HOT TOPIC #1:
THE LANDLORD'S RESPONSE TO MOLD

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Mold is everywhere in our environment. This is particularly true in Southeast Texas where there is abundant moisture; from rain, floods, ground water and humidity. Mold exists in the natural environment, even where there is no development. Likewise, mold exists in all buildings, including our homes. Mold and "Sick Building" claims against insurance companies and landlords have become a hot topic in the last 5 years. There is great controversy in both medical and legal circles regarding the actual health risk from mold exposure and the liability for any harm. Millions are being spent to identify and remediate mold in residential and commercial buildings and to reconstruct and reconfigure those buildings.

Fortunately for everyone, recent reports from impartial experts indicate that the medical risk from mold exposure, even to the dreaded "black mold," has been overblown. Consider the following:

- Dr. Gailen D. Marshall, Jr., Director of the Allergy and Clinical Immunology Division at The University of Texas Medical School-Houston states in a Quest Commentary in the Houston Business Journal July 26, 2002 edition:

  "Is mold harmful to people? Can molds cause memory loss, fatigue and brain damages? For most people, the answer is a resounding, and hopefully reassuring, 'No!'".

  "Should you find someone to blame? The mere presence of mold in a home or office does not automatically mean that someone has done something wrong."

  "And, perhaps most importantly of all, if someone comes to you to try and assess blame for the mold 'exposure,' ask yourself whether you want the aggravation, expense and frustration associated with trying to get compensated for the everyday risks associated with living on our planet."
  (a complete copy of the commentary is attached)

- The Texas Medical Association's Council on Scientific Affairs issued a September 2002 report entitled "Black Mold and Human Illness." This report was a response to requests that the TMA update the "state of the medical science" in the area of mold exposure and related health impact. The memo presenting the report for approval by the TMA states:

  "To study this issue, the council conducted a search of medical and scientific literature and contacted Texas and national experts/ specialists. After reviewing the available data, the council has concluded that public concern for adverse health effects from inhalation of *Stachybotrys* spores in water-damaged buildings is generally not supported by published reports in medical literature."
  (a complete copy of the report is attached).

- The Texas Real Estate Center at Texas A&M University (which is state sponsored) issued this month a 95 minute video presentation on mold. In it, Dr. Marshall states that for 99.9% of the population, mold is not a problem and that the $1/10^{th}$% who have adverse reactions are those with immune suppression conditions, such as AIDS or

Cancer patients undergoing chemotherapy, and those with allergies to specific types of mold. Dr. Mani Skaria, a Professor of Plant Pathology at Texas A&M demonstrated how to inspect for mold and mold conducive conditions with a flashlight and a $35 moisture meter, and how to prevent mold. (more information on this video and how to order it is attached)

- The Texas Department of Insurance issued a report entitled "Protecting your Home from Mold" in June 2002. The report states:

  "The vast majority of people are exposed to small amounts of mold or their spores on a daily basis without evident harm."

Unfortunately, mold continues to be viewed as the next "Mass Tort" opportunity for plaintiff personal injury attorneys. See, for example, the elaborate website www.toxic-mold-news.com which is sponsored by Houston Mass Tort attorney Robert L. Steinberg. It seeks clients from all 50 states.

This article addresses how a landlord in a mold contaminated building should respond to the discovery of mold. The viewpoint is that of a commercial real estate attorney who is not an environmental expert, but has been forced to deal with mold contamination from the landlord side. The issues of health impact, insurance coverage and construction/design defects are not addressed, but are the subject of many articles available over the internet and through continuing legal education resources. Resources for the landlord and its counsel to consult in the event of mold contamination are provided in the research materials and attachments portions of this article.

A primary driver of attention to mold was the $32,000,000 judgment rendered in June 2001 by a Travis County, Texas court against a State Farm affiliated insurance company. In December, the Court of Appeals reduced the judgment to $4,000,000. *Allison v. Fire Ins. Exchange*, No. 99-05252, 2002 WL 31833440 (Tex. App. – Austin, 2002) (The parties named in the original suit were Ballard and State Farm . . . on appeal, the case style was Allison v. State Farm).

In *Ballard/Allison*, the Court of Appeals reversed the trial court's finding on the issues of unconscionability and the insurer's breach of its duty of good faith and fair dealing. Because the appeals court found no knowing violations, $17,000,000 of the jury verdict due to punitive and mental anguish damages was eliminated. Due to the significant reduction in the damage award, the appellate court remanded the issue of attorney's fees (originally $9,000,000) for recalculation. The most significant issue is the appellate court's affirmation of the exclusion of evidence of personal injuries alleged by Ms. Ballard's husband due to exposure to stachybotrys (i.e. "black mold"), which was alleged to have caused brain damage. The appellate court found that the testimony of two experts (acknowledged to be leading experts in the area of health effects due to mold mycotoxins) was unreliable based on the factors in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, a 1997 Texas Supreme Court decision dealing with expert witness testimony. *Ballard/Allison* is expected to be appealed to the Texas Supreme Court.

I. THE SHORT ANSWER

For those not willing to wait until the end of the presentation, the recommended response by a landlord to the discovery of mold is the following:

1. TAKE IT SERIOUSLY (INVESTIGATE).
2. AGREE TO FIX THE PROBLEM.
3. IMPLEMENT THE FIX NOW.
4. CONSULT WITH EXPERTS.
5. DECIDE WHO SHOULD PAY.

The bottom line with a mold problem in today's uncertain medical and legal environment is that there continues to be a strong perception that mold is (or at least could be) a serious health risk, particularly to the very young, the very old and those with sensitive respiratory systems. The issues are heightened for residential structures, schools and medical facilities.

In the author's opinion, promptly addressing and solving the problem in a caring, conscientious manner is the best policy.

II. WHAT IS MOLD?

Mold is a type of fungus. Although all molds are fungi, not all fungi are molds (e.g., mushrooms). Mildew is another name for mold. For the purpose of this discussion, mold, mildew and fungus are treated the same. Mold is everywhere in our environment, particularly in Southeast Texas, but it is when mold concentration exceeds that in the natural environment that potential problems arise.

Sometimes mold is described as "good" or "bad". Other times you hear about "toxic" mold. In reviewing many recent publications, particularly legal seminar materials about mold, it is clear that perceptions of mold, and the titles used, relate to the side at the plaintiff/defendant table of the author. Defense attorneys have stated "there is no such thing as toxic mold" while plaintiff counsel have stated "the truth is that there is no good mold." As there is no established safe exposure limits for mold, we currently exist in a huge grey area, waiting for scientific and medical guidance. However, it appears that the weight of impartial authority is moving toward the view that mold is a health problem for only a small percentage of the population. Unfortunately, the consequences of mold exposure for that small group is still unclear. Therefore, until more medical studies are concluded, the specter of serious medical risk for some people due to mold exposure continues. With that risk, claims will continue against landlords when mold appears in the leased premises.

Reportedly, there are over 70,000 types of mold and related fungi, but only around 100 pose a purported risk to humans. Mold requires only two components to grow: (1) moisture and (2) food. Mold may take its moisture from humidity in the air, particularly where the humidity exceeds 60%. Moisture enters buildings from a number of sources, including roof leaks, plumbing leaks, condensation, sprinkler systems spraying directly on porous building materials (e.g., brick), and improperly installed or maintained drainage systems (e.g., flashing and weep holes). An improperly designed, maintained or operated HVAC system may allow humidity to exceed 60% (a recommended maximum- although some sources recommend 50%), resulting in damp surfaces. Mold will consume many types of construction materials such as sheetrock, carpet, fabric, wallpaper, wood, upholstery, and ceiling tiles. Any cellulosed based building materials are particularly conducive to mold growth.

Molds like warm temperatures to grow, generally being happy somewhere between 60º and 85º, but growing reasonably well between 40º and 100º. With the right temperature, food and moisture (and some oxygen), mold may grow quickly. Generally, mold growth begins within 24 to 48 hours after exposure to favorable conditions, although it may begin in as short a period as 12 hours.

Since molds are everywhere, and as simple organisms need little to thrive, it is agreed that <u>the primary defense to mold is the elimination of moisture</u>.

Some forms of mold produce mycotoxins. Mycotoxins are compounds containing carbon, hydrogen and oxygen that are toxic to other organisms. These mycotoxins are products of the metabolism of various forms of mold. Examples include aspergillus, penicillium, cladosporiun and stachybotrys (with stachybotrys being the feared "black mold").

Health effects of mold exposure relate to the manner of contamination (inhalation, absorption through skin, ingestion or injection [i.e., through a cut]), the amount of mold, length of exposure, the mold involved, the age of the person and their health. Apparently, many molds may cause discomfort to the respiratory system and flu-like type reactions. Plaintiff's attorneys assert that exposure to mycotoxins can be a severe health risk, especially to children, old people and those with weakened immunity systems. One plaintiff's law firm seeking mold referrals has produced a brochure listing 34 illnesses linked to mold from watering eyes to memory loss.

III. THE LANDLORD'S DILEMMA.

Consider what you, as landlord's counsel, would recommend in the following fact situation:

BACKGROUND: You represent the landlord of a professional building which has been net leased to a pediatric medical practice. Landlord is responsible only for repairs and maintenance of the roof and building exterior, but the tenant is responsible for all other repairs. Tenant is obligated to notify landlord of problems with the building. Several roof leaks have been reported and repaired, most under the roofer's warranty. These leaks are suspected by the landlord to be the result of either poor roof design or poor initial construction. No mold was reported relating to the old roof leaks. The building survived a hurricane without damage and there were no claims made by the tenant regarding leaks at the time of the hurricane.

THE MOLD: A few months after the hurricane, tenant discovered mold, LOTS OF IT. Landlord's asset manager takes the position that the building is net leased, therefore any problems are the tenant's to address, and since no roof leaks have been asserted, the landlord has no responsibility.

THE FIRST ATTEMPT TO FIX: Unhappy, tenant initially accepted landlord's position and undertook remediation of the mold, at its expense. Due to the sensitive nature of tenant's business, it took an extremely conservative approach to remediation, removing the bottom 4 feet of sheetrock and removing, rather than cleaning any potentially mold contaminated building materials. In order to facilitate the remediation, tenant moved out of half of its space and had that space sealed off while remediation proceeded. Tenant stopped its remediation when it discovered new leaks during rainstorms, which appeared to come through the exterior building walls and windows.

THE SECOND ATTEMPT TO FIX: Tenant's demands escalated and the asset manager met with the tenant. Tenant asserted that water was penetrating the exterior of the building (a landlord responsibility), the window systems were faulty allowing additional window penetration (another landlord responsibility), and the landscaping installed by the landlord blocked the building's weep holes, thus clogging the building's internal drainage system (potentially a landlord responsibility). Landlord investigated and determined it would be prudent to take the following actions:

1. Lower all landscaping so weep holes are not blocked;
2. Modify all sprinklers so they will not regularly spray the brick façade of the building (a porous material), thus preventing potential water intrusion/condensation inside the brick;
3. Treating the brick exterior of the building with a waterproofing agent;
4. Removing the lowest 3 courses of brick around the entire building to clean out, repair and upgrade internal flashing and drainage system which allows water penetrating the exterior wall to be drained through the weep hole system, which system had become damaged and clogged during the construction process by excessive mortar and rough treatment by brick masons.

MORE MOLD AND LEAKS: At this point, tenant discovered mold in the portion of the premises it continued to occupy, including small amounts of stachybotrys. Additionally, small water leaks continued during rainstorms.

IT'S A "BAD BUILDING": Tenant announces to your client's asset manager that this is a "bad building," that it cannot be remediated since water intrusion continues (and has been a recurring problem), and that the water intrusion is the landlord's responsibility. Tenant announces it is vacating the building as soon as temporary buildings can be delivered to an adjacent, vacant site which it intends to lease for the temporary relocation of its pediatric medical practice.

YOU ARE CALLED: Your client's president calls you to attend a critical meeting with the tenant to try to salvage the situation and convince the tenant to stay and give the landlord another chance.

HOW SHOULD LANDLORD RESPOND?

IV. LANDLORD'S RESPONSE.

Assuming the very difficult fact situation set forth above (with minor alteration, a true story), how should a landlord respond? This factual situation is used since it outlines a rather extreme circumstance, but a landlord's response to any tenant can be drawn from the lessons learned.

1. Take the issues seriously. There is nothing worse than a tenant thinking that a landlord is taking a cavalier or uncaring attitude regarding its mold exposure. Mold is an issue which can provoke emotional responses, as there is currently no clear scientific or medical standard for exposure, or resulting harm. The last thing a landlord needs is a tenant concerned about the health of its employees and customers feeling that it is not receiving sincere attention from its landlord. If not already engaged, the tenant will surely engage legal counsel to investigate its alternatives and, potentially, to punish the landlord for its cavalier attitude.

The first step in taking a mold complaint seriously is to meet with the tenant and gather as much factual information as possible. An inspection of the premises is necessary and the retention of experts (discussed below) should be considered. When the initial claim is made, the most critical issue is to show the tenant that the landlord is taking a serious consideration of the issue.

Although the Landlord should never dismiss or belittle the tenant's symptoms or concerns, referral to independent information about mold (such as referenced at the beginning of this paper and attached), may be helpful. Commenting about the reports distributed to the tenant should be kept to a minimum, as it may look like the Landlord is promoting its agenda. Instead, let the independent sources speak for themselves…it is good news and should provide comfort to the tenant.

With that start, the tenant should give the landlord a reasonable time to assess the situation and take action.

2. Fix the Problem. Once the landlord determines there is a mold problem, except in unusual circumstances (like some triple net leases, a bondable lease or ground lease) or a flooding event (if the landlord is not responsible for the repair), the landlord should promptly agree to identify and fix the problem causing the mold. In almost every circumstance, this is water intrusion or excessive humidity. STOP THE WATER IMMEDIATELY. In most every lease, a landlord is responsible for the roof and exterior weather tightness. Roof leaks are notoriously difficult to find and fix, particularly on flat roofs, but also on metal roofs and older roofs. Even where no roof leak has been reported, there may be water penetration. Mold cannot be stopped unless the moisture is stopped. Once the moisture is stopped, the remediation and reconstruction can commence.

Landlord should be skeptical of easy fixes of moisture intrusion. Leaks are difficult to locate. Use well credentialed contractors so if all the leaks aren't caught the first time (as often occurs), landlord won't look like they are being cheap or not putting forth their best effort. Remember, to the tenant, this is a health risk, not just an inconvenience. Be sure to survey the premises for all possible moisture sources and address them.

Unless there are unusual circumstances, the landlord should handle the remediation and reconstruction. The current trend with respect to remediation is that a majority of personal property is capable of being cleaned rather than having to be replaced. Hard surfaces are generally cleaned, however, porous materials, particularly sheet rock and carpet, must be removed and replaced. Remediation can be done economically or expensively, to address the same situation. A tenant may overreact and have too much remediation done. Also, a tenant is less knowledgeable in construction matters and may be subject of overreaching by a contractor, particularly a "mold specialist". There are no qualifications or licensing for mold testing or remediation. Like asbestos, many contractors see mold as a golden opportunity to create jobs. If a landlord forces the tenant to handle the remediation and reconstruction with the idea that the landlord can always reimburse the tenant if it turns out to be the landlord's

responsibility, the ultimate cost may skyrocket. Additionally, it may be prudent for good tenant relations to "bite the bullet" and pay for the remediation. Finally, by accepting the responsibility for remediation and reconstruction, the landlord probably eliminates much time, effort and expense playing the "blame game".

3. Respond Promptly. The landlord should not only respond promptly to the tenant's mold complaint, but should promptly repair all leaks and have the reconstruction completed as soon as reasonably possible. Doing so is good tenant relations, but also mitigates damages which could be asserted by a tenant for loss of business.

Most experts now say that testing is not necessary to determine the type of mold, except in unusual situations. JUST CLEANUP THE MOLD ASAP.

A prompt response is necessary in dealing with mold, since it grows rapidly, thus continually increasing the cost of remediation and reconstruction.

4. Consult With Experts. The landlord should promptly consult with knowledgeable experienced mold professionals. A list of potential experts that may be necessary in an extensive mold case are as follows:

- roofers/plumbers/contractors – investigation of leaks
- HVAC engineer/contractor – investigation of HVAC system and humidity;
- **certified industrial hygienist/indoor environmental consultant** – existence of mold, causation, remediation protocol
- **environmental attorney** – legal issues
- certified lab – test samples for mold and type of mold
- architect/engineer – building design deficiencies and corrective procedures
- general contractor – type, scope and cost of remediation and repair
- toxicologist/microbiologist – extreme cases or medically sensitive tenants

Because an appropriate final response to mold requires prompt response and action, it is highly recommended that landlords and a commercial real estate attorney advising landlords establish relationships with a knowledgeable environmental attorney and an experienced competent environmental consulting firm knowledgeable in dealing with mold so that they can be immediately available should mold be discovered. The environmental attorney and consultant can be relied upon to assist in locating other competent professionals, particularly remediation companies.

Increasingly, experts are advising that where small concentrations of mold occur, testing is not necessary, the mold should simply be remediated and any damage repaired. The Texas Apartment Association, citing *New York City Dept. of Health Standards*, does not recommend testing mold unless:

(i) there is a musty odor;
(ii) there is visible evidence of mold growth in the air conditioning equipment or duct work; or
(iii) an occupant has been diagnosed by physician as having a serious disease or symptom that is likely caused by mold exposure.

Mold: Some Practical Information for Rental Housing Owners, distributed by Texas Apartment Association, Inc., January 2002, prepared by Larry Niemann, TAA legal counsel.

Some experts recommend against sampling, if possible, unless knowing the species of mold present will make a difference in remediation. If mold is obviously present, and remediation is planned, the type of mold may be irrelevant, as the methodology for remediation may not be different.

Sometimes, it may be appropriate for the Landlord and the environmental consultants to meet with the Tenant (and any consultants it may have). This is an opportunity for the Landlord's consultants to show they are experienced and knowledgeable, answer questions about mold, dispel any untruths about mold, and demonstrate that the actions being taken by Landlord are reasonable and consistent with best practices.

5. Decide Who Should Pay. The last issue for the landlord to address is who will pay for the cost of

addressing the mold problem. This is counter intuitive for most landlords who typically have a "bottom line" agenda. However, the nature of mold and the hysteria surrounding it, dictates that the prudent landlord, in most cases, should expend the funds to cure the problem and then investigate possible reimbursement.

Clearly, the first potentially liable party is the landlord's insurance carrier. However, current insurance policies are reducing, if not eliminating, mold exposure. Nonetheless, the landlord's insurance carrier should be promptly notified of the mold claim to avoid jeopardizing potential coverage. The question of whether the landlord has insurance coverage is beyond the scope of this paper. See the materials on insurance by Fred Cook under Tab 24.

The second potential contributing party is the tenant. Landlord's counsel should carefully review the lease to see if any provisions may be relied upon to offset the cost of remediation. Perhaps the tenant has failed to timely notify landlord of the water intrusion, thereby being (at least partially) responsible for damage. The particular factual circumstances may lead to a determination that the water intrusion was due to matters either caused by the tenant (e.g., plumbing leaks not repaired by the tenant where plumbing is tenant's responsibility), or where the exterior building system allowing water intrusion was tenant's responsibility (e.g., window or door systems in some net leases). Generally, water tightness of the building will be a landlord responsibility. Since water is necessary to cause mold, the tenant is unlikely to be responsible for the source of the water intrusion. In some circumstances, the operation and maintenance of the HVAC systems may be a direct or contributing factor to mold. There are many circumstances where the tenant has full responsibility for the HVAC system's maintenance and operation.

The third potential candidate for responsibility is the contractor who originally constructed the building or who performed repairs to the roof, plumbing or HVAC system (whichever was determined to be the source of water/moisture intrusion).

The final likely candidates for responsibility are the architects or engineers who designed the building or any systems which were the source of moisture or water leading to mold. There have been a surprising number of examples of buildings improperly designed which had mold problems either prior to occupancy or shortly thereafter, including the Caribbean Beach Resort at Walt Disney World, The Omni Hotel in Charleston, South Carolina, the Hale Coa Hotel in Honolulu, Hawaii and the Kalia Tower at Hilton Hawaiian Village in Hawaii. Apparently, the design industry is just learning how to properly deal with moisture levels in new buildings. Design changes made to increase energy efficiency in buildings has led to using more non-permeable materials (such as non-pervious building wrap like tyvec). This, together with more complex HVAC systems, sometimes leads to moisture retention problems, which leads to mold contamination.

A major problem in mold is causation. There may be multiple factors contributing to the existence of mold and an inability to clearly allocate responsibility. This fact makes it difficult for the landlord to obtain reimbursement from any one source, as there are usually others to be blamed. Therefore, the "blame game" may not be worth the time and expense. Other than insurance, except in unusual circumstances, the landlord is likely to bear the cost of mold problems.

HOW DID THE LANDLORD IN OUR FACT SITUATION PERFORM?

- TAKING THE ISSUE SERIOUSLY:
  Initially, the Landlord felt the Tenant over-reacted, and tried to make this a Tenant issue. Although this initially worked, it came back to haunt Landlord when Tenant turned on Landlord and asserted Landlord was a "bad" landlord and the building was a "bad" building.

  The personal involvement of the President of Landlord saved the day through personal meetings with the senior officers of Tenant and a personal commitment to involving himself in the issue.

- AGREE TO FIX THE PROBLEM
  Initially, Landlord flunks by trying to sluff off the problem on Tenant. In this case the

building was net leased and Landlord tried to argue the issues were for Tenant to handle. Ultimately, Tenant felt Landlord was overreaching. When Landlord's President became involved, he immediately committed to FIX THE PROBLEM. This commitment saved the day.

- IMPLEMENT THE FIX NOW
  Landlord passes this test, at least as far as it went. Initially, Landlord only investigated exterior water penetration, but took prompt action, even overly conservative action, to insure there would be no reasonable likelihood of penetration though the exterior of the building. Landlord implemented a "100% solution." Landlord sincerely believed there were no roof leaks. Unfortunately, wall penetration was not the only water source and when leaking continued after the exterior wall was repaired, Tenant reacted negatively, despite the partial fix implemented. Tenant threatened to move-out (and dared Landlord to stop them or claim that Tenant was not justified). When Landlord's President committed to the fix, he asked who Tenant would recommend for roof leaks and used that contractor, giving Tenant needed assurance of the quality of the repair. Extra points for this move. The roof contractor recommended by Tenant issued 2 reports; the first that the roof was repairable (to dispel the "bad building" concern) and outlining what should be done, then a report that the roof was fixed and has a reasonable remaining life, which report was important to Tenant's peace of mind and its agreement to retake possession. Landlord's environmental consultant met with Tenant to educate it on mold issues generally, and specifically, the results of tests on the building, as well as the procedure to remediate. After the remediation was complete, the environmental consultant retained by Landlord issued a report that the remediation was complete and the air quality acceptable for Tenant to retake possession. Reconstruction was no different from any other tenant buildout, however, vinyl wallpaper was removed form all exterior walls and replaced by a pervious wall covering.

- CONSULT WITH EXPERTS
  Landlord passes the test, except that environmental experts were not brought in until Landlord's President became involved. Tony Ekonomou of the Houston environmental law firm Campbell, George & Strong provided environmental law expertise and Jan Simon Clark, CIH, CSP, a certified industrial hygienist with ERM (Environmental Resources Management), a Houston environmental firm, provided calming, professional and practical advice regarding mold, its cause and its remediation.

- DECIDE WHO SHOULD PAY
  Landlord flunks due to its initial focus on the "net" aspect of the lease and the fact that Tenant had not complained about roof leaks specifically in some time. Landlord initially felt that Tenant was trying to put a Tenant cost on Landlord. This worked initially, but ultimately cost Landlord. Landlord investigated insurance coverage, but had problems tying the mold to a particular insured event (i.e., a specific storm, rain, etc.). Claims were submitted to insurance carriers for both Landlord and Tenant, but denied.

The Landlord was unprepared for mold - this made it slow on the uptake. Additionally, Landlord's focus on cost containment (i.e., making Tenant pay) ended up costing much more in the end. Once Landlord acknowledged the seriousness of the problem, Landlord scored well on accepting responsibility to fix the problem, soothing Tenant's ruffled feathers, acting promptly and, ultimately, fixing the problem to Tenant's satisfaction. In the end, Landlord paid for the fix, but more than if the matter had been managed effectively by Landlord from reporting.

V. PREVENTION.

Experts suggest the following preventative measures to be taken by landlords:

1. **INSPECTION:** Periodic building inspections to investigate water/moisture sources: roofs, HVAC, plumbing, condensation sources, ground water intrusion, landscaping blocking weep holes, etc.;
2. **MAINTENANCE:** Routine HVAC maintenance: filters, drip pans, humidity control, air flow adjustments, cleaning, etc.;
3. **DRAINAGE:** Keep foundations dry with proper drainage and sloping;
4. **BUILDING MATERIALS:** No carpeting in bathrooms and kitchens (absorbs and holds moisture) and no vinyl or other impervious wall coverings on internal surface of exterior walls (keeps moisture trapped in walls);
5. **LOWER HUMIDITY:** Keep indoor humidity under 50-60% (Experts vary on the top level which is acceptable);
6. **EDUCATION:** Educate landlord personnel to look for indications of mold (any musty odor should be investigated for potential subsurface mold contamination), evidence of leakage and evidence of consistently damp surfaces. Provide information to tenants and request prompt reporting;
7. **IDENTIFY YOUR EXPERTS:** Have qualified mold experts identified so they may be called upon when necessary;
8. **FIX IT QUICKLY:** When mold, leaks or HVAC problems are discovered, insure they are promptly and properly repaired;
9. **MONITOR TENANT ALTERATIONS:** When a tenant requests to make modifications to a premises, insure that the modifications properly address water and moisture issues, particularly as they affect the HVAC system, the roofing system (e.g., roof penetrations), and exterior wall systems;
10. **BE AWARE OF HIGH RISK TENANTS:** The very young, very old, AIDS patients, cancer patients and individuals with respiratory problems are the "high risk" individuals for mold exposure. Consider carefully renewing a "high risk" tenant, if you think mold might be an issue in the leased premises.

VI. THE DON'T LIST.

Landlord should not do the following when confronted with a mold complaint:

1. **DELAY:** Delay and hope it will go away.
2. **"NOT MY PROBLEM":** Tell the tenant "It's not my problem, it's your problem" without having FULLY assessed the situation.
3. **OVERLAWYER:** Argue legalistic or extreme interpretations of lease provisions.
4. **CONDESCENDING:** Dismiss the tenant's symptoms/ fears or downplay the medical risk of mold exposure.
5. **TOUGH:** Tell the tenant "Sue me" - They will.
6. **CHEAP:** Don't be pennywise and poundfoolish. A little money well spent UP-FRONT may solve what would otherwise be a very expensive and vexing problem. "Pay me now or pay me later".

VII. LEASE PROVISIONS.

The Texas Apartment Association has promulgated a "Mold Information and Prevention Addendum" to recommend for use in all residential leases. This addendum is primarily informational, but it requires the tenant to promptly report leaks, moisture accumulation, HVAC problems, and visible mold. Some commercial landlords are including specific mold provisions in their leases. An example from a lease negotiated by the author for a tenant client is attached.

VIII. RESEARCH MATERIALS.

The following are materials which may be helpful in addressing a mold problem:

1. Ekonomou "Mold –What Is It? Remediation and Litigation", 18th Annual Real Estate Law Conference, So. Tx. College of Law, May 2000 (attached). Mr. Ekonomou was an invaluable resource to the author in addressing the actual landlord/tenant dispute which was the basis for the fact situation outlined in this presentation.
2. "Solving Water Intrusion and Mold Problems in Texas", CLE seminar by Lorman Education Services, December 2002.
3. Mold Litigation Course, 2003 – CLE Seminar presented by Texas Bar CLE, February 2003 (and earlier seminars in this series).
4. Niemann, "Mold: Some Practical Information for Rental Housing Owners", article distributed by Texas Apartment Association, Inc., January 2002.
5. Bradley, "Mold, Mildew, Millions: Mold Claims Under Commercial Policies", 6th Annual Insurance Law Institute, University of Texas School at Law, September 2001.
6. Breissi, "Mold, Mildew & Millions: Mold and Sick Building Renovation, Fundamentals and Insurance Coverage and Losses", 6th Annual Insurance Law Institute, University of Texas School at Law, September 2001.
7. Chriss, "Coverage for Mold Damage Under Standard Homeowners' Policies", 6th Annual Insurance Law Institute, University of Texas School at Law, September 2001.
8. New York City Department of Health, "Guidelines on Assessment and Remediation of Fungi in Indoor Environments (2000)", www.ci.nyc.us/html/doh/epi/moldrptl.html (this is a widely cited report).
9. "Questions and Answers on Stachybotrys, Chartarun and Other Molds", National Center for Environmental Health, www.cdc.gov/nceh/asthma/factsheet/mold/default.html.

IX. ATTACHMENTS.

Attachment 1: "The mold scare: Medical facts versus dubious myths"; Gailen D. Marshall, Jr., Guest Commentary, Houston Business Journal – July 29, 2002

Attachment 2: "Black Mold and Human Illness"; O. Edwin McClusky, MD, Texas Medical Association's Council on Scientific Affairs, September 2002

Attachment 3: Real Estate Center of Texas A&M University information regarding video and how to order

Attachment 4: Mold Lease Provision for Retail Lease

Attachment 5: "Mold – What is it? Remediation and Litigation", Tony Ekonomou, Campbell, George & Strong, 18th Annual Real Estate Law Conference, So. Tx. College of Law, May, 2002

Attachment 6: Information on Texas Bar CLE 2nd Annual Advanced Mold Litigation Course

Attachment 7: Information on ASPE seminar entitled "A Practical Strategy to Prevent and Remedy Mold Infestation Claims"

ATTACHMENT 1

The mold scare: Medical facts versus dubious myths - 2002-07-29 - Houston Business Journal Houston

Business Journal - July 29, 2002

From the July 26, 2002 print edition Guest Commentary

The mold scare: Medical facts versus dubious myths

Gailen D. Marshall Jr

What do the following things have in common: Wine, penicillin, cheese, beer and mushrooms?

Can't guess? Here's a big hint: It's also the latest dubious health scare, costing Texas consumers millions of dollars in higher insurance premiums and needless home "health" testing, and it's being used as a get-rich-quick scheme for some personal injury lawyers.

Ah, now you know -- it's called mold.

So how did this very common type of fungus, present in all sorts of good things we use on a daily basis and ever-present in our environment, grow into the major consumer crises that it has become today? The answer may surprise you.

As a board certified allergist-immunologist, I have taught, done research and seen patients with a variety of immune-based medical conditions for the past 14 years.

In the last several years, my clinical office has become increasingly populated by very frightened, sometimes angry individuals. They believe, or have been told, that they have "toxic mold disease." But do they really?

Let's examine some facts about mold. There are many different kinds -- at least 10,000 common types. Mold is everywhere, because it simply requires a source of water, sugar and oxygen along with a friendly surface to thrive and grow.

In places where lots of water is actually in the air itself (i.e. high-humidity environments like Texas), mold easily finds comfortable growth sites and is especially prosperous.

Molds are not new -- they have always been around us and always will be. It is not possible to "get rid of mold," nor would we even want to.

Is mold harmful to people? Can molds cause memory loss, fatigue, or brain damage? For most people, the answer is a resounding, and hopefully reassuring, "No!"

The world is filled with mold spores -- we breath it in our air, we eat it in our foods, and we drink it in our water every day with no ill effects. Some people do develop allergies and experience symptoms of asthma or hay fever when exposed to certain mold spores. There are also a few mold-related diseases that can be serious, but these are extremely rare.

But what about the "experts" who claim to diagnose all sorts of mold related illnesses such as memory loss or learning disabilities? There is absolutely no proof to support these claims.

And what about the dreaded "toxic mold?" The term itself seems to have been manufactured to arouse panic and fear among otherwise normal people. Some molds do produce "mycotoxins," but these are mostly of concern in the agriculture and food industries.

Still, even though health risks may be vastly exaggerated, most people would rather not have excess, visible mold in their homes. If there is a lot of mold, it looks bad and has an unpleasant odor.

Mold removal, however, is relatively simple to accomplish. If you have mold, you have excess moisture and this source needs to be eliminated, whether it is a roof leak, a shower leak, condensation, or from some other source. Often, the mold can simply be cleaned off, and will not return if the moisture is removed.

Should you pay for a "mold test?" No. The nation's most reputable experts, including the U.S. Centers for Disease Control and the reigning mold expert from Harvard's School of Public Health, do not support most home mold testing.

Remember, in a place with high humidity like the entire Gulf Coast, you will find at least some mold in virtually 100 percent of homes more than a couple of years old. If you see or smell mold in your home, clean it up and stop the source of water. It's that simple.

Should you find someone to blame? The mere presence of mold in a home or office does not automatically mean that someone has done something wrong.

Unfortunately, our society today seems to be about everyone suing everyone else for things that used to be considered part of life.

Should you panic? To me, this is the most important issue of all. You need to react to mold based on the facts, not on the hysteria and hype you may have recently heard or read.

The mold scare is already having a demonstrable and troubling effect on the Texas economy and on individual lives. Texas insurance rates are already more than double the national average and are continuing to rise based in large part on mold-related claims.

Many people can no longer afford homeowner's insurance, assuming they can even get coverage in the first place. Home sales are not going through because of mold concerns.

At the same time, home sellers, lenders, Realtors, title companies and a host of other industries are being damaged, which will begin to show up as real job losses for real Texans.

Moreover, individuals and families are being moved out of their homes by testers and remediators and having their lives disrupted -- most for no legitimate reason whatsoever.

If you think the major concern is really about your health, ask yourself this question: Do the apartments and hotels into which these people are being relocated have higher or lower mold content than the homes from which they have been removed for weeks or months while expensive renovations are completed?

Or how about the outside air that we are exposed to every day -- are the same molds inside the home found in the air outside?

The bottom line is this: If you are ill, see a physician. If he or she thinks you may have mold allergies, ask to be tested by a reputable specialist who has the credentials to provide calm, reliable medical information -- then follow your doctor's direction for treatment.

Check the physician's credentials to determine their expertise claim in the diagnosis and management of mold-related allergic diseases.

Don't be afraid to discuss with your doctor why he or she thinks mold is causing your problems. If you see or smell mold in your home, simply clean it up and plug the water leak. If you need an expert to help, find a reputable person or company trained in moisture issue management to find and fix the water source.

And, perhaps most importantly of all, if someone comes to you to try and assess blame for the mold "exposure," ask yourself whether you want the aggravation, expense and frustration associated with trying to get compensated for the everyday risks associated with living on our planet.

Is the stress, anxiety and guilty conscience really worth it? You be the judge.

Gailen D. Marshall Jr. is director of the Allergy & Clinical Immunology Division at The University of Texas Medical School-Houston.

ATTACHMENT 2

REPORT OF COUNCIL ON SCIENTIFIC AFFAIRS

CSA Report 1-I-02

Subject: Black Mold and Human Illness

Presented by: O. Edwin McClusky, MD, Chair

Over the past several years, increasing public attention has focused on a potential or suspected role in human illness from the mold *Stachybotrys chartarum*, commonly known as "black mold," particularly in association with water-damaged buildings. In Texas, this attention has been manifest not in scientific or medical publications, but rather in the lay press and in an increasing number of insurance claims filed for mold remediation of homes and workplaces. Texas Medical Association's Council on Scientific Affairs has been asked to update the "state of the medical science" in this important area.

To study this issue, the council conducted a search of medical and scientific literature and contacted Texas and national experts/specialists. After reviewing available data, the council has concluded that public concern for adverse health effects from inhalation of *Stachybotrys* spores in water-damaged buildings is generally not supported by published reports in medical literature.

Recommendation: Approval of the attached policy paper on black mold and human illness.

Related 2002-03 Strategic Priority: Expend political capital to promote and strengthen Texas' public health infrastructure.

HOUSE ACTION: Approved conclusions and recommendations as policy; filed remainder of report.

BLACK MOLD AND HUMAN ILLNESS
SEPTEMBER 2002

INTERACTIONS OF HUMANS WITH AGENTS IN THEIR ENVIRONMENT

Living organisms capable of causing infection or other types of illnesses are everywhere in our environment. In addition to molds and other fungi, these include bacteria, viruses, protozoa, and helminthes. Infections are by far the most common forms of human illness produced by exposure to these organisms. These are generally combated or prevented by our natural host defenses, which include protein antibodies and cell-mediated immunity. In recent times, anti-microbial drugs have substantially augmented these natural defenses against environmental agents.

The human immune and inflammatory systems protect us from a multitude of these and other agents in our environment, usually by one or more of the following four general types of immune reactions: [1]

1. Type I reactions are mediated by IgE antibodies and are the cause of most "allergic" reactions. Approximately 8 to10 percent of the population have adverse symptoms due to Type I reactions to pollens, dust, mold, animal dander, or food.
2. Type II (cytotoxic) reactions target molecules on the surface of cells and initiate processes leading to the death of that specific cell (hemolytic anemia).
3. Type III reactions are "immune-complex" reactions in which a protective antibody attaches to an antigen and initiates an inflammatory reaction (glomerulonephritis).
4. Type IV reactions (cell-mediated immunity) is important in immunity to foreign tissues (organ transplantation), certain infectious agents (tuberculosis), chemicals (contact dermatitis), and in cancer biology.

Once specificity is provided by the immune system, effector systems are responsible for neutralization or eradication of the environmental agent. This is accomplished by inflammatory cells, cytokines, and other chemical mediators.

Still, a minority of persons develop an illness or other adverse manifestation from contact with environmental agents. These adverse effects might take the form of allergies or other immune reactions, or autoimmunity. Autoimmunity, for which there are clear genetic and other factors, is generally thought to be caused by failure of the immune system to recognize parts of the body as "self."

POTENTIAL HEALTH ISSUES RELATED TO MOLD EXPOSURE

In theory, there are five ways in which molds could produce or aggravate human illness or otherwise contribute to symptoms:

1. Type I immune reactions, which can lead to allergic rhinitis (nasal discharge, sneezing, conjunctivitis) or asthma (bronchospasm, wheezing, mucous secretion and plugging).
2. Irritation to mucous membranes through mold production of volatile organic compounds (VOCs) in a manner analogous to non-mold irritants, e.g., tobacco smoke, gas/kerosene stove emissions, ozone.
3. Type III immune reaction, examples including hypersensitivity pneumonitis, which includes "farmer's lung" (lung tissue inflammation occurring from exposure of an inhaled antigen), and allergic aspergillosis (a rare lung tissue inflammation involving both airways and tissues in the lungs).[3]
4. Toxic reaction from mold products (mycotoxins).
5. Toxic reaction from microbial byproducts (endotoxins).[4]

Infectious health issues related to mold exposure can occur in both normal and immuno-compromised individuals. Normal persons may experience the overgrowth of candida normally found in vaginal and oral cavities after treatment with antimicrobial drugs that alter the dominant normal microbial flora. Another example is chronic dermatophyte infection of skin (athlete's foot) or nails. Immunocompromised individuals often have true infections with tissue damage when microbes that may be present in the body or environment overgrow and invade body tissues. Examples include re-activation of tuberculosis, histoplasmosis, coccidiomycosis, and invasive candidiasis.

The prior reported occasional syndromes associated with residential fungal exposure primarily have been hypersensitivity pneumonitis.[5-10] Human colonization by other environmental fungi also has been reported to cause chronic allergic sinusitis.[11] The cases of hypersensitivity pneumonia reports are case reports; only one has described *Stachybotrys* as the causal agent.[5]

Ingestion of mycotoxins in foods has been of concern for some time, and there are widespread efforts to protect our food supplies from such agents. Inhalation exposure outside of agricultural or industrial settings has been thought to be insufficient to produce much morbidity.[12]

Several molds commonly found in homes, including *Stachybotrys*, are capable of producing mycotoxins. In vitro (laboratory only), some mycotoxins are capable of blunting the phagocytic removal of particulate matter. Our knowledge about mycotoxins is very incomplete regarding dose-health effects relationships, how to measure them in environmental samples, or to detect them in patient samples.[12]

STACHYBOTRYS LITERATURE SUMMARY

A summary of available literature on *Stachybotrys* reveals that it is commonly found in water-damaged buildings and dwellings, as are many other molds. However, there is no convincing evidence that *Stachybotrys* is a significant or even proven pathogenic antigen in either traditional allergic reactions (Type I hypersensitivity) or the rare forms of hypersensitivity pneumonitis (Type III hypersensitivity). The only report in the peer-reviewed medical literature suggesting a potentially significant causative role for *Stachybotrys* in human illness is a report of pulmonary hemorrhage in infants thought to be (but not proven to be) caused by *Stachybotrys* mycotoxin. Re-examination of this presumed outbreak has identified shortcomings in the implementation and reporting of the investigation. These reviews have "led CDC to conclude that a possible association between acute pulmonary hemorrhage/hemosiderosis in infants and exposure to molds, specifically *Stachybotrys chartarum*, commonly referred to by its synonym *Stachybotrys atra*, was not proven."[13] The original report was based on suggestive epidemiological evidence rather than proof.[14]

The "state of the science" is perhaps best expressed by Dearborn in his paper "Health Effects of Molds and Mycotoxins" at the 55th Annual Meeting of the American Academy of Allergy and Immunology, March 2002.[12]

> There are major limitations to our better understanding of the potential health impact of chronic toxigenic mold exposure. The exposures are to multiple fungi with varied amounts and types of mycotoxins. Most of the symptoms are rather subjective and difficult to objectively measure. While quantitative identification of fungi in indoor environments is improving, quantification of even some of the mycotoxins is at best expensive. Epidemiologic studies are greatly hampered by the lack of either acute or chronic biomarkers of exposure. Controversy, overreaction, and inadequate public health prudence will continue until these challenges are adequately addressed.

Terr expressed a similar opinion in a review that examined and critiqued the published literature on *Stachybotrys*. This review found *Stachybotrys* to be a minor component of the indoor mycoflora, found on certain building

material surfaces in water-damaged buildings. However, airborne spores are present in such low concentrations that they are unlikely to cause illness. [15]

Page and Trout reported in 1998 on a MEDLINE search strategy that located 13 articles on fungi, mycotoxins, and the indoor environment. They concluded that the literature contained inadequate evidence to support a causal relationship between symptoms or illness among building occupants and exposure to mycotoxins. They recommended, "that research involving the identification and isolation of specific fungal toxins in the environment and in humans is needed before a more definitive link between health outcomes and mycotoxins can be made."[16]

In summary, the hypothesis that exposure to molds and their toxic products may lead to adverse health effects can be made. However, the proposition that molds in indoor environments may lead to adverse health effects through mechanisms other than infection and allergic/immunologic reactions is an untested impression.

EVIDENCE REQUIRED TO VALIDATE AN ENVIRONMENTAL AGENT AS CONTRIBUTORY TO HUMAN ILLNESS

Koch's postulates are one method to test the concept that molds in the indoor environment may be health hazards. Formulated in 1882, the postulates remain the standard of proof for infectious or toxic agents and would be the logical and favored form of proof of causation of human illness by *Stachybotrys*.

In short, these postulates hold that:

- A pathogenic organism or agent should be associated significantly more often with the illness or syndrome than similar but non-pathogenic organisms;
- A pathogenic organism or agent should produce the same or substantially similar pathology in appropriate animal models;
- The animal model host must become consistently affected using a natural route (even exposure to a known human pathogen does not uniformly lead to disease in all humans); and
- The return of the suspected causative agent to a human host should produce consistently the features of the illness or syndrome.[2]

Scientific and medical knowledge is built using both direct and indirect evidence. Evidence is indirect if two or more bodies of evidence are required to relate the exposure or intervention of interest to the principal health outcome. More recent methodology has augmented the strength of associations and statistical inferences regarding disease etiology, diagnosis, therapy or interventions, prognosis, and outcomes.[3] These evidence categories, in decreasing order of validity, include:

- Primary studies in humans, particularly large, randomized controlled trials as well as meta-analyses of randomized controlled trials, are recognized as best (small trials are less valid). Nonrandomized controlled trials, cohort or longitudinal studies, case-control studies, case series, and reports are less robust, especially the latter two;
- Non-human studies (laboratory studies, animal studies); and
- Syntheses (systematic reviews).

EVALUATING THE ROLE OF STACHYBOTRYS IN "SICK BUILDING SYNDROME"

Bernstein has suggested an approach to suspected building-related illness that includes:[17]

(1) a thorough history (duration and nature of symptoms, home environmental and workplace history, past medical history, family history);

(2) a physical exam;
(3) exclusion of more common infectious causes;
(4) phenotyping the patient as atopic versus non-atopic (skin testing to seasonal and perennial allergens including a mold panel [or corresponding serologic testing], spirometry pre-/post-bronchodilator);
(5) chest x-ray or high-resolution CT of chest (to determine if pulmonary findings consistent with hypersensitivity pneumonitis are present and require additional evaluation);
(6) supportive testing including serologic testing for specific IgG, IgE, or IgA to mold (including *Stachybotrys*), hypersensitivity pneumonitis screen (precipitating antibodies), and consideration of humoral and cell-mediated immune system evaluation;
(7) environmental assessment including walkthrough, air sampling, and measurement of known perennial allergens, irritants (VOCs and chemicals [nitrous dioxide, sulfur dioxide, ozone]), dew point, and mycotoxins;
(8) measurement of total symptom scores in and out of the environment;
(9) measurement of peak expiratory flow rates in and out of the environment event every 2-3 hours while awake and correlation with environmental exposure measurements; and
(10) consideration of specific provocation test (nasal challenge preferred to the more risky bronchoprovocation).

Evidence-based effective interventions for reducing specific types of allergen loads include bedding encasements (dust mites, cat dander, mold), HEPA filtration (cat and dog dander), HEPA vacuum (cat and dog dander, dust mites, cockroach), dehumidification (<50 percent) with air conditioning or dehumidifiers (dust mites, mold, cockroach), and thorough cleaning (cockroach).[18]

Other common but less proven methods for reducing allergen loads include air conditioning or other measure to filter outdoor air, removal of carpets, hot (>130^{o} F) washing of bedding, repair of leaky basements, and changes in home and building design. Patient compliance with these measures usually runs 35 percent or less.[18]

CSA CONCLUSIONS

Adverse health effects from inhalation of *Stachybotrys* spores in water-damaged buildings is not supported by available peer-reviewed reports in medical literature.

The probability or possibility of causation or exacerbation of a medical condition due to exposure to mold in indoor environments currently exists only for the following:

- Traditional Type I immune reactions (allergies, with correlation of symptoms with exposure and in vitro demonstration of IgE antibodies by allergy skin tests or RAST test for specific IgE antibodies in blood samples); and
- Rare Type III immune reactions (hypersensitivity pneumonitis), pulmonary hemorrhage in infants associated with mycotoxins.

Further, for *Stachybotrys* or other molds to be implicated in other disease models, the following must be present:

- Peer-reviewed medical literature should show clearly that such mold or mold by-product has produced clinical manifestations similar to those displayed by the patient;
- Evidence of personal causation of the type described by references 17 and 18 must exist.

RECOMMENDATIONS

The Council on Scientific Affairs recommends that TMA:

(1) support the need for continued scientific research regarding the impact of molds on human health, especially the effects of mycotoxins;
(2) educate our membership regarding this issue, including the use of Koch's Postulates as the means to validate illness caused by *Stachybotrys*, through information in TMA publications and on the TMA web site;
(3) communicate the information in this paper to the appropriate state governmental agencies, such as the Texas Attorney General, Texas Department of Health, Texas Department of Insurance, and others;
(4) support that remediation of water damage in homes and other buildings should generally be based on non-clinical factors, unless clear medical evidence, as described in this paper, exists to demonstrate the role of *Stachybotrys* in a particular case of illness; and
(5) provide educational information on this topic on the TMA web site for interested clinical personnel as well as the general public.

OTHER PHYSICIAN REVIEWERS

Robert Bonham, MD, Dallas (Otolaryngology)
William Fawcett, MD, Beaumont (Allergy, Asthma and Immunology)
John Holcomb, MD, San Antonio (Pulmonology)
Robert Jacobs, MD, San Antonio (Allergy, Asthma and Immunology)
Bobby Lanier, MD, Fort Worth (Allergy, Asthma and Immunology)
Richard Yates, MD, Tyler (Infectious Diseases)

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ATTACHMENT 3

Real Estate Center Video Has Mold Covered

News Release No. 25, January 2003

College Station – Despite a two-year media blitz, doctors agree that common mold is not harmful to the health of most people. However, mold insurance claims and the publicity surrounding them have created problems.

In a new 95-minute video, the Real Estate Center at Texas A&M University interviews experts who confront questions and rumors daily about the unpopular fungus.

In "The Video Book of Mold," Rudy R. Robinson, an appraiser, delves into how the stigma associated with a mold infestation affects a home's value. Robinson's case studies have found that even after a home is fully remediated for mold damage, it carries a stigma that reduces the home's value. He found that homes in the same neighborhood as the once "moldy" house are also affected by the stigma.

Mold claims have caused homeowners insurance premiums to increase dramatically and have also affected policy terms and availability. Judon Fambrough, attorney with the Real Estate Center, explains recent changes in Texas homeowners' policies that relate to mold and water damage coverage. Some companies will not insure homes that have had a mold claim in the last four years, he says.

Dr. Gailen Marshall, Jr., a noted immunologist, discusses health risks. He says that for 99.9 percent of the population, mold is not a problem.

The one-tenth of a percent who have an adverse reaction are those with immune suppression conditions, such as AIDS patients or cancer patients undergoing chemotherapy, and those who are allergic to certain types of mold.

For homeowners who suspect mold, Dr. Mani Skaria, a professor of plant pathology at the Texas A&M University-Kingsville Citrus Center, shows how to do a simple inspection using a flashlight and a $35 moisture meter. Homeowners can eliminate the need to have the house tested by professionals by looking for signs of water damage and using the meter. Skaria gives several tips in the video on how to prevent the growth of mold.

The video also includes a look at a full-house remediation by specialists and a step-by-step demonstration of how homeowners can remove a mold infestation from their homes on a smaller scale.

For easy use, the video is divided into five chapters and has an index noting where each topic can be found on the tape.

To order, call 800-244-2144 and ask for "The Video Book of Mold." It is $19.95.

The Real Estate Center has been providing solutions through research for more than 30 years. Funded primarily by Texas real estate licensee fees, the Center was created by the state legislature to meet the needs of many audiences, including the real estate industry, instructors, researchers and the general public.

ATTACHMENT 4

Mold Lease Provision- Retail Lease

Section _____. Mold. It is agreed and understood that mold spores are present essentially everywhere. Tenant acknowledges and understands that mold can grow in any moist location, including within the Leased Premises. Tenant acknowledges the necessity of good housekeeping, ventilation, and moisture control (especially in kitchens, bathrooms, beneath cabinets and around outside walls) for mold prevention. In signing this Lease, Tenant has first inspected the Leased Premises, and certifies that Tenant has not observed mold, mildew or moisture within the Leased Premises except on the ceiling over the Tenant's office where there have been intermittent roof leaks. Tenant agrees to immediately notify Landlord if Tenant observes mold/mildew and/or moisture conditions (from any source, including leaks), and allow Landlord to evaluate and make recommendations and/or (if Landlord elects, Landlord having no such obligation) take corrective action.

Since Tenant is responsible for the heating, ventilation and air conditioning system in the Leased Premises, and in acknowledgment that the existing system (which has been utilized by Tenant for __ years) is old, Tenant assumes all responsibility relating to moisture or the growth of or occurrence of mold or mildew in or about the Leased Premises relating to deficiencies in the HVAC system. Tenant assumes the responsibility to properly ventilate the Leased Premises and cause the Leased Premises to be in compliance with applicable laws, codes, ordinances or regulations related thereto. Tenant further acknowledges its responsibility for leakage around windows in the Leased Premises and assumes all liability relating to moisture or the growth of or occurrence of mold or mildew on or in the Leased Premises relating to window leaks.

ATTACHMENT 5

MOLD – WHAT IS IT?
REMEDIATION AND LITIGATION

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MOLD – WHAT IS IT?
REMEDIATION AND LITIGATION
Real Estate Law Conference – May 2-3, 2002

I. Introduction

Mold has recently revealed itself to be a real issue in homes and buildings across Texas and the rest of the nation. If a home or building develops mold, its occupants potentially may become sick as a result. But how do you know if you have a problem? How do you go about remediating a mold problem once it has been discovered? This paper will focus on these two questions and discuss how the mold issue has been litigated in Texas courts. In the final section, recent events in the insurance industry are discussed. The "mold" issue is often mentioned as an "insurance" issue, in that after the mold has been found the question that remains is, will the damage to the property be covered by the property owner's insurance policy? This is a debatable issue that turns largely on the individual facts of each case. In addition, the Texas Department of Insurance has recently promulgated new policy language dealing with the mold issue. Such language is designed to limit the coverage a policy owner will have, unless a policyholder specifically requests and pays for additional coverage.

II. What is Mold?

A. Overview

There are over 70,000 identified species of mold, yeasts and mildews, however, only around 100 species pose a potential health risk to humans.1 Mold grows most commonly in rooms where the temperature ranges between 40 and 100 degrees. Mold also thrives in humid environments that provide a nutrient base—such a nutrient base can be found in porous construction materials.2 "Mold may lurk in carpets; wall-ceiling joints; surfaces that are prone to condensation; wall cavities; uninsulated window lintels; and, the edges of concrete floor slabs where moisture builds in the cool zone."3 A mold problem can often be detected because the room has a musty smell to it. As well, a person's reaction to the area can also be a good indication that mold is present. The physical symptoms of mold range in scale from moderate to severe. On one side of the scale, exposure to mold can result in headache, cough, sore throat, dizziness, eye irritation, respiratory tract infections, pneumonia, severe fatigue, irritability, problems with concentration, skin dryness or rashes, hair loss, stomachache and diarrhea.4 On the other side of the scale, however, stachybotrys chartarum, or "Black mold," is suspected by some to be a factor in infant deaths, bleeding lungs and severe neurological disorders.5 Finally, mold can been seen. "black mold," or stachybotrys chartarum, is a

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1 *Mold Fighter: Total Mold-Free Environment Solutions*, www.moldfighter.com, *last visited* April 22, 2002.
2 Anthony Bartell, *Builders, Subcontractors and Architects: Finding Insurance Coverage for Mold Litigation*, MEALEY'S LITIGATION REPORTS: INSURANCE, March 13, 2001.
3 *Id*.
4 Edward H. Cross, *Litigation a la Mold: Mold Related Indoor Air Quality Claims may Eventually Generate More Litigation than Asbestos*, LOS ANGELES LAWYER, January 2002; *see also*, William F. Stewart, *Mold and You: An Introductory Guide to Mold Claims for Insurance Professionals*, MEALEY'S LITIGATION REPORTS: INSURANCE, Oct. 9, 2001.
5 William F. Stewart, *Mold and You: An Introductory Guide to Mold Claims for Insurance Professionals*, MEALEY'S LITIGATION REPORTS: INSURANCE, Oct. 9, 2001.

greenish-black mold, while Trichoderma is made up of fast-growing white, green and yellow filaments.6

Fungi are a "kingdom" like plants and animals. All molds are fungi but not all fungi are molds. Mushrooms are a fungi but mushrooms are not molds. Fungi have the same life processes as all other living organisms -- they eat, excrete and reproduce. Several species of fungi as a product of metabolizing food, produce substances called mycotoxins (compounds containing carbon hydrogen and oxygen that prove to be toxic to other organisms), thus they are called toxigenic fungi. Mycotoxins are secondary products of metabolism. In fact, mycotoxins, antibiotics, and some volatile organic compounds are all secondary products of metabolism. Mycotoxins are relatively low molecular weight (C_{12}–C_{30}) non-volatile (that is they do not evaporate into the air readily) compounds: the two of primary concern in indoor environments are cytotoxins (e.g. aflatoxin) and the trichothecene toxins.

Molds that produce mycotoxins are ubiquitous in the air and soil throughout the world. There are several species that produce mycotoxins that have been documented in indoor environments: Aspergillus, Penicillium, Cladosporium, and Stachybotrys are probably the names you hear most often. Whether or not a mycotoxin is produced depends on the fungal species, the metabolism substrate (food source), temperature, pH (acid, basic or neutral), presence of other organisms, and the stage of growth of the organism (stage of reproductive cycle).

B. Factors in Human Exposure

Contaminants must enter the human body in order to affect it. Entry can occur by one of four routes: inhalation, absorption through intact skin, ingestion (through the mouth and into the digestive system) or injection, which refers to entry through non-intact skin (either a cut or puncture that occurs at the time of exposure or a pre-existing compromise in the skin). In addition to the route of exposure, health effects are dependent on: the dose, length of time of exposure, the specific toxin, the animal species exposed, and health state of the individual exposed.

Mycotoxins or fungal by products must enter via one of these routes of entry. Since mycotoxins are relatively non-volatile, inhalation exposure is mostly limited to the inhalation of airborne fungal particulate (spores) or fungi contaminated substrates (such as dust particles). Most epidemiological and toxicology data are derived from animal ingestion studies and case studies of occupation inhalation exposures among agricultural workers where levels of mycotoxin exposure were very high. Health effects may include headache, flu like symptoms, diarrhea, fatigue, and dermatitis. No definitive relationship between fungal spore mycotoxins and health symptoms has been established to date.

Extrapolation of the animal toxicology data proves difficult due to several factors:

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6 Walter J Andrews, *Mold Related Property Damage: Is it Really Covered Under First Party Property Insurance?*, ALI-ABA Course of Study, October 11-12, 2001.

- Dose variations and ingestion route in animal studies do not correlate with human indoor environment exposures;
- Animals have differing sensitivities to particular toxins and different from human sensitivities;

Extrapolation of human occupational exposure to human indoor environmental exposure has similar problems: dose, route of entry, and environmental variables.

So in the case of mold exposure, it does not appear that "safe levels" for human indoor exposure will be established easily. Thus, reducing or eliminating possible health effects dictates that the potential for exposure must be controlled. The mold needs a food source, suitable temperature conditions and moisture: controlling one or all of these will prevent the mold growth.

III. Remediation

Given these potentially harmful health effects, a key question is how does one go about remediating a mold problem if they discover they have mold in their home or office building? The first decision to make is whether the mold problem is severe enough that a professional remediation team/person is needed.

A. Should a remediation expert be hired?

Whether a remediation expert should be hired often depends on how severe the mold problem is on the property.7 Severity is not the only factor to consider. The location of the mold can also suggest that a remediation company should be engaged. For instance, if the mold is located in a homeowner's house in small, manageable amounts, then the homeowner may not necessarily have to hire a mold remediation company to take care of the problem. If the mold is in a more delicate area, however, for instance if the mold is located on a wall in an infant health care facility, the danger of severe health risks increases.8 In such an instance, it may be more advisable to hire a remediation company to ensure that the mold is removed entirely from the area.9

Short List of Mold Remediation Protocols10

Steps to follow for all levels of concern:

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7 David Governo, *Avoiding and Minimizing Mold Liability: Understanding the Dynamics of Mold and its Remediation*, MEALEY LITIGATION REPORTS: INSURANCE, April 10, 2001.
8 *Id.*
9 *Id.*
10 *See* American Conference of Governmental Industrial Hygienists, *Bioaerosols Assessment and Control*, 1999. New York City Department of Health, "Guidelines on Assessment and Remediation of Fungi in Indoor Environments" 2000. www.ci.nyc.us/html/doh/epi/moldrptl.html. U.S. EPA, www.epa.gov/iaq/pubs/moldresources

1. Identify source of cause of water or moisture problem.
2. Repair water or moisture problem.
3. Determine size of affected area
4. Select remediation personnel (in-house or contract)
5. Select PPE (Tyvek coveralls, gloves, eye protection and at least N95 respirators may be required.)
6. Determine extent of containment required
7. Clean and dry materials
8. Bag and discard contaminated materials
9. Check for return of moisture and mold problem
10. Implement maintenance program to prevent recurrence of water damage or moisture accumulation

Visible Mold

- If total surface area affected less than 10 square feet, follow steps 1-5 above. Remove and replace porous building materials. Keep materials damp with water to reduce airborne dust and spores. Non-porous surfaces can be cleaned with bleach solution, vacuum when dry with a HEPA vacuum. Workers should use eye protection, N95 respirators, protect clothing and hands from contamination. Confirmation sampling may be considered but will probably not be necessary.

- If the total surface area affected between 10 and 100 square feet, again follow steps 1-5 above. Remove all porous contaminated materials and clean non-porous surfaces with bleach and HEPA vacuum when dry. Provide containment during remediation. Workers should use personal protective equipment, including Tyvek coveralls, gloves and respirator. Confirmation sampling should be considered after remediation.

- If the total surface area affected is greater than 100 square feet, again follow steps 1-5. Remove porous building materials, provide containment, scrub non-porous surfaces with bleach and HEPA vacuum when dry. Containment and negative pressure are needed. Workers should use Tyvek coveralls, gloves, eye protection and respirators. Perform confirmation sampling after remediation.

For Non-Visible Mold

- Locate and identify any sources or causes of water or moisture problems. Investigate microbial induced corrosion of ceiling mounted fire suppression system piping as the source of water.
- Repair water or moisture problems.
- Clean and dry non-porous, wet materials.
- Discard porous, wet materials.
- Check areas between walls for evidence of mold growth by observation or sampling.
- Check for return of water or moisture problems by conducting confirmation sampling.

As a general rule, you should consider hiring a consultant if any of the following

statements are true:

- You cannot solve the problem yourself, either the contamination is too extensive and invasive or you can't locate the source of the moisture.
- Delay will aggravate the problem.
- Tenant-landlord, employer-employee relationships are tense; consultant may bring objectivity and credibility to the investigation.
- Litigation or Workers Compensation claims are likely.
- Specialized skills, equipment or expertise are needed (either for evaluation or repair).

B. Choosing a remediation company

Should you decide that the best option to dealing with a mold issue is to hire a remediating company, the next step is to choose a qualified mold remediation professional.11 Because the mold remediating industry is a hot area today, it is especially advisable to do the necessary background check on a company. The Better Business Bureau should be consulted to determine if the company has a favorable reputation in the industry.12 Also, as always request bids from three different companies and request references before contracting with one particular company to do the work to compare cost and scope of work. It is also important to make sure that the company is insured properly. A mold remediation company should have worker's compensation insurance, contractor's liability insurance and pollution insurance.13 In addition, "request documentation of OSHA-mandated safety programs such as respiratory protection (medical and fit testing), confined space entry, personal protective equipment, fall protection, haz/mat communication," among others.14 Finally, before hiring a mold remediation expert, request a scope of work and work plan in writing for the specific area to be remediated. The plan should identify the specific problem to be remediated and the specific services to be performed on the area. It should also indicate how many technicians will be used to address the problem and how long it will take to complete the job. Finally, the plan should indicate the condition that the company will leave the property once they have finished the remediating services.

C. What goes into a remediation project?

Even if a mold remediation company is hired to correct the mold problem, it is still advisable to know the basics on how to remediate a mold problem so that you can ensure that the company is taking all the necessary steps and doing a proper job. Number one on a list of things to do is to determine the source of the mold contamination in the room(s) or building.15 This means that the mold remediation company should investigate all broken pipes, appliances, HVAC systems, sprinkler systems and plumbing back-ups. Any rooms

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11 David Governo, *Avoiding and Minimizing Mold Liability: Understanding the Dynamics of Mold and its Remediation*, MEALEY LITIGATION REPORTS: INSURANCE, April 10, 2001.
12 *Id.*
13 David Governo, *Avoiding and Minimizing Mold Liability: Understanding the Dynamics of Mold and its Remediation*, MEALEY LITIGATION REPORTS: INSURANCE, April 10, 2001.
14 *Id.*
15 *Id.*

constructed underground should also be checked for flooding. After the source of the contamination has been identified, it must be repaired.

Industrial hygienists have fundamental training in indoor air quality, ventilation, environmental health, toxicology, microbiology and other IH issues. Many times an industrial hygienist can guide your project and determine what and when other professionals are needed, such as HVAC contractors, architects and drainages specialists, structural or geotechnical engineers, or medical professionals.

Having rectified the source of the contamination, the company can then begin their remediation efforts. "The two most important initial principles of mold remediation are to protect the technicians performing the work and to protect the surrounding environment and its occupants. Technicians performing this work should, at a minimum, be equipped with respirators, single use disposable Tyvek suits, eye protection and rubber gloves."16 In addition, some level of containment should be done to protect the surrounding environment and its occupants. "This means sealing off all pathways from the work area to the surrounding environment and either negatively pressurizing the work area or positively pressuring the surrounding environment. Typically this can be accompanied by tenting the work area with poly-sheeting and installing hepa filtered negative air exhaust fans."17 The remediating efforts continue by removing all surfaces containing mold and all porous building materials from the property.18 It is important that the materials be removed from the area, and not simply sprayed with a biocide. "A dead mold spore is still an allergen,"19 and can be toxic. Next all the surfaces within the contained area should be vacuumed with a hepa vacuum, and wiped with a biocide. Finally, a coating or encapsulant should be applied to the porous surface.20 It is advisable that a daily logbook be kept of the project while the remediation is being performed. This will document the mold issues encountered on the property and the work performed to remove that mold. Photographs should also be taken of the area before, during and after the remediation process has been performed.21

D. A Word about Sampling

The first rule of sampling is: Avoid sampling if at all possible. Know the reason you need to sample. Know what you will do with a positive result and a negative result. If knowing the species of mold present will not make a difference in what you do, don't waste your money on sampling. Clients, building owners, tenants and courts may readily interpret positive or negative results as (probably erroneously) supportive of their own hypothesis. A positive result from sampling does not imply health risk and likewise a negative result does not certify no-risk.

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16 David Governo, *Avoiding and Minimizing Mold Liability: Understanding the Dynamics of Mold and its Remediation*, MEALEY LITIGATION REPORTS: INSURANCE, April 10, 2001.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 David Governo, *Avoiding and Minimizing Mold Liability: Understanding the Dynamics of Mold and its Remediation*, MEALEY LITIGATION REPORTS: INSURANCE, April 10, 2001.

There are many methods of sampling and each has advantages, disadvantages, and uses. Different types of sampling may be complimentary to each other or may give seemingly contradictory results. In addition, there are no quantitative baseline values of recommended threshold exposure levels for mold contamination.

Keep in mind that sampling will give you a picture of the contamination situation only at the point in time and at the site when the samples were taken. It will not confirm or deny exposures over the previous 6 months. Sampling may be air, surface and/or bulk. The methods are not mutually exclusive and may be used in combination.

Air sampling usually requires a pump and filter media. The filter is transported to and analyzed by a laboratory. Air sampling requires that samples be taken in suspect areas, as well as non-suspect areas and outside in order to interpret the results. The investigator will need to carefully select the sample site and supervise the sampling since air currents, wind, rain, temperature, and adjacent activities can influence the results and affect the interpretation. A "negative" result might show indoor levels 25% to 95% that of the outside samples and the species should be the same. A "positive" result would show amplified levels over outdoor or different species.

Surface samples can be settle plates or tape or swab samples. A settle plate or swab collects previously aerosolized particles and will be biased towards heavier, larger entities. Settle plates may also bias the results as species are amplified by different culture media. Swab samples, depending on how they are collected, may be cultured and will give qualitative results and identification of viable and non-viable species. Tape samples of the surface acting as the growth medium may be useful if information about viability is not needed but the results (species present) will be highly dependent on the investigators choice of sample location.

There are no currently accepted guidelines to identify surface concentration of biological materials that indicate unhealthy conditions, due mainly to variability in surface and air sampling results and poor correlations with inhalation exposures.

Bulk sampling involves removal of the substrate harboring the fungi and submitting it to the laboratory for investigation. The substrate may be solid cellulosic building material or water. Bulk samples can help identify the source of airborne contamination.

Prevention requires:

- Systematic facility inspections that focus on typical moisture sources such as roofs, piping, HVAC, condensation sources, ground water incursion, and humidity control systems.
- Timely repair of identified water leaks or other sources of water incursion
- Routine HVAC maintenance (filters, drip pans, humidity control adjustments, airflow adjustments, and cleaning.
- Routine inspections to look for visible evidence of mold growth or water stains or

damage (ceilings, walls, floors, attics, window sills, under sinks) and odor.

- Adequate cleaning if mold growth is observed such as with 10% bleach solution (bathrooms) or the removal of contaminated porous materials (carpeting, drywall, ceiling tile, household furnishings)
- Repair pluming leaks as soon as possible.
- Watch for condensation problems and standing water in A.C. or refrigerator drip pans.
- Vent moisture generating appliances and processes directly to the outside (clothes dryers, dishwashers, shower rooms)
- Keep foundations dry with proper drainage and sloping.
- Remove carpeting from bathrooms and kitchen areas
- Keep indoor humidity between 35% -65%

IV. Litigation Issues

A. Overview

Mold claims have recently resulted in a number of large payouts to some claimants against their insurance carrier. In June 2001, a jury awarded $6 million in actual damages, $12 million in punitive damages, $5 million for mental anguish and over $8 million in attorney's fees to a Dripping Springs couple, Melinda Ballard and Ron Allison, whose 22-room mansion was ruined by mold. The family was alleged to have suffered serious ill health effects. The couple's four-year-old son began to cough up blood, and Mr. Allison quit his position as an investment banker because of physical injuries and memory loss that he allegedly suffered as a result of living in the house.22 The jury found against a Farmers Insurance affiliate, finding that the couple's loss was caused in part to the insurance company's delay in responding to the mold issue.

Mold litigation occurs in a variety of contexts. Cases have involved:

1) "Realtors for failing to disclose the potential for mold to exist in a seller's home;
2) The construction industry for either product defects or installation defects;
3) City and County Building Departments for poor building inspections;23
4) Home-owners associations;
5) Property owners (residential and commercial)
6) Property managers (residential and commercial)
7) Employers for poor property management and maintenance practices;
8) School districts for poor building maintenance;
9) Insurance companies whose policies cover all of the above for bad faith when denying coverage and for not alerting or protecting the insured for mold-related problems."24

22 *Jury Awards $32 Million Toxic Mold Verdict*, Texas Environmental Compliance Update, July 2001.
23 *But see*, infra, *Sheri Foster v. Denton Independent School District and Honeywell, Inc. and Control Systems Contracting and Consulting, L.L.C.*, 2002 Tex. App. LEXIS 2225 (Tex. App. – Fort Worth, March 28, 2002).

Potential plaintiffs in a mold or mold related case may include:

- Property Owners/Homeowners
- Homeowners/Condominium Owners Associations
- Employees
- Customers/Invitees?

Potential defendants in a mold or mold related case may include:

- Prior Property Owners/Sellers
- Developers
- Contractors and/or Subcontractors
- Property/Real Estate Inspectors
- Realtors
- Insurers
- Building/Structure or HVAC system designers
- Remediation Contractors/Environmental Consultants
- Building Managers

Potential liabilities and/or damages in a mold or mold related case may include:

- Property Damage
- Personal Injury
- Business Interruption
- Punitive Damages

Potential causes of action in a mold or mold related case may include:

- Tort claims – negligence, fraud/failure to disclose, negligent misrepresentation
- Contract claims – breach of implied warranties, habitability, constructive eviction
- Statutory claims – worker's compensation, ADA, landlord/tenant

B. Mold Cases

How does one measure their vulnerability in litigation? First, it should be noted that to date there are no definitive studies evidencing the health effects of mold exposure on people.25 Thus, many testifying experts are vulnerable to *Daubert* challenges.26 More often, however, whether a claimant will succeed in their mold claim is determined by the facts of the case. For instance, does the contract contain an "as is" clause? If so, this fact does not guarantee absolute protection from mold liability as shown in the case, *Jimmie Faye Chancey*

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24 Kurt B. Martin and Peter J. Lynch; *Mold: Serial Litigation Strikes Again*; MEALEY'S LITIGATION REPORTS: INSURANCE, January 29, 2002.
25 Kurtis B. Reeg, *Mold Litigation—It's Not Asbestos Déjà vu All Over Again*, ENVIRONMENTAL COMPLIANCE AND LITIGATION STRATEGY, November 2001.
26 *Id.*

v. Lawrence R. Herkimer, et al. In this unreported case a Dallas appeals court reversed the lower courts grant of a summary judgment, saying that the "as is" clause "does not, as a matter of law, negate causation" of the damages suffered by Jimmie Chancey.27 Quoting the Texas Supreme Court in *Prudential Insurance Co. of America v. Jefferson Assocs*.,28 the appeals court said whether an "as is" clause will be enforceable depends on the "nature of the transaction, and the totality of the circumstances surrounding the agreement."29

The Dallas appeals court went on to say that "a buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller."30 On the claim of fraud, the appeals court said that the summary judgment evidence "does not conclusively negate the Herkimers' knowledge of claimed facts." Rather the court said, "proof that a defendant made a statement knowing of its falsity or without knowledge of its truth, may be made by direct or circumstantial evidence."31 The court continued,

> "[t]he evidence shows Mr. Herkimer had the house custom built, he was the only owner of the home, and some type of past water problems to the foundation and holes in the roof were known to the Herkimers' maintenance man and pest control service. Although Mr. Herkimer said he did not know of any problems, a jury could reasonable infer he knew of past problems with the foundation, wood rot, and water damage, and he concealed these facts by marking unknown on significant portions of the Seller's Disclosure Notice…[further] Chancey's deposition evidence provided evidence that the walls had been painted to conceal water damage, that plywood had been replaces in the floor of the air conditioner closet and that Chancey detected the various other problems within only a week of the Herkimer's moving out."

As the above text indicates, what the seller "knows" is the condition of the property at the time of the transaction is an important issue. If the seller has actual knowledge that their property has mold, then the seller must disclose that fact in the sales transaction.32 In another unreported case, *Robert and Betina Cregg v. Richard Roman*, a Dallas appeals court, however, found that a seller did not have to disclose "any general concerns" they may have had concerning mold in the house.33 In this case, the Cregg's sued the Romans' for breach of an implied warranty and for deceptive trade practices after the Cregg's spent almost $20,000 to have the drainage problems repaired in the house that they had recently bought from the Roman's. "Both causes of action are predicated on appellant's assertion that the Romans knew of and concealed drainage defects and excessive moisture levels in the

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27 *Jimmie Faye Chancey v. Lawrence R. Herkimer, et al*, 2000 Tex. App. LEXIS 4438 at *9 (Tex. App.-Dallas, June 30, 2000, unpublished decision).
28 *Prudential Ins. Co. of America v. Jefferson Assocs*., 896 S.W.2d 156 (Tex. 1995).
29 *Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d at 162.
30 *Jimmie Faye Chancey v. Lawrence R. Herkimer, et al*, 2000 Tex. App. LEXIS 4438. *8.
31 *Jimmie Faye Chancey v. Lawrence R. Herkimer, et al*, 2000 Tex. App. LEXIS 4438 at *10 (*quoting Johnson & Higgins of Tex. Inc., v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 526 (Tex. 1998).
32 TEX. BUS. & COM. CODE ANN. § 17.46(b)(23).
33 *Robert and Betina Cregg v. Richard Roman, et al.*, 2000 Tex. App. LEXIS 3387 at *14 (Tex. App—Dallas, May 24, 2000, unpublished decision).

house,"34 thus the Court found that the determinative factor was what the sellers "actually knew" during the transaction. According to the court, the summary judgment evidence did not show whether "the Romans actually knew of ongoing drainage defects or excessive moisture levels in the house."35 The court upheld the Romans summary judgment based on the evidence that the Romans disclosed that they had had an inspection done on the house and had made some repairs to the house to alleviate the drainage problems, but did not know "of any currently defective condition to the drainage of the Property."36 The Cregg's also had their own inspection done of the house, and the inspector advised that they hire a drainage specialist. The Cregg's did not do so, but rather proceeded to buy the house.37 The court said "a seller has no duty to disclose facts he does not know,… [n]or is a seller liable for failing to disclose what he only should have known… the Romans had no greater duty to investigate the presence of drainage defects" than [the Cregg's]."38

Whether a party has a claim for mold damage also depends on the party that they are suing. In *Sheri Foster v. Denton Independent School District, et al*, Sheri Foster, an elementary school teacher in the Denton school district, filed suit against the school district after she allegedly became ill as a result of mold which was found growing under Foster's classroom. The mold spread through the school through the HVAC system. Foster sued the Denton school district and Honeywell, the company who installed the HVAC system, for intentional nuisance and intentional pollution, among other claims. The school district moved for summary judgment, arguing principally that the school district retained sovereign immunity from Foster's claims. The upper and lower courts upheld the motion. Foster alleged against Honeywell that it was negligent in its failure to properly "maintain and monitor the HVAC unit and by allowing standing water under the school building to become infested with mold and fungus. 39 Honeywell responded with a no-evidence motion for summary judgment, which the trial court granted. In upholding the lower courts decision, Judge Sam J. Day noted that Honeywell had fulfilled the terms of its contract regarding the HVAC unit and that "[I]n this case, it would be extremely detrimental to merchants such as Honeywell to require them to guarantee the absence of future contamination of the air by microbiological agents when it has absolutely no control over microbiological growth under and around the customer's building."40

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34 *Robert and Betina Cregg v. Richard Roman, et al.*, 2000 Tex. App. LEXIS 3387 at *6.
35 *Robert and Betina Cregg v. Richard Roman, et al.*, 2000 Tex. App. LEXIS 3387 at *9 (The appeals court also found for Coldwell Banker, saying that they did not have actual knowledge of the drainage problems. The court however, found that the trial court improperly granted summary judgment for the inspector, Mr. Bickham, saying that Mr. Bickham did not sufficiently show through the evidence that his inspector report met the Texas Real Estate Commission standards for home inspection. *Id*. at *18-21).
36 *Id*. at *7.
37 *Id*. at *8.
38 *Robert and Betina Cregg v. Richard Roman, et. al.*, 2000 Tex. App.LEXIS 3387 at *13-14 (*citing Prudential Ins. Co.*, 896 S.W.2d at 162.)
39 *Sheri Foster v. Denton Independent School District and Honeywell, Inc. and Control Systems Contracting and Consulting*, 2002 Tex. App. Lexis 2225 at *29.
40 *Id*. at *33.

What are some proactive measures that can be taken to avoid creating a mold problem in your home or building and incurring such liability?:

1. "Respond to complaints immediately.
2. Comply with all applicable legal requirements in construction
3. Enlist experts to assist in assessing the contamination and developing a defense.
4. Engage a reliable consultant to sample and identify any suspected mold or other substances and conduct a thorough removal.
5. Repair or replace any damp or otherwise damaged buildings materials or furnishings.
6. Develop and follow an effective preventive maintenance plan.
7. Consider available insurance products for IAQ [indoor air quality] claims."41

V. Insurance Issues

A. The Debate

There is debate today over whether a mold problem is covered by a policyholder's insurance policy. On the one hand, policy owners pay on their insurance policy in good faith that when their property suffers damages they can get the problem rectified. On the other hand, the damage amounts attributable to the mold problem have ballooned to such an extent that some insurance companies in Texas, such as State Farm Lloyds, have begun to stop selling comprehensive home insurance policies to new customers. "State Farm says it made its decision to stop issuing new home insurance policies due to heavy financial losses stemming from mold, wind and hail claims."42 As a result of the debate, the Texas Department of Insurance has promulgated new policy language which is designed to limit the coverage policy holders can expect if they discover mold on their property.

B. Current Coverage and Exclusions

An insured property owner has coverage for "fortuitous" or accidental losses or "occurrences" that are discovered or occur during the time period under which they held their insurance policy.43 An insurance company may try to avoid covering mold-related damage, however, by arguing, for example, that the loss did not manifest while the company was insuring the property, or by using mold exclusions to limit the coverage. A mold exclusion generally reads:

> "We do not pay for loss caused by contamination or deterioration, including corrosion, decay, fungus, mildew, mold rot, rust or any quality, fault, or weakness in covered property that causes it to damage or destroy itself. We do

41 Robyn E. Ice, *Strategies for Breaking the Link Between Airborne Toxin Claims and Liability*, PRODUCT LIABILITY LAW AND STRATEGY, December 2001.

42 "State Farm stops selling home insurance in Texas due to mold, wind, and hail," *available at* www.insure.com.

43 *Molding the Complaint: A Plaintiff lawyer Looks At Mold*.

> cover any resulting loss caused by a "specified peril" or breakage of building glass."44

Mold exclusions can be attacked by using the "efficient proximate test," which states that where an insured peril, such as water, and an uninsured peril, such as mold, contribute to the loss, the loss is covered on the policy.45 An insured can also make an argument "based upon the rule of insurance construction known as 'ejusdem generis.' Roughly translated, these words mean that where descriptive terms are grouped together, they should be interpreted to show some common design or intent. Within the above-cited exclusion, the term 'mold' is surrounded by types of loss that occur naturally over a period of time. As a result, insureds will argue that the intent of the mold exclusion is to bar coverage for mold which occurs gradually, and which is not associated with a fortuitous event like water damage."46 However, insurance companies may also try to limit their liability by using the pollution exclusion. The pollution exclusion says, "[s]ince toxic mold is an irritant and a contaminant, it is also a "pollutant"…Thus bodily injury resulting from the dispersal of mold toxins arguably falls within the scope of the absolute pollution exclusion….U.S. jurisdictions, however, are split on the issue of whether the absolute pollution exclusion applies when injuries result from exposure to indoor toxic pollutants."47

In Texas, the most common policy carried is the Texas Homeowner's Form B policy.48 The Form B policy covers "all risk of physical loss." But while the Homeowner's Form-B policy appears to exclude mold damage, the policy contains exceptions for damages caused by "water damage" or "accidental discharge, leakage or overflow of water or steam from within a plumbing, heating or air conditioning system."49 On the other hand, a Form A policy provides coverage only for damage done by certain "perils" to the dwelling and/or personal property. An insured can also be covered under the Texas Dwelling Policy Forms 2 and 3. These can provide coverage to a house or building for damages caused by plumbing leaks and/or the ensuing water damages. Commercial property owners may also carry comprehensive general liability policies (CGL), which may apply to losses and damages caused by water, plumbing leaks and/or ensuing mold damages.50

C. Water Damage Exclusion

Whether a policy covers a mold problem is often a factual question that turns on whether the mold is related to water damage to the structure. For instance, in an unreported

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44 William F Stewart, *Mold and You: An Introductory Guide to Mold Claims for Insurance Professionals*, MEALEY'S LITIGATION REPORTS: INSURANCE, October 9, 2001.
45 *Id.*
46 William F Stewart, *Mold and You: An Introductory Guide to Mold Claims for Insurance Professionals*, MEALEY'S LITIGATION REPORTS: INSURANCE, October 9, 2001.
47 *Id.*
48 *Molding the Complaint: A Plaintiff Lawyer Looks At Mold*, Insurance Law Seminar, University of Houston Law Foundation, May 2001.
49 *Id.*
50 *Molding the Complaint: A Plaintiff Lawyer Looks At Mold.*

case, *Home Insurance Co. v. McClain*51, a Texas appellate court found that the mold damage was an "ensuing loss" resulting from water damage, and was covered by the policy. The court wrote" [t]o be an ensuing loss caused by water damage, the mold and fungi would necessarily have to follow or come afterward as a consequence of the water damage."52 This court found that the facts of the case indicated that the mold was caused by the water damage to the home from the leaking roof, and thus was covered under the policy.

Other cases have found that the water damage did not cause the mold problem in the structure, however, and as a result of this factual interpretation, found that the mold problems were not covered by the policy. In *Merrimack Mutual Insurance Co. v. Mcaffree*, a Dallas appeals court reviewed a case involving water damage which was caused by the absence of a shower pan under the shower floor. The lack of the shower pan caused the water to eventually leak onto the wood under the shower stall. "The leaking water over many years' time plus inadequate ventilation and the absence of light…was conducive to the growth of decay causing fungus. Such fungi did grow in this environment, living off and consuming the cellulose in the wood under said shower, causing it to decay and deteriorate to a condition that can be generally described as 'rotten'." The court found that the ensuing loss provision did not provide coverage in this situation because the "loss in question was caused by the fungi, and to some extent by termites." The court continued, "[w]hile it may be said that the fungi grew in a favorable atmosphere the deterioration, rot, and fungi cannot be said to be "water damage" as such."53 Similarly, in *Aetna Casualty and Surety Co. v. Harold C. Yates*,54 the Fifth Circuit found that air conditioning condensation, which had rotted joists, sills and subflooring in the crawl space under the plaintiff's house, was not covered as "water damage." In making this decision the Fifth Circuit wrote:

> "[w]e do not think that a single phenomenon that is clearly an excluded risk under the policy was meant to become compensable because in a philosophical sense it can also be classified as water damage; it would not be easy to find a case of rot or dampness of atmosphere not equally subject to that label and the exclusions would become practically meaningless. In our case the rot may have ensued from water but not from water damage, and the damage ensuing from the rot was not the damage from the direct intrusion of water conveyed by the phrase 'water damage'55

D. Revised Home Owner Policy

On December 7, 2001, the Texas Department of Insurance revised its homeowner policy. After January 2003 all Texas insurance companies will, upon time for renewal, include a mold exclusion in their insurance policy which says that coverage is excluded for "mold, fungi and other microbes" except in the case of mold ensuing from covered water

51 *Home Insurance Co. v. McClain*, 2000 Tex. App. LEXIS 969 (Tex. App.-Dallas, Feb 10, 2000, unpublished opinion).
52 *Id*. at *9 (*quoting Merrimack Mut. Fire Ins. Co. v. McCaffree*, 486 S.W.2d 616, 620 (Tex.Civ. App. – Dallas 1972, writ ref'd n.r.e).
53 *Merrimack Mutual Fire Insurance Co. v. McCaffree*, 486 S.W.2d 616 at 620.
54 *Aetna Casualty and Surety Co. v. Harold C. Yates*, 344 F.2d 939, 941(5th Cir. 1965).
55 *Id*. at 941.

damage.56 Only mold "caused by or resulting from sudden and accidental discharge, leakage or overflow of water or steam" will be covered.57 The revised language defines "sudden and accidental" as "a physical loss that is hidden or concealed for a period of time until it is detectable…[a] hidden loss must be reported to the insurer no later than 30 days after the date that the insured detected or should have detected the loss."58 This language is designed to exclude coverage resulting from leakage that has occurred conspicuously over a period of time.

In addition, insurers will cover only "reasonable and necessary repair or replacement of property covered under Coverage A (Dwelling) and/or Coverage B (personal property)."59 Insurance companies will no longer pay the expenses incurred due to the remediation, such as rent at another apartment, home or building unless the basic policy provides such coverage. The new language also limits coverage by stating that the cost of remediation is not covered. The new policy defines remediation as: "to treat, contain, remove or dispose of mold, fungi or other microbes beyond that which is required to repair or replace the covered property physically damaged by water or steam. Remediation includes any testing to detect, measure or evaluate mold, fungi or other microbes and any decontamination of the residence premises or property."60 However, an insured can get additional coverage for remediation costs by buying endorsements on their basic policy in increments of 25 percent, 50 percent and 100 percent. These endorsements may pay for the cost to remediate (including testing), to repair, and to replace covered property damaged by the mold. The stacking of claims under the buy back provision will not be allowed, however.61

56 26 TexReg 10115, Volume 26, Number 49, Dec. 7, 2001.
57 *Id.*
58 *Id*.(emphasis added.)

59 *Id.*
60 *Id.*
61 *Questions and Answers on New Homeowner Policy*, TEXAS DEPARTMENT OF INSURANCE, tdi.state.tx.us.