HISCOCK & BARCLAY LLP

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Practice Group UPDATE

TORTS, INSURANCE & PRODUCTS LIABILITY PRACTICE GROUP

Handling A Mold Infestation Scenario

Introduction:

The way in which any case is handled depends upon your perspective. In other words, it depends upon whether you are representing the plaintiff, a defendant, or the insurance carrier. Although there are central themes which every perspective must explore, and those issues will be a central topic of the presentation, this article will attempt to provide practice pointers from each of these perspectives.

For ease of presentation, let us assume the following scenario. While circumstances in which mold litigation can arise are infinite, we will use the following scenario so that everyone has the same picture:

Dewey Cheatem & Howe ("Employer") is a successful law firm located in Syracuse, New York. Their offices are located in a suburban location, and they have recently (within the past year) undergone a major renovation. The work was performed by Fly-By-Night Construction Company ("Contractor"), who subcontracted the HVAC work to Billy Bob Waters ("Sub").

George "Squeaky" Wheel ("Employee" or "Plaintiff") has been out of work since about one month after the renovations were completed. Squeaky has been complaining of respiratory difficulties and fatigue. During an investigation of Squeaky's Workers' Compensation claim, a plugged reservoir in Dewey's HVAC system was found to contain a variety of mold.

The Role of Consultants - Testing, Assessment, Remediation and Abatement:

When it comes to toxic torts and cost recovery actions, consultants are your best friends. Experts, and I put an emphasis on the plural, are invaluable when it comes to learning the science, evaluating causation, and developing a remediation plan. Retain your experts early!

Practice Pointer: Lawyers often wait until the case is well underway before retaining an expert, in hopes of an early settlement, or to avoid the expenditure of costs. This could be a mistake. An experienced defense attorney may want to "force the hand" of the plaintiff, and seek summary judgment or a *Lone Pine* order, mandating the plaintiff to produce expert opinion evidence of scientific causation.

In addition to the technical experts that you will need to hire to determine if there were defects in the construction and plans, you will need to hire an expert having a specific knowledge of molds and fungi. I might suggest beginning your task by consulting with an Industrial Hygienist. Make sure you do so before any evidence is destroyed. This testing could be critical to your case. Similarly, the lack of testing might be used as a "sword" against you and as a basis to have your client's claim dismissed on "spoliation" grounds.

When interviewing a proposed expert, make sure that you ask the consultant about his or her specific experience with mold-type claims. One of the best ways that I use to screen proposed experts, is to ask them about pertinent scientific literature. Not only does this show their competence in the chosen subject, but it will give you articles and books to read, so that you can familiarize yourself with the science and technology. Read these immediately. The information that you learn and the knowledge you obtain may make or break your case.

In cases involving a remediation plan, it is often preferable to hire a single consultant or expert that will do nothing else but to guide you through the hiring of specific consultants for the varying tasks that will need to be addressed, evaluated, scoped, and implemented. Like hiring a general contractor or a "clerk of the works" to build a house or oversee a project, this consultant will work with you, and assist you in your legal machinations.

As others in this presentation will more fully address, there are hundreds of mold types. Isolating the specific strains, identifying the toxic nature of them, and determining the efficacy of an abatement plan, is your primary concern. Your experts will provide you with the specifics of testing and methodologies that you will need to have conducted. I cannot emphasize the importance of having this done as soon as you get involved.

Information Management and Protection:

As noted above, nothing is more important than a primary, non-testimonial, consulting expert, to act as a liaison between you and the various other experts and assistants in the case. Although information that is gleaned by experts hired by counsel can fall within the purview of either the attorney-client privilege, or the work product doctrine as material prepared in anticipation of litigation, if that expert is ultimately asked to testify, the conversations and information that forms the basis of their opinions may then become "fair game" for cross-examination. Therefore, it is my preference to hire this type of expert, as my initial task. Especially, when the situation involves abatement of an existing condition.

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Practice Pointer: When letters are sent to experts or proposed experts, refrain from gratuitous comments about the case. At best, this could cause embarrassment during the trial, when your comments are read into the record to show bias or prejudice. At worst, it may form the basis for a disqualification on the basis that you have placed yourself on the witness list by attesting to certain items in the letter.

In addition, the use of a good paralegal can streamline this process. If you do not have access to a paralegal, I would recommend that you organize your file in a fashion that allows you to easily locate pertinent materials. These types of cases can often involve reams of paper, and multiple reports. Therefore, organization is key.

Determining Causative Factors:

Like any toxic tort matter, or remedial cost recovery action, causation can be the most critical element of your case. You must be prepared not only to prove (or disprove, as the case may be) that the specific mold can cause the injury or damage in question, but you must also present probative evidence that the specific mold did cause the injury or damage in your case. See *Sterling v. Velsicol*, 855 F.2d 1188, 1200 (6th Cir. 1988)(explaining the concept of "dual causation").

In addition, the issue of causation may end up being pushed to the beginning of the case, in a so-called *Lone Pine* motion, where a request for bi or trifurcation is made, and evidence of causation must be presented before the court will even allow discovery or an ultimate trial on the merits. Thus, the necessity of a good expert, who is sufficiently qualified, and who relies upon a sound scientific methodology, can make or break your case. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579. 580 (1993).

Identifying/Investigating Responsible Parties and Available Insurance:

Without a viable party to pay for an ultimate verdict or award, your efforts may be for naught. Therefore, one of the first things a plaintiff in a mold case should do, is to determine who the parties are that may ultimately be responsible for the harm, and whether or not they have adequate resources or insurance to pay. By the same token, if you are representing a potentially responsible party, you should make sure that timely requests for a defense and indemnification are forwarded to potential insurance carriers.

With respect to finding out who the potentially responsible parties are, you may need to invoke the protection afforded by pre-action discovery, or do other informal discovery, before suit is filed! For instance, the use of Freedom of Information laws, and/or obtaining any Workers' Compensation records (if they exist) may assist you in this regard. When requesting medical records, however, be especially cognizant of the new requirements imposed by HIPAA.

Furthermore, when you are dealing with mold cases, carefully scrutinize any construction activities, maintenance activities, or repairs. These may be central to a potential claim. They are a wellspring of information. Be sure to obtain full copies of any invoices, contracts, and pertinent correspondence as may relate to these activities.

Developing Successful, Cost Effective Repair, Remediation and Rehabilitation Plans:

Again, this aspect of your case is largely dependent upon the experts and consultants you engage. However, you must also assess the situation presented, and the feasibility, both financial and otherwise, in determining what will work for the particular situation. For instance, if you are dealing with a building that houses multiple businesses, and those business will be sustaining lost business types of damages, then one of your paramount concerns will be to get the building repaired, and the businesses back up and running, as quickly as possible. However, you must also be cognizant of any potential litigation that might arise, and make sure that you preserve any evidence.

Although it sounds redundant, you must immediately hire a reputable company to assess the situation, and recommend a course of action. That task must include a plan to evaluate all possible causes of the complaints in question. You might even begin by interviewing persons who voiced complaints, to determine the exact point at which the "problem" first arose. Determining the "when" can sometimes lead you to the "why."

Once you identify the source of the offending complaints, and after testing has confirmed that a toxic mold infestation has occurred, then a remedial investigation and feasibility study of sorts must be completed. Depending upon the party you are representing, you must work with both insurance carriers, consultants, and other attorneys to develop a plan that will both remove the source of the mold, and eradicate any possible pathways to exposure. For example, if the mold is found in the HVAC system, you might end up having to replace the entire system. At the very least, you are going to have to contract with a company that will clean and sanitize any areas that may be contaminated. Like a cancer, if the offending mold is not fully removed, it may reappear.

Another often overlooked aspect of any rehabilitation plan, involves a certain component of public relations. Recognize that television or newspaper coverage may take

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place early. Be sure to "nip this in the bud." Have a plan to respond to any media inquiries. Also, be prepared to release statements or information to interested parties, such as building tenants, business owners, or others. Offense is always the best defense when it comes to the media. A "no comment" response is often seen by the public as an admission of guilt.

Strategies for Assessing and Handling Potential Personal Injury/Impacts to Tenants/Residents:

While this has been an overriding theme of this article, strategies should include both proactive and reactive components. If you are the owner of a building where a possible toxic mold has been discovered, the key is to get both competent legal counsel, and qualified technical help, so that the situation can be assessed immediately, and so that any notification to tenants and/or building residents can take place quickly.

As noted above, and as is more fully addressed by others in this program, you should immediately contact any insurance carriers that may be associated with the claim, the building or any potential parties. Not only will this assure you of timely notification requirements, but it will also fulfill your obligation to cooperate with the insurance carrier. Furthermore, depending on the particular type of coverage you have, many of your fiscal and remedial obligations, may be undertaken by the insurer.

At some point in the investigatory process, it may become necessary to notify the residents and/or tenants. In order to mitigate any potential personal injury aspects of the situation, the manner in which notification occurs can be critical. Obviously, of paramount concern would be the health of the residents, and to remove them from any potential exposure pathway. However, because such a notification often occurs as a precautionary measure, and before all of the tests and information have been completed, the notification should include qualifications. This satisfies all concerned. The residents are protected from potential exposure to toxic molds by being warned of a potential risk at the earliest possible moment. At the same time, the notifying party can be protected from possible exposure to unfounded lawsuits (if the testing reveals an absence of any toxic mold). Remember, discretion is the better part of valor.

Assembling, Documenting and Prosecuting Claims for Cost Recovery:

When bringing a claim for cost recovery (obtaining the money you have paid to rectify the situation), whether you are a private individual who has expended funds for the remediation and rehabilitation of a toxic mold infestation, or if you are an insurance carrier involved in a subrogation claim against others, one of the most critical elements of your case is a detailed summary of (including the actual documents) of the funds expended, and the products or services that formed the basis for such expenditures. Therefore, as you incur expenses for services, you need to keep detailed records. Here again, your experts and consultants will carry the "lion's share" of this task. All the more reason for retaining qualified and respected experts.

Much of what has been written above, and by other presenters of this seminar, relate particularly to the prosecution of a cost recovery claim. Although there is not a lot of specific guidance available for cost recovery actions involving toxic mold, there are many resources available with respect to environmentally contaminated real property cost recovery actions. For instance, claims for the recovery of monies spent to clean up properties contaminated with chemicals or substances permeate the courts. Many of the cases involving these actions are instructive.

One must also be cognizant of the applicable statute of limitations with respect to the time in which such a claim must be brought. Again, there are more cases that address these claims when the subject matter is petroleum or contaminated real property. As a "rule of thumb," most cost recovery actions must be commenced within six (6) years of the expenditure of the funds. However, some types of damages, if claimed, require that a claim be commenced within three (3) years of the discovery of the injury, or when discovery should have been known. See e.g., CPLR section 214-c.

Another overriding concern, should be the issue of mitigation of damages. The quicker you rectify the situation, and get any tenants or businesses back into their residences, the less you will face a claim that the costs are exaggerated. Therefore, make sure that the situation is properly assessed, the appropriate responses are undertaken, and good records are maintained. Only then will you be able to prosecute, defend or avoid any legal action. ■

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