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INDOOR ENVIRONMENTAL ISSUES AND INFORMATION . . . TODAY

CALIFORNIA APPELLATE COURT RULES MOLD INVESTIGATION DATA NOT PRIVILEGED

The California Appellate Court, Second District, recently held that raw evidence, such as sampling data, photographs and similar materials, even if gathered by attorneys and their non-testifying consultants, is not protected by the work-product or mediation privileges and that it is even discoverable in other litigation. *Rojas v. Superior Court (Coffin)*, (October 10, 2002, 2nd Dist.) 102 Cal.App.4th 1062. To the extent that such raw evidence is incorporated into a document also containing an attorney's or consultant's mental impressions or evaluations, the raw data itself is not privileged. In that case, the raw data may either be separated from the privileged impressions and evaluations and produced on its own or, if it cannot be separated, the entire document, including raw data, impressions and evaluations, must be produced if the benefits of doing so outweigh the burdens associated with this production.

Applied to the mold context, this means that data such as air sampling results, photographs of moldy areas, and other similar raw evidence, regardless of who gathered and for what purpose is discoverable. As in *Rojas*, this issue comes up often in the context of tenant lawsuits against landowners. For example, the landowner previously brought an initial construction defect lawsuit against the developer and subcontractors, discovery was conducted, and settlement was reached through mediation. Thereafter, a subsequent lawsuit is brought by the tenants against the landowner for alleged bodily injuries due to mold exposure caused by the construction defects that allowed moisture intrusion and microbial growth. The tenants of the later lawsuit will typically seek production of the air sampling data, defect photograph, and other similar raw evidence generated in the initial construction defect lawsuit. *Rojas* holds that such raw evidence is not privileged, regardless of whether it was prepared by a non-testifying consultant, commingled with an attorney's or consultant's mental impressions or evaluation or compiled preparatory for mediation.

Until this decision, many believed that investigation data was not discoverable. The *Rojas* court rejected the notion that such data is purely part of the consultant's and attorney's mental impressions

and evaluations of the case. Thus, while the opinions of the consultants employed as non-testifying experts are still entitled to qualified protection, *Rojas* holds that the actual test data used in their reports is not.

Moreover, though the materials may have been gathered in preparation for mediation, the case narrowly limits the mediation privilege to the substance of the negotiations and communications in furtherance of mediation, and does not protect the raw evidence used as the basis for those negotiations. Therefore, as a practical matter, investigations, mediation, and litigation must be conducted under the assumption that all test data, photographs and other raw evidence generated to evaluate the strength of a case may in great likelihood be discoverable.

Perhaps more importantly in the litigious climate of today, investigation decisions must be made under the assumption that the data generated will be discoverable not only in the immediate case, but in other related cases as well. Thus, while evaluating the mere merits of a construction defect lawsuit, it may also be necessary to gather evidence relevant to a potential subsequent lawsuit brought by tenants or homeowners for bodily injury claims. With this new decision in mind, once in litigation, interrogatories and document production requests should focus on the opponent's investigation efforts, e.g., requesting photographs, raw test data, results of mold testing and other similar *raw data and evidence*.

GUILTY PLEAS IN MOLD RELATED INSURANCE FRAUD

Seven people in the Houston area have either pled or been found guilty of intentionally flooding homes to cause mold growth and then filing bogus insurance claims which has cost insurers more than \$5 million dollars. These individuals face up to 20 years in prison and substantial fines in connection with the state's largest mold-related fraud case to date. The Texas Department of Insurance worked with the FBI and U.S. Postal Service to crack the case.



These individuals served as homeowners, independent sub-contractors, vendors and service providers in filing claims, repairing the damage and selling the homes to each other to repeat the process. They purchased and insured several two-story homes and then, pretending to be away for the weekend, intentionally flooded the homes with water hoses or by damaging water pipes. The pipes would be repaired before an adjuster arrived. Claims were filed to obtain the full policy limits of the insurance coverage for their damaged personal property along with additional living expenses. Some homes were flooded more than once. At least one of the homes was "cooked," a new term in the mold industry, which describes the fraudulent practice of intentionally sealing a house and turning up the heat to encourage mold growth damages.

DOGS – THE LATEST MOLD-DETECTING DEVICE ?



The long tradition of pigs and dogs hunting for truffles at the foot of oak trees in France is legendary. Truffle dogs earn their owners \$200 per pound for the tasty, but rare, edible fungi. But there is a now new breed of work dog that make that work look like chump change.

Dogs have joined the toxic mold detection industry. Several environmental consultants have begun to enlist a dog's keen sense of smell to help find hidden mold infestation and avoid costly destructive testing. You may have met Amber – the mold-sniffing dog – currently making the national mold seminar circuit with her employer and owner, Mike O'Reilly, of Trade-Winds Environmental Restorations, Inc. demonstrating

her powerful mold detection abilities.

The mold dog generally accompanies the environmental consultant to the building with suspected, but hidden mold contamination. The dog indicates that he smells mold by scratching on the wall. The environmental consultant then opens that wall cavity and performs a further inspection. Bill Whitstine, chief executive officer of the Florida Canine Academy, has made a career of training dogs to sniff out residential termite infestations for \$150-\$250 depending on the size of the home. However, Whitstine has also begun training mold dogs for the last five years and recently sold a mold dog for almost \$10,000. Prospective mold dog buyers include home inspectors, microbiologists, forensic companies and entrepreneurs.

Whitstine has not had any of his mold dogs show harm from their work, but he has heard of mold dogs in Europe developing hypersensitivity to the molds and having to "retire" early. The governments of Sweden and Denmark reportedly use large teams of dogs to detect mold in government buildings. "A mold dog can get to places faster than people and can detect mold in places that people cannot easily get to," said Alan Borner, of Healthy Indoor Environment. "Mold dogs can pinpoint areas that may have been missed by other kind of searches," said David Harvey of Trade-Winds Environmental, who has been using mold-sniffing canines as part of its environmental investigations for the last two years.

**CALIFORNIA RESEARCH BUREAU'S
MOLD REPORT FORTHCOMING**



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On October 5, 2001 California Governor Gray Davis signed Assembly Bill 284 (AB 284), authored by Assembly-woman Hannah-Beth Jackson (D-Ventura), into law. AB 284 required the California Research Bureau (CRB), in

consultation with the California Department of Health Services, to perform a study of, and publish review panel findings on, the affects of fungal contamination on indoor environments. The draft report will be available for review and comment in January 2003. Comments are welcomed at an open forum to discuss the report's findings in Sacramento, date to be announced.

The report will include findings on the following:

- (a) The health effects of exposure to fungi, based on a review of the literature addressing immunology, infectious disease, and medical evaluation.
- (b) The practices for assessing fungal contamination, including the use of visual inspection, surface sampling, air monitoring, and the proper analysis of environmental samples.
- (c) To the extent feasible, the appropriateness of commercially available methods for identifying fungal contamination of building components including, but not limited to, walls, ventilation systems, and support beams.
- (d) The options for preventing and remediating fungal contamination in indoor environments.
- (e) Recommendations on hazard communication for distinct sub-populations, including workers employed in high-risk occupations.
- (f) The development of a recommended reading list related to molds, their health effects, their impacts on indoor air quality, and related topics for local government officials, including environmental health officers.

Panel members were appointed in September 2002 and have been meeting frequently in the preparation of the draft report. Panelist include:

Rajiv Bhatia, MD, MPH, Director, Occupational &

Environmental Health, San Francisco Department of Public Health;

Harriet Burge, Ph.D., Harvard School of Public Health, Associate Professor of Environmental Health;

Eugene Cole, Dr.P.H., M.P.H., Brigham Young University, Department of Health Sciences, Professor of Environmental Health;

Frederick Fung, M.D., M.S., SHARP Rees Stealy Medical Group, Toxicology and Occupational Health University of California at San Diego and Irvine;

James Holland, R.E.A., C.R., W.L.A., C.M.R., CEO, Restoration Consultants;

Robert Levin, M.D., Ventura County Health Officer;

Edward Light, C.I.H., M.S., President, Building Dynamics, LLC;

Joseph Lstiburek, Ph.D., P. Eng., M.Eng., Principal, Building Science Corporation;

Kenneth F. Martinez, C.I.H., M.S., National Institute for Occupational Safety and Health;

Philip R. Morey, Ph.D., M.S., C.I.H., Air Quality Science, Inc.;

Stephen S. Ruggiero, P.E., Simon, Gumpertz & Heger, Incorporated;

Brian Shelton, M.P.H., B.S., Director of Laboratories & Consulting Microbiologist, VP/COO Pathcon Control Associates;

Linda Stetzenbach, Ph.D., University of Nevada, Director Microbiology Division;

Chin S. Yang, Ph.D., M.S., Microbiologist, P&K Microbiology Services, Inc.; and

Bud Offerman, Indoor Engineering.

The draft report will be summarized in the next issue of *Mold. . . Matters!*

LANDMARK MOLD PUNITIVE DAMAGE VERDICT REVERSED ON APPEAL

In an unpublished decision, the 9th Circuit Court of Appeals reversed an already reduced punitive damage award in *Anderson v. Allstate Insurance Co.* The court found that the insurer did not act with malice, oppression or fraud in handling plaintiff's mold claim because the health hazards of mold were less clear at the time the claim was made in January 1997. However, the court found that a compensatory award of \$484,853 was reasonable based on the insurer's conduct which

amounted to more than a simple mistake or legitimate dispute as to coverage and damages.



A federal jury in Sacramento originally awarded \$18 million dollars in punitive damages against the insurer defendant for alleged bad faith in handling a water intrusion and mold claim following a burst pipe in plaintiff's home. The trial court reduced the punitive damage award to \$2.7 million and the insurer appealed. On September 3, 2002, the appeals court removed the punitive damage award altogether.

The court's finding that "the health hazards of mold were less clear at the time of Allstate's actions then they later became," indicates the court's belief that mold-related health hazards are now more clearly known, and therefore future actions by an insurance company related to mold claims could potentially be subject to a punitive damage claim.

NEW CALIFORNIA STATUTE OF LIMITATIONS PERMIT LONGER TIME TO FILE PERSONAL INJURY LAWSUITS



Effective January 1, 2003, California Senate Bill 688 amends the Code of Civil Procedure to extend the statute of limitations for personal injury, wrongful death, assault and battery from one to two years. The bill also increases the notice period for summary judgment motions from 28 days to 75 days before the judicial hearing. This bill permits plaintiffs a longer period of time to file lawsuits alleging personal injury due to indoor

mold and increases the logistical difficulty of bringing a summary judgment motion for cases which lack merit.

PROPOSED CAUSAL CONNECTION BETWEEN INHALATION OF INDOOR MOLDS AND SEVERE HEALTH MALADIES IS "WEAK AND UNPROVEN" ACCORDING TO MEDICAL ASSOCIATION

On October 27, 2002, the American College of Occupational and Environmental Medicine (ACOEM) recently published a position statement regarding "adverse human health effects associated with molds in the indoor environment." The ACOEM approved an "evidence-based statement" which concludes that current scientific evidence does not support the hypothesis that the health of an individual can be severely affected by inhalation of mycotoxins in the home, school, or office environment. Specifically, the causal connection between inhalation of *Stachybotrys chartarum* in water damaged buildings and adverse health effects is still "weak and unproven" despite years of intensive study.

According to the ACOEM, if mycotoxins are to have human health effects, there must be absorption of a "toxic dose" over a short period of time. However, the scientific evidence indicates that it is "highly unlikely" that a toxic dose can be delivered through inhalation exposure even in the most vulnerable individuals.

In spite of this conclusion, the statement still recommends that indoor mold growth should not be tolerated because (a) mold physically destroys the buildings on which it grows, (b) mold is unsightly, (c) mold growth produces offensive odors and (d) mold growth is likely to produce allergic responses in some individuals.

CALIFORNIA APPEALS CT AFFIRMS INADEQUATE LINK BETWEEN MOLD AND HEALTH CLAIMS

A trial court determined that after a three week trial with several expert witnesses, plaintiff failed to show mold was a substantial factor in causing her health problems. After her landlord sued her for 18 months of non-payment of rent, plaintiff Christine Dick counter-claimed that standing

water in her garage and a broken sewer pipe behind the garage wall of the townhouse she rented caused her to experience a continuous cough, fatigue, weight loss and skin lesions.

At trial, two medical doctors and an environmental consultant testified that plaintiff's symptoms were consistent with mold toxicity. The defendant asserted that plaintiff had a history of mental illness and other pre-existing injuries. The property manager testified that plaintiff had never complained of mold or illness during her tenancy. The appellate court found that there was ample evidence to support the trial court's conclusion that plaintiff failed to prove her tort claims based on mold toxicity. See *Dick v. Pacific Heights Townhouses*, Cal Ct. App 3d Dist., No. C037044, September 25, 2002.

RECENT MOLD PRESENTATIONS:

On December 10, 2002, Gordon & Rees partner Mike Pietrykowski spoke at the CA Industrial Hygiene Conference regarding defending IH sampling and analysis. He was also a speaker at the Northern California Association of Defense Counsel and spoke on mold-related injuries and the state of scientific evidence.

Contributions to Mold Matters made by Mike Pietrykowski, Sara Thorpe and Molly McKay.

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GORDON & REES, LLP – LAS VEGAS

In response to clients' needs, Gordon & Rees is proud to announce that it will be opening an office in Las Vegas, Nevada in the New Year. Please contact Mike Pietrykowski for further information.