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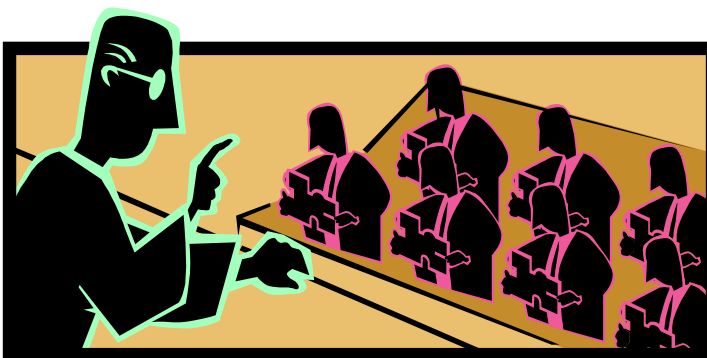
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## INDOOR ENVIRONMENTAL ISSUES AND INFORMATION . . . TODAY

### FIRST PERSONAL INJURY MOLD CASE TRIED IN ORANGE COUNTY



In a recent bench trial decision, a plaintiff family was awarded \$303,944 for health problems as result of indoor mold in their rental home in Costa Mesa. [See *Fleener v. Kindrat*, Orange County Superior Court Case No. 01CC01932, (2002)]. Plaintiffs claimed that their landlord was aware of the mold and failed to disclose or remedy the problem causing the family to become mold-sensitized and resulting in their children developing asthma. All plaintiffs claimed life-long medical expenses and care due to the "mycotoxic affects" of the mold.

Defendant denied all prior knowledge of mold. Defendant admitted that plaintiffs' children were temporarily asthmatic, but disputed the nature and extent of their damages and contended that any ill-effects from mold were transitory. Defendant further contended that due to the lack of speciation of the mold and lack of adequate sampling, plaintiffs could not establish the type of mold they were exposed to and whether the mold present released mycotoxins. Finally, defendant argued that there was insufficient causal link between mycotoxic exposure to mold in an indoor environment and health effects in current scientific literature.

The bench verdict awarded \$78,944 in economic damages (which included \$26,569 in past medical expenses, \$50,000 for loss of personal property and \$775 for the environmental report.) The court also awarded each family member between \$25,000 to \$75,000 each for their non-economic damages but did not award any money for future medical expenses, medical monitoring expenses or punitive damages.

### LITIGATION BIAS INHERENT IN PLAINTIFFS' MOLD-RELATED HEALTH COMPLAINTS

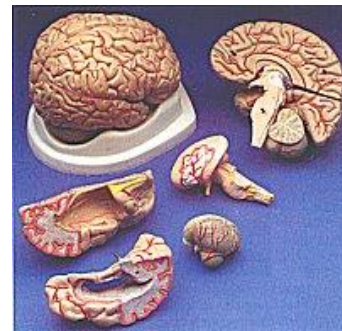
A recent article by Paul R. Lees-Haley, Ph.D, ABPP explains the influence of the "toxic mold" litigation on plaintiffs claiming "mold-related" injuries. (See Lees-Haley, P.R. (2002). "Mold Neurotoxicity: Validity, Reliability and Baloney." Presentation to conference entitled "Mold Medicine and Mold Science: Its Practical Applications for Patient Care, Remediation and Claims" hosted by the International Center for Toxicology and Medicine and the Georgetown University Department of Pharmacology. May 13-14, 2002.) Dr. Haley notes that "mold neurotoxicity is an increasingly common allegation in personal injury litigation, although conspicuously absent from the clinic...The primary problem with the allegations is that speculation has been substituted for scientific reasoning based on empirical data."

Mold Neurotoxicity is the umbrella term for conditions such as brain damage, toxic encephalopathy, cognitive defects and sick building syndrome. Subjective symptoms include memory deficits, difficulty concentrating, mental fatigue, dizziness, headaches, depression and anxiety. Dr. Haley points out that because there is no scientific basis for the allegation that breathing mold spores or mycotoxins in household and commercial office settings causes neuropsychological impairments, "toxic mold" experts rely heavily instead on subjective symptom reporting and on tests that are affected by response biases associated with litigation.

Substantial research and studies confirm that patients in litigation behave differently than other non-litigants. Plaintiff/patients often report their pre-injury history in unusually benign terms and discount alternative explanations for their complaints to an implausible degree. Plaintiff/patients also report more intense, frequent and persistent symptoms than non-litigating patients do.

Dr. Haley points to several potential factors for this phenomena. First, he notes that attorneys and clinicians who "specialize" in mold-injuries may cause alarm and genuine emotional distress to persons potentially "exposed" to mold, causing them to associate non-specific symptoms with this

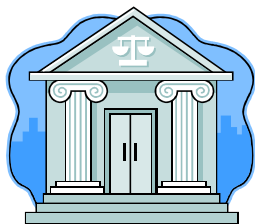
exposure. Other plaintiff/patients with pre-existing somatoform characteristics and histrionic personalities tend to be more susceptible to advocates who tell them they are brain-damaged and doomed to suffer permanent deficiencies caused by their "toxic" environment. Finally, some compensation-seeking patients intentionally exaggerate or fabricate symptoms for financial gain, obtaining drugs, or avoiding work. One 1978 study estimated that 64% of personal injury plaintiffs feigned claimed cognitive deficits.



Dr. Haley suggests that litigation is such a powerful force in "toxic-mold" claims, it should be considered by mental health professionals in the process of differential diagnosis and ruled out as the most likely explanation for abnormal findings in neuropsychological and psychological evaluations wherever incentive are involved. (The full text of Dr. Haley's article and his contact information may be obtained by contacting Gordon & Rees.)

### **ROJAS CASE TO BE REVIEWED BY CALIFORNIA SUPREME COURT**

On January 15, 2003, the California Supreme Court granted review and republished *Rojas v. Superior Court*, (October 10, 2002, 2nd Dist.) 102 Cal.App.4th 1062 (See Mold Matters January/February 2003) In *Rojas*, the Appellate Court held that raw evidence, such as sampling data, photographs and similar materials, even if gathered by attorneys and their non-testifying consultants, is not protected by the work-product or mediation privileges and that it is even discoverable in other litigation. The decision has serious implications because it means that data such as air sampling results, photographs of moldy areas, and other similar raw evidence, regardless of who gathered and for what purpose is discoverable. We will report the Supreme Court's holding on this case in future issues.



### **TOXIC SUBSTANCES CONTROL ACT HR 5040 REINTRODUCED IN U.S. CONGRESS**

On February 4, 2003, U.S. Representative John Conyers (Dem – Michigan) reintroduced “The United States Toxic Mold Safety and Protection Act,” a comprehensive bill which directs the Environmental Protection Agency (EPA) and Centers for Disease Control (CDC) to examine the effects of different molds on human health and develop accurate scientific information on the hazards presented by indoor mold and mandates that the Department of Housing and Urban Development (HUD) establish guidelines that identify conditions that facilitate indoor mold growth and measures that can be implemented to prevent such growth.

The guidelines would also mandate that the EPA and HUD establish guidelines for certifying mold inspectors and remediators and require mold inspections for multi-unit public housing and all property that is purchased or leased using funds guaranteed by the federal government. The bill would also create a National Toxic Mold Insurance Program administered by the Federal Emergency Management Agency (FEMA) to protect homeowners from catastrophic losses in the event that their insurance companies do not offer adequate coverage for mold and require states to provide medicaid coverage to “mold victims” who are unable to secure adequate health care.

### **CALIFORNIA’S DRAFT REPORT ON INDOOR MOLDS POSTPONED**

Pamela J. Davis, RN, PHN of the California Research Bureau, commissioned by AB 284 to study the current literature on the potential health effects of indoor mold exposure has indicated that the publication of its draft report, due on January 1, 2003, has been postponed until Spring. California, Texas, New Jersey, Indiana and Maryland all have established task forces and/or proposed legislation to develop guidelines and regulations on handling indoor molds.

Meanwhile, the federal agency, Center for Disease Control (CDC), has commissioned the Institute of Medicine, a division of the National Academy of Sciences, to study the health effects from exposure to mold in damp indoor spaces. The study began in January 2003 and is expected to be completed by early fall of 2004.

### **BALLARD PUNITIVE DAMAGE VERDICT REVERSED ON APPEAL**

On December 19, 2002, the Third District Texas Court of Appeals reversed a jury’s \$17 million punitive and mental anguish damages award, finding that the insurer did not knowingly breach its duty. *Ballard v. Fire Insurance Exchange* No. 03-01-00717-CV, Texas App., 3rd Dist.) This decision is similar to the Federal 9th Circuit Court of Appeals’ complete reversal of the original \$18 million punitive damage award in *Anderson v. Allstate Insurance Co.* Ironically, both of these well-known mold trial verdicts, both significantly reduced on appeal, were instrumental in the insurance industry’s move to exclude mold from homeowner insurance policies for fear of future similar jury verdicts.

### **MOLD OF THE MONTH: ARTILLERY FUNGUS**

It’s a bird, it’s a plane, no, it’s the dreaded artillery fungi! Five hours after opening, the fruiting body of the artillery fungus, shaped like a tiny cream or orange cup with one black egg, orients itself towards bright surfaces, such as light-colored houses or parked automobiles, and forcefully shoots its sticky black spore mass, the “egg,” as far as 20 feet. The spore mass sticks to the side of the building or automobile and resembles a speck of tar. Once in place, the spore mass is very difficult to remove without damaging the surface of whatever it latched onto and once removed, leaves an unsightly stain.



Picture of fruiting artillery fungus

Researchers from Penn State are engaged in a study to determine how to handle this fungus, which commonly grows in mulch piles and accounted for over \$1 million dollars in homeowner property damage claims in Pennsylvania alone.

Mulch growers fear that if the menace is not controlled, it will result in consumers demanding a change to the use of synthetic plastic, gravel or black pellet mulches. The fungus is found throughout the United States, except for desert climates, but presents the greatest problem currently in the Mid-Northern part of the states due to the type of woods commonly used in its mulch. Redwoods, cedar and cypress bark tend to be resistant to this fungus.

### UPCOMING MOLD SEMINARS



Bill Peters, Esq. and John Condrey, Esq., partners, Gordon & Rees, Construction Defect Practice Group. Present Seminar on Mold Issues to CNA/VOSCO in Sacramento on March 19, 2003. Contact [bpeters@gordonrees.com](mailto:bpeters@gordonrees.com) for further information.

The information contained in Mold Matters is general and while it is intended to present useful background material to our clients and friends, it is not legal advice and should not be relied upon in any specific instance or for any specific matter. Please consult with counsel prior to making any decisions or taking any action in respect of the matters discussed herein.



Michael J. Pietrykowski, Esq., partner, Gordon & Rees, Environmental and Toxic Tort Practice Group, has produced an instructional video on mold litigation and prevention techniques for the assisted housing industry. Copies of the video may be ordered from Nan McKay and Associates, Inc. at [www.nanmckay.com](http://www.nanmckay.com).

Mike will be making mold presentations at the Western Insulation Association Spring Meeting (Walnut Creek, California on March 13 & 14, 2003) and at the Assisted Housing Management Association (AHMA) Conference (in San Jose on April 9-11, 2003).



Sara M. Thorpe, Esq, managing partner, Gordon & Rees, Insurance Coverage Practice Group, Program Co-Chair and Featured Speaker at DRI "Mold: Effective Defense Strategies" April 24-25, 2003 in Houston, Texas. Topics covered include: