

Mold For Gold

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October 2002

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FACTS ABOUT MOLD LITIGATION

Lack of evidence significant

- ★ Mold is commonly found in homes and buildings and will grow naturally indoors where there is moisture. Mold has existed for thousands of years, and no new virulent strain has been discovered. (Sources: U.S. Centers for Disease Control, Insurance Information Institute.)
- ★ No scientific evidence has shown that mold leads to serious health problems. While mold commonly can cause hay fever-like allergy symptoms, a causal link between mold and more serious health issues has not been proven. (Source: U.S. Centers for Disease Control.)
- ★ Mold toxins at indoor environmental levels have never been shown scientifically to cause any illness. Mold toxins indoors have never been proven to cause disease or brain damage; no chronic diseases are characterized by symptoms alone due to mold. (Source: Ronald E. Gots, M.D., Ph.D., principal, International Center for Toxicology and Medicine, Rockville, Md., “*Correcting Mold Misinformation*,” presented at “Mold Medicine and Mold Science” Conference, May 13-14, 2002.)
- ★ An estimated 70 percent of all homes have mold behind the walls, and it is unlikely that there is a home in the world without some *Stachybotrys* spores in it. Yet mold toxins at indoor

environmental levels have never been shown scientifically to cause any illness. (Source: Ronald E. Gots, M.D., Ph.D., principal, International Center for Toxicology and Medicine, Rockville, Md., “*Correcting Mold Misinformation*,” presented at “Mold Medicine and Mold Science” Conference, May 13-14, 2002.)

- ★ Mold at summer camp is much more extensive and, theoretically, hazardous than the mold found in a home, school or workplace. Yet, no disease outbreaks have ever been reported at a summer camp. (Source: Ronald E. Gots, M.D., Ph.D., principal, International Center for Toxicology and Medicine, Rockville, Md., “*Correcting Mold Misinformation*,” presented at “Mold Medicine and Mold Science” Conference, May 13-14, 2002.)

Texas mold claims largest in nation

- ★ Mold claims by Texas policyholders have jumped dramatically between the first quarter of 2000 and the fourth quarter of 2001:

The total number of mold claims grew from 1,050 to 14,706 – a 1,300 percent increase.

Claims per 1,000 policyholders rose from 1.7 to nearly 23.6 – a 1,288 percent increase. The average cost per Texas policyholder per year grew from \$23.32 to \$300.50 – an 1,189

Facts about Mold Litigation

percent increase. However, the average cost per policyholder has fallen since third quarter 2001, when it peaked at \$444.35. (Source: Texas Department of Insurance.)

- ★ Texas accounted for 70 percent of new mold claims in 2001; yet the state has only about 7.5 percent of the U.S. population. (Source: Insurance Information Institute; U.S. Census Bureau.)
- ★ In 1998, Texans paid the highest homeowners insurance premiums in the country, an average of \$879 per year, and nearly double the national average of \$481. (Source: Insurance Information Institute.)
- ★ In 2002, homeowners have seen premium increases from 14 percent to 200 percent, largely due to mold claims. (Source: *Fort Worth Star Telegram*, February 23, 2002.)
- ★ A typical homeowner's mold claim costs between \$15,000 and \$30,000. (Source: Insurance Information Institute.)
- ★ The cost of cleaning mold can climb as high as \$100,000, far exceeding a typical water-damage claim, industry representatives say. (Source: *Houston Chronicle*, June 25, 2001.)

New policies offer less protection

- ★ Texans are paying more money for less coverage. Some companies have stopped selling new policies because longer offering consumers the comprehensive HO-B policy, which offers the most protection to homeowners, including coverage for mold and

— foundation damage. Until last year, the HO-B policy was the dominant homeowners policy in Texas, held by 96 percent of homeowners. Instead, homeowners are being offered HO-A or "enhanced" HO-A policies, which are more affordable but provide less protection. (Source: *Dallas Morning News*, June 2, 2002.)

- ★ "Thousands of home sales could be delayed or halted because of recent decisions by several insurance companies to stop selling new policies for homes that have had water damage in the past." (Source: *Dallas Morning News*, August 22, 2001.)
- ★ A major Texas homebuilder is introducing a new line of homes it says is constructed to reduce the potential for mold infestations. The added cost to homebuyers will be an average of \$1,500 to \$2,000 to the price of each home. (Source: *Austin American-Statesman*, October 20, 2001.)
- ★ Much of the recent attention given to mold stems from a June 2001 court decision in which a central Texas family won a \$32 million damage award against Farmers Insurance Group in a dispute over the removal of mold from the family's 11,500-square-foot mansion. In that case, the trial court judge ruled that the family's lawyers could not introduce expert testimony regarding possible health problems caused by mold.

This ruling was based on a Texas Supreme Court decision that, in health effects cases, requires unequivocal scientific studies showing a substance causes a specific problem. (Source:

Facts about Mold Litigation

Austin American-Statesman, May 20, 2001.)

- ★ The mold issue continues to undergo examination in Texas. The Texas House of Representatives Committee on Insurance is studying mold-related issues during the interim before the 2003 legislative session. The Texas insurance commissioner has appointed a task force to recommend procedures for handling mold and

- mold-related claims. Insurance reform also has become a campaign issue for statewide candidates. (Source: Press releases from the Texas House of Representatives (Nov. 5, 2001), Texas Department of Insurance (Jan. 11, 2002), Office of Gov. Rick Perry (May 16, 2002), Tony Sanchez for Governor campaign (Feb. 12, 2002).

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Armed with an arsenal of experience bending well-established tort principles to prevail on more than \$21.6 billion in asbestos claims, the personal injury bar is gearing up for its next potential tort gold mine – “toxic” mold. Attorneys in these lawsuits have had some help getting the word out about the alleged health dangers of “toxic” mold. Erin Brockovich, the single mom-turned environmental health activist whom Julia Roberts portrayed in her Oscar award-winning role, has declared “toxic” mold to be

her new pet project. Ed McMahon also made headlines recently for his mold lawsuit. The ploy is working. According to a recent Texas poll, nearly 80 percent of Texans believe that mold in the home can cause serious health problems.¹

The problem is, little reliable medical or scientific evidence exists establishing a causal link between mold and illness. To date, “toxic” mold is largely considered toxic because the personal injury bar says so.

TORT TACTICS

The personal injury bar is trying to cash in on mold litigation using two tactics that could seriously impair the civil justice system. First, the personal injury bar is trying to introduce evidence of personal injury in order to inflate awards for non-personal injury claims, like property damage. Second, the personal injury bar is trying to prevail on personal injury claims without establishing a causal link between mold and illness.

¹ Poll: *Mold Harm Serious*, DALLAS MORNING NEWS, Dec. 2, 2001.

No causation? No matter. In asbestos litigation today, approximately 80 percent of the plaintiffs who sue are unimpaired. That is, they show signs of exposure to asbestos, but are otherwise healthy. Just as the personal injury bar found creative ways around the injury requirement in asbestos litigation, it is finding a way around the causation requirement in mold litigation.

For personal injury lawyers, mold litigation shows promising potential as a toxic tort because mold, like asbestos once was, is pervasive. Asbestos was once used as insulation in piping, in ships, in schools, and as a shingle ingredient in roofing. It was virtually everywhere. Approximately 260 million people in the United States have had some exposure to asbestos.² Mold has the same potential. We all breathe thousands of mold spores everyday. Thus the universe of potential plaintiffs is exceptionally large.

Today, the problem with asbestos litigation is that the pool of potential defendants is drying up. More and more companies have fallen victim to litigation-driven bankruptcies. But in the world of mold litigation, the deep pocket-defendants are just emerging. Despite important differences between asbestos and mold litigation, the personal injury bar is making progress and appears optimistic about its chances for success.

INSURERS MOVE QUICKLY

At the same time, insurers are moving quickly to write mold exclusions into their policies so that they are no longer on the hook for these specious claims.³ As a result of the \$1.3 bil-

² Walter Dellinger & Victor Schwartz, *Asbestos Litigation Today: A Discussion of Recent Trends*, HARRIS MARTIN COLUMNS, Jan. 2002, at 4.

³ Richard Mize, *Insurers Limiting Mold Coverage*,

lion the insurance industry paid last year to remove mold and repair mold damage in households nationwide, State Farm, the nation's largest home insurer, recently announced it has eliminated coverage for mold damage in 33 states, even in cases in which the mold resulted from damage covered by the insured's policy.⁴

In March 2002, the Texas Department of Insurance (TDI) authorized State Farm to use substantially the same homeowners policy in Texas that the insurer uses in other states.⁵ Two months later, the Department gave similar approval to USAA. State officials are currently reviewing requests from other insurers to do the same.⁶

The agreement with the TDI requires State Farm and USAA to reduce its rates to reflect coverage differences between its national homeowners policy and the standard policies they have sold in Texas in the past.⁷ The agreement further requires the insurers to allow policyholders to “buy back” certain coverage not included in the basic policies.⁸

The TDI struck these agreements with State Farm and USAA because maintaining the state's former mold coverage requirements would have resulted in rate increases of “at least” 40 percent for Texas policyholders.⁹

CHICAGO TRIBUNE, April 14, 2002, at 7F.

⁴ *Major Insurers Drop Coverage for Mold*, LOS ANGELES TIMES, Aug. 18, 2002, at K.3.

⁵ Texas Department of Insurance, News Releases, Montemayor Further Expands Homeowners' Options, available at <http://www.tdi.state.tx.us/commish/nr05222a.html>, (last visited Aug. 26, 2002).

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Texas Department of Insurance, News Releases, Commissioner Montemayor Statement to Consumer

Indeed, according to estimates from USAA, the agreement with the TDI allows the insurer to lower the average rate for a brick veneer home insured for \$80,000 without water and mold coverage from \$1,645 to \$779. The agreement also allows USAA to offer water and mold coverage under the “buy back” option for \$1,617, a 1.7 percent reduction.¹⁰

Interestingly, Texas Insurance Commissioner Jose Montemayor recently commented on what he believes is driving the recent surge in mold claims: sensationalistic media coverage. The Commissioner editorialized in one recent statement, “I believe the claim surge is a temporary phenomenon created in part by extensive news media coverage. If we all work together to reduce not only mold claims but also mold exposure, we can eliminate the ‘horror stories’ and big judgments that create headlines and scary features on TV news magazines.”¹¹

Regardless of what is driving the rise in mold claims, insurance companies and builders in Texas should expect lawmakers to consider standards for appropriate mold levels, remediation standards, building standards, and testing when the legislature returns in 2003. Committees formed by the Texas Department of Health, Texas Department of Insurance, and Representative Todd Smith (R) have been studying the issue this year.

and Consumer Groups, *available at* <http://www.tdi.state.tx.us/commish/moldconsumer.html>, (last visited Aug. 26, 2002).

¹⁰ *TDI Allows USAA to Drop Mold Coverage*, SAN ANTONIO BUSINESS JOURNAL, *available at* <http://www.bizjournals.com/sanantonio/stories/2002/05/20/daily17.html> (last visited June 6, 2002).

¹¹ Texas Department of Insurance, News Releases, Commissioner Montemayor Statement to Residential Property Insurers, *available at* <http://www.tdi.state.tx.us/commish/moldinsurer.html>, (last visited Aug. 26, 2002).

The Goldman Example

Steven F. Goldman of the law firm Goldman & Goldman in New York recently settled a toxic mold case for an undisclosed amount. Goldman opined, “toxic mold litigation is almost certain to be an exploding trend in the century.”¹² His recently-settled case sought compensation for personal injury, property damage, clean-up costs, rent abatement, and first-party medical pay benefits, in addition to punitive damages in the sum of \$50 million for 480 plaintiffs.¹³

As Goldman wrote, “I expect that over the next five to ten years, hundreds of thousands of cases alleging mold related injury and property damage will be filed. I believe that once the dust clears, billions of dollars will have been paid out on water damage and mold related claims nationally on both first-party and third-party suits.”

Goldman’s comment touches on one of the attractive features of mold litigation. From the plaintiffs’ perspective, mold litigation is a target-rich environment. Claims can be brought against a home seller, a builder, engineers, building material manufacturers and others. Compounded by competing coverage claims from each party’s insurer or insurers, for a defendant, mold lawsuits can be a real litigation thicket. In an effort to clear that thicket, many parties choose to settle even questionable claims.

Moreover, for homeowners, evidence suggests that mold may be less a catastrophic loss issue (thereby triggering homeowners’ coverage) and more a prudent home maintenance issue.

¹² Steven F. Goldman, *Perspective: Toxic Mold is Here to Stay*, N.Y. LAW JOURNAL, Apr. 3, 2002, at 2.

¹³ *Id.*

The Environmental Protection Agency's website list nine guidelines for preventing mold; all nine focus on moisture avoidance, and all can be easily performed by a careful homeowner.¹⁴

The only obstacle standing in Goldman's way is causation. Whether toxic mold litigation develops into an asbestos-like litigation explosion depends largely on the extent to which the personal injury bar can establish evidence that mold causes serious harm.

Two Standards for Expert Testimony

Causation is an essential element of a personal injury claim because, regardless of how ill or sympathetic a plaintiff may be, it is unfair to hold a defendant accountable for a plaintiff's health problems if the defendant's actions did not cause them. Recently, the Supreme Court of Texas emphasized the fairness aspects of the causation requirement, finding, "The law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for an injury unless the preponderance of the evidence supports cause in fact."¹⁵ Plaintiffs usually rely

¹⁴ United States Environmental Protection Agency, Mold Remediation in Schools and Commercial Buildings, available at <http://www.epa.gov/iaq/molds/prevention.html>, (last visited May 6, 2002).

¹⁵ *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997). Pursuant to *Havner*, the Texas courts consider data showing the causes, distribution, and control of disease to be valid if the data: (1) is a result of a properly designed study free from bias; (2) demonstrates an increased risk of injury; and (3) satisfies the "Hill criteria." Walter J. Andrews et al., *Daubert v. Merrell Dow Pharmaceuticals Provides Key Challenge to Mold Injury Causation*

on expert testimony to establish causation in personal injury cases. To establish causation in a mold case would require an expert to testify that science has linked mold and the plaintiff's illness. State judges generally rely on two standards for the admission of expert testimony of scientific evidence – the older *Frye* standard¹⁶ and the *Daubert* standard.¹⁷ The *Frye* standard requires that a judge find that an expert's opinion is "generally accepted" in the relevant scientific community before allowing for the admission of such testimony.

The newer *Daubert* standard requires that a judge consider the following factors before admitting such testimony: (1) whether the theory or technique in question has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the particular theory or technique, and

tion Evidence, SG004 ALI-ABA 19, 27 (2001). The Hill criteria are: (1) strength (high relative risk or correlation, e.g., smoking and lung cancer); (2) consistency (evidence of a similar association confirmed on multiple occasions); (3) specificity (causative agent and response are narrowly defined, not broad or variable); (4) temporal relationship (the exposure must precede the reaction, and the reaction should follow within a reasonable time); (5) biological gradient (intensity of responses should vary with that of exposure; also known as the "dose-response curve"); (6) coherence (similar responses are observed for similar exposures); (7) biological plausibility (a believable biological basis for the association); (8) experimental evidence (reproducible results under controlled conditions); and (9) analogy (similarity of association to other established causal associations). *Id.* at 27-28, citing A.B. Hill, *The Environment and Disease: Association or Causation?*, 56 PROC. R. SOC. MED., 295-300 (1965).

¹⁶ See *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

¹⁷ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

whether means exist for controlling its operation; (4) the extent to which the theory or technique has been accepted.¹⁸

**NO LINK BETWEEN
MOLD AND ILLNESS**

Right now, science has not established a causal link between mold and illness. As provided on the Center for Disease Control's website: "There are very few case reports that toxic molds (those containing certain mycotoxins) inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxic mold and these conditions *has not been proven*" (emphasis added).¹⁹

According to Ernest N. Charlesworth, MD, who was recently appointed by the American College of Allergy, Asthma and Immunology (ACAAI) to an *ad hoc* committee tasked to study the issues relevant to "black mold," "*Stachybotrys* has not been proven to cause verifiable disease in any individual, including those whose immune systems are suppressed such as transplant recipients, patients on chemotherapy and AIDS patients."²⁰

Asbestos, by contrast, has been scientifically proven to cause serious diseases, such as

mesothelioma (a type of cancer) and asbestosis (a scarring of the lungs). Existing research on the health effects of mold is both inconclusive and insufficient to establish causation.²¹ To date, mold litigation claiming personal injury has been based largely on shaky anecdotal evidence.

Nonetheless, the personal injury bar continues to combine personal injury claims with property damage and other non-personal injury claims. Moreover, the media continue to report on plaintiffs' alleged mold-related illnesses, often omitting or burying the fact that no causal link between mold and illness has been established. For example, the *New York Times Magazine* recently published a 7,514-word cover story on Melinda Ballard, the plaintiff in the now-famous (or infamous) \$32 million Texas mold case, *Ballard v. Fire Insurance Exchange*,²² titled "Haunted by Mold."²³

The article ominously warned: "Warning: Reading this story might make you sick. Not as sick as Melinda Ballard and her family, who began coughing up blood and suffering memory loss... But it could make your skin itch and your throat hurt, and you could start to cough. Then you will wonder whether there is toxic mold growing in your house, too, and whether you should pay someone a great deal of money to come find out."²⁴ Bur-

¹⁸ *Id.* at 593-95.

¹⁹ National Center for Environmental Health, Questions and Answers on *Stachybotrys chartarum* and other molds, available at http://www.cdc.gov/nceh/asthma_old/factsheets/mold/s/default.htm (last visited April 22, 2002).

²⁰ Ernest N. Charlesworth, *Black Mold Concerns Overblown*, SAN ANGELO STANDARD TIMES, May 20, 2002, available at <http://www.texaswest.com/archive/02/may/20/opinion2.html>, (last visited August 26, 2002).

²¹ The few studies that have examined the effects of inhaled mycotoxins provide conflicting or inconsistent results. C.A. Robbins, et al., *Health Effects of Mycotoxins in Indoor Air: A Critical Review*, 15 APPLIED OCCUPATIONAL AND ENVIRONMENTAL HYGIENE 773 (2000).

²² *Ballard v. Fire Ins. Exchange*, No. 99-05252, 2001 WL 883550 (Tex. Dist. Ct. Aug. 1, 2001).

²³ Lisa Belkin, *Haunted by Mold*, N.Y. TIMES, Aug. 12, 2001.

²⁴ *Id.*

ied 3,278 words into the article, the reporter briefly mentions the lack of scientific evidence linking mold and illness. Even if readers were to find this buried truth, it might be difficult for them to believe science over the compelling anecdotal evidence and grim photos upon which the article is based. After all, as the article points out, “a scientific standard of proof is greater than 95 percent.”²⁵

Despite a whopping \$32 million verdict for an insurance company’s mishandling of plaintiffs’ property damage claims, lack of causation evidence is why the plaintiffs in *Ballard* did not prevail on their personal injury claims.

In *Ballard*, the judge refused to allow the plaintiffs’ experts to testify that mold causes illness because the tests and studies underlying the experts’ opinions could not meet the high degree of scientific validity required by the Texas courts.²⁶ The trial judge in *Ballard* probably saved the defendants \$10 to \$20 million in lost future earnings and mental anguish payments by adhering to the law and excluding the plaintiffs’ expert witnesses.²⁷

The personal injury bar’s success in bending the rules in asbestos litigation is making potential deep-pocket targets of mold litigation nervous. As defense counsel in *Ballard* remarked, the prospect of judges admitting unreliable testimony establishing causation

²⁵ *Id.*, quoting Dr. Dorr Dearborn, a pediatric pulmonologist at Cleveland’s Rainbow Babies and Children’s Hospital (quotations omitted).

²⁶ Walter J. Andrews et al., *Daubert v. Merrell Dow Pharmaceuticals Provides Key Challenge to Mold Injury Causation Evidence*, SG004 ALI-ABA 19, 32 (2001).

²⁷ BUREAU OF NATIONAL AFFAIRS, *Toxins: Both Sides Say They’ll Appeal \$32 Million Award in Toxic Mold Case in Texas*, 16 TOXICS LAW REPORTER 779, August 9, 2001.

“scares me to death.”²⁸ But that’s just what state court judges are beginning to do.

UNRELIABLE TESTIMONY

In 2000, in *Minner v. American Mortg. & Guar. Co.*, a Delaware Court of Chancery judge admitted expert testimony asserting that very high-dose, acute exposures to mold-related chemicals potentially cause two allegedly mold-related diseases – Reactive Airways Dysfunction Syndrome (RADS) and Toxic Encephalopathy (TE) – even though the plaintiffs had only been exposed to low doses of mold.²⁹ Although the Supreme Court of Delaware has adopted the *Daubert* standard, the court in *Minner* provided a non-*Daubert*-like reason for admitting the plaintiff’s expert testimony. The court reasoned, “[T]his is one of those cases where it is possible that the precepts of science have not caught up with all the claims of the plaintiffs.”³⁰ The court’s reasoning is chilling because science may never “catch up” with plaintiffs’ claims. Awarding judgments on the assumption that science will sooner or later “catch up” could expose countless blameless defendants to billions of dollars in liability costs, which runs counter to the very basic principles of justice on which our judiciary relies.

Last year, in *Mondelli v. Kendel Homes Corp.*, the Supreme Court of Nebraska reversed a trial court decision to exclude the expert testimony of an environmental toxicologist employed by the state department of health, and a biologist who worked as a director of the laboratory that had analyzed air

²⁸ *Id.*

²⁹ *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 857 (Del. Ch. 2000).

³⁰ *Minner*, 791 A.2d at 857.

samples taken from a plaintiff's home.³¹ The Supreme Court of Nebraska disagreed with the lower court's finding that the experts' testimony failed to satisfy the *Frye* standard, as was required by Nebraska law.³² The Court misapplied *Frye's* "general acceptance" standard, despite a lack of generally accepted scientific or medical evidence supporting a causal relationship between mold exposure and illness. The Court failed to indicate whether or how the evidence would have established causation.

Expert testimony in support of a plaintiff's personal injury claims could determine the amount of money the jury awards for the plaintiff's non-personal injury claims as well. Even if a jury concludes that a plaintiff failed to meet the legal standard for causation, the jury could consider such testimony in its calculation of awards for non-economic damages for property damage or other non-personal injury claims.

A CRAPSHOOT FOR COMPENSATORY DAMAGES

A jury that wants to help a sick plaintiff could take into account expert testimony in its calculation of mental anguish for property damage. Non-economic damages, unlike compensatory damages, which account for actual costs, are imprecise. Each juror's mind is his or her own. How a jury comes up with a figure for such speculative injuries as mental anguish or pain and suffering, or for punitive damages, cannot be as objectively measured or evaluated, as can the process by which a jury calculates compensatory damages.

³¹ *Mondelli v. Kendel Homes Corp.*, 631 N.W.2d 846, 856 (Neb. 2001).

³² *Id.* The Supreme Court of Nebraska later adopted the *Daubert* standard in *Schafersman v. Agland Coop*, 631 N.W.2d. 862 (2001).

It is possible, therefore, that a jury could tack on millions of dollars in non-economic damages for non-personal injury claims in order to "make up for" the alleged health injuries suffered by a plaintiff, regardless of whether or not a plaintiff can make a legally sufficient showing of causation. It is for this reason and others that there should be a \$250,000 limit on non-economic damages. Absent such limits, if the personal injury bar succeeds in weakening admissibility standards, jury awards will increase for non-economic damages for non-personal injury claims, thus spurring more litigation.

The success of the personal injury bar in defying well-established tort principles to accommodate their asbestos claims set the stage for today's mold litigation. In recent asbestos litigation, the personal injury bar succeeded in eliminating the well-established injury requirement by arguing that healthy plaintiffs who have been exposed to asbestos should be compensated for potential injuries. In mold litigation, the personal injury bar is attempting to circumvent the causation requirement by making an emotional case for personal injury claims, and by collecting sizeable jury awards for property damage and other non-personal injury claims.

The courts have a responsibility to keep the tactics of the personal injury bar in line with the rule of law and to minimize the financial burden on citizens who pay for mold claims through the cost of new building materials and insurance premiums. As the Supreme Court of the United States ruled in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, federal judges have a responsibility to act as gatekeepers and to admit expert scientific opinion only if it is shown to be reliable.³³

³³ 509 U.S. 579, 589 (1993).

At least 20 states, including Texas,³⁴ Delaware,³⁵ and Nebraska,³⁶ have adopted the *Daubert* standard.³⁷ Nonetheless, a Delaware Court of Chancery has shown a willingness to abandon its role as a gatekeeper, and the Supreme Court of Nebraska has shown a willingness to admit evidence where “it is possible that the precepts of science have not caught up with all the claims of the plaintiffs.”³⁸ The Delaware court in *Minner* spoke directly to its gatekeeping role, indicating that, “[a]ny challenge as to the causation of RADS appears at this point to go to the weight and not the admissibility of the evidence.”³⁹ While the Delaware court’s ruling on the admissibility of the causation testimony in *Minner* does not amount to an outright abandonment of the *Daubert* principles, it does mark an important victory for the personal injury bar.

WHAT THE FUTURE MAY HOLD

Sweeping changes in the law rarely happen overnight. Change happens incrementally. Over time, however, one or two cases may develop into a trend of “progressive” rulings capable of chipping away at well-established legal principles. The judges that show a willingness to favor the personal injury bar in mold litigation early on will likely see a flood of mold litigation in their courtrooms.

³⁴ See *Tarrant Reg. Water Dist. v. Gragg*, 43 S.W.2d 609 (Tex. App. – Waco 2001).

³⁵ See *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999).

³⁶ See *Schafersman v. Agland Coop.*, 631 N.W.2d 862 (2001).

³⁷ DAVID FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 1.30 n.5 (Supp. 1999).

³⁸ *Minner*, 791 A.2d at 857.

³⁹ *Id.*

The personal injury bar will argue that the appellate process safeguards all parties of litigation to mistakes and abuses of power by judge and jury alike. The lawyers will argue that if a jury wrongly finds causation, the appellate process will correct the mistake. But appellate courts can only overturn a jury’s finding of fact if the jury’s conclusion is “clearly erroneous.” Appellate courts rarely find that a jury’s factual conclusions meet this very high standard.

If this happens, mold litigation will run up a billion-dollar tab in jury awards and settlements over the next few years, and may result in several corporate bankruptcies, but it will do so outside the generally acceptable standards for practicing the rule of law.

Mold litigation is not going away anytime soon. It will soon make its way to courtrooms across the country. State judges should be encouraged to learn more about the issue before they hear their first mold case. They should become aware of the personal injury bar’s tactic of attempting to try a sympathetic, though insufficient, case for personal injury in order to inflate non-economic damages awards for property damage and other non-personal injury claims. State judges should also be aware of the end goal of the personal injury bar to weaken the causation requirement in order to prevail on personal injury claims.

Each mold case is a part of the national effort by the personal injury bar to turn mold litigation into an asbestos-like gold mine. By filing cases across the country in search of judges willing to relax the rules of evidence and causation, the personal injury bar hopes to exploit a trend that has worked in other mass litigation reliant upon junk science. Judges in states that follow *Daubert* should be encouraged not to abandon their gatekeeping roles. States that still follow *Frye* or other evidentiary standards

should be encouraged to adopt the *Daubert* standard that has proven so effective in keeping junk science out of federal courts.

It was once considered preposterous that a healthy plaintiff could prevail on a personal injury claim. But the hard work and ingenuity of the personal injury bar turned tort law on its head with asbestos litigation and turned the preposterous into the norm. They are trying

to do it again by taking on the well-established rules of evidence and causation. State judges should be encouraged to consider the national implications of the mold cases in their courtrooms. Above all, state judges should be encouraged to follow the rule of law.

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