



MOLD AND INDOOR AIR QUALITY

The *Daubert* Dilemma

Mushrooms

*Inconsistencies Between the States
on Toxic Mold Claims*

Abbie Eliasberg Fuchs

Kelly E. Jones

[Return to publication table of contents](#)

ABBIE ELIASBERG FUCHS is a member of Harris Beach PLLC in its New York City office. Her practice focuses on mass and toxic tort litigation involving asbestos, chemical and toxic exposure to solvents, mold and pesticide products and pharmaceutical litigation, including diet drug and DES liability defense.

KELLY E. JONES is an associate in the firm's New York City office, where she focuses her practice on the areas of mass and toxic tort litigation involving mold and other chemicals; and products liability involving hair products, cosmetics, pharmaceuticals, heavy industrial equipment and medical devices.

The *Daubert* Dilemma Mushrooms

Inconsistencies Between the States on Toxic Mold Claims

Table of Contents

<i>Daubert vs. Frye</i> in the Mold Sphere	217
The Standards.....	219
Case Law From Varying States.....	219
Recent Developments in Case Law.....	221
Analysis.....	225
Conclusion	226

The *Daubert* Dilemma Mushrooms *Inconsistencies Between the States on Toxic Mold Claims*

In the wake of Hurricanes Katrina and Rita, toxic mold claims are predicted to be the tort of the decade with multimillion dollar claims throughout the country fueled by devastating property losses and media frenzy. Defensible or not, this height of media attention has created a landslide of insurance claims and lawsuits that are spreading like fungus itself. Even Hollywood's Ed McMahon, sports great Michael Jordan, and toxic tort crusader Erin Brockovich have found themselves in the center of personal mold battles in the courtroom. If you believe much of what you read, it's simple: exposure to mold contamination equals asthma, bleeding lungs, chronic fatigue, or perhaps even death. Indeed, the most notorious case in the toxic mold realm—*Ballard v. Fire Ins. Exch.*—handed down by Texas district court in 2001, although later reduced, awarded homeowners a \$32 million dollar verdict in compensatory and punitive damages against Farmers Insurance Group for its failure to deal adequately with toxic mold infestation. *Ballard v. Fire Ins. Exch.*, No. 99-05252, 2001 WL 883550 at *1 (Tex. Dist. Aug. 1, 2001) (unpublished opinion); see also Lisa Belkin, *Haunted by Mold*, N.Y. TIMES (Aug. 12, 2001). Disturbingly, this watershed verdict surfaced even without admitting into evidence *any* expert testimony linking Ballard's family's alleged injuries to toxic mold.

Daubert vs. Frye in the Mold Sphere

Toxic mold claims are generally decided by applying settled law to new factual issues. Evidentiary issues arise because causation is often at issue and dispositive of the case. Indeed many toxic mold cases claiming damages for personal injuries have been dismissed because of a failure to prove toxic mold exposure is causally related to the injuries. See, e.g., *Fraser v. 301-52 Townhouse Corp.*, 2006 WL 2828595 (N.Y. Super. Ct. Sept. 27, 2006) (determining after a ten-day *Frye* hearing that current scientific evidence does not support a conclusion that mold or damp indoor environments cause illness); see also *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227 (Tex. App. 2002). Additionally, toxic mold has not been

clearly linked by the medical community with any specific disease—there exists a conflict of authority in the medical community regarding the amount of exposure likely to cause injury. *See, e.g.*, Institute of Medicine (U.S.) Committee on Damp Indoor Spaces and Health, *DAMP INDOOR SPACES AND HEALTH* (National Academies Press, Washington, D.C., 2004) (concluding that evidence in 2003 was not sufficient to conclude that a causal relationship exists between health outcomes and damp/moldy indoor environments); Bush, R.K., *et al.*, *The Medical Effects of Mold Exposure*, *J. ALLERGY CLIN. IMMUNOL.* 117(2): 326–33 (February 2006) (position paper of the American Academy of Allergy Asthma and Immunology finding that current studies do not conclusively demonstrate a causal relationship of airborne mold exposure to clinical rhinitis and atopic dermatitis); James D. Lomax & Eckhardt Johanning, *OCCUPATIONAL MEDICINE, Indoor Environment Quality* (2001) (noting that there is an “association” between health problems and exposure to moisture); Jay Romano, *Court Rebuffs a Suit Linking Mold to Illness*, *N.Y. TIMES* (Oct. 15, 2006) (quoting public health expert Dr. Joseph Q. Jarvis as being surprised by New York’s decision in *Fraser*, stating that “it is well documented that exposure to indoor mold can cause respiratory allergies in some people”).

The fate of many of these cases ultimately will be determined by the rule controlling expert testimony adopted by the court in which the suits are brought. Furthermore, the reliance of various states on different standards for the admissibility of scientific evidence has made mold verdicts increasingly inconsistent from state to state. In addition to federal courts, the majority of state appellate courts in the United States have adopted the *Daubert* standard of admissibility for expert testimony. *See, e.g.*, *M.G. Bancorporation, Inc. v. Le Beau*, 727 A.2d 513 (Del. 1999); *State v. Porter*, 698 A.2d 739 (Conn. 1997); *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *State v. Martens*, 629 N.E.2d 462 (Ohio Ct. App. 1993). The Supreme Court in *Daubert* rejected the *Frye* standard for the admissibility of novel scientific evidence, holding that something more than “general acceptance” within the scientific community was required for admissibility. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 584 (1993). Despite the ruling in *Daubert*, a number of states continue to use the *Frye* test, including

New York, California, Illinois, Maryland, Florida, Michigan, Pennsylvania and Washington; while still other states continue to rely on their own individual tests for scientific admissibility of evidence. *See, e.g., People v. Wesley*, 83 N.Y.2d 417 (1994); *People v. Leahy*, 882 P.2d 321 (Cal. 1994); *People v. Basler*, 740 N.E.2d 1 (Ill. 2000); *Hutton v. State*, 663 A.2d 1289 (Md. 1995); *Flanigan v. State*, 625 So. 2d 827 (Fla. 1993); *Stitt v. Holland Abundant Life Fellowship*, 624 N.W.2d 427 (Mich. 2000); *Commonwealth v. Crews*, 640 A.2d 395 (Pa. 1994); *State v. Riker*, 869 P.2d 43 (Wash. 1994).

The Standards

As established by *Daubert*, trial courts must act as “gatekeepers,” mandating a demonstration of the reliability and relevance of an expert’s opinion before it is admitted into evidence. *Daubert*, 509 U.S. at 584. The four-factor non exclusive test applied in *Daubert* was: (1) whether the expert’s proposed theory can be or has been scientifically tested; (2) whether the theory of technique has been subjected to peer review or been published; (3) consideration of the technique’s known or potential rate of error; and (4) whether the theory or technique has been generally accepted in the scientific community. *Id.*

The *Frye* test on the other hand, is merely guided by a “general acceptance” test. Under this approach, expert testimony based on scientific principles or procedures is admissible only after such principles or procedures have gained general acceptance in the relevant discipline. *See, e.g., Wesley*, 83 N.Y.2d at 417 (adopting the “general acceptance” test articulated in *Frye* in New York as essentially a vote-counting test among scientists plus a foundational inquiry of relevancy). While the *Frye* test of general acceptance is a factor, it is not an absolute prerequisite to admissibility and a trial court also has discretion to consider other factors. *See, e.g., id.*

Case Law From Varying States

Traditionally, an analysis of case law reveals that *Frye* jurisdictions have had more success for plaintiffs in allowing certain expert witness testimony. For example, in *Mondelli v. Kendel Homes Corp.*, a mold case decided in the *Frye*-friendly state of Nebraska, the homeowners sued Kendel

Homes for construction defects, as well as the city for negligent inspection of the premises. *Mondelli v. Kendel Homes Corp.*, 631 N.W.2d 846 (Neb. Super. Ct. 2001). The Nebraska Supreme Court reversed the trial court's decision and admitted expert testimony concerning mold toxicity based on the expert's familiarity with scientific publications on mold and health hazards. In this case, the toxicologist expert testified only to mold as a cause of asthma and rhinitis, but did not testify as to any link between mold and sick building syndrome, chronic fatigue syndrome, or fibromyalgia. *Id.*; see also, e.g., *Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20 (Fla. Ct. App. 1997) (finding a \$14.1 million verdict was supported by two experts who testified about publications that the court believed to be generally accepted within the scientific community on the link between mold and health concerns). In California and Maryland, both *Frye* jurisdictions, juries have returned large plaintiff verdicts in mold-related personal injury cases where the plaintiffs' experts' causation was suspect. See, e.g., *Mazza v. Schurtz*, 2001 WL 1940440 at *1 (Cal. Super. 2001) (awarding over \$2.7 million to a family for serious and permanent damage to their health, including lifelong asthma, hypersensitivity to mold and higher susceptibility to respiratory illness and disease); *Nicholson v. Metro Prop. Mgmt.*, 2001 WL 1893181 at *1 (Md. Cir. Ct. 2001) (awarding \$219,000 to a four-year old child for exposure to mold spores resulting in severe respiratory allergies, despite the fact that the plaintiff was born immunocompromised and had a liver transplant).

In *Daubert* jurisdictions, however, mold related personal injury claims have been dismissed and/or settled where the defendants filed pre-emptive motions to exclude the plaintiffs' experts before trial. Under *Daubert*, the expert must first prove general causation before testifying; in other words, the expert must demonstrate that mold is capable of causing a particular injury or condition in the general population. For example, the Delaware Superior Court in *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 828 (Del. Super. Ct. 2000), held that in a sick building syndrome case, it was "one of those cases where it is possible that the precepts of science have not caught up with all the claims of the Plaintiffs." *Id.* The court ultimately excluded all expert testimony that mentioned chronic fatigue syndrome, sick building syndrome, fibromyalgia or multiple chemical sensitivity. *Id.*

Furthermore, general causation in toxic tort litigation is frequently exhibited via epidemiology. However, currently, there are few epidemiological studies of inhaled mycotoxins and disease in indoor air settings, and the few that exist were conducted on animals rather than humans. See DAMP INDOOR SPACES, *supra* (finding that most of the information regarding the toxic effects of fungi and bacteria is derived from animal studies); Harriet M. Ammann, *Mold Toxicity: Risk Assessment for Humans Exposed Indoors*, Proceedings from the 5th International Scientific Conference on Bioaerosols in Indoor and Work Environments (Saratoga Springs 2003) (determining exposure to indoor mold is “highly imperfect” in part due to the dearth of animal studies). These vague associations, based on anecdotal circumstantial evidence or differential diagnoses, are not sufficiently reliable to guide a jury’s deliberation, and it appears courts in *Daubert* jurisdictions have typically recognized this reality.

Recent Developments in Case Law

Despite the fact that typically cases in *Frye* jurisdictions have had more success for plaintiffs in allowing certain expert witness testimony, there has been a recent indication that this trend is changing. Significantly, a New York County Supreme Court—a *Frye* following court—issued a significant decision in *Fraser v. 301-52 Twp. Corp.*, finding that current scientific evidence does not support a conclusion that mold or damp indoor environments cause illness. *Fraser v. 301-52 Townhouse Corp.*, 2006 WL 2828595 (N.Y. Super. Ct. Sept. 27, 2006). The lengthy decision was issued by Judge Shirley Werner Kornreich after a ten-day *Frye* hearing encompassing more than one-thousand pages of testimony and the introduction of more than seventy scientific articles and books.

In *Fraser*, the plaintiffs (husband, wife and child) sued their cooperative for personal injuries allegedly caused by mold in their water-damaged apartment. The plaintiffs alleged that their injuries included “headache, rashes, nasal congestion, frequent cough, sore throat, fatigue, itchy and swollen eyes, sneezing, mental and emotional distress, anxiety and depression, hypersensitivity to mold, asthmatic symptoms, repetitive and pervasive upper respiratory infections and nightmares.” *Id.* at 1.

The court heard evidence to determine whether the plaintiffs’ the-

ory that mold and/or dampness caused their illnesses was “generally accepted in the scientific community and whether the methodology used by plaintiffs to measure the mold, was within generally accepted scientific methods.” *Id.* at 48. The two publications found most compelling by the court, *DAMP INDOOR SPACES AND HEALTH* (National Academies Press, Washington, D.C., 2004) (concluding that evidence in 2003 was not sufficient to conclude that a causal relationship exists between health outcomes and damp/moldy indoor environments) and Bush, R.K., *et al.*, *The Medical Effects of Mold Exposure*, *J. ALLERGY CLIN. IMMUNOL.* 117(2): 326–33 (February 2006) (position paper of the American Academy of Allergy Asthma and Immunology finding that current studies do not conclusively demonstrate a causal relationship of airborne mold exposure to clinical rhinitis and atopic dermatitis), held that the prevailing scientific consensus fails to establish a causative link between mold and/or damp indoor space and health problems. *Id.* at 47. Indeed, both plaintiffs’ experts testified that the American Academy of Allergy Asthma and Immunology was one of the most prestigious medical organizations in the United States. Thus, the court determined that plaintiffs “failed to demonstrate that the community of allergists, immunologists, occupational and environmental health physicians and scientists accept their theory—that mold and/or damp indoor environments cause illness” and that there are no reliable generally accepted standards for measuring indoor airborne mold or for determining what amount of mold in indoor air is excessive. *Id.* at 48.

Interestingly, with respect to the four expert witnesses who testified at the hearing (two for the plaintiffs, two for the defendant), the court discredited both the plaintiffs’ and the defendant’s lead experts, finding them both “far from objective.” *Id.* at 44. The court noted that the defendant’s expert, Dr. Ronald Gots (a doctor/researcher specializing in forensic medicine and involved in environmental and occupational research), heads a company which provides litigation support mainly to the defendants. *Id.* at 37–38. Moreover, the court further discredited the plaintiffs’ expert, Dr. Eckardt Johanning (a doctor/researcher specializing in occupational and environmental medicine), based on the fact that his testimony was based on a clinical, differential diagnosis in individual cases, which was “not the same as a causal assessment of

their complaints.” *Id.* at 36–37. The testimony of the defendant’s expert, Dr. Stanley Michael Phillips (director of clinical allergy and immunology services at the University of Pennsylvania Medical School and senior scholar, clinical epidemiologist and consultant of medicine at the Philadelphia Veterans’ Administration Center), was persuasive on the *Frye* question. *Id.* at 44–45. The crux of Dr. Phillips’ argument was that “association is not sufficient for a clinician to draw a conclusion about causation,” and that the “cornerstone for treating patients . . . and understanding the medicine is epidemiological research.” *Id.* at 40.

In addition to New York, California’s Second District Court of Appeal—following its slight variation of *Frye*—recently issued a noteworthy decision involving a personal injury claim allegedly caused by exposure to toxic mold in *Geffcken v. D’Andrea*, 137 Cal. App. 4th 1298 (2006). The decision is notable by the appellate court’s approach used to address evidentiary issues involving the admissibility of technical environmental sampling standards and expert testimony. The *Geffcken* case is instructive on how a mold plaintiff’s technical evidence can be analyzed and attacked.

In *Geffcken*, Eva and Alexander Geffcken, mother and son, claimed injuries from alleged exposure to mold in the condominium they rented. *Id.* at 1301–02. They sued the homeowners’ association and the management company for their condominium complex. *Id.* The plaintiffs had only one expert witness, Dr. Gary Ordog (a medical doctor specializing in emergency medicine and certified as a Diplomate of the American Board of Medical Toxicology), who was willing to testify that the Geffckens’ exposure in their home to mold byproducts known as mycotoxins caused Eva Geffcken to suffer from lung cancer, neurological problems, respiratory problems, immune deficiency, fibromyalgia, skin infections, chronic fatigue and headaches, and caused Alexander Geffcken to suffer from chronic fatigue, elevated liver enzymes, chemical hepatitis of the liver, and immunological, respiratory and neurological problems. *Id.* at 1302.

The Geffckens sought to introduce evidence and testimony from several sources including an environmental engineer, lab technicians, and a physician. *Id.* at 1303–05. The defendants retained experts who found fault with each of the methodologies employed by the Geffckens’ experts Daniel Baxter (Environmental Scientist), Dr. Daniel Sudakin (Board

Certified in Medical Toxicology and Clinical Assistant Professor in the Department of Environmental and Molecular Toxicology at Oregon State University), and Dr. Adrian Casillas (Assistant Professor at the UCLA Department of Medicine, Division of Clinical Immunology and Allergy), who found flaws with each of the methodologies employed by the Geffckens' experts. *Id.* at 1303–05. The defendants were able to persuade the court to exclude the plaintiffs' evidence by attacking (1) the sloppy collection of sampling data, (2) the non-industry-standard lab tests obtained by the Geffckens, and (3) the lack of qualifications of the Geffckens' medical expert to opine on the affect of the mold exposure on the Geffckens. *Id.* at 1307–10. The defendants' experts effectively undermined the majority of the Geffckens' evidence, without which the Geffckens could not prove their case. *Id.* at 1307–11.

Under the California's *Kelly-Frye* rule for admissibility of expert evidence, the proponent of evidence derived from a new scientific methodology must satisfy *three* prongs: by showing first that the reliability of the new technique has gained general acceptance in the relevant scientific community, second that the expert testifying to that effect is qualified to do so and third, that “correct scientific procedures were used in the particular case.” *People v. Roybal*, 19 Cal. 4th 4891, 505 (1998). The trial court here ruled that the experts' opinion was unsupported by competent evidence. *Geffcken*, 137 Cal. App. 4th at 1305–06. The trial court found not only that there was no evidence mycotoxins could cause the serious illnesses suffered by the Geffckens, but that there was not even evidence the Geffckens had been exposed to mycotoxins in their home. *Id.* The court therefore excluded the experts' testimony and then entered judgment for the defendants because the plaintiffs could not prove causation. *Id.* The court of appeal affirmed. *Id.* at 1313. The court reasoned that (1) the mold sampling data on which Dr. Ordog relied was properly excluded under Evidence Code §352, (2) the blood tests on which Dr. Ordog relied were properly excluded under *Kelly-Frye* because the plaintiffs failed to show the blood tests were generally accepted in the relevant scientific community, and (3) Dr. Ordog's opinions were properly excluded under Evidence Code §801 because “in view of the absence of any reliable evidence that [plaintiffs] had been exposed to

mycotoxins at the properties in question, Dr. Ordog’s opinions were speculative and conjectural.” *Id.* at 1310–12.

Although these are just two decisions by a trial court and an appellate court, it is likely that they will have an immediate impact on pending mold litigation and may possibly curtail similar personal injury suits in the future; unless, of course, the scientific consensus changes or other courts assess the current state of the science differently.

Analysis

Mold cases are no exception to the rule that retained experts are valuable and essential litigation tools. In the mold sphere, there are several obvious areas in which expert testimony will frequently become important. In personal injury cases, the causal link between the presence of mold and the injuries suffered by the particular plaintiff is also an element commonly proved by expert testimony. Notwithstanding the inconclusive scientific evidence linking mold to severe human illness, there now exists a unique social awareness of fungus which has instilled a deep-rooted, albeit unproven, belief in the dangers of toxic mold.

Predictably, toxic mold claims involving personal injury are less successful in jurisdictions adhering to *Daubert*, since expert testimony relating to toxic mold’s health effects is unlikely to be regarded as more than mere “junk science.” See generally *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471 (Apr. 2005) (finding that a state’s choice of a scientific admissibility standard does not have a statistically significant effect on removal to federal court, but suggesting that the *Daubert* decision created a greater awareness of the problems of junk science and that state courts should consider uniformly adopting the *Daubert* standard to lessen confusion). Based on past case law, and despite *Frye*’s reputation for being conservative, jurisdictions adhering to *Frye* have been much more likely to allow self-professed mold experts to testify as to the dangers of toxic mold, even without a clear scientific link between mold and human disease.

Thus, the breadth of mold related decisions suggest that *Daubert* gets it right with respect to the admissibility of expert testimony in mold-related personal injury suits. Over the past few years, defendants in *Frye* jurisdictions have been unfairly disadvantaged as juries were allowed to

consider unfounded opinions from unqualified experts. However, there are recent indications that this trend may be changing. As evidenced by the recent case decided in New York County, courts in what have been the more lax *Frye* jurisdictions may now be changing their tunes and precluding experts and evidence that link indoor mold to human illness. If upheld on appeal, this change would be a landmark for landlords, building owners, managing agents, contractors and cooperative and condominium boards, and indicates a growing trend among courts across the country to view evidence of mold-caused illnesses with increasing skepticism.

Conclusion

While the number of toxic mold claims has sky rocketed in the past decade, and proved to be a force within the realm of first and third party insurance claims across the country, proving personal injury from mold may be more difficult than many analysts originally predicted. In order to reach asbestos or lead paint status on the toxic tort hierarchy, a more conclusive medical link must be established between indoor toxic fungus and human illness. At present, due to the varying evidentiary rules and standards across America, mold cases are often conflicting from state-to-state and are producing many inconsistent results. Unfortunately, until state and federal governments establish more uniform standards for the handling of mold claims and mold exposure/cleanup, inconsistencies in these cases between the different states will continue to “mushroom,” leaving the defense bar with the arduous task of adjusting its trial strategy in each case to the unique rules in a particular jurisdiction.

Return to publication table of contents