litigation will continue to be based upon theories that relate to the ultimate cause of water intrusion rather than to the existence of mold in its own right.

The Ballard v. Farmers insurance case, which generated the current media attention to the mold issue, presents a classic example of a bad faith claim against an insurance company. A significant portion of the judgment awarded to the Ballards by the trial court, being \$10 million of the total \$32 million verdict, was for punitive damages. The trier of fact decided that Farmers Insurance acted in bad faith in not acting to resolve the mold contamination on a more rapid basis.

Of significance for other cases in many states and at the federal court level, the Ballard court at that time did not admit testimony as to the neurotoxic effects of *Stachybotrys chartorum*. This strict application of the so-called "Daubert" rule will make it difficult for evidence that is currently being debated in the scientific community to be heard at trial. In simplistic terms, the Daubert rule prevents the admission of scientific evidence that is not generally accepted in the scientific community. The judge in the case is the "gatekeeper" in making this determination.

Given the recent growth in cases and the snail's pace at which most cases proceed through the judicial system, very few cases have resulted in verdicts that have a reported appellate record. It is difficult to rely on squibs and snippets of information from the media or reporting services that identify cases being filed. This information is often not accurate and reflects the view of the industry group reporting on a particular case. I have identified some cases of interest, if not for any new groundbreaking rule of law or evidentiary value, but to show the trends in litigation.

In *Garcia v. the Regents of the University of California*, filed in 2001, students residing in a dormitory alleged they were injured as a result of exposure to mold and other contamination. The case speaks for the difficulties in sustaining a class action in toxic mold cases.

Class actions are often employed when there are multiple victims of an incident. A class action reduces the cost of filing separate actions, assists in resolving common issues to avoid inconsistent results and, in part, to place greater pressure on the defendants due to the potential for a large judgment.

So far, most of the class action claims filed in connection with toxic mold torts have failed to have the class successfully certified and accepted by the court. This is part due to the fact that, unlike the proverbial train wreck, mold contamination often does not result from a single accident or common incident. Contamination of several apartment units in an apartment complex are often related to specific problems with each unit and thereby a separate set of facts governing both the liability of the landlord and the resulting injuries and damages suffered by each tenant. Plaintiffs in a mold case often include special classes of people who are hypersensitive or who are otherwise suffering from a unique condition that may make them more susceptible. If the class is "broken," the cost of trying numerous separate cases increases dramatically, and yet the potential

aggregate recovery is no greater than that sought by the class as a whole.

While 2002 did not indicate any particular change in the view of class actions, the potential for use of class actions for groups of plaintiffs, whether employees on a factory floor or office workers, where a common incident may be proven, must be carefully watched. To date, class action certification has been denied in mold exposure cases.

Other recent cases both filed in 2002 and prior which are still circulating through the courts indicate that pattern of types of claims and the potential expanding liability for those who own, manage or construct buildings, whether office buildings, houses, apartments or factories.

For example, in *Jenses v. Amgen Inc.*, filed in late 2000, the plaintiff sought a \$2 million recovery for exposure to mold in an Amgen building. In *J.J. Acquisition Corp. v. Pacific Coast Properties*, the employees of the California newspaper sought \$10 million, for injuries resulting from exposure to mold, from the landlord in the building. In *Spectrum Community Association v. Bristol House Partnership*, homeowners sued the developer and contractors, based upon allegations that construction defects of the building caused the growth of toxic mold, resulting in injury. In *Andrejevic et al. v. Board of Education of Wheaton-Warrenton School District No. 200*, a class action was filed on behalf of students, parents and teachers, seeking \$67 million for injuries caused by exposure to mold, which allegedly arose from a flood that occurred at an elementary school.

One of the more celebrated (or at least celebrity-filled) cases is *Brockovich v. Robert Selleck*, 2001, in which Erin Brockovich, of the movie of the same name, filed a claim for injuries resulting from construction defects against the former owner and the builder of the home. Brockovich's claims were outlined in the CBS "48 Hours" story, *Silent Killers: Toxic Mold*.

Another celebrity victim alleging injury from exposure to mold is Ed McMahon, formerly of "The Tonight Show" and "Star Search." McMahon filed suit in 2002 against American Equity Insurance Company, a unit of Citigroup, and against several restoration contractors charged with remediating the flood and mold contamination. Despite headlines such as "Death Mold Killed My Dog," which are more reminiscent of "The X Files" than they are an accurate portrayal of the issues, McMahon's case indicates a new trend, in which restoration contractors and remediators are now becoming targets for their failure to solve problems. Given the explosion of companies getting into the mold assessment and remediation industry, caution is warranted in instituting legal proper protections. The effect of the McMahon case is also noted for its effect on the financial markets; see *Business Week's "Can Toxic Mold Spoil a Stock Offering?"* for a reasoned analysis of the potential economic damage resulting from large verdicts against insurance companies.

In one of the most startling cases as to damages being sought, *Cheneski v. Glenwood Mansville. et al.*, the plaintiffs are seeking as much as \$180 million for injuries and personal property damage caused by exposure to mold while living in an

apartment owned by the defendant. The fact that this case was filed in New York shows that there is no geographical bias in mold cases. In another New York case, *Robert E. Coiro et al. v. Dormitory Authority of the State of New York*, the plaintiffs are seeking punitive damages and other damages in the amount of \$50 million.

If a pattern can be found in these cases, one is that mold claims are not limited to actions by homeowners against insurers and contractors. Another pattern is the ever-increasing amount of damages being sought.

Lastly, builders, developers, landlords and employers who operate in areas that are not particularly known for long periods of humidity cannot feel that they are immune to indoor environmental problems and resulting litigation. The bottom line for anyone who owns a building or maintains a building, or for those who design or construct buildings, is that careful attention must be paid to improve the prevention of water intrusion and to remove water and mold promptly when discovered. Water-resistant design and construction details should be contemplated. Given that mold can begin to grow as soon as 24-48 hours after exposure by various building components to moisture, problems cannot be ignored or waived off but must be promptly addressed by skilled professionals.

The Mold Rush is on. And be careful, as I predict that 2003 will be more like the OK Corral for those who choose to ignore the risks of toxic mold.