

NOTHING TO FEAR BUT FEAR ITSELF: DEFEATING “TOXIC ANXIETY” CLAIMS

By Michael Bogin

For decades plaintiffs have sought to recover for personal injuries associated with exposure to toxic substances. In certain types of toxic tort personal injury cases, such as asbestos, plaintiffs have met with success. However, as public awareness of environmental issues have increased over the years, plaintiffs have begun to claim personal injuries based on exposure to more generic substances, such as petroleum or solvents, that are not readily identified with a distinct type of injury.

As a consequence, companies and even individual homeowners who have released contamination can face toxic tort claims. These tort actions come from not only actual disease victims but increasingly from exposed persons who have not yet developed any symptom of disease.¹ These post-exposure,

pre-symptom plaintiffs have sought to maintain tort actions for purely psychic injuries arising from alleged “increased risk” of disease claiming emotional distress damages and “medical monitoring” costs.² However, decisions in New York show that a defendant who develops a solid record in discovery may ride out this new wave of “toxic anxiety” litigation.³

“The only thing we have to fear is fear itself.”⁴ In many “fear of disease” cases this is precisely so; and ensuring that the record makes this clear will result in a successful defense--sometimes on summary judgment.

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The History Of Purely Psychic Injury As A Cause Of Action

Although it is not specifically stated as such, a plaintiff's cause of action for “fear of disease” arising from a toxic exposure is founded on the theory of negligent infliction of emotional distress.⁵ New York courts have traditionally been reluctant to allow recovery for negligent infliction of emotional distress because of the danger that a plethora of “vexatious, frivolous lawsuits would result from the theory's wide-spread use.”⁶ To prevent the abuse of the litigation process by frivolous actions, the courts initially allowed a plaintiff to recover for purely “psychic injury” only if there were attendant physical injuries.⁷ However, in Battalla v. State (“Battala”)⁸ the Court of appeals dispensed with the need for accompanying physical injuries, and in its place, mandated that there only be some “guarantee of genuineness” of the alleged “psychic injury”. Even without a rigid requirement of physical injury, subsequent cases showed that the indicia of legitimacy would invariably include “some form of physical trauma, however minimal, stemming from the defendants’ negligence.”⁹

“Fear Of Cancer” Arises As A Cause Of Action

Ferrara v. Galluchio (“Ferrara”) predated Battalla, yet continues to serve as the foundation for the standard of proof in “fear of disease” cases in New York. In Ferrara, plaintiff went to a dermatologist for treatment of X-ray burns that she sustained in the course of therapy administered by defendant physicians. The dermatologist informed her that she must have the burned tissue examined every six months, as cancer might develop. As a result of that statement, the plaintiff developed severe “cancerphobia”, and sued the physicians who gave her the X-ray treatment for her “mental anxiety” arising from that statement.¹⁰ The Court recognized that the case was “somewhat novel...in that it appears to be the first case in which a recovery has been allowed against the original wrongdoer for purely mental suffering arising from information the plaintiff received from a doctor to whom she went for treatment of the original injury.”¹¹

In a preview of the standard it would later lay down in Battalla, the Court found the “present case [to be] a proper one for redress since we find a ‘guarantee of genuineness (of the cancerphobia) in the circumstances of the case.’”¹² That “guarantee of genuineness” was that the “plaintiff suffered an X-ray burn which did not heal for an unusually long period of time”¹³ and that it was “common knowledge among laymen and even more widely among laywomen that wounds which do not heal over long periods of time frequently become cancerous.”¹⁴ Thus, while the Court allowed recovery for a purely psychic injury (“cancerphobia”) based on exposure to a toxic substance (X-rays), it did so where the plaintiff had (1) provided admissible evidence of an exposure-related physical manifestation (there an X-ray burn and open wound) and (2) substantiated that such physical manifestation was indicative of the feared disease (the skin cancer).¹⁵

While Ferrara and Battalla opened the door for strictly “fear of disease” claims, the New York courts have paid careful heed to the requirement that such claims have a “guarantee of genuineness”. Over the years, that language has evolved into what is now the two-prong “rational basis” test:

To maintain a cause of action to recover damages for emotional distress following exposure to a toxic substance, a plaintiff must establish both that he was in fact exposed to a disease-causing agent and that there is a ‘rational basis’ for his fear of contracting a disease . . . A ‘rational basis’ has been construed to mean the clinically-demonstrable presence of a toxin in the plaintiff’s body, or some other indication of a toxin-induced disease.¹⁶

Setting The Record Straight

The Broich v. Nabisco, Inc. (“Nabisco”) decision is a good example of how to succeed as a defendant using New York’s “rational basis” test.

The plaintiffs in Nabisco grew up and still lived in a small neighborhood centered around Carroll Street in Sag Harbor, Southampton Township, New York, near a former toy car motor manufacturing facility. In 1984, the Suffolk County Department of Health Services determined that the facility had contaminated local residents' private drinking water wells with manufacturing waste solvents. By March 1985, in a well publicized emergency response and remedial action, the United States Environmental Protection Agency ("EPA") categorized the facility and the groundwater "plume" as a federal Superfund, and immediately connected all affected homes to the public water supply, thereby cutting off residents' exposure to site-related chemicals. More than a decade later, in 1998 the federal Agency for Toxic Substances and Disease Registry ("ATSDR") issued a public health assessment concerning groundwater contamination at the site. It stated that individuals exposed to the toxins for more than 20 years "may" have an increased risk of stroke and cancer.

A DEFENDANT CAN LIMIT ITS LIABILITY EARLY IN THE DISCOVERY PROCESS BY EXPOSING PLAINTIFFS' LACK OF MEDICAL EVIDENCE. NEW YORK STATE REQUIRES MORE THAN SIMPLY EXPOSURE TO A "DISEASE-CAUSING AGENT" TO SUSTAIN A "TOXIC ANXIETY" CLAIM.

Based on the ATSDR report, plaintiff claimed that she had a substantially "increased risk" of developing cancer, liver disease, kidney disease, cardiac abnormalities, lupus, and immune system alterations and that this increased risk had caused "emotional distress."¹⁷ The court recited the prevailing case law: "in order to maintain a cause of action for fear of developing cancer or for future medical

monitoring costs following exposure to a toxic substance, a plaintiff must establish both that he or she was in fact exposed to the disease-causing agent and that there is a 'rational basis' for his or her fear of contracting the disease [meaning] the clinically demonstrable presence of (the toxin) in the plaintiff's body, or some indication of (toxin) induced disease i.e. some physical manifestation of (toxin) contamination."¹⁸

This was perhaps the clearest recitation of the "guarantee of genuineness" required by Ferrara. While the plaintiff "established exposure," the Court granted defendants summary judgment, dismissing her claim because she "failed to demonstrate any physical contamination or any physical manifestation of toxin contamination."¹⁹ Plaintiff tried to avoid this result by showing any sort of physical injury, alleging she had a breast cyst and a miscarriage. However, early in the discovery process, defendants had obtained a stipulation that plaintiff "is not claiming and does not intend to prove specific medical causation for any physical injuries except emotional distress (meaning fear of cancer and fear of other diseases) and post traumatic stress disorder."²⁰ Moreover, these injuries were not of the type identified in the ATSDR report and plaintiff had provided "no medical evidence" linking either her cysts or miscarriage to "past exposure to toxins." Accordingly, the court found, "she has not shown a 'rational basis' for her fear of developing cancer and other diseases."²¹

Conclusion

The defendants succeeded in Nabisco because the record was clear. Defendants had obtained plaintiff's medical records and showed that none of them contained any diagnosis of a toxin-related physical symptom. At her deposition plaintiff had admitted not having been so diagnosed by any doctor, and had conceded she was not directly seeking damages for her "cysts" and "miscarriage." Moreover, defendants established through records and deposition testimony that, despite evidence of her repeated exposures, plaintiff had not lived in the neighborhood for the 20-years, which according to the ATSDR, was necessary for plaintiff to have an increased risk of developing cancer. Obviously, this will not always be the case for every plaintiff, but where a defendant has good reason to believe plaintiff has no genuine physical injuries, preparing a record that shows plaintiff "has nothing to fear but fear itself" will still win the day--even in this age of increasing "toxic anxiety" claims.

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FOR THE RECORD

Court Forces Municipality to Take Action on Environmental Review

A Supreme Court Justice in Orange County New York took the highly unusual step of ordering the Newburgh Planning Board to complete its environmental review of a project that it had been studying for over 900 days. The Court found that the voluminous record had demonstrated that the developer had “gone to extraordinary lengths to comply with the demands of an insatiable planning board.” David Paget and Steven C. Russo represented the applicant, Pilot Corporation, which was seeking site plan approval to construct a travel center.

RCRA’s “Imminent and Substantial Endangerment” Provision Limited

SPR obtained a favorable ruling in defense of a RCRA citizen’s suit that placed a significant limitation on the broad provisions of RCRA’s “imminent and substantial endangerment” provision. In *87th Street Owner’s Corp. v. Carnegie Hill Corp.*, the U.S. District Court for the Southern District of New York held that once a state has taken some environmental cleanup action, a property owner must show that additional measures beyond the measures the state has already initiated are needed to abate the alleged endangerment, and that absent such proof the Court lacks jurisdiction. The case was litigated by Daniel Riesel, David Yudelson and Kate Sinding, representing the defendant, Carnegie Hill Corporation.

SPR Defends Rights of Senior Housing Development

SPR successfully defended the environmental review conducted in connection with a rezoning and subdivision approval to construct a 250 unit senior housing development in Long Island. The Petitioners, who included neighboring industrial property owners, alleged spot zoning and a failure to study issues relating to the compatibility of the project with neighboring uses. David Paget and Steven C. Russo represented the developer, Sandy Hollow Associates, in connection with the environmental review and the legal challenge.

Court Finds Indemnification Clause Did Not Encompass Environmental Liability Incurred After Expiration of Indemnity Period

The U.S. Court of Appeals for the Second Circuit ruled in favor of SPR client, Cooper Industries, in affirming a District Court ruling that dismissed a claim that Cooper was required to indemnify the purchaser of a Cooper industrial plant for environmental liabilities that occurred after the expiration of the indemnification period. Daniel Riesel and Steven C. Russo represented Cooper Industries.

Court Verdict Rejects Alleged Breach of Contract Claim

SPR obtained a defense verdict after a trial in a multi-million dollar lawsuit in New York County Supreme Court brought against Leroy Clarkson, LLC. The plaintiffs alleged that Leroy Clarkson and its principal, Jeffrey Brown, had reneged on a purported joint venture agreement. SPR was able to establish a complete defense at trial and the plaintiff recovered nothing. Steven Barshov represented Leroy Clarkson, LLC and Jeffrey Brown.

Total Victory

SPR obtained an arbitration award on behalf of Accessible Development Corporation and successfully defended against a counterclaim. The arbitration award not only compensated Accessible for its damages, but also awarded Accessible its attorneys’ fees and costs of litigation. Steven Barshov represented Accessible.

Court Grants Summary Judgment Dismissing Breach of Contract Claim

On behalf of J&R Music World, Inc., Steven Barshov successfully defended a breach of contract claim involving a multi-million dollar construction project. Summary judgment was obtained after the close of discovery under the Statute of Frauds.

Court Finds Reason to Vacate EPA’s Bioaccumulation Standard

The U.S. District Court for the Southern District of New York vacated EPA’s imposition of a new PCB bioaccumulation standard applied to dredged material proposed for

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¹ See, e.g., Klein, “Rethinking Medical Monitoring”, 64 Brooklyn L. Rev. 1, 2 (1998).

² See, e.g., *Abusio v. Consolidated Edison Co. of New York, Inc.*, 238 A.D.2d 454, 656 N.Y.S.2d 371, 372 (2d Dept. 1997).

³ *Broich v. Nabisco, Inc.*, 9/5/02 N.Y.L.J., pg. 22, col. 2 (Sup. Ct. Suffolk Cty.).

⁴ Franklin D. Roosevelt, First Inaugural Address.

⁵ See, e.g., *Ordway v. County of Suffolk*, 154 Misc.2d 269, 583 N.Y.S.2d 1014, 1015 (Sup. Ct. Suffolk Cty. 1992)(“AIDS-phobia” claim is based on “negligent infliction of emotional distress” arising from exposure to AIDS virus).

⁶ *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 999 (1958).

⁷ *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107 (1896).

⁸ 10 N.Y.2d 237, 219 N.Y.S.2d 34 (1961).

⁹ *Lancellotti v. Howard*, 155 A.D.2d 588, 547 N.Y.S.2d 654, 655 (2d Dept. 1989); see *Ferrara*, 176 N.Y.S.2d at 997 (court upheld plaintiff’s purely emotional distress claims arising from doctor telling her she could contract cancer where she had suffered serious x-ray burns).

¹⁰ *Ferrara*, 176 N.Y.S.2d at 998.

¹¹ *Id.* at 999.

¹² *Id.* at 1000.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 999-1000 (plaintiff “was personally advised by a doctor specializing in dermatology that her wound might develop into cancer...”).

¹⁶ *Prato v. Vigliotta*, 253 A.D.2d 746, 677 N.Y.S.2d 386, 388 (2d Dept. 1998) (citations omitted). See also *Abusio*, 656 N.Y.S.2d at 372; *Wolff v. A-One Oil, Inc.*, 216 A.D.2d 291, 627 N.Y.S.2d 788, 789 (2d Dept. 1995); *Conway v. Brooklyn Union Gas Co.*, 189 A.D.2d 851, 592 N.Y.S.2d 782, 783 (2d Dept. 1993); *Rittenhouse v. St. Regis Hotel Joint Venture*, 149 Misc.2d 452, 565 N.Y.S.2d 365, 367-68 (Sup. Ct. N.Y. Cty. 1990), modified on other grounds, 180 A.D.2d 523, 579 N.Y.S.2d 100 (2d Dept. 1992).

¹⁷ *Nabisco*, 9/5/02 N.Y.L.J., pg.22, col. 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Notably, the Court also dismissed plaintiff’s “fraud” and “conspiracy” causes of action on the grounds that there was “no underlying independent tort.”*Id.*

placement as remedial fill at the Historic Area Remediation Site off the coasts of New Jersey and New York. The court held that as an effective rule the standard was subject to the public notice and comment procedures required by the Administrative Procedure Act. Daniel Riesel and Elizabeth A. Read represented the plaintiff United States Gypsum Company against EPA and the U.S. Army Corps of Engineers.

Toxic Anxiety Antidote

This past fall, SPR successfully defeated related toxic tort suits brought against Nabisco, Inc. by nearly 50 Sag Harbor residents and their children alleging “fear of cancer” arising from alleged exposure to contaminated groundwater. The plaintiffs contended that their alleged exposure to contaminants increased their risk of developing cancer (and various other diseases) and sought an award of several hundred million dollars in medical monitoring, emotional distress and punitive damages. On successive summary judgment motions, SPR attorneys, Daniel Riesel, Michael Bogin and Kate Sinding, demonstrated through a public health assessment, deficient discovery responses and plaintiffs’ deposition testimony that their purported “fear” was unreasonable as a matter of law, and the court dismissed both actions in their entirety. **SPR**

TOXIC MOLD: A LEGAL HORROR STORY

By David Yudelson and Steven C. Russo

Toxic mold¹ is a hot topic these days. The potential hazards posed by this condition can, in certain circumstances, present a major public health issue. Moreover, the investigation and remediation of toxic mold conditions, and the potential liability issues related to these conditions, can make this relatively new environmental concern appear more frightening than a Hollywood B-movie. Recent court cases alleging damages due to mold have targeted a variety of defendants, including property managers, building owners, architects, contractors, construction managers and suppliers, as well as commercial and personal lines insurers. Damages may include the cost of mold remediation, diminution in property value or loss of use, and personal injury claims. Successful lawsuits based on hazardous mold conditions have caused some personal injury lawyers to dub toxic mold the asbestos of the new millennium.²

The lack of any statutory or regulatory requirements that govern the response to this hazard further complicates the issue. This article discusses recent legislative proposals that will fill this gap in environmental regulation, and specifies some common sense approaches that building owners, property managers and others should consider in the interim to reduce potential liability.

Causes Of Mold

Aside from increased public awareness, mold has become an issue in large part due to expedited construction practices and “sealed” energy efficient buildings. Expedited construction practices have exposed materials to moisture and “sealed” buildings have trapped moisture. It is these excessively moist environments where molds flourish. Specific causes of moisture also may include flaws in building construction, design and condensate management or improper functioning of plumbing, HVAC units or other building systems resulting in water leaks.

Proposed Legislation

Presently there is a total absence of quantified indoor air exposure limits to mold and its mycotoxins. Recently, legislation has been proposed in the New York State Legislature that would convene a task force to advise the State Department of Health on the development of air exposure limits to mold in indoor environments, following the completion of a health study of the issue. In addition, federal legislation has been proposed that would address the issue. The proposed “United States Toxic Mold Safety and Protection Act of 2002” would, among other things, undertake a comprehensive study of the health effects of mold and promulgate national standards for mold inspection, remediation and testing.

Currently, however, there are no federal, state or local laws or regulations pertaining to mold.³ Nor are there health based standards or threshold value limits for airborne concentrations of mold.⁴ Thus, persons affected by mold or charged with addressing the condition, including property owners and managers or employers, have no binding legal standards to rely on when formulating an appropriate response.

Existing Guidance Documents

There are, however, relevant guidance documents that can help fill the gap while formal legislation and/or administrative rulemaking is considered. Both the United States Environmental Protection Agency (EPA) and the New York City Department of Health (NYCDOH) have each developed guidelines for assessment and remediation of mold. In the absence of any legally enforceable laws or regulations, the EPA and NYCDOH Guidelines represent the most detailed governmental statements respecting the assessment and remediation of mold. For a property owner, manager or other person faced with a toxic mold condition, the respective guidelines are important because courts may look to these guidelines when formulating a standard of reasonable care for addressing mold conditions in future personal injury or property damage lawsuits. Thus, conformity with the guidelines in assessing and remediating mold conditions may form the first line of defense in establishing conformance with a standard of reasonable care in addressing this new hazard.

The following are the major steps identified in the respective guidelines for addressing a mold condition:

- *Retain Qualified Experts* -- In order to develop an appropriate investigation, remediation, testing and monitoring response to a significant mold condition both guidelines recommend hiring professionals. Qualified restoration and toxicological/industrial hygienists are typically retained. The experts will work together with the property owner/manager to determine the physical extent of the mold condition and the measures needed to address the condition. Once delineated, the restoration expert will undertake the actual remediation. The toxicological/industrial hygienists will also conduct independent inspections and testing after the remediation is complete.
- *Eliminate The Water Source* -- Both the NYCDOH and EPA Guidelines recommend that the source of the water causing the mold growth be eliminated. The NYC Guidelines provide "in all situations, the underlying cause of water accumulation must be rectified." The EPA Guidelines contain a similar recommendation.
- *Assessing Extent of Fungal Growth* -- Both the NYCDOH and EPA Guidelines recommend that the extent of fungal growth be determined by visual inspection and then remediated. The NYCDOH Guidelines provide, "The extent of any water damage and mold growth should be visually assessed."⁵ The EPA Guidelines provide that "if visible mold growth is present, sampling is unnecessary."⁶
- *Personal Protective Equipment (PPE)* -- Both the NYCDOH and EPA Guidelines recommend that workers hired to clean up mold wear appropriate PPE, including "respirators, disposable protective clothing covering both head and shoes and gloves". The EPA Guidelines also recommend "full" PPE.
- *Containment With Negative Pressure* -- Both the NYCDOH and EPA Guidelines recommend that the remediation of areas greater than 100 square feet be conducted under Containment with Negative Pressure, which ensures that airborne mold does not escape to other uncontaminated areas.
- *Cleaning Versus Removal And Disposal* -- One of the most difficult decisions in addressing mold contamination is whether to clean contaminated materials or discard them. Both the NYCDOH and EPA Guidelines provide for the cleaning and reuse of porous materials provided the materials are dried, cleaned free of visible mold and can still fulfill their intended function. The guidelines also each provide that porous materials that cannot be cleaned should be removed and discarded.
- *HVAC Cleaning* -- Both the NYCDOH and EPA Guidelines state that a building's HVAC system should be cleaned by a qualified professional if it is found to contain fungal growth. Even if no mold growth is identified in the HVAC system, an

SOURCES: "TOXIC MOLD: A LEGAL HORROR STORY"

¹ The molds of typical concern include cladosporium, penicillium, alternaria, aspergillus, fusarium, trichoderma, memnoniella, mucor, and stachybotrys chartarum.

² Mascitti, "Toxic Mold Lawsuits May Become A Growth Industry," *The News Journal* (October 10, 2002).

³ See "Guidelines On Assessment And Remediation of Fungi In Indoor Environments," New York City Department of Health (April 2000) ("NYCDOH Guidelines") at 3.

⁴ "Mold Remediation In Schools and Commercial Buildings," United States Environmental Protection Agency (March 2001) ("EPA Guidelines") at Table 2.

⁵ NYCDOH Guidelines at 5.

⁶ EPA Guidelines at 25.

owner or manager should give serious consideration to cleaning the HVAC system if other areas had significant growth conditions.

- *Post-Remediation Testing* -- Both the NYCDOH and EPA Guidelines provide for professional post-remediation air testing prior to the occupancy of a remediated area. The results are compared to outdoor air levels and should indicate mold concentrations that are equivalent or lower than outdoor air levels.

- *Post-Remediation Monitoring* -- Both the NYCDOH and EPA Guidelines provide for the regular inspection of remediated areas. The NYCDOH Guidelines provide that: “[r]outine inspections should be conducted to confirm the effectiveness of remediation work.” The EPA Guidelines state that the remediated areas should be revisited to confirm that there is no water damage or mold growth.

Making A Record

When faced with a potential toxic mold issue, it is critical that a proper team is assembled to both address the problem, and to ensure that a record is made of the efforts undertaken to address the mold problem. The goal must be to first investigate whether a condition exists by searching for water intrusion or moist conditions as well as mold growth. If mold growth is detected, such condition should be fully identified and delineated and then effectively treated. All actions should be undertaken with an eye toward the recommendations set forth in the NYCDOH and EPA Guidelines to ensure that, in the event of subsequent litigation, such efforts can be shown to constitute a reasonable standard of care under the circumstances.

UNTIL LEGISLATION REGULATING THE INVESTIGATION AND REMEDIATION OF TOXIC MOLD CONDITIONS IS ADOPTED, THE COMMON SENSE APPROACHES IDENTIFIED IN THE NYCDOH AND EPA GUIDELINES CONSTITUTE THE MOST COMPREHENSIVE GOVERNMENTAL STATEMENTS FOR RESPONDING TO MOLD CONDITIONS. ADHERENCE TO THESE STANDARDS MAY ALSO ASSIST IN THE EVENT OF LITIGATION TO DEMONSTRATE THAT THE PROPERTY OWNER OR MANAGER TOOK ACTIONS THAT CONFORMED WITH A STANDARD OF REASONABLE CARE.

Even if a mold condition is found to exist, a plaintiff must also establish causation and damages. That would usually require that a plaintiff establish both an exposure pathway and adverse health effects attributable to the mold. Thus, it is critical that in the face of an allegation that a mold condition has caused an illness, that a potential defendant perform a thorough investigation of a plaintiff’s home and work environment, including an assessment of potential exposure pathways. Such an investigation should be performed as early as possible and should consider whether the illness could be attributed to factors other than mold.

Conclusion

Until legislation or regulations regulating the investigation and remediation of toxic mold conditions is adopted, the common sense approaches identified in the NYCDOH and EPA Guidelines constitute the most comprehensive governmental statements for responding to mold conditions. In the absence of any enforceable laws or regulations, compliance with the NYCDOH and EPA Guidelines represent a reasonable and appropriate course of conduct for an owner or manager confronted with a toxic mold condition. Adherence to these standards may also assist in the event of litigation to demonstrate that the property owner or manager took actions that conformed with a standard of reasonable care. **SPR**

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