GORDON & REES LLP

Mold…*Matters*!

Nov./Dec., 2001 Vol. I, No. 4

INDOOR ENVIRONMENTAL ISSUES AND INFORMATION . . . TODAY

For questions or comments, please contact
mpietrykowski@gordonrees.com

SAN FRANCISCO
Embarcadero Center West
275 Battery Street
Suite 2000
San Francisco, CA 94111
Telephone: (415) 986-5900
Fax: (415) 986-8054

SAN DIEGO
101 West Broadway
Suite 1600
San Diego, CA 92101
Telephone: (619) 696-6700
Fax: (619) 696-7124

LOS ANGELES
300 South Grand Avenue
Suite 2075
Los Angeles, CA 90071
Telephone: (213) 576-5000
Fax: (213) 680-4470

ORANGE COUNTY
18881 Van Karman
Suite 1500
Irvine, CA 92612
Telephone: (949) 271-9331
Fax: (949) 271-9301

Texas Insurance Commissioner Restructures Mold Coverage for Homeowner Policies

On November 28, 2001, in an effort to avert an insurance crisis sparked by costly mold claims, Texas Insurance Commissioner Jose Montemayor restructured the state's residential property policies. The Commissioner eliminated coverage under the basic homeowner's insurance policy for high-priced mold remediation procedures, such as testing, treating, containing or disposing of mold beyond that necessary to repair or replace property that is physically damaged by water. Such procedures have contributed to unexpected and dramatic premium increases. However, the Commissioner requires no later than January 1, 2003 that all insurers offer consumers the option of purchasing additional mold coverage.

"This decision is a common-sense, middle ground approach," Montemayor said. "It gives Texas homeowners basic protection plus the ability to purchase additional coverage if they so choose. This decision protects consumer choice and insurance availability, and addresses insurance cost drivers to help keep policies affordable." Policyholders will have the option of purchasing additional coverage - in increments of 25 percent, 50 percent and 100 percent of policy limits -- that will include more costly mold remediation procedures.

Montemayor said he believes most Texans want to get "back to basics" in handling mold claims, removing the problem without a lot of expensive procedures. These procedures can cause premiums to increase for everyone. Interestingly, Montemayor noted that "the absence of an established body of science" has contributed to the problem. Montemayor's order also eliminates "stacking" of claims within the same policy year. "Stacking" is a process that has allowed some homeowners to collect more than 100 percent of their policy limits by filing several separate mold-related claims. Montemayor said "stacking" can drive up rates paid by everyone.

"My goal is to preserve as much protection as possible for homeowners while coming to grips with the excesses that have driven Texas to the brink of a crisis in the residential property insurance market," Montemayor said. Until two years ago, few mold-related claims were filed, but since then, claims costs have soared, causing insurers to seek elimination of this coverage. Texas Department of Insurance (TDI) data, based on information from the three largest

Continue to Page 5…

ESTABLISHING MEDICAL CAUSATION-- AN UPHILL FIGHT FOR PLAINTIFFS

Perhaps more so than with any other type of toxic tort case, litigation in a mold case turns on expert testimony. Whether plaintiffs will be allowed to pursue damages for serious and potentially long-term mold-related injuries will be determined by whether plaintiffs' experts can meet the court required standards for admissibility.

In order to establish a claim for personal injuries in toxic tort litigation, a plaintiff must prove that his/her injuries were proximately caused by the presence of and exposure to the particular toxin. Industrial hygienists establish (or controvert) the presence of mold in sufficient quantities to establish bodily injury. Medical experts establish (or controvert) not only general causation (i.e., that mold is capable of causing a particular injury or condition in the general population) but specific causation as well (i.e., that mold caused the specific injuries involved in a given case).

Although plaintiffs have been successful in establishing the causal link between exposure and allergen-produced symptoms (e.g. headaches, coughs, sore throats), plaintiffs' experts face a much greater challenge to establish the necessary causal link between serious, toxic injuries and mold exposure.

II. General Causation

General causation focuses on whether mold is capable of causing injuries to the population in general. In order to establish general causation, experts must rely on epidemiological studies that demonstrate exposure to a particular toxin increases the risk of a particular injury. Reliance on an epidemiological study, however, is only appropriate if the study (1) is properly designed, (2) is properly executed, (3) results in an increased, doubled risk, (4) is unbiased in its design, and (5) has a 95% confidence level. In addition to epidemiological studies, most courts require compliance with the *Bradford Hill* criteria, which are used to determine whether epidemiological evidence is reliable.

Currently, there are no reliable epidemiological studies that demonstrate, by a preponderance of the evidence, a causal connection between environmental mold and the injuries frequently complained of in mold litigation. Presently, the neurological effects of mold are largely unknown. The struggle over causation, at least for today, is in favor of defendants.

III. <u>Specific Causation</u>

Even if general causation is proven, plaintiffs must still prove specific causation: whether the specific plaintiff has been exposed to the specific toxin at issue. To establish specific causation in a mold case, plaintiffs must prove through expert testimony that (1) molds in the residence produced mycotoxins; (2) plaintiff was exposed to the mycotoxins; (3) the dose and duration of exposure to mycotoxins was sufficient to cause the claimed injury; and (4) plaintiff was injured.

Plaintiffs' experts must make several assumptions to establish the above criteria. For example, experts assume that because mold was present, it produced mycotoxins that were ingested by plaintiff, and that existed in sufficient quantities such that plaintiff's presumed ingestion of the spores caused the claimed injury. Defendants have successfully challenged these assumptions and prevented experts from testifying about specific causation at trial.

Mold cases involving alleged serious injury come down to a struggle between the experts, and only the most qualified and experienced environmental and medical experts should be secured. It is also imperative from a defense perspective to have plaintiffs' experts identify their findings and research, as it may be possible to preclude these findings through a challenge in pretrial motions.

Given the fact that mold litigation on the rise (see article on recent $2.7 million dollar verdict against landlord) and the media frenzy – from Erin Brokovich to numerous "News Magazine" programs – it may only be a matter of time before the necessary medical and scientific literature and research reaches a point where the struggle will shift in favor of plaintiffs and against defendants.

Figure 1: Mold remediation in a Kitchen

California Research Bureau to Perform Toxic Mold Study

The California Research Bureau (CRB) has been appointed to head up the first comprehensive study sponsored by the State of California designed to analyze indoor fungal contamination and the effectiveness of various remediation techniques. The study is a mandate from AB 284, signed into law by Governor Gray Davis. The impetus behind AB 284 was the Legislature's concern that the State of California needed to promote a more thorough understanding of the options for addressing indoor fungal contamination. The CRB is charged with appointing and convening a review panel of experts to examine and evaluate potential hazards, prevention tips, and remediation techniques associated with indoor molds.

Pamela J. Davis, a policy analyst with the Environmental and Natural Resources branch of the CRB specializing in toxins and pollutants, has been assigned to design and implement the study. Ms. Davis, a registered nurse and a public health nurse, formerly served in various Assemblymember offices as a specialist in toxins, pollutants and waste management.

Earlier this year, the California Research Bureau published Ms. Davis' primer on the issue titled, "Molds, Toxic Molds, and Indoor Air Quality." It is available online at http://www.library.ca.gov/crb/01/notes/v8n1.pdf. The paper provides a good background and explanation of the problems associated with indoor fungal contamination. Topics covered include "what are 'toxic molds,' challenges with setting exposure limits,' 'what to do when molds are discovered,' and Hazard Reduction." The paper provides the starting place for the panel's further study on the issue.

At this time, Ms. Davis is designing the study process and compiling a list of potential review panel members, including health officers, medical experts on the health effects of mold, mold testing experts, industrial hygienists, and others. She is also assembling a preliminary bibliography on the health effects of molds, the identification and remediation of molds, and the prevention of mold growth. Ms. Davis envisions the scope of the study to consist of a "literature review of what is out there and a determination, if possible, of best practices for addressing different types of mold in different settings and contexts." The study will not undertake any new research; rather, the goal is to gather all the information available and strive to reach consensus among the panel members.

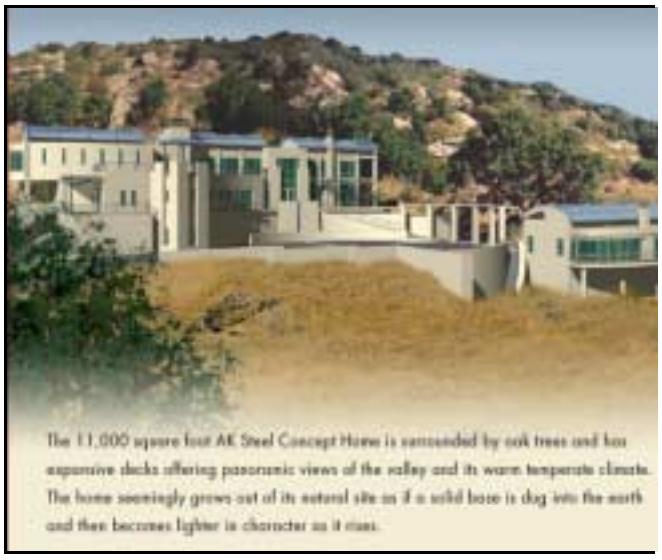
Ms. Davis must submit and publish the panel's findings no later than January 1, 2003. The findings may then provide a basis for the SB 732 taskforce, whose goals include setting remediation standards and permissible exposure limits for California.

MOLD RESISTANT BUILDING MATERIALS DEVELOPED

In response to increased interest and attention to the costs of remediation and litigation following indoor fungal contamination, new products are being marketed to proactively address the problem.

Claiming to make "a less friendly world for bacteria," AgION Technologies and AK Steel are offering building materials coated with an antimicrobial compound. The compound combines silver with an inorganic ceramic that "permits a continuous, controlled release of ionic silver over an extended time period". Manufacturers claim that this coating inhibits the growth of bacteria, mold, algae and fungus. The coating is available for a large number of uses including framing, roofing, wallboards, insulation, heating ducts, countertops, and even shower stalls.

For more information on the "AK Steel Concept Home" visit their website at www.akconcepthome.com.



JURY AWARDS $2.7 M IN LARGEST EVER PERSONAL INJURY MOLD VERDICT

As we reported in our recent Mold Bulletin, on November 8, 2001, Sacramento Superior Court Judge Rhodda entered the nation's largest jury verdict ever awarded in a personal injury mold case against a building owner and property manager. After a two-week trial and two days of jury deliberation, the jury returned with a $2.7 million dollar award. Moreover, plaintiffs are entitled to attorney fees and costs as the prevailing party under the lease agreement.

Plaintiffs, a family of three residing in an apartment complex in Sacramento, alleged that water from a leaky toilet located in the unit above and a sprinkler system eventually caused significant levels of Stachybotrys, Aspergillus, and Penicillium in their unit. Plaintiffs' complaints included headaches, respiratory problems, joint pain, skin rashes, repeated colds, and gastrointestinal ailments.

Significantly, plaintiffs were permitted to introduce medical testimony indicating plaintiffs' health symptoms were causally linked to the mold in their unit as evidence at trial. Plaintiffs' experts included Dr. Fredrick Herman, Dr. Marinkovich (industrial hygienist), John Banta (engineer), Robert Cox and Patrick MacIntosh (real estate consultant.) Defendants' expert was epidemiologist, Dr. Gershwin.

Plaintiffs sued their building owner and manager for negligence, breach of contract, breach of implied warranty of habitability, nuisance, constructive eviction and negligent infliction of emotional distress. The jury awarded damages for economic loss, past and future medical expenses wage loss, and costs associated with the breach of the lease. Defendants allegedly failed to remedy the situation following plaintiffs' complaints about mold. Interestingly, plaintiffs did not plead punitive damages and had resolved their property damage claim for $17,000 prior to trial.

This case signifies the increasing trend towards lawsuits alleging only personal injuries related to mold exposure in the indoor environment. The case also shows juries are increasingly concerned and sympathetic to allegations of adverse health effects related to mold exposure. Plaintiffs' bar is likely to be encouraged to bring similar suits in the future given this result.

MOISTURE CONTROL IS THE KEY TO PREVENTING MOLD GROWTH

With the start of the rainy season, it is more important than ever to ensure that homes are free from water intrusion that could lead to mold growth. The key to controlling indoor molds is to eliminate the source of moisture. Whether it is excess humidity, condensation or water intrusion as a result of roof leaks, pipe failures, or subgrade seepage, the water intrusion must be controlled. Treating only the visible symptoms of mold growth, without dealing with the larger problem of the source of the water intrusion, invites an ongoing problem.

Water damage and/or mold growth can result from poor or infrequent maintenance, neglect and general deterioration or from an unexpected leak, storm or flood. Proper home maintenance and prompt attention to an accidental leak or catastrophe can help prevent and minimize damage.

INSPECTION, MAINTENANCE & PREVENTION TIPS FOR THE HOME

Start with the roof

Your roof is usually "out of sight and out of mind" until you have a leak. Defend your home by stopping leaks before they start.

Deterioration, wind/hail damage, and improper installation of vents, flashing, chimneys, or air conditioners can all cause roof leaks. Regular inspections and maintenance can prevent problems before they begin.

- Inspect your roof for cracks or signs of leaks at least once a year and make repairs right away.
- Clean and inspect rain gutters and downspouts for leaks and proper functioning. While on the roof remove dirt, leaves, branches and any other debris on your roof or gutter.
- Inspect and seal the roof around vents and chimneys.
- Look for and repair loose, damaged or missing shingles, missing or damaged vent caps, raised nail heads and anything else that is in disrepair or could cause damage.
- After storms, inspect your roof for damage, check that the storm water is properly routed away from your foundation.

Continue to page 5 …

Continued from page 4… Moisture Control

Check the exterior

Outside walls, doors and windows may be poorly constructed or may deteriorate over the years. Storms, floods and other natural events may impact the integrity of your home. Water and moisture penetrate these areas if they are not regularly maintained.

- Repair or replace caulking, weather stripping, window seals, door seals or any other exterior area damaged by use, abuse, storms or normal weathering.
- Examine the exterior. Look for cracks, especially in stucco buildings.
- Inspect exterior doors, especially wooden ones, for wear and tear and cracking. Check weather stripping and seals as well as the sill and the threshold for signs of leaking or other damage.
- Be sure your sprinkler system is not set to regularly spray water on the home or at the foundation. Plants should not touch the house. They should be setback sufficiently enough so that air can circulate.
- Check crawl spaces, basements and garages for standing water or other indications of a drainage or sewage problem. Don't let foundations stay wet. Keep these areas well ventilated to allow air to circulate freely. This will help eliminate unwanted moisture from being drawn into the sub-flooring of your home.
- Provide proper drainage, and slope the ground away from the foundation of your home.
- Check and quickly clear your sewage lines if leaks or blockages are detected.

Eliminate excess internal moisture.

Well-built, well-insulated homes can trap excess moisture resulting in condensation inside, especially if you have inadequate ventilation. This unwanted moisture shows up as:

- musty odors
- rusty stains around light fixtures
- damp, sticky floors
- mildew along the ceiling, wall and baseboard edges, window sills, basement, attic after storm or if observe roof worn or damaged under sinks check for water stains, dripping pipes
- condensation on windows and cold surfaces, and
- mold and mildew growth.

Good preventive maintenance can help eliminate many moisture problems.

- Keep inside air circulating with vents and fans to avoid condensation. Use exhaust fans in the bathroom when showering and in the kitchen while cooking. It is a good idea to have an exhaust fan installed in your laundry area and to use it when doing laundry. Also, make sure your dryer is vented to the outside.
- Fix leaky faucets and dripping toilets. In cold climates, water in supply pipes may freeze, causing pipes to break and leak.
- Maintain low indoor humidity, below 60% relative humidity, ideally 30-50% if possible. Invest in a good portable dehumidifier with humidity control. Choose one that shuts off automatically when the collector pan is full.
- Use storm windows to help conserve energy and keep condensation from forming on windows. They have the added benefit of reducing heat loss. Pay attention to repeated condensation on windows.
- Perform regular HVAC inspections and maintenance as scheduled. Keep heating, ventilation, and air conditioning drip pans and drain lines clean, flowing properly and unobstructed. Routinely check air filters and replace as necessary.
- Do NOT carpet bathrooms.
- Add mold inhibitors to paints.
- Use mold-killing products to clean bathrooms, but read the labels. Do not use products that may, cause other problems because of their ingredients.

See www.epa.gov/iaq/molds for tips on remediation.

****

Continued from Page 1…Texas

homeowners insurers, showed these insurers' cost of mold-related claims jumped from $9.1 million in the first quarter of 2000 to $79.5 million in the first quarter of 2001.

Montemayor said consumers will have to do their part to resolve the problem with good maintenance practices that keep mold from developing into a problem. TDI will conduct informational campaigns to help both consumers and insurers deal quickly and responsibly with mold problems, he added. Homeowners should take immediate action to stop the water discharge and begin drying the area. Insurers should quickly respond to claims where mold might become a problem. Montemayor intends to appoint a task force to develop recommended procedures for handling mold claims. In addition, the House Committee on Insurance will examine mold-related issues as an interim study prior to the 2003 legislative session.