Mold Legal Guide Book

by

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Mold Legal Guide

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1 Mold lawsuits in the news

While the overall number of lawsuits being filed has been declining in recent years, there is one area that has been growing like mold, and that is mold lawsuits. Although molds have been around far longer than humans, and there is no industry promoting mold's use like there was with tobacco or asbestos, there are still numerous approaches to filing actions in the area, ranging from personal injury to breach of contract to bad faith."

On March 6, 2012, a New York Court of Appeals court decision has cleared the way for more people (such as apartment tenants) to file lawsuits based on claims that they developed illnesses after being exposed to mold. The entire case decision is published as **Appendix 1** in the **New Appendices for *Mold Legal Guide*** at the very end of this book. The legal court decision citation is *Cornell v. 360 W. 51st St. Realty*, 95 A.D. 3d 50 (292) 939 N.Y.S. 2d 434; 2012 N.Y. Slip Op. 1643.

Mold problems have become more prevalent because of increased use of cheaper building materials like plasterboard and plywood, which are more prone to growing mold when wet. Mold, as always, is spreading. But so is mold litigation, to the consternation of the insurance industry…a state court in Austin, Texas, awarded Melinda Ballard and her family $32.1 million in a case involving…extensive mold damage to their Dripping Springs, Texas, house. The jury ruled that Farmers Insurance Group had failed to properly address Ms. Ballard's original water-damage and mold claim and committed fraud in its handling of her claim," ---Christopher Oster, *Insurers Blanch At proliferation of Mold Claims, Wall Street Journal* on June 6, 2001**.**

Recent news articles highlight the growing number of lawsuits over liability for mold contamination. What will follow are some of the more important toxic mold cases, lawsuits, and news gathered from all over the United States.

"Toxic mold lawsuits are spreading as fast as the fungus among us." Plaintiff's attorney Alexander Robertson IV, of Woodland Hills, California, had his first toxic mold case in 1994, when he represented an unidentified actor and his wife whose million-dollar home in Malibu was suddenly overrun with slimy --- deadly toxic black mold --- Stachybotrys that was harming their health as well as their million dollar home. The case was later on settled for $1.35 million. "Robertson has since represented about 1,000 plaintiffs, and he fields calls daily from across the country," - Adrienne Mand, *www.fowxnews.com* (Oct. 12, 2000).

1.1 Mold lawsuits up by 300%

NBC 10 consumer reporter, Tracy Davidson, wrote in her article entitled *Insurance Companies Resist Paying Mold Insurance*: "since 1999, mold-related lawsuits against building contractors, insurance companies, hotels, schools and airports have increased by **300 percent** and 10,000 suits are pending nationwide." When a Texas jury, in 2001, awarded $32 million in damages to a family that claimed severe illness from toxic mold exposure in their home, it opened the floodgates to mold litigations in different parts of the country.

Thousands of insurance claims have poured in across the country, since then, seeking damages for mold-related injuries and property damage. However, insurance companies are fighting back, claiming that the mold scare is based on junk science. Although there are quite a number of fraudulent insurance claims, there are also genuine ones. Mold plaintiffs and mold lawyers say the insurance industry is trying to shirk its responsibility to mold-stricken policyholders.

"They (insurance companies) need to abide by their end of the deal. The people that pay their premiums, the insurance companies take it, yet when they take the money they don't want to pay on valid claims. Mold claims, the right mold claims, are, in fact, real. People do get sick from them and the insurance companies just don't want to pay. That is really the problem," said Robert Steiberg, a mold attorney.

Mold claims and litigations have put a high premium on every aspect of our lives. "The mold claims have driven up the cost of construction. They've driven up in terms of the inability to obtain insurance coverage," said Anita Drummond, of the *Associated Builders and Contractors*.

"Something like mold can have a dramatic impact on homes being built and the resale market. If you own a home and for some reason you've been there 15 or 20 years and you had a small leak you didn't know about and you have mold in your home that's been discovered, you can't sell your home. That does not do anything to help individuals, nor does it do anything to stimulate the economy -- quite the opposite," said Rep. Gary Miller, of California.

Experts say mold thrives in new, well-insulated houses that trap heat and moisture. Right now there is an entire nationwide mold remediation industry devoted to mold removal. And as long as molds continue to grow in our homes, so will the number of mold cases, year after year.

WALL STREET JOURNAL, Jan. 9, 2007, page A 1 by David Armstrong

Court of Opinion: Amid Suits Over Mold, Experts Wear Two Hats Authors of Science Paper Often Cited by Defense Also Help in Litigation

Soon after moving into a New York City apartment, Colin and Pamela Fraser say, they began to suffer headaches, rashes, respiratory infections and fatigue. They attributed it to mold.

But their lawsuit against the cooperative that owns the building hit a roadblock when the court wouldn't let their medical expert testify that mold caused their problems. This is "unsupported by the scientific literature," the state trial judge said.

She relied in part on a position paper from the American College of Occupational and Environmental Medicine, or ACOEM. Citing a substance some molds produce called mycotoxins, the paper said "scientific evidence does not support the proposition that human health has been adversely affected by inhaled mycotoxins in the home, school, or office environment."

The paper has become a key defense tool wielded by builders, landlords and insurers in litigation. It has also been used to assuage fears of parents following discovery of mold in schools. One point that rarely emerges in these cases: The paper was written by people who regularly are paid experts for the defense side in mold litigation.

The ACOEM doesn't disclose this, nor did its paper. The professional society's president, Tee Guidotti, says no disclosure is needed because the paper represents the consensus of its membership and is a statement from the society, not the individual authors.

The dual roles show how conflicts of interest can color debate on emerging health issues and influence litigation related to it. Mold has been a contentious matter since a Texas jury in 2001 awarded $32.1 million to a family whose home was mold-infested. That award, later reduced, and a couple of mold suits filed by famous people like Ed McMahon and Erin Brockovich helped trigger a surge in mold litigation. Insurers and builders worried it would become a liability disaster for them on the scale of asbestos.

The number of suits hasn't been as big as anticipated. One reason appears to be the insurers' success in getting many states to exclude mold coverage from homeowner's-insurance policies. But also helping turn the tide, lawyers and doctors say, is the ACOEM report. Building groups and the U.S. Chamber of Commerce have cited it to rebut the notion that mold in the home can be toxic.

James Craner, a Nevada doctor who has testified for scores of people who claimed ill effects from mold, says the paper "has been used in every single mold case. The lawyer asks, 'Isn't it true the American College of Occupational and Environmental Medicine concluded that there is no scientific evidence that mold causes any serious health effects?'"

The result, Dr. Craner maintains, is that "a lot people with legitimate environmental health problems are losing their homes and their jobs because of legal decisions based on this so-called 'evidence-based' statement."

Dr. Craner says a majority of his work is on the plaintiff side and he is paid when he testifies, but he says he currently is an expert for the defense in a case where he concluded the plaintiffs' health issues weren't related to mold.

Two other medical societies have also published statements on mold written, in part, by legal-defense experts. The societies didn't disclose this when they released the papers, although one later published a correction saying two authors served as expert witnesses in mold litigation.

Mold reproduces through tiny spores. These can float into homes through windows and vent systems or be carried in on clothes or shoes. Indoors, mold grows when moisture is present.

There's debate about how much this matters. Plaintiffs attribute ills ranging from asthma to cognitive problems to inhalation of mold. The Institute of Medicine, a largely federally funded nonprofit, reviewed the research in 2004 and said "studies have demonstrated adverse effects -- including immunotoxic, neurologic, respiratory and dermal responses -- after exposure to specific toxins, bacteria, molds or their products." But it added that the dose required to cause adverse health effects hasn't been determined. The U.S. Centers for Disease Control and Prevention, for its part, says on its Web site that mold can cause wheezing and eye or skin irritation, but a link to more serious conditions "has not been proven."

'Highly Unlikely'

The ACOEM paper goes further. It says not only is there no evidence indoor mold causes serious health effects, but even if mold produced toxic substances, it's "highly unlikely at best" that anyone could inhale enough to cause a problem. The paper reaches this conclusion by extrapolating from animal studies in which rodents' throats were injected with molds.

The paper's authors say their conclusions are validated by the Institute of Medicine's paper. But the author of the Institute paper's mold toxicity chapter, Harriett Ammann, disagrees, and criticizes the ACOEM paper's methodology: "They took hypothetical exposure and hypothetical toxicity and jumped to the conclusion there is nothing there."

Dr. Ammann, a recently retired toxicologist for Washington state's health department, recently helped the plaintiff side in a mold case. She says this was the only time she has one so for pay. In the Fraser lawsuit in New York, after the judge barred testimony that mold caused health problems, Dr. Ammann, on her own and without pay, provided an affidavit filed with the appellate court saying the judge misinterpreted the research.

The ACOEM, a society of more than 5,000 specialists who investigate indoor health hazards and treat patients with related illnesses, first moved to develop a position paper on mold in early 2002. Dean Grove, then the medical society's president, asked the head of its council on scientific affairs, Yale medical professor Jonathan Borak, to set the process in motion.

He turned to a retired deputy director of the National Institute for Occupational Safety and Health -- part of the CDC -- to spearhead the project. Dr. Borak says he wanted someone with "no established background record of litigation related to mold."

For the Defense

The person he chose, Bryan Hardin, says he hadn't worked on any mold lawsuit at that point, though he was a consultant on other matters for GlobalTox Inc., a firm that regularly worked for the defense in mold cases. And Dr. Hardin says he consulted for the defense in a mold case while he was helping write the ACOEM paper.

In a Feb. 27, 2002, email, Dr. Borak told Dr. Hardin: "That position paper would be prepared by you and your GlobalTox colleagues." Dr. Borak says he believes he didn't know at the time that GlobalTox did mold defense work.

A GlobalTox colleague who aided Dr. Hardin was Bruce Kelman, now president of the firm, which recently changed its name to Veritox Inc. Drs. Kelman and Hardin, now principals at the firm and entitled to a share of its profits, were two of the ACOEM paper's three authors. They are paid $375 to $500 an hour for work on mold cases, court records say.

EXPERT WITNESSES

The Situation: Mold defendants rely on medical-society position papers that reject a link to serious ills, but papers were written by scientists who often work for defense side in mold cases.

The Debate: Whether courts get accurate or skewed view of possible health effects of indoor mold.

What's at Stake: Outcome of widespread litigation over mold.

The paper's third author was Andrew Saxon, then chief of clinical immunology and allergy at the medical school of the University of California, Los Angeles. He, too, has served as a defense expert in numerous mold suits. Dr. Saxon says he is paid $510 an hour for his help. If called to testify in court, his rate rises to $720 an hour, according to a deposition he gave.

Until he retired from UCLA in September, money he earned as a legal-defense expert was paid to the university, and he says UCLA then gave him a little less than half of it. Dr. Saxon estimates he generates $250,000 to $500,000 a year from expert defense work, which includes non-mold cases.

The ACOEM knew about mold defense work by the authors of its paper. Dr.
Hardin informed the society in a Sept. 23, 2002, document under his letterhead. Labeled "confidential" and "share only with the ACOEM board of directors," it told of his work as a defense expert on one mold case.

The letter said the other two authors, Drs. Saxon and Kelman, "have been retained by both the defense and plaintiff bar in litigation relating to indoor mold." Both say they work mostly for the defense in mold cases.

Internal ACOEM documents indicate that as the paper was being written in August 2002, there was concern within the society that the paper was too friendly to defense interests. Its authors were asked to modify the first draft's tone "because of the concern about possible misinterpretation of 'buzz words' and phrases such as 'belief system,' 'adherents may claim,' 'supposed hypersensitivity,' and 'alleged disorder,'" according to a June 2002 email to Dr. Hardin from the society's communications director. (The email was obtained by a plaintiff's attorney in a mold case, Karen Kahn.)

Dr. Borak, the head of the society's council on scientific affairs, suggested sending a draft for review to one particular mold authority, Michael Hodgson, director of the occupational safety and health program at the U.S. Veterans Health Administration. Dr. Hardin objected. He said it would be "inappropriate to add ad hoc reviewers who are highly visible advocates for a point of view the draft position paper analyzes and finds lacking." The draft ultimately wasn't sent.

'A Defense Argument'

In September 2002, Dr. Borak emailed colleagues that "I am having quite a challenge in finding an acceptable path for the proposed position paper on mold." He said several reviewers "find the current version, much revised, to still be a defense argument."

The society released a paper two months later, and its authors, as well as ACOEM officials, say it accurately reflects the science on indoor mold exposure. The authors' "views, if prejudicial, were removed," Dr. Borak says. "It went through a dramatic change of top-heavy peer reviews." He says objections come mainly from "activist litigants" who find it "annoying."

Drs. Hardin and Kelman say the paper has been controversial because it challenged "a belief system" that mold can be toxic indoors. "A belief system is built up and there is anger when the science doesn't support that belief system," Dr. Kelman says.

The Manhattan Institute, a conservative think tank, paid Veritox $40,000 to prepare a lay version of the paper. That version said "the notion that 'toxic mold' is an insidious, secret 'killer,' as so many media reports and trial lawyers would claim, is 'junk science' unsupported by actual scientific study." Its authors were the three writers of the longer paper plus a fourth, who also is a principal at Veritox.

Lawyers defending mold suits also cite a position paper from the American Academy of Allergy, Asthma and Immunology. This paper says it concurs with the ACOEM that it is highly unlikely enough mycotoxins could be inhaled to lead to toxic health effects.

Among the academy paper's five authors is Dr. Saxon. Another, Abba Terr, a San Francisco immunologist, has worked as a defense expert in mold cases.

The academy published the paper in its Journal of Allergy and Clinical Immunology last February, not citing the mold-defense work of either man. The publication later ran a correction disclosing their litigation work.

The academy's president says officials were aware Dr. Saxon was an expert witness. "We should have published their [disclosure] statements with the paper," says the official, Thomas Platts-Mills. He says the lapse resulted from a variety of factors, including confusion about whose responsibility the disclosure was.

Unhappy Author

A third author of the academy's paper, Jay Portnoy, chief of allergy, asthma and immunology at the Children's Mercy Hospital in Kansas City, Mo., says he "felt that there was an agenda" -- the effort "seemed very biased toward denying the possibility of there being harmful effects from mold on human health." He says he considered removing his name from the paper, but it was published before he could decide.

Dr. Portnoy says a section he contributed was rewritten by Dr. Saxon to be "a lot more negative." He says the paper wrongly says mold isn't proven to cause allergic rhinitis, with symptoms like wheezing, sore throat and sneezing. Dr. Saxon denies the authors had a bias but says they applied a high standard for proving mold causes a particular effect. He says he didn't skew the content of Dr. Portnoy's section but rewrote it because it was "too diffuse." Dr. Terr in San Francisco didn't return a call seeking comment.

In New York, the Frasers are appealing the refusal of the trial judge, state Supreme Court Justice Shirley Werner Kornreich, to let their expert testify that indoor mold caused their health complaints. The Frasers had moved into the East Side Manhattan apartment in 1996. Their 2002 suit said they repeatedly complained to the co-op's board of dampness and leaks as their health deteriorated.

Their appeal attacks the credibility of mold position papers drafted by scientists who work for defendants. "What you have here is defense experts authoring papers under an official guise," says their attorney, Elizabeth Eilender. Justice Kornreich declined to comment.

Write to David Armstrong at david.armstrong@wsj.com

Buyers should beware home claim history

Buying a home without getting CLUE of its claim history can land you in deep trouble. Previous payouts on property may make your dream home uninsurable.

CLUE is the Comprehensive Loss Underwriting Exchange, which tracks insurance-claim histories of both people and properties, and it can be a major roadblock on the highway to homeownership.

Home buyers who have never made a claim on their own policies are finding themselves being rejected for insurance coverage on the house they've just bought, because the house itself has a poor CLUE record.

If you can't get insurance coverage, you can't get a mortgage. Worse, if you pay cash for a house and then get turned down for coverage you can find yourself between a rock and a hard place — either paying excessive premiums to get your property protected or "going bare" with no insurance protection against a variety of perils.

"Buyers assume that because they have a good insurance history that getting a policy on their new home will be routine," says John Dixon, a real estate lawyer and faculty member of the John Marshall Law School in Chicago.

"You might find, after closing, you can't get a policy, and you're in breach of your mortgage, which requires you to keep the property — the lender's collateral, after all — protected."

Even more shocking, adds Dixon, is the possibility of closing the deal on your new home — with an insurance certificate issued — and then have insurance denied after you close.

"The CLUE report is not available to the insurer until after closing, so they typically put a caveat in the policy language allowing them to refuse coverage should adverse information about the property be discovered after the insurance certificate is issued," he said.

If your own insurer refuses to cover you, then you have to scramble to find someone who will — usually at a hefty price.

Insurance woes mount

"Mold is the big issue at present," said Stephanie Vitacco, a top real estate agent for Coldwell Banker in Los Angeles' San Fernando Valley. "People have brought so many lawsuits about mold in their homes causing health problems that some of our biggest insurers have stopped issuing new homeowners' policies. It's like asbestos was a few years ago, a fruitful area for lawsuits and attorneys."

Under CLUE guidelines, any homeowners' insurance claim is logged and kept on the database for five years. More than 600 insurers, or nine of every 10 in the industry, provide and share the data.

They report on claims for about 30 kinds of losses, from wind damage to dog bites. A cyber visit to Choicetrust.com, a division of the credit reporting giant Equifax, will get you a report on every claim against the property filed in the past five years for $12.95.

But only the homeowner can get the report, so a buyer has no access to CLUE data before owning the home.

What's more, a seller might genuinely not know about prior claims because they might have been made before that person owned the home.

"I have heard horror stories, especially in a fast-moving real estate market, where a seller has not lived in the home for more than a year or two," Vitacco says.

In one case, the seller had been in the house for just nine months when she put it on the market, not knowing that four years previously, her home had been flooded.

"The claim was still in the CLUE database, but the buyer didn't find out until after closing, and then he had to scramble to find an insurer or lose his mortgage policy," Vitacco says.

Lawyer Doris Calandra found out the hard way, too. She made several small claims for water damage to her home in Venice, Calif., and her insurance company dumped her.

"Our house has the red cross of the Black Death on the door," she says. "If we wanted to sell, we could not — no buyer would get insurance until time wipes the CLUE record clean."

Dixon says, "The insurance companies have been getting so many water damage and mold claims that it has became unprofitable for them, so they have modified their policy language to exclude damage related to water.

"One of the nation's biggest insurers stopped writing new policies in 30 states last year."

"You should not take insurability for granted," warns National Association of Realtors President Kathy Whatley.

Dixon says it's another reason for buyers to research thoroughly and get their purchase contracts written properly. He strongly urges buyers to make sure their agents or attorneys insert a clause in the contract giving them the right to receive and review the CLUE report before they close their deals.

"Simply, it's the Realtor's and the lawyer's job to find out what has happened to the property. We check for everything from radon to asbestos. Mold and water damage are just extras on that list. Maybe the basement floods all the time; maybe there's a leaky roof."

Vitacco agrees. "We use a form as part of the contract requiring the seller to disclose any and all insurance claims made on the property in the past five years. That flushes it out at the beginning."

A similar technique is to require in the contract that the owner provide a CLUE report well ahead of closing.

"People need to understand who their insurance agent works for," Dixon said. "Making lots of minor or frivolous claims can affect your standing, and maybe take away your insurance

or your ability to sell your home easily." By Paul Bannister, *Buyers should beware home claim history*, **www.Bankrate.com** (Monday, April 26, 2004).

Same Mold Story: Gilbert mom says apartment mold has caused health problems

BY CALEB CORREA

Paolo Vescia
Crystal and Connor Todd

In September, Crystal Todd happened to catch a television documentary that surprised her. The program, on the health effects of water damage and mold in homes and buildings, could have starred Todd and her 8-year-old son.

For five years, Todd and her son, Connor, lived in the Vista Montaña Apartments on Baseline Road in Gilbert. Todd says she and Connor were sick 95 percent of the time. Constant coughing, allergic reactions and lack of sleep were symptoms Todd now attributes to high levels of mold in the apartment.

The unit is on the first floor of a three-story building, is partially underground and receives no sunlight. Over the years, water from busted water heaters, leaky pipes and faulty gutters in upstairs units seeped into and settled inside Todd's walls, breeding countless patches of green and blackish mold that make the apartment an unlivable "biohazard," according to a lawsuit she's now filed in Superior Court.

The suit, filed last month, accuses CJ Management Inc., the Phoenix-based complex owner, of not providing a "safe, sanitary and habitable apartment." The lawsuit also alleges neglect, claiming the company was aware of health hazards associated with mold but that company officials never told Todd about the risks.

Lanae Rossi, property manager for CJ Management, says she can't comment on the case. "I have been advised by legal counsel that the lawsuit is public record and you could get a copy of it," she says.

Todd, 33, says the apartment flooded at least once a year while she lived there.

In July of last year, the unit was flooded four times, mainly in the bathrooms. In months prior to the flooding, Todd says she would often hear drops of water plopping inside the bathroom walls. She says a maintenance worker tapping the wall for damage stuck his hand through the drywall under the toilet and pulled out a soggy clump of chalk.

Todd initially thought nothing of it, but the television documentary seemed to be speaking directly to her situation. She wrote a letter to the management office requesting a mold test be conducted in the apartment. Todd says the company initially refused but agreed to replace her plumbing.

In October, when the drywall had been removed to repair the pipes, Todd paid $1,000 for Environmental Research Consultants in Chandler to conduct the mold test.

James Dohm, executive researcher for ERC, says the test revealed above-average levels of two molds -- penicillium and aspergillus. A sample of stachybotrys mold was found on a chunk of drywall sitting on Todd's porch, but it was unclear if it had come from inside the apartment.

Penicillium is common in households but can cause respiratory problems in some allergy sufferers, Dohm says.

Aspergillus and stachybotrys, in a worst-case scenario, produce toxins that can cause serious health conditions including nerve damage, Dohm says.

Stachybotrys is believed to cause bleeding lungs in infants, according to research by the Case Western University School of Medicine in Cleveland.

The management company also sent in its own tester, ACT Environmental Inc. of Tucson, but found that mold levels were not at an unsafe level.

"They basically gave her the clean bill of health, and our results did not show that," Dohm says.

After the mold test, Dohm suggested that Todd move out of the apartment because her son already had health problems that could worsen if they stayed. In late October, Todd and her son moved in with her mom in Mesa.

"Generally, this place is wonderful for its lack of mold," says David Feuerherd, vice president of programs for the state chapter of the American Lung Association. "The problem occurs always -- always -- inside of walls where leaks are occurring. It's the only place in Arizona where it can manifest itself. The problem is that in most cases it's not visible."

Cases in Arizona involving mold contamination are relatively few, Feuerherd says.

"You live in the desert, compared to, say, Seattle or moldy, wet, damp places in the world."

Still, last year, reported cases of mold contamination closed high schools in Prescott and Yuma. A pet supply store in Phoenix and a bank in Tucson also were shut down because of mold.

Once Todd got the test results, she asked management to clean up the mold and replace or clean any furniture, clothing or other items that might have been infected with mold spores. The company refused, and she called an attorney.

Now, she wants her property cleaned and the company to pay her medical bills associated with mold-related symptoms.

"What I want is for them to take responsibility," Todd says. "Sadly, the way to make the biggest impact is through money."

Most important, she says, "My son is out of his home."

When they moved to her mother's, it was like a vacation for a while, she says.

But soon Connor was asking for his books, his toys -- his GameBoy, especially. But under the advice of her attorney, Todd has left all the items in the apartment, partly because they're contaminated and also because they might be needed in the lawsuit.

Todd, a single mother working on a master's degree in social work at Arizona State University, has replaced some clothing and toys but can't afford to do much more.

A few weeks ago, Todd's attorney went into the apartment to check recent plumbing repairs. He lifted the carpet from the closet floor and with a putty knife scraped off a gooey substance mixed with rotted wood.

Some of the carpet was still wet. And, Todd says, the apartment owners "still don't think there's a problem."

From phoenixnewtimes.com
Originally published by Phoenix New Times Feb 01, 2001

1.2 Washington State Landlords are Required to Notify Tenants about Mold

During the 2005 legislative session, the Washington State legislature approved Engrossed Senate Bill (ESB) 5049 (Effective 7-24-2005), that requires landlords to notify their tenants about mold.

The Department of Health has developed this web page to provide you with the materials you need as a landlord to comply with this new legislation.

Mold can impact human health. For some, molds impact can be profound. Mold may trigger an attack in people with asthma. For people who are allergic to mold, exposure may cause allergy symptoms (not unlike hay fever). Mold and the mycotoxins they may produce are still a topic of considerable debate; however mold should not be tolerated in the space where you live.

Senate bill 5049 requires landlords to notify tenants about mold. Specifically, landlords must supply information to tenants about:

1. The health hazards associated with exposure to indoor mold

2. Steps to take to control mold growth in their dwelling units

Landlords must notify:

1. New tenants starting July 24, 2005
2. Current tenants by January 1, 2006.

Posting of this information in a visible, public location at the dwelling unit property is allowed.

The following information can be obtained from the Washington State Department of Health (DOH) either electronically or in printed form. Materials (Any one of the following documents will fulfill the notification requirements of Senate Bill 5049):

1. DOH web page, "Got Mold."
2. From California Department of Health Services, "Moho en Mi Casa: Que Hago? (Mold in My House: What do I Do?)"
3. From University of Minnesota: "Molds - Your Safe Home" - in Spanish.
4. EPA document "A Brief Guide to Mold, Moisture and Your Home". This document is available in English and Spanish, both online and at 1-800-438-4318.

1.3 Tenant Sickened By Mold Awarded $1 Million

Disabled Woman Claimed Landlords Ignored Her Complaints
by thebostonchannel.com

March 18, 2009
BOSTON -- A civil jury has awarded Helen Herman what amounts to, with interest, just over $1 million dollars for damages suffered while living at 56 River Road Rear in Tewksbury four years ago.

"Although the verdict was awesome, we love it, it doesn't bring back my health," said Herman.

Newscenter 5's Amalia Barreda first did a story in March 2005 on a mold problem in the house they were renting, which Herman claimed was making her sick. She said her landlords, area developers John Sullivan and his father, Kevin Sullivan, ignored her complaints.

At the time, the couple's own mold home testing kit revealed alarming results. Molds appeared that could trigger debilitating ailments. Severe asthma is among the things that permanently disabled Herman, and forced her to leave her MBTA job of 20 years.

"My doctor suggested I leave, and I was devastated," said Herman.

Herman's husband said all of their possessions were contaminated.

"We wound up throwing everything we owned in the trash," said Christian Langlois.

The couple said their complaints to the Sullivans fell on deaf ears. Barreda reported that over the

telephone their attorney told Newscenter 5 they were "disappointed in the jury verdict." Michael O'Reilly added, "we do intend to pursue fully our rights on appeal."

But Herman's attorneys said the jury heard strong evidence that the Sullivans repeatedly ignored the mold problem, even after Herman and her husband moved out.

"They just kept turning it over after slapping on a new coat of paint," said attorney Robert Doyle.

The judge has taken a very important matter under advisement, and that is that under the Consumer Protection Act, the judge could double or even triple the jury's verdict.

http://www.thebostonchannel.com/news/18961264/detail.html

1.4 Toxic Mold Case In California Settles For $22 Million

A California family recently negotiated a landmark $22.6 million settlement in a toxic mold case, claiming that moldy lumber used to build their house created a "poison prison" that severely injured their son.

As one of the first successful mold lawsuits against a lumber yard — and the largest to involve a single-family home — the case should put the lumber industry on notice, said the family's attorney, Brian D. Witzer. "We hope this settlement sends a signal to lumber yards nationwide to treat mold growth issues seriously and establish polices to protect the public's health and safety," Witzer said. Witzer predicted the settlement will spur an onslaught of similar claims, saying that mold litigation could become the "next asbestos," noting that his firm has handled several cases in the last few years that have ended with settlements of more than $1 million.

But attorneys for the defense believe the settlement is an aberration caused by unfavorable rulings prior to trial. The settlement was reached the day after Los Angeles Superior Court Judge Victoria G. Chaney excluded 10 of 17 expert witnesses for the lumber company, because the company missed court deadlines for witness lists and then backdated documents, according to Witzer. In published reports after the settlement was announced, the company said in a statement that it believed jurors would have "completely vindicated" it they had been able to hear its witnesses, which included a microbiologist and a toxicologist.

None of the 17 defendants, including the lumber company, which agreed to pay $13 million, admitted any wrongdoing. The other defendants in the suit — which included the general contractor, construction supervisor, framer, engineer, roofing company, plumber and window installer — agreed to pay a combined $9.6 million as part of the settlement. Dream home turned nightmare The Gormans contend their son, Kellen, suffered serious neurological brain damage because of exposure to toxic molds growing on framing studs that had been improperly stored at Crenshaw Lumber Co. in Gardena, Calif. The studs were used to build the Gormans' $1.9 million home in Manhattan Beach. The Gormans moved into their home in 1999.

Prior to that, Witzer said, the family had a spotless health record. But soon after moving in, they began to suffer respiratory and sinus problems. At first the family thought the mold throughout their home was caused by living close to the ocean in an area of high humidity. They wiped it off the walls and woodwork, but it kept returning. Eventually they called an environmental company to advise them how to get rid of the mold, and the company told them to move out immediately. They did not believe the situation was that serious, however, and called another company. "Just from their physical observations, that company told them to get out right away, that staying was a health hazard," Witzer said. Subsequent testing showed that the house was contaminated with dangerous molds.

The Gormans finally moved out after two years. But by then, their son Kellen had suffered irreparable damage, including brain lesions and cysts. At age 5, he still functions as a 1 1/2 year old and needs round-the-clock care. His two sisters, now 7 and 3, did not suffer serious health problems. Witzer said an MRI conducted when Kellen was 3 1/2 years old revealed the lesions and, when compared to a problem-free MRI performed when he was 1, clearly showed the jury that the youngster's brain had been damaged.

The defense attempted to keep out medical testimony regarding the child's neurological injuries, but the judge ruled there was enough evidence to allow jurors to hear the opinions of doctors linking the damage to exposure to dangerous molds. Other powerful evidence came in the form of environmental testing and blood serum testing, which showed high levels of exposure to molds.

Kellen's father also complained of cognitive and neurological problems such as memory loss, which the plaintiffs' medical experts testified is associated with exposure to certain fungi, Witzer said. Head in the sand?

Witzer said the owner of the lumber company testified at trial that he did not believe the mold on the lumber was dangerous and that the company did not have a policy to prevent mold from growing on its lumber. "He indicated that, yes, there was black material on the wood prior to delivery, but that in his opinion this was just black stains or harmless molds," Witzer said. "This is just inconsistent with all the scientific evidence that is out there now."

He said Crenshaw did not follow industry recommendations to cover lumber and keep it dry to prevent mold. "Basically [Crenshaw] ignored the instructions from the supplier to keep [the wood] dry, and they just left it out in the rain," Witzer said. "They didn't keep it raised twelve inches off the ground and they didn't cover it. In fact, they kept the lumber in a puddle, just operating with their heads in the sand."

Although he believes mold litigation is poised to take off, Witzer warned that attorneys will have to put $250,000 or more into a case and be willing to risk failure. He said mold cases are typically very complicated, involving expensive medical testing that is usually not covered by health insurance, intensive environmental testing and costly experts whose travel expenses add up quickly, since many top mold authorities live out of the country. "You have to treat it like a

poisoning case, meticulously building up all the evidence and bringing in the top experts," Witzer said. "This is a potentially wonderful area of litigation, but a toxic mold case cannot be handled like an automobile accident case." *By Natalie White, Staff Writer on January, 2006. (This article was originally published in Lawyers Weekly USA)*

1.3 Homeowners feeling trapped

Brittany Chase residents say they can't sell homes because of mold but won't walk away.

ZIONSVILLE, Ind. -- When Sheri Weaver tells people she lives in the Brittany Chase subdivision, the reaction is almost like she's had a death in the family.

"Is everyone OK?" she is often asked.

"I just tell them my neighbors have it worse than me."

The subdivision of $200,000 to $500,000 homes has become the focal point for the mold problem gripping housing developments in some metro Indianapolis counties.

Fifty of the neighborhood's 127 homes are now vacant because the builder has bought them from their owners to eliminate the mold.

Some of the remaining Brittany Chase residents say they are trapped. No one will buy their homes, and their investments are too big to walk away from.

Judge Bernard L. Pylitt of Hamilton Superior Court will decide this fall whether to accept an estimated $24 million settlement of a class-action lawsuit brought by homeowners against builder Trinity Homes and parent company Beazer Homes. The proposed settlement was made public recently.

Under the proposal, Trinity would pay for repairs under the supervision of an engineer chosen by the homeowners. After repairs are done, homeowners would receive an engineer's certificate stating that remediation is complete. They would also get a two-year warranty on the work.

Brittany Chase was once one of the Zionsville area's most desirable neighborhoods. Drawn by two-story brick houses, large lots and the reputation of nearby schools, families flocked to the neighborhood starting in the late 1990s.

It borders other subdivisions with large, high-priced homes in an area of Eagle Township where housing and commercial developments blend with open fields of green grass.

Houses in Eagle Township sell for an average of $329,785, well above the Boone County average of $219,516, according to the Metropolitan Indianapolis Board of Realtors. Homes typically sell in 60 to 90 days.

But four Trinity-built homes in Brittany Chase that went on the market in the past year haven't sold, said Richard Felton, president of the Brittany Chase Neighborhood Association.

"By the time they were put up for sale, the negative publicity (about the mold) had killed the market," Felton said.

Some residents contend their home values also are plummeting because Trinity has failed to maintain the vacant houses. The grass was cut recently, but in some places the fine touches so often a part of suburban life were missing, such as edging and trimming.

Trinity contends that a "vocal minority" of residents are exaggerating the situation.

The company is maintaining the vacant homes sufficiently and is confident they will sell as remediation work now under way is completed, said Michael Rosiello, a lawyer for Trinity.

"Trinity is doing a great deal," Rosiello said. "There will always be people who are dissatisfied. Trinity is going the extra mile."

Christopher J. and Mary A. Colon, who claim they had mold in their Noblesville home, originally filed the class-action lawsuit in 2003.

An estimated 2,100 homes built in the Indianapolis area -- including many in Boone, Hamilton and Hendricks counties -- from 1998 to 2002 are part of the mold court case. Trinity and Beazer say the number of homes that actually have mold is much smaller.

The mold can cause health problems, including nasal stuffiness, other forms of breathing difficulties and eye irritation.

Homeowners allege that improperly installed brick veneer, incorrect grading of soil and leaky roofs caused the problem.

The issue surfaced in Brittany Chase in 2002 when a mushroom was found growing from the floor of an office in Brian Farrow's home.

Farrow, his wife and their two children moved out for nine months while workers tried to rid their $255,000 home of mold. Trinity paid them a monthly stipend while they were out of the house.

When they moved back in, tests showed the mold was still present, Farrow said.

Farrow, 28, said he is trying to sell the house.

About 20 prospective buyers have looked at the house since it was put on the market six months ago, but "when the mold issue comes up," they lose interest, he said.

Farrow said his young daughter had to endure 20 needle shots as part of her treatment for allergies to mold. Two doctors have recommended that the family move from the house because the girl frequently has difficulty breathing and a severe cough, he added.

Trinity does not believe the mold issue has made the homes difficult to sell, Rosiello said.

He said part of the problem is that some residents have spoken negatively about the subdivision to the media.

"Who's really driving down the value of the homes?" Rosiello asked. "If you had a car for sale, would you say (bad things) about it to the newspaper?"

The mold problems have put a stigma on Brittany Chase, but it will bounce back after a few years, said Michelle Decatur, a member of the board of directors for the Metropolitan Indianapolis Board of Realtors.

Zionsville "always has been a (hot housing market) and always will be," Decatur said. "It's an upscale Mayberry."

Early in the controversy, Trinity bought 50 homes from the owners. The company made the offer to a limited number of homeowners and refuses to buy any more.

Homeowners now have until Sept. 27 to decide whether they will opt out of the proposed settlement or pursue other legal action.

Their lawyers are recommending they remain part of the class-action lawsuit.

"We get more relief than we would under a (court order)," said Richard Shevitz, one of the lawyers for the homeowners. "I can't imagine why any homeowner would not want to take advantage of it."

But Weaver and Brittany Chase resident John Knabel say they might opt out.

Sheri Weaver, 38, said that besides the mold, water leaks into the house that she and her husband bought for $276,000 four years ago.

She quit working and planned to raise their three children in the house before discovering in 2002 that a leaky window and pungent odor in the house were the result of mold.

What bothers Weaver most now is that her son's friends have moved away. Many of the homes surrounding hers are empty.

"I have caught my son crying three times because his friend is moving," she said. "A lot of kids are left with no one to play with."

Knabel said he and his wife moved into the neighborhood in February 2001 after buying a $255,000 home. A year later, they noticed a strong odor, and Knabel learned his wife's headaches were caused by mold.

The family of four moved out for nine months while work crews tried to remove the mold, said Knabel, 37, an airline pilot.

He paid $2,000 in April to have tests conducted; they revealed mold was still present.

"It's just upsetting," Knabel said. "I have no confidence in Trinity to properly fix my home." By Fred Kelly, Homeowners Feeling Trapped. The Indianapolis Star, Indystar.com. (September 5, 2004).

1.4 Bedbug Lawsuit Bites Motel Owners

CHICAGO, Illinois — Federal appeals court judge Richard Posner upheld a Cook County jury's $372,000 punitive damages tag against Motel 6 in a lawsuit brought by packaging tradeshow visitors Burl and Desiree Mathias, who found their downtown Chicago motel room on East Ontario Street (the motel is now a Red Roof Inn under the same owners) was overrun with bedbugs, the ***Chicago Tribune*** reported Nov. 25, 2003.

According to the newspaper; the motel had been renting infested rooms for months; Posner concluded that the plaintiffs, who received $5,000 each for pain and treatment of the bug bites, were each entitled to the jury's award of roughly 37 times that, as motel management rejected offers to exterminate for only $500, even when the problem reached "farcical proportions."

In an important decision, Posner reasoned that the award should be large enough to punish the wrongdoer and also to justify a lawsuit, ensuring a legal climate for justice, the newspaper reported.

1.5 Parents plan to sue middle school

TORRINGTON --Another parent has jumped on the bandwagon to sue the City's school board and area construction companies due to alleged medical ailments experienced by their middle school-age children.

A New Haven attorney representing the parent of a former Torrington Middle School student now being home-schooled has filed a statutory notice of intent to sue the City's Board of Education, Superintendent of Schools and the builders, all of whom are local construction companies.

Attorney John E. Deaton of the law firm Early, Ludwick, Sweeney & Strauss filed the official notice at Torrington's City Clerk's office this month, claiming that poor (indoor) air quality and ventilation were among the causes of an irreversible medical (lung) disease.

Deaton represents parents Peter and Joanne Avoletta, whose child Peter Avoletta allegedly sustained health injuries (due to inhalation of indoor toxic mold spores) while enrolled at Torrington Middle School.

"Peter currently receives homebound instruction because Dr. John Santelli performed tests in July 2003 and found that toxic mold exists in Peter's blood, and Peter was then diagnosed in August 2003 by Dr. Karen Daigle at the Connecticut Children's Medical Center with irreversible lung disease."

According to Deaton, Avoletta's exposure to negligent conditions (high levels of indoor toxic mold) within the Torrington Middle School building was a significant contributing factor to Daigle's diagnosis, Deaton said.

"These conditions, which exist because of the repeated negligence to adequately repair the roof and to provide a healthy indoor environment at TMS include, but are not limited to elevated dampness, lack of proper ventilation, mold and overall poor indoor air quality," Deaton said.

According to Deaton, the City of Torrington and/or its employees have known about the poor indoor air quality at Torrington Middle School from the time of the installation of the roof and all of its attending problems thereafter.

"I anticipate filing the lawsuit in the very near future," he said.

Heeding the advice of their attorney, the Avolettas declined to comment on the notice of intent to sue the City's Board of Education, Superintendent of Schools as well as local construction companies.

Mayor Owen Quinn, Corporation Counsel Al Vasko and Superintendent of Schools Dr. Gregory Riccio were also furnished copies of Deaton's letter.

Parties anticipated in the prosecution of the lawsuit include but are not limited to Riccio, Torrington's Board of Education, O&G Industries, Borghesi Building and Engineering and the Butler Manufacturing Company, all of which were involved in the construction, maintenance and/or repair of Torrington Middle School. ---Torrington, Connecticut Register Citizen newspaper, Nov. 25, 2003.

1.6 Denver International Airport faces mold lawsuits

Since 1996, at least six investigators have found water leaks (due to poor drainage) and mold growth in the basement areas, and de-icing fluid stink up the plush red Carpet Lounge of the Denver International Airport (DIA). Federal inspectors found that that mold contamination remained in the basement office three years after the airport was notified about it. The airport was also notified about its drainage problems but airport administration response had been slow.

Lawsuits have been filed against DIA by two United Airlines employees, which contain 18 allegations of serious mold, odor, or other indoor air problems. They alleged that the airport has been negligent by allowing tens of thousands of travelers as well as airline staff to be exposed to these dangerous conditions.

The Colorado Occupational Safety & Health Administration (OSHA) report said DIA needs to address a structural problem, i.e., water seepage from the outside. "The presence of water on building materials…supports, microbial growth with the potential of causing adverse health effects…prompt repair to the infrastructure must be the *primary* response to microbial contamination."

Increasingly, complaints have come from United Airlines employees, regarding a sewer-like smell that wafted into their work environment, causing short-term health effects, some to the point of requiring medical attention. The source of the stink is micro-organisms feeding off de-icing fluid trapped in DIA storm drains. The foul odor is brought inside via roof drains.

In defense of DIA, spokesman Steve Snyder said DIA has been "responsive" to these problems. "We've done everything we can up to this point. We haven't left (the issues) unaddressed." he said. As regards another claim in the lawsuit that travelers are in danger because of the alleged mold/bacterial contamination and other problems, Snyder took an exception and said: "The traveling public is in absolutely no danger." ---Todd Hartman, *Mold stinks up DIA,* **Rocky Mountain News** (July 28, 2003).

The mold lawsuits against DIA were filed by two prominent law firms: Childress & Zdeb, Ltd of Chicago, one of the nation's leading mold litigation firms, and Fognani Guibord & Homsy, of Denver, one of the country's best environmental law firms, on behalf of travelers and United Airlines employees. "The firm seeks to force the airport to institute safeguards for future contamination and provide plaintiffs with medial examinations to diagnose any adverse health effects caused by the exposure. It also seeks to establish a fund to administer medical surveillance program allowing plaintiffs to periodically screen for early detection and treatment of health problems that may develop." --- **Denver Business Journal** (July 31, 2003).

1.7 Orange County jury returns defense verdict in mold case

Orange County jury returns defense verdict in mold case involving alleged bodily injuries: jury deliberates for less than 30 minutes.

An Orange County jury returned a defense verdict in a closely watched case involving claims of serious bodily injury from exposure to mold in a town home located in Mission Viejo, California. Jury deliberations were less than thirty minutes according to trial lawyers Kevin Smith and Sam McDermott with the law firm of Wood, Smith, Henning & Berman which represented defendant, Equity Residential Property Management Corporation.

The eight day trial of Shapiroholland v. Equity Residential Property Management Orange County Superior Court case 03CC0376) stemmed from the rental of a town home located in

Mission Viejo, California. During the tenancy of the rental, the property management company noticed a water leak emanating from a water heater closet in an outdoor patio of the plaintiff's unit. Within two days, repairs were made including extraction of all water that had saturated parts of the carpeting in the living room of the unit. The occupants of the unit, husband/wife/seven year old minor child, all complained they suffered debilitating health effects due to exposure to mold.

The Plaintiffs were relocated from the unit while mold remediation work was performed, including air testing at the conclusion of the remediation which underscored successful abatement. All of the property in the unit was removed and/or cleaned during the remediation work. Despite the fact the unit was abated and air testing reflected there was no elevation of the indoor air quality, Plaintiffs refused to move back into the unit until January, 2003 -- more than three months after the initial water leak was repaired.

Subsequently, Reginald and Sari Anne Shapiroholland, along with their young son Zachariah, brought suit against Equity Residential, the property management company. In their suit, the plaintiffs claimed a host of physical ailments as a result of their exposure to mold, including asthma, allergies, chronic fatigue, gastrointestinal problems, bladder problems, headaches, skin rashes, febrile seizures, memory loss, bronchitis, sleep apnea, colds, sore throats, diarrhea, emotional distress and a reoccurrence of cancer.

Plaintiffs also claimed that virtually all of their personal property was lost, damaged or destroyed as a result of the repairs effected to the unit. In deposition testimony, plaintiffs claimed they lost "millions" for personal property and emotional distress damages.

In support of their claims, Plaintiffs engaged Scott Environmental to perform mold testing of the unit. Bulk samples of drywall in the water heater closet did reveal the presence of the mold stachybotyrs. Scott also took a swab sample on a wooden beam near the air conditioning unit and discovered cladosporium mold. Notably, the air testing performed by Scott did not find any elevation of mold spores in the unit, actually concluding the unit seemed to be a healthy living environment.

Superior Court Judge Randall Wilkinson allowed plaintiffs' medical expert Dr. Roger Katz to testify at trial over objections that his testimony lacked foundation and was based on testing methodologies not generally acceptable under the Kelly-Frye doctrine. Thereafter, Dr. Roger Katz, testified during trial that the Plaintiffs were in fact allergic to stachybotyrs. Dr. Katz also concluded, based on his review of Scott's mold reports, that Plaintiffs were exposed to stachybotyrs mold while living in their unit.

Plaintiffs' attorneys asked for property and personal injury damages. They also projected future medical expenses. According to defense attorney Kevin Smith, the settlement demand decreased with the passage of time, dropping eventually from $500,000 to $125,000 during trial. Smith also advised that all causes of action were effectively thrown out prior to the trial by the court, with the jury only deciding the negligence cause of action. The jury deliberated for less than thirty minutes, and then returned the defense verdict. The jury found for the defendants 10-2 on the negligence cause of action. After the trial, the jurors noted they were particularly

impressed with the response of Equity Residential which went to extraordinary lengths to relocate and address the concerns of its residents.

On a national level, this case is believed to be the 20th mold bodily injury case to proceed to trial and verdict. Of this number, 11 have been verdicts favorable to the defense. Five of the 20 cases have proceeded to trial in Orange County, California, of which two of the five have been verdicts where nothing has been awarded on the claims of bodily injury from exposure to mold. Notably, trial lawyers Kevin Smith and Sam McDermott tried both of these Orange County cases.

Observers in the construction, property management and insurance industry have taken particular interest in the outcome of trials in this emerging area of law. Mold claims have been blamed for skyrocketing insurance premiums and insurance carriers pulling out of markets entirely. Recent defense verdicts, particularly in cases where experts are allowed to testify as to exposure and injuries, underscore the difficulty for plaintiffs in succeeding when the decision is left to the capable hands of the juries. --- PRNewswire, Sta Ana, California (July 22, 2004)

1.8 Mold forces cuts in hours in Tulare County Court

Tulare County Courthouse employees who routinely call in sick alleging toxic-mold contamination have led officials to limit daily access to three public-service counters. The employee shortage has caused filing to back up in the clerk's offices, resulting in a four-hour cutback of public access each work day.

Those who wish to do legal business – such as pay a parking ticket, change a name or file a civil lawsuit – must do so between 8 a.m. and 1 p.m. Drop boxes placed outside first-floor and second-floor clerk counters will take documents for filing and payments until 5 in the afternoon.

"I'm sure people will be concerned that there's a cutback in service, but we didn't have any choice," Superior Court Judge Paul Vortmann said Tuesday. "It's reached a point where in order to keep our head above water in the filing department, we had to close at 1 p.m."

The courts are operating with two-thirds of normal staff. Twenty-seven (27) of eighty-four (84) employees who work in the court division have taken medical leave, saying mold in the building made them sick, Vortmann said.

Seventy (70) employees have filed for workers compensation and three (3) have filed general liability claims, County Risk Manager Gregg Breed said.

Friday, Darryl Ferguson became the second Superior Court Judge to file a general liability claim with the county alleging mold-induced medical problems. Ferguson's lawyer, Steven Williams, said the judge will decide within six (6) months whether to sue the county for damages.

"I've been suffering breathing problems for over a year. Even on the bench I gasp for breath." Ferguson said. "I don't know if the problem is because of the mold in the building. There isn't any concrete proof that the building is a problem, but there are a lot of indications."

The courthouse mold scare began when Superior Court Judge Elisabeth Krant sued the county in March. She alleged that the toxic Stachybotrys mold found in her office made her sick with rashes, nausea, headaches and dizziness. She had experienced the symptoms since November 1998, but her doctors couldn't identify what was causing her illness.

In April 1999, a softball-sized cluster of Stachybotrys mold was discovered behind a ceiling tile in Krant's office. Authorities found a small patch of Stachybotrys last month in a storage closet in the basement of the courthouse used by the data-processing division. Also, a single, microscopic Stachybotrys spore was found in an air sample taken from Vortmann's third-floor office. Judges plan of holding in-custody arraignments either at a building next to Bob Wiley Corrections Facility, or at the new Dinuba courthouse.

The three-story building in Visalia also houses probation, the district attorney, the public defender, elections, data processing, purchasing, the county assessor, tax collector and auditor. An environmental expert has examined the courthouse and late last month deemed it safe to work in, Breed said. "Employee safety is our concern. Our certified industrial hygienist has said the building is safe, and we don't have to close it down." County officials walked through the courthouse on June 29 with a second environment expert who could order more tests, Breed said.

Vortmann said the county isn't working fast enough to resolve the problem. Court staff members are meeting today with lawyers from the state Attorney General's Office to discuss hiring a separate agency to test the courthouse for mold.

"Maybe it's mold, maybe it's not. We have to rely on our experts to tell us what we should be doing. Our goal is to be sure the environment is safe, and we want to do what's necessary," said Vortmann.

Ferguson said he is worried about his work environment. He said he's been tested for mold exposure and is waiting for results. Ferguson, who works out of a first-floor courtroom, moved to an office on the third floor when officials found evidence of mold in his chambers. ---Jennifer M. Fitzenberger, *Mold Forces Cuts in Hours in Tulare County Court*, **Fresno Bee** (July 19, 2000)**.**

1.9 NY Judge Dismisses Attempt to Evict Bianca Jagger

NEW YORK (Reuters) - A judge on Wednesday dismissed a New York landlord's attempt to evict Bianca Jagger, former wife of the Rolling Stones lead singer, who has sued over mold she says made her $4,600-a-month apartment uninhabitable.

Jagger says she is "homeless" and has been living out of suitcases at friends' homes for almost three years because of a mold infestation in her four-room Park Avenue apartment.

She was served with an eviction notice earlier this month while pursuing a $20 million lawsuit she filed in state Supreme Court in Manhattan against the landlord and contractors.

Judge Anthony Fiorella dismissed the eviction proceeding and also indicated it would be inappropriate for the landlord to refile an eviction proceeding against her, at least until Jagger's lease expires next February.

In court papers, landlord Katz Park Avenue Corp. said Jagger's Park Avenue residence was not her primary residence and that she maintained a home in London.

She said she had not lived at the London residence since 1980 after her divorce from Rolling Stones singer Mick Jagger.

"This ordeal has put me through tremendous stress, hardship and humiliation by a landlord who has retaliated against me," Jagger said after the hearing.

The landlord's lawyer declined comment.

The Nicaraguan-born former model had a daughter, Jade, with Jagger, whom she married in 1971. She has been a campaigner for human rights and environmental causes. --- By Jeanne King, Wed. May 26, 2004

1.10 Mold-stricken Ed McMahon files lawsuit

Former Tonight Show sidekick, Ed McMahon, filed a mold lawsuit against American Equity Insurance Co., two insurance adjusters and several cleanup contractors for $20 million in April 2002, claiming his mansion was ruined.

McMahon's mold problem began in July 2001, when a pipe burst in his home, flooding his den, and brought about rapid and uncontrolled growth of toxic molds, which ruined his 8,000-square-foot Beverly Hills mansion.

McMahon, 80, and his wife got sick, and their dog died of respiratory illness due to toxic mold contamination. Even his collection of treasured TV memorabilia is gone because the mold clean-up crew hauled away the contaminated keepsakes. Following their doctor's orders, the couple moved out of their Beverly Hills mansion and rented another home at $23,000 a month.

McMahon's lawyer, Allan Browne, said "It started with a broken water pipe, which is not a big deal. It turned into a horrific nightmare that only Stephen King could write about…this is a **death mold**. It can cause **respiratory illness** or even **death**." The company hired to clean up the mess in his mansion didn't remove the mold, but simply painted over it and kept quiet. Ed McMahon is suing for **physical injuries**, **emotional distress**, and **expenses** he incurred.

McMahon obtained a $7 million settlement from several companies he sued for allowing toxic mold to infest his Los Angeles home. Travelers and American Equity Insurance companies and other related insurance entities settled with McMahon for more than $5 million, according to

the hearing transcript. Four mold cleanup firms and two insurance adjusters paid the rest of the sum.

1.11 Bank dismisses mortgage for mold-affected Davis family

The Davis family, whose financial and health problems stemming from mold that pervaded their Shawnee Road home have been well-documented, received unexpectedly good news last Wednesday when the bank that holds their Fannie Mae mortgage told them they will be released from the document.

"Washington Mutual Savings Bank [of Jacksonville, Fla.] and Fannie Mae is charging off the mortgage," Nancy Davis said. "It's just wonderful news. We heard June 23 at 2 p.m." She said the bank's process is to contact its investors and "ultimately," the mortgage will be charged off.

The Davises haven't made mortgage payments for several months and accrued $10,000 in penalties every three months. Their credit cards are almost maxed out and their totals they can borrow have been reduced.

"I feel wonderful, but I still have a lot of work to do," Davis said.

One thing still to do was to send to the bank copies of an insurance report saying that the house is uninsurable, a decontamination bill for their two automobiles, and air quality reports from two different companies.

Another is to continue working with residents of other communities who, having read and seen news reports, have called Davis for help with their situations.

She finds it "very interesting" that on May 28 the Department of Housing and Urban Development released a "Radon Gas and Mold Notice and Release Agreement" that is now a requirement for all HUD home sales contracts to make certain that purchasers know radon gas and mold may cause health problems.

"My next step once the paperwork is done is to approach the town to tell the Board of Health that I want to see this through," Davis said. "Thank God this news releases anything with the town having to do anything [with the house] as I see it."

Davis said she did not ask why the bank excused her mortgage. "I guess the reason the bank is taking it back is obvious," she said. "We haven't paid the mortgage, I'm now out of work, and we're in financial ruin."

Last month, Davis repeated her story before the health board for the first time. She had hesitated to ask the property to be condemned she said because the family would have had nowhere to move to. It might also have jeopardized a lawsuit her husband, Rich, filed against the former owner, home inspector and two Realtors. That suit is still proceeding.

Meanwhile, Davis said she "can't say enough about [attorney] April Babbitt" who represented her in foreclosure proceedings. "She did [the job] unselfishly. She is an amazing woman," Nancy said. "The bank asked if I wanted to move back into the house. I said 'Noooo,'" Davis said.

She had sent a letter to one of the bank's vice presidents who was assigned the case and told her story about creeping illness and the toxicity of the molds in the house. She had been diagnosed with Sudden Onset Asthma, and coughed constantly despite HEPA filters in every room, and was prescribed Allegra, inhalers, a nebulizer and steroids. She had endured unexplained rashes, headaches, nosebleeds, and became allergic to allergy shots.

"He said it was the saddest letter he ever read," Davis said. "To have someone with feeling working in a big bank is amazing."

Davis did not know what might happen to the Shawnee Road house. -----By: Don Eriksson, Pepperell Free Press, Pepperell, Massachusetts (June 30, 2004).

1.12 Davis: Lenders do another reversal on mortgage issue

"I don't know what's going to happen next," Nancy Davis said about the news she received Friday night at 5:45 p.m. on her cell phone.

An attorney for Washington Mutual bank of Jacksonville, FL told her the bank is willing to give her family a full deed in lieu of foreclosure. That would effectively wipe their $225,889 mortgage and $21,502 worth of interest and other charges for the family's unlivable, mold-infested duplex on Shawnee Road off the books.

Two weeks prior, Davis had received a letter of foreclosure and demand for immediate payment from attorneys hired by the Federal National Mortgage Association (Fannie Mae). The letter had come on the heels of an even earlier offer from Washington Mutual to excuse the mortgage.

The roller-coaster of events is nothing new to Davis, who is doggedly pursuing a lawsuit against two real estate brokers and a home inspector involved in the original sale of the house. She has taken in stride two previous attempts by the bank to auction the house.

The most recent attempt was aborted when the auctioneer saw Davis and her husband, Rick, removing their belongings dressed in full HAZMAT clothing before television cameras.

She doesn't know the status of the third auction try, which is scheduled for Sept. 8.

"Washington said Fannie Mae controls the mortgage and [the foreclosure] was Fannie Mae's decision," Davis said. "They won't discuss what's going on with Fannie Mae but all of a sudden we got this phone call. Whose on first? I don't know and I don't know what's on second."

Neither the Federal National Mortgage Association nor the Washington Mutual Bank responded to requests for comment.

Davis does know a couple of things, however.

"In negotiations, if that's what we're doing, I want the property sold as a full tear down. I want to make sure there isn't another family in there, ever," Davis said.

The Davises had ceased making mortgage payments some months ago when Nancy became ill from the pervasive mold that is eating away at the interior of the house. Inch-thick multi-colored mold has eaten away 40 percent of the roof sheathing. Doctors persuaded her to vacate the property, she said, and throw away their possessions.

In June, the Davises presented their plight to the Pepperell Board of Health. They had delayed their appearance because they would have had no place to live if their house was condemned. After townspeople raised money last year for the family to move into an apartment, they met with health officials who said they were powerless because the Davises no longer live at the property.

"We can't go bankrupt because the lawsuit is pending," Davis said. "The case might be heard three years from now, and even after a case goes to jury, the judge has to rule on it. There's no guarantee how long that will take so that's why I'm doing what I'm doing."

The other thing Nancy knows is that her story, with the help of newspaper and television reports, is now a national one. She is coming into increasing contact via e-mail and telephone with mold sufferers from as far away as Dublin, Ireland.

She has been selected as a volunteer coordinator for a 50-state lobbying effort for passage of federal mold regulations sponsored by Rep. John Conyers Jr. of Michigan. She has also begun working with Mold Relief Inc., which she describes as the "Red Cross of mold relief," to help fellow sufferers find housing and financial support.

Sunday night, for example, she was speaking with a photojournalist from Colorado who has been operating his cell phone and computer from a tent in the woods. Mold has forced him to abandon his home, he reportedly told her, and there isn't enough money to purchase another. She put him in touch with people in California who might help.

"I'm working on the humanitarian end of helping displaced families nationwide. It's wonderful and it fills me up," Davis said. "Sure, we have this lawsuit and so on but you have no idea how long it will go. In the meantime, you can pick up the pieces."

Her husband Rick, meanwhile, is moonlighting delivering furniture for the company that was able to restore some of the couple's antiques in order to pay off the bill.

"I'm just a little woman with a big mouth," she said, "but there are families all over the country with mold problems. There are families out there just trying to get a deal on a home. You have no idea what fight I have.

"Look what one person can do," she said. "Who would have believed that this tragedy could turn into helping people in states I've never even been to." ----- By: Don Eriksson, Pepperell Free Press, Pepperell, Massachusetts (August 25, 2004).

1.13 Tennessee jail mold makes staffers ill; kills inmate

Five lawsuits were filed against *Giles county Criminal Justice Facility*, naming as defendants the county, the local sheriff and all contractors and subcontractors who constructed the building. Two of these cases were filed in state court and the other three cases were lodged with federal court.

The plaintiffs in these five cases are varied:

- One suit includes 24 jail employees, who cite unsafe working conditions because of the alleged toxic molds present in the jailhouse.

- In another case, a former employee who has been hospitalized twice for respiratory ailments contends that she was fired from her job at the jail in May for publicly speaking about the mold contamination issue.

- The mother of a dead inmate also filed suit. She alleged that her son died from "multi-system organ failure" caused by exposure to toxic mold.

All of the lawsuits blame the faulty design, construction and maintenance, which allowed water to seep through the building, which allegedly resulted in the infestation of toxic molds which wrecked havoc on the health and safety of the jailers as well as the inmates.

Plaintiffs alleged that the county has engaged in a "civil conspiracy to conceal the true condition of the facility…allowed and/or required the plaintiffs to continue working in the facility" despite the fact that the county has "knowledge of its true hazardous condition."

In an answer to the plaintiff's allegations, the county contends that there was no conspiracy against the jail employees. The county also points to its suit against the architect, contractor and subcontractors as proof of their intent, saying the resulting public record was "neither secret or *(sic)* conspiratorial.'"

Dr. Elena H. Page of the **National Institute for Occupational Safety and Health** conducted telephone interviews with four affected employees, made a check on their medical records, and studied an indoor environmental quality evaluation performed in February 2003.

Dr. Page did not attribute the presence of molds to the jail's health problems but reported that: "employee's health problems were not due to mold exposure, or other exposures within the workplace."

Plaintiffs' lawyers were not satisfied with the findings and said: "we want our own experts to do some testing. So far we have not had that opportunity." ---Leon Alligood, *Staffers say jail mold makes them ill*, **Tennessean** (July 20, 2003).

1.14 San Benito schools' mold lawsuit settled

Three years after two San Benito, Texas campuses were rid of mold, the company that installed the school district's heating and cooling systems has agreed to pay the school district $15 million.

Honeywell International Inc.'s $15 million settlement falls short of the $180 million in damages and attorney fees that the school district was seeking in a lawsuit that was headed to trial this week.

But School Board President Oscar De La Fuente, Jr., said that the settlement would cover a $7 million loan to pay for the mold remediation and save the district legal fees from a prolonged lawsuit.

The money will also cover $729,000 the district has paid in interest on the two-year-old loan, and attorney fees whose percentage is still being worked out, schools interim superintendent Antonio Limon said.

"We will break even with this settlement," he said.

First National Bank of Edinburg had given the loan, which had to be renewed every year and did not allow for payment on the principal, Limon added.

The school district alleged in its 2002 lawsuit that Honeywell installed and mismanaged faulty heating and cooling systems at SBCISD from 1994 to 2001.

A November arbitration in Minnesota was going to decide the outcome of the litigation involving mold cases at Bertha Cabaza Middle and Dr. Raul Garza Elementary schools, where most of the mold was found and cleaned up.

Limon said that the mold consultant had given all 13 campuses a "clean bill of health" and that he did not anticipate any future substantial cost in mold clean up.

A statement issued by the company stated that there was no basis to the school district's allegations of fraud and that "we believe that we would have prevailed at trial."

The statement added that no mold was found in any of these schools and that the school board has not done any mold remediation over the last 2 years since moisture concerns were raised.

"Honeywell had a successful working relationship with the San Benito schools for more than eight years," the statement adds. "All along this case was shaped by the district's mold consultant, Assured Indoor Air Quality."

The statement said that the mold consultant gained millions of dollars to assess the cause of moisture in the schools and resolve the problem. By Pallavi Agarwal, San Benito schools' mold lawsuit settled, **The Valley Morning Star** (September 2, 2004).

1.15 Hilton settles over moldy Hawaii hotel

HONOLULU -- A judge has approved a $1.8 million class action settlement between Hilton Corp. and guests who stayed in a mold-infested Waikiki hotel tower, lawyers for the plaintiffs said.

Experts said the mold was a variety that can trigger asthma and also irritate the eyes, nose and throat, but no serious health problems were reported.

Hilton denied liability but agreed to the settlement, said a statement from the law firm of Davis, Levin, Livingston and Grande. Calls seeking comment from Hilton representatives at corporate headquarters in Beverly Hills, Calif., were not returned.

Hawaii Circuit Court Judge Sabrina McKenna gave preliminary approval to the agreement Friday, the lawyers said.

Mold overtook the 453-room Kalia Tower in the Hilton Hawaiian Village complex and forced its closure in 2002, about a year after the $95 million building opened.

The tab for cleanup was more than five times the original $10 million estimate. The tower reopened in September 2003. Hilton sued 18 companies and individuals, saying design and construction defects produced excessive humidity that encouraged the mold to grow.

About 2,900 people who stayed at the building during June 14-July 23, 2002, will be eligible for $50 in cash or $150 worth of travel coupons for each night they spent there, said Price, Okamoto, Himeno and Lum, the other law firm involved in the lawsuit. *As reported by the AP Biz Wire, Seattlepi.com, on Saturday, December 24, 2005*

1.16 Hayward tenants settle mold suit

A group of 124 current and former Park Hill Apartments tenants who had filed a lawsuit alleging mold infestation and other substandard living conditions settled for almost $4 million, their attorneys announced this week.

For plaintiff Judy Sedano, whose children were constantly sick living in an apartment that sometimes leaked "like it was raining inside," the settlement money will go to a college trust fund, a vacation and possibly the purchase of a home so they'll never have to deal with such problems again, she said.

"I'm very happy," said Sedano, who lived at Park Hill for nine years and watched the health of her 7- and 11-year-old kids improve once she moved to another Hayward rental. "They're sleeping now at night. Before they were always coughing and wheezing."

The suit, initially filed in 2001, sought more than $5 million in damages for unhealthy living conditions, racial discrimination, retaliation and sexual harassment. It alleged that the complex was poorly constructed and suffered from water and raw sewage leaks, defective furnaces and cracked walls.

The tenants suffered health problems such as asthma, headaches and skin, upper respiratory and sinus ailments from the mold infestation, said their San Francisco attorneys, Kenneth Greenstein and Steven McDonald. Park Hill Apartments owner Rodney Busk, who built the nine-building complex on upper B Street in the 1960s, could not be reached for comment. Park Hill's attorney, Orange County-based John Wilcoxson, did not return a message.

A manager at Park Hill, 22842 Vermont St., referred questions to Hayward attorney Ron Peck, who also didn't respond to a message.

McDonald said the settlement is "definitely one of the largest" of its type in the Bay Area and goes to show "the power in numbers" and determination. The settlement offer was made before a May 14 trial date, he said.

After unsuccessful attempts to settle in conferences with a judge, McDonald said, his firm conducted a rare "destructive testing," in which walls and the roof were opened up.

"The water was pouring in," McDonald said, and the roof was dry-rotted. That may have helped precipitate the settlement offer, he added.

All but four of the plaintiffs have moved out of the 109-unit apartment complex., including Guadalupe Sandoval, who lived there with his wife and two children for about 18 months.

A construction foreman, Sandoval said his family would report a perpetual leak in his bedroom and the management would respond by giving them a 35-gallon bucket.

"The carpet was always wet. The leak would wake us up, and we'd end up sleeping in the living room," he said, adding that his kids and wife suffered from constant headaches and colds.

He, too, is pleased by the settlement and hopes it prevents landlords from repeating such offenses.

Both he and Sedano said a lot of people are living in such conditions but are afraid to do anything about it or don't think their efforts will matter.

"People told me '(Busk) is too powerful. People are just wasting their time (on the lawsuit,'" Sedano said. "I didn't care about the money. I just wanted my kids' (health) tested. I felt like no one was listening to me."

Plaintiff Tracy Ryan, who now owns a house in Modesto, said she is relieved the suit is over and thinks it may lead to some greater good.

"If we hadn't taken the step we did to try to make living conditions better," it could have resulted in a death due to illness or injury, she said.

The apartments range in rent from $900 to $1,495 a month, and are relatively spacious. One tenant, who asked to remain anonymous, has lived there for less than a year but noticed mold and moisture beading up on the walls during the rainy season.

However, another tenant, who also wanted to remain anonymous, said she hasn't had any problems with her unit.

The size of the individual payouts in the case are confidential, McDonald said. The settlement total was $3.83 million. *By Michelle Meyers, STAFF WRITER, Oakland Tribune; Friday, June 25, 2004 - HAYWARD*

1.17 Mold claims spread to cars

The case of a man who says he suffered debilitating illness caused by a leaky utility vehicle demonstrates that insurers' exposure to mold damage claims extends beyond homeowners coverage, an insurers trade group is cautioning. "Mold claims may arise from any property that can support mold, especially property that is subject to water damage," a bulletin from the Alliance of American Insurers warned. In the reported case the claimant is suing an auto dealer and vehicle manufacturer.

The Alliance advisory comes as insurers throughout the nation are seeking to limit their exposure after seeing a surge of mold-related illness claims related to water-damaged homes--primarily in Texas and California. In the auto case referred to by the *Alliance, Greene v. General Motors Corporation*, Watauga County Superior Court in North Carolina was the venue.

According to the Alliance, the complaint filed in March by Timothy Everett Greene and wife Amy V. Greene alleged that they bought a 1999 Cadillac Escalade in 2000 and shortly after buying it they noticed a foul odor in the car and discovered moisture in the carpets. The Escalade was returned to the dealership, Mack Brown Inc., several times and the dealership attempted to repair water leaks over the next year, without success.

The Greenes also alleged that soon after purchasing the Escalade, Mr. Greene began suffering a number of health problems, including fatigue, migraine headaches lasting twelve to

fifteen (12-15) hours, ear aches, loss of ability to taste, body tremors, dizziness, loss of memory, confusion, irregular urination, sinus problems, as well as respiratory problems.

General Motors said that the toxic-mold lawsuit was filed after they asked to inspect the vehicle in order to get medical details.

After being examined by a specialist, it was determined that mold and yeast were growing in Mr. Greene's sinuses. Testing of the Greene's home, tour bus, church, and the Escalade revealed that mold was growing only in the Escalade. Mr. Greene underwent multiple surgical procedures in an effort to rid himself of the mold growing in his sinuses and remains under his doctor's care.

In their action, the Greenes accused GMC and Mack Brown of unfair or deceptive trade practices, breach of contract, negligence, including fraud as well as infliction of emotional distress.

GMC was sued also for breach of warranty and punitive damages. It was alleged that the manufacturer concealed design defects that cause water intrusion problems with this model of the Escalade.

A total compensatory damage figure was not specified, but $200,000 in medical expenses were claimed. The suit alleged that Mr. Greene is totally disabled and Ms. Greene suffered loss of consortium. "While allegations made in a complaint only give one side of the case, this is a reminder that mold claims are not restricted to structures on real property," the Alliance said.

Leslie Gentry at Mack Brown said he had no contact information, but that the legal issues are being handled by lawyers provided Century Insurance.

Jay Cooney, director of legal communications at General Motors Corporation released a statement that: "Contrary to the assertions of Mr. Greene's lawyers, there is not a widespread problem with this vehicle. Of the more than 87,000 Cadillac Escalades sold since October 1998, GM is not aware of any other lawsuit like this one involving the Escalade.

"We understand that Mr. Greene's attorneys are suggesting that the mere existence of a Technical Service Bulletin from GM indicates that a problem exists. This bulletin was issued to provide information that could assist dealers in the proper service of a vehicle if a customer commented on water entering the rear-compartment area of the vehicle.

All that the “bulletin proves is that GM cares about the service its customers receive by providing helpful information to our dealers.”

"We also understand that Mr. Greene is claiming that he suffered health problems due to exposure to mold. When lawyers contacted us before the lawsuit was filed, we requested information regarding his claim.

GM specifically asked for the opportunity to inspect Mr. Greene's Escalade and for medical information related to his alleged health problems. Mr. Greene's lawyers answered these

reasonable requests by filing a lawsuit and publishing an inflammatory press release." ---Daniel Hays, *Warning: Mold Claims Spread To Cars*, **NU Online News Service (**May 3, 2003).

1.18 Canada Toxic Mould Lawsuits

By: Ron Chepesiuk

Take action against mold, a billion dollar problem that can cause serious illness and even death.

The houses in the Victoria Village subdivision of Port Perry, Ontario, may be young, but their owners know something is terribly wrong with their investments. A black rot eats away the posts holding up the porches, while the paint on many houses peels and crumbles, inside and out. The presence of toxic mold, though, is the most serious problem. Worried residents know that the dangerous fungus can lead to a number of illnesses, including asthma, nausea, migraines, respiratory illnesses... And even death.

"We've had to buy new mattresses," residents Kathy McIntosh, told the press. "Anything that was in there (her house) had to be condemned." McIntosh has joined fellow residents in a $5 million lawsuit against the developer and the township of Scugog. The lawsuit alleges negligence, misrepresentation and breach of contract on the developer's part and claims the township failed to carry out proper inspections and ensure that the developer was meeting all the building codes.

The toxic fungus Stachybotrys Chartarum grows especially well on water-damaged sheet rock. From healthandenergy.com.

The Port Perry lawsuit is one of several such recent lawsuits in the U.S. and Canada. In one Toronto suburb, for example, parents who say their children have been ill from toxic mold have launched a $1 billion suit against the Peel Region Separate School Board. Meanwhile, leaky condos in Vancouver have affected a huge population and sparked a provincial inquiry. "The damage has been assessed at $1 billion in repair costs for houses built since 1986," revealed Dr. John Straube, a professor at the University of Waterloo in Waterloo, Ontario, who serves as a consultant on the toxic mold problem.

Experts predict Canadians and Americans will be hearing a lot about incidents of toxic mold in the coming years. The Ottawa-based Canadian Mortgage and Housing Corporation (CMHC) warn in a pamphlet published at its web site that "if you live in a damp house, or have ever experienced flooding, your house may be breeding an often invisible and always unwelcome intruder - mold."

Ken Ruest, Senior Researcher with the CMHC points out that, "a lot of people are unaware there's a toxic mold problem until their house is so badly affected they can't live in it anymore."

1.19 Court Finds Toxic Mold Caused Worker's Health Problems

Nathan Cameron worked for Merisel Americas, Inc., a computer hardware and software company. Between December 1998 and April 2000 he worked in the company's Cary office. This office had a history of water leaks and moisture problems.

Cameron noticed that his windows leaked when it rained and that the walls, ceilings, and carpets in his office had been damaged by water and mold. In 1999, the office next door to Cameron's flooded, increasing the water damage to the carpets and the mold on the walls.

While he was working in the Cary facility, Cameron started to have trouble with his balance and vision. In the fall of 1999 a doctor determined that he had developed irreversible damage to his inner ear and vestibular system, resulting in a permanent loss of balance. In 2002 Cameron and his wife sued Merisel, claiming that Cameron's workplace was contaminated with toxic molds and that its failure to correct the problem or warn Cameron caused his permanent injuries.

After numerous pre-trial activities, the case went to trial in Wake County in March 2006. The jury found that Merisel was liable for damages to Cameron. It awarded him $1,600,000 for his injury and awarded his wife $200,000 for her loss of his company and services. Merisel appealed to the North Carolina Court of Appeals.

Merisel argued that Cameron had not proven that his illness was caused by exposure to toxic molds at work and that the trial court therefore should have dismissed the case. The court disagreed, finding that Cameron had produced ample evidence of the Merisel's mold having caused his problems.

According to Cameron's account, before Merisel purchased the facility in 1998, it had received inspection reports indicating that it had moisture problems. A number of Cameron's co-workers claimed that they had various respiratory problems and complained about the mold to Merisel's maintenance supervisor, Brian Goldsworthy. Goldsworthy notified company administrators, but the mold problem continued. Goldsworthy reportedly expressed that he thought the complaining employees were trying to avoid work.

In 1999, air quality tests confirmed that mold was present in the building. After these test results, Merisel replaced Goldsworthy with another supervisor, who was entrusted with building maintenance and specifically instructed to solve the moisture problems in the Cary building. In January 2000 a Merisel employee lodged a complaint about mold and moisture with NC OSHA. In March, tests revealed the presence of Stachbotrys mold in Cameron's office. Cameron's health had been fine before he went to work at Merisel, but it quickly deteriorated while he worked in the Cary facility. Cameron's doctor diagnosed him with bilateral vestibular dysfunction. The doctor testified that he had considered other causes of ear diseases, such as brain tumors, skull fractures, chemotherapy, and various other factors that can affect vestibular function, but had ruled them out. In his opinion, Cameron's condition was caused by poisoning of the ears by exposure to some toxin. He did not learn that Cameron had been exposed to toxic molds until after making this initial diagnosis. Once he heard about the presence of Stachybotrys

mold in Cameron's office, he concluded that the loss of Cameron's vestibular function was, in his best medical judgment, due to exposure to a mycotoxin from the fungus.

Cameron also brought in two other expert witnesses, an expert in environmental medicine and a mold expert, who also testified that the mold at the Cary facility presented a health hazard and that mold was most likely the cause of Cameron's illness. The court held that this was more than ample evidence that the mold at Merisel had caused Cameron's problems. It affirmed the trial court's decision. *Cameron v. Merisel Properties, Inc.*, Court of Appeals of North Carolina, No. COA07-54 (11/06/07)

OSHA requires employers to protect their workers from a variety of hazards, known and unknown. An employer who knows about a hazard should address it immediately. It appears clear that if the supervisor and administrators who received the employees' complaints about the mold had responded quickly and adequately, the company could have avoided paying such hefty damages.

http://safety.blr.com/display.cfm/id/104952

1.20 City of Fargo, North Dakota fights paying house claim

BISMARCK – Gary and Rhonda Ficek thought they'd found a great house to raise their three growing sons.

With Fargo's Elephant Park and tennis courts directly behind 1831 3rd St. N., Gary Ficek said Wednesday the home was "an absolutely dream location" when they found it in 1996.

By 2002, the house was falling down. It was heaving and settling in different directions. It leaked, causing mold to move in. Rafters had pulled apart from the roof beam, inviting squirrels to nest in the rafters. Experts warned them the house was so unsafe they should get out. They did. And they sued.

Last year, a Cass County jury awarded the Ficeks $323,000 after finding Fargo and the previous homeowners at fault.

Jurors agreed the previous owners had negligently remodeled the house and Fargo building inspectors had approved it in the course of more than 40 visits.

The two-story home, with 2,952 square feet, and the land it sits on were appraised at $168,300 in 2003. The proposed appraisal of the land and home this year is $22,500, which is entirely comprised of the land's value.

The Ficeks have not lived in the home for two years.

The couple who'd remodeled and sold the house, James and Carole Morken, paid the Ficeks $107,000 for negligence, $56,000 for mental distress and punitive damages and tens of thousands more for the costs of the lawsuit.

James Morken, a West Fargo developer, could not be reached for comment at his home Wednesday evening.

Fargo has resisted paying the $133,000 the court says it owes the Ficeks. It appealed to the North Dakota Supreme Court Wednesday, arguing that city building codes and inspections are only for the "general public." They're "not for the specific benefit of an individual."

A building permit and approval for occupancy "does not make a municipality an insurer against defective construction," the city argues in its court briefs. Fargo's attorneys want the justices to order a new trial or declare judgment in the city's favor.

The city's attorney, Patricia Roscoe, said that if the justices let the jury's verdict stand, "every building inspector has now become a project manager."

She said, "When a building inspector goes out, he's there for a snapshot in time."

The justices seemed skeptical.

"Then why bother sending the building inspector out?" Justice William Neumann asked during Wednesday's arguments. "Is that a meaningless act?"

The Ficeks' lawyer, Ron McLean, said Fargo officials admitted during the trial that the house does not meet building codes. Among other problems, a large part was built on concrete piers not dug below the frost line as required.

"The city's building inspector candidly admitted that he 'just missed it' with respect to approving the foundation on this building," McLean wrote in his brief.

Justice Dale Sandstrom wondered if upholding the jury's verdict could create a situation in which a city is found responsible for a business' loss if a police officer fails to notice a broken lock on the back door of a store and thieves subsequently make off with property.

The Ficek case has frightened the North Dakota League of Cities and the International Code Council, which develops model building codes. Both groups submitted friend-of-the- court briefs. The groups, along with Fargo officials, argue that if the Ficeks prevail, it would create a huge cost for cities and excessive delays in future building.

They want North Dakota's high court to give them the benefit of the "public duty doctrine," which says cities have a duty to the public at large and not to individuals.

"Without the doctrine, cities would have to provide round-the-clock inspection of all building projects or end up serving as insurer for all errors made by the builder," the league argued in its brief. By Janell Cole, *City of Fargo [North Dakota] fights paying house claim*, **The Fargo [North Dakota} Forum**, (April 29, 2004).

1.21 Beware of illegal and unregistered fungicide

On July 9, the U. S. Environmental Protection Agency ordered ParPac Inc. of Swanzey, N.H. to stop selling its unregistered pesticide "Dry Pac Wall System TM," which the company claims controls fungus and toxic molds such as Stachybotrys, also known as Black Mold.

The stop sale order further requires Par Pac Inc. to remove all pesticide claims from their advertising and labeling and to notify EPA of the steps they have taken within 30 days. EPA will be monitoring compliance with this stop sale order as well as the Internet for illegal pesticide sales.

"Dry Pac Wall System TM" is a cellulose insulation product used in building construction. Under the "Federal Insecticide, Fungicide and Rodenticide Act**,** products claiming to prevent, destroy, or repel pests, including molds and fungus, are considered pesticides and must be registered."

During EPA's comprehensive pre-market registration process, a company must first prove not only that the product is safe, but also that it is effective for consumer use, before said company can make a legal claim that its product protects people from disease-causing microorganisms.

The label of all EPA registered products must bear the EPA registration number, plus directions for use and any safety precautions. According to the Center for Disease Control web site, Stachybotrys is a black mold, which in the presence of moisture, can grow on material with a high cellulose and low nitrogen content, such as fiberboard, gypsum board, paper, dust and lint.

The common health concerns from all molds include fever-like allergic symptoms. Certain individuals with chronic respiratory disease may experience difficulty breathing, and individuals with immune suppression may be at increased risk for infection from toxic molds.

1.22 The reasons behind the rise in mold lawsuits

There is no doubt that the number of claims for mold damages have been rising. According to the Insurance Information Institute (III), repair and litigation costs related to mold claims topped $1.2 billion in 2001. The III estimates there were 10,000 mold-related lawsuits pending that year, a 300 percent increase in a two-year period. The state with the largest number of new cases was Texas, which accounted for seventy percent of all mold cases filed that year. This was accompanied by a fourteen-fold increase in the number of mold-related insurance claims in that state between the first quarter of 2000 and the fourth quarter of 2001, according to Texas Department of Insurance figures (http://www.tdi.state.tx.us/commish/news/molddata2.html).

Although the cynical would say that the rise in mold-related suits is primarily a method of keeping attorneys and experts fully employed, there are other factors which have led to its growth, including:

1.22.1 Population shifts

Problems with mold growth are concentrated in the southern and western parts of the country. These are also the areas with the greatest population growth. While the total United States population grew by 13.1 percent between 1990 and 2000, Florida grew by 23.5 percent, Georgia 26.4 and Texas 22.8 percent. So the population is shifting to areas likely to have mold problems.

1.22.2 The rise of new buildings

This population growth is necessarily accompanied by an increase in the number of housing units. These newer units are built using newer construction methods and materials which keep the building more airtight, lowering the heating and cooling costs. This air tightness, however, also tends to trap moisture inside the walls, resulting in more mold. The use of synthetic stucco also caused problems in many cases.

1.22.3 Rising property values

Double digit growth rates in housing prices means that any property damage is suddenly more costly. It is more inviting to pursue compensation for damages to a house that is now worth $300,000 than it was a few years ago when it was worth half that amount.

1.22.4 More plumbing

Homes are now built with more bathrooms than previously. This increases the potential for water damage and toxic mold.

1.22.5 Advances in medical science

A greater understanding of potential health problems related to mold means that it is no longer viewed as just an eyesore, but as a toxin.

1.22.6 Increased public awareness

The I.I.I. last year did a Nexus search for toxic mold articles and found an increase from 1255 articles in 1998 to 3,685 in 2002 (based on data through May 17 of that year). Suits by prominent individuals including Ed McMahon and Erin Brockovich have added to the publicity.

1.22.7 Government action

State legislatures and agencies have conducted hearings and passed new laws and regulations, most notably California's Toxic Mold Protection Act (Senate Bill 732) which went into effect in January 2002. At the federal level, H.R. 1268 The United States Toxic Mold Safety and Protection Act of 2003 (the Melina Bill), currently in committee, commands a wide range of actions to be performed by the Environmental Protection Agency, the National Institutes of Health, the Federal Emergency Management Agency, the IRS, the Department of Housing and Urban Development, and other federal entities. Health and environmental agencies are also addressing the issue by conducting studies and publishing information. The references section on page four lists some of these.

1.22.8 Mold industry

The past few years have seen the establishment of a mold testing and remediation industry, complete with its own associations, which has an interest in promoting awareness of this topic. These companies promote themselves to realtors as well as to the general public.

1.22.9 Numerous successful mold litigations

Success breeds imitation. The last few years have seen several mold cases which have produced large returns, led by the Ballard case in Texas with its $32 million award. Large awards make it worthwhile to pursue litigation.

1.23 Mold Law Frequently Asked Questions (FAQ)

Q. I took your advice and had the bathroom mold tested. Yesterday, I received the devastating news that one of the molds discovered in the mold lab analysis was Stachybotrys mold.

What do I do next? I live in a co-operative housing project in Northeastern Ontario. I do not know if any local lawyers or even if they would take my mold problem seriously. The mold lab has taken it very seriously, and the lab recommended that I see my doctor. If I can avoid any drawn out court battle, that outcome would be good. This Co-op has insurance for such things. I just do not know what steps need to be taken first. I had contacted the City Building Standards department a few weeks ago, and I was faxed a report to fill out. Should I follow through with that first, or seek legal advice? This Co-op is government run, and I just know that my unit is not alone here in having a mold problem. Most residents are too afraid to complain.

A. Yes, do file the complaint form with the city building department, especially in view of the government ownership of your co-op project. Do your complaint in great detail and attach your mold lab reports to it. Your official written complaint might get co-op board results and it will strengthen your prospective mold lawsuit. You would be wise to move temporarily to a mold-safe place to live until your co-op apartment has been mold remediated successfully and it tests as being mold-safe by an independent Certified Mold Inspector who was uninvolved in the mold remediation effort. Learn the 25 recommended steps of mold remediation to make sure that the co-op does the mold remediation thoroughly and completely.

The best type of local physicians to seek mold diagnostic help from would be a pulmonary physician (lung specialist), neurologist (for possible brain and central nervous system damage), and an infectious disease specialist. Learn about the medical mold diagnostic and treatment procedures in the in depth ebook Mold Health Guide. Find a real estate or environmental attorney to represent you in getting the co-op to do mold remediation and to pay for your needed medical diagnostic and treatment procedures (if any). Buy a copy of the ebook Mold Legal Guide for both you and your attorney to read to know about the prosecution of mold health claims against the co-op.

Q. I have sticky situation and I am looking for some direction. There was a minor leak under my kitchen sink and some missing grout at the backsplash, we removed everything and replaced the cabinet, repaired the drip at the fridge water filter shut off valve, removed 2x4's replacing them with new 2x4's beyond the scope of the mold/mildew, replaced the insulation, redirected the sprinklers outside (so as not to hit stucco exterior wall had three mold samples (air) taken after the remediation and we received a clearance from a licensed laboratory. The problem is my home is in escrow and the buyer wants assurances that the mold will not come back. What can I do? I have already done the work and it passed testing. Is there anything I can do to assure the buyer that the problem is gone? This escrow is due to close within 5 days. EPA offers no advice, says it is a judgment call. I need some help. Thank you in advance for your assistance.

A. Congrats on the thoroughness of your mold remediation efforts and successful clearance tests. Have you mold tested your entire home? Suggest that the buyer hire his or her own Certified Mold Inspector to check both the mold remediation area and to test the air of each room, basement/attic/crawlspace/garage, and the outward airflow from each heating/cooling duct

register for the possible presence of elevated levels of airborne mold spores, in comparison to an outdoor mold control test. If the buyer us not willing to rely on the inspection and testing done by his or her own-hired inspector, there is probably nothing else you can do to save the sale.

To enable adequate time for mold testing and mold laboratory analysis reports, you need to delay the closing for at least 14 to 21 days. Mold laboratory results from collected mold samples will take 7 days along just for mold growth in mold culture plates prior to mold laboratory analysis by a mold microbiologist. You should not provide any assurance that there will never be a future mold problem because mold can begin growing anywhere as the result of future roof leaks, plumbing leaks, high indoor humidity, etc. You don't want to close this deal without getting legal help from a local attorney to draft a release of liability for signature by the buyer that the buyer has done his or her own mold inspection and testing and that he or she accepts the house "as is" with no mold warranty or guarantee of any kind. If you don't protect yourself legally, selling your home could be the beginning of years of a mold lawsuit by this particular concerned buyer. (Learn more about mold lawsuits by reading the Lawsuit Section of this book).

Q. Prior to signing the contract on the purchase of a new [name of builder] home I was presented with the following "Disclosure". "The framing package delivered to this home site was found to contain active mold. The mold was pervasive but limited to the second floor frame materials. Production was halted, the contaminated surfaces were washed and sanitized, and moisture levels were monitored until they reached [name of builder] maximum standards of 15% or less, at which time construction resumed." Should this be of concern to me? Does the home warrant an inspection by a mold expert?

A. Most mold remediation is done poorly because of ineffective mold remediation procedures, poor worker training, and job shortcuts taken by contractors and their employees. You don't know how "the contaminated surfaces wee washed and sanitized." Usually washing and sanitizing are not enough to get mold out of moldy timbers and building materials. Learn the 27 steps for safe and effective mold remediation. To know whether the new home is mold-safe for you to live in, you would need to hire your own Certified Mold Inspector for indepth mold inspection and testing, including fiber optics inspection for hidden mold growth inside ceilings, walls, floors, and the heating/cooling equipment and ducts. Even if you can find and remediate all mold growth in this new home, you would still own a home with a mold history which you would probably have to disclose to a future buyer or tenant. Learn about new home mold problems. You need also to consult with your attorney about the legal consequences to you of the mold disclosure if your home and family suffer future mold damage because of the allegedly-remediated mold problem.

1.24 Montana State Mold Law for Real Estate Sellers and Landlords

70-16-703. Mold disclosure statement on real estate documents -- disclosure of prior testing -- immunity from liability.

(1) A mold disclosure statement may be provided on at least one document, form, or application executed prior to or contemporaneously with an offer for the purchase and sale, rental, or lease of inhabitable real property. The seller, landlord, seller's agent, buyer's agent, or property manager may provide the following disclosure statement to the buyer or tenant, and the buyer or tenant shall acknowledge receipt of this disclosure statement by signing a copy of the disclosure statement:

“MOLD DISCLOSURE: There are many types of mold. Inhabitable properties are not, and cannot be, constructed to exclude mold. Moisture is one of the most significant factors contributing to mold growth. Information about controlling mold growth may be available from your county extension agent or health department. Certain strains of mold may cause damage to property and may adversely affect the health of susceptible persons, including allergic reactions that may include skin, eye, nose, and throat irritation. Certain strains of mold may cause infections, particularly in individuals with suppressed immune systems. Some experts contend that certain strains of mold may cause serious and even life-threatening diseases. However, experts do not agree about the nature and extent of the health problems caused by mold or about the level of mold exposure that may cause health problems. The Centers for Disease Control and Prevention is studying the link between mold and serious health conditions. The seller, landlord, seller's agent, buyer's agent, or property manager cannot and does not represent or warrant the absence of mold. It is the buyer's or tenant's obligation to determine whether a mold problem is present. To do so, the buyer or tenant should hire a qualified inspector and make any contract to purchase, rent, or lease contingent upon the results of that inspection. A seller, landlord, seller's agent, buyer's agent, or property manager who provides this mold disclosure statement, provides for the disclosure of any prior testing and any subsequent mitigation or treatment for mold, and discloses any knowledge of mold is not liable in any action based on the presence of or propensity for mold in a building that is subject to any contract to purchase, rent, or lease."

(2) Whenever a seller or landlord or an agent of either has knowledge that a building has mold present, the seller, landlord, or agent of either shall, prior to or upon entry into a contract for the purchase, rent, or lease, disclose to the buyer or renter the presence of the mold. Whenever a seller or landlord knows that a building has been tested for mold, the seller or landlord, prior to or upon entry into a contract for the purchase, rent, or lease of that building, shall advise the buyer or tenant that testing has occurred and shall provide to the buyer or tenant a copy of the results of that test, if available to the seller or landlord, and evidence of any subsequent mitigation or treatment. A prospective buyer or tenant who contracts for the testing may receive the results of that testing and shall provide a copy of the results of that test, if available, to the seller or landlord. The furnishing of test results and evidence of mitigation or treatment is not to be construed as a promise, warranty, or representation of any sort by the seller, landlord, seller's agent, buyer's agent, or property manager that the test results are accurate or that the mitigation or treatment is effective. This section does not create a contingency on the purchase of the property or any right to rescind a contract for purchase unless the contingency or right to rescind is an express term of the applicable contract.

(3) A seller, landlord, seller's agent, buyer's agent, or property manager who provides the disclosure in subsection (1) and complies with subsection (2) is not liable in any action based on the presence of or propensity for mold in the building.

1.25 Mold concerns continue to grow along with health risks, lawsuits

They come in a variety of sizes, colors and patterns. They thrive in warm, moist environments. Not tropical flowers -- molds. Fungi. Spores. A natural fauna key in completing the circle of life in nature that is a killer in commercial real estate.

Molds and mold losses create increasingly important and difficult issues in the commercial real estate market. And with stars like Ed McMahon, Erin Brockovich and Bianca Jagger all making some form of mold claim, molds continue to take center stage in commercial real estate litigation.

The 25-story Kalia Tower at Waikiki's Hilton Hawaiian Village is one example. Opened in 2001 at a price of $95 million, the Tower was closed by Hilton less than a year later because of persistent mold problems. After spending $55 million to clean up the mold, the hotel giant sued two dozen architects, contractors and engineers, alleging that they were responsible for creating the conditions that allowed the mold to grow.

All mold needs to grow is damp, warm conditions and nutrients such as paper or wood. Left in peace in these conditions, growth of a mold colony is inevitable. By the same token, defining the conditions in which mold will grow also reveals the way to prevent that growth from occurring. Deprive a mold spore of warmth, dampness or nutrition, and it will remain inactive.

Real losses

According to the Insurance Industry Institute, losses for mold-related property damage claims rose from $700 million in 2000 to $ 2.5 billion to $3 billion in 2002. Jury awards remain high despite growing evidence that the average cost of mold-remediation is $34,000 in residential construction and $200,000 in commercial construction.

Case in point, Melinda Ballard, a Texas homeowner was awarded $32 million in compensatory and punitive damages from a jury because of her insurer's alleged unwillingness to pay a mold claim (the award was later reduced on appeal to $4 million with all punitive damages removed).

The insurance industry has severely limited coverage for mold-related losses because of a flood of mold-related claims in California and Texas, although coverage is beginning to emerge in environmental insurance at a significant price.

Real health risks

On May 25, the Institute of Medicine, an arm of the National Academy of Sciences, issued "Damp Spaces and Health," the first comprehensive evaluation of the existing scientific

literature to determine the true nature and extent of health problems associated with mold exposure.

The Institute report concludes that there is a link between exposure to mold and upper respiratory symptoms, wheezing, asthma symptoms in sensitized persons and allergic reactions in sensitized persons. Evidence also exists to support a link between mold and development of shortness of breath and lower respiratory illness in otherwise healthy children.

Significantly, however, the Institute report found there is not a strong link between mold exposure and many of the conditions popularly attributed to it, including chronic obstructive pulmonary disease, skin symptoms, gastrointestinal problems, fatigue, neuropsychiatric symptoms, cancer, reproductive effects and rheumatologic and immune disorders and pulmonary hemorrhage.

Commercial litigation

Even with this growing array of data, those in commercial real estate should remember the lesson of the Kalia Tower: commercial mold litigation is not over injuries but over breached warranties and alleged failures to disclose.

Mold awareness must be constant from the first sketch of a new building to the last day of an owner or manager's involvement with it.

The American Society for Testing and Materials has created a screening process that can be used to help determine whether mold is present in a structure. Other trade associations and industry groups such as the Mortgage Bankers Association of America are deeply involved in efforts to ensure accurate identification, monitoring and remediation of mold problems.

Governmental agencies ranging from the U.S. Environmental Protection Agency and the Occupational Safety & Health Administration to the New York City Department of Health and Mental Hygiene have published valuable guidance documents on mold that are available on-line to guide those in commercial real estate in the pitfalls of mold.

Materials matter

Mold control is moisture control. During design and construction, use materials that are not conducive to the growth of mold when and wherever possible. Select engineers and contractors familiar with mold issues and prevention. Don't assume the knowledge is there; ask questions and check references.

Inventory areas that could produce mold problems in advance. While broken pipes and roof leaks from hail storms may not be anticipated, knowing the location of such things as air conditioners, moisture-generating appliances, steam or exhaust pipes, drains and other equipment that generates dampness can save time and trouble later.

After construction, conduct regular inspections with emphasis on areas that produce mold-friendly conditions. Pipes, roofs, gutter and drain pipes, air conditioners and a host of other locations, appliances and equipment that can produce moisture must be checked, and checked regularly.

A formal operations and maintenance plan should be developed and followed rigorously. Inspection should be documented and pictures taken as necessary. If repairs to structures or roofs become necessary, ensure that any entering moisture has been removed. It is just as important as stopping future leakage.

If mold is discovered, act promptly. Mold grows. It will continue to grow as long as it has access to food and warmth. Leaving moldy conditions in place increases problems and the costs of repair.

Select remediation contractors carefully; check experience, credentials and references. Having a couple of maintenance workers pour bleach on an affected area may kill the mold, but it will not fix the root cause and will not remove the perception that the problem is fixed.

Document all phases of the operations and maintenance plan. Leave a record of what happened and how it was remedied. Pictures are an important adjunct to any remediation project and when the time comes to sell. Buyers should and will inspect. Having records is essential to answer the inevitable questions.

With mold, as with so many other issues, there is no substitute for common sense and quick, persistent, directed action. Vigilance is the first line of defense against this eternal problem.

By Joe Stuckey, Special to Houston Business Journal. Joe Stuckey is an environmental attorney and member of the Environmental Practice group at Winstead Sechrest & Minick PC, which relates to real estate transactions, financial transactions, corporate risk management, litigation, personal injury and work-related exposures and property damage. From the September 17, 2004 print edition of the Houston Business Journal.

Chapter 2

2 Filing class action lawsuits

2.1 What is a class action?

A class action lawsuit is a court procedure under which a party, or a group of parties, may sue as representatives for a larger class of people. To proceed, the Federal court must permit the class action lawsuit. If the class action is certified, members of the class must be given a notice, and an opportunity to exclude themselves from the class action. Only the class members who ask to be excluded are not bound by the judgment in the case.

2.2 Class action prerequisites and legal procedure

Rule 23, Federal Rules of Civil Procedure

2.2.1 Prerequisites to a class action

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

2.2.2 Class actions maintainable

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

2.2.3 Determination by Order and Class Actions

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into

subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

2.2.4 Orders in conduct of actions

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

1. Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence/argument.

2. Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all members of any step in the action, or of the proposed extent of the judgment, or the opportunity of members to signify whether they consider the representation fair & adequate, to intervene & present claims or defenses or otherwise to come into the action.

3. Imposing conditions on the representative parties or on intervenors.

4. Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.

5. Dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

2.2.5 Dismissal or compromise of class action

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Chapter 3

3 Legal implications of mold contamination of HVAC systems

Design and construction defects claims related to sick building syndrome and building-related illnesses are growing in frequency and consequence. Exposure to Indoor Air Quality (IAQ) liability should be of major concern to designers, developers, tenants, building owners and managers, and service providers. --- *Construction Defect Claims and Litigation* (Aspen Publishers, Inc., 1995).

3.1 Sick building syndrome and IAQ lawsuits

The phrase “sick building syndrome” (SBS) has become part of the common vernacular over the last ten (10) years. Juries have been siding with plaintiffs in IAQ (Indoor Air Quality) lawsuits while toxic mold has led to the closing of office buildings and schools. In this new environment, HVAC engineers need to understand what their legal responsibilities are and how to protect themselves.

IAQ is not a "stand-alone" issue. Inadequate IAQ, sick building syndrome, and building-related incidents of illness have many causes: improper building and systems design, management decisions to cut costs, inadequate due diligence, and the building owner's and manager's failure to institute internal environmental management processes.

The 500,000 square foot Polk County Courthouse in Bartow, Florida cost $37 million to build in 1987. After five years of operation, the county faces a $37 million retrofit including replacement of all the duct work and temporary lease and relocation costs due to air quality problems. The county has sued all parties to the buildings construction, including interior designers and manufacturers.

The Polk Courthouse problems were described to be due to interdisciplinary error: bad design; bad construction; deficient specifications for the envelope and interior spaces; poorly positioned air intakes and exhausts; HVAC that was oversized by a factor of three and had no dehumidification controls; poor filtration; improper space planning; and lack of circulation and ventilation systems.

In 1985, HVAC work triggered a sequence of events that resulted in health problems among the tenants in a 24-story office building in El Segundo, California a month after they moved in, including dizziness, nose bleeds, disorientation, breathing difficulties, numbness, anxiety, and drowsiness.

The premises had to be evacuated during acute episodes, and several windows were removed in an effort to provide additional ventilation. The IAQ problems were never resolved, and the tenants moved out within a year.

In a lawsuit that followed, *Call v. Prudential*, the tenants claimed that the HVAC system was defective in design and installation, that certain building products and construction materials emitted toxic substances, and that building management waited too long to act to correct the problems.

Call v. Prudential is significant because it was the first IAQ/sick building syndrome case to reach a jury. It is also significant because it was the first time a judge has ruled that those involved in the design, construction, and installation of an HVAC system could be held liable under the theory of strict product liability. In addition, the general contractor ultimately was forced to bear the cost of the settlement due to the standard indemnity agreement it had signed with the developer. --- Bledel, *Indoor Air Quality Defects*, **Urban Land** 37 (June 1995.)

3.2 HVAC manufacturing and design defects

The American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE) indicate that fifty percent (50%) of all cases of poor IAQ result from badly designed or fitted HVAC systems. One cause of building-related illnesses (BRIs) is the growth and distribution of various biological contaminants in HVAC systems. HVAC systems may produce condensation, which contributes to the growth of microorganisms. Scientific studies have indicated that various types of non-toxic molds are sometimes present in HVAC systems.

Toxic and non-toxic molds have generated litigation for construction defects in commercial buildings and for personal injuries to individuals. The suits have been filed against contractors involved in the maintenance of HVAC systems. One such case involves the Martin County Courthouse in Florida ---*Centrex-Rooney construction Co. Inc., et al v. Martin County, Florida*.

Centrex-Rooney entered into a construction management agreement with Martin County in 1985 to serve as the manager of construction of the courthouse and adjacent buildings. Centrex assumed complete control over the site and project, including the selection of all subcontractors and the management and inspection of all their work. Centrex completed the project in 1988; however, in early 1989 the county made several complaints to Centrex about window and exterior wall leaks, mold growth, and excessive humidity. An investigation revealed problems with the HVAC system. While Centrex and its subcontractors attempted to remedy the problem, the humidity remained.

The complex was evacuated in December 1992 after more than 50 percent of its two 218 employees developed SBS symptoms. An IAQ expert hired by the county discovered a significant presence of two highly unusual and toxic molds that were not specifically identified in public documents.

The county filed suit against Centrex, their sureties, the project architect, and the concrete and masonry construction company for breach of contract and negligence for the improper design and construction of the courthouse.

While the HVAC manufacture and designers were apparently not sued directly by Martin County in this action, there is the possibility of continued litigation by way of a cross-complaint for indemnity filed by Centrex against the various subcontractors that it hired.

3.3 Legal liability of HVAC manufacturers for mold-related injuries

Prior to trial, the county settled with the architect and the concrete and masonry construction company for $2.75 million. The jury awarded $14 million to the county for the existing damage to the courthouse facilities. On appeal, Centrex claimed that the scientific principles underlying expert testimony—studies linking exposure to the toxic molds found in the buildings with health risks—were not generally accepted in the scientific community.

The Florida Court of Appeals rejected Centrex's claims, stating that each expert testified about numerous publications that were accepted in the scientific community. According to the Centrex-Rooney decision, plaintiffs may expand their causes of action from negligence for construction defects to negligence for personal injuries. IAQ plaintiffs may take the position that buildings and/or the HVAC system within are defective products.

3.4 Proposed HVAC design solutions

What, then, if anything, can manufacturers, designers, and contractors involved in the construction and maintenance of HVAC systems do to avoid or limit the liability for these types of potential lawsuits? Design specification for HVAC systems should include attention to factors that will minimize moisture accumulation since this is a major design defect that plagues HVAC systems today.

The HVAC system installed in any commercial building must be well-maintained, inspected, cleaned on a prescheduled and periodic basis, and repaired as needed. Inadequate maintenance may cause growth and dissemination of molds—toxic and non-toxic. There must be reasonable and consistent control of temperature and relative humidity. Finally, there should be a commissioning phase before a building is occupied to identify potential HVAC defects. ---Emily Wheeler, *Legal Implications of Mold contamination of HVAC Systems, Heating, Piping, Air* **Conditioning and Engineering website** (May, 2000). Emily Wheeler is an associate attorney with the firm Bechere, Kannett & Schweitzer in Emeryville, Calif. She specializes in cases involving asbestos contamination as well as SBS litigation. She can be contacted at this email address: ewheeler@bkskal.com.

Chapter 4

4 Possible causes of action and potential damage awards for mold contamination

Although no individual or company directly and intentionally causes the mold, there are still a number of ways to litigate the matter, and several different parties to seek recovery from. According to a 2001 report from Guy Carpenter & Company, Inc., Toxic Mold: A Growing Risk, of 9000 mold suits filed in the previous two to three years, five thousand were against insurance companies, one thousand against former homeowners, two thousand against builders and two thousand against home owners associations. Other targets include architects, engineers, building inspectors, property managers and real estate agents.

4.1 Common causes of action

Toxic Mold Injuries: Legal Theories of Liability

Negligence. Negligence is the most common theory of recovery in mold cases. Negligence is described as the failure of a responsible party to work with the degree of care that a person of reasonable prudence would use under the same or similar circumstances. For example, a contractor in a mold case may be negligent because they failed to use reasonable care in sealing the moisture out of your home or commercial building, and that failure caused an infestation of mold that resulted in illness, structural damage, and/or excessive clean-up costs.

Breach of Warranty. Many states have statutes that require builders and architects to warrant their work for a specified period of time. If your home or commercial building suffers from a mold infestation problem because of faulty workmanship, you may have a warranty claim. You should contact an attorney as soon as you discover mold or water intrusion, as many warranty statutes have time limitations pertaining to when you must bring your claim.

Failure to Disclose. Most states require previous owners to disclose material facts that affect the value or desirability of the property they are selling. If a previous owner knew of a potential mold problem and failed to tell the potential buyer, there may be a failure- to-disclose claim. As with breach of warranty, you should contact an attorney as soon as you discover mold or water intrusion because many laws have time limitations pertaining to when you must bring a failure-to-disclose claim.

The causes of action are as varied as the defendants. Common ones include:

- Property Damage - This would cover costs for remediation of water damage and attendant mold, as well as any lost business as a result.

- Bad Faith - Actions against insurance companies for failure to pay for remediation.

- Construction Defect - Failure to properly seal a home against water penetration, or for leaky pipes or air handling equipment.

- Negligence - Against building owners or maintenance companies for failure to properly maintain equipment and premises so as to produce healthy indoor air quality.

- Emotional Distress

- Breach of Contract - This includes written and implied contract terms of usability for purchased or leased property or for maintenance services.

- Product Liability - These are against manufacturers of products such as synthetic stucco or, in some states, the building as a whole can be considered a product.

- Fraud - Failure by sellers or their real estate agents to disclose the presence of mold or conditions that could create it.

- Personal Injury - Health problems caused by breathing mold toxins

Given this combination of factors, it is no wonder that when the insurance information firm ISO Properties, Inc., conducted an informal survey which asked, "Do you think mold will prove to be the next asbestos?" fifty-six percent of respondents answered, "Yes, mold is a long-term crisis that will plague insurers for years to come," and only forty-four percent saying it was "a minor concern that will fade away as the media hype subsides."

4.2 What is a tort?

A tort is a civil wrong **not** arising out of a contract or statute, usually but not necessarily negligent or unintentional, that injures someone in some way, and for which the injured person may sue the wrongdoer for damages. Legally, torts are called civil wrongs, as opposed to criminal ones.

For example, if you want to sue a landlord, real estate seller, realtor, or another party (defendant) for failing to disclose to you a mold contamination problem which the other party knows about, such harm to you is called a **TORT**.

4.3 Four elements of tort

There are four elements of a tort, all of which must be proven to the satisfaction of a judge (if a non-jury trial) or the jury (if a jury trial):

- **Duty.** The defendant must owe a legal duty to you (the plaintiff) such as a duty to disclose to you the existence of any mold contamination known about by the defendant.

- **Breach of duty.** The defendant breached that duty (e.g., failure to disclose to you molds contamination known about by the defendant).

- **Causation.** The breach was the direct or proximate cause of an injury to you (plaintiff).

- **Injury.** There must be an actual injury such as the costs of mold testing and remediation, health testing of you and your family, medical care for you and your family, incurring of additional living expenses (A.L.E.) because of the need to live somewhere else during the mold removal, loss of rental income (if it is a rental unit for which you are the landlord), as well as loss in commercial value of the mold-contaminated property.

4.4 Duties of a landlord

Landlords who fail to test for, and remove, mold contamination in their rental units (apartments, homes, offices, and commercial properties) are violating their **landlord duty to maintain fit premises.** Most States and many counties and cities have such a duty as part of their real estate laws and regulations. For example, the State of Arizona has the following *Ariz. Revised Statute 33-1342* **Landlord to maintain fit premises:**

A The landlord shall:
1 Comply with the requirements of applicable building codes materially affecting health and safety.
2 Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
3 Keep all common areas of the premises in a clean and safe condition.
4 Maintain in a good and safe working order and condition all electrical, plumbing, sanitary, elevators, supplied or required to be supplied by him.

California attorneys and laws are usually the pacesetter for up and coming legal trends such as mold liability. Even though the following article is by California attorney Alexander Robertson IV about California laws, the points raised probably have relevance in most American states and Canadian provinces. If you are interested in hiring Mr. Robertson, contact information about law firm is provided at the end of this excerpt from *Microbiological Contamination aka The Mold Monster* in **Mealey's Emerging Toxic Torts**, Nov. 24, 1999.

Mr. Robertson's article concerns legal aspects in California of both property damage and personal injury claims arising from microbiological agents found in structures, which are the result of chronic water intrusion into the building envelope caused by construction defects.

4.5 Legal grounds to file lawsuit against defendants

There is a litany of potential causes of action available to the plaintiff, including but not limited to,

- negligence,
- professional malpractice,
- strict liability,
- breach of implied and express warranties,
- constructive eviction,
- worker's compensation,
- violations of the American's with Disabilities Act,
- breach of contract, fraud,
- failure to disclose in the sale of property, and
- violations of the Unfair Competition Act pursuant to Business & Professions Code Section 17200 et seq.

4.5.1 Negligence

When a case is filed as tort of negligence, the defendant is accused of causing the injury by failing to prevent it. Negligence is the most common cause of action asserted for mold contamination.

The elements of this tort are:

- The defendant owed a duty of care to the plaintiff.
- The defendant breached that duty by failure to exercise ordinary or reasonable care that a person of ordinary prudence would use under similar circumstances.
- The plaintiff was injured.
- The breach was the proximate cause of the injury, damage or loss to the plaintiff.

This cause of action is commonly used in actions against builders, general contractors, design professionals and subcontractors for alleged negligence in the performance of their duties. See *Sabella v. Wisler*(1963) 59 Cal.2d 21; See also the case of *Del Mar Beach Club Owner's Association v. Imperial Contracting Co.* (1981) 123 Cal. App.3d 898.

In addition to any obligation contained in the lease, landlords have both a common law and statutory duty to make repairs and take steps to ensure that the property is fit for human habitation. ---- Civil Code § 1941.

Homeowners associations have the duty to maintain, repair and replace the "common areas" of a common interest development pursuant to the conditions, Covenants & Restrictions ("CC&R's") and Civil Code § 1364. The Board of Directors owes a fiduciary duty to the homeowner/members to discharge their duties as well. ---*Ravens Cove Townhomes, Inc. v. Knuppe Dev. Corp*. (1981) 114 Cal. App. 3d 783.

4.5.2 Strict Liability

Personal injury. Under strict liability, a personal injury attorney may bring charges against a company whose defective product is responsible for an injury. Strict liability applies whether negligence or malice was involved or not, **as long as the product was being used as was intended.**

For more than three centuries, the general rule governing the purchase of real estate was caveat emptor, or let the buyer beware. However, beginning in 1969, courts in California began recognizing a homeowner's right to sue a builder of mass produced housing (e.g., condos, tract homes) under a strict liability theory. ---*Avner v. Longridge Estates* (1969) 272 Cal. App. 2d 607.

This theory of liability evolved from products liability law. In order to prove this cause of action, the plaintiff must show that the defendant was involved in the mass production of housing, that there is in fact a construction defect in the house, and the damages were proximately caused by the defect and that the defendant caused or created the construction defect.

The plaintiff is not required to prove that the defendant failed to follow the standard care of similar builders in the community, an essential element of the negligence cause of action. It is important to note that this theory does not apply to subcontractors, design professionals or to commercial property.

4.5.3 Breach of Warranties

For new construction of both residential and commercial properties, the courts have created an implied warranty that the structure was designed and constructed in a reasonably workmanlike manner. *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374. Similarly, a builder or seller of real property may expressly warrant the condition of the construction and improvements, which is a contractual cause of action.

For the tenant, the courts have modified the common law duty of the landlord to maintain and repair residential premises by creating an implied warranty of habitability. *Knight v. Hallsthammer* (1981) 29 Cal. 3d 46.

4.5.4 Constructive Eviction

When a landlord breaches an implied covenant of habitability, or covenant of quiet (see chapter on *Tenant rights and responsibilities*) use and enjoyment, a constructive eviction may occur. The landlord's breach of the covenant may entitle the tenant to recover monetary damages from the landlord for a constructive eviction. *Barkett v. Brucato* (1953) 122 Cal. App.2d 264.

4.5.5 Workers Compensation

The legislature has enacted a broad statutory scheme in California to compensate workers who are injured on the job. However, an injured worker is generally barred from suing his employer for an injury if worker's compensation insurance is maintained by the employer. Labor Code §3602(a).

In a news report by Alicia Fabbre, entitled *St. Charles mold lawsuit won't involve teachers*, which appeared in the **Daily Herald** (posted July 23, 2003); a student of **St. Charles East High School** (St. Charles City, Illinois) claimed mold at school made her ill and filed a lawsuit against the district, which was later joined by other students as well as their teachers.

The judge dismissed the teachers' claim, saying the proper venue for their claim against the district would be a workman's compensation claim. The claims by the students as well as other contractual workers, who are not covered by the workman's compensation insurance, remained in the lawsuit. Attorneys for the students, teachers, and other employees requested class action status to cover anyone made ill by the building, which has not yet been heard by the judge.

The lawyers of the plaintiffs noted however, that under the *occupational disease act***,** employees who claim work-related injury or illness may file under workman's compensation. It is uncertain yet whether the teachers will appeal the judge's decision so they can be included in the class suit or whether they are going to file a separate claim under workman's compensation.

4.5.6 Failure to Disclose

Every person who sells or transfers title to residential real estate must disclose (to prospective buyers) all facts that materially affect the value or desirability of the property. *Easton v. Strassburger*(1984) 152 Cal. App.3d 90.

Individual sellers must comply with Civil Code § 1102, which requires the seller, the listing (seller's) agent and the buyer's agent to complete and deliver to all prospective buyers a standardized form containing information about the property, commonly referred to as **Transfer Disclosure Statement** ("**TDS**").

Real estate agents are also required to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to a prospective buyer all facts materially affecting the value or desirability of the property that an investigation would reveal. Civil Code § 2079.

Several cases have further defined these duties. In one case, a seller of a condo in a **Homeowners Association** (**HOA**) delivered a TDS to the buyer before escrow closed, stating that she was unaware of any flooding, drainage or grading problems. However, prior to this, seller had completed a homeowners questionnaire sent to her by her HOA, when she reported a white residue on the interior concrete wall of her garage and algae or fungus on the exterior of the wall. Seller's real estate agent noted on her portion of the TDS that she knew nothing to contradict Seller's representations, but that she knew that some other units in the HOA had experienced water intrusion.

Prior to the close of escrow, the HOA sent a letter to all homeowners, including Seller, that HOA had recently filed a construction defect lawsuit against the builder. Seller forwarded a copy of the announcement to the buyer. One month after escrow closed, buyer discovered water intrusion damage when she removed a portion of the carpet in her unit.

Buyer sued the seller and the seller's brokers for failure to disclose. The Court of Appeals finally ruled that the seller was not required to disclose past occurrences of algae or white residue in seller's unit, because she believed the unit had been repaired and saw no signs of the problem reoccurring prior to sale.

As to Seller's broker, the Court held it was sufficient disclosure to state that some of the units, but not the subject unit, had experienced leaks and that the litigation by the HOA had been filed against the builder. --- *Pagano v. Krohn* (1977) 60 Cal. App. 4th 1.

In the same manner, there is no duty for a real estate agent to make an inquiry to the HOA whether or not there are any existing construction defects or if the HOA is currently involved in a construction defect lawsuit. ---*Padgett v. Phariss* (1977) 54 Cal. App. 4th 1270.

Additionally, the HOA has no duty to tell a prospective purchaser about construction defects or the existence of a lawsuit against the builder to repair the defects. The HOA is not acting as a seller, is not a party to the sale contract, and doesn't assume any special relationship with the buyer. *Kovich v. Paseo Del Mar HOA* (1996) 41 Cal. App. 4th 863.

4.6 How to claim workers compensation

The following guide is based on California's workers compensation law. If you live in a different state you will still benefit from it since most of what is mentioned or stated here apply to most other states. Please check your state's law on workman's compensation.

- Report immediately to your employer as soon as you suspect you sustained work-related injury. Delay in reporting an injury can cause denial or delay of workers compensation benefits. Do not sleep on your rights; it can have dire consequences.
- If your injury causes temporary disability, the first payment of temporary disability indemnity shall be made not later than 14 days after the knowledge of the injury or disability.
- Generally, your claim is invalid if made only after you have been terminated from your job. Except where it is shown by evidence that prior to termination your employer has been notified of the injury.
- As a worker, you have a right to representation by an attorney (a Workers' Compensation Law specialist). Which initially costs nothing, but if he or she later on takes the case, he or she will be entitled to 9 - 15% of any settlement or adjudication that you actually received.
- You must immediately hire an attorney for the following reasons:
    - The insurance company's interests are actually opposed to yours. It will do whatever it can to defeat your claim

- The process is highly complex with time limitations.
- The insurance company has lawyers to represent their interests and you have none.
- Your lawyer can help you find a doctor who is not biased in favor of your employer or the insurance company.

4.7 California mold disclosure law

The new California mold disclosure law took effect in California on Jan. 1, 2002, but real estate sellers and prospective landlords won't have to disclose the presence of mold in California homes and buildings to prospective buyers and prospective tenants under the first state law to address growing public fears about mold problems until some future date (probably Jan. 1, 2004) when the State of California publishes both mold contamination and mold remediation standards. The State of California has until July 1, 2003, to set such established standards.

Sellers, real estate brokers and agents, and home inspectors will have to be diligent in following the law. In conforming with the law, the property seller's transfer disclosure statement---a requirement in real estate transactions since 1985---will now include mold.

In addition, the California State Department of Toxic Substance Control will soon include a chapter on toxic mold in its Environmental Hazards Handbook, which is provided to all buyers and sellers. Enforcement of mold standards and mold disclosure statements will be done by local governmental agencies under the new mold law. --- *Los Angeles Times, November 11, 2001*

Health & Safety Code Relating to Toxic Mold
Senate Bill No. 732 Chapter 584
An act to amend Section 1102.6 of the Civil Code, and to add Chapter18 (commencing with Section 26100) to Division 20 of, the Health and Safety Code, relating to toxic mold. (Approved by Governor October 5, 2001.

Filed with Secretary of State October 7, 2001.) LEGISLATIVE COUNSEL'S DIGEST SB 732, Ortiz. Toxic mold.

Existing law provides the State Department of Health Services with various powers to enforce its regulations, to promulgate regulations to protect the public health, and to enjoin and abate nuisances dangerous to public health.

The department is vested with the power to perform studies, evaluate existing projects, disseminate information, and provide training programs to enforce regulations related to public health.

This bill would enact the Toxic Mold Protection Act of 2001. The bill would require the department to convene a task force comprised of various individuals including, but not limited to, health officers, health and medical experts, mold abatement experts, representatives of government-sponsored enterprises, representatives from school districts or county offices of education, representatives of employees and representatives of employers, and affected consumers and affected industries including, residential, commercial, and industrial tenants, proprietors, managers or landlords, insurers, and builders, to advise the department on the development of permissible exposure limits to mold, standards for assessment of molds in indoor environments as well as alternative standards for hospitals, child care facilities, and nursing homes, standards for identification, and remediation of mold.

This bill would require the department to consider the feasibility of adopting permissible exposure limits to molds in indoor environments. If it is determined to be feasible, the department would be required to adopt, in consultation with the task force, permissible exposure limits to mold for indoor environments that avoid adverse health effects. The department would be required to report its progress on developing the permissible exposure limits for molds by July 1, 2003.

This bill would require that, in the process of adopting the permissible exposure limits (to toxic molds), the department would be required to conduct studies, consider specific delineated criteria, and consult with the task force to arrive at both permissible exposure limits to mold to avoid adverse effects on health on the general public and alternative permissible exposure limits to avoid adverse health effects for hospitals, child care facilities, and nursing homes, whose primary business is to serve members of a subgroup that is a meaningful portion of the general population. This bill would also require the department, in consultation with the task force, to develop and adopt guidelines for the identification and the remediation of toxic molds.

This bill would require that, after the adoption of permissible exposure limits to molds, the department review and revise the exposure limits at least once every 5 years and consider any new technological or treatment techniques or new scientific evidence that indicates that molds may present a different health risk than was previously determined. This bill would also require the department to develop and adopt standards for the assessment of the health threat posed by the presence of molds, both visible and invisible or hidden, in indoor environments.

The department would be required to consider specific delineated criteria in developing the assessment standard including the balancing of the protection of public health with technological and economic feasibility. The department would also be authorized to adopt alternative assessment standards for hospitals, child care facilities, and nursing homes. The department would be required to report its progress on developing the assessment standards for molds by July 1, 2003.

After the adoption of mold assessment standards, the department would review and revise the exposure limits at least once every 5 years and consider any new technological, treatment techniques or new scientific evidence that indicates that molds may present a different health risk than was previously determined.

The bill would provide for specific protocol to allow the public to be involved (actively participate) in the process to determine permissible exposure limits to toxic mold, guidelines for identification (testing) and remediation (removal or killing) of mold, and the guidelines for the assessment of molds.

This bill would require the department to develop public education materials and resources to inform the public about the health effects of toxic molds, methods of prevention, methods of identification (testing) and remediation (removal or killing) of toxic mold growth, as well as contact information to organizations or governmental entities to assist public concerns.

This bill would, except under specified circumstances, also require that any person who sells, transfers, or rents residential, commercial, or industrial real property or a public entity that owns, leases, or operates a building who knows, or in specified instances has reasonable cause to believe, that mold is present that affects the unit or building, and the mold exceeds the permissible exposure limits to molds, would be required to provide a written disclosure to potential buyers, prospective tenants, renters, landlords, or occupants of the mold conditions.

However, this bill would not require a landlord, owner, seller, or transferor to conduct air or surface tests to determine whether the presence of molds exceeds the permissible exposure limits or for mold remediation.

These disclosure duties and requirements would not apply until the January 1 or July 1 that occurs at least 6 months after the department adopts the requisite standards, and guidelines, as provided in the bill. This bill would authorize the enforcement of all conditions of this bill, including the (toxic mold) disclosure provisions, by designated enforcement officers.

The implementation of this bill would depend on the extent to which the department determines funds are available for its implementation.

The people of the State of California do enact as follows:
SECTION 1. Section 1102.6 of the Civil Code is amended to read:

1102.6. The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form: (NOT SHOWN HERE)

SECTION 2. Chapter 18 (commencing with Section 26100) is added to Division 20 of the Health and Safety Code, to read:

CHAPTER 18. TOXIC MOLD Article 1. General Provisions

26100. This chapter shall be known, and may be cited, as the Toxic Mold Protection Act of 2001.

26101. For purposes of this chapter, the following definitions apply:

(a) ‘‘Affect’’ means to cause a condition by the presence of (toxic) mold in the dwelling unit, building, appurtenant structure, common wall, heating system, or ventilating (HVAC systems) and air-conditioning system that affects the indoor air quality (IAQ) of a dwelling unit or building.

(b) ‘‘Authoritative bodies’’ means any recognized national or international entities with expertise on public health, mold identification and remediation, or environmental health, including, but not limited to, other states, the United States Environmental Protection Agency, the World Health Organization, the American Conference of Governmental Industrial Hygienists, the New York City Department of Health, the Centers for Disease Control and Prevention, and the American Industrial Hygiene Association.

(c) ‘‘Certified Industrial Hygienist’’ means a person who has met the education, experience, and examination requirements of an industrial hygiene certification organization as defined in Section 20700 of the Business and Professions Code.

(d) ‘‘Code enforcement officer’’ means a local official responsible for enforcing housing codes and maintaining public safety in buildings using an interdepartmental approach at the local government level.

(e) ‘‘Department’’ means the State Department of Health Services, designated as the lead agency in the adoption of permissible exposure limits to mold in indoor environments, mold identification and remediation efforts, and the development of guidelines for the determination of what constitutes mold infestation.

(f) ‘‘Indoor environments’’ means the affected dwelling unit or affected commercial or industrial building.

(g) ‘‘Mold’’ means any form of multi-cellular fungi that live on organic (plant or animal) matter and in (moist) indoor environments. Types of toxic molds include, but are not limited to, Cladosporium, Penicillium, Alternaria, Aspergillus, Fusarium, Trichoderma, Memnoniella, Mucor, as well as Stachybotrys chartarum, often found in water-damaged building materials.

(h) ‘‘Person’’ means an individual, corporation, company, association, partnership, limited liability company, municipality, public utility, or other public body or institution.

(i)‘‘Public health officer’’ means a local health officer appointed pursuant to Section 101000 or a local comprehensive health agency designated by the board of supervisors pursuant to Sec. 101275 to carry out the drinking water program.

26101.5. All standards that the department develops pursuant to this chapter shall be in accordance with existing administrative law procedures applicable to the development of regulations.

26101.7. The department shall convene a task force which shall advise the department on the development of standards pursuant to Sections 26103, 26105, 26106, 26120, and 26130.

The task force shall be comprised of representatives of public health officers, environmental health officers, code enforcement officers, experts on the health effects of molds, medical experts, certified industrial hygienists, mold abatement experts (certified mold inspector or certified mold remediator), representatives of government-sponsored enterprises, representatives from school districts or county offices of education, representatives of employees and representatives of employers, as well as affected consumers.

They include, but are not limited to, residential, commercial and industrial tenants, homeowners, environmental groups, and attorneys, and affected industries, which include, but are not limited to, residential, commercial and industrial building proprietors, managers or landlords, builders, realtors, suppliers of building materials and suppliers of furnishings, and insurers.

Task force members shall serve on a voluntary basis and shall be responsible for any costs associated with their participation in the task force.

The department shall not be responsible for travel costs incurred by task force members or otherwise compensating task force members for costs associated with their participation in the task force.

26102. The department shall consider the feasibility of adopting permissible exposure limits to mold in indoor environments.

26103. (a) If the department finds that adopting permissible exposure limits to mold in indoor environments is feasible, the department, in consultation with the task force convened pursuant to Section 26101.7, shall:

(1) Adopt permissible exposure limits to mold for indoor environments that avoid adverse effects on health, with an adequate margin of safety, and avoid any significant risk to public health.

(2) Notwithstanding paragraph (1), balance the protection of public health with technological and economic feasibility when it adopts permissible exposure limits.
(3) Utilize and include the latest scientific data or existing standards adopted by authoritative bodies.

(4) Develop permissible exposure limits that target the general population.

(b) The department shall consider all of the following criteria when it adopts permissible exposure limits for molds in indoor environments:

(1) The adverse health effects of exposure to molds on the general population, including specific effects on members of subgroups that comprise a meaningful portion of the general population.

This may include infants, children age 6 years and under, pregnant women, the elderly, asthmatics, allergic individuals, immune compromised individuals, or other subgroups that are identifiable as being at greater risk of adverse health effects than the general population when exposed to molds.

(2) The standards for molds, if any, adopted by authoritative bodies.

(3) The technological and economic feasibility of compliance with the proposed permissible exposure limit for molds. For the purposes of determining economic feasibility pursuant to this paragraph, the department shall consider the costs of compliance to tenants, landlords, homeowners, and other affected parties.

(4) Toxicological studies and any scientific evidence as it relates to mold.

(c) The department may develop alternative permissible exposure limits applicable for facilities, which may include hospitals, child care facilities, and nursing homes, whose primary business is to serve members of subgroups that comprise a meaningful portion of the general population and are at greater risk of adverse health effects from molds than the general population.

These subgroups may include:

- infants
- children age 6 years and under
- pregnant women
- the elderly
- asthmatics
- allergic individuals
- immune compromised individuals

(d) The department shall report to the Legislature on its progress in developing the permissible exposure limit for molds by July 1, 2003.

26104. (a)
(1) The department shall, at the time it commences preparation of the permissible exposure limits to mold, provide notice electronically by posting on its Internet Web site a notice that informs interested persons that the department has initiated work on the permissible exposure limits to mold.

(2) The notice shall also include a brief description or a bibliography of the technical documents or other information the department has identified to date as relevant to the preparation of the permissible exposure limits.

(3) The notice shall inform persons who wish to submit information concerning exposure to molds of the name and address of the person in the department to whom the information may be sent, the date by which the information must be received in order for the department to consider it in the preparation of the permissible exposure limits, and that all information submitted will be made available to any member of the public who makes the request.

(b) The department may amend the permissible exposure limits to molds to make the limits less stringent if the department shows clear and convincing evidence that the permissible exposure limits to molds should be made less stringent and the amendment is made consistent with Section 26103.

(c) The department may review, and consider adopting by reference, any information prepared by, or on behalf of the United States Environmental Protection Agency or other authoritative bodies, for the purpose of adopting national permissible exposure limits to molds.

(d) At least once every five years, after adoption of permissible exposure limits to molds, the department shall review the adopted limits and shall, consistent with the criteria set forth in subdivisions (a) and (b) of Section 26103, amend the permissible exposure limits if any of the following occur:

(1) Changes in technology or treatment techniques that permit a materially greater protection of public health.

(2) New scientific evidence that indicates that molds may present a materially different risk to public health than was previously determined. 26105.

(a) The department, in consultation with the task force convened pursuant to Section 26101.7, shall adopt practical standards to assess the health threat posed by the presence of mold, both visible and invisible or hidden, in an indoor environment.

(b) The department shall adopt assessment standards for molds that do the following:

(1) Protect the public's health.

(2) Notwithstanding paragraph (1), balance the protection of public health with technological and economic feasibility when it adopts assessment standards.

(3) Utilize and include the latest scientific data or existing standards for the assessment of molds adopted by authoritative bodies.

(4) Develop standards that target the general population.

(5) The department shall ensure that air or surface testing is not required to determine whether the presence of mold constitutes a health threat posed by the presence of mold, both visible and invisible or hidden, in an indoor environment.

(c) The department shall consider all of the following criteria when it adopts standards for the assessment of molds in indoor environments.

Chapter 5

5 Damages Recoverable in Mold Cases

The general principle governing the measure of damages in all California tort cases entitles an injured party to recover full compensation for losses proximately caused by a wrongdoer's act or omission. This principle is codified in Civil Code § 3333, which provides, "[F]or the breach of an obligation not arising from a contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

5.1 Diminution of value and cost to repair

The principle codified in Section 3333, supra describes the measure of damages for personal injury, as well as injury to real and personal property. The general rule in construction defect cases is that the proper measure of damages is in the diminution of value or the cost to repair, whichever is less. *Mozetti v. City of Brisbane* (1977) 67 Cal. App.3d 565.

5.2 Cost of remedying the defects

However, in at least one other major case, the Court of Appeals held that the proper measure of damages in a construction defect case is the cost of remedying the defects, together with the value of lost use during the period of injury, regardless of the theory of liability relied upon by the plaintiff. *Ravens Cove Townhouses, Inc. v. Knuppe Dev. Co.* (1981) 114 Cal.App.3d 783.

5.3 Personal exception rule

And at least one case holds that the homeowner can recover the cost to repair, even if it exceeds the diminution of value caused by the defects. *Orndorff v. Christiana Community Builders* (1990) 217 Cal. App. 3d 683. The rule adopted by the court in this case is commonly referred to as the "personal exception" rule, because the court found that the plaintiffs had a personal reason for wanting to repair their home and had no intention of moving.

Other cases have held that "there is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property, and whatever formula is most appropriate in the particular case will be adopted." *Ferraro v. southern Calif. Gas Co.* (1980) 102 Cal.App.3d 33.

5.4 Personal injury

Personal injury law is an area of law that seeks to recover damages (compensation) for victims of physical or mental injury (like brain damage caused by Stachybotrys mold) that has occurred due to the action (or inaction) of another (landlord for example). Mold-related personal injury cases can be filed by the victim, or loved ones, based on negligence and strict liability.

Regarding the personal injury claim arising from toxic mold related illness, damages recoverable include pain and suffering, past, present and future medical care, future medical monitoring, lost wages, and loss of earning capacity. California Jury Instruction, BAJI Nos. 14.10-14.13.

In rare cases where a death has occurred due to fungal or bacterial exposure, a wrongful death claim can be made by the surviving family members for loss of love, companionship, comfort, affection, society, solace or moral support, and any loss of enjoyment of sexual relations or loss of physical assistance to a spouse in the operation or maintenance of the home. Survivors can also recover for lost financial support from the decedent. *Cal. Jury Instruction, BAJI Nos. 14.50-14.52.*

5.5 Prejudgment interest

A prejudgment interest is an additional amount that an insurer or losing defendant may be required to pay as part of a court settlement. The amount basically represents an interest charge on the disputed settlement.

The intent is to provide compensation for any settlement gap related to the payment delay caused by the lawsuit and trial process. In other words, prejudgment interest is the interest that a losing defendant pays a prevailing plaintiff on damages from the time of injury until the time of recovery.

Prejudgment interest can also be recovered to compensate the plaintiff for the loss of use of his money or property. See California *Civil Code § 3291*.

5.6 Attorney's fees

In the State of California, attorney's fees are generally only recoverable if there is a contractual right to recover them. In most instances, purchase agreements between buyer and seller of real property would include an attorney's fees clause. Also, in any action brought to enforce the terms of the **Declaration of Covenants, Conditions and Restrictions** (CC&R's) for a common interest development, the prevailing party is entitled to recover reasonable amount of attorney's fees as well as costs pursuant to Civil Code § 1354(f).

5.7 Punitive damages

Punitive damages may be justified in a fungal contamination case when the evidence establishes that the defendant was aware of the probable dangerous consequences of his conduct, and the defendant willfully and deliberately failed to avoid those consequences (e.g., landlord or HOA knows of the presence of toxic mold and fails to remediate the dangerous condition or disclose this material fact to homeowner). *Penner v. Falk* (1984) 153 Cal.App.3d. 858.

To determine whether or not it is proper to apply punitive damages to a particular case, the trial court will have to consider the following:

(1) The degree of reprehensibility of the defendant's misconduct;

(2) The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

(3) The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

5.8 Emotional distress damages

Emotional distress damages may also be recoverable in cases involving personal injury or fraud. However, emotional distress damages cannot be recovered where the injury is confined to property damage. ---See the case of *Erlich v. Menezes* (1998) 21 Cal.4th 543.

A jury in Austin, Texas awarded $32 million to a couple who sued their insurer after the company allegedly failed to repair a water leak in their 22-room home in Dripping Springs, Texas. The jury awarded $6.2 million in actual damages $12 million in punitive damages, $5 million for emotional distress, and $8.9 million in attorneys' fees. In December, another insurer settled a mold-related bad-faith lawsuit for $1.5 million. See the case of *Blum v. Chubb Custom Insurance Co.* (No. 99-3563, Nueces Co., Texas Dist. Ct.).

Chapter 6

6 Statute of Limitations for mold cases

The Statute of Limitations determine the period of time whereby a person (plaintiff) is allowed by law to bring action (complaint or lawsuit) in court against another (defendant) for the redress (award in damages) of a wrongful act or an omission (things the defendant failed to do). So that beyond this time-limit, the plaintiff is forever barred and may no longer institute such an action, complaint or lawsuit against the defendant in the court of law.

6.1 Purpose of statute of limitations

The statue of limitations has been devised to operate primarily against those who failed to exercise their legal rights and claims on a timely basis (waiting too long to complain). The statute of limitations sets a time limit for filing a lawsuit. If you fail to file the lawsuit on time, your claim will be forever barred.

All injury claims including claims for mold-related injuries are subject to the statute of limitations. **Note: Consulting an attorney about your legal problems will neither stop nor interrupt the running of this period.**

Care should be taken regarding the statute of limitations for personal injuries caused by fungal contamination. In the only published decision involving this type of claim in California, the Court of Appeals held in *Miller v. Lakeside Village Condominium Association, Inc.* (1991) 1 Cal.App.4th 1611; that the one (1) year statute of limitations provided by Code of Civil Procedure 340(3) applied to a homeowner's claim against her homeowner's association for failure to maintain the plumbing system, which resulted in the plaintiff suffering personal injuries from her exposure to toxic mold after flooding occurred.

Although the plaintiff's condition was not diagnosed as immune dysregulation until 1986, she suffered "extreme allergic reactions" and "severe bouts of asthma" for which she sought medical attention in 1983 and 1984.

6.2 Delayed discovery rule

The court ruled that the "delayed discovery rule" did not apply because the plaintiff had actual knowledge of the negligent cause of her injuries in October of 1984, when the plaintiff hired a microbiologist who pinpointed the source of the mold in her unit and plaintiff performed an unsuccessful remediation.

The fact that plaintiff's ultimate medical condition was not properly diagnosed for two more years was not persuasive to the court.

For the one year period to begin to run, two conditions must be met:

- Physical injury to the plaintiff.
- Plaintiff must have knowledge of the cause of the injury.

Because the source and cause of water intrusion problems are often difficult to identify and correct, coupled with the fact that the *Code of Civil Procedure 337.15* provides for a ten (10) year statute of limitations to commence an action for latent defects, a potential conflict may arise between the accrual of a homeowner's cause of action for personal injuries caused by fungal contamination and the limitation period to sue for the underlying defective condition which caused the fungal contamination.

This conflict is exacerbated by the three (3) year limitation period provided in Code of Civil Procedure 338 to commence an action for negligence arising from damage to real property. Thus, a homeowner who discovers a roof leak has up to three years to file suit (provided suit is filed within ten [10] years from substantial completion of project), but only has one year to sue for any exposure to toxic fungus that grows because of that leak.

6.3 Interruption of one-year statute of limitations

However, the Miller case is in direct conflict with the silicone breast implant cases, which have expressly held that the one year statute of limitations is tolled until the breast implant recipient suspected or should have suspected that autoimmune disease may have been caused by a product defect. See, *Tucker v. Baxter Healthcare Corp.* (9th Cir. 1998) 158 F.3d 1046; *Hopkins v. Dow Corning Corp.* (9th Cir. 1994) 33 F.3d 1116. In those cases, the courts have held that when the injury claimed is not commonly associated with a malfunctioning products, the statute of limitations is tolled until the plaintiff suspects or should have suspected the cause of his or her injury.

Because the causal connection between fungal contamination and personal injury is not yet common knowledge to the medical or legal community, let alone to lay persons, application of the one year statute of limitations appears overly harsh to victims that do not know the source of their medical problems until more than a year after the onset of the initial symptoms.

Chapter 7

7 Verdicts and settlements of mold cases

The frequency of mold contamination cases being reported in the media and medical journals translates to published verdicts and settlements in legal publications. Because most of these cases involve a recovery for both property damages to repair and remediate the defective conditions, as well as for personal injury, it is difficult to extract an amount paid for each category of damage.

Also, in larger construction defect cases where an entire homeowners association comprised of several hundred units is suing the builder for defects to the common areas, many times a mold claim is thrown in to trigger insurance coverage for personal injury or loss of use of property.

However, there have been a number of cases reported over the past few years involving single family homes or condo units, giving a good idea of the value of such claims on a per unit basis.

7.1 Recent court verdicts favoring owners in mold lawsuits

The courts have handed property owners two important victories in mold-related lawsuits. In the first, an owner was able to use the recently-released federal study on the health effects of mold exposure to successfully defend itself against a resident's claims that exposure to mold in her apartment caused her to develop a brain injury, a seizure disorder, a movement disorder, a neurocognitive impairment and an immune system disorder.

(Kilian v. Equity Residential Trust, U.S. District Court for the District of Arizona District, No. CV-02-1272-PHX-FJM ORDER.)

In its ruling, the Court stated that "we agree with the conclusion of the Institute of Medicine of the National Academy of Sciences that there is insufficient evidence of an association between neuropsychiatric symptoms and the presence of mold....We thus exclude the expert testimony in this case that sought to establish causation between the presence of mold and plaintiffs symptoms."

The reference to the Institute of Medicine study is important as in this study they also call for the implementation of an O&M plan [building operational specifications and building maintenance specifications].

In a second case, which reaffirmed the importance of developing a mold O&M plan for dealing with moisture intrusion, a jury deliberated 30 minutes before returning a verdict in favor of the property manager. The plaintiffs alleged that management was negligent in dealing with a leak in a water heater closet and that the ensuing mold caused physical harm to the occupants and their

possessions. (Shapiroholland v. Equity Residential Property Management, Orange County Superior Court, No. 03- 03767). The sole issue decided at trial was whether the property manager had acted negligently when alerted to the problem; all other causes of action were dismissed. The property owners had dealt promptly and effectively with indoor dampness in properly repairing the leak. After the trial, the jurors noted they were particularly impressed with the response of the management company and the extraordinary lengths taken to relocate and address resident concerns.

7.2 Recent published verdicts and settlements of mold cases in California

In May of 1999, this author recovered $350,000 for a Simi Valley woman against her homeowner association for failure to repair and remediate chronic water damage to her condo and for her personal injuries suffered from exposure to toxic molds, including Stachybotrys. The plaintiff also contracted Meniere's Disease as a result of microbiological contamination of her unit.[5]

In May of 1998, the owners of a 7,000 square foot custom home in Playa Del Rey settled their case against the builder for $900,000 when the ceiling caved in as a result of roof leaks before they even moved in. Stachybotrys was found in many locations in the house.[6]

In February of 1998, three families in Alameda County settled their case against their homeowners' association for $545,000 after leaky pipes caused toxic mold to grow in the crawlspaces of their condo units. The plaintiffs reported depression, anxiety, emotional distress, gastrointestinal maladies, vomiting diarrhea, respiratory tract infections, severe headaches, fatigue, lethargy and other symptoms. Blood samples showed elevated antibodies to neurotoxin-producing molds, including Stachybotrys, Aspergillus and Penicillium.[7]

In November of 1997, a Rialto family settled their case against the City of Rialto for $600,818 after raw sewage spewed from the family's drains and toilets when a city contractor caused a backup of the city sewage system. The plaintiffs' complained of neurotoxins causing diffuse brain damage to the father, gastrointestinal maladies, respiratory tract infections, severe headaches, fatigue and mental problems. Blood tests from the three of the six family members showed elevated antibodies to neurotoxin-producing molds.[8]

In November of 1997, this author recovered $1,353,000 for the owners of a Malibu beachfront home they had purchased new for $2.5 million from defendant. The husband complained of mild respiratory problems and headaches in response to exposure to mycotoxins released by Stachybotrys.

The wife, who was previously diagnosed with immuno-compromised condition, suffered flu-like symptoms, sore throat, diarrhea, headaches, fatigue, dermatitis, and general malaise. Plaintiffs' cost to repair the home was $662,000.

7.3 Recent publicized old cases in other states

In September of 1999, a lawsuit was filed on behalf of 65 former employees of Forest City Enterprises alleging over $100 million in damages for the company's alleged requirement of employees to renovate two apartment projects that contained asbestos, toxic mold and lead paint, without any safety equipment or disclosing the presence of these hazardous materials.

In July of 1999, Farmers' Insurance Group was sued by a Texas family for $100 million for failure to settle a flood damage claim, even after Farmer's own repair contractor warned Farmer's that toxic mold could grow in the plywood sub floor and Texas Tech University's Health Sciences Department found Stachybotrys in the house.

In June of 1999, two New York apartment building owners were sued with 125 lawsuits seeking a total of $8 Billion in damages for personal injuries allegedly sustained from exposure to mold and fungi contamination.

In the largest published verdict of its kind, Polk County in Florida recovered $48 Million for cost to repair and remediate the Polk County Courthouse, which was heavily contaminated with toxic fungi. --- *Polk County v. Reliance Ins.*, No. 94-7135-CI-11 (Fla. Cir. Ct.), filed 4/25/95.

Recently, a $14 Million judgment was affirmed by the Florida Court of Appeals against the contractor of the Martin County Courthouse for sick building syndrome and construction defects. --- *Martin County v. Pate Constr. Inc.*, No. 95-274(Fla. 19th Cir. Ct.), filed 10/13/92.

In April of 1996, an Indian River, Florida jury awarded Martin County $11.5 Million against a construction manager and three surety companies. The county alleged that two buildings evacuated in December, 1992, suffered from construction defects, which resulted in leaks to the building's exterior skin and problems with the air conditioning. Water intrusion and high humidity fostered the growth of toxic molds and mildew in the buildings.

It is important to note that this jury verdict only dealt with property damage and did not include any personal injury claims, which were the subject of separate cases. The trial judge reduced the jury's award by $2.75 Million, reflecting the amount received by the county in pre-trial settlements with other defendants. The court entered an amended final judgment for $14.2 Million, including $8.8 Million in damages and $5.4 Million in prejudgment interest.

The most notable portion of the appellate decision to uphold the judgment was the affirmation of the trial judge's admission of expert testimony by two doctors that suggested the existence of a health hazard stemming from the presence of toxic molds in the buildings.

The Court of Appeals held that the county met its burden of proof under *Frye v. U.S.* (1923) 54 App. D.C. 46,293 F. 1013 D.C. cir., noting that both experts testified about numerous publications accepted by the scientific community; linking mold exposure and adverse health problems. *Centrex-Rooney Construction Co. v. Martin County*, No. 96-2537, Fla. App., 4th Dist.

7.4 Jury Awards Florida Homeowner $903,000 for Mold in New House

Woman contracted pneumonia 6 times because of problem inside structure.

By Susie Schottelkotte
THE LEDGER.com

BARTOW, FLORIDA, October 3, 2008. A Lakeland woman who contracted pneumonia six times in 18 months because of mold in her newly built house won a $903,000 jury verdict late Thursday against the home builder.

Jurors deliberated about five hours before deciding that Lakeland builder Rudy Brown was responsible for the problems in the house.

They awarded $718,000 to Janice Martin Arnett so she could repair her house in Eagle Lake, and another $185,000 to compensate for the time she couldn't use the house.

Bartow lawyer Tom Saunders, speaking on behalf of Arnett, said they were pleased with the verdict.

"It's been a difficult time, but we are pleased with the outcome," he said.

Brown did not return telephone calls for comment Friday.

During the two-week trial, Saunders told jurors that Arnett and her husband, Mike, moved into the $1.4 million, 8,500-square-foot lakefront house in July 2002.

"There were problems with the windows leaking and cracks in the stucco," he said. "The builder tried to fix it, but by August 2004, he said there was nothing else he could do."

By January 2005, Arnett had to move from the house because the mold was making her sick, Saunders said.

Orlando lawyers Steve Houser and Ray Watts, representing Brown, argued that the problems had been repaired and mold was no longer a problem in the house.

Saunders had estimated the cost of repairing the house at $1.4 million, and the loss of use at about $400,000. Brown's lawyers said the limited repairs that might be needed wouldn't cost more than $276,000.

Jurors reached a verdict that was half the amount Saunders had sought.

Saunders said Friday that the verdict will enable the Arnetts to repair the house on the eastern shore of Eagle Lake. Mike Arnett wasn't named in the lawsuit because he and his wife weren't yet married when she contracted to build the house in 2000.

This case isn't over with this verdict, however. Brown is suing the subcontractors involved with the home's construction, including Bock & Hoeft Custom Painting Contractors, Smith Contracting, Payne Air Conditioning & Heating, Overhead Door Company of Polk County and The Windowmaker Company.

7.5 Legal liability of insurance companies

An **Insurance Journal** article by Stephanie K. Jones entitled *Jury Sends Message to Insurance Industry in Toxic Mold Case* shows how serious and common mold-related insurance claims have become. In the recent past, insurance companies simply shrugged their shoulders and dismissed mold damage claims. Recent jurisprudence has changed all that, and now insurance companies are being warned not to take mold-related claims lightly or face dire consequences.

A recent jury decision should put up red flags for insurers: Take care of toxic mold claims adequately and promptly, or risk being assessed millions of dollars. That warning came in the form of a $32-million award to a Dripping Spring, Texas, family after the jury concluded that a subsidiary of Farmers Insurance Group mishandled the family's claim. This case is one of the first to order an insurance company to pay damages to the homeowner in a toxic mold case.

In their lawsuit against Farmers' subsidiary, Fire Insurance Exchange (FIE), homeowners Melinda Ballard and Ron Allison alleged the company mishandled their claim. They requested $100 million in restitution.

According to Ballard and Allison, Farmers Insurance Group delayed in covering repairs for a water leak in the couple's 22-room mansion and ignored contractors' warnings that dangerous molds could grow under the house's sub-flooring if the sub-flooring were not pulled up. The couple alleged that Farmers' failure to properly handle the claim allowed the toxic mold *Stachybotrys atra* to spread and damaged the family's health.

Judge John Dietz previously ruled that medical testimony on health effects of mold could not be introduced because the level of scientific proof required by a

Texas Supreme Court mandate does not yet exist; however, the jury found that the house was damaged beyond repair and will have to be demolished and rebuilt. The family was awarded $6.2 million in *actual damages*, $12 million in *punitive damages*, $5 million for *mental anguish* and $8.9 million for *attorney's fees*.

According to court documents in *Ballard v. Fire Insurance Exchange* (Travis Co. Cause No. 99-05252), Ballard experienced a plumbing leak in a bathroom in 1998, had it repaired, and that several months later the house's hardwood floors started buckling. Ballard filed a claim with Farmers, which had insured her home since 1992. The suit alleges that in December 1998, a flooring contractor cautioned Farmers about the potential for dangerous mold growth but Farmers ignored the contractor's warning.

Instead, the company reportedly followed the advice of a Farmers adjuster who indicated that the problem was related to the settling of the slab and was not covered by Ballard's policy. In addition, Farmers was alleged to have conducted a plumbing check but reported that it had found no leaks.

In early 1999, the family—Ballard, Allison and their three-year-old son, Reese—experienced the first of a number of unexplained illnesses, including coughing up blood. The condition of the floors got worse, and walls, windows and doors were damaged as a result of the sub-floor being waterlogged. Farmers tried to settle the claim at that time, but offered an amount that the homeowners considered insufficient to cover the damages to the home.

According to the complaint, a Houston microbiologist retained by Farmers, Dan Bridge of Rimkus Engineering, found that the space contained airborne Stachybotrys spores. However, neither Farmers nor Bridge informed the family about the discovery until after the illnesses occurred. Ballard and Allison hired scientists from Texas Tech University to test the home, and after the presence of toxic mold spores was confirmed, the family moved out.

Commenting on the case, Austin attorney Sean Michael Quinn, who specializes in insurance matters, said it is unlikely that the $32-million assessment will stand after the case moves through the appellate courts, as it is expected to do. However, the impact of the jury's award in an "ably tried case on both sides" will reverberate through the insurance industry, Quinn said.

He noted that in fact, the case has already influenced the way that insurance companies handle mold claims, even before the jury award, causing them to be more careful in the handling of those claims.

Quinn speculated that one result of the jury award will be to make insurance companies stand up and take notice that "maybe 'bad faith' is not dead," at least not in Texas. He said the award sends a message that "here's what a jury will do"

in a case like this and that insurance companies are likely to gear up with a faster, more adequate response.

Another result of the award could be that surplus lines carriers, which are not required to have state approval of their forms, will begin to issue specific exclusions for mold, Quinn said.

Chris Martin, an attorney with Martin, Disiere & Jefferson, a Houston-based firm that specializes in insurance law, agreed that Farmers will probably appeal the verdict. He said that the trial will not conclude until Judge Dietz hands down his judgment on the verdict, noting that attorneys on both sides are preparing motions for such a judgment.

Farmers' motions will likely request, among other things, a reduction in the damages and, perhaps more importantly, that the judge find the plaintiffs' claims for damages were not covered under the homeowners policy. Martin said that the coverage question is a huge one for the industry and added that even if the judge reduces the damages, Farmers is sure to appeal.

Farmers Insurance was successful in its appeal because the appellate court reduced the jury award to approximately five million dollars.

Chapter 8

8 The mold-illness relationship

The cause and effect relationship between mold and various illnesses is still controversial and is subject to ongoing medical mold studies.

But there is enough published mold medical studies that establish the connection between exposure to mold and mold health problems, and large amounts of empirical evidence establish the link between mold and health problems, so that plaintiffs alleging mold health problems can find medical substantiation for the medical portions of their lawsuit claims.

In addition, plaintiffs can produce expert medical witnesses to provide sworn testimony in depositions and trials that the plaintiffs' particular medical problems are the result of their exposure to mold. For detailed information on the link between mold and health problems, read the new book (September, 2003) **Mold Heath Guide**, available on the website: **http://www.moldmart.net**. Another source of information about the link between mold exposure and health problems is the in depth doctors' website: **http://www.doctorfungus.org**.

8.1 Hysteria or reality?

The Ballard case has received a lot of attention as well as intense media scrutiny, and while the case is significant, it is not the only mold-related case moving through the court system in the United States.

In May, the Delaware Supreme Court upheld a $1-million verdict in a mold exposure case and found a landlord liable for injuries suffered by its tenants because of mycotoxins, bacteria and fungi within an apartment.

The plaintiffs in that case claimed that exposure to toxic mold spores while living in an apartment complex prevented them from performing their regular duties, and caused economic losses and illnesses, such as asthma, permanent cognitive defects, osteopenia and an increased risk of tuberculosis that will require future medical care.

Mold issues are a hot topic in the insurance world right now, "and the media are contributing to the hysteria," according to attorney Martin. He said that the majority of claims that companies are seeing are not ones where the claimants actually see mold. Often, they begin to experience allergy symptoms and ask the insurance companies to investigate.

A large number of claims are generated by lawyers, neighbors or friends who may suggest that a claimant may have mold problems, Martin said. Finally, a smaller number of the claims are "legitimate water damage claims where mold and fungus grow due to water damage," he said.

8.2 Scientific proof and the implications of legal liability

In his letter to the **Cleveland Plain Dealer**, March 2000, Dr. Timothy E. Horgan, Health Commissioner of Cuyahoga County Board of Health, said, the initial outbreak of the bleeding lung disease, in Greater Cleveland way back in 1993 and 1994, brought together a remarkable combination of local, state and federal experts, who convened to investigate causes of these outbreaks and to develop a protection and prevention program.

In another study done in Atlanta, the **Centers for Disease Control and Prevention** (**CDC**) published a report which confirmed the accuracy of the findings of the original study done earlier in Cleveland. These pioneering studies faced countless criticisms as well as skepticism about the link between mold and the appearance of this acute and sometimes fatal disorder.

Dr. Horgan said, "Scientific 'proof' of such a linkage has liability implications that affect people and property owners far beyond our issue of bleeding-lung disease in Cleveland. Due to this nationwide concern regarding liability, the level of proof and assurance assigned to the original study has proved to be beyond what an initial pioneering effort could provide."

This is unfortunate." Dr. Horgan said. "The study and the work within it were a shining example of scientific cooperation and would be better served by more support from the CDC. To the credit of our community, our physicians and institutions, we have continued with our research efforts to provide more definitive information. Residents of Greater Cleveland can be assured that the work done here since 1994 has continued to support the hypothesis that **toxic molds are the most likely factor in bleeding-lung disease**."

"We welcome the CDC's interest in moving forward with us to protect children in Greater Cleveland and have hopes that our pioneering efforts may eventually save lives and reduce illness for everyone," said Dr. Horgan.

A new medical study conducted by a team of medical experts, Dr. Diane R. Gold, from Harvard University in Boston, and colleagues, has confirmed the link between high levels of mold in the home to respiratory illnesses affecting infants as well as young adults who are living in damp environments with high mold levels. However the team cautions the public that just because your entire house is dry, doesn't mean you are free from molds.

Dr. Dianne R. Gold and colleagues found that “that exposure to high levels of fungi made breathing problems much more likely for infants.” The likelihood of babies developing breathing problems, according to the study, are actually twice in homes with high levels of *Zygomycetes* fungi.---*Mold in Home May Mean Baby Breathing Problems,* **American Journal of Respiratory and Critical Care Medicine** (July 15, 2003).

8.3 Other reports linking mold to serious health and property damage

"Fifty percent (50%) of homes contain problem molds. A new medical study attributes nearly 100% of chronic sinus infections to mold. A 300% increase in the asthma rate over the past 20 years has been linked to molds," ---*USA WEEKEND, Dec. 3-5, 1999.*

"Exposure to certain types of fungi, known as toxic mold, can cause a serious (allergic) reaction. If you're unlucky, this is the kind of mold you have. If you're really unlucky, your toxic mold will gird for battle and go to war, secreting chemicals called mycotoxins, which can find their way into your body, entering through your nose, mouth, and skin, lodging perhaps in your digestive tract, your lungs, or your brain. Among these toxins are trichothecenes, which were rumored to have been used as a biological weapon during the wars in Afghanistan and Vietnam," ---Lisa Belkin, *Haunted by Mold*, *NEW YORK TIMES*, Aug. 13, 2001.

"All molds have the potential to cause health effects. Molds can produce allergens that can trigger allergic reactions or even asthma attacks in people allergic to mold. Others are known to produce potent toxins and/or irritants. Potential health concerns are an important reason." **U. S. Environmental Protection Agency** (March, 2001).

“Even if mold in your house doesn't cause you any medical problems, if it becomes established in the wood in your home, 'dry rot' may form. Dry rot can result in a homeowner's nightmare.”

“When the mold dies, the wood dries and then shrinks, breaking up into irregular chunks. Cracks in the wood fiber then act like straws, siphoning up moisture and carrying it to undamaged portions of the wood. Left unchecked, this process keeps recurring, continually rotting more wood, and can cause severe structural damage to your home.” ---Vicki Lankarge (**www.insure.com**).

Chapter 9

9 Mold insurance primer

"Not all water and mold damage is covered by your residential property insurance policy - coverage and limitations vary with individual policies. Coverage also varies from company to company. Read your policy carefully so that you understand the extent of your coverage.

9.1 Types of insurance

In the State of Texas, most of the homeowner's insurance policies sold today are known as HO-A policies. This type of policy only covers the problems and situations specifically listed in the policy, such as glass breakage, damage from falling trees, theft and vandalism. In general, HO-A policies only cover sudden and accidental water leaks in your plumbing, heating or air conditioning systems, and do not cover damage resulting from continuous or repeated leakage.

Many do not cover remediation of mold; those that do generally have a cap on coverage of between $5,000 and $10,000. In addition, HO-A policies without a replacement cost endorsement only pay for the actual cash value of the structure of your home. (Actual cash value is the replacement cost minus depreciation - the decrease in value due to age and 'wear & tear').

The other principal type of policy, commonly offered in Texas in the past, is referred to as HO-B. This type of policy pays for the full replacement cost of the structure of your home, except for items specifically excluded in the policy. Few insurers in Texas are now offering HO-B policies to new or renewing homeowners.

General information on homeowner's policies is available online from the **Texas Department of Insurance** (**TDI**). The **Office of Public Insurance Counsel** (**OPIC**) has published detailed information on the homeowners coverage offered by many of the insurers in Texas. See OPIC website for more information.

Some homeowners who have filed claims for mold or water damage later experience difficulty in renewing or obtaining new insurance coverage for their homes. These homeowners may qualify for coverage under the TDI's new Texas FAIR (Fair Access to Insurance Requirements) Plan Association.

This is an insurance program of last resort for homeowners who have been rejected for coverage by at least two licensed insurance companies and who have not received a valid offer of comparable insurance from any other licensed company. At this time, the FAIR Plan only covers single family residences, duplexes and town homes. Both the homeowner and the home must meet the

program's basic underwriting standards. For more information, read the FAIR Plan Frequently Asked Questions at TDI's Web site.

Some homeowners who have been denied coverage from licensed insurance companies are able to purchase policies from eligible surplus lines insurers. These insurance companies are not licensed to sell insurance in Texas, but are considered 'eligible' by TDI because they are licensed in their home state or country to sell the insurance they offer here. About 200 such insurance companies are operating in Texas.

They primarily sell commercial liability and damage coverage, but some also offer residential coverage. It is important to remember that surplus lines policies are not covered by the Texas Property and Casualty Insurance Guaranty Association. This means that if the surplus lines insurer goes broke, there is no guarantee that claims against your policy will be paid. TDI can provide you with more information about surplus lines insurance. You can verify whether a surplus lines insurer is eligible by calling TDI toll-free at (800) 252-3439.

You may want to consider purchasing additional coverage for water or mold damage. Many insurers offer this extra coverage as an endorsement (addition) to the standard residential policy. When deciding whether to purchase this additional coverage, choose only the dollar amount of coverage you need and make sure you understand what the endorsement covers.

Be aware of any applicable deductibles. If the water or mold coverage limit is relatively low (e.g. $5,000), or is very limited in what it covers, you may instead want to set money aside in a contingency fund to pay for water damage repairs out-of-pocket, rather than buying the additional insurance.

9.2 Traditional mold insurance

In the past, mold damage has been covered where it results from a covered peril, such as a broken pipe, a storm, or fire suppression efforts, but not where it occurs gradually over time due to wear and tear. However, public awareness and scientific knowledge of the health hazards of mold have increased dramatically.

Techniques for cleaning up mold have become more sophisticated and expensive. As a result, insurers are panicking, refusing to cover mold claims under existing policies and rewriting their policy forms to exclude all coverage for mold, regardless of origin. This in turn is creating a national crisis.

Here’s a mold insurance case that illustrates traditional insurance coverage. A couple in Michigan, who have lived in their home for ten years, contacted the Office of Financial & Insurance Services for assistance, stating they are having difficulty making their mold claim against an insurance company, after

a fire razed their home in September 2001, which brought about the spurious growth of molds causing tremendous damage to their health and home.

The couple attributed all of their mold problems to water damage from fighting the fire in their home. However, the couple waited a year, before they filed their mold claim, which the insurance company denied.

The insurance company said that the couple's complaint appeared as if they have not received any compensation at all. Although their policy does not provide coverage for mold damage to the property, any mold that was related to the water damage from fighting the fire was paid for.

The insurance company also presented an IAQ (Indoor Air Quality) report made for the insured's home, which showed that aside from the fire-related mold damage there were also extensive pre-existing mold damage in a greater part of the house, which was totally unrelated to the fire. Since the policy does not provide coverage for mold; this portion of the couple's claim was denied.

9.3 Mold insurance? or incidental mold coverage?

Therefore before getting a policy, make sure the insurance company expressly includes mold contamination and mold-related damages in its policy, and not merely as incidental to an insured peril.

Always demand for a complete copy of your policy. Read the "declarations page," carefully. It tells you what coverages you have, the policy limits for the coverage, and the effective dates of the policy. And never ever sign a policy without having read and understood the "fine prints;" they always contain important information like: what's insured and what's not insured, and what you have to do to prove your claim when the time comes.

Be wary of any "endorsements" attached to or added on the policy form; study them to see if they change, eliminate or add coverages to your policy.

9.4 Review your policy carefully & understand your coverages

If you don't have a complete copy of your policy, get one from your insurance agent. Review the "declarations page," which tells you the coverages you have, the policy limits for each coverage, and the effective dates of the policy. Review the fine print of the policy form itself to identify what's insured, what's excluded, and what you have to do to prove your claim. Review any "endorsements" added on to the policy form to see if they change, eliminate or add coverages to your policy.

Homeowner and business property policies typically have separate coverages for dwelling, contents (personal property), business personal property (inventory

and fixtures), additional living expenses (if you have to move out during repairs), loss of business income (if you are a business and can't earn income during repairs), building code upgrade coverage (if you have to spend more money to meet current building codes), "scheduled" personal property items (artwork, jewelry, valuables), electronic data, and "extra expense" (to relocate or to reconstruct lost records or data). If your policy doesn't seem to reflect the coverage you thought you had, contact your agent. You may need to contact your state's department of insurance, a public adjuster (licensed professionals that specialize in helping policyholders prepare and submit insurance claims) or a policyholder attorney.

Although most states require insurance companies to write their policies in plain, ordinary English, the typical insurance policy reads like Sanskrit - unintelligible to the average person. Don't be intimidated. There are no dumb questions when it comes to understanding an insurance policy.

9.5 The basics of mold contamination insurance coverage

Mold is fungus. There are all kinds. It's everywhere–indoors and out. At trace background levels, mold is not usually a problem for most people. There are exceptions. Mold needs a moist breeding ground to grow and reproduce. Mold can grow almost anywhere there is water intrusion, high humidity or dampness. Most often mold is confined to areas near the source of water. As mold grows, it may break down or otherwise compromises the integrity of its host material. The first 48 hours after water damage can be critical in preventing or containing mold growth.

Mold reproduces by generating spores–microscopic reproductive bodies similar to seeds. Spores and microscopic fragments of mold growth are a natural component of both outdoor and indoor air. However, when mold germinates and grows, it can produce large amounts of spores. Elevated levels of mold spores in indoor living or working environments can cause adverse health effects, particularly respiratory problems. When moldy material becomes damaged or disturbed, spores can be released into the air. Even if you kill the mold with bleach, but don't remove the mold, when it dries, you may actually make the problem worse by disturbing the dry mold and releasing spores in the air. Exposure can occur if people inhale the spores, directly handle moldy materials, or accidentally ingest them. Some species of mold are considered benign.

Some species of mold are considered hazardous. And there is everything in between. Mold sometimes produces chemicals called mycotoxins. Mycotoxins can cause moderate to severe illness in people who are sensitive to them or if they are exposed to large amounts in the air.

Most mold insurance claims typically arise in one of two circumstances: (1) mold comes to the property owner's attention along with the discovery of ongoing

moisture buildup, water leakage or water intrusion that has gone on for some time below the property owner's radar; or (2) after a sudden, accidental flood or leak from a plumbing system or appliance, there is a delay in or failure to adequately dry out water damaged building products, fixtures, furnishings, finishes or belongings.

If you are making a claim to your own insurer for damage to your property, you are making a "first party" property claim. If you are asking your insurer to investigate or defend a claim against you–for example, your tenants are suing you for mold contamination–you are making a "third-party" liability claim to your insurer. Here are some helpful pointers for each type of claim.

9.6 Property damage coverage

Homeowner, commercial property owner and renter property policies differ in kind and in scope from insurer to insurer. Whether mold contamination is covered under your policy will depend on the specific policy language and the cause or causes of the mold contamination. Read your policy carefully. Some property policies are "specified peril" policies, which may cover mold contamination if you can prove that it is caused by one the listed "perils" or causes. Some property policies are "all risk" policies, which may cover mold contamination, unless the insurer can prove that the cause(s) or the mold contamination itself is excluded in the policy.

Most property policies have a long laundry list of exclusions for damage caused by mold, dry or wet rot, corrosion, pollution, wear and tear, deterioration, faulty workmanship and materials, construction defect, and the like. To make matters more complicated, some policies have limited "exceptions" to the exclusions–kind of like a double negative–that may provide some very limited coverage for mold contamination.

In several states, like California and Texas–in response to insurers threatening to boycott coverage for water damage, as well as mold contamination coverage–insurance regulators are developing rules to permit insurers to provide minimum mold contamination coverage, e.g., $5,000 property limits, unless the policyholder buys more expensive coverage separately. Check your policy after it has been renewed to see if mold coverage limitations have been inserted.

When, however, mold contamination develops as a secondary or "ensuing" problem from water damage that is covered, your insurance company may cover the additional cost to remediate the mold contamination. More often than not, the real fight with your insurance company is over identifying the most important cause or causes of the mold contamination–are they covered or excluded? The jury is still out in most states as to whether mold is a "pollutant" within the meaning of most pollution exclusions.

As a general rule, most insurers attempt to exclude coverage for mold contamination associated with long-term leakage, moisture or water intrusion from a construction defect, wear and tear, deferred maintenance or poor repairs. Most insurers will acknowledge coverage for mold contamination associated with accidental discharge of a closed plumbing system–as long as you take reasonable steps to protect and repair the property after you discover the damage.

Accordingly, never speculate or guess about the cause(s) of the mold contamination or suggest to or agree with your insurance company that the mold must have been around for a long time or that there must be some hidden leak somewhere. Wait until all the investigation is completed before you acknowledge or agree as to the cause(s) of the loss with your insurance company.

Once you determine that you have a covered loss, be sure to go down the list of all the coverages in your declarations page, including additional living expense (if you have to move out during repairs), and make sure that you explore all the benefits you are entitled to.

9.7 Third-party liability coverage

In most liability policies, your insurer agrees to defend you if you're sued, and to reimburse ("indemnify") you if get hit with a judgment. Somewhere in between, there is a duty to settle claims against you. The duty to defend you is much broader than the duty to indemnify you: typically the insurer must defend you if the person suing you alleges facts that merely potentially seek damages within the coverage of your policy.

You only have to show that the claim might be covered, the insurer has to show conclusively that the claim cannot under any circumstances be covered. Accordingly, immediately tender the defense of any lawsuit against you to your insurer by sending a copy of the complaint and summons and asking for a defense. Don't wait. Tender early and often. You may not be able to recover attorneys fees you have to pay before you tender your defense to your insurer. If your insurance company refuses to defend you, consult a policyholder attorney to analyze your policy and the claims against you.

9.8 Call your insurance agent & report a suspected claim immediately

Call your insurance agent immediately to report a suspected claim. Put everything in writing. Follow the phone call with a fax, an email and a letter. In a catastrophic flood or pipe burst claim, getting a remediation team in within the first 48 hours to begin drying out property can be crucial to preventing or containing mold growth. If you get the run-around from your agent, insurance company, independent adjuster, or restoration company, follow up with a fax, an

email and a letter confirming their delay in responding. Be firm, but always be courteous. Insurance representatives and adjuster's do have their own crosses to bear. If you can elicit the adjuster's sympathy, empathy or kindness–or at least avoid ticking them off–your claim is likely to be handled more expeditiously.

Take detailed notes of every conversation, including the name, company, phone number, address, and job title of every insurance adjuster, representative, consultant and contractor you deal with. Confirm all agreements in writing. Insist that appointments and deadlines be honored. Keep a log or binder of all notes and letters. Ask for and keep business cards from everyone involved in your claim.

9.9 Protect all property from any further damage

Protect all property from any further damage, but do not make permanent repairs, and do not dispose of any damage property until after it has been inspected. Turn off any water flow to broken appliances or pipes. Take any necessary emergency measures to protect the building and personal property from any further damage. Do not throw anything away until you have the permission of the insurance company, and you have documented its condition. In mold claims you may need to hang on to mold contaminated items until they can be sampled by a lab for mold content. If in doubt, wrap the items in plastic or seal them in a plastic bag and store them.

If there is roof damage to your building, you may need to hire a contractor to cover it with a plastic tarp or tent the building to protect against bad weather. If the insurer delays in authorizing these measures, or in getting back to you, confirm the insurer's delay in a fax, email and a letter, and take whatever reasonable measures you can afford to protect the property. If your loss is covered, the insurance company should also cover the cost of any reasonable emergency measures you had to take to protect your property. It is not unusual for an aggressive insurer to deny coverage for damage resulting after the initial claim on the grounds that you failed to protect the property from further damage.

9.10 Photograph, videotape and inventory all damaged property

Document your loss as thoroughly as you can, and do not exaggerate, guess or speculate about the loss or the value. Photograph, videotape and inventory all damaged property. Make sure you record the date of the photos and videotape. It is important to document the source and extent of water intrusion, and visible mold contamination. Seal and save contaminated items. In a dispute with your insurer over whether any particular building component, finish, furnishing or belonging is contaminated, the item may need to be tested by a remediation consultant–the insurer's and perhaps your own. Don't throw these items away until any such issues are resolved in writing.

In most states a material misrepresentation, concealment or omission–even an unintentional one–made in connection with the claim–for example, claiming that an item was destroyed that really wasn't, or substantially overstating the value of a damaged item–may give your insurer a valid excuse to reject the claim and even rescind the policy. It is not an uncommon tactic for adjusters and claim representatives who are predisposed to reject or lowball a claim, to ferret out even minor discrepancies between your first recorded statement and subsequent recorded statements, and argue that these discrepancies constitute material misrepresentations sufficient to reject your claim.

Don't give them the opportunity. Don't exaggerate, speculate or guess about the loss or value of any particular piece of property. Make it clear to your insurer when your recollection may not be accurate, and when you are estimating value, and on what you are basing your estimate. It's fine to insert "To Be Determined" for the value of items you're not sure about.

If you don't have receipts to show what an item cost, get catalogs, statements from retail clerks, bank statements, credit card statements or statements from family members or friends. If all else fails, obtain a formal appraisal. Save this as a last resort, because your insurer will usually refuse to reimburse you for the costs of hiring your on appraiser and consultants.

9.11 Handling insurance claims: where to get the information

Every state has statutes and regulations that set minimum standards for handling insurance claims. Understand your rights and learn the laws that regulate how insurance claims are supposed to be handled. You usually can find these laws through your state department of insurance or insurance regulator website. Our website links to www.insure.com/states/, which in turn links you to all 50 state insurance regulatory agencies, where you can typically find a link to insurance laws in your state. You can also call your state's department of insurance or insurance regulator for information.

9.12 Your obligation to cooperate with insurance company investigation

You have a contractual obligation under your insurance policy to cooperate with your insurer in its investigation and handling of your claim. You do not have an obligation to allow yourself to be abused. In most states you and your insurance company have a reciprocal obligation to act in good faith and deal fairly with each other to investigate and process your claim.

This means that each of you should avoid taking any unreasonable position or doing or saying anything that would unreasonably frustrate each other's rights under the policy. The insurer should never make an unreasonable request to you.

You should never refuse a reasonable request from your insurer for information related to your claim. But do not give a recorded statement, or a sworn statement, or a sworn “proof of loss” form until you are sure you understand your rights, your insurance coverage and the full extent of your claim.

Your insurer may require you to give one or more recorded statements. Use your own tape recorder to tape your statement and the insurer’s questions. More often than not, insurers and their attorneys delay or refuse to give you a copy of your recorded statement. Do not give a recorded statement until your are sure you understand your rights, your insurance coverages, and the full extent of your claim.

You may also be required to appear for an "Examination Under Oath"("EUO"). Your insurer may hire an attorney to take your EUO. You may have an attorney present to represent you, but your insurer will not pay for your attorney. Do not appear for an EUO until your are sure you understand your rights, your insurance coverage and the full extent of your claim.

Your insurer may ask you to make available various documents related to your claim, including banking statements, investment reports, receipts and other personal financial documents. You are not required to produce your tax returns, but you are required to produce any other documentation reasonably related to your insurer’s investigation of your claim.

Your insurer can require you to produce these kinds of documents as long as they are reasonably related to its investigation. Do not provide these documents to your insurer until your are sure you understand your rights, your insurance coverage and the full extent of your claim.

Most policies require that you submit a "sworn proof of loss" form to your insurer within a certain amount of time after being provided the form.

In most states you are contractually obligated to submit the sworn proof of loss within the time limit, or at least to substantially comply with the requirement, unless you get an agreement from your insurer for more time or an agreement to dispense with the sworn proof of loss.

Do not submit the sworn proof of loss to your insurer until your are sure you understand your rights, your insurance coverages, and the full extent of your claim. It is not unusual for an aggressive insurer to use mistakes in the sworn proof of loss to reduce or reject coverage for a claim.

Aggressive insurers may keep asking you for more and more information, anticipating that at some point, you will draw a line in the sand. If, however, you refuse to comply with reasonable requests for a recorded statement, an EUO, a sworn proof of loss, or documents reasonably related to your insurer’s

investigation, you may be giving your insurer a valid excuse to deny your claim, based solely your purported breach of the duty to cooperate. If you believe that any requests are unreasonable, ask you insurer to explain the reason for the requests in writing. Err on the side of caution.

If in doubt, consult with a policyholder attorney, a public adjuster or your state department of insurance, before you say "no way" to a request that may–in retrospect–turn out to have been a reasonable one.

9.13 Never sign anything without proper legal advice

Never sign a release, waiver, indemnity or “hold harmless” agreement without proper legal advice (from your attorney or lawyer). You should never have to sign a release to settle an undisputed claim. If your insurer, adjuster, consultant or contractor asks you to sign a release, waiver, indemnity or hold harmless agreement, ask them to explain why in writing.

These kinds of agreements can be used to deprive you of rights and benefits forever. These kinds of agreements can obligate you to pay thousands of dollars for issues that come up down the road that you never anticipated. Consult a policyholder attorney as to your rights before signing any such agreement.

9.14 Get a second or even third opinion regarding estimates

Be wary of "lowball" estimates from insurance friendly contractors. Get a second and even a third written estimate to repair and replace damaged property from reputable, independent professionals that you would hire to do the actual work. You are entitled to have your damaged property replaced with "like kind and quality." Insist on it. When you can’t match the remaining undamaged tile, wallpaper, carpeting, or other portions of undamaged property, you are entitled to have the entire "line of sight" replaced to match. Insist on it.

Make sure that you understand how your insurance policy pays out on covered claims. Some losses are paid on "actual cash value," which in many states can mean either the "fair market value" or the cost to replace the property, less depreciation for age, wear and tear. Some losses are paid out on a replacement cost value. Your policy may permit your insurer to pay you actual cash value, and withhold the additional cost to replace property until you actually go out and replace it. In recent years, some insurers have attempted to also withhold an amount for contractor "profit and overhead." Don’t let them. Policyholder attorneys and some insurance regulators have successfully prevented insurers from withholding these amounts.

If you have a disagreement with your insurer over the amount of your claim, you may be required by your insurer to submit the dispute to "appraisal." Appraisal is a form of binding arbitration to settle disagreements over the amount of your claim. It typically does not decide disagreements about what is covered, what is not covered, what caused the loss or poor claims handling problems, unless you and your insurer agree to submit those additional disputes to the appraisal. While appraisal was initially designed to be an inexpensive, informal resolution of insurance disputes, insurers have turned it into one of the most expensive, over-lawyered, dragged out sideshows in insurance claim resolution. If you cannot resolve a dispute with your insurer over the amount of your claim, or your insurer demands appraisal, you should consult with a policyholder attorney.

9.15 You don't have to use insurer's "approved contractors"

You do not have to use consultants or contractors recommended or "approved" by your insurer to perform repairs. And if ever you want to hire an "approved contractor," you should thoroughly investigate the qualifications, license, and references of your insurance company's "approved" contractor before agreeing to hire them to do the repairs.

"Approved" contractors are typically contractors who have agreed to discount their labor and costs, and follow insurer guidelines, in exchange for a volume of business from the insurance company. If your insurer promises to "guarantee" the approved contractor's work, the "guarantee" is generally limited to replacing any defective materials or correcting faulty workmanship. Your insurer is not insuring against any contractor delays, negligence or liability. Accordingly, do not use the "approved" contractor unless it is a contractor that you would independently hire to do the work after a thorough screening.

Be sure to check that each contractor's license is valid, and for any complaints against the license. Be sure that the contractor is covered (bonded and insured). You can usually find some of this information online at your state's contractor licensing agency website.

9.16 Get professional help if you need it

If you reach an impasse with your insurer, be sure to document the dispute fully in writing. Explain why your position is reasonable, and your insurance company's position is not reasonable. If your dispute does not necessarily require legal advice, you may be able to resolve the dispute by calling your state's department of insurance or insurance regulator, or by hiring a public adjuster. If your dispute requires legal advice, contact a lawyer who is experienced and specialized in representing policyholders.

If you need a qualified consultant for testing or advice about mold remediation, be sure to contact a qualified certified industrial hygienist (CIH) with experience in microbial contamination and testing. You can find a qualified firm in your area by searching through the American Industrial Hygiene Association's website at http://www.aiha.org/ConsultantsConsumers/html/consultantslist.htm. There are a lot of consultants out there who have jumped on the "mold bandwagon" without adequate training or experience.

9.17 Statute of limitations

Make sure you know the statute of limitations (deadlines) that may cut off your right to file a lawsuit. All states have statutes of limitation that will cut off your right to bring a lawsuit against your insurance company if you don't file a lawsuit in time. The statutes of limitation differ from state to state.

Most property insurance policies have a shorter contractual limitation period that will cut off your right to bring a lawsuit against your insurance company if you don't file a lawsuit in time. These periods are typically one year or two years after a loss occurs or after you first discover a loss. Sometimes the "clock" stops running during the time your claim is pending, and starts again once your insurer denies your claim. In most states your insurance company is required to tell you in writing that your claim is denied, and that the limitations clock is running. Make sure you understand all possible deadlines. Consult with a policyholder attorney sooner, rather than later. You will make it harder for a policyholder attorney to give you the representation you deserve, if you show up on her doorstep the day before the clock stops ticking.

9.18 Report all unfair claim handling to your department of insurance or insurance regulator

Most state insurance regulators track policyholder complaints about their insurers and compile the results. The results may be available through your state insurance regulator's web site. In some states you can file a formal complaint online. Insurance regulators also regularly compile "market conduct" reports on unfair claim practices. If you don't file a complaint, you can't make a difference.

Chapter 10

10 Toxic mold legislation

10.1 2003 toxic mold legislation

Here's a list and summary of recently passed mold laws. Note: this list does not purport to include all the toxic mold bills that may have been introduced across the country. However, you may use this list as a guide as to what mold laws are available or applicable in your state.

10.1.1 Illinois

- Bill # **HJR 12** - Creates a Joint Task Force on Mold in Indoor Environments to examine the mold issue and make recommendations to the General Assembly pertaining to the regulation of mold in indoor environments. Resolution passes 6/1.

10.1.2 Louisiana

- Bill # **HB 1328** - Licenses persons who perform mold assessment and mold remediation services. Governor signed 7/1. Effective: 8/15/03. Act 880, Laws of 2003.

- Bill # **HB 1681** - Requires the Louisiana Real Estate Commission to produce a mold information pamphlet to be distributed by realtors to home buyers by July 1, 2004. Governor signed. Effective 7/2/03. Chapter 1123, Laws of 2003.

10.1.3 Massachusetts

- Bill # **SB 657** - Authorizes the study of the health effects from indoor exposure to toxic mold. Public hearing 7/16.

10.1.4 Montana

- Bill # **HB 536** - This law permits, but does not require, a seller, landlord, seller's agent, buyer's agent or property manager to provide a mold disclosure statement on at least one document, form, or application executed prior to or contemporaneously with an offer for the purchase and sale, rental, or lease of inhabitable real property. Governor signed. Law effective 5/5/03. Chapter 584, Laws of 2003.

10.1.5 Oklahoma

- Bill # **HCR 1011** - Creates a Joint Task Force on Mold and Mold Remediation. Adopted 5/23/03.

10.1.6 Oregon

- Bill # **SB 557** - Modifies a seller's obligation to disclose information about real property to a prospective buyer to include disclosures related to mold and health-related problems potentially related to mold. Referred to Senate Committee on Business and Labor on 2/26. Legislature adjourned 8/27.

- Bill # **SB 562** - Requires persons selling property to disclose knowledge of health problems related to mold or other contaminants experienced while residing on the property and any testing for mold or other contaminants conducted on the property. Referred to Senate Committee on Business and Labor on 2/26. Legislature adjourned 8/27.

10.1.7 Pennsylvania

- Bill # **HB 1187** -Requires the Department of Health to establish a task force on mold. Referred to the House Committee on Health and Human Services on 4/16.

10.1.8 Rhode Island

- Bill # **SB 983** (Substitute A as amended) -Creates a Senate commission to study the health effects of toxic mold. Resolution passes. Resolution 185, Laws of 2003.

10.1.9 Texas

- Bill # **HB 329** -Relates to the regulation of mold assessors and remediators; providing civil and administrative penalties. Governor signed 6/11. Effective 9/1/03. Chapter 205, Laws of 2003.

- Bill # **SB 127** -Relates to procedures by insurers for handling water damage claims. Governor signed 6/11. Effective immediately. Chapter 207, Laws of 2003.

10.2 Toxic mold insurance legislation

California --Toxic Mold. SB 732 (Ortiz), Chapter 584:

Enacts the Toxic Mold Protection Act, intended to protect the public from adverse health effects related to the presence of molds in residential and commercial properties.

Outlines specific requirements for property owners (to be regulated through the Department of Health Services).

Adds mold to the list of substances, materials or products which may be an environmental hazard and which must be disclosed to a prospective purchaser of residential property as part of the standard "Real Estate Transfer Disclosure Statement." ---C*alifornia Department of Insurance* (*www.insurance.ca.gov).*

Texas -- Gov. Rick Perry has signed into law a number of bills intended to reform the state's comprehensive homeowner insurance system that some blame for skyrocketing insurance rates, during the regular session and was signed into law Tuesday by Gov. Perry during a ceremony in Temple.

The bills signed into law include:

- Senate Bill 14 which was designed to close a loophole that had allowed many homeowner and auto insurance companies to bypass rate regulation. It would also strengthen regulatory oversight and increase consumer options for coverage.

- House Bill 329 was written to protect consumers from unlicensed mold remediators and prevents repaired mold claims from being a factor in insurance underwriting.

- Senate Bill 127 requires the licensing of public adjusters and gives the Texas Department of Insurance the authority to require more prompt response to water damage claims.

- Perry lauded lawmakers for closing loopholes in Texas law that allowed a handful of companies to dominate the state's insurance market. Currently about 95 percent of homeowners insurance policies in Texas are written by unregulated companies, and almost two-thirds of the market is held by three companies.

- "Senate Bill 14 provides that rate standards will apply to all homeowner and auto insurance companies with no exceptions, and no loopholes," Perry says. "All future rates must be fair, reasonable and justified. If future

rates are unfair, the Department of Insurance now has the authority in law to reject excessive rates out of hand and force insurance companies to offer lower rates."

Throughout the U.S.A., lawmakers have been busy introducing a variety of bills aimed at the issue of mold, how it is addressed by society, and how it is covered by insurers. According to Kirk Hansen, director of claims for the Alliance of American Insurers, "We are currently tracking nearly 30 bills under consideration in 14 states. Fortunately, many state lawmakers and regulators wisely permitted insurers to exclude mold coverage or to place limits on coverage. So far, 39 states and the District of Columbia have approved limitations on homeowners policies."

Hansen said, "What we're seeing this year (2003) is an effort by some lawmakers to require studies that determine acceptable exposure limits for mold or set air quality standards. The Alliance believes that it is premature to establish standards at this time since the science of how mold affects individuals is not well developed." The states of California and Nevada have passed bills making mold coverage compulsory, drastically affecting insurance premiums consumers will have to pay.

"California has a couple of bills dealing with mold – one is SB 31 (that deals with requirements for home inspectors), but the one more concern is SB 850 (that allows the insurance commissioner to disapprove, deny, or disallow a policy form or certificate, policy change, or policy exclusion filed with the Department by an insurer, or withdraw any previous approval, if the policy form or certificate, policy change, or exclusion is likely to contribute to a significant health risk or to a property being in an uninhabitable condition). The bill did not mention the word mold, but it seems that mold could possibly come in play if the bill was enacted."

"If that's the case, under this law, policy forms the commissioner has already approved could be disallowed further down the road. This is a unique bill we have never seen the likes before. This is a brand new bill and it is potentially viable. It has not yet been debated. The Alliance is certainly going to object it."

Hansen noted that the Nevada bill would require insurers to disclose coverage for the control of mold in property insurance, which "also requires insurers offer coverage for mold in various amounts," and that "Texas serves as an example why it's a bad idea to mandate coverage for mold since the situation had a catastrophic effect on rates. If insurers are not allowed to limit coverage or offer coverage as they see fit, some insurers may be forced to leave the marketplace and availability of coverage for consumers. This is also a new filing and it has potential viability."

New York – The **Office of General Counsel** issued the following opinion on April 1, 2003, representing the position of the New York State Insurance Department: RE: Enforceability of mold exclusions in New York policies.

Questions Presented:

1. May a mold exclusion be included in a property/casualty insurance policy written in New York, regardless of where the property or risk is located?

2. May a mold exclusion be included in a property/casualty insurance policy issued to a New York policyholder, regardless of where the policy is issued or delivered?

3. Is a mold exclusion unenforceable with respect to any risk located in New York, regardless of where the policy was issued or delivered, or where the policyholder is domiciled?

Conclusion:

Nothing in the Insurance Law or regulations thereunder specifically prohibit a mold exclusion in an insurance policy. However, in a policy issued by an authorized insurer written on risks or operations in this State, an exclusion that is misleading or violative of public policy is not permissible. The Superintendent has not approved any mold-related exclusions.

Facts:

This was a general inquiry and no specific facts were provided. The inquiry does not indicate whether it pertained to property or liability exposures, but the Department will address both. The inquirer also did not indicate whether the question pertained only to authorized insurers or also to excess line insurers, so the Department will address both also.

Analysis:

There is nothing in the Insurance Law or regulations promulgated thereunder that specifically restricts or otherwise addresses mold exclusions in either a property or liability insurance policy, whether issued by an authorized insurer or on an excess line basis. However, there are certain statutorily mandated coverages, such as certain types of motor vehicle insurance (including statutory automobile liability, no-fault insurance and uninsured motorist coverage) and workers' compensation insurance, where a mold exclusion is not permitted because it is not specifically authorized.

Authorized insurers:

Authorized property/casualty insurers are subject to Article 23 of the Insurance Law, in regard to "all kinds of insurance written on risks or operations in this state," subject to certain exceptions contained in N.Y. Ins. Law § 2302(a) (McKinney 2000), which are not relevant to this inquiry. Article 23, therefore, applies regardless of where the authorized insurer issues or delivers the policy, but only in regard to a policy insuring a New York risk or operation.

Subject to certain exceptions (such as for special risk insurance policies issued pursuant to Article 63 of the Insurance Law1), all policy forms must be filed with, and approved by, the Superintendent, before they may be used.

However, whether or not the policy form must be filed, the insurer is subject to the compliance and standards requirements of Article 23 and the Insurance Law, as well as regulations promulgated thereunder, including the requirement in N.Y. Ins. Law, section 2307(b) (McKinney 2000) that a policy may not be misleading or violative of public policy.

While the Insurance Department has received over one hundred filings restricting mold coverage, the Department has not approved any of them. As the Superintendent stated on May 3, 2002, in testimony before the Joint Senate Committees on Health and Environmental Conservation Regarding the Issue of Toxic Mold, in light of the scientific uncertainty concerning mold-related damages, the Department has not yet formulated a policy position.

But the department will proceed in such a manner as to ensure that New Yorkers continue to have access to affordable and meaningful insurance coverage. In the meantime, the Superintendent has stated that the Department will not approve any limitations or exclusions for mold-related coverages until it receives information sufficient to warrant such exclusions or limitations.

Unauthorized insurers

New York authorized insurers are generally required to obtain the Superintendent’s approval to use their insurance policy forms in this state (special risk insurance being a notable exception).

However, insurance policy forms for policies issued by unauthorized insurers through a New York licensed excess line broker, in accordance with the provisions of N.Y. Ins. Law § 2105 (McKinney 2000 & Supp. 2003), N.Y. Ins. Law § 2118 (McKinney 2000 & Supp. 2003) and N.Y. Comp. Codes R. & Regs. tit. 11, Part 27 (1999) (Regulation 41), are not approved by the Superintendent of Insurance and are not subject to the requirements of Article 23.

This does not mean that excess line policies may provide any kinds of terms and conditions that the insurer wants since a particular statute or regulation may be applicable to such policies. For example, N.Y. Comp. Codes R. & Regs. tit. 11, § 27.11(a) (1999) of Regulation 41 provides:

(a) No excess line broker shall procure coverage from an unauthorized insurer if such coverage is prohibited by law, including if such coverage:

(1) does not constitute insurance within the meaning of section 1101 or other sections of the Insurance Law;

(2) involves a kind of insurance not authorized under section 1113 or other sections of the Insurance Law;

(3) is not within the scope of section 2105 of the Insurance Law;

(4) is determined by any Appellate Division of the New York State Supreme Court or the New York State Court of Appeals to be against public policy in this State; or

(5) has been otherwise proscribed by law.

In regard to mold, there is nothing in the Insurance Law that specifically restricts or otherwise limits the exclusions that may be contained in an excess line insurance policy or that would otherwise require an excess line insurer to provide coverage for damage or loss resulting from mold. Without an amendment to the law or regulations, mold exclusion would be permissible in an excess line policy.

Enforceability of exclusion

In all respects in which a provision of an insurance policy violates the requirements or prohibitions of the Insurance Law, the policy is enforceable as if it conformed to such requirements or prohibitions. N.Y. Ins. Law § 3103 (McKinney 2000); Bersani v. General Accident Fire & Life Assurance Corp., 36 N.Y.2d 457, N.Y.S.2d 108 (1975).

Accordingly, an authorized insurer that used an unapproved policy form for a New York risk or operation containing mold exclusion (where prior approval was required) may not enforce the exclusion against the insured.

This Department offers no opinion as to whether a court would conclude that mold exclusion is unenforceable on public policy or other grounds in the absence of a statute or regulation governing such exclusion.

This opinion should not be construed to limit the Superintendent's authority to determine that a mold exclusion would be misleading or against public policy or otherwise be prohibited.

For more information please contact Principal Attorney Paul Zuckerman at the New York City Office.

10.3 The Comprehensive Loss Underwriting Exchange (CLUE)

CLUE is a database used by insurers to track claims filed on properties all across the nation. The database includes information on both the claims history of your house - regardless of who filed the claim - and on claims filed by you as a homeowner. CLUE is administered by Choice Point Asset Company.

In general, all property claims filed with insurers are recorded in the CLUE database. In some cases, insurers have reported inquiries about the process for filing a mold claim, even when no claim was actually made later on.

It is increasingly common for potential home buyers to request a copy of a building's CLUE report to learn its past repair history. An extensive list of claims on a property may limit the ability of potential buyers to obtain homeowner's insurance on the structure, which in turn may limit your ability to sell your property. For these reasons, you may wish to consider carefully whether or not to file repair claims on your home.

Under federal law, you have the right to challenge incorrect information in your CLUE report. If you are denied homeowner's coverage on the basis of information in a CLUE report, you are entitled to receive a free copy of the report. Contact the Equifax Insurance Consumer Center at (800) 456-6004 for assistance.

10.4 Reporting mold damage to your insurer

You are not obligated to report mold problems to your insurance company if you pay for the remediation yourself. Depending on the scope of the problem and the estimated remediation cost, you may choose to pay these expenses out-of-pocket rather than filing a claim.

However, your policy may require you to report water damage to the insurance company within a set time limit (generally 30 days) after you discover or should have discovered the damage in order for a claim to be accepted.

10.5 Things to consider when reporting mold problem to your insurer

You should consider the following when deciding whether to contact your insurance company about a mold problem:

- If the estimated repair cost is less than your insurance deductible, you will be paying for the repair out-of-pocket whether you file a claim or not. Since any claim for mold or water damage will be recorded on your home's CLUE report, regardless of who pays for the repair, in this situation you may decide not to file a claim.

- If you do not file a claim and the mold damage turns out to be more extensive than you expected, or if the damage continues to worsen after initial out-of-pocket repairs are made, your insurance company may claim that it does not have to pay if you later file a claim. Your insurer might argue that the total remediation cost would have been lower if you had promptly reported the problem. In this case, you may be responsible for some or all of the cost of remediation.

In general, your insurer must begin an investigation within fifteen days after you file a written claim. The company may ask you for additional information, and has fifteen more days after you send the information before it must accept or reject the claim. If the company agrees to pay the claim, it must do so within five days. If the company rejects the claim, it must give you the reasons in writing.

10.6 Additional Living Expense (A.L.E.) Coverage

Your homeowner's insurance policy may include Additional Living Expense (ALE) coverage. This coverage pays for your living expenses if you must vacate your home during remediation. Review the coverage to determine whether it is adequate to meet your family's needs. Also make sure you understand any limitations on how this may be spent.

If you must leave your home, be sure to check frequently with your insurer as to the amount of ALE coverage you have remaining under your policy, and plan your expenses accordingly. Make sure to keep copies of receipts related to all expenses covered by ALE.

Be aware that, subject to the coverage limits set in your policy, you are entitled to receive the amount necessary to cover the reasonable increased living expenses that arise from leaving your home, so that you can maintain your normal standard of living. Your insurance company may not limit ALE coverage to a certain amount per day or per month.

10.7 Coverage for personal items

As with reimbursement for structural repairs, Texas HO-A insurance policies reimburse you for the actual cash value of the contents of your home. Actual cash value means the current replacement cost minus depreciation due to age, use or wear and tear. Check your policy to see if that will be sufficient coverage. You may want to consider purchasing additional coverage that offers reimbursement for personal belongings at the current replacement cost. Texas Department of Insurance (TDI) website has more information regarding depreciation and replacement.

10.8 The role of your mortgage company

If you have a mortgage on your home, the mortgage company has a financial interest in making sure the building is structurally sound and livable. It is common for an insurance settlement check to be made out to both the homeowner and the mortgage company. Some mortgage companies will simply endorse the check over to the homeowner, leaving it to the homeowner to arrange for remediation. Other companies take full control of the remediation process. In these situations, the mortgage company usually takes possession of the insurance check and pays the contractor in installments, with an inspector monitoring the progress of the work and releasing payments.

Consult with your mortgage company on the extent to which it will become involved in the remediation process. If the company oversees the work, make sure you understand whose responsibility it will be to ensure the job is done properly, and the extent of your liability in the event of problems with the contractor. You should remain active in this process as much as possible.

10.9 Resolving disputes with an insurer or claims adjuster

If you have a problem with your insurer regarding coverage or the payment of a mold-related claim, you may file a complaint with TDI's, Consumer Protection Division.

Some consumers have experienced problems working with a claims adjuster, including failure to return their phone calls, explain the coverage given under their policies or discuss their claims. If this happens to you, contact the adjuster's supervisor and, if necessary, the claims manager at your insurance company. If this does not resolve the problem, or if the supervisor and manager fail to respond to your calls and concerns, you may want to file a complaint with TDI. You may also wish to consult with or retain an attorney to help you with the claims process." --- *www.oag.state.tx.us/consumer/mold_remed.shtml*.

Chapter 11

11 Effectively handling mold and water damage claims

Source: Texas Department of Insurance website (www.tdi.state.tx.us).

The following suggested practices have been developed by the Texas Department of Insurance (TDI) with input from the Advisory Task Force for Mold-Related Claims, which included representatives of the insurance industry, consumer groups, the building and trade industries, lenders, mold remediation specialists, and the scientific community.

The task force recognized the various and complex issues associated with mold-related insurance claims and the many factors that may have contributed to the cause of the problems. The suggested practices alone will not address all of these issues. TDI's intent in developing these suggested practices is to improve the processing and handling of water damage claims with ensuing mold losses, to identify potential problem areas, and to outline the roles of the industry and the consumer in dealing with these claims.

The suggested practices are not mandatory for insurers and do not amend existing law nor the provisions of the insurance contract between the insurer and the homeowner. The suggested time frames do not alter or amend Texas Insurance Code Article 21.55, which sets forth the statutory timelines for processing claims.

In addition, while insurers should make every effort to handle claims promptly and thoroughly, circumstances may exist that would make time periods or other steps infeasible or not applicable. Also, certain steps listed in this document may not apply to a particular insurer or claim or may vary according to the severity of the claim. With every claim, however, the claimant and the insurer should maintain communication so that processes and steps utilized by that insurer are thoroughly and effectively conveyed to the claimant.

As an insured and potential claimant, these are some key points to be aware of when faced with water damage that could lead to the development of mold. These guidelines are designed to help consumers with claims involving water or potential mold damage.

Note: Not all water and mold damage is covered by your residential property insurance policy - coverage and limitations vary with individual policies. Whether or not your water damage is a covered claim, you should take immediate action to stop the leak and dry the area to prevent mold growth that could cause further damage to your home and/or affect your family's health.

11.1 I have identified a potential water damage claim. What should I do?

Your actions should include, whenever possible:

- Stop the water leak/flow
    - Notify your insurer
    - Ask what is required of you
- Begin the process of determining if your loss is covered and to what extent it is covered
- Remove standing water and begin drying the area
- Photograph the damaged property
- Remove water soaked materials
- Keep removed materials and move them to a secure, dry and well-ventilated area, or outdoors
- Protect repairable and undamaged items from further damage
- Keep an activity log, including a record of all contact with your insurance company
- Keep all receipts
- Don't throw away removed or damaged materials until instructed by your insurance company
- Don't jeopardize your safety
- Don't make large structural or permanent repairs
- Don't exceed personal capabilities

*Since **molds require moisture to grow** and can begin growing within **24 to 48 hours** of a water event, stopping the flow of water and drying out materials as soon as possible reduces the potential for mold growth.*

Water damage claims that include active mold growth involve significantly higher costs than water damage claims without mold. Your policy allows you to protect your property from further damage without jeopardizing your coverage. It is important to document any repairs, keep all materials for review by your insurer, and document your expenses.

Your duties, as outlined in most residential property insurance policies, include, but are not limited to:

- give prompt written notice to the insurer of the facts relating to the claim
- protect the property from further damage
- make reasonable and necessary repairs to protect the property
- keep an accurate record of repair expenses

11.2 What can I expect from my insurance company when I report water damage?

For typical water damage claims, it is appropriate for your insurance company to:

- Make written or verbal contact within 24 hours or one business day of notice of claim, and share information regarding emergency repairs and mold prevention.
    - In the case of an active leak, your company may verify that you have shut off the water and advise you to contact a qualified specialist (such as a plumber or drying company) if needed. Your company may provide a list of qualified specialists who can address the problem immediately. However, it is your right to select any vendor of your choice, including vendors not on the insurance company list.
    - Your company may advise you of your responsibilities under the policy.
- Provide the name and contact information of a company representative and advise you that multiple individuals may be involved with the investigation and processing of your claim. However, one insurance company representative should oversee your claim and be available to answer questions.
- Send a company representative to your home within 24 to 72 hours of notice of claim. Your company may take into consideration the severity of the potential claim, and strive to have a representative on-site within 24 hours.
- Determine whether your claim is covered and provide an initial estimate of damage within seven to 14 days after the company representative's initial on-site visit. This initial estimate is subject to change. Within the same timeframe, your company should strive to provide you with a written statement confirming or denying coverage.
- Return all phone calls within 24 hours.

Policy provisions require you to provide your company with a written notice of claim, but on most water damage claims your initial contact should be via telephone. Have your policy number available and be prepared to provide information on the extent and severity of the water damage. Initial contact may be with your insurance agent, a claims office or the toll-free phone number included in the policy.

Under most loss settlement provisions, your insurer is responsible for paying the actual and necessary cost to repair or replace the damaged part of your home with material of like kind and quality, subject to your limit of liability and all

other policy provisions. However, your insurer is not responsible for paying any claims that do not exceed the policy deductible.

There are times when these timelines may not be feasible, such as in the event of a major catastrophe.

11.3 What can my insurance company expect from me?

- The name and contact information of a responsible person to provide information and access to the home. This person should be available to allow prompt inspection of the damage to minimize delays in claims processing.
- Cooperation and complete information in order to accurately and adequately resolve the claim.

While the company representative inspecting your home may be your most direct contact with the company, claims processing involves a number of company representatives. Having a responsible person available reduces the risk of providing incomplete or inaccurate information, and helps the claims process proceed smoothly and efficiently. Written notes should be kept as a record of any requests for more information or discussion of what to expect during the process.

11.4 What can I do if I feel my insurance company is not being responsive?

- Document conversations with and activities by your insurance company, including dates, names of company representatives, dates when requests for additional information were given to you, and dates the additional information was provided.
- Be persistent.
- Request to speak to the representative's manager, and continue up the chain of command as necessary.
- If you cannot resolve the dispute directly with your company, file a complaint with the Texas Department of Insurance (TDI).

> *Note: For those living in other states, you may contact your state's insurance department, and lodge your complaint there.*

You may file a complaint with TDI in several ways:

- by our Web site at www.tdi.state.tx.us/consumer/complfrm.html
- by e-mail at ConsumerProtection@tdi.state.tx.us
- by fax at 512-475-1771
- by mail at
- Texas Department of Insurance
- Consumer Protection (111-1A)
- P.O. Box 149091
- Austin, TX 78714-9091

- For more information or to request a complaint form, call TDI's Consumer Help Line
- 1-800-252-3439
- 463-6515 in Austin

Documenting all conversations with written notes will reduce the risk of misunderstandings between you and your insurance company. In the event a misunderstanding cannot be resolved, this documentation will make it easier for the company representative's superior or a TDI complaint specialist to assist in resolving your complaint.

11.5 Should I test my home if I find mold growing?

- The Texas Department of Health (TDH) and the Environmental Protection Agency (EPA) advise that testing mold prior to remediation is not necessary to determine if remediation is needed. There are, however, other reasons why testing may be desired. Consult the TDH and EPA websites for additional information.

- Mold testing can be expensive and time-consuming. At this time, there are no numerical health standards to which test results can be compared, making interpretation difficult. Your policy may not cover mold testing, and money spent on mold testing could reduce the amount available for cleaning up the mold and repairing your home. Your insurance company, however, may choose to conduct testing. If your insurance company insists on conducting tests, this should be done at the insurer's expense and not included as part of the settlement amount.

- Post-remediation testing, performed after your home is remediated, is used to determine whether remediation has been effective. This type of testing is best used only as a quality control check on the mold remediation specialist and should be done while the area is still under containment. Establish in advance with your insurance company whether the cost of post-remediation testing will be part of the settlement amount.

To date, there are no established standards for evaluating and applying the results of most mold tests. A number of states, including Texas, have health task forces reviewing this issue. TDI recommends that anyone considering testing review information available on the Internet from independent sources.

*The **Texas Department of Health** (TDH) has links to a variety of federal and state agencies. Although the focus of federal agencies like the **Environmental Protection Agency** (EPA) has primarily been indoor air quality in schools and commercial buildings, the EPA recently released **A Brief Guide to Mold, Moisture, and Your Home**.*

11.6 Should I move out of my home if I discover a mold problem?

- If you are concerned about possible health risks from mold growth in your home, you should consult a physician. Health expenses are not covered under your residential property insurance policy.
- When determining whether relocation is necessary, you and your insurance company should consider the following factors:
    - Is the home unlivable due to significant structural damage?
    - A thorough inspection applying guidelines such as those found on the Texas Department of Health (TDH) website should be done. For example, is there heavy mold growth surrounding the window in your bedroom, or is the mold growth in a light traffic area such as a garage?
    - Do any members of the household have health symptoms consistent with mold? Is there a time-link relationship between the symptoms and the mold infestation, or can the symptoms be linked to another potential cause such as the adoption of a new family pet?
    - Do the symptoms persist after the affected person leaves the home?
    - Is there an unexplained strong musty smell or visible mold?

While experts agree more research is needed on the potential health effects of mold, some individuals appear to be more susceptible to potential mold-related health symptoms. Infants, the elderly, asthmatics, persons with weakened immune systems or persons in frail health are thought to be at higher risk. Visit the TDH website for additional information and links to other health resources.

11.7 I had to move out of my home. What can I expect from my insurance company regarding Additional Living Expense (ALE) coverage?

For typical water damage claims, it is appropriate for your insurance company to:

- determine if ALE is payable within 10 to 14 days of notice of claim
- provide advance payment for ALE within 24 hours of determination of need
- reimburse covered ALE expenses within five business days of receipt of documentation
- provide information on ALE provisions of your specific policy, such as how it may be used and the limits of coverage available under your policy
- keep you advised of remaining coverage available under the ALE provision

As defined in the standard residential property insurance policy, Additional Living Expense refers to *any necessary and reasonable increase in living expense you incur so that your household can maintain its normal standard of living.*

For example:

Regular Monthly Expenses		**Monthly Expenses While Out of Home**		**ALE Reimbursement**	
mortgage	$1000	mortgage + $900 rent	$1900		$900
groceries	$300	meals	$450		$150
utilities	$200	home + apartment utilities	$325		$125
pet expenses	$50	pet boarding	$300		$250
Monthly Total	$1550	Monthly Total	$2975	Monthly Total	$1425

11.8 How can I control my ALE expenses?

- Monitor your expenses closely and know the limits of your policy. Discuss the timing of recurring bills (such as rent) with your adjuster to ensure that claims processing time is considered. When possible, consider using vendors who can direct-bill your insurance company.
- Obtain a written plan of action from the remediator and contractor regarding when repairs will be completed, and monitor the repair progress.
- Be aware that any vendor you select is an independent contractor chosen and retained by you.

It is important to know the amount of ALE available and to monitor these expenses. You should compare the estimated time you will be out of your home to your coverage limit. Even if you believe your ALE coverage is adequate based on the contractor's estimated completion date, additional damage may be uncovered during the remediation process and the repair time lengthened.

11.9 How can I select a qualified remediator? How can I ensure the mold remediation and repair process is handled correctly and efficiently?

- At this time, there are no standards or certification for mold remediation specialists. Some insurers may have a list of recommended specialists, but it is your responsibility to select the contractor. Your insurer is prohibited from requiring you to use a specific company, but may assist you with the

selection of a contractor and with getting remediation work done in a timely manner.

- If your insurer provides a list of recommended specialists, consider asking:
    - How are the vendors selected?
    - What are the benefits of selecting a recommended vendor?
    - Will the work be guaranteed by the insurer?
    - When selecting a mold remediation specialist, use the same care that you would employ when selecting any contractor. Specifically, it is advisable to select a contractor who is experienced in removing mold from homes and who has the necessary safety equipment to do the job. Ask the contractor to provide references and proof of education in mold remediation and related areas. Ask to see written company operating procedures and the type of insurance the company carries. Be aware of possible conflicts of interest on the part of companies providing multiple services, such as testing, water extraction, and build-back. Consult the Texas Department of Health website for additional information on selecting mold remediation specialists.
- One person should diligently monitor and supervise the remediation and repair process to ensure that work is progressing and completed in a timely fashion.
- Obtain a written contract that includes estimated completion dates for various stages of the work.
- Have the contractor develop a written plan of action within five business days of accepting the job.
- Check that the job is progressing on schedule and, if not, follow up.

The remediation and repair of your home can cost thousands of dollars. Therefore, it is important to be selective in your choice of a mold remediation specialist. It may be valuable to seek other homeowners who have experience in mold remediation and selecting contractors.

You may also wish to contact your local Better Business Bureau to learn whether any of the contractors you are considering have had complaints filed against them. It is your responsibility to choose and hire a contractor, and you are never obligated to use a contractor recommended by your insurer.

11.10 Should my belongings be cleaned or replaced?

- Most reputable mold remediation contractors develop and follow decontamination procedures.
- In general, moldy items that are porous, such as paper, rags, wallboard, rotten wood, carpet, drapes, and upholstered furniture, may be difficult to properly clean. Solid materials, such as glass, plastic and metal, can generally be kept after they are thoroughly cleaned.

- For additional information, consult established guidelines such as those linked to the Texas Department of Health website.

If improperly cleaned items are returned to the home, the mold may return. Proper cleaning, however, may allow you to salvage a family heirloom or reduce expenses. You should verify coverage and limits with a company representative prior to deciding whether to clean or replace belongings.

11.11 What other information do I need?

- How can I prevent mold growth in my home?
    - Consult the Texas Department of Health (TDH) website & the Texas Department of Insurance (TDI) website for additional information and publications on water damage & mold prevention.

- I know there are different types of adjusters - who are they and what do they do?

    - Company adjusters - full-time employees of the insurance company who must be licensed by TDI.
    - Independent adjusters - independent contractors who provide claims services to various insurance companies and must be licensed by TDI. Independent adjusters charge insurance companies a fee for each claim that they handle.
    - Public adjusters - independent contractors who provide claims services to consumers. Public adjusters generally charge consumers a percentage of the total claim payment. If you decide to use a public adjuster, establish up front what the public adjuster's fee will be. TDI does not license public adjusters.

- How can I get more information on water damage claims, and the coverage and limitations of my policy?

    - Your insurance agent, claims adjuster or company representative should be available to answer questions regarding policy coverages and steps you should take in the event of a water damage claim.

To find a good mold lawyer in your area, look for a lawyer who specializes as an environmental attorney. You can locate an environmental attorney in your area by checking the legal specialties of attorneys as found in the reference book volumes of Martindale Hubbell Directory of Attorneys, which you can read in the reference section of a large public library, or more easily, you can access the Directory online at http://www.martindale.com/xp/Martindale/Lawyer_Locator/search_advanced.xml

Chapter 12

12 Texas Department of Insurance suggested practices for insurers

12.1 What should the claimant expect when reporting water damage claims?

- For typical claims, it is appropriate for insurers to make an effort to:
- Make written or verbal contact within 24 hours or one business day of notice of claim, and share information regarding emergency repairs and mold prevention.
    - In the case of an active leak, verify that the insured has shut off the water and advise the insured to contact a qualified specialist, if needed. You may provide a list of qualified specialists (such as plumbers and drying companies) who can address the problem immediately. Advise the insured of the right to select any vendor, including vendors not on the insurance company list.
    - Encourage insured not to exceed personal capabilities.
    - Provide the insured with an estimated timetable for the claims process to help the insured understand the next steps and to establish expectations for both parties.
    - Advise the insured of the insured's responsibilities under the policy.
    - Provide insured with the name and contact information of a company representative and advise that multiple individuals may be involved with the investigation and processing of the claim. Ensure that one company representative is overseeing the claim and available to answer insured's questions.

- Have a company representative at insured's home within 24 to 72 hours of notice of claim. Take into consideration the severity of the potential claim and strive to have a representative on-site within 24 hours.
- Determine whether the claim is covered and provide an initial estimate of damage within seven to 14 days after the company representative's initial on-site visit. Inform the insured that this estimate is subject to change. Within the same timeframe, provide insured with a written statement confirming or denying coverage.
- Return all phone calls within 24 hours.

12.2 How can the overall water damage claims handling process be improved?

It is appropriate for insurers to make an effort to:

- Identify and eliminate "bottle necks" in the claims process.
- Establish a 24-hour information system to provide insureds with immediate information and recommended actions for water damage.
- Develop standard procedures based on these suggested practices for all potential water damage claims to ensure that claims are handled in the best possible manner.
- Create a specialized unit to handle potential mold damage claims, including specialized training for adjusters and additional staff to handle the increased claims workload.
- Provide insured with information and guidance on how to protect the property from further damage.
- Promptly respond to inquiries and concerns from the insured and keep a record of all communications in the claim activity record, including the time calls were received, the nature of the call, and when the call was returned.
- Identify a range of reasonable costs and standards for water damage, mold remediation and repair. Periodically review methods used to assess repair and replacement costs to ensure that they are current and accurate.

    - When selecting or recommending mold remediation specialists, use the same care employed when selecting any contractor. Specifically, it is advisable to select a contractor who is experienced in removing mold from homes and who has the necessary safety equipment to do the job. Ask the contractor to provide references and proof of education in mold remediation and related areas. Ask to see written company operating procedures and the type of insurance the company carries. Be aware of possible conflicts of interest in companies providing multiple services, such as testing, water extraction, and build-back. Consult the Texas Department of Health website for additional information on selecting mold remediation specialists.

- Develop a strategy to have a company representative diligently monitor the remediation and repair processes to ensure that work is progressing and completed in a timely fashion.
- Encourage the contractor to develop a written plan of action within five business days of accepting the job.

12.3 Should the home be tested?

- The **Texas Department of Health** (TDH) and the **Environmental Protection Agency** (EPA) advise that testing mold prior to remediation is not necessary to determine if remediation is needed. There are, however, other reasons why testing may be desired. Consult the TDH and EPA websites for additional information.
- Mold testing can be expensive and time-consuming. At this time, there are no numerical health standards to which test results can be compared, making interpretation difficult.
- If the insurer insists on conducting tests, this should be done at the insurer's expense.
- Post-remediation testing, performed after the house is remediated, can be used to determine whether remediation has been effective. This type of testing is best used only as a quality control check on the mold remediation specialist and must be done while the area is still under containment. Establish in advance with the insured whether the cost of post-remediation testing will be part of the settlement amount.

12.4 What factors should be considered when determining whether a dwelling is wholly or partially untenantable and Additional Living Expense (ALE) is necessary?

- Develop guidelines to follow when determining whether ALE is applicable. Suggested factors to consider include:
    - Is the home untenantable due to significant structural damage?
    - Do a thorough inspection and apply guidelines such as those found on the Texas Department of Health website. For example, is there heavy mold growth surrounding the window in a bedroom, or is the mold growth in a light traffic area such as a garage?
    - Do any members of the household have health symptoms consistent with mold? If so, have they consulted a physician? Is there a time-link relationship between the symptoms and the mold infestation, or can the symptoms be linked to another potential cause such as the adoption of a new family pet?
    - Do the symptoms persist after the affected person leaves the home?
    - Is there an unexplained strong musty smell or visible mold?

- For typical claims, it is appropriate for insurers to make an effort to:
    - determine if ALE is payable within 10-14 days of notice of claim
    - provide advance payment for ALE within 24 hours of determination of need

- reimburse covered ALE expenses within five business days of receipt of documentation
- provide consumer education on ALE provisions such as how it may be used and the limits of coverage available under the policy
- keep the insured advised of remaining coverage available under the ALE provision
- offer to set up direct-bill with insured's selected vendors
- examine practices that may unnecessarily increase ALE

12.5 What additional information, assistance and education can the insurer provide the insured?

- Inform the insured that complete information and cooperation is needed to accurately resolve the claim. Attempt to involve the insured in the process and assist as needed.
- Provide the insured with information regarding required access to the property to process the claim. Consider after-hours and weekend appointments to accommodate the insured.
- Provide a checklist for the insured to follow in the event of a water damage claim.
- Explain the policy coverage, including any applicable coverage limitations.
- Refer the insured to the Texas Department of Health website for mold resources and information.

For additional information related to mold, consult the mold or indoor air quality resources at:

- Texas Department of Health
  http://www.tdh.state.tx.us/beh/IAQ/default.htm
- Environmental Protection Agency
  http://www.epa.gov/iaq/pubs/moldresources.html
- California Department of Health Services
  http://www.dhs.ca.gov/ps/deodc/ehib/ehib2/topics/mold.html

Chapter 13

13 Mold in construction defect cases

13.1 Is mold a construction defect?

Mold has often been mentioned, blamed, or referred to in construction defect cases, but the thing is; Mold is not really a construction defect at all, but may constitute damage caused as a result of a construction defect.

In other words, mold infestation is the result of faulty construction, not the cause of construction defects, giving rise to a rightful claim against a contractor for mold damages. This is the case when moisture or water intrusion that provides the suitable environment for the mold is caused by a construction problem, rather than a situation of the homeowner's own making.

There are numerous examples of these types of situations, and a few of these might be helpful to consider. One situation is a slow plumbing leak inside the walls or under the slab of a home. The slow and constant release of moisture over a long period of time provides a perfect medium for mold, and the colony may grow large without being visible.

The manifestation of mold on the outside of the wall may indicate a massive amount of mold inside the wall. In this type of case, self-help might be futile. Even if a plumber repairs the leak and the area dries up, the mold will potentially become airborne, and may cause health problems for the residents.

Where mold damage exists due to improper or defective construction conditions which resulted in water intrusion, there is strong legal support for recovery. Under the California Civil Code and case law, remediation and elimination cost of the mold infestation and repair of the defective construction condition are recoverable as damages.

13.2 Statute of limitations in construction defect cases

Where caused by a **construction defect**, claims for repair or remediation of mold damage are limited by the same legal concepts and statutes of limitation which govern construction defect litigation.

Claims must be brought within ten years of the date of substantial completion of the structure. Other statutes of limitation require filing a claim within three or four years of discovery of the construction defect.

Claims for **personal injury** can be included in construction defect cases, and are not subject to the 10-year limitation period otherwise applicable to latent

or hidden construction defects. Whether occurrence of mold triggers knowledge of the defect for purposes of the statutes of limitation is a question of fact.

A significant amount of mold in any residence reasonably notifies almost anyone of a serious problem that requires immediate attention. Failure to investigate and pursue some course of action to address the problem may seriously impede the ability to recover damages. The action taken should be reasonable and accomplished within a reasonable period of time.

For a homeowner, under the facts of that particular circumstance, reasonable action might be cleaning up the mold areas with water and bleach and hiring a plumber to fix a leak. For a homeowners' association, it might entail a review of the Declaration of Covenants, Conditions and Restrictions (Declaration of CC&Rs) to determine whether a mold complaint implicates common area, or is otherwise the duty of the Association to repair. Remember, the merits and success of each potential mold-related claim, depend solely on the facts of that case.

13.3 Mold-related construction defect cases

Mold construction defects usually get the blame for toxic mold infestations in the home (including rented apartments), and in the workplace.

In chapter 1 you will note that all of the lawsuits filed against *Giles County Criminal Justice Facility* blame the situation on faulty design, construction and maintenance, which allowed moisture to enter the building. Consequently, "the facility became infested with molds and fungi that created a hazardous working environment," according to the federal suit filed by 24 jail employees April 24. All of the cases allege that the county has engaged in a "civil conspiracy to conceal the true condition of the facility" and "allowed and/or required the plaintiffs to continue working in the facility, even though" county officials "had knowledge of its true hazardous condition." - Leon Alligood, *Staffers say jail mold makes them ill*, *Tennessean* (July 20, 2003).

In another case, Plaintiffs shortly after purchasing their home began experiencing severe water intrusion into the home from leaking exterior balconies, the roof and the windows, as well as a complete malfunction of the electronic automation system.

Plaintiffs contacted the Defendant seller approximately one year after purchase demanding he make repairs. The seller, who had never occupied the residence or had any knowledge of any of the claimed problems, promptly notified all responsible parties (the other Defendants) including the contractor, subcontractors and suppliers and demanded they make the necessary repairs.

Plaintiffs brought this action against the seller, the **general contractor**, the roofer and the electrical, framing, waterproofing and plumbing.

Plaintiffs, husband and wife, suffered injury and health problems due to mold contamination in their home. The husband suffered mild respiratory problems and headaches in response to exposure to the mycotoxins released by the Stachybotrys fungus. The wife, who was previously diagnosed with an immunocompromised condition, had flu-like symptoms, sore throat, diarrhea, headaches, fatigue, dermatitis, and a generalized malaise.

These are classic symptoms of exposure to toxic-mold Stachybotrys and other mycotoxins which were documented to exist in the home. Plaintiffs claimed $662,000 for costs of repair, plus damages for loss of use, stigma and personal injury resulting from toxic black-mold stachybotrys fungus exposure.

By way of defense, defendant seller contended that he never met Plaintiffs and never represented the house as "new" construction. Defendants contended that during the time the case was pending, Plaintiffs refused to allow the seller to make the necessary repairs and failed to mitigate damages, i.e., take any steps themselves to make the property watertight; that Plaintiffs removed a tarp that was placed on their balcony, thereby worsening their water intrusion problems.

Defendants claimed that there was no evidence that the mold grew to significant levels or became airborne so as to pose health problems; that Plaintiffs' damage claim was grossly exaggerated.

The defendants said that the plaintiffs made no effort to mitigate damages, despite their financial ability to do so nor did they take any practical measures to make the necessary repairs; that the plaintiffs unreasonably allowed their water intrusion problems to increase, thereby necessitating greater repairs and causing the growth of nontoxic mold.

Defendants contended that Plaintiffs made little use of the home warranty policy; that the plaintiffs failed to pursue any other rights under the warranties that were assigned by the seller.

Defendants' experts estimated the cost of repair at approximately $150,000, contending that the entire house could be torn down and entirely rebuilt, excluding caissons and pilings to match its present class of construction for approximately $450,000. The case was eventually settled for $1,353,700 --- Confidential Report for Attorneys, CRA No. 8795; 1997 Issue, pg. 10-53; *Doe Homeowners v. Roe Seller.*

In May 1999, a Simi Valley woman recovered $350,000 against her homeowners association for failure to repair and remediate chronic water damage to her condo and for her personal injuries suffered from exposure to toxic molds, including Stachybotrys. The plaintiff also contracted Meniere's disease as a result of microbiological contamination of her unit. --- Jan *Hickenbottom v. Raquet Club Villa HOA*, VCSC case no. SC 020 526.

In May 1998, the owners of a 7,000-square-foot custom home in Playa Del Rey sued the builder after the ceiling caved in as a result of roof leaks that occurred before they moved in. Stachybotrys was found in many parts of the house. The case settled for $900,000. - Confidential Report for Attorneys, CRA No. 10272, 1998 Issue, at pg. 12-54; *Doe Homeowners v. Roe Builder.*

In February 1998, three families in Alameda County sued their homeowners association after leaky pipes caused toxic mold to grow in the crawl spaces of their condo units. The plaintiffs reported depression, anxiety, emotional distress, gastrointestinal maladies, vomiting, diarrhea, respiratory tract infections, severe headaches, fatigue, lethargy, and other symptoms. Blood samples showed elevated antibodies to neurotoxin-producing molds, including Stachybotrys, Aspergillus, and Penicillium. The case settled for $545,000. --- *Jacqueline Berry v. Mission Terrace HOA*, ACSC case no. H-182260-5.

RANCHO SANTA MARGARITA HOMEOWNERS awarded $3.5 million in construction defect case for poor concrete.

SANTA ANA, CA (October 4, 2000) --The owners of 41 Rancho Santa Margarita homes who claimed their homes fell victim to poorly made concrete have been awarded a total of $3.5 million.

Judge Stuart Waldrip signed a $2,022,000 judgment against James Mock, Inc. in a series of legal actions that concluded in Orange County Superior Court Tuesday. The remaining funds were obtained in an earlier settlement.

The first phase of the trial this summer resulted in a jury verdict award of more than $2 million. The second phase was tried before Judge Stuart Waldrip, who made the final award. The now-defunct James Mock company was a concrete subcontractor in the Cantobrio II residential development built by The Fieldstone Company. The oldest of the claims were originally filed in May 1997.

All construction defect claims of the 41 homeowners against other defendants had been settled earlier this year, according to David G. Epstein, a

partner with the Irvine law firm of Kasdan, Simonds, Epstein, & Martin, which represented the plaintiffs.

"This case revolved around a large group of homeowners, many of them young families, whose homes were under attack from water intrusion, sulfates, and mold and mildew, all the result of poorly made concrete used in the homes' foundations, " Epstein explained. "Mock shorted the developer and the homeowners on the cement content of the concrete."

"At the time the homes were built, James Mock, Inc. was the largest residential concrete subcontractor in Orange County, and was responsible for many thousands of homes in the County," Epstein said.

"These homeowners trusted that the contractors who built the homes had complied with requirements specified in their contracts, and in the building plans, and had met Building Code requirements," Epstein said. "Instead, due to Mock's corner-cutting, the homeowners have suffered losses in the enjoyment and value of their homes. It's a tale told a thousand times in Southern California."

Epstein noted that while the Cantobrio II homes were the victims of numerous construction defects, the poorly made concrete and resulting water intrusion and sulfate damage were by far the most significant problem.

"The cement subcontractor, James Mock, used inferior ingredients and put too much water in the cement," Epstein explained. "This produced weak concrete that was too porous to resist moisture penetration, contributing to mold infestation."

James Mock, Inc. was contractually required to use five 94-pound sacks of cement in each cubic yard of concrete. Instead, Mock shorted the cement by up to two bags per yard, and substituted low-grade fly ash, a relatively inexpensive recycled material. The cement subcontractor also allegedly added too much water, resulting in concrete that may have been easier to apply at the construction site, but was extremely porous. Water intrusion resulting in mold and mildew can lead to residents suffering from respiratory ailments, allergies, and compromised immune systems, particularly among children. Homeowners are often unaware of the source of these health problems in their family members, Epstein pointed out. ---*Kasdan Simonds Riley & Vaughan* LLP, ATTORNEYS AT LAW (website: **http://www.kasdansimonds.com/**).

Homeowners file lawsuit against builder over mold problem

-by Darryl Tardy and **First Coast News** Staff (www.firstcoastnews.com)

JACKSONVILLE, Fl (Southside) - Local homeowners are filing a lawsuit against a big-name builder, Arvida. Arvida is responsible for building thousands of homes on the First Coast. Behind the walls of some Arvida homes, there's a hidden danger that's becoming a hazard.

Homeowner Havnicca Welcome says she was comfortable at first when she bought her new home. "I thought the greatest problem was to pay the mortgage. I thought that was the greatest problem but it wasn't."

After less than two years, Havnicca says she started seeing problems like rain seeping through the windows. "I saw some molds on the outside and then on the inside in the storage," said Havnicca Welcome.

It was a sight the James Island Homeowners Association didn't care to see. First Coast News obtained a copy of a letter sent to welcome from the association. The property manager told Welcome to clean the mildew from the stucco and trim of her house. She did but the mold grew back.

"It makes me uncomfortable but not to the point where I have to leave," said homeowner and mold victim Havnicca Welcome.

Right down the street, Karen and Bill Connor had the same problem.

"They let us live in this house knowing how dangerous it was," said Karen Conner, homeowner. "We had to move out a couple of days before Christmas. We left everything that we own in here except for what we could throw in a washer and dryer and use bleach to clean."

The Connor's new home was filled with mold.

"Thick, white, fluffy mold...probably at least a quarter-inch thick in huge patches and dark, black, rotten wood," said Karen Conner, homeowner. "There were several different kinds of toxic mold growing inside the house."

With **gas masks** on, First Coast News photojournalist Mike Bunker and reporter Darryl Tardy entered the Connor home. Inside, they saw firsthand the mold Karen Connor described. Not only was there mold inside the walls but it could be smelled in the air.

Havnicca Welcome and the Connors are now both part of a multi-family lawsuit against the builder, Arvida Community Sales. The lawsuit alleges that builder Arvida Community Sales constructed plaintiffs' homes in a defective manner that violated both local laws as well as state building codes.

Their lawyer Barry Ansbacher said, "We believe that it comes to just the matter of homes that were not built properly."

The allegations include stucco walls that were not sealed properly or built to the required thickness causing water to leak into homes and creating an unsafe environment. Arvida denies these all these allegations. Arvida's lawyers said "it's Arvida's position that the allegations are untrue."

The homeowners are seeking monetary damages and are also asking Arvida to repair any damages that were caused to their homes. Local homeowners are still coming forward with their claims.

Chapter 14

14 Real estate brokers' rights and responsibilities

There is little or no statutory, regulatory or case law that expressly addresses the duties of real estate brokers specifically related to mold concerns. In the absence of explicit guidance regarding those duties and obligations, real estate brokers should follow existing requirements of state law relating to latent defects and disclosure, including any particular requirements and standards of care set forth by their state licensing authorities.

14.1 What real estate professionals must do

Beyond the requirements of law, real estate professionals, which include, (1) listing brokers, (2) buyers' representatives, and (3) transaction brokers, should consider adopting practices intended to help their clients and customers become aware of and familiar with mold concerns, such as:

- Identify publications of the state or local departments of health or other appropriate agencies, if any, for material explaining this issue.

- While licensees (real estate professionals) are not microbiologists or mold specialists, they can provide public educational booklets regarding mold-awareness as a service to their clients and customers.

In at least one state, as an incentive for providing these public educational booklets about toxic molds, real estate professionals are actually given statutory protection from some liability.

14.2 Conduct a reasonably diligent visual inspection

Some states require real estate professionals to conduct a reasonably diligent visual inspection, and many licensees (real estate professionals) conduct such an examination of the property even though not expressly required by law.

Licensees, however, should refrain from giving an opinion regarding the cause of unusual property conditions they may have observed, but should note down only **facts** (not opinions) regarding conditions that may lead to mold problems. Examples of such conditions are obvious water stains, such as on carpets or walls, strong or musty odors, leaky roofs or windows, plumbing leaks, overflow from sinks and sewers, or even visible mold growth.

A licensee should not speculate whether these conditions may in fact indicate a mold problem, however, since licensees are generally untrained in such matters.

As in any transaction sellers should be encouraged to disclose any actual knowledge they may have of mold problems on their properties, subject to any state disclosure requirements.

Most sellers will not know if their properties have mold problems. If the seller is aware of an existing mold problem, the seller may elect to ask a competent mold expert (Certified Mold Inspector) to determine the extent of mold present and to recommend any corrective actions required.

To the extent publications or materials discussing mold are available from local, state or Federal health or other agencies, licensees may also find it to be a prudent and helpful service to provide such information to clients and customers.

Such information should be provided in response to a buyer's expression of concern about mold. As usual, when a licensee notes red flags indicating the possibility of latent property defects, the buyer should also be advised, in writing, that it may be prudent for him or her to contact a qualified expert to inspect the property and determine the nature of any problems and what options for remediation exist. One state, however, recommends that air sampling not even occur until further standards are developed.

Some purchase contracts available in some states already contain such a written advisory to buyers that they should conduct appropriate environmental investigations including any concerning toxic mold.

Armed with this information, the buyer can make an informed decision regarding the purchase of a home that has or may have mold concerns.

14.3 Watch for moldy conditions

"Although it is not prudent for licensees to opine on the cause of unusual property conditions they may have observed, the conditions that licensees would normally note in the course of a visual inspection may include some conditions that may also lead to mold problems.

Examples of such conditions are obvious water stains, such as on carpets or walls, strong or musty odors, leaky roofs or windows, plumbing leaks, overflow from sinks and sewers, or even visible mold growth.

A licensee should not speculate whether or not these conditions may in fact indicate a mold problem, however, since real estate professionals (licensees) are generally untrained in such matters.

As in any transaction sellers should be encouraged to disclose any actual knowledge they may have of mold problems on their properties, subject to any state disclosure requirements. Most sellers will not know if their properties have mold problems. If the seller is aware of a mold problem, the seller may elect to ask a competent expert to determine the extent of mold present and to recommend any corrective actions required."

"To the extent publications or materials discussing mold are available from local, state or Federal health or other agencies, licensees may also find it to be a prudent and helpful service to provide such information to clients and customers. Such information should be provided in response to a buyer's expression of concern about toxic mold.

As usual, when a licensee notes red flags indicating the possibility of latent property defects, the buyer should also be advised, in writing, that it may be prudent for him or her to contact a qualified expert to inspect the property and determine the nature of any problems and what options for remediation exist. Armed with this information, the buyer can make an informed decision regarding the purchase of a home that has or may have mold concerns."

To put this in Wisconsin license law terms, Wisconsin licensees should inspect properties and disclose material adverse facts and information suggesting the possibility of material adverse facts, but should never give opinions about the presence, extent or toxicity of any suspected mold.

If buyers want to test for mold, members may use the mold testing contingencies in Legal Update 01.07 or develop their own contingency for this purpose. It is critical to remember, however, that testing for mold is not something that can be done under the inspection contingency. Buyers who want to test for mold must have proper authorization from the sellers.

14.4 Disclose any known mold problems

Sellers should disclose any known mold problems on item C15 of the RECR: "I am aware of a defect caused by unsafe concentrations of, or unsafe conditions relating to, radon, radium in water supplies, lead in paint, lead in soil, lead in water supplies or plumbing system or other potentially toxic substances on the premises." A new item D.1.c. also is being added to the WRA's RECR forms.

That new item will state, "I am aware of the presence of unsafe levels of mold, or roof, basement, window or plumbing leaks, or overflow from sinks, bathtubs or sewers, or other water or moisture intrusions or conditions that might initiate the growth of unsafe levels of mold." These updated RECR forms should be available on Zip Forms and in hard copies in March.

As far as information to give to buyers and sellers, Wisconsin unfortunately does not as yet have a good informational brochure available. The Environmental Protection Agency and the Centers for Disease Control have some good information - check for information on the newly updated **WRA Mold Resource Page**: www.wra.org/Resources/resource_pages/Mold_resources.htm.

Some states like California and Minnesota have very good brochures and articles. A good sample of these can be found at California Indoor Air Quality Program: Infosheets and Related Links: http://www.cal-iaq.org/iaqsheet.htm#Mold. - **National Association of Realtors Government Affairs Department**, *Mold in the Home: How it Affects REALTORS*, www.realtor.org/gapublic.nsf/pages/moldpapers.

14.5 Incorporate mold considerations into sale and lease agreements

In California, Senate Bill 732 implements the new Toxic Mold Protection Act of 2001:

- It directs the California Department of Health Services (CHDS) to adopt permissible exposure limits to mold in indoor environments, if feasible. The CHDS is currently scheduled to report its progress in adopting exposure limits to the legislature by July 1, 2003. Along with permissible exposure limits, the CHDS must adopt standards for assessing the health risks posed by mold in indoor environments, guidelines for identifying indoor mold, and remediation guidelines addressing the removal of both indoor and its underlying causes.

- It creates various mold-related disclosure requirements for certain sellers and lessors of real property. For example, this legislation modifies the Real Estate Transfer Disclosure Statement required in most transfers of residential one-to-four-unit properties to specifically prompt sellers to disclose mold which is known to be present in the subject property.

- It requires certain commercial and industrial landlords to take remedial action against mold or water intrusion.

The law requiring disclosure requirement for sellers of one to four residential units, amends the Real estate Transfer Disclosure statement (TDS) to specifically include the word “mold” --- effective January 2001.

Sellers complying with the TDS requirement must disclose, in section IIC1 of the form, whether they are aware of any…substances, materials or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead- based paint, mold, fuel or chemical storage tanks. --- California Civil Code, § 1102.6.

The seller is not required to know whether or not the mold present in the property for sale is an environmental hazard, the only thing the law requires is that the seller discloses the presence of mold, that is, if the seller is aware of its presence. To avoid unnecessary confusion, the seller may use the explanation section of the TDS form to clarify that he or she does not know whether or not the mold is an environmental hazard.

A similar bill has been passed in the State of Montana. House Bill No. 536 or the Montana Mold Disclosure Act, which is "An Act providing for the **disclosure** of the potential for mold in inhabitable property with agreements for the **sale** and **purchase** of inhabitable property with agreements for the sale and purchase of inhabitable property; providing for the disclosure of prior testing and mitigation and providing immunity for sellers, landlords, seller's agents, buyer's agents, and property managers who comply with the disclosure requirements."

14.6 Top 10 legal issues facing brokers today

By Marcie Roggow, ABR-M, CCIM, CRB, CRS, DREI, GRI, SRES

National Association of REALTORS® General Counsel Laurie Janik has reviewed legal cases brought against REALTORS® and compiled the 10 top issues affecting brokers today.

Here they are:

1. Misrepresentation and failure-to-disclose issues make up over 69% of the lawsuits against REALTORS®, according to the NAR-endorsed errors and omissions insurance program.

2. Agency problems or breach of fiduciary duties are the second largest source of complaints. The problem of course is that very few agents really understand what their "statutory duties" to clients really mean.

3. Fair housing violations account for only 1% to 2% of litigated cases, but result in the most costly judgments- especially for those who are in the rental business.

4. Antitrust laws are intended to prevent unreasonable restraints of trade. With today's competitive environments for sellers- brokers falling at their feet with all sorts of competitive rates to get the listing- a big question for brokers is, "Do you

know what your agents are saying while they are out competing for listings?" When was the last time you did antitrust training in your office?

5. False or misleading advertising lawsuits may result from such issues as "For Sale" sign bans. Internet advertising is a hot topic right now.

6. The employment or independent contractor status of salespeople and personal assistants can impact your tax liability. Over 90% of salespeople are independent contractors, but is the same true of their assistants?

7. Environmental issues are only number seven on this list, but I can guarantee you that, since the list was generated, environmental issues have climbed to one of the top spots. The main complaint? The agent's failure to recommend persons with the expertise to evaluate hazards. With the Lead Paint disclosure form alone worth $66,000 in fines ($11,000 per line not checked/initialed/or signed) a broker cannot let agents' compliance with environmental disclosures go unchecked.

8. Real Estate Settlement Procedures Act violations occur when mortgage brokers, lenders, title services, or real estate brokers give or receive anything of value in return for referrals. With many brokers today offering mortgages services as well as home protection plans, conflicts of interest are everywhere!

9. Unauthorized practice of law spawns lawsuits whenever brokers or salespeople provide legal advice. Having been a broker/owner for years, I shutter when I think of the "legal advice" given out by me as well as my agents. Adding addendums to purchase agreements, drafting agreements between the parties at the closing, or just giving a legal opinion on what should be done regarding inspections can create a huge problem for the broker later.

10. Americans with Disabilities Act complaints have been brought against brokers who fail to do what's readily achievable with reasonable effort and expense to serve clients with disabilities. The NAR 2003 Legal Matrix lists the top issues brokers think they are facing and compares that list to the list that real estate commissions have developed as well as a list of issues from "real estate insiders" who have predicted future developments in real estate. Compare these lists to each other as well as to the list above to see how the focus of real estate has changed over the last couple of years. The list from the real estate commissions concentrates on those issues where they have seen an increase in disputes based upon these individual issues.

14.7 How realtors can minimize mold liability

Mold is causing headaches–figuratively and literally. Here are a few steps you can take to minimize your risk. With all the public discussion and concern about mold recently, you may wonder about sellers', buyers', and brokers' liability for toxic mold found in properties. While there is never an absolute method to avoid potential liability, there are a few risk-reduction steps you can take.

14.7.1 Disclosure a key concern

The basis for potential liability rests largely on the question of disclosure. The Texas Property Code and the Texas Deceptive Trade Practices Act, as well as common law duties, require sellers of real property and real estate licensees to disclose any defect in a property known to the seller or the licensee.

Toxic mold in a property in a quantity sufficient to cause harm to an occupant is an item that likely requires disclosure if the seller or the real estate licensee knows about it. Otherwise the seller or realtor can be held liable for nondisclosure of mold and can be sued for breach of contract under the implied warranty of habitability as well as for physical injuries due to toxic molds.

Texas real estate licensees are not required to inspect properties for physical defects or environmental hazards; in fact, only licensed professionals, such as engineers, inspectors, plumbers, and electricians (within their respective disciplines) may inspect properties for fees.

Licensees are not likely to know of a defect in a property unless the principal has disclosed the defect to the licensee, or the defect is obvious. Mold exists in every structure that has ever been built.

Therefore, there is no question about whether mold exists in a particular property. In mold damage claims or litigation, courts are likely to focus on whether mold harmful to human beings is present in the property in a sufficient quantity to be harmful to ordinary occupants.

Because real estate licensees do not possess the expertise to judge whether toxic mold is present in a property, you must rely on experts regarding the presence of toxic mold. But presently, the scientific community is divided on the extent and danger of toxic mold. So, one toxic-mold expert may contradict the opinion of another. Regardless, you are better off playing it safe.

Your duty is to disclose material information you are aware of regarding toxic mold or its remediation. You are most likely to receive this information from the property owner, but you may also receive such information from prior inspection reports made of the property.

14.7.2 Lack of standards as to level of exposure to toxic mold

Presently, there are no promulgated standards as to the level of exposure to toxic mold that is likely to cause harm to an ordinary individual. The scientific community is debating the standards.

Equally puzzling is that there are no promulgated inspection standards as to the type and extent of inspections that should be made to a property to determine if toxic mold is present to an extent that it might cause harm to an ordinary individual. There is legislation pending in several states that may lead to the development of such standards in the future.

14.7.3 The issue of insurability

Because of the number of insurance claims related to mold caused by accidental water discharge, the insurance industry in Texas has paid a large number of claims involving toxic mold remediation. Insurance companies report that the cost of such claims is devastating and is practically bleeding them dry.

The Texas insurance commissioner is presently working on proposals at the Texas Department of Insurance to address many concerns involving toxic mold coverage. A few insurance companies have gone so far as to refuse to write insurance that covers water damage. While other insurance companies have become very selective as to which properties they will insure.

Until standards are developed and solutions are reached, property owners and buyers may find it, at times, more difficult to obtain acceptable insurance. Industry predictions are that insurance premiums are likely to increase as a result of recent mold claims. Insurability is an issue and concern that seems to be changing week to week at the present time.

14.7.4 Checklist for realtors

Inform your client, i.e., the buyer or seller, that toxic mold may be a concern for buyers, sellers, brokers, inspectors, appraisers, as well as lenders.

Provide your client (buyer or seller) with information about mold from reputable sources like the Texas Department of Insurance's Mold Resource Page (www.tdi.state.tx.us/commish/mold.html). Tell your client that you are not an expert on mold and point your client to the aforementioned source.

Tell your client that insurability may be an issue. Suggest that the buyer discuss the insurability of the property with the buyer's insurance agent early in the transaction or, in some cases, before an offer is made.

Tell your client that he may have the property inspected (tested) for the presence of (toxic) mold. The cost for toxic mold inspection (testing) varies depending on the size of the property, the extent of the mold present, the type of expert conducting the inspection, and other factors.

Because there are presently no licensing or inspection standards for mold in properties, it may be best to avoid recommending any particular inspector or expert. Inform your client that such standards are presently not in place and that the client should discuss mold inspections with more than one expert.

Most experts will discuss the limitations of the inspections. For example, an air-sampling test for toxic mold that does not reveal extraordinary levels of toxic mold does not necessarily mean that mold is not present behind walls or under floors where the air samplers were not placed.

Tell your client that most mold experts suggest that property owners undertake preventive action, such as periodic cleaning of a/c systems, regular reviews of attic spaces, and periodic plumbing leak tests.

Chapter 15

15 Landlord rights and responsibilities

15.1 How Employers and Commercial Landlords Can Maintain a Mold-Safe Workplace

Employers, commercial landlords, and employees in Canada, the USA, and worldwide should suspect a mold health threat if any of these three mold warnings occur in the workplace---

(1) Visible mold growth appears on or in ceilings, walls, floors, heating/cooling ducts and registers, attic, basement/crawl space, and/or on furniture, equipment, and inventory of raw materials or finished products.

(2) Workers or customers report experiencing any of the most common, possible mold health symptoms: allergies, asthma, bleeding lungs, breathing difficulties, central nervous system problems, recurring colds, coughing (chronic), coughing up blood, dandruff problems (chronic) that don't go away despite use of anti-dandruff shampoos, dermatitis, skin rashes, diarrhea, and/or:

Eye and vision problems, fatigue (chronic, excessive, or continued) and/or general malaise, flu symptoms (chronic), sudden hair loss, headaches, hemorrhagic pneumonitis, hives, hypersensitivity pneumonitis, irritability, itching (of the nose, mouth, eyes, throat, skin, or any other area), kidney failure, learning difficulties or mental functioning problems or personality changes, memory loss or memory difficulties, and/or:

Open skin sores and lacerations, peripheral nervous system effects, redness of the sclera (white of your eyes), runny nose (rhinitis) or thick, green slime coming out of nose (from sinus cavities), seizures, sinus congestion, sinus problems, and chronic sinusitis, skin redness, sleep disorders, sneezing fits, sore throat, tremors (shaking), verbal dysfunction (trouble in speaking), vertigo (feelings of dizziness, lightheadedness, faintness, and unsteadiness), and vomiting.

People differ significantly in their sensitivity and reaction to mold exposure. Consequently, there are no federal standards or recommendations, (e.g., OSHA, NIOSH, and EPA) for airborne concentrations of mold or mold spores in the workplace. Even the smell of mold can make some workers sick.

Thus, if only one or a few workers or customers experience one or more possible mold health symptoms, the employer or landlord should still inspect and mold test the work premises for the health protection of both the mold-

sensitive employees and others who may ultimately be harmed from time-cumulative mold exposure.

(3) Workplace mold inspection and testing discover elevated levels of indoor mold in the air, on visible surfaces, or hidden inside walls, ceilings, floors, the heating/cooling equipment and ducts, the attic, or the basement/crawl space.

"All molds have the potential to cause health effects. Molds can produce allergens that can trigger allergic reactions or even asthma attacks in people allergic to mold. Others are known to produce potent toxins and/or irritants," according to the U.S. Environmental Protection Agency (E.P.A.).

As to asthma, a health study by the Finnish Institute of Occupational Health links adult-onset asthma to workplace mold exposure. "The present (health study) results provide new evidence of the relation between workplace exposure to indoor molds and development of asthma in adulthood. Our findings suggest that indoor mold problems constitute an important occupational health hazard."

The Finnish workplace mold study estimated that the percentage of adult-onset asthma attributable to workplace mold exposure to be 35%. (Reported in Environmental Health Perspectives, May, 2002)

Furthermore, a number of commonly found indoor mold species are, in fact, toxic mold, a description applied to any mold that produces mycotoxins in its spores. Stachybotrys ("black mold"), Aspergillus, and Penicillium are three of the most dangerous indoor toxic molds.

Mycotoxins are cytoxic, meaning they have the capacity to pass through the human cellular wall and disrupt certain cellular processes---potentially causing serious health damage to workers and customers.

What should employees do? "If you see or smell mold, or if you or others are experiencing mold-related symptoms, report it so the problem can be investigated. You may need to tell your employer, supervisor, health and safety officer, union representative, or school board. Find out whether co-workers are experiencing any [mold-related] symptoms," recommends the California Department of Health Services.

What should companies and property managers do for mold prevention, maintenance, and remediation? Step 1 is to conduct periodic and thorough physical inspections of the workplace for evidence of water and mold problems---whether visible or hidden.

For effective mold inspection and testing, the employer or property owner should hire a certified mold inspector, environmental hygienist, or industrial hygienist. Alternatively and less expensive, utilize mold test kits for all-around mold testing.

The inspector or hygienist will collect samples of all visible mold growths, mold test the air of each room and area of the employer's facility, and obtain mold laboratory analysis and mold species identification and quantification of the collected mold and air samples.

The most common mold-causing water problems are roof leaks, siding leaks, plumbing line leaks, sewer line breaks, a wet crawl space or basement, flooding, and high humidity. Finding and fixing the underlying water problem are always required for successful mold remediation.

For step 2, follow the U.S. Occupational Safety and Health Administration (OSHA) recommendation that the employer and the building owner should notify workers in the affected area(s) of the presence of mold in their workplace.

Notification should include a description of the proposed remedial measures and a timetable for completion. Group meetings held before and after remediation with full disclosure of plans and results can be an effective communication mechanism.

Individuals with persistent health problems that might be related to mold exposure should be encouraged to visit their physicians for a referral to practitioners who are trained in occupational/environmental medicine or related specialties and are knowledgeable about medical mold diagnostic and treatment procedures.

Step 3 is for the employer or landlord to do safe and effective mold killing, mold removal, and mold remediation of all mold growths and of all airborne and surface-deposited mold spores. After the completion of mold remediation, the workplace needs to pass "clearance tests" to be safe for employees and customers.

15.2 Obligations and duties of landlords

1. Correct violations of any health code or housing code standard and violations of any other laws and regulations which endanger the tenants' health or safety.

2. Keep common areas such as hallways, laundry rooms, and parking lots reasonably clean, sanitary, and safe from defects that could cause fires of other accidents.

3. Provide a smoke detector.

4. Make sure the rental is not infested with rodents, insects, and other pests when the tenant moves in, and, except in the case of a single family residence, control infestation during the tenancy.

5. Keep the rental in as good repair as it was or should have been at the beginning of the tenancy, except for normal wear and tear.

6. Provide adequate locks and keys.

7. Keep the electrical, plumbing and heating systems in good repair and repair any appliances or other facilities that are supplied.

8. Keep the rental unit weathertight. (Sometimes you can use this if you have a lot of mold.)

9. Provide garbage cans and arrange for trash removal for tenants other than those who occupy single family residences.

10. Provide facilities to supply a reasonable amount of heat and hot and cold water, unless the building is not equipped to supply these utilities. (RCW 59.18.060) However, city and county laws are often stronger and most require heat and water.

Some cities and counties in Washington have enacted additional requirements. For example, the Seattle Housing and Building Maintenance Code require that the locks be changed between tenants, and that doors have peepholes as well as deadbolts or deadlatches (SMC 22.206.140). You can check your own city's codes by calling the Housing Code Enforcement office.

15.3 Your options if the landlord won't make required repairs

Now you know what the landlord is supposed to do, but how do you get him to actually make those repairs? Most people's first reaction is to file a complaint. In some (but not all) cities, the housing code enforcement office will send out an inspector. But a city bureaucracy can be very slow and frustrating.

There are a number of options that you can pursue if your landlord doesn't make repairs. It is usually fastest and easiest to do **Repair and Deduct**. But it's important that you follow the legal requirements for this. You cannot withhold rent if even if the landlord won't make repairs. If you do, this will be held against you and the landlord could legally evict you.

In addition to these options, there's also the possibility of negotiation. Sometimes a landlord will be willing to work out a settlement agreement with you. For example, you'll give him two months to do the work and he'll give you 4 months free rent. If you need help negotiating this type of agreement you can get a free mediator at the Dispute Resolution Center. In King County call (206) 443-9603. When you're negotiating be sure to ask for more than you think you can get, because you never get all that you ask for. And don't lay all your cards on the table in the first move. You must always have a backup plan.

15.3.1 Repair and deduct

If you are current in your rent and utilities, you can have the repairs done and deduct the cost from your next months' rent by following these:

Pay your rent. Otherwise you can not do repair and deduct if you are behind in rent, even if you are only a dollar behind.

Write a letter. The landlord is not legally responsible until they get it in writing. Describe the repair and estimate how much it will cost to fix. This does not have to be a professional estimate; it can just be your best guess. If you want, you can say in your letter that if the landlord doesn't do the repairs you will, but you're not required to. Sign and date the letter, and keep a photocopy.

To prove that he received your letter, have your landlord sign your copy, or have a friend who does not live with you watch (witness) you hand it to him, or send it certified mail, return receipt. If you do not know who your landlord is or if you do not have his or her address you can call the county tax assessor and ask for the address of the person who pays taxes on your building.

15.3.2 Wait

For most repairs the landlord has 10 days from when he receives the letter to even begin to make the repairs. If you cannot use a major plumbing fixture, or the refrigerator, range or oven, the landlord has 72 hours. If you have no hot or cold water, heat or electricity, or something that's "imminently hazardous to life," the landlord has only 24 hours. Be careful. Judges interpret "imminently hazardous" very narrowly. If you're in doubt about which time limit applies to your repair, assume it's 10 days, or call the Tenants Union.

If your landlord does start the repairs within the time limits list above, they then have a "reasonable time" to finish. Unfortunately the law does not define what a reasonable time is. It depends on the repair, so you will have to judge whether the landlord is moving or dragging his heels.

15.3.3 Do the repair

If the landlord doesn't begin the repair by the time required, or doesn't complete the repair in a reasonable time, you can either hire someone or do it yourself. If you do the repair yourself you can spend half a month's rent per month, and can charge for your labor. If you hire someone you can spend one month's rent per month. You have to pay this money out of your own pocket.

If you don't have a lot of money, it helps to find a repairman who will bill you. As an alternative you can do the repair near the end of the month, with the money you have set aside to pay the rent anyway.

15.3.4 Let your landlord look at the repair

Let your landlord look at the repair. He doesn't have to, but the landlord has the right to inspect the work. You can call and let him know the work (repair) is done and he can come and look. Alternatively you can just tell the landlord in your first letter that you'll do the work as soon as his time is up, and then he can then inspect the work if he wants to.

15.3.5 Get your money back

You reimburse yourself by taking the cost of the repair out of your next month's rent check. When you send in the reduced rent don't forget to attach a copy of the receipt, either from the repairman or from the hardware store. If you do the work yourself write up a receipt saying what day you worked, how many hours, and for how much an hour. You charge your landlord the median wage ($10 an hour is the median wage in Seattle). Be sure to send a copy of the receipt.

15.4 How many times can I do this?

How many times can I do this? Beware! In any twelve month period (for example, June to May, or January to December) you can spend no more than two month's rent total if you hire someone. You can only spend a maximum of one month's rent if you do the work yourself. So if you do several little repairs over 3 or 4 months, keep tabs on your running total.

15.5 Can I use repair & deduct for cosmetic purposes?

You cannot use it for cosmetic repairs that are a result of ordinary wear and tear. But if there is a big stain on the wall from a leak, or a flood, you can fix that.

15.6 Can I use repair & deduct to put accommodation for my disability

Can I use Repair and Deduct to put in a flashing doorbell or other accommodation for my disability? No. But the landlord has to let you put it in if you are willing to pay for it yourself.

What if my repair costs more than one month's rent? This is a hassle, and something that the Tenants Union is trying to get changed in the law. Sometimes you can do part of the repair in one month, and that will get the landlord to finish the repair. Tenants in apartment buildings can join together and pool rent deductions in order to make more expensive repairs.

Chapter 16

16 Tenant rights and responsibilities

In general, the relationship between landlord and tenant is governed by the terms of the lease agreement. But state and federal law impose certain conditions that the landlord and tenant cannot change, even if the lease purports to do so.

When moving into an apartment or house, there are certain things you need to consider, such as how much rent you can afford, the cost of purchasing food, monthly utility expenses, whether or not to have a roommate(s) and so on

The laws and ordinances are mainly enforced on a complaint basis and may carry fines if there are any violations. This means that people living in your community are the ones responsible for reporting any violations. It is a good idea to get to know your neighbors and those living in your area as soon as you move in. That way, if there are any problems, you and your neighbors can work them out before any other measures are taken.

First and foremost, you are bound to your lease obligations. Secondly, you must honor all of the laws and ordinances that govern all other citizens including noise, parking, speed limits, and pets.

16.1 What the landlord is required to do

This section discusses the things a landlord is legally required to do or perform in order to free him or herself of any legal liability as landlord as well as protect the interest and welfare of his or her tenants.

16.1.1 Maintain facilities

The landlord is required to maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord. But the landlord need not perform this duty unless the tenant first advises the landlord of needed repairs in writing. The tenant may wish inform the landlord of the problem immediately over the telephone or in person and then follow up by notifying the landlord in writing. The tenant should always keep a copy of all written communication between herself and the landlord.

In the event of an emergency, such as when the heat fails during the winter, prior written notification is not required. The landlord must tend to emergency repairs as he becomes aware of the problem, regardless of whether the tenant has

given written notification. And if the tenant repairs an emergency problem, the landlord must reimburse the tenant, regardless of prior notice.

The tenant can agree to perform some or all of the landlord's maintenance duties, but the parties must make an agreement separate from the lease and the tenant must be compensated.

16.1.2 Comply with building codes

The landlord must maintain the residence in compliance with the local building and housing codes. Most towns and cities in North Carolina have enacted housing, fire, and health codes. But the requirements of these codes vary depending on the city or town. Housing codes often require functional heating and plumbing, locks on windows and doors, and weather-tight walls, windows and doors. Also, the code may require the landlord to rid the premises of infestations, and to repair holes or cracks in walls. Local fire codes govern heating and electrical systems. And the health code deals with sewage disposal and well water systems.

If, after the tenant advises the landlord of a violation of these codes, the landlord does not take action, the tenant may wish to report the problem to a local building, fire, or health inspector. These inspectors have independent authority to force compliance with the codes, and may take prompt action when a violation creates a risk to the safety of the tenant. The landlord must comply with these local codes regardless of whether the tenant has given the landlord prior written notice of a particular problem.

16.1.3 Keep common areas safe

The landlord is required to maintain all common areas in a safe condition, regardless of whether a tenant has given the landlord notice of an unsafe condition. Common areas include hallways, parking lots, play areas, laundry rooms, and sewage or plumbing systems serving more than one rental unit open to more than one rental unit.

16.1.4 Keep premises in safe and habitable condition

If the landlord complies with his other duties, he most likely will be in compliance with this requirement as well. But this general, catch-all requirement ensures that the landlord cannot rent an unsafe or uninhabitable residence due to some loophole in the specific requirements of the local codes and state laws.

The landlord must provide operable smoke detectors that have been approved by a national testing laboratory and that have been installed properly. The landlord must replace or repair the smoke detectors provided that the tenant has notified the landlord in writing of needed replacement or repairs. The landlord must place new batteries in a battery-operated smoke detector at the beginning of the lease term, unless the lease provides otherwise.

16.2 What the tenant is required to do

(1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises, nor render inoperable the smoke detector provided by the landlord, or knowingly permit any person to do so;

(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes;

(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces; and

(7) Notify the landlord of the need for replacement of or repairs to a smoke detector. The landlord may require that this notification be in writing and the landlord need not repair a smoke detector unless the notification is in writing. The tenant is responsible for replacing the batteries in smoke detectors when the batteries expire during the term of the lease, unless the lease provides otherwise.

Of course, the tenant must pay the rent according to the terms of the lease. For a lease that provides that rent is due at a fixed time (for example, by the fifth of each month), the landlord cannot seek to evict the tenant until ten days after the landlord or his agent has requested that the tenant pay all rent that is past due. (The procedures for eviction are discussed below.) But if the lease provides for immediate eviction, the landlord may evict the tenant without delay.

If rent is due at a fixed time, the lease may provide for a late payment fee. The fee cannot exceed $15 or 5% of the payment that is due (whichever is greater) and the fee cannot be imposed unless the tenant pays the rent five days or more late.

16.3 Checking into your apartment or house

It is a good idea to note all existing damage and necessary repairs on the lease before you sign it. A check-in sheet can be included as part of the lease itself. The check-in sheet helps determine "normal wear and tear."

It is also a record of damage that already existed, and for which you should not be held responsible when you move out. Remember to be thorough! If you run out of room on the original sheet, write "see attached sheet" at the bottom and continue on an additional piece of paper.

Try to be as detailed as possible about location, type and extent of damage. If there is extensive damage to the premises, consider photographing the area(s). Arrange with the landlord, realtor, property management company or an objective third party to inspect the premises together before you sign the lease and move-in. (An objective witness is not a roommate or relative).

Check for visible signs of molds, if you there are, note them down in your check-in sheet. Of course any discoloration on the walls or ceiling does not necessarily mean they are molds.

Use this mold check checklist as a rough guide:

- There is a musty, moldy smell.
- There are visible signs of mold.
- There is water damage.

WARNING! *Do not deliberately go hunting for molds if there are no visible signs around you. Do not touch, handle, sniff or smell any discolored patches that you find in the vicinity; it could be molds or other harmful pollutants and contaminants. Leave that job to your Certified Mold Contractor, Certified Mold Inspector or Certified Environmental Inspector.*

The mold menace is very real, and you can't be warned enough about the danger it can pose to your health. Here are some of the effects of mold exposure:

- Aggravation of asthma
- Cold/flu like symptoms
- Eye irritation
- Fatigue
- Fever
- Headaches
- Inability to concentrate

- Lung infections (sometimes)
- Nasal stuffiness
- Rashes
- Shortness of breath
- Wheezing

During this inspection, you may complete the check-in sheet and an inventory of needed repairs. If a check-in sheet is to be made part of the lease, attach it to the lease. If the check-in sheet is not to be part of the lease, obtain a written commitment from the landlord regarding repairs she/he will complete and a completion date. All tenants and the landlord, property management company, and/or realtor should sign and date this document.

If these repairs involve floodwater damage and mold contamination, postpone rental of the property until the problem has been fixed by a **Certified Mold Inspector**. Better yet, find another mold-free property to rent.

As always, keep a copy of the check-in sheet for yourself and give a copy to your landlord, property Management Company, and/or realtor.

16.4 Renter's insurance

It is recommended that whenever you rent a house or apartment that you take out a rental insurance policy that will protect you and your belongings from loss due to fire or water damage or in the event that your property is burglarized or vandalized. Find an insurer willing to include health and mold coverage, and not just incidental to an insured peril like fire. Renter's insurance is often available from the same company that is insuring your vehicle or motorcycle.

16.5 Lawn upkeep

Once you have found a property to rent, you may find that your landlord, property Management Company, and/or realtor will expect you to maintain any yard space on the property.

You should talk to the landlord to determine if you will be required to maintain the lawn and yard space that you will be renting. If that's the case you will have to provide the necessary equipment, such as, lawn mower, rake, and broom for maintaining your property.

16.6 Quiet enjoyment

The concept of quiet enjoyment is not a specific law or statute; it has evolved from old English common law and it has been enforced as common law ever since. Although it doesn't have a statutory basis, it is recognized to be a valid, unwritten law that is enforceable.

The principles of quiet enjoyment accompany any lease signed by a landlord and tenant. For example, quiet enjoyment prevents your landlord from appearing any time of the day or night to make repairs or remodel or cause you to suffer unreasonable disturbances in any way.

Specific mention of the right to quiet enjoyment may not be in the lease, but you are entitled to a tenancy free from unreasonable disturbances under the control of the landlord. A tenant may waive his/her right to a covenant (promise) of quiet enjoyment if he/she signs a lease that contains a waiver of this type.

16.7 Repairs and mold remediation to your rental

Many tenants face the problem of repairs and who is responsible for them. Even with a lease clause, it is often difficult to get repairs done. If you do have problems first check to see if there are any procedures to follow in your lease, if not we suggest the following strategy:

- Tell your landlord immediately when repairs or mold remediation are necessary. If he or she agrees to make the repairs or have the property inspected by a Certified Mold Inspector, wait a reasonable period of time.

  Note if your problem is toxic molds you must vacate the area immediately!

- If nothing is done contact your landlord again and ask why the repair or remediation by a Certified Mold Inspector has not been made. (There may be a perfectly sound reason). Again, give your landlord a reasonable amount of time to complete the repair or remediation.

- If nothing happens, write a letter which re-states the history of the problem needed repair, times of contact, and the promises.

    - If your lease stipulates the landlord is responsible for the repair, quote it.
    - Ask that the repair be completed in a certain amount of time.
    - Photocopy the letter and send the original via certified mail.
    - Still no action, contact an attorney. The attorney will offer specific counsel.

Do not withhold payment without the advice of counsel. You may run the risk of being evicted for non-payment of rent.

(See Appendices A, B, and C for legal forms intended as legal notices to landlord regarding mold inspection and mold abatement or mold remediation.).

16.8 Tenants can be held responsible for property damage caused by molds

As insurers have taken a hard line on offering landlords mold-related coverage, owners from Massachusetts to California are adding sharply worded one-page addenda to leases, giving residents instructions and rules on how to minimize the potential for mold growth.

16.9 Shifting the burden of mold responsibility to tenants

"PREVENTING MOLD BEGINS WITH YOU" says one addendum, before advising tenants to keep their dwellings clean, remove visible moisture on windows, walls, ceilings, floors and other surfaces as soon as possible and notify landlords -in writing -about any signs of water leaks, water infiltration or mold.

"If you fail to comply with this addendum," it says, "you can be held responsible for property damage to the dwelling and any health problems that may result. We can't fix problems in your dwelling unless we know about them."

The move reflects landlords' increasing fears about liability in light of high-profile lawsuits. The Insurance Information Institute estimates that insurers have reported triple-digit increases in the frequency of mold-related claims in commercial buildings in the past three years.

As a result, many insurers have sharply reduced or stopped offering mold coverage in traditional property and liability policies. Instead, a handful of insurers such as New York-based American International Group Inc., XL Capital Ltd. of Bermuda and Chubb Corp. of Warren, N.J., offer it in separate environmental policies.

16.10 Molds usually caused by building structure not tenant behavior

But some tenant advocates see the move as shifting the burden of responsibility to residents. "While it's a good thing to ask tenants to advise the landlords of problems that arise, it's outrageous to hold the tenant liable for a problem that's not of the tenant's doing," says Charlie Harak, an attorney at the National Consumer Law Center, a Boston-based consumer-advocacy group. "Mold is usually not caused by tenant behavior but usually caused by the structure of the building or a system in the building, things outside the tenant's control. It's so clearly a building problem."

Furthermore, Charlie Harak says, the costs of mold remediation (including mold testing) and repairs are "quite significant."

16.11 An attempt to share tenant-landlord responsibilities

Doug Culkin, executive vice president of the National Apartment Association, denies that landlords are trying to transfer the bulk of liability to tenants. Instead, he says, it's an attempt to share responsibility. "If you as a tenant don't say anything, how do you say logically that it's management's problem?" he asks. "This is just a proactive addendum on our part to explain to residents they have rights and responsibilities, as do the owners."

The mold addendum originated two years ago in Texas, where mold problems have been severe. The National Apartment Association, a federation of groups representing about 28,000 multifamily housing companies with more than 4.6 million apartments in the U.S. and Canada, adopted the addendum last year.

The association, which sells lease forms to apartment owners and property managers, is offering the mold addendum to members in 29 states, including Arizona, Colorado, Florida, Georgia and Pennsylvania, and is planning to eventually make it available in all fifty (50) states. There are no statistics on how many landlords are using it.

Mold is a fungal growth found in damp or wet conditions. It has been blamed for a number of health problems, including breathing difficulties, headaches, nausea, gastrointestinal ailments, skin rashes, severe allergic reactions and neurological damage. The Centers for Disease Control and Prevention in Atlanta has commissioned a study of the health effects of indoor exposure. It is expected to be completed by late summer or early fall. ---Copyright Dow Jones & Company Inc Mar 18, 2003.

Chapter 17

17 Landlord-tenant lease contract

17.1 What is a lease contract?

A lease is a contract between a landlord and tenant which contains the terms and conditions of the rental. It cannot be changed while it is in effect unless both parties agree. A lease may be oral or written. However, an oral lease for more than one year cannot be enforced. (General Obligations Law Sec. 5-701)

If you are renting an apartment, and are not covered by rent stabilization or rent control, you must negotiate with your landlord, the rent, the duration of the rental, as well as the conditions of occupancy. You must also address these matters and negotiate with your landlord when the lease is up for renewal.

Some leases contain an automatic renewal clause. Because this can be a trap for unwary tenants, landlords are required to give tenants advance notice of the existence of an automatic renewal clause. Landlords must give this notice between 15 and 30 days before the tenant is required to notify the landlord of an intention not to renew the lease. (General Obligations Law Sec. 5- 905)

Unless the lease states otherwise, the landlord is obligated to deliver possession of the apartment to the tenant at the beginning of the tenancy. If the landlord fails to do so, the tenant has the right to cancel the lease and obtain a full refund of any deposit. (Real Property Law Sec. 223-a)

A lease provision which requires a tenant to pledge his/her household furniture as security for rent is void. (Real Property Law Sec. 231)

Tenants protected by rent stabilization have the right to either a one or two year lease when they move into an apartment and when they renew their leases. The renewal leases for rent stabilized tenants must be on the same terms and conditions as the prior lease and rent increases, if any, are limited by law.

New York City rent stabilized tenants are entitled to receive from their landlords a fully executed copy of their signed lease no more than 30 days after the tenant signs the lease. The lease's beginning and ending date must be stated. (L. 1984 Ch. 439)

17.2 Lease contract must be in plain English

Leases must use words with common and everyday meanings and must be clear and coherent. Sections of leases must be appropriately captioned and the

print must be large enough to read easily. (General Obligations Law Sec. 5-702; C.P.L.R. Sec. 4544)

17.3 Unconscionable (unfair) lease clauses

Most landlords use printed form leases which they ask tenants to sign on a take-it-or-leave-it basis. The law does not require that any particular lease be used. Since tenants often have no meaningful opportunity to reject lease provisions, the courts may refuse to enforce a provision found to be unreasonably favorable to the landlord. Nevertheless, read your lease and all riders carefully before you sign. Do not rely on oral promises; make sure that all promises and agreements are written in the lease before signing it. It is wise to consult an attorney if you have any questions about your lease. ---see N.Y. Real Property Law Sec. 235-c

17.4 Month-to-month tenants

Tenants who do not have leases and pay rent on a monthly basis are called month-to-month tenants.

In localities without rent regulations, tenants who stay past the end of a lease are treated as month-to-month tenants if the landlord accepts their rent.

A month-to-month tenancy may be terminated by either party by giving at least one month notice before the expiration of the term. For example, suppose your rent is due on the first of each month. Your landlord must tell you by September 30th before your October rent is due that he wants you to move out by November 1st. The termination notice need not specify why the landlord seeks possession of the apartment. It is sufficient that the landlord has given you enough time to prepare in advance before the termination of the lease.

A landlord cannot unilaterally raise the rent of a month-to-month tenant without the consent of the tenant. However, if the tenant does not consent, the landlord can terminate the tenancy by giving appropriate notice.

In New York City, the landlord must serve the tenant a written termination giving 30 days notice before the expiration of the term. The notice must state that the landlord elects to terminate the tenancy and that refusal to vacate will lead to eviction proceedings.

A termination notice does not automatically allow the landlord to evict the tenant. The landlord must first bring an eviction proceeding in court and prove the case (Real Property Law Sec. 232-a; Sec. 232-b; Sec. 232-c).

17.5 Contract clauses to help protect landlord from mold litigation

Here is a sample residential lease contract containing clauses that can help protect landlords from mold litigation. This is only a sample contract and should not be treated as a rigid standard for landlord-tenant residential contracts.

17.5.1 Sample landlord-tenant residential lease contract

RESIDENTIAL LEASE

LEASE AGREEMENT, entered into between _____ (Landlord) and _____ (Tenant).

For good consideration it is agreed between the parties as follows:

1. Location: Landlord hereby leases and lets to Tenant the premises described as follows: _____

2. Term: This lease shall be for a term of ___ year(s), commencing on _____, 20_____.

3. Rent: Tenant shall pay Landlord the annual rent of $_____ during said term, in monthly payments of $_____, each payable monthly on the first day of each month in advance at such place as we may from time to time specify by written notice to you. Tenant shall pay a security deposit of $_____ to be returned upon termination of this Lease and the payment of all rents due and performance of all other obligations.

4. Utilities and Services: Tenant shall at its own expense provide the following utilities or services: Tenant must pay promptly as they become due all charges for furnishing _____[specify, e.g., water, electricity, garbage service, and other public utilities] to the premises during the lease term.

Landlord shall at its expense provide the following utilities or services: [specify]

Landlord does not warrant the quality or adequacy of the utilities or services specified above, nor does Landlord warrant that any of the utilities or services specified above will be free from interruption caused by repairs, improvements, or alterations of the building or the Apartment or any of the equipment and facilities of the building, any labor controversy, or any other causes of any kind beyond Landlord's reasonable control. Any such interruption--and any other inability on our part to fulfill our lease obligations resulting from any such cause--will not be considered an eviction or disturbance of Tenant's use and possession of the Apartment, or render us liable to you for damages, or relieve you from performing your lease obligations.

5. Tenant further agrees that:

a) Condition of Premises: Upon the expiration of the Lease it shall return possession of the leased premises in its present condition, reasonable wear and tear, fire casualty excepted. Tenant shall commit no waste to the leased premises.

b) Assignment or Subletting: Tenant shall not assign or sublet said premises or allow any other person to occupy the leased premises without Landlord's prior written consent.

c) Alterations: Tenant shall not make any material or structural alterations to the leased premises without Landlord's prior written consent.

d) Compliance with Law: Tenant shall comply with all building, zoning and health codes and other applicable laws for the use of said premises.

e) Tenant's Conduct: Tenant shall not conduct on premises any activity deemed extra hazardous, or a nuisance, or requiring an increase in fire insurance premiums.

f) Pets: Tenant shall not allow pets on the premises.

g) Right of Termination and Re-Entry: In the event of any breach of the payment of rent or any other allowed charge, or other breach of this Lease, Landlord shall have full rights to terminate this Lease in accordance with state law and re-enter and re-claim possession of the leased premises, in addition to such other remedies available to Landlord arising from said breach.

7. Subordination: This Lease shall be subordinate to all present or future mortgages against the property.

8. Time of Essence: Time is of the essence in this agreement.

9. Indemnity: Tenant will indemnify and hold Landlord and Landlord's property--including the leased premises--free and harmless from any liability for injury to or death of any person, including Tenant, or for damage to property arising from Tenant's using and occupying the premises or from the act or omission of any person or persons, including Tenant, in or about the premises with Tenant's express or implied consent.

10. Binding of Heirs and Assigns: Subject to the provisions of this lease against assignment of Tenant's interest under this lease, all lease provisions extend to and bind, or inure to the benefit of, the parties to this lease and to every heir, executor, representative, successor, and assign of both parties.

11. Rights and Remedies Cumulative: The rights and remedies under this lease are cumulative, and either party's using any one right or remedy will not preclude or waive that party's right to use any other. These rights and remedies are in addition to any other rights the parties may have by law, statute, ordinance, or otherwise.

12. [Name of State] Law To Apply: This agreement is to be construed under [Name of State] law, and all obligations of the parties created under this lease are performable in _____County, [Name of State].

13. Legal Construction: If any one or more of the lease provisions are for any reason held invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provision of this lease, which will construed as if it had never included the invalid, illegal, or unenforceable provision.

14. Prior Agreements Superseded: This agreement constitutes the only agreement of the parties and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter.

15. Amendment: No amendment, modification, or alteration of this lease is binding unless in writing, dated subsequent to the date of this lease, and duly executed by the parties.

16. Additional Lease terms:

Resident hereby indemnifies and shall hold Owner harmless from any and all claims or causes of action, arising (in whole or in part) from the Resident's breach of the obligations.

Resident hereby releases Owner from any and all claims of resident, Occupant or your invited guest, etc. arising out of or relating to the presence of mold in the apartment, other than claims based on breach of this contract by Owner and further releases Owner from any and all claims of consequential damages such as damages to resident's personal property, or claims of adverse health conditions associated with exposure to mold.

Signed this _____ day of _____, 20____.

IN WITNESS OF THIS AGREEMENT, the Landlord and Tenant execute this agreement as of the day and year first above written.

LANDLORD

_____ [typed name of Landlord]
By _____ [signature]
_____ [address]

TENANT

_____ [typed name of Tenant]
By _____ [signature]
_____ [address]

Chapter 18

18 Landlord and tenant disputes

Here are some remedies and options available to you as tenant, should a dispute arise between you and your landlord. Please be advised that before you try to apply any of this information, go and see a lawyer first.

18.1 Withhold rent

A tenant cannot unilaterally withhold rent from a landlord who fails to make required repairs. However, the landlord and tenant can agree to a reduction in rent. For example, the landlord may allow the tenant to pay for repairs to a broken refrigerator, and then subtract the amount of the bill from the next month's rent. (The tenant should retain copies of all receipts.) Another example: The landlord may reduce the rent for a month during which the tenant could not use one room because the roof leaked. This type of solution occurs frequently and should not be overlooked.

18.2 Abandonment of lease

The lease is a contract between the landlord and the tenant. The tenant can get out of the lease only if the lease itself allows the tenant to do so and the tenant follows the procedures laid out in the lease. For example, the lease may permit the tenant to move out simply by giving notice thirty days in advance. But there is no law that allows tenants to abandon any lease just by giving a notice thirty days in advance. If the tenant abandons the premises prior to the expiration of the lease, the tenant will still have to pay rent every month until the landlord rents the premises to another tenant or the lease expires.

18.3 Small claims court

If the landlord and tenant cannot settle their differences between themselves, the tenant may file an action in small claims court. The tenant has the option of performing a repair and either suing to be reimbursed, or suing to have the right to withhold future rent payments until he has recovered the cost of the repairs. The tenant may also sue before the problem is fixed and request that the court allow the tenant to withhold future rent payments to cover the cost of repairs. In either case, the tenant may recover damages for the actual cost of the repairs and for the inconvenience placed on the tenant while the problem persisted. Damages for inconveniencing the tenant are measured by how much the problem reduced the fair rental value of the property.

An action for reimbursement of money that the tenant has spent is called "rent recoupment". Suing for a court order allowing the tenant to withhold future rent payments is "rent abatement". A tenant may choose rent abatement if she does not have the money up front to perform the necessary repairs, or if she does not want to risk paying for repairs and possibly losing in court.

18.4 What you need to show as tenant in small claims court

- That the tenant had a written or verbal lease when the problem existed;
- That the type of problem that existed was one that the law required the landlord to remedy;
- That the tenant gave written notice, if required;
- That the landlord failed to fix the problem within a reasonable time;
- That the tenant, in an action for rent recoupment, fixed the problem and incurred expenses (The tenant should retain copies of all repair bills and proof that the bills have been paid by him, such as a receipt of payment, or a canceled check); and
- Evidence of the reduced rental value of the property (this most likely will be provided by oral testimony of the tenant).

In an action for rent abatement, the tenant may want to bring evidence showing the estimated cost of repairs. For example, the tenant may present a written repair estimate, or a sales brochure showing the cost of a new appliance. If the tenant anticipates that the landlord will argue that the tenant paid for repairs that were unnecessary or overpriced, the tenant should arrange to have the person who performed the repairs in the court room. Once the court issues an order, the tenant should read the order carefully and follow the court's instructions.

The tenant may also be able to recover for damage to his personal property caused by the landlord's failure to properly maintain the premises. If conditions of the residence were so bad that the tenant was forced to move, and these conditions resulted from the landlord's actions, omissions or negligence, the tenant may be able to recover the moving expenses.

If the tenant wins in court, the court may require the landlord to pay the tenant's court fees but it will not require the landlord to pay any attorney's fees. Because disputes between a landlord and a tenant usually involve no more than a few hundred dollars, tenants should consider proceeding in small claims court without a lawyer or attorney. Small claims court is a more informal forum and parties quite often do not hire lawyers or attorneys.

18.5 Evictions

In the State of **New York**, to evict a tenant a landlord must sue in court and win the case. Only a sheriff, marshal or constable can carry out a court ordered warrant to evict a tenant. (RPAPL Sec. 749)

According to the Real Property Law (sec. 235) of the State of New York, landlord cannot take the law into his or her own hands and evict a tenant by use of force or unlawful means, For example, a landlord cannot use threats of violence, remove a tenant's possessions, lock the tenant out of the apartment, or willfully discontinue essential services such as water or heat.

A tenant who is put out of his or her apartment in a forcible or unlawful manner is entitled to recover **treble** damages in a legal action against the wrongdoer. Landlords in New York City who use illegal methods to force a tenant to move are also subject to both **criminal** and **civil** penalties. Further, the tenant is entitled to be restored to occupancy. ---See RPAPL Sec. 5 713, Sec. 853 and New York City Local Law 56, 1982.

When a tenant is evicted, the landlord has no right to retain the tenant's personal belongings or furniture.

It is wise to consult an attorney to protect your legal rights if your landlord seeks possession of your apartment. Never ignore legal papers.

In the State of **North Carolina** landlords are not permitted to use "self-help" eviction. That is, a landlord cannot change the locks or otherwise impede the tenant's ability to enter the premises (except in order to maintain or repair the premises), even if the tenant fails to pay the rent. In order to evict the tenant, the landlord must obtain a court order through a process called "summary ejectment". (N.C. Gen. Stat. §§ 42-26 to 36.2)

The landlord cannot evict a tenant in retaliation for certain protected actions. These protected actions include:

1) Complaints made to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair.
2) Complaints to a government agency about a landlord's alleged violation of any health or safety laws.
3) Attempts to exercise rights described in the lease in state or federal law.
4) Attempts to become involved with any tenants' rights groups. If the tenant has undertaken any of these actions in good faith and in the six months before the eviction proceeding, the tenant should bring this to the court's attention. (N.C. Gen. Stat. §§ 42-36.1-36.3).

18.6 Security deposits

A security deposit is an amount paid by the tenant to the landlord at the beginning of a lease to cover expenses incurred by the landlord for which the tenant was responsible, but did not pay. Security deposits are governed by the 1977 Tenant Security Deposit Act (N.C. Gen. Stat. §§ 42-50 to 56). Under this Act, if the lease is month-to-month, the security deposit cannot exceed one and one half months' rent, and if the lease is longer than month-to-month, the security deposit is limited to two months' rent. (If the lease is week-to-week, the security deposit is limited to two weeks' rent).

18.7 Landlord's obligations during the lease

The Act forbids the landlord from depositing the security deposit in his personal bank account. The landlord must establish a separate trust account in a North Carolina bank, and must inform the tenant of the name and address of that bank within thirty days of the beginning of the lease. In lieu of opening a trust account, the landlord may purchase a security deposit bond from a North Carolina insurance company. These requirements are designed to make it easier for the tenant to recover her security deposit at the end of the lease.

18.8 Landlord's obligations at the end of the lease

The landlord can retain part or all of the security deposit made by the tenant to cover **only** the following costs:

1) the tenant's failure to pay rent;
2) damage to the premises;
3) expenses related to the tenant's moving out before lease expires;
4) unpaid bills of the tenant which become a lien against the premises;
5) costs of re-renting the premises after a breach of the lease by the tenant;
6) costs of removing and storing the tenant's property after eviction; and
7) Court costs in connection with terminating a tenancy.

The landlord must return the deposit within thirty days of the end of the lease. If the landlord keeps any portion of the security deposit, for any of the reasons given above, the landlord must explain the charges to the tenant in writing. This is referred to as an accounting.

The landlord can only keep enough of the security deposit to cover his actual costs of repairs, unpaid bills, etc. For example, if the tenant paid a $600 deposit, and the landlord then paid a repair service $100 to replace a window that the tenant had broken and did not repair before moving out, the landlord can charge no more than $100 for that item on the accounting. If that is the only charge against the security deposit, the landlord must return $500.

Any clause in the lease that gives the landlord the power to withhold more than his or her actual costs --commonly called forfeiture clauses--is not enforceable. Conversely, if the actual costs incurred by the landlord exceed the amount of the security deposit, the landlord can keep the entire deposit and sue the tenant for the difference.

18.9 Normal wear and tear damage

The landlord can use the security deposit to repair damage for which the tenant is responsible. But the landlord cannot apply the security deposit to normal wear and tear. The question is: What's the difference?

Normal wear and tear includes deterioration of the premises that occurs under normal use conditions. For example, paint may fade, electrical switches may wear out and break, pull strings on curtains may fray and snap and carpet may wear down. These things happen even if the tenant cleans regularly and cares for the premises reasonably. Damage occurs from unreasonable use or accidents, and includes extreme build up of dirt, mold, etc., stains on carpets, and broken windows. Even planned alterations to the premises are considered damage.

For example, the tenant cannot leave large holes in the walls from shelving, and cannot repaint the walls to significantly change the color. If the tenant wishes to make changes to the premises that will remain after the tenant moves out, the tenant should secure that landlord's written permission.

The tenant can take steps to avoid disputes over damage. At the beginning of the lease term, the tenant should inspect the premises thoroughly and note all problems in writing. The tenant should sign and date the list and also have the landlord sign the list. At the end of the lease, the tenant should again inspect the premises with the landlord present, discuss any damage with the landlord, and against prepare a list.

18.10 What to do if landlord unlawfully withheld excessive security deposit

If the tenant believes that the landlord has unlawfully withheld an excessive amount of the security deposit, and the parties cannot resolve the dispute between themselves, small claims court is an option. If the landlord deliberately withheld more than his lawful share of the security deposit, or deliberately withheld the deposit past the thirty-day period, the court may award the tenant the cost of her attorney's fees, in addition to any other damages. ---www.jus.state.nc.us/

Chapter 19

19 Suing your landlord

If requested repairs to your rental have not been made, you may be able to file a lawsuit against your landlord. The court may be able to order your landlord to make repairs or reduce your rent until repairs are made. You may bring this lawsuit in District or Superior Court. You should consult with an attorney before exercising this option. (RCW 59.18.090).

19.1 Suing your landlord under "warranty of habitability"

In the 1973 court case Foissy v. Wyman, the Washington Supreme Court ruled that landlords have an obligation to provide a livable rental unit. This obligation is called an "implied warranty of habitability".

There is no specific standard of determining when the warranty of habitability has been violated. If your home (or rental) is partially or totally uninhabitable as a result of failure of the landlord to repair defects in your home or rental, you may be relieved of the obligation to pay all or part of the rent.

Using the warranty of habitability, you can sue your landlord for back rent. A more risky option is to deduct a justifiable portion of your rent and use the warranty of habitability as a defense in legal action your landlord might take to try to evict you. This is risky because if a judge does not agree that the amount deducted was justified, you could be evicted. Eviction court is not a friendly place.

19.2 Local code enforcement

Some cities and counties in Washington have passed housing, building, and health laws which provide additional protection to tenants in those areas. The authorities that administer these codes may be able to use their enforcement powers to get defects corrected or impose penalties on landlords who do not make necessary repairs.

In Seattle, tenants are entitled to a free Housing Code inspection. Call the Department of Construction and Land Use at (206)684-7899.

19.3 Moving out –vacating your rental

If your landlord fails to make necessary repairs you can break your rental agreement or lease. If you are current in rent and utilities, have given a notice to repair and waited the required period of time, and no repairs have been started by your landlord, you can give your landlord written notice and move out of your place immediately. (Samples of the notice of repairs needed and the intent to vacate letter are available.) The notice can either be mailed or delivered personally. Once you move out you are entitled to a pro-rated refund of any rent which you have already paid. Your landlord must return your deposit if you are entitled to it. (RCW 59.18.070).

19.4 Rent escrow

If your landlord fails to make necessary repairs or provide necessary services which results in conditions which substantially endanger or impair your health or safety, you may be able to deposit your rent money in an escrow account until the conditions are corrected. In order to use this remedy, you must follow every specified procedure which includes having a government inspector certify the substandard condition of your home. Please consult the Tenants Union or a lawyer for more information about this option. (RCW 59.18.115)

19.5 Landlord retaliation is illegal

Your landlord is prohibited from retaliating against you for exercising any of your rights as tenant under the RLTA or for reporting code violations (acts or omissions) that endanger your health or safety. Retaliatory actions include eviction, rent increases, reduction of services, or increases in your obligations. Written proof that you have asserted your rights is often necessary to prove retaliation. (RCW 59.18.240 and 59.18.250).

19.6 How to sue your landlord

You probably want to sue the landlord for violating your lease. Sometimes it is not easy to figure out who that is. For example, what if the person who broke the law was the manager of the apartment complex and the manager works for a management company that runs the complex for the landlord? Do you sue the apartment complex name? Do you sue the manager? Do you sue the management company too? You certainly can. But remember suing different people can cost you more money, and can make the case very confusing.

The person or entity that is ultimately responsible is the landlord --the person that owns the land. The manager is just an employee of the management company who is acting on behalf of the landlord. So the landlord is liable for anything the manager or the management company does. A landlord you know at least has one asset that you can try to collect on if you win (the rental property itself). So suing the owner of the land and not the name of the complex, the manager or the management company is probably the best plan.

19.7 How to find the landlord –the owner of the land

Finding out the name of the owner is not easy. Do you sue the name on the sign? probably not. Businesses use names called "assumed names" and they are probably not the name of the real landlord. You want to sue the actual person or business entity that owns the land as listed on the deed.

There are a few ways to determine this information. First, ask the manager or the person you deal with who the owner is and their address. As we just discussed, you are not interested in the owner of the management company (many managers only give out this information). You are interested in the owner of the property. It is important to know that landlords have a duty to disclose this information in seven days upon a written request by posting the information in the office or responding to you in writing.

The only exception to this duty is when the information is in your lease (so check this first). Tex. Prop. Code 92.201. Even if you get information from the landlord, it is best to check it against other records. *Note: many landlords try to keep their true names hidden as much as possible.*

Second, contact the tax appraisal office in your area. All tax appraisal offices attempt to maintain correct ownership data on all real property in their district. Much of this information can be searched online by the county the property is in. If the county does not have a web site, call or email them for the information. Again, this information may not be always correct, however this information it is easy to search and can be obtained for free.

Third, the best way, but the most complicated way to find out the name of your landlord is to check with the deed records department of the county where the property is located. Unfortunately, deed records are not user friendly so searching for the name here will not be that easy.

Rather than organizing records by postal address, deed records use the legal description of the property. Often you can get that information easily using the tax appraisal records as described above, and this will make your search easier. Rather than trying to figure everything out at deed records, ask a clerk for

help. Explain you only want to know about the owner of one piece of land. Clerks of these offices will usually help.

In summary, landlords can be people or they can be business entities. If a natural person owns the land, sue the person, not the name of the business or the name of the apartment complex. If the owner of the land is a corporation or a limited partnership, you should sue them in their official names.

19.8 Serving the right person with the court papers

Once you know the name of the landlord, you will also have to know the name and address of the person to give the court papers. Sometimes there is a difference between the defendant, and the person that will get the papers.

Who do you sue and give the court papers to? Getting this information is the hard part of course, but once you have it do not be fooled -- sue the landlord. According to Section 92.003 of the Texas Property Code, if you have been given the name and street address of a management company being used by the landlord, then you must serve the papers on that management company.

Again, keep the landlord as the defendant, but list the management company as the person to give the papers to. If the name and street address of the management company has not been supplied to you, then you can serve the manager of the complex or any person that collects the rent with the papers. So check your lease agreement and other papers for this information. - http://www.texastenant.org/.

Chapter 20

20 Consumers' home-buying and home remodeling guide

*The most important thing you can do as a homebuyer is to play an **active role** in the home inspection process.*

20.1 Home Selling and Buying – Water, Mold & Other Environmental Problems

Whether you want to sell or buy a home or other real estate, you need to be concerned about the possible presence of mold infestation and other environmental health threats which may be resident in the home, condominium, apartment complex, office, store or other real estate project.

If you are the home seller, you should consult with your local real estate attornye about whether or not your state requires real estate sellers to disclose any water, mold or other environmental problems known to the seller. You need to complu in good faith with all of your state's laws. If you know your home or property has a problem, you would be wise to remedy the water problem, mold infestation, or environmental threat *prior to even offering the property for sale and prior to even listing the property for sale with a realtor*. To find both the visible and hidden mold problems in the property you wish to sell, hire a comprehensive mold inspection and mold testing by a Certified Mold Inspector, or follow the do-it-yourself mold tips provided at Mold Inspection, including the use of our do-it-yourself mold test kits. Learn the steps recommended for safe and effective mold remediation. Ask your attorney to be the one to draft a home sales contract which might include the following items (plus any other helpful provisions recommended by your attorney]: (1) the buyer is encouraged to hire [at his or her own expense] a qualified home inspector to inspect the entire home or building for water or environmental defects or problems of any kind, plus a Certified Mold Inspector for comprehensive mold inspection and mold testing; (2) a detailed listing of home or building water, mold, and other environmental problems currently known to the seller[s]; (3) a provision that the home is being sold "as is" with no home, plumbing, mold, or environmental warranty or guarantee of any kind; and (4) a provision that the buyer accepts full responsibility for any home, water, mold, and environmental problems which may be now in the home or property being sold, or which may ever arise in the future.

If you are the home buyer, you should consult with your local real estate attorney about whether or not your state requires real estate sellers to disclose any water, mold, or other environmental problems known to the seller. Regardless of any state requirement to do so, prior to making an offer to purchase the home or other real estate, insist that the seller[s] provide a signed and dated written disclosure [written by your attorney, if possible] of all seller-known home, water, mold, and environmental property problems of any kind. Your goal should not to

be the home or property "as is," but to try to obtain whatever written assurance [in the sales agreement] that you are able to negotiate from the seller [s], if any, about the home condition, water, mold, and environmental status of the home or property. Have your attorney insert a 21 day [14 day minimum, but 21 is better] environmental inspection time period [beginning at contract signing] for you to have the home or property thoroughly inspected by a Certified Home Inspector and by a Certified Mold Inspector, and other environmental professions whose expertise may be required, with your retaining the right to cancel your purchase offer and receive back promptly a full refund of your earnest money deposit [in the hands of a title insurance company or the licensed realtor in the realtor escrow account] should there be any physical or environmental problems of any kind which are unacceptable to you as the prospective buyer. Do not rely on any mold testing and mold remediation done by the seller or mold professionals not hired by you. During the environmental inspection time period, pay for a comprehensive mold inspection and mold testing by a Certified Mold Inspector, or, follow the do-it-yourself mold tips provided at Mold Inspection, including the use of our do it yourself mold test kits. Learn the steps recommended for safe and effective mold remediation. Get legal help from your attorney before waiving any present or future legal claims you may have in regard to water damage, mold problems, and environmental problems. Please be aware that it is very easy for the costs of mold remediation to exceed the value of the remediated home.

20.2 Ten Tips to Avoid Mold Problems and Lawsuits in Selling and Buying Real Estate

1. A property owner should not even offer the property for sale, or list it for sale with a Realtor® or other real estate agent/broker, until after a thorough mold inspection and mold testing of the home, rental property, or commercial property. Hire a Certified Mold Inspector (USA and Canada), or use a do-it-yourself mold inspection checklist and mold test kits.

2. If the owner discovers visible or hidden mold problems, he should do safe and effective mold removal and remediation prior to offering the property for sale. Hire a Certified Mold Remediator (USA and Canada), or follow the recommended steps for safe and effective do-it-yourself mold remediation. Re-inspect and re-test the building after remediation.

3. The owner should avoid hiding or camouflaging mold problems by deceptions such as painting over mold growth; concealing mold growth behind stored items, furniture, furnishings, and decorations; and masking the distinctive smell of mold growth with air fresheners and deodorizers. The smell of mold is from the digestive gases of the mold eating the building materials.

4. The real estate sales contract should include an environmental inspection clause that grants at least a 14 to 21 day inspection period. The buyer should hire an independent inspector such as a Certified Mold Inspector, Certified Environmental Hygienist, industrial hygienist, and/or home inspector with

mold expertise to inspect and test thoroughly the property for mold and other environmental dangers.

5. The mold inspector or the buyer himself should do an all-around physical examination of the building for both visible and hidden signs of water damage and mold growth. In addition, the inspector or the buyer should mold test the air and visible mold growths in all rooms, the basement, crawl space, attic, garage, plus the outward airflow from each heating/cooling duct register.

6. Mold testing requires mold laboratory analysis and mold species identification of the collected mold and air samples. In building locations with previous floods or leaks, the examination should also include fiber optics inspection to look inside water-penetrated surfaces for hidden mold infestations.

7. The seller should disclose in writing to all prospective buyers any previous or present building water and mold problems, and what the owner has done, if anything, to correct such problems. These water damage and mold disclosures should be attached to the real estate sales contract so that the buyer acknowledges receipt thereof.

8. If the property for sale is a USA residential property (home, condominium, co-op apartment), the seller should order ahead of time and provide to all prospective buyers the insurance industry's C.L.U.E. (Comprehensive Loss Underwriting Exchange) Property Report that provides a five-year insurance loss history for a given address.

   Every U.S.A. homeowner insurance claim inquiry or loss report by a homeowner (even including those that do not result in any loss payment) goes into the C.L.U.E. database. In some states (including California) it is becoming standard for sellers to provide Realtors® with a copy of the C.L.U.E. report up front so that there are no unpleasant surprises at closing or afterwards.

9. In consideration of the seller's accurate and complete mold disclosure, and the buyer's full and unrestricted opportunity to inspect and test the property thoroughly and carefully, the sales contract may include a seller's requirement that the real estate property is being sold "as is" with no implied or express warranties as to the physical, mold, and environmental condition of the property.

10. Similarly, the sales contract may also include a seller-requested clause that releases the seller, lender, and real estate agent/broker from all mold liability to the buyer. This release of liability should be contingent on the accuracy and completeness of the provided details in the seller's written mold disclosure and on the buyer's full and unrestricted right to do mold inspection and mold testing prior to completing the property purchase.

20.3 What to do before you buy

A little investigation on your part along with paying an additional few hundred or more up front can save you the experience and expense of spending $30,000.00 in legal fees to "win" an award of $13,000.00 to fix $80,000.00 in repairs. To make matters worse, your homeowner insurance carriers have made builder defects, molds and code violations exclusions in their policies.

Many in the building industry would like you to believe that consumer groups and the media are trying to sensationalize the issue and serve only to needlessly alarm prospective home buying consumers. Nothing could be further from the truth. We have firsthand knowledge of the crisis in defective housing, which includes deficient building materials being used nationwide. We are not attorneys, nor builders, but homeowners who are living and working out of our own deficient homes.

Too much confidence is placed on the building industry. Residential contractors (builders), real estate agents and developers are in the business for a profit. Always remind yourself of that fact. The real estate agent will get a percentage of the sale as well as the builder. So, who works for the home-buyer in this process? No one works for the home-buyer. The situation is no longer just "buyer beware", but "**buyer be scared!**"

Buying a home is the single most expensive investment most of us will ever make. However, most Americans are more cautious about how they spend a few dollars as compared to investing hundreds of thousands in a home. We Americans will clip coupons to save a few cents but don't think twice about inspecting a new or existing home!

Inspecting your home, whether it is an older home, new, manufactured, or from the ground up, may cost a few hundred dollars now versus tens of thousands of dollars in the long run.

Words cannot express what we have gone through in respect to our defective homes--the frustration, coupled with a sense of moral outrage, sense of loss, and total feelings of helplessness. Laws are stacked against the homeowner/buyer. We are not a disgruntled few, but hundreds of thousands whose lives have been destroyed by poorly built, unsafe housing. A multitude of homeowners, with nowhere to turn, is desperately ill from deficient (un-repaired or poorly constructed) homes that breed toxic molds.

20.4 Demand full disclosure

Demand from the landlord full disclosure of prior water moisture intrusion, structural damage (construction defects), interior water leaks, and any knowledge

of mold. Disclosure of water damage is the law in most states, yet disclosure mandates for mold are only starting to emerge.

20.5 Conduct a general home inspection

It is surprising that many home owners still wave this option, especially in competitive, "seller's markets." But regardless of the market, every buyer should seek a home inspection to avoid potentially catastrophic losses. Although a general home inspector is not an expert in microbiological contamination, they often identify more obvious signs of water intrusion, structural damage, common cover-up tactics, and even suspected mold growth.

20.6 Follow up

Consult with your real estate agent or seller if you have concerns regarding the disclosure statements and inspection results. If the inspection reveals potential problems, either walk away from the deal now or pursue further investigation. Few buyers see the need to verify or question disclosure statements; yet when the inspection result contradict the seller's claims, you should certainly seek further clarification. There are a number of ways to verify the owner's responses. For example you can consult with earlier owners as identified by city records.

20.7 Hire a professional home inspector

Question: Who needs to have a home inspection?

Anyone who is buying or investing in real estate should have the home thoroughly inspected. It is recommended that that you use a certified/qualified home inspector and or professional construction consultant firm (who are usually architects, engineers, or general contractors) that carry errors and omissions insurance, to help cover liabilities you will incur in the future.

Home inspectors should be well trained in new construction and affiliated with inspection agencies such as ASHI and/or NAHI or a state licensed inspector (e. g., CREIA in California and TAREI in Texas). Although not all states license their builders, an inspector who is also a licensed contractor is a big plus. Be certain that your inspector is well qualified in construction inspections, is familiar with all federal, state and local building codes/municipal ordinances, and works for you. Do not use an inspector recommended by your realtor and/or seller.

Remember also that "typical" home inspection services are different from Professional Construction Firms. Home inspections provide a routine inspection, usually prior to the closing of escrow, for the more obvious problems. Home

inspection services cost less, but the depth of their inspection usually will not uncover hidden structural or geotechnical problems. Be thorough when hiring a home inspector and ask if they are experienced in new home construction and are capable and trained in phase inspections.

Do not rely on VA and FHA inspections. The majority of distressed homeowners have VA and FHA loans.

In your contract with the home inspector and or a professional construction firm, do not sign any arbitration clauses. If your inspector has been negligent, you will be signing away your rights to recourse in the courts. Also do not sign any clauses that releases your inspector from liabilities...that is what his errors and omissions insurance is for.

20.8 Inspection: when and how it should be done

Question: When should an inspection be done?

A thorough inspection should be done after an offer has been made and before closing. Ongoing inspections are recommended throughout the construction process for new homes. Additionally, many professionals are now encouraging homebuyers to have any prospective homes tested for molds.

Question: What does a home inspector do?

The home inspector will perform a non-destructive, objective overview of the building's structural, grading, electrical, plumbing, and mechanical conditions.

Question: Is an inspection needed on new homes?

Yes. We have learned that cities are overwhelmed, understaffed, and immune to liabilities; therefore it is not in anyone's best interest to rely on their city's building inspection department to conduct adequate inspections. The builder is both responsible and liable for problems with the home. By documenting any problem areas before you move in, you avoid the problems of how and when they came to exist. Photographs are marvelous tools, and if they must be sent to the builder or other entities, send any correspondence via certified mail. Do not send originals, and be certain to keep copies of any correspondence for your records.

20.9 Building a new home

Question: I'm having a new home built. Do I need to have a home inspection?
YES. By having phase inspections done you can accomplish several things:

1. The first thing is to let the builder know that you will be having phase inspections done and that you will also have a comprehensive final inspection. Insist on this in your purchase contract with the builder! No good builder should object!

2. You show the builder, sub-contractors, and workers that you will have a high involvement in the building of your home. Let them know you will not accept cutting corners on the single largest investment of your life and/or permit practices that may ultimately risk your family's safety!

Phase Inspections Include but are not limited to:
The soil, compaction, grading and drainage (Poor grading can lead to moisture intrusion and toxic molds.)

- The Foundation
- The Structure
- Stairs and landings
- The electrical and plumbing systems
- Exterior cladding
- The roof, and all ventilation, including roof flashings (poorly installed flashings are a big source for water intrusion and molds.)
- Fireplace/Chimney
- Window Installation (Poor installation can lead to moisture intrusion and molds)
- Finish work (Begin with floorboards, carpets, and doors through completion of finished cabinetry.)
- Interior and Exterior walls
- Appliances
- Landscaping (CAUTION: builders often encourage homeowners to do their own landscaping by charging outrageous prices, but when homeowners experience grading problems, the builder then often blames the homeowners' landscaping.).

20.10 Home-buying FAQ

Question: Should I buy any home as is?

NO. Unless you have had an older home that is fully inspected and are willing to accept and pay for any problems that may have been missed. **Never** buy a new or recently built home **as is**!

Question: How long does an inspection take?

Normally the inspection will take anywhere from 2 to 4 hours.

Question: Should I attend the inspection?

Yes. You are encouraged to attend the inspection.

The information that you will gain from being there is invaluable. It is also beneficial to you, as you will be able to go over the report and discuss questions you might have regarding important homeowner maintenance. Many homeowners today are unaware of all the details that go into keeping a new home in good repair. Your inspector can give you ideas for fulfilling your responsibilities in the home (e. g., changing the air filters in your AC and heating units, proper caulking of windows and tubs, along with many other tips)

Question: How much does an inspection cost?

Most inspections cost on the average of about $250.00 and more depending on the inspector. As one of the most expensive investments you will make may be at stake, percentage-wise and for peace of mind, the cost of a home inspection is extremely low in comparison to discovering unknown deficiencies and facing repair costs in the future. Just ask us!

Question: I purchased a new home almost a year ago and my builder refuses to address the problems I am having with my home and/or to make repairs. Is there anything that I can do to possibly get their attention?

Yes. Get an inspection. This puts the builder and his sub-contractors on notice. You are letting them know that you are very serious about your concerns and that you have had problems. This is also helpful if you must pursue repairs through other venues. Your builder and subs are hoping you have bought into the fallacy of a one-year warranty, but in most states you have much longer for defects to be addressed and repaired.

Remember to take photos of ongoing problems, document everything, and be certain to send any correspondence by certified mail to the builders and subs. Keep all mail receipts!

20.11 Guard yourself against poor construction work

Inspecting the builder

There are unscrupulous and untrained workers offering construction and remodeling work. Buying a dream home or remodeling your home shouldn't turn into a nightmare!

Have your purchase agreement interpreted to you by an attorney. **Do not sign any new home/remodeling/and or inspection contracts that contain a binding arbitration clause!** You will be signing away your rights to the courts should construction defects arise. Have your contract interpreted to you by a **construction defect attorney**...they have the hindsight of knowing how your contract can entrap you should you discover problems later on. Also, be certain that your contractor is financially solvent. Ask for copies of liability insurance should something go wrong and for proof of workers compensation insurance should some one sustain injury construction.

Use your own real estate agent; use a buyer's agent/broker who doesn't "swing", which means they only represent buyers. Never use an agent on-site (model home agent) or the seller's agent. They don't represent you and are not looking out for your best interests. For the same reason, never use the builder's/sellers' inspectors.

Talk with neighbors in the subdivision. Ask them if they are happy with their homes and how the builder has performed in response to problems with the homes. When remodeling, ask for references and do make those calls.

Check out your contractor with the Better Business Bureau, any state licensing agency, your state attorney general's office, and most importantly, county court records to see if the builder has ever been in litigation for construction defects (a good sign that he wouldn't make repairs and/or honor warranties and/or remodeling contracts). This is information you won't find with the BBB and state licensing agencies.

It is our sincere hopes that you find and buy the home of your dreams, but should problems arise, **don't buy into builder's warranties**. In some states the time period covering statutes and rights for repairs can be as many as ten years. For instance, in California the homebuyer has up to 10 years, but only three years from discovery of a defect to file complaints. Check with a local construction defect attorney.

If you suspect problems with your home, be certain to document everything and send all correspondence via certified mail to the builder. Take pictures---Pictures tell a thousand words.

Don't let your statutes (statute of limitations) expire waiting for your builder to complete home repairs! Your builder is well aware of these statutes and hopes that is exactly what you will do! This is often the very reason builders give homeowners the run-around!

Also be certain to get in writing that the builder will provide the following one week prior to close of escrow:

- List of all subcontractors and suppliers (check out all the subcontractors records).
- Copies of all product manufacturer warranties.
- Copy of your home warranty.
- A set of "as-built" drawings showing the stamp of the architect and the structural engineer.
- Instructions on proper maintenance of the home.
- Any and all relationships to lenders, realtors, home inspectors, title companies and all agencies involved in the home-buying process.

20.12 What the new home buyer should know before close of escrow

By Peter Kuchinsky II, Construction Building Analysts.

You are about to obtain the American dream of homeownership. In fact, you are one of millions that will buy and move into a new home each year. For the most part you have worked hard to save for the down payment and are committing about a third of your annual income to paying off a 30-year mortgage. With so much on the line, it will benefit you to be prepared and educated about what you should know prior to the close of escrow to avoid your dream home turning into your biggest nightmare.

1. Obtain the Builders Warranty.

Most new homebuilders provide a warranty. Unfortunately, most new homeowners don't read it until after their walkthrough and close of escrow. Like with any manufactured product, a new home comes with both expressed and implied warranties. In addition, each state has a statute of limitations that holds the homebuilders responsible for latent and patent defects. These statutes can range from 1 to 10 years depending upon the state you live it.

Because many items can go wrong over a course of several years, you must know what warranties and time limits apply to your new home before you purchase. You should ask builder for their warranty prior to you even opening escrow, and you should have the builder provide you information regarding your State Contractor License Board and Department of Real Estate. You will want

this information to check if there are any past or on-going investigations involving the homebuilder. If your builder won't openly provide this information, you should re-consider your new home purchase from the builder.

2. Look for Excluded Items.

You got the warranty, now what? Read it. Read it again. Highlight any items that are excluded after you do your walkthrough. Common items excluded include broken glass, damaged finishes or misuse.

This will alert to what specific items you must look at and examine closely during the walkthrough, because unless you note the damage during the walkthrough the builder is most likely not going to repair or replace it when you find it a week after closing. During the walkthrough, it is important that you use and test every item. Turn each knob, open every drawer, lock and unlock doors.

In addition, some items that are built into your new home come with a manufacturer's warranty. It is important that you know which items the builder will cover, and which items are covered by the manufacturer's warranty. Be sure the builder provides you with all the manufacturers instructions and warranties. You will want you keep those warranties and instructions in a file and safe place. Send in all warranty cards as soon as possible. This protects your rights and allows the manufacturers to notify you in case of recalls.

3. Arrange to have Utilities turned on.

If the builder doesn't turn on the utilities prior to the walkthrough, you can be pretty sure that your home has gone through a limited quality control process. In order to ensure that all items are properly installed and in working order, the only way to check everything out, is to have the gas, electric and water turned on prior to your walkthrough and close of escrow. If the new homebuyer doesn't turn on these utilities, again consider a builder that does.

During your walkthrough, many items are excluded. How can you test and check these items if there is no light to see, power to test appliances or water to run down the drains to check for leaks? Nothing can ruin the joy of moving into a new home quicker than a backed up toilet or an appliance that doesn't work, because utilities weren't turned on during the walkthrough.

4. Hire a Professional.

Moving into a new home requires lots of patience and paperwork. So many things to deal with look it and inspect. Some of the things you don't even understand, but are afraid to ask the question because you might sound dumb. First, there are no dumb questions, and second, if you don't understand something, ask. This is where hiring your own professional inspector might help. The

inspector works for you unlike the project superintendent, sales agent and customer service representative that work for the builder.

Look for a home inspector that has experience with new homes. This second set of eyes can often discover items that will develop into problems down the road including but not limited to lack of drainage, inadequate flashings, or improper installations. Do not rely on the builder's assurance that the home has passed all the building inspections; they are obviously biased.

Under the Uniform Building Code it states; "nor shall the code enforcement agency (building department or inspectors) be held as assuming any such liability by reason of inspections authorized by this code or any permits or certificates issued under this code. Check before agreeing to purchase the new home from the builder if you can bring a professional home inspector to your walkthrough, if not, again, consider a homebuilder that will.

5. Don't bring family and friends.

With so much going on, you don't need distractions from the task at hand, thoroughly inspecting your new home. You need to give this task your undivided attention. Children should be left with a family, friends or babysitter.

Those that you would bring with you to the walkthrough are most likely going to be more interested in whose rooms are whose, what are your decorating or landscaping plans, and not looking at tiles and fixtures for chips or dents. After your walkthrough and on moving day is when you will want family and friends with strong back to come over for a visit.

6. Make a day of it.

Plan on setting aside a day to do your walkthrough. A thorough home inspection usually takes a professional inspector 2 to 4 hours to complete. In addition, there will be paper work that the builder will want you to read and sign. Each adult that will be signing the mortgage and dealing with the builder after the close of escrow should attend the walkthrough and fully understand the warranty and customer service process.

7. Schedule walk-through at least 3 days before closing.

Three days is the minimum time that should be scheduled before the close of escrow. If possible, schedule the walkthrough one-week before the close of escrow. You should never schedule your walkthrough to be completed on the same day as closing escrow. By allowing some time between your walkthrough and closing date, you allow the builder an opportunity to repair any items noted, without having to schedule around you. Once you move in, you will have to be home in order for work to be done on your home.

In some cases, the builder will simply hand you over a list of subcontractors with telephone numbers for you to contact and schedule your own appointments. If this is the case, be prepared to wait weeks for missed appointments when subcontractors don't show up because they forgot or were too busy. During the purchase agreement and terms, obtain a written agreement that allows you to hire a professional inspector and conduct your walkthrough at least one (1) week prior to the close of escrow. If your new homebuilder won't agree to these conditions, consider one that will.

8. Real estate transactions must always be in writing

Real estate transactions are contracts, and as such, they must be done in writing. The spoken work, handshake or promises made by the builder or their representatives are meaningless.

All items you are promised must be in writing. Should you have to file a complaint with the Contractor Board, Department of Real Estate or, worst, go to court, only the written agreement that you have will be of any value to you.

9. The squeaky wheel gets the grease.

During the escrow period and prior to close, find out who's who at the builder's company. Most likely your day-to-day dealing will be with the superintendent, sales agent or customer service representative. However, you should know the chain of command and how to reach the Vice-President of Construction, Customer Service or Sales should problems develop along the way. Don't work through Project Manager when issues develop. They are usually better at burying issues, than resolving them.

Going to the V. P. level usually gets action, and the word that comes down from the top usually gets action. If needed be prepared to go the company President. In fact, when issues develop, invite the higher level of company management out to your home to review the issue first hand. Again, when dealing with any level in the company, remember to get written confirmation of any promises made or action to be taken.

10. Keep written records and photographs.

Information is power, and documents are information. Once you enter escrow, buy a notebook and keep a log of every visit or appointment you have with the builder, sales agent, design center, and superintendent or customer service representative. Keep it simple and short.

Note who, what, when, what, where and how. If needed, obtain samples or take photographs. Note even what you might consider to be a minor issue,

because a little stain is often the first sign of a big leak. During the walkthrough, write down any item you want addressed by repair or replacement. After the walkthrough and upon moving in, keep the log on the kitchen counter and note any item that comes to your attention.

After the fist week, send in your first customer service request. Continue to keep a running log of items that come to your attention. At the end of two more weeks, follow up with another customer service request. Hopefully, some items from your first request have already been scheduled and completed.

From this point on, until all customer service requests are completed, send in a monthly request / reminder to the builder's office. Should repairs be attempted that do not meet your level of acceptance or quality expectation, be prepared to ask a V.P. or President of the company to become involved and personally inspect the item. As a rule, a builder should acknowledge your request within two weeks, schedule and repair/repair the item within 2 - 4 weeks, and on the rare occasion when some item is backordered or out of stock, 4 - 6 weeks.

Mr. Peter Kuchinsky II has over twenty years of extensive experience in all segments of residential construction, culminating in superior knowledge and sought after construction management experience. Throughout his career, he has held positions of increasing responsibility and authority with top homebuilders from Project Superintendent to Vice President of Construction. He has provided construction management, inspection and consulting services for major corporations including General Electric, US Bank, Brookfield Homes and Sunrise Colony Companies. His "hands on" experience and realistic approach to issues and problem solving, along with instructing construction technology and safety classes at the college levels, authoring books and articles related to construction and safety; and membership in leading industry associations completes his qualifications in providing consulting, litigation support, training and expert witness services related to construction and worker safety.

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We understand that not all homebuyers are aware of the legalities behind arbitration clauses in home purchase/warranty contracts. We have provided the following article from our newsletter to educate the homebuyer about the pitfalls of arbitration in contracts.

20.13 What is binding arbitration?

The superficial answer is that binding arbitration is an alternative means of settling legal disputes. Instead of going through the public court system, parties involved in a legal controversy can waive their rights to public court and instead

submit the dispute to a private arbitrator. The arbitrator will then review the case and make a legally binding decision. Should consumers trust arbitration?

"No," says Hunter Ford of Alabama Consumers Against Arbitration. "There is climbing evidence that arbitrators are often biased to big business and the consumer loses." A Washington Post story recently reported that First USA, the nation's largest second-largest issuer of credit cards, has won 99.6 percent of arbitrated consumer disputes. Recently Business Week headlines read, "FORCED INTO ARBITRATION? NOT ANY MORE." More employees are saying it's unfair--and many judges agree. (From Alabama Consumers Against Arbitration, with thanks from HADD).

20.14 Russian roulette

Mandatory binding arbitration clauses are increasingly found in "preprinted" homebuyer purchase contracts, or seller/buyer agreements. Today it is important for consumers to make informed decisions when signing a home purchase agreement. Arbitration simply means relinquishing their right to a trial by their peers, a decision that many consumers have unsuspectingly made and regretted. This up and rising trend of arbitration clauses in consumer contracts means one party, an arbitrator, will resolve any dispute. Not surprisingly, most homeowners have found this to be a little similar to Russian Roulette when having their disputes resolved through arbitration. Reasons:

- Often there are no options for appeal. The arbitrator's decision is final.
- Often plaintiffs are denied discoveries and or witnesses.
- Homebuyers are unaware of the perplexity of arbitration, along with hidden costs. Many homeowners found the cost of arbitration to far exceed court costs.
- No jury of your peers to weigh the facts, reports, photos, and other documentation, or relate to the hardships-- hardships that often include living with illness due to toxic molds, fear for one's safety, excessive stress and financial losses. All need and deserve to be heard by one's peers.
- Bias. Many arbitrators are used often by developers and those in the building industry and develop a rapport.

As advocates for distressed homeowners, we too often hear, "I didn't understand the implications of what I signed and/or understand how it could affect me if problems arise with my home." The mandatory pre-dispute binding arbitration clauses that are in consumer contracts are buried all too often in fine print, written in legalese, and with wording that varies from contract to contract, or they may just say enough to sound like a good idea at the time. Consumers are all too often unaware that they have waived the right to go to court. By signing a contract with such a clause in it, they have effectively abrogated that option.

When they haven't committed themselves to binding arbitration, and the homeowners have the chance to consider arbitration as an alternative to litigation, they will frequently find that the steep costs of arbitration, the inconvenience of traveling to the arbitration hearing site, and their attorney fees are far more than the typical $100 filing fee at their local court house.

20.15 Just who is really being harmed the most by the arbitration clause?

The burden of mandatory arbitration clauses is likely to fall most heavily on socially and economically disadvantaged consumers who are the least sophisticated, the poorest, and the least educated. This group has benefited, perhaps more than others, from jury decisions enforcing their legal rights. For those in low-income housing, coming up with a few thousand dollars for arbitration may never be a possibility at all.

Jury decisions are still the best way to send a message to corrupt businesses and corporations who would walk on the rights of the consumer. Arbitration decisions are private; therefore they serve no public function in warning consumers of those involved in unscrupulous business practices. A jury's decision is a matter of public record and can save other consumers a lot of hardship.

Now, more than ever, we need to retain our jury system that best sends this message to the public sector and not have it effectively emasculated by binding arbitration agreements. --- **www.hadd.com/**

Chapter 21

21 How to apply for a contractor's license

If you have ever had the pleasure of dealing with any state office, you may have discovered how difficult it can be to obtain any useful information. Every state has licensing laws that vary from one another. Some states will allow reciprocity with another state, and some will require you to complete the entire licensing process like everyone else. There are also some states that do not require a formal contractor's license to perform work.

21.1 Who can become a licensed contractor?

To qualify to become a licensed contractor an individual must be 18 years of age or older and have the experience and skills necessary to manage the daily activities of a construction business, including field supervision, or must be represented by someone else with the necessary experience and skills, who serves as the qualifying individual.

The contractor or other person who will act as the qualifying individual must have had, within the ten years immediately before the filing of the application, at least four full years of experience at a journey level, or as a foreman, supervisor, or contractor in the classification for which he or she is applying. The experience claimed on the application must be verifiable and individuals who have knowledge of the experience must certify the accuracy of the experience information provided by the applicant.

21.2 Who must be licensed as a contractor?

Under California law, all businesses or individuals who construct or alter any building, highway, road, parking facility, railroad, excavation, or other structure in California must be licensed by the California Contractors State License Board (CSLB) if the total cost (labor and materials) of one or more contracts on the project is $500 or more. Contractors, including subcontractors, specialty contractors, and persons engaged in the business of home improvement (with the exception of joint ventures and projects involving federal funding) must be licensed before submitting bids. Licenses may be issued to individuals, partnerships, corporations, or joint ventures. The CSLB does not issue licenses to Limited Liability Companies (LLC's).

21.3 What happens if I contract without a license?

In California, contractor's license is not necessary as long as you advertise yourself as an unlicensed contractor; provide your customers with a written statement that you are unlicensed, and never contract for jobs costing $500 or more, including labor and materials.

The Contractors State License Board has established statewide investigative teams that focus on unlicensed contractors and the underground economy. These units conduct stings and sweeps to curtail illegal contracting activities.

Contracting without a license is a misdemeanor.

Unlicensed contractors face potential sentences of up to one year in county jail and potential administrative fines of from $200 to $15,000. The CSLB filed 1,136 non-licensee citations and referred 854 cases to the District Attorney during the 2001-2002 fiscal year. Stings and sweeps are routinely publicized to ensure maximum consumer education.

21.4 License classification & experience requirement

The first step to take is deciding what type of license you will need in order to perform the work you would like to do. Many states vary on their license classification names and/or codes. You will need to contact the "State Licensing Board," to obtain this information. Make sure that your skills and experience match with the appropriate license classification you are applying for in any state that requires a license.

21.5 Signing up for an exam date

The majority of states that require a contractor's license will require that a qualified individual take and pass a trade and a business as well as law exam. When you discover the type of license the "State" will require you to obtain, you can then schedule an exam date. Exam date information can be obtained by contacting the "State Licensing Board."

21.6 Signing up for a seminar

If you are interested in taking a course to prepare you for the state exam, you can contact your local state agency, to get the necessary information regarding registration. You will be informed whether there are specific state agencies or private groups that handle these seminars as well as how to register or join.

Seminars can greatly increase your chances of passing the examination, since aside from getting you a lot of pointers, the experience and knowledge that you will gain could greatly boost your self-confidence.

21.7 Taking and passing the State exam

If the state you are applying for a license in requires an exam, you MUST pass the state exam before you can apply for your contractor's license. If you are in a hurry, same day scoring is available for most exams in most states. Some states will allow you to use the "Same Day" scores to apply for a license.

21.8 Applying for your contractor's license

Now that you have passed your exams, it is time to apply for your Contractor's License. In most states your grades are valid for a one (1) year period from the date you took the exam. We suggest that you apply for your license as soon as you can. Most individual do not apply for their license within 4 to 6 months after passing the exams, they usually will never apply for the actual license.

At this point, you will now need to decide on what type of entity your company will be set up as. Your choices are: Sole Proprietorship, Partnership, Corporation or LLC. Information regarding setting up your business entity can be found in the "Licensing Information Packet," that you can request from the various state licensing boards.

21.9 Insurance

Most states require that you at least carry **Workers Compensation Insurance** if you have any employees. Some companies may qualify for an exemption from Workers Compensation Insurance.

Another popular insurance is, **General Liability Insurance**. This insurance covers the work that you and your employees perform. Most states do not require that you carry this type of insurance, but we highly recommend it.

21.10 How to prepare for the examination

Find list of books recommended by the State Licensure Board. Personal study time is so often neglected when it comes to preparation for a state licensing exam. Purchase any and all books necessary, and READ them. I worked through the math problems related to the trade. And most important, purchase the Code book and begin to understand what the writers of the Code are saying.

21.11 Contact your state licensure for the application

The preparation for a state Contractor, Master or Journeyman license begins with your contacting the state licensure board to request an application for a license and/or examination. When you request exam information be sure to ask for any and all recommended study materials. Most exams are based upon a technical book or a Code book. The investment in these books or materials is invaluable as a resource not only for exam preparation but as a good guide in the contracting business. It always pays to learn from the experts.

21.12 Applying for the correct classification

When you apply for a "license" you'll need to know the correct classification for which you need licensed.

A contractor's license in Arizona, Utah, Nevada, and New Mexico requires the passing of two exams, the trade exam and a business as well as law exam.

In Colorado, there is a statewide Plumbing license for Residential, Journeymen and Masters, and, a statewide electrical license for residential Wireman, Journeyman, and Masters.

In New Mexico there are many Journeyman and Contractor license classifications. For example, if you are an electrician only installing low voltage wiring, you'll need a Journeyman Low Voltage License (JES3), but, if you are a contractor soliciting business from the public at large and NOT doing any of the work of installation, you'll need a Contractor's License (ES3).

In Texas the Electrical licenses have several classifications such as Journeyman, Master, and Signs. The air-conditioning license has two classifications. The "A" license is unlimited tonnage of air-conditioning. The "B" license is limited to 25 ton systems or less.

In the State of Utah there is a statewide Electrical and Plumbing license for Residential, Journeyman and Masters.

Las Vegas, Nevada, Clark County requires an Electrical and Plumbing Certificate similar to a journeyman license.

21.13 Documented experience required

Even if you are a very knowledgeable businessman, who took a class to study for your General Builders License, and passed all the required number of exams under your classification, you could still end up with very serious problems if you do not have enough documented experience. Your application will simply be

denied outright, even if you passed the exam with “flying colors.” If you are being hasty in your licensing process, it may cause you to over look a circumstance like this one that may seem obvious.

21.14 Fill out and send application for exam or license

This step is a crucial step in the exam process. The worst thing you can do is show up for an exam and you're not on the examiners' schedule. The time loss and expense can be devastating. Do not presume that someone else has registered you for an exam. If you haven't received a confirmation from the examining agency, pick up the phone and call them yourself to confirm your exam. Some jurisdictions require the application to be notarized.

21.15 Purchase minimum recommended books

Many exams are based on a code book. Modern construction techniques for general Building, fire protection, painting, plastering, roofing, concrete, masonry, Electrical and Mechanical are based on building codes, electrical codes, mechanical codes and plumbing codes. Any construction professional should have at least a library of one book that contains a Code addressing his trade.

The next levels of books that you should have in your library are books written by construction professionals describing particular aspects about your trade. It's really OK to learn from others in your industry who have taken the time to document what they've learned.

Access to specific subject books has never been easier. Once you've obtained a list of recommended books, search the internet for the titles.

21.16 Familiarize yourself with the code books & other books purchased

After purchasing your books, study them long before any exam. A lot of examinees wait until the day of the exam to open their books only to find out that an open book exam can be much more difficult than a closed book exam.

An open book exam requires you to look up information in a book to find a particular section or table to answer a question. If you are not familiar with how to look up or read a table, precious minutes tick away reducing your chances of selecting a correct answer. I agree that opening a code book, reading and understanding it is about as exciting as watching paint peal. However, with practice you can learn to use a code book as a valuable tool. Insofar as this aspect is concerned, our best advice is practice, practice, practice!

21.17 Exam study guides and tutorials

There are other additional study materials that you can use to help prepare you for the exam. If you search the technical bookstores or bookstores that specialize in construction related books you will find books that are written just for exam preparation. These study guides are great training tools for learning both the trade and the types of questions that can be asked on the exam. This is especially true for the study guides published in conjunction with the Code. These tutorials have been written with some key features that won't be found in other publications.

21.18 Exam preparation seminar and classes

You should look for a class that covers thoroughly the information that will appear on your specific exam. The content of any class would not be complete if references to books on the list of recommended books were not given as a part of the class time. Any construction math, electrical math or plumbing math should be explained in easily understood terms. Contact clsi.com for more information on available classes.

21.19 Computer based training exam preparation

Computer-based training (CBT) is fast becoming the chosen preparation format for the construction professional. Software can be purchased that when installed on your desktop or laptop you can study at your convenience. The format is question with multiple choice answers.

You can give yourself tests and you can study as much as you like. This type of exam preparation is cost effective because you can arrange your schedule to study without having to be away from the office or project site to attend class. This type of exam preparation is not for everyone, but if convenience is what you're looking for, then CBT is for you. Contact clsi.com for more information.

Chapter 22

22 Insuring projects with mold coverage

This chapter discusses the process and difficulties encountered by contractors in obtaining adequate insurance coverage for mold liability as well as some of the more common exclusionary endorsements being attached to contractors' liability policies and highlight the key variations in these endorsements that can affect coverage significantly and outlines the measures that contractors can take to protect themselves. We will as examine as well the changing scope of additional-insured coverage.

Until recently, only a very small percentage of contractors have carried contractor's pollution liability even though there has always been considerable exposure in the construction industry. Types of historical exposures have been excavators puncturing fuel tanks, drillers causing water pollution, building contractors causing asbestos or lead exposures, pollution caused by the use of chemicals or other pollutants.

Mold has changed the relaxed attitude of contractors towards pollution coverage. There have been a great number of General Contractors, Plumbers, HVAC, Drywall and other contractors who have had major mold claims. Most contractor general liability policies are now excluding mold coverage.

The only coverage available is usually with a contractor's pollution policy that does not exclude (or specifically includes) mold coverage. No one knows how large mold claims will ultimately get, but plaintiff attorneys are very organized and often successful in mold litigation.

Some common exclusionary endorsements being attached to contractors' liability policies can affect coverage significantly. An onslaught of construction defect litigation over the past two decades has pummeled the construction insurance industry. Contractors must rely primarily on their liability insurance programs for protection against construction defect claims.

Unfortunately, in some states, the impact of construction defect claims on coverage availability and affordability has reached crisis status. Subcontractors, in particular, have experienced a drying up of insurance markets because much of the risk from construction defects falls in their laps. California, Nevada, Arizona, Texas, Florida and Colorado have the most significant construction defect problems, but many other states are experiencing increased litigation in this area.

Insurers have undertaken a number of strategies for dealing with the growing cost of construction defect claims. General and umbrella liability insurers

alike are altogether avoiding certain classes of contractors, types of construction or problematic regions. For example, some insurers have stopped writing coverage for residential developers, general contractors performing residential construction, or any contractor directly or indirectly involved in the installation of synthetic stucco --- this is commonly known in construction and insurance circles as Exterior Insulation and Finish Systems, or EIFS.

Other insurers may decline to write contractors with more than a certain percentage of their work in problematic areas, such as residential construction or EIFS installation. Some insurers have completely withdrawn from construction insurance markets in problematic areas, primarily California. Besides implementing the underwriting restrictions described above, many insurers are using a combination of coverage-restricting endorsements.

Carriers may attach to contractors' and subcontractors' policies exclusions that target common types of construction defects claims, such as mold and EIFS-related losses. The precise combination will vary by class of contractor, type of construction and state. Many insurers also have begun using restrictive additional-insured endorsements, which may leave contractors in noncompliance with respect to their additional insureds and with less coverage than they expected to receive as additional insureds on subcontractors' policies.

22.1 How builders should manage and insure their risks and assets

If you think your general liability insurance policy is enough to cover you in the event of a homeowner’s claim you have fallen in with a number of design/build professionals who thought they were protected too.

Homeowners are flocking to lawyers looking to sue; lawyers are devoting departments just to go after construction defect claims; and consumer advocacy groups are sprouting up all over to serve as “experts” to put you out of business. Sound like a situation you want to be in? There is hope.

Though more and more components of building are being excluded from general liability insurance coverage today, the good news is there are a number of things you can do to manage your risk and protect your assets.

22.2 Building industry liability crisis

The home building industry is in a liability crisis. General liability coverage is getting harder to get, and many states are down to one or no carriers.

“Construction defect litigation is increasing; insurance companies are tired of paying the freight on it. Underwriting practices are becoming more stringent.

The reinsurance market is shrinking. The general liability carriers are struggling to survive. They're adding more exclusions for mold, EIFS, lead-based paint, soil movement and even now, coverage for subcontractors' work," explains Bob Bush, an attorney specializing in residential construction and construction liability with Bush & Motes in Arlington, Texas.

"The reason that insurance companies are leaving the industry is that they have difficulty determining what the legal liability is for builders and contractors," -*Bruce Harrell of Home Buyers Warranty Insurance (Atlanta, Ga.).*

"The insurance industry operates on legal liability," he states. Your general liability policy is designed to insure you for legal liability brought against you, but there's little to no defined limits of liability for builders, and insurance providers generally leave the market, Harrell explains. "Insurers need to have defined limits in order to be able to set premiums so they can make money at it," he says. The result is building professionals need to come up with a way to define their legal liability between their company and their clients. And, to further protect themselves, design/build professionals need to implement risk management controls to protect their assets.

There are steps you can take to protect yourself and have some control over what's happening to your business. The most common and a very important one is general liability insurance.

22.3 General liability insurance

"General liability insurance provides legal liability for premise operation claims which occur during the operation period or construction period. If someone comes on your jobsite and gets injured or hurt, this policy protects you, pays for that bodily injury claim and provides defense attorneys in case you get sued."

"The coverage also provides legal liability protection for claims arising after the home is sold which occur during the policy period. "If you built a home five years ago and you have a completed operations claim for a defect that results in property damage but occurred in this policy period, then the terms and conditions of that policy determine what coverage you have and don't have — even if the policy you had five years ago didn't have any exclusions to it."

"Coverage for homes sold in the past are subject to deductibles and exclusions of the current year. Every new and expanded exclusion takes away critical coverages on homes that you constructed in previous periods."

It's also important to know your state's statute of repose — the time a homeowner has to make a claim. "If a homeowner brings a claim to you within your state's statute of repose, then the exclusions on this policy define what

coverages you do and don't have," ---*Bruce Harrell of Home Buyers Warranty Insurance in Atlanta, Georgia*.

Therefore, Harrell warns that the coverage you have this year may be less next year. To help protect your assets and avoid exposure to risks, Harrell suggests using the following eight-point plan to help manage your risks.

22.4 Eight-point plan to manage your risks

-by *Bruce Harrell of Home Buyers Warranty Insurance(Atlanta, Ga.)*

1. Maintain good documentation. Keep a file on every house built, and keep it someplace safe for the duration of your state's statute of repose. Have a written statement of your best practices for purchasing quality products. Document your work in progress. Video or take photos to document footers and the foundation — the things you can't see once the house is built.

2. Site conditions and preparations. If you're buying a lot from a developer, make sure you get a copy of the soil testing report. If they didn't do one, then get one. You need documentation that the soil has been tested and was deemed able to hold that house on that lot.

3. Selection of subcontractors. Have a signed subcontractor agreement that includes a hold harmless indemnity agreement. "This means the subcontractor holds you harmless and indemnifies you for the work that they perform and bodily injuries related to their employees coming on your jobsite. Include the insurance requirements. If you have a hold harmless indemnity from your framer, it is only worth the amount of money the framer has in his pocket or the insurance policy they have supporting that indemnification."

Include a waiver subrogation. "If a claim goes to the subcontractor and they pay it, they can't subrogate back against you." You should also have an arbitration agreement to keep you out of court if you get a dispute. Obtain certificates of insurance before work has begun. "The best thing to do is to be named an additional insured on your subcontractor's policy. This way if something happens to that policy, the insurance company has to notify you that the subcontractor's policy has been cancelled, and you know the status of your subcontractor."

Make sure your subcontractors implement OSHA programs, especially if you're doing two- and three-story homes. "This is where most of the bodily injury claims come out of," Harrell warns. Make sure they're carrying at least a $500,000 in general liability insurance. Have a master service agreement in your contract that applies to your subcontractors and vendors.

4. Jobsite supervision and reviews. Make sure the site supervisor documents what they're doing. Harrell recommends the National Association of Homebuilders' check lists which cover the inspection process through project completion, and keep it in your project file.

5. Jobsite safety and security. Be sure all openings are blocked and temporary handrails on stairs are in place. Post warning signs that state "Private property unauthorized entries prohibited," and use caution tape around site perimeter.

"Trespassers do not have the same rights as invited guests. If a trespasser gets injured on your site, and you have signs, you're in pretty good shape. It's not foolproof, but it's worth it to spend the 20 cents per sign," he says.

This is important for homeowners to understand as well. According to Harrell, there are a lot of claims against builders for homeowners who get injured when they show up on the jobsite unexpectedly. Place a provision in the sales contract that the homeowner cannot go on the jobsite without you being there.

"If they choose to ignore that, you at least have a defense," he says. He also recommends this even if they own the lot or you're just in a management agreement and managing the site. "You're still responsible for that jobsite."

6. Comprehensive sales contract. Have your attorney draw up a comprehensive sales contract for you, and never sell a house on a contract that's not yours, Harrell advises. "If a real estate agent brings a contract, counter it with your sales contract so you make sure you've got your contract in there."

The contract should have a waiver, which means the homeowner says they waive their rights against the implied warranty law, in place of a written warranty that you give them. Also be sure to include an arbitration provision. Any changes to the original sales contract should be in writing. Be sure to document everything and every change order to prevent liability.

7. Define your legal liability. Because juries are so unpredictable, John Hubbard, a vice president with Home Buyers Warranty, recommends avoiding them at all costs. In order to do so, it is critical that you define your legal liability as much as you can so the courts won't.

"Builders must have a written warranty that defines their legal liability in writing. Include what you cover and what you don't," explains Hubbard.

One of the key elements your warranty needs to include is mandatory and binding arbitration protection under the Federal Arbitration Act. "If you have a third-party warranty company that uses interstate commerce, then you can go to federal arbitration and you can file a case in federal court, not just state court. Federal law trumps state law every time," Hubbard says.

"Be sure to include an exclusive remedy provision in states that allow it. This simply says that any and all claims that have to do with this house are referred to in the terms and conditions of the warranty which pushes it into an arbitral situation for a covered claim," he explains.

Have a clear definition of the homeowner's responsibilities. "You also want a clear and fair definition of the builder's responsibilities in writing. Tell them specifically what you're going to do and what is covered in a warranty. Have a procedure in place for the coordination of claims and complaints," he advises.

"If you do not have a mechanism for deflecting litigation or handling your claims, then you have to do it or pay someone else to do it. These elements will protect you and your assets from lawsuits," Hubbard states.

"If you have a warranty that says you'll cover these workmanship items for a year and you get a claim for a leaky window in year five, then you can look to that homeowner and tell them you're not liable because it is out of warranty. That's the same thing car manufacturers do," Harrell explains.

8. Implement a comprehensive warranty program. "Invest in good warranty people who have strong decision-making abilities," Harrell advises.

He also recommends providing your warranty person with comprehensive warranty training and use software created for handling customer complaints. "You don't want to get a complaint in your busy day and forget about the homeowner. Then, 30 or 60 days later, they're contacting you through a lawyer or serving you with papers," Harrell says.

He suggests having a standard request-for-service form for the homeowner to fill out at closing. "Use written work orders to request the work of the subcontractors. Document all repair declinations and why you declined it, and send a letter to the homeowner indicating why it is declined. Have a form the homeowner signs that indicates the repair was done to their satisfaction. That way if they come back to you you've got documentation," Harrell advises.

22.5 What builders must do when mold and fungus arise

"Coverage for mold and fungus is excluded in most general liability insurance because the industry can't figure out what your limit of liability is. The insurance industry has backed out of it, leaving you exposed. The biggest problem isn't the water damage. It's the bodily injury claims." ---*Bruce Harrell of Home Buyers Warranty Insurance(Atlanta, Georgia).*

In order to limit your exposure to mold and fungus claims, use a sales contract that contains an exclusive remedy to a warranty that has mandatory binding arbitration. “If it has mandatory binding arbitration for all disputes and you get sued for bodily injury, it will go to arbitration,” Harrell says.

Utilizing a written warranty that excludes mold and fungus is also important. You can also use subcontractor agreements that contain a hold harmless indemnity. This way your subcontractor will be liable for the work they did, explains Harrell.

It’s also vital to take all the necessary steps to prevent moisture exposure including following product design and implementation procedures.

“This is where your supervisor needs to be very careful about the installation of doors, roofing, windows — those places where moisture comes into the house. Make sure they’re following the letter of the manufacturer and document that they did so,” Harrell advises.

He also recommends conducting a comprehensive inspection of the areas that cause moisture intrusion and documenting accordingly. “Be sure to check flashing, windows, doors, roofing, siding, plumbing, and look for nail holes and other problems,” he explains.

Harrell suggests creating a guide for your clients that tells them they’re responsible for caulking the windows and other areas, to make sure the soil at the foundation isn’t washed away, etc. “It tells the homeowner what they have to do to prevent moisture claims, and if they don’t they’re liable,” he explains.

If mold presents itself, Harrell advises that you use smart cleanup practices and limit your employees to remediate no more than a 10-sq.-ft. area if they’re properly trained; beyond that hire an expert.

“This is risk management loss control,” he says. “If the homeowner says they have a water leak or smell something musty, move fast. If you have any health complaints, notify your insurance agent and get a remediation specialist there quickly to document what kind of mold is there. Remove water and moisture within 24 hours. Contain it, and don’t let people in that area,” Harrell advises.

“Don’t always think of the cost of a risk management control program. It needs to fit into your budget, but the cost of a claim will far outweigh the cost of a solid risk management loss control program that prevents claims before they ever start,” he adds. ---Jordanna Smida, Editor (www.designbuildbusiness.com).

22.6 Mold and pollution exclusion

In recent years, the construction and insurance industries have seen a dramatic increase in the number of claims alleging bodily injury and property damage caused by mold. Experts disagree on the prevalence of toxic molds and their long-term effect on people exposed to them, but it is without a doubt that molds can produce very serious damage to property.

Molds tend to form where there is a combination of moisture and poor ventilation; therefore any construction activity that has a propensity to lead to water infiltration or restricted ventilation presents a mold risk.

Unfortunately, this includes the work of a wide spectrum of contractors, such as roofers; plumbers; window, sheetrock or siding installers; HVAC contractors; and anyone performing grading, landscaping or foundation work on a property. Most insurers have unscrupulously attached mold exclusions to a broad cross-section of contractor's liability policies.

Some insurers attach them to all such policies, regardless of the risk assessment. The standard ISO "fungi or bacteria exclusion" endorsement is broad, removing coverage for all injury or damage that would not have occurred "but for" exposure to any fungi (e.g., mold) or bacteria, as well as for any costs incurred in cleaning up the fungi or bacteria.

Mold exclusions are in wide use on contractors' general liability policies, and most insurers are not open to negotiating their removal. For a while, contractors who carried pollution liability insurance could find protection for mold claims under those policies.

Today, most of them routinely exclude coverage for mold claims, although contractors can buy back coverage for an additional premium. The "buy back" may be limited in terms of covered damages, or it may have a sub-limit.

The sudden surge of toxic mold litigations present unique insurance coverage issues for contractors. A contractor's primary "litigation insurance" is the **Commercial General Liability (CGL)** insurance policy, which is usually issued on a standard form produced by the **Insurance Services Office (ISO)**.

Included in the form is a standard "pollution exclusion" that is frequently implicated in **mold claims** and relates to both bodily injury and property damage. The exclusion states that the insurance does not apply to the following:

- "Bodily Injury or Property Damage arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants"

- "Pollutants" is defined as any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and “waste” --- which includes materials to be recycled, reconditioned, or reclaimed.

Two major questions surround the pollution exclusion:

- Whether or not mold constitutes a “pollutant” as defined in the pollution exclusion.

- Whether or not the way in which exposure to the mold actually occurs is a “discharge, dispersal, release, or escape” under the exclusionary language.

22.7 Subcontractor exclusion endorsements

The CGL policy's "Damage to Your Work" exclusion, often referred to as the "workmanship" exclusion, eliminates coverage for damage to a contractor's completed work that arises out of the contractor's work. This prevents the CGL policy from acting as a warranty on the insured's work.

Although the definition of "your work" includes work performed by subcontractors, by exception the exclusion does not apply to damage to a subcontractor's work or to damage caused by a subcontractor's work. In other words, the contractor's CGL will respond to all of the following:

- Damage to the contractor's work that arises out of the work of a subcontractor.
- Damage to a subcontractor's work that arises from that subcontractor's work.
- Damage to a subcontractor's work arising out of the insured contractor's work.
- Damage to a subcontractor's work arising out of another contractor's or subcontractor's work.

Some states, including Florida and Minnesota, do not recognize any preservation of coverage under the subcontractor exception. For example, under Florida law, the moment a contractor accepts a subcontractor's work, that work is considered to be the work of the hiring contractor. As a result, insured contractors would have no insurance coverage, because insofar as a completed operation is concerned, there is no “subcontractor's work.”

In 2001, ISO introduced two optional endorsements that remove the coverage that the subcontractor exception leaves intact:

- An optional endorsement that eliminates all coverage for damage to "your work" that is, or is caused by, a subcontractors' work.
- An optional endorsement that eliminates this coverage only with respect to scheduled sites or operations.

So far, the subcontractor exclusion endorsements do not appear to be in widespread use, but contractors and their insurance representatives should be on the lookout for them. Contractors engaged in residential work are particularly likely to encounter these exclusions. For contractors who subcontract a significant portion of their work, the reduction in coverage is significant.

22.8 "Discharged", "dispersed," and other terminologies used by courts

Except in a few cases, courts have always evaded the issue of insurance coverage for mold under liability policies. The very few that did address this issue however were somewhat hesitant to apply the standard pollution exclusion since they are unsure whether or not mold can be considered as a "pollutant" that is "discharged" or "dispersed."

In an early Wisconsin case, the court made a conclusion that mold from water vapor trapped in the walls did not constitute a "release" of contaminants, but rather was formed over time by environmental conditions. ---*Leverence v. USF&G*, 462 N.W.2d 218 (Wis. App. 1990)

In a similar context, another court held that the pollution exclusion did not apply to a claim involving an inadequate HVAC system that caused excessive accumulation of carbon dioxide. The resultant poor air quality caused the plaintiffs' headaches, sinus problems, eye irritation, and extreme fatigue.

The court held that the pollution exclusion was ambiguous when applied to injuries resulting from the breathing of carbon dioxide, "in every day activities gone slightly, but not surprisingly, awry." --- *Donald v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997).

In yet another case, the plaintiffs sought damages for styrene fumes from a floor-resurfacing job that contaminated chicken in a processing plant. The court held that "discharge," "dispersal," "release," and "escape" were terms of art in environmental law and that indoor emissions did not constitute any of these terms as regulated by the pollution exclusion. --- *West America Ins. Co. v. Tufco Flooring East, Inc., 409 S.W.2d 692 (N.C. App. 1991).*

On the other hand, other cases have found that indoor emissions of various substances, such as carbon monoxide fumes from an **HVAC unit** --- *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App., 648 A.2d 1047 {1994), **fumes from concrete curing chemicals** --- *Madison Constr. Co. v. The Harleysville Mut. Ins.*

Co., 557 Pa. 595, 735 A.2d 100 (1999), and l**ead paint chips** --- *Peace v. Djukic*, 228 Wisc.2d 106, 596 N.W.2d 429 (1999); *Auto-Owners Ins. Co. v. Hansen*, 588 N.W.2d 777 (Minn. App. 1999), do indeed constitute a "dispersal" or "discharge" under the pollution exclusion. Some argue that mold is like lead in the way it flakes out or otherwise eventually "disperses" into the air from plenums, ductwork, and walls. This line of argument maintains that mold, like lead, should be subject to the pollution exclusion.

22.9 Is mold a “pollutant”?

The accompanying issue to the "discharge, dispersal, release, escape" controversy relates to whether or not the pollution exclusion's definition of "pollutant" applies to mold. It may well be considered that historically the pollution exclusion has been directed at chemical or hazardous substances produced by industry, and not by live organisms such as mold.

However, the symptoms and resulting injuries of mold inhalation may qualify mold as an "irritant" or "contaminant," and may therefore be considered as "pollutant," under the pollution exclusion.

Still, some courts have hesitated to classify airborne mold, fungi, or other organisms as "pollutants." In a Florida case, former bank employees sued the building owner, charging that the negligent design, maintenance, installation, and repair of the HVAC system led to airborne molds, fungi and yeasts that made them sick. The owner tendered its defense to its CGL carrier which denied coverage based on-among other things-the pollution exclusion.

The trial court found the policy to be ambiguous because it did not define "pollutant." In the absence of another definition, the term was interpreted according to its popular meaning: Broadly defined, the term can include common and naturally occurring substances such as dust. Narrowly defined, it includes only extremely toxic substances such as nuclear waste.

The court chose the narrow definition and ruled in favor of the insured. --- *Stillman v. Charter Oak Fire Ins. Co*., No. 1949-CV (S.D. Fla. June 18, 1993), rev. on other grounds, *Stillman v. Travelers*, 88 F.3d 911 (11th Cir. 1996).

Here’s a case that attracted considerable attention for the way it addressed the issue of microorganisms as pollutants: Plaintiff became seriously ill after drinking from a public water system contaminated with fecal coliform bacteria.

The court refused to apply the pollution exclusion, stating that it was intended to preclude coverage for only widespread industrial pollution of the environment and not for all contact with substances that can be classified as pollutants. The court also determined that the exclusion was only intended to deny

coverage for cleanup operations ordered under environmental laws. Since the source of the bacteria was unknown, it could have resulted from causes unrelated to what is traditionally considered "environmental pollution." --- *Keggi v. Northbrook Property & Casualty Insurance,* 13 P.3d 875 (Ariz. App. 2000).

Obviously, the court cases so far haven't definitively determined the proper application of the standard pollution exclusion. However, we know that the standard pollution exclusion in the ISO CGL policy generally does not apply to property damage or bodily injury occurring within the "products-completed operations hazard," or after the work has been completed.

Work is deemed complete when all the work called for in the contract is finished or has been put to its intended use by the owner.

Therefore, the standard pollution exclusion will likely not apply to mold infestations that occur overtime and after project completion.

22.10 New insurance language that excludes coverage for mold

Because of the standard pollution exclusion's limitations, many policies may contain provisions that broaden its scope to deny coverage for mold. One such exclusion is called the "Total Pollution Exclusion," a standard endorsement also promulgated by the ISO.

Yet even this exclusion shares essentially the same definition of "pollutant" and requires a "dispersal" or "discharge" in the same manner as the standard ISO pollution exclusion discussed above. As such, the same issues relating to the status of mold as a "pollutant" and whether indoor circulation of spores constitutes a "discharge" or "dispersal" apply to this exclusion.

While standard ISO forms are still in the works, some insurers have adopted exclusions that state that the insurance does not apply to bodily injury or property damage arising out of or contributed to by any fungus, mildew, mold, or resulting allergens. Neither does it cover any costs associated with abatement, mitigation, remediation, or containment of mold.

22.11 New insurance products to deal with mold

Still other insurers are contemplating providing coverage for mold under pollution legal liability (PLL) policies or contractors pollution liability (CPL) policies, expressly extending the definition of "pollutant" to include "fungi"-bacterial matter that produces the release of spores or the spreading of cells, including mold, mildew, as well as viruses.

However, it appears that such coverage may be provided only through a relatively small sub-limit. Alternatively, in order to obtain a higher limit, an additional premium may be charged on a case-by-case basis. Still other carriers may not offer such coverage or enhancements at all.

22.12 CGL policies and the liability crisis

The bottom line is that mold claims are serious business for insurance companies, and will do anything they can to avoid liability. Contractors are well advised to address this issue when their current CGL coverage is up for renewal.

Ongoing coverage for mold may not be easily obtainable, especially in light of the hardening of the insurance market which will make insurance more expensive for all. It's likely that claims in the near future will be eventually excluded from coverage by standard CGL policies.

Whether this happens because of court interpretations of the pollution exclusion, or because of additional mold exclusionary endorsements, it will become even more necessary for contractors to consider PLL or CPL policies.

Setting aside all issues relating to possible pollution and environmental effects, the root of a mold claim against a contractor is likely to remain the alleged construction defect which caused the water damage out of which the mold infestation arose. These are always hotly contested claims by insurers and they raise issues about whether the alleged defective workmanship constitutes an occurrence or property damage as defined in the CGL policy, and whether or not the so-called "business risk" exclusions apply.

Basically, these exclusions are designed to ensure that the policy does not provide coverage to a contractor for risks such as faulty workmanship which are within the contractor's own control. However, these exclusions are often not held to apply where the allegedly defective work damages other nondefective components of the work. As such, mold growing on drywall, or inside a wall, may in fact be covered as property damage to other work.

22.13 From “buyer beware” to “builder beware”

In his 28 years of legal work, Bob Bush (an attorney specializing in residential construction and construction liability with Bush & Motes in Arlington, Texas) noticed a transition from buyer beware to builder beware.

Bush says, “The Texas Supreme Court summed it up really well . . . They said to apply the rule of buyer beware to an inexperienced home buyer and in favor of a builder who is engaged daily in the business of building and selling homes is manifestly a denial of justice.

"More and more of the risk of these types of transactions is being shifted to the builder through the creation of implied warranties which only benefit the consumer."

Bush says there are two types of warranties all building professionals need to be aware of: expressed and implied. "Expressed warranty arises when a seller makes a statement of fact representing the quality or character of the product sold, which the statement is reasonably relied on by the buyer. Implied warranties are warranties the courts have created from thin air to fill the gap when there is no expressed warranty or when they feel the expressed warranty is not sufficient to provide the type of protection that the courts feel the homeowners need."

He advises all warranties need to be clear, concise written warranties that include clauses stating this is the warranty you're getting, and there are no other warranties contained.

"Many states are holding that if you give a specific detailed expressed warranty you can disclaim these implied warranties. These are huge liability triggers for builders because who is going to define whether or not you breached this implied warranty?" Bush explained.

He also recommends that you have an attorney work with you to write your warranties given the number of federal laws you have to comply with.

22.14 What builders must do to survive

Here are some tips offered by Bob Bush to improve a builder's survival:

1. Select the appropriate business entity for your operations, and be sure it's properly formed and maintained.

"If you're operating as a sole proprietor you're nuts! Get into a limited liability company or corporation. Talk to your accountant and lawyer. You need a liability shield. Do not put your personal assets on the line behind your product if you can avoid it. These types of businesses require annual reporting and maintenance, so make sure you do it. Separate your personal and business," he says.

2. Develop and use appropriate contract forms — make sure your contracts adequately describe your transaction and provide the protection you need.

3. Be sure all key subcontractors have and maintain an adequate liability insurance with your entity listed as an additional insured. Have clear written

agreements with your subcontractors that have indemnity clauses in your favor and binding arbitration provisions.

4. Obtain and review all available site information before construction begins including soil reports, aerial photos and easement locations.

5. Don't cut corners on your structural components.

6. Document your change orders.

7. "If you're in an active soils area, when the house is completed, do a finished floor elevation, and put those elevation points on the survey at closing because the homeowners will sign that at closing. It's important to substantiate that and have a benchmark to evaluate the performance of your foundation," Bush suggests.

8. Be careful about the content of your marketing materials.

9. To the fullest extent permitted by applicable law, disclaim implied warranties. "If those implied warranties are still out there and you have not disclaimed them, they will follow the house. File an appendix with the deed that puts the buyers on notice of several key factors," he says. A. We're disclaiming by the full extent of the law all implied warranties. B. Any claims go through binding arbitration. Even though buyer two or three doesn't sign the agreement, it runs with the land.

10. Give an expressed limited warranty that clearly describes what is covered and what is not.

11. Include binding arbitration.

12. Respond promptly and politely to warranty requests and keep a written record of that.

13. Respond immediately to any demand letters and put your subcontractors on notice.

14. Be proactive on settlement offers. "Many juries get to see your settlement offers," Bush warns.

15. Have and maintain good general liability insurance to offset the cost of defense.

16. "You can exclude specific performance in your contracts. If you put it in your contract, put a statement in that you'll complete the house within two years because that's an exclusion to the Federal Interstate Land Sales Act," he says.

17. When you do a walk-through, have the clients sign a walk-through acceptance form stating that they've inspected the house, had an opportunity to have it inspected, have stipulated that construction is adequate in compliance with the plans, specs and change orders, and it releases for a valuable consideration, all claims except those that arise under the expressed written warranty given. F

But whatever issues are involved, once a contractor is hit with one of these claims, the first thing to do is report it immediately to the insurance company, and then aggressively pursue coverage.

For as long as construction defect claims continue in great numbers, **insurers will look for ways to limit their exposure to such losses**. Unfortunately, some insurers are not completely forthcoming about changes in their policies that reduce contractors' coverage, and some appear to even deliberately try to mask them by using endorsement names and numbers that could lead risk and insurance professionals to believe they provide broader coverage than they actually do.

The restrictions are often not discovered until a claim is denied. Agents and brokers serving the construction market, particularly the residential construction market, must diligently examine CGL policy forms and endorsements for irregularities in the language that could affect coverage. --- *Jordanna Smida, Editor* (www.designbuildbusiness.com).

Chapter 23

23 The mediation alternative to lawsuits

23.1 Mediation definition and overview

Settling a case before trial often involves mediation. In its most basic form, mediation can be defined as a process in which a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is a nonadversarial process designed to help the disputing parties reach a mutually acceptable agreement.

In mediation, decision-making authority rests with the parties. The role of the mediator is merely to assist them in identifying issues, fostering joint problem solving, and exploring settlement options.

Since each party wants to mold any settlement to its own benefit, the actual process can combine elements of show-and-tell and poker. Whether mediation before trial is court-ordered or voluntary, lawyers have a duty to their clients to maximize the potential for settling fairly and equitably.

Of course, not all cases can be settled. Where it is clear there is absolutely no chance of settlement, you should ask the court to be excused from mediation to avoid wasted effort and any unnecessary expense.

One often hears of the term "mediation" in connection with resolution of disputes which have already become lawsuits, and, occasionally, before those lawsuits are filed. Mediation is a process by which a neutral third party called a Mediator hears a dispute between two or more parties and attempts to help the parties settle their dispute without judging the merits of the case.

The term "mediation" is often confused and interchanged with the term "arbitration." Like mediation, arbitration is another form of dispute resolution by a third party (as opposed to a trial before a judge or jury).

In mediation, there is no judgment on the merits of the case, while in arbitration, the Arbitrator listens to the evidence presented by each party and then makes a judgment as to who is responsible for the claimants' damages, and how much the responsible person must pay to the claimant, if any payment is due.

However, even when a case does not resolve in mediation, the experience may prove invaluable because the information that is gleaned during negotiations may compel the parties to take a new approach to the case. Insofar as the attorney is concerned, mediation affords him the unique opportunity to evaluate an opponent's style and the issues an opponent will be emphasizing at trial. It will

also allow the attorney to assess how well an opponent responds to the weaknesses in a case. This is often the same kind of information lawyers seek through depositions and carefully planned discovery requests.

23.2 Who can mediate a case?

Mediators range in training from practicing attorneys, retired judges or other professionals to highly trained mediators who work full or part time in the specialized field of mediation. The right mediator for your case is one who demonstrates overriding neutrality in evaluating and resolving your case.

The effective mediator will help the parties recognize the strengths and weaknesses of both sides' case, so that at the end of mediation both parties are reasonably satisfied with the outcome. The effective mediator will also help you consider the risks and costs of resolving a dispute before a judge or jury without meeting the expectations of either party.

23.3 Mediate or Litigate?

Ninety-five percent of cases filed in the California court system settle before trial. Some settle early, others settle on the eve of trial or as close as after a jury is picked. The difference between the former and the latter is the amount of money and time a party will spend in getting from one point to the other.

Depending on the type of case, the cost could range from hundreds to several thousands of dollars. Often, the costs are not recovered at the time of settlement. Thus both parties bear their own burden of costs.

Mediating a case before a lawsuit is filed enables the parties to present their case to a mutually selected neutral person (or in some cases two persons as co-mediators) before any money is spent on litigation. Many times the simple process of telling one's story to a neutral willing to listen will take the parties a long way toward settlement.

The cost of mediating a case (which can be as little as a few hundred dollars or as much as several thousand dollars per day) is minimal compared to the costs incurred through the life of a lawsuit.

23.4 Will the court make me mediate?

There are some cases wherein contracts between the parties require that a case be mediated and/or arbitrated. This is often the case in medical malpractice cases as well as in construction defect cases.

The excessive backlog in court calendars (clogging of court dockets) makes mediation an attractive alternative in other types of cases, resulting in the resolution of disputes in a timely manner, and avoiding the painstaking experience of costly and lengthy litigation lasting up to five years.

23.5 How do I start the mediation process?

If you have a dispute with another person or business, which you want resolved, you can first propose to the other side to mediate the case. If you are uncomfortable with that option, then you can make the first call to the mediator and ask the mediator to approach the other side with the invitation to mediate.

A well-trained mediator can effectively maintain his or her neutrality during this process. If you are not familiar with any mediators, you can call the local court and ask for potential mediators, or you can call your local bar association which often has a panel of mediators. Other possible sources are the Internet, e.g., *www.lawyers.com*, and private mediation companies.

Select a mediator who has some familiarity with the area of law of your dispute (i.e., homeowners associations, landlord/tenant, business practices, construction disputes, family law, etc.) and someone in your geographic area. Ask the mediator what his or her fees are, and how much time he or she will allocate to your dispute. A good mediator will commit as much time as is necessary to help you resolve your dispute.

23.6 What if mediation does not settle my case?

In most states, what takes place in mediation is confidential. For example, in California, the mediator cannot be forced to testify at trial as to what was said in a mediation hearing. Any offers made during the mediation process, and any concessions made, are confidential if the case doesn't settle.

Of course, certain limitations do exist in connection with protecting others from danger or imminent harm, or in connection with illegal activities. But, parties to most typical disputes over money or negligent conduct are generally protected by laws of confidentiality.

23.7 What is the secret to a successful mediation?

The mediation process is as successful as the willingness of the parties to participate in good faith to reach a settlement. A good mediator will work with the parties until he or she determines that a settlement cannot be reached at the time. Parties who consider what they have learned during the mediation process often reach a settlement after the hearing in order to avoid spending precious time and additional funds which may never be recovered at trial. --- *Adrienne L Krikorian*.

Adrienne L. Krikorian is an attorney and private mediator in Los Angeles, California. Ms. Krikorian is a trained mediator, and serves as a mediator for the Los Angeles Superior and Municipal Courts. She represents homeowners associations and small businesses in her private law practice. For more information, please call (818)347-6107.

23.8 Eight (8) things your lawyer should do to succeed at mediation

This section should be read and studied by both lawyer and client. The lawyer should read this material for obvious reasons. The client should also study this section so that he will understand what his lawyer is doing and why.

23.8.1 Choose a mediator carefully

Opinions differ on the importance of choosing a mediator. Some attorneys believe that the choice has little or no bearing on the outcome, so they give little thought to this part of the process. However, we believe that choosing an appropriate mediator is as important and deserves as much of a lawyer's attention as selecting jurors for trial.

Unlike at trial, the parties at mediation settle the case among themselves rather than submitting to the decision of a judge or jury. However, whether in trial or mediation, lawyers are obligated to provide clients with the same level of care, be it in selecting jurors or in selecting a mediator. Lawyers who have a working knowledge of the mediators in the local circuit and who carefully consider mediators' personality styles, backgrounds, and suitability for a given case are paving the way for a successful mediation.

Mediation is essentially a negotiation between the parties and is governed by the same principles that apply to any negotiation. The mediation process varies depending on the personalities, goals, and strategies of the participants—which includes the mediator as well.

To a great extent the personality styles of the participants determine the outcome. Since the mediator's job is to facilitate a resolution that the parties and their counsel working alone cannot accomplish, the mediator's style can be a great aid -- or a great impediment -- to the negotiation.

Understanding personality characteristics and negotiating styles will give you an advantage at mediation. Negotiating styles may be identified and grouped (classified) according to four basic types of personality: (1) directors, (2) influencers, (3) steady types, and (4) compliant types.

Directors, as their name suggests, want immediate results. They accept challenges, and they make things happen. Directors seek power and authority, prestige and challenge. They need others to weigh the pros and cons (advantages or disadvantages) of an action and calculate risks.

If you know that certain parties or their counsel are directors, selecting a directing mediator is likely to bring the mediation to a quick, but perhaps premature, conclusion. Any settlement would tend to be accomplished quickly, but your client could get shortchanged in the process.

Influencers are articulate "people person" types who make favorable impressions on others. They want to be popular, and social recognition is important to them, as is freedom of expression. Influencers need others to seek out the facts and focus on the task at hand.

An influencing-type mediator may be able to keep a mediation socially lubricated, so that directing parties do not reach an impasse or walk out too soon. The chances for a settlement between two directing parties would tend to be increased with a well-respected, influencing-type mediator.

Steady types are patient people who focus on getting the job done. They want security and prefer the status quo unless valid reasons indicate change is necessary. Steady types need others who can react quickly to unexpected change and extend themselves in new ways to meet the challenges of an accepted task.

A steady-type mediator could be particularly effective when the parties belong to the influencer type, providing a patient focus on the facts and the job at hand. Any settlement would be more likely to account for all the facts and needs of the parties. Details that otherwise might be overlooked by influencing or directing types will more likely be covered.

Compliant types tend to concentrate on key details. They focus on key directives and standards. They want a sheltered environment with standard operating procedures and security. Compliant types need others to delegate important tasks and expand their own authority.

A compliant type may be most useful in mediation between director and influencer parties, accepting delegation of various tasks and providing no challenge to the parties' desire for control and expression. In this situation, a settlement would likely take into consideration the concerns and fully articulated positions of the parties.

The compliant-type mediator; under the circumstances, would act more as a messenger between the parties. The implications of this kind of analysis for the mediation process are readily apparent. The point is that the process and outcome of any mediation will depend, in large part, on who the participants are. So, it is important to select a mediator appropriate to the psychodynamics of a particular case, given the parties, issues, and counsel involved.

23.8.2 Prepare for mediation as if preparing for trial

Prepare and plan the mediation as if you were preparing for trial. Show confidence, commitment, and professionalism at every stage of the process. Remember; the opposing party is evaluating all aspects of the mediation.
Be prepared and prepare your client, because the possibility always exists that the mediation will reach an impasse. Be sure the client is prepared to discontinue the process if it appears futile.

Know the client's bottom line. Confirm it beforehand, and be clear about this. If you are ambivalent on this point, your ambivalence will be construed as less than a full commitment to the client's position. Be prepared to end the mediation if it be-comes clear that the client's bottom line will not be reached.

An exception to this rule occurs when new information emerges that materially affects the client's position. You then need to be prepared to work with the client to agree on a new bottom line so that the mediation can continue.

Clients who are well informed about the process are more relaxed and make a better impression. Ensure that the client knows the purpose of mediation, the gamesmanship involved, and the likely goals and strategies of the other party.

Clients need to know that they are an integral part of an effective presentation and that they should display an appropriate attitude during the mediation despite any negative feelings they have toward the other party. Clients should come to your office appropriately attired and ready to finalize strategies at least two to three hours before the mediation begins.

Communicate clearly to the client what the odds or chances of a successful outcome are if the case finally goes to trial. The client is relying on your guidance to make informed decisions. Analyze all offers from the other side (opposing party) with realistic expectations.

Make counteroffers that consider the client's bottom line, the appropriateness of the last offer discussed, as well as the history of the mediation's give and take. However, do not consider how long the mediation has already taken. Mediation can reach a good result at any time, be it 1 hour or 23 hours into the process. Always try to approach each point in the negotiation with fresh energy to avoid mental traps that could adversely affect the client.

23.8.3 Negotiate at a time and place it is advantageous

Avoid negotiations that take place too early or too late in the day or in too close proximity to another unrelated, important event, such as an important hearing on the same day. You need to be able to adjust your schedule to stay

longer than planned for your client if the mediation is flowing and purposeful. Ensure that all the key participants are as focused and alert as possible. At minimum, the mediation should take place on neutral, comfortable ground that is convenient to counsel, client, and mediator.

You and your client should arrive early to familiarize yourselves with the environment and the surrounding facilities. Avoid bringing along the entire case file, but do have all supporting documents, such as accident reports, medical records, applicable case law, and economic loss analysis. If necessary, also bring appropriate support staff to assist with document retrieval.

When possible, use this time to set up visual aids that will keep the mediation visually lively. Make sure all electronic equipment is operational and correctly positioned. In personal injury cases, use blowup exhibits of the client's injuries and other key pieces of evidence. Mount on poster board and visually enhance important documents and critical medical records, just as you would for trial. A little extra expense and attention to these details could make a tremendous difference in the way your case is evaluated by your opponent.

23.8.4 Share information strategically

By the time a case reaches mediation, quite a bit of information has already been disclosed by each side, particularly if the case has been litigated for a while. Before putting the matter into suit, you may have presented the other party with a demand package that disclosed your theory of liability and outlined your client's damages. At the mediation, you should build the initial presentation on this previously disclosed in-formation, emphasizing the elements that support a favorable settlement.

It is possible that the other party and the other party's counsel have taken a relatively routine (regular) approach to the case until the mediation. Use mediation to hammer home your case, exposing the reasons why the plaintiff will win big at trial.

Address your case's potential weaknesses, but also explain why the strengths of your position outweigh any weaknesses and why you will obtain a favorable verdict at trial. Let the other side see how the case will play to a jury.

In some cases, it may be advantageous to show a short video highlighting the strengths of the case. The video should include excerpts of depositions of key experts and before-and-after witnesses, scenes of the client before` and after the injury, newspaper articles noting the client's achievements, and accolades awarded to the client before the injury. These can take any form desired, as there are no evidentiary rules at mediation.

Remember, no matter how well things are going there are no guarantees that the case will be settled. Even though each party should arrive at mediation prepared to resolve the case in good faith, part of the other side's motivation may be to prepare for trial ---not to actually resolve the case. Do not disclose any more elements of your position than you have to in order to achieve a satisfactory settlement that is fair to all the parties.

On a related note, reserve some information to use later in the mediation. A successful mediation may take hours to resolve. If you allow your opponent to understand your position too early, he or she will make an offer based on that understanding. Withholding some information allows you to reveal your position in stages, and a more satisfactory settlement for all parties is likely to result, based on a better understanding of your client's position.

23.8.5 Prepare the mediator

Several weeks before the mediation, prepare a written overview of the case -- for the mediator's eyes only -- that gives a quick, accurate reference to all pertinent information, and hand-deliver it to the mediator immediately before the mediation. Stamp it confidential, because this is your work product, which reflects your mental impressions of the case.

For example, in a mold-related personal injury case, include the client's name, the date of the discovery of the mold-related injury, current age and age at the time of injury was discovered or reported, and employment information and earnings on the date of injury. Also provide the facts of the case, counsel's theory of liability and the other side's defenses, as well as why those defenses fail or don't materially affect a favorable outcome for your client. In addition, give a detailed description of the client's current damages, including all injuries, the impact on the client's life, the assessments of all treating physicians and other experts, related medical bills, and out of-pocket and earnings losses.

23.8.6 Include a detailed description of the client’s future prospects

Provide specific information about the client's future economic losses, including medical needs as well as earnings capacity losses prepared by an economist or vocational rehabilitation consultant. It is also advisable to include or provide a summary of the insurance limits or resources available from the other party and any coverage issues that may apply.

A good mediator should be impartial (unbiased), which implies a commitment to aid all parties, not any individual party, in moving toward an agreement. This commitment is mandatory in Florida, which has adopted mediator qualification requirements and to our knowledge is the only state to implement a disciplinary process for mediators.

Nothing in this obligation, however; precludes the mediator from making a professional determination that the case should be resolved on one party's terms. In fact, any agreement based on the mediator's impartial view of the merits of each side's case will be entirely appropriate from the perspective of the mediator's statutory or ethical obligations, as long as the mediator remains impartial.

If you are comfortable with and respect the mediator; let him or her be your sounding board. When meeting privately with the mediator; be candid when discussing any offers the other side may have made. If uncertain, ask the mediator for strategic input as to what the next move in the process should be.

Mediation statutes generally provide that, with certain very limited exceptions, nothing that is said to a mediator during private caucus may be disclosed to the other party or anyone else without the disclosing party's consent, and the confidentiality of all mediation proceedings, including any disclosure of records or materials, must be maintained. This confidentiality requirement encourages open and honest negotiation by the parties. A good mediator will recognize the strengths and the weaknesses of the plaintiff's case -- and the defendants -- and steer both disputing parties toward a fair and equitable result.

23.8.7 Use the mediator as a messenger

Certain information cannot be conveyed to the other side without evoking adverse-- or even hostile --reactions. For example, a non-negotiable aspect of your position can rarely be brought directly to the other party without causing that party to raise an equally non-negotiable position.

This can be unfortunate, because these delicate facts may be the key to a successful negotiation. By expressing this information to the mediator in private and encouraging the mediator to communicate it to the other side, potentially explosive reactions may then be defused.

The mediator's job is to move the parties off their initial positions toward settlement; provide the documents, facts, or theories that go to the heart of the other party's weaknesses to gain additional leverage for your client. Doing so helps bring the other side closer to a fair settlement

Although being candid with a good mediator is important, let the mediator discover all the case facts over time. A mediator who understands the plaintiff's bottom line too soon will spend less time exploring available options and may miss an opportunity to effect a more equitable settlement.

A mediator who arrives at a gradual understanding of the plaintiff's position will be more likely to engage in new methods of problem solving to settle an old and frustrating problem. Remember; mediation is a journey for all the

participants, and shortcuts may shortchange the process, possibly to the client's detriment.

For example, there is often a chance -- however slight --that you could be underestimating the value of your case. In fact, the opponent may be willing to pay more than your client's bottom line. By allowing the mediation process to run its course, both sides may facilitate a creative solution in which the parties reach an unexpected -- but mutually agreeable --settlement.

23.8.8 Seal the deal in writing

A clearly written agreement is the goal of mediation. Ensure that this document carefully describes the intent and agreement between the parties and is signed by all parties and their counsel. The time frame for all payments should be clear, as should any unacceptable release terms. This way, elements of the settlement not explicitly addressed in the written agreement will be unenforceable.

The agreement should be written by one person, with input from each of the parties. This reduces the opportunity for error that can result when too many hands create a document The agreement can be comprehensive or merely memorialize the basic elements of the settlement, depending on how the parties wish to construct the binding aspects of the agreement At a minimum, the agreement should ensure that all the key elements of the settlement, including the respective obligations of the parties, are sufficiently detailed so as not to be subject to interpretation later. Ambiguity can kill the deal.

Given the evolving trend toward mediation as a viable and sometimes mandatory exercise in dispute resolution, the future promises to test the traditional role of trial lawyers in ways that will challenge their imaginations and creativity. Trial lawyers need to be alert to maximizing the potential benefits that mediation may bring to their cases. Clients who are well informed about the mediation process are more relaxed and make a better impression.

Chapter 24

24 The dark side of arbitration

24.1 The abuse of binding arbitration in new-home contracts

This report is specifically targeted for the State of Texas and was created to document and address the concerns of Texas homeowners concerning the use of arbitration as the sole alternative dispute resolution method to resolve construction defects. Although this report is specific to Texas, most of the information is applicable to the United States.

The information gathered in this report is based upon two Interim Hearings in the Texas House of Representatives during the summer of 2002 and the experiences of homeowners' real life experiences in dealing with the arbitration issue throughout the state. This report does not attempt to discuss arbitration in business-to-business transactions.

This report deals strictly with new home contracts which require a pre-dispute arbitration clause as a prerequisite to purchasing a new home. This report is written from a consumer's perspective based upon real life experiences and not from a legal standpoint. Any similarity to a legal opinion is by chance only and is not intentional or intended.

24.2 The nature of binding arbitration

This is an entirely different view of arbitration. Contrary to popular belief, arbitration is a private, profit motivated justice system forced upon new homebuyers, and is abusive, extremely costly and grossly unfair, and provides no tangible benefit to the homebuyer.

Mandatory binding arbitration has been considered successful in business-to-business contracts as a low-cost alternative to the civil court system. Unfortunately the same cannot be said about arbitration in consumer-to-business transactions, especially in new home contracts. During the summer of 2002, two interim studies by the Texas House of Representatives heard testimony from homeowners and consumer groups concerning the use of mandatory binding arbitration as a prerequisite to purchasing a new home.

The facts, based on this testimony, were very clear. Contrary to popular belief, arbitration is a private, profit-motivated justice system forced upon new homebuyers, and is abusive, extremely costly, grossly unfair, and provides no tangible benefit to the homebuyer.

A clause in new home contracts, which binds the buyer to resolve all disputes through arbitration, is inserted in almost every new home contract in Texas. This private justice system has an unfounded reputation for being faster, cheaper, and for being just as fair as our time-honored court system. Homebuyers, focused on their new purchase, and not expecting to need the benefits of legal assistance to combat an uncooperative builder, unknowingly accept this clause without understanding what legal rights and protections they have lost.

Of all the obstacles a consumer must face when dealing with a new home construction defect, the use of arbitration is by far the worst. Not only does it mislead the consumer at the signing of the contract into thinking arbitration is faster, cheaper, and better, it deprives them of their American rights to a trial by jury guaranteed by the 7th Amendment to the Constitution. Only when consumers are faced with an expensive defect and an uncooperative, irresponsible builder, do they fully understand protection granted by our Constitution has been lost, simply by signing a contract with a builder.

The Texas homebuilding industry is one of the few industries allowed to rewrite the US Constitution on behalf of the consumer, but make no mistake about this: Arbitration is a savior, providing additional protection and limited liability for the building industry. It provides negligible, if any, protection for the consumers and little punishment for builders who refuse to stand behind their products and take responsibility for their actions.

Mandatory binding arbitration should be allowed to stand on its own and compete with our current civil court system which is relatively low-cost and fair to both parties. Arbitration should always be an option for both parties to agree upon if all the facts about the arbitration process, including fees and process have been disclosed to both parties and their legal representatives. To be successful, arbitration should never be forced upon a new homebuyer.

To encourage this competition, the use of mandatory binding arbitration clauses in new home contracts should be immediately prohibited.

24.3 Lack of consumer protection for new homebuyers

The use of arbitration--or any alternative dispute resolution system--would not be an issue if there were preventive measures or alternative methods to resolve construction defects without resorting to homebuyers' use of an attorney. Unfortunately, in the State of Texas, as with many states, there is little for consumers to depend upon for this type of assistance. Many times their only recourse is to seek legal advice.

When consumers purchase a new home, they incorrectly assume their 30-year investment comes with adequate protection from defects. This error in judgment

is never realized until a construction defect occurs and the builder decides to stand behind attorneys instead of standing behind the product. The homeowner, over a number of months or years, learns that no state, county, or city organization is available to provide assistance to resolve the dispute.

Limited Warranties: Because of the severe limitations of new home warranties, homeowners have little, if any, recourse in resolving a new home defect. In "New Home Warranties. Deception or Protection", the limitations of the various warranties used throughout the United States have been addressed.

Board of Licensing and Regulation: In many states, especially Texas, the homebuilding industry is unregulated, unlicensed, and unmonitored. Unlike plumbers and electricians, which have a governing board, builders have no organization that can issue citations or assist in resolving a construction defect.

Attorney General's Office: After a long interrogation process with the Attorney General's Consumer Complaint Division, it was learned the investigator assigned to a complaint against a builder doesn't even read complaints filed against a builder. Instead, they send a copy, which the homeowner must provide, to the builder and await their response. The response will be forwarded to the homeowner with a recommendation to "hire an attorney". The Attorney General's office is little more than a post office for the paper complaints. Our Texas Attorney General's Office has shown no interest in pursuing complaints against builders.

The Better Business Bureau: The Better Business Bureau complaint process is not much better. Complaints filed against a builder are considered "resolved" if the builder simply responds to the complaint. Even when builders refuse to cooperate with the rules of the BBB, they can simply opt out of the membership. In one case, a builder, after being forced into arbitration and losing, sued the homeowner and the BBB for demanding arbitration. The builder has still not paid the homeowner, some three years later.

Homebuilder Associations: Various homebuilder associations at one time provided some amount of policing of their membership. Now the associations are more of a lobbying and industry organization for builders and contractors. Complaints about builders who have violated the code of ethics are ignored and, in the end, HBAs provide no assistance to resolve the defect for the homeowner.

Trial Lawyers: It is unfortunate, but with the lack of regulation and monitoring of the home building industry, plus the lack of adequate recourse, homeowners find their only option is to seek the assistance of an

attorney. At this point the homeowner learns of the arbitration clause. Finding an attorney willing to take on arbitration is becoming difficult, especially with the limitations of awards put in place by tort reform. From experience, the majority of homeowners with construction defects would rather have the defects addressed without the use of an attorney. The homeowners are looking for a low-cost, fast alternative, but binding arbitration does not provide this alternative.

24.4 History of arbitration in home contracts

"Seen historically therefore, the Seventh Amendment, the right to trial by jury in civil cases involving more than $20, is a bulwark of political liberty rather than a procedural amendment. Its purpose was to provide the citizen protection against the government. The Founding Fathers included many lawyers who knew this would make the judicial system slower, more inefficient and more cumbersome. They saw this as a small price to pay for protecting freedom from corrupt or tyrannical judges or from powerful or rich persons with unfair influence." ***---The*** *Seventh Amendment A 100 Years of Government Encroachment*. Newt Gingrich.

When our country was created, one of the first amendments to the Constitution was the right to a civil trial. This right seems to have become lost in the discussion of the mandatory use of arbitration. As an example, if a builder, as a prerequisite to purchasing a home, forces the buyer to give up their 2nd Amendment rights to bear arms, it is highly unlikely this clause would ever be upheld in any United States court. It can be imagined that Charlton Heston himself, spokesman for the NRA, would likely argue the case to our elected officials. Unfortunately the loss of our 7th Amendment Constitutional rights in order to own the "American Dream" does not have this same protection or attention, and anyone rising to the defense of the American public would probably be labeled "a greedy trial lawyer".

In 1989, the Texas Legislature passed the Residential Construction Liability Act (RCLA), which, in its final form, relieves the builders of the strong Texas Deceptive Trade Practices Act (DTPA) and places caps on an award when a jury finds in favor of the homeowner. The DTPA allowed for treble damages if the homeowner prevailed--and provided stiff punishment for an irresponsible builder. RCLA requires a notice from the homeowner and allows the builder up to three months to resolve the issue before a homeowner can continue to file a suit. In 1999, a requirement for mediation was added as yet another step to be taken before a suit could be brought against a builder.

The use of arbitration in new home contracts became popular in the mid 90's and is widely used throughout the industry. Arbitration clauses have also been put into credit card agreements and employment contracts. Some of these clauses were added after the consumer charged for years or after the employee was

employed for years. Although credit card and employment arbitrations are very important issues and should be addressed, they are not included in this report.

Only during the last few years has arbitration in consumer-to-business contracts been exposed as being anti-consumer. In March, 2001, the American Arbitration Association, in what seemed to be an attempt to squelch the complaints and become more consumer- friendly, reduced their high fee schedule and "allowed" the use of small claims court, as if they were the keepers of the Constitution. In Texas, the industry will be filing a bill to create a Builders' Commission which, among other things, establishes an arbitration process to resolve construction defects.

In *Emerald Texas, Inc. vs. Peel, the Texas Supreme Court* weighed in on the use of mandatory arbitration clauses in new home contracts. Unfortunately, the anti-consumer Supreme Court ruled in favor of the homebuilders and allowed the arbitration clause to stand, regardless of whether details of the high fees or the process were disclosed or not.

In business-to-business arbitration, fees and procedures are of no business to the general public since they are considered a private matter, but arbitration is now a complete substitute for the current court system, and consumers should be very concerned about who decided it was an acceptable substitute. Many states are now passing legislation to address the problems of the high cost and unfair aspects of the arbitration process. As with the building industry, the private justice system of arbitration is not regulated or monitored in Texas. This, coupled with the lack of regulation of the building industry, is a disaster for the consumer with a home construction defect.

24.5 Interim studies by the Texas House of Representatives

"Home buyers object to clause in sales contracts. Texas House panel hears complaints about binding arbitration requirement." **---***Getting It Built Copping An Attitude: War of Words*. **Builder Online.**

Two interim studies concerning arbitration issued by Speaker of the House Pete Laney (2002):

- **Business and Industry Committee:** Review trends in the use of binding arbitration requirements in consumer agreements, with special attention to transactions in which the consumer has little or no bargaining power.

- **Civil Justice Committee:** Examine changes over the last decade to the civil justice system that affects the right of litigants (citizens

or businesses) to receive appropriate review by a judicial body, including arbitration, mediation, and other types of alternative dispute resolutions.

The Committee has recently released a report which can be downloaded at htttp://www.house.state.tx.us/committees/reports/77interim /civil_practices.pdf

During both hearings many homeowners across the state testified about the abuse of arbitration in new home contracts. Although these hearings were designed to address arbitration in general, the homebuilding industry overwhelmingly took the brunt of the comments. As of this report the study from the Business and Industry Committee was not published, but should be available in the near future on the House website at http://www.house.gov.

24.6 Homebuilders with arbitration clauses

"Brian Binash, executive vice president of Emerald Homes in The Woodlands, Texas, tells any client who refuses to sign his company's arbitration clause to go elsewhere. He says they will continue the practice, even if (and when) the roaring economy slows down." - *Getting It Built Copping An Attitude: War of Words*. **Builder Online.**

The overwhelming majority of new homebuilders in Texas have a mandatory binding arbitration clause within their contract as well as in the warranty provided. There is no option or negotiation for the potential homebuyer. In order to purchase the American Dream, you must give up your American Rights to a civil trial guaranteed by the United States Constitution. Homebuyers cannot use this as a bargaining tool between builders since all builders use this clause, therefore there is no choice. And few if any will allow this clause to be removed.

Below is a chart of the most popular homebuilders in Texas showing their use of arbitration and a list of warranty companies with arbitration clauses. As of this writing there aren't any Texas builder that does not use an arbitration clause or of any warranty company.

Texas Homebuilders

Beazer Homes	Lennar Homes
Brighton Homes	Life Form Homes
Brookshire Homes	Milburn Homes
Ryland Homes	Morrison Homes
Casa Builders	Newmark Homes
Centex Homes	Prestige Homes
Choice Homes	Pulte Homes
Clark Wilson Homes	Ray Tonjes Builder

Continental Homes
David Weekley Homes
DR Horton
Drees Custom Homes
Emerald Homes
Gordon Hartman Homes
KB Homes
Kimball Hills Homes
Legacy Homes
Royce Homes
Legacy Homes
Toll Brothers
Tremont Homes
US Homes
Village Builders
Wilshire Homes
Woodhaven Homes

Warranty Companies:
Residential Warranty Corporation (RWC)
HomeBuyers Warranty (HWB)
Home of Texas
Pulte Protection Plan
Ryland Warranty
Aces Builders Warranty

As another example of the lack of choice or bargaining power, below is a chart of the tract homebuilders in The Woodlands, a master planned community north of Houston, which has up to 30,000 homes. It is clear from this chart, the use of arbitration is mandatory and cannot be negotiated. In order to purchase a new home in The Woodlands a homebuyer must give up their rights to the 7th Amendment to the Constitution.

Builder	Arbitration Clause	Opt Out Option	Warranty	Arbitration Clause
David Weekley	Yes	No	Home of Texas	Yes
Village Builders	Yes	No	HBW*	Yes
Emerald Homes	Yes	No	RWC**	Yes
Coventry Homes	Yes	No	Home of Texas	Yes
Darling Homes	Yes	No	Home of Texas	Yes
Ashton Woods	Yes	No	RWC	Yes
Lennar Homes	Yes	No	HBW	Yes
Life Forms	Yes	No	No Answer	No Answer
Morrison	Yes	No	Morrison	Yes
Newmark	Yes	No	No Answer	No Answer
Pioneer	Yes	No	Home of Texas	Yes
Plantation	Yes	No	No Answer	No Answer
Ryland	Yes	No	Ryland	Yes

*Home Buyers Warranty (2-10 Warranty)
**Residential Warranty Corporation

24.7 Lack of an "Alternative" Dispute Resolution (ADR) system

"The availability of legitimate alternative methods of civil dispute resolution is an important and valuable right in our free society. Citizens should be free to contract within the current parameters of the law as it relates to arbitration, and the Legislature should be cautious when considering measures that will encroach on this freedom to contract." **---***Arbitration as a fair and effective alternative to litigation*, **Texans for Lawsuit Reform (TLR).**

There is no "choice" when purchasing a new home with or without an arbitration clause. The only choice a consumer has is to not buy a new home. Homebuilders do not allow homebuyers the option of selecting the time-honored court system or the uncertainty of an arbitration clause. This is a take-it-or-leave-it situation dictated not only by many of the builders, but by the industry itself.

Homebuyers at the time of purchase are not considering the ramifications of legal action against their builder. In fact most, if not all, incorrectly assume the home is being built to the highest standards and has many safeguards to prevent defective homes from being built in the first place. They also incorrectly believe there is ample protection in the warranties and within the state to address complaints. Their minds are on closing, popping a bottle of champagne, and moving into their new home, not on whether they need to choose an alternative dispute resolution (ADR) system prior to finding any defects.

Builders do not provide for an *alternative* dispute resolution (ADR) system. They provide *only one* resolution system of their preference, binding arbitration. This is not a choice. This is not an alternative. It is the *only* resolution system available and allowable by the builder, regardless of the intent or meaning of the United States Constitution. Regardless of the wiggle words used by the proponents of arbitration, the common homebuyer is not aware of the pitfalls of arbitration when purchasing the new home. Homebuyers have no choice regarding acceptance of this system.

The proponents also fail to mention that the only way this *alternative* dispute resolution would be accepted is if it is forced upon the consumer. If the facts concerning the cost, abuse, and fairness of arbitration were disclosed, few, if any, homebuyers would forgo their rights to a civil trial.

24.8 Other available Alternative Dispute Resolution (ADR) systems

> "The homeowner in Texas has one remaining alternative dispute resolution system, a 2 by 4. When you have a defect in your new home, you take a 2 by 4 and visit your salesman." ---John R. Cobarruvias.

When a dispute arises, it has been our experience that homeowners use every means available to resolve a construction defect without resorting to legal

action via an attorney or through the laws of Texas. This includes months, sometimes years, of attempting to work in good faith with the builder by using low cost methods currently available. This includes phone calls, letters, certified letters, faxes, emails, and one-on-one conversations with the builders and service representatives.

These methods are all low-cost, private, and do not require any third party interference. Unfortunately, when an uncooperative builder refuses to work in good faith, the homeowner has no other alternative than to seek legal counsel. Usually, the homeowner at this stage is at a breaking point with the builder. Working in good faith has failed, and the builder, instead of standing behind the product, now stands behind attorneys.

The homeowner is furious and helpless at this point. Many would like nothing more than to see their builder behind bars for stealing from their family. Their frustration at the builder and the lack of support from the state are at a peak. It is then that homebuyers seek legal help to even the playing field, only to learn their legal rights have been replaced by the arbitration clause in their contract.

The builders have ample time and chances to resolve the defects. Instead, many would rather draw out the conflict to a breaking point, with many homeowners giving up in frustration. Homeowners, on the other hand, are not "sue happy" as many believe. They would rather spend their time and effort in other activities like decorating, meeting their neighbors, joining the civic club or PTA, and being active in their community. The last thing they want is to have to seek legal advice to combat a builder who has cheated their family.

Builders have many free alternative dispute resolutions systems available, yet they tend to ignore them and hide behind their own, that being arbitration.

24.9 The benefits of arbitration to the homebuilding industry.

"If buyer does not seek arbitration prior to initiating any legal action, buyer agrees that seller shall be entitled to liquidated damages in the amount of $10,000." ---*DRHorton's new home contract concerning arbitration.*

Arbitration is a boom to the homebuilding industry. The fact that arbitration must be forced upon the unsuspecting buyer should give a good indication of its intent. Arbitration awards are generally much less than what a jury will award after hearing the testimony and arriving at a unanimous decision. An arbitrator will rarely punish builders, regardless of how they have disrupted the buyer's life or family, unlike punitive damages a jury could award. Additionally, the arbitration process and award are held in secrecy, which further protects the builder from further scrutiny.

As noted, homeowners are not interested in punishment of the builder in the early phases of a dispute, but once they have been disrespected and have to resort to the help of an attorney, punitive damages are just and wanted. Arbitration relieves the builder of the threat of being held accountable for disrespecting the buyer and dragging out the dispute until legal action is necessary. The builder has no incentive to work with the homeowner to resolve the dispute. Instead, the attitude is, "So sue me!" knowing they will be protected by the arbitration process.

24.10 High cost of arbitration

The Malkani family of Austin, Texas, had to take its dispute with a homebuilder to arbitration. The Malkanis were charged $3,500 as an initial administrative fee, followed by $1,375 in other miscellaneous fees. In the end, the family was awarded $18,819; however, the builder didn't have to pay the family's attorney fees or administrative fees. The arbitration fees cost the family $13,069 – not counting attorney fees. ---source: *Arbitration More Expensive Than Court – So Costly That Many Victims of Consumer Fraud, Employment Discrimination Give Up*. **Public Citizen.**

Arbitration has received unfounded praise for being a low-cost alternative to the civil court system. Unfortunately, this is untrue in most cases. Arbitration generally is a very low-cost alternative for the builder but extremely costly for the consumer. As an example, a simple claim for a $5000 defect would cost only $55 in small claims court; however in arbitration it would cost $125.00 not including the cost of the arbitrator.

In more complex cases, the fee is much more, sometimes ranging into the thousands of dollars, and that is just for the initial arbitration fee. Additional charges must be paid for the arbitrator(s), the stenographer, and rental of the room. In contrast, our court system costs only $125.00 to file, and the judge, jury, and stenographer have already been paid with our tax dollars.

The consumer, regardless of the use of arbitration or the court system, must pay attorney fees, but the awards of attorney fees in arbitration are up to the discretion of the arbitrator. Expert witnesses and engineering studies must also be paid whether for arbitration or court. These fees may or may not be awarded to the consumer.

The American Arbitration Association also prides itself in saying the most a homeowner would pay for a $50,000 claim is $375.00, but this buys only a paper review by someone in another state who will generate a mail order judgment. A $50,000 claim is significant, regardless if this is a $100,000 home or a $1,000,000 home and shouldn't be left up to a mail order private justice system.

This amount of damages could easily wreck an owner's financial situation and should be dealt with very seriously through a judge and jury system.

The current civil court system may not be perfect, but it is a time-honored system, as fair as it could be, and has been paid for by our tax dollars. If a public justice system such as binding arbitration can be just as fair and as inexpensive, then it should be able to compete without forcing an unsuspecting homebuyer into a mandatory pre-dispute clause. It is clear from all the testimony during the interim hearings that this public justice system cannot compete and therefore must be forced onto the consumer.

24.11 Biased arbitrators

"James Evans, a Houston attorney, cited a case where a client's house slid down a hill because of an improper foundation. After his client got nothing, Evans sued the association and arbitrator Stephen Paxson, claiming Paxson, a lawyer for the Greater Houston Builders Association, had lobbied to change the law his client was relying on." --- Adolfo Pesquera, *Consumer Advocates hammer arbitration*. **Express News** (May 16 2002).

Many homeowners who are faced with arbitration have concerns about the selection process of the arbitrator. Unlike an elected judge, an arbitrator is usually selected from a list provided by the arbitration organization. This arbitrator, in the spirit of providing a fast and low cost process, does not have to follow the law as a judge would. These arbitrators have no governing or monitoring organization to determine fairness or process complaints against them.

As an example referenced in the Civil Practice Committee report, arbitrator Stephen Paxson from Houston ruled in favor of the builder. It was only after the award that the attorneys for the homeowner learned that Paxson served as General Counsel for the Greater Houston Homebuilders Association.

They also discovered that he had helped with two *amicus* briefs to the Texas Supreme Court concerning consumer protection for new homeowners. --- 01-0135 PERRY HOMES, a joint venture v. AZIZ ALWATTARI and HAJER ALWATTARI; from Tarrant County; 2nd district (02-98-00106-CV, 33 SW3d 376, 11-02-00) and Brief of *Amicus Curiae* Submitted by the NAHB for the Supreme Court of Centex v. Buecher.

The laws being considered in the briefs had bearing on the arbitration.

The process for selecting arbitrators, not by the consumers, but by the arbitration industry should be reviewed for fairness. The question should therefore be; who is allowed to be an arbitrator, and why does it seem the arbitrators have some kind of relationship to the building industry?

24.12 Exceptions to the arbitration clause

"HUD's policy on approving 10 year warranties permits binding arbitration as an acceptable available remedy for complaint resolution. However the department precludes binding arbitration as the sole remedy." Vance T. Morris Director, **Office of Single Family Program Development** (Dec. 7, 2001).

Some organizations such as Housing and Urban Development, Veterans Administration, and Federal Housing Association do not require the use of mandatory binding arbitration in new home contracts or warranties. Although this is their policy, it is not known whether the homeowners who question this prevail in removing the clause. Homebuyers should question the builder on the use of the arbitration clause if they have an FHA/VA approved loan.

24.13 Recommendations and conclusions

State lawmakers should allow the private system to compete with our current justice system by fostering a competitive and alternate environment and allowing consumers to choose after a dispute arises and when all the facts concerning fees and procedures are presented to both parties.

The proponents of arbitration in consumer contracts are quick to note arbitration could be faster, cheaper, and better for the consumer, yet they continue to advocate forcing this on consumers through pre-dispute clauses.

Arbitration is a private justice system and should be allowed to compete with our current civil justice system purchased with our tax dollars, protected under the United States Constitution.

It is disturbing that the only way this private justice system can survive is to have it forced upon consumers instead of the consumers and their attorneys having the option to make choices based upon facts.

State lawmakers should allow the private system to compete with our current justice system by fostering a competitive and alternate environment and allowing consumers to choose a resolution method after a dispute arises.

For consumers, because of the limited protection provided by the state and the limited benefit of arbitration to those harmed by a builder, new homebuyers should consider protecting their investments by taking steps to prevent defects or to detect defects prior to moving into the home. To further protect their investment, the following steps are recommended:

1. Read and understand the contract before purchasing a new home.
2. Do not purchase a new home with a binding arbitration clause.

3. Remove the arbitration clause from the contract. If the builder refuses, have it noted on the contract.
4. Remove the arbitration clause from the warranty. If the builder refuses, have it noted on the warranty.
5. If the clause cannot be removed, demand to see the arbitration fee schedule, the cost of the proceedings, and all rules that apply to the process.
6. If the home is FHA/VA approved, demand to know your rights concerning the use of arbitration in the contracts. Have the clause removed in accordance with FHA/VA rules.
7. Remove the waiver of the implied warranty. If the builder refuses, have it noted on the contract.

Have the home inspected during and after construction. This may cost a significant amount of money, but it could also save a costly repair.

24.14 Arbitration FAQs: Is binding arbitration faster, cheaper, better?

This is at least one area that can be agreed upon. Arbitration is generally faster than the court system, although that is not always the case. Many times homeowners with serious defects in their homes do not want a fly-by-night process that will rule on the biggest investment of their lives. They want a process that is fair and that will take the necessary time to fairly resolve the dispute. If builders were so concerned about the time spent in litigation, they would save time and money and resolve the conflict quickly.

24.14.1 Is binding arbitration faster than our court system?

Generally no; it depends on what you expect from the court system and arbitration. It is hard to adequately compare each since they are two different processes. One is a private justice system, with few or no rules to follow, the other a strict, time-consuming process which must follow the law. In arbitration you must pay for the fee, the arbitrator, and use of a building and stenographer. In our justice system, these have already been paid by our tax dollars.

24.14.2 Is binding arbitration cheaper than our court system?

No. Our court system was designed when this country was founded. It was done carefully with strict rules that must be followed. The court system provides the best available resolution system for the consumer when a builder decides to stand behind attorneys. It strikes fear into builders because it makes their actions and defects public. In the private justice system, everything is secret and does not hold a builder reasonably accountable.

24.14.3 Do I have a choice to select arbitration over our court system?

No. Arbitration is mandated by the contract signed at closing. You can have your attorney, legal representative or any other person review it; however it is binding on the parties and generally cannot be removed.

24.14.4 Should I buy a new home with a mandatory arbitration clause in the contract?

No. These are sugar-coated deals and will leave you devastated in the end.

24.14.5 Which builder in Texas have mandatory arbitration clause?

Almost all builders in Texas have an arbitration clause in their contracts, and every warranty also has an arbitration clause. ---**www.hadd.com**.

Chapter 25

25 Mold victims can become medical malpractice victims

Mold victims who seek medical treatment may become victims of medical malpractice if they do not know their rights as patients or what to expect of their doctors. Medical malpractice is a term that refers to any medical mistake made by a doctor, or other medical professional, that leads to personal injury or wrongful death. Medical malpractice can be the result of negligence on the part of the doctor, nurse, hospital, or other medical staff.

Medical negligence occurs when medical personnel fail to perform their duties in a way that meet the standards of conduct for the medical profession. A physician who prescribes the wrong medication can be found liable for negligence because all physicians (doctors) are expected or are presumed to possess the knowledge needed to correctly prescribe medication.

25.1 Types of medical malpractice

Medical malpractice cases can be brought against doctors for any of the following reasons:

- Failure to diagnose
- Failure to disclose diagnosis
- Improper diagnosis
- Medication errors
- Surgical errors
- Surgical instruments left inside patient after surgery
- Lack of informed consent
- Abandonment
- Surgical procedure error –mistake during surgery

Signing a physician's consent form does not mean you consent to substandard medical attention.

According to the National Academy of Sciences, approximately 98,000 Americans die from "medical mistakes" each year. Medical malpractice can result in serious personal injury and/or wrongful death. It is usually a result of negligence, in which the physician does not perform up to medical standards.

Medical negligence refers to the failure of a physician or other medical personnel to meet the standards of conduct for duties relating to the medical

profession. The standards of conduct expected for duties relating to the medical field are based on what a reasonable person with the requisite knowledge and skills would or would not do. A doctor who prescribes the wrong medication may be negligent because the knowledge needed to give the correct prescription is specific to his field and known by any reasonable professional in that field.

25.2 Damages for medical malpractice

There are two types of damages that are applicable in a medical malpractice case:

- Actual damages - refers to the cost of additional treatment, loss of wages, loss of future wages, and pain and suffering.
- Punitive damages - refers to damages awarded when malpractice is the result of reckless or willful behavior on the part of the physician.

25.3 Medical records

The majority of medical malpractice cases are personal injury cases, which often require a review of personal medical records. A medical expert will be asked to consult on the case and if, after a review of the records, the expert determines that malpractice led to the injury, a lawsuit can then be filed.

25.4 Limits on recoveries

Some states have imposed laws that cap or limit the maximum amount of money an individual can recover in a medical malpractice suit. However, many of these laws are being challenged and several state Supreme Courts, such as Illinois and Ohio, have thrown them out. Therefore, it is important to remember that although there may be a cap in your state, it may not hold up in court.

25.5 Surgical injuries

Surgical injuries, also known as surgical accidents or surgical mistakes, can be the result of medical negligence on the part of a doctor, nurse, or hospital. Common causes of surgical injuries include:

- Wrong-site surgery - operating in the wrong area of the body.

- Wrong surgical procedure. This can include removing the wrong part of the body, such as limbs, organs, and tissue.

- Surgical instrument left in the body - retractors, sponges, and surgical towels can all be left in the body. According to the Centers

for Disease Control, approximately 15,000 surgical patients have had a surgical instrument left inside their body in the past few years.

- Surgery unrelated to the patient's diagnosis.
- Wrong patient surgery.
- Damage from a planned surgery - this can occur when damage is not a risk that was explained to the patient before undergoing surgery.

25.6 Surgical injury statute of limitations

There is a statute of limitations on the filing of surgical injury cases, so it is important to file a lawsuit as quickly as possible. The statute of limitation usually begins on the date of the injury, but there are cases where the injury is not discovered for months or years after the surgery. For instance, in the case of a surgical instrument being left in the body, the patient may not suffer any pain until months after the surgery.

If the patient seeks treatment for the pain and the surgical instrument is discovered, the statute of limitations begins from that point, but if the patient delays treatment and the mistake is found later, the statute of limitations will begin from the date the patient first experienced pain, when the mistake should have been discovered.

If you or a loved one has suffered a surgical injury, you may want to contact a medical malpractice attorney for more information.

Appendix A: Legal form – Tenant legal notice to landlord of mold infestation

TENANT LEGAL NOTICE TO LANDLORD: MOLD PROBLEMS

Date of this notice: _____

To: _____, Manager or Landlord

Landlord Address: _____

_____

Via U.S. Post Office Certified Mail No.: _____

Subject: Tenant Legal Notice to Landlord:

My/our rented: ____ apartment, ____ condominium, or _____ house #_____ at this property address:

_____
is unsafe, uninhabitable, and untenantable because of mold infestation problems.

Dear Manager or Landlord,

This legal notice is to inform you and to put you on legal notice that the physical condition of the above- described property has deteriorated to the extent that it is now unsafe, uninhabitable, and untenantable because of the below described mold problems that prevent my/our healthy and safe use of the property.

— Visible mold growth in the following areas:
_____
_____**See color photographs in Exhibit A**.

— Mold contamination of the heating/cooling equipment/ducts as evidenced by mold growth in mold test kits exposed to the outward air flow. **See Mold Test Kit Results Exhibit A.**

— Elevated levels of airborne mold spores INSIDE the above-described rental property, in comparison to an outdoor mold control test done 5 feet beyond the roof drip edge, as documented with mold test kits. **See Mold Test Kit Results Exhibit A.**

— The presence of mold species spores [INSIDE the above-described rental property] which are **not** present in the outdoor mold control test done 5 feet beyond the roof drip edge, as documented with mold test kits. **See Mold Test Kit Results Exhibit A.**

These mold problems have now made the rental property unsafe, uninhabitable, and untenantable, and represent a material breach by you, as our landlord, of our lease or rental agreement. You have also breached your statutory duty under our state's landlord-tenant law requiring the above property to be maintained in a safe, habitable, and tenantable condition. The above adverse mold

conditions materially affect our health, safety, and enjoyment of the property. I [we] did not cause these serious mold problems.
I [we] herein request that you, as our landlord, do immediately the following remedial steps:

— Find and pay for suitable, mold-safe living quarters for me [us] to move into now and temporarily until you have had adequate time to carry out safe, effective, and professional mold inspection, testing, and remediation of the above-described rental property.

— Pay for professional mold decontamination of my/our clothing and personal property prior to its being moved to our temporary, mold-safe living quarters.

— Pay for the professional moving expenses to move my/our clothing and personal property to and from our temporary, mold-safe living quarters.

— Do safe, effective, and professional mold remediation of the above-described rental property so that it is tested to be safe, habitable, and rentable in clearance testing by a Certified Mold Inspector who mold tests the property after the completion of the mold remediation work.

Please respond to me/us in writing within three (3) days of your receipt of this letter as to your willingness to promptly take the remedial steps selected/checked above. If I [we] do not receive your written consent to take the above-listed steps, I [we] will make temporary arrangements to live elsewhere at your sole expense until the premises are mold remediated and tested to be mold-safe by independent clearance testing by a Certified Mold Inspector. I [we] will not be paying rent to you during our absence from the above described rental property. I reserve all legal rights and remedies with regard to this situation.

Please phone or email me/us immediately in regard to your immediate resolution of these mold problem If you have any questions please ask me/us. Your prompt attention would be very much appreciated.

(_____)_____ (_____)_____ (_____)_____
Day phone number Evening phone number Cell phone number

Email address:_____

Sincerely,

_____ _____
Tenant Signature Tenant Signature

_____ _____
Printed Tenant Name Printed Tenant Name

Please use this standard form legal notice wherein you, acting on your own, can input you own specific information. However, if you have specific needs or situations not addressed by this standard form, you should see a lawyer to help you prepare your legal notice.

Appendix B: Legal Form – Tenant legal notice to landlord that tenant is withholding rent

TENANT LEGAL NOTICE TO LANDLORD:
BECAUSE OF YOUR FAILURE TO DO MOLD INSPECTION, TESTING, & REMEDIATION, I [WE] AM WITHHOLDING MY [OUR] RENT

Date of this notice: _____

To: _____, Manager or Landlord

Landlord Address:
_____

_____

Via U.S. Post Office Certified Mail No.:
_____

Subject: Tenant Legal Notice to Landlord:

Because of your failure to do mold inspection, testing, and remediation, I [we} are withholding our rent and placing said rent into escrow in regard to my/our rented: _____ apartment, _____ condominium, or _____ house [#_____] at this property address:

_____
because it is unsafe, uninhabitable, and untenantable because of mold infestation problems.

Dear Manager or Landlord,

I notified you of a problem with my/our leased/rented property described above on the ____ day of _____, 20____ by Certified U.S. Mail #_____

You have to date failed to fix the mold problem(s), and you have failed to do my/our requested remedial steps. Your failure to timely repair these serious mold problems represents a breach of our lease/rental agreement, and your violation of applicable state law. As is my right under the applicable landlord tenant law of this state, I [we] am withholding rent until these mold problems are safely and effectively taken care of. I [we] will place the rent, when due, in an escrow account with _____ Bank, with any set-up fees charged to you by deduction from the rent amount. Once you have taken care of the mold problems in a safe and effective manner, I will pay your rent, minus a reasonable amount for the loss in rental value of my living in these premises while they remained in an unsafe and moldy condition.

You are hereby notified of my/our full reservation of all of my/our legal rights and remedies in this matter, including my/our right to sue you for any increase in rent I am forced to pay for a comparable but mold-safe place to live, and for mold decontamination costs of my/our clothing and personal property, and for my/our moving expenses, and for payment of all of my/our personal medical testing and medical treatment required because of my/our exposure to mold

infestation and contamination while living in the above-described rental property, plus reimbursement for loss of business profits and/or salaries/wages not earned because of my/our exposure to said mold infestation and contamination.

I [we] will consider your refusal to comply with this rent withholding to be willful malicious conduct warranting punitive damages.

If you have any questions please ask me/us. Your prompt attention would be very much appreciated.

(_____)_____ (_____)_____ (_____)_____
Day phone number Evening phone number Cell phone number

Email address:_____

Sincerely,

_____ _____
Tenant Signature Tenant Signature

_____ _____
Printed Tenant Name Printed Tenant Name

Please use this standard form legal notice wherein you, acting on your own, can input you own specific information. However, if you have specific needs or situations not addressed by this standard form, you should see a lawyer to help you prepare your legal notice

Appendix C: Legal form – Tenant legal notice to vacate

TENANT LEGAL NOTICE TO LANDLORD: BECAUSE OF YOUR FAILURE TO DO MOLD INSPECTION, TESTING, & REMEDIATION, I [WE] AM VACATING

Date of this notice: _____

To: _____, Manager or Landlord

Landlord Address: _____

_____

Via U.S. Post Office Certified Mail No.: _____

Subject: Tenant Legal Notice to Landlord:

Because of your failure to do mold inspection, testing, and remediation, I [we] am vacating My/our rented: ____ apartment, ____ condominium, or _____ house [#____]
at this property address:

_____
because it is unsafe, uninhabitable, and untenantable because of mold infestation problems.

Dear Manager or Landlord,

I notified you of a problem with my/our leased/rented property described above on the ____ day of _____, 20____ by Certified U.S. Mail #_____

You have to date failed to fix the mold problem(s), and you have failed to do my/our requested remedial steps.

Your failure to timely repair these problems represents a breach of our lease/rental agreement, and your violation of applicable state law. I [we] am therefore exercising my/our right to vacate the premises and find another place to live. In this case I [we] expect all prepaid, but unearned monthly rent to be returned promptly to me on a pro-rata basis in the amount of $_____. I [we] also expect a full and prompt refund of my/our security deposit.

You are hereby notified of my/our full reservation of all of my/our legal rights and remedies in this matter, including my/our right to sue you for any increase in rent I am forced to pay for a comparable but mold-safe place to live, and for mold decontamination costs of my/our clothing and personal property, and for my/our moving expenses, and for payment of all of my/our personal medical testing and medical treatment required because of my/our exposure to mold infestation and contamination while living in the above-described rental property, plus reimbursement for loss of business profits and/or salaries/wages not earned because of my/our exposure to said mold infestation and contamination.

I [we] will be completely moved out and surrender the above-described rental property to you on the ___ day of _____, 20___. Please promptly send my/our pro-rata rent refund, and security deposit to the following address:

_____.

I [we] will consider your refusal to comply with this full and prompt refund request to be willful malicious conduct warranting punitive damages.

If you have any questions please ask me/us. Your prompt attention would be very much appreciated.

(_____)_____ (_____)_____ (_____)_____
Day phone number Evening phone number Cell phone number

Email address:_____

Sincerely,

_____ _____
Tenant Signature Tenant Signature

_____ _____
Printed Tenant Name Printed Tenant Name

Appendix D: Landlord's Mold Disclosure To Tenant

To: _____
Name of prospective tenant(s)

Re: Rental Unit # _____

_____
Name of rental property and property address

_____ _____ _____
City *State* *Zip*

There are many types of mold. Inhabitable properties are not, and cannot be, constructed to exclude mold. Moisture is one of the most significant factors contributing to mold growth. Information about controlling mold growth may be available from your county extension agent or health department. Certain strains of mold may cause damage to property and may adversely affect the health of susceptible persons, including allergic reactions that may include skin, eye, nose, and throat irritation. Certain strains of mold may cause infections, particularly in individuals with suppressed immune systems. Some experts contend that certain strains of mold may cause serious and even life-threatening diseases. However, experts do not agree about the nature and extent of the health problems caused by mold or about the level of mold exposure that may cause health problems. The Centers for Disease Control and Prevention is studying the link between mold and serious health conditions.

The landlord or property manager cannot and do not represent or warrant the absence of mold. It is the tenant's obligation to determine whether a mold problem is present. To do so, the tenant should hire a qualified inspector and make any contract to rent or lease contingent upon the results of that inspection.

Landlord's disclosure of any prior testing and any subsequent mitigation or treatment for mold the above rental unit number and property address:

_____

_____

_____

_____ _____
Printed Name and Signature of Landlord Date

Appendix E:

Seller, Seller's Agent, and Buyer's Agent Mold Disclosure To Buyer

To: _____
Name of prospective buyer(s)

Re: _____
Purchase property address

_____ _____ _____
City State Zip

There are many types of mold. Inhabitable properties are not, and cannot be, constructed to exclude mold. Moisture is one of the most significant factors contributing to mold growth. Information about controlling mold growth may be available from your county extension agent or health department. Certain strains of mold may cause damage to property and may adversely affect the health of susceptible persons, including allergic reactions that may include skin, eye, nose, and throat irritation. Certain strains of mold may cause infections, particularly in individuals with suppressed immune systems. Some experts contend that certain strains of mold may cause serious and even life-threatening diseases. However, experts do not agree about the nature and extent of the health problems caused by mold or about the level of mold exposure that may cause health problems. The Centers for Disease Control and Prevention is studying the link between mold and serious health conditions.

The Seller, Seller's Agent, and Buyer's Agent cannot and do not represent or warrant the absence of mold. It is the buyer's obligation to determine whether a mold problem is present. To do so, the buyer should hire a qualified inspector and make any contract to purchase the property contingent upon the results of that inspection.

Seller, Seller's Agent, and Buyer's Agent disclosure of any prior testing and any subsequent mitigation or treatment for mold in the above purchase property address:

_____

_____

_____

_____ _____
Printed Name and Signature of Seller Date

_____ _____
Printed Name and Signature of Seller's Agent Date

_____ _____
Printed Name and Signature of Buyer's Agent Date

Appendix F: Mold Cases

1. Miller v. lakeside Village Condominium Assn, 2 Cal. Rptr. 2d 796, 1 Cal. App. 4th 1611 (Cal. App. 2 Dist., 1991)

Meredith MILLER, Plaintiff and Appellant, v.
LAKESIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,
Defendant and Respondent (Dec. 24, 1991)

Summary:

Plaintiff Meredith Miller appeals from summary judgment granted in favor of defendant Lakeside Village Condominium Association, Inc. (Lakeside Village) on plaintiff's fourth amended complaint for damages for personal injuries allegedly caused by defendant's negligence in failing to repair and maintain the plumbing system in plaintiff's condominium.

The primary question on appeal is whether the trial court properly concluded that [1 Cal.App.4th 1616] there was no triable issue of material fact on the statute of limitations defense and that as a matter of law defendant was entitled to judgment.

PROCEDURAL AND FACTUAL BACKGROUND

Miller filed her action on August 27, 1986. The gravamen of the fourth amended complaint is the claim that defendant's failure to maintain and repair the plumbing in plaintiff's condominium caused the premises to become mold-infested and caused plaintiff to suffer from a fungal infection, which condition was diagnosed in December 1986 as immune dysregulation.

According to the allegations of the verified fourth amended complaint, the facts in the parties' separate statements which the parties agree are undisputed, and other testimony which is not disputed, plaintiff moved into her future husband's condominium unit in January 1983; the unit and adjacent hallway were flooded several times from mid-1981 through February 1983, and flooded again in February 1983; plaintiff's husband notified defendant of the flooding in February 1983; in September 1983, plaintiff began experiencing allergies and asthma. Plaintiff had no history of asthma. Aside from prior episodes of mild seasonal hay fever which she experienced back east and for which she took no medication, plaintiff had no allergies before October 1983.

In September and October 1983, an allergist, Dr. Epstein, tested plaintiff and determined that she was highly allergic to all types of pollens and numerous other substances, including mold. Dr. Epstein advised her that the sudden onset of such allergic reactions was not unusual, but rather, it was common to develop allergies

to an environment after having lived there for a substantial number of years. In October 1983, plaintiff noticed that after taking her asthma medication, her heart started beating very fast; she told Dr. Epstein about her rapid heartbeat; when she developed more and more symptoms with her heart, he referred her to Dr. Rubins.

In May through June of 1984, plaintiff was writing her master's thesis and spent most if not all of her time in the unit; she experienced further and more [1 Cal.App.4th 1617] severe bouts of asthma. In July 1984, for her worsening condition, she was hospitalized at Cedars Sinai Hospital; she was diagnosed as suffering from allergies, asthma, and an episode of mitral valve prolapse, a heart condition that she had had all her life.

In July and August 1984, plaintiff noticed that the unit smelled musty; Dr. Epstein advised her to have the unit tested for mold contamination; in August, Health Science Associates tested the unit for mold and told plaintiff that they found more mold in her unit than they had found previously in any residence; although the location of the mold was not determined, plaintiff told Dr. Epstein of the results of the mold contamination testing in early September 1984; he advised plaintiff to leave the unit. According to plaintiff's declaration submitted in opposition to the summary judgment motion, Dr. Epstein did not tell her that the mold was the cause of her allergies or asthma; plaintiff admits, however, that the doctor told her that the mold was "probably causing a temporary worsening of my general allergic symptoms."

On Labor Day weekend in 1984, plaintiff and her husband relocated to a hotel; plaintiff's allergies did not subside while she was living at the hotel.

In October 1984, the Millers retained a microbiologist, Dr. Swatek, who located the source of the mold infestation behind the panelling on the walls and under the carpeting; Dr. Swatek told plaintiff that the mold was caused by the floods. From September to October 1984, the Millers renovated the unit; they removed the panelling, put antifungal paint on the walls, replaced the carpeting with wood flooring, and cleaned out the air ducts. In October 1984, plaintiff attempted to move back into the unit, but her allergic reactions worsened and she remained in the unit for only three days; Dr. Epstein advised her to leave the unit.

In October 1984, the Millers moved out of the unit permanently. An October 10, 1984 letter written by plaintiff's husband to defendant stated in pertinent part, "I have owned my unit for over five years and as you know, my building has had a great deal of problems due to the inferior plumbing system. My condominium has been flooded numerous times and the association has replaced my carpeting due to the plumbing failures in the building.... [p] I became engaged to Meredith Labes in June 1984. She has been living with me since January 1983. In the summer of 1983, Meredith began to experience extreme allergic reactions. By late

1983, her condition worsened with the onset of an asthmatic condition. We have discovered the cause of this severe allergic condition: it was a prolonged and severe exposure to a particular mold fungi [sic]. [p] I had my condo inspected and tested for the presence of mold and the results were positive.... As a [1 Cal.App.4th 1618] result of these findings and after discovering the cause of her illness, we have been unable to live in our condo, and have been living at the Airport Hilton"

After October 1984, the Millers moved to another condominium and had that unit specifically tested for mold. From October to December 1984, plaintiff continued to see various physicians. A cardiologist, Dr. Rubins, referred her to a psychologist, Dr. Reiter. According to plaintiff's deposition testimony, Dr. Rubins and Dr. Reiter believed that she was making too much out of her medical problems; however, her medical records reveal that they continued prescribing asthma and other medication and pulmonary and other testing.

In December 1984, Dr. Rubins referred plaintiff to Dr. Young, a pulmonary physician at Cedars Sinai Hospital, who diagnosed plaintiff as suffering from asthma. Plaintiff was treated with medication which managed and controlled the asthma; from March through July 1985, plaintiff was in a pulmonary rehabilitation program. Although plaintiff had sporadic asthma attacks, she testified in a deposition that her condition was improving until October 1985, when she had a "severe month long asthma attack" which ended when she took a steroid, prednisone. At this time, she also began to experience, off and on, blurred vision, numbness in her arms and legs, and forgetfulness and confusion, which became worse through December 1985. At about this time, plaintiff saw a psychologist, Dr. Pines. According to plaintiff, Dr. Pines was "very sympathetic" to her claim that no one believed that she was sick and suffering from asthma; Dr. Pines wanted her to see an allergist.

In January 1986, an allergist, Dr. Eitches, diagnosed plaintiff as suffering from a fungal infection or candidiasis, and plaintiff began an anti-fungal treatment. Dr. Eitches prescribed medication which lessened the symptoms of her fungal infection, including the blurred vision, numbness and tingling of her arms and legs, rashes on her neck and face, and mental confusion; however, the symptoms did not completely go away.

In December 1986, Dr. Levin diagnosed plaintiff as suffering from immune dysregulation, which was caused by having an untreated fungal infection, which infection was caused by exposure to the severe mold in the condominium unit. In her deposition, plaintiff stated that in December 1986, Dr. Levin told her that her immune system was damaged because of the long-term fungus infection since the summer and fall of 1983.

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According to Dr. Levin's declaration, at the time of plaintiff's injury, an overwhelming number of physicians were unfamiliar with the disease of [1 Cal.App.4th 1619] immune dysregulation; moreover "based upon the manifestations of allergic reactions and asthmatic conditions, it was not unusual for any of [plaintiff's] physicians to attribute her condition to an emotional and psychological overreaction. Basically, the manifestation of such symptoms, which are, in fact, the beginning symptoms of immune dysregulation, are often misdiagnosed due to the fact that they appear on the surface to be simply allergic reactions or asthma."

In March 1987, plaintiff began gamma globulin infusion treatment for immune dysregulation. Plaintiff has not suffered from asthma since 1987.

In its answer to the fourth amended complaint, defendant asserted the affirmative defense, inter alia, that plaintiff's cause of action for personal injuries (third cause of action) was barred by the one-year statute of limitations of Code of Civil Procedure section 340, subdivision (3). Defendant moved for summary judgment with respect to plaintiff's claim for damages for personal injuries on the ground that the claim was barred by the one-year statute of limitations because the action, filed in August 1986, was filed over one year after she suffered appreciable harm--asthma and allergies--which she knew were caused by the mold in the unit.

In opposition to the motion for summary judgment, plaintiff admitted that her allergies and asthma were constant and chronic from October 1983 through 1987, but alleged that the allergies and asthma were not the injuries for which she sued; rather, the injury for which she sought recovery was immune dysregulation, which she alleges she discovered in January 1986. Plaintiff maintained that although she experienced asthma and allergic reactions in late 1983, the particular symptoms in October 1985, including blurred vision, memory difficulty, numbness and tingling of extremities and severe premenstrual symptoms, were different and not normally associated with allergies; these new symptoms were manifestations of a different injury, a fungal infection, which developed into immune dysregulation. Plaintiff argued that a triable issue of fact existed as to whether plaintiff's January 1986 discovery of her injury (fungal infection) was reasonable. In reply to the opposition, defendant argued that plaintiff's exposure to mold-infested premises constitutes the invasion of one primary right, which caused her appreciable harm as early as October 1983; treating the later-diagnosed immune dysregulation as the basis for a separate cause of action impermissibly splits her cause of action.

After hearing, the trial court granted defendant's motion for summary judgment. Plaintiff filed timely notice of appeal from the summary judgment. On appeal, plaintiff contends that the trial court did not read and [1 Cal.App.4th

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1620] consider all of the papers and evidence submitted and that the evidence presented triable issues of material fact on the issue of whether the action was barred by the statute of limitations. Specifically, appellant maintains that the facts are

disputed and it cannot be determined as a matter of law that the assertion of a cause of action based on immune dysregulation constitutes the impermissible splitting of a cause of action and that the delayed discovery rule is inapplicable.

SUMMARY JUDGMENT PRINCIPLES

Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor; where as here, the moving party is the defendant, he must either negate a necessary element of the plaintiff's case or state a complete defense. (Preis v. American Indemnity Co. (1990) 220 Cal.App.3d 752, 757, 269 Cal.Rptr. 617.)

A defendant's motion for summary judgment addresses the legal question whether there are undisputed material facts which foreclose the plaintiff's right to relief. (Panattoni v. Superior Court (1988) 203 Cal.App.3d 1092, 1094, 250 Cal.Rptr. 390.) "We are limited to the facts shown in the affidavits and those admitted and uncontested in the pleadings. (Classen v. Weller (1983) 145 Cal.App.3d 27, 42-43 [192 Cal.Rptr. 914]....) The caution expressed in these general rules however, should not be allowed to sap the summary judgment procedure of its effectiveness in cases which lack any actual triable issue of fact. [Citation.] ... Finally, while resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. (Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1112 [245 Cal.Rptr. 658, 751 P.2d 923]....)" (Uram v. Abex Corp. (1990) 217 Cal.App.3d 1425, 1430, 266 Cal.Rptr. 695.)

In reviewing a grant of summary judgment, an appellate court must make its own independent determination of the construction and effect of the papers submitted, and the validity of the ruling is reviewable irrespective of the reasons stated. (Preis v. American Indemnity Co., supra, 220 Cal.App.3d at p. 757, 269 Cal.Rptr. 617.)

FAILURE OF TRIAL COURT TO READ MOVING PAPERS

Appellant contends that the trial court incorrectly granted summary judgment because all the papers and evidence submitted were not considered. [1 Cal.App.4th 1621] At the outset of the hearing on the motion for summary judgment, the trial court stated that it could not find any moving papers in the file; the court stated that it was "sufficiently familiar with the facts from the other papers and I will hear argument, and then I will take it under submission and read the moving papers, unless there is nothing additional that will be revealed in the moving papers, in that the reply and the opposition papers gave me enough facts so I can possibly make a decision."

Plaintiff's counsel did not object to this procedure and the motion was orally argued. At the conclusion of the hearing, the court stated that "I am going to grant the motion for summary judgment. Take it up on appeal." Plaintiff's counsel responded that he would do so, and then asked, "This is without reading anything, you are making this conclusion?" The court responded, "Reading what?" Plaintiff's counsel said, "All of my medical records." The court replied, "I read your papers and I read their reply."

As our record on appeal does not contain the minute order for the May 24, 1990 hearing on the motion for summary judgment, appellant has not established that prior to signing the judgment on June 13, 1990, the court did not take the matter under submission and read the moving papers.

Even if our record shows that the trial court did not read the moving papers, the record shows that the court did read the opposition and reply, including defendant's reply to plaintiff's statement of undisputed facts, which summarized all of the evidence submitted as to each fact framed by the parties. Thus, our record indicates that the substance of the moving papers could be gleaned from plaintiff's opposition and defendant's position was repeated in defendant's reply. Even now, appellant fails to establish that there was any critical point or piece of evidence in the moving papers that was not contained in the opposition or reply.

In any event, had the trial court failed to read the moving papers, such failure would not constitute prejudicial error mandating reversal because on appeal we make our own determination of the construction and effect of all of the papers submitted. We thus proceed to discuss the issue of whether summary judgment was properly granted on the ground that as a matter of law the action is barred by the statute of limitations.

STATUTE OF LIMITATIONS DEFENSE

A. Accrual of the Cause of Action.

In this case, the parties concede that the applicable statute is Code of Civil Procedure section 340, subdivision (3), which prescribes a one-year [1 Cal.App.4th 1622] period to bring an action "for injury ... caused by the wrongful act or neglect of another."

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." (Code Civ.Proc., § 312.)

"[I]n order to have an actionable tort there must be a wrongful invasion by the defendant of some legal right of the plaintiff and damage resulting to the plaintiff from the wrongdoing." (Priola v. Paulino (1977) 72 Cal.App.3d 380, 387, 140 Cal.Rptr. 186.)

The longstanding rule in California is that a single tort can be the foundation for but one claim for damages. (DeRose v. Carswell (1987) 196 Cal.App.3d 1011, 1024, fn. 5, 242 Cal.Rptr. 368.) Accordingly, if the statute of limitations bars an action based upon harm immediately caused by defendant's wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing would normally amount to splitting a cause of action. (See id., at p. 1021, 242 Cal.Rptr. 368.)

"[A]lthough a right to recover nominal damages will not trigger the running of the period of limitation, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period. Under present authority, neither uncertainty as to the amount of damages nor difficulty in proving damages tolls the period of limitations." (Davies v. Krasna (1975) 14 Cal.3d 502, 514, 121 Cal.Rptr. 705, 535 P.2d 1161.)

As explained in DeRose v. Carswell, supra, 196 Cal.App.3d at pp. 1021-1022, 242 Cal.Rptr. 368: "There are times when a tort initially causes injuries so insubstantial that it is not reasonable to expect the victim to file a lawsuit, even though she would be entitled to at least nominal damages. When such a person does not sue, and later suffers substantial injuries that do justify a lawsuit, the statute of limitations may already have run. This is because the limitations period begins to run, under the traditional view, as soon as the plaintiff is aware of any harm, however slight. [Citation.] [p] More recently, courts have modified the traditional rule in order to avoid punishing the plaintiff, who, having acted reasonably in not prosecuting a lawsuit for insignificant damages, later suffers

more substantial harm. The Supreme Court in Davies v. Krasna, supra, observed that 'we have drifted away from the view held by some that a limitations period necessarily begins when an act or omission of defendant constitutes a legal wrong as a matter of substantive law.... Rather we generally now subscribe to the view that [1 Cal.App.4th 1623] the period cannot run before plaintiff possesses a true cause of action, by which we mean that events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages.' (14 Cal.3d at p. 513 [121 Cal.Rptr. 705, 535 P.2d 1161.])"

Accordingly, "[t]he extent of damage is not an element of a cause of action in tort, and the general rule is that the cause of action is complete on the sustaining of 'actual and appreciable harm,' on which the recoverable damages would be more than nominal." (Evans v. Eckelman (1990) 216 Cal.App.3d 1609, 1620, 265 Cal.Rptr. 605.)

Appellant maintains that triable issues of fact exist on the issue of whether her cause of action accrued by virtue of her 1983 and 1984 experiences of asthma and allergies. She argues that respondent failed to establish with medical evidence that her asthma and allergies experienced in 1983 and 1984 constitute injuries for which she could have sued, or were caused by the mold. She also argues that the more severe and debilitating symptoms which began in October 1985 (including numbness of the extremities, memory difficulty, headaches, and blurred vision) were symptoms of a different "injury," a fungal infection (later diagnosed as immune dysregulation), and the record does not compel the finding that the assertion of this latter injury constitutes splitting a cause of action.

In addressing the issue of "appreciable and actual harm," we turn first to the allegations of the complaint itself. "A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues." (Uram v. Abex Corp., supra, 217 Cal.App.3d 1425, 1433, 266 Cal.Rptr. 695.)

According to the facts alleged in the fourth amended complaint, Miller experienced "allergies and had minor incidents of asthma" in September and October 1983; in May and June 1984, she began to experience "further and more severe bouts of asthma"; in July 1984, Miller was "hospitalized for her worsening condition," and was "diagnosed as suffering from allergies, asthma, and an episode of mitral valve prolapse, a heart condition...."

In her response to the defendant's separate statement of undisputed facts, Miller also agreed it was undisputed that in October 1984, her husband's letter to the defendant stated that the flooding caused mold which caused her to experience

extreme allergic reactions in the summer of 1983; in June 1984, her condition prevented her from pursuing her career; in August 1984, [1 Cal.App.4th 1624] upon the advice of her doctor, her unit was tested for mold contamination; in October 1984, the Millers retained a microbiologist to pinpoint the source of the mold; Miller's symptoms worsened when she returned to the unit for three days in October 1984; she moved out of the unit permanently in October 1984.

Given the above facts, reasonable minds can draw only one conclusion--that Miller suffered appreciable and actual harm within the meaning of Davies by October 1984 and that she was also aware of its negligent cause by October 1984. 2 Such appreciable and actual harm consisted of conditions characterized by appellant herself as "extreme allergic reactions," and "severe bouts of asthma," for which she sought medical advice and treatment. We conclude that as a matter of law, such harm is sufficient to commence the running of the statute of limitations. This is so whether the mold, alone or in conjunction with other factors, caused her allergies and asthma in the first instance, triggered a predisposition to allergies and asthma, or aggravated them as pre-existing conditions. Under general principles of tort law, it is "not necessary that the negligence of the defendant be the sole proximate cause of the damage, but there may be other factors which contribute to the extent of the damage" (Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal.App.2d 675, 704, 39 Cal.Rptr. 64), and "damages may be recovered for aggravation of a preexisting condition...." (Taylor v. Sims (1945) 72 Cal.App.2d 60, 65, 164 P.2d 17.) Accordingly, whether the mold alone or in conjunction with other factors caused Miller appreciable harm is not a material factual issue pertinent to the statute of limitations defense.

The fact that Miller's medical condition may not have been diagnosed correctly until 1986 does not delay the running of the statute of limitations [1 Cal.App.4th 1625] under the facts of this case. (See, e.g., Uram v. Abex Corp., supra, 217 Cal.App.3d 1425, 1432, 266 Cal.Rptr. 695.) Whatever label or diagnosis her doctors may have attached, or failed to attach, to her condition in 1983 and 1984, such diagnosis did not prevent Miller from being aware that defendant's negligence caused her harm. She cites no authority for the proposition that a cause of action cannot accrue until a plaintiff can attach a medical diagnosis, whether correct or incorrect, to her condition, even though plaintiff suffers harm and is aware of its negligent cause. We conclude that as a matter of law on this record, her 1983 and 1984 injuries constituted actual and appreciable harm.

Appellant relies heavily on Martinez-Ferrer v. Richardson-Merrell, Inc. (1980) 105 Cal.App.3d 316, 164 Cal.Rptr. 591, which appellant claims compels reversal of the summary judgment against her. Not only is Martinez-Ferrer easily distinguishable on its facts from the instant case, but it has been soundly criticized as reading Davies v. Krasna, supra, too restrictively and disregarding the rule

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against splitting a cause of action. (DeRose v. Carswell, supra, 196 Cal.App.3d 1011, 1024-1025, 242 Cal.Rptr. 368.)

In Martinez-Ferrer, the court of appeal reversed summary judgment in favor of a drug manufacturer and distributor which the trial court had granted on the ground that plaintiff's action for personal injuries (cataracts) filed in June 1976 was barred by the one-year statute of limitations. Plaintiff, a physician, took a drug, MER/29, for a high cholesterol condition in March 1960; in September 1960, plaintiff was unable to read; his doctor diagnosed his condition as macula edema, an acute allergic reaction of the backs of his eyes, and speculated that plaintiff's condition was caused by the drug, which he advised plaintiff to stop taking; a few weeks after the eye problems, plaintiff developed a severe case of dermatitis, which his doctor concluded was likely caused by the drug. Plaintiff's dermatitis cleared up in four or five months and his eyes got better. Plaintiff had no further eye problems until 1976, when cataracts were discovered; plaintiff's doctor determined the cataracts had been caused by the MER/29. In 1961, the manufacturer of MER/29 sent letters to all doctors in the United States warning them that patients who had received the drug reported cataracts and icthyosis, a form of dermatitis; in 1962 the drug was taken off the market.

The court in Martinez-Ferrer noted that plaintiff "makes no claim that his 1960 problems were caused by MER/29 and unless the record establishes without substantial contradiction that they were, the summary judgment must be reversed whatever [plaintiff] knew or, rather, thought he knew at the time." (Martinez-Ferrer v. Richardson-Merrell, Inc., supra, 105 Cal.App.3d at p. 321, 164 Cal.Rptr. 591.)

[1 Cal.App.4th 1626] The court in Martinez-Ferrer concluded that the "record does not compel a finding that the 1960 symptoms were caused by MER/29" (105 Cal.App.3d at p. 321, 164 Cal.Rptr. 591), and that "for reasons rooted in the nature of summary judgments plaintiff is entitled to a reversal." (Id., at p. 322, 164 Cal.Rptr. 591.) Although this ground alone would have been sufficient to reverse the judgment, and would have been justified under Davies v. Krasna, supra, the court of appeal did not stop there; it went on: It speculated that "any realistic assessment of the record compels the conclusion that at the trial it will be found that MER/29 did cause at least some of Raul's [plaintiff's] 1960 problems--most likely dermatitis. The real question for the trial court will therefore be whether Raul can proceed against defendants on the theory that his cataracts were caused by MER/29, even though his action was filed years after he knew or should have known that he had suffered some bodily injuries from that product." (105 Cal.App.3d at p. 322, 164 Cal.Rptr. 591.)

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All of the discussion in Martinez-Ferrer that follows the latter statement is technically dicta, as it is premised on a set of hypothetical facts which the court speculated would be found in the future. 3

Unlike Martinez-Ferrer, there is no dispute in our case that the plaintiff's earlier condition in 1983 and 1984 was caused by the mold. Moreover, we decline to follow the Martinez-Ferrer court's conclusion, in dicta, that there is a trend away from inflexible enforcement of the rule against splitting a cause of action.

The court in Martinez-Ferrer seemed to imply that the 16-year delay between the plaintiff's earlier eye problem and dermatitis and his development of cataracts was the factor that created injustice in application of the rule against splitting a cause of action: "The sad fact is that Raul would have been laughed out of court had he sued for his dermatitis and macula edema [1 Cal.App.4th 1627] when defendants say he should have--say in 1962--and had he then attempted to be compensated for the speculative possibility that his 1960 ingestion of MER/29 might cause cataracts before that chance became a fact in 1976. On the other hand, under our statutory scheme ... Raul would have been quite unable to keep his action alive for a decade and a half." (105 Cal.App.3d at pp. 323-324, 164 Cal.Rptr. 591.)

There is no similar delay and no similar injustice under the facts of the instant case because it is undisputed that by 1987, Miller not only obtained a correct diagnosis of her condition, but had received treatment for it; she has not suffered from asthma since 1987. Therefore, had she brought her action within one year of October 1984, her action most likely would have been pending after the time that she apparently had suffered most, if not all, of the harm caused by the mold. The purported injustice that may have existed under the circumstances of Martinez-Ferrer is simply not present in our case.

Even were we to adopt the suggestion in Martinez-Ferrer and apply the rule with respect to nuisance cases, such rules lend no support to appellant's position herein. The well-settled rule with respect to property damage caused by nuisance is that "[i]f appellants demonstrate that whatever nuisance caused by defendant is continuing in nature, every repetition of the wrong may create further liability. Hence the statute of limitations would not run merely from the original intrusion...." (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 937, 101 Cal.Rptr. 568, 496 P.2d 480.) The court in Nestle stated that "it would be incongruous for each repetition to be considered a separate wrong for property damage purposes but not for personal injuries." (Ibid.)

Even if we deem each of Miller's exposures to the mold as a separate wrong, the last such exposure occurred in October 1984, after which time she moved out of the unit permanently. Miller testified that when she moved from a hotel back into the unit for three days in October 1984, her asthma became more severe. After permanently moving out of the unit, Miller suffered sporadic asthma attacks. One of her doctor's progress records for January 9, 1985, states: "She has ongoing respiratory difficulties, ongoing chest tightness, but her lungs remain totally clear when she is in the office. Her contention is that because of faulty pipes in her apartment building, the rooms became moldy. Studies in Stewart Epstein's office show she [is] allergic to mold."

Miller admitted in her deposition that between October 1984 and October 1985, she continued to have sporadic asthma attacks.

Accordingly, even if Miller's exposure to the mold on the last day she resided in the unit constitutes a separate wrong, she suffered actual and [1 Cal.App.4th 1628] appreciable harm from that wrong immediately and the statute of limitations on that "separate wrong" would have begun to run in October 1984, barring the complaint filed herein in August 1986. A different result is not compelled by Howe v. Pioneer Mfg. Co. (1968) 262 Cal.App.2d 330, 68 Cal.Rptr. 617, which is also distinguishable from the facts of the instant case.

In Howe, plaintiffs appealed from summary judgment in favor of their landlord and the manufacturer of a gas furnace which allegedly was defective and dangerous and leaked gas into their premises, causing them personal injuries, on several different occasions between December 1960 and January 1964; plaintiffs alleged that in December 1960 they took possession of the premises for a four-year period; their illness was unexplained and undetermined until January 1964 when it was discovered that gas from the defective furnace had been permeating the premises; the action was filed in October 1964; plaintiffs sought to recover for only those injuries occurring within one year of filing suit. The appellate record was apparently limited to the pleadings and excerpts from depositions and it was not clear therefrom "whether there was one continuing or cumulative illness, or separate illnesses." In concluding that plaintiffs "should be permitted to show that such injuries were separately incurred" (262 Cal.App.2d at p. 348, 68 Cal.Rptr. 617), the court also cautioned that "This is not to say that upon trial the facts may not show that plaintiffs knew or should have known at an earlier date that the furnace was defective, and they knew or should have known that their injuries resulted therefrom. These are matters of defense and do not defeat the right to sue for a separate injury if such in fact was incurred within one year of filing suit. The following comment is pertinent: This discussion should not conclude without underscoring that, in liberally construing and asserting the depositions most favorably to appellant (as we are required to do), we are stating that which has not yet been proved and may never be. We have merely accepted the appellant's story. Summary judgment and demurrer reversals are untrustworthy source materials for 'fact finders.' " (262 Cal.App.2d at pp. 348-349, 68 Cal.Rptr. 617.)

It is clear that the court in Howe was working not only with a different set of facts, but with a more limited factual record than we have in the instant case.

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Howe lends no support to appellant's position that triable issues of fact exist as to whether the statute of limitations bars her action.

B. Delayed Discovery Rule.

Appellant contends that because her injury involved a progressively developing disease, whose nature and extent was not readily discoverable, a triable issue of fact was presented as to whether she was diligent in discovering her injury under the delayed discovery rule.

[1 Cal.App.4th 1629] "[T]he common law rule, that an action accrues on the date of injury (Lambert v. McKenzie (1901) 135 Cal. 100, 103 [67 P. 6] ...), applies only as modified by the 'discovery rule.' The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. [Citation.] A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." (Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923; fn. omitted.)

The delayed discovery doctrine applies only when a plaintiff has not discovered all of the facts essential to the cause of action; if the plaintiff has discovered all of the essential facts, the doctrine does not apply. (See Spellis v. Lawn (1988) 200 Cal.App.3d 1075, 1080, 246 Cal.Rptr. 385.) There is no dispute in this case that Miller had actual knowledge of the negligent cause of her 1983 and 1984 injuries at the latest by October 1984; the fact that she subsequently suffered from immune dysregulation is a fact that does not give rise to a separate cause of action. Moreover, later-discovered information that her asthma and allergies were actually early manifestations of a condition known as immune dysregulation was not essential to any asserted cause of action and did not stop the running of the statute of limitations. 4 We conclude that the delayed discovery doctrine does not apply under the circumstances of this case.

C. Reliance on Physician's Misdiagnosis.

Relying on Brown v. Bleiberg (1982) 32 Cal.3d 426, 186 Cal.Rptr. 228, 651 P.2d 815, a case involving an action against the physicians who allegedly caused plaintiff's injury, appellant contends that the statute of limitations should be tolled in the instant case because of her reliance on her physicians' advice and misdiagnosis from 1983 to 1985. As this case is not one against physicians who allegedly misdiagnosed appellant's condition, Brown is inapposite. As appellant fails to support the contention with any applicable authority, we find it without merit. [1 Cal.App.4th 1630]

DISPOSITION

The judgment is affirmed.

FRED WOODS, J., concurs.

JOHNSON, Associate Justice, concurring.

I concur in the judgment because the facts of this case do not compel application of the landmark decision in Martinez-Ferrer v. Richardson-Merrell, Inc. (1980) 105 Cal.App.3d 316, 164 Cal.Rptr. 591. I write separately, however, to register my disagreement with the majority's treatment of the important rule and supporting rationale enunciated in that decision. Unlike the majority, I do not adopt the DeRose (DeRose v. Carswell (1987) 196 Cal.App.3d 1011, 1024, 242 Cal.Rptr. 368) court's characterization of the decision as a "too restrictive" application of the Supreme Court's decision in Davies v. Krasna (1975) 14 Cal.3d 502, 121 Cal.Rptr. 705, 535 P.2d 1161 (reiterating the rule the statute of limitations commences running when a plaintiff suffers actual and appreciable harm). Instead, I read Martinez-Ferrer as embodying a distinct rule. Under appropriate circumstances the occurrence of some actual and appreciable harm will not foreclose a later suit for a serious physically distinct injury which first manifests itself after the limitations period has expired as to the initial harm.

Martinez-Ferrer highlighted the problem of plaintiffs who experience symptoms of "actual and appreciable" harm early on but much later suffer a different type of harm, quantitatively and qualitatively, as a result of the initial tortious act. Historically, of course, the law would have barred such plaintiffs from bringing suit for the later, more serious injury because the cause of action accrued upon the act or omission that caused the legal harm whether or not there were manifestations of injury. (See generally, Developments in the Law--Statutes of Limitations (1950) 63 Harv.L.Rev. 1177.) This harsh rule was later tempered by the adoption of the discovery rule under which a cause of action was held not to have accrued until the plaintiff knew or reasonably should have known of the injury and its cause. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 186-190, 98 Cal.Rptr. 837, 491 P.2d 421.) The rules for determining when a cause of action accrued were further liberalized by the Supreme Court's decision in Budd v. Nixen (1971) 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491 P.2d 433, which held the limitations period does not begin until a plaintiff has suffered "actual and appreciable harm".

It is true the discovery doctrine led to more just and equitable results in that a plaintiff was not precluded by the bar of the statute of limitations from [1 Cal.App.4th 1631] seeking recovery until there was actual evidence of injury from a tortious act or omission which may have occurred years before. This

doctrine was inadequate, however, to prevent the inequities that arose in situations where exposure to deadly toxic substances caused not only immediate injuries but latent or progressive diseases which did not manifest themselves until possibly decades later. Rigid application of the discovery doctrine meant plaintiffs who had some early minor symptoms of harm were barred from bringing suit for a later developed, related, but qualitatively and quantitatively different, illness.

Martinez-Ferrer recognized principles of res judicata should not bar suit for the later more serious injury in these circumstances. The Martinez-Ferrer court found the general rules of merger and bar should not apply where "the policies favoring preclusion of a second action are overcome for an extraordinary reason...." or "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme...." (Martinez-Ferrer v. Richardson-Merrell, Inc., supra, 105 Cal.App.3d at p. 327, 164 Cal.Rptr. 591; internal quotation marks deleted, emphasis added by the court.)

The policies underlying the doctrine of res judicata and the prevention of claim splitting include judicial economy and concern about the quality of evidence available at trial. (Davies v. Krasna, supra, 14 Cal.3d at p. 512, 121 Cal.Rptr. 705, 535 P.2d 1161 ["The fundamental purpose of such statutes is to protect potential defendants by affording them an opportunity to gather evidence while facts are still fresh."]; Elkins v. Derby (1974) 12 Cal.3d 410, 417, 115 Cal.Rptr. 641, 525 P.2d 81 [purpose of statutes is to prevent " 'surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " (Citing Telegraphers v. Ry. Express Agency (1944) 321 U.S. 342, 348-349, 64 S.Ct. 582, 586, 88 L.Ed. 788)]; Pashley v. Pacific Elec. Ry. Co. (1944) 25 Cal.2d 226, 229, 153 P.2d 325 ["The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution."].)

These same concerns support allowing independent suits for the different injuries as well. First, considerations of judicial economy in these circumstances weigh in favor of recognizing separate causes of action. Allowing suit on the later developed, serious injury avoids forcing a plaintiff to make speculative claims early on as a means to escape the bar of the statute of limitations. Recognizing a separate accrual period for the separate injury when and if it occurs will prevent courts from being burdened with suits [1 Cal.App.4th 1632] involving relatively minor injuries filed to avoid the bar of the statute of limitations should more serious injuries develop. It would also discourage the filing of premature or questionable claims. It would be more efficient, and society would be better served, if judicial resources were reserved for lawsuits which seek compensation for the more serious, yet physically distinct, harm when and if it materializes.

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Secondly, where a plaintiff is forced to bring suit at the first indication of "appreciable" harm, claims for a possible eventual disease will not be based on actual evidence of injury but on speculation or evidence of probabilities only. It is possible immediate accrual of all contingent claims would better serve defendants' interests in repose. However, evidentiary concerns of the existence of a prospective disease, its proximate cause and resulting damage, are better served by presentation of actual evidence which has developed over time. Plaintiffs will have a better chance of securing fair and accurate compensation for an existing harm when the injury has manifested itself and when medical certainty can replace speculation.

Thirdly, allowing suit on a later developed, different and more serious injury, eliminates the risk of defendants overcompensating a plaintiff who does not in fact develop future problems or undercompensating those plaintiffs who do. Allowing suit for an actual injury based on current and reliable evidence prevents the inequity of giving a windfall to some plaintiffs and undercompensating others.

Many decades elapsed before society became aware of the dangers of asbestos and other toxic chemical substances in our environment. With new sciences and scientific discoveries continually placing heretofore unknown substances on the market, and with the constant introduction of new drugs, synthetics and biologically altered plants and animals, we may be largely ignorant of all the ramifications of our technologically advanced society. Preservation and amplification of the Martinez-Ferrer doctrine is needed to protect those individuals presently or in the future who belatedly discover exposure to a new drug, solvent or structural material caused not only the initial "actual and appreciable" yet only modest illness or injury, but also the present deadly cancer or respiratory failure or similar insidious injury which was far more serious and physically distinct from the initial manifestations of the exposure.

Under Martinez-Ferrer these plaintiffs' claims will accrue upon discovery of the later developed and different disease if and when it occurs as a result of the initial injury. Treating the different injuries separately for purposes of accrual of the cause of action is the only just and equitable method to [1 Cal.App.4th 1633] compensate victims of latent, progressive or presently unknown diseases. It protects plaintiffs who suffer progressive diseases that take years to develop after the initial exposure to a toxic substance. It also preserves a cause of action for those plaintiffs, who because of the new drug, substance or technology, are unaware the initial symptoms could also mean a risk of a much more deadly and dangerous disease in the future.

The rationale exemplified in Martinez-Ferrer preserves these plaintiffs' interests, and establishes an equitable method to deal with the unknown consequences of today's technological advances. The decision is significant in

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California jurisprudence and has been recognized or adopted in numerous other jurisdictions as well. (Associated Indem. Corp. v. Indus. Acc. Com. (1932) 124 Cal.App. 378, 12 P.2d 1075 [despite early symptoms years before filing suit, worker's

claim did not accrue until injury progressed to silicosis]; Urie v. Thompson (1949) 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 [same]; Zambrano v. Dorough (1986) 179 Cal.App.3d 169, 224 Cal.Rptr. 323 [cause of action did not accrue as to later injury because loss of reproductive capacity was qualitatively of a different type of injury than that initially accompanying the misdiagnosis]; Wilson v. Johns-Manville Sales Corp. (D.C.Cir.1982) 684 F.2d 111 [mild asbestosis did not start limitations period running in 1973 for separate and distinct disease of mesothelioma first manifested in 1978]; Pierce v. Johns-Manville Sales Corp. (1983) 296 Md. 656, 464 A.2d 1020 [in same factual situation, held policy considerations weighed in favor of recognizing separate causes of action lest plaintiff be compelled to rush to court with questionably meritorious claims rather than risk losing all claims for future serious injury]; Goodman v. Mead Johnson & Co. (3d Cir.1976) 534 F.2d 566 [plaintiff's cause of action for cancer did not accrue simultaneously with manifestations of thrombophlebitis although both caused by defendant's contraceptive device]; Anderson v. W.R. Grace & Co. (D.Mass.1986) 628 F.Supp. 1219 [in suit for injuries caused by contaminated water well, causes of action for increased risk of leukemia and other cancers not yet accrued because qualitatively different from present injuries]; Gore v. Daniel O'Connell's Sons, Inc. (1984) 17 Mass.App. 645, 461 N.E.2d 256 ["Not only does it offend fairness to require of claimants the gift of prophecy, [citation] but it is unsound judicial policy to encourage the initiation of lawsuits in anticipation that a grave disease will manifest itself pendente lite."].)

The facts of this case, however, do not compel a finding the cause of action for Miller's later developed immune dysregulation was so qualitatively or quantitatively different from the initial symptoms of asthma and allergies as to be treated as a different injury for purposes of accrual of a [1 Cal.App.4th 1634] separate cause of action. Mold in the condominium was the cause of all the symptoms. The later developed immune dysregulation was a result of infection caused by prolonged exposure to the mold of which Miller's symptoms of asthma and allergies were early manifestations. When a later developed disease is the natural and probable consequence of failure to treat the initial symptoms of the same disease, the two diseases are not sufficiently physically distinct and Martinez-Ferrer does not apply.

Because I conclude Martinez-Ferrer does not apply on the facts of this case, I concur in the judgment.

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1 The fourth amended complaint contained three causes of action, purportedly asserted by both plaintiff and her husband, Lee Miller, not a party to this appeal. Only the first cause of action, for property damages for breach of contract, and the third cause of action, for damages for personal injuries, are asserted against Lakeside Village. Lakeside Village moved for summary judgment on the first cause of action on the ground that Meredith Miller was neither an owner of the condominium, owned

by her husband as his separate property, nor a party to the contract sued upon, and had no breach of contract claim against it.

In the trial court, plaintiff did not challenge the grant of summary judgment as to the first cause of action, but only opposed the motion for summary judgment on the third cause of action. Accordingly, only the third cause of action is at issue on this appeal and we deem any issue pertaining to the first cause of action to be abandoned. We do not set out any facts pertinent only to the first cause of action.

Further, respondent points out that a day before the hearing on its motion for summary judgment, and in response to a demurrer by another defendant, plaintiffs filed a fifth amended complaint, which contained identical allegations against Lakeside Village as in the fourth amended complaint. As the trial court honored a purported stipulation that Lakeside Village's motion for summary judgment would be deemed to be addressed to the fifth amended complaint, we also deem the motion to be addressed to the fifth amended complaint. Accordingly, any reference herein to the fourth amended complaint is deemed to include the fifth amended complaint.

2 This case does not present the issue of belated discovery of the element of defendant's alleged negligence or wrongdoing, as the pleadings contain no allegations pertinent to this theory, Miller does not address this issue in her briefs on appeal, and the only conclusion to be drawn from the undisputed facts is that by October 1984 Miller knew that defendant's alleged negligent failure to repair and maintain the plumbing caused the mold, which caused her to experience allergic reactions and asthma.

Nor is the question of whether immune dysregulation is a permanent or continuing condition pertinent to the issue of when defendant's wrongdoing caused Miller actual and appreciable harm and when the statute of limitations began to run.

In her opening brief, appellant disingenuously states that she "is not claiming that these earlier 'injuries' were caused by mold, nor is the evidence 'without substantial contradiction' on this point." However, Miller specifically agreed it was undisputed that "As of October 1984, the mold was a factor contributing to [her] injury." Further, Dr. Levin's declaration submitted in opposition to the motion for summary judgment motion states that "In essence, Ms. Miller's

immune dysregulation was triggered by the heavy and prolonged mold exposure she received while she was residing at the unit," that in October 1983, "her allergies and asthma were the first indication of the true extent and nature of her injury of immune dysregulation," and the manifestation of allergic reactions and asthmatic conditions "are, in fact, the beginning symptoms of immune dysregulation."

3 For example, the court went on to state that the instant case did not permit it to conclude that the 1960 problems were so minimal that they did not trigger the running

of any cause of action. "Unfortunately, however, the facts will not permit us to agree. In 1960 Raul obviously suffered substantial damages, including a substantial loss of earnings." (105 Cal.App.3d at p. 325, 164 Cal.Rptr. 591.) Given these assumed facts, the court acknowledged that the prohibition against splitting a cause of action barred plaintiff's action, but blithely decided not to enforce that principle because "it would lead to injustice." (105 Cal.App.3d at p. 326, 164 Cal.Rptr. 591.) The court also concluded that "permitting Raul to proceed advances, rather than hinders, the policies which support the statute of limitations in general, as explained in Davies v. Krasna.... Turning more specifically to the rule against splitting causes of action we perceive a trend away from an unthinking enforcement of the rules." (Ibid.) The court then discussed the rules pertaining to nuisance actions, progressive occupational diseases, and the purported relaxation of the merger aspect of res judicata. Finally, the court stated that "We make no attempt to even summarize where all of this may lead. We are, however, convinced that under the peculiar circumstances of this case it would be a miscarriage of justice not to permit plaintiff to go to trial." (Id., at p. 327, 164 Cal.Rptr. 591.)

4 In her reply brief, appellant states that "Dr. Levin never testifies that the allergy and asthma were manifestations of this particular condition in this particular patient." That appellant's asthma and allergies were early manifestations of her immune dysregulation is the only reasonable inference to be drawn from Levin's declaration, and there is nothing in our record which creates a dispute of fact on this point.

Further, it is inconsistent for appellant to maintain on the one hand that such conditions were not early manifestations, and on the other hand to maintain that her other physicians misdiagnosed her condition. If her asthma and allergies were not early manifestations of immune dysregulation, there was no misdiagnosis.

2. Droegkamp v. Langdon (Wis. App., 2003)

JOHN J. DROEGKAMP AND LYNNE L. DROEGKAMP, PLAINTIFFS, AMERICAN SOUTHERN INSURANCE COMPANY, INTERVENING PLAINTIFF-RESPONDENT,
v.
JAMES F. LANGDON AND SUSAN M. LANGDON, DEFENDANTS, REALTY EXECUTIVES AND TIMOTHY MICHELIC, DEFENDANTS-APPELLANTS, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, INTERVENOR. (July 30, 2003).

Summary:

Realty Executives and Timothy Michelic appeal from summary judgment orders dismissing American Southern Insurance Company (American Southern) from this action, concluding that American Southern does not have a duty to defend Realty Executives and Michelic in this action because all causes of action alleged in the complaint are outside the coverage of its insurance policy. Both Realty Executives and Michelic argue that the policy exclusions relied upon by American Southern and the circuit court do not preclude coverage for all the claims alleged by John J. Droegkamp and Lynne L. Droegkamp (Droegkamps). We agree that some of the claims against Realty Executives and Michelic are not precluded by American Southern's policy exclusions. We affirm the circuit court in part, reverse in part and remand this matter for proceedings consistent with this opinion.

FACTS

¶2 This case arises from the sale of a residence located in Oconomowoc, Wisconsin. The Droegkamps purchased the property from James F. Langdon and Susan M. Langdon (Langdons). The Droegkamps and the Langdons signed the purchase contract on March 16, 2000. Michelic acted as the real estate broker in the transaction and at all times relevant to this matter was employed by Realty Executives. American Southern is Michelic's and Realty Executives's errors and omissions insurer.

¶3 The Droegkamps alleged eight causes of action against the Langdons, Michelic and Realty Executives: (1) breach of contract (warranty); (2) intentional misrepresentation; (3) statutory misrepresentation pursuant to WIS. STAT. §§ 895.80 and 943.20(1)(d) (2001-02);1 (4) fraudulent misrepresentation pursuant to WIS. STAT. § 100.18; (5) strict liability misrepresentation; (6) negligent misrepresentation; (7) negligence; and (8) rescission/restitution. In their complaint, the Droegkamps alleged that certain defects in the property were not disclosed to them. The Droegkamps alleged the Langdons and Michelic did not disclose that the garage roof and windows leaked and that the basement wall got

wet. The Droegkamps also alleged that the Langdons and Michelic falsely represented that the only defect in the property was a window that did not open. The Droegkamps seek various damages, including diminished value, repair costs, personal injury damages, "mold problems" and loss of use.

¶4 American Southern moved to intervene, a motion that was granted on May 2, 2002. This first intervenor complaint addressed American Southern's coverage for Michelic and claimed that the policy's pollution exclusion (Exclusion Q) precluded coverage for claims alleged against Michelic.

¶5 American Southern filed a motion for summary judgment on June 27, 2002, regarding its coverage of Michelic. American Southern argued that the pollution exclusion, along with two additional policy exclusions, precluded coverage for Michelic. After Michelic filed his brief opposing summary judgment, American Southern amended its intervenor complaint, adding the two additional exclusions (Exclusions A and F) argued in its brief.

¶6 A hearing on American Southern's motion for summary judgment was held on July 29, 2002. The circuit court granted American Southern's motion, ruling that Exclusions A, F and Q all apply, precluding coverage. The circuit court did not specify which claims were covered by which exclusion. The court also ruled that the complaint did not allege a causal connection between Michelic's conduct and the claimed damages. The order granting summary judgment was filed on August 8, 2002.

¶7 On August 5, 2002, American Southern filed a second amended intervenor complaint that asserted the same policy exclusions raised with regard to Michelic precluded coverage for Realty Executives. That same day, American Southern filed a motion for summary judgment based upon the three exclusions cited in the second amended intervenor complaint and sought a declaration it was not required to defend or indemnify Realty Executives. American Southern also argued that the Droegkamps' complaint failed to allege a causal connection between Michelic's conduct and the claimed damages.

¶8 A hearing on American Southern's second motion for summary judgment was held on November 4, 2002. The circuit court granted summary judgment in favor of American Southern. The court held that the allegations of the Droegkamps' complaint were insufficient to trigger coverage for Realty Executives under the policy. An order granting summary judgment was filed on November 15, 2002. Michelic and Realty Executives appeal.

DISCUSSION

¶9 Michelic argues that American Southern's policy exclusion for deliberate misrepresentation does not preclude coverage for all the claims against him. He further argues that the policy exclusion for bodily injury and property damage does not preclude coverage for all alleged damages. In addition, Michelic argues that the policy exclusion for pollution does not preclude coverage for all the claims against him. Specifically, Michelic argues that the record is inadequate to support summary judgment based upon the pollution exclusion, that claims based upon water infiltration are not encompassed by the pollution exclusion, that mold does not qualify as a pollutant under the pollution exclusion and that mold did not seep, discharge, disperse, release or escape as required by the pollution exclusion. Finally, Michelic argues that the circuit court erred in finding no causal connection between Michelic's conduct and the alleged damages.

¶10 Realty Executives argues the complaint alleges facts sufficient to invoke American Southern's insurance coverage because the complaint's allegations satisfy the requirements of the policy's insuring agreement. Realty Executives argues that a claim is asserted against an insured, the complaint requests damages and the damages result from a claim which arises out of a negligent act, error or omission which occurred in rendering or a failure to render professional services. Realty Executives further argues that the policy's coverage exclusions are inapplicable.

¶11 The circuit court held, and American Southern argues, that the policy's exclusions, specifically Exclusions A, F and Q, operate to preclude coverage. The coverage of the policy is as follows:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages for Claims first made against the Insured and reported to the company during the Policy Period, arising out of any negligent act, error, omission or Personal Injury in the rendering of or failure to render Professional Services by an Insured covered under this policy.

The policy also contains several exclusions:

This insurance does not apply to Claims:

A. Arising out of a dishonest, fraudulent, criminal or malicious act or omission or deliberate misrepresentation (including, but not limited to, actual or alleged violations of state or federal anti-trust, price fixing, restraint of trade or deceptive trade practice laws, rules or regulations) committed by, at the direction of or with the knowledge of any Insured;

....

F. Of bodily injury, sickness, disease or death of any person or physical injury to or destruction of or loss of use of tangible property; provided, however, that this exclusion does not apply to the performance of Professional Services by an Insured in the distribution, maintenance, operation or use of a lock box or keyless entry system on property not owned or occupied by or leased to the Insured. The limit of liability available for Claims arising from the distribution, maintenance, operation or use of a lock box or keyless entry system shall not exceed $25,000 per claim. This limit shall be part of, and not in addition to, the limit of liability stated in the Declarations and the deductible provision shall apply;

....

Q. Based on any claim, action, judgment, liability, settlement, loss, defense, cost, or expense in any way arising out of actual, alleged, or threatened pollution, contamination, or any environmental impairment resulting from seepage, discharge, dispersal, release, or escape of any solid, liquid, gaseous, or radioactive matter including, but not limited to smoke, vapors, soots, fumes, acids, alkalis, chemicals, or toxic matter; or waste material (including materials to be recycled, reconditioned, or reclaimed); or oil or other petroleum substances or derivatives (including any oil refuse or oil mixed with waste), or thermal or vibratory effect including, but not limited to, sound or noise, or heat or cold, into or upon land, the atmosphere, or any water course or body of water, underground water or water table supplies, whether such results directly, indirectly, or in concurrence or in any sequence from the insured's activities or the activities of others and whether or not such is sudden, gradual, accidental, intended, foreseeable, expected, fortuitous, or inevitable and wherever or however such occurs.

But this exclusion shall not apply to bodily injury or property damage caused by heat, smoke, or fumes from a hostile fire unless such fire involves:

1. materials which are or were at any time used for the handling, storage, disposal, processing or treatment of waste; or

2. any premises, site or location:

a. which is or was at any time used for the handling, storage, disposal, processing or treatment of waste; or

b. on which any insured or contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations to test for, monitor, cleanup, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of, pollutants.

In essence, the policy does not cover intentional acts (Exclusion A), bodily injury of any person or physical injury to any tangible property (Exclusion F) or any claim resulting from pollution (Exclusion Q).

¶12 The means by which we review a grant of summary judgment are well known and need not be repeated here. C.L. v. Sch. Dist. of Menomonee Falls, 221 Wis. 2d 692, 697, 585 N.W.2d 826 (Ct. App. 1998). In essence, if there is no genuine issue of material fact and one side is entitled to judgment as a matter of law, the action is appropriate for summary judgment. U.S. Fire Ins. Co. v. Good Humor Corp., 173 Wis. 2d 804, 818, 496 N.W.2d 730 (Ct. App. 1993).

¶13 Interpretation of an insurance policy is a question of law we review independently without deference to the decisions of the trial court. Peace ex rel. Lerner v. Northwestern Nat'l Ins. Co., 228 Wis. 2d 106, 120, 596 N.W.2d 429 (1999). When determining whether an insurer has a duty to defend, we must compare the allegations contained within the four corners of the complaint with the terms of the insurance policy. C.L., 221 Wis. 2d at 699. The duty to defend is determined solely from the allegations contained in the complaint and extrinsic facts cannot be considered. Atl. Mut. Ins. Co. v. Badger Med. Supply Co., 191 Wis. 2d 229, 236, 528 N.W.2d 486 (Ct. App. 1995).

¶14 The existence of a duty to defend depends solely upon the nature of the claim being asserted against the insured and has nothing to do with the merits of that claim. C.L., 221 Wis. 2d at 699. At this stage, it is irrelevant if the allegations in the suit are later proven to be "groundless, false or fraudulent." Fireman's Fund Ins. Co. of Wis. v. Bradley Corp., 2003 WI 33, ¶21, 261 Wis. 2d 4, 660 N.W.2d 666. If the allegations contained in the complaint would be covered by the policy if proven, the insurer has a duty to defend. C.L., 221 Wis. 2d at 699.

¶15 The complaint in the instant case makes eight allegations against the Langdons, Realty Executives and Michelic: (1) breach of contract (warranty); (2) intentional misrepresentation; (3) statutory misrepresentation pursuant to WIS. STAT. §§ 895.80 and 943.20(1)(d); (4) fraudulent misrepresentation pursuant to WIS. STAT. § 100.18; (5) strict liability misrepresentation; (6) negligent misrepresentation; (7) negligence; and (8) rescission/restitution. The Droegkamps' request for relief asks for:

A. Difference in value between the property as represented and its actual value;

B. Cost of placing the property in the condition that it was represented to be in;

C. Costs of all repairs;

D. Costs of the action;

E. Actual reasonable attorney fees pursuant to Wis. Stats.;

F. Personal injury;

G. Mold problems;

H. Diminished value;

I. Loss of use.

¶16 The question is whether the allegations of the complaint fall within an exclusion under the insurance policy. If the allegations, if true, fall under any exclusion, American Southern is not obligated to defend Realty Executives and Michelic and the circuit court properly granted summary judgment. We will address each claim separately.

¶17 Again, the policy does not cover intentional acts (Exclusion A), bodily injury of any person or physical injury to any tangible property (Exclusion F) or any claim resulting from pollution (Exclusion Q). The first cause of action, breach of contract (warranty), reads as follows:

... That as a term and condition of the contract, the sellers [Langdons] warranted and represented that they had no notice or knowledge of any structural or mechanical defects of material significance in the sale of the property that is the subject of this action.

... That in truth and in fact, there were significant structural or mechanical defects in the subject property that were known to the defendants, including, but not limited to: garage roof leaks, windows leak, basement wall gets wet.

... That the fact that the property contained these defects constitutes a breach of the warranty provided by the defendants.

... That as a direct and proximate cause of the breach of the contract by the defendants, the plaintiffs incurred substantial monetary damages.

This breach of contract (warranty) claim alleges an intentional act, the "sellers warranted and represented" no knowledge of any defects but in truth there were significant defects "known to the defendants." Pursuant to Exclusion A, count one is not covered by the policy.

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¶18 The second cause of action, intentional misrepresentation, reads as follows:

... That the defendants made the following false representations of fact regarding the condition of the subject premises, knowing that said representations were untrue, or recklessly, without caring whether they were true or not: only defect was window, didn't open.

... That the defendants additionally owed a duty to the plaintiffs to disclose all known material facts about the property, specifically significant defects in the property, which they failed to do.

... That the defendants made these representations, including the failure to disclose material facts, with the intent to deceive and induce the plaintiffs to act upon them, and indeed the plaintiffs did believe such representations to be true and justifiably relied on them, and as a result, purchased the subject property.

... That as a direct and proximate result of the false representations made by the defendants, the plaintiffs suffered pecuniary damages.

This claim of intentional misrepresentation, by its very name, requires an intentional act; in addition, the complaint alleges an intentional act of misrepresentation. Pursuant to Exclusion A, count two is not covered under the policy.

¶19 The third cause of action, statutory misrepresentation pursuant to WIS. STAT. §§ 895.80 and 943.20(1)(d), reads as follows:

... That the defendants made the following false representations of fact regarding the condition of the subject premises, knowing that said representations were untrue, or recklessly, without caring whether they were true or not: only defect was window, didn't open.

... That the defendants additionally owed a duty to the plaintiffs to disclose all known material facts about the property, specifically significant defects in the property, which they failed to do.

... That the defendants made these representations, including the failure to disclose material facts, with the intent to deceive and induce the plaintiffs to act upon them, and indeed the plaintiffs did believe such representations to be true and justifiably relied on them, and as a result, purchased the subject property.

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... That the misrepresentations made by the defendants are in violation of Wis. Stats. §§ 895.80 and 943.20(1)(d), entitling the plaintiffs to treble damages, attorney fees, and all costs.

... That as a direct and proximate result of the false representations made by the defendants, the plaintiffs suffered pecuniary damages.

The third cause of action alleges that the defendants failed to disclose material facts with the "intent to deceive and induce the plaintiffs to act upon them." Pursuant to Exclusion A, count three is not covered under the policy.

¶20 The fourth cause of action, misrepresentation pursuant to WIS. STAT. § 100.18, reads as follows:

... That the defendants made the following false representations of fact regarding the condition of the subject premises: only defect was window, didn't open.

... That the defendants additionally owed a duty to the plaintiffs to disclose all known material facts about the property, specifically significant defects in the property, which they failed to do.

... That the defendants made these representations, including the failure to disclose material facts, with the intent to induce the plaintiffs to act upon them, and indeed the plaintiffs did believe such representations to be true and justifiably relied on them, and as a result, purchased the subject property.

... That the fraudulent misrepresentations made by the defendants are in violation of Wis. Stats. § 100.18, entitling the plaintiffs to attorney fees, and all costs.

... That as a direct and proximate result of the false representations made by the defendants, the plaintiffs suffered pecuniary damages.

The fourth cause of action alleges that the defendants failed to disclose material facts with the "intent to induce the plaintiffs to act upon them." Pursuant to Exclusion A, count four is not covered under the policy.

¶21 The fifth cause of action, strict liability misrepresentation, reads as follows:

... That the defendants made false representations as previously alleged and additionally failed to disclose material facts which also constitutes misrepresentation.

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... That these representations were made under circumstances where the defendants necessarily ought to have known the truth or untruth of the statements, or was [sic] in a position to know the truth and purported to know the truth.

... That the plaintiffs believed such statements and justifiably relied on these statements to their pecuniary damage.

Exclusion A applies only to misrepresentations characterized by deliberate or intentional conduct. The strict liability misrepresentation claim does not allege an intentional or deliberate act and can be established without proof of deliberate conduct. Exclusion A does not apply.

¶22 Nor is the strict liability misrepresentation claim precluded by Exclusions F or Q. Again, Exclusion F excludes coverage for bodily injury or physical injury to tangible property. While this may apply to some claimed damage, the Droegkamps also allege pecuniary damage, damage not excluded by the policy. Exclusion Q precludes coverage for any claim based upon actual or alleged pollution. The strict liability claim does not allege any pollution damage. Admittedly, the Droegkamps' request for relief does request compensation for mold problems. However, the mold language in the complaint appears only in the request for relief, not in the substantive portion of the complaint; thus it is not properly considered a substantive allegation. See Midway Motor Lodge of Brookfield v. Hartford Ins. Group, 226 Wis. 2d 23, 35-36, 593 N.W.2d 852 (Ct. App. 1999). Furthermore, there is some support for the argument that mold does not constitute pollution. See Leverence v. U.S. Fid. & Guar., 158 Wis. 2d 64, 97, 462 N.W.2d 218 (Ct. App. 1990). We must therefore conclude that Exclusion Q does not preclude coverage for the strict liability misrepresentation claim.

¶23 The sixth cause of action, negligent misrepresentation, reads as follows:

... That the defendants negligently disclosed or negligently failed to disclose or discover material facts regarding the condition and/or history of the property under circumstances in which a person of ordinary intelligence, prudence and similar experience would have discovered and disclosed including, but not limited to: garage roof leaks, windows leak, basement wall gets wet.

... That this misrepresentation created an unreasonable risk of monetary damages to the plaintiffs.

... That the defendants' actions constituted a lack of reasonable care in ascertaining and disclosing those facts.

... That the plaintiffs believed such representations to be true and justifiably relied on them to their pecuniary damage.

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The same logic from the strict liability misrepresentation claim applies with equal force here. Exclusion A applies only to misrepresentations characterized by deliberate or intentional conduct but the negligent misrepresentation claim does not allege an intentional or deliberate act. Exclusion F only excludes coverage for bodily injury or physical injury to tangible property but the Droegkamps allege monetary and pecuniary damage, damage not excluded by Exclusion F. Exclusion Q, the

pollution exclusion, does not apply as the negligent misrepresentation claim does not allege any pollution damage and there is some authority that holds mold is not a pollutant. See id. Count six is not excluded by the policy.

¶24 The seventh cause of action, negligence, reads as follows:

…That the defendants owed a duty of due care to provide the plaintiffs with all pertinent information regarding the subject premises and to inspect the subject premises to determine whether it contained structural or mechanical defects or other material facts that should have been brought to the attention of the plaintiffs including, but not limited to: garage roof leaks, windows leak, basement wall gets wet.

... That the defendants breached their duty by failing to discover said defects or material facts where, in the exercise of ordinary care and considering the expertise of the defendants, should have ascertained said defects or facts, and by failing to provide all pertinent information regarding the property to the buyers.

... That because of the failure of the defendants to locate the defects and/or notify the plaintiffs of said defects or material facts, the plaintiffs purchased the property and, as a result, sustained pecuniary loss.

Our previous rationale applies. Exclusion A applies only to misrepresentations characterized by intentional conduct but the negligence claim does not allege an intentional or deliberate act. Exclusion F only excludes coverage for bodily injury or physical injury to tangible property but the Droegkamps allege pecuniary damage, damage not excluded by the policy. Exclusion Q does not apply as the negligence claim does not allege any pollution damage and there is some authority that holds mold is not a pollutant. See id. The negligence claim is not excluded by the policy.

¶25 The eighth and final cause of action, rescission/restitution, reads as follows:

... In the alternative, the plaintiffs allege that as a result of the misrepresentation of the defendants, the plaintiffs have purchased property that is defective and will never be the property that was represented to the plaintiffs.

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... That the plaintiffs ask the Court to rescind the sale, return all moneys paid by the plaintiffs in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property.

While this count is labeled a separate cause of action, it is, at heart, an alternative prayer for relief; the Droegkamps are asking the court to rescind the sale based upon the misrepresentations of the defendants. Because we conclude that some of the misrepresentation claims are covered under American Southern's policy, the request for rescission must also be covered.2

¶26 We next address the "causal nexus" issue. Relying on Qualman v. Bruckmoser, 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991), Benjamin v. Dohm, 189 Wis. 2d 352, 525 N.W.2d 371 (Ct. App. 1994), and Smith v. Katz, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), American Southern argues, and the circuit court agreed, that the complaint does not allege a causal connection between the alleged misconduct and the damages alleged. We disagree.

¶27 In determining whether damage was caused by an occurrence, we must look at the alleged misconduct and determine whether a "causation nexus" exists between the alleged misconduct and the damage claimed. Smith, 226 Wis. 2d at 823. Without a "causation nexus," the alleged occurrence cannot cause damage. Id.

¶28 The Smith facts are as follows: The Smiths purchased a lot in July 1991 but did not discover underground springs on the lot until they prepared for construction in March 1993. Id. at 801. When their builder began to construct the foundation of the house, the foundation hole filled with water, causing the concrete foundation to collapse three or four times during construction. Id. The Smiths filed suit against the seller alleging breach of warranty, intentional misrepresentation, strict liability misrepresentation and negligent misrepresentation. Id.

¶29 In addressing causation, the supreme court held that there were several reasons why the seller's misrepresentations did not cause physical injury to the property. Id. at 823. First, the court noted that the Smiths purchased the property in July 1991 but there was no physical injury to the property until after March 1993. Id. In addition, ownership and control of the lot had changed hands during the interim. Id. The Smiths had decided not only to build a house but also decided where on the lot the house would be located. Id. Someone other than the seller decided to continue building the house on the same spot even after the foundation had collapsed several times. Id.

¶30 Furthermore, the supreme court noted that the Smiths' additional allegations of negligence against the builder provided evidence that the seller's

misrepresentations did not cause the property damage. Id. The supreme court concluded that negligent misrepresentations do not cause groundwater pressure or cracks in concrete foundations and there were too many "interruptions" between the occurrence and the property damage to show an unbroken chain of causation under the policies. Id. at 824.

¶31 However, the Smith court indicated that in a different factual situation, the nexus requirement could be satisfied, citing with approval to a passage in our decision in Welter v. Singer, 126 Wis. 2d 242, 250, 376 N.W.2d 84 (Ct. App. 1985):

The Wisconsin Supreme Court in Olsen v. Moore, [56 Wis. 2d 340, 202 N.W.2d 236 (1972)], joined the majority of jurisdictions by adopting the "cause" analysis. That is, where a single, uninterrupted cause results in all of the injuries and damage,

there is but one "accident" or "occurrence." If the cause is interrupted or replaced by another cause, the chain of causation is broken and there has been more than one accident or occurrence (Smith, 226 Wis. 2d at 824).

¶32 Here the facts relating to causation alleged in the Droegkamps' complaint are markedly different from those in Smith. First, the Droegkamps remained in full ownership and control of the property. Second, the home in question on the property already existed at the time of purchase. Third, the Droegkamps have not alleged any intervening negligent acts by or against third parties.

¶33 The complaint alleges that the Langdons made false representations of material facts, representations that the Langdons necessarily ought to have known the untruth of, and that the Droegkamps believed these representations and relied upon them to their damage. The complaint also alleges that the Langdons negligently disclosed or failed to disclose or discover material facts regarding the condition of the property, which constituted a lack of reasonable care, and that these misrepresentations created an unreasonable risk of monetary damage to the Droegkamps, who believed the misrepresentations and relied upon them to their pecuniary damage. The complaint further alleges that the Langdons owed the Droegkamps a duty of care to provide them with pertinent information regarding the property, that the Langdons breached this duty by failing to discover material defects and that this breach caused the Droegkamps to purchase the property and suffer pecuniary loss.

¶34 In examining the allegations of a complaint in relation to the terms of an insurance policy, we must liberally construe those allegations and assume all reasonable inferences. Id. at 815-16. Under this favorable test, we conclude the Droegkamps' complaint sufficiently alleges a nexus between the alleged misrepresentations and negligence and the ensuing loss.

¶35 We also conclude that Qualman, 163 Wis. 2d at 361, and Benjamin, 189 Wis. 2d at 352, are equally inapplicable. Both of these cases hold that allegations of pecuniary loss resulting from structural damage do not constitute property damage under an insurance policy and that even if an allegation of

pecuniary loss included a claim for loss of use thereby resulting in property damage, coverage would still not exist since it was the structural defect, not the misrepresentation, that caused the damage. Qualman, 163 Wis. 2d at 366-68; Benjamin, 189 Wis. 2d at 361-63. However, as noted, the statements regarding the effect of an allegation of loss of use were dicta. Furthermore, it is not clear from the text of the two cases whether the complaints expressly alleged that the misrepresentations induced the purchasers to buy. Here, the Droegkamps' complaint expressly alleges that the Langdons' misrepresentations were made to induce the Droegkamps to purchase the property and the misrepresentations directly and proximately caused the Droegkamps to do so. Again, our duty to defend analysis is limited to a comparison of the language of the complaint against the language of the policy. Smith, 226 Wis. 2d at 806-07. The complaint adequately alleges a causal nexus.

CONCLUSION

¶36 We agree with Michelic and Realty Executives that some of the allegations of the complaint, specifically the strict liability misrepresentation claim, the negligent misrepresentation claim, the negligence claim and the rescission/restitution claim, are not excluded under American Southern's policy. We also conclude that a sufficient causal nexus between the alleged misrepresentations and the damage is alleged in the complaint. We therefore affirm that portion of the judgment granting summary judgment to American Southern on the intentional causes of action and reverse that portion of the judgment granting summary judgment on the strict liability misrepresentation claim, the negligent misrepresentation claim, the negligence claim and the rescission/restitution claim and on the issue of causal nexus. We remand this matter to the circuit court for proceedings consistent with this opinion.

Costs are denied to all parties.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Notes:

1. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

2. Even though the complaint does contain theories of liability not covered by the policy, American Southern is obligated to defend the entire action because one theory of liability falls within the coverage of the policy. See Sch. Dist. of Shorewood v. Wausau Ins. Cos., 170 Wis. 2d 347, 366, 488 N.W.2d 82 (1992).

3. Pulte Home Corp. v. Parex, Inc., 2003 VA 243 (Va, 2003)

PULTE HOME CORPORATION v. PAREX, INC. (April 17, 2003)

Summary:

In the case at bar, Pulte was left with the naked allegation in its cross-claim that its approval of the use of the EIFS was based upon the express oral or written warranties of Parex "by way of affirmations of fact, promises, descriptions, and/or use of samples and/or models regarding the appearance, durability, and/or water-resistance of [EIFS]." This allegation merely parroted the language of Code § 8.2-313, which sets forth several legal bases for the creation of express warranties, and amounted to no more than a legal conclusion. *fn5 The cross-claim did not identify any "affirmations of fact, promises, descriptions, and/or use of samples and/or models" purportedly made by Parex.

FACTS OF THE CASE

The allegations of the cross-claim were insufficient, therefore, to state a claim for breach of express warranty. Rule 1:4(d); Moore v. Jefferson Hospital, Inc., 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967) (motion for judgment must set forth the essential facts of a claim, not conclusions of law).

On June 15, 2000, Tim L. Peckinpaugh and Pamela S. McKinney- Peckinpaugh (the Peckinpaughs), owners of a home in Wheatland Estates, Fairfax County, filed an amended motion for judgment against Pulte Home Corporation (Pulte), builder of the home, for damages allegedly caused by Pulte's use of a defective synthetic stucco product known as "Exterior Insulation and Finish System," or "EIFS." *fn1 Parex, Inc. (Parex), the manufacturer of the EIFS, was also named as a defendant. The Peckinaughs sought damages of $500,000 from Pulte and Parex to cover the cost of removing the synthetic stucco, installing new exterior siding, and repairing the damaged property.

Also on June 15, 2000, Pulte filed a cross-claim against Parex. In separate counts, Pulte asserted claims for breach of express warranty, breach of implied warranty, indemnification, and contribution. *fn2 In each count, Pulte sought recovery from Parex for any damages that Pulte might be required to pay the Peckinpaughs, plus costs, interest, and attorney's fees. *fn3

Pulte filed a demurrer to the Peckinpaughs' amended motion for judgment, and Parex filed demurrers to the Peckinpaughs' amended motion for judgment and to Pulte's cross-claim. The demurrers were argued before the trial court on September 28, 2000. With respect to Pulte's demurrer to the Peckinpaughs' amended motion for judgment, the trial court orally overruled the demurrer and entered a written order embodying that ruling.

With respect to Parex's demurrer to the Peckinpaughs' amended motion for judgment, the trial court sustained that demurrer. With respect to Parex's demurrer to Pulte's cross- claim, the trial court orally sustained the demurrer as to each count, except the count for breach of implied warranty, which the court took under advisement. Later in the day on September 28, 2000, the court entered an order sustaining the demurrer to the count for implied warranty.

On October 18, 2000, Pulte sought by motion to have the trial court reconsider its action on the demurrers but was unsuccessful in the effort. Pulte then settled the Peckinpaughs' claim. It does not appear from the record, but Pulte states on brief and Parex does not deny, that the Peckinpaughs assigned to Pulte their claim against Parex. Pulte stated during oral argument that it is not asserting any rights as an assignee in this appeal. *fn4 .

An order sustaining Parex's demurrer to the counts in Pulte's cross-claim for breach of express warranty, indemnification, and contribution was entered on March 2, 2001. The proceeding was terminated by a final order entered on May 20, 2002. Thereafter, we awarded Pulte this appeal.

Pulte has filed four assignments of error, attacking in order the sustaining of the demurrer to the cross-claim counts for breach of express warranty, breach of implied warranty, indemnification, and contribution. The sole question for decision is whether the trial court erred in sustaining Parex's demurrer to Pulte's cross-claim.

I. Breach of Express Warranty

Pulte argues that, in its cross-claim, it "pled its breach of express warranty based on two separate theories." First, it alleged in the cross-claim that, to the extent it approved the use of EIFS on the Peckinpaughs' house, such "approval was based upon the express oral or written warranties of Parex by way of affirmations of fact, promises, descriptions, and/or use of samples and/or models regarding the appearance, durability, and/or water-resistance of [EIFS]." Second, Pulte alleged in its cross-claim that it was entitled to recover as a direct and/or intended beneficiary under written limited warranties provided by Parex to the subcontractors and supplier.

Pulte maintains that, in sustaining Parex's demurrer, the trial court engaged in "raw fact finding," erroneously "determining that there was 'no express warranty'" and that "no [written limited] warranties existed." For this error, Pulte concludes, the judgment of the trial court should be reversed.

We disagree with Pulte. Before demurring to Pulte's cross-claim, Parex filed a motion referencing the allegations in the cross-claim with respect to oral and written express warranties and craving oyer. The motion sought "any alleged contract or agreement and any alleged express warranty forming the basis" of the count for breach of express warranty in Pulte's cross-claim. Pulte responded that it was "not yet in possession of any written contract entered into by Parex, nor any written warranty issued by Parex" but would soon serve requests for documents upon Parex, the subcontractors, and the supplier.

Hence, Pulte was left with the naked allegation in its cross-claim that its approval of the use of the EIFS was based upon the express oral or written warranties of Parex "by way of affirmations of fact, promises, descriptions, and/or use of samples and/or models regarding the appearance, durability, and/or water-resistance of [EIFS]." This allegation merely parroted the language of Code § 8.2-313, which sets forth several legal bases for the creation of express warranties, and amounted to no more than a legal conclusion. *fn5 The cross-claim did not identify any "affirmations of fact, promises, descriptions, and/or use of samples and/or models" purportedly made by Parex. The allegations of the cross-claim were insufficient, therefore, to state a claim for breach of express warranty. Rule 1:4(d); Moore v. Jefferson Hospital, Inc., 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967) (motion for judgment must set forth the essential facts of a claim, not conclusions of law).

II. Breach of Implied Warranty *fn6

Whether the trial court erred in sustaining Parex's demurrer to Pulte's claim for breach of implied warranty turns on whether the damages for the alleged breach are direct or consequential. Parex contends the damages are consequential and not recoverable in the absence of privity between Pulte and Parex. Pulte does not claim privity exists but contends the damages at issue are direct and recoverable despite the lack of privity. *fn7

In its order of September 28, 2000, the trial court stated that it was sustaining Parex's demurrer to Pulte's count for breach of implied warranty "based upon the ruling in Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., et al., 254 Va. 240, 491 S.E.2d 731 (1997)." There, we responded to a question certified to us by the United States Court of Appeals for the Fourth Circuit. The question read as follows:

Is privity required to recover economic loss under Va. Code § 8.2- 715(2) due to the breach of the implied warranty of merchantability, notwithstanding the language of Va. Code § 8.2- 318? 254 Va. at 244, 491 S.E.2d at 733.

Pulte Home Corp. v. Parex, Inc., 2003 VA 243 (Va, 2003)

We said that to "answer this question, we must first determine whether § 8.2-715(2) requires the existence of a contract for the recovery of economic loss damages

in breach of warranty cases." 254 Va. at 244, 491 S.E.2d at 733. Section 8.2-715(2) provides as follows:

Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise[.]

We said that because the Court of Appeals had directed its inquiry specifically to this section, we would assume the court had concluded that the economic loss damages claimed by Beard were consequential damages rather than direct damages. 254 Va. at 244, 491 S.E.2d at 733. We also said that because § 8.2-715(2)(a) contained the language, " 'at the time of contracting,' " the statute "requires a contract between the parties for the recovery of consequential economic loss damages incurred as a result of a breach of warranty by the seller." 254 Va. at 245, 491 S.E.2d at 733-34.

We then turned to the question whether the provisions of § 8.2-318, also referenced in the certified question, supersede the contract requirement of § 8.2-715(2)(a). Section 8.2-318 provides in pertinent part as follows:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods[.]

We stated that because § 8.2-715(2)(a) addresses in a specific way the subject of the ability to raise the common law requirement of privity as a defense and § 8.2-318 addresses the subject in a general way, § 8.2-715(2)(a) prevails. We stated further that "because § 8.2- 715(2)(a) requires a contract between the parties for recovery of consequential economic loss damages in a claim for breach of the implied warranty of merchantability, we answer the certified question in the affirmative," 254 Va. at 246, 491 S.E.2d at 734, meaning that privity is required to recover economic loss under Code § 8.2-715(2) due to the breach of the implied warranty of merchantability.

Here, Pulte argues that the trial court misapplied this Court's opinion in Beard. That case dealt only with consequential damages, not direct damages, Pulte maintains, yet the trial court cited Beard in ruling that privity is required not only to assert claims for consequential damages but also to assert claims for direct or non-consequential damages.

Pulte cites a passage from the record to show that the trial court made such a ruling. During oral argument on Parex's demurrer on September 28, 2000, the trial judge stated he was taking under advisement the question whether the damages in question were direct or consequential and that he would "have an answer on that this afternoon." One of the counsel then stated that "the Beard case doesn't address whether the anti-privity [rule] does apply to direct damages" and "[t]hat will have to be part of your ruling." The judge replied: "You are right. Thank you." This indicates, Pulte says, that when the trial judge entered the order that afternoon sustaining Parex's demurrer based upon Beard, such entry meant that the judge had held the requirement of privity applicable to both consequential and direct damages.

We do not read the record this way. Since the trial judge cited Beard, it will be presumed that he had read our opinion, understood that the case involved only consequential damages, and applied our ruling correctly. Without some indication the trial judge acted otherwise, we can only conclude that his reference to Beard meant he found the damages in this case, like those in Beard, to be consequential, not direct, and, as a result, there could be no recovery for Pulte without privity between it and Parex.

Pulte maintains that if the trial court did determine that the damages at issue were consequential, its determination was inappropriate because made at the demurrer stage and "this was the wrong point in time." Pulte says that in its cross-claim it specifically requested "direct damages under Section 8.2-714(2) of the Virginia Code, together with consequential damages to the extent available by law." This was sufficient, Pulte concludes, to save its claim for direct damages from dismissal on demurrer, and it was "entitled to have [its] day in court on that issue." *fn8

We disagree with Pulte. Whether damages are direct or consequential is a matter of law for decision by the court. R.K. Chevrolet, Inc. v. Hayden, 253 Va. 50, 56, 480 S.E.2d 477, 481 (1997). The trial court had before it Pulte's fourteen page cross-claim with each count set forth fully, giving the court all the information it needed to make an informed judgment on Parex's demurrer. Furthermore, we cannot find from the appendix where Pulte ever objected to the court's acting on the demurrer on the ground it was "the wrong point in time," Rule 5:25, and none of Pulte's assignments of error mentions the point, Rule 5:17(c).

With respect to Pulte's argument that its claim for direct damages should have survived demurrer merely because it requested such damages in its cross-claim, the trial court during argument appropriately observed that just saying damages are direct does not make them direct. The allegations of the cross-claim leading up to the request disclose the true nature of Pulte's damages as consequential. These allegations read as follows:

In the event [Pulte] is found liable to [the Peckinpaughs] or otherwise incurs any loss whatsoever as a result of [the Peckinpaughs'] allegations, [Pulte] is entitled to recover from Parex for the breach of said implied warranties insofar as Parex's breach would be the factual and proximate cause of all or part of [Pulte's] loss.

WHEREFORE, [Pulte] demands payment from Parex for any damages that [Pulte] may be required to pay [the Peckinpaughs] and for any other loss that [Pulte] consequently may incur . . . .

In other words, Pulte would suffer damages from Parex's breach of warranty only upon the happening of an intermediate event, i.e., Pulte being found liable to the Peckinpaughs for the damages they suffered. Hence, by their very nature, Pulte's damages would be consequential rather than direct.

"The term 'consequential damages' is thus defined in Black's Law Dictionary: 'Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.' " Washington & Old Dominion Ry. Co. v. Westinghouse Elec. & Mfg. Co., 120 Va. 620, 634, 91 S.E. 646, 647 (1917) (quoting Black's Law Dictionary 249 (2nd ed. 1910)).

Pulte's damages fit into this definition like a hand in a glove. They did not flow directly and immediately from the act of Parex's breach of warranty but from a consequence of the Peckinpaughs' recovery of damages from Pulte. Indeed, Pulte acknowledges that it is entitled to recover only on some "sort of a pass through." Since such a detour is required to get from Parex's breach of warranty to Pulte's damages, those damages cannot be considered as direct but consequential, with a showing of privity necessary for their recovery. There has not been such a showing in this case.

III. Indemnification

Pulte states that its claim for indemnification "is based on the theory that any liability incurred by [Pulte] 'would be derivative, constructive, passive and/or secondary, while the acts and omissions of [Parex] would be the active, direct and primary cause of Plaintiffs' damages.' " Pulte says it is entitled to implied or equitable indemnification because it is called upon to discharge the obligation of Parex, the party primarily liable for the Peckinpaughs' damages. Yet, Pulte complains, the trial court denied its claim for implied or equitable indemnity because the court erroneously relied upon Virginia Elec. & Power Co. v. Wilson, 221 Va. 979, 277 S.E.2d 149 (1981), which states that "[t]he distinguishing feature of indemnity is that it must necessarily grow out of a contractual relationship." Id. at 981-82, 277 S.E.2d at 150.

Pulte maintains that the statement in Wilson is "pure dicta," that the case involved contribution, not indemnification. However, the statement is not dicta; the Court stated that it had granted the appeal "to determine if Vepco . . . has a right of contribution or indemnity against Wilson," id. at 980, 277 S.E.2d at 150 (emphasis added), the Court noted that the third-party motion for judgment alleged "liability for contribution or indemnity," id., 277 S.E.2d at 149 (emphasis added), and the Court held that "no right of contribution or indemnity could exist in favor of Vepco," id. at 982, 277 S.E.2d at 150 (emphasis added).

However, Pulte argues, Wilson is not controlling because this Court held Carr v. The Home Ins. Co., 250 Va. 427, 463 S.E.2d 457 (1995), that equitable indemnification is viable under Virginia law. We did say in Carr that we agreed that "[e]quitable indemnification arises when a party[,] without personal fault, is nevertheless legally liable for damages caused by the negligence of another." Id. at 429, 463 S.E.2d at 458. But we also said that "[a] prerequisite to recovery based on equitable indemnification is the initial determination that the negligence of another person caused the damage." Id.

So, whether Wilson or Carr is applied, Pulte loses either way. It cannot win under Wilson because the claim for indemnification did not arise out of a contractual relationship, and it cannot win under Carr because there has been no determination that any act or omission of Parex caused the damage to the Peckinpaughs' house.

IV. Contribution

Pulte initially said on brief that its claim to contribution was based upon Code § 8.01-34, which provides that "[c]ontribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral

turpitude." Countering, Parex stated that it cannot be deemed a joint tortfeasor with Pulte and, therefore, Code § 8.01-34 is inapplicable.

Apparently conceding the point, Pulte now says that, "even if Parex were not a joint tortfeasor," this Court recognized in Thweatt's Adm'r v. Jones, Adm'r, 22 Va. (1 Rand.) 328 (1823), "that the common law right to contribution is not limited just to joint tortfeasors, but rather that contribution runs to all parties who 'are equally bound to bear a burthen.' 22 Va. at 334." Responding, Parex maintains that because the trial court sustained its demurrer to "each and every claim" in the Peckinpaughs' amended motion for judgment, there is no joint liability for those claims and contribution will not lie.

We agree with Parex. In Virginia Elec. & Power Co. v. Wilson, supra, we emphasized that " 'before contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought.' " 221 Va. at 981, 277 S.E.2d at 150 (quoting Bartlett v. Roberts Recapping, Inc., 207 Va. 789, 792-93, 153 S.E.2d 193, 196 (1967)). And in Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp., 234 Va. 54, 360 S.E.2d 342 (1987), we made it clear that while contribution will lie if the injured party's cause of action is not presently enforceable but was enforceable at some time in the past, contribution is unavailable if the injured party "never had an enforceable cause of action against the target of the contribution claim." Id. at 58, 360 S.E.2d at 344 (emphasis added).

The trial court's action in sustaining Parex's demurrer to the Peckinpaughs' amended motion for judgment was tantamount to a holding that the Peckinpaughs never had an enforceable cause of action against Parex. *fn9 Hence, there is no joint liability for the Peckinpaughs' claims as between Pulte and Parex, and Pulte's claim for contribution against Parex does not lie.

V. CONCLUSION

Finding no error in the rulings of the trial court, we will affirm its judgment.

Opinion Footnotes

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*fn1 The Peckinpaughs alleged in their amended motion for judgment that the EIFS was defectively designed and applied, causing undue amounts of moisture intrusion into the structure of their home, without means of escape, in turn causing wood to rot and decay.

*fn2 Originally, the cross- claim also contained a count for breach of contract, but Pulte later abandoned that count.

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*fn3 Pulte makes the assertion on brief that "[o]ne item of damage sought by [Pulte] is the lost value of the stucco goods received from Parex . . . (i.e. the lost value of a defective product). App. 13." However, this claim cannot be found on Page 13 of the appendix; that is a page in the Peckinpaughs' amended motion for judgment related to an entirely different matter. But the claim cannot be found in the cross-claim either.

*fn4 The owners of fourteen other homes built by Pulte filed similar separate actions against Pulte and Parex for damages caused by the use of EIFS. Those cases are not before us, but Pulte states in a footnote to its brief that the cases "followed a similar path, with the plaintiffs settling their claims with [Pulte] and assigning their remaining claims against [Parex] to [Pulte]," and that Pulte and Parex agreed that Pulte "would non- suit its assigned claims against Parex in the other cases pending the outcome of this appeal . . . ."

*fn5 Code § 8.2- 313 provides in pertinent part as follows: (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . . . (b) Any description of the goods which is made part of the basis of the bargain . . . . (c) Any sample or model which is made part of the basis of the bargain . . . .

*fn6 Pulte states it is the implied warranty of merchantability that is at issue in this case.

*fn7 Pulte did not purchase the EIFS from Parex. Rather, Pulte engaged a subcontractor to apply the EIFS, the subcontractor obtained the EIFS through a supplier, and the supplier purchased the EIFS from Parex.

*fn8 Code § 8.2- 714(2) provides that "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

*fn9 In a last- ditch effort to demonstrate that the Peckinpaughs have an enforceable cause of action against Parex, Pulte says that the Peckinpaughs "alleged facts that supported an unasserted claim against Parex for false advertising, in violation of Va. Code § 18.2- 216," and that the same allegations in the fourteen companion cases withstood demurrers by Parex. However, Pulte does not tell us what facts support the unasserted claim, where they can be found in the record, or how we can even consider, let alone find determinative, what happened in cases not before us.

3. Allison v. Fire Insurance Exchange, 2002 TX 8008 (TXCA, 2002)

December 19, 2002

Summary:

In June 2001, a Travis County jury awarded a verdict for over thirty-two million dollars against Fire Insurance Exchange, a member of the Farmers Insurance Group ("FIE"), for its handling of Mary Melinda Ballard's *fn1 homeowner's insurance claims, which began as a single claim for water damage to a hardwood floor and evolved to include mold contamination of the entire house and outbuildings. FIE contends in eleven issues on appeal that the evidence was legally and factually insufficient to support the jury's liability findings; the district court erred in denying transfer of venue to Hays County; the evidence was legally and factually insufficient to support the jury's findings that FIE failed to appoint a competent, independent appraiser and that the appraisal decision was rendered as a result of fraud, accident, or mistake; the district court abused its discretion in numerous evidentiary rulings; there was no evidence of a knowing violation; the punitive damages award is excessive; there was no evidence to support the mental anguish award; there was insufficient evidence to support the attorneys' fees award; and there was no basis for the statutory penalty under article 21.55 of the insurance code. See Tex. Ins. Code Ann. art. 21.55, § 6 (West Supp. 2003).

FACTS OF THE CASE:

We recognize the constraints on this Court in its review of this hotly disputed case and the importance of according the proper degree of deference to the fact finder. We have carefully reviewed the entire record. We hew to the record below despite the metamorphosis of the parties' theories on appeal. We hold that probative evidence supports the district court's denial of FIE's motion to transfer venue to Hays County. We further conclude that the district court did not abuse its discretion in the evidentiary rulings of which FIE complains. We also find sufficient evidence to uphold the jury's findings that FIE breached its duty of good faith and fair dealing toward Ballard and that FIE committed a Deceptive Trade Practices Act (DTPA) violation. We find insufficient evidence, however, to support the jury's findings of unconscionability or fraud. We additionally find insufficient evidence to support the jury's findings that FIE failed to appoint a competent, independent appraiser or that the appraisal decision was a result of fraud, accident, or mistake. Because the court's charge specified that findings of either a breach of the duty of good faith and fair dealing or a DTPA violation are sufficient to uphold the jury's award of actual damages, we affirm the actual damages award in part, in the amount of $4,006,320.72, in addition to prejudgment and post judgment interest as stated in the final judgment. We reverse the award of $176,000 for Ballard's reasonable and necessary costs of the appraisal process.

[11] We further conclude that there is no evidence to support the jury's finding that FIE "knowingly" breached its duty of good faith and fair dealing toward Ballard. Because a finding of a knowing violation is required to uphold punitive and mental anguish damages, we reverse the jury's awards for these damages and render judgment that Ballard take nothing for punitive and mental anguish damages. We uphold the district court's award of the article 21.55 statutory penalty in part and remand the penalty for recalculation in accordance with this opinion. We find sufficient evidence to support the award of attorneys' fees but cannot say that the amount of the award is reasonable, given our significant reduction of the jury's damages awards. Therefore, we remand the issue of attorneys' fees to the district court for further proceedings consistent with this opinion.

[12] Ronald Allison, Ballard's husband, filed a separate appeal, contending that the district court erred in granting FIE's motion to exclude Allison's causation experts and in turn granting FIE's no-evidence motion for partial summary judgment pertaining to Allison's personal injury claims. Because we find no error in the district court's rulings, we affirm the district court's rulings in granting FIE's motion to exclude his causation experts and no-evidence motion for partial summary judgment pertaining to Allison's personal injury claims. Accordingly, we affirm the district court's judgment dismissing Allison's personal injury claims.

[13] BACKGROUND

[14] In 1990, Ballard bought a large house in Dripping Springs, Texas, for $275,000 in a foreclosure sale. The main house was approximately 7,400 square feet, with several outbuildings, including a nanny's apartment (also referred to as the groundskeeper's house), a garage, and a barn. In late 1992, Ballard began insuring the house with FIE. The amount of coverage remained steady over the next few years, except for cost-of-living adjustments. The coverage in late 1998 was $313,000 for the house and $187,800 for the contents.

[15] Within a couple of years before the claims at issue, which began in December 1998, the Ballard house had a few plumbing leaks. In 1996 and 1997, Ballard filed two claims for plumbing leaks caused by frozen pipes; FIE paid $60,000 to $70,000 for the 1997 claim. She did not make another claim until December 1998 but continued to have plumbing leaks. In late 1997, Ballard had a toilet leak repaired in the downstairs half bathroom, which required another repair in January 1998.

The leak caused damage to the bathroom carpet pad and wood subflooring, both of which were replaced in February 1998. The same month, Ballard notified Richard Roberts of Double R Floors that some of the boards in the downstairs

hardwood floor were warping. Roberts took a moisture reading in the area of warping, which read nineteen to twenty percent. The normal moisture content of hardwood floors is around twelve percent. He then replaced some of the boards.

[16] The plumber returned a third time to repair the half bath toilet leak in July 1998. In August 1998, Ballard notified Roberts of more hardwood floor warping and buckling. He took another moisture measurement, which was seventeen to eighteen percent, then replaced more boards. In October 1998, Ballard called Roberts again to report more hardwood floor damage. The moisture measurement was fifteen to sixteen percent, and Roberts replaced more boards. Roberts examined the floor again in December 1998 and took a moisture reading of fourteen to fifteen percent. At that time, Roberts said that the damage was too extensive to do any more spot repairs. He recommended that Ballard file a claim under her homeowner's insurance policy.

[17] On December 17, 1998, Ballard filed a claim with FIE for the water damage to the hardwood floor. An outside adjuster inspected the floor on December 22 and at first opined that the damage was caused by foundation settling, which is not covered under the homeowner's policy. After seeing two areas of water damage, he reconsidered and requested plumbing tests. The claim was assigned to Theresa McConnell, an adjuster in FIE's Austin foundation claims office, who received the file on December 30, 1998. McConnell's original estimate of the claim was around $100,000, and her level of authority was $20,000.

[18] On the same day, the Gerloff Company, a plumbing contractor, performed tests at FIE's request and found no leaks. McConnell contacted Jeff Jackson, a civil engineer, to determine the amount and cause of damage to the hardwood floor. In the meantime, Ballard obtained bids to replace the hardwood floor, ranging from approximately $89,000 to $171,000. The $89,000 bid, from Boatright Floors, increased to $127,950 after Ballard requested that the floor be custom made, not manufactured, as was the original floor.

[19] McConnell and Jackson went to the Ballard home on January 7, 1999, so that Jackson could inspect the damage. Jackson found two sources of moisture, one in the half bathroom and one around the refrigerator. On January 11, McConnell sent a letter to Ballard stating that "complete plumbing tests of your residence were conducted by Gerloff Co., Inc. No leaks were located in the plumbing system of your residence." On January 12, Jackson requested additional testing of the moisture sources. The additional test showed that the moisture level of the floor was twelve percent. Ballard sent a letter to McConnell expressing concern that buckled floors presented a tripping hazard; McConnell suggested temporary repairs while the claim was being investigated, including covering the areas with carpet or replacing the buckled pieces with plywood. Ballard agreed to

carpeting the entire floor or replacing the boards in "trouble" areas, but the temporary repairs were never made.

[20] McConnell requested an appraisal of the house by an independent appraiser because she was concerned that the house was underinsured. The appraiser valued the house at approximately $749,000. McConnell notified Ballard of the appraisal, and Ballard requested increased coverage if her current coverage was not adequate. In early March, FIE increased the coverage to $750,000 for the house and $450,000 for the contents.

[21] In the meantime, on February 8, McConnell sent a letter to Ballard stating that FIE needed a forty-five-day extension to complete the claim investigation. At approximately this same time, Ballard hired an attorney to represent her. On February 24, FIE paid Ballard $108,316.50 for accidental water discharge damage to the floor, based on the $127,950 Boatright estimate, less depreciation and the deductible. FIE imposed an underinsurance penalty, paying the depreciated value instead of replacement cost, because the house, recently reappraised, was insured for only $313,000 at the time of the December 1998 claim.

[22] On March 4, McConnell and contractors went to the Ballard home to inspect newly discovered damage, which was assigned a new claim number. Ballard's lawyer was present for this meeting and notified FIE in writing on March 11 that he was representing Ballard and that all contact concerning the claims should be with him instead of Ballard. At Ballard's request, FIE sent a technician to determine if her refrigerator was still leaking; the report showed additional damage behind the refrigerator.

[23] In early April, Ballard met Bill Holder, an indoor air quality consultant, on a plane flight. Upon hearing about the damage to Ballard's house and physical symptoms that her family was having, Holder suggested that she might have a mold problem. Holder came to the Ballard house on April 5 at Ballard's insistence to take some air samples. The samples contained mold spores, including a type of mold called stachybotrys, which produces toxins that may cause health problems. On April 7, Ballard's lawyer sent a letter notifying FIE of the mold findings. Ballard, concerned about possible health effects of the mold, moved with her husband, Ron, and three-year-old son to the nanny's apartment. FIE's attorney suggested on April 8 that the parties mediate their dispute. Meanwhile, Holder met with Ballard, McConnell, and Steve Shelburne, McConnell's supervisor, on April 13 to discuss the mold findings. At the meeting, Holder explained the possible health effects of mold and that mold grows "exponentially."

[24] FIE sent engineers from Rimkus Consulting to take air samples on April 14. Holder and others returned to the house to conduct tests on April 21. On April 23, Holder told Ballard that, based on the new test results, she and her family

immediately needed to move out of the house. Ballard's family took Holder's advice and left the house that day, leaving behind their belongings. They and their nanny moved into the Four Seasons Hotel in Austin, which FIE agreed to pay for until a more permanent location was found. Ballard and her family moved out of the Four Seasons and into a rental home around June 1.

[25] Around the same time, FIE paid about $8,000 for a shower leak claim in late April, about $25,000 for damage related to an ice-maker leak claim in late April, and about $45,900 for supplemental damage to walls and sheet rock in early May. On May 5, Ballard filed suit in Travis County against FIE for breach of contract, deceptive trade practices, breach of the duty of good faith and fair dealing in the claims handling process, and negligence.

[26] In preparation for mediation, also in May, Rimkus prepared an estimate to remediate and repair the house and the contents, which totaled $382,000. Ballard's expert estimated that remediation would cost approximately $1,015,500. The parties proceeded to mediation for three days in late May, which ended unsuccessfully on May 27. That same day, FIE invoked the appraisal provision, as allowed under the insurance policy if the parties do not agree on valuation of a claim. Under the appraisal provision, both parties were to choose independent appraisers to evaluate the claims.

[27] FIE notified Ballard in its May 27 letter that it had designated Peter de la Mora, a structural engineer with extensive experience in the construction industry, as its appraiser. Ballard chose as her appraiser an attorney, who had to resign a few months later because of trial obligations. Both parties agreed that Michael Schless, a former county-court-at-law judge, would be the "umpire," as termed in the policy, to whom the appraisers would submit their differences if they failed to agree on the amount of loss. Ballard then chose another attorney, Mike Duffy, as her successor appraiser in November 1999.

[28] From May through July 1999, Ballard submitted additional claims for leaks in the roof, two leaks in the water tank room, water damage in the garage and barn, water damage under the kitchen sink, leaks in the nanny's apartment, loose tiles on the porch, and a fountain leak. In June, Sandra Clanton replaced Theresa McConnell as the adjuster. On August 30, FIE paid approximately $382,000 for mold remediation and repair of the house and contents. Ballard's attorney returned the checks on the ground that the payments were based on "invalid" bids. In February 2000, FIE again tendered checks for approximately $382,000, which Ballard's attorney deposited into the registry of the court.

[29] The appraisal process continued for several months, then the appraisers met for four days in November 2000 to determine the amount of loss. The appraisal decision, issued on November 16, 2000, awarded $1,287,092.72,

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deducting amounts that FIE had previously paid, for the house, its contents, and additional living expenses. Although both appraisers and the umpire signed the decision, only FIE's appraiser and the umpire agreed to the amount of the award. On November 18, FIE sent checks for the amount of the appraisal decision to Ballard's attorney, who again deposited the checks into the registry of the court.

[30] Meanwhile, the lawsuit proceeded, with the parties conducting discovery and various hearings. FIE filed a motion to transfer venue to Hays County, where the house was located, on the ground that venue was mandatory in Hays County because this was a property damage claim. The district court denied the motion to transfer venue in November 1999. FIE later sought to exclude Ronald Allison's personal injury claims on the ground that the toxic effects of mold were not sufficiently established in the scientific community. Just before trial, the district court excluded Allison's claims on the basis that his expert witnesses did not have reliable epidemiological studies about the health effects of exposure to mold.

[31] The case proceeded to trial on May 7, 2001. The jury began deliberations on May 30, 2001 and returned a verdict in favor of Ballard the next day. The jury awarded $2,547,350 to replace the home; $1,154,175 to remediate the home; $2,000,000 to replace the contents of the home; $350,000 for past and future additional living expenses; $176,000 for Ballard's costs of the appraisal process; $5,000,000 for Ballard's mental anguish; $12,000,000 in punitive damages; and $8,891,000 for attorneys' fees. The district court rendered a final judgment on October 30, 2001, for over $33 million, reducing actual damages by $2,045,204.28 (the total amount that FIE had already paid to Ballard on her claims) and including prejudgment interest and a statutory penalty under article 21.55 of the insurance code on portions of the award.

[32] FIE filed motions for new trial, for remittitur, and to modify the judgment. The district court denied the motion for remittitur. The motions for new trial and to modify the judgment were overruled by operation of law. Allison appeals the district court's rulings concerning the exclusion of his causation expert witnesses. FIE appeals all of the jury's findings and several district court rulings.

[33] ALLISON'S APPEAL

[34] In two issues, Allison urges that the district court erred in granting FIE's Daubert/Robinson motion to exclude causation opinions of expert witnesses and as a result granting FIE's no-evidence motion for partial summary judgment as to Allison's personal injury claims. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

[35] FIE's Motion to Exclude Causation Opinions

[36] In his first issue, Allison contends that the district court erred in granting FIE's motion to exclude causation opinions of expert witnesses. In Robinson, the Texas Supreme Court held that rule of evidence 702 requires proponents of scientific expert testimony to satisfy the test for admissibility formulated by the United States Supreme Court in Daubert. Tex. R. Evid. 702; Robinson, 923 S.W.2d at 556. A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified, and (2) the testimony must be relevant and based on a reliable foundation. Robinson, 923 S.W.2d at 556. According to this test, the trial judge must act as a "gatekeeper" and decide whether a qualified expert's testimony is relevant and reliable. Daubert, 509 U.S. at 589; Robinson, 923 S.W.2d at 556-57.

We review the district court's ruling under an abuse of discretion standard. Robinson, 923 S.W.2d at 558; Olin Corp. v. Smith, 990 S.W.2d 789, 797 (Tex. App.-Austin 1999, pet. denied).

[37] "The court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed." Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998). In Robinson, the Texas Supreme Court recognized several nonexclusive factors enumerated by the court in Daubert to guide trial courts in acting as gatekeepers to assess the reliability of scientific expert testimony:

[38] • the extent to which the theory has been or can be tested;

[39] • the extent to which the technique relies upon the subjective interpretation of the expert;

[40] • whether the theory has been subjected to peer review and/or publication;

[41] • the technique's potential rate of error;

[42] • whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

[43] • the non-judicial uses which have been made of the theory or technique. Robinson, 923 S.W.2d at 557 (citations omitted).

[44] When properly considered, this Court cannot conclude that a trial court abused its discretion even if in some circumstances we would have ruled differently.

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Id. at 558. A trial court must "focus solely on the validity of principles and methodology underlying the testimony, not the conclusions generated." North Dallas Diagnostic Ctr. v. Dewberry, 900 S.W.2d 90, 95 (Tex. App.-Dallas 1995, writ

denied). If an expert relies on unreliable foundational data, any opinion drawn from that data is likewise unreliable. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997).

[45] We now determine whether the district court abused its discretion in excluding the testimony of Allison's causation expert witnesses. A reviewing court cannot conclude that a trial court abused its discretion merely because, in the same circumstances, it would have ruled differently or the trial court committed a mere error in judgment. Robinson, 923 S.W.2d at 558. The test is not whether the facts present an appropriate case for the trial court's action in the opinion of the reviewing court. Id.

Rather, we will gauge an abuse of discretion by whether the trial court acted without reference to any guiding rules or principles. Id. Thus, a trial court enjoys wide latitude in determining whether expert testimony is admissible. See Olin, 990 S.W.2d at 795.

[46] Stachybotrys was discovered in the Ballard home in early April 1999. The family moved from the main house to the nanny's apartment, then moved into a hotel on April 23, 1999, after mold was also discovered in the apartment. Allison began having increasing problems with concentration and memory in April through July 1999. After seeing several doctors in Austin, Allison was diagnosed with a type of brain damage called toxic encephalopathy. Several medical professionals, including two leading experts in the study of the health effects of molds and mycotoxins, *fn2 Wayne A. Gordon, Ph.D. and Eckardt Johanning, M.D., agreed that exposure to mold caused Allison's toxic encephalopathy.

[47] Toxic tort cases require proof of both general and specific causation about the effects of the toxic substance. Havner, 953 S.W.2d at 714. "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." Id. One can prove general causation either through experiments to show that a substance is capable of causing a particular injury or by attempting to show that exposure to a substance increases the risk of a particular injury. Id. at 714-15. Specific causation cannot be based on inferred general causation; general causation must be affirmatively proved. Among the underlying data to support Allison's proof of general causation was a study by Dr. Gordon and Dr. Johanning of twenty people who were exposed to mold in a building. The district court found that although the experts' foundational data to prove general causation met the requirements of Daubert and Robinson, the data was unreliable according to the factors discussed in Havner.

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[48] The question in Havner was whether the experts' foundational data was sufficiently reliable to show that the drug Bendectin caused birth defects. In Havner, as here, the underlying data included epidemiological studies, which "examine existing populations to determine if there is an association between a disease or

condition and a factor suspected of causing that disease or condition." Id. at 715. The Havner court determined that for an epidemiological study to be a reliable foundation, it must be unbiased in its design, otherwise properly designed, properly executed, and show that exposure to the substance more than doubles the risk of injury. Id. at 717-19. Another factor for determining if an epidemiological study is reliable is that it must be capable of repetition with the same results ninety-five percent of the time, known as a confidence interval of ninety-five percent. Id. at 723.

[49] Allison argues that the district court incorrectly applied Havner because "[t]he decision clearly states that epidemiology is a permissive, not mandatory, type of evidence that a plaintiff may choose in a toxic tort case." Allison's logic about whether Havner applies is flawed. The Havner court concluded that if an expert relies on epidemiological studies, those studies must meet certain criteria. Id. A crucial underpinning for the opinions of Allison's causation experts was an epidemiological study; therefore, the district court appropriately determined that the factors discussed in Havner applied.

[50] Dr. Gordon testified in his deposition that calculation of a confidence interval for the results of the study was "premature." A calculation of the risk factor was also premature. Additionally, Dr. Gordon could not say whether the techniques used were generally accepted. The epidemiological study on which Allison's experts relied therefore does not meet the Havner requirement of a ninety-five percent confidence interval, nor does it show that exposure to the substance more than doubles the risk of injury. Id. at 717-18, 722-23. Further, the causation experts' testimony was not based on a reliable foundation as required by Havner. If an expert relies on unreliable foundational data, any opinion drawn from that data is likewise unreliable. Id. at 714. Because Allison did not establish a reliable foundation for the admission of general causation evidence, we need not address the evidence relating to specific causation. Therefore, we cannot say that the district court abused its discretion by excluding the testimony of Allison's causation experts. Accordingly, we overrule Allison's first issue and uphold the district court's order excluding the testimony of Allison's causation experts.

[51] FIE's No-Evidence Motion for Partial Summary Judgment

[52] In his second issue, Allison contends that the district court erred in granting FIE's no-evidence motion for partial summary judgment as to Allison's personal injury claims. A party seeking a no-evidence summary judgment must assert that no evidence exists as to one or more of the essential elements of the non-movant's claims on which it would have the burden of proof at trial. Holmstrom v. Lee, 26 S.W.3d 526, 530 (Tex. App.-Austin 2000, no pet.). A no-evidence summary judgment is properly granted if the non-movant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. See Tex. R. Civ. P. 166a(i); Havner, 953 S.W.2d at 711. If the evidence supporting an element rises to a level that would enable reasonable, fair-minded

persons to differ in their conclusions, then more than a scintilla of evidence exists. Havner, 953 S.W.2d at 711. Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of fact, and the legal effect is that there is no evidence. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983). A no-evidence summary judgment is essentially a directed verdict granted before trial, to which we apply a legal sufficiency standard of review. Jackson v. Fiesta Mart, 979 S.W.2d 68, 70 (Tex. App.-Austin 1998, no pet.).

[53] When, as here, the summary judgment states the ground or grounds on which the district court based its decision to render summary judgment, we will affirm the summary judgment if one of those grounds is meritorious. See State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 380 (Tex. 1993); State Farm Mut. Auto. Ins. Co. v. Nguyen, 920 S.W.2d 409, 410 (Tex. App.-Houston [1st Dist.] 1996, no writ). The district court granted the motion based on the exclusion of Allison's causation experts. Because Allison could no longer prove the essential element of proximate cause in his personal injury claims, the district court properly granted FIE's no-evidence motion for partial summary judgment as to Allison's personal injury claims. Therefore, we overrule Allison's second issue and affirm the district court's judgment dismissing Allison's personal injury claims.

[54] FIE'S APPEAL

[55] FIE contends in eleven issues, with several sub-issues, that the evidence was legally and factually insufficient to support the jury's liability findings; the district court erred in denying transfer of venue to Hays County; the evidence was legally and factually insufficient to support the jury's findings that FIE failed to appoint a competent, independent appraiser and that the appraisal decision was rendered as a result of fraud, accident, or mistake; the district court abused its discretion in numerous evidentiary rulings; there was no evidence of a knowing violation; the punitive damages award is excessive; there was no evidence to support the mental anguish award; there was insufficient evidence to support the attorneys' fees award; and there was no basis for the statutory penalty under article 21.55 of the insurance code. We will address the venue issue first, given the emphasis that both parties gave to this issue in their briefs and at oral argument.

[56] Venue

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[57] We must first decide whether venue was appropriate in Travis County, even though the property at issue is located in Hays County. In its fourth issue, FIE contends that the district court erred in denying its motion to transfer venue to Hays County. Because the civil practice and remedies code allows the interlocutory review of an order denying a motion based on mandatory venue and FIE elected not to seek such review, Ballard urges that FIE waived its right to transfer by foregoing interlocutory review. We reject this position because it is inconsistent with the permissive nature of sections 15.064 and 15.0642. Tex. Civ. Prac. & Rem. Code Ann.

§§ 15.064(b), 15.0642 (West 2002) (allowing either an appeal of a venue determination after a trial on the merits or an application for writ of mandamus to enforce a mandatory venue provision). Ballard brought suit in Travis County on the permissive venue grounds that all or a substantial part of the actions giving rise to the claim occurred there and that FIE's principal place of business is there. See id. § 15.002(a)(1), (3) (general rule for venue). Section 15.002 lists several choices for permissive venue and applies to all lawsuits unless a mandatory venue provision or another permissive venue provision applies. See id. § 15.002(a).

[58] FIE argues that venue lies in Hays County because the lawsuit is for damage to the Ballard house, which is in Hays County. Asserting that the nature of Ballard's causes of action is irrelevant, FIE further contends that "[i]f any of Ballard's causes of actions sought recovery of damage to her home, the trial court had no discretion to deny the motion." We disagree. The venue provision that FIE asserts is applicable and mandatory provides that

[59] [a]ctions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located. Id. § 15.011.

[60] When considering venue, we note that the legislature's use of the word "shall" in a statute generally indicates the mandatory character of the provision. Id. § 15.004; Wichita County v. Hart, 917 S.W.2d 779, 781 (Tex. 1996). Because of the mandatory nature of section 15.011, we will strictly construe it and will not hold that it applies unless Ballard's suit falls clearly within one of the categories in the section. Bennett v. Langdeau, 362 S.W.2d 952, 955 (Tex. 1962) (concerning the predecessor to section 15.011); Maranatha Temple, Inc. v. Enterprise Prods. Co., 833 S.W.2d 736, 739 (Tex. App.-Houston [1st Dist.] 1992, writ denied).

[61] A defendant raises the question of proper venue by objecting to a plaintiff's venue choice through a motion to transfer venue. See Tex. R. Civ. P. 86; Wichita County, 917 S.W.2d at 781. That mandatory venue lies in another county provides one ground for a motion to transfer venue. See Tex. R. Civ. P. 86(3)(b). If a plaintiff's chosen venue rests on a permissive venue statute and the defendant files a meritorious motion to transfer based on a mandatory venue provision, the trial court must grant the motion. See Wichita County, 917 S.W.2d at 781. A trial court's erroneous denial of a motion to transfer venue requires reversal of the judgment and remand for a new trial. See Tex. Civ. Prac. & Rem. Code Ann. § 15.064(b); Ruiz v. Conoco, Inc., 868 S.W.2d 752, 757 (Tex. 1993). In determining whether venue was proper, we review the entire record, including the trial on the merits. Tex. Civ. Prac. & Rem. Code Ann. § 15.064(b); Ruiz, 868 S.W.2d at 758. If we find probative evidence to support the district court's determination, even if there is a preponderance of the evidence to the contrary, we will defer to the district court's determination. Ruiz, 868 S.W.2d at 758.

[62] FIE argued at the hearing on its motion to transfer venue that although Ballard's case involved multiple causes of action, including breach of contract, deceptive trade practices, and a breach of the duty of good faith and fair dealing insurance claim, and Allison's personal injury claims, the dominant purpose of Ballard's lawsuit was to recover damages to real property. Under this test, a court looks to the dominant purpose of the lawsuit, solely from the facts alleged in the plaintiff's petition, the rights asserted, and the relief sought, to determine whether it falls under a mandatory venue provision. See Maranatha Temple, 833 S.W.2d at 738. FIE now argues on appeal that the legislature abrogated the dominant-purpose test with the enactment of section 15.004 of the civil practice and remedies code in 1995. *fn3

See Tex. Civ. Prac. & Rem. Code Ann. § 15.004 (if lawsuit has two or more claims arising from same transaction or occurrence, with one claim governed by a mandatory venue provision and another governed by a permissive venue provision, the mandatory venue provision controls); Marshall v. Mahaffey, 974 S.W.2d 942,

947 (Tex. App.-Beaumont 1998, pet. denied). We agree with FIE's current position to this extent: If we find the mandatory provision applies but it is in conflict with a

permissive rule, the mandatory provision controls. Tex. Civ. Prac. & Rem. Code Ann. § 15.004; Wichita County, 917 S.W.2d at 781. *fn4 Upon our review of the record, we conclude that although section 15.011 is a mandatory venue provision, it does not apply here.

[63] FIE argues that the phrase "recovery of damages to real property" is not ambiguous, but is instead "crystal clear." Because in 1995 the legislature reinstated the clause in section 15.011, *fn5 FIE urges that the mandatory venue provision was thereby broadened to include any injury to Ballard's home. By any reasonable construction, we may not read the provision by the expansive interpretation that FIE would have us adopt. Even though FIE urges this Court to read "plain and common meaning" into its reading of the statute, accepted principles of construction require that the provision in question be construed in its present context and given a rational meaning.

[64] If we were to look at the words "recovery of damages to real property" in isolation, we would concede that the phrase may be sufficiently broad to encompass the expansive reading urged by FIE. But we do not construe statutory phrases in isolation; we read statutes as a whole. Contrary to FIE's assertion that the nature of the causes of action is irrelevant and that only the remedy sought is relevant, section 15.011 specifically addresses five types of "actions" relating to "Land"-the title of the section *fn6 -that mandate venue in a particular county. The actions are:

[65] • for recovery of real property or an estate or interest in real property,

[66] • for partition of real property,

[67] • to remove encumbrances from the title to real property,

[68] • for recovery of damages to real property, or

[69] • to quiet title to real property. Tex. Civ. Prac. & Rem. Code Ann. § 15.011.

[70] That the word "action" must be read to modify each of these is clear beyond cavil. Thus, we must look to the "true" nature of the action to determine whether the mandatory venue provision applies. Renwar Oil Corp. v. Lancaster, 154 Tex. 311, 313, 276 S.W.2d 774, 775 (1955); Yzaguirre v. KCS Res., Inc., 53 S.W.3d 368, 371 (Tex. 2001).

[71] Before the addition of the phrase "recovery of damages to real property," the venue provision applied only when the suit directly involved a question of title to land. See, e.g., Yzaguirre, 53 S.W.3d at 371 (mandatory venue provision does not apply because suit does not involve recovering real property or quieting title);

Maranatha Temple, 833 S.W.2d at 738; Scarth v. First Bank & Trust Co., 711 S.W.2d 140, 141-42 (Tex. App.-Amarillo 1986, no writ). We have been cited to no authority that supports expanding the scope of the provision beyond questions relating to the recovery of real property or affecting title to "land." Except to make it explicit that the provision in question allows for the recovery of damages in such a suit relating to land, there is no indication that the legislature sought to broaden the provision with the addition of the phrase. That the phrase "for recovery of damages to real property" was sandwiched between "to remove encumbrances from the title" and "to quiet title" further bolsters our reading. Reading the relevant phrase in its entire context, then, gives support for the more narrow interpretation. See 1 Scott Brister, et al., Texas Pretrial Practice § 9.34 (2000).

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[72] Were we to interpret the provision to allow for mandatory venue in all instances in which any damages are sought relating to a dwelling, no matter the nature of the action, we believe we would be extending beyond permissible bounds the statute's language. The doctrine of construction, noscitur a sociis-a word is known by the company it keeps-seems particularly apt here to avoid ascribing to one clause a meaning so broad that it is inconsistent with its accompanying clauses, thus giving unintended breadth to the provision as a whole. County of Harris v. Eaton, 573 S.W.2d 177, 181 (Tex. 1978) (Steakley, J., dissenting) (discussing the maxim of noscitur a sociis: "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute; and that where two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other."). The phrase must be understood against the background of what the legislature was attempting to accomplish in restoring a damage provision to

the section, thereby completing the availability of an array of remedies to actions involving "land."

[73] Ballard brought actions for negligence, negligence per se, breach of contract, deceptive trade practices, and breach of good faith and fair dealing in insurance claims handling, all of which allegedly caused damages to the Ballard house. Because the suit does not involve recovering real property or quieting title or seeking damages for such loss, the district court correctly concluded that the mandatory venue provisions of section 15.011 do not apply. We therefore overrule FIE's fourth issue.

[74] Legal and Factual Sufficiency

[75] FIE next contends in several issues that the evidence is legally and factually insufficient to support the jury's findings. We will first address the standards of review for challenges to legal and factual sufficiency. Challenges to the legal sufficiency of the evidence must be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence established conclusively the opposite of a vital fact. See Havner, 953 S.W.2d at 711. In reviewing legal sufficiency, we are required to determine whether the proffered evidence as a whole rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994).

[76] If a party is attacking the legal sufficiency of an adverse finding of an issue on which it did not have the burden of proof, the attacking party must demonstrate on appeal that there is no evidence to support the adverse finding. Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983). In reviewing a no-evidence issue, we are to consider only the evidence favoring the finding, disregarding all direct and circumstantial evidence to the contrary. Lenz v. Lenz, 79 S.W.3d 10, 13 (Tex. 2002); Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996).

[77] When reviewing a challenge to the factual sufficiency of the evidence, we must consider, weigh, and examine all of the evidence in the record. See Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989). If a party is attacking the factual sufficiency of an adverse finding on an issue to which the other party has the burden of proof, the attacking party must demonstrate that there is insufficient evidence to support the adverse finding. See Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex. App.-Austin 1992, no writ). In reviewing a factual insufficiency of the evidence challenge, we must first consider all of the evidence that supports and is contrary to the jury's determination. See Plas-Tex, 772 S.W.2d at 445. We should set aside the verdict only if the evidence that supports the jury finding is so weak as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We may not reverse merely because we conclude that the evidence preponderates toward an affirmative answer. Herbert v. Herbert, 754

S.W.2d 141, 144 (Tex. 1988). To assist with the analysis of FIE's legal and factual sufficiency challenges, we will summarize FIE's acts of which Ballard complains.

[78] The Complained-of Acts

[79] Although the trial was long and the arguments complex, each of Ballard's causes of action revolve around the following core of complained-of acts:

[80] 1. Plumbing test

[81] As part of FIE's insurance code violation, Ballard complains that Theresa McConnell misrepresented to her that "complete" plumbing tests had been performed on the house even though McConnell "secretly" thought that there might be other leaks. In December 1998, Ballard reported a claim that her hardwood floor was water-damaged. FIE retained the Gerloff Company, a plumbing contractor, to determine whether there was an ongoing leak causing the floor to remain wet. On January 11, 1999, McConnell forwarded a copy of the Gerloff report to Ballard. The report described the procedures employed and time taken to test the building drain piping, domestic water piping, and air conditioning condensate lines, and further stated that no shower pan test was conducted. Enclosing a copy of the plumbing test results, McConnell represented in a cover letter that "[c]omplete plumbing tests of your residence were performed . . . . No leaks were located in the plumbing system of your residence." A Gerloff plumber testified that the tests were complete according to his company's procedures. He testified that he was asked to do a complete test and that it was a "complete test of

the plumbing system, going by our procedures." The tests were complete in the context of the leaks that existed on December 30, 1998, when the testing was done. McConnell's concerns about the possibility of additional leaks were not secret. Despite the report that no leaks were found, she contacted Jeff Jackson, a civil engineer, to determine the amount and cause of damage to the hardwood floor. In her cover letter enclosing the Gerloff report, McConnell stated that Jackson had been retained in the investigation of the claim and the "cause of the problem" continued.

[82] 2. Completion-of-claim letter

[83] McConnell wrote a letter to Ballard on February 8 saying that FIE required a forty-five-day extension because "[t]he additional time is needed to complete our claim investigation." McConnell admitted at trial that FIE had all of the information that it needed to evaluate the claim but that she needed the additional time to obtain the authority from supervisors to pay the claim because she did not have that level of authority. FIE paid the claim on February 24, 1999, less than three weeks after McConnell's letter.

[84] 3. Refusal to pay claim/failure to promptly pay

[85] Ballard also argues that FIE violated the insurance code because FIE admitted that as of May 17, 1999, it had obtained all of the information it needed to pay for remediation of the house. She urges that FIE tendered insufficient and untimely payments. Because of FIE's piecemeal payments and intentional delays in paying her claims after it had all of the information it needed on May 17, 1999, Ballard contends that FIE refused to pay the claims without conducting a reasonable investigation of the claims and that it failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claims when its liability had become reasonably clear.

[86] FIE paid the first claim for hardwood floor damage on February 24, 1999. It based the payment on a bid from Boatright Floors, less depreciation and the deductible. FIE paid the depreciated value instead of replacement cost because the house was underinsured. Ballard immediately claimed that this was a partial payment because she thought the Boatright bid was too low. Thereafter, Ballard began submitting other claims. Within the next couple of months, she submitted a claim for a shower leak, ice maker leak, and supplemental damage to sheet rock and walls. FIE paid all of these claims, which Ballard again accepted as partial payments. Nevertheless, Ballard contends that because of the completion-of-claim letter, plumbing test letter, and FIE's invocation of the appraisal provision, full payment of these claims and other pending claims was delayed.

[87] 4. Denial of coverage

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[88] Ballard argues that FIE tried to deny the hardwood floor damage claim under an exclusion in the policy for foundation problems. The first adjuster to handle the claim was Sean Dollery, who visited the home on December 22, 1998. Although his initial reaction was that foundation settling might be the cause of the hardwood floor damage, he changed his mind after seeing the water damage to the floor. In response to her attorney's question-"About how long did he talk to you about this being a slab settling problem?"- Ballard testified: "Until Richard Roberts got there [that day] and started pulling up boards that showed the migration of water." Dollery stopped suggesting that it was a slab-settling problem "about 20 minutes after Richard Roberts had pulled up some boards." From then on, FIE handled the hardwood floor damage as a covered claim.

[89] 5. Sham and fraudulent bids

[90] Ballard complains that FIE intentionally paid her inadequate sums based on sham and fraudulent bids FIE received from contractors who subsequently refused to perform the work for the amount of the bids. These contractors were then retained by FIE as its experts in this litigation. FIE obtained bids from many contractors during the course of handling the claims and paid the claims according to its own valuation, assisted by the bids. FIE based the hardwood floor claim payment on a bid from

Boatright Floors, which was the lowest bid that it received. Ballard contends that the payment was invalid because the Boatright bid was only good for thirty days and had expired by the time that FIE made the payment on February 24, 1999. FIE counters that it did not receive the bid until February 5, just a few weeks before it made payment. After mold was discovered in the Ballard home, FIE hired Rimkus Consulting to prepare a remediation bid. Because Rimkus had no experience in the relatively new field of mold remediation, its engineers talked with Ballard's consultants to find out more about the process. The remediation bid that Rimkus submitted in preparation for mediation was considerably less than the bid from Ballard's experts.

[91] Ballard also contends that FIE based its August 1999 payments on expired bids, because two companies that had made bids would not do the work for Ballard at the prices they had quoted to FIE. But by that time they had been retained as FIE's expert witnesses. Ballard further contends that de la Mora's estimates during the appraisal process were not based on like kind and quality. De la Mora testified that he determined like kind and quality replacement costs during the appraisal process. One of the contractors who submitted a bid to de la Mora also testified that he prepared his bid based on like kind and quality materials.

[92] 6. Invocation of the appraisal provision

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[93] Ballard urges four complaints concerning FIE's invocation of the appraisal provision: (i) the mere invocation of the provision was a breach of its duty of good faith and fair dealing because it was intended for the purposes of delay and to gain leverage in negotiations; (ii) FIE deliberately appointed an appraiser who was not independent or competent; (iii) FIE refused to include all of the pending claims in the appraisal; and (iv) FIE intentionally withheld estimates and information from its own appraiser.

[94] Under Ballard's standard form homeowner's insurance policy, either party may request an appraisal if it becomes apparent that the parties cannot agree on the value of a claim or claims. FIE's employees testified that they invoke the appraisal provision rarely, only if it is apparent that the parties cannot agree on the appraised value. FIE asserted the provision here after an attempt to settle at mediation failed, although it was apparent long before then that Ballard and FIE did not agree about the value of her claims.

[95] Peter de la Mora, a structural engineer who was FIE's appraiser, had a business relationship with FIE before working on this appraisal. However, he has never been an employee of FIE. Further, FIE instructed de la Mora to determine costs on his own, not from any figures that FIE had. He had no restriction on receiving assistance from outside experts. He had years of experience in the homebuilding industry.

[96] The letter invoking the appraisal provision listed three of the five claims that were pending as of late May 1999. Ballard testified that she asked FIE to include all of the claims in the appraisal but that FIE did not want to do that, suggesting the appraisal did not cover all of her claims. De la Mora testified that although the appraisal did not include all of the claim numbers, the fact that the appraisal covered the entire house encompassed all of claims. Additionally, the amendment to the appraisal decision stated that because "some of the claim numbers may have been improperly included, and [o]thers may have been improperly excluded," "the Appraisal Decision was intended to be a comprehensive statement" of the cost to remediate or replace the house, its contents, the groundskeeper's house, plus additional living expenses, "considering only those claims which were properly subject to the appraisal."

[97] 7. Underinsurance

[98] The amount of insurance on the Ballard home was tied to the county tax appraisal, not the resale value of the house. In 1996, Ballard's agent told her that the insurance coverage was insufficient to cover the full value of the home. She replied that she wanted to keep the insurance at the value of the tax appraisal, then signed a form rejecting an increase in coverage. The amount of insurance on the home when Ballard filed the hardwood damage claim was $313,000. McConnell,

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concerned that the house might be underinsured, requested a property appraisal in January 1999. After seeing that the appraised resale value was approximately $750,000, Ballard requested an increase in her insurance coverage. Because this increase did not occur until after the payment of the first claim, FIE imposed an underinsurance penalty on its payment of the hardwood floor claim. It paid Ballard for the actual cash value of the floor, deducting depreciation, instead of paying the full replacement value. Ballard contends that FIE thus misrepresented to her that her policy covered replacement costs.

[99] 8. Reservation-of-rights letter

[100] On December 30, 1998, FIE sent a standard form homeowner's policy reservation-of-rights letter, which restated exclusions from the policy that might apply. Insurance companies must assert a reservation of rights or risk waiving any coverage defenses that they may have. See, e.g., State Farm Lloyds v. Borum, 53 S.W.3d 877, 892 (Tex. App.-Dallas 2001, pet. denied) The fact that the form letter contained inapplicable exclusions for damage by "waves" and "earthquake" is inconsequential. Furthermore, there was no evidence of any connection between this letter and how FIE handled Ballard's claims, and coverage was not at issue.

[101] Having summarized FIE's acts of which Ballard complains, we now turn to FIE's legal and factual sufficiency challenges to the jury's findings.

[102] Breach of Duty of Good Faith and Fair Dealing

[103] FIE urges in its first issue that the evidence is legally and factually insufficient to support the jury's finding that it breached its duty of good faith and fair dealing toward Ballard. FIE further contends that the evidence is legally and factually insufficient to support a finding that its alleged breach caused damages to Ballard. We disagree. Some evidence supports the jury's finding that FIE breached its duty of good faith and fair dealing and that the breach caused damages to Ballard.

[104] An insurer breaches its duty of good faith and fair dealing by denying or delaying payment of a claim when "the insurer's liability has become reasonably clear." Tex. Ins. Code Ann. art. 21.21, § 4(10)(a)(ii) (West Supp. 2003); Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 55 (Tex. 1997); id. at 69 (Hecht, J., concurring). "Liability for payment of a claim is reasonably clear when it is no longer fairly debatable." Giles, 950 S.W.2d at 69 (Hecht, J., concurring). The statutory standard and common-law standard for breach of the duty of good faith and fair dealing are identical. Mid-Century Ins. Co. v. Boyte, 80 S.W.3d 546, 549 (Tex. 2002) (citing Giles, 950 S.W.2d at 55; id. at 69 (Hecht, J., concurring)). Evidence establishing only a bona fide coverage dispute does not demonstrate breach of the duty of good faith and fair dealing. Provident Am. Ins. Co. v.

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Castaneda, 988 S.W.2d 189, 193 (Tex. 1998); State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 448 (Tex. 1997); Moriel, 879 S.W.2d at 17.

[105] The issue of the breach of the duty of good faith and fair dealing "focuses not on whether the claim was valid but on the reasonableness of the insurer's conduct" in handling the claim. Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 601 (Tex. 1993). Reasonableness is determined using an objective standard of

whether a reasonable insurer under similar circumstances would have delayed or denied payment of the claim. Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 213 (Tex. 1988). Whether an insurer breached its duty of good faith and fair dealing is a fact issue. Giles, 950 S.W.2d at 56. Moreover, the question of whether an insurer's conduct is reasonable in the face of acknowledged liability is one peculiarly tailored to the province of the jury. See id. In determining whether the evidence is legally sufficient to support a judgment for breach of the duty of good faith and fair dealing, we resolve all conflicts in the evidence and draw all inferences in favor of the jury's findings. Id. at 51.

[106] There is some evidence from which a jury could find that FIE failed to attempt in good faith to effectuate prompt, fair, and equitable settlement of claims after its liability had become reasonably clear. See Tex. Ins. Code Ann. art. 21.21, § 4(10)(a)(ii); Giles, 950 S.W.2d at 56. FIE does not challenge that its liability was reasonably clear. Its liability was only "fairly debatable" for a brief time, when FIE's

outside investigator, Sean Dollery, expressed his preliminary view that the claim might not be covered. See Giles, 950 S.W.2d at 69 (Hecht, J., concurring). Ballard contends that FIE, after its liability had become reasonably clear, delayed payment of the hardwood floor claim through its plumbing test and completion-of-claim letters. She further contends that FIE breached its duty of good faith and fair dealing toward her by invoking the appraisal provision in May 1999, when at the same time it had all of the information that it needed to pay for remediation of the home. She argues that waiting for payment of her claims during the eighteen-month appraisal process allowed mold to spread and cause irreparable damage to the house. While Ballard alleges that other acts are part of the pattern of acts that violated article 21.21, these are the primary acts of which she complains.

[107] Some evidence shows that McConnell's lack of authority or experience in handling claims of this magnitude caused delays in processing the claims. McConnell knew on the first day she received the claim that estimates to replace the hardwood floor were over $100,000. She had a level of authority only to pay claims up to $20,000 and had never worked on a claim this large. Additionally, McConnell testified that she had sufficient information that liability was reasonably clear on the hardwood floor claim as of February 1, 1999. Yet she wrote the February 8 letter to Ballard, stating that FIE required a forty-five-day

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extension because "[t]he additional time is needed to complete our claim investigation." McConnell admitted at trial that FIE had all of the information that it needed to evaluate the claim but that she needed the additional time to obtain the authority from supervisors to pay the claim because she did not have that level of authority. A jury could have found that she misrepresented to Ballard why she needed more time to handle the claim. Ballard argues also that McConnell made a misrepresentation in the "complete plumbing test" letter, when in fact not all plumbing had been tested. Both McConnell and a plumber with the Gerloff Company testified that the term "complete plumbing test" is not literally true, because the standard industry test runs through underground systems only, not any pipes above the first floor. Although McConnell correctly characterized the test that Gerloff performed, the jury could have reasonably concluded that this statement was a misrepresentation.

[108] Other evidence called into question FIE's good faith handling of the claims. Ballard testified that although she "begged" to remove the wood floor because it was a tripping hazard, McConnell told her that she would "jeopardize coverage" if she removed the floor. McConnell testified that Ballard could have removed the floor at any time after payment of the $108,000 to replace the floor. Ballard countered that she did not want to remove the floor with the claim investigation ongoing for months, even after she received the $108,000 payment. She testified that she did not remove the floor "[b]ecause [FIE] kept calling for inspections. And if I had torn up the floor, there would be nothing there for them to inspect." As part of the pattern of

mishandling and delay in handling her claims, Ballard also testified that FIE's large number of inspections were designed to harass and cause further delay. McConnell countered that the inspections were necessary to determine the cause of the water damage and because Ballard kept submitting claims for new damage. The jury, as the trier of fact in this case, could have chosen to believe Ballard instead of McConnell. A jury judges the credibility of witnesses and the weight given their testimony. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561, 563 (Tex. 1952); Trinity Indus., Inc. v. Ashland, Inc., 53 S.W.3d 852, 862 (Tex. App.-Austin 2001, pet. denied). It is the jury's province "to resolve conflicts and inconsistencies . . . in the testimony of different witnesses." Ford, 252 S.W.2d at 563.

[109] Further, Ballard presented some evidence of a pattern of failure to promptly pay that caused further damage to the house. The jury heard evidence that FIE had all of the information that it needed to pay the hardwood floor claim in early February but did not pay the claim until three weeks later. Further, Ballard contended that every payment from FIE was insufficient to pay for the damage, leading to further delays that caused the mold to spread. The jury heard additional evidence that although McConnell admitted that FIE had all of the information that it needed to pay for remediation of the house as of May 17, 1999, FIE instead invoked the appraisal provision after it failed to settle the claims at mediation. During the appraisal process, which lasted eighteen months, nothing was done to remediate the mold in Ballard's house. The mold continued to grow. This was some evidence from which the jury could have determined that FIE delayed in paying the claims and that the delay caused further damage to Ballard's house.

[110] Were we the trier of fact in this case, we may not have been persuaded that FIE did not breach its duty of good faith and fair dealing toward Ballard. That determination, however, is not ours to make. An appellate court may not substitute its judgment when a jury's finding is grounded in sufficient evidence. Trinity Indus., 53 S.W.3d at 862-63. We are required by the standards and scope of review to credit verdicts grounded on probative evidence. Further, the legislature requires us to "liberally construe[]" article 21.21. Tex. Ins. Code Ann art. 21.21, § 1(b) (West Supp. 2003) ("This Article shall be liberally construed and applied to promote its underlying purposes as set forth in this section."); see also Rocor Int'l, Inc. v. National Union Fire Ins. Co., 77 S.W.3d 253, 260 (Tex. 2002); Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 384 (Tex. 2000). Viewing the evidence in the light most favorable to Ballard, we hold that there is some evidence to support the jury's finding that FIE failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of Ballard's claims after its liability had become reasonably clear and that this failure caused damages to Ballard. See Tex. Ins. Code Ann art. 21.21, § 4(10)(a)(ii). Weighing all of the evidence, we cannot say that it is so weak as to be clearly wrong or manifestly unjust. Cain, 709 S.W.2d at 176. Accordingly, FIE's legal and factual sufficiency challenges to the breach of the duty of good faith and fair dealing finding must fail. We overrule FIE's first issue. Even if we were to apply the standard for breach of the duty of good faith and fair dealing set forth in Aranda v. Insurance Co. of North America-that FIE had no reasonable basis for delaying payment of the benefits of the policy and that it

knew or should have known that it had no reasonable basis for delaying payment-the evidence would support the finding. See 748 S.W.2d at 213.

[111] Because the court's charge specified that a finding of a breach of the duty of good faith and fair dealing is sufficient to uphold the jury's award of actual damages, we affirm the actual damages award in part, in the amount of $4,006,320.72, in addition to prejudgment and postjudgment interest as stated in the final judgment. This amount takes into account the reduction in the final judgment for the $2,045,204.28 that FIE had previously paid to Ballard, information that the court's charge did not present to the jury. Elsewhere in the opinion, we will discuss the $176,000 award for Ballard's reasonable and necessary costs of the appraisal process.

[112] DTPA Violation, Unconscionability, and Fraud

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[113] FIE contends in its second issue that the evidence is legally and factually insufficient to support the jury's findings that FIE engaged in deceptive trade practices, unconscionable conduct, and fraudulent conduct. Ballard counters that FIE waived this argument because it did not properly brief this issue. See Tex. R. App. P. 38.1(h). Because FIE's argument on this issue is grounded in its lengthy discussion that it did not breach its duty of good faith and fair dealing, we find that FIE sufficiently briefed this issue for the Court. The jury found that FIE violated the DTPA by engaging in a false, misleading, or deceptive act or practice by (1) representing that services had or would have characteristics or benefits that they did not have, (2) representing that services are or will be of a particular standard or quality when they were of another, (3) representing that an agreement confers or involves rights, remedies, or obligations that it did not have or involve, or (4) representing that work or services have been performed, when the work or services were not performed. See Tex. Bus. & Com. Code Ann. § 17.46(b)(5), (7),

(12), (22) (West 2002).

[114] Ballard contends that the plumbing test letter was a misrepresentation about work performed. We agree that this is some evidence to support the jury's finding of a DTPA violation. The jury may have reasonably concluded that McConnell's characterization of the test was a misrepresentation of work performed. Additionally, the jury could have concluded from the evidence that Ballard's reliance on the plumbing test letter caused further damages to the house. Viewing the evidence in the light most favorable to Ballard, the evidence is legally sufficient to support the jury's finding that FIE committed a DTPA violation. Weighing all of the evidence, we cannot say that it is so weak as to be clearly wrong or manifestly unjust. Cain, 709 S.W.2d at 176. We overrule this part of FIE's second issue and affirm the jury's finding that FIE committed a DTPA violation.

[115] The jury also found that FIE engaged in an unconscionable action or course of action, which is "an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Tex. Bus. & Com. Code Ann. § 17.45(5)(A) (West 2002). "Gross," as used in this section, means "glaringly noticeable, flagrant, complete and unmitigated." Nicolau, 951 S.W.2d at 451. Ballard's sole contention in this regard is that any misrepresentation by FIE equates with unconscionable conduct. That is not the law. "[N]ot every misrepresentation of fact, even an intentional one, constitutes unconscionable conduct." Latham v. Castillo, 972 S.W.2d 66, 72 (Tex. 1998). The test is whether the consumer was taken advantage of to a grossly unfair degree. Id. The record does not provide support to satisfy this test. Having reviewed the record, we find no evidence to support the finding that FIE engaged in an unconscionable action or course of action.

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[116] The jury further found that FIE committed fraud against Ballard. A fraud cause of action requires: (1) a material misrepresentation, (2) that was either known to be false when made or was asserted without knowledge of its truth, (3) that was intended to be acted upon, (4) that was relied upon, and (5) that caused injury. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001). Ballard makes no citation to the record to support her fraud claim, nor does she point to any actions that might have been fraudulent. In our review of the record, we find no evidence to support this claim. Having found sufficient evidence to support the jury's finding of a DTPA violation, but no no evidence to support the jury's findings of unconscionability and fraud, we overrule FIE's legal and factual sufficiency challenge to the DTPA violation finding and sustain FIE's challenges to the unconscionability and fraud findings. Therefore, we affirm the jury's finding that FIE committed a DTPA violation. The court's charge specified that a finding of a DTPA violation is sufficient to uphold the jury's award of actual damages. Based on this finding, we affirm the actual damages in the amount of $4,006,320.72, in addition to prejudgment and postjudgment interest as stated in the final judgment. We reverse the jury's findings that FIE engaged in unconscionable and fraudulent conduct and render judgment that Ballard take nothing on her claims for unconscionability and fraud.

[117] Appraisal Decision

[118] FIE contends in its third issue that Ballard is bound by the appraisal decision because the evidence is legally and factually insufficient to support the jury findings that the appraisal was the result of fraud, accident, or mistake and that the appraiser was not competent and independent. FIE further contends that Ballard waived any complaints about de la Mora because she did not challenge him as the appraiser until after the appraisal decision was made.

[119] An appraisal decision made pursuant to the provisions of an insurance contract is binding and enforceable. Wells v. American States Preferred Ins. Co., 919 S.W.2d 679, 683 (Tex. App.-Dallas 1996, writ denied). Every reasonable

presumption will be indulged to sustain an appraisal decision. Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist., 877 S.W.2d 872, 875 (Tex. App.-San Antonio 1994, no writ). An award may be set aside in three instances: when it was (1) made without authority; (2) the result of fraud, accident, or mistake; or (3) not made in substantial compliance with the terms of the contract. Wells, 919 S.W.2d at 683; Providence Lloyds, 877 S.W.2d at 875-76.

[120] Ballard's homeowner's insurance policy, a standard form policy promulgated by the Texas Department of Insurance, contains an appraisal clause. Under this clause, either party may invoke an appraisal if the party disagrees about the value of a claim or claims. Each party then hires its own appraiser. If the

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two appraisers cannot agree on the value, they select an umpire, or a district judge will appoint one if the appraisers cannot agree on an umpire. A decision signed by any two of the three is binding as to the value of the claim.

[121] FIE invoked the appraisal provision on May 27, 1999, the day that the parties failed to reach a settlement at mediation. FIE chose as its appraiser Peter de la Mora, a structural engineer who had performed appraisals for FIE approximately four or five times. Ballard chose an attorney as her appraiser, who had to resign a few months later because of trial obligations. Both parties agreed that Michael Schless, a former county court at law judge, would be the umpire. Ballard then chose another attorney, Mike Duffy, as her successor appraiser in November 1999.

[122] Over the course of the next year, the appraisers gathered estimates for remediation and replacement of the Ballard house. In November 2000, de la Mora, Duffy, and Schless worked for four days to determine the appraisal decision. They met at the Ballard house with various experts, then de la Mora and Duffy discussed their proposals with Schless. On November 16, 2000, they issued an appraisal decision in the amount of $1,287,092.72, which took into account payments that FIE had already made to Ballard. Both appraisers and Schless signed the decision, but Duffy, Ballard's appraiser, disputed the amount of the award.

Under the terms of the insurance policy, the appraisal decision was binding because two of the three agreed on the amount. FIE then sent checks to Ballard's attorney for the amount of the appraisal decision. De la Mora and Schless issued an amendment to the appraisal decision on January 30, 2001, to reflect the intent of the decision to be a "comprehensive statement of the actual cash value to replace or remediate the structure of the residence and the groundskeeper's house, the contents of the residence, and the alternative living expenses, considering only those claims that were properly subject to the appraisal." Duffy did not participate in the amendment because he no longer had authority to act on behalf of Ballard.

[123] We will first address FIE's preliminary issue that Ballard waived her right to challenge de la Mora as FIE's appraiser because she did not raise the issue until after

the appraisal decision was made. Having learned from de la Mora's deposition, taken soon before the appraisal decision, that he had previously done work for FIE, Ballard contended in an amended petition that the appraisal decision should be set aside. She claimed that FIE breached the insurance contract by selecting an appraiser who was neither competent nor independent. The effect of an appraisal decision is to estop one party from contesting the issue of the value of damages in a suit on the insurance contract. Hennessey v. Vanguard Ins. Co., 895 S.W.2d 794, 797-98 (Tex. App.-Amarillo 1995, writ denied). As with other affirmative defenses, it is the defendant's burden to raise the issue of

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estoppel, Tex. R. Civ. P. 94, which FIE did in an amended answer. Ballard has arguably waived any challenge because she did not oppose FIE's appraiser until after determination of the appraisal. We will nevertheless address FIE's legal and factual sufficiency challenges to the jury's findings concerning the appraisal.

[124] FIE argues in a sub-issue concerning the appraisal that the evidence is legally and factually insufficient to support the finding that the appraisal decision was rendered as a result of fraud, accident, *fn7 or mistake. In question seven of the charge, the jury was instructed that fraud means in part that a material misrepresentation was made and that the speaker made the misrepresentation with the intent that the other party act on it. Ballard contends that the jury had sufficient evidence to find fraud because the appraiser intentionally prevented Ballard from receiving like kind and quality replacement, failed to use available price and quality information, intentionally excluded items from the appraisal process, and based his calculations on fraudulent bids from unqualified contractors. There is no evidence in the record to support these contentions. For example, although Ballard claims that de la Mora intentionally prevented her from receiving like kind and quality replacement, de la Mora testified that he determined like kind and quality replacement costs during the appraisal process. One of the contractors who submitted a bid to de la Mora also testified that he prepared his bid based on like kind and quality materials. Despite the allegation, we find no evidence from which a reasonable jury could infer that the appraiser intentionally prevented Ballard from receiving like kind and quality replacement.

[125] The evidence also does not show that anyone intentionally excluded items from the appraisal. At oral argument, Ballard contended that she wanted to submit "everything" in the appraisal but that FIE refused. Although Ballard made fourteen separate claims between December 1998 and August 1999, she had only submitted five claims by the time the appraisal process began in May 1999. FIE's May 27, 1999 letter listed only three of those five claims, but de la Mora testified that because the entire house had to be remediated, it did not matter what claim numbers were included. Additionally, the amendment to the appraisal decision stated that the decision "was intended to be a comprehensive statement" of the cost to remediate or replace the house, its contents, and the groundskeeper's house, plus additional living expenses. There is no evidence that de la Mora or FIE intended to

exclude items from the appraisal. Likewise, de la Mora's reliance on bids from contractors that he chose does not rise to the level of fraud. Ballard opposed the bids because some of the contractors had done previous work for FIE and because some of the contractors, such as the mold remediation company, had never submitted bids for work of this magnitude. A lack of experience does not equate with making material misrepresentations in a bid. Given that mold claims were still relatively novel in April 1999, when mold was discovered in Ballard's

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house, *fn8 it is not surprising that the contractors had little experience in the area of mold remediation.

[126] Ballard objects to the bids solicited by de la Mora in part because she does not agree with the valuation of the repair and replacement costs. "[A] finding of disparity, even gross disparity, between an appraisal award and the cost of repair, cannot support a finding of bias or partiality without additional evidence."

Hennessey, 895 S.W.2d at 799. Ballard fails to cite to any additional evidence. Based on our review of the record, we cannot find any evidence from which a reasonable jury could infer that the appraisal decision was rendered as a result of fraud.

[127] Ballard argues that the appraisal decision was also rendered as a result of mistake because it listed "alternative living expenses" instead of "additional living expenses" for the costs of Ballard's family living away from their house. The jury was instructed that "mistake" means a situation in which the appraisers were operating under a mistake of fact such that their award does not speak to their intention or that the error in the award is so great that it shows gross partiality, undue influence, or corruption. Here, the "mistake" about which Ballard complains is similar to a clerical error. De la Mora testified that the term "alternative living expenses" was intended to be the same as "additional living expenses" and that the mere difference in wording did not affect the appraisal process. A clerical error that does not affect the intention of the appraisers cannot support a finding of mistake. See Providence Lloyds, 877 S.W.2d at 878 (column labeled "court award" instead of "agreed award" did not constitute a mistake). Based on our review of the record, we cannot find sufficient evidence to support a finding that the appraisal was rendered as a result of mistake. Viewing the evidence in the light most favorable to Ballard, the evidence is legally insufficient to support the jury's finding that the appraisal decision was the result of fraud, accident, or mistake. Weighing all of the evidence, the evidence is also factually insufficient to support the jury's finding that the appraisal decision was the result of fraud, accident, or mistake. We therefore sustain FIE's sub-issue, reverse the jury's finding, and render judgment on this finding in favor of FIE.

[128] FIE contends in its second sub-issue concerning the appraisal that the evidence is legally and factually insufficient to support the finding that FIE failed to

appoint a competent, independent appraiser. We agree. Ballard attempted to prove lack of independence because de la Mora had a pre-existing business relationship with FIE. However, Ballard presented no evidence that FIE influenced or exercised control over de la Mora. There is no evidence that de la Mora ever was an employee of FIE or had a financial interest in the claims. Instead, Ballard's evidence shows an arm's-length business relationship between FIE and de la Mora, which was fully disclosed before the appraisal decision.

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[129] Ballard presented evidence that: de la Mora's company performed twenty to twenty-five percent of its work for FIE and eighty percent of its work overall for insurance companies; de la Mora had performed four or five appraisals for FIE before the Ballard appraisal; and that de la Mora had worked with FIE's attorney ten times since 1996. The showing of a pre-existing relationship, without more, does not support a finding of lack of independence. Gardner v. State Farm Lloyds, 76 S.W.3d 140, 143 (Tex. App.-Houston [1st Dist.] 2002, no pet.). De la Mora has never been an employee of FIE. Further, FIE instructed de la Mora to determine costs on his own, not from any figures that FIE provided. FIE never told him how to estimate the costs. He had no restriction on receiving assistance from outside experts. As an independent contractor, de la Mora amply demonstrated that despite his previous business dealings with FIE, he exercised independent judgment in the appraisal process; Ballard has directed us to no evidence to the contrary, and we cannot find any support for her position in the record.

[130] Ballard attempted to prove lack of competence on the ground that de la Mora had no experience with molds or mold remediation. The evidence shows, however, that de la Mora was competent as an appraiser. He has a degree in civil engineering, is a registered professional engineer, has thirty-three years of experience in structural engineering, and has built hundreds of houses, including houses comparable to the Ballard house. Because he had no experience with mold remediation, he retained mold experts to assist him with the remediation estimate. This was no different than Ballard's appraiser, an attorney, retaining mold experts to assist him with his estimates. Viewing the evidence in the light most favorable to Ballard, we conclude that the evidence is legally insufficient to support the jury's finding that FIE failed to appoint a competent, independent appraiser. Weighing all of the evidence, the evidence is also factually insufficient to support the jury's finding that FIE failed to appoint a competent, independent appraiser. We therefore sustain FIE's sub-issue, reverse the jury's finding, and render judgment on this finding in favor of FIE.

[131] Because we conclude that the appraisal was not rendered as a result of fraud, accident, or mistake and that the appraiser was competent and independent, he appraisal decision is binding and enforceable. Wells, 919 S.W.2d at 683. We thus sustain FIE's third issue. Under the terms of the insurance contract, each party must pay its own appraiser and bear the other expenses of the appraisal and umpire equally. Therefore, we reverse the jury's award of $176,000 to Ballard for her reasonable and

necessary costs of the appraisal process and render that Ballard take nothing on this claim. Given, however, that Ballard's claim for breach of the duty of good faith and fair dealing is statutorily based and extra-contractual, outside of the bounds of the appraisal decision, Ballard's damages are not limited to the amount of the appraisal decision.

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[132] Knowing Violation

[133] In its seventh issue, FIE challenges the legal sufficiency of the jury's finding that FIE knowingly engaged in deceptive acts or practices toward Ballard, contending that there is no evidence to support this finding. We agree. "Knowingly," as the district court correctly charged the jury, is the "actual awareness of the falsity, unfairness, or deception of the conduct in question." Tex. Bus. & Com. Code Ann. § 17.45(9) (West 2002). "[A]ctual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." Id. "Actual awareness" does not mean merely that a person knows what he is doing; rather, it means that a person knows that what he is doing is false, deceptive, or unfair. In other words, a person must think at some point, "Yes, I know this is false, deceptive, or unfair to [the other person], but I'm going to do it anyway." St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co., 974 S.W.2d 51, 53-54 (Tex. 1998). Actual awareness is more than conscious indifference toward another's rights or welfare. Id. at 54. We must affirm the jury's finding if we find more than a scintilla of evidence that FIE's conduct fit within the definition of "knowingly." Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995).

[134] There is some evidence from which the jury could have found that FIE breached its duty of good faith and fair dealing toward Ballard, but there is no evidence in the record that FIE was actually aware that its actions toward Ballard were false, deceptive, or unfair-that is, that FIE was more than consciously indifferent to Ballard's rights and welfare. Under the St. Paul Surplus test, relied upon by both parties, we must find that someone with FIE must have had a subjective awareness of the falsity, deception, or unfairness before FIE may be held to have acted knowingly. Ballard admits that a single act does not rise to the level of knowing conduct and without citation to the record tries to paint a "knowing" picture from the pattern of acts relied upon for her lack of good faith and fair dealing claim. Ballard contends, for example, that McConnell's plumbing test letter was a knowing misrepresentation. McConnell based this statement on information that she received from the plumbing company, and we cannot say this is evidence from which a reasonable jury could infer that McConnell made a knowing misrepresentation.

She had no conversation with Ballard about the plumbing test, instead simply forwarding information after she received the report from the plumbing company. Additionally, FIE relied on the statement that "complete plumbing tests" were made as much as Ballard did.

[135] Ballard further argues that FIE knowingly refused to pay an estimate from one of its bidders. Ballard makes no citation to the record for this contention, and we cannot find any support for it in our review of the record. Ballard next

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contends that FIE "intentionally withheld" approved claim funds to gain leverage to settle all matters in controversy. We disagree. Although the first payment for the hardwood floor damage may have taken longer than necessary, FIE did pay all but one of Ballard's claims, both before and after she filed suit against FIE. The record does not contain evidence that FIE knowingly withheld claim payments to gain leverage.

[136] Ballard also argues that FIE intentionally made payments based on sham and fraudulent bids from contractors who refused to perform work for the amount of the bids and who were retained as FIE's experts. Although "sham and fraudulent bids" was one of Ballard's themes during the trial, we cannot find any evidence to support this theme. FIE obtained bids from many contractors during the course of handling the claims and paid the claims according to its own valuation, assisted by the bids. Ballard also attempted to show that FIE based its payments on expired bids, because two companies that had made bids would not do the work for Ballard at the prices they had quoted to FIE. They in fact would not do the work because they had been retained as FIE's expert witnesses by that time. Both Ballard and FIE hired contractors involved in the claims as its experts in the trial, which is not itself unreasonable because they were familiar with the damage to the Ballard home. The record does not contain evidence that any of FIE's conduct concerning its bids from contractors was knowingly false, deceptive, or unfair.

[137] Ballard next argues that FIE improperly invoked the appraisal provision to gain leverage against her. FIE had a right to invoke the appraisal provision under the terms of the homeowner's insurance policy and did so when mediation attempts failed. See, e.g., Gardner, 76 S.W.3d at 142. There is no evidence in the record from which a reasonable jury could infer that this conduct was knowingly false, deceptive, or unfair. Nor was the appointment of an appraiser with a previous business relationship with FIE evidence of knowing conduct. A previous business relationship, standing alone, is not probative of knowingly false, deceptive, or unfair conduct. Id. at 143. De la Mora disclosed his relationship with FIE in his deposition, taken before the appraisal decision was issued. Ballard did not object to de la Mora until after receiving that decision.

[138] Finally, Ballard argues that FIE intentionally withheld estimates and information from de la Mora. De la Mora testified, however, that FIE told him that he had to arrive at his own estimates, independent of anything that FIE had. FIE did so because the insurance policy required that de la Mora be independent. Complying with the terms of the insurance policy is no evidence of knowingly false, deceptive, or unfair conduct. The only evidence that might support a finding of knowing conduct, which Ballard did not raise with regard to this issue, is that McConnell made a

misrepresentation to Ballard that she needed more time to evaluate the claim, when in fact she needed time to obtain authority from her

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supervisors to pay the claim. Although McConnell admitted at trial that she needed more time to gain authority, not to investigate, we cannot say that this was part of a pattern of knowing conduct or that this conduct resulted in damages to Ballard. It merely delayed payment of the first claim by less than three weeks.

[139] In examining the finding that FIE breached its duty of good faith and fair dealing, we looked at whether FIE acted reasonably in handling Ballard's claims. See Giles, 950 S.W.2d at 56; Lyons, 866 S.W.2d at 601. The test for finding knowing conduct, enunciated in St. Paul Surplus, is much more stringent: we must find some evidence in the record that someone with FIE must have had a subjective awareness of the falsity, deception, or unfairness. Connell Chevrolet Co. v. Leak, 967

S.W.2d 888, 893 (Tex. App.-Austin 1998, no pet.). None of the evidence to which Ballard points demonstrates such a subjective awareness. Because the record contains no evidence that FIE engaged in knowingly false, deceptive, or unfair conduct, we sustain FIE's seventh issue challenging the legal sufficiency of this finding. See Croucher, 660 S.W.2d at 58. Accordingly, we reverse the jury's finding and render judgment on this issue in favor of FIE.

[140] The jury awarded punitive damages and mental anguish damages based on conduct committed "knowingly or fraudulently." Under the insurance code, a party may recover punitive damages and mental anguish damages only if the jury finds that the violation was committed knowingly. Tex. Ins. Code Ann. art. 21.21, § 16(b)(1) (West Supp. 2003) (concerning punitive damages); State Farm Life Ins. Co. v. Beaston, 907 S.W.2d 430, 435-36 (Tex. 1995) (concerning mental anguish damages). The DTPA also requires a knowing finding to recover these damages. Tex. Bus. & Com. Code Ann. 17.50(b)(1) (West 2002); Gulf States Utils. Co. v. Low, 79 S.W.3d 561, 566 (Tex. 2002); see also Tex. Civ. Prac. & Rem. Code Ann. § 41.003(c) (West 1997):

[141] If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages resulted from the specified circumstances or culpable mental state.

[142] Having found no evidence of a knowing violation, we must reverse the jury's awards of punitive damages and mental anguish damages. We therefore need not address FIE's eighth and ninth issues that the evidence is legally and factually insufficient to support these findings. We render judgment that Ballard take nothing on her claims for punitive damages and mental anguish.

[143] No-Evidence Motion for Summary Judgment on Concurrent Causation

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[144] FIE argues in its sixth issue that the district court erred in granting Ballard's no-evidence motion for summary judgment on concurrent causation. We will apply the general standards for reviewing a grant of a no-evidence motion for summary judgment. See, e.g., Holmstrom, 26 S.W.3d at 530. Because the district court's order does not specify the ground or grounds relied on for its ruling, we will affirm the summary judgment if any of the theories Ballard advanced are meritorious. See Carr, 776 S.W.2d at 569.

[145] FIE asserted in its second amended answer that Ballard had the burden of segregating damages among covered and non-covered losses, under the doctrine of concurrent causation. Under this doctrine, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 162 (Tex. 1971); Wallis v. United Servs. Auto. Ass'n, 2 S.W.3d 300, 302-03 (Tex. App.-San Antonio 1999, pet. denied). The doctrine of concurrent causation is not an affirmative defense or an avoidance issue; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove that their damage is covered by the policy. Wallis, 2 S.W.3d at 303. Thus, an insured may only recover for the amount of damage caused solely by the covered peril. Id. The burden is on the insured to prove coverage. Id. The insured must therefore present some evidence upon which the jury can allocate the damages attributable to the covered peril. Id. Because allocation is central to the claim for coverage, an insured's failure to carry the burden of proof on allocation is fatal to the claim. Id. The insured must attempt to segregate the loss caused by the covered peril from the loss caused by the excluded peril. Id.

[146] The doctrine of concurrent causation is inapplicable in this case for two reasons. First, FIE never denied any claim at issue in this appeal on the ground that the claim was a non-covered peril. Second, FIE asserted the doctrine of concurrent causation pursuant to article 21.58(b) of the insurance code, which states that

"[i]n any suit to recover under a contract of insurance, the insurer has the burden of proof as to any avoidance or affirmative defense that must be affirmatively pleaded under the Texas Rules of Civil Procedure." Tex. Ins. Code Ann. art. 21.58(b) (West Supp. 2003). All of Ballard's claims presented to the jury were extra-contractual, beyond recovery under the contract of insurance. Therefore, we overrule FIE's sixth point of error and affirm the district court's ruling granting Ballard's no- evidence summary judgment on concurrent causation.

[147] District Court's Evidentiary Rulings

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[148] FIE contends in its fifth issue that the district court abused its discretion and deprived FIE of a fair trial by excluding evidence of settlement offers made during mediation, some instances of Ballard's conduct toward FIE's adjusters, and de la Mora's testimony that Ballard's lawyers delayed the appraisal process. FIE further argues that the district court abused its discretion by allowing evidence about the possible health effects of mycotoxins from molds. We apply an abuse of discretion standard to the question of whether a district court erred in an evidentiary ruling. National Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525, 527-28 (Tex. 2000); City of Brownsville v. Alvarado, 897 S.W.2d 750, 753 (Tex. 1995). We may reverse a district court under this standard only when we find that "the court acted in an unreasonable or arbitrary manner," Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991), or "without regard for any guiding rules or principles." Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998) (quoting Alvarado, 897 S.W.2d at 754).

[149] When seeking to reverse a judgment based on an improper evidentiary ruling, a complaining party "need not prove that but for the error a different judgment would necessarily have been rendered, but only that the error probably resulted in an improper judgment." Alvarado, 897 S.W.2d at 753; accord Malone, 972 S.W.2d at 43. To prevail, the party must demonstrate that "the judgment turns on the particular evidence excluded or admitted." Alvarado, 897 S.W.2d at 753- 54. We review the entire record to determine whether a party has met this burden. Id. at 754. If any legitimate basis exists to support a district court's evidentiary ruling, then we must uphold the court's decision. Malone, 972 S.W.2d at 43; State Bar v. Evans, 774 S.W.2d 656, 658 n.5 (Tex. 1989) (citing McCormick on Evidence § 52, at 131 (3d ed. 1984)).

[150] FIE argues that its offer of $734,000 at mediation and Ballard's demand of no less than $10 million plus media rights should be admissible to show that FIE attempted to settle in good faith and to counter the implication that FIE could have settled in May 1999. Discussions in alternative dispute resolution proceedings are generally confidential and inadmissible as evidence against a participant in any judicial proceeding. Tex. Civ. Prac. & Rem. Code Ann. § 154.073(a) (West Supp. 2003). Evidence of conduct made in settlement negotiations can be admissible if offered for a purpose other than to show liability, such as "negativing a contention of undue delay." Tex. R. Evid. 408. However, as the district court stated, a "cloak of confidentiality" surrounds mediation, and the cloak should be breached only sparingly.

[151] FIE cites Avary v. Bank of America, N.A. for the proposition that it should have been able to disclose evidence of Ballard's conduct during the mediation. 72 S.W.3d 779 (Tex. App.-Dallas 2002, pet. filed). Avary is distinguishable: it concerned a bank's breach of fiduciary duty in rejecting a higher settlement offer during mediation. The court allowed evidence of the bank's conduct during mediation because it went to the heart of the parties' dispute. Id. at 796. Here, the district court

excluded this evidence primarily because FIE's conduct was at issue, not Ballard's. See Tex. Ins. Code Ann. art. 21.21, § 4(10)(a)(ii) (conduct in question is whether insurer "fail[ed] to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear").

[152] FIE's reliance on two other cases allowing evidence of settlement negotiations is also misplaced. U.S. Fire Ins. Co. v. Millard, 847 S.W.2d 668 (Tex. App.-Houston [1st Dist.] 1993, orig. proceeding); State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260 (Tex. App.-Houston [14th Dist.] 1992, orig. proceeding). In both cases, because the entire basis of the claim was the amount of the insurance company's settlement offer, it was necessary for the court to admit settlement negotiation evidence. Here, although the district court could have admitted evidence of Ballard's demands at mediation for the purpose of countering her contention that FIE unduly delayed in paying her claims, see Tex. R. Evid. 408, he excluded the evidence because of the danger of unfair prejudice and because of the general rule that settlement discussions are confidential. In light of the standard of review, we decline to breach the "cloak of confidentiality" that exists to encourage settlement discussions. See Wilborn, 835 S.W.2d at 261. Accordingly, we hold that the district court did not act in an unreasonable or arbitrary manner or without regard for any guiding rules or principles in excluding evidence of settlement offers made during mediation. Beaumont Bank, 806 S.W.2d at 226. Further, FIE has failed to show how the exclusion of this evidence led to the rendition of an improper judgment.

[153] FIE next argues that the district court abused its discretion in excluding certain evidence of Ballard's interaction with FIE's adjusters. FIE asserts that the jury could not properly determine whether FIE acted reasonably without hearing evidence of Ballard's conduct, which FIE alleges obstructed FIE's efforts to adjust her claims, caused delay, and generally defeated FIE's attempts to settle. Evidence that FIE attempted to admit included Ballard's threats to use her $44 million trust fund to fight FIE and to snort stachybotrys if necessary to hurt FIE. The district court excluded the character evidence after balancing what he termed the "extremely, extremely limited probative value" of the evidence against the danger of unfair prejudice, confusion of issues, and misleading the jury. See Tex. R. Evid. 403, 404. Further, he specifically excluded the evidence about Ballard's wealth because courts "try to keep those kinds of tawdry considerations out of the fact-finding process."

[154] Although other evidence of Ballard's conduct may have added coloratura to the trial, there was ample evidence before the jury showing the flavor of Ballard's conduct. For example, the jury saw dozens of letters that Ballard sent to FIE throughout the claims- handling process. As early as mid-January 1999, Ballard complained in a letter to McConnell about "your `experts' traipsing in and out of my house." In a March 8, 1999, letter to McConnell, Ballard wrote, "I hope

you take great comfort knowing while you are out trying to manipulate the facts and throw an inadequate sum of money at me that doesn't get me to first base, my family is living in a house that clearly is dangerous." She ended her letter with, "You should be ashamed." After moving out of the house, she demanded that FIE pay for accommodations at the expensive Four Seasons Hotel in Austin as "the only thing I've found suitable." These letters and many others more than adequately conveyed the flavor of Ballard's contentious stance toward FIE, which began within weeks of her filing the December 17, 1998 claim. Additionally, the jury heard evidence that Ballard changed both lawyers and appraisers during the claims-handling and litigation process, which it could have inferred as a contribution to delays.

[155] While the jury did not get to see the full picture of Ballard's conduct, we believe that it saw enough of the picture to evaluate whether her conduct hampered

FIE's efforts. Accordingly, we hold that the district court acted within the bounds of its discretion in excluding certain evidence of Ballard's interaction with FIE's

adjusters. More importantly, FIE failed to demonstrate how the exclusion of this evidence led to the rendition of an improper judgment.

[156] FIE further asserts that the district court erred in excluding testimony by de la Mora that Ballard "obstructed and delayed" the appraisal process. FIE argues that by excluding this testimony, the "court permitted Ballard to profit from the false impression that [FIE] delayed the process." The jury heard evidence that the appraisal process began in May 1999 and did not conclude until November 2000. But it heard no evidence about why the process took so long because the judge granted Ballard's motion in limine that no mention be made of Ballard or her appraiser delaying the appraisal process. The district court's practice of allowing jurors to question witnesses at the end of their testimony resulted in the district court posing the following question to de la Mora:

[157] THE COURT: Why did the appraisal process take 18 months?

[158] THE WITNESS: The appraisal process took 18 months because the Ballard attorneys kept keeping us from going to the house to do the work that we needed to do.

[159] The district court then excused the jury, reprimanded de la Mora, and warned that he would be in contempt of court if he "advocated" for FIE again. The jury returned, and the district court requested that they disregard de la Mora's answer.

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[160] For the same reasons as discussed concerning Ballard's conduct toward FIE, we conclude that the district court acted within the bounds of its discretion in excluding evidence of Ballard's conduct purportedly delaying the appraisal process and that FIE has failed to show how the exclusion of this evidence led to the rendition of an improper judgment.

[161] In its last contention that the district court abused its discretion, FIE argues that the district court should not have allowed admission of evidence that mycotoxins from molds can cause serious personal injury. FIE urges that the district court should have excluded all evidence in this area because it granted FIE's motion to exclude Allison's causation experts, who would have testified about the health effects of exposure to the mycotoxins.

[162] Among the few references to the health effects is that one of the mycotoxins is a known liver carcinogen and, in a letter from Ballard put into evidence by FIE, that one of the Ballard pets had a "terrible skin problem caused by Stachybotrys exposure." The district court, after careful deliberation, allowed this evidence because it was relevant to Ballard's mental anguish claim, not for her own fear of getting ill but her concern for her family. *fn9 The district court put a further safeguard in place by twice instructing the jury that personal injury claims were not part of the case. The general rule is that an instruction to disregard a subject not part of the case will cure error. See, e.g., Fowler v. Garcia, 687 S.W.2d 517, 520 (Tex. App.-San Antonio 1985, no writ). We therefore hold that the district court acted within the bounds of its discretion in allowing evidence of the health effects of mycotoxins and that FIE has failed to show how the admission of this evidence led to the rendition of an improper judgment. Having found no abuse of discretion in the district court's evidentiary rulings of which FIE complains, we overrule FIE's fifth issue.

[163] Attorneys' Fees

[164] FIE contends in its tenth issue that there is insufficient evidence of reasonable and necessary attorneys' fees and thus that we should reverse the jury's award of $8.9 million in fees to Ballard's attorneys. A plaintiff who prevails in a DTPA cause of action "shall be awarded court costs and reasonable and necessary attorneys' fees." Tex. Bus. & Com. Code Ann. § 17.50(d) (West 2002). A plaintiff who prevails in a cause of action under article 21.21 of the insurance code may obtain "the amount of actual damages plus court costs and reasonable and necessary attorneys' fees." Tex. Ins. Code Ann. art. 21.21, § 16(b)(1) (West Supp. 2003).

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[165] While we review the amount that the jury awarded under a legal sufficiency standard, we review the trial court's decision to grant or deny fees at all under an abuse of discretion standard. Bocquet v. Herring, 972 S.W.2d 19, 22 (Tex. 1998) (Baker, J., dissenting); Hunt v. Baldwin, 68 S.W.3d 117, 135 n.8 (Tex. App.-Houston [14th Dist.] 2001, no pet.). One of the factors in determining the reasonableness of an

award of attorneys' fees is the amount of damages awarded. Wayland v. City of Arlington, 711 S.W.2d 232, 233 (Tex. 1986). However, this is only one among many factors to consider. See Gill Sav. Ass'n v. International Supply Co., 759 S.W.2d 697, 703-04 (Tex. App.-Dallas 1988, writ denied) (detailing twelve factors normally used in determining reasonableness of award of attorneys' fees). Because we are remanding the question of attorneys' fees, we need not decide whether the district court abused its discretion.

[166] Factors that a fact finder should consider when determining the reasonableness of a fee include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (citing Tex. Disciplinary R. Prof. Conduct 1.04, reprinted in Tex. Govt. Code Ann., tit. 2, subtit. G app. A (West 1998) (Tex. State Bar R. art. X, § 9)). The fact finder should consider a contingent fee agreement, but "the plaintiff cannot simply ask the jury to award a percentage of the recovery as a fee because without evidence of the factors identified in rule 1.04, the jury has no meaningful way to determine if the fees were in fact reasonable and necessary." Id. at 818-19. The plaintiff must ask the jury to award fees in a specific dollar amount, not as a percentage of recovery. Id. at 819.

[167] Here, the jury heard evidence of the above factors from Ballard's attorneys' fees expert, Richard Cedillo. He discussed all eight factors from rule 1.04, including the quality of the attorneys on the case and the time required. He stated that a contingent fee contract of thirty-five percent on the first eight million and forty percent on any award above that amount was fair. FIE contends that the evidence is insufficient partly because Ballard's attorneys did not submit hourly time sheets. Cedillo testified, based on his experience on complex cases and review of the Ballard file, that Ballard's attorneys spent a great deal of time on her case because of the paper, motions, preparation for seventy depositions, trial preparation, and complex issues involved. He further explained that Ballard's

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attorneys did not keep hourly time sheets because they were under a contingent fee contract, not an agreement based on an hourly fee. Thus, Ballard would not expect statements about their time on the case. Having heard Cedillo's testimony, the jury awarded fees in a specific dollar amount, as requested in the charge. Cedillo's coverage of the factors stated in Arthur Andersen, including the suggestion that the dollar amount be based on the contingent fee, are sufficient evidence to support the

award of attorneys' fees. See Vingcard A.S. v. Merrimac Hospitality Sys., Inc., 59 S.W.3d 847, 870 (Tex. App.-Fort Worth 2001, pet. denied) (jury award of dollar amount based on contingent fee, after hearing testimony of the rule 1.04 factors, met the Arthur Andersen requirements). Accordingly, we overrule FIE's tenth issue and hold that there was legally sufficient evidence of reasonable and necessary attorneys' fees.

[168] We cannot say, however, that the award of $8.9 million is still reasonable, given that we have significantly reduced the damages awarded by the jury. We remand the determination of attorneys' fees to the district court for further proceedings consistent with this opinion.

[169] Article 21.55 Damages

[170] FIE asserts in its eleventh issue that there was no basis for awarding or calculating any interest penalty under article 21.55 of the insurance code. The purpose of article 21.55 is to obtain prompt payment of claims pursuant to policies of insurance, and its provisions are to be liberally construed to promote this purpose. See Tex. Ins. Code Ann art. 21.55, § 8 (West Supp. 2003). Article 21.55 provides that "if an insurer delays payment of a claim following its receipt of all items, statements, and forms reasonably requested and required . . . for more than 60 days, the insurer shall pay damages and other items as provided for in Section 6 of this article." Tex. Ins. Code art. 21.55, § 3(f). Section six provides for eighteen percent annual interest on the amount of the delayed payment, together with reasonable attorneys' fees. Id. § 6.

[171] FIE argues that there was no basis for the 21.55 penalty because Ballard did not prove or obtain jury findings that FIE violated the article. As discussed above, we have found some evidence to support the jury finding that FIE breached its duty of good faith and fair dealing in "[f]ailing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear." Tex. Ins. Code Ann. art. 21.21, § 4(10)(a)(ii).

McConnell unequivocally testified that FIE had all of the information that it needed to pay the costs of remediation by May 17, 1999. FIE did not pay any of those costs until August 30, 1999, more than 60 days later. Therefore, FIE subjected itself to the provisions of article 21.55.

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[172] But the record demonstrates that FIE did not cause all of the delay. Ballard rejected FIE's August 30, 1999 payments of $382,738.69 on the ground that they were based on invalid bids, but then accepted checks for the same amounts on February 17, 2000. We find, therefore, that the district court erred in calculating eighteen percent interest on $382,738.69 between August 30, 1999 and February 17, 2000, because Ballard caused that delay in payment. Otherwise, we find that the evidence supports the district court's calculations of the eighteen percent penalty, based on evidence that FIE delayed full payment of Ballard's claims for more than

sixty days. Accordingly, we remand the statutory penalty issue to the district court for recalculation in accordance with this opinion.

[173] CONCLUSION

[174] Because we find no error in the district court's rulings concerning Allison's claims, we affirm the rulings of the district court in granting FIE's motion to exclude his causation experts and FIE's no- evidence motion for partial summary judgment pertaining to Allison's personal injury claims. Accordingly, we affirm the district court's judgment dismissing Allison's personal injury claims.

[175] We hold that probative evidence supports the district court's denial of FIE's motion to transfer venue to Hays County. We further conclude that the district court did not abuse its discretion in the evidentiary rulings of which FIE complains. We also find sufficient evidence to uphold the jury's findings that FIE breached its duty of good faith and fair dealing toward Ballard and that FIE committed a DTPA violation. After a thorough review of the evidence in the record, and with deference to the province of the jury, we hold that the evidence is both legally and factually insufficient to uphold the jury's verdict on several other grounds of recovery. We find insufficient evidence to support the jury's findings of unconscionability or fraud. We additionally find insufficient evidence to support the jury's findings that FIE failed to appoint a competent, independent appraiser or that the appraisal decision was a result of fraud, accident, or mistake. Because the court's charge specified that findings of either a breach of the duty of good faith and fair dealing or a DTPA violation are sufficient to uphold the jury's award of actual damages, we affirm the actual damages award in part, in the amount of $4,006,320.72, in addition to prejudgment and postjudgment interest as stated in the final judgment. We reverse the award of $176,000 for Ballard's reasonable and necessary costs of the appraisal process.

[176] We further conclude that there is no evidence to support the jury's finding that FIE "knowingly" breached its duty of good faith and fair dealing toward Ballard. Because a finding of a knowing violation is required to uphold punitive and mental anguish damages, we reverse the jury's awards for these damages and render judgment that Ballard take nothing for punitive and mental anguish damages. We uphold the district court's award of the article 21.55 statutory

penalty in part and remand the penalty for recalculation in accordance with this opinion. We find sufficient evidence to support the award of attorneys' fees but cannot say that the amount of the award is reasonable, given our significant reduction of the jury's damages awards. Therefore, we remand the issue of attorneys' fees to the district court for further proceedings consistent with this opinion.

[177] Affirmed in Part; Reversed and Rendered in Part; Reversed and Remanded in Part

[178] Publish

Opinion Footnotes

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[179] *fn1 The parties to this appeal are Mary Melinda Ballard and her husband, Ronald Allison, the plaintiffs in the case below, and Fire Insurance Exchange, the defendant in the case below. Ballard owns title to the house, and thus the homeowner's insurance is in her name.

[180] *fn2 A "mycotoxin" is a toxic substance produced by mold.

[181] *fn3 FIE also now argues that the district court failed to recognize the abrogation of the dominant-purpose test. FIE fails to acknowledge that it based its argument at the hearing on the dominant- purpose test.

[182] *fn4 In light of the addition of section 15.004, we need not discuss the cases, cited by both sides, that base their reasoning on the dominant-purpose test.

[183] *fn5 Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3247, amended Act of May 8, 1995, 74th Leg., R.S., ch. 138, § 2, 1995 Tex. Gen. Laws 978, 980. The predecessor to section 15.011 contained the phrase "for recovery of damages to real property" until 1983. See Act of June 17,

1983, 68th Leg., R.S., ch. 385, 1983 Tex. Gen. Laws 2119 (Tex. Rev. Civ. Stat. Ann. art. 1995, since repealed).

[184] *fn6 In construing a statute, we may consider and, in this case, are informed, by the statute's title. See Tex. Govt. Code Ann. § 311.021(7) (West 1998).

[185] *fn7 Ballard does not contend that the appraisal decision was rendered as a result of accident.

Allison v. Fire Insurance Exchange, 2002 TX 8008 (TXCA, 2002)

[186] *fn8 In 2001, "Farmers registered more than 12,000 mold claims, up from 12 in 1999. Allstate says its monthly tally of such claims in Texas climbed to 1,000 in the first three months of this year, up from 40 a year ago." Harsh Policies: Hit With Big Losses, Insurers Put Squeeze on Homeowners, Wall Street Journal, May 14, 2002, at A1.

[187] *fn9 FIE, relying on Temple-Inland Forest Products Corp. v. Carter, asserts that mental anguish for fear of disease is no longer compensable in Texas. See 993 S.W.2d 88, 93 (Tex. 1999). FIE interprets Temple-Inland too broadly. The case only addresses fear of an asbestos- related disease in the absence of symptoms of any disease. Id. at 93 ("The question . . . is whether . . . fear of an increased risk of

developing an asbestos-related disease when no disease is presently manifest should be permitted. . . . We conclude that no such action should be recognized.").

4. Homes v. Carns (2001) February 14, 2001

PERRY HOMES, A JOINT VENTURE d/b/a Perry Homes, Appellant and Cross-Appellee
v.
Ronald G. CARNS, Appellee and Cross-Appellant

No. 04-00-00185-CV

Court of Appeals, Fourth District of Texas

Delivered and Filed: February 14, 2001

From the 224th Judicial District Court, Bexar County, Texas Trial Court No. 98-CI-07653 Honorable Carol R. Haberman, Judge Presiding

Sitting: Tom Rickhoff, Justice Catherine Stone, Justice Sarah B. Duncan(Concurring), Justice

Summary:

From the 224th Judicial District Court, Bexar County, Texas Trial Court No. 98-CI-07653 Honorable Carol R. Haberman, Judge Presiding Sitting: Tom Rickhoff, Justice Catherine Stone, Justice Sarah B. Duncan(Concurring), Justice Opinion Tom Rickhoff, Justice Carns sued Perry Homes for damages resulting from construction defects in a house built pursuant to a contract. Carns asserted causes of action for violation of the Deceptive Trade Practices Act ("the DTPA"), as well as for breach of contract.

FACTS OF THE CASE:

Carns sued Perry Homes for damages resulting from construction defects in a house built pursuant to a contract. Carns asserted causes of action for violation of the Deceptive Trade Practices Act ("the DTPA"), breach of contract, and negligence. As relief, Carns sought attorney's fees and damages for rescission, or alternatively, damages based on the reasonable cost and expenses of repairs. Perry Homes' answer alleged, in part, that Carns' causes of action were preempted by the Residential Construction Liability Act ("the RCLA") and his right to all recovery, if any, was limited to the damages under the RCLA. Carns filed special exceptions to Perry Homes' preemption argument, which the trial court sustained.(FN1) The jury determined that Carns was entitled to restoration of the home's purchase price pursuant to DTPA section 17.50(b)(3).(FN2)

Perry Homes raises several issues on appeal. The threshold issue is whether Carns' causes of action are preempted by the RCLA. Because we are invincibly

unable to divine legislative intent, we are unwilling to take such a large step as to eliminate an equitable remedy and hold that the RCLA preempted Carns' equitable rescission claim. We therefore find that the RCLA applies only to actions for monetary damages.

CARNS' CAUSES OF ACTION

In his petition, Carns made the following factual allegations:

Perry Homes . . . expressly and impliedly contracted, agreed and warranted that his home would be constructed in a good and workmanlike manner. Perry Homes also warranted that its warranty repairs would be done in a good and workmanlike manner. In reliance on Perry's representations, Carns made significant and costly improvements to the home. To the extent that any contractual disclaimer of Perry attempts to waive the implied warranty of habitability and good and workmanlike construction of the home and good and workmanlike performance of repairs, the waiver is against [the] public policy of the State of Texas and is invalid.

Perry's work was not as represented, since it was not accomplished in a good and workmanlike manner and resulted in shoddy and defective work throughout the house. Numerous construction deficiencies exist as more specifically set forth in Exhibit A. In addition to the defects in Exhibit A, the roof framing of the house is done in a very poor and unworkmanlike manner . . . .

The jury found that Perry Homes' failure "to comply with a warranty" was the proximate cause of Carns' damages. "Failure to comply with a warranty" was defined as any of the following: (1) failing to construct a home in a good and workmanlike manner; (2) failing to perform repairs in a good and workmanlike manner; or (3) constructing or selling a home that was not suitable for human habitation. The jury found that the defects resulting from the failure to construct a home in a good and workmanlike manner rendered the home unsuitable for its intended purposes.

APPLICATION OF THE RCLA

The RCLA applies to any action to recover damages resulting from a construction defect. Tex. Prop. Code Ann. § 27.002(a) (Vernon 2000). To the extent the RCLA conflicts with any other law, including the DTPA, the RCLA controls. Id. § 27.002(a)(2). The narrow issue here is whether the RCLA applies when the claimant seeks the equitable remedy of rescission. Perry Homes argues that the monetary component of Carns' rescission claim is an action to recover damages within the scope of the RCLA's limitation on damages; therefore, Carns' rescission claim is preempted by the RCLA. Carns argues that the RCLA applies only when a claimant is seeking monetary damages, and rescission and damages

are mutually exclusive remedies, and therefore, his rescission claim is not preempted.

We hold that monetary damages and rescission are mutually exclusive remedies because one is based on recovery of benefits under the contract and the other on avoidance of the contract. Rescission is an equitable remedy and, as a general rule, the measure of damage is the return of the consideration paid, together with such further special damage(FN3) or expense as may have been reasonably incurred by the party wronged on account of the contract. Smith v. National Resort Communities, Inc., 585 S.W.2d 655, 660 (Tex.1979); see also Nabours v. Longview Savings & Loan Ass'n, 700 S.W.2d 901, 911 (Tex. 1985) (noting that "it is hornbook law that rescission, like an injunction, is an equitable remedy."). If damages as well as rescission are essential to accomplish full justice, they both will be allowed. Smith, 585 S.W.2d at 660. Restoration under DTPA section 17.50(b)(3) is a statutory recognition of the equitable remedy of rescission and restitution, based on the theory that the complaining party may elect to avoid the contract, surrender any benefits received and recover that with which he parted. Smith v. Kinslow, 598 S.W.2d 910, 915 (Tex. App.--Dallas 1980, no writ). Thus, rescission and damages are mutually exclusive remedies. Scott v. Sebree, 986 S.W.2d 364, 368 (Tex. App.--Austin 1999, pet. denied) (holding that rescission is an equitable remedy used as a substitute for monetary damages when such damages would not be adequate); Bayou Terrace Inv. Corp. v. Lyles, 881 S.W.2d 810, 816 (Tex. App.--Houston [1st Dist.] 1994, no writ) (plaintiff who elects to treat contract as valid and recover damages on account of its breach could not maintain a suit for rescission); Kargar v. Sorrentino, 788 S.W.2d 189, 191 (Tex. App.--Houston [14th Dist.] 1990, no writ) (under DTPA, rescission/restitution and actual damages are mutually exclusive remedies).

We now turn to the issue presented: whether the RCLA applies only when the claimant seeks monetary damages. In construing a statute, our purpose is to give effect to the Legislature's intent. Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 280 (Tex. 1994). To do so, we consider the statute's language, history, and purposes and the consequences of alternate constructions. Id.

The RCLA leaves much to be interpreted. Its language indicates it applies only to an action for damages, not to an action for equitable relief. Section 21.002, entitled "Application of Chapter," begins with the following sentence, "This chapter applies to: (1) any action to recover damages resulting from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods . . . ." Tex. Prop. Code Ann. § 27.002 (emphasis added). Section 27.003, entitled "Liability," begins with the following sentence, "In an action to recover damages resulting from a construction defect . . . ." Id. § 27.003 (emphasis added). Section 27.004, entitled "Notice and Offer of Settlement," states "Before the 60th day preceding the date a claimant seeking from a

contractor damages arising from a construction defect . . . ." Id. § 27.004(a) (emphasis added). Section 27.0041, entitled "Mediation," begins with the following sentence, "If a claimant files suit seeking from a contractor damages arising from a construction defect . . . ." Id. § 27.004 (emphasis added). Section 27.006, entitled "Causation," states, "In an action to recover damages resulting from a construction defect, the claimant must prove that the damages were proximately caused by the construction defect." Id. § 27.006 (emphasis added).

The RCLA's language does not indicate clearly that the Legislature intended to replace a claimant's equitable remedy of rescission with the exclusive remedy of monetary damages. To the contrary, the act's language suggests that the Legislature sought to shield builders from liability and impose a cap on monetary damages. See Richard F. Whiteley, Comment, The Scope of the Residential Construction Liability Act in Texas, 36 Hous. L. Rev. 277, 300 (1990) ("The RCLA . . . tilts the playing field in favor of homebuilders by providing numerous defenses and liability limits not available under the DTPA. Unfortunately, it seems the intent of the RCLA's framers simply served as camouflage for the underlying objective of insulating homebuilders from the kind of DTPA liability with which other providers of products and services in Texas must deal."). Indeed, during the Senate Jurisprudence Committee's hearings concerning passage of the act, the key Senators never reached agreement about the RCLA's interplay with the DTPA.(FN4)

We interpret the RCLA's reference to "damages" as setting forth the threshold issue for determining whether the act applies to an action as whether the homeowner is seeking monetary damages as the remedy for his or her injury. If the homeowner seeks an equitable remedy (like rescission), and not monetary damages, then the RCLA does not preempt the action. If the Legislature had intended the RCLA to apply to any and all claims arising from a construction defect without regard to the remedy sought, it would have so stated.(FN5) It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540 (Tex.1981). Likewise, every word excluded from a statute also must be presumed to have been excluded for a purpose. Id. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision. Id.

We read the RCLA as limiting its application to actions seeking damages, and we conclude that the Legislature's intention was to provide a method to cap those damages, preempt certain claims seeking monetary damages, and expand defenses for homebuilders. The Legislature failed to make it clear that the RCLA limits the type of remedies to be recovered against a homebuilder, and we are unwilling to recognize an unstated intent or to insert additional words or requirements into the act to provide for such a limitation.

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Our conclusion is supported by the type of construction defects the Legislature intended the RCLA to remedy. Perry Homes asserts that rescission claims under the DTPA, and presumably under the common-law, were "among the evils to be remedied by the RCLA." We disagree. The language of the RCLA and its legislative history indicate the RCLA was meant to address only those construction defects that could be repaired in a good and workmanlike manner.

The RCLA speaks in terms of curing the defect, paying for temporary housing during the repair period, reduction of market value, and attorneys' fees. Tex. Prop. Code Ann. § 27.004(f), (h). These damages contemplate the homeowner staying in a house in which the construction defect can be repaired in a good and workmanlike manner. See Bruce, 943 S.W.2d at 123 (holding that the RCLA was enacted to promote settlement between homeowners and contractors and to afford contractors the opportunity to repair their work in the face of dissatisfaction). Senator Montford stated, "It's not my intend [sic] to . . . take away or to demean any home owner's rights . . . to . . . obtain repairs . . . to get redress that is proper for the condition." If the "condition" is a construction defect that can be repaired, the RCLA applies. If the "condition" cannot be repaired, rendering the residence unsuitable for habitation, then the act does not apply. Under these circumstances, monetary damages are not an adequate remedy; only an equitable remedy, such as rescission, would be adequate to cure the "evil" of a residence that is not suitable for its intended purposes.

The RCLA cannot be interpreted so broadly as to force a homeowner to remain in a residence that is unsuitable for its intended purposes. If the contract is rescinded and Carns returns the house to Perry Homes, returning to Carns the purchase price of the house merely completes the rescission and restitution process. See Kargar, 788 S.W.2d at 191.

We hold that Carns was entitled to restoration.

CARNS' ENTITLEMENT TO RESCISSION

Perry Homes asserts Carns is not entitled to rescission because Carns did not prove a timely tender of the benefit derived by him from possession of the house.

The DTPA(FN6) allows a consumer to choose restoration of benefits as his remedy, subject to the right of the defendant to plead and prove a right of offset. Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980). The consumer is not required to plead and prove predicates to recovery, such as notice and tender, not found within the statutory scheme of the DTPA. Id.

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Furthermore, in his petition, Carns tendered the house and the value of its use during the time he used and occupied the house. As a general rule, one seeking equity must

do equity, and therefore one seeking cancellation of an instrument should offer or tender the consideration received. Pope v. Darcey, 667 S.W.2d 270 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); Sudderth v. Howard, 560 S.W.2d 511, 516 (Tex. Civ. App.--Amarillo 1977, writ ref'd n.r.e.). However, the court may accomplish this result by its judgment. Id. Here, the jury determined the market rental value of the house for its use and occupancy was $18,000. The trial court deducted the reasonable value of Carns' use of the house from the amount he paid for the house when it awarded him restitution. Therefore, Carns was entitled to rescission.

PREJUDGMENT INTEREST

The trial court awarded Carns prejudgment interest from the date he closed on the house. Perry Homes asserts prejudgment interest should be calculated from the earlier of the date he filed suit or 180 days from the date he gave notice of his claim. Perry Homes is correct. A claimant under the DTPA (or the RCLA) is entitled to prejudgment interest as determined by the Finance Code, which provides that "prejudgment interest accrues on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered." Tex. Fin. Code Ann. § 304.104 (Vernon 1998).

APPELLATE ATTORNEY'S FEES

The trial court awarded Carns attorney's fees in the event of an appeal to the Court of Appeals, the filing of a petition for review with the Supreme Court, or if the Supreme Court granted review. The court did not condition the award of these fees on Perry Homes' not being successful on appeal. Perry Homes asserts this was error, and we agree. To the extent that Perry Homes is successful, Carns is not entitled to an award of appellate attorney's fees for that portion of fees attributable to an unsuccessful defense of the case. Goldman v. Alkek, 850 S.W.2d 568, 578 (Tex. App.--Corpus Christi 1993, no writ) (op. on mot. for reh'g).

IMPLIED WARRANTY

Perry Homes asserts the trial court erred in excluding from evidence an express warranty booklet given to Carns that contained a disclaimer of all implied warranties. This issue is foreclosed by this Court's opinion Buecher v. Centex Homes, 18 S.W.3d 807 (Tex. App.--San Antonio 2000, pet. granted), which held

that a homeowner cannot waive an implied warranty by signing a sales agreement that contains such a waiver.

CLOSING COSTS

In a single cross-issue, Carns complains that the trial court erred in not awarding him his closing costs. Perry Homes asserts Carns waived any error by not presenting this complaint to the trial court.

The final judgment awarded Carns "the amount of $169,413.00, being the amount paid by [Carns] for the property plus improvements thereon, less the reasonable value of [Carns'] use of the property." In his motion to enter judgment, Carns asked the court to enter the proposed judgment attached to his motion, which provided "that [Carns] shall have and recover judgment against [Perry Homes] in the amount of $175,883.00, being the amount paid by [Carns] for the property plus improvements thereon, less the reasonable value of [Carns'] use of the property." The jury determined that Carns had paid $185,000 for the house, $10,518 for improvements, and that the market rental value was $18,000; a total of $177,518.

Emerson v. Tunnell, 793 S.W.2d 947, 948 (Tex. 1990), the Texas Supreme Court held that a post-verdict motion for judgment on the verdict preserved error for appellate review when the trial court entered judgment for the movant but for less than the verdict. We find, therefore, that Carns preserved the issue raised on appeal.

The measure of rescission damages is the return of the consideration paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract. Smith, 585 S.W.2d at 660. We agree with Carns that closing costs are the type of special damages or costs that may be awarded as rescission damages. Therefore, Carns was entitled to an award of his closing costs.

CONCLUSION

We affirm that portion of the trial court's judgment granting Carns restoration of the consideration paid by him for the property made the basis of this suit. We reverse that portion of the trial court's judgment awarding Carns the amount of $169,413.00, and we reform the trial court's judgment to award Carns the amount of $175,883.00, being the amount paid by him for the property, plus improvements thereon, less the reasonable value of his use of the property. We reverse that portion of the judgment awarding Carns prejudgment interest from August 29, 1997 and remand to the trial court for a determination of prejudgment

interest pursuant to Texas Finance Code section 304.104. We reverse that portion of the judgment awarding unconditional appellate attorney's fees and remand to the trial court for a determination of the reasonable amount of appellate attorney's fees to be awarded to Carns in view of the fact that Perry Homes was partially successful in this appeal.

Tom Rickhoff, Justice

PUBLISH

NOTES:

(FN1). Judge Carol Haberman signed the judgment; however, Judge David Peeples signed the order sustaining the special exceptions.

(FN2). "In a suit filed under this section, a consumer who prevails may obtain . . . orders necessary to restore to any party to the suit any money or property . . . which may have been acquired in violation of this subchapter . . . ." Tex. Bus. & Com. Code Ann. § 17.50(b)(3) (Vernon Supp. 2000).

(FN3). General damages are those that naturally and necessarily flow from a wrongful act, are so usual an accompaniment of the kind of breach alleged that the mere allegation of the breach gives sufficient notice, and are conclusively presumed to have been foreseen or contemplated by the party as a consequence of his breach of contract. Hess Die Mold, Inc. v. American Plasti-Plate Corp., 653 S.W.2d 927, 930 (Tex. App.--Tyler 1983, no writ). Special damages arise naturally but not necessarily from the breach, are so unusual as to normally vary with the circumstances of each individual case, and must be shown to have been contemplated or foreseen by the parties. Id.

(FN4). Following is an exchange between Senator Montford and Senator Caperton:

Montford: Now this bill likewise has had a lot of discussion . . . it . . . was essentially . . . designed to assist both the builder and the home owner to cure the problems . . . before resorting to litigation. . . . .

Caperton: Senator, [inaudible] as against the bill or under the DTPA?

Montford: Well, it, it clarifies I think the terms of the procedure for exercising those rights? I think -

Caperton: But it, but it doesn't take those rights away?

Montford: - well -

Caperton: The procedure you follow is different because you have the right to repair, -

Montford: Well.

Caperton: - that's, that's very clear now, isn't that right?

Montford: There is . . . I think if you'll look, there is a . . . damages provision . . . that I think is exclusive in terms of the effective [sic] of the . . . notice and failure to give repairs. It's not my intent to . . . take away or to demean any home owners' rights . . . to obtain repairs . . . to get redress that is proper for the condition.

Caperton: Certainly we're not trying to defend shoddy workmanship or tell those people of our constituents [sic] who go buy homes, that their remedies . . . when they are victims of shoddy workmanship if in any way have been impaired, I've . . . never sensed that that was what this bill was about.

Montford: No, quite the contrary, I think if anything it's designed to expedite a fair repair procedure.

Caperton: And it doesn't really grant new defenses to protect shoddy workmanship, it simply identifies a method by which repairs can be made as undoubtedly . . . they ought to be made sometimes. Isn't that really the thrust?

Montford: Well, I think there are reasonable defenses but . . . a defensive [sic] is not designed to undo or make permissive shoddy workmanship.

Caperton: Precisely and, and indeed this bill is designed to work with the DTPA not to replace the DTPA in dealing with workmanship that doesn't measure up.

Montford: There, there is specific language in the bill, the bill dealing with the conflict of those two provisions. I personally think in the, in retrospect and looking at it . . . they can work hand in glove to, to I think protect the consumer . . . who ought to be protected. . . . .

. . . .

Caperton: - Senator I agree with you and that is why I support this bill as a very reasonable way of working with the DTPA but there are going to be some cases . . . I think where you just [sic] not going to be able to get the kind of response from your home builder that you want. And there are gonna be some cases,

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unfortunately, where home builders don't measure up to the standards that they promise, when we entered into that contract and I want to make sure that when those home builders engage in shoddy workmanship and in fact . . . use false misleading or deceptive acts or practices in the construction and sale of those homes that they're, we're still going to have remedies and I don't think we're trying to excuse any of those folks who don't live up to their promises or, or keep their part of the bargain, isn't that right?

Montford: Senator, I think you'll find that this is a . . . timely . . . response approach and I believe in the final analysis that this is going to get the problems cured much more expeditiously.

(FN5). See e.g., Tex. Bus. & Com. Code Ann. § 147.002 (Vernon Supp. 2000) ("Subject to Section 147.004 and regardless of the legal theory, statute, or cause of action on which the action is based, including an action based in tort, contract, or breach of an express or implied warranty, this chapter applies only to an action in which a claimant seeks recovery of damages or any other relief for harm caused by: (1) a computer date failure as described by Section 147.003; or (2) the failure to properly detect, disclose, prevent, report, correct, cure, or remediate a computer date failure as described by Section 147.003.").

(FN6). Under the common-law, before a buyer may rescind a contract, the buyer must give timely notice to the seller that the contract is being rescinded and either return, or, at least offer to return, the property received and the value of any benefit he derived from its possession. Mathis Equip. Co. v. Rosson, 386 S.W.2d 854, 869 (Tex. Civ. App.--Corpus Christi 1964, writ ref'd n.r.e.). The rule requiring the buyer desiring to rescind to take such action is based on the view that before rescission can be granted, the parties must be placed in status quo, and on the maxim "He who seeks equity must do equity." Id. The burden of proof is on the party seeking rescission to establish that he or she is entitled equitably to such relief. Id. at 869-70.

Concurring opinion by: Sarah B. Duncan, Justice

I do not know the correct result in this case; nor do I know how to decide what it is.

As in any statutory construction case, our charge is to divine and effectuate legislative intent. Texas Water Comm'n v. Brushy Creek Mun. Util. Dist., 917 S.W.2d 19, 21 (Tex. 1996). When the language is clear and unambiguous, legislative intent may be determined from the plain and ordinary meaning of the words used. Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 960 (Tex. 1999). But even if the statute is unambiguous, we may consider the legislature's objective, the consequences of particular constructions of the statute, and any administrative

constructions. Tex. Gov't Code Ann. § 311.023 (Vernon 1998); Atascosa County v. Atascosa County Appraisal Dist., 990 S.W.2d 255, 258-59 (Tex. 1999). In any event, "[a] statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it." Acker v. Texas Water Com'n, 790 S.W.2d 299, 301 (Tex. 1990).

On the one hand, the express terms of the RCLA limit the act's application to "any action to recover damages." Tex. Prop. Code Ann. § 27.002 (Vernon 2000). And it is clear the Texas Legislature is cognizant of the distinction between an action in equity for rescission and an action at law for damages. See Tex. Rev. Civ. Stat. Ann. art.

581-33(A)(1); (B) (Vernon 1964 & Supp. 1996) (buyer "may sue either at law or in equity for rescission or for damages"). This might be considered some indication the legislature did not intend the RCLA to apply to actions seeking rescission. However, the legislature is presumed to have enacted the RCLA with full knowledge that the Supreme Court of Texas quoted this court with apparent approval in stating: "As in other cases where equity requires the return of property, this 'recovery of the consideration paid as a result of fraud constitutes actual damages ....'" Nabours v. Longview Sav. & Loan Ass'n, 700 S.W.2d 901, 904 (Tex. 1985) (quoting International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 583 (Tex. 1963) (quoting Briggs v. Rodriguez, 236 S.W.2d 510, 516 (Tex. Civ. App.-San Antonio 1951, writ ref'd n.r.e.)). Geters v. Eagle Ins. Co., 834 S.W.2d 49, 50 (Tex. 1992) (per curiam) (holding surety's liability not limited to "rescission damages"); Smith v. National Resort Communities, 585 S.W.2d 655, 660 (Tex. 1979) ("Rescission is an equitable remedy and, as a general rule, the measure of damage is the return of the consideration paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract."). Thus, it may be the legislature believed an action seeking "rescission damages" is, in legal effect, an action for damages to which the RCLA would apply. Unfortunately, the legislative history underlying the RCLA does not resolve the issue.

I thus do not concur in my colleagues' judgment because I agree with its statement of the law. In my view, the law will support either result. I concur in the judgment because I cannot and do not believe the legislature intended the RCLA to saddle a buyer with a home that is so defective it is not suitable for its intended purpose.

Sarah B. Duncan, Justice

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New Appendices for *Mold Legal Guide*

Appendix 1

This New York Court of Appeals case held on March 6, 2012, set an important legal precedent that will allow more mold victims to file lawsuits based on claims that they developed illnesses after being exposed to mold.

CORNELL v. 360 W 51ST ST.

95 A.D.3d 50 (2012)

939 N.Y.S.2d 434

2012 NY Slip Op 1643

BRENDA CORNELL, Appellant,

v.

360 WEST 51ST STREET REALTY, LLC, et al., Defendants,

360 W. 51ST STREET CORP. et al., Respondents. (And a Third-Party Action.)

113104/04, 4810.

Appellate Division of the Supreme Court of New York, First Department.

Decided March 6, 2012.

Gallet Dreyer & Berkey, LLP, New York City (*Morrell I. Berkowitz* and *Beatrice Lesser* of counsel), for appellant.
Bonner Kiernan Trebach & Crociata LLP, New York City (*Alan L. Korzen* and *Mindy L. Jayne* of counsel), for respondent.
ANDRIAS, J.P., SAXE and ABDUS-SALAAM, JJ., concur with MANZANET-DANIELS, J.; CATTERSON, J., dissents in a separate opinion.

[95 A.D.3d 52]

OPINION OF THE COURT

MANZANET-DANIELS, J.

The motion court incorrectly interpreted our ruling in *Fraser v 301-52 Townhouse Corp.* (57 A.D.3d 416 [2008], *appeal dismissed* 12 N.Y.3d 847 [2009]), as setting forth a categorical rule requiring dismissal of plaintiff's toxic mold claim due to failure meet the standard of scientific reliability set forth in *Frye v United States* (293 F 1013 [DC Cir 1923]). In *Fraser,* another case involving injuries arising out of exposure to toxic mold, we affirmed dismissal of the plaintiff's personal injury claim because the plaintiff's submissions failed to raise a triable issue of fact. We never disavowed the underlying theory that exposure to mold may, under certain circumstances, give rise to respiratory and other ailments. Indeed, this Court was careful to limit its holding in *Fraser,* explicitly stating, "We stress that our holding does not set forth any general rule that dampness and mold can never be considered the cause of a disease, only that such causation has not been demonstrated by the evidence presented by plaintiffs here" (57 AD3d at 418).

The motion court erred in finding that plaintiff's proof was not "strong enough to constitute a causal relationship," or that the methodologies used to evaluate her condition failed to meet the *Frye* standard (26 Misc.3d 1211[A], 2009 NY Slip Op 52707[U], *2-3 [2009]). The focus of the *Frye* inquiry "should not be upon how widespread [a] theory's acceptance is, but should instead consider whether a reasonable quantum of legitimate support exists in the literature for [an] expert's views" (*Marsh v Smyth,* 12 A.D.3d 307, 312 [2004, Saxe, J., concurring]). Even the dissent does not dispute that plaintiff's theory of causation finds some support in the scientific literature[1] (*compare Lara v New York City Health & Hosps. Corp.,* 305 A.D.2d 106, 106 [2003] [complete absence of any clinical data or formal studies supporting expert's theory that a precipitous delivery, without significant bleeding, could give rise to cerebral palsy arising six months after birth; trial court noted that expert "could not point to a reported case and could not point to a

medical writing that set forth his theory even in general terms"]).[2] Since plaintiff's expert's opinions relating plaintiff's condition to the mold infestation find "some support in existing data, studies [and] literature" (*Marsh,* 12 AD3d at 313), namely, studies that have found a statistically significant relationship between mold and various respiratory maladies, the *Frye* standard is satisfied.

Plaintiff has lived in the subject apartment since 1997. The apartment is located directly above the basement area of the building. Plaintiff testified that she had occasion to walk through the public areas of the basement throughout her tenancy and described the area as damp, musty, and harboring bugs and mice. Floods in the summer of 2002 and 2003 resulted in water damage in the basement stairwell and on the walls of the basement. During the summer of 2003, a steam pipe broke in plaintiff's apartment, releasing steam. In July 2003, after the pipe broke and water leaked in the basement, plaintiff noticed a small amount of mold in her bathroom. Plaintiff testified that when she entered the bathroom she began to feel ill, experiencing a body rash, shortness of breath, fatigue, disorientation and headaches. She testified that the landlord placed a dehumidifier in the bathroom and advised her to wash the area with bleach. Plaintiff did so and her symptoms disappeared. During the course of plaintiff's tenancy, on or about September 5, 2003, 360 West 51st Street Realty, LLC[3] purchased the building from defendants-respondents 360 W. 51st Street Corp. and Geoffrey Shotwell. On October 1, 2003, the new owner began renovations in the basement. On the day debris removal commenced, plaintiff experienced

dizziness, chest tightness, congestion, shortness of breath, a rash, swollen eyes and a metallic taste in her mouth. Despite allergy medicines prescribed by her doctor, plaintiff's symptoms only subsided when she left the premises for a period of time.
On October 7, 2003, plaintiff left the apartment due to difficulty breathing. In November 2003, plaintiff informed defendant landlord that she was unable to live in the apartment due to

the ongoing renovation work and was withholding rent for the month of November. Plaintiff moved in with a friend and never again slept in the apartment.
360 West 51st Street Realty commenced a summary nonpayment proceeding against plaintiff in the Civil Court. Plaintiff answered and asserted counterclaims for, inter alia, constructive eviction and breach of the warranty of habitability. Following a 17-day trial, the Civil Court found in plaintiff's favor, awarding her a 100% abatement for the months of October 2003 through April 2004, as well as a 20% abatement in July 2003 when the pipe broke in plaintiff's apartment and plaintiff first noticed mold and experienced physical symptoms.
At the Civil Court trial, plaintiff's experts testified that the damp conditions in the basement had created the ideal environment for growth of fungus, and that the contractors disturbed years of spores and dust when they cleaned out the basement. Plaintiff's witnesses theorized that a hazardous suspension of these particles moved up a dumbwaiter shaft and through cracks in the floor, entering plaintiff's apartment and contaminating the space. Lawrence B. Malloy, an environmental investigator and consultant concerning indoor air quality and toxic materials abatement, visited the premises on November 3, 2003 and took samples. His tests confirmed the presence of molds including aspergillus/penicillium, stachybotrys and chaetomium. Mr. Malloy noted that stachybotrys cannot exist without a continuous source of water and opined that there is no acceptable indoor level of the mold. Dr. Chin S. Yang, a microbiologist, testified that samples collected in March 2004 from plaintiff's apartment showed contamination from aspergillus/penicillium, stachybotrys, chaetomium and paecilomyces variotii. Dr. Yang stated that stachybotrys and chaetomium are excellent indicators of water damage and opined, based on the combinations and different species of fungi found in the apartment, that the environment had sustained long-term water damage.
Jay Danilczyk, an environmental consultant, inspected and took samples in the basement, apartment and air shaft in March 2004. Danilczyk also found mold growing under the floorboards in the apartment.
The evidence showed that defendant landlord was on notice of the mold condition as early as October 1998, as demonstrated

by a "mold testing" report dated October 14, 1998 that it commissioned from an environmental consultant. The report noted, inter alia, the presence of mold in the cellar, "mold stained sheetrock walls," and a variety of fungi including aspergillus and penicillium. The testing was done specifically in response to "tenant concerns regarding mold" and discovery of mold in the apartment of a basement tenant.

Defendant ordered additional testing of the basement in July 2003 in response to further complaints by the basement tenant. The consultant stated that its primary purpose was to test the apartment for the presence of mold following a water infiltration episode. The consultant noted that aspergillus/penicillium spores were the "dominant finding" in the apartment location and recommended cleaning of the impacted area and retesting. Thus, the evidence supports the inference that a mold condition existed in the basement for years prior to defendants' sale of the building.

Defendants and plaintiff cross-moved for summary judgment. Defendants' expert, Dr. Michael Phillips, M.D., acknowledged that "[m]olds can cause a wide spectrum of illnesses, including allergies, irritation, hypersensitivity pneumonitis and direct infection." Defendants' expert opined that mold was "ubiquitous" and that mold under floorboards "generally constitute no significant exposure." Defendants' expert did not examine plaintiff in arriving at his conclusion that mold had not caused her ailments, concluding, upon a review of her medical records, that "in the case of Ms. Cornell, molds caused no significant, objectively documented illness."

Plaintiff relied on the affidavit of her treating physician, Dr. Eckhard Johanning. Dr. Johanning opined that exposure to damp buildings with excessive and atypical mold contamination was a recognized cause of respiratory health complaints and conditions such as asthma, rhino-sinutis, bronchitis, allergy, infections and irritant-type reactions of the skin and mucous membranes.

Dr. Johanning opined, with a reasonable degree of medical certainty, that plaintiff's irritative and allergic-type symptomatology was caused by exposure to building dampness and excessive and atypical mold exposure, over time, at her apartment. In arriving at his conclusion concerning plaintiff's physical health and its cause, Dr. Johanning considered plaintiff's medical and occupational history and history of environmental exposure, other competing/confounding environmental/occupational

exposures, a detailed physical examination of plaintiff, diagnostic laboratory studies, the medical and scientific literature, and details of the environmental and exposure data.

Dr. Johanning conducted a number of different blood tests/ panels that included an evaluation of the liver, kidneys and immunological system, hormones (to assess thyroid function), protein chemistry, heavy metal analysis, urinalysis, allergy specific IgE and IgG, and respiratory function tests such as spirometry, inhaler studies and diffusion tests, and other examinations. Dr. Johanning opined that plaintiff still exhibited immune mediated hypersensitivity reactions (IG antibodies) to microbes typically found in very wet and damp environments, consistent with her medical history and exposure.

Dr. Johanning stated that in arriving at a conclusion assessing the health effects of building dampness and mold exposure in plaintiff (or any other patient), he used a differential diagnosis, the universally accepted methodology used by physicians in assessing causation and diagnosing illness.

Dr. Johanning stated there was "no question" that the conditions existing in plaintiff's apartment, including dust, microbial growth, mold, heavy metals and a diversity of fungi and bacteria that had come up through the floorboards and the air shaft in the apartment as a result of demolition work in the basement, contamination from flooding, as revealed

by long-term water damage, as well as dust, standing water, moisture and streaking on the walls, "had a host of deleterious effects" on plaintiff's health.
In forming his opinions, Dr. Johanning relied on a number of peer-reviewed studies, including a 2004 publication of the Institute of Medicine in the National Academies, entitled *Damp Indoor Spaces and Health,* relied upon by the *Fraser* plaintiffs, as well as two studies which postdate *Fraser,* a 2007 study entitled *Excess Dampness and Mold Growth in Homes: An Evidence-Based Review of the Aeroirritant Effect and its Potential Causes* (28 Allergy and Asthma Proceedings No. 3, May-June 2007), and an article published in 2008 entitled *Hydrophilic Fungi and Ergosterol Associated with Respiratory Illness in a Water-Damaged Building* (Environmental Health Perspectives, 116:45-50, Jan. 2008). The first study reviewed the major epidemiological and biological studies, concluding that "[t]he preponderance of epidemiological data supports a link between exposure to dampness and excess mold growth and the development of aeroirritant symptoms," and that studies

"support the role of VOCs [volatile organic compounds] in contributing to the aeroirritant symptoms of occupants of damp and mold-contaminated homes." The authors noted, in reviewing the data, that "[m]ultiple studies [ ] have found a dose-response relationship between the numbers of indicators of dampness present and aeroirritant symptoms." These studies found statistically significant relationships between visible mold growth and eye, nose and throat/respiratory symptoms.
The second study found that among workers in a building with long-term water damage, "respiratory illnesses showed significant linear exposure-response relationships to total culturable fungi." The authors stated that they had found "significant linear exposure-response relationships between various microbial measurements (total fungi, fungi requiring A*w* ≥ 0.8, hydrophilic fungi, ergosterol, and endotoxin) in dust and health outcomes (respiratory cases, epi-asthma cases, and postoccupancy asthma cases)." The authors found that the associations between health outcomes and fungi were mostly driven by exposure to fungi requiring A*w* ≥ 0.8, and specifically hydrophilic fungi in both floor and chair dust, that exposure to hydrophilic fungi in floor and chair dust was associated with about a two-fold increase in the chances of being a post-asthma occupancy case, and that of all the environmental variables, hydrophilic fungi in floor dust were most strongly associated with postoccupancy asthma cases.
The court granted defendants' cross motion for summary judgment dismissing the complaint, finding that it was constrained by this Court's decision in *Fraser v 301-52 Townhouse Corp.* (57 A.D.3d 416 [2008], *appeal dismissed* 12 N.Y.3d 847 [2009], *supra*), to dismiss plaintiff's claims for personal injuries caused by exposure to mold. The court stated, with respect to the issue of general causation:
"Higher appellate review is awaited, given that this dispute arises in the context of widespread public concern and increasing litigation about the effects of mold on health. For purposes of this opinion, however, the *Fraser* majority has resolved the issue of the sufficiency of the current epidemiological evidence to demonstrate general causation. As the majority found that the epidemiological evidence on which Dr. Johanning relied was not sufficiently strong to permit a finding of general causation, and as the limited supplemental studies that are submitted

in this action plainly do not remedy the insufficiency found by the *Fraser* majority, this court is constrained to hold that plaintiff is unable to prove general causation" (2009 NY Slip Op 52707[U], *6).

The court also found that *Fraser* had foreclosed plaintiff's evidence of specific causation, stating that "*Fraser* rejected Dr. Johanning's claim to have established causation by means of `differential diagnosis'" (*id.*). The court concluded:

"The scientific theory advanced in *Fraser* is the same theory advanced here, by the same witness, Dr. Johanning, on the basis of largely the same scientific evidence. While stressing that its holding did not `set forth any general rule that dampness and mold can never be considered the cause of a disease,' *Fraser* found that such causation had not been demonstrated by the evidence presented by the plaintiffs there ... *Fraser* mandates this court's dismissal of plaintiff's personal injury cause of action" (*id.* at *7).

Despite this Court's admonition in *Fraser,* that *Fraser* "does not set forth any general rule that dampness and mold can never be considered the cause of a disease" (*Fraser,* 57 AD3d at 418), the motion court nonetheless interpreted *Fraser,* erroneously in our view, as requiring rejection of plaintiff's personal injury claim based on exposure to mold. The scientific evidence shows that exposure to molds, particularly the types of molds whose presence in plaintiff's apartment was confirmed by sampling, i.e., aspergillus/penicillium, stachybotrys and chaetomium, can cause the types of ill effects experienced by plaintiff. The evidence offered on the motion easily satisfied the test of scientific reliability set forth in *Frye.* The motion court found that the supplemental studies relied on by Dr. Johanning "plainly do not remedy the insufficiency found by the *Fraser* majority" (2009 NY Slip Op 52707[U], *6). However, a thorough reading of the studies relied on by plaintiff's expert demonstrate a clear relationship between exposure to mold and respiratory and other symptoms. One study found "significant linear exposure-response relationships between various microbial measurements (total fungi, fungi requiring A*w* ≥ 0.8, hydrophilic fungi, ergosterol, and endotoxin) in dust and health outcomes (respiratory cases, epi-asthma cases, and postoccupancy asthma cases)." Another, upon a review of the epidemiological data, concluded that "*[t]he preponderance of epidemiological*

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data supports a link between exposure to dampness and excess mold growth and the development of aeroirritant symptoms" (emphasis added).

The results in the studies relied on by plaintiff were found to be statistically significant, meaning the strength of the association was sufficient to conclude, within the range of probability, that exposure to mold caused the identified ill-health effects. Scientists do not report their results in terms of black and white causality, but rather, in terms of the strengths of the associations found. These associations having been found sufficiently strong by the literature as to be indicative of a causal relationship, plaintiff's evidence must be deemed to meet the *Frye* standard.

Plaintiff has also adequately established specific causation. The evidence confirmed the presence of these types of molds in plaintiff's apartment. Plaintiff's expert opined that plaintiff's exposure to these fungi, including their by-products such as allergens, mycotoxins, and microbial volatile organic compounds, caused plaintiff's ailments. Plaintiff's expert opined that plaintiff still exhibited immune mediated hypersensitivity

reactions, as confirmed by IG testing, to microbes typically found in very wet and damp environments.
The motion court found that plaintiff had failed to adequately set forth her exposure levels to the molds identified in the apartment. Yet we have stated, time and time again, in cases involving environmental contamination and exposure to toxic substances, that it is generally difficult or impossible to quantify a plaintiff's exposure to a toxin.
The Court of Appeals, in *Parker v Mobil Oil Corp.* (7 N.Y.3d 434 [2006]), made clear that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (*Parker,* 7 NY3d at 448; *see Wright v Willamette Indus., Inc.,* 91 F.3d 1105, 1107 [8th Cir 1996] ["We do not require a mathematically precise table equating levels of exposure with levels of harm, but there must be evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular plaintiff the kind of harm of which he or she complains"]).
The motion court's reasoning runs counter to that of the Court of Appeals in *Parker* and is contrary to the views expressed by our sister Departments in cases involving exposure

to toxic mold (*see e.g. Cabral v 570 W. Realty, LLC,* 73 A.D.3d 674 [2d Dept 2010] [denying summary judgment where, inter alia, defendant failed to meet its initial burden of establishing, through scientifically reliable methodology, that no causal link existed between the plaintiff's injuries and their exposure to mold]; *Rashid v Clinton Hill Apts. Owners Corp.,* 70 A.D.3d 1019 [2d Dept 2010]). The Fourth Department, in *B.T.N. v Auburn Enlarged City School Dist.* (45 A.D.3d 1339 [2007]), affirmed denial of defendant's motion for summary judgment in a case alleging harm from exposure to atypical molds, stating:
"The record contains sufficient epidemiological evidence to support a finding of general causation, i.e., that the atypical molds found to be present in the school building can cause plaintiffs' symptoms. In addition, the affidavit of plaintiffs' expert is sufficient to support a finding of causation. There is no requirement that an expert precisely quantify exposure levels or establish a dose-response relationship. Rather, an expert may use a methodology generally accepted in the scientific community in concluding that the particular exposure caused the plaintiffs' symptoms" (*id.* at 1340 [citations omitted]; *see also Martin v Chuck Hafner's Farmers' Mkt., Inc.,* 28 A.D.3d 1065 [4th Dept 2006] [the plaintiff's expert affidavit raised a triable issue of fact as to whether the plaintiff's exposure to aspergillus mold caused his injuries]).
Moreover, this Court, in *Daitch v Naman* (25 A.D.3d 458 [2006]), seemingly embraced the theory that exposure to mold can cause personal injuries. In denying cross motions for summary judgment, this Court stated, "The conflicting opinions of the parties' experts raise issues of fact as to . . . whether such mold caused plaintiffs' alleged injuries" (25 AD3d at 459).
It is undisputed that exposure to toxic molds is capable of causing the types of ailments from which plaintiff suffers. Plaintiff's expert, via differential diagnosis, arrived at the scientifically sound conclusion that exposure to the toxic molds in plaintiff's apartment was a cause, within a reasonable degree of medical certainty, of her documented medical

ailments. The motion court reasoned that "*Fraser* rejected Dr. Johanning's claim to have established causation by means of `differential diagnosis'" (2009 NY Slip Op 52707[U], *6). However, this Court has never rejected differential diagnosis as an unsound scientific

procedure. Rather, this Court has stated that in order to be considered as a possible cause, in a differential diagnosis matrix, a given agent must be capable of causing the harm observed. Thus, in *Marso v Novak* (42 A.D.3d 377 [2007], *lv denied* 12 N.Y.3d 704 [2009]), we rejected an expert's opinion as to causation, arrived at through differential diagnosis, not because the differential diagnosis was an unreliable methodology, but because the medical literature did not support the premise that bradycardia was a risk factor for the type of stroke suffered by the plaintiff (*compare B.T.N. v Auburn Enlarged City School Dist.,* 45 A.D.3d 1339 [4th Dept 2007], *supra* [the plaintiff's expert opinion that the plaintiff's injuries were caused by toxic mold exposure, arrived at through differential diagnosis, met test of scientific reliability]).

Here, on the other hand, plaintiff's expert and defendants' expert agree that mold is capable of causing the ill-health effects experienced by plaintiff. Defendants' expert opined that "[m]olds can cause a wide spectrum of illnesses, including allergies, irritation, hypersensitivity pneumonitis and direct infection." Defendants' expert did not examine plaintiff in arriving at his conclusion that mold had not caused her ailments, concluding that "in the case of Ms. Cornell, molds caused no significant, objectively documented illness." Defendants argue that they are not liable because plaintiff's symptoms arose in October 2003, when demolition commenced in the basement, one month after defendants had sold the building. However, the evidence supports the inference that the molds found in the basement were indicative of longstanding water damage occurring while defendants owned the building, and that the long-standing mold had migrated through the floorboards and the air shaft as a result of the demolition work in the basement.

Based on the foregoing, we modify the order appealed from and reinstate plaintiff's claims against defendant 360 W. 51st Street Corp. Plaintiff, however, failed to raise an issue of fact whether defendant Shotwell acted in his individual capacity rather than in his capacity as an officer and shareholder of 360 W. 51st Street Corp., and thus, the complaint was properly dismissed as against him (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.,* 296 A.D.2d 103, 109 [2002]).

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered January 13, 2010, which, inter alia, granted the motion of defendants 360 W. 51st

Street Corp. and Geoffrey Shotwell for summary judgment dismissing the complaint as against them, should be modified, on the law, to reinstate the complaint as against defendant 360 W. 51st Street Corp., and otherwise affirmed, without costs.

CATTERSON, J. (dissenting in part).

In my opinion, the plaintiff's expert failed to establish the reliability of his theory under the *Frye* standard of review—namely that his theory is generally accepted in the scientific community. The majority is persuaded by the "significant" findings in the two studies relied on by the plaintiff's expert. However, the majority disregards *Frye*'s requirement that those "significant" findings must be "generally" accepted. There is nothing in the record nor does

the majority address whether these studies that link mold with respiratory illness are "generally accepted in the relevant scientific community." Therefore, I must respectfully dissent.

The plaintiff in this case is the tenant of an apartment on the first floor of a building in Manhattan. Defendant 360 W. 51st Street Corp. owned the apartment building until September 5, 2003, when it was sold to 360 West 51st Street Realty, LLC. On the day that the new owner began removing debris from the basement in order to renovate, the plaintiff allegedly became ill from dust, dirt, mold and debris that was purportedly released into the air and infiltrated her apartment. The plaintiff brought this personal injury action against, inter alia, the defendant and an individual shareholder.[*]

On January 25, 2008, the defendant and shareholder moved for summary judgment. The motion court granted the motion and dismissed the plaintiff's complaint. For the reasons set forth below, I would affirm the motion court's order in its entirety.

Although the plaintiff alleges that from 1997 through 2004 the basement of the building was damp and musty, the record suggests that her alleged injuries coincided not with the presence of mold or damp conditions in the basement, but with the demolition work performed in October 2003, when the defendant no longer owned the building. Moreover, there is no evidence in the record as to the level of mold or toxic substances present in the plaintiff's apartment during the time that the defendant owned the building. Thus, the plaintiff fails to raise an inference that her alleged injuries were proximately caused by any breach of duty by the defendant.

In any event, the plaintiff's submissions do not establish that her theory of causation is generally accepted within the relevant scientific community. The *Frye* test, articulated in *Frye v United States* (293 F 1013 [DC Cir 1923]), requires that the reliability of a new test, process, or theory be "generally accepted" within the relevant scientific community. (*Marsh v Smyth,* 12 A.D.3d 307, 310-311 [1st Dept 2004, Saxe, J., concurring].) Reliability is typically established by considering whether other experts in the same field accept the reliability of the theory. (*Id.,* citing *People v Wesley,* 83 N.Y.2d 417, 439 [1994, Kaye, J., concurring] ["(t)he *Frye* test emphasizes counting scientists' votes"] [internal quotations marks and citation omitted].)

The plaintiff put forward the affidavit of an expert who opined that the plaintiff's injuries were the result of exposure to "an unusual mixture of atypical microbial contaminants," including mold. The expert supported his conclusion through the use of his differential diagnosis of the plaintiff. In *Fraser v 301-52 Townhouse Corp.* (57 A.D.3d 416 [1st Dept 2008], *appeal dismissed* 12 N.Y.3d 847 [2009]), this Court rejected this theory as not generally accepted in the scientific community.

The majority contends that the plaintiff's scientific evidence was sufficient to establish that "exposure to molds . . . can cause the types of ill effects experienced by plaintiff." Similarly, the majority finds that the plaintiff's evidence "easily satisfied the test of scientific reliability set forth in *Frye.*"

While the plaintiff's expert may have sought to demonstrate that there was scientific evidence that mold caused the plaintiff's injuries, the expert failed to establish the essential requirement of *Frye,* general acceptance of the expert's theory within the relevant scientific community. Indeed, the first of the two post-*Fraser* studies, relied on by the plaintiff's

expert and the majority, plainly states that, "[t]he data reviewed here represent *initial* steps toward defining the pathophysiological mechanisms for the aeroirritant effects of damp homes and associated excess mold growth" (emphasis added).
Similarly, the second post-*Fraser* study relied on by the plaintiff's expert for the exposure-response relationship was based on a study of a single office building in 2001-2002. The study contains no evidence that the conclusions were adopted by the National Institute for Occupational Safety and Health, the agency sponsoring the study; nor does the plaintiff make that claim.
These two studies fall short of establishing general acceptance in the scientific community that there is a causal connection

between exposure to mold and the plaintiff's injuries. As such, I would not depart from our holding in *Fraser.*
Order, Supreme Court, New York County, entered January 13, 2010, modified, on the law, to reinstate the complaint as against defendant 360 W. 51st Street Corp., and otherwise affirmed, without costs.

Footnotes

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1. The dissent's criticisms of the studies relied on by plaintiff unfairly adjudge the quality of the data, not the quantum of data. For example, the dissent derides the data in one study as "represent[ing] *initial* steps toward defining the pathophysiological mechanisms" for certain "aeroirritant effects" associated with excess mold growth. This statement in no way detracts from the study's conclusion, however, that "there remains a large population of patients who do suffer medical problems related to damp indoor home environments."
2. *See also* Jonathan Vatner, *Battling Mold Infestations,* New York Times, Feb. 11, 2011 (discussing fact that the Department of Housing Preservation and Development issued 14,290 violations in 2010 alone for mold in residential buildings, and noting that the building industry may soon adopt mold-resistant drywall as a standard, quoting source as stating, "This is a very low-cost proposal with substantial health benefits").
3. 360 West 51st Street Realty, LLC has settled with plaintiff and is not an appellant.
* Plaintiff settled with the new owner, defendant 360 West 51st Street Realty, LLC.