

**ENVIRONMENTAL LITIGATION AND
TOXIC TORTS SEMINAR**

Building and Managing Your Case
and Trial Strategies

By

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INTRODUCTION

This paper will address common theories of liability asserted by the toxic tort plaintiff and the relationship of federal law, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601 et seq. (“CERCLA”) for delaying or tolling any applicable state statute of limitation. Second, this paper will address theories of liability at common law and the current state of the law under CERCLA. Finally, this paper will provide some guidance on identifying potentially responsible parties through the use of federal and state databases and internal investigations, and the use of experts in the presentation and defense of the toxic tort law.

I. COMMON THEORIES OF LIABILITY.

A. CERCLA Preemption.

Congress enacted CERCLA in 1980 to address releases of hazardous substances, primarily from hazardous waste disposal sites. The statute provides significant enforcement mechanisms both to the federal government and private parties including the ability to file suit against potentially responsible parties for all environmental response costs necessary to abate the environmental release. As discussed in detail in section II below, CERCLA has engendered significant litigation concerning the responsibility for apportionment of environmental response costs. The statute, however, deals exclusively with liability for the remediation or removal of property contamination. It does not deal with or otherwise address a substantive right for personal injury.

Despite CERCLA’s pervasive dominance over claims for response costs caused by releases of hazardous substances, there exists one unique aspect of CERCLA that applies to personal injury actions. Although CERCLA has no bearing on the merits of a claim under state law for personal injury, it provides for a tolling of any state statute of limitations for personal injuries caused by exposure to a hazardous substance regulated by CERCLA.

Section 309 of CERCLA (42 U.S.C. Section 9658) provides a federally-required commencement date for toxic tort actions based on state law for cases alleging personal

injury for damages resulting from exposure to hazardous substances, pollutants or contaminants. In material part, the statute states as follows:

Actions under state law for damages from exposure to hazardous substance.

(a) State statutes of limitations for hazardous substance cases.

(1) Exception to state statutes.

In the case of any action brought under state law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the state statute of limitations or under common law) provides a commencement date which is earlier than the federally-required commencement date, such period shall commence at the federally-required commencement date in lieu of the date specified in such state statute.

(4) Federally-required commencement date.

(A) In general, except as provided in subparagraph (B), the term “federally-required commencement date” means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the *hazardous substance or pollutant or contaminant concerned*.

42 U.S.C. Section 9658 (emphasis added).

In many states, the statute of limitations begins to run when the plaintiff is first aware of her injury, or of “wrongdoing” caused by the defendant, rather than the specific hazardous substance that arguably caused the injury. *See, Angeles Chem. Co., Inc. v. Spencer and Jones*, 51 Cal. Rptr. 2d 594, 599 (Cal. Ct. App. 1996) (discussing the

commencement date of California's statute of limitations). According to the House Conference Report, the purpose of the CERCLA Section 309 is as follows:

This section provides for a federal commencement date for state statutes of limitations which are applicable to harm which results from exposure to a hazardous substance. State statutes of limitations define the time in which an injured party may bring a lawsuit seeking compensation for his injuries against the party alleged to be responsible for those injuries. These statutes usually run from two to four years, depending on the state. In the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury—rather than from the time when the party 'discovers' that his injury was caused by the hazardous substance or pollutant or contaminant concerned.

Section 309 does not create any federal cause of action for personal injury or property damage. The section simply preempts state statute of limitations under certain circumstances and applies to all actions brought after December 11, 1980. For example, in *O'Connor v. Boeing North America, Inc.*, 311 F.3d 1139 (9th Cir. 2002), the Ninth Circuit held that Section 309 preempted the commencement date of the California statute of limitation (then one year) which generally required that the statute began to run when the plaintiff first became aware of any "wrongdoing" caused by the defendant, regardless of whether that wrongdoing was specifically responsible for the injuries sustained. The Ninth Circuit held, in accordance with Section 309, that the California one-year statute of limitations would not commence until the plaintiff became aware of the specific hazardous substance of concern.

(a) Available claims for relief.

Employing the federal commencement date of limitations as set forth in CERCLA, the plaintiff can avail herself of a variety of common law claims, including negligence, strict liability, trespass, unreasonably dangerous or ultrahazardous strict liability, toxic assault and battery, fraud, and nuisance.

(1) Negligence.

As in any case of personal injury, the elements of a negligence claim are similar with respect to a toxic tort. They involve duty, breach of duty, damage, and proximate causation. In the toxic tort case, the defendant's duty of care is measured by the conduct of a "reasonable person" similarly situated as the defendants. *See, Restatement (2d) of Torts*, Section 283 (1965); *Meyer, the Environmental Fate of Toxic Wastes, the Certainty of Harm, Toxic Torts and Toxic Regulation*, 19 *Env'tl Law Review* L231, 346 (1988). The reasonableness of the conduct of the defendant is typically a jury question, based on the facts of the case. Additionally, the duty of the defendant is measured as of the time of the asserted negligent action, and not as of the time of trial. Consequently, a plaintiff is prohibited from introducing rapidly evolving concepts of standard of care that did not exist at the time of the release of the hazardous substance. Classic tort law cases have traditionally demonstrated that the state of the art is set when the product reaches the operational setting. Although CERCLA does not grant a private cause of action for personal injuries, liability under common law negligence may be supported from a violation of CERCLA under the theory that the violation is a breach of the duty of care. *See, Nutrasweet, Co. v. X/L Eng' Corp.*, 933 F.Supp. 1409 (N.D.La. 1996). However, negligence claims regarding releases into groundwater contamination typically fail if the plaintiff does not offer testimony regarding the then-existing standard of care and the defense demonstrates that the defendant acted in accordance with industry practices.

(2) Toxic assault and battery.

Civil assault and/or battery are intentional acts. The defendant must have reasonably anticipated the event or knew to a substantial certainty that a release of chemicals occurred and that plaintiff was exposed as a result. Although harmful contact must be shown, the plaintiff need not prove immediate physical injury.

(3) Fraud.

Fraud is an appropriate claim in the toxic tort context where evidence demonstrates that the potential harmful conditions, i.e., the releases of hazardous

substances, were concealed from third parties, including authorities responsible for the environmental safety of residents. The elements of a common law fraud claim include:

1. Misrepresentation of fact by the defendant.
2. Knowledge or belief that the representation was false.
3. Inducing the plaintiff to act, or refrain from acting, by reliance upon the misrepresentation.
4. The plaintiff's justifiable reliance.
5. Damage or loss caused by the misrepresentation and the plaintiff's reliance.

In accordance with the Rules of Civil Procedure, fraud must be pleaded with particularity and the plaintiff must prove that she would have acted differently if the facts had been known instead of concealed.

(4) Infliction of emotional distress.

As a secondary claim in a toxic tort context, plaintiffs often allege emotional distress, together with fear of future injury, as part of their claims. This scenario often arises in the case of plaintiffs bringing suit against a defendant for the migration of hazardous substance to groundwater into the drinking water of the plaintiffs.

The tort of intentional infliction of emotional distress or "outrage," is intentional. It requires sufficient proof that the defendant knew of the toxicity of the release, did nothing to prevent it, but nonetheless acted in intentional or reckless disregard of the neighbor's safety. In contrast, the tort of negligent infliction of emotional distress may be actionable even where a third party merely witnesses the exposure and injury caused to another. *See, Madrid v. Lincoln County Med. Center*, 909 P.2d 14 (N.M. Ct. App. 1995).

In most cases of negligent infliction of emotional distress, the courts require evidence of physical symptoms, in addition to proof of emotional distress. Conceptually, this claim may provide a vehicle for the recovery of damages due to "cancerphobia," so long as the court is persuaded that physical symptoms presently exist and that "cancerphobia" is a reasonable concern after proof of exposure-related facts. *See, Barth v. Firestone Tire & Rubber Co.*, 673 F.Supp. 1466 (N.D. Cal. 1987).

(5) Untrahazardous strict liability.

The concept of strict liability, without the requirement to prove negligence, may be beneficial where plaintiffs can demonstrate that the defendant engaged in an abnormally dangerous occupation. According to the restatement, the factors to qualify as an ultrahazardous activity are as follows:

1. Is there a high degree of risk that the release of the chemicals would harm another person's land or cause personal injury or property damage?
2. Is it likely that the harm from the release would be great?
3. Is the defendant unable to eliminate this risk by exercising ordinary care?
4. Is the activity not a matter of common usage?
5. Is the activity inappropriate to the place where it is being carried on?
6. To what extent is the value of this particular activity outweighed by the dangerous consequences?

In essence, the balancing of these factors is essentially a negligence analysis and focuses heavily on demonstrating the standard of care.

(6) Private nuisance.

Private nuisance is the interference with the use and enjoyment of real property in which the plaintiff has a possessory interest. *See, Restatement (2d) of Torts*, Section 821(d) (1965). In the context of toxic tort and continuing releases, plaintiffs typically allege continuing interference. A continuing private nuisance has no statute of limitations and excessive multiple suits for damages may be brought to the ongoing tort.

In a claim for injury to real property, the measure of damages recoverable by the owner depends on whether the nuisance or damage is temporary or permanent. If the nuisance is permanent, the measure of damages is the diminution of fair market value of the property. However, if the nuisance is abatable, the measure of damages is the lost rental value or the cost of restoration, so long as it is less than the diminution. *See, Carter Farms v. Amoco Production Co.*, 103 N.M. 117, 703 P.2d 894 (1985).

II. SUPERFUND LIABILITY

A. An Overview of CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”)¹ in 1980, in an effort to control further damage to sites contaminated by hazardous substances. Ever since that time, the term “environmental liability” has taken on new meaning for American businesses. CERCLA is unusual - it imposes harsh concepts of liability on responsible and innocent parties alike, notwithstanding the fact that the environmental problems addressed by CERCLA have usually developed over long periods of time with involvement by numerous companies and individuals.

B. CERCLA Liability

CERCLA is a direct extension of common law principles of strict liability for abnormally hazardous activities.² CERCLA responds to the release, or substantial threat of a release, of any hazardous substance. Hazardous substances include: hazardous wastes under Subtitle C of RCRA; toxic water pollutants regulated by the Clean Water Act; and hazardous air pollutants listed in the Clean Air Act.³ However, the term does not include petroleum, including crude oil or any fraction thereof, unless specifically listed or designated as a hazardous substance.⁴

To establish liability, there must be a release, or threatened release, of a hazardous substance from a facility⁵ which caused a government or private plaintiff to incur costs. Four categories of persons are considered potentially responsible parties (“PRPs”) who can be held liable for pollution. These PRPs include:⁶

1. Current owners and operators of a contaminated facility;

¹ 42.U.S.C. §§ 9601 to 9675.

² It is also important to note that CERCLA does not preclude common law recovery actions.

³ 42 U.S.C. § 9601(14).

⁴ *Id.*

⁵ *See* 42 U.S.C. § 9601(9).

⁶ *See* 42 U.S.C. § 9607(a).

2. Anyone who owned or operated the facility at the time hazardous substances were disposed of;
3. Anyone who generated the hazardous substances or arranged for the treatment or disposal of a hazardous substance at a facility; and
4. Anyone who transported hazardous a substance to a disposal or treatment facility.

CERCLA imposes joint and several liability on these PRPs so each can be held liable for:

1. all costs of removal or remedial action incurred by the federal government, a state, or an Indian tribe not inconsistent with the National Contingency Plan (“NCP”);
2. any other necessary costs of response incurred by any other person consistent with the NCP;
3. damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
4. the costs of any health assessment or health effects study.⁷

The difference between numbers 1 and 2 should be noted. In an action initiated by the EPA, a state, or an Indian tribe, the defendant has the burden of proving that the costs incurred by the cleanup were “inconsistent” with the NCP.⁸ However, in a private party cost recovery action, the plaintiff must prove that the necessary costs of response were “consistent” with the NCP.⁹

CERCLA’s liability is somewhat harsh in that it does not attempt to tie degree of fault to degree of financial liability. Congress intended for those at least partially responsible for pollution to bear the costs of the uncertainty of allocating proportionate responsibility. However, if a defendant can demonstrate that the harm is actually

⁷ 42 U.S.C. § 9607(a)(4).

⁸ *See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986).

⁹ *See* City of New York v. Exxon Corp., 633 F.Supp. 609 (S.D.N.Y. 1986).

divisible, the court will allow apportionment of liability. The court may consider such equitable factors as:

1. the relative fault of the parties;
2. any contracts between the parties that bear on the allocation of cleanup costs;
3. economic benefits derived from the activities that created the hazards;
4. the benefits of remediation activities to property owners
5. which hazards caused specific response costs; and
6. “Gore factors” such as: the ability of the parties to demonstrate that their contribution can be distinguished; the amount of the hazardous substance involved; the degree of toxicity of the hazardous substance; the degree of involvement by the parties in generation, transportation, treatment, storage, or disposal; the degree of care exercised by the parties taking into account the characteristics of the hazardous substance; and the degree of cooperation by the parties with government officials.

C. The Innocent Purchaser Problem

A purchaser of contaminated property may be able to escape CERCLA liability if he can establish that, prior to purchasing the property, he made all appropriate inquiries about the existence of hazardous substances.¹⁰ To be eligible for this defense, the purchaser must demonstrate that:

1. on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and
2. the defendant took reasonable steps to stop any continuing release; to prevent any threatened future release; and to prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.¹¹

¹⁰ See 42 U.S.C. § 9601(35).

¹¹ See *id.*

D. Corporate Liability

In 1991, the United States District Court for the Western District of Michigan held that a corporate parent could be liable under CERCLA for contamination at a site owned and operated by a subsidiary.¹² Focusing on the remedial nature of the statute instead of on the traditional corporate doctrine of limited liability, the District Court held that if a corporate parent exercises “power” or influence over its subsidiary by actively participating and exercising control over the subsidiary’s business during a period of disposal of hazardous wastes, then the parent is directly liable under CERCLA.¹³ After a decision by the Sixth Circuit, the Supreme Court granted certiorari to clarify the issue of corporate parent liability under CERCLA.

In *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876 (1998), the Supreme Court reverted to traditional notions of corporate limited liability by holding that a parent corporation that actively participates in and exercises control over the operations of a subsidiary may not be held liable as an operator of a contaminated site owned and operated by the subsidiary, unless the corporate veil is pierced under state law. The Supreme Court expressly found that CERCLA does not authorize a departure from traditional principles of limited liability for a corporate parent: “It is a general principle of corporate law deeply ‘engrained in our economic and legal systems’ that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries. . . . Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature, . . . nothing in CERCLA purports to reject this bedrock principal, and against this venerable common law backdrop, the congressional silence is audible.”¹⁴

It is important to note that, in *Bestfoods*, the Supreme Court recognized that a parent corporation may be liable directly for its own acts where those acts satisfy the

¹² See *CPC International, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549 (W.D. Mich. 1991).

¹³ *Id.* at 573.

¹⁴ *Id.* at 1884-85.

elements of operator liability under CERCLA.¹⁵ However, the Court refused to sanction a broad interpretation of the statute which would place (i) direct CERCLA liability on a parent under circumstances where the parent is not an “operator” based on its own actions or (ii) vicarious liability under circumstances where the corporate veil could not be pierced by traditional veil-piercing standards.¹⁶ The Court refused to discard the notion that officers employed by both the parent and a subsidiary are presumed to serve the subsidiary when acting on behalf on the subsidiary. The Court explained “there would in essence a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability.”

E. Defenses

Although CERCLA liability is strict, a PRP still has some potential defenses available to him even if he cannot establish himself as an “innocent” purchaser. For instance, a PRP has some protection if he has already settled with the federal government,¹⁷ if he acquired the facility by inheritance or bequest,¹⁸ or if he purchased the land from the federal government.¹⁹

F. Contribution Actions

(1) The Right to Contribution

Although the early decisions addressing private party contribution rights held that such a right existed under federal common law,²⁰ the language of section 113 seemingly makes such a common law analysis unnecessary. Section 113 provides that covered parties are liable for costs “incurred by any other person.”²¹ The 1986 SARA

¹⁵ *Id.* at 1886.

¹⁶ *Id.* at 1885-87.

¹⁷ *See* 42 U.S.C. § 9622.

¹⁸ *See* 42 U.S.C. § 9601(35).

¹⁹ *See* 42 U.S.C. § 9620(h).

²⁰ *See* *United States v. Ward*, 1984 WL 15710 (E.D.N.C. 1984).

²¹ 42 U.S.C. Section 9607(a)(4)(A). *See* *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp 1135, 1141-43 (E.D. Pa. 1982).

amendments, however, resolved any confusion on this issue. 42 U.S.C. § 9613(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a).”

In the early years of CERCLA, some Courts held that a private party may recover costs from another only if the site was listed on the National Priority List.²² Other Courts expressed the more rational view that only some form of government approval is necessary before allowing a private party cost recovery action.²³ The better view, however, appears only to require private parties to prove that the costs incurred were “consistent with” the NCP.²⁴

(2) The Extent of Contribution

In apportioning liability among private parties for response costs, the Courts may consider a broad range of equitable factors under section 113(f). These factors are set forth in the legislative history of the amendment, and they include (i) the amount of the hazardous substances involved; (ii) the toxicity level of the hazardous substances; (iii) the degree of the parties’ involvement in disposing of the hazardous substances; (iv) the level of care exercised; and (v) the degree of the parties’ cooperation with federal, state, or local officials.²⁵

Because a present owner of a facility is a person who may be liable for response costs under section 107, the issue of contribution often arises where the present owner, who arguably had nothing to do with the disposal of the contaminants, brings suit under

²² See *Cadillac Fairview v. Dow Chemical Company*, 1984 WL 178617 (C.D. Cal. 1984).

²³ See *Bulk Distributing Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984); *Pinole Point Properties Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984).

²⁴ *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984); *Amoco Oil Co., v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989); *Cadillac Fairview/California v. Dow Chemical Co.*, 840 F.2d 691 (9th Cir. 1988); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988); *Roe v. Wert*, 706 F. Supp. 788 (W.D. Okla. 1989) (citizen suit requires 60-day pre-suit notice); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896 (9th Cir. 1986).

²⁵ See H. Rep. No. 153, 99 Cong., 1st Sess. 18-19 (1985).

CERCLA against the generators and transporters of the hazardous substances. In *Gopher Oil Co. v. Union Oil Company of California*, 757 F. Supp. 988 (D. Minn. 1990), the Court allocated all of the liability for past and future response costs to the previous site owner. In *Gopher*, the present owner neither caused nor contributed to the contamination of the property. In *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420 (D. Md. 1991), the Court reached a different result on markedly different facts. The owner in *Weyerhaeuser* not only knew of and acquiesced in the disposal activities, but also had required them as a condition of the lease with the operator. Consequently, the Court reasoned that the owner had received some benefit from the operations, and apportioned the liability 40% to the owner and 60% to the operator.²⁶

(3) Conditions Precedent to Private Action.

Before initiating a claim under CERCLA, the party seeking cost reimbursement must have incurred at least one cognizable response cost.²⁷

G. Cost Recovery vs. Contribution

During the early years of CERCLA, PRPs, such as a present landowner, often brought Section 107 actions against those who were culpable for the disposal of hazardous substances. These actions were based on the express language of Section 107, which clearly authorizes private parties to bring actions to recover response costs.²⁸ In a private cost recovery action, the land owner assumed the position of the government and sought to hold arrangers, transporters, and past operators jointly and severally liable for all response costs incurred.²⁹

Judicial reception to private cost recovery actions has changed dramatically in recent years. The question presented is whether a PRP may maintain a Section 107 “cost

²⁶ See, e.g., *United States v. A&F Materials Co.*, 578 F. Supp. at 1256; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d at 672-73; *United States v. Monsanto*, 858 F.2d at 168 n.13.

²⁷ See *Trimble v. Asarco*, 232 F.3d 946, 951 (8th Cir. 2000); *Cook v. Rockwell International Corp.*, 755 F. Supp. 1468 (D. Colo. 1991). See also *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 756 F. Supp. 713 (W.D.N.Y. 1991).

²⁸ See 42 U.S.C. Section 9607(a)(4)(B).

²⁹ See *Key Tronic Corp.*, 511 U.S. at 812 n 7.

recovery” action, or whether the PRP must proceed with a “contribution” action under Section 113. Although there is a split of authority in the lower Courts, “every Court of Appeals that has examined this issue has come to the same conclusion: a section 107 action brought for recovery of costs may be brought only by innocent parties that have undertaken clean-ups,” and a non-innocent PRP may only bring a section 113 action for contribution.”³⁰ The Tenth Circuit adopted this position in *United States v. Colorado Eastern R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995). The First, Third, Seventh, Ninth, and the Eleventh Circuits have reached the same conclusion.³¹ These Courts have found that the 1986 enactment of Section 113 indicates that Congress intended contribution to be an exclusive remedy for PRPs, that to allow PRPs to recover clean up costs under Section 107 would render Section 113 meaningless, and that the availability of Section 107 actions should be limited to governmental or “innocent PRP’s for public policy reasons.”³²

Despite the apparent trend to limit Section 107 actions by private parties, the claim has not been entirely extinguished. Section 107 historically has been used by the government to recoup the costs incurred in investigating and responding to hazardous substances. Some courts have noted that allowing “any other person” – including a PRP – to bring a 107 action is consistent with the plain language and expressed goals of CERCLA because it provides PRPs with an incentive to effectuate a prompt clean-up.³³ Thus, several district courts have held that PRPs that are “innocent” may maintain a direct 107 action.³⁴

³⁰ *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3rd Cir. 1997) (emphasis in original).

³¹ *See Bedford Affiliates v. Sills*, 156 F.3d 416 (2nd Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997); *United Technologies Corp., v. Browning-Ferris Industries, Inc.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied.*, 513 U.S. 1183 (1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994).

³² *See, e.g., United Technologies*, 33 F.3d at 100; *Colorado Eastern R.R. Co.*, 50 F.3d at 1536.

³³ *See, e.g., Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575 (D. Conn. 1994); *United States v. Kramer*, 757 F. Supp. 397, 416-17 (D.N.J. 1991).

³⁴ *See Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1239-42 (7th Cir. 1997);

“Innocent” in the context of CERCLA, appears to mean “parties who [are not] themselves liable” under CERCLA, *i.e.*, those who can establish “innocent landowner” defense under Section 101 (35) and Section 107 (b).³⁵ The Fifth Circuit, has taken a more expansive view, recognizing that “it is possible that, although falling outside of the statutory parameters” of innocence, “a PRP who spontaneously initiates a clean-up without government prodding” may maintain a direct claim under section 107 (b).³⁶

The distinction between a section 113 and section 107 is of paramount importance. In a section 107 action, the plaintiff must establish a *prima facie* case, which includes only satisfying the four elements of section 107 (a). Those elements are that: (1) the defendant falls in one of the four categories of “responsible parties;” (2) hazardous substances were disposed of at a “facility;” (3) there was a “release” of hazardous substances into the environment; and (4) the release caused “response costs to be incurred.”³⁷ The burden then shifts to the defendant of proving that the harm at the site is divisible, and there is a reasonable basis for portioning liability for response costs.³⁸ The practical consequence of placing this burden on defendants is that it becomes difficult to escape the joint and several liability.

In contrast, in a typical section 113 contribution action, the plaintiff must not only demonstrate that the defendant is a “covered person” under section 107, but also has the additional burden of proving each defendant’s allocable share of damages.³⁹ A PRP’s “defense” to a section 113 claim also differs from a defense to a section 107 claim. Under section 107, the defendant must prove a reasonable “apportionate of harm” to

Boyce v. Bumb, 944 F. Supp. 807, 812 (N.D. Cal. 1996).

³⁵ See, e.g., *United Technologies*, 33 F.3d at 100; *Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1513 (11th Cir. 1996) (“parties who are not themselves liable or potentially liable for response costs under Section 107 (a) of CERCLA can bring a cost recovery action directly under Section 107 (a) against potentially responsible parties”).

³⁶ See *United Technologies*, 33 F.3d at 99 note 8.

³⁷ See 42 U.S.C. § 9607.

³⁸ See, e.g., *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1552 (W.D. Mich 1989).

³⁹ See *United States v. Taylor*, 909 F. Supp. 355, 361 (M.D.N.C. 1995); *United States v. Atlas Minerals and Chemicals, Inc.*, 1995 WL 510304 at *188 (E.D. Pa. 1995).

establish a divisibility defense to the imposition of joint and several liability. In section 113, a defendant simply cannot be “allocated” more than its “equitable share” of several liabilities for the harm at a site.⁴⁰ Thus, even if a defendant cannot show a reasonable basis for apportioning the harm (which is a defense to a section 107 claim) a defendant in a section 113 contribution proceeding can rely on any number of “equitable factors” to allocate that defendant’s proportionate share of response costs.

H. Recent Ninth Circuit Decision Regarding CERCLA Apportionment of Liability

CERCLA does not state whether liability among liable PRPs can be severed and apportioned. In *United States v. Burlington Northern & Santa Fe Railway Co.*, 479 F.3d 1113 (9th Cir. 2007), the Ninth Circuit followed all other circuit courts that have addressed the issue and held that liability under CERCLA’s §9607(a) may be joint and several even though the statute does not so expressly provide. In addition to this holding, the case provides a detailed analysis of how courts – at least in the Ninth Circuit – must allocate liability based on record evidence.

In *Burlington Northern*, the contaminated site at issue was a 3.8 acre parcel owned by Brown & Bryant, Inc. (“B&B”) a now-defunct agricultural chemical storage and distribution company. In 1975, B&B’s business outgrew the parcel, located in Arvin, California, and B&B began leasing an adjacent 0.9-acre parcel that was owned by two railroad companies (the “Railroad parcel”). B&B used the Railroad parcel as an integral part of its facility: it purchased, received delivery of, stored, and distributed agricultural chemicals at the site; B&B stored rigs filled with chemicals on the Railroad parcel. The two chemicals at issue were sold and shipped to B&B by Shell Oil Company.

In 1983, after more than 20 years of leakage and dissemination of hazardous materials, state and federal authorities found B&B in violation of several hazardous waste laws and began to remedy the contamination pursuant to their clean up authority under CERCLA. In 1991 the EPA ordered the Railroads to take specific preventative steps on the Railroad parcel. In 1992, the Railroads filed an action against B&B for contribution

⁴⁰ See *United States v. Western Processing Co.*, 734 F. Supp. 930, 938 (W.D. Wash. 1990).

for costs incurred in the EPA-ordered cleanup. Four years later, the state and federal authorities filed CERCLA actions against B&B, the Railroads, and Shell for reimbursement of their investigation and cleanup costs.

The U.S. District Court for the Eastern District of California consolidated the cases. *See United States v. Atchison, Topeka & Santa Fe Ry.*, 2003 U.S. Dist. LEXIS 23130 (E.D. Cal., July 14, 2003). The trial court held that the Railroads were liable as owners of the facility under §9607(a)(1),(2). The court found Shell liable as an “arranger” under §9607(a)(3). And as to the question of apportionment of liability among the Railroads and Shell, the court found that the harm to the site was capable of apportionment and went on to apportion the costs among the liable PRPs.

The Ninth Circuit affirmed the district court’s decision that the Railroads and Shell were liable, but reversed with respect to the court’s apportionment analysis. Although the court followed every circuit court that has faced the issue and held that apportionment is available under CERCLA, the court found that the harm in this particular case could not be apportioned among the liable parties and therefore held that the Railroads and Shell were jointly and severally liable for the entire harm at the site. The court based its holding that the harm was not divisible (and therefore able to be apportioned) on a very detailed analysis as to whether the harm at the site (the contamination) could be traced to, and quantified, as to each of the PRPs based on their status as such. For example, the Railroads were PRP-owners and held liable for the contamination under CERCLA. But the trial court’s apportionment of liability with respect to the Railroads was based on their ownership of land area in proportion to the entire site, their period of ownership, and the types of hazardous products that were stored on the Railroad parcel. The Ninth Circuit found that none of these categories, in light of the evidence in the record, could support a conclusion that discrete portions of the contamination were traceable to the Railroad parcel.

In situations where multiple PRPs are found liable under CERCLA the Burlington Northern case provides a useful framework to analyze apportionability issues.

I. Recovery Under §107(a) vs. §113(f) – *United States v. Atlantic Research Corp.*

A recent decision by the U.S. Supreme Court clarifies whether and how potentially responsible parties (“PRPs”) may recoup CERCLA-related costs from other PRPs. In the Court’s unanimous ruling in *United States v. Atlantic Research Corp.*, 551 U.S. ___ (June 11, 2007), the Court held that Section 107(a) allows PRPs to recover costs of voluntary Superfund Cleanups from other PRPs.

The case involved a company that contracted with the U.S. government to retrofit rocket motors. Atlantic Research Corp. leased property at the Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense. Atlantic voluntarily cleaned up pollution from rocket propellant that seeped into the soil and groundwater as a result of the company’s operations. Thereafter, Atlantic sought to recover some of its costs by suing the United States under §107(a).⁴¹ The United States moved to dismiss, arguing that §107(a) did not allow PRPs such as Atlantic to recover costs. The trial court granted the motion to dismiss, but the decision was reversed by the Eighth Circuit. The appellate court held that §113(f) did not provide the “exclusive route by which [PRPs] may recover clean up costs” and that §107(a)(4)(B) authorized suit by any person other than persons permitted to sue under §107(a)(4)(A). Accordingly, the Eighth Circuit held that §107(a)(4)(B) provided Atlantic with a cause of action against the United States.

The dispute the Supreme Court resolved focused on the perceived conflict between §§107(a)(4)(B) and §113(f)(1) among various circuit courts. Specifically, the dispute centered on what “other person[s]” may sue under §107(a)(4)(B). The government argued that “any other person” refers to any person not identified as a PRP in §§107(a)(1)-(4) (listing four broad categories of persons as PRPs and by definition liable to other persons for various costs). Atlantic argued that §107(a)(4)(B) provides a cause

⁴¹ Atlantic had initially filed suit under §§107(a) and 113(f). But after the Supreme Court’s decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) foreclosed relief for PRPs under §113(f), Atlantic amended its complaint seeking relief solely under §107(a) and federal common law. In *Cooper Industries* the Court held that a private party could seek contribution from other liable parties only after having been sued under §106 or §107(a). *See id.* at 161.

of action to anyone except the United States, a State, or an Indian tribe – the persons listed in §107(a)(4)(A).

The Court sided with Atlantic and allowed Atlantic's suit to proceed against the government to recover clean up costs under §107(a)(4)(B). The Court stated that "the statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs." And with respect to the government's argument that allowing Atlantic's suit to go forward under §107(a)(4)(B) would create friction between §107(a) and §113(f), the Court explained that the two sections provide for two "clearly distinct" remedies. In particular, §107(a) allows for the recovery of costs under certain circumstances and §113(f) allows for separate rights to contribution under other circumstances. In other words, while recovery under §113(f) is contingent upon the establishment of common liability among PRPs (either before or after suit, but in all circumstances once a PRP has paid more than his own proportionate share), §107(a) provides the right to recover clean up costs independent of whether another PRP has been found liable.

J. Brownfields Revitalization Act of 2002 and New Mexico Voluntary Remediation Act

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act⁴² to bring new clarity to brownfields regulation and provide government funding to assist in restoration efforts. Most significantly, the 2002 law authorizes up to \$250 million in funds annually for Brownfields' grants. The grants are administered through the EPA to encourage businesses and localities to redevelop brownfields. Generally, grants of up to \$200,000 each are awarded to assess brownfields and identify creative and cost-effective means to clean-up contaminated property and restore them to productive use. In 2003, \$73.1 million in grants were awarded. In 2004, the EPA announced a record \$75.4 million grants to be distributed to 219 applicants, including 42 states, Puerto Rico, and 5 tribes.

⁴² The full text of the Act is available from the EPA's website at www.epa.gov/brownfields

The Brownfields Revitalization Act also established the Brownfields Cleanup Revolving Loan Fund (BCRLF).⁴³ The fund allows communities to provide funds to public and private entities for Brownfields clean up. Groups can apply for funds of up to \$1 million, provided that sixty percent of the award must be used to capitalize a revolving loan of funds used in clean-up efforts. The EPA administers this fund, and has already awarded well over \$100 million in grants. The loans contain escalation clauses that provide for the loan of additional cleanup funds if additional contamination is found during cleanup.

Similar to the purposes set forth in the Brownfields Law, the New Mexico Environment Department, pursuant to the New Mexico Voluntary Remediation Act⁴⁴ (“Remediation Act”), established a Voluntary Remediation Program to promote voluntary cleanup of contaminated sites. “The program is designed to facilitate redevelopment of contaminated sites by providing a streamlined, non-punitive remediation process.”⁴⁵

Any current or prospective landowner or operator can apply to participate in the program. Parties that successfully complete the program obtain a Certificate of Completion or a Conditional Certificate of Completion stating the contamination has been successfully mitigated. Parties can also receive a Covenant Not to Sue shielding the purchaser from liability. Finally, lenders are also protected from liability arising from any sites participating in the program.⁴⁶

Cleanups conducted under the Brownfields Law or under the New Mexico Environment Department’s Remediation Program limit the authority of the EPA at

⁴³ Information on borrower eligibility and loan fund conditions can be found at www.epa.gov/brownfields/rlflst.htm

⁴⁴ 1978 N.M. STAT. ANN. 74-4G-1.

⁴⁵ New Mexico Environment Department, *Guidance for Prospective Applicants to the Voluntary Remediation Program 1* (2004-05), http://www.nmenv.state.nm.us/gwb/New%20Pages/ROS_files/VRP_New/Statutes-Rules-Guidance/VRP_Prospect-App-Guide.pdf.

⁴⁶ *Id.*

eligible response sites.⁴⁷ The Brownfields Law prohibits the EPA from bringing an action against a person conducting, or having completed, a response action.⁴⁸ This prohibition, however, extends on to actions as to the same releases addressed by the response action. Thus, the EPA may bring a separate action as to a different release. Furthermore, the prohibition applies only to the party that conducted, or is conducting, the cleanup.⁴⁹

K. New “All Appropriate Inquiry” Requirements

The new “All Appropriate Inquiry” rule implements the Brownfields Law. The Brownfields Law intended to clarify and add possible defenses to CERCLA’s strict liability. CERCLA and the EPA had previously not defined the minimum requirements for an “all appropriate inquiry.” Therefore, people relied on the practices of the American Society for Testing and Materials (“ASTM”) as the standard for an “all appropriate inquiry.” The new “All Appropriate Inquiry” makes significant changes to the long used ASTM E1527-00 standard, mainly by enhancing the scope of the due diligence activities. These new changes will increase the cost and time associated with performing an Environmental Site Assessment (“ESA”).⁵⁰ Parties can try to minimize these expenses and additional time commitments by incorporating language into purchase agreements that would permit a purchaser, or the purchaser’s environmental professional,

⁴⁷ Brownfields Law §231(b), Pub. L. No. 107-118, 115 stat. 2356, 2375-79 (codified at 42 U.S.C. § 9628) (2002). In order to effectively limit EPA authority, state programs must specifically govern response actions for the protection of public health and the environment. States must also maintain a public record of sites involved in remediation.

⁴⁸ Brownfields Law §128(b)(1).

⁴⁹ As the Committee Report commentary notes, there are four exemptions to this rule which include instances where the state requests assistance in a response action, when jurisdiction and cross-jurisdiction issues may arise, when an Administrator learns that information was not previously know by that state and further remediation is necessary to protect the environment or public health. *See* Report 107-2 to accompany S.350, Brownfields Revitalization and Environmental Restoration Act of 2001, 107th Cong. 1st Sess., Committee on Environment and Public Works, at 15-18 (Mar. 12, 2001).

⁵⁰ The EPA estimated that the cost increase will be between \$41 to \$48. This number, however, appears unrealistically low and does not account for environmental professionals’ increase in time that will be invested into conducted a more comprehensive AAI, among other factors. *See* “Preamble” to AAI.

access to the property and property records while the property is still within the seller's control.

(1) Objective of the "All Appropriate Inquiry" Site Assessment

The EPA's new "Standards for Conducting All Appropriate Inquiry"⁵¹ rule ("Rule" or "AAI"), which takes effect on November 1, 2006, establishes a regulatory standard for performing environmental due diligence in real property transactions. The new Rule supersedes the commonly used ASTM E1527-00 standard; when the rule takes effect, parties will have to comply with the AAI requirements or follow the new ASTM E1527-05 standards.⁵² The AAI serves as a crucial component to three liability defenses available under CERCLA: innocent landowner defense,⁵³ *bona fide* purchaser ("BFP") defense,⁵⁴ and contiguous property owner defense.⁵⁵ Parties receiving grants under the Brownfields Grant programs must also perform an AAI.⁵⁶

⁵¹ 40 C.F.R. § 312.

⁵² *Id.* § 312.11(a). The now superseded E1527-00 standard can still be purchased through ASTM International by visiting their website at www.astm.org. The active standard, E1527-05, can also be purchased through ASTM's website.

⁵³ The innocent landowner defense applies to persons who purchase property and are unaware of, or have no reason to know of, contamination existing on the property at the time of purchase. The landowner may use this defense if: 1) the owner conducted an AAI before acquiring title, 2) no contractual relationship exists between the owner and the party responsible for the contamination, and 3) the owner exercised due care with respect to hazardous substances. 42 U.S.C. § 103(35) and § 107(b)(3).

⁵⁴ The BFP defense applies to purchasers with prior knowledge of contamination. The purchaser may assert this defense if: 1) the purchaser conducted an Inquiry prior to acquiring title, 2) disposal of all hazardous substances occurred prior to acquiring title, 3) the purchaser used "appropriate care" to prevent continued or future releases, 4) the purchaser limits or prevents exposure to the contamination. 42 U.S.C. § 101(40) and § 107(r).

⁵⁵ A purchaser of contiguous property must not know of, or have reason to know of, contamination existing on the property at the time of purchase. A landowner may assert this defense if: 1) the purchaser conducted an AAI prior to acquisition, 2) the contamination resulted from hazardous substances migrating from adjacent parcels, and 3) the purchaser took "reasonable steps" and used "proper care" to prevent future releases. 42 U.S.C. § 107(q).

⁵⁶ United States Environmental Protection Agency, *Comparison of the Final All Appropriate Inquiries Standard and the ASTM E1527-00 Environmental Site Assessment Standard* (Oct. 2005), at <http://www.epa.gov/brownfields/>.

(2) Standards and Practices of the “All Appropriate Inquiry” Site Assessment

An AAI requires an environmental professional to conduct an investigation of a property which includes: interviewing past and present owners, operators, and occupants; interviewing neighbors if the property is abandoned; reviewing historical sources of information; reviewing federal, state, tribal, and local government records; visually inspecting the facility and adjoining properties; reviewing commonly known or reasonably ascertainable information; and evaluating the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination.⁵⁷ Although not necessarily performed by an environmental professional, an AAI must also include: searches for environmental cleanup liens; an assessment of the relationship of the purchase price to the fair market value of the property if the property was not contaminated; and an assessment of any specialized knowledge or experience of the prospective owner.⁵⁸

The results of an AAI must be documented in a written report that includes: 1) “an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substance...on, at, in, or to the subject property; 2) an identification of data gaps...that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances...on, at, in, or to the subject property and comments regarding the significance of such data gaps on the...professionals’ ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases; 3) the qualifications of the environmental professional;”⁵⁹ and 4) two signed declarations.⁶⁰

⁵⁷ 40 C.F.R. § 312.20.

⁵⁸ *Id.*

⁵⁹ *Id.* § 312.21(c).

⁶⁰ *Id.* § 312.21(d). The professional must include the following two statements: 1) “[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part” and 2) “[I, We] have the specific qualifications based on

All AAIs must be conducted within one year of acquisition of a property. Certain components, however, must be updated within 180 days of acquisition.⁶¹ Peter Domenici and Bill Mansker will provide an in-depth analysis of the components of an AAI.

(3) How Much Research is Enough?

As mentioned, the AAI requires more research than ASTM E1527-00. In the event that a property is abandoned, for example, the AAI rule, unlike ASTM E1527-00, requires the environmental professional to interview neighbors or nearby property owners.⁶²

Furthermore, all “[h]istorical documents and records must be reviewed for the purposes of achieving the objectives and performance factors.”⁶³ These documents, under the AAI, must “cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.”⁶⁴ This new requirement proves far more extensive than the ASTM E1527-00 standard of researching only obvious uses beginning when the property was first developed.

(4) “Di Minimis” Contamination

The Brownfields Law added a new liability exemption to CERCLA. The new exemption provides otherwise liable generators or transporters a qualified exemption from liability where the parties can demonstrate that, prior to April 1, 2002, the amount of hazardous substances they contributed to a CERCLA site listed on the National Priorities List [“NPL”] was less than 200 pounds of solid materials or less than 110

education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquires in conformance with the standards and practices set forth in 40 CFR Part 312.”

⁶¹ *Id.* § 312.20.

⁶² *Compare* 40 C.F.R. 312.23(d) *with* ASTM E1527-00.

⁶³ 40 C.F.R. § 312.24(a).

⁶⁴ *Id.* § 312.24(b).

gallons of liquid material.⁶⁵ This exemption “is similar, but not identical, to the protection previously afforded by the” EPA and U.S. Department of Justice (“DOJ”) “regarding settlements with de minimis parties at Superfund sites.”⁶⁶ This exemption, however, does not apply in certain cases.⁶⁷

A party may still enter *di minimis* waste contributor settlements under the EPA/DOJ policy. A party entering such settlements provides cleanup funds based on its share of the total waste contribution.⁶⁸ This share often includes a premium.⁶⁹ In exchange, a party may receive “a covenant not to sue and contribution protection from the United States.”⁷⁰

III. INDOOR AIR QUALITY AND MOLD LITIGATION

A. INTRODUCTION

Americans spend a lot of time indoors. That fact, when coupled with the growing evidence that indoor environments may be contaminated with potentially toxic mold, has fostered a growth in mold-related insurance claims and litigation. Although the number

⁶⁵ See CERCLA § 107(o).

⁶⁶ Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement at EPA, and Bruce Gelber, Chief of Environmental Enforcement Section at DOJ, to EPA directors and regional counsel 2 (Nov. 6, 2002) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf>. The codified exemption differs from the EPA/DOJ’s policy in two significant ways. First, the exemption applies only to NPL sites, while the EPA/DOJ policy applied to both NPL and non-NPL sites. Second, the exemption does not apply to disposal or transport occurring after April 1, 2001, while the EPA/DOJ policy did not have a date limitation. *Id.* at 4.

⁶⁷ The exemption does not apply when “the President determines that: 1) the person sent material that contributed or could contribute significantly...to the cost of the response action...; 2) the person has failed to comply with an information request or agency subpoena; 3) the person has impeded, through action or inaction, a response action...; or 4) the person has been convicted of a criminal violation for conduct related to the exemption.” *Id.* at 3.

⁶⁸ United States Environmental Protection Agency, *Superfund Enforcement FAQs* (Mar. 2006), <http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/enf-faqs.html> [hereinafter “Superfund FAQs”]. In lieu of, or in addition to, providing funds, parties may undertake some of the cleanup work. *Id.*

⁶⁹ See, e.g., *United States v. Cannons Eng’g Corp.*, 899 F.2d 79 (1st Cir. 1990)(upholding premium).

⁷⁰ *Id.*

of mold-related cases still very limited, the early examples serve as useful tools to anticipate future legal developments and strategies in this emerging area of litigation. This section will begin by exploring some of the unique issues associated with claims for mold-related damages and then address legislative efforts related to mold prevention and remediation. The section will close by providing some guidance on developing effective legal strategies for mold litigation.

B. EXISTING CASE LAW: AN OVERVIEW

The number of mold-related cases is still small,⁷¹ but it is growing. Some in the insurance industry fear the potential for skyrocketing losses due to increased litigation expenses and payments for mold-related damage. The industry's fear is predicated upon its belief that mold claims are strikingly similar to the extraordinarily expensive superfund cleanup claims and litigation.⁷² Some industry experts see parallels between the two types of claims because each of them usually allege bodily injuries and property damage; multiple plaintiffs can allege injuries which may result in class action lawsuits; multiple defendants may be named; and the primary defendants are likely to then file suit against other potentially responsible parties to seek contributions for damages.⁷³

Additionally, the insurance industry fears what it calls "serial litigation" in which a series of lawsuits, premised upon substantially identical claims, is brought against the same defendant or defendants in different courts by different plaintiffs. The lawsuits are related in that a group of lawyers representing these claimants organizes itself and shares

⁷¹ A search in Westlaw's "ALLCASES" database identified only 55 cases even mentioning the issue of toxic mold, and a substantial number of these addressed only procedural issues without discussing the substance of the mold claim.

⁷² "Superfund" cases address the problem of remediating properties contaminated by hazardous wastes. These cases are based upon the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). See 42 U.S.C. §§ 9601 to 9675.

⁷³ See "*Toxic Mold Litigation*" by Charlie Kingdollar, in FacWorld, published by GeneralCologneRe, and available at <https://extranet.gcr.com/FACWORLD.nsf/Doc/Toxmold2>

information, witnesses, and documents against the target defendants. Then, once someone receives a “breakthrough verdict,” any remaining claimants attempt to rely upon that precedent to achieve similar success.⁷⁴ In sum, the insurance industry is very worried. To get a sense of the basis for its concern, it is helpful to survey some of the claims, verdicts, and settlements resulting from recent litigation.

(1) Civil Claims - A Survey of Recent Litigation

As previously mentioned, mold-related litigation is still in its infancy. However, it is already clear that civil suits for damages caused by mold contamination can result in large settlement and verdicts.⁷⁵ To gain some perspective, it is useful to survey some notable settlements and verdicts in mold cases so that one may get a sense of the allegations and the range and type of damages that might be expected. Because most mold-related claims for damages will involve some type of insurance coverage, the insurance industry is in a unique position to monitor and collect data on the filing and outcomes for these claims. As such, the following information is substantially derived from various insurance industry publications.⁷⁶

An overview of some recent mold-related verdicts and settlements include:

- * \$275,000 against an Alabama building contractor; \$545,000 against a California condominium builder; \$600,000 against a California municipality; \$6.1 million against a California construction contractor; \$300,000 against a California homeowners’ association; \$140,000 against a Colorado homeowners’ association; \$818,000 against a Delaware landlord; \$6.5 million against an Illinois storage firm; \$6.7 million against North Carolina motel contractors; \$1.5 million against a Texas

⁷⁴ See “*Mold Serial Litigation Continues*,” available at www.moldupdate.com/articles

⁷⁵ The focus of this paper is litigation, but the insurance issues associated with mold-related claims for losses are discussed more fully in the authors’ paper, “Insurance Coverage Issues in Toxic Mold Litigation.”

⁷⁶ For a more comprehensive list of known cases, visit the websites cited throughout this paper and others maintained by GeneralCologneRe, the National Association of Mutual Insurance Companies, and the Independent Insurance Agents of America.

homeowner insurer; and \$40,000 against a California auto dealer, for *mold in a car*.

- * In New York, 500 plaintiffs from a New York City apartment complex filed a class action suit against their landlord, alleging injuries caused by toxic mold. Plaintiffs are seeking \$8 billion in damages.⁷⁷
- * A County sued the construction manager for dampness that promoted mold growth in the county courthouse. The construction company used a synthetic stucco called “exterior insulation and finishing systems” or “EIFS.” The county received a \$14 million verdict against the construction manager.⁷⁸
- * One hundred workers in the Visalia County, California courthouse alleged injuries resulting from mold exposure and sued the county for failing to properly maintain the building, and various contractors for negligently developing, designing, planning, and building the courthouse.⁷⁹
- * One of the most costly instances of mold contamination is found in Florida. In 1987, Polk County Florida built a new courthouse for \$37 million. By 1992, mold contamination prevented the building from being inhabited. Court employees sued the county and by 1997, the County had paid over \$50.4 million in damages and costs: \$33.7 million in building repairs, \$10 million in defense expenses, \$4.1 million in relocation costs, and \$2.6 million for workers’ health claims. Third party plaintiffs received approximately \$8.9 million in out of court settlements from the general contractor, several subcontractors, and the design engineer.⁸⁰

⁷⁷ The landlord’s insurer, Zurich American Insurance Group has reportedly denied coverage for the alleged injuries and the plaintiffs have responded by adding a bad faith claim against the insurer, seeking \$10 million in compensatory and \$50 million in punitive damages.

⁷⁸ Centex-Rooney Construction Co. v. Martin County, Florida, 706 S.2d 20 (Fla.App. 1998).

⁷⁹ The case is identified as Sadler v. County of Tulare.

⁸⁰ See “*Toxic Mold*” in the October 2000 issue of Hazardous Times, published by GeneralCologne.

(2) The *Ballard* Case: An Insurer's Nightmare

Texas has seen the greatest number of mold-related civil litigation. The most recent case, *Allison v. Fire Insurance Exchange*,⁸¹ (a.k.a. the “Ballard case”) provides an illustrative example of how an appellate court may review the trial court’s approach to the mold-specific issues associated with causation, remediation, and the calculation of damages. In the Ballard case, the insured homeowners’ property experienced a series of plumbing leaks which caused damage to the bathroom carpet pad and wood sub-flooring. After a series of attempted repairs, plaintiffs discovered that the water damage had caused extensive mold contamination throughout their home and then submitted insurance claims for the mold damage. Frustrated by the insurer’s response, plaintiffs then sued their insurance carrier for breach of contract, deceptive trade practices, breach of duty of good faith and fair dealing, and negligence, relating to the insurer’s handling of claims for water damage and mold remediation. The plaintiffs also brought personal injury claims, alleging bodily injuries resulting from exposure to mold. In June 2001, a jury awarded plaintiffs more than \$32 million in damages.

Specifically, the jury awarded \$2,547,350 to replace their home, \$1,154,175 for remediation expenses, \$2,000,000 to replace the contents of plaintiffs’ home, \$350,000 for past and future additional living expenses, \$176,000 to reimburse the homeowners for incurring appraisal expenses, \$5,000,000 for mental anguish, \$12,000,000 in punitive damages, and \$8,891,000 for attorneys’ fees. The insurance company appealed, presenting multiple arguments that the evidence was legally and factually insufficient to support the jury’s findings.

The Texas Court of Appeals issued a mixed ruling, affirming in part, reversing in part, and reversing and remanding in part. The factual background for this case is quite extensive so before relying upon the case for any legal propositions, it will first be necessary to acquaint oneself with the sequence of events leading up to the homeowners’ claims and the insurer’s response to those claims. As an initial matter, the appellate court

⁸¹ 98 S.W.3d 227 (Tx.Ct.App., Dec. 19, 2002).

ruled that the district court did not abuse its discretion by allowing evidence about the possible health effects of mycotoxins from mold.

The court found sufficient evidence to uphold the jury's findings that the insurer breached its duty of good faith and fair dealing during its response to plaintiffs' claims, but it found insufficient evidence to support the jury's findings of unconscionability or fraud. Additionally, the court found insufficient evidence that the insurer failed to appoint a competent, independent appraiser or that the appraisal decision was a result of fraud, accident, or mistake. Likewise, the court found no evidence that the insurer "knowingly" breached its duty of good faith and fair dealing toward the homeowners so it reversed the jury's award of punitive and mental anguish damages. Finally, the court found sufficient evidence to support the award of attorney's fees but remanded the issue to the trial court for reconsideration of the amount in light of the revised award of damages. However, even after the reduction of some of the originally awarded damages, the insurance company still faced the possibility of paying millions of dollars in damages.

(3) Criminal Charges

In at least one instance, a grand jury found reason to continue a criminal investigation of child endangerment charges against an insurance company for its handling of a water damages claim.⁸² Although this may be the only known instance of criminal charges stemming from mold contamination, it is possible that such prosecutions may increase if research continues to demonstrate the health hazards caused by mold exposure, thus raising level of public awareness and potentially providing the basis for alleging a "knowing" endangerment.

C. A SAMPLE CASE STUDY

Although review of the above-mentioned cases provides a useful sense of the patterns emerging from mold-litigation, it is also helpful to engage in an in-depth analysis

⁸² The investigation followed the filing of a \$100 million lawsuit in 1999 in Travis County Texas, against the same insurance company. Information on this matter, was obtained from the article, "*After the Deluge, Will Mold and Bad Faith Claims Proliferate?*" in the July 2001 issue of *Insurance Issues*, published by GeneralCologneRe.

of one case to identify the advantages and pitfalls that can result from different strategic approaches to litigating a mold claim. Such an analysis is found in “A Mold Case Study” written by Gordon M. Parkland and Christopher Lozano, attorneys involved in defending a mold damages case, *Tarp v. E & W Associates III*, in Fresno County California.⁸³

In the Tarp case, the plaintiffs were a husband and wife who rented an office space from defendants, a partnership devoted to real estate investment, development, and management. Within the first few months of the plaintiffs’ tenancy, a series of flooding events occurred and as a result, *Stachybotrys Chartarum* (a.k.a. “black mold”) began to grow. Plaintiffs alleged that the flooding events and thus, the mold growth, resulted from the defendants’ negligent maintenance of the building and roof and that the defendants had failed to warn them of the historical water problems of the property. Plaintiffs further alleged that as a consequence of the mold growth, all of their personal belongings located in the property were irrevocably contaminated with mycotoxins and that they had suffered bodily injuries from exposure to the mold. In sum, plaintiffs claimed economic damages of more than \$1.8 million and general, non-economic damages of \$3 million.

Each of the parties retained several experts in a variety of fields. Each side retained structural engineering experts to analyze the construction and maintenance of the building, including the surrounding parking lot. The plaintiffs retained a geotechnical engineer to discuss the potential flooding and mold facilitation role played by the soil underneath the building and the parking lot. Each side also retained roofing experts and Certified Industrial Hygienists and the plaintiffs retained an occupational health specialist, whereas the defense retained a neurologist and a neuropsychologist.⁸⁴

⁸³ The full text of “A Mold Case Study” is available at www.themoldsource.com/litigation. All of the information in this section is derived from the contents of this article.

⁸⁴ Neuropsychologists examine the relationship of brain injury to diminished function whereas neurologists describe the organic state of the brain and the nervous system.

The trial lasted more than a month and resulted in a verdict for defendants.⁸⁵ In reviewing their experience, the defense attorneys made several observations which they believe will be instructive to anyone litigating mold-related claims. First, they note that the wide range of retained experts highlight the multiplicity of factors and complex issues that must be considered when dealing with mold-related claims. Because the causal relationship between mold and human health effects is not well known and there are no state or federal standards for safe levels of mold exposure, it is very difficult to establish sufficient evidentiary support for claims of personal injury. Nonetheless, plaintiffs alleging bodily injury must retain experts to get over the evidentiary hurdles of proving (1) exposure to mold and/or mycotoxins and (2) a medically-based causal link between exposure and their symptoms of illness.

Second, the attorneys stress the importance of understanding the “building envelope” as much as possible. They claim that one “simply cannot know too much about the construction, materials, and history of any building that is allegedly ‘sick.’” The defense gained a significant advantage at trial because neither the plaintiffs nor their experts developed detailed knowledge of the leased structure to anticipate or counter the evidence produced by the defense’s experts.

Third, learn as much as possible about the plaintiffs’ response to the flooding or water events. The defense’s investigation revealed that the plaintiffs compounded the mold problem by repeatedly using the same towels to soak up the flood waters even after the towels began to emit a “mildew-like” odor. Furthermore, the plaintiffs allowed the wet towels to set inside the office space for over a month and used fans to help dry the area. Although the Plaintiffs were using the fans with the intentions of mitigating the problem, the fans actually resulted in compounding the mold problem by dispersing the mold spores over a much wider area than would have naturally occurred. In the eyes of the jury, this translated into a significant contribution to the mold problem.

⁸⁵ The Plaintiffs’ rental agreement with defendants contained an attorneys’ fees clause which entitled defendants to all attorneys’ fees incurred to defend the Plaintiffs suit. This resulted in Plaintiffs being ordered to pay \$653,000 and then subsequently, declaring bankruptcy.

Fourth, the defense attorneys recommend the use of comprehensive physical and psychological evaluations of plaintiffs alleging bodily injuries. They believe that in their case, the use of these types of examinations resulted in: discrediting the wife's allegations of personal injury; suggestions of an alternative cause of some of her physical symptoms; and an objective measure of her cognitive functioning and her vocational/economic potential. In addition to these medical examinations, the defense also retained a private investigator to produce a surveillance video of plaintiffs engaging in normal, daily activities. The attorneys believe that this video significantly discredited the Plaintiffs' claims that they had suffered from bodily injuries and diminished activity and life enjoyment.

Fifth, the defense attorneys believe that the plaintiffs made a "strategic error" by retaining an economist, as opposed to a certified public accountant ("CPA"), as their expert for supporting their claim of economic damages. The attorneys believe that the economist's testimony carried less weight with the jury and was vulnerable to attack by the defense because economists have no corollary to the "generally accepted accounting principles" which govern the work of CPAs.

Finally, the defense attorneys strongly recommend the "liberal use" of motions *in limine* in litigation involving mold contamination because such procedures may prevent the introduction of irrelevant and potentially prejudicial information. The attorneys note that due to recent media attention to the problems associated with mold exposure, there is an "abundance of non-scientific, non-peer reviewed materials" on molds available to the general public and that little of this information is credible. The attorneys observed that during the testimony phase of the trial, one of the most important and effective pieces of information to convey to the jury (by means of a mycologist, industrial hygienist, or a physician) is that molds, even potentially toxigenic molds such as *Stachybotrys chartarum*, are an "ancient and ubiquitous element of the earth."

IV. USE OF EXPERTS IN TOXIC TORT LITIGATION.

The 1993 decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), significantly affected the admissibility of expert witness testimony. Under *Daubert*,

expert testimony must be reliable and relevant. The testimony is not relevant where it is limited to opining that the exposure could possibly have caused the injuries, rather than “it more likely than not” caused the resulting harm. This holding has resulted in a proliferation of *Daubert* attacks prior to trial, with the result that employing to *Daubert* standards has generally been the most effective strategy of the defense.

The United States Supreme Court expanded *Daubert* so that it applies not only to testimony based on “scientific knowledge,” but to all expert testimony that is founded on “technical” and other specialized knowledge. *See, Cumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999). The *Daubert* and *Cumho* decisions require the trial court to require a gatekeeping function and to determine whether the evidence satisfies one or more of the specific factors announced by the *Daubert* court: testing, peer review, air raids and general acceptability. This reliability test is not rigid, however, and all of these factors are not considered necessary or exclusive in all cases.

Under *Daubert*, experts are not required to do their own research or testing but may rely on extrapolation of other studies. The trial court, however, must make the threshold determination as to whether there is a significant analytical gap between the prior testing and the opinion offered by the expert. *See, Amorgianos v. National R.R. Passenger Corp.*, 137 F.Supp.2d 147, 166 (E.D. NY 2001).

In the toxic tort context, the general requirements are that the plaintiff must show that the plaintiff was exposed to a hazardous substance, that the exposure was sufficient to cause the injury, that the hazardous substance to which the plaintiff was exposed is generally accepted as being capable of causing the injury, and that the exposure did in fact cause the injury sustained. These requirements—particularly the requirements of general and specific causation—will require myriad experts. First, it is helpful, but not necessary, to show an increase in the type of injuries when compared to that of an appropriate reference population. In this regard, epidemiology studies may be helpful in demonstrating that the exposure can cause the types of injuries sustained. Appendix A to this paper contains an epidemiological study commissioned by the author in the prosecution of a toxic tort case in Federal Court in the Central District of California. The

epidemiological study, as embodied in the published paper, was done during the course of the litigation and for the express purpose of demonstrating that the types of exposures alleged were capable of causing the injuries sustained.

Concurrently with an optional epidemiological study, the plaintiff must demonstrate actual exposure to the chemical of concern. Depending on the type of case, i.e., groundwater or airborne contaminants, the plaintiff must demonstrate ingestion or contact with the water in sufficient dosages, or must demonstrate specific events of airborne exposure. The latter is exceedingly more difficult, and was the subject of the lawsuit on which the epidemiological study, attached as Appendix A, was based.

Additionally, the plaintiff must establish specific causation i.e. that the exposure was a contributing factor to the injury sustained, based on the medical condition of *each* plaintiff. This type of showing, perhaps the most susceptible to *Daubert* challenges, requires toxicological and other medical examinations, including the performance of a differential diagnoses to exclude other potential causes of injury.