

## Calif. Mold Case Seen By Defense As Growing Trend

BY PHIL GUSMAN, National Underwriter

An Orange County, Calif., jury verdict rejecting a negligence claim against a remediation company is the latest result from a new variety of mold cases that are being filed, a defense attorney said.

In the case—*E.H. Webb Blessley and Donna L. Blessley v. Fire Insurance Exchange; Orange Restoration dba ServiceMaster AAA Restoration*, heard in the Orange County Superior Court—plaintiffs H. Webb Blessley and Donna Blessley filed suit against ServiceMaster AAA Restoration, a dry-out/mold remediation company that had performed work on their home, alleging negligence.

The plaintiffs said they discovered water damage and mold after the remediation company had completed its work.

They also complained against the first-party insurance carrier, Fire Insurance Exchange, for breach of the implied covenant of good faith and fair dealing and breach of contract. The plaintiffs attempted to argue that the mold remediation company was an agent of their first-party insurance carrier.

The trial, presided over by Judge Kirk Nakamura, lasted two months.

Victoria Ersoff, a partner with Wood, Smith, Henning & Berman, said the case is significant because she has seen mold cases trending away from traditional construction defect litigation involving bodily injury claims, and toward cases against contractors for failure to properly remediate.

Previously, she said, plaintiffs would argue that water intrusion through the roof or windows caused toxic mold to form, which led to a range of health complications.

But recent cases, she noted, do not involve bodily injury. Instead, a homeowner will have a house fixed and then sue the contractor for failure to properly remediate.

Ms. Ersoff said mold litigation may have evolved to this point because the bodily injury claims were hard to prove at trial. She said medical science did not support many of the claims, and noted that she has never lost a mold bodily injury case.

Even with this newer tactic, though, Ms. Ersoff said mold litigation is not increasing the way it did a few years ago. Back then, she said, big law firms

took on mold cases, whereas now, it is smaller, random firms.

In the Blessley case, Ms. Ersoff said the plaintiffs, who had been “vigilant” about documenting damage to their home with video and photos, could produce no documentation of damage relating to their charges. Additionally, Ms. Ersoff said it was discovered during trial that the house had sustained previous heavy water damage despite plaintiffs’ claims that there were no prior incidents of flooding.

Jim Keathley, an attorney representing the plaintiffs, did not return a phone call.

## Jury Awards Homeowner \$903,000 for Mold in New House

Woman contracted pneumonia 6 times because of problem inside structure.

Suzie Schottelkotte, THE LEDGER



MIKE AND JANICE ARNETT'S \$1.4 million house, standing empty in the sunshine on Friday, has been vacant since 2006 because of litigation. A jury awarded Janice Arnett \$903,000 from the home's builder.

BARTOW | 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.

That case is still pending in Polk Circuit Court.

Florida

## Eastern District of New York Recognizes "Medical Monitoring" as Cause of Action

By Nicholas Papain, Esq

In the field of toxic torts, a person who is exposed to a dangerous substance may not develop symptoms of an injury or illness until years after the exposure. As a consequence, a claim is sometimes brought for what is known as "medical monitoring". Such a claim seeks compensation for the costs of future medical examinations or tests reasonably intended to detect the onset of latent injuries or diseases caused by the exposure to toxic substances, which the claimant does not presently have but is at an increased risk of contracting in the future.

Medical monitoring may include a claim for future diagnostic tests and studies, used to timely detect and treat cancers and other diseases, preventative care, and therapy for those actually stricken with an illness.

Not all states recognize medical monitoring claims. In others, a perceived absence of clear recognition of medical monitoring claims leads defendants to challenge the rights of plaintiffs to bring them at all.

Recently, in the United States District Court for the Eastern District of New York, a judge addressed such an argument, and ruled that medical monitoring based on toxic exposure stands as an independent cause of action. Judge Arthur D. Spatt in *Sorrentino v. ASN Roosevelt Center* (September 29, 2008), denied a landlord's motion to dismiss a class action complaint brought by former tenants of a luxury apartment complex located in Westbury, New York. These tenants had been notified by their landlord that they would have to va-

cate their premises because water intrusion and mold had been found within spaces between the walls in the Westbury Complex. The tenants needed to vacate the premises in order to do reconstruction work.

In their complaint, the tenants disputed whether their leases had been appropriately terminated. In addition, the tenants added claims for medical monitoring and violation of New York General Business Law §349.

The landlord moved to dismiss the cause of action for medical monitoring contending that the New York Court of Appeals has never recognized an independent cause of action for medical monitoring, and that such a claim may only be asserted in the form of a remedy. Further, the landlord argued that even if a cause of action for medical monitoring could be maintained, the tenants had failed to allege an actionable toxic exposure.

The tenants had alleged in their complaint that the landlord caused all potential class members reasonable apprehension of a serious illness attributable to living in apartments infested with mold and/or elevated levels of bacteria. Further, the tenants claimed that as a direct and proximate result of the negligence of the defendants, they would need ongoing diagnostic, curative and preventative medical care because of their potential exposure to toxic mold.

Judge Spatt determined that "[a]lthough the New York Court of Appeals has never expressly recognized an independent cause of action for medical monitoring, the Court disagrees with the defendants' contention that the courts of the Appellate Division have not done so." Judge Spatt added that "the federal courts in this district have found that 'in cases involving exposure to toxic materials, the New York Court of Appeals would recognize an independent cause of action for medical monitoring.' *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 538 (S.D.N.Y. 2007) (collecting cases arriving at the same conclusion)."

Further, the Court found that the tenants had properly alleged an actionable exposure to a toxic substance by establishing both exposure to the disease-causing agent and that there was a "rational basis" for their fear of contracting the disease. Citing to New York authority, the Court stated that this "rational basis" has been construed to mean the clinically demonstrable presence of the toxic substance in the plaintiff's body, or some indication of toxin-induced disease, i.e., some physical manifestation of toxic contamination. The landlord did not dispute that exposure to mold can result in serious health effects. Further, the Amended Complaint contained sufficient allegations that the mold caused by water-infiltration was detected in and around the occupied spaces in the Westbury Complex. Finally, the tenants alleged that at least some of those exposed to the conditions at the Westbury Complex have developed exposure-related health conditions. Accordingly, the Court found that the tenants had stated a rational basis for exposure to a disease-causing agent and there was a rational basis for their fear of contracting the disease. Therefore, the Court denied the motion to dismiss the medical monitoring claim.

The tenants' case will now proceed into what is known as the "discovery" phase of litigation, in which the parties have the opportunity to investigate the facts supporting the claims and defenses at issue.

Nicholas Papain, Esq. is a New York Personal Injury Lawyer. He concentrates his practice in personal injury, negligence, premises liability, and products liability litigation.



## Court Applies Insurance Settlement to Judgment Against Remediator

Harris Martin

AUSTIN, Texas — A Texas appellate court has voided a \$214,400.58 judgment against a mold remediator after concluding that a trial court erred in not applying the homeowners' \$532,000 insurance settlement to the claim. *Galle Inc. v. Pool, et ux.*, No. 03-07-00619-CV (Texas Ct. App., 3rd Dist.).

The Texas Court of Appeals, Third District, held in its Aug. 29 opinion that appellant Galle Inc. was entitled to a dollar-for-dollar setoff under the state's "one-satisfaction rule."

Galle's appeal raised only one issue, whether the 126th District Court in Travis County erred in denying the remediation company's demand that the settlement reached between Joe and Leslie Pool and Allstate Texas Lloyds Co. be applied to the Pools' claims against Galle.

The Pools sued Allstate, a testing service and Galle under various theories related to mold contamination discovered in their house in 2002. Allstate advised them to move out while work repairs were made, according to the Pools, and retained its own testing form and handled the remediation by Galle.

The Pools settled with Allstate in August 2004 for \$532,000, but took their claims of negligence, misrepresentation and breach of contract against Galle to trial.

A jury found both parties negligent, but because jurors apportioned 60 percent of the negligence to the Pools, they awarded no damages on that count.

Jurors did find for the Pools on their misrepresentation count, however, awarding \$44,000 in actual damages and \$170,400.58 for economic loss.

The jury also awarded the Pools \$51,200 in remediation costs, \$6,400 in alternative living fees, \$1,704 in storage costs and \$82,111.37 in attorneys' fees.

The trial court, however required the Pools to choose between damages on the misrepresentation or contract counts, and the couple chose the damages awarded for misrepresentation.

The court rejected Galle's request that the damages be offset by the prior settlement, and Galle appealed that ruling.

The Court of Appeals said that the damages the Pools sought from Galle were "for the same harm for which they had sought recovery from Allstate," and that the negligent misrepresentation claim came against all defendants.

Further, the court found, the damages were for harms that the Pools blamed jointly on Allstate and Galle.

The Pools argued that the settlement amount paid by Allstate was for the carrier's contractual and statutory lapses, and compensated the

family for damages arising from plumbing leaks and statutory violations.

"Although it is theoretically possible that some of the damages the Pools sought to recover against Allstate and for which they were compensated in the settlement agreement may have been separate rather than joint, it was the Pools' burden to offer evidence allocating the settlement between actual damages for which only Allstate was liable and those for which Allstate and Galle were jointly liable, in order to limit the credit to the former," the court explained. . . . "They failed to do so."

"Consequently the district court was required to apply the full amount of the settlement credit against the jury's award of negligent misrepresentation damages," the court concluded. "Further, because the amount of the settlement credit exceeds the amount of the jury's award of negligent misrepresentation damages, we must reverse the district court's judgment awarding the Pools damages under that cause of action and render judgment that they take nothing on that theory."

The opinion was by Justice Bob Pemberton and joined by Chief Justice W. Kenneth Law and Justice David Puryear.

Richard A. Harwell of Fletcher, Farley, Shipman & Salinas in Dallas and John M. Cox and Wade N. Hallisey of Cox & Associates in Dallas represent Galle Inc.

Peter E. Ferraro in Austin, Texas, represents the Pools.

## Mold causes illness in home in Loudoun County

by Virginia Lawyers Weekly

### SUMMARY

**Type of Action:** Sick building, toxic mold, construction defects, fraud, VCPA violations

**Injuries Alleged:** Personal injuries, property damage and other losses

**Name of Case:** Meng v. The Drees Company

**Court:** Loudoun County Circuit Court

**Case No.:** 46450

**Verdict Date:** Dec. 23, 2008

**Tried Before:** Jury

**Name of Judge:** Thomas D. Horne

**Offer:** \$260,000

**Verdict/Settlement:** Verdict Amount: \$4.75 Million

**Insurer:** Chubb Group of Insurance Companies

**Plaintiff's Attorneys:** David Hilton Wise and James P. Lukes, Fairfax

Paul and Wendy Meng purchased a new home from The Drees Company in November 2005 for \$900,000. During construction, the Mengs noticed that the house was not being protected from the weather, which allowed water to saturate the building materials. Drees did not dry the lumber before covering it up with drywall, and the leaks continued even after the drywall and insulation was installed.

Prior to closing, Drees misrepresented that all the leaks had been fixed, and the Mengs proceeded to closing. At trial, the Mengs presented evidence that Drees knew that the windows that they installed in the Meng house were leaking because they were not installed correctly, but Drees never corrected it and instead relied upon caulking, which the company knew would not fix the leaks permanently. The basement window leaks were

not repaired until January 2007. By then the Mengs were all getting sick in their "dream home."

Wendy Meng was the first to get sick. Several months after closing, she began to get serious migraines that forced her to stay bedridden for weeks at a time. During 2006 and early 2007, she was rushed to the hospital seven different times due to the ongoing migraines, tachycardia, heart palpitations, loss of memory, nervous system dysfunction, difficulty breathing, and chemical sensitivity. To avoid the pain, she had to sleep on the floor of her closet to avoid exposure to light. She had to stop volunteering at her kids school and doing other typical "mom activities."

At first, the doctors were stumped. They ran her through a battery of tests to check for all types of illnesses, including brain tumors and cancer, all of which came up negative. In the fall of 2006, Paul Meng began to suspect that the house was the cause of his wife's illness. His wife had never suffered from such debilitating migraines before moving into the house, and he noticed that he was also coughing and was not feeling well.

After a series of tests confirmed the presence of mold in the house in early 2007, and Drees' refusal to fully address or remediate the mold, the Mengs had to move out of their house in April 2007. They have been renting since that time, and the house remains vacant to this day.

At trial, the Mengs presented

evidence that it would cost \$400,000 to properly remediate the house (including the removal of all drywall and remediation of the hidden lumber that was contaminated with mold). The mold was hidden inside the wall cavities, and the mold seeped into the indoor living space of the home throughout the time the Mengs were living there.

According to the experts, the chronic low-dose exposure to the mold caused the entire Meng family to get sick and forced them to discard all of their clothing and personal belongings. As a result of the mold exposure, both Wendy and Paul (to a lesser extent) began to suffer from chemical sensitivity, which caused Wendy to continue to wear a mask even after she moved out of the Drees home until she received treatment.

Dr. Ritchie Shoemaker of Pocomoke, Md., tested the Meng family and confirmed that Wendy's health issues were caused by the mold. He also found that Paul Meng (who had been healthy prior to moving into the house) was now suffering from asthma as a result of the mold. Dr. Allan Lieberman made the same findings and treated the entire Meng family to a month long biodetoxification program in his clinic in South Carolina in September of 2008.

The trial began on Dec. 15, 2008, and carried over into the following week. On Dec. 23, 2008, the jury returned four counts in favor of the plaintiffs. The jury returned verdicts in favor of Wendy Meng for \$2,276,000 for negligence, in favor of Paul Meng for \$500,000 for negligence, and in favor of both Paul and Wendy Meng for two other counts: \$1,474,000 for constructive fraud and \$500,000 for violation of the Virginia Consumer Protection Act ("VCPA").

The jury found in favor of Drees on the remaining counts, including negligence for their daughter's personal injury claims, actual fraud and breach of contract.

There are also two other counts seeking rescission and attorney's fees pursuant to the VCPA. The parties agreed that the attorney's fees would be bifurcated and resolved by way of a post-trial application to the court. Final hearing on the matter has been scheduled for Feb. 6, 2009.





### WISCONSIN FAMILY WATCHES DREAM HOME BURN TO THE GROUND

NORTHLANDS NEWSCENTER

It's not everyday that you hear that a family has built their dream home only to have it burn to the ground before they \*even\* have a chance to move in. But that happened in Ashland... and there is a silver lining to this story.

It was supposed to be the dream home of Barry and Adrienne Stromberg, but it turned into a nightmare before the couple and their two kids even had a chance to move in.

Weeks before the family was to move, it was discov-

ered that two types of toxic mold had infected the house, making it unlivable. The news broke the Stromberg's heart.

"You know when the tell you you're never going to be fully complete you know it's true you never get back what you put into it and we're far from that."

Friends, family and about 50 fire fighters gathered today at the house, valued in the hundreds of thousands, to watch it burn to the ground. The Stromberg's saw their misfortune

as an opportunity to help others, and decided to volunteer the house to the Wisconsin Indianhead and Technical College fire program.

Heading the fire operation is WITC fire instructor Mike Herrmann and he says controlled burns are important to fire departments.

"It certainly refreshes their skills, if you're on a department that does not have a lot of structure fires and that's a good thing this is probably the best way to keep people up to date and keep their skills at top notch."

The Stromberg's are hopeful that watching their home that they emptied their pocketbooks and poured their hearts into, go up in a ball of smoke and fire will bring closure to this nearly 3 year ordeal.

"We needed some closer on this and this is a wonderful way to do that"

The Stromberg family has

since moved from Ashland, but says their friends and family in the area helped them through the trying time.

"It's just nice to feel comforted by them and that they've been here you know with us through this whole ordeal"

So did the Stromberg's get that closer they were seeking?

"Just watching kind of your dream finally being complete but not in the way that you necessarily envisioned it."

The Stromberg's say they aren't planning on building again, but hope their ordeal raises awareness of the \*dangers\* of mold growth in new construction.

**Who's counting? POS is. From our records, this makes the 4,747 house, since 2000, that has been destroyed because of mold. Still think mold is not harmful?**

### HOW TO BEAT AGING, STRESS, AND ENVIRONMENTAL TOXINS, NATURALLY

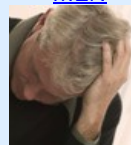
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