

TOXIC MOLD: A GROWING PROBLEM FOR THE REAL ESTATE INDUSTRY

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Elliot Klayman
Associate Professor of Finance and Business Law
Max M. Fisher College of Business
The Ohio State University
voice: (614) 292-4334
e-mail: klayman.1@osu.edu

EXECUTIVE SUMMARY

The number of lawsuits associated with toxic mold is growing exponentially and threatens to continue. Million dollar awards and settlements are now a reality. The insurance industry is reacting; the building industry, including architects, exhibits serious concerns, and the ordinary residential seller and buyer are often the ultimate victims. The ultimate question is, who should pay for injuries and illnesses associated with toxic mold growth inside the home? How should buyers, sellers, and brokers protect themselves against the cost of uncertainty associated with such potential claims and lawsuits? This article seeks to answer those questions by proposing a comprehensive practical solution to this continuing threat to health and property.

Litigation will continue. Some lawyers are specializing in toxic mold cases and there seems to be no end in sight for potential plaintiffs, defendants, and toxic mold-related claims. Legislation and regulation will no doubt expand in this area to protect those who are unaware of the problem. However, with the insurance industry becoming

reluctant to insure against toxic mold in their general homeowner's policies, judgments may go unsatisfied. There are a few common sense antidotes intended to cut the risk in this potentially ruinous environment. There is no single solution, but one that attacks the problem on a variety of fronts includes:

- Buyer security through purchase of mold protection insurance coverage.
- Pre-closing inspections specifically directed to mold and mold-related problems.
- Incorporation of a mold inspection clause within the standard real estate purchase contract.
- State licensure of toxic mold remediators.
- Legislative action expanding mandated disclosures for owners to include toxic mold.
- Government encouragement of research through offering funding for toxic mold and its related effects.

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Elliot Klayman*

BACKGROUND: AN ANCIENT PLAGUE?

Plagues were not uncommon in the ancient world. People,ⁱ garments,ⁱⁱ and even housesⁱⁱⁱ were susceptible to them. When a physical plague was thought to infect a house, the priest was called to do a visual inspection of the walls to determine the telltale signs of coloration^{iv} and location.^v After a period of seven days, the priest returned to observe whether the plague had spread. If so, the process of scraping, removing, and replacing the foundational stones and re-plastering with mortar began. In the event that turned out to be insufficient, and the plague continued to inundate the walls, the whole house had to be torn down — wood, stone, mortar — and the building materials discarded.^{vi}

As antiquated and far-fetched as this scenario sounds, this plague — toxic mold — has come home today to haunt with a vengeance. Across the country headlines scream: “Toxic Mold Drives Family from Home, Possessions,”^{vii} “Mold Takes Hold,”^{viii} and “Suit Blames Building Mold in Tenant Death.”^{ix} Famous people are not immune from the toxic mold plague. Ed McMahon, who gives out millions of dollars in the Publisher’s Clearing House Sweepstakes, sought to collect millions for toxic mold infestation in his Los Angeles home.^x Erin Brockovich, who was made famous by the actress Julia Roberts in the movie “Erin Brockovich,” found her house riddled with toxic mold, and continues to pursue a remedy.^{xi} Courthouses,^{xii} schools,^{xiii} libraries,^{xiv} other public buildings,^{xv} and office buildings,^{xvi} not to mention residential properties,^{xvii} are all coming down with “sick building syndrome.”^{xviii}

The number of lawsuits associated with toxic mold is growing exponentially, and threatens to continue. Million dollar awards and settlements are now a reality.^{xix} The insurance industry is reacting;^{xx} the building industry, including architects, exhibits serious concerns,^{xxi} and the ordinary residential seller and buyer are often the ultimate victims. The ultimate question is, who should pay for injuries and illnesses associated with toxic mold growth inside the home? How should buyers, sellers, and brokers protect themselves against the cost of uncertainty associated with such potential claims and lawsuits? This article seeks to answer those questions^{xxii} by proposing a comprehensive practical solution to this continuing threat to health and property.

INTRODUCTION TO MOLD

Mold comes in a variety of shapes and sizes. There are perhaps 100,000 different types of molds, of which only a few have the potential to cause health problems for humans. Mold needs water and cellulose to thrive. Cellulose is contained within wood, wall board, and many of the synthetic building materials. Water seeps into a building through rain, flooding, pipe bursts, underground seepage, wind-blown pressure, and a host of other ways. And spores emitted from mold are distributed through air conditioning vents, heating systems, and other ductwork. The tighter a building, the greater the hazard of mold saturation. Mold can survive on the moisture in the air, even with less than fifty per cent humidity.

The most toxic variety of molds are those that produce mycotoxins,^{xxiii} a potentially dangerous by-product emitted into the air that when inhaled or even exposed to the skin can result in serious health problems.^{xxiv} Some of the more infamous molds

include stachybotrys, aspergillus, and penicillium, the “three wicked sisters.” Stachybotrys, in its varieties, has become a household word, with its black and greenish streak across indoor walls and flooring being its common mark. Although the toxicological and epidemiological studies are still in their infant stage, evidence is emerging of direct health problems linked to exposure to these molds.^{xxv} Some of the medical problems connected to mycotoxin-producing molds include mild symptoms of persistent coughing, dry throat, teary eyes, rashes, skin dryness, diarrhea, nausea, and other flu symptoms. More serious symptoms include memory loss, chronic fatigue syndrome, respiratory ailments, brain and neuro-dysfunction, and even cancer.^{xxvi} As the scientific community seeks positive proof of the threat and reality of toxic health problems associated with exposure to these molds, the legal community has already pioneered the way through the scientific maze, and courts have awarded damages for remediation and physical and neuro-psychological injury.

BATTLE OF THE EXPERTS

Plaintiffs’ attorneys battle for legitimacy in a growing industry of toxic mold suits that promises to pass the combined total of asbestos, lead-based paint and radon claims as the all-time mass tort. Some attorneys have devoted their full time efforts toward seeking recompense for clients who have been forced to move out of their homes and have suffered a variety of debilitating injuries from this “plague.” Defense attorneys maintain that the cases lack causative linkage, or that the scientific community has not adopted a consensus on the nexus between toxic mold and personal injury. On the one hand there is a growing body of scientific literature outlining the harmful effects of certain strains of

molds. On the other hand the Centers for Disease Control (CDC), along with some scientists, has taken a very conservative approach, stating that there are no conclusive findings to date that serious medical implications flow from mold exposure. So, the debate rages.^{xxvii} To further complicate the matter, there are no standards that have been developed for what is a permissible level of various strains of mold in the indoor environment. In the midst of all of this uncertainty the law has a way of dealing with these opposing positions.^{xxviii}

Toxic mold cases often involve a battle of the experts.^{xxix} Plaintiffs' experts are needed to assess the presence, type, and toxicity levels of the mold, as well as to prove the causative link between the mold and the damage,^{xxx} and to assess the remedial measures. In the event personal injury is involved, medical experts are needed to render an opinion based upon reasonable medical probability, evaluate treatment, and prognose the medical condition of the plaintiff. Defense experts are invoked to rebut the plaintiffs' experts. Hence, mold cases may involve an array of experts, including contractors, engineers, architects, waterproofing and remediation experts, as well as physicians, microbiologists, epidemiologists, pathologists, toxicologists, psychologists, neurologists, allergists, immunologists, gastroenterologists, pulmonologists and economists.^{xxxi}

Rules of evidence control the admissibility of expert testimony. In the federal system, the Federal Rules of Evidence govern, and in particular Rule 702.^{xxxii} Most states pattern their rules of evidence after the federal rules. According to Rule 702, a witness qualified as an expert may testify as long as scientific, technical, or other specialized knowledge would assist the trier to understand the evidence or determine a fact.^{xxxiii} This rule appears to be very broad and receptive to expert testimony. However, a federal court

of appeals case predating the federal rules institutes a harsher standard for admissibility of expert evidence. *Frye v. United States*^{xxxiv} excludes expert testimony unless it is based on a scientific principle or discovery that is “sufficiently established to have gained general acceptance in the particular field in which it belongs.”^{xxxv} This appears to contradict the more benign test of Rule 702. To further complicate the situation, the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*^{xxxvi} interpreted the federal rules by adding four additional questions for a court to consider before admitting expert testimony: (1) was the theory tested? (2) was the theory subject to peer review? (3) what is the ratio to error? and (4) was the *Frye* standard met?^{xxxvii} This is the most rigorous of the tests; some states, following the federal lead, have adopted the strictness of the federal tests. Nonetheless, experts are testifying in toxic mold cases throughout the country, in many cases meeting the admissibility tests of the jurisdiction.

INVADING THE PILLARS OF GOVERNMENT

Quite ironically, the first celebrated case of toxic mold to raise public awareness involved a courthouse. In *Centex-Rooney Construction Co. v. Martin County*^{xxxviii} the Florida District Court of Appeals affirmed a \$14 million-plus judgment against the construction manager of the Martin County Courthouse. The court held that the manager’s breach of contract produced various problems, the most dramatic consisting of the proliferation of toxic mold resulting in workers suffering from work-related asthma. The county evacuated the building and began remediation. An even more extensive buildup of mold-related infestation due to a defective heating, ventilation, and air conditioning system (HVAC) and water infiltration through the exterior synthetic

hardcoat systems was uncovered. Out of this arose a number of private lawsuits by workers who had suffered injury due to exposure to the toxigenic conditions in the courthouse.^{xxxix}

Mold infestation does not stop at the courthouses; it also invades other public facilities including prisons.^{x1} It even attacked a fitness center at the Transportation Department in Washington, where *stachybotrys* was found lurking under the tiles in the women's showers.^{xli} Complaints at a district fire station in the Seattle area resulted in the closure of that station due to toxic molds that were nourished by a leaky roof.^{xlii} And schools have been closed due to the danger of toxic mold breeding in the building.^{xliii} Neither are libraries exempt from the black and greenish streaks of gob that emit harmful mycotoxins into the air.^{xliv} But courthouses, prisons, government buildings, schools, and libraries are only scratch the surface. Ordinary private buildings and residences are also affected, and the proliferation of toxic mold among the rank and file structures threatens to turn into a bigger problem than asbestos.

ORDINARY BUILDINGS AND RESIDENCES

Liability exposure for toxic mold includes a host of players. Builders, contractors, architects, subcontractors, and construction managers are just a few on the "manufacturing" level. Landlords, sellers, and real estate brokers are also subject to liability.

The Supreme Court of Delaware, in *New Haverford Partnership v. Stroot*,^{xlv} affirmed a lower court award in favor of two tenants that amounted to over \$1 million for injury due to toxic mold. The tenants had complained to their landlord about the mold-

ridden condition of the property, and the failure of the landlord to respond caused an exacerbation of damages, which included permanent chronic ailments. The court based its holding on a negligence theory.

In addition to negligence actions for injuries due to toxic mold, fraud may be a successful basis for recovery. In *Gifford v. Matejka*,^{xlvi} the buyers alleged that the sellers concealed the true reason why bleach stains existed on the walls and carpets, contending that the bleach was used to remove children's markings, rather than mold and mildew. Fraud may be of a passive or active variety. Commonly, in order to recover, based upon active fraud, there must be an intentional misrepresentation of a material fact.^{xlvii} A landlord, seller, or sales broker may engage in this actionable wrong, as in *Gifford*, by knowingly misrepresenting that a structure is not troubled by toxic mold. Knowledge may be difficult for the plaintiff to prove. It may be established by evidence of previously ordered inspections, or the owner's treatment of areas of recurrent mold infestation.

Passive fraud occurs under circumstances where a person remains silent instead of being forthright. Ordinarily, a seller or broker who knows of a hidden defect that is material is under an affirmative obligation to report the defect to one who would be affected by a transaction involving the property. Toxic mold is certainly a material defect, given the growing understanding of the medical implications of exposure. Hence, it behooves landlords, sellers, and real estate agents to make full disclosure of a mold condition. The prudent approach is to remedy the mold problem before entering into a transaction and then to fully inform the tenant or buyer of the remediation. The stakes

are often high in this mold environment. Even a little mold can jeopardize a big real estate deal^{xlvi} and spawn a humongous lawsuit.^{xlix}

STATUTORY INTERVENTION

Statutory activity has been very sparse in the area of toxic mold regulation. Only a few states have acted and only a few more have made overtures toward a statutory scheme covering the area. California has taken the lead. It has enacted comprehensive legislation designed to protect the public health.¹

The California Toxic Mold Protection Act of 2001 establishes definitions of terms including mold, which it defines as “any form of multicellular fungi that live on plant or animal matter and in indoor environments.”^{li} The California legislation further establishes a task force that is in an advisory capacity to the Department of Health on the development of standards.^{lii} The Department is required to “consider the feasibility of adopting permissible exposure limits (PELS) to mold in indoor environments.”^{liii} The Department is to report to the state legislature its progress by July 1, 2003.^{liv} Any published guidelines are to be reviewed at least once every five years and revised as necessary.^{lv} The aim is to develop mold identification guidelines, permissible exposure limits, and remediation guidelines for indoor molds. In addition, the statutory scheme employs a mold disclosure requirement to some classes of prospective buyers and tenants.^{lvi} Finally, the statute incorporates a scheme for considering standards for mold testing professionals and remediation specialists.^{lvii}

The statute is ambitious. To date there have not been any standards implemented.^{lviii} It is a formidable task and to a large extent much of it is dependent

upon the state of the art of mold science. Nonetheless, it is commendable that the state legislature has “raised the bar.” This will undoubtedly spawn further activity and model legislation in other jurisdictions. Maryland is on California’s heels.^{lix} Other states will follow with a variety of schemes designed to grapple with the mold issue and attend to the public health. However, there is currently a paucity of state legislation.^{lx}

Federal legislation leaves much to be desired. Few federal regulatory agencies are empowered to enact regulations that directly control or establish toxic mold standards. The U.S. Environmental Protection Agency (EPA), although evincing some concern, is generally confined to regulating outdoor air pollution.^{lxi} The Department of Housing and Urban Development (HUD) has issued guidelines on indoor air quality but none that directly relate to mold standards. The Consumer Products Safety Commission has generated some standards on measuring fungi in buildings and reducing exposure to these contaminants, but has not comprehensively addressed the problem.^{lxii}

The Occupational Safety and Health Administration (OSHA) has direct authority to regulate indoor air quality. Although that authority is confined to the workplace, 70 million people are covered. The general duty clause contained in the Occupational Safety and Health Act (OSH Act) requires an employer to provide a place of employment that is free from recognized hazards likely to cause serious injury or death.^{lxiii} However, there are no specific standards that provide guidance for toxic mold exposure. And, although the workplace is a significant locus of exposure, people spend more time in their homes throughout their life. What is lacking is comprehensive protection on all fronts. Until then, the best protection available for the players in the real estate industry, including buyers and brokers, would appear to be insurance.

PUTTING THE BREAKS ON INSURANCE COVERAGE

Mold claims are in the billions of dollars annually^{lxiv} and only threaten to continue to accelerate. As demonstrated, these claims consist of both property and personal injury damage. Remediation of mold is an art, and should be left to the professional. Although licensing of mold removal has not yet reached the level of asbestos removal, it will undoubtedly overtake it in the not too distant future. Some regulation already exists in some localities. The bottom line is that it is an expensive endeavor to undertake the inspection, assessment, and removal of toxic mold. Personal injury damage is even trickier as far as the assessment is concerned. Once the causative link is determined, personal injury damage claims will soar, which of course is another high cost outlay. Insurance companies are looking for ways to avoid coverage in homeowners' policies and the high cost of pay-outs it perceives as out of control.^{lxv}

An Austin, Texas jury awarded \$32 million to a couple whose mold problem was exacerbated because the couple's insurer failed to give it proper attention when notified. It started out with a plumbing leak. The insurer initially failed to pay the claim and authorize proper repairs; it thereafter offered a settlement that would not cover the entire costs of remediation of the mold condition spreading through the 11,500-square-foot house. Even after the claimants alerted the insurance company that experts advised that they immediately evacuate the 22-room mansion, which would have to be razed due to immediate health concerns, the insurer failed to adequately respond.^{lxvi} In part, due to this huge verdict and the realization that claims are mushrooming, the insurance industry petitioned Texas's state insurance regulatory agency, seeking permission to eliminate

mold coverage on their standard homeowner's insurance policy.^{lxvii} This is a trend that will continue.

Even absent *carte blanche* exclusion within a home insurance policy, there are still exclusions that cloud coverage. The standard homeowner's policy (referred to as "HO-3") admits coverage for "direct physical loss" to the property. Although mold may certainly qualify as causing a direct physical loss, this standard policy excludes loss that results from wear and tear over time. What is typically understood is that mold and damage emanating from such a condition that develops over time due to climate and humidity is not covered. However, mold damage that originates from a covered peril such as a burst pipe or hailstorm damage is covered.^{lxviii} An updated version of the standard homeowner's policy states:

We do not insure ... for loss ... [c]aused by ... [m]old, fungus or wet rot. However, we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam within: (a) A plumbing, heating, air conditioning or automatic fire protective sprinkling system, or a household appliance, on the residence 'premises;' or (b) A storm drain, or water, steam or sewer pipes, off the 'residence premises.'^{lxix}

This clause further complicates the intent and interpretation of the exclusions. It is an open question as to whether the language would support coverage for mold damage due to a covered peril within the policy other than those specifically mentioned in the clause.

However, to the extent that this language poses an ambiguity, courts will give the best construction for the insured.

Additionally, some homeowner's peril coverage is limited by the standard "emission and pollution" clause that excludes coverage. Coverage is excluded when the mold is deemed to cause damage due to a "discharge, dispersal, seepage, migration, release or escape of pollutants."^{lxx} In *Leverance v. U.S. Fidelity & Guaranty*,^{lxxi} the court refused to exclude coverage, under the policy, for mold that resulted from water vapor trapped in the walls, holding that it did not "discharge, disperse, seep, migrate, release or escape." Science now recognizes the mycotoxin-release nature of mold; this may suggest a different result for future application of this mold exclusion clause under this language.^{lxxii}

The question of whether mold is a pollutant has not been the subject of extensive litigation; however, case decisions are mixed, with about an even number lining up on each side of the issue.^{lxxiii} The uncertainty that exists in the area of "mold coverage" plus the threat of a total exclusion within homeowners' policies is very unsatisfying as a long term solution to the growing problem.

A CONTEMPORARY SOLUTION

Litigation will continue. Some lawyers are specializing in toxic mold cases^{lxxiv} and there seems to be no end in sight for potential plaintiffs, defendants, and toxic mold-related claims. Legislation and regulation will no doubt expand in this area to protect those who are unaware of the problem. However, with the insurance industry becoming reluctant to insure against toxic mold in their general homeowner's policies, judgments

may go unsatisfied. There are a few common sense antidotes intended to cut the risk in this potentially ruinous environment.

Buyers should protect themselves in the contract, with a pre-closing provision authorizing inspection for mold. This may take the form of a general right to inspect, or a more pointed inspection designating “mold, mildew, and water damage.” Many local real estate purchase contract forms already include a buyer’s right to inspect. It often takes the form of a condition, meaning that in the event that the inspection reveals that there is substantial mold damage, then the buyer may elect to rescind the contract.^{lxxv} The buyer should take advantage of the right to inspect by hiring a specialist to determine the presence of mold. However, buyers are not ordinarily in control of contractual provisions in the real estate purchase contract. Moreover, they usually do not hire lawyers to negotiate the terms of the contract. Some hope therefore lies in the standard real estate contract that is commonly adopted by the local real estate industry.

Local bar associations in cooperation with local real estate associations often craft a standard approved contractual form suggested for use. It reflects the custom in the industry. This is where toxic mold protection may yield significant results. Many such form contracts already provide for inspections; however, they ordinarily do not specify mold. Termite, gas, and water inspections are the normative expressed inspections. Many form contracts also mention structural inspections and inspections in general. However, adding the express wording to include mold raises awareness of the problem and encourages such an inspection, thus revealing problems pre-closing, and hence, affording a better chance of resolving the issue early, without litigation. The mold inspection industry will undoubtedly burgeon, and, not unlike gas line and termite inspections, it

should give rise to demand for a pre-closing mold warranty or guaranty — one that will protect the homeowner and afford a lot of players in the industry, from the builder to the plumber, a good sleep.

Additionally, many state statutes require disclosures. For example, Ohio mandates that the seller make disclosures on a statutory form that requires the seller who has occupied the premises to check certain boxes that, for example, inquire into the presence of asbestos, radon and lead-based paint.^{lxxvi} It would be a simple matter to add another environmental hazard: toxic mold.^{lxxvii} Some disclosure forms require the answer to the questions such as: “Have you had a leaky roof, or water problems associated with the house?”^{lxxviii} The answer may indicate a mold problem, but it is not as helpful as a mold-specific question.

Then there is the insurance problem previously discussed. Insurers continue to de-insure for toxic mold related problems. The law is uncertain even for those standard homeowner insurance policies that do not expressly exclude toxic mold coverage. Under the circumstances a buyer should seriously consider purchasing a toxic mold rider to the homeowner’s policy to insure against such a peril.

Mold remediation is a serious undertaking and requires professionals. Not everyone has the expertise. There needs to be some minimum standards in this industry, which like asbestos removal, is best left to a licensing system.

Finally, further research in this area will advance the interest of a society under assault from the microscopic colonies of mycotoxin-producing molds. Government funding should encourage such research.

CONCLUSION IN SUMMATION

Toxic mold is a plague of “biblical proportions” confronting a number of areas of society and players in the real estate sales and building industry. There is no single solution, but one that attacks the problem on a variety of fronts includes:

- Buyer security through purchase of mold protection insurance coverage.
- Pre-closing inspections specifically directed to mold and mold-related problems.
- Incorporation of a mold inspection clause within the standard real estate purchase contract.
- State licensure of toxic mold remediators.
- Legislative action expanding mandated disclosures for owners to include toxic mold.
- Government encouragement of research through offering funding for toxic mold and its related effects.

* Associate Professor, Legal Environment of Business, Fisher College of Business, The Ohio State University; LL.M. Harvard Law School; J.D., B.B.A., University of Cincinnati. This article was funded by The Center for Real Estate Education and Research, Fisher College of Business, The Ohio State University. Thanks to Louis Pilder, M.Ed., for providing the idea and inspiration for this article. I want to acknowledge the valuable editorial and research assistance of John Wilson, second year student at The Ohio State University College of Law. I also want to recognize the

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ⁱ *Leviticus* 13:1-46. (Unless otherwise noted, all references are to the New Revised Standard Version.) There is conjecture that the tenth plague of Egypt was poisonous mold. Philip J. Hilts, *The Mold Scare: Overblown or Not?*, N.Y. TIMES, Oct. 23, 1997, at F10.

ⁱⁱ *Leviticus* 13:47-59.

ⁱⁱⁱ *Id.* at 14:33-53. See Sam Meier, *House Fungus: Mesopotamia and Israel (Lev 14:33-53)*, 96 REVUE BIBLIQUE 184-92 (1989). The obscure Hebrew construction here termed “plague” has been variously translated: plague of leprosy (Jewish Publication Society, 1917; King James Version); leprous infection (New American Bible); mark of leprosy (New American Standard); spreading mildew (New International Version); disease (New Jerusalem Bible); leprous plague (New King James Version); leprous disease (New Revised Standard Version); eruptive plague (Jewish Publication Society Tanak). The Hebrew construction is so obscure that every time it occurs, the New Revised Standard Version includes a note indicating the precise meaning is uncertain. However, one eminent biblical scholar writes that it is “some sort of mold, blight, or rot, perhaps of a fungoid character.” Baruch A. Levine, *Leviticus*, in THE JPS TORAH COMMENTARY 89 (Nahum M. Sarna ed., 1989).

^{iv} According to *Leviticus* 14:37, “greenish” or “reddish” were dangerous color indicators. “[T]he specific diagnosis in differentiating various types of katarru [the Akkadian word for house fungus] . . . serves to distinguish calamities, which include future death,

mourning, destruction, declining success, poverty, lack of food, or demons” Meier, *supra* note 3, at 188.

^v A plague that appears to be “recessed within the surface of the wall” is especially dangerous. *Leviticus* 14:37; Levine, *supra* note 3, at 90.

^{vi} *Leviticus* 14:38-45 describes the procedure the Israelites were to follow. Ancient Mesopotamian texts describe a similar procedure to be followed by another ancient near-eastern community. Meier, *supra* note 3, at 185-89. Indeed, “[t]he presence of a peculiar growth in buildings was a matter of life and death proportions in Mesopotamia.” *Id.* at 185. “The text is silent as to the possibility of future construction on this site. Presumably, it would be a precarious undertaking and so eschewed. Likewise, no suggestion is offered as to any compensation or communal solace which the ultimately unfortunate home-owner might expect, and it appears that any financial loss was his alone to bear” *Id.* at 186.

Whether a house in ancient Israel ever had to be destroyed because of this plague is unclear. One opinion in the Talmud, a voluminous and foundational commentary on Jewish law, is that “[t]here never was a leprous house [to need destruction], and never will be,” *id.* at 185, and that the purpose of the prescription for dealing with one is simply “[t]hat you may study it and receive reward.” *Sanhedrin*, in HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD 71a (Jacob Shachter & H. Freedman, trans. 1969). Two individuals call this into question: Rabbi Eliezer son of Zadok said that he knew of a place called the leprous ruins, and Rabbi Simeon of Kefar Acco said that he once walked by a place that had been marked off and was told that leprous stones were thrown there.

^{vii} Kristin McAllister, *Toxic Mold Drives Family from Home, Possessions*, J. NEWS (Hamilton, Ohio), Sept. 1, 2001, at A1.

^{viii} Arnold Mann, *When Mold Takes Hold*, USA WEEKEND, July 19-21, 2002, at 5.

^{ix} Derek Rose & Barbara Ross, *Suit Blames Bldg. Mold in Tenant Death*, N.Y. DAILY NEWS, Sept. 5, 2001, at 17.

^x *Ed McMahon Files \$20M Lawsuit*, AP ONLINE, Apr. 10, 2002, available at 2002 WL 18181923.

^{xi} Brockovich v. Morrison Assocs., No. 051037 (L.A. County Super. Ct.). See David Alden & Robert Infelise, *A Toxic Threat: Preventing Investment Dollars from Molding Away*, 66 J. PROP. MGMT. 8 (2001).

^{xii} Centex-Rooney Constr. Co. v. Martin County, 706 So. 2d 20 (Fla. Dist. Ct. App. 1997).

^{xiii} See *infra* note 43.

^{xiv} See *infra* note 44.

^{xv} See *infra* notes 40-42.

^{xvi} See *infra* note 48.

^{xvii} See *infra* notes 45-46.

^{xviii} Sick building syndrome is actually a general term used to describe indoor pollution problems that cannot be clearly identified. Sometimes they are determined by circumstantial evidence. For example, if a certain percentage of the inhabitants of an office building are experiencing symptoms not attributed to the general population and mold is present, an inference may be drawn that the building is “sick.” Building-related illness is a term used when the specific ailment can be linked to a specific indoor

pollutant. One author has noted that we are really talking about a continuum, where we begin with illness with etiology unknown and proceed to very well diagnosed related conditions to building pollutants, accomplished sometimes by biomarkers.

^{xix} See, e.g., *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 1999) (\$1.04 million award to two women whose landlord failed to respond to mold problems caused by water leaks); *Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20 (Fla. Dist. Ct. App. 1997) (\$11.5 million judgment for various defects including mold); *Blum v. Chubb Custom Ins. Co.*, No. 99-3563 (Tex. Dist. Ct.) (\$1.5 million settlement against insurer for bad faith mold-related case); *Club at Wood Ranch v. Roberts Group*, No. 21522 (Cal. Super. Ct.) (\$1.3 million settlement of claims against builders and contractors); *Anderson v. Allstate Ins. Co.*, 45 F. Appx. 754 (9th Cir. 2002) (affirming nearly \$485,000 in compensatory damages to homeowner against insurer who declined coverage for mold damage, but reversing trial court's award of \$3 million in punitive damages; jury originally had awarded \$18 million); Kevin Carmody, *Mold Case Decision Now Faces Mediation; Lawyer Will Work with Insurer, Family to Reduce \$32 Million Award*, AUSTIN AMERICAN-STATESMAN, July 31, 2001, at B1; Bob Van Voris, *Sexy It's Not, But Mold is Real Hot: Litigation Explodes over an Issue that's New and Yucky*, 23 NAT'L L.J., June 11, 2001, at A1.

^{xx} Insurers are seeking a shield from mold claims by amending their policies and by petitioning the insurance regulatory authority for permission to exclude mold coverage in their standard policy. Eric Berger, *Mold Fears Overblown, Experts Say*, HOUSTON CHRON., July 12, 2001, at 21; Amanda Zamora, *The Mold That Ate Texas: Insurance*

Companies and Politicians are Ensnared in the Explosion in Homeowner Claims, WASH. POST (national weekly edition), Oct. 14-20, 2002, at 30.

^{xxi} Ira Kustin, Note, *Limiting Architects' Liability for Indoor Air Pollution and Sick Building Syndrome*, 7 N.Y.U. ENVTL. L.J. 119 (1999).

^{xxii} To date few mainstream law review articles have tackled the toxic mold issue. See, e.g., Robert J. Aalberts, *Will Toxic Mold Become the Next Asbestos?* 31 REAL EST. L.J., at i (2002); Mike Bischoff, Comment, *Theories of Toxic Mold Liability Facing Arizona Homebuilders*, 34 ARIZ. ST. L.J. 681 (2002); Robert Geisler, *The Fungus Amongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511 (1996); Gene Heady, Comment, *Stuck Inside These Four Walls: Recognition of Sick Building Syndrome Has Laid the Foundation to Raise Toxic Tort Litigation to New Heights*, 26 TEX. TECH. L. REV. 1041 (1995); Kustin, *supra* note 21. Other articles have appeared in professional and proprietary law reviews. See, e.g., David Blundell, *Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?* 8 ENVTL. LAW. 389 (2000); Stephanie Cahill, *For Some Lawyers, Mold is Gold: Toxic Troubles Translates into Millions of Dollars for a Practice that's Bound to Grow*, 87 A.B.A. J. 22 (Dec. 2001); Edward Cross, *The Fourth Wave of Construction Defect Litigation?* 40 ORANGE COUNTY LAW. 26 (Dec. 1998); Edward Cross, *Litigation a la Mold: Mold-Related Indoor Air Quality Claims May Eventually Generate More Litigation than Asbestos*, 24 L.A. LAW. 28 (Jan. 2002); Charles LiMandri, *Epidemic of Mold Litigation Plagues Insurance Industry*, 23 INS. LITIG. REP. 261 (July 12, 2001); John Mitby & Kevin Trost, *The Emergence of Toxic Mold Litigation*, 75 WIS. LAW. 14 (Mar. 2002); Nana Nakano, *Toxic Mold in California: Recent Verdicts and Legislation*, 17 ANDREWS

TOBACCO INDUSTRY LITIG. REP. 10 (July 12, 2002); Rebecca Porter, *Something Rotten in Synthetic Stucco, Suits Claim*, 38 TRIAL 12 (Apr. 2002); Jennifer Reichert, *Homeowners, Insurers Spar Over Spores in Toxic-Mold Cases*, 37 TRIAL 14 (Sept. 2001); *Removal of Mold Case to Federal Court Upheld: Lewis v. State Farm Lloyds*, 24 ANDREWS ASBESTOS LITIG. REP. 9 (July 3, 2002); Stephen P. Samuels, *Mold Litigation: A Growing Industry*, COLUMBUS B. BRIEFS, Oct. 2002, at 26; Michael Withey, *When Mold Spreads to Masses*, 38 TRIAL 36 (Feb. 2002).

^{xxiii} Mycotoxins are highly toxic principles produced by molds or fungi. HAWLEY'S CONDENSED CHEMICAL DICTIONARY 767 (14th ed. 2001).

^{xxiv} As early as 1993, ten cases of bleeding lung syndrome in infants in Cleveland were linked to *stachybotrys atra*, a toxic mold that bred in standing flood water in homes. Hilts, *supra* note 1.

^{xxv} See, e.g., R. Dales et al., *Adverse Health Effects Among Adults Exposed to Home Dampness and Molds*, 143 AM. REV. RESPIRATORY DISORDERS 505 (1991) (a study linking mold to lower respiratory symptoms); American Academy of Pediatrics Committee on Environmental Health, *Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712 (1998) (statement describing mold's potential for causing respiratory problems in infants); J. Sykes, *Sick Building Syndrome: A Review*, HEALTH & SAFETY EXECUTIVE (1988) (report reviewing published information on high incidence of sickness associated with "sick buildings"); J. Bernhard et al., *Sick-Building Syndrome*, 349 LANCET 1913 (June 28, 1997) (discussing the role of mycotoxins and their influence of sick buildings). In fact, over 500 articles in academic journals have linked health problems to mold. Berger, *supra* note 20.

^{xxvi} At least one death has been attributed to toxic mold. Berger, *supra* note 20.

^{xxvii} *Id.*

^{xxviii} In *Mondelli v. Kendel Homes Corp.*, 631 N.W.2d 846 (Neb. 2001), the court overruled a lower court decision excluding expert evidence and said that “the scientific community has generally accepted the principle that a connection exists between the presence of mold and health.” *Id.* at 856.

^{xxix} *Cf.* *Gifford v. Matejka*, 107 Wash. App. 1014 (2001) (discussion of toxicologist versus hygienist on summary judgment ruling).

^{xxx} Causative linkage between the presence of toxic mold and consequent physical injury or illness is often difficult to directly identify and quantify. The burden is upon the plaintiff to prove causation — that the mold was a *substantial factor* in producing the injuries. See RESTATEMENT (SECOND) OF TORTS §§ 431-434 (1965); *see also* *Dick v. Pac. Heights Townhouses*, No. C037044, 2002 WL 31117253 (Cal.App. Sept. 25, 2002)(tenant was able to identify mold but unable to establish causation). Causation may be proved statistically, by showing a large disparity between the incidence of the particular anomaly in the general population compared to the anomaly in the affected area. However, the use of biological markers (biomarkers) is growing in this area. Biomarkers offer a more direct test that identifies “chemical footprints” that link the ailment to the exposure. See Heady, *supra* note 22, at 1077-79, and accompanying notes.

Somewhat akin to the "causation" issue is the statute of limitations which time bars litigants. The question in those cases depends on the particular statute and when it begins to run. *E.g.*, *Miller v. Lakeside Village Condo. Ass'n.*, 2 Cal. Rptr. 2d 796 (Cal. Ct. App. 1991).

^{xxxi} Kristopher Huelsman & Stephen Samuels, *Mold Litigation: A Growth Industry* (May 2, 2002) (paper presented at the Ohio State Bar Association Environmental Law Conference) (on file with author).

^{xxxii} FED. R. EVID. 702.

^{xxxiii} *Id.*

^{xxxiv} 293 F. 1013 (D.C. Cir. 1923).

^{xxxv} *Id.* at 1014.

^{xxxvi} 509 U.S. 579 (1993).

^{xxxvii} *Id.*

^{xxxviii} 706 So. 2d 20 (Fla. Dist. Ct. App. 1997). *See also* Polk County v. Reliance Ins. Co., No. 94-7135 (Fla. Cir. Ct. 1995), in which the courthouse required extensive remediation due to sick building syndrome. The contractors and construction professionals paid a \$7 million settlement. Also, it was reported that in Lakeland, Florida, toxic mold had infiltrated the air conditioning ducts at City Hall, necessitating remediation and temporary closure and the institution of a lawsuit. *See* Steve Newborn, *Lakeland Plans to Sue Over "Sick Building,"* TAMPA TRIB., Jan. 16, 1999, at 6.

^{xxxix} Martin County v. Pate Constr., Inc., No. 95-274 (Fla. Cir. Ct. 1992), *appeal docketed.*

^{xl} *Dodd v. Gottula*, 89 F.3d 849 (10th Cir. 1996). The federal appellate court rejected claims that officials had subjected an inmate to "cruel and unusual punishment" since the evidence was insufficient that the officials knew of the danger and that the inmate was deliberately exposed to it. *Cf.* *Greene v. Plano Indep. Sch. Dist.*, No. 4:02-CV-118, 2002 WL 31268439 (E.D. Tex. Aug. 16, 2002) (holding that a school employee allegedly

injured by toxic mold in the school failed to state a cause of action for denial of substantive due process).

^{xli} Frank Swoboda, *Toxic Mold Found at Sick Building; Transportation Dept's Fitness Center Closed*, WASH. POST, May 4, 1996, at C1.

^{xlii} Louis Corsaletti, *Toxic Mold in Roof Closes Fire Station*, SEATTLE TIMES, Apr. 14, 1999, at B5.

^{xliii} See, e.g., Dionne Searcy, *Students Finally Go Back to School*, SEATTLE TIMES, Sept. 29, 1998, at B3.

^{xliv} James Gillapsy, *Library is Ready for New Chapter: Building that Has Been Cleaned and Repaired is Free of Mold that Caused it to Close for 8 Months*, INDIANAPOLIS STAR, May 5, 2001, at N1.

^{xlv} 772 A.2d 792 (Del. 1999).

^{xlvi} 107 Wash. App. 1014 (2001). The lower court entered summary judgment in favor of the defendants asserting that there was a lack of proof of a causal link between the house defect and injury. The Washington Court of Appeals reversed and remanded the case to the trial court. *Washington Ct. Overturns Judgment for Home Seller in Toxic-Mold Case*, 19 ANDREWS TOXIC CHEMICALS LITIG. REP. 8 (Aug. 24, 2001).

^{xlvii} See RESTATEMENT (SECOND) OF TORTS § 310 (1965).

^{xlviii} Daryl Strickland, *Toxic Mold Threatens \$929 Million Deal*, L.A. TIMES, Sept. 22, 2000, at C2.

^{xlix} Dareh Gregorian, *Jury Hears of Toxic Mold 'Lies'*, N.Y. POST, Oct. 16, 2001, at 20 (more than 500 residents of a housing complex, involving more than 160 lawsuits seek more than \$9 billion in damages caused by "festering mold").

¹ CAL. HEALTH & SAFETY CODE §§ 26100-26156 (2001).

^{li} *Id.* § 26101.

^{lii} *Id.* § 26101.7.

^{liii} *Id.* § 26102.

^{liv} *Id.* § 26103.

^{lv} *Id.* § 26125.

^{lvi} *Id.* §§ 26140 (commercial and industrial sellers); 26141 (commercial and industrial landlords); 26146 (public entities); 26147 (residential landlords); 26152, 26154 (enforcement of disclosure requirements).

^{lvii} *Id.* § 26155.

^{lviii} Economic considerations could bog it down. A provision states that it shall be “implemented only to the extent that the department determines that funds are available for the implementation of this chapter.” *Id.* § 26156.

^{lix} Task Force on Indoor Air Quality, Md. Laws ch. 591 (2001). New Jersey has enacted stachybotrys-specific legislation. S. Res. 77, 209th Leg. (N.J. 2001).

^{lx} States and localities have building code regulations that may facilitate a plaintiff’s cause of action for breach of a warranty of habitability, *e.g.*, *Dick v. Pac. Heights Townhouses*, No. C037044, 2002 WL 31117253 (Cal.App. Sept. 25, 2002); negligence per se, or even strict liability, *c.f.*, *Pulte Home Corp. v. Smith*, 823 So.2d 305 (Fla. Dist. Ct. App. 2002), at 307, 308; however, they are rarely, if ever, mold-specific.

^{lxi} The EPA has issued guidelines for identifying and remediating mold in school buildings. *See* *Mold Remediation in Schools and Commercial Buildings*, at http://www.epa.gov/iaq/molds/mold_remediation.html.

^{lxii} See generally Kustin, *supra* note 21.

^{lxiii} 29 U.S.C. § 654(a) (1976). Note also that, pursuant to OSHA's Regulation 1977.12, workers have a right to say no to exposure to working conditions that pose an immediate threat to employee safety. Elliot Klayman, *Regulation 1977.12: The Right to Say No to Exposure to Working Conditions that Pose an Immediate Threat to Employee Safety*, 59 DETROIT J. URB. L. 187 (1982).

^{lxiv} Mold claims for Farmer's Insurance Co. were projected at \$85 billion for 2001. Mitby & Trost, *supra* note 22, at 14.

^{lxv} See generally *id.*

^{lxvi} Ballard v. Fire Ins. Exch., No. 99-05252, 2001 WL 883550, at *1 (Tex. Dist. Ct. Aug. 1, 2001); Locke Liddell & Sapp, *Jury Awards \$32 Million Toxic Mold Verdict*, 5 TEX. ENVTL. COMPLIANCE UPDATE 6 (July 2001) (the verdict included \$12 million in punitive damages and \$8 million for attorney fees); Reichert, *supra* note 22. The court appointed a mediator in attempts to produce a mediated settlement in lieu of an appeal. Carmody, *supra* note 19.

^{lxvii} Carmody, *supra* note 19. Farmer's Insurance has dropped mold coverage in at least thirty states already. Reichert, *supra* note 22.

^{lxviii} LiMandri, *supra* note 22; Mitby & Trost, *supra* note 22, at 17.

^{lxix} Mitby & Trost, *supra* note 22, at 17.

^{lxx} For a discussion of this clause, see *supra* note 68 and accompanying text.

^{lxxi} 462 N.W.2d 218 (Wis. Ct. App. 1990).

^{lxxii} Mitby & Trost, *supra* note 22.

^{lxxiii} Huelsman & Samuels, *supra* note 31, notes 8 & 9.

^{lxxiv} Cahill, *supra* note 22.

^{lxxv} There may be a whole host of other options within the inspection clause, short of outright rescission, for example, the seller may be given the right to remedy the mold; the seller may be obligated to remedy the mold in the event that the cost is less than a designated percentage of the purchase contract, say ten percent; or, the buyer may waive the condition and in effect choose to go through with the transaction.

^{lxxvi} OHIO REV. CODE ANN. § 5302.30 (West 2002).

^{lxxvii} One U.S. Congressman has offered a solution to the disclosure requirement in the form of a federal bill that would require homeowners and real estate developers to disclose the presence of mold when selling a house. *Mich. Congressman Poised to Introduce Federal Toxic-Mold Bill*, 12 ANDREWS INS. COVERAGE LITIG. REP. 11 (June 14, 2002).

^{lxxviii} See 12 Real Estate Transactions: Purchase and Sale of Real Property (MB) § 2.01[3].