

Massachusetts Appeals Court Resurrects Toxic Mold Claim Against Condominium

by Richard D. Vetstein © 2011

Application of “Discovery Rule” Enables Toxic Mold Claim To Survive Dismissal

Toxic mold is a dangerous condition that can arise in buildings with untreated water leaks and penetration. The most common form of “toxic mold” is *Stachybotrys chartarum* (also known by its synonym *Stachybotrys atra*), a greenish-black mold. It can grow on material with a high cellulose and low nitrogen content, such as fiberboard, gypsum board, paper, dust, and lint. Growth occurs when there is moisture from water damage, excessive humidity, water leaks, condensation, water infiltration, or flooding. Constant moisture is required for its growth.

According to the [Centers for Disease Control](#), toxic mold causes upper respiratory tract symptoms, cough, and wheeze in otherwise healthy people; with asthma symptoms in people with asthma; and with hypersensitivity pneumonitis in individuals susceptible to that immune-mediated condition. The CDC also found limited or suggestive evidence linking indoor mold exposure and respiratory illness in otherwise healthy children.



Roof Leaks Lead To Toxic Mold

According to the August 15, 2011 case of *Doherty v. Admiral’s Flagship Condominium Trust* (see below), Denise Doherty owned a condominium unit at the Admiral’s Flagship Condominium in Chelsea. (If you are driving into Boston northbound on the Mystic Bridge, these are the condominium units on Admiral’s Hill under the bridge.) In 2004, a roof leak led to ceiling cracks and loosening plaster in Doherty’s unit, and she requested that repairs be made. Any repairs made were either untimely or inappropriate. In February, 2006, Doherty noticed mushrooms and water infiltration on the same threshold and notified the condominium management company. It replied that the threshold was rotted, and required replacement. The management company did a shoddy job repairing the damage.

A month later a mold remediation company found hazardous mold in unsafe levels in Doherty’s unit caused by water infiltration and chronic dampness. Following this discovery, the condominium management promised to repair the leaks, and that the mold would be removed. A mold remediation was attempted, but failed, and mold remains in the unit. In 2008, Doherty’s doctor ordered her to vacate her unit due to the presence of the mold. Although Doherty has

continued to request repairs of the leaks and chronic dampness, and a full remediation of the mold, no further action has been taken. She filed suit against the condominium and its manager on February 13, 2009, claiming that due to the defendants' failure to repair, she has suffered severe, permanent health problems, lost income, loss of her personal property, and loss of the value of her condominium unit.



Limitations Period Begins When Toxic Mold Symptoms First Arise

Doherty's personal injury claims are governed by a 3 year statute of limitations. A statute of limitations is the time period set by law by which a person is allowed to file a lawsuit. If you sleep on your rights, you lose them.

The condominium claimed that the stopwatch for Doherty's claims started in 2004 when the water leak occurred, and that she filed her lawsuit 2 years late. The lower court agreed and dismissed the lawsuit.

The Appeals Court overturned that ruling, holding that under the "discovery rule" the statute of limitations for a toxic mold claim starts when the injured person becomes aware of the existence of toxic mold through investigation or some physical manifestation of being exposed to toxic mold, such as respiratory symptoms, asthma and the like. In Doherty's case, she first became aware of the toxic mold when the lab results came back in March 2006 which was within the 3 year limitations period. The court reasoned:

We agree with the foregoing cases that without some indication of a hazardous contamination, the plaintiff could not have been aware that she was being exposed to toxic mold, regardless of when the leak began. Contrary to the defendants argument, it is not a certainty that all water infiltration will eventually evolve into toxic mold. To conclude otherwise would encourage, and possibly even require, a plaintiff to preemptively file suit the moment water starts to infiltrate a dwelling or other building, before any mold or mold-related injury has even occurred.

According to the judges themselves, this decision is the first Massachusetts appellate case dealing with the statute of limitations for toxic mold, so it's quite important. The case will make it easier for toxic mold victims to sue wrongdoers in state court. The case also highlights the importance of addressing water leaks in condominiums quickly and professionally. If the condominium management had properly dealt with the roof leaks in the first place, perhaps Ms. Doherty would not have been exposed to toxic mold in the first place!