



WOOD SMITH  
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## 2010 ANNUAL MOLD LITIGATION UPDATE

### *DESPITE FAVORABLE TRENDS, MOLD PERSONAL INJURY CLAIMS PERSIST*

For the last five years, we have used this annual update to advise our clients and colleagues of the trends in mold litigation, with an emphasis on personal injury claims. We have litigated these cases for the last ten years and have seen many positive trends for defense interests develop. In turn, we predicted that the number of new mold personal injury claims filed, and the resulting verdicts and settlements, would eventually become insignificant. Based on results from Courts across the country this year, that prediction was only partially correct. While mold claims have never reached the levels once anticipated by the media and the plaintiffs' bar, significant verdicts were reported in multiple venues in 2009. This update analyzes those results and other developments which will impact mold litigation in the coming year.

#### **Significant Plaintiffs' Verdicts Dominate the Headlines**

In January, a Virginia jury returned a \$4.75 million dollar verdict against a new home builder. The plaintiffs, Paul and Wendy Meng, purchased their home from The Drees Company for

\$900,000. Plaintiffs alleged that lumber used to build the residence became wet during construction and was not properly dried. The home also allegedly had a number of leaks which were never properly repaired. As a result of these problems, mold developed and the Mengs claimed to have suffered numerous health problems, including migraines, breathing problems and memory loss. These illnesses were "confirmed" by Dr. Ritchie Shoemaker, a plaintiffs' expert whose opinion has been rejected in prior mold cases. However, a Loudoun County jury found for the Mengs and awarded them a total of \$4.75 million. This is one of the largest amounts ever awarded in a single family home case.

In *Minium v. Pillar Communities LLC*, an Arizona jury ordered a landlord to pay a former tenant \$3.3 million. The lawsuit alleged that the landlord's failure to prevent water leaks and warn tenants about on-going mold remediation projects at plaintiff's apartment complex caused her to suffer both physical and cognitive injuries. Defendant relied on the testimony of an allergist, who told the jury that mold exposure cannot

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cause long term injury. The Court also allowed the testimony of both a physician and a psychologist who found that plaintiff had suffered a loss of cognitive abilities due to mold exposure. This verdict is believed to be the largest ever awarded to a single plaintiff.

A similar result was reported in late 2008 in a case in the Los Angeles County Superior Court, *Amzallag v. The Beaumont Management Company, Inc.* The plaintiff was a tenant in a building converted from a hotel. She alleged that the landlord and its management company failed to properly remedy numerous water issues in her unit, including a leaking sink and a defective shower drain, despite complaints by prior tenants. The excess moisture led to mold growth in plaintiff's apartment. As a result of exposure to the mold, plaintiff allegedly suffered breathing problems, joint pain, memory loss, brain damage and other injuries. The jury awarded her just under \$1.5 million.

These are some of the largest verdicts ever reported in mold personal injury cases. They were obtained despite plaintiffs' reliance on discredited experts (Dr. Shoemaker) and unsupported medical theories (cognitive injuries due to mold.) This type of evidence has been excluded in numerous prior cases, based upon defense motions.

These results may be due to the composition of a particular jury, the facts of the individual case or strategic decisions by counsel. But they demonstrate the need for defendants in every mold case to take the steps necessary to prevent plaintiffs from reaching a jury with unsupported claims of "brain injuries" due to "toxic" mold. Proven strategies and scientific evidence exist to defeat these claims. But when this evidence is not presented, or is presented improperly, a record gets built on which plaintiffs can rely to defeat future motions to exclude and to argue for larger verdicts and settlements.

#### **Study Finds That Indoor Exposure to Mycotoxins of No Toxicologic Concern**

Mycotoxins are secondary metabolites of molds and are the theoretical cause of "toxic" injuries due to mold exposure. Specific species of mold release mycotoxins under certain environmental conditions. Because mycotoxins are not released

on a constant basis, the presence of toxigenic molds cannot be equated to the presence of mycotoxins. The presence of mycotoxins in a specific location can only be proven through environmental testing.

In January 2009, four researchers published the results of a study of mycotoxins and human health in the Journal of Toxicology and Environmental Health. In an article titled "The Concentration of No Toxicologic Concern (CoNTC) and Airborne Mycotoxins," the authors explained that the "Threshold of Toxicologic Concern" concept was developed to determine a chemical intake level that is predicted to be without adverse human health effects, assuming daily intake over the course of a 70-year lifespan. Exposures below this limit are identified as being of No Toxicologic Concern (CoNTC). Applying known data on airborne levels of mycotoxins, the researchers reached an important conclusion: "[T]hese data suggest that common exposures to mycotoxins from airborne molds in daily life, including in the built indoor environment, are below the concentration of no toxicologic concern." These results are supported by a number of prior studies and position papers by scientific and medical groups.

Toxicity is the alleged cause of brain injuries due to mold exposure. Accordingly, at the same time that juries across the Country were returning the multi-million verdicts reported in this update, the scientific community was publishing objective findings that undercut the basis for those verdicts. In our view, there is no scientific or medical basis for claims of injury due to "toxic" mold, and defense attorneys need to continue to educate judges and juries on this issue.

#### **Haven't We Heard This One Before? Chinese Drywall and Mold Claims**

Chinese drywall, not mold, has dominated the media for the last year. Many on the defense side see similarities between the current situation with Chinese drywall and the initial media frenzy regarding mold. Both mold and Chinese drywall litigation are directed at the residential building industry, and both consist primarily of property damage claims and the personal injuries associated with exposure, which are largely subjective and controversial. What can those

handling Chinese drywall cases learn from the boom and bust of mold litigation that has taken place over the last ten years?

First, the media has a short attention span. The typical media cycle for mass torts appears to be hype, followed by a questioning of the basis for the claims, and then indifference. This pattern has been seen in regard to breast implants, mold and other mass torts. Newspapers once ran headlines for stories as innocuous as claims that mold killed Ed McMahon's pet dog. Today, the three verdicts reported in this update, totaling almost ten million dollars, barely create a ripple in the mainstream press. Instead, the press focuses on what is perceived to be another dangerous and defective product imported from China. We believe that while Chinese drywall claims may not disappear, the press coverage will.

Another lesson is to beware of self-appointed experts. Press coverage of the dangers of "toxic" mold created an entire industry of mold inspectors, remediation companies and sellers of home test kits. Many of these so-called experts were self taught and offered little, if anything, of value. Air conditioner repairmen became instant mycology experts in response to the mold problem. Homeowners, landlords and builders were all taken in, paying for services which neither properly identified mold nor cleaned it up. Much of the subsequent litigation was the result of the false test results and inadequate remediation services provided by the mold industry. This phenomenon is repeating itself in regard to Chinese drywall, with consultants, contractors and other "experts" offering to identify the offending drywall and remove it from homes. Caution should be exercised in retaining anyone who advertises his or her expertise in a brand new field, particularly one driven by litigation.

Finally, many with a stake in the Chinese drywall litigation are waiting for the results of studies by the Consumer Products Safety Commission and the Florida Department of Health to determine what, if any, health effects result from exposure to sulfur compounds from Chinese drywall. Likewise, many wait for either government regulations or an industry standard to emerge directing the proper method and scope of remediation for this material.

Based on the experience with mold, it may be a long wait. The closest the government came to a definitive study of mold personal injuries was the 2004 report by the Institute of Medicine, "Damp Indoor Spaces and Health." While the Institute of Medicine is part of the National Academies of Science, which holds a Congressional charter, it is not a federal agency. The federal government has never issued a single, definitive study on mold personal injuries. Likewise, no single standard, industry or governmental, has ever been established to regulate mold remediation. The lack of standards is one reason that mold litigation continues to be filed, even if it not at the pace once anticipated.

**Wood, Smith, Henning & Berman** continues to have the premier mold defense practice in the country. In early 2009, an Orange County, California jury returned a complete defense verdict in favor of our client following a two-month trial in a mold personal injury case. As a result, plaintiffs were ordered to pay our clients \$411,125.09 in attorneys' fees and Court costs.

Our clients have never been held liable by a jury for personal injuries as a result of mold exposure. Our practice includes the defense of mold claims at both trial and arbitration, as well as pre-litigation counseling, including the supervision and review of abatement and remediation projects and consulting on mold personal injury and property damage issues across the nation. If you would like more information on any of the subjects mentioned in this update, or our practice in general, please feel free to contact us.



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