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A Newsletter On Developments in the Law for Clients and Friends of Vernis & Bowling

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RECENT DEVELOPMENTS IN WORKERS' COMPENSATION



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The Florida Legislature recently concluded a special session by approving extensive revisions to the workers compensation law in a 202 page bill. The amendments have been signed into law by the governor. There is insufficient space in this newsletter to outline all of the changes. Some of the more important amendments are outlined below.

Definitions: The specificity requirements for a petition for benefits require a petition to include the exact statutory classification and time periods of benefits requested. A claim for medical benefits must include a statement explaining why the benefit is requested and why the current treatment is not sufficient. A claim for alternate medical care must include the name of the physician recommending such treatment and must include a copy of the report making the recommendation.

Medical Evidence and Major Contributing Cause: The relationship of medical conditions and disability to occupational causation must be established based on objective, relevant medical findings. "Major contributing cause" means the cause which is more than 50 percent responsible for the injury. "Major contributing cause" must be demonstrated by medical evidence only. Pain or other subjective complaints alone, in the absence of objective relevant findings, are not compensable.

Psychiatric injury: Mental or nervous injuries unaccompanied by physical injuries requiring treatment are not compensable. A mental injury is not compensable absent medical evidence from a licensed psychiatrist meeting criteria in the most recent edition of the DSM. A mental injury is not compensable unless the physical injury is and remains the major contributing cause of the mental injury and the physical injury must be at least 50 percent responsible for the mental injury. No compensation is payable for a mental injury arising out of depression from being out of work or losing employment opportunities, or from a pre-existing mental condition, or from an emotional condition due to unsubstantiated, subjective complaints of pain. Compensation for a mental injury is not payable more than six months after maximum medical improvement for the physical injury.

Immunity: To overcome employer immunity, the employee has the burden to prove his injuries were caused by the employer's intentional tort and not by accident. To do so, the employee must show: that the employer deliberately intended to injure the employee; or the employer knew the injury was virtually certain to occur based on the employer's knowledge that similar injuries had occurred in the past or that the employer had received explicit warnings identifying a known danger; and the employee was not aware of the danger because it was not apparent; and the employer deliberately concealed or misrepresented the danger.

Chiropractic Care: The number of chiropractic visits allowed is increased from 18 to 24. Unauthorized treatment: an employee may seek unauthorized care at the carrier's expense if the carrier fails to provide care within a reasonable time after the care is requested.

Changing Physicians: The carrier must authorize a one time change of physician within five days after receiving the request.

If the carrier fails to respond within five days, the employee may select the physician who is then deemed authorized. Once an alternative physician is authorized, the original physician is deauthorized upon writ-

ten notice from the carrier. If the carrier fails to timely comply with a request for a change of physician the carrier is subject to penalties under 440.525.

Confidentiality of Medical Records: An employee claiming a work-related injury waives any physician-patient privilege for conditions relevant to the claimed injury. A medical release from the employee is not required. Physicians must provide records upon request. [But see HIPAA!!] If the physician is outside the state, and not subject to Florida law, the employee must provide a written medical information release.

Independent Medical Examinations: An independent medical examiner may not be a physician providing treatment unless the parties agree. The employee and the carrier are entitled to only one independent medical examination for any one accident and not one for each specialty. The party requesting and selecting the independent medical examination is responsible for all up front associated costs. The party requesting the independent medical examination must notify all other parties within fifteen days after the date the independent medical examination is to take place. Failure to do so renders the examiner's opinions inadmissible. The independent medical examiner may not provide follow-up treatment even if such treatment is held compensable. If the employee prevails in a medical dispute, or if benefits are paid or treatment is provided based on the independent medical examination, the carrier must pay for the examination. Each party is bound by the opinions of his or her selected independent medical examiner. The carrier is not responsible for scheduling an independent medical examination other than its own. A "consensus independent medical examination" may occur if the parties agree to a mutually acceptable physician specializing in the medical condition at issue. The findings and conclusions of the examiner are binding on the parties and constitute a resolution of the medical dispute. Agreeing to a "consensus independent medical examination" does not alter the parties' right to their own independent medical examination.

Expert Medical Adviser: The party requesting an expert medical adviser evaluation is responsible for payments of the fee. If the employee requests the evaluation and prevails based on the report, the carrier is responsible for the fee. If the judge of compensation claims orders the evaluation on his or her own motion, the carrier is responsible for the fee.

Average Weekly Wage: The average weekly wage is determined based on the accident date. "13 weeks" means calendar weeks, and the phrase "substantially the whole of 13 weeks" means 75 percent of the total customary hours of employment.

Permanent Total Disability: An award of permanent total disability is prohibited if the employee is physically capable of engaging in at least sedentary employment. An employee is presumed to be permanently and totally disabled if the employee suffers certain serious injuries [the injuries are listed in the statute. A carrier can overcome the presumption with evidence that the employee is able to engage in at least sedentary employment within a 50 mile radius of the employee's residence. In all other cases permanent total disability may be awarded if the employee is not able to engage in at least sedentary employment within a 50 mile radius of the employee's residence. Permanent total disability benefits end at age 75. The age 75 limitation does not apply if the employee is not eligible for Social Security benefits because the employee's injuries prevented working sufficient quarters to become eligible. If the employee is age 70 or older when the accident occurred, permanent total disability benefits are payable for no more than five years. A carrier may conduct vocational evaluations, even after permanent total disability is established, performed by a rehabilitation provider of the carrier's choice. Permanent total disability supplemental benefits are not payable after the employee reaches age 62 regardless of whether the employee is eligible for social security benefits. This limitation does not apply if the employ-

ee is not eligible for social security benefits because injuries prevented working sufficient quarters to become eligible.

Impairment Income Benefits: Impairment benefits are paid bi-weekly rather than weekly. The benefit increases from 50 percent to 75 percent of the temporary total disability benefit amount. Impairment benefits are payable only for physical impairments. Impairment benefits for psychiatric impairment are limited to one percent. Entitlement to impairment benefits begins the day after maximum medical improvement, or the expiration of temporary benefits, whichever ever occurs first. Duration of eligibility increases as the impairment rating increases from a low of two weeks for each percentage point from 1 to 10 percent, to a high of six weeks for impairments of 21 percent or higher.

Supplemental Income Benefits: Supplemental income benefits were eliminated. Temporary Partial Disability: Benefits are not payable if the employee has achieved overall maximum medical improvement. Benefits are payable only if compensable medical conditions created work restrictions. Within five days after the carrier learns of a restricted work release, the carrier must send a letter to the employee explaining rights and responsibilities. If the employee returns to work earning less than 80 percent of the pre-injury wage, the first installment of temporary partial disability benefits is due seven days after the end of the first work week. Subsequent payments are due no later than seven days after the end of each bi-weekly worksheet. If the employee is not able to work within restrictions, payments are due no later than the last day of each bi-weekly period. No temporary partial disability payments are due if the employee's employment is terminated for misconduct. Aggravation of pre-existing conditions only disability, or need for medical treatment associated with the compensable injury, is compensable. The degree of disability or medical treatment required for pre-existing conditions must be excluded from the impairment rating. The exclusion applies without considering whether the prior condition would have been disabling without the compensable injury. Impairment ratings must apportion out the pre-existing condition. Medical benefits are to be paid apportioning out the percentage attributable to the pre-existing condition.

Benefit Disputes: A petition for benefits seeking an award of medical benefits must have attached a copy of the physician's request, authorization or recommendation for the treatment sought. A judge of compensation claims may consider only those claims that were ripe, due and owing when the petition was filed and which have undergone mediation.

Attorneys Fees: Fees may be awarded based only on benefits secured on behalf of a claimant. A judge of compensation claims may not approve any agreement, stipulation, or order for fees in excess of the statutory fee schedule. A judge of compensation claims is not required to approve any retainer agreement between a claimant and his or her attorney. Attorney is not entitled to a fee for an issue that was ripe, due and owing but was not addressed during the pendency of other issues for the same injury. The term "benefits secured" does not include benefits the carrier offered to provide, including fees, on issues pending before a judge of compensation claims, if the offer was made in writing 30 days before trial. Benefits secured are deemed to be only benefits above the carrier's settlement offer. Such offers must address each pending issue separately and must state whether each offer is severable and must clearly indicate whether the offer includes medical witness fees and other costs. The prevailing party in a proceeding before a judge of compensation claims is entitled to recover the costs of such proceedings, not including attorney fees, from the non-prevailing party. If the judge of compensation claims determines that the statutory fee schedule will not fairly compensate the attorney for a disputed medical-only claim, the judge may award an alternate fee not to exceed \$1,500, but only one per accident based on an hourly rate of \$150.



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FALLING MERCHANDISE CASES IN FLORIDA

Res Ipsa Loquitor does not apply to falling merchandise cases.



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G. Jeffrey Vernis was lead trial counsel in the case of *Armstrong v. Wal-Mart Stores, Inc.* In that case, the Plaintiff alleged that 12 twenty-five pound garden hoses fell from the top shelf of a retail store, striking him on the head, neck and shoulders, while he was reading packages on the opposite side of the aisle. The Plaintiff claims significant injuries to his head, neck, shoulders and wrists. His case was tried over a period of three weeks, with the Plaintiff claiming \$781,000.00 in economic loss, past medical expenses and lost wages, and requested the jury award an amount between \$900,000.00 and \$1.6 million.

At trial, the Plaintiff's counsel had requested that the trial judge give an instruction to the jury under the doctrine of *res ipsa loquitor*. *Res ipsa loquitor* is a doctrine under law with extremely limited application which is used to provide a basis for liability if the instrumentation causing the injury was under the exclusive control of the defendant and if there is a lack of evidence of negligence. Essentially, if the instrumentation causing the injury was under the exclusive control of the defendant, and the defendant cannot provide negligence, liability can be assessed against the defendant having the exclusive control. In the *Armstrong* case, there was evidence at trial, that although the shelf where the hoses fell from was high, it still was accessible to customers. In fact, the trial court found that this portion of the store was not under the exclusive control of Walmart, specifically finding that customers come in, buy items, or put items back on the shelves.


In the appeal, the Plaintiff's counsel relied on several cases which found that the doctrine of *res ipsa loquitor* did apply to falling merchandise cases. However, those cases were very distinguishable from cases dealing with public places and retail stores. All of the cases relied upon


by the Plaintiff were in areas that were found to be "inaccessible to customers," specifically in areas not open to the public. The Plaintiff argued that even if this area was open to the public, there was no specific proof that a customer moved any particular item that could have caused this incident, arguing that if the hoses did in fact fall, they fell because of the way they were placed by the employees, and not because a customer moved them. Although there was no specific testimony at trial that any customer did in fact move any particular item on this particular shelf, the Court had never previously required such proof, finding only that customers had access to this area and therefore it was not under the "exclusive control" of the store.


G. Jeffrey Vernis, lead appellate counsel, argued at oral argument that there were no cases supporting the Plaintiff's proposition, and clearly distinguished the cases cited by the Plaintiff as not being in areas accessible to customers. In support, the cases of *Montforti v. Kmart* and *Wal-Mart v. Rogers* were used, which supported the proposition that in a retail store, an area accessible to customers was found to be not under the exclusive control of the store. Ultimately, the Appellate Court agreed and affirmed the finding of the jury, and the denial by the trial court of the Plaintiff's motion for a new trial. The Appellate Court found no reason to change the existing case law, that for retail establishments, the doctrine of *res ipsa loquitor* does not apply to areas which are "accessible to customers," and therefore, are not under the exclusive control of the retail establishment. Of importance, you should note that there was specific trial evidence presented to defeat the expected claim of *res ipsa loquitor*, specifically testimony by Wal-Mart employees that although customers are discouraged from doing so, customers would access top shelf merchandise, and this specific shelf was between 6 and 7 feet high, clearly accessible to many customers, even though there was no direct evidence that any customer specifically accessed this shelf.


Although there is no written opinion discussing these issues, it is clear by the Appellate Court's ruling that the existing case law in Florida does not allow for an instruction on *res ipsa loquitor* in areas accessible to customers in retail merchandise falling cases. If you would like any further details on this, you are asked to contact G. Jeffrey Vernis at (561) 775-9822.


VERDICTS


 **Kenneth Moffet, Esq.** (Palm Beach) tried the matter of *Isma v. Dominguez*, a wrongful death case, on behalf of the Defendants in Miami-Dade County. The Defendants were physicians from Spain and Venezuela. The vehicle being driven by one of the Defendants was involved in a motor vehicle accident which resulted in the death of the Plaintiff's decedent/driver. The Defendant driver went through a flashing red traffic light without stopping at 6:00 a.m. on a Sunday morning and his vehicle crashed into the Plaintiff's decedent's vehicle which caused fatal injuries to the driver of the Plaintiff's vehicle, a 49 year-old mother of 3 children and 3 adopted children. The Plaintiff's decedent driver was on her way to church. The Defendant driver had been in the South Beach (Miami Beach) all evening and during the early morning hours celebrating the birthday of his friend immediately preceding this accident. A Miami-Dade Circuit Court jury reached their verdict in favor of the 6 surviving children awarding \$125,000.00 to the family, which will be reduced by the Plaintiff's comparative negligence in proceeding into the intersection on a flashing yellow traffic light without her headlights illuminated. The net judgement will be \$81,250.00. The jury found the Defendant driver 65% at fault and the Plaintiff's decedent driver 35% at fault. The Plaintiff's lawyer asked the jury to award \$3.9 Million to the family. The verdict was rendered on May 13, 2003.

 **Michelle Hendrix, Esq.** (Northwest Florida) received a not guilty verdict in a case where the Defendant was charged with Robbery with a Deadly Weapon. If convicted as charged, the Defendant would have received a mandatory life in prison without possibility of parole because he was a Prison Release Reoffender. The first trial ended in a hung jury, 4-2 to acquit. A re-trial one week later resulted in an acquittal.

 **Jean Frances Niven, Esq.** (Northwest Florida) the 1st District Court of Appeal (Tallahassee) a successful "Per Curiam Affirmed" ruling of the jury defense verdict finding Wal-Mart not to be negligent in the case of *Oglesby v. Wal-Mart Stores, Inc.* Even after the defense verdict, plaintiff's were demanding in the mid six figure range to withdraw their appeal. This is considered an important case because of the potential for adverse precedent. Mr. Oglesby was making a delivery to Wal-Mart through the correct service entrance as he had done on at least 10 previous occasions. When he opened a loading dock overhead door, he was struck in the face with a cast-iron door roller that had separated from its track. The appellant raised four issues on appeal; alleged abuse of discretion by the trial court failing to shift the burden of proof to Wal-Mart for failure to preserve and maintain physical evidence; alleged abuse of discretion by the trial court in excluding proffered testimony; error by the trial court in failing to give a jury instruction on *res ipsa loquitor*; and legal error by the trial court for its refusal to shift the burden of proof to Wal-Mart pursuant to *Owens v. Publix Supermarket*. The 1st DCA's decision was a "Per Curiam Affirmed" (which means that the three appellate judge panel affirmed the trial court's ruling without any findings of fact or opinions of law by the 1st DCA).

 **G. Jeffrey Vernis, Esq.** (North Palm Beach) obtained a final summary judgment on behalf of defendant, Luxury Imports of Palm Beach, Inc., d/b/a Lexus of Palm Beach, on a claim brought by a Plaintiff alleging fraud in violation of Florida's Deceptive and Unfair Trade Practices Act. The Plaintiff claims that he went into the dealership, negotiated to purchase a vehicle, and put down a deposit, after the negotiations were complete. The Plaintiff alleged that thereafter, Lexus sold the vehicle to a third party, who increased the price and sold it to the Plaintiff. Defendant asserted that the Plaintiff could not qualify for a loan, and therefore, was required to use a non-traditional lending source. During the Plaintiff's deposition, taken by Mr. Vernis, the Plaintiff admitted that he entered into a purchase agreement which was contingent upon financing. The Plaintiff further admitted that he did not read the documents before signing them, and that he could have, if he had chosen to do so. The Plaintiff further conceded in his deposition that the whole matter could have been avoided had he just simply read the documents prior to signing them. The Motion for Final Summary Judgment was granted in favor of Lexus, finding that the Plaintiff had no evidence to refute his admissions that he did not read the documents, and that he could have avoided the whole matter simply by reading the documents prior to signing them. Lexus had filed proposals for settlement and we have filed Motions to Tax Attorney's fees and costs against the Plaintiff to seek to recover the expenses incurred in the defense of this action.


 **G. Jeffrey Vernis, Esq.** (North Palm Beach) was lead trial and appellate counsel in the case of *Armstrong v. Wal-Mart Stores, Inc.* At trial, the Plaintiff alleged that 12 twenty five pound garden hoses fell off the top shelf, striking him in the head, neck, and shoulders while reading packages on the opposite side of the aisle. The Plaintiff claimed injury to his head, neck, shoulders and wrists, resulting in a herniated cervical disc. He underwent shoulder surgery and bilateral carpal tunnel release surgeries. The trial proceeded over a period of three weeks and the Plaintiff requested between \$900,000.00 and \$1.6 million from the jury. The trial culminated in a defense verdict, finding no liability on the part of Wal-Mart Stores, Inc. Plaintiff's counsel appealed the verdict, arguing, primarily, the denial by the Court of the jury instruction pertaining to *res ipsa loquitor*, among other things. Oral argument was heard on May 9, 2003. On May 14, 2003, the Fourth District Court of Appeal affirmed the jury's findings and the trial court's denial of the Plaintiff's request for a new trial and affirmed the judgement obtained against the Plaintiff be Wal-Mart.

 **Mario E. Lopez, Esq. and David W. Grossman, Esq.** (Miami), obtained a defense verdict in the case of *Solangel and Orlando Vazquez vs. Costco Wholesale Corporation, Inc.*, Case No.: 00-17881 CA 32, in the 11th Judicial Circuit in and for Miami-Dade County, Florida, on June 25, 2003. The Plaintiff sustained a torn rotator cuff of her left shoulder after falling at Costco, allegedly on six drops of marmalade or unknown sauce. The Plaintiff incurred approximately \$40,000.00 in medical bills and asked the jury for \$264,000.00.

MOLD CLAIMS: A QUAGMIRE FOR THE UNWARY



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 Mold can be found almost everywhere, even on the surface of Antarctic rocks. It has been around for millennia and is not going to be eradicated. Instead, an understanding of mold contamination, possible health effects, and remediation protocol are desperately needed. Americans spend anywhere from 75-90% of their time indoors. Therefore, indoor air quality is an issue which effects all of us.

Mold contamination claims were virtually unheard of until a few years ago. Now insurers are inundated with claims and escalating costs. The existence of mold itself has been recognized since Biblical times. The Holy Bible itself prescribes containment and remediation measures.¹ In fact, there is scientific evidence mold first appeared on earth 1.3 billion years ago, which is 1 billion years prior to plant life. In the past five years, however, the public awareness of mold and concern over health related issues has triggered an exponential growth in mold claims throughout the United States, including Florida. Mold-related lawsuits are especially prevalent in California and Texas, where insurance claims have skyrocketed 1,306% in two years. In the past few years, 70% of all mold claims have emanated from the state of Texas. It is important to watch and learn from the precedents being set in that state, including underlying claims handling and litigation of mold actions, both property damage and personal injury. Claims costs can range from \$10,000.00 to \$100,000.00 + to cover testing, remediation, and additional living expenses.

Mold is a ubiquitous substance. Studies indicate three of the common molds will be present in 86% of all air samples and *Stachybotrys* in 6% of all air samples. *Stachybotrys* alone produces more than 163 different mycotoxins. *Stachybotrys* is the most famous of four well-known toxic molds. The others are *Penicillium*, *Aspergillus*, and *Fusarium*. At the present time, 17 toxigenic molds have been identified. There are numerous subspecies of the different molds, not all of which are toxigenic. For example, if your CIH determines that *Cladosporium* is present in a structure, this of and in itself does not tell you whether there is any health threat. *Cladosporium* is the most common fungal agent there is. If only limited sampling is accomplished and not a microbial assay, the *Cladosporium* will not be cultured to the species level. There are a number of different subgroups of *Cladosporium* some of which are capable of producing mycotoxins.

Molds comprise approximately 25% of the earth's biomass², which is a salient reason for establishing credible exposure and reaction guidelines. There are strict guidelines and regulations in place, for example, that govern asbestos exposure. The National Institute for Occupational Safety and Health (NIOSH) recommends occupational standards for

preventing asbestos-related diseases and OSHA standards set permissible exposure limits (PELs). OSHA standards also contain surveillance, medical screening, analytic methods and methods of control. EPA National Emission Standards for Hazardous Air Pollutants (NESHAP) defines acceptable practices for removal and demolition activities that involve asbestos-containing materials.

A significant problem in litigating mold contamination cases has been the lack of state or federal statutes and regulations regarding mold and indoor air quality. Neither the EPA nor the CDC have promulgated regulations regarding mold exposure. In 2001 OSHA withdrew its Notice of Proposed Rule Making concerning indoor air quality. Its proposed rule had aspired to establish standards for contaminants present in indoor air, including molds and fungi. In an attempt to address this problem, at least 14 mold-related bills have been introduced so far this year in six states. Texas leads the number of introductions with eight bills. They range from House Resolution 11, which asks Congress to pursue research to quantify health risks and develop uniform exposure guidelines for mold to HB 329 and SB 243, which would regulate mold assessors and the mediators. Two other bills, HB 747 and SB127, relate to procedures that insurers would use for handling water-damage claims. Connecticut is the only other state with multiple bills, both related to schools. Other states with mold-related legislation include Georgia, Indiana, Massachusetts and New York. In 1993 the state of New York published a document entitled, "Guidelines on Assessment and Remediation of Fungi in Indoor Environments." This document addresses health issues, environmental assessment, remediation, and health hazards relating to mold issues. It provides the only instructive policy and is cited extensively by those addressing goals for mold cleanups. It is important to remember that mold is a living organism with a survival mechanism. Recent studies have shown certain types of mold can "sense" moisture 40 feet away and will travel to the water source.

The sheer number of different types of mold, by some estimates of over 100,000, makes the task of determining harmful levels of exposure to specific molds a daunting undertaking. Molds are microscopic and only become visible when individual structure or spores accumulate. They are referred to as "colony forming units" or CFUs. There is a wide diversity of opinion when experts even try to define what type of exposure has the potential for serious human health effects. There is a significant variation among the 100,000 + mold species, with respect to their propensity for promulgation and precipitating adverse health effects. The pendulum swings just as wide when it comes to the amount of mold various people can endure being exposed to without evidencing health effects. Beyond these variants, are questions regarding the synergistic effects of mixing various molds. While a particular mold in isolation may not produce a toxic reaction, mixed with select other mold species, they may become highly toxic.

Who is a target for mold-related lawsuits? Just about anyone involved in construction or maintenance of a structure, including general contractors,

home builders, building subcontractors, architects, engineers, HVAC companies, real estate agents, prior owners, and management companies. Insurance companies are a prime target for breach of contract suits, and alleged bad faith.

Residential water damage claims were routinely handled by an emergency service company and contractor prior to 1999. Claims handling generally involve drying and restoring the area damaged by water, homes were rarely deemed uninhabitable, and health concerns about mold following a water damage loss were almost never raised. Today, all that has dramatically changed. After a water intrusion problem, if the proper remediation is not instituted within 24-48 hours, the question is not whether mold will develop, but what type(s) of mold. Some mold actually germinate in as little as 4-12 hours.³

The nature of water-damage claims has not changed in the past few years but increased homeowner and tenant awareness of mold has led to increased scrutiny regarding claims handling procedures.

Just because a person has a license to practice in their field, does not mean they are qualified to advise you regarding your potential mold contamination claim. For example, when hiring experts, generally a Certified Industrial Hygienist (CIH) should be the first expert retained. A CIH is a member of the American Industrial Hygienist Association (AIHA) who after acquiring experience points, is permitted to take a multiple choice exam. With a passing score, the designation of CIH is conferred. The applicant, unfortunately, does not have to have any experience in mold investigation. The AIHA recently started a sub-specialty called "Indoor Air Quality." Less than 200 CIHs nationwide applied for this category within their own organization. A recent exam did not have one question on mold investigation. The industry itself has several organizations, such as the American Indoor Air Quality Council, that offers certification programs. A recent exam included 200 questions on mold. It is essential that prior to retaining an industrial hygienist, you ascertain his specific experience with mold. Mold differs substantially from another indoor air problem, asbestos. Yet, a number of firms and individuals have simply moved from asbestos containment and removal to mold remediation. The protocol, however, is different so don't assume because an expert has tremendous experience and credentials with asbestos, he can, like an overlay, transfer to mold contamination. A number of articles in popular publications equate the understanding of the asbestos problem and its removal with mold contamination and remediation. This reasoning is significantly flawed. Asbestos describes six naturally occurring fibrous minerals found in certain types of rock formations. Asbestos was a desired component part of products while mold is not a product. Studies have shown intact and undisturbed asbestos materials do not pose a health threat.⁴ Mold contamination must be eliminated or the problem will spread. Remember, mold spores proliferate. They may be dormant until the correct ambient air conditions exist, which may take years. The EPA administrator issued an "Advisory to the Public on Asbestos in Buildings" in 1991. That document summarized EPA's policies

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for asbestos control, including a cautionary warning that "removal is often not a building owner's best course of action to reduce asbestos exposure. Improper removal can create dangerous situations where none previously existed."⁵

Mold poses an entirely different challenge. We don't have the guidance of published standards to rely on. There is considerable controversy among the experts themselves regarding the health hazards of being exposed to mold. Experts are grappling with the problem of how much exposure is too much and that depends on a variety of factors, including the types of mold, the age of the individual, other health-related problems the exposed person may have, such as an impaired immune system.

Although all of us are exposed to molds on a daily basis, the effects on health generally depend upon the type and amount of mold exposure and the individual. Some individuals do not experience health reactions from exposure to mold, while others experience one or more of the following: infections; allergic/immunologic reactions, and toxic effects. Allergic reactions are the most common health problems associated with exposure to mold. The reaction can range from a mildly uncomfortable feeling to life threatening, as in a severe asthma attack. Some common signs or symptoms of an allergic reaction include watery eyes, runny nose and sneezing, nasal congestion, itching, coughing, wheezing, difficulty breathing, headaches and fatigue. Although infection for molds is not as common as allergies, there have been noted several types of mold-generated infections. These include Aspergillosis in susceptible people and allergic fungal sinusitis. To date, toxic reactions are the least studied and understood health problems caused by molds. There have been reports of cognitive dysfunction, impaired or altered immune function, esophageal cancer, kidney cancer, liver cancer and testicular cancer. According to Dr. Andrew Campbell, a specialist in immune toxicology and Medical Director of the Medical Center for Immune and Toxic Disorders in Houston, Texas, there are mycotoxins that can produce liver cancer with an 8 year latency period. That means only after that protracted length of time will symptoms become evident and the cancer detected. Medical evidence such as this makes initial claim evaluation with proper documentation crucial. It must be kept in mind when evaluating the property damage aspect of claim, that a personal injury claim may follow many years thereafter.

As you become acquainted with mold-related claims, you will find it is not the older commercial buildings and residences that are likely to experience mold growth. Rather buildings constructed in the 70s through the present day are mold breeding grounds. Engineers opine that due to sealed windows and tighter building envelopes, which have become the norm since the energy crisis, indoor mold growth has proliferated.⁶ The theory is that because buildings have become dependent on their heating, ventilation and air conditioning systems (HVAC) to maintain the desired climate within the buildings, the HVAC systems are forced to re-circulate contaminated air which drives the potential for

mold growth and proliferation.

I would urge you to keep an open mind when hearing statements, such as, "there is no conclusive evidence linking mold to health effects." Statements like this must be clarified. There is conclusive evidence that certain molds are harmful to human health. The problem is, at present, there are no biomarkers (bloods tests) that can prove an individual has been exposed to mold. Traditional means of proving the correlation between exposure and symptoms is impossible. The "no conclusive evidence" argument is usually referring to the Centers for Disease Control position on inhaled *Stachybotrys*, which is a very particular issue. The argument is there is no scientific evidence that mycotoxins produced indoors by *Stachybotrys* are a danger to humans through inhalation as opposed to ingestion. That doesn't mean it has been proven safe, it just means it has not been proven harmful in the academic forum of peer review and publication in preferred journals. It is analogous to the FDA studying a drug for years before ascertaining whether it is safe for human ingestion and whether it produces the desired effect without catastrophic side effects. Dr. Stephen C. Redd, Chief, Air Pollution and Respiratory Health Branch, National Center for Environmental Health, CDC, testified before the Subcommittees on Oversight and Investigation and Housing and Community Opportunity on July 18, 2002. As part of his statement, he testified he was the lead CDC scientist on air pollution and respiratory health at the CDC. Dr. Redd testified that molds can cause illnesses when people are exposed to extensive mold growth indoors. For example, the Institute of Medicine (IOM) concluded that airborne fungal allergens were most often associated with allergic diseases, such as allergic rhinitis/conjunctivitis, allergic asthma, and hypersensitivity pneumonitis. The IOM further concluded there is sufficient evidence of an association between exposure to mold and exacerbations of asthma. At this time, there is inadequate evidence that molds cause people to become asthmatic.

Dr. Redd, in testifying before the Subcommittees, stated the CDC had documentation that molds can cause infections in susceptible people, particularly in hospital settings where 9% of hospital-acquired infections are caused by fungi. Respiratory infections, due to inhalation of the Fungus *Aspergillus*, have been documented primarily in immunocompromised individuals. Molds have also been associated with some cancers. Two mold-produced toxins (aflatoxin and ochratoxinA) have been classified by the National Toxicology Program as human carcinogens (<http://ntp-server.niehs.nih.gov/>). Chronic ingestion of these toxins from eating contaminated foods have been associated with liver and kidney tumors in both animals and humans.

In 1999, the CDC's occupational health experts began a five year program on work-related asthma in offices and school with an emphasis on moisture and mold exposure. To date, the CDC has determined there were significant relationships between reports of work-related respiratory disease and visual assessment of water and mold-damage in two studies they conducted; and there were significant relationships between indicators of mold and chair

and floor dust on a work-related respiratory symptoms. Dr. Redd concluded his testimony by stating that because molds can be harmful, the CDC concurred with the general recommendations of EPA and FEMA, which offer information on preventing and cleaning up mold growth in indoor environments. It is extremely important to recognize the jury is still out on all the detrimental health effects that can be caused by mold exposure. A rational common sense approach must be taken to investigating mold claims, which in large measure, will depend upon the selection of competent, bonified experts. Additionally, even if health effects are not a primary issue in a claim, health is still an issue for other reasons, such as indemnification, according to an insurance policy, and stigma when owners try to resell property.

What type of experts you need to retain will depend on the outstanding issues. For example, in one case, how a mold got there may be the focal point. In that case, you may look towards industrial engineers, architects, and water intrusion experts. In another case, you may not be arguing liability, but rather whether the structure needs to be razed and containment procedures utilized or whether a mold remediation specialist can contain the spread of the mold by removing infected areas not susceptible to cleaning techniques.

This article is intended to provide a general overview of mold contamination cases. In future articles, the following topics will be discussed: Ensnaring Loss Issues in First-Party Property Mold Claims; Causes of Action including negligence, professional malpractice, strict liability, breach of implied and express warranty, constructive eviction, breach of contract, fraud, failure to disclose and sale of property, worker's compensation; regulatory issues; how to determine if a "expert" is truly an expert in mold related issues, including certified industrial hygienists, civil engineers, mold remediation companies, and medical experts; spoliation of evidence claims.

If you have any questions pertaining to mold contamination claims, including the selection of experts, please do not hesitate to contact me at JFNiven@Florida-Law.com.

¹The Holy Bible, Leviticus, 14:33-14:57 (St. Joseph's Edition).

²Sandra Mc Meel R. Kreutzer, "Fungi & Indoor Air Quality" Health and Environment Digest, Vol 10, No. 2, (May/June 1996), Pp. 9-12.

³Pamela J. Davis, *Molds, Toxic Molds and Indoor Air Quality*, March, 2001, CBR Note. Vol. 8, Number 1, ISBN: 1-58703-133-7, Page 2.

⁴*Building Air Quality, A Guide for Building Owners and Facility Managers*, US Environmental Protection Agency, Office of Air and Radiation, December, 1991, ISBN: 0-16-035919-8, Appendix D, Asbestos, Page 147.

⁵*Building Air Quality, A Guide for Building Owners and Facility Managers*, US Environmental Protection Agency, Office of Air and Radiation, December, 1991, ISBN: 0-16-035919-8, Appendix D, Asbestos, Page 148.

⁶Nadine Mary Post, *Containing Noxious Mold*, ENGINEERING NEWS RECORD, May 3, 1999.

NEWS about THE FIRM

WEB SITE - Please visit our Vernis & Bowling Web Site at: www.Florida-Law.com

Announcements & Speaking Engagements

VERNIS & BOWLING IS PLEASED TO ANNOUNCE:

Vernis & Bowling held a CEU Seminar in Ft. Lauderdale, FL on Friday, June, 6, 2003

Vernis & Bowling held its Annual Firm Retreat in Orlando, FL, June 20-22, 2003

G. Jeffrey Vernis (North Palm Beach) was a guest speaker at the National Restaurant Association's Risk and Safety Executive Group's Annual Meeting on July 23, 2003. Mr. Vernis discussed strategies and preventative measures for liability exposures resulting from coffee/food burns.

Patrick Gonyea (Miami) was a guest speaker at the Florida Association of Self Insurance Annual Convention in Naples, Florida on July 29, 2003. Mr. Gonyea provided an update on Employment Practices and Sexual Harassment

Patrick Gonyea (Miami) was guest speaker at the South Florida Hospitality Human Resources Association, Labor & Employment Law Seminar held at the Mandarin Oriental Hotel in Miami on Wednesday, August 13, 2003

G. Jeffrey Vernis (North Palm Beach) is scheduled to be a speaker at the Florida's Public Risk and Insurance Management Association's Annual Convention in October, 2003. Mr. Vernis is scheduled to speak on public liability.

VERDICTSEARCH, Florida Reporter June 2003 Edition selected **Terry Dixon's**, Vernis & Bowling of Central Florida, P.A., defense verdict in the case of *Wilson v. Housing Authority of the City of Orlando* as its "Verdict of the Month".

Vernis & Bowling, upon request, offers national, in-house accredited and non-accredited seminars for its clients.

Please call or email Director of Client Services & Development - Tammy Bouker (954) 648-8552 / TBouker@Florida-law.com

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The information contained herein is not to be construed as legal advice or opinion. We provide such advice or opinion only after being engaged to do so with respect to particular facts and circumstances.

This publication may be considered "advertising material" under the rules of professional conduct governing attorneys in some states.

The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

We are pleased to announce the addition of the following attorneys to the Vernis & Bowling Team:



WILLIAM J. RINALDO, ESQ.
(Clearwater)
WRinaldo@Florida-Law.com

William was born in Oswego, New York on August 5, 1971. He was raised and attended school in Zephyrhills, Florida. He attended the University of South Florida (U.S.F.) where he graduated with a Bachelor of Science in Finance in 1996. While at U.S.F., he was an active member and Treasurer for the Pi Kappa Alpha Fraternity.

William obtained his J.D. from Nova Southeastern University in 1999. While in law school, William was the Treasurer of the American Bar Association/Law School Division and served as the Director of the Voluntary Income Tax Assistance Program. Since being admitted to the Florida Bar, he has been active in the community such as providing pro bono work through the Pro Bono Program of the Tenth Judicial Circuit in and for Highlands County, Florida. William has donated his time to charitable organizations such as the Kiwanis, March of Dimes, and United Way.

William has extensive experience in Chapter 7 Bankruptcy, Chapter 11 Bankruptcy, Chapter 12 Bankruptcy, Chapter 13 Bankruptcy, Asset Protection, Entity Formation, and Business Consulting. William is admitted to practice law in all State Courts in Florida, the Federal District Court for the Southern District of Florida, and the Federal District Court for the Middle District of Florida.



PAUL L. HAMMOND, ESQ.
(Miami)
PHammond@Florida-Law.com

Paul Hammond was born in Albany, N.Y. on August 22, 1976. He graduated from the University of South Florida in 1998 with a degree in Speech Communication. Paul graduated from the Shepard Broad Law Center at Nova Southeastern University where he obtained his J.D. in May of 2002. During his academic career at Nova Southeastern University, Paul was a member of the Moot Court Honor Society, and served on the executive board of this honor society for one year. Paul was also a member of the Nova Southeastern University Law Review. While in law school, Paul also gained valuable and rewarding experience volunteering with both the Broward Bar Association, and the Literacy Coalition of Broward County. Paul was recently admitted to the Florida Bar in September of 2002.

Paul is currently practicing in the General Liability Division of our North Miami Office. Vernis & Bowling's General Liability division serves a wide array of clients in the practice areas of legal and medical malpractice, nursing home litigation, premises liability cases, personal injury, and PIP Litigation.

COURTS ADMITTED TO PRACTICE:
All Florida State Courts.



JONATHAN A. BERKOWITZ, ESQ.
(North Palm Beach)
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Jonathan was born in Brooklyn, New York. Mr. Berkowitz graduated from the University of Michigan with a Bachelor of Arts Degree in Political Science and Philosophy in 1988, and from Valparaiso University School of Law with a Juris Doctor in 1991. Mr. Berkowitz was initially admitted to the State Bar of Michigan in 1991 and admitted to the Florida Bar in 1994. Mr. Berkowitz was also admitted to practice before the U.S. District Court for the Western District of Michigan in 1991, the United States Court of Appeals, Sixth Circuit, in 1994, the United States District Court for the Southern District of Florida in 2000, and the United States District Court for the Middle District of Florida in 2003. His professional memberships include the State Bar of Michigan; The Florida Bar; Florida Defense Lawyers Association; Defense Research Institute; Palm Beach County Bar Association, and The International Legal Fraternity of Phi Delta Phi. Mr. Berkowitz has extensive experience in all facets of liability defense; insurance coverage disputes; first party litigation; medical malpractice; and product liability claims. Mr. Berkowitz attended the intensive trial program offered by the National Institute of Trial Advocacy and has presented a lecture on PIP to Progressive Casualty Insurance Company. In his career, Mr. Berkowitz has been counsel on many contested jury trials and bench trials. Mr. Berkowitz is recognized as an AVTM rated attorney by Martindale-HubbellTM, the highest rating attainable. Mr. Berkowitz concentrates his practice in medical malpractice defense, general civil liability insurance defense, prod-