R-Speech.152 **Paper: Will Mold Be Gold?**

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WILL MOLD BE GOLD?©

By

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BIO FOR ROGGE DUNN

Rogge Dunn was born in Dallas, Texas, on January 22, 1957 and is a sixth generation Texan. He was admitted to the Bar of the State of Texas in 1984 and was subsequently admitted to the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit and all Federal District Courts in Texas. He has received an AV rating from Martindale Hubbel, which is the highest rating awarded to an attorney.

Education

Mr. Dunn was educated at Southern Methodist University in Dallas, where he received a B.A., cum laude, with Departmental Distinction in English 1980. He received a J.D., with honors, from the University of Texas in 1983. At the University of Texas Law School, he served as a Note Editor of the Texas Law Review, 1982-1983 and was a member of the Board of Advocates, 1981-1983.

Professional Experience

Mr. Dunn obtained substantial experience in insurance and subrogation matters with two of the largest subrogation law firms in the country. He was a Partner at Zelle & Larson. He also opened the Dallas office for Cozen and O'Connor and was a Senior Member.

Mr. Dunn has won more than $140 million in settlements and judgments for his clients, including individual jury verdicts worth more than $1 million each in Texas and Louisiana[1]. Two of his closing arguments were recorded for the 1999 edition of the *Million Dollar Arguments* series published by Professional Techniques Library in Cohasset, Massachusetts.

Mr. Dunn was the lead attorney for the subrogating carriers in the New Orleans Fairgrounds racetrack disaster. The $58 million verdict won by Mr. Dunn stands as the largest product liability verdict in Louisiana history.

Adjunct Professor

Southern Methodist University MBA Program 1986 - 1998

Recent Presentations and Speeches

Speaker, "Mold and Sick Buildings: Contractual and Tort Theories and Strategies," Advanced Personal Injury seminar, University of Houston Law Foundation (Dallas and Houston, 2001);

Speaker, "Class Actions: Strategic Considerations for Plaintiffs and Defendants," Advanced Personal Injury seminar, University of Houston Law Foundation (Dallas, 2001);

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[1] Past successes are no guarantee of future results.

Speaker, "Overcoming Objections at Trial," Evidence and Discovery Law seminar, University of Houston Law Foundation (Houston and Dallas, 2001 and 2000);

Speaker, "Subrogation Seminar: Issues, Strategies and Solutions," The Republic Underwriters (Dallas, 2000);

Guest, The McCuistion Show, "Privacy and the American Consumer," nationally syndicated PBS t.v. show (Dallas, 2000);

Guest, The Charlie Jones Show, "The Government's Use of Carnivore to Monitor the Internet and Citizens' Privacy Rights," KRLD Radio 1080 AM (Dallas, 2000);

Speaker, "Subrogation Strategies for the Millennium," Insurance Company of the West seminar (San Diego, 1999);

Speaker, "Subrogation: Pursuing and Defending Claims," University of Houston Law Foundation, Insurance Law for Agents, Adjusters and Attorneys who Represent Insurers (Dallas and Houston, 1999, 1998);

Guest, The Charlie Jones Show, "Background Checks when Hiring Employees," KRLD Radio, 1080 AM (Dallas, 1999);

Presenter, "Closing Argument for the Plaintiffs in the Fairgrounds Corp., Travelers Ins. Companies, Insurance Company of the West and Royal Insurance Co. v. ADT, et al. case," Million Dollar Arguments (Cohasset, 1999);

Speaker, "Electronic Communications: Internet, E-Mail etc.; Understanding Employers' Liability Exposure and Limiting it," Employment Law for Lawyers and Human Resource Professionals seminar, University of Houston Law Foundation (Houston and Dallas, 1999);

Speaker, "Protecting Carriers' Subrogation Rights: First Dollar Out Issues and Pro Rata Agreements," Traveler's Insurance Company seminar (Milwaukee, 1999);

Presenter, "Closing Argument for the Plaintiff in the Allison v. Taylor Publishing Co. case," Million Dollar Arguments (Cohasset, 1999);

Guest, The Charlie Jones Show, "Protecting Your Privacy Rights," KRLD Radio, 1080 AM (Dallas, 1999);

Speaker, "Cutting Edge Issues in Arbitration and Practical Tips," Dallas Bar Association Friday Clinic seminar (Dallas, 1998);

Speaker, "Workplace Privacy in the Electronic Age," Plano Bar Association meeting (Plano, 1998);

Speaker, "Subrogation: Potential Responsible Parties," Commercial Union Insurance seminar (Dallas, 1998);

Speaker, "Subrogation from A to Z," St. Paul Insurance seminar (New Orleans, 1997);

Speaker, "Subrogation Smorgasbord: Tips for the Professionals," Unified Investigation & Sciences, Inc. seminar (Dallas, 1997);

Speaker, "Workplace Privacy in the Electronic Age," University of Houston Law Foundation (Houston, 1997);

Speaker, "Subrogation from A to Z," Allstate Insurance seminar (Woodlands, 1996);

Panelist, "Staging Your Own Event--the Winning Adversary in Mediation," Bench/Bar Conference, Dallas Bar Association (Del Lago, 1996);

Speaker, "Expert Fire Investigation," North Texas Fire Investigators' Association meeting (Denton, 1993);

Panelist, "Mediation Demonstration," Dallas Association of Legal Assistants and Fort Worth Paralegal's Association seminar (Irving, 1993);

Speaker, "Persuasive Expert Testimony," International Association of Arson Investigators, The Legal Process: From the Ashes to the Courtroom seminar (Las Vegas, 1992);

Panelist, "Insurance Fire Claims Issues," International Association of Arson Investigators, Advanced Insurance Fire Claims Training conference (Dallas, 1991).

Publications

Trial Objections book, James Publishing (2001 3rd edition, 2000 revision);

"EPLI Policies Prevelant," Texas Lawyer (December 18, 2000);

"Pushing the Arbitration Envelope," Texas Lawyer (May, 1999);

"Electronic Communications and Computer Records: Employer Liability and Discovery Issues," University of Houston Law Foundation seminar (1998);

"Arbitration vs. Litigation: It's No Contest," Texas Lawyer (November, 1997);

"Fifth Circuit Holds OWBPA Does Not Apply to Arbitration Agreements," Personnel Law Update (May, 1996);

"Persuasive Expert Testimony," Journal of the Southwestern Association of Forensic Scientists (Spring, 1992);

"Persuasive Expert Testimony," Fire & Arson Investigator (1991).

Activities and Honors

Law clerk to Hon. Reynaldo G. Garza, U.S. Fifth Circuit Court of Appeals, 1983-84
Legal Honor Society: Phi Delta Phi
Life Member, Million Dollar Advocates Forum

Member, International Association of Arson Investigators "IAAI" 1990 - present
Chair or Co-Chair, Attorney Advisory Committee, IAAI 1994-2000

Pro-Bono Service Certificate Award, N. Tex. Legal Services, 1986
Pro-Bono Service Certificate Award, N. Tex. Legal Services, 1987
Distinguished Pro Bono Service Award, N. Tex. Legal Services, 1988
Member, Board of Directors, SMU Mustang Club 1996 - present

I. SCOPE OF ARTICLE

The following provides an overview and general analysis of the history and issues surrounding sick building litigation. While sick building syndrome is the common name for indoor air quality illnesses, sick building syndrome is more specifically defined. Therefore, to avoid confusion or perpetuating misnomers, this paper refers to this type of litigation as indoor air quality (IAQ) litigation.

While this paper examines many of the issues surrounding IAQ litigation, it does not and cannot address every conceivable issue or analyze every case concerning IAQ litigation. The law in this area is developing rapidly. This paper is not a substitute for legal consultation. Any specific questions should be analyzed on their particular facts with the assistance of legal counsel.

II. BACKGROUND

IAQ claims have consumed the media. It is rare that a day passes when a report of a mold condition effecting tenants of a building or a homeowner does not make the paper or television. Indeed, a story involving mold and an "evil" developer recently aired on Giddeon's Crossing, a popular network television series.

The recent boom in IAQ claims has raised scepticism and concerns. However, regardless of one's personal position on the viability of IAQ claims, more claims are forthcoming.

Although IAQ issues have existed for a significant period of time, insurance companies, attorneys, and those individuals effected by IAQ conditions have very little clear guidance as to the proper handling of claims. Furthermore, very little independent legislation exists addressing IAQ claims. Instead, traditional theories of liability are implemented in pursuing and defending IAQ claims.

A. HISTORICAL

Issues surrounding indoor air quality are not recent developments. Mold was recognized as problematic even in the Old Testament:

> 33 The LORD said to Moses and Aaron,
> 34 "When you come into the land of Canaan, which I give you for a possession, and I put a leprous disease in a house in the land of your possession,
> 35 then he who owns the house shall come and tell the priest, 'There seems to me to be some sort of disease in my house.'
> 36 Then the priest shall command that they empty the house before the priest goes to examine the disease, lest all that is in the house be declared unclean; and afterward the priest shall go in to see the house.
> 37 And he shall examine the disease; and if the disease is in the walls of the house with greenish or reddish spots, and if it appears to be deeper than the surface,
> 38 then the priest shall go out of the house to the door of the house, and shut up the house seven days.
> 39 And the priest shall come again on the seventh day, and look; and if the disease has spread in the walls of the house,
> 40 then the priest shall command that they take out the stones in which is the disease and throw them into an unclean place outside the city;
> 41 and he shall cause the inside of the house to be scraped round about, and the plaster that they scrape off they shall pour into an unclean place outside the city;
> 42 then they shall take other stones and put them in the place of those stones, and he shall take other plaster and plaster the house.
> 43 "If the disease breaks out again in the house, after he has taken out the stones and scraped the house and plastered it,
> 44 then the priest shall go and look; and if the disease has spread in the house, it is a malignant leprosy in the house; it is unclean.
> 45 And he shall break down the house, its stones and timber and all the plaster of the house; and he shall carry them forth out of the city to an unclean place.
> 46 Moreover he who enters the house while it is shut up shall be unclean until the evening;
> 47 and he who lies down in the house shall wash his clothes; and he who eats in the house shall wash his clothes.

Leviticus 14: 33-47. Indoor air quality and proper building ventilation was also addressed as early as the 1600s when England's King Charles I established building ventilation requirements. The edicts required 10 foot ceilings and windows longer that they were wide in homes.

B. SUSPECTED CAUSE OF RECENT IAQ PROBLEMS

The generally accepted root of the recent IAQ cases is the 1970s energy crisis. The Arab Oil Embargo of 1973 spurred legislators and the building industry to adopt building standards designed to increase energy efficiencies. One method which looms as a major culprit is making buildings "tighter". "Tighter" buildings reduced the introduction of outside air in an effort to lessen the amount of air requiring conditioning. Essentially, tighter buildings necessitated less energy to cool or warm the air, since it maintained almost the same air constantly. Groups supporting these changes included the ASHRAE (American Society of Heating, Refrigerating and Air-Conditioning) which quadrupled its recommended external air quantities in 1989 after 16 years of low-quantity recommendations.

Although improper ventilation may exacerbate an IAQ problem, numerous other considerations must be made. As discussed below, most IAQ problems are classified based on the suspected cause and symptoms resulting from the cause. Rarely is ventilation pinpointed as the reason for the IAQ claim. However, ventilation will play a role in any IAQ claim.

III. CLASSIFICATIONS OF "SICK" BUILDINGS

Thanks in part to significant media coverage, most individuals are aware of sick building claims. However, "sick building" is not an exact term. In an attempt to foster proper analysis of claims and conditions, the scientific community differentiates types of sicknesses. Unfortunately, the definitions are comprised of factors which perpetuate ambiguity.

Three categories exist to describe poor indoor air quality:

1. Sick Building Syndrome or SBS.
2. Building-Related Illness or BRI.

3. Environmental Tobacco Smoke or ETS.[2]

Unfortunately, the groundwork laid to differentiate a building's indoor air quality is wrought with problems. The categories are defined considering the cause--known or unknown--and the resulting severity of the effects or symptoms--persisting or temporary. Not surprisingly, classifying specific buildings is problematic because of the overlapping indicators. Most authorities view the definitions as a continuum, rather than separate, distinct categories.

Further, the definitions necessarily involve a human component. IAQ litigation focusing on only property damage or dimunition appear to be without a category. While this paper will analyze straight property damage and personal injury claims, SBS and BRI will be reserved for personal injury or hybrid claims (personal injury and property damage).

A. SICK BUILDING SYNDROME (SBS)

The physical symptoms associated with sick building syndrome include:

1. Eye, nose, and throat irritation;
2. Dry mucous membranes and skin;
3. Redness and inflamation of the skin;
4. Headaches and mental fatigue;
5. Coughing and respiratory infections;
6. Hoarseness;
7. Hypersensitivity reactions; and
8. Dizziness and upset stomach.

[2]ETS is of less concern to the IAQ litigator and will not be addressed in this paper.

The symptoms are usually considered less serious than BRI symptoms and often disappear when the individual leaves the contaminated building.

The causative factors in SBS are generally considered unknown. Unknown causes may include a number of possibilities, the mix of which will affect individuals differently. For example, since SBS necessarily includes a human component, one individual may be affected by a combination of low-level VOCs and one type of "mold". However, other types of mold and VOCs may exist in the building which, in a different combination, affects a different individual. Therefore, while both individuals may have some of the symptoms generally recognized, the individuals may suffer from different causative factors. An IAQ litigator may face the difficult position of establishing which unknown causative factors affect the individual.

B. BUILDING RELATED ILLNESS (BRI)

Unlike SBS, BRI is more specifically defined. BRI's human component includes the following symptoms:

1. Sensory irritation caused by *known agents*;
2. Respiratory allergies;
3. Nonsocomial infections;
4. Humidifier fever;
5. Hypersensitivity pneumonitis;
6. Legionaires' disease; and
7. Symptoms associated with exposure to chemical or biological substances.

The human symptoms are more defined. Further, the causes, contaminants, and their sources are known in the BRI case. The symptoms tend to be more serious and may continue although the

individual has left the affected building. For the IAQ litigator, a BRI case will likely be stronger since contaminants and the associated causes may be specifically identified.

C. THE MIDDLE GRAY

A major problem facing IAQ litigators is fashioning a claim or defense when the claimant falls in the "middle gray". As discussed above, the definitions for building illnesses produce a large gray area. A continuum depicting the definitions would look something like this:

Unknown Cause **Known Cause**

SBS

├──

──────────┤ BRI

Mild, allergy-like symptoms **Severe, persistent symptoms**

Where the claimant has more severe and persistent human symptoms, but is unable to definitely establish the cause of the ailments, it will be difficult to determine whether the claim is for SBS or BRI.

IV. CLASSIFICATIONS OF MOLD AND VOCS

As related above, it is difficult to determine whether an individual is suffering from SBS or BRI. However, in an attempt to provide more concrete categories for analysis and discussion, two sources of IAQ problems are identified in the literature:

1. Microbial contamination; and
2. Volatile organic compounds (VOCs).

A. MICROBIAL CONTAMINATION

Excessive moisture in buildings will provide opportune, moist breeding grounds for obligate pathogens. Obligate pathogens are microbes which require a living host to breed. Breeding grounds for obligate pathogens include any area where standing moisture will occur including:

1. Areas where leaks have formed;
2. High relative humidity within the building or HVAC system;
3. Drip pans;
4. Any pool of stagnant water; and
5. Areas of persistent condensation.

Areas of obligate pathogen breeding may result in microbial contamination. The excessive moisture may be "built-in" or result from improper cleaning and maintenance. Regardless, the focus is on excessive, continuing moisture.

Microbial contamination is generally referred to as mold or fungus. It is beyond the scope of this paper to analyze every scientific aspect of fungus and its relation to IAQ litigation. The more prevalent, problem-causing fungi include aspergillus, penicillium, stachybotrys, cladosporium, and fucarium. These fungi produced microtoxins which are toxic substances that can have severe and detrimental effects on humans. Microtoxins are airborne. Microtoxins are produced by the common indoor fungi listed above.

B. VOCs

1. Background

Volatile organic compounds result from the decomposition of organic materials. Specific types of materials which may decompose and release VOCs include office products, solvents,

perfumes, cleaning products, and, of particular importance, glues. Formaldehyde is often a detected VOC from glues used in installing carpeting and applying paneling. Obviously, VOCs are primarily found in modern construction that has utilized man-made materials. Further, VOC problems are most likely to develop soon after the construction has occurred. The settling-in process of any new construction will necessarily emit certain VOCs.

VOCs are often difficult to detect and do not leave tell-tale signs like molds. Thus, VOC cases are usually tougher to defend for defendants because they will not have any bases for arguing that the plaintiff nor the water nor the mold problem which exacerbated rather than mitigated the plaintiff's damages. On the other hand, cases involving injuries caused by VOCs can provide compelling arguments for the plaintiff since VOCs can be characterized as "the invisible killer." Jurors are often more concerned by "mysterious" things they cannot see, hear or touch.

Common VOCs include:

1. Acetone;
2. Carbon Disulfide;
3. Benzene;
4. Hexane;
5. Acetic Acid;
6. Ethenol;
7. Isopropanol; and
8. Ethyl Acetate.

V. POTENTIAL FOR PERSONAL INJURY CLAIMS

While the experts differ over whether or not individuals can suffer permanent injuries as a result of exposure to the toxins emitted from mold, most doctors recognize that there is a definite harm, including potential long-term affects, from exposure to VOCs. Thus, plaintiffs will have an easier time proving up past and future medical expenses in cases where they have been exposed to VOCs as opposed to permanent injuries caused by mold.

Part of the difficulty of proving permanent medical effects resulting from mold exposure is the fact that most people who are removed from the mold environment quickly become well. Further, any of the temporal symptoms caused by mold vary widely from one person to another. Finally, it is easy for defense lawyers to criticize a plaintiff who is suffering symptoms caused by mold because many of the symptoms are similar to the ones suffered by many people due to allergies, "hay fever" and the common cold.

VI. POTENTIAL LEGAL THEORIES OF LIABILITY

Litigators pursuing or defending IAQ claims are presented with a number of available legal theories. The availability of particular legal theories may vary by state. This paper does not provide an exhaustive analysis of each state's laws. However, the general theories, and applicable Texas case law and statutes, are provided.

Further, the applicable legal theories may vary depending upon whether the claim is strictly seeking property damage, personal injury damage, or a hybrid where a personal injury will need to be shown or alleged for purposes of establishing damages.

A. Breach of Contract

A breach of contract occurs when one of the parties fails to perform its obligations. *See Crutcher-Rolfs-Cummings, Inc. v. Ballard*, 540 S.W.2d 380 (Tex. Civ. App.--Corpus Christi 1976,

writ ref'd n.r.e.), *cert. denied*, 433 U.S. 910 (1977). In the construction context, the contractor's failure to meet the purpose of the contract is a breach. However, each individual step in the construction process is likely not considered--only the end result. However, if a portion of the work does not meet the doctrine of substantial performance, a breach may occur for that specific component of the work.

B. Breach of Express Warranty

Certain construction contracts will contain express warranties. A breach of an express warranty will be grounds for a cause of action under breach of contract theory. *See Drury v. Reeves*, 539 S.W.2d 390 (Tex. App.--Austin 1976, no writ).

C. Breach of Implied Warranty

Every contract for construction includes the implied warranties that the building was constructed in a good and workmanlike manner and is suitable for human habitation. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). Each of these warranties are separate and independent of each other, and may not be waived or disclaimed. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987). The requirements of using reasonable skill and diligence is encompassed by the good and workmanlike standard. *See Miller v. Spencer*, 732 S.W.2d 758 (Tex. App.--Dallas 1987, no writ).

Included in the implied warranty is the warranty of habitability. The warranty of habitability requires that a house be safe, sanitary, and otherwise fit for human habitation. *Id*.

Subsequent purchasers of homes are entitled to the same implied warranties. *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168-69 (Tex. 1983). However, the warranties are only from the builder

and not the seller. *Wiggins v. Overstreet*, 962 S.W.2d 198, 201 (Tex. App.--Houston [14th Dist.] 1998, pet. denied).

D. Negligence

Negligence provides the most likely cause of action for owners or tenants. Builders, architects, contractors, management companies, and owners all may have varying duties to an individual or entity effected by a sick building. However, although a breach of a duty may be proof, it will be important to establish that the breach was the cause of the Plaintiff's damages. As discussed above, in the personal injury context, SBS claims will likely prove more difficult than BRI claims to establish causation. Likewise, a hybrid claim may also be affected by difficult causation standards. However, a building which requires repair as the result of negligent construction or maintenance may prove easier to establish causation.

E. Express Negligence Doctrine

Importantly, contracts may provide for the waiver of a party's own negligence. However, any indemnity clause that releases a party from its own future negligence must be clear and conspicuous. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 507-508 (Tex. 1993).

In 1993 the Texas Supreme Court held that the express negligence rule is now applicable to standard disclaimers. The express negligence rule requires that a party seeking to avoid liability "from the consequences of its own negligence must express that intent in specific terms within the four corners of the contract." *Dresser Indus., Inc. v. Page Petroleum*, 853 S.W.2d 505, 508 (Tex. 1993); *see also Ethel Corp. v. Daniel Const. Co.*, 725 S.W. 2d 705, 707-08 (Tex. 1987) (express negligence rule applied to contractual indemnity disclaimers).

In *Ethel* the Texas Supreme Court overruled an intermediate Texas appellate court which had held that "it is unnecessary for the party to say 'in so many words' [that it is disclaiming] its own negligence." In Ethel an employee of a contractor sued the owner of a plant that hired the contractor. The contract contained the following clause:

> Any loss . . .as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of contractor.

Ethel Corp., 725 S.W. 2d at 708. The court held that the clause did *not* meet the express negligence rule because the clause did not use the "magic words" of disclaiming liability for one's "own negligence."

F. Breach of covenant of quiet enjoyment by constructive eviction

Tenants are entitled to delivery of a leased premises and its use for the full term of the lease. Failing to deliver possession to the tenant, or preventing the tenant from using the premises is a breach of the covenant of possession and quiet enjoyment. A tenant may be entitled to avoid the lease if the landlord's actions are egregious. For example, the inability to use the premises as a result of mold infestation may provide a grounds for the tenant to abandon a lease and seek damages for constructive eviction.

G. Covenant of suitability for intended purposes in commercial leases

The Texas Supreme Court recognized an implied warranty of suitability for intended purposes in commercial leases in 1988. *Davidow v. Inwood North Pro. Group*, 747 S.W.2d 373 (Tex. 1988). The warranty is limited to latent physical or structural defects the landlord has a duty to repair. The warranty does not apply to common areas. *Coleman v. Rotana, Inc.*, 778 S.W.2d 867, 871 (Tex. App.--Dallas 1989, writ denied).

VII. SPOLIATION OF EVIDENCE

The spoliation defense is typically overused. It was designed to prevent a party from intentionally destroying evidence to gain an advantage in a lawsuit. It is most appropriate in these situations such as the Texas case where a doctor intentionally destroyed patient records after the doctor was put on notice that a patient was going to pursue a claim for malpractice.

Some attorneys take the issue of spoliation beyond these basic principles and attempt to use the doctrine as a tactical weapon. They may claim spoliation when an expert did not retain all wiring in a case involving the failure of an electrical product even though 99% of the wiring in the house is totally irrelevant to the claim.

Of course, stretching the spoliation doctrine to this extent is nothing more than a tactical argument. An expert should be required to retain only the portions of equipment, wiring, etc. that could reasonably be expected to answer the questions of when, why and where a failure or fire occurred. One must not forget the fact that it is economically unfeasible to retain all pieces of equipment, wiring, etc.

They may claim that keeping only one panel of sheetrock containing mold and throwing away the rest of the sheetrock in a structure that had mold in it, during the remediation or reconstruction process spoliated evidence. What makes the spoliation of evidence issue problematic in the context of mold cases is that the various panels of sheetrock mentioned in the previous hypothetical may contain different kinds of mold in different stages of development, with spores in different reproductive stages that pose differing levels of risk to the building's occupants.

Further, to the extent that other equipment or materials at the loss site can be sold for salvage value, an insured and/or its carrier is subject to the rule that it must mitigate its damages. Overly broad enforcement or interpretation of the spoliation doctrine is uneconomical and bad public policy.

Nevertheless, one must always be cognizant of the fact that numerous Courts in most states have taken action against a party that spoliates evidence. The penalties for spoliating evidence can range from the judge issuing a jury instruction regarding presumptions as to what the evidence would indicate to recognizing a separate tort for the spoliation of evidence.

A. Cases Denying a Cause of Action for Spoliation

The Texas Supreme Court has held that there is no cause of action for spoliation of evidence. Further, the Dallas Court of Appeals noted that the Texas Supreme Court had never recognized the tort of spoliation of evidence and Dallas court declined to create same. Malone v. Foster, 1997 W.L. 196340 (Tex. App. -- Dallas, April 23, 1997) (unpublished opinion) Accord Phillips Petroleum Co., v. Burke, Cause No. 97-94-0040-CV (Tex. App. -- Amarillo, January 24, 1996) (unpublished opinion).

B. Cases Granting an Evidentiary Presumption Because of Spoliation

Some Texas cases concerning spoliation have created a presumption against the spoliator. Phennel v. Roach, 789 S.W.2d 612 (Tex. App. -- Dallas 1990); Fuller v. Preston State Bank, 667 S.W.2d 214 (Tex. App. -- Dallas 1984, writ ref'd n.r.e.); Newton v. General Manager of Scurlock's Supermarket, 546 S.W.2d 76 (Tex. Civ. App. -- Corpus Christi 1977); Kroger's Store, Inc. v. Hernandez, 549 S.W.2d 16 (Tex. Civ. App. -- Dallas 1977); Vic v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1974); Bird Provision Co. v. Owens Country Sausage, 379 F. Supp. 744, 751 (N.D. Tx. 1974).

C. Cases Prohibiting Testimony or Evidence Concerning Destroyed Evidence

In the following cases, the court prohibited testimony or excluded evidence regarding destroyed evidence. American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.Ed. 2d 1115 (Ill. App. Ct. 1992); Barker v. Bledsoe, 85 FRD 545 (W.D. Okla. 1979); Nally v. Volkswagen, 539 N.E. 2d 1017 (Mass. 1989).

D. Potential Criminal Sanctions for Spoliating Evidence

Many states have statutes penalizing a person for destroying evidence. E.g. Tex. Penal Code Ann. § 37.09 (West) (class A misdemeanor); La. Rud. Stat. Ann. § 14:130.1 (West) (penalty dependent on nature of proceeding); Ark. Code Ann. § 5-53-111 (Michie) (class D felony if actor impairs or obstructs prosecutor or defense of felony; otherwise, class B misdemeanor); Kan. Stat. Ann. § 21, 3816 (1988) (class A misdemeanor). Approximately another 20 states have similar laws.

While these statutes typically apply when an individual destroys evidence that would be useful in a criminal prosecution, the statutes can be applicable to someone involved in a civil subrogation investigation. For example, if a party destroys important evidence at a fire scene where authorities are conducting an arson investigation, potential criminal liability could result for destroying the evidence.

This liability can be avoided by coordinating efforts with the investigating governmental officials. In most cases, fire department and ATF officials will not allow access to the scene until they have completed their investigation and removed all evidence the officials deem necessary. In cases where fire government officials allow attorneys or their investigators to work "side by side with them," it is crucial to be sure that no evidence is disturbed without the express approval of the authorities.

E. Insurer Liability for Destruction of Evidence

F. Publications Discussing Spoliation

Recent articles concerning spoliation include: "Tort of Spoliation", Texas Bar Journal 656 (July 1997); "Watch Out for Civil Tort Liability for Spoliation of Evidence", Fire and Arson Investigator, 17 (June 1997); "Punishing Evidence Destruction", Trial Magazine, 66 (November 1992); Owens, "Should Iowa Adopt the Tort of Intentional Spoliation of Evidence in Civil Litigation," 41 Drake L.R. 179 (1992); Thompson, "Spoliation of Evidence: A Troubling New Tort," 37 Kansas L.R. 563 (1989); Lionberger, "Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?," 21 St. Mary's L.J. 209 (1989); Solum & Marzen, "Truth and Uncertainty: Legal Control for the Destruction of Evidence," 36 Emory L.J. 1085 (1987); Rouse, "Spoliation: Civil Liability for the Destruction of Evidence," 20 U. Rich. L.R. 191 (1985).

G. Practical Tips to Avoid Spoliating Evidence

The ever present tension between the need to preserve evidence at the loss site for use in possible litigation versus the desire to clean up the site quickly and promptly salvage materials at the loss scene requires prompt and thorough action by a party's attorney and the carrier's adjuster.

Potential problems with spoliation of the evidence can be solved by promptly informing anyone who may come into contact with the evidence not to disturb or destroy same. You should warn your contact at the insured of this in person and stress the importance of preserving all the evidence. If the authorities are still investigating and the state in which the loss occurred has criminal statutes governing destruction of evidence, you should mention the law. This warning should be followed up by written confirmation of same.

Do not trust your contact at the insured to inform all of the employees who may come into contact with the evidence. You should personally inform the insured's supervisors and its employees.

Many times a loss affects only part of the insured's building or operations. Often a business interruption or "down time" deductible, pursuant to which lost sales incurred in the first 72 hours of the facility being down are not insured or "covered" damages. Such policy provisions and the insured's general desire to "get back to business" or get tenants back into their leased space give the insured every incentive to clean up the loss site very quickly.

Further, property adjusters with limited experience may unwittingly spoliate evidence. This problem is exacerbated when the carrier uses "independents" to adjust the loss. These independents may have limited experience with these issues.

The adjusters have an incentive to assist the insured to restart operations as soon as possible to minimize the insured's claim for business interruption or alternative living expense damages under the applicable insurance policy. Further, the insurance carriers rightfully want to adjust a loss as quickly as possible to be as responsive to the insured (its customer).

When salvage opportunity exists typically, adjusters will be anxious to get salvagers to the loss site as quickly as possible to begin salvaging partially damaged equipment and inventory.

VIII. POTENTIAL LITIGANTS AND AVAILABLE THEORIES

A number of scenarios exist for an IAQ claim. For example, a building owner who is dissatisfied with the construction of the building because of mold infestation may seek damages from a number of individuals. Additionally, the same building owner may be impacted by loss of tenants or purchasers claiming personal ailments from the building. The third claim involves strictly personal injury claims of tenants or residents.

A. BUILDING OWNERS

In the construction context, original building owners will likely bring a breach of contract claim against the builders, architects, designers, subcontractors, and suppliers (collectively the "construction team"). However, unless the owner can establish it was a third-party beneficiary of an agreement, the owner is limited to those with whom he directly contracted to seek redress. For a complaining owner, this limitation may shrink the collective pocket from which to be satisfied. A building owner may also seek redress from a management or maintenance company

However, suing a management or maintenance company, at least early on in the litigation, may prove a double-edged sword. For example, if the building owner and the management company have been sued by tenants or residents of a building for personal injuries allegedly stemming from mold infestation, the building owner and management company may want to make a united front against the claims. An important consideration will be the contractual agreement between the owner and management company and where responsibility will lie for the mold infestation.

Furthermore, an owner's damages may be limited. For example, consequential damages are generally not available in contract actions. Exemplary damages are usually unavailable as well.

Measuring damages also presents an interesting proposition. An owner of real property is generally allowed to collect the cost of repair or the diminution in value the property sustained. Again, the issue of causation arises. If the owner is faced with a SBS case, and loses a major tenant or finds it difficult to rent the property, the measure of damages may appear quantifiable. However, if the tenant's departure from the building is based on a SBS claim, versus a BRI claim, the owner may be faced with a more difficult burden.

Additionally, an owner is entitled to recover damages for breach of a construction contract. An owner's damages are difficult to assess for a contractor's breach because the owner was looking forward to a completed building. The primary consideration when measuring damages is what amount of money will place the owner in the same position if the contractor had not breached the contract. *McAllen State Bank v. Linbeck Const. Corp*, 695 S.W.2d 10 (Tex. App.--Corpus Christi 1985, writ refused n.r.e.). Obviously, how the owner intended to use the property, whether specific monetary losses have occurred, and the extent to which the property could not be used are all considerations.

If the contractor substantially completes the building, an owner's damages may be measured by the amount it will cost to remedy the defects or the difference in value. *Turner, Collie & Braden v. Brookhollow, Inc.*, 642 S.W.2d 160 (Tex. 1982). If a question exists whether the contractor has substantially completed its requirements under the contract, the jury will decide. *Precision Homes, Inc. v. Cooper*, 671 S.W.2d 924 (Tex. App.--Houston [14th Dist.] 1984, writ refused n.r.e.).

A contractor, of course, may look to the architects and claim that any damages sustained by the owner as a result of its reliance on the plans and specifications provided.

B. OCCUPANTS

Occupants, including tenants, owners, and residents, are able to use the same theories of liability. Additionally, the occupants will potentially have numerous defendants including the building owner, the management company, material manufacturers, and building subcontractors. The most significant burden on the occupant is to establish that the damages he or she sustained as a result of an IAQ condition. These issues are discussed further below.

IX. DEFENSES

A. Statutes of limitation

The statute of limitations for breach of contract in Texas is four years. The four years runs from the date of the accrual of the cause of action. Contracts may provide for a shorter limitations period, but not less than two years. Tex. Civ. Prac. & Rem. Code § 16.070. A breach of contract cause of action accrues when the contract is actually breached. However, a latent or inherently undiscoverable breach may bring in the discovery rule which provides that a cause of action does not accrue until the breach should have been discovered through the exercise of reasonable diligence.

The two-year statute of limitations for tort causes of action generally accrues when facts are in existence that would allow an individual to seek a judicial remedy. The accrual of the cause of action does not necessarily depend on when the Plaintiff learns of the injury. The discovery rule may affect when the action accrues. Under the discovery rule, a statutory limitations period accrues when the injury is discovered or should have been discovered if reasonable diligence is exercised. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex. 1990).

B. Statute of Repose

Texas Civil Practice and Remedies Code section 16.009 provides that any action for wrongful death, personal injury, property damage, or indemnity and contribution for construction or repairs to a real property improvement must be brought within ten years after substantial completion. The statute of repose runs from the completion of the project, not from the accrual of a cause of action.

C. Texas Construction Liability Act

D. Spoliation of Evidence

X. CAUSATION, CAUSATION . . . CAUSATION?

Most experts will acknowledge from the outset that causation is the major hurdle in an IAQ claim. The arguments are typically that no link exists between the building's air quality and the damages of which the party complains.

To address this issue, litigators need to ensure that facts and circumstances causally connect the IAQ with the alleged damages. Direct evidence is usually difficult to produce, at least where personal injury is alleged.

Owner's who are able to establish by direct evidence that a damage-causing condition exists in the building (i.e. visible mold; standing, stagnant water conditions; limited outdoor air circulation) will need to establish the remedial costs. Again, however, the alleged condition must be the producing cause of the damage. Therefore, owner's should consider the following:

A. Retain an independent testing service to perform industry-recommended tests;

B. Retain an independent, ***certified*** laboratory to test samples. Most litigators will agree that the laboratory's credibility, certification, and experience in testing samples is of utmost importance;

C. Obtain statements from executives who made the decision to leave a building;

D. Retain highly qualified experts in engineering, HVAC systems, and architecture to analyze the appropriateness of the building team's design and construction; and

E. Coordinate well with local officials who provided permits, performed inspections, issued certificates to ensure all activities occurred properly.

Each of these steps will assist in linking the building team's decisions and work to the building's condition.

Tenant's should also take steps to assist in causally linking their damages with alleged building conditions. Specifically:

1. Remember that there is strength in numbers. If one individual complains of symptoms and associates those symptoms with a building condition, while others do not, it may be more difficult to establish causation. However, if 35 of the 50 individuals working in a building are suffering the same symptoms, the causal connection is strengthened.

2. Obtain a full medical history. Whether defending or pursuing an IAQ claim, the individual's medical history is incredibly important. The onset of symptoms, exacerbation of previously displayed symptoms, or no change at all in the individual's medical condition is telling evidence.

3. Be very careful in selecting treating physicians. An individual who suddenly changes physicians, physician shops, or selects a noted authority in IAQ claims will lose or gain credibility. If a physician other than the individual's primary care physician is chosen, determine whether the new physician received the patient's prior medical history before determining that IAQ symptoms are present.

4. Insist on independent sampling.

5. Insist on preserving evidence. Preserving evidence necessarily requires immediate action. For example, a potential defendant, after becoming aware of a condition, real or alleged, may need to take immediate steps to reduce or eliminate the condition. Before a tenant's attorney forwards the demand letter, ensure that experts are ready soon thereafter to inspect the property, obtain samples, and make recommendations. While spoliation of evidence claims may prove useful later in the litigation, a plaintiff is not wise to simply hope for a future ruling. Additionally, a TRO may prove necessary to preserve relevant evidence.

Experts are necessary to establish or defend various aspects of an IAQ case.

XI. STRATEGIES

A. SALE OF COMMERCIAL BUILDINGS

1. Issues in sale.

2. Contractor liability.

3. Owner liability.

B. SUBROGATION POSSIBILITIES

1. Property damage.

C. POTENTIAL TARGETS

1. Owner.
2. Contractors.
3. Building managers.
4. Maintenance companies.
5. Sub-contractors.
6. Remediation/cleanup companies.
7. Suppliers.

XII. THEMES AVAILABLE IN MOLD CASES

A. RISKS ARE EVERYWHERE

B. MOST RISKS ARE KNOWN

C. IF RISK IS KNOWN ITS PREVENTABLE

1. If Something is Predictable, its Preventable

XIII. RESOURCE SERVICE PROVIDERS

In an effort to assist IAQ litigators, the following provides some resources on these issues. By providing this information, the author's are not commenting on the qualifications, expertise, etc. of the resources.

Indoor Air Quality Branch
Toxic Substances Control Division
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756

(800) 572-5548

PE Service, Inc.
Environmental Division
(888) 219-0553

Pathogen Control Associates, Inc.
270 Scientific Drive, Suite 3
Norcross, Georgia 30092
(770) 446-0540

ATC Associates, Inc.
Environmental Geotechnical and Materials Professionals
1860 Crown Drive, Suite 1406
Farmers Branch, Texas 75234
(972) 556-2204

XIV. WEBSITES

Mychotech Biological
www.mycotechbiological.com
www.mmildew.com

American Industrial Hygiene Association
www.aiha.org

Environmental Protection Agency
www.epa.gov

www.claimsmag.com

Center for Disease Control
www.cdc.gov

Association of Specialists in Cleaning and Restoration
www.ascr.org

XV. ABATEMENT/TESTING COMPANIES

Enrvirotest, Inc.
3902 Braxton
Houston, Texas 77063

(713) 782-4101

XVI. LABORATORIES

Pathogen Control Associates, Inc.
270 Scientific Drive, Suite 3
Norcross, Georgia 30092
(770) 446-0540

Microbiology Specialists, Inc.
8911 Interchange Drive
Houston, Texas 77054
(713) 663-6888

Gemini Laboratories
3425 Twin River Boulevard
Corpus Christi, Texas 78410
(361) 265-9200

Steve Moody
Micro Services, Inc.
1510 Randolph Street, Suite 602
Carrollton, Texas 75006
(972) 446-9482

XVII. CONCLUSION

Indoor air quality litigation, and the issues surrounding indoor air quality, are clearly hot topics. The area is rapidly developing and the issues surrounding IAQ litigation are in the process of being focused by the courts and legislatures. Traditional common law causes of action coupled with competent expert analysis will provide relief for legitimately affected owners and tenants and defenses for questionable claims.

If you should have any questions regarding indoor air quality litigation or the contents of this paper and its presentation, please feel free to contact either R. Rogge Dunn or Gregory M. Clift. Rogge Dunn can be reached at:

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