TEXAS MOLD:
The Litigation Gusher That Didn't Hit,
.....Yet

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Introduction

"The next asbestos," "the next Fen-Phen," "the next breast implant," "mold is gold." Almost two years ago, these were all phrases associated with the much anticipated future of "black mold" litigation. Even better, thought many trial lawyers, black mold litigation would never go away. Breast implant and Fen-Phen litigation is virtually dead, and asbestos litigation is in its golden years. Mold, on the other hand, cannot be removed from the market place like diet drugs, silicon and asbestos.

Mold can, and often does, proliferate anywhere there is organic material and a water source. Homes, businesses, and even personal automobiles, and the personal effects within these places, are potential food sources for a host of over 1,000 different indoor molds identified by scientists. Mold is so prevalent that virtually every building and room contains mold spores, no matter how clean the room. Once the mold hype began, at least in Texas, claims against insurance carriers skyrocketed with homeowners seeking expensive mold testing and remediation services and related coverages such as alternate living expenses. The number of mold related claims made by businesses against their own carriers, or claims made directly against businesses for that matter, were small by comparison. The rapid proliferation of mold claims made by homeowners against their carriers can be viewed as a "gusher" in and of itself, a flow that is now greatly reduced. The real Spindletop (depending on point of view), the one involving significant personal injuries, has not materialized, ...yet.

THE RISE AND DECLINE OF TEXAS MOLD CLAIMS

I. A 32 million dollar judgment in a mold case contributed to the rapid rise in claims.

A. "Black mold" became an extremely hot litigation topic after a Travis County jury returned a June 2001 verdict in Melinda Ballard's favor. The verdict was against her homeowners carrier, Fire Insurance Exchange, a member of the Farmers Insurance Group. The case was primarily a first party bad faith case. Ms. Ballard's claims arose out the carrier's handling (or mishandling rather) of numerous water leak claims experienced in her home. The jury awarded the following damages:

- $2,547,350 to replace the home;
- $1,154,175 to remediate 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 attorney's fees.

With prejudgment interest and a statutory penalty under article 21.55 of the insurance code added, the trial court signed a final judgment in excess of thirty-three million dollars, which was reduced to the thirty-two million dollar range for previous payments made by the insurance company.

B. Notably absent from the recitation of damages given above are the personal injury damages of Ronald Allison, Melinda Ballard's husband. During the time Allison was still living in the home, he alleged having increasing problems with concentration and memory. Allison was later diagnosed with a type of brain damage known as toxic encephalopathy. Allison had two leading experts in the study of the health effects of molds and mycotoxins ready to testify that exposure to mold caused Allison's toxic encephalopathy. However, the opinions of these two experts did not pass scientific muster and were excluded by the trial judge on the eve of trial.

II. According to Texas Department of Insurance personnel, the vast majority of Texas mold claims involved homeowners who pursued property damage claims under their insurance policies.

A. Mold was, and is, generally excluded under the standard homeowners policy. However, after the mold hype began, homeowners in vast numbers sought reimbursement from their carriers for mold related losses. Homeowners could do so when the mold was caused by a covered loss, such as a plumbing leak or roof leak. The typical exclusion in a homeowners policy is as follows:

"We do not cover loss caused by:

- *Wear and tear, deterioration or loss caused by any quality in property that causes it to damage or destroy itself.*
- *rust, rot, mold or other fungi.*

We do cover ensuing loss caused by . . . water damage . . . if the loss would otherwise be covered under this policy."

B. Home Insurance Company v. Dennis D. McClain, 2000 WL 144115 (Tex. App. – Dallas, Feb. 2000)(unpublished opinion). McClain is illustrative of a homeowner seeking reimbursement from a carrier for mold under the ensuing loss provision of a homeowners insurance policy. In this case, rainwater entered the McClains' house through leaks in a new roof. The McClains alleged water leaks caused damage to the Sheetrock and wood members in interior walls and that water flowed

into crawl spaces and "ponded" resulting in mold underneath the house. The Dallas Court of Appeals held the "ensuing loss" provision afforded coverage for the mold that resulted from the leaky roof.

III. Through the adoption of new insurance endorsements (exclusions) the Texas Department of Insurance subsequently limited many mold claims.

A. Effective January 1, 2002, the Texas Department of Insurance approved new mold endorsements for the various standard homeowners policies. The new endorsements were approved in an effort to curtail the tremendous amount of "ensuing loss" mold claims insurance carriers were receiving. While mold is generally still covered as an "ensuing loss," remediation and testing costs are no longer covered. Sample exclusionary language is as follows:

"We do not cover the cost for remediation, including testing of ensuing mold, fungi or other microbes. We do not cover any increase in expenses for Loss of Use and/or Debris Removal due to remediation and testing of ensuing mold, fungi or other microbes.

'Remediation' means to treat, contain, remove or dispose of mold, fungi or other microbes beyond that which is required to repair or replace the covered property physically damaged by water. Remediation includes any testing to detect, measure or evaluate mold, fungi or other microbes and any decontamination of the residence premises or property."

B. The mold endorsements were appended to new policies beginning January 1, 2002 and incorporated into new policy forms beginning January 1, 2003.

C. As a result of these exclusions, insurance companies are no longer paying for testing, remediation or "Loss of Use" due to testing and remediation, and homeowners simply are not filing many new mold claims. Environmental consultants offering mold testing and remediation services have advised us that their business has dropped considerably since Fall 2002, a time after which the new exclusions have had a chance to take effect.

D. Homeowners can still purchase a rider for mold remediation and testing coverage with the payment of an additional expensive premium. However, as discussed previously, such coverage no longer exists under a standard homeowners policy.

IV. The Austin Court of Appeals recently upheld the exclusion of expert testimony in the Ballard case and also significantly reduced the damages previously awarded.

A. On December 19, 2002 the Austin Court of Appeals rendered its unpublished opinion concerning the Ballard case. Allison v. Fire Insurance Exchange, 2002 WL 31833440 (Tex. App. – Austin, Dec. 19, 2002)(unpublished opinion).

B. The Austin Court upheld the exclusion of expert testimony for the reason that sufficient epidemiological studies regarding the adverse health effects of mold had not yet been performed.

C. The Austin Court determined that "knowing" conduct was not established on the part of defendant Fire Insurance Exchange and there was, accordingly, no basis for the recovery of punitive damages and mental anguish damages. The judgment was reduced to little more than four million dollars and remanded to the district court to determine attorneys' fees consistent with the appellate decision.

D. The Ballard case, in a rough sense, bracketed the Texas "bubble" of mold claims. When the Ballard verdict was rendered in June 2001, mold claims were being filed at a frantic pace. Now, nearly two years later, the filing of new mold claims has fallen off considerably.

MOLD CONSIDERATIONS FOR CORPORATE COUNSEL

I. Commercial insurance policies are very likely to contain mold exclusions; be sure to review coverages with your broker or environmental lawyer.

A. Similar to the current homeowners insurance market, mold exclusions are contained in commercial policies and carriers have sought to exclude expensive remediation and testing costs.

B. Mold has historically been excluded in commercial policies as well. The exclusions usually appear following an introductory preamble, such as the following:

> *"This policy does not insure against loss caused directly or indirectly by any of the following:*
>
> *"This policy will not pay for loss or damage caused by or resulting from any of the following:*
>
> *"This policy does not insure against the following types of loss or damage:"*

This introductory phrase is followed by a listing of all exclusions applicable to the policy. Mold is rarely found as a separate item. It is normally included in a listing

of similar perils, which are of a type that occur over time. The following examples are illustrative:

> *"Wear and tear, deterioration, depletion, erosion, corrosion, **mold**, wet or dry rot."*
>
> *"Moth, vermin, termites or other insects; inherent vice; defective or faulty workmanship, error in design or materials; wear and tear or gradual deterioration; contamination; pollution; corrosion, rust, wet or dry rot, **mold**, dampness of atmosphere, smog or extremes of temperature; or loss or damage, by normal settling, shrinkage, or expansion in buildings or foundations."*
>
> *"Rust, corrosion, **fungus*** [mold is a fungus], *decay, deterioration, hidden or latent defect, or any quality in the property that causes it to damage or destroy itself."*

C. According to several contacts in the insurance industry, most mold losses in the commercial insurance context have been paid because the mold was just a portion of the damage caused by water infiltration from another covered cause. This result is similar to the "ensuing loss" coverage under a Texas homeowners policy. It must be noted, however, that commercial insurance policies are not regulated as tightly in Texas as is the homeowners business, and commercial insurance policies generally do not have to conform to exact forms pre-approved by the Texas Department of Insurance, a prerequisite in homeowners underwriting. Accordingly, commercial general liability and property damage policies written by various carriers can, and often do, differ from each other. Some policies may contain exclusionary language where other policies may not. Keeping the foregoing caveat in mind, commercial carriers have generally afforded coverage if the cause of the mold was actually a covered loss such as water damage from a broken pipe or a leaking roof.

D. Commercial property insurance companies are also moving to limit or exclude coverage altogether for repair costs for the remediation of mold, regardless of causation. The following is a representative provision excluding coverage:

Notwithstanding any other terms or conditions, this policy does not insure against:

a. *Any cost or expense incurred to clean up, remove or remediate any Fungi* [once again, mold is a fungus, and carriers often use the broadest exclusionary terms possible]*, or*

b. *Any cost or expense incurred to test for, monitor, or assess the existence, concentration or effects of Fungi.*

*For the purpose of this endorsement, Fungi shall mean any form of fungus, including but not limited to, yeast, **mold**, mildew, rust, smut, mushroom, spores, mycotoxins, odors, or any other substances, products, or byproducts produced by, released by, or arising out of the current or past presence of Fungi.*

E. We have also heard that some commercial insurance carriers have tried to rely on pollution exclusions to limit mold claims, but we are not aware of any reported cases in Texas or the Federal Fifth Circuit that have addressed whether mold constitutes "pollution" under a pollution exclusion. Neverthless, such tactics by insurance carriers are indicative of the current trend to attempt to limit mold claims and coverage for such claims.

II. Mold and environmental insurance.

A. Environmental Impairment Liability (EIL) forms, which typically provide for both first-party property damage and third-party liability coverage for environmental conditions, also include exclusions for mold. EIL insurers will often agree to provide some mold remediation coverage, but only for a sub-limited amount. However, in most policies remediation costs are covered only to the extent required by environmental laws. Pending adoption of federal, state or local laws establishing cleanup standards for mold, it is questionable whether mold testing and remediation costs would be covered.

B. Mold Inspection Programs

In what may represent a new trend in mold insurance, Hartford Steam Boiler has created a mold protection program initially targeted at schools in Pennsylvania, New Jersey and Connecticut. The "Mold Protection Program" is designed for schools that are willing to work with Hartford Steam Boiler to implement loss prevention recommendations to proactively manage the growth of mold. The program begins with an inspection and evaluation to determine qualification. Once qualified, Hartford Steam Boiler provides loss prevention recommendations based upon the results of the inspection and works with the client over time to control moisture, water intrusion and other conditions that can cause mold growth. The program includes a mold remediation policy that can pay for remediation costs if visible mold is discovered at an insured location.

III. Asbestos regulations impact mold investigations and remedial activities.

A. Mold investigations and remediation may trigger certain requirements relating to asbestos, including obtaining an asbestos survey prior to any remediation work.

"The State of Texas has experienced an increase in mold remediation in public and commercial buildings. The majority of evaluations of mold contamination involve the disturbance of building materials to locate the mold. In accordance with [25 TAC 295.34(c)], *prior to any renovation or dismantling within a public or commercial building, including preparations for partial or complete demolition, a thorough asbestos inspection must be conducted. The survey should be done prior to any disturbance of building materials. If asbestos is present, then the asbestos would need to be abated in accordance with either TAHPR* [Texas Asbestos Health Protection Rules] *or NESHAP* [National Emission Standards for Hazardous Air Pollutants]*, depending if the building is public or commercial."* "Mold Contamination and Asbestos Surveys," TDH Publication No. 18-10948, Volume 9, No. 1 January - April 2002.

B. Emergency situations, such as burst pipes, broken water heaters and floods, often necessitate an immediate response: to shut off the water source, clean up the flooded area, and dry the area in an effort to prevent mold growth. An emergency response may render an asbestos survey impracticable, if not impossible, given the need for immediate action. Although the Texas Asbestos Health Protection Rules do contain provisions for emergency renovations made necessary by an unexpected "asbestos incident," that term is not defined in those same rules. Therefore, it is not clear whether these provisions would relate to emergency situations that could result in mold.

IV. The current state of mold regulations.

A. Currently, there are no environmental-type regulations governing mold. The Environmental Protection Agency and the State of New York have issued guidance documents, but these documents relate more to operations and maintenance issues than regulatory standards. In fact, there are not even any licensing requirements for mold testers and remediators.

B. Both the Texas Department of Insurance and the Texas Department of Health established "Mold Task Forces" to help address the mold crisis.

C. Texas Department of Insurance.
In January 2002, Insurance Commissioner Jose Montemayor appointed an Advisory Task Force for Mold-Related Claims to develop recommendations on how insurers should respond to mold claims. The TDI task force acted quickly. In April 2002, Mr. Montemayor released for publication and distribution a document entitled, Effectively Handling Water Damage and Mold Claims: A Consumer Guide and

Texas Department of Insurance's (TDI's) Suggested Practices for Insurers. http://www.tdi.state.tx.us/consumer/moldpub.html. This document is targeted at homeowners and insurance companies handling homeowner claims. The TDI guide may not have much practical application for corporate counsel handling mold claims. However, it is indicative of the State reacting to the mold crisis, and it is instructive of how a business may expect its insurer to respond to a mold claim.

D. Texas Department of Health.

The Texas Department of Health established a Mold Task Force to create voluntary guidelines for indoor air quality in all government buildings including schools. Additionally, the Task Force is purported to be working on licensing guidelines for mold inspectors, laboratories, and remediators performing work in government buildings. In a recent "Meet your Legislator's" luncheon, two local state senators have indicated such licensing requirements are legislative priorities in the current session.

The TDH recently adopted revised voluntary indoor air quality guidelines which were prepared in part by its mold task force. The guidelines became effective December 22, 2002. These indoor air quality guidelines can be found at http://www.tdh.state.tx.us/beh/IAQ/Gov_Bld_Gd.htm. It is of note that these guidelines are strictly voluntary. In fact, the TDH does not even have any enforcement authority to implement the guidelines. Tex. Health & Safety Code Ann. sec. 297.1(b)(1) (Vernon Supp. 2003). Moreover, no liability on the part of a governmental entity is created for any personal injuries caused by the failure to enforce or implement the guidelines. Tex. Health & Safety Code Ann. sec. 385.003 (Vernon Supp. 2003).

The indoor air quality guidelines contain a section on minimum risk levels for many indoor air contaminants. Tex. Health & Safety Code Ann. sec. 297.8(b) (Vernon Supp. 2003). Yet, unlike many other contaminants, no minimum risk level is set for mold. Rather, it is simply stated that "[*v*]*isible mold on surfaces or mold odors is unacceptable*." *Id.*

The indoor air quality guidelines also contain a section on "microbial management," a section that applies to mold. This section relates to operations and maintenance issues. The "microbial management" section of the indoor air quality guidelines is included here because it is the closest Texas has come to adopting any "official" mold regulations.

"(g) ***Microbial management****. The control of the conditions that allow or encourage microbial growth should be a primary objective of building operations and maintenance.*

"(1) Water intrusion. Damaged building systems or components that cause water condensation or water leaks in the building should be promptly repaired. Inspect the building for evidence of water damage and visible mold growth and promptly correct the problem. Areas that go unattended can soon become major problem areas.

"(2) Water damage. Porous materials that cannot be dried within 24-48 hours usually cannot be saved without great expense. Remove and dispose of water-damaged porous materials, such as sheetrock, fiberglass or cellulose insulation, carpets, mattresses, pillows, upholstered furniture, papers, and books. If water damage is from floodwaters that may contain sewage or from sewage backup, the water-damaged porous materials should be replaced and special cleaning is required for all hard surfaces. If large areas are water-damaged, desiccants and/or dehumidifiers may be necessary to remove excess humidity and prevent mold growth.

"(3) Cleaning/replacement. Promptly clean or replace materials contaminated with mold or other microbials. Contaminated porous materials should be replaced. Take precautions to prevent exposures to workers/occupants when cleaning and/or disinfecting with chemicals. When removing contaminated materials, handle the material carefully and gently to avoid dispersion of contaminant, and bag the material prior to removal from contamination site to prevent further contamination of adjacent areas.

"(4) Construction, operation and maintenance. To prevent microbial growth: exhaust the air directly to the outside in high moisture areas; prevent condensation on cold surfaces (i.e. windows, piping, exterior walls, roof or floors) by adding insulation, raising the temperature and increasing circulation; prevent water intrusion from rain and ground water by proper maintenance of the landscape, roof, and exterior structure materials; maintain relative humidity below 60%, preferably below 50%, at all times if possible; do not install carpet in areas where there is a potential moisture problem; and check the installation and operation of moisture barriers, weep holes, HVAC systems, roof, windows, and vents.

"(5) Water systems. Ensure that the following water systems are built, operated and maintained to prevent the growth of Legionella and other microorganisms that can become airborne: potable water systems, emergency water systems, heated spas, whirlpool baths, drip pans, architectural fountains, waterfall systems, cooling towers, fluid coolers, evaporative condensers, direct evaporative air coolers, misters, air washers and humidifiers. Treatment for these systems includes the use of chemicals, ionization and/or heat, depending on the system. Additional guidance can be found in ASHRAE Guideline 12-2000" Minimizing the Risk of Legionellosis Associated with Building Water Systems."

Tex. Health & Safety Code Ann. sec. 297.5(g) (Vernon Supp. 2003)

V. Is mold litigation dead?

A. The future of mold litigation in Texas appears limited to property damage claims, as long as no link is made between severe personal injuries and exposure to indoor, airborne mold. The scientific evidence linking indoor, airborne mold exposure and severe personal injury has not yet been established.

B. The Texas Medical Association Council on Scientific Affairs issued a paper in September of 2002 basically stating that there is no scientific evidence, to date, linking *Stachybotrys* (black mold) exposure to sever human illness or injury.

1. *"There is no convincing evidence that Stachybotrys is a significant or even proven pathogenic antigen in either traditional allergic reactions or the rare forms of hypersensitivity pneumonitis."*

2. Conclusions of the Texas Medical Association Council on Scientific Affairs:

a. *Adverse health effects from inhalation of Stachybotrys spores in water-damaged buildings is not supported by available peer-reviewed reports in medical literature.*

b. *The probability or possibility of causation or exacerbation of a medical condition due to exposure to mold in indoor environments currently exists only for the following:*
- *Traditional Type I immune reactions (allergies); and*
- *Rare Type III immune reactions (hypersensitivity pneumonitis), pulmonary hemorrhage in infants associated with mycotoxins.*

3. Please see http://www.texmed.org for the complete article.

C. Shortly thereafter, in October of 2002, the American College of Occupational and Environmental Medicine published a paper with findings similar to those of the Texas Medical Association.

"[I]t should be remembered that molds are not dominant allergens and the outdoor molds, rather than indoor ones, are the most important….Molds growing indoors are believed by some to cause building-related symptoms. Despite a voluminous literature on the subject, the causal association remains weak and unproven, particularly with respect to causation by myotoxins. …Levels of exposure in the indoor environment, dose-response data in animals, and dose-rate considerations

suggest that delivery by the inhalation rate of a toxic dose of myotoxins in the indoor environment is highly unlikely at best, even for the hypothetically most vulnerable subpopulations."

See http://www.acoem.org/guidelines/pdf/mold-10-27-02.pdf for the complete article.

D. The CDC (Centers for Disease Control and Prevention) also fairly recently addressed the current state of scientific knowledge regarding mold exposure and adverse health effects. The CDC is of a similar mind set as the Texas Medical Association and the American College of Occupational and Environmental Medicine regarding exposure to airborne, indoor molds. According to CDC, exposure to mold can cause serious health effects under certain circumstances, which circumstances do not currently include exposure to airborne, indoor molds in normal healthy individuals.

"*We* [CDC] *do know that people who are exposed to molds may experience a variety of illnesses. Fungi account for 9% of nosocomial infections, that is, infections originating or taking place in a hospital. Ingestion of foods contaminated with certain toxins produced by molds is associated with development of human cancer. Many respiratory illnesses among workers may be attributed to mold exposures. Uncommon illnesses that collectively can be called hypersensitivity pneumonitis are caused by chronic exposures to high concentrations of mold and are almost exclusively limited to certain agricultural workers in particularly moldy environments. Common illnesses caused by molds include allergic conditions such as hay fever and asthma.*

"Because molds can be harmful, CDC concurs with the general recommendations of agencies such as EPA and FEMA, which offer information on preventing and cleaning up mold growth in indoor environments. ***Linkages between indoor airborne exposures to molds and other health effects, such as bleeding from the lung, or memory loss, have not yet been scientifically substantiated."***
Stephen C. Redd, M.D., *Statement of the Science on Molds and Human Health,* (Statement for the Record Before the Subcommittees on Oversight and Investigations and Housing and Community Opportunity Committee on Financial Services United States House of Representatives, July 18, 2002)(emphasis added). Please see http://www.cdc.gov/nceh/airpollution/images/moldsci.pdf for the complete statement.

F. For yet another article questioning the association of mold exposure to serious personal injury please see: Elena H. Page & Douglas B. Trout, *The Role of Stachybotrys Mycotoxins in Building-Related Illness*, 62 American Indus. Hygiene Ass'n J. 644 (Sept./Oct. 2001). *"The literature review indicates that currently*

there is inadequate evidence supporting a causal relationship between symptoms or illness among building occupants and exposure to mycotoxins."

G. Despite scientific evidence that mold can cause allergic reactions, it can still be difficult for plaintiffs to prove even allergic reactions to mold in court. The foregoing issue was addressed in *Flores v. Allstate Texas Lloyds*, 229 F.Supp.2d 697 (S.D. Texas, 2002). The Plaintiffs in *Flores* alleged their home was untenantable because Mrs. Flores suffered allergic reactions from exposure to household mold. In this regard, the Flores family was seeking alternate living expense coverage for having to move out of the house. The Flores family intended on relying on the testimony of Dr. Gutierrez, the Flores family doctor and a general practitioner. Dr. Gutierrez was going to testify that household mold was causing Mrs. Flores' allergic reactions, thus making the house untenantable. However, the district court excluded the testimony of the doctor as being scientifically unreliable.

The "scientific" evidence was excluded for several reasons. First, Dr. Gutierrez never conducted any tests of anyone in the Flores family to determine if they were in fact allergic to any household mold, despite such tests being available. Furthermore, no dosage studies had been conducted to determine the amount of mold exposure suffered by the family. Third, the Flores family doctor did not point to any peer reviewed studies linking allergies to household molds (such studies do exist and this seems to be sloppy work on the part of the Plaintiffs' attorney). The trial court determined that the doctor failed to provide any evidence that "a particular mold in the house had a greater possibility than cigarettes, dust mites, fibers, huisache, mesquite, or any other number of present environmental allergens, of causing health effects in Mrs. Flores or any other Plaintiff." *Id*. at 702. Thus, the testimony of Dr. Gutierrez was excluded.

H. Mold property damage claims will continue, but not at the pace seen over the last two years. Furthermore, some plaintiffs' attorneys will continue to file claims involving personal injuries associated with mold exposure in an effort to increase the value of their property damage cases. However, at least for the near future, mold personal injury cases simply do not have much appeal to the plaintiffs' bar. Allergy and sinus cases do not carry the level of potential reward necessary for plaintiffs' lawyers to risk significant time expenditures and the advancement of expert witness fees, only to have the experts struck prior to trial, assuring a loss in a personal injury case. Accordingly, the personal injury gusher of mold claims has not occurred, ….yet.

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