

# **Construction Users Round Table Quarterly Member Meeting September 9, 2003**

## **Legal Update**

### **There's A Fungus Among Us: The Current Epidemic of Toxic Mold Litigation**

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## **There's A Fungus Among Us: The Current Epidemic of Toxic Mold Litigation**

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Although man has been exposed to mold since its first appearance on Earth, mold has only recently become a major legal issue. However, one could argue that warnings about mold have been around since biblical times.<sup>1</sup> Some have prognosticated that toxic mold litigation may be poised to become the asbestos of the 21<sup>st</sup> century. In fact, mold litigation could potentially eclipse asbestos litigation given that everyone is a potential plaintiff because mold is ubiquitous. Potential parties to mold suits may include insurance carriers, homeowners, building owners, developers, landlords, governmental entities, contractors, inspectors, remediation contractors, building product manufacturers and design professionals.

As of late, newspapers and television news programs have bombarded the public with "horror" stories about the threat posed to people by the presence of toxic mold in their homes, schools and work places. Despite the fact that there is no definitive scientific evidence linking toxic mold exposure to many of the debilitating conditions from which mold victims claim to suffer, both judges and juries have awarded plaintiffs in mold suits large monetary awards. Given the media coverage and noteworthy successes by plaintiffs in mold suits, it is no wonder that there has been a virtual explosion of mold litigation. Although the highest concentrations of mold suits are in California and Texas, mold litigation is a growing national phenomenon.

A testament to the importance that the mold issue has assumed is the fact that California has enacted the Toxic Mold Protection Act<sup>2</sup> (TMPA) that authorizes the creation and implementation of standards regulating mold levels. California is the first state to have enacted such legislation but given the magnitude of the problem it is quite probable that other states will enact similar laws. Recently, there was an unsuccessful attempt to enact legislation on the federal level to establish mold standards.<sup>3</sup>

## **Toxic Mold – What Is It?**

Molds are microscopic organisms that pervade both indoor and outdoor environments. In fact, humans are constantly exposed to mold spores. In order to thrive, mold requires moisture and substrate on which to grow. Materials commonly used to construct and furnish residential and commercial structures such as paint, particleboard, dry wall, carpet, wood, leather and cloth serve as ideal substrata for mold. The requisite moisture can come from anywhere but the most common sources are leaking pipes, leaking roofs, improperly vented bathrooms, malfunctioning HVAC systems, storms or floods.

While the vast majority of molds are benign and beneficial, all molds can cause allergic reactions in humans and animals. A small subgroup of molds have been termed “toxic” because they can cause far more dangerous health problems. The three most common forms of toxic mold are stachybotrys, penicillium, and aspergillus.


Stachybotrys chartarum or S. atra is the most deleterious of the toxic molds. It has a greenish, black appearance and is found in extremely wet areas. Stachybotrys produces chemicals called macrocyclic tricothecenes, exposure to which can result in lung disease. Macrocyclic tricothecenes may also have neurotoxic properties that cause cognitive and behavioral problems. In addition, stachybotrys also generates immunotoxins that can compromise the immune system.

While Penicillium does not produce macrocyclic tricothecenes or immunotoxins, it can cause asthma, allergies, and hypersensitivity pneumonitis that often results in recurring pneumonia. The presence of Penicillium can be detected by a strong, musty odor.

There are a wide variety of species of Aspergillus. Some are considered opportunistic pathogens and may cause pulmonary infections. One species of Aspergillus produces aflatoxin B, a very potent carcinogen.

The common symptoms associated with mold allergies include sneezing, runny nose, chronic cough, nasal congestion, itchy, watery eyes, skin rashes, sinus headache, and difficulty breathing.

Some symptoms reportedly resulting from exposure to toxic mold include coughing up blood, nose bleeds, dizziness, nausea, vomiting and diarrhea, chest congestion, difficulty breathing, anemia, skin rashes, hearing impairment and cognitive impairment.



Exposure to mold does not automatically mean that a person will suffer adverse consequences. Rather, there are several factors that determine whether mold exposure will produce health problems, including duration of exposure and the particular susceptibility of the individual.

### **The Magnitude of the Toxic Mold Problem**

Toxic mold claims could potentially have an enormous, negative macroeconomic effect given the wide range of industries that potentially face liability from mold-related damage. Following are brief surveys of the impact that toxic mold claims have had on various industries:

#### **Insurance Companies**

Insurance companies have been the hardest hit so far by the current rash of mold claims. The value of mold claims nationwide has risen from \$200 million in 2000 to over \$2.5 billion in 2002.<sup>4</sup>

With approximately 75% of the total mold claims in the United States, Texas has the most mold claims nationwide. The second-largest insurer in Texas withdrew from the Texas homeowners insurance market in response to the dramatic increase in mold claims in Texas between 2000 and 2002. There were 250 mold claims in Texas in 2000, but a staggering 24,000 in only the first six months of 2002.<sup>5</sup>

The *Ballard*<sup>6</sup> case in Texas seems to have been the catalyst for the recent firestorm of mold claims. The Ballards built a twenty-two room, 11,000 sq. ft., plantation home. A plumbing leak led to mold growth. During the period when the insurer refused to cover the damage, mold infested the entire house and made the family ill from toxic mold exposure. The insurance company could have settled the claim for \$190,000 but refused. As a result of the infestation caused by the insurer's delay in handling the claim, the remediation of the mold required the demolition of the house. After the trial court excluded the personal injury claims, the jury awarded the Ballards \$32 million in compensatory and punitive damages against their insurer for breach of its duty of good faith, fraud and violation of the Deceptive Trade Practices Act (DTPA). On appeal, the court reduced the judgment to \$4 million plus interest and attorneys fees.<sup>7</sup>

In response to the rash of mold litigation, many providers of CGL policies have begun categorizing mold as a toxic substance, thereby forcing contractors to purchase special coverage.

## **Building Owners**

The Hilton Hawaiian Village in Honolulu closed a newly constructed hotel tower because of the presence of toxic mold. The problem came to light when members of the housekeeping staff reported finding excessive mold and complained of illness after working in the tower.<sup>8</sup> The hotel has filed suit against 18 contractors to recover \$55 million in cleanup costs, alleging breach of contract, defective planning, construction, design and inspection of the tower.<sup>9</sup>

## **Developers/Contractors**

Two hundred condominium owners in Santa Ana, California, have sued the developer and contractors, who built the complex, for \$35 million because of mold problems and other construction defects.<sup>10</sup>

Homeowners in Laguna Niguel, California, were awarded \$7.8 million from the builders of a condominium complex for defective construction that led to water intrusion resulting in mold growth.<sup>11</sup>

In 2001, forty-one homeowners in Rancho Santa Margarita, California, received \$1.5 million in a settlement with the home builder and a \$2 million judgment against a subcontractor for defective concrete work that led to water invasion and mold growth.<sup>12</sup>


The University of California at Irvine received \$11 million for water damage and mold in student housing units that occurred because of defective construction.<sup>13</sup>

## **Landlords**

An executive of a property management company that manages 35,000 apartments nationwide believes that mold is the single, greatest issue impacting multifamily housing that he has encountered in his thirty-plus years in the business.<sup>14</sup>

In New York, tenants of an apartment building have sued their landlord for \$180 million, alleging that the landlord had knowledge of a mold problem but failed to either notify the tenants or remediate the problem.<sup>15</sup>

Archstone-Smith, the nation's largest apartment real estate investment trust, has spent \$11.3 million to remediate a 452-unit building in Florida.<sup>16</sup> The mold problems in the building have spawned two class action lawsuits and several personal injury and property damage claims against Archstone-



Smith. In turn, Archstone-Smith has brought suit against the architect, engineer and HVAC contractor that worked on the renovation of the building. Archstone-Smith is also facing mold problems in four other apartment properties in Florida.

### **Governmental Agencies**


In Illinois, 1,700 students, parents and teachers are suing the school district alleging that the district's failure to remediate flood damage resulted in exposure to toxic mold. The plaintiffs are seeking \$67 million.<sup>17</sup>

### **What the Appellate Courts Have Said About Toxic Mold**

Jurisprudence on toxic mold issues is rather limited given the issue's recent entrance on to the legal stage. Following is a survey of five appellate level mold decisions.

In *Miller v. Lakeside Village Condominium Ass'n., Inc.*,<sup>18</sup> a woman living in her boyfriend's condominium brought suit against the condominium association for personal injuries caused by defective plumbing. The condo flooded on multiple occasions, resulting in the growth of mold. The plaintiff became seriously ill from mold exposure but did not file suit until two years after she had moved out of the condo. The court held that the plaintiff's action was barred by the one-year statute of limitations for personal injury actions. Although the plaintiff knew that the mold had caused her to suffer asthma and allergic reactions, she did not become aware of a more serious condition, immune dysregulation, until two years after moving out of the condo. Even though the plaintiff did not immediately know the exact diagnosis of her condition, the court found that the plaintiff had known that the mold was causing her to have asthma and allergic reactions. As such, the court held that the plaintiff had enough information to bring her claim within the statutory period.


In *Centex-Rooney Construction Co., Inc. v. Martin County*,<sup>19</sup> the County was awarded \$14 million in damages and interest resulting from a suit against a construction manager for a defectively constructed courthouse. The building had several defects that led to water intrusion and mold growth. After occupants of the building complained of health problems, the building was partially evacuated and testing was performed. When the tests detected the presence of toxic mold, the county evacuated the entire building and began to remediate. During the remediation, a multitude of further defects were



discovered, which increased the costs of redesign, reconstruction and relocation. The construction manager appealed the judgment, asserting that the trial court had erred in admitting the plaintiff's expert testimony that exposure to mold caused the health problems complained of by the occupants of the courthouse. The appellate court affirmed, finding that the trial court had properly admitted the testimony under the *Frye*<sup>20</sup> test.

In *New Haverford Partnership v. Stroot*,<sup>21</sup> tenants brought an action against their landlord, alleging that the landlord's negligent failure to maintain the premises in a sanitary condition had caused them to suffer severe health problems. As a result of leaks that were not repaired by the landlord, the plaintiffs claimed that toxic mold had infested the plaintiffs' apartments and had caused them to suffer pulmonary and cognitive impairment. At trial, the jury awarded the plaintiffs \$1 million. On appeal, the appellate court affirmed the jury verdict, finding that a negligence action was proper against a landlord who had violated a statute requiring him to maintain leased premises in a safe and sanitary condition.

In *Mondelli v. Kendell Homes Corp.*,<sup>22</sup> homeowners sued both the homebuilder and the City for injuries resulting from water intrusion and mold exposure. The owners of a newly constructed home experienced water intrusion after successive rainstorms. Consequently, the owners sued the homebuilder for negligence and breach of contract for defectively constructing the home. The owners also sued the City for negligence, alleging that the City had issued a building permit despite the fact that the blueprints and construction plans violated the municipal code. There was a bifurcated trial on a liability and causation/damages basis. In the liability phase, the trial court found in favor of the homeowners. In the causation/damages phase, the trial court excluded the plaintiffs' expert testimony concerning the causal link between mold exposure and health problems, the court then entered a directed verdict in favor of the defendants, finding that the plaintiffs had failed to prove causation. On appeal, the court reversed and remanded finding that the trial court's exclusion of the expert testimony amounted to prejudicial error. The appellate court held that plaintiffs' expert testimony satisfied the *Frye* test criteria for admission in that the witness was qualified as an expert, the testimony was relevant to the issue of damages, the testimony concerning the connection between mold and health concerns would have assisted the jury, and the probative value of the testimony would have outweighed any danger of unfair




prejudice. Moreover, the court stated that the scientific community had generally accepted the premise that there is a connection between the presence of mold and adverse health. The court also reversed the finding of liability against the City holding that the City was immune from suit under state law.

The *Ballard* case,<sup>23</sup> dealt with the mold issue in the context of liability for claims handling on the part of an insurer. At trial, the jury awarded the homeowners \$32 million, finding that the insurer had breached its duty of good faith and fair dealing, knowingly violated the DTPA and committed fraud. On appeal, the appellate court reversed the knowing violation and fraud rulings but upheld the breach of good faith and DTPA rulings. As such, the appellate court held that sufficient evidence had been presented for the jury to find that the insurer had breached its duty by delaying payment, which led to further mold damage. The court also held that sufficient evidence had been presented for the jury to find that the insurer violated the DTPA by misrepresenting the nature of a plumbing test. The appellate court upheld the trial court's decision to exclude epidemiological evidence presented by the homeowners to support their claim that mold exposure had made them ill. Under Texas law, epidemiological evidence is admissible in Texas only if it satisfies the following criteria: 1) the study must be unbiased in design, 2) the study must be designed properly, 3) the study must be performed properly, 4) the study must show that exposure to the substance in question more than doubles the risk of injury and 5) the results of the study must be able to be replicated 95% of the time. The appellate court ruled that the trial court was correct in excluding the evidence given that the homeowner had not presented sufficient foundational evidence to show that the study either proved that exposure to mold more than doubles the risk of injury or that the study satisfied the 95% replication requirement.

### **Responding to Toxic Mold Claims**

The most effective way to minimize or eliminate mold claims is to adopt a proactive method of response. Given the relatively short time--often less than forty-eight hours--it takes for mold to grow after water intrusion, building owners and operators should have an inspection and remediation program in place so that they are not caught off guard when a mold issue arises. For example, soon after water invades a building, either through a leaky pipe or roof, it may require only a few thousand dollars to



repair any resulting damage. However, if undetected or ignored, minor property damage could evolve into a multi-million dollar problem.

Landlords should consider including lease provisions requiring tenants to inform the landlord or property manager in a timely manner about the occurrence of water intrusion or the presence of mold.

When drafting construction contracts, provisions should be included that assign liability for water intrusion and mold growth during and after construction. During construction, owners should ensure that moisture and mold monitoring are part of the construction oversight process.

As mold claims become ever more commonplace, insurance companies are increasingly excluding coverage or not writing policies at all. The Insurance Services Office (ISO) has approved a mold limitation for homeowners policies that excludes coverage for loss due to mold and rot unless the condition results from a covered risk.<sup>24</sup>

Therefore, everyone should carefully review their insurance coverage to make sure that they or parties that are working for them have coverage for damage resulting from mold.

### **Inspection, Testing & Remediation**

Timely inspection, testing and remediation may or may not prevent mold litigation but at least it can serve to limit potential damages. If ignored, mold problems only get worse. While the goal of both sides in a mold dispute is to eradicate the mold from the premises, differences often arise as to the method and extent of remediation required to solve the problem. Understandably, occupants or owners of contaminated buildings will want to achieve optimal remediation. However, such a result may not be necessary or economically sound.

To date, there exist no standards establishing permissible exposure limits for mold levels in indoor environments.<sup>25</sup> Therefore, plaintiffs will find themselves in rather weak positions when they argue for costly and extreme remediation regimes. Given the lack of mold standards, a conservative remediation approach should be pursued. That is not to say that one should choose the absolute cheapest method; rather, one should choose the least expensive method that will actually eradicate the problem. Otherwise, further liability will result if the remediation is not successful.

## **Defending Toxic Mold Claims**

When toxic mold claims are not amenable to settlement and have progressed to the litigation stage, defendants must be prepared to mount an aggressive defense.

### **Expert Witnesses**

Given the complex issues involved in mold claims, expert testimony is necessary for a successful defense. At the earliest possible stage in the litigation, the defense team should determine the types of experts required and make every effort to retain them. Early retention of expert witnesses can prove advantageous because it allows the defense team more time to build the case and become conversant with the issues. More importantly, retaining an expert early means that opposing parties will not be able to use them in their case.


Typically, mold claims often have both construction and medical components. As such, experts from various disciplines may be required. Depending on the severity of the health problems claimed, litigants may need to retain the following as experts: industrial hygienists, allergists, dermatologists, microbiologists, mycologists, gastroenterologists, toxicologists, pulmonary specialists, immunologists, endocrinologists, psychiatrists and psychologists. Since the complexity of the structure involved will determine the array of construction experts required, litigants may need to retain experts in the following areas: engineering, architecture, ventilation, roofing, soils, waterproofing, remediation, plumbing, concrete, and cost estimation and valuation.

### **Risk Transfer**

As early as possible in the litigation process, but preferably even before litigation has become a reality, a party who faces potential mold-related liability should perform a thorough investigation into the possibility of transferring the risk of liability to another party.

The first step in such a process is a determination of all the potentially responsible parties. This requires looking beyond the pleadings to ascertain whether there are any missing parties who may be responsible for the claimed injury. If so, they should be brought into the litigation.

Next, a thorough review of the insurance policies should be performed to determine which policies provide coverage for the claim. Such a review requires examining all of one's policies, even if it



appears at first blush that a policy would not be implicated by the claim. Since mold claims often have both property damage and personal injury components, multiple policies may provide coverage. Careful attention should be paid to the exclusionary language contained in the policies; newer policies often contain mold exclusions. Finally, the review should aim to reveal all policies in which the party is named as an additional insured.

If one or more contracts are involved, the defense should carefully analyze the various contracts to determine if they afford any opportunities for risk transfer. This would include reviewing contract provisions concerning indemnity, insurance requirements, choice of forum, attorney fees and alternative dispute resolution.


### **Statute of Limitations**

Since statutes of limitations vary by jurisdiction, it is necessary to ascertain the applicable statute especially if choice-of-law questions are involved. As shown in the *Miller* case discussed above, the statute of limitations can effectively eliminate mold claims because many mold suits involve personal injury claims that are generally subject to shorter statutes of limitations than contract claims. The shorter statute of limitations for personal injury claims can be particularly beneficial for defendants in mold suits because plaintiffs often become aware of the fact that mold is responsible for their ailments but wait to bring suit until they have received a definitive diagnosis which can often take longer than the one year limitations period.

### **Causation**

The most vulnerable part of a plaintiff's mold claim is the causal link between exposure to mold and the complaint of health problems. As demonstrated in the *Ballard* case discussed above, if the defendant aggressively challenges the causation element of the plaintiff's suit, he can eliminate the personal injury action, which often has the greatest potential for large damage awards.

The strongest weapon that the defendant possesses is the lack of definitive scientific evidence linking mold exposure to serious health conditions. While it is generally accepted in the scientific community that mold causes allergic and respiratory reactions, the scientific community remains divided



as to whether mold exposure can cause the more serious, debilitating conditions that are often claimed in mold suits.

One key study conducted by the Centers for Disease Control (CDC) led the CDC to conclude that a link existed between toxic mold exposure and acute pulmonary hemorrhage or pulmonary hemosiderosis (PH) in infants. However, the results of a subsequent study undertaken by outside experts caused the CDC to disavow its earlier conclusion and adopt the position that no causal link has been proven to exist between toxic mold exposure and PH. According to the CDC, further study of the issue is necessary.<sup>26</sup>

Recently, the American College of Occupational and Environmental Medicine released a position statement holding that “current scientific evidence does not support the proposition that human health has been adversely affected by inhaled mycotoxins in the home, school, or office environment.”<sup>27</sup>

Given the uncertainty of the evidence connecting toxic mold to serious health problems, defendants in mold suits should have a fairly good prospect of excluding the plaintiff’s expert testimony regarding causation.

In general, jurisdictions employ one of two tests to determine the admissibility of scientific evidence: the *Frye*<sup>28</sup> test or *Daubert*<sup>29</sup> test. Under the *Frye* test, expert testimony is admissible only if it is shown that the techniques or methods used are generally accepted within the scientific community. The *Daubert* test is more flexible in that it allows judges to consider the following factors in determining whether to admit expert testimony: 1) whether the theory or technique in question can be tested; 2) whether the theory or technique has been subjected to peer review; 3) the statistical validity of the theory or technique; and 4) general acceptance of the theory or technique in a particular scientific community.

Whether a court employs the *Frye* or *Daubert* test, defendants should be able to successfully exclude expert causation testimony concerning the link between toxic mold and serious health problems because there are no studies that have gained general acceptance in the scientific community that prove such a causal link.

Even if the defense is able to exclude or merely discredit the expert testimony on causation, there is still no guarantee that a jury will find in favor of the defendant. According to one insurance coverage expert, “[I]t doesn’t matter that science is vague about mold. What matters is what juries think. Jury members don’t want mold in their houses and aren’t receptive to the idea that mold might not hurt.”<sup>30</sup>

## **Conclusion**

Unless a causal link between toxic mold exposure and serious health problems is scientifically established, it does not appear that toxic mold will become the next asbestos. That being said, mold litigation still remains a significant issue facing insurers, property owners, developers and contractors. The very large judgments in mold cases have been primarily associated with bad faith claims against insurance companies. The old proverb “an ounce of prevention is worth a pound of cure” sums up nicely the approach to be taken in addressing mold issues. If parties who potentially face mold claims – which could be virtually everyone- would establish protocols to quickly respond, inspect, test and remediate damage from water intrusion and mold, most mold problems would never advance to the litigation stage. Moreover, paying the relatively small cost to address the problem in the early stage is preferable to paying an enormous breach of contract and/or tort judgment later.

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<sup>1</sup> One could argue that the Bible predicted the dangers associated with mold in Leviticus 14:44-45, which states: “If the mildew has spread in the house, it is a distinctive mildew: the house is unclean. It must be torn down – its stones, timbers and all plaster.”

<sup>2</sup> California Health & Safety Code §§ 23100 *et seq.* California has still not issued the mold regulations authorized by the TMAPA.

<sup>3</sup> The federal legislation languished in committee in the 107th Congress.

<sup>4</sup> Dean Calbreath, *The New Asbestos*, San Diego Union-Tribune, Feb. 16, 2003.

<sup>5</sup> Insurance Council of Texas, Press Release, May 22, 2003.

<sup>6</sup> *Ballard v. Fire Insurance Exchange, et al.*, No. 99-05252 (Tex. Dist., Travis Cty., May 30, 2001) rev’d in part, *Allison/Fire Insurance Exchange v. Fire Insurance Exchange*, 98 S.W.3d 227 (Tex. App. 2002).

<sup>7</sup> *Allison/Fire Insurance Exchange, supra*, 98 S.W.3d at 264-65.

<sup>8</sup> Tim Ruel, *Hilton Mold Cost Hits \$20 Million*, Honolulu Star-Bulletin, Oct. 24, 2002; Tim Ruel, *Hilton Begins Kalia Tower Mold Removal*, Honolulu Star-Bulletin, Sept. 12, 2002.

<sup>9</sup> Rita Beamish, *Hilton Suing Contractors Over \$55 Million Cleanup*, The Boston Globe, Apr. 27, 2003.

<sup>10</sup> Jennifer Hieger, *Mold: Builder’s Growing Foe*, The Orange County Register, Apr. 2, 2002.

<sup>11</sup> Jennifer Hieger, *Shea Homeowners Win \$7.8 Million Verdict Over Defects*, The Orange County Register, June 25, 2002.

<sup>12</sup> Jennifer Hieger, *Mold: Builder’s Growing Foe*, The Orange County Register, Apr. 2, 2002.

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- <sup>13</sup> Mike Anton, *UCI to Fix Housing Flaws With \$11 Million Won in Court*, Orange County Register, Nov. 26, 2002.
- <sup>14</sup> Mike McCarthy, "Mold Rush: Rising Mold-Related Costs Bedevil Building Industry," Sacramento Bus. J., July 1, 2002, <[www.bizjournals.com](http://www.bizjournals.com)>.
- <sup>15</sup> MoldUpdate.com, Litigation, Nov. 20, 2002 (citing *Dean H.M. Chenensky v. Glenwood Mgt. Corp., et al.*, No. 120461/2000 (N.Y. Sup. Ct.), <<http://www.moldupdate.com/litigation.htm>>).
- <sup>16</sup> Alexis Muellner, *Legal Fight Over Mold Responsibility Spreads*, S. Florida Bus. J., June 16, 2003, <<http://southflorida.bizjournals.com>>.
- <sup>17</sup> *Andrejevic v. Board of Educ. Of Wheaton-Warrenville School Dist.*, No. 99L-0067, (Cir. Ct., DuPage County, Ill., July 9, 1999).
- <sup>18</sup> *Miller v. Lakeside Village Condominium Ass'n., Inc.*, 1 Cal. App. 4th 1611, 2 Cal. Rptr. 2d 796 (1991).
- <sup>19</sup> *Centex-Rooney Construction Co., Inc. v. Martin County*, 706 So.2d 20 (Fla. App. 1997).
- <sup>20</sup> In *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), the Court established a test for the admissibility of scientific expert testimony. Under this test, expert testimony is only admissible if it is based on a scientific principle or discovery that is sufficiently established as to have gained general acceptance in the particular field in which it belongs.
- <sup>21</sup> *New Haverford Partnership v. Stroot*, 772 A.2d 792 (Del. 2001).
- <sup>22</sup> *Mondelli v. Kendell Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001), modified on denial of rehearing, 262 Neb. 663, 641 N.W.2d 624 (2001).
- <sup>23</sup> *Allison/Fire Insurance Exchange v. Fire Insurance Exchange*, 98 S.W.3d 227 (Tex. App. 2002).
- <sup>24</sup> Thirty-five states have adopted the ISO mold limitation for homeowners coverage: Alabama, Arizona, Colorado, Delaware, District of Columbia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming. *35 States OK ISO Mold Limitations*, Thompson Media, Dec. 30, 2002, <[www.namic.org/topnews/021230\\_1.asp](http://www.namic.org/topnews/021230_1.asp)>.
- <sup>25</sup> Although California became the first state to enact mold legislation with the California Toxic Mold Protection Act, any standards regulating mold levels will not be in place until at least 2004. The EPA has published guidelines but they are not enforceable, as the EPA has not been given the authority to regulate mold.
- <sup>26</sup> D. Chris Hardins, *The Writing Is On the Wall . . . and Inside It! The Recent Explosion Of Toxic Mold Litigation and the Insurance Industry Response*, 2001 Tex. Tech. L. Rev. 1101, 1104-05.
- <sup>27</sup> "Adverse Human Health Effects Associated with Molds in the Indoor Environment," American College of Occupational and Environmental Medicine, Oct. 27, 2002, <[www.acoem.org/guidelines](http://www.acoem.org/guidelines)>.
- <sup>28</sup> Established by *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
- <sup>29</sup> Established by *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- <sup>30</sup> Kelly Johnson, *Mold Litigation Soars*, Sacramento Bus. J., July 5, 2002, <[www.bizjournals.com](http://www.bizjournals.com)>.

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