

## Toxic Mold Litigation

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### I. Mold Lexicon

- A. Mold - a fungi. Other examples of fungi are mildew, mushrooms and yeasts. There are many different types of molds. Molds grow when moisture is present. A few different molds found indoors are listed below:
1. Stachybotrys - the most infamous mold that is associated with neurotoxic effects and death. It is greenish-black in appearance. For more information on this mold, see this webpage: <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm>. See also Role of Stachbotrys Mycotoxin in Buildings Related Illness, Amer. Indus. Hyg. Asso. Journal, Sept/Oct 2001.
  2. Aspergillus - a common mold that is associated with lung disease if exposure occurs in large quantities. There are many types of aspergillus molds and some are more dangerous than others. A website has been established that describes the genus that contains over 100 species. <http://www.aspergillus.man.ac.uk/patients/>
  3. Cladospirium - a common outdoors as well as inside. High levels inside can occur when moisture conditions are present
  4. Penicillium - most famous mold.
- B. Spores - Fungi produce microscopic spores to reproduce itself. Spores are produced by the millions and are spread by air movements, both indoors and outside.
- C. Mycotoxins - Injurious substances that can be contained in the mold spores.

### II. What is the problem?

- A. Degree of exposure- We are all exposed to some levels of mold. Only persons with particular susceptibilities and with higher than levels of exposure will experience injury

- B. Symptoms of overexposure include both irritant and systemic effects.
1. Irritant effects
    - a. eye irritation/conjunctivitis
    - b. upper respiratory irritation
      - i. coughing/ bronchitis
      - ii. sinusitis
      - iii. nose bleed
    - c. dermatitis
    - d. reactive airways disease [RADS]
  2. Systemic effects
    - a. Allergic - either aggravated or caused by the mold. Allergic reactions can be severe with asthmatic attacks, and hypersensitivity pneumonitis
    - b. Toxic
      - i. Headaches, dizziness
      - ii. Central nervous system dysfunction with cognitive problems; E. Johnaning, et al, "Health and immunology study following exposure to toxigenic fungi (*Stachybotrys chartarum*) in a water damaged office environment," Int. Arch. Occup. Environ. Health 68 (1996): 207-28.
    - c. Lung disease - fungal growth in lung. M. Hodgson, et al, "Building Associated Pulmonary Disease From Exposure to *Stachybotrys chartarum* and *Aspergillus veriscolor*," JOEM 40 (1998); 241-49.

### III. How to determine if there is a problem

- A. Inspection - if mold is a problem it can usually be seen or smelled. If there is a moisture problem in a house, then the possible presence of mold should be investigated.
- B. Test kits - These can be used for screening for molds. Homeowner collects own sample by placing collection dishes that labs send to the homeowner. Homeowner then mails the dishes to the lab. The lab will send back a report. Abbey Lane Laboratory, P.O. Box 1665, Philomath, OR 97379 (phone)541-929-5984
- C. Industrial Hygienist - Expensive with costs of up to \$1,500. Samples are collected by person with training in scientifically approved protocols. This testing can involve the collection of sheetrock or cellulose material with visible molds for laboratory testing, swab samples of HVAC ducts and

vents and air sampling, both inside and outside. Collected samples are then identified and quantified by a laboratory.

#### IV. Causes of Action

A. Bad Faith - insurance coverage issue. In Georgia, the insurance commissioner has allowed an exclusion on homeowner policies that limits liability to \$5,000 for mold remediation.

1. In other states, particularly Texas and California, the bad faith actions were the most successful actions. These actions were brought for refusal of the insurance companies to timely remediate the mold related problems in homes.

2. Georgia Bad Faith - OCGA § 33-4-6

a. Make demand for payment within 60 days.

b. Bad faith is a frivolous and unfounded refusal to pay a claim. United Services Auto Ass'n v Carroll, 226 Ga. App. 144, 486 S.E.2d 613 (1997).

c. Damages limited to 50% more than the asserted claim and attorney fees

B. Breach of contract and tort claims - Defective construction issue

1. Allegations that a contractor failed to perform its duties in accordance with a construction or maintenance contract, failed to perform duties with reasonable care or failed to comply with state required minimum code standards

2. Contract claims

a. Privity required

b. Six year statute of limitations for breach of written contract

c. Breach of implied duty of good workmanship. Worthey v. Holmes, 159 Ga. App. 262 (1981), 282 S.E.2d 919, 249 Ga. 104, 106, 287 S.E.2d (1982); Rosenheimer v. Tidal Const. Co., 250 Ga. App. 145, 550 S.E.2d 698 (2001); Smith v. KLS Const.

Co., 247 Ga. App. 493, 544 S.E.2d 197 (2001);  
Mitchell v. Jones, 247 Ga. App. 113, 541 S.E.2d  
103 (2000); Cherry v. Ward, 420 S.E.2d 763, 204  
Ga. App. 833 (1992).

### 3. Negligence claims

- a. Foreseeability required
- b. Four year statute of limitations. Discovery rule only applies if problems arose due to synthetic siding
- c. Negligence per se. Holbrook v. Exec. Conference Center 219 Ga. App. 104, 464 SE2d 398 (1995); Williams v Runion, 173 Ga. App. 54, 325 SE2d 441, 445 (1984).
- d. Breach of duty of generally accepted standard of care in the industry. Hudgins v. Bacon, 171 Ga. App. 856, 321 S.E.2d 359 (1984).

#### e. Damages

##### 1. General damages for personal injury

- a. Requires air level test results
- b. Requires doctor's opinion

##### 2. Remediation costs.

- a. Remediation requires containment of the contaminated area and personal protective equipment for the workers. EPA, Mold Remediation in Schools and Commercial Buildings, Table 2 at p. 14(March 2001).  
[www.epa.gov/iaq](http://www.epa.gov/iaq)
- b. Professional remediation is expensive. Minimum level of personal protective equipment requires respirators, gloves and goggles. Id.

## V. Case Law

### A. Defective Construction opinions

1. New Haverford v Stroot, 772 A.2d 792 (Del. 2001) - Affirms jury verdict of \$1,000,000 against landlord of personal injury caused by excessive mold growth. Expert testimony on personal injury allowed.
2. Mondelli v Kendel Homes Corp., 262 Neb. 263, 631 N.W.2d 846 (2001)- Trial Court erred in excluding Plaintiff's expert witness on personal injury caused by mold exposure.
3. Gifford v Matejka, 2001 WL 819067 (Wash. App. Div. 2, 2001)- Trial court erred in granting summary judgement after excluding Plaintiff's expert on issue of causation of personal injury from mold exposure.

### B. Bad Faith claim

1. Allison v Fire Insurance Exchange, No. 03-01-00717-CV, 2002 WL 31833440, -- S.W.3d -- (Tex. App.- Austin, Dec. 19, 2002) - Jury verdict of \$32,000,000 upheld in part and reversed in part. Claim filed against insurance carrier which was providing homeowners coverage.