

**EMERGING TOXIC WARS: CHEMICAL, GERMS, & MOLD  
LITIGATION**

by

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## I. INTRODUCTION

Technological advances in science and medicine have served as the precursors to emerging theories of liability in personal injury litigation.

## II. OLD PESTILENCE -- NEW THEORIES

### A. Chemicals have long been a concern for human health.

Acute exposure of benzene, hydrogen sulfide and other dangerous products have long been recognized as the cause of toxic and even fatal incidents.

We now see emerging litigation of claims for permanent physical and neurological effects of minimal doses of gases or chemicals from long term exposure, as opposed to acute exposure.

### B. Mold has historically been seen as a human bane, but now is considered by some to be the cause of permanent physical ailments, including allergies, skin disorders, lung dysfunction and neurological deficits

The new litigation battlefield over mold concerns the foreseeable harm caused by, *inter alia*, shoddy manufacturing, negligent maintenance and insurers' willingness to cut corners.

The most prevalent litigation and regulation issues revolve around long term health effects, medical causation and pre-existing water damage.

## III. CHEMICAL WARFARE – PRIVATE ENTERPRISE LIABILITY

### A. The Gulf War Syndrome

#### 1. A lawsuit currently pending in a Texas state district court alleges that over 1800 United States veterans, including approximately 185 Texas residents and their dependents, incurred personal injuries arising from exposure to biological and chemical materials that were sold to Iraq by numerous U.S. and European private companies during the 1980's.

The materials sold by these companies were used by Iraq to make chemical weapons utilized against the Allied forces during the 1991 Persian Gulf War.

Foreseeability is the crux of liability – for what other use could Iraq want these highly particularized materials?

Violation of Federal Laws and International Treaties also come into play, as Iraq has long been known to use chemical and biological weapons.

#### 2. The Texas Court's Jurisdiction currently is a major "Konzern"

Many of the entities sued in Texas were foreign companies who have attempted to avoid adjudication for their actions by alleging that the parent companies are not subject to the imposition of personal jurisdiction of the Texas Court, despite having subsidiary companies that

are.

The Texas Supreme Court soon will decide the extent to which a foreign corporate entity may do business in Texas with its own subsidiaries, but not have those contacts considered in the jurisdictional analysis without a finding of "alter ego." See *Preussag AG v. Coleman*, 16 S.W.3d 110 (Tex. App.– Houston [1<sup>st</sup> Dist.] 2000, pet. filed).

3. Medical effects are becoming more clear as studies at the highly acclaimed University of Texas Southwestern Medical School in Dallas have substantiated the veterans' claims.

B. Hydrogen Sulfide (H<sub>2</sub>S)

1. Long known by the oil and gas industry to cause catastrophic effects with significant acute exposure (above 50 ppm causes death).
2. Now considered by many to cause long term neurological defects with minimal amount of gas but long term exposure.
3. Release of small amounts into oxygen and water supply, once believed to be harmless, now may be a source of significant liability.

IV. BLACK PLAGUE – MOLD SPORES AND MICOTOXINS:  
STACHYBOTRYS DEBATE

A. An ancient risk, as noted in Biblical Text:

"On the seventh day the priest shall return to inspect the house. If the mildew has spread on the walls, he is to order that the contaminated stones be torn out and thrown into an unclean place outside the town. If the mildew reappears in the house after the stones have been torn out and the house is scraped and plastered, it is a destructive mildew and the house is unclean. It must be torn down - its stones, timbers and all the plaster - and taken out of town." Leviticus, Chapter 14: 39 - 47

B. New applications – Actual claims.

1. Consumer (or builder) v. manufacturer (sub contractor) – New artificial stucco system on million dollar homes retains moisture causes growth of mold.
2. Consumer v. Contractor – Contractor placed siding such that it covers vents of wood frame residence, traps moisture inside.
3. Consumer v. Insurance Company – Settling for "band aid" fix instead of remedial repair, *i.e.* painting over active mold, refusing to remediate.
4. Tenant v. Landlord – Failure to properly maintain rental property and evacuate in the face of danger – Results in condemnation of entire upscale apartment complex.
5. Purchaser v. Seller, Agent, Inspector – Failed to advise of previous water

damage?

6. Commercial Tenant v Commercial Landlord – Sick Building Syndrome.

C. Real Life Case Study

*Mary Belinda Ballard, et al v. Fire Insurance Exchange, a member of the Farmers Insurance Group*, No. 99-05252, 345th Judicial District Court, Travis County, Texas.

Ms. Ballard's residence had a simple plumbing leak in her bathroom. The wood floor would not dry after several months so she called her insurer, Farmers. The Farmers adjuster blamed the wood damage on foundation shifting (not a covered loss) instead of the water leak (covered loss).

– not an unusual position for Farmers. See *Barbara Field v. Fire Insurance Exchange*, No. LC046295, Cal. Sup., Los Angeles Co. (Adjuster claimed water damage from tub not caused by sudden or accidental leak from tub). *Mealey's Litigation Report: Mold*, Vol. 1, No. 8, August 2001, at p. 20-21.

Not happy with the result, and continuing to have problems, Ms. Ballard again requested Farmers' assistance. An engineer for Farmers reported that there were, in fact, two leaks causing the damage (covered claim).

Ms. Ballards' contractor advised that the floor should be removed and replaced to avoid mold contamination. Farmers chose to authorize only the replacement of the damaged pieces, not the entire floor, despite warnings of mold growth. While arguing over the extent of damage and cost of repair, Farmers' own agent discovered *stachybotrys atra* in the residence. Each of the Ballards became ill, including her three (3) year old son.

Mr. Ballard, a successful businessman, now complains of neurological deficits preventing him from returning to gainful employment.

D. The *Ballard* case was tried to a jury who found for the Plaintiffs in the amount of 32 Million dollars – for total destruction of the 3 Million dollar house and for bad faith in adjusting the claim. Farmers will appeal the judgment.

E. Instructive because –

Mold is not a concern of only those individuals living in low income housing and of low income levels – but anybody, anywhere.

Court ruled that the Ballards could not support their personal injury claims because their experts were not qualified under Texas law to present expert testimony as to medical causation – this ruling will be appealed by the Ballards.

– This is a major battle front in the mold wars, as the very same experts were accepted by the Delaware Supreme Court in *New Haverford Partnership v. Stroot*, No. 549, 1999 Del. Sup., a case in which Plaintiffs recovered over 1 Million dollars in damages for personal injuries. (Underlying case at 1997 WL 753916).

Minor water leak

- could have been repaired for a minimal amount – resulted in the entire destruction of the 3 Million dollar home, and alleged severe personal injuries of Plaintiffs.

F. Major Mold Issues on the Battle Field.

1. Regulatory – Pre existing water damage. Texas insurers are attempting to convince the State Board of Insurance to allow them to deny insurance to those with pre existing water damage.
2. Several Insurers no longer writing homeowners' insurance pending additional "protections" from insurance regulatory agencies.
  - They blame increase in costs and number of mold claims for their decision.
  - Shouldn't they blame their own claims handling procedures, as illustrated by the Ballard claim, instead?
3. Medical Causation – *Daubert* and *Robinson* challenges.
  - Lack of studies to support long term impairment?
  - Lack of evidence of specific causation of mold?

Expect these battles in every case as insurers attempt to limit their exposure.
4. Spoliation of evidence or good faith attempt at remediation.
  - Both plaintiffs and defendants need be aware of the consequences of overzealous actions once mold is found.
  - If defendants remediate before allowing destructive testing by plaintiffs, should they then be allowed to argue that plaintiffs' experts cannot establish specific causation under *Daubert*?

V. CONCLUSION