

**Defense Research Institute
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DISPUTING THE EXTENT OF MOLD-RELATED PERSONAL INJURY CLAIMS

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Exhibits

U. S. Centers for Disease Control: Morbidity & Mortality Weekly Report January 17, 1997 (46 [02]; 33-35)	Exhibit A
U. S. Centers for Disease Control: Morbidity & Mortality Weekly Report March 10, 2000 (49 [09]; 180-84)	Exhibit B
Sample Mold Report	Exhibit C
Sample Motion to Exclude Expert Witness Testimony (<i>Daubert</i> Challenge)	Exhibit D

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I. INTRODUCTION

Weight loss, emesis, diarrhea, nervous disorders, cardiovascular alterations, immunodepression, hemostatic derangements, skin toxicity, decreased reproductive capacity, bone marrow damage, headaches, gastrointestinal problems, infections, lower respiratory problems, eye irritation, chronic fatigue, low-grade fevers, swollen lymph nodes, difficulties concentrating, sinus congestion, breathing difficulties and death are but a few of the myriad of symptoms plaintiffs contend are caused by their exposure to various molds and their accompanying mycotoxins. During the last three years, we have seen the creation of an entire industry based on the discovery and remediation of the most common types of fungus on earth.

There are many theories about how and why mold, and its association with adverse indoor air quality issues, became prevalent. Some theorize the oil embargo of the early 70's resulted in the construction of tighter buildings that reduced the quality of air through changes in construction designs and HVAC regulations. Others theorize that it evolved after several hurricanes in the south resulted in significant flood loss claims that were excluded by homeowners' policies. When advised their claims were not covered due to exclusions, insureds and their lawyers alleged personal injuries in order to attempt an end run around the policy exclusions. Some believe the research study funded by the Centers for Disease Control, published in 1997 (Exhibit A), suggesting a link between *Stachybotrys chartarum* found in infants' water-damaged homes, and pulmonary hemorrhage caused the tidal wave of claims. (See Exhibit B, for CDC report showing initial report was scientifically deficient.).

Whatever theory you may adhere to, there is no doubt that personal injury claims involving mold will be one of the hotly contested personal injury claims during the next few years. In order

to defend against these claims, the defense lawyer and claims handler must become aware of the science and/or the lack thereof as it relates to mold exposure and medical causation issues. This paper will attempt to outline the relevant areas of inquiry needed to effectively defend against mold related personal injury claims.

II. TYPES OF ILLNESSES

There are only three types of illnesses that have been scientifically documented as being associated with indoor non-occupational mold exposure: allergy, infection and irritation. A fourth type of illness, toxicity, has been alleged, theorized, and discussed in medical journals, but has not received general scientific acceptance.

Illness relating to allergy, infection and irritation are normally considered minor by medical standards, because they typically resolve completely once removed from the exposure and having received appropriate medical treatment. Therefore, the first important step in analyzing a mold related personal injury claim is understanding the type of illness being alleged. The defense of claims alleging allergy, infection or irritation will be much less involved than those dealing with toxicity. However, all four areas have common discovery requirements.

III. MOLD TESTING

In the typical mold case, plaintiff's counsel will have tested and retested the structure many times to determine the types of molds present as well as the amounts and location. Determination of the types of mold is important to the personal injury claim, because different molds and their corresponding mycotoxins cause different types of reactions. For instance, exposure to high concentrations of *Aspergillus* can lead to infection in some individuals. Other molds, however, have no scientific basis with regards to causation of infection. There are roughly 100 types of mold that are known to cause some type of medical response in humans. Knowing the specific types of mold a plaintiff is exposed to is therefore helpful in evaluating the medical causation issue.

Attached as Exhibit C to this paper is a sample mold report. While the format of this type of report will change based on the provider of the service, the content is substantially similar. It is important for defense counsel and claim handlers who regularly work in this area to have a general understanding of how to read these reports. One problem in analyzing the reports is the lack of any universally accepted criteria on what constitutes a low, moderate, high and very high concentration of mold.

The American Academy of Allergy, Asthma and Immunology hosts a website at aaaai.org, which contains information from the National Allergy Bureau, an organization which provides pollen and spore counts for various cities and states around the country. In the National Allergy Bureau section of the website, they provide the following chart:

Allergen (spores per cubic meter)	Result
0-6,499	low
6,500 – 12,999	moderate
13,000 – 49,999	high
> 50,000	very high

The National Allergy Bureau (“NAB”) makes note that these are ecological measurements and are not based on health effects. They go on to say, however, that assuming dose/response relationships are the same across the country, the definitions are probably more appropriate than a definition based on local numbers. The NAB attempts to categorize some general results from the various exposure levels. It is important to recognize the absence of any duration criteria with regard to the following hypothetical exposures.

If the Count Falls within this Category:	Allergy Sufferers who are allergic to these pollens or molds may experience symptoms of hay fever or asthma.
Absent	No symptoms.
Low	Only individuals extremely sensitive to these pollens and molds will experience symptoms.
Moderate	Many individuals sensitive to these pollens and molds will experience symptoms.
High	Most individuals with any sensitivity to these pollens and molds will experience symptoms.
Very high	Almost all individuals with any sensitivity at all to these pollens and molds will experience symptoms. Extremely sensitive people could have severe symptoms.

When dealing with personal injury claims, it is important to know whether the mold spores are airborne. Oftentimes, mold is discovered in a structure but is concealed within an interstitial wall space. This paper will not attempt to explain the wide range of mistakes which can be made in sampling and interpretation. This area is better left to your consulting Industrial Hygienist. What’s important for you to understand is the presence of mold doesn’t always mean the occupants of the building were exposed to it.

Mold testing typically involves various forms of surface and air sampling. There are limitations to all types of testing. The following are a few you should be aware of. Often when testing is performed, there are a lot of visitors to the home observing the sampling. During this time period, doors and windows are typically opened more often and for longer periods of time, thereby exposing the indoor air to larger than normal quantities of outside air. Since mold is present outdoors at all times, the natural migration into the home will increase the levels inside the home, even without any mold activity in the home. Additionally, the movement of additional people within the home will stir up mold on surfaces and imbedded in carpets. The greater the foot traffic you have, the more mold spores will be stirred up into the air from the carpet. If someone dusts before sampling, those spores will be potentially cast into the air. The scientific literature tells us that mold spores will typically fall to the ground over time due to their weight. Therefore, to ensure results which would best reflect the common exposure of the occupant, the testing should be performed while disturbing the area as little as possible.

IV. WORK & MEDICAL HISTORY

Your next area of investigation concerns the plaintiff's work and medical history. It is important to obtain a complete work history due to the wide variety of mold exposures common in work place settings. Agricultural workers are regularly exposed to high concentrations of mold in their workplace. In addition to determining other sources of possible mold exposure, the work history is important to determine whether the symptoms plaintiff has, may be attributable to some other type of environmental or industrial exposure. Many of the same symptoms or complaints seen in persons who attribute their problems to mold also mirror the effects of various chemical exposures.

A thorough medical history is important to a complete understanding of the possible causes of the plaintiff's complaints. Plaintiffs regularly testify their symptoms first began at a particular point in time. The time usually coincides with plaintiff's counsel's contention as to a limitations issue or some policy period issue. Frequently, the medical records reflect similar symptom complaints years before the time actually testified to. The doctor's notes will often reflect or attribute the symptoms to a condition not related to mold. These notes are very important when cross-examining the medical doctor on his opinion of the cause of the symptoms.

Many physicians dealing in the area of allergies currently believe exposure to mold is not significant long term, so long as the persons exposed either move out of the environment or have the condition remediated. It is not uncommon to see a plaintiff visit numerous medical practitioners before they find someone who attributes their condition directly to mold exposure. Locating prior physicians is therefore helpful in building a defense to the claim.

V. DEPOSITIONS OF EXPERTS

The deposition of the medical and scientific experts in any personal injury claim related to mold is really the key to a successful result. The deposition of the expert is critical to piecing

together sufficient information to challenge the ability of the expert to testify at trial. In preparation for the deposition of plaintiff's expert, you need to consult with your various consulting experts to make sure you have a good appreciation of all of the questions necessary to attack the credibility of the expert's opinion from a scientific standpoint. In general, however, some universal questions to ask your medical doctor include the following:

1. Have you ever written a peer-reviewed article for any medical journal relating to mold's health effects on humans?
2. How many patients have you treated where you have diagnosed the patient's symptoms as having been caused by exposure to mold?
3. In those cases where you have diagnosed a medical condition relating to mold exposure, what mold or molds were involved?
4. What illness did you attribute to each of your patients exposed to mold?
5. What do you contend the plaintiff was exposed to in this case?
6. What was the source of information you used to determine your patient's exposure in this case?
7. What was the source or method of exposure to the patient (i.e., absorption, inhalation or ingestion)?
8. How long do you contend your patient was exposed to this particular mold?
9. How much do you contend your patient was exposed to this particular mold during this time?
10. Is it your opinion the concentration of the particular mold was the same for your patient's entire length of exposure?
11. If so, how did you reach that conclusion?
12. What peer-reviewed medical literature have you reviewed or relied upon in forming your opinion in this case?
13. Are you aware of any peer-reviewed medical literature which supports your medical diagnosis in this case?
14. What other possible causes did you rule out (differential diagnosis) in arriving at your diagnosis in this case?

15. Are there any other possible causes which you did not consider and/or rule out?
16. Once you determined mold exposure was the cause of their illness, did you advise the patient to leave the environment or advise him of the consequences of his remaining in the environment?
17. Do you know whether the patient heeded your advice?
18. Short of moving out, did you suggest or recommend anything else to the plaintiff that you thought might be helpful if he continued to remain in the environment?
19. Do you know whether the patient followed your recommendations?

These are but a few general questions to ask the medical doctor in preparation for your *Daubert* challenge.

VI. DAUBERT CHALLENGES

The U. S. Supreme Court in *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), adopted new reliability requirements relating to expert testimony. These more restrictive requirements have now been adopted and codified by most states in an attempt to eliminate the use of “junk science.” While different states have slightly different standards and forms for the presentation of a motion to strike experts, the general content of the motions will be the same. Exhibit D to this paper is one of the more well known motions to exclude expert testimony in a mold case to date. This is, of course, the motion to exclude filed in *Ballard v. Fire Insurance Exchange* in the 345th District Court of Travis County, Texas.

The allegations in the *Ballard* case related initially to claims for damage to their hardwood floor caused by a water leak. Over the next six months, various tests were performed which revealed the presence of mold in the home. The plaintiffs ultimately moved out and amended their claim for property damage to include personal injury claims.

Plaintiff Ronald Allison contended his exposure to the mycotoxins given off by the molds *Penicillium*, *Aspergillus*, *Cladosporium* and *Stachybotrys* caused his personal injuries and left him totally unable to work in his profession of investment banking. He alleged his exposure to the mold and mycotoxins caused him difficulty in concentration and memory. His medical doctor diagnosed him as suffering from “toxic encephalopathy.” The motions and briefs prepared and presented by defense counsel in that case cover all facets of the current debate over admissibility of expert testimony. The attached motions are a roadmap for the defense practitioner in presenting an effective challenge to an expert, irrespective of your jurisdiction.

With any motion to exclude, it is important to have a complete understanding of the rules for admissibility. In *Ballard*, the defendants contended the plaintiffs' experts were unable to prove that Allison was exposed to the various mycotoxins generated by the various molds because there was no specific testing for the mycotoxins as opposed to the molds. Further, defendants contended plaintiffs could not establish the dose or duration of exposure, since the testing was able to document the concentrations at only one moment in time. Without the ability to provide information on the quantities over the period of time necessary for any medical condition to develop, defendants contended the plaintiffs failed to meet their burden.

Failing to muster sufficient evidence to show specific causation, the defendants then attacked the theory of general causation; however, plaintiffs suffered from the same absence of information as they did with regard to specific causation. Furthermore, the absence of peer reviewed medical literature tying "toxic encephalopathy" to the specific exposure did not exist. The Court ultimately agreed and excluded the expert causation opinion testimony relating to personal injuries of Dr. Eckardt Johanning, Dr. Wayne Gordon, Dr. David Tucker, Dr. Nancy Nussbaum, David Straus, James Cooley and Homer "Bill" Holder. The *Daubert* challenge contained in the *Ballard* case is must reading for anyone planning to file a motion to exclude medical and scientific experts in mold related litigation. Defense counsel cited numerous treatises in support of their motion and it is a treasure trove of information.

VII. CONCLUSION

Mold is everywhere. It's indoors and outdoors. It has been around since the beginning of time. The recent media exposure has sensationalized the potential effects of mold, without being restrained by the truth. The scientific truth, at least at this point in time, is that exposure to mold can cause allergies, infection and irritation. Each of these conditions is short-term and resolves rapidly after removal from the exposure. The most significant of the claims by plaintiffs' attorneys relating to toxicity has not been proven in any peer-reviewed medical literature to exist. Numerous studies suggest a link between mold and toxic exposure but in each, scientists have proven the results to be flawed or inaccurate. The U. S. Supreme Court has provided a reasonable basis for determining what jurors are allowed to hear in order to form their opinions. As defense advocates, we must use every weapon provided to us by the courts and statutes to ensure the fairness of every judicial proceeding. With reliable information, juries can better reach more consistent results.