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THE LACK OF MOLD LEGISLATION: A RECIPE FOR DISASTER

Leticia M. Diaz*

“There’s so much pollution in the air now that if it weren’t for our lungs there’d be no place to put it all.”**

As the song goes, “[a]ll I need is the air that I breathe”¹ and just so it isn’t full of mold! Because the short and long term effects of inhalation of indoor mold are still very much unknown, true causal relationships between exposure and illness are yet to be proven.² However, notwithstanding these unknowns, there is sufficient evidence pointing to a cause and effect that litigation, like mold, is ever growing.³ In fact, some states actually have legislation recognizing the detrimental effects of toxic mold.⁴ Conversely, in those states lacking legislation, the problem remains at the forefront of health concerns.⁵ While the EPA has published a source to assist health professionals in diagnosing symptoms related to indoor air pollution (Indoor Air Pollution: An Introduction for Health

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1 THE HOLLIES, The Air That I Breathe, on HOLLIES (Polydor 1974).


3 See infra Section IV.

4 Some states, such as California, have extensive mold legislation. See, e.g. CAL. HEALTH & SAFETY CODE §§ 26100-26157 (West 2006). Others, such as Virginia’s statute requiring a landlord to take reasonable care in preventing mold growth on his or her premises, are more limited in their scope. VA. CODE ANN. § 55-248.13(A)(5) (West 2006).

Professionals), there is no federal unified system. This article will address current legislation and litigation, analyze how states are addressing the problem, and propose a federal system of regulation.

I. HISTORY OF MOLD LITIGATION

What exactly is mold litigation? Is one suing for fungal invasion? According to Morgan & Morgan’s Insurance Litigation Group, mold plaintiffs present a variety of unique claims. One type of claim stems from excessive moisture generally caused by faulty or damaged housing components (such as pipes, roofs, etc.), permitting water intrusion or flooding into the home. If the issue merely consists of clean up and repair, homeowner’s insurance should dispense with the claim. However, if left untreated, the excess moisture could create a condition conducive to mold growth, often proving deleterious to health. With the onset of adverse health effects, it is likely that those injured will file lawsuits seeking damages for personal injuries incurred as a result of exposure to mold.

A similar claim for personal injuries arises from mold exposure experienced by tenants. These cases are usually slanted towards recovery based on personal injury, as someone other than the plaintiff owns the property. Additionally, another type of claim arises out of toxic exposure in the workplace. A plaintiff may suffer ailments as a result of exposure created by negligent maintenance of the work site.

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8 Id. Although a common cause is the run-of-the-mill roof collapse, the issue of hurricane damage will be addressed at a later point.
9 Id.
10 Id. In addition to creating new health problems for the unwary homeowner or tenant, mold exposure may aggravate or amplify existing injuries. Id. Additional or aggravated illnesses may also be actionable. Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id. The plaintiff in this case may be entitled to workers’ compensation, as well as a personal injury award. Id.
It appears that mold litigation is sweeping the nation, and a need for a unified system is imperative. Legislation addressing this critical issue is on the rise, but will it suffice? In 2000, there was a total lack of legislative directives addressing the problem. By 2003, approximately thirty states had enacted some type of legislation, and the federal government became an active participant with the proposition of a corpus of federal mold legislation.

The immense flooding and corresponding property damage caused by Hurricane Katrina has set the stage for the next decade of lawsuits related to toxic mold claims. Hurricane Katrina took the lives of thousands of Americans. But its devastating impact may result in further hardship, and potentially death, as mold contaminates thousands of homes and increases air toxicity. Never has the need for federal mold legislation been greater to ensure the health and safety of countless Americans as they return home.

II. STATES: STATUS OF LEGISLATION OR LACK THEREOF

As noted above, states are beginning to take notice of the mold issue, and several have enacted some type of legislation addressing mold. Texas was one of the first states to consider legislation specific to

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17 Id.
18 Id. In 2003, sixteen states proposed progressive mold legislation – propositions that had previously been absent from legislative debate in each of those states. Id. Further, the U.S. Congress made a second attempt to pass a bill, the United States Toxic Mold Safety and Protection Act (“TMSPA”), which had previously failed to pass committee scrutiny. Id. Although Congress has yet to pass such a bill, the TMSPA represented a comprehensive attempt to regulate mold growth in both residential and commercial property bought or leased using funds guaranteed by the U.S. Id.
23 CAL. HEALTH & SAFETY CODE §§ 26100-26157 (West 2006); VA. CODE ANN. § 55-248.13(A)(5)
"mold exposure." The Texas legislature passed House Bill 329 into law on July 11, 2003. The Texas Act requires certification of mold remediation and further requires property owners to provide a copy of said certificate when the property is sold. However, the Texas Act fails to adequately address compensation for personal injury claims resulting from mold exposure.

California was the first state to pass comprehensive mold legislation; as such, other states will likely use California as a model.

California's Toxic Mold Protection Act of 2001 is thought to be the most all-encompassing legislation specifically related to mold. The bill directs the California Department of Health Services ("DHS") to gather a task force of health and medical experts, mold abatement experts, government representatives, representatives of Californian employers and employees, affected consumers, and representatives of affected industries to develop permissible exposure limits to indoor molds. Disclosure requirements mandated by the bill directly impact property owners. Owners must provide potential buyers with a written disclosure when they have actual knowledge of both visible and invisible mold. Additionally,
the disclosure must be specific as to whether the mold exceeds the permissible exposure limits or poses a possible health threat.\textsuperscript{33}

At first glance, the Toxic Mold Protection Act appears to address many issues regarding mold exposure. However, there is a void with respect to air quality. Aside from disclosure, a landlord’s duty is somewhat inadequate. He or she has no duty to disclose former mold contamination that has been “remediated” or to conduct any air quality tests.\textsuperscript{34} California’s Act also does not require landlords to conduct air or surface tests to determine whether mold levels are acceptable.\textsuperscript{35} Without air or surface tests to establish the existence of mold, it is impossible to determine whether the mold exceeds permissible limits.\textsuperscript{36} Obviously, mold is ubiquitous and not always visible to the naked eye, making air quality tests a necessary precursor to buying or leasing real property. Despite this deficiency, California’s Act is a good example of the type of legislation needed to protect the public, especially against the most egregious strains of mold.\textsuperscript{37}

California also enacted Assembly Bill 284 in the 2001-2002 session.\textsuperscript{38} This bill directs the DHS to put together a task force for the purpose of establishing a mold surveillance, monitoring, and education program.\textsuperscript{39} This bill seems to have been incorporated into the many provisions of the Toxic Mold Protection Act, particularly section 26105.\textsuperscript{40} Although this bill may not, on its face, appear to muster strength in that there is no enforcement section, a monitoring and surveillance system will, at a minimum, establish the existence of mold.\textsuperscript{41}

although tenants could likely pursue claims against landlords for negligent maintenance of the premises when a landlord is willfully ignorant of mold contamination after known structural damage or flooding.

\textsuperscript{33} Id.

\textsuperscript{34} Id. at § 26141(c)-(d).

\textsuperscript{35} Id. at § 26141(d).

\textsuperscript{36} Id.

\textsuperscript{37} See AlbionMonitor.com, supra note 22 (discussing mold in the aftermath of Hurricane Katrina and the need to instruct returning residents on precautionary measures). Black mold, much like that now streaking the damp surfaces of Katrina-torn cities, can be deadly. Id. Some molds release spores into the air, which can cause a number of respiratory and other illnesses when inhaled. Id.


\textsuperscript{39} Id.

\textsuperscript{40} CAL. HEALTH & SAFETY CODE § 26105. This provision requires the DHS, in conjunction with its task force, to assess the health threats of mold in an indoor environment. Id. at § 26105(a).

\textsuperscript{41} Assemb. B. 284, 2001 Leg., Reg. Sess. (Cal. 2001).
Unfortunately, one of the bills with the most muscle did not pass. Assembly Bill 178, which died in committee, would have amended California’s existing Health and Safety Code relating to housing standards. Specifically, the bill would have created notice requirements that, in turn, would have placed greater pressure upon landlords to provide mold-free residential units, making it commercially unsound to act otherwise.

The next bill to pass in California, Assembly Concurrent Resolution 75, addresses issues of poor indoor air quality in schools and the relationship between indoor air quality and asthmatic symptoms. The bill is particularly useful in preventing respiratory disease in school-aged children in that it specifically encourages school districts to implement the Indoor Air Quality Tools for Schools Programs, a strategic initiative designed to identify and prevent indoor air problems.

Texas and California are not alone in their quest to educate and protect the public from mold-related health problems. Other states have also attempted to enact legislation, although none as comprehensive or as successful as California. In some instances, the state’s bills passed, but not all afford much protection. Nevertheless, any bill is a step in the right direction in addressing what appears to be an ever-growing crisis of illness from mold exposure.

Although only a first step in addressing the damages and illnesses associated with mold exposure, many states have followed California’s example by enacting legislation placing certain limitations on building

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43 Id.
44 Id. There would also have been a requirement that landlords provide notice to prospective tenants of the presence of mold within a unit . . . using language “to the extent that the mold endangers life, limb, property, safety or welfare of the occupants or prospective occupants.” Lagasse & Reyna, supra note 16 (citing Assemb. B. 178).
46 Id.
47 New York representatives have proposed legislation nearly as comprehensive as that of California, but the state has yet to enact a substantial portion of it. See N.Y. PUB. HEALTH LAW § 1384 (Consol. 2005) (establishing a state toxic mold task force); S.R. 5252, 2003 Leg., Reg. Sess. (N.Y. 2003); Assemb. B. 7221, 2003 Leg., Reg. Sess. (N.Y. 2003).
owners and landlords. For example, Virginia mandates that landlords use "reasonable efforts" to prevent moisture accumulation and mold growth on their premises and to promptly respond to their tenants' written complaints regarding mold contamination. Likewise, tenants have a corresponding obligation to prevent moisture accumulation and mold growth and to promptly notify their landlord, in writing, of any evidence of mold or excessive moisture.

Similarly, Mississippi’s New Home Warranty Act subjects all home-builders to liability for certain defects in the property. This provision actually excludes damages caused by mold contamination except where the builder’s negligence proximately causes or contributes to mold contamination or damage. Also, Montana has not been silent on the issue; its Montana Mold Disclosure Act requires sellers and landlords who know of the existence of mold to disclose its existence to buyers or renters prior to contract. Montana’s Act further mandates disclosure of whether mold tests have been conducted, as well as the results of such tests and any remediation measures taken.

Conversely, other states strive to limit the liability of those involved in the building or sale of homes for mold-related injuries and damages. Louisiana, for example, proposed to eliminate commercial and marine contractor liability for all personal injuries or damages related to mold that were not caused by defective workmanship or design. While the Mississippi statute leaves open a number of avenues for plaintiffs to pursue under the broad principles of negligence and warranty, the proposed Louisiana statute would have required plaintiffs to prove a manufacturing or design defect. However, in its final incarnation, the

49 See, e.g., VA. CODE ANN. § 55-248.13(A)(5) (requiring landlords to use reasonable efforts to keep premises free from mold).
50 VA. CODE ANN. § 55-248.13(A)(5).
51 Id. at § 55-248.16(A)(8).
53 Id. at § 83-58-5(2)(j).
54 MONT. CODE ANN. § 70-16-703(2) (2005).
55 Id. Oregon has a similar disclosure requirement pertaining to whether tests for mold have been conducted. See OR. REV. STAT. § 105.464 (2003).
Louisiana statute excludes liability for all mold damage.\textsuperscript{59} The modern trend in state statutes is to develop a task force to analyze the health impacts of mold contamination within the state.\textsuperscript{60} New York is one state following this trend.\textsuperscript{61} Its task force was created to assess the adverse environmental impact caused by toxic mold; measure the detrimental health affects caused by mold exposure amongst the general population; examine the actions and legislation promulgated by other states and organizations; assess the limits to mold exposure in an indoor environment; and determine the cost-efficient and environmentally sound measures to control mold contamination and growth.\textsuperscript{62} Other states, such as New Jersey, Maryland, Indiana,\textsuperscript{63} Pennsylvania,\textsuperscript{64} Illinois, Massachusetts, and Oklahoma,\textsuperscript{65} have all proposed or enacted legislation creating similar task forces. The success of these task forces is still unknown.

Another area where state mold legislation is becoming increasingly prevalent is the indoor air quality of state schools. In Nebraska, school boards, after determining the need for mold abatement in particular schools and estimating the costs of repair, may acquire all such costs from the state to promptly correct the health risk.\textsuperscript{66} In Tennessee, Senate Bill 641, signed by the state’s governor on June 6, 2005, encourages inspection and evaluation of the air quality and mold growth in its schools.\textsuperscript{67} Still other states require renovation or installation of HVAC systems or stricter air quality standards for public schools.\textsuperscript{68} Why not extend these inspection and renovation requirements to all public buildings? Why not extend them to private buildings prior to their sale or rent?

On the other hand, maybe a proactive approach will best alleviate personal injuries from mold contamination. Some states look to anecdotal

\begin{footnotesize}
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\item \textsuperscript{60} See Julie S. Elmer, \textit{A Fungus Among Us: The New Epidemic of Mold Claims}, 64 \textit{Ala. Law.} 109, 112 (Mar. 2003) (listing states that have established task forces).
\item \textsuperscript{61} See \textit{N.Y. Pub. Health Law} § 1384.
\item \textsuperscript{62} \textit{Id.} at § 1384(1)(a)-(e).
\item \textsuperscript{63} Elmer, \textit{supra} note 60, at 112.
\item \textsuperscript{65} Lagasse & Reyna, \textit{supra} note 16.
\item \textsuperscript{68} Lagasse & Reyna, \textit{supra} note 16.
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evidence and are actively promoting mold prevention and remediation notwithstanding the critiques about lack of scientific causation.69 Florida takes such an approach.70 The Florida Department of Health has developed a brochure with the goal of keeping its citizens informed of the health risks imposed by mold, and preventative or corrective measures that can be taken in the event of mold contamination.71 The brochure addresses ways the public can protect itself and the environment against the perils of mold.72 It is intended to educate the public as to the types of mold and ways to avoid exposure.73 Health problems associated with exposure are explained in order to assist consumers in identifying sometimes innocuous health symptoms.74 Education and communication are the first steps in addressing the issue. Legislation that enforces air quality control, however, must follow.

Florida's brochure also clarifies the confusion surrounding the differing types of molds and their impact on human health.75 As discussed below, certain molds produce mycotoxins, which can wreak havoc on the human body.76 These types of molds are sometimes called “toxic molds” although the strain differs from the typically known toxic mold, “black mold.”77 Black mold, which is really greenish-black in color, is called Stachybotrys Chartarum.78 In a normal setting, the indoor air levels of Stachybotrys are low and not an issue.79 However, in “abnormal” conditions, where high levels of the mold are present, adverse health effects can include cold-like symptoms, rashes, inflammation, eye irritation, aggravation of asthma, and even some general types of

69 FLORIDA DEP’T OF HEALTH, supra note 5.
70 Id. Florida also proposed a bill that would require certification of its mold remediation professionals. H.R. 117, 2005 Leg., Reg. Sess. (Fla. 2005).
71 FLORIDA DEP’T OF HEALTH, supra note 5.
72 Id.
73 Id.
74 Id. As an example, the guide discusses nasal and sinus congestion, dry hacking cough, wheezing and other allergic type symptoms. Id. Additionally it points out the susceptibility to infection of people with chronic illnesses or depressed immune systems. Id.
75 Id.
76 See infra notes 158-59 and accompanying text.
78 Id.
79 Raymond D. Harbison, et al., Toxicology and Risk Assessment of Mycotoxins, 19 J. LAND USE & ENVT’L L. 451, 456 (2004). If low, there are usually no adverse effects from exposure. Id.
complaints, such as fatigue and difficulty concentrating.80

A cursory glance at these symptoms may lead the reader to wonder if indeed mold is the culprit. Could not cold-like symptoms actually result from a virus or bacterium? Likewise, for allergy-sensitive individuals, is dust the culprit in their eye irritation and respiratory distress?

In a nutshell, these queries describe the challenges with mold litigation and attempts at passing state or federal legislation. There is still much scientific uncertainty and a lack of reliable technology able to detect mold and its specific concentration within a low margin of error.81 For example, Stachybotrys can only be identified through a microscopic exam or by cultures.82 Yet, even if mold is identified, how is the air concentration detected? Air quality is crucial to mold litigation cases. State legislatures have been sluggish in responding to toxic mold most likely because of the scientific uncertainty surrounding both mold detection techniques and the possible ill effects caused by mold.

Although the risks of personal injury from mold contamination may be high, some states seek to limit damage awards.83 Two such states, Alabama and Wisconsin, have placed caps on mold claims.84 In June of 2003, Maryland’s Insurance Commissioner declared that insurance companies could not exclude toxic mold coverage in their personal or commercial policies; however, the companies can cap damages at $50,000,85 a small price to pay for a potential plaintiff’s lifelong battle with mold-related illnesses.

The failure of states to provide adequate legislation ignores the growing need to confront the mold problem. States need to provide greater incentives (or deterrence) to builders, landlords, and property owners to maintain their premises in a manner that curtails mold growth and eliminates its corresponding health risks. Unfortunately, disasters like

80 See Ill. Dep’t of Pub. Health, supra note 77
82 Harbison, et al., supra note 79, at 455.
84 Id.
85 Lagasse & Reyna, supra note 16.
Hurricane Katrina cannot be prevented, but something can be done about particular after-effects, with mold contamination making that list. Perhaps state legislation is inappropriate to cover the large-scale, mold contamination caused by Katrina. Maybe it is time for a more substantial, federal system to ensure safe air quality and a better environment for all.

III. A FEDERAL SYSTEM, FRIEND OR FOE?

A. Federal Legislation: How Long in Committee?

Will a federal system unify or divide? Are states so uniquely situated that they should be left alone to their own devices? The first bill attempted, the United States Toxic Mold Safety and Protection Act of 2002 ("TMSPA") was a flop and did not even come out of committee. The bill, which would have a major impact on Air Quality Consultants, inspectors and remediators, was re-introduced and is presently in subcommittee. This bill, if passed, would give specific directives to the Centers for Disease Control ("CDC"), the Environmental Protection Agency ("EPA"), and the National Institute of Health ("NIH") to conduct an overall study of health effects resulting from indoor mold. The results of the study would guide the EPA in establishing standards for mold inspection and remediation, certifying mold inspectors and remediators, and promulgating techniques and standards for corrective ventilation and mold prevention.

Additionally, the Department of Housing and Urban Development

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86 U.S. Toxic Mold Safety & Protection Act, H.R. 5040, 107th Cong. (2002). This bill provided the Center for Disease Control and the Environmental Protection Agency with the power to conduct research to assess the effects of mold on humans. Id. It also directed agencies to develop guidelines with respect to mold remediation. Id. This bill was also known as the "Melina Bill." Id. See HomeSafeTraining.com, Mold Legislation, http://www.homesafetraining.com/training/moldlaws.html (last visited Feb. 11, 2006).


88 Id.

89 Id.
("HUD") would institute guidelines for the identification of construction conditions conducive to indoor mold growth and recommend a method for eliminating these conditions.\(^9\) Further, the TMSPA would impose other national obligations.\(^{91}\) For example, the Federal Emergency Management Agency ("FEMA") would have the responsibility of establishing a national toxic mold insurance program.\(^{92}\)

Although such uniformity in a national system speaks to a solution desperately needed, this legislation has its critics and has not made it out of committee.\(^ {93}\) Of primary concern is the provision requiring the establishment of minimum levels of exposure to mold, as well as the uncertainty inherent in these minimum levels.\(^ {94}\) Representative Cynthia McKinney has proposed less-encompassing legislative action, specifically a bill that calls for comprehensive environmental sampling and monitoring of air, soil, water, and human populations in areas ravaged by both Katrina and Rita.\(^ {95}\) Though only a small step, Representative McKinney's bill would make headway down the right path.

The fate of the TMSPA is uncertain, and the bill faces the same criticism as that of its predecessor. However, Hurricane Katrina and the expansive mold contamination left in its aftermath may be the impetus necessary to hurry the legislation from a mere proposal to a legislative enactment. Although Congress may be slow to act, it has not forgotten Katrina's victims. The proposed Hurricane Regulatory Relief Act of 2005 is designed to aid hurricane victims in all facets of rebuilding and survival.\(^ {96}\)

As it pertains to mold contamination, some representatives urge immediate action.\(^ {97}\)

\(^{90}\) Id.
\(^{91}\) Id.
\(^{92}\) Id.; see also Lagasse & Reyna, supra note 16.
\(^{94}\) UNIV. OF MINN., Indoor Mold: Management Considerations, http://www1.umn.edu/coh/hazards/hazardssite/indoormolds/moldmanagement.html (last visited Feb. 24, 2006). Critics insist more research is needed due to the scientific uncertainties regarding the health effects of mold. Id. Additionally, people differ with respect to sensitivities; hence, the challenge is in setting uniform standards. See Morgan & Morgan, supra note 7.
\(^ {97}\) 151 CONG. REC. H10241 (daily ed. Nov. 16, 2005) (letter from more than 100 different groups and individual experts interested in the recovery of areas affected by Hurricane Katrina, reprinted
As the flood waters recede, contaminants that remain have the potential to become airborne when disturbed by natural causes (wind and other storms) or by cleanup activities, creating an even greater occupational and public health hazard. We must not repeat the errors of 9/11 today in New Orleans. Response and recovery operations must proceed expeditiously, but the health and safety of those engaged in such efforts must be protected.

“Rescue” and “recovery” have separate and distinct meanings. Undoubtedly, many Katrina victims are still in need of economic rescue, but the environments impacted are now in the recovery stage. As the floodwater recedes, a “Katrina cough,” caused by toxic mold exposure and contaminated dust, now plagues citizens of impacted areas. Now is the time for legislative action.

Representative John Conyers, the author and sponsor of the TMSPA acknowledges the challenges surrounding this somewhat controversial legislation. A spokesperson for Conyers compares it to the “firestorm once you open Pandora’s Box. It’s no different from the asbestos debate . . . We’re trying to open a Pandora’s Box.” But isn’t the Pandora’s Box already opened? Litigation is no longer novel in this

in the Congressional Record in its entirety and sent to every member of Congress).

Id. The immediate action proposed entails: (1) presuming mold contamination unless proven otherwise; (2) testing the environment and workers, volunteers, and residents for contamination; (3) enforcing all EPA and OSHA regulations; (4) assessing all environmental hazards in all impacted areas; (5) training and protecting clean up workers; (6) providing appropriate decontamination procedures and medical surveillance; and (7) adopting uniform re-occupancy standards. Id. at H10241-42.

Id.

Id. (statement by Rep. Owens).

INSIDE OSHA, Texas Becomes First State to Pass Mold Legislation, July 25th 2005.(cite no longer available without a subscription).

Id. The bill has the support of many grassroots organizations, as well as the American Industrial Hygiene Association. Id. However, the U.S. Chamber of Commerce has opposed the legislation. Id. The Chamber states except for “persons with severely impaired immune systems, indoor air is not a source of fungal infections, and current scientific evidence does not support the idea that human health has been adversely affected by inhaled mold toxins in home, school, or office environments.” Id.
area. What is needed is legislative guidance.

B. The EPA and the Clean Air Act – Protection from Mold Exposure?

The Clean Air Act ("CAA") provides a general framework for the federal government to regulate air pollution. Its purpose is to encourage and promote federal, state, and local governments to actively pursue the elimination of air pollution. To accomplish this goal, the CAA gives the states the primary responsibility for implementing the means to reduce air pollution. However, the CAA provides little protection or remedial assistance to those exposed to toxic mold or other indoor air pollution. Yet, by improving outdoor air quality, the CAA indirectly improves indoor air quality by lowering concentrations of air pollutants entering real property from outside. But how can this regulation control air pollution caused by indoor sources?

Currently, the EPA’s broadest power to control indoor air pollution is enumerated in the Toxic Substances Control Act ("TSCA"). Unfortunately, however, the TSCA authorizes the EPA to regulate only

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108 42 U.S.C. § 7407(a) states:

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

109 Reitze & Carof, supra note 2, at 254.
110 Id.
“chemical substances and mixtures” that present unreasonable health or environmental risks.112 As mold is a living, biological organism, it can hardly be said to fit the necessary requirements for coverage under the statute. Why not extend the TSCA to cover natural substances that are equally as lethal or harmful as chemicals covered by the statute? Better yet, why not draft new legislation encompassing mold contamination as it pertains to indoor air pollution?

Further, the Occupational Health and Safety Act (“OSHA”)113 offers some protections to covered employees from mold in the workplace.114 OSHA requires employers to furnish a work environment free from recognized hazards that could cause death or serious harm to employees.115 This requirement is known as the “General Duty Clause.”116 Certainly, mold contamination is now a recognized health risk.117 OSHA may cite employers for violating the General Duty Clause when they allow mold to cultivate without taking reasonable steps to abate or prevent the hazard.118 Therefore, employers must prevent mold growth from reaching unsafe levels.119

Other than the public housing requirements mandating that owners and other entities maintain all components and areas in a manner that prevents health and safety risks120 and the few federal statutory provisions previously discussed, the federal government has failed to regulate toxic mold. No currently enacted federal legislation addresses the issue solely and completely. With the significant health risks caused by Katrina,121 will a few housing requirements, minimal occupational protections, and air pollution legislation that, unlike the air pollutants themselves, refuses

114 See Reitze & Carof, supra note 2, at 258-59.
116 Robertson, supra note 18.
118 Robertson, supra note 18.
121 Mould 'Risks Health ' supra note 117.
to enter the home environment be enough to cure the toxic mold problem?

IV. LITIGATION - STILL GROWING . . .

A. The Molding of Mold Litigation

With scientific advancement and extensive research having already proved a causal connection between mold and some illnesses, mold-related personal injury claims will likely flood the courts as Katrina’s floodwaters recede. In the past, the plaintiff’s primary barrier to a successful verdict in mold litigation has always been establishing the element of causation. In the present, Katrina has made one thing certain – mold will make people sick. Out of this sickness, a healthy body of case law will arise.

Mold cases dealing with personal injury are a fairly recent phenomenon. Mold cases dealing with property damage, however, have been litigated in numerous jurisdictions over the last decade. Property damage cases often arise when mold causes a property defect, such as a roof collapse or a plumbing leak. The plaintiff then claims damages under his or her homeowner’s policy, and the insurance company asserts non-coverage for mold damage.

Personal injury cases of the mold genre have faced a somewhat lukewarm reception. Successful defenses to personal injury claims have

124 See MoldUpdate.com, supra note 105.
125 See, e.g., Wright v. Safeco Ins. Co. of Am., 109 P.3d 1 (Wash. Ct. App. 2004) (construction defects caused water and mold damage). In this case, the plaintiff would have succeeded on her claim for property damages caused by mold contamination but for an explicit provision in the insurer’s policy excluding damages caused by mold. Id. at 28-29. Such “mold damage exclusion clauses” appear to be fairly common.
127 See, e.g., Wright, supra note 125 and accompanying text.
been as diverse as avoiding liability on the basis of the exclusivity provision of a state workers' compensation law;\textsuperscript{128} requiring the plaintiff to provide expert testimony as to the appropriate standard of care for the maintenance of a large office building;\textsuperscript{129} requiring an overwhelmingly high burden on plaintiffs to show intentional and severely dangerous misconduct on the part of their employer;\textsuperscript{130} disqualifying or limiting the testimony of particular experts;\textsuperscript{131} and dismissing the case due to a failure to prove causation.\textsuperscript{132}

Conversely, other cases have met with more plaintiff-friendly results. For example, in \textit{Nangle v. National One, LLC},\textsuperscript{133} two plaintiffs recovered a monetary award of approximately $85,000 for their allergies, muscle pain, immune system impairment, and other ailments caused by mold contamination resulting from negligent construction and remediation of the premises at issue.\textsuperscript{134} More substantially, a Texas court awarded plaintiffs over $32 million for property damages, mental anguish, punitive damages, and attorney fees in \textit{Ballard v. Farmers Insurance Group}.\textsuperscript{135} On appeal, however, the court reversed certain parts of the damage awards, of most consequence being the reversal of the mental anguish and punitive damage awards.\textsuperscript{136} Additionally, the U.S. Court of Appeals for the Ninth Circuit similarly excluded punitive damages but allowed compensatory damages for an insurer's bad faith denial of coverage and underhanded tactics in dealing with an insured claiming mold exposure.\textsuperscript{137} Of course

\textsuperscript{134} \textit{Id.}, at *16.
\textsuperscript{136} Allison, 98 S.W.3d at 265. Fire Insurance Exchange is a member of the Farmers Insurance Group. \textit{Id.} at 233.
other cases, such as *Blum v. Chubb Custom Insurance Co.*, settle.\(^{138}\) The *Blum* case settled for $1.5 million after it had been in the trial phase for two weeks.\(^{139}\)

Although the cases already decided show some insight into future mold litigation, the cases currently before both state and federal courts and the onslaught of litigation that will undoubtedly arise from Hurricane Katrina will reveal the evolving role of toxic mold in litigation. While mold litigation has historically focused on property damages, personal injury claims, seeking high damage awards, are becoming more prevalent.\(^{140}\)

Several current cases premise their claims, including claims for wrongful death, against landlords, building owners, and employers.\(^{141}\) In *Fickett v Davis Management Corp.*, a plaintiff is suing her former landlord for her ailments and her husband’s death as a result of toxic mold exposure.\(^{142}\) In Illinois, the case of *Andrejevic v. Board of Education* consists of a class action suit by approximately 1700 teachers, students, and parents seeking $67 million from the school district for their injuries caused by toxic mold exposure following a school’s flood.\(^{143}\) In New York, plaintiffs seek $180 million for their injuries and property damage caused by mold exposure while living in the defendants’ apartment complex.\(^{144}\) In *Jenses v. AMGEN Inc.*, a plaintiff is claiming personal injury damages of $2 million against his employer from mold exposure in the workplace.\(^{145}\) Likewise, in *J.J. Acquisition Corp. v. Pacific Gulf Properties*, employees of a Californian newspaper company are seeking $10 million for their exposure to toxic mold.\(^{146}\)

As mold-related cases increase, so do their stakes. Multi-million dollar verdicts could usher in a new era of toxic tort, led by a familiar

\(^{138}\) MoldUpdate.com, *supra* note 104.

\(^{139}\) Id. The parties settled this case on December 18, 2001. *Id.*

\(^{140}\) See *supra* notes 125-127.

\(^{141}\) Id. The cases discussed in this paragraph do not contain direct citations as they have not yet been decided.

\(^{142}\) Id.

\(^{143}\) Id.

\(^{144}\) Id. In this case, *Chenensky v. Glenwood Management Corp.*, the plaintiffs claim that defendants knew of the contamination and chose to do nothing about it. *Id.*

\(^{145}\) Id.

\(^{146}\) Id.
fungus. Some have claimed that mold is “not the next ‘asbestos.’” With scientific advancement alleviating causational issues and the fungus’ natural tendency to grow anywhere and everywhere left damp, mold litigation has the potential to grow as fast as mold itself – to top asbestos as king of the toxic torts.

B. Katrina and the Need for a Unified System: Litigation, Air Quality . . .

What Is Being Done?

The aftermath of Hurricane Katrina is replete with uncertainty regarding how much and what kind of air toxins and other air pollutants have infiltrated the hurricane ravaged area. Katrina swept New Orleans, leaving thousands of homes filled with copious amounts of water, which, when drained, left behind the not-too-friendly mold. The Natural Resources Defense Council (“NRDC”) reported airborne mold levels as a serious threat to the health and safety of residents returning to Katrina ravaged areas. Not only has mold been invading the inside of homes, but mold spores have also found haven in outside air. According to Dr. Gina Solomon, M.D., the head of the NRDC research team, “the outdoor mold spore concentrations could easily trigger serious allergic or asthmatic reactions in sensitive people . . . . The indoor quality was even worse, rendering the homes we tested dangerously uninhabitable by any definition.” The NRDC recited the need for governmental control over the situation, given the absence of U.S. regulatory standards for either indoor or outdoor levels of mold spores. Monique Hardin of Advocates for Environmental Human Rights spoke with harsh words: “[t]he federal government is falling down on the job by not addressing the public health impacts from mold.”

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147 Graziano & Collins, supra note 81.
149 AlbionMonitor.com, supra note 20.
150 Id.
151 Id. The National Allergy Bureau of the American Academy of Allergy and Immunology rates mold spore levels greater than 50,000 spores per cubic meter as “very high.” Id. The outdoor mold spore counts in flooded New Orleans’ areas ranged from 77,000 to 81,000. Id.
152 Id.
153 Id.
154 Id.
This catastrophic inundation of mold spores underscored the desperate need not only for state regulation but also for a unified federal system setting forth stringent standards, implementation procedures, and enforcement mechanisms.

V. CAUSATION AND THE HEALTH IMPACTS OF MOLD EXPOSURE

Why all the fuss over fungi? Didn’t mold save countless lives through the discovery of Penicillin? Mold is developing quite the "killer" reputation due to effects of some of its toxic metabolites, otherwise known as "mycotoxins." Historically, mycotoxin-induced health issues resulted from mass poisonings of humans or livestock that ingested large amounts of food contaminated with the toxin. The increased number of complaints allegedly stemming from exposure to mold has attracted public attention. The difficulty in quantifying or identifying the culprit is the ubiquitous nature of mold in general and the commonality of physical complaints. Those pointing a finger at mold for a host of health issues cite to toxicological data obtained from mycotoxins in animal studies. However, these studies are not dispositive, as the results were based on inoculation or ingestion of very large amounts of the toxin into laboratory animals. In fact, there are no studies which conclusively establish that the inhalation of mycotoxins is capable of causing measurable health effects when inhaled at levels similar to those found commonly in mold-contaminated environments. Thus, other factors could be contributing to health symptoms blamed on mold. For example, humidity affects the production of formaldehyde gas and other irritants. Hence, it has been proposed that upper

156 See Harbison et al., supra note 79, at 451.
157 Id. at 452.
158 Id. at 451-52.
159 Id. at 454-55.
160 Id. at 452.
161 Id.
162 Id.
163 Id. at 455. This is gas produced by off-gassing from indoor building materials. Id.
164 Id.
respiratory complaints attributed to mold can, in actuality, be due to these irritants. And yet despite the existence of a definitive causal link, litigation is growing.

VI. CONCLUSION

The proliferation of asbestos litigation and the resulting legislative response is an obvious reference to possibilities that may unfold with respect to this emerging era of toxic mold. Unless and until there is federal legislative action to guide the states, individual jurisdictions will continue to randomly address the myriad of possible issues surrounding mold and the impending litigation. There is still a lot of scientific uncertainty regarding reliable mold detection technology, especially technology able to detect specific mold concentrations with a low margin of error. Without comprehensive legislative guidance, states are left to decide one of the most critical questions in toxic mold litigation: what is the appropriate method to detect mold concentration in the air? It is likely that legislative bodies have been slow to respond to the issues surrounding mold litigation because of the uncertainty regarding the available detection techniques and the scientific ambiguity regarding the harm mold causes.

The devastation resulting from Hurricane Katrina and the speculation about its long-term effects on public health illustrate the urgent need for the federal government to address the issue of toxic mold. It is likely that monies expended to clean up the damage could have been saved if the government had taken appropriate measures to prevent and remediate the destruction left in Katrina’s wake. The nation must legislatively ready itself for the next possible catastrophe, which could leave behind conditions conducive to mold.

Toxic mold has the ability to grow in a variety of conditions, making it an incredibly powerful danger to air quality. Although each state has a unique environment, all states are in danger of harvesting the fungi associated with toxic mold. Thus, a national air quality standard is both appropriate and necessary, as all humans have the same threshold and

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165 Id. Dust mites are also potentially harmful allergens which may be the actual cause of the malady, rather than the mold at issue. Id.
166 MoldUpdate.com, supra note 104.
167 Graziano & Collins, supra note 81.
tolerance with respect to air toxicity, irrespective of where they live.

Rachel Carson stated, "[f]or the first time in the history of the world, every human being is now subjected to contact with dangerous chemicals, from the moment of conception until death."\(^{168}\) It’s certainly no leap to attribute Ms. Carson’s observations and assertions to society’s newest toxin: mold.