

## OMNIBUS

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OHRENSTEIN & BROWN LLP  
COUNSELORS AT LAW

## Today's Indoor Environmental Pollutants Bring Greater Liability Threats



By  
Bennett R. Katz, Esq.

Indoor environmental pollutants such as E. coli, norovirus, staph infections (staphylococcus aureus), and Methicillin Resistant Staphylococcus Aureus (MRSA) are increasingly being encountered in our environment and causing significant health problems. The news media has reported that one of every 20 people who go into a US hospital picks up a staph infection.<sup>1</sup> Outbreaks of illness from these types of bacteria have been commonplace in the hospital setting; more recently, however, there have been outbreaks in non hospital-related environments such as hotels, sports facilities, prisons, and cruise ships. Norovirus, the bacteria identified as causing outbreaks on cruise ships, was to blame for the closing of the Hilton Hotel near Dulles International Airport last January. And, E. coli outbreaks caused the closing of Taco John and Taco Bell franchises in cities around the country. How can businesses of all kinds safeguard their patients, customers, and/or employees while minimizing their liability?

### Burden of Proof

In order to state a claim for negligence based upon the contraction of an illness or infection (caused by an environmental toxin), the plaintiff must prove that

1) the defendant was aware or should have been

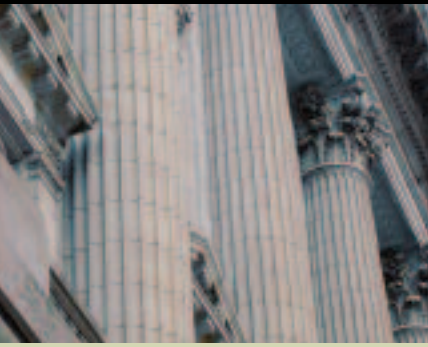
aware of the infectious source within the premises;

- 2) the defendant committed a negligent act or omission, which exposed the plaintiff to the infection; and
- 3) the plaintiff suffered an incident or illness due to the defendant's negligence.

Since some infections can occur in the absence of negligence, the burden of proof falls on the plaintiff. Successful medical malpractice cases will typically involve an "obvious deviation from accepted standards" such as failing to provide prophylaxis antibiotics prior to surgery, or where there is a "traumatic event," e.g., a nurse uses a non-sterilized towel to stop blood at a surgical site and an infection subsequently develops. In cases where the plaintiff is unable to point to an obviously negligent act on the part of the physician or medical staff, it has been difficult to recover for injuries caused by a common staph infection.

Regardless of whether the action involves MRSA, mold or noroviruses, experts play a critical role in environmental toxins litigation. In every case, before an expert will be permitted to testify or to submit an affidavit, the Court will evaluate the expert's methodology and his resulting conclusions to make certain that the expert, whether basing his testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice

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# Inside Story: Lobbying's New Look

—By Ross Daly, Reporter, Long Island Business News (Excerpts reprinted with permission LIBN, 3/16/07)

## O&B NEWS

In his February 16th column, New York Times' Op-Ed columnist Paul Krugman commented on Michael Brown's RICO case on behalf of Jamaica/Flushing Hospitals. In his column entitled *The Health Care Racket*, Mr. Krugman stated that regardless of what happens in court, the hospitals' lawsuit illustrates "perfectly the dysfunctional nature of our health insurance system." Mr. Krugman goes on to illustrate examples of inequities in our present healthcare system and includes statistics from McKinsey & Company that medical insurance companies spend \$98 billion a year in excess administrative costs while it would cost \$77 billion a year to provide full medical care to all of America's uninsured.

When it comes to lobbying in Albany, things ain't what they used to be.

Lobbyists and government watchdogs alike say it's a whole new game for those seeking influence over New York legislation and policies since the arrival of Gov. Eliot Spitzer and his younger crew. Spitzer's people are "being very careful with their contacts with lobbyists," said Fred Ohrenstein, who heads the government affairs practice of Garden City-based Ohrenstein & Brown. "They don't want to be drawn into the same old game." Ohrenstein, a former state Senate minority leader, has long familiarity with the Albany scene. He recalled years of "heavy politicization of the process" and lobbying based "not enough on the merits."

Now he sees a shift. "You make your phone call, you have your meeting, you talk about the merits and that is the end of it," he said. "At that point, the conversation is not about 'do me a favor.' That is the way lobbying should proceed."

Rachel Leon, executive director of Common Cause New York, cited a "feeling of new energy" and the fact that "the governor is always around." That and an accessible staff mean there's more opportunity for dialogue, she said. "It feels like there are a lot of people you could reach out to to give your opinion," Leon said. The state Legislature appears in tune with the new tone. Legislators have approved a bill that would ban lawmakers and state officials from accepting all but nominal gifts from lobbyists. The bill would also limit how quickly state employees could become lobbyists after leaving public service and



**Mayor Michael R. Bloomberg with Fred Ohrenstein (center) and Senate Majority Leader Joseph L. Bruno**

would ban fees for speaking, with regulations enforced by a revamped state Ethics Commission. Spitzer has pledged to sign the legislation.

"There's a lot in it that's good," said Leon. "It will hopefully make Albany a more ethical environment." However, Leon believes Albany's tradition of closed-door dealing continues. Common Cause supports the total package of changes despite concerns about the strength and independence of the Ethics Commission...

...[Fred] Ohrenstein predicts the legislative moves and the Spitzer administration's approach will have lasting effects. "They will have an influence in changing the method of lobbying over the long term," he said. "The public will gain."

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## Environmental Pollutants *continued from page 1*

of an expert in the relevant field. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

### Legal Standards

In federal courts, experts must satisfy the *Daubert* Standard, which asks whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (U.S. 1993).

New York courts, by contrast, apply the *Frye* Standard, which provides that an expert may testify regarding novel scientific principles, procedures or theories “if the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.” Recently, in *Fraser v. 301-52 Townhouse Corp.*, 2006 NY Slip Op 51855U (September 27, 2006), a New York County Supreme Court held a 10-day *Frye* hearing to determine whether the plaintiffs’ theory of the case – “that mold in their apartment caused them respiratory problems – is generally accepted in the relevant scientific community and whether the methodology used by plaintiffs to measure the mold, was within generally accepted scientific methods.” During the *Frye* hearing, the Court reviewed more than 1,000 pages of expert testimony, and more than 70 scientific articles and books.

Based upon the documentary evidence and testimony, the Court noted that only one of the 70 scientific writings established that indoor exposure to mold causes the symptoms for which the plaintiffs sought to recover. It also determined that the plaintiffs’ expert testimony was unreliable because the scientific papers upon which the expert relied failed to show a causative link between health conditions and damp and/or moldy indoor environments. Finally, the Court found that the evidence

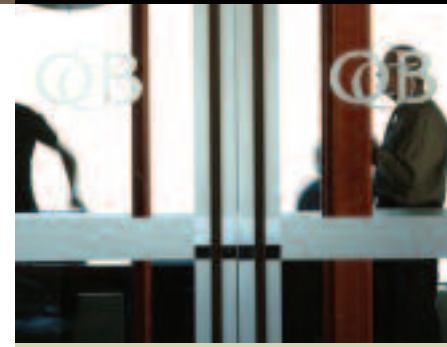
provided no standards for determining what amount of mold is excessive in terms of human health and the indoor environment, and there are no generally accepted standards for measuring indoor airborne mold. As a result, the Court precluded the plaintiff from presenting any expert testimony to the effect that mold and/or damp indoor space causes health problems. This decision is indicative of the conscientious manner in which New York courts undertake a review of expert testimony in cases involving environmental toxins. We’ll have to wait to see if the *Fraser* decision will stand up to appeal.

In a related matter, *Parker v. Mobil Oil Corp.*, 2006 NY Slip Op 7391 (October 17, 2006), the Court of Appeals determined that in toxic exposure cases, a plaintiff’s expert must also provide evidence proving that the level or degree to which the plaintiff was exposed to the toxic chemical has been shown to cause injuries similar to those suffered by the plaintiff. A copy of the decision can be found at [www.law.cornell.edu/nyctap/I06\\_0121.htm](http://www.law.cornell.edu/nyctap/I06_0121.htm).

### Limiting Liability

Owners or managers should be mindful of the ways to limit liability on their premises for exposure to environmental toxins. First, any time a possible environmental toxin exists, premises’ owners should act quickly to detect, identify, and remove the environmental toxin and its source. The premises’ owner must also inform building occupants of the toxin and provide any necessary warnings. Second, when leasing space within a building, the owner should include a provision in the lease making the tenant responsible for maintenance and repairs. The owner should also include a hold harmless clause in all leases, as well as a provision requiring the tenant to procure property and liability insurance.

<sup>1</sup>*AARP Bulletin*, 1/07



## By the Numbers

According to an ABC News report, hospital infections are the fourth-leading cause of death in the United States killing more people than AIDS, breast cancer and auto accidents combined.

“...of every 20 people who go into a US hospital, one of them picks up a staph infection.”

See our cover story for more

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## We've Moved!

Due to present conditions in the Manhattan real estate market, Ohrenstein & Brown, LLP has moved its headquarters to its Garden City, New York location. This move has allowed O&B to consolidate all operations and provide continuous, efficient service to clients of the firm.

Please forward all correspondence to the address below. Our Manhattan phone number, (212)682-4500, will continue to be operational; however, we encourage you to contact us directly at 516-873-6334. Please note, all faxes should be sent to 516-873-8912.

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