

COUNSELOR

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Indoor Air Quality; Mold and Other Toxins Give Rise to Litigation

by Frank C. Sutherland

You have probably heard of “sick building syndrome” by this time. If not, you have certainly heard of the evacuation of schools, commercial buildings or residences, due to the presence of mold or other airborne toxins. It looks as though you may be hearing more reports of this kind in the coming months and years.

Commentators are reporting a significant increase in litigation associated with indoor air contamination in the places where we live and work. For example, an employee of the State of Florida recently developed severe pulmonary illness, which doctors indicate requires

a lung transplant. The employee brought a workers compensation claim, and established that her illness was caused by the presence of mold spores and other contaminants in her workplace. Late last year, a Florida appellate court upheld an estimated \$600,000.00 award for past and future medical expenses in that case. Health risks and associated liability of this proportion give rise to concerns on many fronts.

Concerns over indoor air quality, however, usually arise under less dramatic circumstances. Occupants of a building, be they employees, students, tenants or homeowners, may

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first experience symptoms similar to a common cold or seasonal allergies in response to elevated levels of indoor air contaminants. The World Health Organization has identified eight nonexclusive symptoms that may serve as warning signs: mental fatigue and headaches; irritation of the eyes, nose and throat; dry mucous membranes and skin; respiratory infections and coughs; hoarseness of the voice and wheezing; redness and inflammation of the skin; hypersensitivity reactions; and, nausea and dizziness. When building occupants experience such symptoms on an acute or recurring basis, symptoms seem to be linked to time spent in the building, and no specific cause can be identified, the situation may be recognized as a case of sick building syndrome.

Medical and health professionals often identify a situation as a case of sick building syndrome when there appears to be a number of possible causes for adverse health conditions, but no single cause is clear. In this regard, commentators commonly identify at least three general categories of contaminants. One category of contaminants includes

chemicals from outdoor sources. For example, pesticides or other pollutants may find their way into a building and be trapped in an enclosed area, resulting in unsafe levels of concentration. A second category of potential contaminants includes chemical agents from indoor sources, such as modern adhesives, carpeting, copy machines and cleaning fluids.

The category of indoor air contaminants that has received the most attention in recent months includes biological contaminants, most notably mold. Mold is the biological contaminant most often cited as a significant contributing cause to sick building syndrome. Varying levels and types of molds are found in soils and plants, and can grow on a wide variety of porous substances, as long as there is a sufficient food source, moisture and oxygen. For this reason, some authors have pointed to modern building practices as a significant cause for the increase in indoor air quality issues. New energy efficient (read airtight) homes and buildings, in which porous building materials such as sheet rock and ceiling tiles are used, may serve as prime breeding grounds for mold.

When considering the cause of health problems, it is also important to note the psychological, or “psychogenic,” aspects of sick building syndrome. Some academics studying this phenomena observe that, when a group of people become ill, others may be inclined to feel ill themselves, or associate unrelated health problems with a particular building or location. Thus, it is important to bear in mind the potential impact of psychological factors when addressing indoor air quality issues.

There are a number of practical considerations we can all keep in mind, in response to increasing concerns regarding indoor air contaminants. The old adage that an ounce of prevention is worth a pound of cure is readily applicable when dealing with mold or other airborne toxins. For example, be certain that air intakes are pumping fresh air, not polluted air, into a building. This may be of particular concern if intake vents are located near parking areas or courtyards where there is a high volume of vehicular traffic.

With respect to mold, periodic visual inspections of areas that are susceptible to mold growth serve as a basic and inexpensive means of helping to protect against potential problems. Taking steps to prevent the increased moisture levels that contribute to mold growth, whether from roof leaks,

Patent Holders Beware: What The Government Wants, It Can Take!

by Theodore J. Long

The U.S. government can reach past a patent owner and contract with others to produce the patented product for the government.

Traditionally, patents offer their holders the exclusive right to produce, market and sell a product. However, whenever the U.S. government wishes to obtain a patented product at a lower price than that offered by the patent owner, it can have that product produced by a vendor of its own choosing, at the lowest price it can negotiate or obtain through a bidding process.

While the government may take the patent for its own use, the patent holder retains all rights to the patent, and may continue to manufacture and sell it on the open market. The taking is only for the government's use. The patent remains in force against all other parties.

When a patent is taken by the government, the patent owner's sole legal remedy is an action against the United States in the U. S. Court of Federal Claims. There, the patent owner can recover reasonable and entire compensation for the use of the patent. Although the government is entitled to raise the same invalidity and non-infringement defenses available to a non-government infringer, the patent owner's recovery in most cases is limited to a "reasonable royalty".

In most cases, it may be in the patent holder's best interests to attempt to negotiate a license with the government before the patent is taken. Such negotiations may establish an acceptable royalty rate for both parties. The government then avoids the substantial risk that the patent owner will be able to establish a higher level of just compensation by litigation. If the government's action results in a substantially increased market for the patented product,

improper ventilation or other sources, is also advisable. In the case of new construction, proper precautions should be taken throughout the construction process to avoid excessive moisture accumulation caused by rain, snow or humid conditions. Once new construction is completed, as with existing buildings, property owners should inspect heating, ventilation and air conditioning systems on a periodic basis, the frequency and nature of such inspections being dictated by site specific factors.

In circumstances where there is reason to suspect unacceptable levels of indoor air contamination, caution is obviously warranted. No one wishes to see individuals suffer adverse health conditions. Recent media reports clearly illustrate that it may, in fact, be necessary to evacuate contaminated areas.

Upon detection of a problem, a property owner should immediately notify the appropriate insurance carrier so that delay of notification may not serve as a basis for denying insurance coverage. Whether insurance coverage exists in the first place is an entirely separate question. A portion of the litigation arising from indoor air contamination involves the question of whether insurance policies cover health care costs, remediation costs and other liability associated with indoor air quality problems. Depending upon individual circumstances, it may be advisable to make inquiries with legal counsel or an insurance agent regarding the existence of coverage, prior to the time that indoor air quality issues arise.

If you have reason to believe that indoor air contaminants have reached unacceptable levels in your workplace, apartment building, school or home, it is time to contact competent professionals. Beyond visual inspections, much of the testing and evaluation necessary to determine the source and nature of an indoor air quality problem is outside the competence of most lay persons. Prompt identification, followed by remediation based upon the advice of professionals, will help to ensure that you will be able to breathe freely once again. ■

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the agreed compensation to the patent owner may be both considerable and beneficial.

For example, when the drug, Cipro[®], began to disappear off the shelves in the heat of the Anthrax scare, the government had the option of contracting with several other companies – all non-patent holders – to meet the government’s, and ultimately the public’s, anticipated needs for the product. Instead, U.S. Health and Human Services Secretary Tommy Thompson was able to negotiate a more advantageous deal with the patent holder, Bayer AG.

In this situation, other companies were reportedly in a position to produce a generic substitute for Cipro[®]. If Bayer had not cooperated at the bargaining table, Thompson had authority under the law to authorize those companies to produce the generic product for the government, subject only to Bayer’s right to seek reasonable and entire compensation from the government for its damages.

Thompson’s leverage came from a law passed in 1918. The United States was in the final stages of World War I and needed more gunships. However, the shipbuilders were battling over patent rights in the courts. Acting Secretary of the Navy, Franklin D. Roosevelt, wrote a letter to the Chairman of the Senate Committee of the Navy, noting that “manufacturers are exposed to expensive litigation, involving the possibilities of prohibitive injunction, payment of royalties, rendering of accounts, and payment of punitive damages, and they are reluctant to take contracts that might bring severe legal consequences.”

Almost immediately, the U.S. Congress passed a law that enabled the government to get its gunship orders filled despite patents that stood in the way. That law, since amended and clarified to its present form (28 U.S.C. § 1498), now provides:

“[W]henever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner’s remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.”

There is a delicate balance between the needs of the government and the rights of patent holders. In the CIPRO[®] case, Thompson’s

negotiations allowed Bayer to retain the CIPRO[®] business while succeeding in saving U.S. taxpayers a reported \$82 million.

The threat of government intervention, and the resulting litigation with the U.S. Justice Department to obtain “reasonable compensation”, could inhibit significant investment in the development of products that could benefit national health or security.

Companies invest in research and product development with a profit motive. When there is a threat of government intervention, profit may be diminished. The danger is that companies will invest in areas least likely to attract government interest, creating a deficiency of products that could aid in the battle against terrorism and potential health crises.

If the government has the right to take a patent at whim, why should inventors continue to go through the patent application process? Patents still offer considerable rights to patent holders. When the government takes and effectively infringes on a patent, the holder must be fairly reimbursed. Other parties have no right to infringe and may be subject to injunction, considerable damages and penalties if they do. A patent remains a valuable investment for the inventor. ■

Theodore J. Long is a member of the Patent, Trademark and Copyright Group at Lathrop & Clark LLP, where he counsels clients on patents, trademarks, copyrights, unfair competition and the licensing of intellectual property.



Notes From The Chair

My turn as chair of our partnership has run, and the position is rotating to a fellow member of our executive committee, John Frank.

I have been fortunate. For the past five years, I have witnessed from the special position of chair the challenges and opportunities of our times. For our firm, as for our profession and society in general, it has been a remarkably dynamic period. During this time, we have changed quarters. We have integrated to a large degree the advances in communications and technology which have so greatly affected all of society. We have seen people join and leave our firm. We have practiced law in a changing legal environment.

Throughout this same period, however, we have remained committed to fundamental values which have not changed, which underlie our organization and which continue to guide us—the rule of law, professional integrity, and service to our clients and communities.

Change is often a good thing. For my part, I look forward to the challenges and opportunities which will be presented to me as my term expires and I am able to re-direct my attention and energies. Similarly, I know that life within our firm will continue to be influenced by events and forces within our profession and our world. But I am equally certain that this change will be given direction and meaning by the same values which have marked us throughout our history and served us so well. ■

William L. Fahey



Ventures

John Frank was named as chairperson of the Planned Gifts Advisory Committee of St. Marys Hospital and Care Center Foundation, January 9, 2002. ■ **Shannon Day** and **David Rohrer** wrote the chapter on School Law for the State Bar Annual Survey of Wisconsin Law. ■ Members of the firm's Real Property, Probate, and Trust Team, the Business Law Team and the Intellectual Property Law Team participated in the 2002 Governor's Conference on Economic Development at the Concourse Hotel in Madison, Wisconsin on February 13-15, 2002. The firm's booth was well attended by conference participants and allowed the firm to meet many new businesses and development corporations. ■ **Jeffrey Clark** appeared at two conferences sponsored by the South Central Wisconsin Alzheimer's Association. In June 2001, Jeff presented "Legal and Financial Planning for Alzheimer's Families" at St. Claire Hospital and Health Services in Baraboo and, in November 2001, he presented "Legal Planning and Alzheimer's Disease" in Reedsburg. Jeff is a member of the National Association of Elder Law Attorneys and the State Bar of Wisconsin Elder Law Section. ■ **David Uphoff** is also a member of the State Bar of Wisconsin Elder Law Section. David made two presentations in October 2001 entitled "Estate Planning: Having Your Affairs In Order" to the Department of Workforce Development at its Team ASD 2001 Conference. David also participated in September 2001 at the Third Annual Caregivers Forum of the East Madison/Monona Coalition of the Aging, Inc. presenting "Know Your Powers of Attorney" and volunteered for the *Ask a Lawyer* session at the end of the forum. ■ **Shelley Safer** and **Ted Long** were named in the 2001 Executive Register of *In Business Magazine*, a listing of Dane County's most community-oriented executives. ■ **Shelley Safer** presented a trademark law seminar on February 28, 2002, at Westfalia-Surge, Inc., in Naperville, Illinois. ■ **Jerry McAdow** was elected President of the Dane County Public Affairs Council. The Council meets monthly to listen to speakers discuss, and to discuss with speakers, a variety of issues and topics involving state, county and city government and public education. Membership in this Council consists of area business leaders. ■ **Ken Axe** was appointed to a three-year term on the board of Downtown Madison, Inc. ■ **Ken Axe's** article, "Creation, Perfection and Enforcement of

Security Interests in Intellectual Property Under Revised Article 9 of the Uniform Commercial Code” was published in the January 2002 issue of *The Banking Law Journal*. ■ **Ken Axe** and **Frank Sutherland** will be speaking at an upcoming seminar sponsored by Lorman Education Services on the terms of the new Article 9 of the Uniform Commercial Code. ■ **Mike Julka** participated in a forum panel entitled “Free Speech-Zero Tolerance” presented by the Wisconsin Academy of Science, Arts and Letters on Friday, October 12, 2001. The Wisconsin Academy Fall Forum “Private Rights, Public Good: The Bill of Rights in Our Lives” was held at the Midwest Express Center in Milwaukee. Besides Attorney Julka, the forum panels included a wide-range of prominent individuals and area professionals, including keynote speakers James Sensenbrenner, Shirley Abrahamson and Russ Feingold. ■ **Joanne Harmon Curry** has agreed to participate in the National School Board Association’s IDEA reauthorization committee comprised of special education experts from around the country who will identify the changes that need to be made within IDEA and “shape the debates surrounding the reauthorization of the Individuals with Disabilities Education Act (IDEA)”. ■ **Joanne Harmon Curry, Mark Herman** and **David Rohrer** presented at the “Hot Topics in Wisconsin School Law” seminar in March 2002 sponsored by Lorman Education Services. This seminar provided information about current legal issues facing school districts. ■

New Faces

Shana R. Lewis is an associate with Lathrop & Clark LLP and earned her B.A. in Political Science and a Certificate in Women’s Studies from the University of Wisconsin in 1996 where she graduated with distinction. In 1999, she received her J.D. from the University of Wisconsin Law School where she graduated *cum laude*. During law school, Shana served as an Articles Editor and the Senior Note and Comment Editor for the *Wisconsin Women’s Law Journal*. Shana has experience representing individuals and employers in public and private sector employment law. In this capacity, she has appeared before the Wisconsin Personnel Commission, the Department of Workforce Development Equal Rights Division, and the Department of Workforce Development Worker’s Compensation Division. She has also represented clients in public and private sector labor law, appearing before various arbitrators and hearing examiners with the Wisconsin Employment Relations Commission and the National Labor Relations Board. Shana is a member of the Wisconsin, Dane County, and American Bar Associations. She is also a member of the Legal Association for Women, the National Employment Lawyers Association, and the American Trial Lawyers of America. Shana volunteers as a

Supervising Attorney in the Unemployment Compensation Appeals Clinic, an organization that pairs law students with indigent clients in need of representation before the Wisconsin Department of Workforce Development Unemployment Insurance Division. In her spare time, Shana is a fledgling golfer who has embraced the game with great enthusiasm. During the summer months, she and her husband can be spotted at various golf courses around south-central Wisconsin. ■

Ann C. Krummel is an associate with Lathrop & Clark LLP and focuses her practice on family issues and conflict resolution. She joins Lathrop and Clark after ten years on the bench presiding as Court Commissioner in Family, Juvenile and Small Claims for Columbia County. She is sought as a trainer and professional education presenter for judges, attorneys and law enforcement officers. Her work has received recognition by the Domestic Violence Coalition of South Central Wisconsin and the State Bar of Wisconsin. Ann has served as President of the Wisconsin Family Court Commissioner’s Association and Columbia County Co-Ordinated Community Response Task Force. She is a contributing author to the Encyclopedia of American Law, State Bar Family Law Journal, and the Lodi Enterprise. She recently served on the State of Wisconsin Child Support Guidelines Advisory Committee. A native of Madison, Ann received her law degree from the School of Law at the University of San Diego. She received her undergraduate degree with Highest Honors from the University of San Diego in La Jolla. Her favorite haunts include the Ice Age Trail in Lodi and the Art Institute in Chicago. ■

Jennifer A. Kolinski is a paralegal in Probate and Trust Administration with Lathrop & Clark LLP and received her honors paralegal certificate from Roosevelt University in Chicago, Illinois in 1994. She received her Bachelor’s Degree from UW-Madison majoring in Behavioral Science and Law in 1993. Jennifer currently works in the Madison office and her work involves probate and trust administration, fiduciary and individual income tax preparation, and estate planning, where she has six years experience. Jennifer also has experience working as a paralegal in the family law practice area. ■

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