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INDOOR ENVIRONMENTAL ISSUES AND INFORMATION . . . TODAY

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Mold Verdict – Texas Style

The old adage is apparently true that everything is big in Texas. Recently, a jury in a state court in Austin, Texas, awarded Melinda Ballard and her family \$32.1 million in a case involving allegedly extensive mold damage in their Dripping Springs, Texas, home. The jury ruled that the homeowner's insurer failed to properly address Ms. Ballard's original water-damage and mold claim, and committed fraud in its handling of her claim. Ms. Ballard's case is the largest jury verdict against an insurer in a mold-related bad faith case to date.

Ms. Ballard sued her insurer for failing to adequately repair her 11,500 square-foot home in 1998, after she filed a water damage claim. The claim involved a bathroom-plumbing leak that caused damage to the hardwood floors. The flooring contractor informed the insurer that mold could grow under the hardwood floor, and therefore it should be removed. The insurer failed to approve the removal of the hardwood floor as part of the necessary repairs. Ms. Ballard sued alleging that because the hardwood floors remained, it caused mold to spread throughout the house.

In early 1999, Ms. Ballard, her husband and son allegedly started having health problems, including coughing up blood and neurological damage.

Late last year, after a ruling by an independent appraiser brought in to handle Ms. Ballard's disputed claim, her insurer paid more than \$1.8 million to replace Ms. Ballard's home. Ms. Ballard turned the money over to the court and asked for more money. Just to tear the house down, she contended, would cost \$1.3 million because of the environmental concerns involved.

Ms. Ballard's \$32.1 million award represents \$6.2 million to replace her family's home and possessions, \$5 million for mental anguish, \$12 million in punitive damages and \$8.9 million for legal fees.

However, Ms. Ballard intends to pursue further legal action against her insurer for her and her family's health-related claims. The judge earlier ruled that medical testimony regarding her husband's alleged mold-related health problems were not admissible, thereby eliminating the personal injury aspect of her claim. Ms. Ballard warned, "They will not be done with me for a long time."

Court Recognizes Landlord Duty to Tenants for Mold in Unit but Reduced Award for Tenant's Negligence

New Haverford Partnership, et al. v. Stroot, et al.
(May 8, 2001) Supreme Court of Delaware,
Case no. 95C-05-074

In a recent opinion, the Supreme Court of Delaware found a landlord liable for its tenants' mold-related injuries caused by unsanitary conditions in resident's apartments.

The landlord, New Haverford Partnership, appealed a lower court's decision that a landlord's common law and statutory duty to maintain its buildings in a safe and sanitary condition included liability for mold growth. New Haverford also appealed the trial court's rulings on the admissibility of expert testimony and evidence regarding the mold levels present in the plaintiffs' apartments and the causal effect of exposure to mold on the plaintiffs' health. The Court affirmed the lower court's rulings and the \$1million dollar personal injury verdict for Stroot and \$40,000 verdict for Watson, reduced 22% for their own contributory negligence.

Plaintiffs' Claims

Plaintiffs, Elizabeth Stroot and Joletta Watson, were tenants at the Haverford Place apartments in the early 1990's. Continual water leaks in plaintiffs' apartments resulted in mold. Both women claimed that their general health deteriorated while living at Haverford Place. Stroot, a 33 year old graduate student when she moved in to Haverford Place in 1993, claimed severe health problems. In her first apartment, there were ongoing leaks in Stroot's bedroom ceiling, kitchen and bathroom. Stroot's bathroom ceiling in her second unit at Haverford also leaked, causing holes in the drywall covered with a black substance and emitting black water whenever the tenants above showered.

New Haverford attempted to fix the shower but nothing was done to the ceiling of plaintiff's apartment, which continued to get worse. In May 1994, Stroot made an emergency call to the maintenance department because the hole in the ceiling was so large that it was "raining" in the bathroom. Soon after, the ceiling collapsed and water flooded her bathroom. The drywall debris and the exposed ceiling area were covered with black, green, orange and white mold. Maintenance would

not come until the next morning. The next morning, Stroot was hospitalized after discovering she could not breathe. Shortly after, Stroot moved out of the apartment.

Stroot had a history of allergies and asthma since childhood, which required hospitalization and medication periodically. However, the frequency and severity of her medical problems increased significantly after she moved to Haverford Place.

Watson lived at Haverford Place from 1990 to 1994 and experienced similar problems. A leaky pipe was fixed, but the water damaged cabinets were never replaced. A gap between the tile and the tub caused drywall behind the tiles to mold and rot. Black mold spots appeared behind the toilet, around the sink and on the ceiling. The windows were coated with a gummy substance. After cleaning, the mold always returned.

Watson experienced fatigue, frequent headaches, sinus problems, chest pains and body aches. Prescribed medication did not relieve the symptoms. Six months after she left Haverford Place, her symptoms started to go away.

Plaintiffs' Expert Testimony Permitted

Four experts testified regarding plaintiffs' health conditions. Dr. Yang, a mycologist and microbiologist, inspected Haverford Place, took bulk and air samples, and interviewed residents. He opined that there was excessive and atypical mold growth in the buildings caused by long term leaks. He testified that the widespread mold contamination posed a health risk to tenants.

Dr. Johanning, a physician board-certified in environmental and occupational medicine, gathered similar data from the apartments and took samples from the plaintiffs. He opined that the high concentration of "toxic mold" at Haverford Place significantly and permanently increased the severity of Stroot's asthma. He also testified that Stroot's cognitive deficits, diagnosed by Dr. Gordon, were caused by exposure to excessive and atypical molds. Dr. Johanning further testified that Watson developed an allergy to Penicillium and permanent upper respiratory problems as a result of her exposure to the same molds.

Dr. Gordon, a neuropsychologist, who studied cognitive defects associated with exposure to atypical molds, evaluated Stroot and concluded that she suffered from significant cognitive impairment in the areas of attention, concentration, memory and executive functions. He opined that the problems were permanent and were proximately caused by

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Stroot's exposure to atypical molds.

Dr. Rose, a board-certified physician in pulmonary, occupational and environmental medicine, testified that Stroot developed osteopenia as a result of her increased steroid usage while at Haverford Place and an increased risk of developing tuberculosis.

After a two week trial, the jury awarded Stroot \$1 million for personal injuries and \$5,000 for property damage. The award was reduced by 22% for her contributory negligence. Watson was awarded \$40,000 for her personal injuries, also reduced by 22%.

Court Did Not Sustain New Haverford's Objections to the Medical Expert Testimony

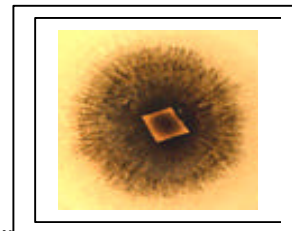
New Haverford argued, in addition to other evidentiary claims, that the plaintiffs' experts opinions regarding plaintiffs' bodily injury claims were deficient. The court disagreed with each of New Haverford's objections.

The court addressed the standard used to determine whether to admit expert testimony under the Supreme Court decision *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 580. The court stated that a trial court may consider whether the scientific theory has been tested and subjected to peer review; whether it is governed by standards; and whether it is generally accepted in the relevant scientific community. The court also noted that a trial court has flexibility in deciding whether the *Daubert* factors are appropriate in a given case.

New Haverford claimed that the experts did not have a proper foundation to base an opinion on the causation between mold exposure and the plaintiffs' bodily injury claims. The court was not persuaded, citing Dr. Yang's testimony that the mold level in Haverford Place was ten times higher than the outdoor samples and Dr. Johanning's testimony that the mold level inside the building were so high it overloaded the testing machine. Accordingly, the court affirmed the trial court's evidentiary rulings and upheld the jury verdict.

New Haverford exemplifies the use of expert testimony and some of the issues involved in bodily injury claims resulting from mold exposure. Among the issues are the scientific reliability of sampling and testing, the availability of corroborating and contrasting data, and the elimination of other explanations for the injuries. Each case presents different facts and admissibility standards may vary in different jurisdictions.

Mold of the Month: The Villain: Stachybotrys



Stachybotrys chartarum or *Stachybotrys atra* (often referred to as "Stachy") has received a lot of attention recently because of the concern regarding its possible association with health effects. As a result, when mold is present, there is often a question whether it is Stachy.

Stachy is most often seen as a greenish-black mold. It is a "saprophytic fungus," which means it grows on non-living organic material, such as drywall sheetrock, ceiling tiles, and wood which is moist or water-damaged. Like all fungi, Stachy needs water.

Stachy is a relatively uncommon mold. Its spores do not become easily airborne or "aerosolized." Stachy is easily overgrown by other molds or bacteria. As a result, contamination of indoor air by Stachy is unusual. Determining whether Stachy is present requires professional testing as many molds are black and similar in appearance.

As with other types of mold, exposure to large quantities of Stachy may cause health effects including allergic rhinitis (cold like symptoms), dermatitis (rashes), sinusitis (inflammation of sinus membrane), conjunctivitis (eye infection), and aggravation of asthma. Some related symptoms are more general, such as inability to concentrate and fatigue. Usually symptoms disappear after the fungi are removed.

There has been some evidence linking Stachy with pulmonary hemosiderosis, a condition that causes bleeding in the lungs of infants generally less than six months old. This is a very rare condition. In the reported cases of hemosiderosis, the infants were continually exposed over a long period of time to highly contaminated indoor environments. To date, the possible association between the pulmonary hemorrhage in these infants and *Stachybotrys* has been questioned. Further studies are being conducted to determine what causes acute idiopathic hemorrhage. Additional information regarding this topic and the most recent analysis of studies conducted can be found in the following Center for Disease Control and

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Erin Brockovich and California Legislation: From "Secret Settlements" To Mold

Erin Brockovich, of Hollywood fame, is linked to two important sets of legislation in California this session. The first includes three proposed bills relating to mold: Assembly Bill 178 (AB 178) "Housing standards: molds"; AB 284 "Public health: toxic mold"; and Senate Bill 732 (SB 732) "Toxic mold." The second is AB 36 and SB 11 regarding "Secret Settlements."

"Toxic Mold Protection Act" Proposed

On February 23, 2001, Senator Deborah Ortiz introduced SB 732 "Toxic mold," to enact the Toxic Mold Protection Act. The bill incorporates similar provisions related to mold legislation, AB 178 and AB 284. The Act would require the State Department of Health Services to adopt regulations to "protect the public health from toxic mold" based upon studies, specific delineated criteria, and consultation with professional and medical experts in the field to arrive at permissible exposure limits to mold. The bill also seeks to set standards for the identification and remediation of "toxic molds." It would further require an assessment of the risks to public health by the Office of Environmental Health Hazard Assessment to be used by the department in setting standards. The bill would add "toxic mold" to the department list of "substandard conditions" and as a "structural hazard to health for buildings used for human habitation." Finally, the bill would require written disclosure to a potential buyer or renter of the presence and location of mold-containing construction materials in the building, heating, ventilation, and air-conditioning system, or surrounding environments, as well as the potential health risks that may result from exposure to mold.

On March 7, 2001, Senator Ortiz chaired an informational hearing of the Senate Health and Human Services Committee on "Public Health Effects of Toxic Mold." Erin Brockovich testified before the Senate regarding her own personal experience with mold exposure in her home in Agoura Hills, California. Brockovich testified that she and her family became chronically ill with sinus, throat, ear, skin and respiratory problems from mold caused by construction defects leading to water leaks in her home. She has filed a personal injury/construction defect complaint against the former owner and home builder which include

allegations that the seller neglected to disclose moisture and mold problems.

Other testimony was presented in support and in opposition to the bill by members of the EPA, Environmental Health Investigation Branch, the California Realtors Association, Building Industry Association and Apartment Association. There was testimony received from scientists and doctors on the health implications of exposure to mold. An overview of current institutional responses to mold was presented by plaintiffs' counsel, Alex Robertson.

On May 21, 2001, SB 732 was placed on the suspense file.

Secret Settlement Legislation

The tandem AB 36 and SB 11 bills, originally identical, seek to add § 188 to the California Code of Civil Procedure. Existing law provides for the confidentiality of writings, such as trade secrets, government records, privileged communications and similar documents. The bills provide that in an action based upon injury, wrongful death, or financial loss allegedly caused by a defective product, financial fraud, unfair insurance claims practices, or environmental hazard, information contained in settlement agreements and confidentiality agreements not filed with the court and information acquired through discovery would be presumed public information. Parties could only keep such information private by a court order based upon specified findings. For example, grounds for keeping such agreements "secret" could include: that the information is a trade secret or otherwise privileged; that an overriding interest exists which overcomes the right of public access; or that there is a substantial probability of prejudice, that confidentiality is narrowly tailored, and no less restrictive means exist.

The SB 11 still contains in its legislative findings language that secrecy agreements have "tragic consequences." The bill cites as examples the "dangerous defects" in Firestone tires kept out of the public eye by secretly settled lawsuits and the ability for companies to shield information that shows a practice of treating consumers unfairly such as the circumstances that allowed secrecy regarding the contaminated drinking water connected with Erin Brockovich's crusade against PG&E.

The bills define "environmental hazard" as a "release or threatened release of a hazardous substance that poses a threat to public health or

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safety involving present or future danger of death, bodily injury, or health disability to human beings exposed to a hazardous substance release or threatened release.”

The bills are supported by various consumer agencies including, Consumers Union. See Press Release, Monday December 4, 2000 at: www.consumerunion.org. Those opposed to the bill include Apple Computers, Johnson & Johnson, ARCO, Caterpillar, Chevron, Clorox, Exxon, GTE, Michelin, Microsoft, Shell Oil Company, Farmers Group of Insurers, State Farm Insurance, Building Industry Association, and the Health Industry Manufacturers Association. The Civil Justice Association of California (“CJAC”) submitted opposition to the legislation which included concern that the definitions, including “defective product” and “environmental hazard” create a presumption of “defect” or “hazard” simply because a lawsuit has been filed. Also identified as a concern is whether the confidentiality of settlement discussions would be effected.

The bills have been sent to committees. The last day for the Legislature to pass the bills is September 14, 2001.

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Prevention (“CDC”) article: March 10, 2000: [MMWR Update: Pulmonary Hemorrhage/Hemosiderosis Among Infants ---Cleveland, Ohio, 1993-1996](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm2811a.htm).

Determination of the type of mold present, however, should not be the focus of a mold investigation. The cause, (i.e., the source of water), is the most critical issue in evaluating a mold claim and determining an appropriate remediation and restoration plan.

Sources for information used in this article can be found at: [Facts About Mold](http://www.ci.nyc.ny.us), New York City Dept. of Health Bureau of Environmental Investigations @ www.ci.nyc.ny.us; [Stachybotrys](http://www.aerobiology.org/molds/stachy.htm), M. L. Muilenberg Research Associate/ Instructor Harvard School of Public Health @ www.aerobiology.org/molds/stachy.htm; [Questions and Answers on Stachybotrys chartarum and Other Molds](http://www.cdc.gov/nceh/asthma/factsheets/molds/default.htm), Center for Disease Control and Prevention @ <http://www.cdc.gov/nceh/asthma/factsheets/molds/default.htm> ; [Fungal Ecology of the Indoor Environment](http://www.bioserve.latrobe.edu.au), Eugene C. Cole, P.H.D., Mealey’s Mold Litigation Conference 2001, *Stachybotrys chartarum (atra)*, p. 73. www.bioserve.latrobe.edu.au; and www.tecn.rutgers.edu.



Fungus Gold:

This is the time of year when pigs around Italy and France are put to work sniffing for hidden treasure beneath the ground: black and white

truffles. Truffles have been collected for at least 3,600 years. Truffle lovers claim the fungi have an irresistible taste and aroma. These pricey fungal delicacies range from between \$250 and \$500 per pound. Happy Hunting! Find this and other fun facts at: www.herb.lsa.umich.edu.

What Is Osteopenia?

Osteopenia is a condition where a person’s bones start to lose mass but not to the level of osteoporosis. Among the risk categories used in screening for bone density problems are people receiving “steroid therapy.” Steroids are one method of controlling asthma symptoms. People with asthma may claim increased symptoms from exposure to mold. For more information see the National Osteoporosis Foundation at www.nof.org and www.asthma.about.com.

Helpful Websites

www.aerotechlabs.com: This site offers sample guides on a variety of mixes between contaminants and matrixes. It also provides products and supplies information. It contains a result section that allows the customer to review results of testing online.

There is a library section that offers a fungal glossary, industrial links, NYC guidelines, glossary of terms and an online IAQ microbiology reference guide. This site also contains IAQ technical tips and offers a list of consultants and a press center.

www.cal-iaq.org/iaqsheets.htm (California Indoor Air Quality Program): This site contains fact sheets on mold, health indoor environments for schools, ozone generating air cleaners, asbestos and guidelines for hiring consultants.

www.ci.nyc.ny.us: The New York city “guidelines” provided up-to-date information on the health effects of mold exposure and remediation approaches.

Contributions made by Michael Pietrykowski, Bill Peters, Laura Geist, Molly McKay, Brett Stewart and Haley Norton. This is a Gordon & Rees LLP publication. This publication does not necessarily reflect the opinions or positions of any of the law firm’s clients. If you have any questions or comments regarding its contents, please contact us at gordonrees.com