

Mold Claims: Is the Worst Behind Us?

by Thomas K. Hanekamp

Mold claims exploded last year. According to the Insurance Information Institute, mold cost homeowners insurers more than \$1 billion in 2001, roughly five times the cost in 2000. Major carriers have stopped issuing new homeowners policies in Texas and California. Schools, office buildings, homes, and condominium buildings are being evacuated. Homes are being burned to the ground because of mold “contamination.” Mold claims have even spread to automobiles.

There is purportedly a mold “crisis” in America and an “emergency” has been declared. Federal mold legislation has recently been proposed and California has already passed mold legislation. This article will explore the origins of the recent proliferation of mold claims, and what insurers can do, and have done, to limit how long this bad movie runs.

What Is Mold?

Mold is a fungus that is literally everywhere, both inside and outside buildings. It is in shower stalls, in clothes, in penicillin, and in food (think yogurt or cheese). It is also in our walls, carpeting, and flooring. Mold grows if it has three of the things human beings also need to thrive: food, temperature, and water. It requires food—any carbon-based material—because unlike plants it cannot produce its own food. Unfortunately for homeowners, mold is not a picky eater and enjoys wallboard, flooring, wall covering, ceiling tile, and carpeting. It also prefers a temperature range that is comfortable for humans. Therefore, the human indoor living space and workplace are perfect environments for mold growth if the remaining element is provided: water. It need not be water from a leaky pipe or air conditioning unit; excessive humidity is sufficient to slake the thirst of a mold colony.

Mold reproduces by dispersing seed-like spores that can be released into the air. Certain molds produce mycotoxins, which can be harmful depending on the concentration and duration of exposure. However, only certain species of mold produce mycotoxins.

Origins of Mold Claims

There are numerous theories for the growth in mold claims. We know mold has been on this planet since before human beings even existed. So, why mold claims, and why now?

Some commentators believe it all began with our desire for energy-efficient, airtight buildings, along with central air conditioning. Shoddy construction practices and use of inferior building design and products in areas with booming populations also potentially share the blame. Another, perhaps more cynical, viewpoint is that the increased volume of mold claims was in response to two jury verdicts handed down against insurers in 2000 and 2001. The cases were tried in California and Texas and involved alleged bad-faith claims handling. The verdicts were in the amounts of \$18 million and \$32 million, respectively.

Editor’s Note:

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These cases focused the media spotlight on mold, which resulted in television news stories on the local and national level, including *48 Hours*. Feature articles could also be found in *The Wall Street Journal*, *The New York Times*, and *USA Today*. Mold also came with a bit of celebrity as Ed McMahon and Erin Brockovich brought much-publicized mold claims.

Is Mold Harmful?

The Center for Disease Control (CDC) may also be indirectly responsible for the increase in mold claims. It originally published the results of a study that linked pulmonary hemorrhage in Cleveland infants to the presence of mold in the apartments in which the infants lived. A number of infants died from this condition. Later, however, the CDC retracted its findings, concluding that the study was flawed and that there was insufficient evidence to causally link the presence of mold in the indoor environment to pulmonary hemorrhage.

Certain species of mold can produce mycotoxins, which, in sufficient concentrations and for sufficient durations, may produce nonspecific symptoms in certain individuals. However, these symptoms, like coughing, wheezing, sneezing, irritated eyes and throat, and runny nose, can also be related to other potential causes such as pollen, dust, and pets. People have different levels of sensitivity to mold and it is therefore difficult to define how much mold is too much and apply those standards across the board.

There is no scientific basis to causally link mold and more serious health conditions, including neurological impairments. More studies are needed to obtain a clearer picture of the actual health effects of mycotoxins. The National Academy of Sciences is reportedly working on a mold report for the government. Additionally, Alexander Robertson, a prominent attorney for plaintiffs in mold cases, is funding a study of residents who have been exposed to mold while living in an apartment complex in Orange County, California. The results of these studies could materially alter future litigation.

Despite the absence of scientific evidence to support claims that exposure to mold in the indoor environment causes serious ailments, certain courts have permitted juries to consider expert testimony that mold caused injuries like neurocognitive deficits. This has resulted in at least one verdict in excess of \$1 million. Other experts have questioned the validity of these expert opinions, and courts have barred causation testimony in other instances.

This battle of the experts is the real flashpoint for the future of mold claims. Defendants, and their insurers, must be prepared to fight this "junk science" with all available resources.

Options for Insurers

Insurers should aggressively battle the bodily injury causation issue referenced above. Hiring qualified defense counsel, and experts, is critical to convincing courts to bar the testimony on causation being offered by plaintiffs' medical experts in these cases. Additionally, insurers facing mold claims, who have not already implemented the following, should consider doing so immediately.

Claims Handling

Many insurers have changed the way they handle water damage claims as a result of the influx of mold claims. An emphasis has been placed on more rapidly responding, within 48 hours if possible, to water damage claims. It is within this timeframe that mold can begin to develop if water is not removed. Specialized training has been provided so that adjusters know to look closely for signs of mold. Additionally, it is now understood that serious mold problems should not be addressed with a “bucket of water and some bleach.” More thorough analysis and remediation is being conducted to ensure that mold claims are resolved expeditiously and completely.

Underwriting

There are a number of coverage issues associated with mold claims, most of which have not been addressed by the courts. Generally, mold property damage claims are covered under most homeowner policies if the mold is caused by a covered peril, such as a sudden pipe burst. The mold exclusion may only apply where mold is a result of a long-term slow leak. Therefore, many insurers have made efforts to add new mold exclusions to preclude coverage for mold-related damage, regardless of the cause of loss.

Carriers have taken other steps to protect themselves from the financial consequences of mold claims. Many insurers have substantially increased their rates in certain parts of the country. Carriers have also stopped issuing new homeowner policies in states like Texas and California. Where coverage is being offered, sublimits have often been applied for mold-related damage. The insured is normally offered the option of purchasing higher limits for additional premium. This provides insurers with some measure of certainty as to their potential exposure.

Other potential coverage issues exist in mold claims. In first-party property claims, there may be questions as to whether “direct physical loss” has taken place with respect to property where mold has developed. In the third-party context, the business risks exclusion may apply to preclude coverage for lawsuits filed against insured contractors. The pollution exclusion may also impact the availability of coverage. Most of these coverage issues have not been ruled upon by courts in the mold context. Court rulings on these issues could produce an interesting plot twist.

Responses by Others

Responses to the mold “crisis” have come from other sources as well. Government legislation is being proposed, and the construction industry is attempting to modify construction methods.

Government

There presently exist no standards or regulations setting permissible exposure limits for mold. There is some question whether broadly applied mold standards are even feasible given the large number of different mold species that have a wide range of effects on different people. The United States Environmental Protection Agency (EPA) has provided general guidelines, but has not been authorized to regulate mold. The City of New York Department of Health Guidelines are considered the most comprehensive and are often utilized by remediation contractors.

National legislation creating a toxic mold insurance program was introduced into the United States House of Representatives on June 28, 2002. The bill, H.R. 5040, would establish an office within the Federal Emergency Management Agency to administer a federal mold insurance program similar to the National Flood Insurance Program. The bill also directs the EPA and CDC to examine the effects of different molds on human health, and calls for mandatory mold inspections for multiunit residential property.

California has passed the first mold legislation. California Health and Safety Code section 17920.3 calls for studies to determine if mold standards are feasible. Funding has not yet been approved for these studies. A more recent bill proposed in California, Senate Bill 1763, was directed at the insurance industry and would have required insurers to cover mold arising from otherwise covered perils unless explicitly excluded. The bill would also have required insurers to advise claimants when mold was “likely to be present.” This legislation, on June 28, 2002, failed to make it out of committee.

Construction Industry

It is suspected that certain construction designs and products may have served to set the stage for mold growth. Construction of “air-tight” buildings has reduced the flow of fresh air and created the opportunity for mold to be circulated throughout the building by central air-conditioning systems. Since the explosion of mold claims, building systems have been redesigned, and new mold-resistant materials are being utilized. More care is being taken to reduce needless exposure of construction materials to water and the outside elements. Insurers are also assisting in this effort as evidenced by the recent efforts of the Alliance of American Insurers to participate in discussions to revise the South Carolina State Building Code.

Conclusion

Mold is not expected to become the “next asbestos” as some have opined. Asbestos plaintiffs can suffer from serious illnesses, including cancers that can be identifiably traced to inhalation of asbestos fibers. There are no biological markers that link illness to mold. Further, mold plaintiffs typically suffer from simple allergy-type symptoms. The science linking exposure to mold in the indoor environment to serious bodily injury is simply not there. Even the Texas Insurance Commissioner, Jose Montemayor, indicated that mold claims are sometimes “detached from reality” and that mold is subject to “quack science.”

Additionally, defendants in third-party mold cases are typically small businesses or property owners, not the easily targeted large corporations that existed in the asbestos arena. In asbestos, plaintiffs’ attorneys can share evidence that exists against defendants that commonly appear in asbestos litigation. Plaintiffs in mold cases will not be able to share proofs as easily against recurring defendants, and will be required to prove each and every case on its own merits.

Further, the most significant mold cases have involved first-party claims that were allegedly mishandled. Insurers are addressing any changes that may be necessary in their claims handling to avoid a recurrence of these cases. When third-party claims are brought, frequently, the defendant will tender the claim for defense under its “claims-made” errors and omissions or directors and officers liability policy. Therefore, unlike asbestos, mold claims will not necessarily trigger multiple policy years in those instances.

Injuries from inhalation of asbestos fibers can take decades to appear. With mold, since there is no long-term latency, people suffering from mold sensitivity are able to remove themselves from the affected area and, generally, their symptoms improve. This reduces the number of people who could become ill and lessens the potential for more serious illness to develop. The absence of a latency period has also permitted insurers to respond to mold with new underwriting considerations, including exclusions and rate increases.

Insurance analysts for Standard & Poor’s recently proclaimed that mold claims peaked in 2001. Thus it appears, at least at this point, that the mold “crisis” may have a short life. But it is important to understand the issues and to be prepared for any unexpected outcomes.