When is toxic mold litigation not toxic mold litigation?

To settle with an insurer, you must maneuver around the exclusions for mold and focus on varied tenant claims that arise from an uninhabitable rental unit

By Eric L. Lifschitz and Aaron H. Darsky

Mold litigation is a unique area of law that combines tenant-rights claims with personal injury. Taking a conventional personal-injury approach to working these cases can result in the early entrenchment of the insurer to a non-negotiating position. A key element in avoiding this result is to not overlook the varied tenant claims that arise out of an uninhabitable residential rental unit and the contract claims arising from the lease agreement, in addition to the personal injury damages from suspected mold exposure.

After 11 years of specializing in mold litigation, we have honed our practice to find cost-effective means of resolving claims despite the many obstacles implemented by insurers. This article sets out to unravel some of the myths and misnomers surrounding "toxic mold" litigation and present some strategies for keeping your mold case covered by the landlord's insurer. As we will discuss, the phrase "toxic mold litigation" – bantered about on the Internet and among attorneys – misses the mark in identifying the heart of these claims and the varied damages available.

The insurance industry has made great efforts to dampen this area of litigation with standardized "mold" policy exclusions and all-too-quick letters to counsel warning that claims will not be covered. As a result, deserving clients are too often left with limited options in retaining contingency-fee attorneys willing to pursue viable, covered claims. A broad-based approach permits deserving clients to receive just compensation without the need to try every case and run the inherent risk that the application of post-verdict policy exclusions may necessitate enforcement of a judgment against an individual landlord rather than their insurer.

Focus on water intrusion and dampness

The first notion to dispose of in "toxic mold" litigation is the idea that claims must be "mold" based. Our firm's complaints exclusively reference "excessively damp indoor environments" and exposure to "surface and airborne contaminants" while leaving out the hot button allegations of "mold." Mold is the result (and evidence) of some type of water intrusion – a defective condition that is often the result of negligence and is

much more likely to fall within an insured's policy. There is no benefit or reason to adopt the insurer's preferred language and aid them in denying coverage when the same conditions, more broadly alleged, will inure more coverage. The astute attorney will begin with inquiry into the water intrusion that underscores all the damage claims and draft a complaint that highlights the landlord's failure to maintain a watertight building envelope.

Sources of water intrusion

Often counsel will focus on the presence of mold and how it is causing injury to their tenant clients. However, the more relevant inquiry is to understand and document the source of the problem, not the consequence. This inquiry will often set the stage for statutory violations based on landlord negligence and open the door to insurance coverage.

Typically, claims fall into two scenarios. Under the first scenario, a single event occurred (such as a burst pipe), which was improperly remediated after the event, permitting the environment to degrade. A slipshod response to the event will typically involve third-party contractors, creating the potential for implicating a broad cast of characters (each with their own policy) for the negligence. The plaintiff can direct his entire action solely against the landlord, leaving the defendants the option of

bringing in the third-party contractors. These single-time events tend to have the best coverage under the applicable policies.

More commonly, we see water intrusion resulting from a longstanding failure to maintain a building, such as a failing roof or deteriorating windows. In this second category, too, are illegally converted ground-floor spaces typical in San Francisco (in-law units), where storage space behind a garage was made into a rental unit using a variety of substandard construction techniques. In either of these cases, a competent general contractor or architect is your best expert to identify and document the negligent maintenance or inadequate construction or repairs and lock in your liability claim against the owner. When possible, we try to have an initial inspection by our expert contractor just before the client vacates, and then request another inspection in formal discovery to note any repairs or improvements after the tenant vacated.

With a well-documented habitability claim secured through your expert, *i.e.* a failure to maintain a residential premise in a safe and habitable condition, what remains is to catalog the numerous different damages that flow from the negligence as to make recovery a worthwhile venture. A PI attorney may instinctually try to develop the "mold case" by paying for mold testing, allergy testing, and blood or other types of medical testing. These tests are expensive, not dispositive, and may actually yield results that are harmful to a plaintiff's claims. Rather, the mold-based personal injury damages – being the most contested for coverage purposes – should be the final piece of the damage summary and can include an etiological basis that falls within coverage areas, such as dampness or dust mites. The initial discussion with an insurance adjuster should review all the damage claims that fall more squarely within a policy and begin the discussion of why an insurer need acknowledge the covered claims that will be included in any judgment. By this method, you can avoid a bull-headed standoff that has an insurer lose sight of the serious risks your claim presents to their bottom line if your claims are not resolved before trial.

Statutory basis for habitability claims

The starting point for establishing the landlord's failure to meet their obligation to provide safe, habitable housing is the statutory minimum standards of habitability.

Civil Code section 1941.1 defines "untenantable" conditions as housing in which there is a lack of a laundry list of conditions – most relevant for this discussion being, "[e]ffective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors."

In addition, Health and Safety Code section 17920.3 separately sets forth affirmative conditions, the presence of which constitute a "substandard building," stating: "[a]ny building or portion thereof .... in which there exists any of the following listed conditions to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof. (a)(11) Dampness of habitable rooms, (c) Any nuisance, (g) Faulty weather protection, which shall include, but not be limited to, the following: (2) Deteriorated or ineffective waterproofing of exterior walls, roof, foundations, or floors, including broken windows or doors. (3) Defective or lack of weather protection for exterior wall coverings, including lack of paint, or weathering due to lack of paint or other approved protective covering. (k) Any building or portion thereof that is determined to be an unsafe building due to inadequate maintenance, in accordance with the latest edition of the Uniform Building Code.

Notably, the definition of "nuisance" is broad based and scattered throughout case law of enormous variety. Further, the Uniform Building Code provides an opportunity for a granular analysis that can identify a broad spectrum of housing defects. The dampness that permits mold growth will invariably be the result of some failure to comply with these statutory provisions. Attacking a landlord's negligent failure to comply with a litany of statutory obligations as the foundation for a claim can effectively prevent an insurer from arguing that they have no exposure under their policy.

Mold as evidence rather than the defect

As a further measure supporting this strategy, we flip convention on its head – rather than focusing on the mold as the dangerous condition, we rely upon the mold to support the allegation that the building constituted a damp environment and that the weatherproofing was ineffective. For mold to become a problem, there must be a water source. Hence, the mold is evidence of a statutory violation rather than necessarily being the central defective condition. In this way, we reference mold evidence (such as a mold report or pictures) as evidence intended to support our premise that the defendant has failed to maintain an effective building envelope or otherwise breached the warranty of habitability.

The documentation of these statutory violations then provide the basis for the broad-based claim for breach of the implied warranty of habitability that is part of every residential tenancy, be it implied (case law), contractual (lease agreement) or statutory (detailed above). It is well settled law that the breach of this warranty, under any of these bases, allows a plaintiff to claim the full panoply of tort damages that flow from the breach, including damages for personal injury, property damage, retroactive rent abatement and, if applicable in the lease or other statute, attorney fees. (See *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903.) A tenant may also sue for punitive damages under *Stoiber*, where the requisite showing of malice is established.

Finally, the violation of a rent ordinance, most notably in San Francisco, but now also in Oakland and Berkeley, provides opportunities for the treble

damages, a means to add real consequence to a refusal to negotiate a just settlement.

Damages and fees

With a well established claim of a landlord's negligent maintenance solidified, evaluation of ALL damage claims can make the difference between a stalemate with an insurer and reaching a settlement that is advantageous for all parties. While personal injury may be at the forefront of your client's mind as you evaluate the representation, all other areas need to be explored so as to provide an exclusion-constrained insurance adjuster a myriad of ways to justify funding a settlement acceptable for your client. These include attorney fees, retroactive rent abatement, property damage, and loss of use of a rent-controlled apartment (if applicable.)

One very useful avenue for adding settlement value is the insurer's obligation to pay attorney fees, be it based on contract, such as from the lease, or from certain statutory violations, such as a rent-control ordinance. Such a provision marks one of the most significant distinctions between mold/habitability litigation and garden-variety PI cases. Unlike a typical PI case where the insurer can watch your client's settlement value evaporate through the high costs of litigation and the amount of attorney time that can be frittered away through discovery motions, the right to recover attorney fees and costs dampens bad-faith tactics and negotiations. Even when mold exclusions are trumpeted by the insurer as a basis for not having to pay damages, a strong argument can be made that the insurance carrier will be feeling the pain of reimbursing Plaintiff's counsel for their time and costs under *Prichard v. Liberty Mutual Insurance* (2000) 84 Cal.App.4th 890.

In *Prichard*, the court held that attorney fees fall under the rubric of "costs of litigation" and as such are part of the same coverage that includes their broad duty to defend. As is a part of the standard insurance policy, an insurer agrees to cover the "costs of litigation" under its duty to defend an action when there may be any possible covered claim. By including obligations to pay the attorney fees of the opposing party in this category and apart from the "coverage" areas of the policy, the policy exclusions are arguably outside of coverage analysis. Thus, unlike damages claims, which are scrutinized under the applicable policy exclusions to avoid payment, awards for attorney fees constitute an insurer's obligation to cover *all* costs associated with the defense of its insured. As such, even if the damages do fall outside of coverage, a strong argument remains that the assessment of attorney fees and costs will be borne by the insurer.

Bad faith and conflicts of interest

Another dangerous quagmire for an insurance carrier seeking to avoid paying meritorious claims because of policy exclusions is the very real risk of acting in bad faith against their insured. There are numerous pitfalls for an insurance carrier and defense counsel that should be brought to light through aggressive written communication with opposing counsel. Even while the conflicts are generally not a direct issue for a plaintiff's case in chief, ensuring that such conflicts are well documented in the defendant's file seems to help bring the parties closer to a meaningful resolution.

We always like to point out our concern that the apparent conflict may be brought up by defense late in the game as a tactic to postpone an impending trial because new counsel needs to be associated in to the case. By identifying this issue early, we make it clear that such a tactic will fail, while simultaneously putting a "poison pill" in the insurer's file for scrutiny down the road by a disgruntled insured. Should an unhappy defendant find himself sitting on the wrong side of a judgment with exclusions being invoked to avoid insurance coverage, his file becomes a fertile place for investigating whether his insurer properly represented him. Advocating not only for just compensation for our client, but also for insurers acting in good faith toward their insured are complementary acts that flow from a plaintiff attorney's sense of fair play.

Explore and exploit multiple defendants with one attorney

Habitability cases commonly have multiple defendants, including the property management company as well as the owner. While the law places a non-delegable duty upon the owner for the negligence caused by his agents (*Sritong v. Total Investment Co., et al.* (1994) 23 Cal.App.4th 721), it similarly holds a management company responsible for injuries caused by its negligence in a residential rental setting. (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903.) Typically, one of these parties has agreed to indemnify the other in the landlord/management relationship, putting a single insurer in charge of defending the litigation. The preference for an insurer will almost always be to appoint a single attorney to represent both defendants, minimizing the cost of litigation while simultaneously using a reservation of rights to minimize the exposure of a judgment. However, as exclusions under the policy make either party at risk for paying a judgment, there is often a tension between the owner and manager that can be explored and exploited.

Having co-defendants represented by a single counsel point the finger of responsibility and liability at each other is an indefensible conflict of interest for their counsel. A detailed conflict-of-interest letter to counsel clearly articulating a conflict apparent on the record that will undoubtedly require the association of additional counsel can often spur settlement negotiations to take a positive turn.

In our office, we typically find the evidence of the conflict is most discernable when preparing a mediation brief, and the conflict letter finds its way to defense close to the time of the mediation. However, we like to include the

letter under separate cover so it is not a privileged settlement communication, while still providing a copy to the mediator so that the mediator can discuss the issue during settlement negotiations.

Other conflicts of interest are similarly worth exploring, such as the inherent conflict between the insurer and the insured caused by the reservation of rights, which may necessitate the addition of *Cumis* counsel. Such counsel is brought in when the tri parte relationship between the insurer, the insured and their joint counsel is muddled by the possible defenses to be argued by defense as some defenses may benefit the insured over the insurer (or vice-versa.) For example, we have seen instances where counsel for defense has filed a Motion for Summary Adjudication, which, if successful, would wholly remove certain covered claims from the case leaving only the excluded mold claims. In such a circumstance, it is reasonable to ponder (in writing) how counsel's client is supporting such a motion that only benefits his insurance company and leaves the landlord hanging out to dry with the remaining claim.

Use the literature in the field

When one arrives at the injury portion of your inquiry, the majority of the literature focuses on dampness – as is the title of the 2004 compendium study published by the Institute of Medicine – Damp Indoor Spaces and Health – D.C. National Academies Press. While defense counsel may seek to trumpet the limited conclusions of this right-wing-funded study to diminish mold personal injury claims, the foundational articles of the compendium actually provide significant support for causation. Further, subsequent publications have further bolstered the recognized relationship between damp living spaces and health ailments. A 2011 updated compendium of subsequent studies further bolsters the association between dampness and poor health and provides a firm foundation for a medical causation opinion. (See *Environmental Health Perspectives – Vol. 119, No. 6, June 2011, Mark J. Mendell, et al.)* The authors conclude, "there is sufficient evidence of an association between indoor dampness-related factors and a wide range of respiratory or allergic health effects, including asthma development, asthma exacerbation, current asthma... cough, respiratory infections, bronchitis, allergic rhinitis, eczema, and upper respiratory tract symptoms... Mechanisms seem likely to be both allergic and non-allergic." A competent expert in occupational and environmental medicine can still rely upon many of the individual studies in this compendium, along with many related papers, to support causation for injury to the appropriate medical certainty.

Beware allergy testing

Because of the broad range of etiological pathways by which a damp environment can result in personal injury, trying to lock in a more specific cause can be a trap for plaintiff's counsel. To establish causation between the substandard living environment and the health injury, there is no need to commit to a single cause (such as mold allergies) as this can lead to both coverage issues and weaken a case when other factors are at play. For example, allergy testing is notoriously haphazard. While a positive allergy result is good evidence of an allergy, false negatives are very common. Further, a susceptible individual may be reactive to one mold allergen and not another and no panel of testing can include the entire array of molds to which there could have been an exposure.

More importantly, it is well documented that mold-related injuries can be both allergic and non-allergic in origin. The literature is very supportive of the existence of numerous etiological pathways with which personal injury may flow from exposure to an excessively damp indoor environment. The list includes exposure to resulting bacteria, endotoxins, mycotoxins, dust mite allergies, VOC's (volatile organic compounds) released from damp building materials and mold (through both allergic and irritational pathways.) Dust mite allergies present one of the best means to argue for coverage of claims as dust mites proliferate quickly in damp environments and are squarely outside of mold exclusions. Further, some of the strongest documented associations exist between exposure to dust mites and the exacerbation (and even onset in children) of asthma. Thus a direct line can be drawn from the negligent maintenance of a tenant's residence (say an old roof) to the personal injury and/or constructive eviction of the tenant without mold as the causation factor. In such instances, mold tests and/or pictures of contamination are evidence of the damp environment – a very hospitable place for dust mites to proliferate – rather than the absolute source of the injury.

Given that a variety of injury-causing pathways all flow from the same damp environment, there is little benefit to focus the claim on a single, specific cause. A competent environmental health expert can rely heavily upon the temporal relationship between the exposure and the ailment and the subsequent improvement in health once the exposure ceases. This relationship is both a mainstay in the literature and easily understood as a common-sense association by potential jurors.

One of our medical experts used a great analogy at trial, likening the relationship between a damp indoor environment and respiratory effects to the scientific support for the relationship between cigarettes and cancer. She explained to the jury how there are literally thousands of known carcinogens in cigarettes, the sum total of which are directly linked to causing cancer. The medical community does not need to identify which of these thousands of chemicals caused an individual's cancer, rather a causal connection is made from the broader category of cigarette carcinogen exposure to the cancer itself. Similarly,

the personal injury can be linked to the damp environment rather than a specific, resulting harmful condition.

Temporal relationship

One of the most powerful factors in demonstrating a relationship between the damp environment and the personal injury is the temporal relationship between the environment and the health problems. In other words, the claimed personal injuries should be transient, i.e. your client's health should steadily improve as the time since their last exposure lengthens. There are some exceptions such as the development of asthma during the exposure period, since asthma is a lifelong, incurable condition that can only be managed through medication. In general, these injuries should have a well documented, temporal relationship to the exposure and removal of the client from exposure to the degraded environmental conditions resulting in the abatement of the health conditions. Thus, symptoms should diminish over time.

As a side note, people do not generally go to their physician once they are doing better. However, in the litigation context, we advise our clients to schedule a wellness exam (typically four to eight weeks after relocation, or once they feel they are fully recovered) so their medical records have a clear demarcation point evidencing the resolution of the environmentally caused symptoms. This temporal relationship between poor heath and environmental exposure becomes a lynch pin for the causal connection.

Summary

By adopting a more balanced approach to "toxic-mold cases" – fully developing the housing-rights aspect of the claims; emphasizing water intrusion and damp indoor environment while downplaying mold growth; emphasizing the risk of attorney's fees and exploiting conflicts of interest – you can successfully resolve the claims with settlements funded chiefly by the landlord's insurance carrier.


Lifschitz

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