defense UPDATE

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TOXIC MOLD

By: Noel McKibben, West Des Moines, IA

Introduction

An emerging area of the law is litigation seeking damages for not only property damage, diminution of property value, cost to remediate, etc., but also for bodily injury alleged to be the result of exposure to mold. In this article we will examine the science of mold and the properties associated therewith. Closely associated with the scientific study of mold is the medical perspective of mold's influence, or lack of influence, on people.

Insurance products are examined to determine their response to this developing area of the law. Coverage issues such as ensuing loss, the mold exclusion, and the pollution exclusion are reviewed. Finally, the defense of injury claims are considered with an eye toward the current and future success of causally connecting injury claims with the exposure to mold.

Science of Mold

To begin our analysis of this topic, it is helpful to understand the scientific evidence associated with mold. Fungi are organisms that belong to a kingdom distinct from plants and animals.[1] Fungi include inconspicuous yeasts, molds, and mildews.[2] The majority of fungi are saprobes which obtain nutrients from nonliving organic material. Secondary products from fungi include antibiotics and mycotoxins.[3] The most familiar mycotoxins are produced by fungi growing on grain or nuts in the field or, more commonly, in storage.[4] These toxins have been shown to have profound acute and chronic effects on both humans and livestock.[5] Mycotoxins are believed to be among the most potent known carcinogens.[6] However, there has been only one report in the literature of acute illness following airborne exposure to mycotoxins.[7]

Fungal spores can be present virtually year around in many areas of the world. There are over 100,000 recognized species of fungi.[8] The majority of mold spores travel through the air. The concentration of spores indoors are a mere reflection of the spores outdoors. Molds are ubiquitous as are their nutrient sources. In order to sustain life, a mold must have an organic nutrient source, moisture, and a temperature range between 40 - 100 degrees F.[9] The only practical control for effectively containing or eliminating mold is thus the management of the moisture level.

Although there are a multitude of mold species, some of the types of molds which have been subject of litigation

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[1] Levetin, Estelle, Ph.D. The University of Tulsa, *Fungi Lecture*, Toxic Mold Litigation Seminar, December 6, 2001.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

Inside This Issue

MESSAGE FROM THE PRESIDENT

Mike Ellwanger

The December Board meeting is usually the lengthiest Board meeting of the year because it more or less defines the agenda for this organization during the ensuing months. The Board meeting of December 7 was no exception. The following topics were addressed.

As might be expected, the proposed redistricting plans of the Supreme Court generated considerable discussion. It was determined that the organization would not take a formal position just yet. A committee was formed to keep the Board advised. The ISBA was commissioning a study from an economist at Iowa State University to evaluate impact. Much of this has been rendered moot by the decision of Justice Lavorato not to proceed with his plans to reduce the "litigation centers" to 28. The organization will continue to monitor the situation.

The organization is planning its third annual mini-seminar for April 12, 2002, at the Des Moines Golf & Country Club. The subject will be insurance law.

The legislative agenda for the year 2002 was discussed and approved. A copy of that agenda can be obtained by requesting the same from any officer or our Executive Director/Lobbyist Bob Kreamer. A more complete report will be provided at a later time in the IDCA Update.

Two new applicants were approved—Darin Harmon of Dubuque and David May of Des Moines.

Our Executive Director/Lobbyist Bob Kreamer was granted a three-year contract. Bob presented an extensive report of the preceding year. It is believed that our decision to retain Bob as our Executive Director is turning out to be a wise one. Bob has retained Association Management of Des Moines (in particular Julie Garrison) to act as Associate Director. The Board was provided with a list of some 41 items in which it was felt that service to the organization had been improved during the previous year.

Board member Brent Ruther of Burlington is forming a Young Lawyers Committee of IDCA to attempt to serve the interests of younger defense lawyers and to attract younger members.

Sharon Soorholz-Greer reported that the Law School/Trial Academy will be held at the University of Iowa Law School on August 15-17, 2002. We are co-sponsors for this event.

Committee chairs for 2002 were discussed. These will be identified in a subsequent publication.

The dues for 2002 will remain the same.

According to our Treasurer, Jim Pugh, the organization appears to remain in sound financial shape.

The DRI Mid-Region meeting is scheduled for April 4-6, 2002, in Salt Lake City. The Utah Defense Organization will host.

I know the above regurgitation is probably not terribly exciting. However, it should give you some sense of the issues that are addressed at a typical Board meeting.

At the Annual Meeting in September the Board voted to send a $1,000.00 contribution to the City Bar Fund in New York City to assist them with their legal needs which were generated by the September 11 attack. We have received a gracious response.

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www.iowadefensecounsel.org

Michael W. Ellwanger

REVISITING PEPPER V. STAR EQUIPMENT:

FAMILY MEMBER EXCLUSION PREVENTS "FAULT SIPHONING" OR RECOVERY FROM BANKRUPT DRIVER

By: Jeff W. Wright, Sioux City, Iowa

In *Janson v. Fleck*, No. LACV 117981 (Woodbury County summary judgment ruling March 21, 2001), Iowa District Judge John D. Ackerman enforced an auto liability policy family member exclusion to prevent allocation of fault to or contribution or indemnity claims against an insured but bankrupt driver, addressing issues left open by Iowa Supreme Court precedent. This ruling can be a tool to dismiss such claims, with the practical effect of increasing the fault allocated to remaining, solvent defendants. Judge Ackerman revisited and arguably broadened the impact of *Pepper v. Star Equipment*, 484 N.W.2d 156 (Iowa 1992), which along with *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (1994),[1] held that fault cannot be allocated to a bankrupt defendant under Iowa Code Chapter 668 for fear of "fault siphoning" that would diminish plaintiff's recovery from solvent defendants. *Pepper*, 484 N.W.2d at 158; *Spaur*, 510 N.W.2d at 863.[2]

The *Pepper* Court excepted from its holding bankrupt defendants that have liability insurance. 484 N.W.2d at 158. In other words, if a bankrupt defendant has liability insurance in any amount, fault can be attributed to him. Id. The bankrupt third-party defendant in *Janson* had liability insurance with a family member exclusion. The Iowa Supreme Court has repeatedly upheld such exclusions to defeat coverage for *direct* claims by family members. *See e.g., Shelter General Ins. Co. v. Lincoln*, 590 N.W.2d 726, 728-30 (Iowa 1999). The novel question answered in *Janson* is whether that exclusion applied to third-party contribution and indemnity claims.

A brief discussion of the facts in Janson will provide context. On November 15, 1997, Kyle *Janson* was driving his family in his 1991 Ford Thunderbird on a Woodbury County blacktop road. His wife Candy and their three children were in the car, with daughter Katelyn in a booster seat. A pickup truck driven by Arnold Fleck pulled out from a gravel road into their path, causing a severe accident. Katelyn suffered debilitating injuries that require 24-hour medical care for the remainder of her life.

Initially, Candy Janson on her own behalf and on behalf of her children brought suit against Arnold Fleck, Century Products Company (the booster seat maker), Ford Motor Company (the automobile maker), TRW Company (the seatbelt maker), and Woodbury County, Iowa. Fleck, Century Products, and Woodbury County filed Third Party Petitions against Kyle Janson, seeking contribution and indemnification to limit their exposure for Katelyn's injuries.

Kyle Janson had auto liability insurance but the policy limits were far below the potential exposure he faced for his daughter Katelyn's injuries. For that reason and others, Kyle declared Chapter 7 bankruptcy during the pendency of the litigation, bringing into play the *Pepper/Spaur* prohibition against comparing the fault of a bankrupt party.

The now-bankrupt Kyle Janson moved for summary judgment seeking dismissal of the third-party indemnity and contribution claims against him. As noted, Kyle Janson did have liability insurance, but the policy contained a family member exclusion. Thus, the ultimate issue regarding the application of *Pepper* and its progeny was whether that exclusion applied to third party claims for indemnification and contribution.

The Woodbury County District Court did a thorough analysis of family member exclusions and their validity. Ruling at 47. Relying on *Shelter General Ins. Co. v. Lincoln*, 590 N.W.2d 726 (Iowa 1999) and others, the District Court found that such exclusions generally are valid under Iowa law. Ruling at 45-46. As noted by the District Court, the Supreme Court has repeatedly upheld such exclusions. *See Shelter Gen. Ins.*, 590 N.W.2d at 30 (noting that parties seeking insurance for liability of family members can buy uninsured

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TESTING THE COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE

By: Aaron Abbott, Ph.D. and Gus von Bolschwing, J.D.[1]

First published in the December 2001 issue of For The Defense.

This article is a report on an experimental test conducted by a jury behavior research firm. The question addressed by the test was the effect of including or excluding a comparative negligence instruction and question on a special verdict form, and how it affects the verdict and damage awards in a case in which comparative negligence is a viable defense.

An Overview of the Case

The president of a successful dot.com company died in early 1998 just before his company launched a very successful IPO. The company was later sold for over $6 billion. The widow and daughter of the 38-year-old decedent sued a major institution for wrongful death and for its failure to diagnose, refer, and treat a reversible heart condition.

The defense was very concerned about damages. Because of the decedent's age and earnings history, the dot.com president's loss of earning capacity was worth $100 million according to accepted accounting methods. During trial preparations in late 1999, dot.com valuations were rising to unprecedented levels. At one point, the plaintiffs' accounting methods used to estimate loss of earning capacity exceeded $200 million. Moreover, the venue in which this case was filed was known to be plaintiff-oriented. What would be the mindset of the average juror in a city where two-bedroom, two-bathroom condominiums in modest areas sold for $875,000, and single family homes in the region regularly sold for between $300 and $400 per square foot? How, in such an environment, could the defense ever present a case that would result in a reasonable verdict if liability were found?

Because the stakes were so high, the defendant institution asked the authors' jury behavior research firm and third party administrator to conduct focus groups to develop defense arguments, and then to test and refine these arguments in a large panel study. The latter project was also intended to assess the risk of taking this case to trial, determine the probability of a defense verdict, and develop a "high-low" estimate of the probable range of damages in the event of an adverse verdict.

Defense counsel also wanted to use a controversial tactic to enhance the probability of obtaining a defense verdict. While he agreed with the focus group results that showed that a comparative negligence affirmative defense would be persuasive, he also wanted to omit the comparative negligence instructions/question on the special verdict form. He hypothesized that the comparative negligence instructions/question would have a detrimental effect on verdict. He felt that the inclusion of the instructions/question would only invite the jury to render a plaintiff's verdict and then "split the baby." However, in the event of an adverse verdict, would plaintiff jurors take the comparative negligence evidence into account and reduce their damage awards on their own without the instructions/question?

To our knowledge, these hypotheses had never been scientifically tested. Therefore, we developed an experimental design to test the hypothesis as part of the larger study.

The primary purpose of this study was to test the arguments that had been developed in prior focus groups, and to provide the client (the institution that was the defendant in the lawsuit) with a statistical assessment of probability of a plaintiff's or a defense verdict, as well as "high-low" statistical estimates of the probable damage awards if there was a plaintiff's verdict. Such a test required a large sample size to attain statistical power and reliability. Therefore, a panel of over 100 mock jurors was recruited to hear the case in an all-day mock trial. Half of the panel got the comparative negligence instructions and question on the special verdict form. The other half of the panel did not get the comparative negligence instructions/question on the

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include the following:

> *Alternaria* is a type of mold that is commonly found in indoor air. It produces mycotoxins and is a frequent cause of allergies. *Aspergillis* is also common both indoors and outdoors and may cause diseases usually in persons with an immune deficiency. It is also a mycotoxin producer. The *fusarium* is found in soil and plant litter and not commonly found in indoor air. This mold produces mycotoxins, some associated with behavioral effects. *Penicillium* is a common mold found in indoor environment. It is a common allergen and some varieties produce toxins.[10]

In a study of airborne culturable fungi, in 26 midwestern homes, indoor levels average 25% of the outdoor levels from spring through fall.[11] *Penicillium* and *Aspergillus* were the most frequently recorded types of mold.[12] In other studies, when the indoor relative humidity levels are enhanced with the use of humidifiers, the *Penicillum* and *Aspergillus* counts were magnified 10 times.[13]

Medical Implications

We obviously are surrounded each day in our home, work, automobile, and the outdoors by mold. Why now is this such a hot new litigation issue? Large plaintiff verdicts have drawn the spotlight toward the issue, as is the case with today's media coverage, yet there are reasons beyond just the large plaintiff awards. The medical experts explain that due to better testing and research, which has eliminated previous misdiagnoses, we now are able to pinpoint the physiological impact that mold has upon individuals. The construction experts explain that higher indoor concentrations of mold have been the result of the post oil embargo era that promulgated heat energy saving construction methodology to be employed. The result is a structure that is so energy efficient and air tight that moisture is trapped and the moisture level provides a conducive environment for mold growth. Plaintiff attorneys, in the construction defect cases, are proving that some of the current workmanship in the construction industry is faulty and one of the consequences is the proliferation of mold infected buildings.

Plaintiffs, who are seeking to recover personal injury damages as the result of being exposed to mold, have had good success if they get to the jury.[14] The most prevalent injury associating molds with human disease are hypersensitivity reactions.[15] These afflictions include asthma, allergic rhinitis, and hypersensitivity pneumonitis, and acute toxicosis.[16] In addition, common mold saprobes that are ubiquitous air contaminants can cause serious human infections in immunocompromised patients, e.g., HIV patients, bone marrow transplants, etc.[17] Occupations associated with common mold inhalation by farmers, construction workers, and wood workers may cause interstitial fibrosis or pneumoconiosis.[18]

Insurance & Defense of Mold Claims

The proliferation of the litigation and the size of the verdicts has not gone unnoticed in the insurance industry.

Farmer's Insurance Group had planned not to renew 600,000 homeowners policies in Texas, in part, due to a $32 million award against them by a Travis, Texas County jury.[19] In *Ballard v. Fire Insurance Exchange*, No. 99-05252 (Texas Dist. Ct. 345th

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[10] Guidotti, Tee, M.D., MPH, George Washington University School of Public Health and Health Services, "*Molds*" *Lecture*, Toxic Mold Litigation Seminar, Dec 6, 2001.
[11] *Supra*, Levetin at fn 1.
[12] *Id.*
[13] *Id.*
[14] *Darren Mazza, et al v. Raymond Schurtz et al*, No. 00AS04795 (Calif Super. Ct., Sacramento Cty), (Jury awarded $2.7 million to a family that claimed it suffered severe mold related injuries from their apartment building); *Kathryn Nicholson et al v. Metro Property Management Inc.* et al, No. 03-C-01-005586 (Md. Cir. Ct. Baltimore Cty). (Verdict for $219,200 for liver and respiratory injuries allegedly suffered by residents of a condominium after a leak in an adjoining condo fostered mold growth in the plaintiff's home); *Ballard v. Fire Insurance Exchange*, a member of *Farmers Insurance Group*, No. 99-052252 (Texas Dist. Ct., 345 Jud. Dist., Travis City), ($32 million dollar verdict for bad faith against Farmers Insurance Group).
[15] *Supra*, Guidotti at fn 10.
[16] *Id.*
[17] *Id.* In 1977 five children being treated for leukemia in a Texas hospital developed invasive Aspergillus infections and died within a short period. Mahoney, D.H. Steuber, C.P. Starling, K.A. Barrett, F.F, Goldberg, J. and Fernbach, D.J., *An Outbreak of Aspergillosis in Children with Acute Leukemia*, J. Pediatr., 95, 70, 1979.
[18] *Supra*, Guidotti; at fn 10.
[19] *Mold*, A Mold Property and Personal Injury Litigation Magazine, December, 2001.

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Jud. Dist., Travis Cty), the plaintiffs alleged that due to the insurer's negligence and improper handling of a 1988 water damage claim, the plaintiff's home became contaminated with *stachybotrys*, which in turn caused various health problems for the family.[20] The health component of the claim was removed from the case when the court ordered its exclusion by disallowing the plaintiff's medical experts.[21] The jury determined the insurer handled the claim in an unfair, deceptive, and fraudulent manner when it allegedly refused to pay for the full removal of the water damaged hardwood floors.[22]

The National Association of Independent Insurers (hereafter NAII) has recommended that the Texas mandated policy language be amended and exclude coverage for gradual leaks, unrepaired water damage, improper repair or lack of maintenance.[23] The NAII is also recommending that insurers could offer an endorsement with a $5,000 limit for mold coverage.[24] The State of Texas Insurance Commissioner, seeking to solve the mold crisis in Texas, is recommending incorporating an annual aggregate gap of $5,000 for mold damages.[25]

Coverage Analysis

Typically, the property coverage battles between plaintiff counsel and defense counsel will focus upon the mold exclusion, the ensuing loss provision, and the pollution exclusion.

The insuring agreement of the Homeowners 3 - Special Form, states that the insurer will cover direct loss to property described, however, "we do not insure loss: caused by smog, rust, mold, wet or dry rot.[26] However, an exception to the exclusions provides coverage for any "ensuing loss to property" not excluded in this policy is covered.[27] Under the additional coverages of the policy, the insurer agrees to pay for accidental discharge or overflow of water from a plumbing, heating, air conditioner… or from within a household appliance.[28] The insurer also will pay for damage from sudden accidental cracking, burning or bulging of a hot water heating system, air conditioning system, or an appliance for heating water.[29] Other types of water damage excluded are: surface water, water which backs up through sewers or drains or overflows from a sump.[30]

If you have a dishwasher which overflows and water escapes into the flooring and consequently mold colonizes, then the cost to eradicate the mold and repair the water damage is covered. The fighting issue arises when the water infiltration to the structure is not sudden and accidental or otherwise not covered under the policy.[31]

While Iowa has not directly addressed the issue of causation for mold claims, other jurisdictions have done so.[32] California has provided to us the "efficient proximate cause of the loss doctrine."[33] Although the rule of law did not arise out of a mold case, plaintiffs are using the argument to circumvent the mold exclusion. The doctrine states that when a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss.[34] To illustrate the application of this causation theory to a mold claim, consider these facts:

> Bethany Bowers rents her single family house to tenants. The house was in good condition when the tenants moved in. Ms. Bowers has an insurance contract with Farmer Insurance Group which is an all risk policy. The tenants convert the basement into a

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[20] *Id*. at 10.
[21] *Id*.
[22] *Id*. The actual damages amounted to $30,073,332 plus statutory damages of $1,856,383. Id.
[23] *Id*. at 55. Note: Texas homeowners policy language is mandated by the State of Texas and does not require a sudden and accidental element as do most other jurisdictions.
[24] *Id*.
[25] *Id*. Large insurance carriers (other than just Farmers) are also threatening to withdraw from the State of Texas over this issue of insurance coverage for mold.
[26] HO-03, *Insurance Services Office, Inc*., (hereafter ISO) 1990.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] For instance: humidity level of the structure is too high, a sump pump malfunctions and water enters the structure, a leaking pipe over a long period of time, etc.
[32] Iowa's jury instruction states that a proximate cause of damage is that which is the substantial factor in producing the damage. *Iowa Civil Jury Instructions*, 700.3, 1-2000.
[33] See, *Garvey v. State Farm Fire and Casualty Company*, 275 Cal. Rptr. 292, 770 P.2d 704 (1989).
[34] *Id*. at 402.

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> hot house for growing marijuana. All heat in the house was directed to the basement and the ventilation was sealed. Mold grew rapidly throughout the house with deposits on the floors, carpets, walls, paneling, rafters, etc.[35]

Ms. Bowers submits a claim to Farmers for repair and clean up of the mold damage.[36] Farmers denied the mold related damage.[37] Ms. Bowers argued that the damage to her house was the result of vandalism because the tenants willfully, wantonly, and recklessly damaged her property.[38] Farmers responded by stating the loss was mold, not vandalism, and the mold is excluded in the policy.[39] The court stated that where an insured peril sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, that peril is the efficient cause.[40] Consequently, the tenant's acts were the efficient proximate cause of the owner's loss and coverage was afforded.[41]

Another contested coverage issue is found in the pollution exclusion language of the policy. Typically, the policy provision excludes coverage for damages from the "discharge, dispersal, seepage, migration, release or escape of pollutants."[42] Pollutant is defined to mean any "solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis chemicals and waste.[43] "Waste includes materials to be recycled, reconditioned or reclaimed."[44]

In the mold context, what is at dispute is whether or not that there was a discharge, dispersal, seepage, migration, release or escape of the mold. Must the "release" be into the environment, or, is a "release" indoor a trigger for the exclusion.[45] A building contractor was sued by a homeowner who alleges that his negligent construction of the home had permitted excessive moisture to build up which lead to the mold that caused the occupants to suffer health problems.[46] The court rejected the insurers contention of the pollution exclusion applicability, holding that the growth of spores from excessive moisture was not caused by any discharge of contaminates and that the exclusion does not require discharge into only the outdoor environment.[47] Similarly, in *Employers Casualty Company v. St. Paul Fire & Marine Insurance Company*, 52 Cal. Rptr. 2d 17 (Cal. App. 1996), the court rejected the claim that the pollution exclusion is only applicable to discharges into the environment.[48] The court explained: "The plain language of the exclusion, however, contains no such requirement and clearly refers to any discharge, dispersal, release or escape. In fact, the plain language or exclusion militates against any such restrictive environmental construction: The exclusion expressly refers to discharge, dispersal, release or escape at a site."[49] However, in another case, a painting contractor sought coverage under a CGL policy for injuries caused by inhalation of sealant fumes.[50] The court stated that the pollution exclusion does shield the insurer from liability for injuries caused by toxic substance that are still confined within the general area of the intended use.[51]

Similar to the judicial treatment of asbestos and toxic fumes, courts will likely split on whether exposure to mold resulted from a "discharge" of a pollutant. Insurers will need to advocate a simple contract

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[35] *Bethany Bowers v. Farmers Insurance Exchange*, 99 Wn. App. 56, 991 P.2d 734, (2000).
[36] *Id*. at 43.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 47.
[41] *Id*. *See also*, *Sunbreaker Condominium Assn v. Travelers, Ins. Co*., 79 Wn. App. 368, 901 P.2d 107 (1995) (Wind driven rain was efficient cause of loss from mold claim despite expert testimony which identified "rain" as the cause of the fungus). *But see, Finnv. Continental Ins. Co*. 218 Cal. App.3d 69 (1990) (Leakage from a broken sewer pipe was excluded as no other concurrent coverage cause was offered), Aetna Cas. & Sur. Co. v. Yates, 344 F.2d 939 (5th Cir. Texas 91965) (Rot and mold caused by condensation of moisture may have ensued from water but not the damage from the direct intrusion of water and thus exclusion applied).
[42] *Supra*, ISO at 26.
[43] *Id*.
[44] *Id*.
[45] Generally, various U.S. Jurisdictions are split on the issue of whether the pollution exclusion applies when injuries result from exposure to indoor pollutants. Courts have held that the pollution exclusion unambiguously preclude coverage wherever bodily injury results from exposure to an irritant or contaminant, irrespective of whether the exposure takes place indoors. *See, Townsends of Arkansas, Inc. v. Millers Mutual Ins. Co*, 823 F. Supp. 233 (D. Del 1993). Other courts conclude that the pollution exclusion is intended to exclude only industrial environmental pollution, and consequently "indoor" contaminants do not fall within the exclusion. *See, Lefrak Organ., Inc. v. Chubb Custom Ins. Co*., 942 F. Supp. 949 (S.D.N.Y. 1996).
[46] *Leverence v. United States Fire & Guarantee Co*., 462 N.W.2d 218 (Wis. App. 1990).
[47] *Id*. at 232.
[48] *Id*. 25-26.
[49] *Id*. at 23.
[50] *Meridian Mutual Ins. Co. v. Kellman*, 197 F. 3d 1178 (6th Cir. 2000).
[51] *Id*. at 1183.

interpretation approach wherein the plain language of the policy is its intent.

Another coverage issue for this exclusion is if mold is a pollutant. In a case where a professional golfer sued a water company and the city for injuries arising out of ingesting water that contained "total and fecal coliform bacteria", the court found that "waste" did not include bacteria.[52] The court explained that "waste is defined in the policies to include materials to be recycled, reconditioned to industrial byproducts, rather than to organic matter which might have caused the contamination of the water with total and fecal coliform bacteria." [53]

A Washington court held that the pollution exclusion was intended to apply to injury where a fuel delivery driver had diesel fuel back flow onto him.[54] The court stated:

> Zurich Insurance argues the pollution exclusion applies because diesel fuel is a pollutant. However, this reasoning misunderstands the nature of the claim. The driver was not polluted by diesel fuel. It struck him; it engulfed him; it choked him. It did not pollute him. Most importantly, the fuel was not acting as a pollutant when it struck him any more than it would have been acting as a pollutant if it had been in a barrel that rolled over him. To adapt Zurich Insurance's interpretation would unjustly broaden the application of the exclusion far beyond its intended purpose.[55]

Defending the Injury Claim

At the present time, the advantage appears to rest with the defense against injury claims presented by plaintiffs for mold exposure. As additional scientific studies are conducted, this advantage may dissipate for the defense. As stated previously, mold spores are ubiquitous. They surround us in virtually all our environments. The plaintiff must sustain his/her burden of proof on the issue of causation.

The most common response to mold exposure is an allergic reaction.[56] Approximately 15% of the general public have an inherited condition called atopy.[57] This condition is a predisposition to allergies.[58] These allergies include asthma, rhinitis, and eczema.[59]

One of the threshold questions for the defense is whether an allergic reaction constitutes a bodily injury. The individualized sensitivity to a product or event is referred to as an idiosyncratic condition. In a breach of warranty case involving an idiosyncratic plaintiff, the Iowa Supreme Court denied recovery for the plaintiff.[60] The plaintiff suffered from an allergic reaction to a Revlon sun tan lotion product.[61] The court reasoned that no liability exists upon a seller where the buyer was allergic or unusually susceptible to injury from the product.[62] A merchant is not to assume the role of absolute insurer against physiological idiosyncrasy.[63] "The injury is caused by allergy or the unusual susceptibility of the person and not the product…A reasonable person could not foresee the purchaser's condition and could not anticipate the harmful consequences."[64] Allowing recovery for an idiosyncratic reaction to a natural element, such as mold, is likely to flood the courts with litigation.

The defense must also rely upon science to combat the plaintiff causation theories. Although science

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[52] *Keggi v. Northbrook Property & Casualty Ins. Co*., 13 p. 3d 785 (Ariz. App. Div. 1 2000).
[53] *Id*. at 790
[54] *Kent Farm, Inc. v. Zurich Ins Co*., 998 P.2d 292 (Wash. 2000).
[55] *Id*. at 401. *Note*: Without water, molds are generally a harmless substance. Mold is a byproduct grown under conditions requiring food, air temperature control, and excessive water. Therefore, the presence of mold it not easily described as the discharge or dispersal of a toxic contaminate or pollutant. Yet, the counterpoint to this argument is that by their scientific classification, some are labeled mycotoxins.
[56] *Supra*, Guidotti at fn 10.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Bonowski v. Revlon, Inc*., 100 N.W.2d 5 (Iowa 1959).
[61] *Id*. at 6.
[62] *Id*.
[63] *Id*.
[64] *Id*. at 9.
[65] *Supra*., Guidotti at fn 10, *see also*, C.A. Robins, et al., *Health Effect of Micotoxins in Indoor Air: A Critical Review*, 15 Applied Occupational and Environmental Hygiene 773 (2000); Straus, DC. An Introduction to Mold Exposure, *Harris Martins Columns Mold*: A Mold Property and Personal Injury Litigation Magazine, 2001; 1:60-1.

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has classified mold as toxic or mycotoxic, there exists very limited scientific studies which support a causal relationship between mold and bodily injury.[65] Because the plaintiff must sustain their burden on the causal connection, the table is set for a battle of the experts.

Iowa requires evidence to be relevant.[66] Evidence in the form of scientific, technical or other specialized knowledge (that) will assist the trier of act to understand the evidence or to determine a fact in issue is also permissible.[67] Expert witnesses must be qualified as an expert by knowledge, skill, experience, training or education.[68] Although Iowa has not adopted the *Daubert*[69] analysis, the Iowa Supreme Court has directed trial courts (at their discretion) to consider the *Daubert* facts for expert testimony: "(1) whether the theory or technique is scientific knowledge that can and has been tested (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error or (4) whether it is generally accepted within the relevant scientific community.[70] When a "trial court considers these factors, the court should focus solely on the principles and methodology, not the conclusions that they generate."[71]

Epidemiologists,[72] mycologists,[73] toxologists, neuro-psychologists, etc. will be the cadre of experts relied upon by the plaintiffs as well as defendants. Similar to other toxic exposure cases, plaintiff's will attempt to address their causation problem with a differential diagnosis technique. This methodology relies upon three elements: A toxic substance (mold) has the capacity to cause an injury, the plaintiff was exposed to the mold spores, and the elimination of other potential causes. Utilizing the 702 approach or the *Daubert* analysis, it is difficult for the plaintiff to prove that mold has the capacity to injure because of the lack of scientific knowledge, the lack of peer review and the generally unacceptability (emphasis added) within the scientific community.

Establishing that an individual was exposed to mold spores that caused the condition may be a challenge itself. There are no official standards or guidelines for safe indoor levels for mold.[74] There are various manufacturers and types of air sampling equipment that experts utilize,[75] which do not all work the same and they may have different flow rates and collection efficiencies.[76] Obviously, an open invitation for attacking the credibility of the air sampling findings and conclusions from either the plaintiff or defense perspectives.

Microscopic examination of mold samples will identify the types of mold in the sample, but it will not tell the quantities or the viability of the fungi.[77] The culture method of analysis will provide relative numbers of culturable fungi,[78] however, if insufficient samples are obtained for the cultures, misleading results may occur.[79] Without stringent generally accepted methodology requirements for measuring mold spores and the ubiquitous nature of mold spores, establishing the exposure to the toxic mold spores within a particular locale will be a difficult task.

The third element of the differential diagnosis requires the elimination of other potential causes. As we have previously stated, symptoms associated with mold can be attributable to a great array of other causes. Unlike many other toxic torts, there are no definitive biological markers which establish mold exposure and the neurological effects of mold are still largely unknown. Consequently, the plaintiff must prove that the injury is causally related to the specific exposure as opposed to a

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[66] Iowa Rule of Evidence 402.
[67] Iowa rule of Evidence 702.
[68] *Id*.
[69] *Daubert v. Merrel Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
[70] *Leaf v. Goodyear Tire & Rubber Co*., 590 N.W.2d 525, 533 (Iowa 1999).
[71] *Id.*
[72] Epidemiolgy is the study of distribution and determinants of health related states or events in populations, by its very nature, a science of generalizations. *Supra*., Guidotti at fn 10.
[73] Mycologists typically only specialize in two or three species of mold. They are trained in molecular biology or systematic biology. The latter specialty are considered the most expert on mold but are generally retiring from the field based upon the era of their education. *Supra*, Guidotti at fn 10.
[74] Stewart, James, *Defense of Mold Claims*, Toxic Mold Litigation, December 6, 2001.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Id*., "In one study, samples taken in the same outdoor location between one and four houses apart showed significant variability….There was a difference of 3,500 spores/m3 for spore trap samples for an average difference of 69%." *Id*.

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motorist coverage), *Krause v. Krause*, 589 N.W.2d 721, 724, 728-29 (Iowa 1999); *United Fire & Cas. v. Victoria*, 576 N.W.2d 118, 121 (Iowa 1998); *Principal Cas. Ins. Co. v. Blair*, 500 N.W.2d 67, 69 (Iowa 1993); *Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599, 603 (Iowa 1983). The District Court then turned its analysis to the specific language of the family member exclusion in Kyle Janson's insurance policy and found that the clear intent of the policy language was to exclude coverage for claims asserted by family members. Ruling at 47.

Janson raised an issue never before addressed by Iowa's appellate courts: the application of the family member exclusion to third party claims for indemnity or contribution. Ruling at 47. The impact of the Court's decision on the application of the exclusion was far reaching because if it was found to apply, the parties seeking indemnification and contribution would no longer be able to attribute fault to Kyle Janson for his daughter Katelyn's severe injuries. *Spaur*, 510 N.W.2d at 863; *Pepper*, 484 N.W.2d at 158-59.

Numerous courts outside of Iowa have been faced with similar issues and have found that the exclusion applies to indemnification and contribution claims even though they are not claims asserted directly by a family member. *See Whirlpool Corp. v. Zeibert*, 539 N.W.2d 883, 885 (Wisc. 1995) (holding that intra-family immunity clauses that apply to indemnification and contribution claims are not contrary to public policy); *Dartez v. Atlas Assurance Co.*, 721 So.2d 109, 112-13 (La.App. 1998); *Horesh v. State Farm Fire & Cas. Co.*, 625 A.2d 541, 543 (N.J. Super. Ct. App. Div. 1993) (holding that "a demand for indemnification and contribution by a third party sued by an injured insured is the equivalent of a liability claim against one insured for the injuries to the other insured."); *Chrysler Credit Corp. v. United Services Auto. Ass'n*, 625 So.2d 69, 73 (Fla.App. 1993); *Utley v. Allstate Ins. Co.*, 19 Cal.App.4th 815, 24 Cal.Rptr.2d. 1 4-5 (1993); *State Farm Fire & Cas. Co. v. Ondracek*, 527 N.E.2d 889, 891 (Ill. App. 1988); *Lumberman's Mut. Cas. Co. v. Vaughn*, 199 Cal.App.3d 171, 244 Cal.Rptr. 567 (Cal.Ct.App. 6 Dist. 1988); *Groff v. State Farm Fire & Cas. Co.*, 646 F.Supp. 973, 975 (E.D.Pa. 1986); *Parker v. State Farm Mut. Auto. Ins. Co.*, 282 A.2d. 503, 508-09 (Md.Ct.App. 1971).

The reasoning behind these decisions was explained by the New Jersey Appellate Court in *Horesh*: "In a personal injury action, indemnity claims of someone only vicariously liable and contribution claims of a joint tortfeasor are derived solely from the 'bodily injury' claims of the injured person. Where that bodily injury is allegedly sustained by [a family member of the insured], the exclusion withdraws coverage. *Horesh*, 625 A.2d at 543. Essentially, these courts have found that the "liability is identical whether there is a direct claim [by a family member] or whether the claim is indirectly asserted through a contribution claim." *Rabas v. Claim Management Services*, 556 N.W.2d 410, 412 (Wisc. App. 1996). In *Janson*, the bodily injuries giving rise to the lawsuit were suffered by Kyle Janson's family members and the various other defendants brought Kyle Janson into the case as a third party defendant to "siphon" some, if not all, of the fault for those injuries onto him. *See Pepper*, 484 N.W.2d at 158. The contribution plaintiffs were seeking to do indirectly what the insurance policy prevented Janson's family members from doing directly.

The Woodbury County District Court found the reasoning of the previously cited courts to be applicable and found that Kyle Janson's family member exclusion applied to the various claims of contribution and indemnification filed against Kyle Janson. Ruling at 49. Thus, the Court found that Kyle Janson had no liability insurance for the claims of indemnification and contribution for injuries sustained by his family members. *Id.*

The Woodbury County District Court granted Kyle Janson's motion for summary judgment pursuant to Pepper and its progeny. Ruling at 49-50. The Court's decision regarding the application of Janson's family member exclusion is consistent with the Supreme Court's policy decisions regarding "fault siphoning." *See Baker v. City of Ottumwa*, 560 N.W.2d 578, 584 (Iowa 1997)(holding that Iowa courts have repeatedly rejected

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attempts at "fault siphoning" by defendants); *Spaur*, 510 N.W.2d at 863; *Pepper*, 484 N.W.2d at 158. Simply put, the Iowa Supreme Court has decided that it is preferable for other solvent defendants to bear the insolvency of a co-defendant rather than plaintiffs losing an opportunity to recover all of their damages. *Spaur* 510 N.W.2d at 863; *Pepper*, 484 N.W.2d at 158 (noting that plaintiffs cannot sue bankrupt defendants directly due to automatic bankruptcy stay).

Iowa law has consistently held that family member exclusions do not violate public policy and apply to deny coverage when family members attempt to sue other family members directly for their personal injuries. *Shelter Gen. Ins.*, 590 N.W.2d at 728-29. Therefore, Kyle Janson had no liability insurance and once he filed bankruptcy, his family members had "no possibility of obtaining an enforceable judgment against [him]." *Pepper*, 484 N.W.2d at 158; *see also In re: Schultz*, 251 B.R. 823, 828-29 (W.D.Texas Bnkr 2000) (holding that bankruptcy discharge releases debtor from personal liability for the debt).

The Iowa Supreme Court has held that where a plaintiff has no possibility of obtaining an enforceable judgment against a third-party defendant directly, the plaintiff has no protection from "fault siphoning" and therefore, the third-party defendant cannot have fault attributed to it by way of an indirect contribution and indemnification action. *Pepper*, 484 N.W.2d at 158. Judge Ackerman's decision in *Janson* applying the family member exclusion to contribution and indemnification claims is consistent with *Pepper* and its progeny because a contrary finding would have allowed an action indirectly that could not have occurred directly. *Id*.

The Iowa Supreme Court's decisions in *Pepper, Spaur*, and *Baker* raise serious concerns for the defense bar because the Court has made a policy decision to ensure that plaintiffs fully recover by forcing solvent defendants to pay damages for which they otherwise would not be liable. In certain instances, however, this line of cases can be an effective tool to obtain dismissal of defendants in Kyle Janson's position.

[1]John D. Ackerman represented defendant Owens-Corning Fiberglas Corp. in *Spaur*, well before his appointment to the bench.

[2] *See generally*, Mark Brownlee's Case Note Summary in the January 1995 DEFENSE UPDATE.

UPCOMING EVENTS

MINI-SEMINAR

TORT AND INSURANCE LAW
April 12, 2002
Des Moines
Golf & Country Club

ANNUAL MEETING

September 25-27, 2002
Held again at
Embassy Suites
on the River,
Des Moines, IA

TESTING THE COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE . . . continued from page 4

verdict form.

Focus Group Pilot Study

A jury consultant reviewed the case in depth and presented various aspects of the case to three focus groups. Each presentation was structured to test various hypotheses formulated at the outset, and new hypotheses that developed as feedback was obtained from the first and second groups. Focus group results showed that this case had good evidence for a comparative negligence affirmative defense. Based on these and other results, a defense was prepared and tested in a larger panel study to verify and refine the defense's strategy, and to assess the value of the case.

Selecting Mock Jurors for the Large Panel Study

The primary purpose of the follow-up panel study was to scientifically predict the probable verdict and exposure in this case. This type of study requires a different approach to the typical mock trial. A larger sample size is necessary to provide a statistical measure of exposure. Therefore, 125 mock jurors were recruited with a stratified random sampling procedure throughout the venire; i.e., we sought a group that was representative of the population in the relevant jurisdiction. They were screened on the telephone as they were recruited; this preliminary step helped us to eliminate people who would have been excused for cause, hardship, or who posed potential risks that they would be targets of discovery actions by the plaintiffs' counsel.

The mock jurors that were selected were in fact a representative demographic sample of the venire in terms of age, race, gender, education, and community/neighborhood. The demographic breakdowns were based on U.S. Census data and modified by our own databases of jurors who are ultimately seated in large civil cases in this venue. Participants were paid for their time to participate, thus eliminating the self-selection bias that is inherent with volunteer samples.

111 of the 125 people recruited actually came to the mock trial/research on the appointed day. Upon arriving, jurors were screened again for discovery risks and challenges for cause. All of those who showed up for the research qualified to participate.

Procedure at the Mock Trial

Jurors heard statements from the plaintiff and defense. (Plaintiffs' counsel was role-played by another attorney in the defense firm.) Both statements recited deposition testimony, explained clearly their client's position on the case, and presented demonstrative evidence. Both sides also presented and argued their positions on damages. The plaintiffs' statement included the emotional arguments that would be expected at trial.

Next, jurors were instructed on the law. They filled out a questionnaire to capture their pre-deliberation attitudes and verdict, prior to being exposed to the opinions of fellow jurors. Half of the panel got the comparative negligence instructions and question on the special verdict form. The other half did not.

Finally, two subgroups of twelve mock jurors were retained to deliberate the case. One jury had received the comparative negligence instructions/question, and the other jury had not received the instructions/question. Moderators joined each jury to focus participants on specific issues that needed clarification. Deliberations were videotaped and used in a separate analysis.

Three hypotheses were tested:

- A defense verdict is more probable when the comparative negligence instructions and question are excluded.
- Damages awards by plaintiff-oriented jurors are higher when the comparative negligence instructions and question are excluded.
- The "exclusion effect" on damage awards is only applicable to jurors who would normally be inclined to award high damages; they would have previously been identified and eliminated by peremptory challenges.

The Test's Results

The mock jurors decided, first, the question of the institution's liability for the wrongful death of the dot.com president, and second, the

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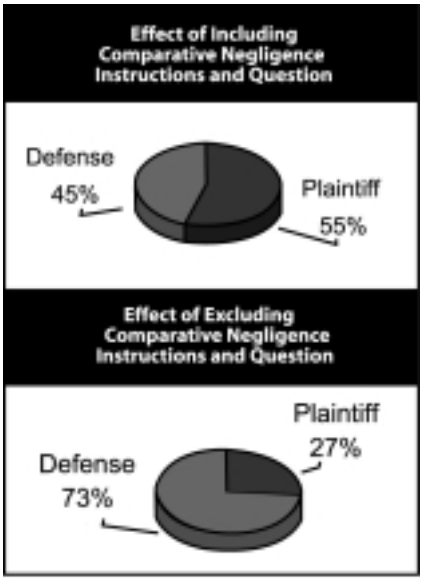
TESTING THE COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE . . . *continued from page 12*

amount of damages to be awarded to the plaintiff. Here are the results of testing the three hypotheses.

Hypothesis # 1: A defense verdict is more probable when the comparative negligence instructions/ question are excluded.

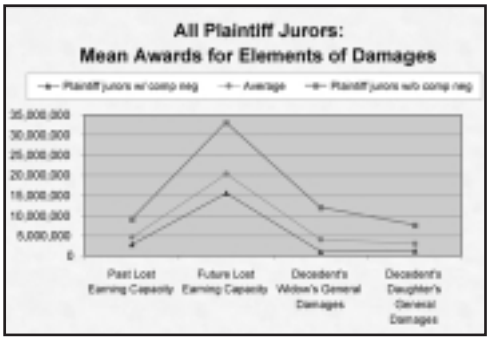
The inclusion/exclusion of the instructions/question produced a statistically significant effect on the verdict. In fact, the difference was dramatic. (The figures indicate the percentage of the 111 mock jurors who would find for the defense or for the plaintiff on the question of liability.) Results showed that there was a 45/55 chance of a defense verdict when the comparative negligence instructions/ question were included. However, the chance of a defense verdict improved dramatically to 73/27 when the comparative negligence instructions/ question were excluded.



Statistically, the probability that this difference was mere chance was only 0.17%, which was well beyond the traditional threshold of 5.0% for asserting that the observed difference is significant. The exclusion of the instructions/question increases the probability of a defense verdict on liability. Therefore, the defense would be better off if it excluded the comparative negligence instructions/ question if it is betting on a defense verdict. Whether this can backfire in the form of higher damage awards, in the event of a plaintiff's verdict, is addressed by the next two hypotheses.

Hypothesis # 2: Damage awards by plaintiff jurors are higher when the comparative negligence instructions and question are excluded.

Can the strategy of omitting the comparative negligence instructions/ question backfire, i.e., result in a higher damage award, in the event of a plaintiff's verdict? Although excluding the instructions/question enhanced the probability of a defense verdict, to what extent did its inclusion/exclusion affect damages awards by those who were plaintiff-oriented? More specifically, would the exclusion of the instructions/question lessen the impact of the defense's comparative negligence arguments on damages awards by plaintiff-oriented jurors?



The results indicate that the exclusion of the instructions/question did have an impact on damages awards. Awards were significantly higher by plaintiff-partisan jurors who did not get the instruction.

Based on these results, it appears that the defense needs to make a distinct choice:

(1)Go for broke by excluding the instructions/ question to enhance the probability of a defense verdict; or

(2)Hedge the bet by including the instructions/ question to minimize damage awards, though this will also increase the likelihood of a plaintiff's verdict.

These data were based on *all* jurors who rendered a plaintiff's verdict. The next question is whether jurors who survive peremptory challenges are susceptible to the "exclusion effect."

Hypothesis # 3: The "exclusion effect" on damages awards is only applicable to "high damages" jurors who would normally be identified and

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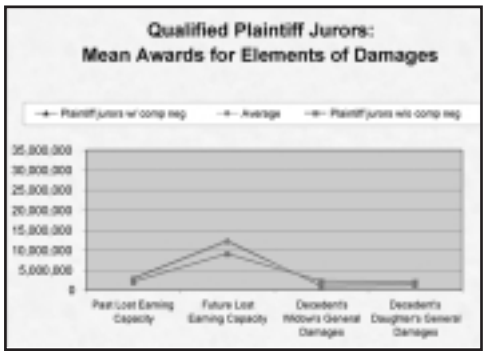
eliminated by peremptory challenges.

Although excluding the instructions/question increased the damage awards of jurors who were plaintiff-oriented, did this "exclusion effect" hold up for jurors who survived peremptory challenges? It may be that plaintiff-oriented jurors who survive peremptory challenges will take the comparative negligence evidence into account on their own and reduce their damage awards accordingly.

Peremptory challenges in this study were done somewhat artificially. Since there were 111 people in the panel, it was impossible to *voir dire* all of them. Therefore, we assumed that experienced counsel on both sides would identify biased jurors. Defense counsel would strike emotional, high-damages jurors. Plaintiffs' counsel would strike conservative, defense-oriented jurors. High-damages jurors were defined as the six jurors who had the highest economic damage awards among the 47 plaintiff jurors in the panel.

The results show that the "exclusion effect" disappeared after peremptory challenges were exercised. Apparently, this effect applies only to high-damages jurors. Once they had been eliminated by peremptory challenges, the damages awarded by plaintiff jurors in either condition were statistically identical.



Conclusions and Recommendations

The results noted above were startling. Yet, the entire exercise was founded on solid research. The research design was well executed, the sample was large and representative, and the presentations for both sides were exemplary. The resulting choice was clear:

> **Go for a defense verdict by excluding the instructions/question, or hedge the bet by including the instructions/question to control damages.**

We also suspect that this strategy will probably be more effective when liability itself is close, as it was here (55%-45% when the instructions/question was included on the verdict form). The strategy may also be more suitable to a medical malpractice setting. Earlier focus group sessions noted that many mock jurors felt particularly strong about "patient responsibility" and thus to some degree that theme might have been an acceptable substitute for comparative negligence. Only additional case-specific research can determine whether these results apply in other cases.

Nevertheless, this research produced some provocative results that conflict with the common thinking of most experienced trial attorneys.

These results strongly suggest that defense counsel and the client must discuss and decide on their objective:

> "Do we want to win the case and accept the risk of a higher award in the event of an adverse verdict, or do we want to control damages and increase the probability of a plaintiff's verdict?"

Whether to include or exclude the comparative negligence instructions/question depends on the objective that counsel and the client jointly decide upon. If the objective is to win the case, then the comparative negligence instructions/question should be excluded. However, both counsel and the client should be clear that this is a "go for broke" strategy. If there is an adverse verdict and there are still some high-damages jurors on the panel, they will not automatically reduce their own awards even when there was ample evidence presented about comparative negligence.

Consequently, this strategy should

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TOXIC MOLD . . . *cont. from page 9*

EDITORIAL . . . *cont. from page 16*

only be exercised if both defense counsel and the client are committed to winning the case, and if they believe that the defense can identify high-damages jurors during *voir dire* in the event of an adverse verdict.

1 Aaron Abbott, Ph.D. is the president of Jury Behavior Research, Inc., a national trial consulting firm headquartered in Portland, Oregon (503) 294-0000. His firm helps trial lawyers anticipate the behavior of juries and turn this knowledge into winning courtroom strategies.

Gus von Bolschwing is a member of the law firm of Golman and von Bolschwing, P.C. in Sausalito, California, and vice chairman of Octagon Risk Services, Inc. (a St. Paul Companies subsidiary), a national Third Party Administrator: 415-332-3414. He is a member of the Defense Research Institute.

magnitude of other potential areas of exposure. For an atopic plaintiff, the burden is even greater in proving that proportion of his/her claimed injury is attributable solely to the claimed wrongful mold exposure.

Conclusion

Given the current lack of scientific study and literature causally linking mold exposures to human injury, the defense appears to hold the advantage in this field of litigation. However, as the science advances and the *Daubert* challenges allow more of these cases to withstand the motion practice and consequently get to the jurors the potential for recoveries from both a frequency and severity aspect may be substantial.

As we have seen, the insurance industry has recognized the possibilities from not only a property coverage perspective but also from a liability perspective with tenants suing landlords, contractors being sued for their workmanship, and other errors and omissions types of exposures. While it appears that Iowa is a jurisdiction which will favor the defense side for these toxic mold injury litigation issues, the evolution of the scientific and medical fields of study may provide the causative proof sought by the plaintiffs and consequently enhance their opportunity for recovery.

This contraction of the Judicial Branch has led to a significant debate regarding the delivery of legal services throughout the State of Iowa and in particular, the availability of courts throughout our 99 counties. In the coming year, there will be an ongoing debate with significant policy decisions being made as to how, when and where the availability of our courts will be impacted. This will affect the delivery of justice throughout the state.

Each member of this organization needs to be cognizant of the pending difficulties and challenges created by the budget shortfall and of the impact which it has had upon our court system and which it will have in the future. It is incumbent upon each of us to provide our thoughts, concerns and recommendations not only to the leaders of this organization, but to the leaders of our bar association and our state representatives. The present situation provides not only challenges, but also opportunities for us to help shape and develop the solutions which will be our system for the foreseeable future. Regardless of what the potential solutions may be, involvement and input in the process is important, and your Board of Editors encourages your participation.

FROM THE EDITORS . . . By Patrick L. Woodward, Davenport, IA

Recent economic trends have directly impacted the very court system on which we as members of the Iowa Defense Counsel and lawyers practicing in the civil justice system in Iowa rely upon for the delivery of justice to our clients. Since the fourth quarter of 2001, the Iowa Judicial Branch has had 5.5 million dollars cut from its previously appropriated budget. Since that slash absorbed by the Judicial Branch, many exchanges have occurred between the Judiciary and the Legislature regarding its impact and the impact of any further budget cuts.

Addressing this subject directly, on January 16, 2002, Chief Justice Lavorato presented the State of the Judiciary message to the General Assembly and the Executive Branch. While the State of the Judiciary message may be of some interest to the general public and lawyers in particular, the message of the Chief Justice holds special significance to the members of this organization who ply their profession in the very civil justice system which is poised to undergo potentially significant change. As these changes, which will occur in the near future, will affect our individual practices and the practice of civil trial law for years to come, the message of the Chief Justice must be carefully considered and our role as advocates brought to bear.

In his speech, the Chief Justice emphasized that the paramount concern for the court and for our state in the wake of budget cuts and contemplated future budget cuts is "the very access to justice itself and to our courts." As part of the 5.5 million dollar reduction already implemented, the Judicial Branch has cut technology projects, travel, supply, communication, and equipment expenses. Further, over 250 employees of the Judicial Branch have been adversely affected with 107 employees being laid off, 67 employees having their hours cut, 79 persons filling supervisory positions being downgraded and 20 vacant positions being eliminated.

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