CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

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LEGIONELLOSIS - EVOLVING EXPECTATIONS AND HANDLING AN ALLEGED OUTBREAK

I. INTRODUCTION:

Legionnaires' disease is the common name for one of the several illnesses caused by Legionnaires' disease bacteria (LDB). Exposure to LDB in certain concentrations can result in an infection of the lungs in the form of pneumonia in certain individuals. Exposure can lead to severe illness, coma or even death.

A. LEGIONELLA BACTERIA IS UBIQUITOUS:

1. Legionella are invisible, odorless, microscopic waterborne bacteria.
2. The bacteria occurs naturally in both natural water systems (e.g., lakes, streams, and ponds) and man-made water systems (e.g., cooling towers, holding tanks, potable water systems, decorative water fountains, indoor pools and spas, whirlpools and hot tubs, misters and humidifiers, and reservoirs). The bacteria is so common in the environment that it has been called ubiquitous or "found everywhere."

B. MULTIPLE FACTORS MUST TYPICALLY EXIST:

While found virtually "everywhere", the mere existence or presence of the bacteria alone does not typically give rise to a dangerous or defective condition sufficient to cause illness or injury. The bacteria, rather, must:

1. be of a virulent variety,
2. exist in sufficient concentrations,
3. be aerosolized; and
4. then inhaled by a susceptible person susceptible to result in illness or injury.

Thus, a number of factors typically must exist before one could reasonably anticipate a condition upon the property to result in illness.

C. UNIQUE ISSUES AND CONCERNS IN HOSPITALITY INDUSTRY:

1. Claims of Legionellosis or Legionnaire's disease present unique issues for members of the hospitality industry.
2. Despite the foregoing, records suggest that confirmed cases of Legionnaires' disease are on the rise.

3. More importantly for purposes of the present seminar, conditions within the hospitality industry are such that there is an increased likelihood of such claims:
    a. Buildings owned and maintained within the industry rely heavily upon man-made water systems for the comfort of guests, patrons and employees. Those systems provide the proper environment for the growth or proliferation of LDB.
    b. In addition, the industry welcomes a large transient population of patrons, guests and other visitors, which might include those susceptible to illness if exposed.

II. COMMONLY ENCOUNTERED CAUSES OF ACTION:

A. GENERAL NEGLIGENCE AND/OR PREMISES LIABILITY:

Absent egregious circumstances demonstrating malice and/or conscious disregard for the rights and safety of others, claims for injuries allegedly caused by exposure to LDB are based upon principles of General Negligence and/or Premises Liability (which is a form of general negligence).

1. Special Doctrines:
    a. Negligence *Per Se*

    Not a separate cause of action, but an evidentiary doctrine affecting the burden of proof: rebuttable presumption of the elements of "duty" and "breach" is created by the violation of a statute, ordinance or regulation which was enacted to protect a group of people, and the plaintiff was a member of that group. See, California *Evidence Code* §669. See also, *Quiroz v. Seventh Avenue Center*, 140 Cal.App.4th 1256 (2006). Jury Instructions – CACI 418, 419, 420 and 421.
    b. *Res Ipsa Locquitur*

    May Not Be Applicable. *Flaherty v. Legum - Norman Realty, Inc.* 2007 U.S. District LEXIS 95921 (2007 U.S.D.C., Eastern District of Virginia).

B. NUISANCE:

A nuisance is typically defined as anything which is injurious to health and/or which interferes with the comfortable enjoyment of life or property. The presence of Legionella upon a property, thus, can constitute a nuisance.

C. BREACH OF WARRANTY OF HABITABILITY:

D. FRAUD OR CONCEALMENT:

The elements of an action for fraud based on concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant had a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed fact; and (5) as a result of the concealment of the fact, the plaintiff sustained damage. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 433.)

If detected upon the premises, to whom must the condition be disclosed: the owner of the property; current guests or patrons; prospective guests or patrons?

III. GENERAL NEGLIGENCE AND PREMISES LIABILITY PRINCIPLES:

A. BASIC ELEMENTS OF A NEGLIGENCE CLAIM:

1. the existence of a legal duty to use due care;
2. a breach of that legal duty;
3. the breach was a proximate or legal cause of the resulting injury; and
4. the plaintiff was damaged. See, *Ladd v. County of San Mateo,* 12 Cal.4th 913, 50 Cal.Rptr.2d 309 (1996).

B. ELEMENTS OF DUTY OF CARE AND CAUSATION ARE OFTEN PROMINENT ISSUES IN CLAIMS ARISING FROM EXPOSURE TO LDB:

IV. DUTY OF CARE RE LEGIONELLA:

In general, a duty of care may be created by statute, contract or by common law upon existence of a "special relationship." With regard to Legionella, the question is whether a duty of care exists to test for and/or prevent LDB.

A. STATUTORY DUTY:

1. No known statute, ordinance or regulation imposes a duty to inspect or test for Legionella absent notice of its presence.
2. O. S. H. A. Rules, Regulations May Not Be Applicable – Patrons and Guests Not Within Class Of Persons Intended to Be Protected. (*Flaherty v. Legum - Norman Realty, Inc.* 2007 U.S. District LEXIS 95921 (2007 U.S.D.C., Eastern District of Virginia).)

B. CONTRACTUAL DUTY:

1. Duty to Inspection for Legionella <u>May Be</u> Imposed by Contract
   a. Management Agreement
   b. Franchise Agreement
   c. Operation Agreement.

2. If an agreement imposes the obligation or duty to inspect for and/or prevent LDB, plaintiffs and/or their counsel may point to said obligations as imposing a duty of care.

3. Question remains as to whom the contractual duty is owed. Does a patron or guest have standing to assert contractual duty is owed to them?

C. STANDARD OF CARE IN THE INDUSTRY:

1. Negligence is actionable when it is shown that a defendant breached the "standard of care" and the breach was the legal cause of the resulting injury. (*Padilla v. Rodas* 160 Cal.App.4th 742, 752 (2008).)

a. No Recognized Standard of Care In the Industry:

The court in *Flaherty, supra*, also concluded on the evidence presented that there was no generally accepted "standard in the industry" with regard to Legionella detection and testing absent notice of its presence. Recommendations are largely voluntary and/or advisory in nature, not required or mandatory. (See also, *Vellucci Allstate Insurance Company* 66 A.3d 215 (2013).)

b. Microbiologists Not Experts in Property Management Standards:

Courts have precluded expert opinion as to standard of care in the industry with regard to Legionella testing and/or detection on the ground that experts in microbiology were not experts in commercial property management, and thus not qualified to opine as to the standard in the industry. (*Flaherty v. Legum - Norman Realty, Inc.* 2007 U.S. District LEXIS 95921 (2007 U.S.D.C., Eastern District of Virginia).)

c. Possible "Standard of Care" Forthcoming:

ASHRAE (American Society of Heating, Refrigerating, and Air Conditioning Engineers) is purportedly preparing a set of standards which will reflect a voluntary consensus as to the standard of care in the industry, entitled "Prevention of Legionellosis Associated With Building Water Systems". However, no standard yet.

D. COMMON LAW DUTY OF REASONABLE CARE BASED UPON SPECIAL RELATIONSHIP:

1. Hotel owners and/or operators of public accommodations have a "special relationship" with their patrons and/or guest which gives rise to a duty "'to protect them against unreasonable risk of physical harm.' " (*Howard v. Omni Hotels Management Corp*., 203 Cal. App. 4th 403, 431(Cal. App. 4th Dist.2012.)

2. Most jurisdictions in the United States recognize that the owner, possessor or controller of real property has a duty to exercise reasonable care so as to maintain real property in a reasonably safe condition. (*Hose v. Winn-Dixie Montgomery*, 658 So.2d 403, 404 (Ala.1995); *Brooks v. Eugene Burger Management Corp.* 215 Cal.App.3d 1611, 264 Cal.Rptr. 756 (1989); *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.)

E. DUTY TO WARN OF OR REMEDY INJURY-PRODUCING CONDITIONS WHICH WERE KNOWN OR IN THE EXERCISE OF REASONABLE CARE SHOULD HAVE BEEN KNOWN:

1. The owner, possessor, or controller of real property has a duty to warn of or remedy only those dangerous or defective conditions of which it either knew or reasonably should have known in the exercise of its duty of reasonable care. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th.1200, 1206-1209; *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156 and *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371-372; *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 431.

   a. The issue of whether a duty exists is an issue of law for the court to decide. See, *Kentucky Fried Chicken v. Superior Court*, 14 Cal.4th 814, 59 Cal.Rptr.2d 756 (1997).

2. The premises owner is not an insurer of the safety of persons upon the property. See, *Stowe* v. *Fritziz Hotels, Inc.*, 44 Cal.2d 416, 282 P.2d 890 (1955).

3. "Reasonable care" or Reasonable Inspections Commensurate With Degree of Risk. A property owner must make reasonable inspections of the property, and the care required is commensurate with the risks involved. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) The greater the risk, the higher the burden imposed.

F. COMMON LAW DUTY TO INSPECT FOR LEGIONELLA MAY NOT EXIST ABSENT NOTICE:

1. Despite its "ubiquitous" nature, some courts have held that there is no duty to test for the presence of Legionella absent "notice" (i.e., Legionella is known to be present or reasonably should have been known to be present in the exercise of reasonable diligence. See, *Vellucci Allstate Insurance Company* 66 A.3d 215 (2013).

   a. Analysis as to Legionella Likely Applies to Other Similar Conditions such as Norovirus, MRSA, Mold, etc.

2. But see, *Butcher v. Gay* (1994) 29 Cal.App.4th 388, which analyzed liability of landowner for guest's contraction of Lyme disease after being bitten by tick. While the court concluded that a duty does not generally arise unless there is some awareness of a danger, it also suggested that one responsible for "fostering" an environment designed to cultivate predators may be responsible for injuries arising from exposure to said predator.

G. DUTY AFTER DETECTION:

1. While it is arguable that, absent notice or "fostering environment" conducive to proliferation, there is no affirmative duty to test for or prevent Legionella, issues arise as to the duty after detection as to:

   a. Existing and/or Prospective Patrons or Guests.

      i. Duty to Warn or Remedy Known Dangerous Conditions likely exists.

ii. Duty to Others. Potential duty to owner of property re (1) prospective sale of property and/or (2) duty not to interfere with operation of hotel - will disclosure to existing and/or prospective guests harm operation of hotel

2. Issue whether owner/possessor/controller of property is on notice of Legionella.

V. CAUSATION IN LEGIONELLA CASES:

A. CAUSATION – THE OTHER BATTLEGROUND:

1. In order to establish liability a plaintiff must demonstrate that a breach of duty was a substantial factor in causing or contributing towards his or her exposed to LDB. (*Miranda v. Bomel Construction Co., Inc.*,187 Cal. App. 4th 1326, 1336(Cal. App. 4th Dist.2010)

2. In personal injury cases, causation must be proven within a "reasonable medical probability". (*Miranda v. Bomel Construction Co., Inc.*,187 Cal. App. 4th 1326, 1336(Cal. App. 4th Dist.2010) Damages. Was the negligence of the defendant a substantial factor in causing or contributing towards the illness, disease or other conditions of the Plaintiff.

3. Mere medical "possibility" is not sufficient. "Mere possibility alone is insufficient to establish a prima facie case.. . . That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]" (Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal.App.3d 396, 402–403 [209 Cal. Rptr. 456].)

4. As Legionella is found virtually everywhere, it is difficult to trace the source of the exposure to a specific location within a reasonable medical probability.

VI. DEFENSES:

A. No Duty

B. Comparative Fault

C. No Causation

D. Failure to Mitigate

E. Assumption of Risk

F. Intervening Superseding Cause