

HAZARDOUS MATERIALS

Misinformed About Mold

By HOWARD SCHECHTER

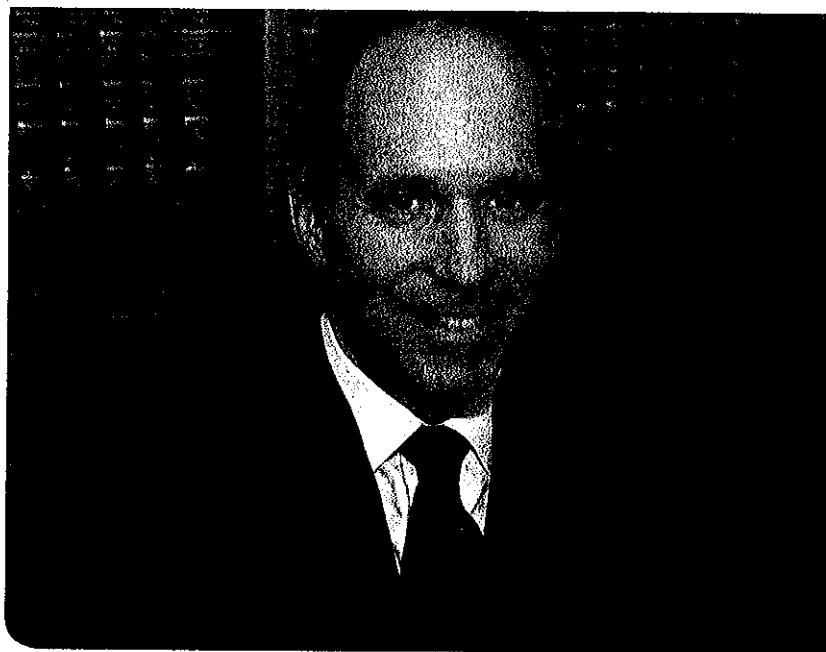
Mold was found in one of the apartments in our co-op. We are responsible for cleaning it up, I believe, but are we responsible if the residents of the affected apartment get sick?

IT DEPENDS. Mold matters – but not every case of mold can lead to a judgment against a cooperative or condominium. I know. My firm represented a board that faced a claim that a shareholder was sickened by mold in the building – and won.

The case involved a shareholder who had a ground-floor apartment that had sliding glass doors onto the patio in the back. The doors leaked and water started coming into the apartment. There was a dispute between the cooperative and the shareholder about who was responsible for repairing the doors, and so the leak went on for some period of time. As a result, mold developed in the apartment.

The cooperative tried to fix the doors, but the initial repair was not successful. So, the board brought a contractor back and it was repaired again. Finally, the leak was stopped and the mold abated. But not before the shareholder made the claim and brought a lawsuit claiming that not only had their property been damaged by the leaks and the mold, but that they were suffering physical effects from exposure to the substance, including headaches, inability to concentrate, upper respiratory symptoms, lack of libido – a virtual laundry list of generalized symptoms that they claimed were caused by exposure to the mold.

They subsequently moved out of the apartment and sought millions of dollars of damages as a result of the relationship that they claimed between exposure to mold and damp conditions in the apartment and the symptoms they were suffering. They even had



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doctors ready to testify at trial that this connection existed.

In rebuttal, we initiated what's called a "Frye hearing," which is intended to test the quality of the scientific evidence that is being offered by a party to a litigation. It is a way of ensuring that an expert doesn't testify incorrectly; he or she must show that there is a scientific basis for the opinion offered by the expert witness. Only if the asserted scientific basis for the expert's opinion is generally accepted in the relevant scientific community will the expert be allowed to offer an opinion based on that science.

We challenged the connection that was being drawn between exposure to mold and damp indoor air conditions and the kinds of physical symptoms that the plaintiff claimed to be suffer-

ing. The Frye hearing lasted for seven days, with extensive testimony and luminous scientific books and articles admitted in evidence, and we succeeded in getting a ruling from that court in our client's favor.

The court said that the plaintiff had failed to show the scientific basis for this case. The standard is that there must be general acceptance in the scientific community for the scientific principle that is being asserted. We demonstrated that, in this case, the asserted causal connection between exposure to mold or damp indoor air and the kinds of symptoms that the plaintiff was complaining about is not generally accepted.

As a result, all of their personal injury claims and all of the millions of dollars of damages that they were see-

ing from them were dismissed. That decision was appealed by the plaintiffs to the appellate division, which issued a decision at the end of last year affirming the trial court's dismissal of the claim and its finding that the scientific validity of the asserted causal connection had not been established.

Recently, an attempt to appeal that decision to the court of appeals was rejected. So, for the purposes of this case, at least, and for other cases similar to it, a plaintiff is going to have to show a lot more than exposure to mold and some sort of symptoms. They'll have to show a connection that one caused the other, rather than they both happened to occur at the same time.

Even though we were successful, our basic advice to boards that are confronted with a legal mold situation of this type is to deal with it immediately, don't ignore it. If there is a source of water infiltration, the water should be stopped because water should not be coming into an apartment. If there is a dispute, as there was in this case, about who is responsible for paying to stop the water from coming in, the board should not hesitate to perform the work and bill the cost back to the shareholder. But it should not allow the water to come into the building and possibly cause damage and create mold, because that could lead to these kinds of lawsuits. You're better off nipping it in the bud and fighting about the cost of abatement than you are leaving it to the kinds of damage claims that were asserted here and then hoping that you're going to be successful defending a claim.

It is important to realize that when you're confronted with claims for damages of this type, it is possible to defend yourself successfully. Remember: there are many misconceptions that are involved with mold. One is the idea that mold is always dangerous. Mold is all around us. Mold can be found almost anywhere and can grow on virtually any organic substance. By some estimates, molds comprise 25 percent of the earth's biomass. Yeasts, for example, which like mold are classified in the kingdom of fungi, have long been utilized to ferment the sugars of barley to produce beer or to expand, or raise, dough. And, if you like blue cheese, you're eating mold.

Another misconception is the idea of "toxic" mold. Mold, itself, is not toxic. Rather, certain mold species are toxigenic, meaning that, under certain conditions, these molds may, but don't

always, produce certain toxic substances called mycotoxins. It does not necessarily follow from the mere presence of a toxigenic species in an apartment that mycotoxins are also present or that the occupants have actually been exposed to mycotoxins, or even if they have, that the substances are present in sufficient quantities to affect human health.

The New York City Department of Housing Preservation and Development nevertheless considers some mold conditions to be a violation of the New York City Housing Maintenance Code. Accordingly, to reiterate the point I made earlier, boards should abate mold conditions immediately and correct the source of any leak that gave rise to the mold condition. By taking prompt and effective remedial action when notified of a mold condition, boards may reduce the likelihood of facing a mold-related lawsuit.

On a final note, abatement of mold can be quite expensive. Insurance is available to pay the cost of mold remediation, but the coverage is an add-on to standard insurance policies. Boards should contact their insurance brokers to determine whether they have this coverage. **H**