

Defending a “Toxic” Mold Claim

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From a \$32 million judgment in Texas against an insurance company to Erin Brockovich and Ed McMahon to potentially unhealthy conditions in our nation’s schools, “toxic mold” has received considerable attention lately. Even the use of the phrase “toxic mold” has led to a debate in some circles, given the lack of certainty and consensus associated with various types of mold. Nevertheless, the term is used herein, recognizing the many uncertainties surrounding the medical and legal implications of exposure to mold.

This paper discusses legal, factual and practical issues to consider when defending a mold claim. The first section discusses steps that can be taken to fully understand and evaluate the various types of mold claims that can arise. The second section discusses the implications of scientific and technical uncertainty in the mold field. Finally, the third section reviews litigation issues and developments, and how those might affect the defense of a mold claim.

Understanding the Claims

Mold claims (like molds themselves) come in many shapes and sizes. They may involve single family residences, apartment buildings, schools, commercial buildings, condominiums or hotels. Defendants can include property sellers, landlords, contractors,

municipalities, insurers, lenders, real estate agents, property managers, and just about anyone else involved in real property. The cases can involve claims for personal injury, property damage, money damages, insurance coverage², and/or injunctive relief for implementation of mold investigation and remediation. It is critical to get a full understanding of the facts of the case, the parties named, and the claims involved in order to formulate a defense strategy as early as possible.

There are several questions a defendant could ask at the outset, the answers to which might dictate how that defendant proceeds. For example, what information is available about the alleged mold conditions, and what is known about the cause of those conditions? Are personal injuries alleged, and if so, is the exposure ongoing? What level of control does the defendant have over the location of the alleged problem? (Consider a situation where the plaintiffs allege that their apartment is infested with mold. If the defendant is the owner of the apartment complex and can provide alternate living arrangements, that defendant might reduce its exposure to personal injury damages by taking such action.³) While certainly information such as this can be learned during discovery, the delays in finding out such information may be detrimental to the defendant.

Asking the right questions early may not be particularly helpful if you are not in a position to understand the answers you are given. Particularly in complex cases, early involvement of experts is helpful in understanding the issues and formulating the defense. However, before discussing the types of experts who may be necessary, the defense lawyer must first consider the *purpose* of the retention. Lawyers often retain consulting

experts to assist them in connection with pending or threatened litigation or to prepare for trial, but do not expect that such experts will testify at trial. Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure (and many analogous state rules) protects consulting experts from discovery, absent exceptional circumstances.⁴ These experts are often relied upon to provide candid advice on the strengths and weaknesses of their client's case. However, it is not always possible to retain multiple experts on the same topic. Experts who were initially retained as consulting experts (and the retention letter should expressly state this) are often subsequently disclosed as testifying experts. If this possibility exists, care should be taken in communicating with the expert, as courts may rule that any information given to or generated by the expert is discoverable, *regardless of when the communication took place*.⁵

In a mold case, experts can assist answering certain fundamental questions, such as:

- Is there a mold problem, and if so, to what degree?
- What was the cause of the problem?
- What needs to be done to address the problem?
- What damage, if any, was caused by the mold?

Unfortunately, these questions are not usually answered by the same experts. Set forth below is a brief discussion of some of the experts who may be relied upon in the defense of a mold claim, and how they might help answer these and other questions.

1. Microbiologists/Mycologists/Industrial Hygienists

In order to determine if a mold problem exists, the building must be inspected and sampled. While a visual inspection can often determine whether mold is present, sampling may be necessary for a number of reasons. First, mold may be present but not readily apparent or visible (e.g. behind sheetrock), and sampling may disclose this. Second, identification of the types and amounts of mold will likely aid in the defense of the case.

The selection of the person or organization that performs the inspection could be one of most important decisions you make. For example, you may choose an industrial hygienist. Industrial hygienists are trained to evaluate the causes of occupational illnesses, which evaluation often involves assessing environmental factors affecting indoor air quality. These individuals may have backgrounds and degrees in engineering, chemistry, biology or microbiology. Industrial hygienists are often used to identify possible indoor air quality problems.

If the problem is known or alleged to be caused by mold, a background in microbiology is critical (and many industrial hygienists have this background). Microbiologist who study fungi (molds are fungi) are called mycologists. In order to fully understand the type and amount of mold present, a microbiologist/mycologist is probably necessary. A good industrial hygienist, with a background in microbiology and the ability to spot other issues and draw on the expertise of others, is invaluable in defending a mold claim.

2. Building Defect Experts

The factors that most affect mold growth are the presence of a source of food (some type of substrate, such as wood, sheetrock, paper, etc.), moisture, and temperature. For indoor air quality problems caused by mold, the most critical element to consider when defending a case is the moisture source. (Generally a substrate will be found and the temperature is relatively uniform.) Thus, when mold is present, a critical issue is identifying why moisture levels have reached the point of facilitating mold growth. This typically involves a thorough evaluation of the building and its components. This evaluation may require architects, engineers, HVAC experts, or other building related consultants. For defense lawyers, these experts may help identify and cure the water problem (which must be done or the mold problem will continue.) In addition, they can also help evaluate the actions taken by others, which could be key to a successful defense.

3. Remediation Experts

Once a problem is identified and its cause established (and eliminated), the mold itself must be addressed. Killing the mold is not enough; it generally should be removed. Retention of a company qualified to remediate mold contamination is critical in all but the smallest jobs. Ask for references and a list of comparable projects. These experts will be important, whether you are advising a client on cleanup obligations or using the expert to critique the work of others.

4. Medical Experts

If you are defending a personal injury case, medical experts are essential. However, the types of medical experts will depend on the injuries and illnesses alleged to be caused by mold exposure. For example, allergists and/or pulmonologists may be necessary, as there appears to be little scientific dispute about the causal connection between molds, allergic reactions, and exacerbation of asthma-like conditions. However, the allegations will often go well beyond simple allergic reactions. As noted in one recent publication, “there is no exhaustive list of alleged mold-related conditions; litigants have attributed almost any physical, mental, or psychological symptom to excessive mold growth in an indoor environment.”⁶ For this reason, you may need to consult with toxicologists, epidemiologists, occupational health specialists, neuropsychologists, psychiatrists, and even oncologists. Unfortunately, this can be a costly and resource intensive exercise, which is undoubtedly what the plaintiff’s bar is counting on.

Evaluating and Accepting the Scientific and Medical Uncertainties

It is not a stretch to say that there is a considerable amount of scientific uncertainty related to mold. To put this in context, consider the following quotes:

Trichothecene mycotoxins are a very large family of chemically related toxins produced by various species of *Fusarium*, *Trichoderma*, and *Stachybotrys*, among others. This family of mycotoxins causes multiorgan effects including emesis and diarrhea, weight loss, nervous disorders, cardiovascular alterations, immunodepression, hemostatic derangements, skin toxicity, decreased reproductive capacity, and bone marrow damage. [*Id.*] Unlike allergens, mycotoxins elicit a toxic response in virtually all individuals who come in contact with them.

Robertson, Alexander IV, "Toxic Mold Litigation: The Asbestos of the New Millenium," Mealey's Online, August 2001.

There are very few case reports that toxic molds (those containing certain mycotoxins) inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxic mold and these conditions has not been proven.

CDC web site, <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm#Q1>. Furthermore, the uncertainty is not limited to the medical implications of exposure to mold. The CDC has noted that "standards for judging what is an acceptable, tolerable, or normal quantity of mold have not been established," thus making the debate even more intense. This makes it difficult to interpret sampling results and make decisions about the need for further testing or remediation.

1. Testing for Mold and Interpreting Results

While sampling techniques for mold may be fairly well established (although not universally applied), what to do with those sampling results is less clear. This dilemma is best summarized by the following answer posted on the CDC web site in response to the question "I found mold growing in my home; how do I test the mold?"

Generally, it is not necessary to identify the species of mold growing in a residence, and CDC does not recommend routine sampling for molds. Current evidence indicates that allergies are the type of diseases most often associated with molds. Since the susceptibility of individuals can vary greatly either because of the amount or type of mold, sampling and culturing are not reliable in determining your health risk. If you are susceptible to mold and mold is seen or smelled, there is a potential health risk; therefore, no matter what type of mold is present, you should arrange for its removal. Furthermore, reliable sampling for mold can be expensive, and standards for judging what is and what is not an acceptable or tolerable quantity of mold have not been established.⁷

Nonetheless, the internet is loaded with sites trying to sell toxic mold test kits. One site promises that “our simple, do-it-yourself test indicates the presence of dangerous molds & mildew in 48 hours” for just \$9.95. But mold is best detected by sight and smell. EPA recommends that in most cases, mold removal is complete when the moisture source is removed and visible mold and moldy odors are no longer present.⁸

This is not to suggest that testing is not necessary when defending a mold claim. On the contrary, having valid sampling results can be critical to a successful defense. But before embarking on an aggressive sampling program, careful consideration should be given to the purpose of the sampling effort. As mentioned above, the presence of mold can just as easily be confirmed by sight or smell. The amount of mold may be meaningless in the absence of standards setting forth acceptable exposure levels. Often the data will only tell you how the indoor air quality compares with outdoor air quality. Finally, it is often very difficult for someone interpreting sampling data to definitively determine whether the presence of mold can be linked to a particular event in question. (For example, scientists often cannot determine if the mold in question is “too old” to have been caused by a recent leak, which can be critical in insurance disputes.) Thus, it is essential to determine whether the sampling and analysis being considered will answer the critical questions you have.

If you embark on a sampling program, here are a few things to keep in mind.

- Make sure you retain an individual or company with the necessary training, qualifications and experience to sample and inspect the property. As discussed above, industrial hygienists, microbiologists, and/or

mycologists are generally preferable. Request a statement of qualifications and ask for references.

- Review the case in detail before any inspection or sampling is done to outline the objectives of the inspection and sampling. Review any existing data to avoid duplication (unless data duplication is one of your objectives.) This will help you achieve your objectives and provide you with insights into the strengths and weaknesses of your opponent's case.
- Because moisture is essential to mold growth, make sure the inspection and sampling includes an evaluation of all moisture sources. This may tell you what caused the mold growth and help dictate what needs to be done to remedy the problem. (Again, keep in mind that as a defense lawyer, you may be more concerned with what caused the problem, which may help shape the sampling and inspection program. Other objectives often associated with sampling programs may be less relevant to you.)
- Make sure your professional is taking advantage of the numerous sampling techniques available, such as wipe samples, tape lifts, culture plates, air sampling, and bulk sampling. Each technique may provide different types of information relevant to the defense of the case.

In the end, the most important task is retaining an expert who will spend the time understanding your case and the property in question, learning your objectives, and designing an inspection and sampling program to meet those objectives.

2. Remediation Requirements and Options

Once mold is discovered, it should be remediated. A quick cleanup of water damage is one of the most effective ways to mitigate and cap potential damages. (This is even more important in the context of insurance disputes, as the highest awards in mold cases have generally involved allegations of poor claims handling and bad faith.) The questions then become, how clean does it have to be, and does the remediation plan (either that was implemented or proposed) address only those conditions that are the responsibility of the defendant?

Again, there are no established standards, but there are several guidance documents that provide helpful information about cleanups. Two of the more frequently cited publications are EPA's "Mold Remediation in Schools and Commercial Buildings" and the New York City Department of Health and Mental Hygiene's "Guidelines on Assessment and Remediation of Fungi in Indoor Environments." The EPA guidance outlines protocols to follow to prevent mold growth in the first 24-48 hours of an event involving water damage; first and foremost, address the source of the moisture. There are also recommendations for addressing certain types of building materials, such as ceiling tiles and insulation (remove and discard), carpeting (extract water, reduce humidity, and dry with fans), concrete and other hard surfaces (vacuum, wipe with detergent, and dry) and porous surfaces (attempt to clean and dry or remove and discard). The faster the response, the more effective it will be in preventing mold growth, thus minimizing or eliminating the scope and magnitude of a claim.

Sometimes, mold growth is inevitable. EPA recommends that medium or large jobs be done by a professional remediation manager. Both guidance documents outline procedures for those situations where mold growth is found, depending on the size of the area affected. For example, the amount of containment or isolation required (and whether the building needs to be vacated) depends on the size of the problem. So does the amount of personal protective equipment (ranging from gloves and goggles to full-face respirators with HEPA filters and full body clothing.) It is also important to clean up the mold and not just kill it. The EPA publication recommends against the use of biocides (to kill the mold) in most instances, stating that “dead mold is still allergenic, and some dead molds are potentially toxic.” All of these factors are important considerations, whether you are implementing a cleanup or evaluating the cleanup methods implemented or proposed by others.

3. The Medical Disputes

It is not the intent of this paper to provide a comprehensive discussion of the disputes and uncertainty about the medical implications of exposure to mold. To attempt to do so here would do a gross injustice to the topic, and would undercut the previous recommendation to involve experts early on in the defense of a claim. Never is that more important than when dealing with the medical issues, and it is those experts who should explain the science to you. They have written numerous papers on the topic, and will likely write numerous more. However, a few points are worth mentioning to those defending mold-related personal injury claims.

Molds are known allergens, and there seems to be little dispute that exposure to molds can cause allergic reactions and exacerbate respiratory and asthma-like conditions (although the Institute of Medicine concluded in a 2000 report “Clearing the Air: Asthma and Indoor Air Exposures” that there was inadequate evidence that molds caused people to become asthmatic.)⁹ However, it is dangerous to make broad, sweeping statements about the medical implications of mold exposure without focusing on specific types of molds. For example, one could say (as CDC did before a House of Representatives subcommittee) that “molds also have been associated with some cancers”, but in order to fully understand this, you must also know that the National Toxicology Program classified these mold-produced toxins (aflatoxins and ochratoxin A) as human carcinogens because chronic ingestion of them (from eating contaminated food) has been associated with liver and kidney tumors.¹⁰ So do the conclusions of that study provide sufficient evidence that the mold in your plaintiffs’ home caused cancer? Probably not, but your expert should answer that question for you.

Defending the Claims

Once you learn the facts, retain the experts, and review the technical and medical aspects of your case, you must then figure out how to attack it legally. Much has been made of using *Daubert* challenges to preclude experts from offering junk science, especially on some of the disputed areas discussed above. There is no doubt that *Daubert* provides a powerful weapon in defending the toxic mold claim. However, a *Daubert* challenge is just one of many defense strategies that must be considered. The best defenses are those that can be successfully asserted in a dispositive motion.

1. Statutes of Limitation

A critical initial question that should be answered (through jurisdiction-specific research) is what statutes of limitation apply, and when do the various causes of action accrue. The limitations period likely differs in actions for property damage and personal injury. The time period may begin to run at the time of the negligence that caused the mold, or it may be triggered when the plaintiff knows or has reason to know of the injury. There are some circumstances that allow for an extension of time to file until after the person has knowledge of the negligent cause of the injury. Presumably, this would allow a plaintiff additional time in those instances where the person knows they are sick, but has not yet made the connection between the illness and the presence of mold. Query whether the logical extension of this approach is to allow even more time, to account for a period of time for the person to discover that the mold growth was caused by some negligent act. This could present a seemingly limitless period of time in which to bring suit.

For example, in *Charter One Bank F.S.B. v. Hamburger*¹¹, the bank sued for failure to pay a note, and the defendant counterclaimed for, among other things, personal injury caused by exposure to toxic mold. The bank prevailed on summary judgment on statute of limitations grounds. The court held that because the plaintiff had written letters to the bank alleging that mold was causing her health problems as early as 1995, her action was time barred. In that case, the cause of action began to accrue when either the plaintiff was diagnosed with the injury or the plaintiff, with reasonable diligence, should have been aware that she was injured.

Similarly, in *Searle v. City of New Rochelle*¹², the court granted summary judgment for the City/landlord, finding that the action was time-barred. The appellate court held that a cause of action for exposure to toxic substances accrues when the injury appears, not when the cause of the injury is identified. The *Searle* plaintiffs began experiencing symptoms in 1995, so their action brought in 1998 was barred by the *two year* statute of limitation.

In *Vsloski v. American Protective Services*¹³, the plaintiff sued a contractor claiming, among other damages, personal injury due to mold growth caused by the negligent installation of a security system. The court, in denying the defendant's motion for summary judgment based on the statute of limitations, held that "injury occurs when a party suffers 'actionable harm' and a 'necessary ingredient' of 'actionable harm' is a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff."¹⁴ The court reviewed the evidence and found that it was "not clear as to exactly when the plaintiff made the causal connection" "between her physical complaints and the moldy conditions caused allegedly by the defendant's negligent work."¹⁵ Thus, the onset of the illness in and of itself did not cause the claim to begin to accrue.

Regardless of the applicable law, the statute of limitations may provide a viable defense, and one that may be asserted successfully at an early stage.

2. Challenging Causation

Given the uncertainty in the science discussed above, especially when it comes to medical causation issues, a mold claim is fertile ground for questionable scientific testimony. This presents an opportunity for the defense lawyer, as a successful attempt to

preclude expert testimony on causation issues can strike a critical blow to a plaintiff's case.¹⁶

Such challenges have come to be known as *Daubert* challenges, following the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*.¹⁷ The Court held that pursuant to Rule 702 of the Federal Rules of Evidence, the judge must act as a gatekeeper to keep out evidence that is not both relevant and reliable.¹⁸ *Daubert* challenges have become popular tools in mold litigation.¹⁹

A *Daubert*-type challenge was an integral part of the *Ballard* case in Texas that originally resulted in the \$32 million jury verdict against an insurance company.²⁰ Interestingly, that judgment did not include a personal injury component, as the trial judge granted the defendant's motion to preclude testimony from the plaintiffs' medical causation experts. The decision to preclude the testimony was affirmed on appeal. The court applied the two part test set forth by the Texas Supreme Court in its adoption of *Daubert*. Expert testimony is admissible if (1) the expert is qualified, and (2) the testimony is relevant and based on a reliable foundation.²¹ The trial court applied the following factors to determine whether the plaintiffs' experts' epidemiological studies were reliable:

- The study has an unbiased design;
- It is appropriately designed;
- It is correctly executed;
- It demonstrates that the exposure to a substance more than doubles the risk of injury; and

- Replication of the study leads to the same results 95% of the time.²²

The appellate court found that the trial court correctly considered these factors when it found that the studies underlying the plaintiffs' experts' opinions did not satisfy the 95% criterion, nor did they show that exposure more than doubled the risk of injury. The trial court found that these studies were not reliable in showing general causation, and thus there was no need for the appellate court to determine whether plaintiff had proven specific causation.²³

Interestingly, two experts precluded from testifying in *Allison* were permitted to testify in a case in Delaware.²⁴ In *New Haverford Partnership v. Stroot*, the trial court allowed testimony about mold levels and a causal relationship between those levels and certain medical conditions. The appellate court held that the trial court has flexibility in applying *Daubert* factors. For example, the court rejected a challenge to the reliability of certain testing data that lacked testing of indoor air pressure, finding the methodology reliable.²⁵ Similarly, the court rejected challenges based on the lack of "baseline testing" and the failure to rule out other possible causes of the plaintiff's injuries, finding these complaints more relevant to the weight of the evidence rather than the admissibility.²⁶

Both the Texas and Delaware appellate courts applied the same abuse of discretion standard to review the trial court's decisions on whether or not to permit these experts to testify. However, the Texas court relied on a much more developed body of law as to how to evaluate whether certain epidemiological tests are reliable. The Delaware court was largely relying on the record before it, without reference to other cases in which the reliability of such tests was evaluated.

In *Minner v. American Mortgage & Guaranty Company*²⁷, the trial court, in an exhaustive opinion, ruled on twelve separate motions in limine on proposed expert testimony in a mold case.²⁸ The court, acknowledging a five step test required by the Delaware Supreme Court²⁹, narrowed its focus to the reliability of the evidence and the bases for the opinions being offered.³⁰ The court stated that “to meet the inquiry required by *Daubert*, *Kumho Tire* and *M.G. Bancorporation*, the Court in this case must closely examine whether or not there is a sufficient methodological foundation for the experts to give their opinion to the jury.”³¹ The testimony at issue in *Minner* related to multiple chemical sensitivity, sick building syndrome, chronic fatigue syndrome, fibromyalgia, reactive airway dysfunction syndrome, and toxic encephalopathy, all allegedly caused by conditions, including mold, in the building where the plaintiffs worked. In the end, the *Minner* court ruled on motions pertaining to 12 different experts, 10 of whom were offered by the plaintiffs. Some testimony was permitted and some was precluded. For example, the court would not permit a doctor to testify as to her diagnosis of multiple chemical sensitivity. The court held that “the Plaintiffs simply have not convinced this Court that MCS as a disease has reached the threshold of reliability needed to survive a *Daubert* inquiry.”³² While the expert opined that mycotoxins in the air caused the onset of MCS, she “was not aware of any published literature supporting a theory that mycotoxin exposure could cause Multiple Chemical Sensitivity” and could not provide “a scientific or diagnostic method that supports her theory. . . .”³³ The court also would not permit testimony about sick building syndrome (“medical community has not accepted as valid a diagnosis of SBS”) or chronic fatigue syndrome (“no known cause of CFS”).³⁴

But the court did allow testimony about reactive airway dysfunction syndrome and toxic encephalopathy and the causal connection between building air quality (dust, molds, VOCs) and these illnesses.

The bottom line is that the strength of your defense to a toxic mold claim may be in your ability to keep out the junk science about the potential adverse health effects of exposure to mold. Because of this, your selection of qualified experts is critical. Not only will they be able to testify on your behalf, but they will be invaluable in helping you separate the valid science from the junk.

3. Contributory Negligence

While a defense of contributory negligence is unlikely to be the show-stopper that a successful *Daubert* challenge can be, the conduct of the plaintiffs should not be overlooked when preparing the defense strategy.³⁵ It is always risky to attempt to shift blame back to the alleged victims in these cases, but keep in mind that most jurors will have encountered mold in their own experiences and may be wary of plaintiffs seeking to take advantage of these conditions. There are numerous circumstances in which a plaintiff may have acted in such a way as to contribute to the problem. For example, tenants often ignore problems or fail to promptly report them in a timely manner. Remember, as stated above, taking prompt action in the first 48 hours after a water incident is critical in preventing mold development. Similarly, poor maintenance of a building, resulting in years of moisture problems, may be as much or more of a contributor to a mold condition as a one-time water intrusion. Again, it is a wise practice

to rely on your experts to help evaluate the impact of the plaintiff's conduct on the mold conditions.

4. Class Actions

A number of recent toxic mold cases have been brought as potential class actions, often on behalf of either tenants in large apartment or condominium complexes or students and employees at mold-contaminated schools. Class actions are designed to handle litigation involving a large number of plaintiffs who have been damaged as a result of the same incident or conduct. For a class to be certified, the plaintiffs must satisfy the following elements: numerosity (claimants too numerous, making joinder impractical); commonality (there are questions of law or fact common to the class); typicality (the claims of the representative parties are typical of the claims of the class members); and adequate representation by the class representatives. Furthermore, the questions of law or fact common to the class must predominate over individual questions.³⁶

In *Wheeler v. Avalonbay Communities*³⁷ the court denied class certification in a case in which residents of a large apartment complex alleged that the landlord was negligent and had breached the warranty of habitability due to excessive levels of mold, mildew and fungus. The court found that there was no well defined community of interest in the relevant questions of law or fact. The court stated the following:

While individualized proof of damages does not necessarily defeat class certification, individualized proof of the elements of liability and causation does. Here for each of the negligence based causes of action [including also the breach of implied warranty and nuisance cause of actions], each purported class member would have to prove exposure to a particular toxic substance, the timing of such exposure, and the effect of such exposure; Defendants would legitimately seek to

present evidence of exposure other than at the apartment complex for each class member.³⁸

Thus, if faced with a purported class action, the defense lawyer should probably focus on the issues of liability and causation that are unique to every purported class member. The facts related to water intrusion and moisture, construction, exposure and damages will all likely differ between class members.

Conclusion

There is no cookie cutter approach to defending a toxic mold claim. However, understanding the facts and science involved, retaining qualified experts at an early stage, and challenging causation theories will certainly help “mold” a successful defense.

¹ Jim Ray is a partner at Robinson & Cole LLP in Hartford, Connecticut. He acknowledges the assistance of Matt St. Amand and Kirstin Etela, an associate and summer associate at Robinson & Cole, respectively, in the preparation of this article.

² Insurance coverage litigation is not covered in this article.

³ While mold litigation has often been compared to asbestos litigation, there is at least one very important distinguishing feature: much of the damage caused by asbestos exposure is permanent, whereas when a person suffering injury due to mold exposure is removed from that environment, their health generally improves pretty quickly.

⁴ “A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” F.R.C.P. 26(b)(4)(B).

⁵ F.R.C.P. 26(a)(2), requires that the report disclosing the intent to rely on expert testimony include “a complete statement of all opinions to be expressed and the basis and reasons therefore; [and] the data or other information considered by the witness in forming the opinions.”

⁶ Andrews, Walter J., Berk, Lon A., and Ferro, David C., “*Daubert v. Merrell Dow Pharmaceuticals* Provides Key Challenge to Mold Injury Causation Evidence,” ALI-ABA Course of Study: Insurance Coverage in the New Millennium, October 11-12, 2001.

⁷ Similarly, the American Industrial Hygienists Association poses the following question and answer on its web site:

“Q: When is sampling necessary in a building evaluation?

A: Sampling may not be necessary. If visible mold is present, then it should be remediated, regardless of what species are present and whether samples were taken. . . .”

⁸ “A Brief Guide to Mold, Moisture and Your Home,” U.S. EPA, p. 9.

⁹ Redd, Stephen C., M.D., Chief, Air Pollution and Respiratory Health Branch, National Center for Environmental Health, Centers for Disease Control and Prevention, “State of the Science on Molds and Human Health,” Statement for the Record Before the Subcommittees on Oversight and Investigations and

Housing and Community Opportunity, Committee on Financial Services, United States House of Representatives, July 18, 2002, page 3.

¹⁰ *Id.* at 2.

¹¹ 2002 Ohio App. LEXIS 751 (Ohio Ct. Apps. 2002).

¹² 742 N.Y.S.2d 314 (N.Y. App. Div. 2002).

¹³ 1996 Conn. Super. LEXIS 2987 (Conn. Super. Ct. 1996).

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 12.

¹⁶ Plaintiffs in personal injury cases must prove two elements of causation; general causation and specific causation. To prove general causation the plaintiff must demonstrate that exposure to the substance in question has been shown to cause the types of injuries or illness alleged. To prove specific causation, the plaintiff must show that the substance actually did cause the injuries or illness in the case at hand.

¹⁷ 509 U.S. 579 (1993).

¹⁸ “The Court set forth some non-exclusive factors that Courts could consider in making a determination as to whether an expert’s testimony was relevant and reliable. They included: 1) whether the technique or scientific knowledge is capable of testing or has been tested (the testing requirement), 2) whether the theory or technique has been subjected to peer review and publication (the publication requirement), 3) the known or potential rate of error and the standards for controlling the technique’s operation (the control requirement), and 4) whether the technique had gained ‘general acceptance.’” *Minner v. American Mortgage & Guaranty*, 791 A.2d 826 (Del. Super. Ct. 2000), citing *Daubert*, 509 U.S. at 593-94.

¹⁹ Not all jurisdictions have adopted the *Daubert* standard. For example, in *Centex-Rooney Construction Co., Inc. v. Martin County, Florida*, 706 So.2d 20 (Fla. Dist. Ct. App. 1998), the appellate court reviewed, *de novo*, the trial court’s application of the *Frye* test when ruling on the admissibility of certain opinions about the health risks associated with mold exposure. The court held that “Dr. Morey and Dr. Hodgson each testified about numerous publications accepted in the scientific community recognizing the link between exposure to the highly unusual toxigenic molds and adverse health effects.” 706 So.2d at 26.

²⁰ The award was reduced substantially on appeal. See *Allison v. Fire Insurance Exchange*, 98 S.W.3d 227 (Tex. App. 2002).

²¹ *Id.* at 238, citing *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

²² 98 S.W.3d at 239.

²³ *Id.* at 239-240.

²⁴ See *New Haverford Partnership v. Stroot*, 772 A.2d 792 (Del. 2001).

²⁵ *Id.* at 799 (“The voir dire established that the methodology employed by plaintiffs’ experts (without the use of air pressure data) was reviewed by peers and generally accepted in the scientific community.”)

²⁶ *Id.* at 800.

[W]e conclude that the failure to conduct extensive baseline testing goes to the weight of the experts’ opinions, not their admissibility. The same is true for the asserted failure to eliminate other possible causes of plaintiffs’ health problems. Johanning testified that he followed the scientifically accepted procedure of obtaining a medical history and a detailed questionnaire from the plaintiffs. He then ruled out other possible causes of plaintiffs’ health problems by reviewing that information together with the blood test results and the data collected from the apartment buildings.

²⁷ 791 A.2d 826 (Del. Super. 2000).

²⁸ The court, recognizing that evidentiary hearings on *Daubert* motions “could overwhelm” and “cripple the trial calendar”, denied the request for pretrial *Daubert* evidentiary hearings. 791 A.2d at 845-46.

²⁹ See *Nelson v. State*, 628 A.2d 69, 74 (Del. Supr. Ct. 1993).

³⁰ *Minner*, 791 A.2d at 847.

³¹ *Id.*

³² *Id.* at 850.

³³ *Id.*

³⁴ *Id.* at 854.

³⁵ For example, in *Stroot*, the jury reduced the award to the plaintiffs by 22% due to the level of the plaintiffs' contributory negligence. 772 A.2d at 797.

³⁶ See, e.g. Rule 23 of the Federal Rules of Civil Procedure.

³⁷ 2002 Cal. App. Unpub. LEXIS 10906 (2002).

³⁸ *Id.* at 8-9, (quoting from the trial court opinion, citations omitted.)