



LJN'S

Product Liability

Law & Strategy®

Volume 26, Number 1 • July 2007

Practice Tip

Firing Your Expert

By Lawrence Goldhirsch and Josh Vitow

During a recent product liability trial, the plaintiff's expert opined in his original disclosure that the subject machine was defective because it lacked a clutch safety mechanism. Trial counsel, retained just weeks before jury selection, learned from the same expert that no machine in the industry contains such a mechanism. They concluded that cross-examination of the expert on this point would probably outweigh any benefit that such testimony might add to the plaintiff's case, and that a simpler explanation for the accident was the manufacturer's failure to place conspicuous warnings to the user on how to operate the device properly. They decided that it would be wise to have the expert testify about the missing warnings instead of the design defect. The problem was that the expert's design defect theory had been presented in the plaintiff's pretrial disclosure statement, which had been served on the defendants, but nothing was disclosed about the failure to warn.

Should counsel call the expert to present his modified theory of liability to the jury and deflect questioning from defense counsel about the theory of the missing clutch or dispense with his testimony altogether? Since a manufacturer's liability for a

continued on page 11

Inhalation Litigation: Mold to Engineered Nanoscale Materials?

By Steven R. Kramer

Asbestos litigation finally may be winding down, and personal injury mold litigation seems to have been stopped in its tracks. That means something else must rise and be the next wave of inhalation litigation, and it looks like it is the emergence of engineered nanoscale materials. Venture capitalists and the government itself predict that engineered nanoscale materials will transform the field of engineering. Such engineering proclamations have been made in prior generations; Henry Adams once warned that "every day nature violently revolted, causing so-called accidents with enormous destruction of property and life, while plainly laughing at man, who groaned and shrieked and shuddered."

REVISITING MOLD LITIGATION

Nanotechnology has become the new buzzword for innovation, and magazines tout its promise to be the next Industrial Revolution. Before getting too far ahead of the subject, however, it would pay to revisit the recent concern over mold litigation.

Like nanotech, mold is a microscopic. Unlike nanotech, mold is a member of the fungi kingdom, found both indoors and outdoors, and there are thousands of species. Mold has been an important ingredient of many life-saving medicines but still, ingestion of mold-tainted foods has been documented to cause mycotoxin poisoning in animals and humans and some molds produce mycotoxins.

Both the good and the bad are hardly matters of debate. However, what has been argued is whether mold causes personal injury.

The mold debate was spurred by the federal government itself. It all started with the publication of the *Cleveland* study, which was later retracted. The study followed an outbreak of infant pulmonary hemorrhage in the Cleveland, OH, area from 1993 to 1994. It was discovered that about 50% of the involved infants had recurrence of symptoms upon their return home. Epidemiologists conducted an investigation and found that different types of mold, including *Stachybotrys atra*

continued on page 2

In This Issue

- Inhalation Litigation ... 1
- Firing Your Expert ... 1
- The Political Question Doctrine 3
- Philip Morris USA v. Williams* 5
- Case Notes 11
- Movers & Shakers ... 12

PERIODICALS

Inhalation

continued from page 1

(now called *S. chartarum*), were present in the young patients' homes.

It was also found that there was a pattern of water damage in the infants' homes that preceded the outbreak by several months, leading the Centers for Disease Control ("CDC") to issue a "preliminary opinion" that the pulmonary hemorrhage was connected to the water damage and resulting increased levels of household fungi.

The *Cleveland* study concluded that mycotoxins could cause infant pulmonary hemorrhage. However, the CDC began to distance itself from the same conclusions in four separate papers, essentially withdrawing its support of the *Cleveland* study.

In the end, the CDC took the stance that "a possible association between acute pulmonary hemorrhage/hemorrhoidosis in infants and exposure to molds, specifically *Stachybotrys chartarum*, commonly referred to by its synonym *Stachybotrys atra*, was not proven." In other words, the science was not reliable enough.

Another factor in the debate over mold was lack of governmental rule-making. The three primary sources for environmental evaluation of workplaces are: 1) the National Institute for Occupational Safety and Health, which issues recommended exposure limits, 2) the American Conference of Governmental Industrial Hygienists, which issues threshold limit values, and 3) the Occupational Safety and Health Administration ("OSHA"), which sets forth permissible exposure limits ("PELs"). Only OSHA's actions have the force of law. Yet despite its power, OSHA has not issued PELs for aerosol mold exposure, and this has resulted in the "battle of mold experts" to go to the jury.

The problems with the reliability of the science gave the CDC reason to request that the National Academy of

Steven R. Kramer is member of Eckert Seamans Cherin & Mellott, LLC., based in Pittsburgh, PA, and focuses his practice on product liability, environmental, and mass tort litigation in federal and state courts throughout the Northeastern states.

Science's Institute of Medicine ("IOM") conduct its own review of the literature centered on the relationship between damp and/or moldy indoor environments and the development of health problems.

In May 2004, the IOM published a study titled "Damp Indoor Spaces and Health." The study utilized five standards to categorize the probability of health outcomes: 1) sufficient evidence of a causal relationship (defined as "[t]he evidence fulfills the criteria for 'sufficient evidence of an association' and, in addition, satisfies the evaluation criteria discussed above: strength of association, biologic gradient, consistency of association, biologic plausibility and coherence and temporally correct association."), 2) sufficient evidence of an association (defined as "[a]n association between the agent and the outcome has been observed in studies in which chance, bias, and confounding could be ruled out with reasonable confidence"), 3) limited or suggestive evidence of an association (where chance, bias, and confounding could not be ruled out), 4) inadequate or insufficient evidence to determine whether or not an association exists, and 5) limited or suggestive evidence of no association.

The IOM study reached the following key conclusion concerning the state of scientific evidence regarding the presence of mold and the probability of health outcomes:

The association between fungal exposures and opportunistic fungal infections of the skin of severely immunocompromised persons is well established. For all the other listed outcomes, the committee concludes that there is inadequate or insufficient information to determine whether an association exists between them and exposure to a damp indoor environment or the presence of mold or other agents associated with damp indoor environments.

A small number of case studies have associated those adverse health outcomes with damp or moldy environments but only in persons with highly compromised immune systems or when

continued on page 8

Product Liability

Law & Strategy®

EDITOR-IN-CHIEF Stephanie McEvily
EDITORIAL DIRECTOR Wendy Kaplan Ampolsk
MANAGING EDITOR Julie Cromer
MARKETING DIRECTOR Jeannine Kennedy
MARKETING COORDINATOR Beth Ann Montemurro
GRAPHIC DESIGNER Louis F. Bartella

BOARD OF EDITORS

PETER ANTONIUCCI Sills Cummis Epstein & Gross P.C.
New York
RUTH A. BAHE-JACHNA Greenberg Traurig, LLP
Chicago
RAYMOND BIAGINI McKenna Long & Aldridge, LLP
Washington, D.C.
MARY CLARE BONACCORSI Bryan Cave LLP
Chicago
D. JEFFREY CAMPBELL Porzio, Bromberg & Newman, P.C.
Morristown, NJ
KIMBERLY H. CLANCY Sidley Austin Brown & Wood, LLP
Los Angeles
LORI G. COHEN Greenberg Traurig, LLP
Atlanta
GREGG A. FARLEY Sidley Austin Brown & Wood, LLP
Los Angeles
HOWARD GIBSON The Center for Forensic Economic
Studies
Philadelphia
STEVEN GLICKSTEIN Kaye Scholer, LLP
New York
LAWRENCE GOLDBIRTSCH Weitz & Luxenberg, PC
New York
KURT HAMROCK McKenna Long & Aldridge LLP
Washington, DC
DANIEL J. HERLING Duane Morris, LLP
San Francisco
MICHAEL HOENIG Herzfeld & Rubin, P.C.
New York
BETH L. KAUFMAN Schoeman, Updike & Kaufman, LLP
New York
ERIC G. LASKER Spriggs & Hollingsworth
Washington, DC
JUDY LEONE Dechert, LLP
Philadelphia
ROBERT O. LESLEV Sonnenschein Nath & Rosenthal
Kansas City, MO
RONALD J. LEVINE Herrick, Feinstein, LLP
Princeton, NJ
ARVIN MASKIN Well, Gotshal & Manges, LLP
New York
JAY P. MAYESH Kaye Scholer, LLP
New York
ALAN MINSK Arnall Golden Gregory, LLP
Atlanta
VIVIAN M. QUINN Nixon Peabody LLP
Buffalo, NY
JAMES H. ROTONDO Day Pitney LLP
Hartford, CT
VICTOR E. SCHWARTZ Shook, Hardy & Bacon, LLP
Washington, D.C.
JOHN SEAR Bowman and Brooke LLP
Minnetonka, MN
JEROME M. STALLER The Center for Forensic Economic
Studies
Philadelphia
JOHN L. TATE Sites & Harbison, PLLC
Louisville, KY
NICHOLAS J. WITNER Nissan Technical Center
North America
Farmington Hills, MI

Product Liability Law & Strategy® (ISSN 0733-513X) is published by Law Journal Newsletters, a division of ALM. ©2007, ALM Properties, Inc. All rights reserved. No reproduction of any portion of this issue is allowed without written permission from the publisher.

Telephone: (800) 999-1916; Editorial e-mail: jgromer@alm.com

Circulation e-mail: almcirc@alm.com

Reprints e-mail: reprints@alm.com

Product Liability Law & Strategy P0000-224
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:

ALM

345 Park Avenue South, New York, NY 10160
Annual Subscription: \$329

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljonline.com

Inhalation

continued from page 2

the circumstances, such as ingestion of contaminated foodstuffs, are not relevant to this report.

Still, the debate over personal injury mold claims has continued. The scope of a property owner's liability for mold was addressed by a New York State appellate court in the case of *Beck v. J.J.A. Holding Corp.* (12 A.D.3d 238 [1st Dept. 2004]). The court adopted traditional notice principles and rejected the plaintiffs' claim that the defendant had constructive notice of mold because the defendant did notice discoloration of walls and a "moldy odor" from prior flooding. When the court dismissed the plaintiffs' negligence claims, its position was:

A landlord has a duty to maintain its property in a reasonably safe condition under the extant circumstances. For a plaintiff to show a breach of that duty she is required to first establish that the landlord either created or had actual or constructive notice of the hazardous condition which precipitated an injury.

On this motion for summary judgment, defendants asserted that they were first notified of the hazardous mold condition in November 1999. That was the same month that plaintiff became aware of the problem, and a month prior to the time plaintiff moved out of the apartment. Thus, in opposition to defendants' motion, it was incumbent upon plaintiff to show that defendant either created, or had actual or constructive notice of, the mold hazard. Since plaintiff failed to meet this burden, or to have established any other act or omission on defendants' part that could have been considered a proximate cause of her respiratory ailments, the IAS court appropriately dismissed plaintiff's claim for common-law negligence.

In *Daitch v. Naman* (25 A.D.3d 458 [1st Dept. Jan. 19, 2006]), a different New York state appellate court muddled the clarity of the *Beck* decision. In *Daitch*, the plaintiff sued a

building owner, managing agent, and facade contractor and asserted personal injury claims. The court began its analysis by citing *Beck* for the proposition that a "landlord's notice of discoloration of walls, and knowledge of previous water damage from a flood, does not constitute notice of likelihood of mold growth." Then, the court accepted the defendant's argument that the plaintiff only complained about mold as a possible cause of problems after experiencing symptoms of respiratory illness. Still, the court held that an issue of fact existed on the rationale that tenant complaints about water and dust entering into their apartments were long-standing and constituted constructive notice that mold was a *foreseeable consequence* of the water and dust intrusion.

The *Daitch* court also muddled the law concerning a contractor's liability to a plaintiff. The court acknowledged the New York State Court of Appeals' decision in *Church v. Callanan Industries* (99 N.Y.2d 104 (2002)), but it held that the facade contractor could face liability because there were issues of whether the facade contractor failed to "[e]xercise due care in the performance of its contract with the owner [which] created an unreasonable risk of harm to plaintiff ..." *Church*, which reiterated the Court of Appeals' earlier decision in *Espinal v. Melville Snow Construction*, 98 N.Y.2d 136, 139-141 (2002), stands for the proposition that a contractual obligation between two parties does not give rise to tort liability in favor of a third party (*i.e.*, a plaintiff), unless 1) the contracting party, in failing to exercise reasonable care in the performance of his duties, "launch[es] a force or instrument of harm"; or 2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; or 3) the contracting party has entirely displaced the other party's duty to maintain the premises safely. The *Daitch* court's application of *Church* and *Espinal* seems to reduce the first exception to mere allegations of negligence — in which the exception swallows the rule.

Beck's precedent was then clarified and substantiated in a New York state

appellate court decision handed down five days after *Daitch*, which included two panel members from *Beck*. Here, the court found no constructive notice. In *Krasnow v. JRBC Management Corporation* (25 A.D.3d 479 [1st Dept. Jan. 24, 2006]), the court's position was that mold was "confined to an area" where an air conditioner abutted a platform bed. The court noted that the defendant did not install the air conditioner and did not have notice of water leakage at the area at issue. Most importantly, the court stated that the plaintiff's expert report did not substantiate the plaintiff's allegation of previous leaks.

Both *Daitch* and *Krasnow* can be reconciled, despite the fact that both cases involved prior water leaks. In only one instance did the prior leaks result in constructive notice of mold growth. *Daitch* held that the prior leaks, characterized as repeated and long standing, created a "foreseeable consequence" of mold growth. *Krasnow*, which did not go as far, emphasized that the defendant did not install the air conditioner, the suspected source of mold growth, and the fact that while mold was "confined to an area," there were locations where leaks occurred where there was no mold growth. The *Krasnow* court appeared to have concluded that prior water leaks in one area do not create a "foreseeable consequence" of mold growth in another area when the mold growth is not attributable to earlier leaks.

Perhaps the most compelling reason that *Krasnow* is significant is that it rejected the plaintiff's causation argument. The court did not reject mold personal injury claims as a whole, but held that the plaintiff failed to rebut the defendant's expert proof.

The court reasoned:

The record also demonstrates that plaintiff did not demonstrate any issue of fact concerning the cause of his sinusitis, *i.e.*, that it was caused by the mold in his apartment. He did not effectively rebut defendant's expert toxicologist's opinion that plaintiff's examination results provided no clinical

continued on page 9

Inhalation

continued from page 8

support for a diagnosis of fungal sinusitis and that no fungus was cultivated from cultures taken from plaintiff's sinuses. Similarly, he did not rebut the opinion of defendant's expert otolaryngologist who noted that plaintiff's pre-operative CAT scan showed his sinuses were clear, that plaintiff's medical records indicated that no fungus was ever found in his sinuses and that his allergy to mold was insignificant. This expert also noted that plaintiff suffered from several other known causes or precursors of sinusitis, including a deviated septum, nasal polyps, hay fever, a history of sinusitis and a compromised immune system. *Plaintiff's proof failed to exclude any of these other possible causes of his sinusitis and, in part, tended to disprove his theory of causation.*

In September 2006, a trial level judge examined and rejected mold causation science in *Fraser v. 301-52 Townhouse Corp.* (13 Misc.3d 1217A [Sup. Ct. N.Y. County Sept. 27, 2006]).

The defendant filed a *Frye* challenge to "[t]he plaintiffs' theory of the case — 'that mold in their apartment caused them respiratory problems — is generally accepted in the relevant scientific community and whether the methodology used by plaintiffs to measure the mold, was within generally accepted scientific methods.'"

Two studies presented as evidence heavily influenced the court's decision: The IOM study and a February 2006 position paper of the American Academy of Allergy Asthma and Immunology, "*The medical effects of mold exposure*," which stated:

Current studies do not conclusively demonstrate a causal relationship of airborne mold exposure to clinical manifestation of allergic rhinitis;

Studies attempting to correlate indoor molds to symptomatic allergic rhinitis are problematic because of lack of quantitative mold sampling and inclusion of

upper respiratory tract infections; There are no publications that establish a causal role for airborne molds to atopic dermatitis; Currently available studies do not conclusively prove that exposure to outdoor airborne molds plays a role in allergic rhinitis, and studies on the contribution of indoor molds to upper airway allergy are even less compelling; Exposure to airborne molds is not recognized as a contributing factor in atopic dermatitis; [and]

Data supporting the role of fungi in chronic rhino sinusitis, are lacking at this time.

Before the plaintiffs could introduce testimony that mold caused their injuries or illnesses, the case was dismissed. This decision by the court was based on the review of literature and expert testimony.

In explaining its decision, the court pointed to the integrity and credibility of the IOM and the American Academy of Allergy Asthma & Immunology and their abilities to review and interpret available research beyond the means of the court itself. Thus, the court, in essence, trusted the judgment and conclusions of both organizations when their reports found insufficient evidence that a causal relationship exists between damp or moldy indoor environments and certain illnesses.

Ironically, science, which first fueled the mold controversy, has now backed off some of its initial contentions and as a result taken some of the momentum away from the personal injury mold litigation movement.

Nevertheless, fresh on the heels of the mold litigation is a new wave of inhalation litigation, once again, fueled by science.

NANOTECHNOLOGY AND ASBESTOS: A COMPARATIVE STUDY

By today's technology standards, the term "nanotechnology" is relatively old. It was coined in the 1970s. By definition, nanotechnology is the engineering of matter at the scale of

1-100 nanometers. A nanometer is one billionth of a meter. It is difficult to imagine something that has been described as a thousand times smaller than a red blood cell or one ten-thousandth the diameter of a human hair. Yet these are the physical dimensions that comprise the nanoworld. It is even more difficult to imagine that matter so small can be created and manipulated — programmed if you will — to serve a multitude of purposes for various industries, including the medical, pharmaceutical and food processing, manufacturing, and textile industries.

Engineered nanoscale materials have been in production, through such applications as stain-resistant apparel and new designer paints and finishes — and this is just the beginning. The potential for nanotechnology to revolutionize other industries, such as those involving consumer electronics, computer technology, agriculture and the environment, is the reason that a national scientific initiative called the "U.S. National Nanotechnology Initiative" has been created.

The unique benefits yielded by nanotechnology are derived partly from the effect that the ultra-small size has on the chemical, physical, and biological properties of matter. Nanoparticles also enjoy benefits associated with a unique surface shape and surface chemistry. These characteristics are referred to as "quantum effects," which one author has described as "simply put, is behavior of matter at the atomic level that is different than the behavior of that very type of matter on a larger scale." (ABA SEER CAA Nanotechnology Briefing Paper, at 5 [June 2006]).

At the same time, the properties yielded by quantum effects present potential health risks that are being taken seriously in both the United States and United Kingdom, which have convened scientific boards to evaluate these risks to both people and the environment.

Based on preliminary risk assessments, it is thought that the dominant pathway of exposure to engineered nanoparticles will most likely

continued on page 10

Inhalation

continued from page 9

be inhalation. While inhalation of nanoparticles is an entirely new concern, inhalation of ultra-small-sized particles has been around since the emergence of heavy industry and the industrial age. Such inhalation problems have been the by-product of both heavy industry and natural phenomena, such as large-scale brush fires and atmospheric photochemistry.

The issue then becomes: Should engineered nanoparticles be treated as a form of ultra-small-sized particles, or should these nanoparticles — which have unique chemical properties — receive specialized treatment?

Early studies of nanoparticles and related risks have revealed an association between very high doses of engineered nanoparticles and fibrotic lung responses and carcinogenesis. Researchers also worry that nanoscale particles as small as cellular components may even be able to evade the body's natural

defenses or even more worrisome, that inhaled nanoparticles could become translocated.

A study by the United Kingdom's prestigious Royal Society (*Nanoscience and Technologies: Opportunities and Uncertainties* [The Royal Society July 29, 2004]) analyzed exposure to asbestos as a means of understanding the potential risks of inhaled engineered nanoparticles. The UK study stated that "[s]tudies of asbestos and other fibres have shown that their toxicity depends on the two physical factors, length and diameter, and the two chemical factors, surface activity and durability (ability to resist degradation)" The study expressly stated some forms of nanoparticles, specifically nanotubes, represent a potential hazard because of their fibrous shape, nanoscale dimensions, with the potential ability to resist dissolution in the lung. The UK study cautioned: "given previous experience with asbestos, we believe that nanotubes deserve special toxicological attention"

CONCLUSION

Has science, once again, opened the door to the next wave of inhalation litigation? The UK study's reference to asbestos exposure as a means of understanding potential exposure to inhaled engineered nanoparticles is ominous. When asbestos was introduced, it was widely heralded for its many applications. Since then, we have seen an entire industry established around the very dangers and risks posed by exposure to and inhalation of asbestos particles.

Now, we are at the dawn of a new era, where nanoparticles offer us hope for new medical treatments, possibly even cures, innovations for agriculture, and more. All we can hope is that the promise is realized and that engineered nanoparticles do not form the foundation of yet a new wave of inhalation litigation.



Political Question

continued from page 4

private defendant to secure early dismissal from a tort suit. Courts disagree over the applicability of the doctrine to tort cases in which only damages are sought. Some courts are hesitant to dismiss a tort suit in which the government is not a party merely because the government was involved to some degree in the events causing the injuries of which plaintiffs complain. These courts have held that "damages are damages" and that they possess the tools necessary to adjudicate the case without running afoul of the elected branches of government.

Further, some courts have shown a willingness to apply the political question doctrine in the product liability context, but prefer if it is decided as a summary judgment motion rather than a motion to dismiss. In these circumstances, courts allow some limited discovery to determine whether the government caused, approved, or otherwise was involved in the specific events that precipitated the lawsuit.

While success with the political question doctrine cannot be guaranteed, there are steps a litigant can take to increase the chances for a positive result. Defense counsel should consider the following:

1) *Evaluate the potential application of the political question doctrine early in the litigation and assert the defense (if applicable) soon after the litigation begins.* Acting quickly on the defense has three advantages. First, the longer the litigation proceeds, the more difficult it will be to convince a court that the matter is nonjusticiable. Second, if a dispositive motion is successful, it enables a defendant to avoid the likely significant costs of litigation. Third, even if the motion is unsuccessful, it still will shift the focus from the defendants' conduct to the role played by the government and others at an early point in the litigation.

2) *Characterize the facts of the case within the framework of the Baker factors.* The courts have made it clear that the application of the political question doctrine is a fact-intensive, case-by-case decision not subject to

exact formulation. However, those courts applying the doctrine to dismiss cases have done so using one or more of the *Baker* factors.

3) *Look for any and all links to government decision-making or supervision.* The greater the amount of government involvement or control, the more likely a court will be to apply the political question doctrine. Direct involvement by the government is best. Indirect involvement can justify dismissal if adjudication of the dispute necessarily will require judicial "second-guessing" of the government's conduct in an area outside judicial competence. (Note, however, that merely because a case or issue is controversial does not mean that it falls within the political question doctrine.)

4) *Seek the government's support.* If the government is not a party to the litigation, it may not be aware of the case or the issues involved. It may be possible to obtain the government's support of a motion to dismiss on political question grounds. This support can take the form of direct intervention; the filing by the government

continued on page 12