

# The Growing Hazard of Mold Litigation



*Papers commissioned by the U.S. Chamber Institute for Legal Reform and the Center for Legal Policy at The Manhattan Institute*

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## ***U.S. Chamber Institute for Legal Reform***

The U.S. Chamber Institute for Legal Reform was founded in 1998 as a 501(c)(6) tax-exempt, separately incorporated affiliate of the U.S. Chamber of Commerce. The mission of ILR is simple: to make America's legal system simpler, fairer and faster for everyone. ILR's multi-faceted program seeks to promote civil justice reform through legislative, political, judicial and educational activities at the national, state and local levels.

## ***Center for Legal Policy at the Manhattan Institute***

The Center for Legal Policy at the Manhattan Institute is a leading voice for reform of America's civil justice system. The Center's mission is to communicate thoughtful ideas on civil justice reform to real decision-makers through books, publications, conferences and public or media appearances. Founded in 1986, hundreds of news reports have cited the Center's work, with The Washington Post going so far as to call Senior Fellows Peter Huber and Walter Olson the "intellectual gurus of tort reform."





***“A New Plague – Mold Litigation: How Junk Science and Hysteria Built an Industry”  
and  
“A Scientific View of the Health Effects of Mold”***

The insurance industry has reported “toxic” mold claims in the billions of dollars. Insurance companies in Texas alone paid \$1.2 billion in mold claims in 2001. Is mold the next asbestos? The U.S. Chamber Institute for Legal Reform, partnering with the Center for Legal Policy of the Manhattan Institute, commissioned two papers that take a close look at mold litigation and the science of mold. The first, by Cliff Hutchinson and Robert Powell, two experienced litigators with Hughes and Luce in Dallas and Austin, provides a legal perspective on mold claims. The second, written by a team of scientists led by Dr. Bryan Hardin, former Deputy Director of NIOSH and former Assistant Surgeon General in the Public Health Service, addresses the scientific evidence – or lack thereof – that forms the foundation of these claims.

In “A New Plague – Mold Litigation: How Junk Science and Hysteria Built an Industry,” Hutchinson and Powell explain the phenomenon of mold litigation by opening with an overview of litigation over Alar and plastics, both based on a media-generated fear of alleged health hazards – fear without scientific support. It segues into a discussion of the 1980s media reports of an emerging illness – “sick building syndrome.” Although this new health hazard resulted in buildings being shut down and in some cases abandoned, clear-eyed scientists have shown the threat to be highly exaggerated – more due to psycho-social factors than to any disease entity. Nonetheless, litigation over alleged health effects from indoor air quality has endured. Against this backdrop of public suspicion of indoor air and media generated fear of phantom toxics, mold claims emerged in the mid-1990s and quickly grew.



## THE GROWING HAZARD OF MOLD LITIGATION

### EXECUTIVE SUMMARY

In November 1994, a Centers for Disease Control and Prevention (CDC) task force looked for possible causes of a rare bleeding lung disorder in eight babies in Cleveland. The CDC explored the possibility that molds could be at fault and concluded there could be a link. The Cleveland study generated a spate of publicity, so much publicity that the CDC convened a working group to reevaluate the findings. The second working group published a report in June 1999 contradicting the Cleveland study. It was about as negative as possible in rejecting the evidence of any association between mold and infant pulmonary hemorrhage. Despite a further CDC report in 2000 also refuting the Cleveland study, “the juggernaut of media frenzy, tort lawyers, and newly-coined [mold] remediators was rolling too fast to be slowed by mere science.”

Hutchinson and Powell lay out the development of mold litigation, including some significant cases with large verdicts, and point out that the proliferation of “junk science” claims that form the foundation of mold litigation ironically occurred at the same time that the U.S. Supreme Court Daubert decision laid down new guidelines that tightened the standards for scientific testimony. The Supreme Court said that federal judges need to be gatekeepers – that they have an obligation to be vigilant against “expertise that is false and science that is junky.” The authors examine mold litigation through the Daubert microscope and argue that the serious health claims that pervade mold litigation – brain damage, lung hemorrhage, and cancer – cannot withstand scrutiny under the “reliable science” standard of Daubert.

The scientific community has not been unresponsive to the spurious nature of mold claims. Probably the most complete examination of the scientific record was conducted by Cleveland microbiologists who published their findings in January 2003, concluding that there is no supportive evidence for serious illness from toxic mold in the contemporary environment. Other studies from the American Industrial Hygiene Association and the National Institute of Occupational Safety and Health (NIOSH) came to similar conclusions. The authors note that “science has confirmed common sense” since mold is not some rare, exotic toxic material but is everywhere, making

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up 25 percent of the earth's biomass. If mold were extremely toxic, one could expect to see epidemics wherever people are exposed to the highest levels of mold – vacation spots and outdoor camps, for example.

Nonetheless, the opportunism of trial lawyers and the media's love for scary stories have kept the litigation "mushrooming." The pace of litigation is increasing. The Insurance Information Institute indicates that 10,000 mold-related suits are pending nationwide, a 300 percent increase since 1999. This number may be conservative. A California plaintiffs' lawyer asserts that he has "thousands" of claims himself, including one brought by Erin Brockovich.

Hardin and his team of scientists provide a detailed primer on mold in "A Scientific View of the Health Effects of Mold." Fungi, they point out, play an "essential role in the cycle of life as the principal decomposers of organic matter, converting dead organic material into simpler chemical forms that can in turn be used by plants for their growth and nutritional needs. Without fungi performing this essential function, plant and animal debris would simply accumulate." Mold is everywhere.

The paper examines in depth each type of health complaint associated with mold and offers an extensive survey of the scientific literature on the topic. It determines that mold can cause allergies for those who are "atopic" or prone to allergic reactions. And, "despite the fact that it can produce toxic substances under appropriate growth conditions, years of intensive study have failed to establish exposure to *Stachybotrys* ["toxic" mold] in home, school, or office environments as a cause of adverse health effects." The paper concludes that infections caused by mold are rare, except for those individuals who are "immune-compromised." Finally, it asserts that "there is no sound scientific evidence that mold causes 'toxicity' in doses found in home environments."

***A New Plague – Mold Litigation:  
How Junk Science and Hysteria  
Built an Industry***

By Cliff Hutchinson and Robert Powell  
Partners, Hughes & Luce LLP

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## ***About The Authors***

### **Clifton T. Hutchinson**

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Mr. Hutchinson is a partner in the law firm of Hughes & Luce LLP, in Dallas, Texas. His practice focuses on the trial and appeal of cases involving complex technical and scientific issues, and he is a frequent speaker and author on expert evidence topics. Since 1980, he has participated in the litigation of the various “waves” of mass toxic tort cases, including asbestos, benzene, formaldehyde, and mold claims.

Mr. Hutchinson received a Bachelor of Industrial Engineering degree from the Georgia Institute of Technology in 1969 and his law degree, cum laude, from Southern Methodist University in 1980. He is admitted to practice before the United States Patent and Trademark Office and is a member of the Dallas, Texas, and American Bar Associations.

### **H. Robert Powell**

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Mr. Powell is a partner in the Austin, Texas, office of Hughes & Luce LLP. Mr. Powell earned his undergraduate degree from Baylor University in 1964 and his law degree, cum laude, from Baylor Law School in 1966. While in law school, he was Editor-in-Chief of the Baylor Law Review. From 1966 through 1969 he served in the U.S. Navy. He began his law practice in Dallas in 1970 and joined Hughes & Luce in 1975. In 1983, he moved from the Hughes & Luce Dallas office to its Austin office.

Mr. Powell has more than 30 years of experience before state and federal, trial and appellate, courts. His litigation practice has centered upon complex civil litigation and has included products liability and insurance litigation concerning alleged indoor air pollution involving formaldehyde and mold claims.

# ***A Scientific View Of The Health Effects Of Mold***

By Bryan D. Hardin, Ph.D., Andrew Saxon, M.D.,  
Coreen Robbins, Ph.D., CIH, and Bruce J. Kelman, Ph.D., DABT





## ***About The Authors***

### **Dr. Bryan D Hardin** GLOBALTOX

Bryan D. Hardin, Ph.D., holds positions as a senior consultant with GlobalTox and Adjunct Assistant Professor at the Rollins School of Public Health, Emory University. He was commissioned into the US Public Health Service and began his public health career with the National Institute for Occupational Safety and Health (NIOSH) in 1972, where he served in research, policy, and management roles, culminating as Deputy Director of NIOSH and Assistant Surgeon General in the Public Health Service.

Dr. Hardin holds a Ph.D. in Environment Health Sciences from the University of Cincinnati. Dr. Hardin is a full member of the American Association for the Advancement of Science, the American Industrial Hygiene Association, the American Public Health Association, and the Teratology Society. He has served on working groups of the World Health Organization, the International Labor Office, and the International Agency for Research on Cancer.

### **Coreen A. Robbins, Ph.D., C.I.H.** GLOBALTOX

Coreen A. Robbins, M.H.S., Ph.D., CIH, holds a position with GlobalTox, Inc. as a consulting Industrial Hygienist for projects in field investigations and in litigation support activity. She has approximately 13 years of experience in industrial hygiene and has served as a consultant in many investigations throughout the U.S.

Dr. Robbins holds a master's degree in Occupational Safety and Health (1989), and a Ph.D. (1995) in Environmental Science from the Johns Hopkins University. Dr. Robbins is also a Certified Industrial Hygienist (CIH). Dr. Robbins has extensive practical experience in conducting industrial hygiene surveys in areas including indoor air quality, mold, asbestos and man-made mineral fibers, chemical exposure assessment and industrial noise exposure. Dr. Robbins is a full member of the American Academy of Industrial Hygiene and the American Industrial Hygiene Association (AIHA), and an affiliate member of the American Conference of Governmental Industrial Hygienists. She is currently serving on the AIHA's Task Force on Microbial Growth as the representative for the AIHA Toxicology Committee.

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**Andrew Saxon**

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Andrew Saxon, MD, is a professor and Chief of the Division of Clinical Immunology and Allergy at the UCLA School of Medicine. Dr. Saxon has over 25 years of experience in immunology, he has published approximately 165 peer-reviewed research articles, and he has three patents in the immunology field. Since 1999, Dr. Saxon has served as editor-in-chief of the journal *Clinical Immunology*.

Dr. Saxon received his MD from Harvard Medical School. He is board-certified in Internal Medicine, Allergy and Immunology, and Diagnostic Laboratory Immunology. He is a member of the American Academy of Allergy and Immunology, where he serves on the Research Awards Committee, the Nominating Committee, the Primary Immunodeficiency Disease Committee and the Clinical and Diagnostic Immunology Committee; and where has served in the past as Chairman of the Basic and Clinical Immunology Section.

**Dr. Bruce J. Kelman**

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Bruce J. Kelman, Ph.D., D.A.B.T., holds positions as Principal and President of GlobalTox, Inc. Dr. Kelman has approximately 25 years experience in toxicology and has served as a consultant and expert in numerous investigations across North America. He has evaluated numerous claims of personal injury and health impacts from many chemicals and drugs, and has presented a variety of health risk concepts to policy makers, government regulators, citizen groups, and individuals involved in all aspects of the legal process.

Dr. Kelman holds a Ph.D. from the University of Illinois (1975) and is certified in toxicology by the American Board of Toxicology (original certification in 1980 with recertifications in 1985, 1990, 1995 and 2000). Dr. Kelman is a member of the Society of Toxicology, American College of Occupational and Environmental Medicine, American College of Toxicology, American Society for Experimental Pharmacology and Therapeutics, Society for Experimental Biology and Medicine, and Teratology Society.



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