

Mold Mania: More Strange Tales From Texas

As legal wrangling continues in a landmark mold case, prosecutors and lawmakers grapple with fraud and insurance reform

Melinda Ballard, the Texas woman who won the famous \$33 million mold liability case against Farmers Insurance Group, has now sued Farmers for defamation, along with Hillco Partners LLC (an Austin public relations firm) and Hillco employee Bill Miller. Ballard says Farmers, Hillco, and Miller have damaged her reputation by accusing her of fraud in the case.

Farmers, which has appealed the original case, is standing by its statements. Its attorneys are optimistic about reversing not just the money



BRETT COOMER

award but the entire verdict, which was actually based not on mold but on the company's supposed bad
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Mold-damaged Texas houses — like this incorrectly detailed EIFS-sided structure — continue to generate news and controversy.

Lead Paint Lawsuits Stumble

Lawyers hoping to nail paint companies for megabucks in lead paint liability had a few bad days in court last fall. In November, a jury deadlocked 4-2 in a suit brought by Rhode Island's attorney general, prompting the judge to declare a mistrial. And in October, a Maryland judge threw out a conspiracy allegation in a lead paint lawsuit brought by trial lawyer Peter Angelos.

Conspiracy issues are an important factor in lead paint litigation around the country, as plaintiffs assert that big paint companies have banded together to hide the dangers of lead paint. It's the same tactic used successfully against tobacco companies to win billions of dollars in damages. If it works against paint makers, the companies will become liable as a group for lead paint-related harms, and individual plaintiffs won't have to establish which company's brand caused their particular injury or illness.

But in Maryland, Judge Joseph McCurdy ruled that "voluminous" documents submitted by attorney Angelos "fail to raise any material facts supporting a conspiracy." The judge

noted that the companies supported university research into paint toxicity in the 1950s, and beginning in 1954 supported a voluntary standard limiting lead pigments in residential paints. Lead-based house paint had largely been withdrawn from the market before Congress banned it in 1978. The judge dismissed entirely Angelos's second suit, brought in the name of one million Maryland homeowners, which claimed that lead paint had reduced household property values. Even if the companies had lied, reasoned the judge, Angelos could not show that the homeowners had based their judgments on any false advertising.

Similar lawsuits remain on the dockets in jurisdictions around the country, however, and Rhode Island attorney general Sheldon Whitehouse has vowed to come back a second time in hopes of finding a more sympathetic jury. If plaintiffs' persistence pays off, analysts say paint companies could take a huge financial hit: Paint company stocks surged the day of the Rhode Island mistrial decision but are likely to slump hard if lawsuits begin to succeed.

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faith in handling a water damage claim. Evidence relating to health effects of mold is rarely admitted in court because the current medical consensus does not support the allegation that mold causes severe illness.

The insurance company contends that the judge in the Ballard case (who was reportedly acquainted with Ballard and had presided over one of her divorces) improperly kept the case in his jurisdiction rather than allowing it to be tried in the county where the house was located. Farmers also claims that the judge refused to let the jury see evidence that Ballard's case was bogus from the beginning. Jeff Beyer, a Farmers executive, told the *Austin Business Journal* that the Ballard situation was "tragically ridiculous" and added, "It's litigation lunacy."

The original lawsuit centered around Ballard's insurance claim for water damage to a wood floor. In a press release, Farmers says that Ballard's intent from the beginning was to make money, not to repair the house. According to Farmers, Ballard submitted inflated bids in the claim, asking the first contractor she contacted to raise his bid from \$89,289 to \$129,950. Farmers says Ballard then obtained additional higher bids from \$139,794 up to \$171,844.50, sums arrived at by simply adding overhead and profit to the already inflated \$129,950 bid. Finally, says Farmers, in order to make the previous bids appear reasonable, Ballard concocted a bid for \$194,269 from a nonexistent company called "Boessling Floors." The jury was not allowed to have this information during the trial or to hear testimony

from a Farmers expert that there was no mold growing under the floor in any case.

Farmers contends that it held a mediation session with Ballard two months after the claim was filed and offered her a \$734,000 settlement — midway between the \$400,000 that Farmers' experts said would repair the damage and the \$1,000,000 price estimate supplied by Ballard's experts. Ballard responded to Farmers' offer by demanding \$10 million, along with unspecified "media rights." Farmers says that the

insurance companies.

"The defendants served as homeowners, independent subcontractors, vendors, and service providers in filing claims, repairing the damage, and selling the homes to each other to repeat the process," said a Texas Department of Insurance news release. "Some homes were flooded more than once."

Legislative moves. Comedy or tragedy, the mold litigation and insurance issues have taken center stage in the Texas legislature, with lawmakers offering reform packages

The jury was not allowed to hear testimony that there was no mold growing under the floor

jury should have had this information before deciding whether to penalize Farmers for failing to negotiate in good faith, but the judge kept that testimony out of the courtroom.

Farmers' appeal of the original judgment is awaiting a decision by a state appeals court. Meanwhile, Ballard's defamation suit is on the docket — in the same county court in which she won the original case.

Fraud ring nailed. Insurance industry groups say Ballard's widely publicized success has inspired an explosion of mold claims in Texas — including some clearly documented cases of out-and-out fraud. In October, Texas prosecutors working with FBI investigators and investigators from the Texas Department of Insurance won a half-dozen guilty pleas and one conviction against a ring of con artists who were buying homes and intentionally wetting and "baking" them to cultivate massive mold growths before submitting false and inflated claims to

that seek both to rein in mold-related profiteering and to provide tighter regulation of insurers. Republican state senators Troy Fraser and Mike Jackson have introduced bills that would require licensing of mold remediators but prohibit insurance companies from denying coverage because of past water-damage claims. Insurance companies would also be prohibited from continuing to sell profitable lines of insurance while abandoning unprofitable lines. According to the *San Antonio Express-News*, Fraser called the mold problem "a manufactured crisis driven by unlicensed and unregulated public adjusters and mold remediators coupled with lawsuit abuse by plaintiffs' trial lawyers." But he also criticized the insurance industry, saying, "Their response has been to hire a public relations firm to say they did nothing wrong. I have a problem with that."

OFFCUTS

The good news is the bugs are dead.

The bad news? The house is gone. The *Santa Cruz Sentinel* reports that workers using a nonchemical high-heat method to “bake” termites out of a house lost control of the process when a propane tank caught fire and exploded, igniting four other tanks. In minutes, the tarp-covered home was reduced to a sooty slab and a pile of charred beams, with firefighters barely able to contain the blaze after it spread to the adjacent hillside. “They exterminated my house,” said homeowner Charles Savoca.

Locked doors proved little use against a Wichita, Kan., burglar

who broke into a home in December by cutting a hole in the garage wall while the family slept upstairs. According to a report in the *Wichita Eagle*, the burglar peeled back vinyl siding and cut through the home’s foam sheathing to enter the garage, then made a smaller hole in the drywall between the garage and the main house and reached through to open the door from the inside. Police called it “a strange way to get inside,” but the method has been reported before in other cities.

The Massachusetts Department of Environmental Protection is considering a proposal to ease the strict soil percolation limit contained in Title 5,

the state law that governs septic systems, says a December report in the *Boston Globe*. Changing from the present 1-inch-in-30-minutes standard to a 1-inch-in-60-minutes rule would open large areas of land in the western and central counties to development. Anti-sprawl advocates oppose the idea.

Fiberglass Loses Cancer Listing

Fiberglass insulation carried a “possible carcinogen” warning label in the U.S. through most of the 1990s, after the International Agency for Research on Cancer (IARC) in 1988 listed glass fiber in its Group 2B classification (“possibly carcinogenic to humans”). Since the original listing, an IARC working group has continued to review the research record, and the fiberglass industry has funded extensive work by independent university and government researchers to pin down the nature of the supposed risk.

Now the IARC has released a 418-page monograph reviewing new and old cancer data on all kinds of “vitreous fibers,” a category that includes rock wool and slag wool along with fiberglass and many industrial-use fibers besides insulation. The 19-member IARC committee decided to take fiberglass insulation out of the “possible carcinogen” category and place it in Group 3, “not classifiable as to carcinogenicity in humans.” Rock wool and slag wool used for home insulation are also in Group 3, but some fibers for high-temperature industrial uses and commercial fire stopping remain listed as possible carcinogens.

IARC said in a statement, “Epidemiologic studies published during the 15 years since the previous review of these fibers in 1988 provide no evidence of increased risks of lung cancer or of mesothelioma (cancer of the lining of the body cavities) from occupational exposures during manufacture of these materials, and inadequate evidence overall of any cancer risk.” In 2000, a U.S. National Academy of Sciences committee made a similar judgment in a review of U.S. Navy fiber exposure standards, saying, “Evidence from the case-control studies demonstrates that there is no significant association between fiber exposure and lung cancer or nonmalignant respiratory disease in the fiber manufacturing environment.”

Pink stuff still irritating. The recommended exposure limit for workers is one fiber per cubic centimeter, a level that is rarely exceeded on site. But even below those levels, people working with fiberglass report itchy skin and irritated breathing passages. A dust mask and protective clothing can help with the discomfort. But there is also non-itchy fiberglass on the market: Owens Corning’s Miraflex, a springy, resilient type of fiberglass that is made by intertwining two types of glass into a single fiber, is reported to produce few airborne fibers and to be much less itchy to work with. The resilient Miraflex also compresses into a smaller package for easier transportation.

PEX Sprinkler System Snuffs Fires in Realistic Test

Canadian researchers have reported encouraging results from realistic fire testing of a home sprinkler system that uses PEX tubing. The system, developed by 30-year plumbing and sprinkler contractor Franz Haase and manufactured under license by Wirsbo (www.wirsbo.com), is designed to integrate with home plumbing. Scientists from Canada's National Research Center installed the tubing and sprinkler heads in the open wood-joint basement ceiling of an abandoned house, then used furniture and other common household combustibles as fuel for a series of fires to assess the sprinkler response.

"After exposure to temperatures above their rated temperature of 93°C (200°F) at 552 kPa (80 psi) for 140 seconds, the pipes and fittings were not visibly damaged, and a single sprinkler head controlled and contained the fire within 1 minute of the sprinkler activation," says the NRC report. "The sprinkler water spray cooled down the fire compartment and limited the damage to the furniture near the ignition source." Although soot deposits formed on the exposed joists and ceilings of the fire rooms, no serious damage was reported. The full report, "Kemano Fire Studies Part 2: Response of a Residential Sprinkler System (Research Report 109)," is available for free download at www.nrc.ca/irc/fulltext/rr109/rr109.pdf.

Pat Coughlin, codes and standards manager for Wirsbo's fire protection systems, notes that the Wirsbo system (trademarked AquaSafe) is not yet listed for an exposed installation like that of the Canadian test. "It costs money to do the testing for the listing, and we haven't gotten around to it yet," he says. But AquaSafe is already listed and on the market for use in aboveground spaces where the tubing



DR. JOSEPH SU, NATIONAL RESEARCH CENTER, CANADA

Canadian researchers have found that low-cost PEX-based residential sprinkler systems can contain fires near their source (inset).

can run protected behind gypsum board walls and ceilings.

Plumber Franz Haase, who holds the patent on the Wirsbo system, notes a number of practical advantages. Installation is quick and simple with the PEX tubing's self-tightening "shape memory" attachment, and there's no need to solder any joints. The flexible tubing readily snakes through framing and has no problem with holes or I-joist punch-outs that don't line up. The tubing layout and the integration with the active house plumbing avoid water stagnation, eliminating the need for back-flow prevention. And the same plumber who runs the house plumbing can run the sprinkler (Wirsbo conducts an active training program for installers).

"My big objective is to get the cost down where builders and customers can accept it," says Haase. "Builders don't mind some added cost on a project — they can just add their markup and still make money — but when the

cost was three or four dollars a square foot, they wouldn't even bother to present it to the customer. But this system can go in for \$1.25 a square foot installed, depending on labor." Having plumbers do the installations makes the process easier for the builder, he adds: "Builders already have relationships with plumbers. They don't have relationships with the sprinkler companies."

Some sprinkler specialty installers object to plumbers invading their turf, but Haase, himself a second-generation plumbing and sprinkler contractor, has little patience with that. "We had 13D [*NFPA 13D — Standard for the Installation of Sprinkler Systems in One- and Two-Family Dwellings and Manufactured Homes*, www.nfpa.org] for 25 years, and we're still burning down thousands of homes a year," he says. "The systems work. The barrier is cost and practicality, and with plumbers installing, we lower that barrier. I'm just trying to get something done."

Think Tank Ranks Toto Toilets Tops

Toto's leading low-flush toilet models swept the top three spots in a 50-toilet comparison study released by the NAHB Research Center in October, posting perfect or near-perfect scores on the research institute's "Flush Performance Index." The study subjected 1.6-gallon toilets to a competitive flush-off using standardized "floater" and "sinker" sponges and anywhere from one to four wads of paper, awarding each toilet a score based on the percentage of test media that remained in the bowl after one flush. The test was run repeatedly on each toilet to obtain a reliable average value.

Leading the pack in first, second, and third place were the Toto models Ultimate Elongated Bowl, UltraMax, and Ultimate Round Bowl. Their respective scores of 0.0, 0.0, and 0.1 indicate that all three essentially cleared the bowl on each attempt. Bringing up the rear was American Standard's Hydra, with a dismal flush performance of 82.1. American Standard was blown out of the water overall, with models ranking in last place, second to last, and fourth to last.

Within a few weeks of its publication, the toilet report had been pulled from the Research Center's toolbase.org website. There's nothing wrong with the methodology or the conclusions, according to the

Research Center's Bob Hill, who directed the study, but Hill noted that the data were being misused.

"Some manufacturers were trying to make it appear as an endorsement, and the Research Center does not do product endorsements," said Hill. The Research

Center was also concerned that some marketers were trying to make a small difference in score

sound like a big advantage over the competition — a conclusion that Hill said the test methods will not support.

"The test was not that precise," Hill explained. "There's a lot of variation from one flush to the next. Also, we only tested two units of each model, and we could only do so many flushes. A small number difference in score is not a sole basis for a decision."

In the case of toilets, says the NAHB, you don't always get what you pay for: "There is no apparent correlation of price with performance." However, Toto's engineering is not free: The base-model UltraMax lists on Toto's website for \$494, with the premium version at \$741, while American Standard's Hydra lists for \$132 to \$166.

A PDF file of the Research Center report is available for free download at www.savingwater.org/toilettest.htm.



OFFCUTS

DeKalb County, Ga., is considering a licensing requirement for home builders, according to the *Atlanta Journal-Constitution*. The measure would require applicants to have three years of experience or pass a test. A board would investigate complaints and have the power to revoke licenses. A county official says 55% of new homes in the area currently fail to meet code in their first inspection. Georgia is the only state in the Southeast with no minimum qualification standards for home builders.

A task force of the HBA of northern Kentucky is proposing toughened regulations on home closings in the state, says the *Cincinnati Business Courier*. The proposal comes in the wake of an alleged bank fraud scandal in which millions of dollars in escrowed funds were illegally diverted into a Kentucky home builder's bank account instead of going to pay off construction loans, preventing the release of mortgage liens. The HBA's proposed rules would make settlement agents legally responsible for the property closing process, require bonding of

settlement agents, and specify procedures for the disbursement of escrow and closing monies.

A state law requiring carbon monoxide (CO) detectors in any home that is built or sold took effect in New York on December 1, reports the *Rochester Democrat and Chronicle*. New York joins Rhode Island, New Jersey, and West Virginia in mandating the devices. Regulations spelling out the details of the requirement are still under development.