



WOOD SMITH
HENNING & BERMAN LLP

2009 ANNUAL MOLD LITIGATION UPDATE

RELUCTANT PLAINTIFFS' ATTORNEYS SLOW LITIGATION TREND: THE DEMISE OF MOLD BODILY INJURY CLAIMS

As we do at the beginning of each year, we are forwarding our 2009 annual mold litigation update. These updates have chronicled the rise and fall of mold litigation during the last decade. For the last several years we have been reporting on the verdicts, rulings and scientific developments that have limited mold personal injury claims, the most potentially troublesome aspect of mold litigation. These trends are now having a direct impact on the number of cases filed, with plaintiffs' attorneys showing increasing reluctance to handle mold claims, particularly on a contingency basis. More than anything, a lack of willing plaintiffs' lawyers will materially impact this once thriving litigation trend.

Although the first widely reported plaintiffs' mold verdict was the *Ballard* case from Texas, in general, trends in mold litigation have been driven by activity in California. The first large plaintiffs' verdict not overturned on appeal was \$2.7 million in the case of *Mazza v. Schurtz*. That occurred in 2002. Plaintiffs were represented by attorney John Miller, who went on to file numerous mold claims throughout Northern California. Ed McMahon's famous mold case followed, which resulted in settlements of more than \$7 million.

More recently, in 2005, attorney Brian Witzer of West Hollywood obtained a \$22.5 million settlement in the case of *Gorman v. Komick*. This case is particularly notable given the small number of plaintiffs – it arose from a water leak in a single family residence – and the severity of the alleged injuries, i.e., developmental and cognitive injuries in a young boy. The *Gorman* case represents a high point for plaintiffs in mold cases. At the time, Mr. Witzer and his firm were litigating mold cases throughout Southern California.

In the last two years, there have been no reported settlements or verdicts from California in the seven figure range. At the same time, there have been a number of defense verdicts. These trends are reflected in the fortunes of two high profile plaintiff attorneys who did the most to foster the mold litigation boom in California. One of these lawyers was recently sanctioned \$13,500 by the Sacramento County Superior Court for filing unsupported, form complaints in mold cases. Based on recent motions we are seeing from the plaintiff bar, we find as a common thread the reluctance of plaintiff lawyers taking mold claims on a contingency basis.

In the past several years Mr. Witzer has lost two mold cases to this firm. Earlier this year, he dismissed the appeal of one of those verdicts in exchange for a waiver of costs. He appears to have deemphasized mold as a practice area in favor of pharmaceuticals, has pared down his staff of attorneys and, earlier this year, his "Witzer Law Building" was placed on the market.

The importance of these developments is that few, if any, plaintiffs' attorneys in California are now handling mold cases on a routine basis. A lack of willing plaintiffs' attorneys will do more than anything else to stop a litigation trend in its tracks.

Creating Your Own Worst Evidence: The Case For Visual Inspections

The mold litigation boom that started at the beginning of this decade created a demand for a previously little sought after practice, environmental testing for airborne and surface fungi. Developers, landlords, property managers and others faced with potential claims or lawsuits sought a means of quantifying the level of mold in their buildings.

As defense attorneys, we have found this practice less than helpful. The environmental levels of a bioaerosol, such as mold, vary constantly, so the usefulness of test results is very limited. The training of the personnel who conduct the tests is often suspect, calling into question the accuracy of the results. All mold testing relies on the skill of the laboratory technicians who review the samples, making the results subjective. Finally, all mold testing will reflect the presence of some level of fungi in the air. We have yet to meet a plaintiffs' attorney or expert who is willing to call any test result "normal."

Our advice is often to simply rely on visual inspections when responding to a water damage and/or mold situation. Now, one of the most widely followed set of guidelines on mold remediation echoes that advice. The 2008 revisions to the New York City Department Of Health Guidelines on Assessment and Remediation of Fungi in Indoor Environments were just released. These guidelines state:

Environmental sampling is **not** usually necessary to proceed with remediation of visually identified mold growth or water-damaged materials. Decisions about appropriate remediation strategies can generally be made on the basis of a thorough visual inspection. Environmental sampling may be helpful in some cases, such as, to confirm the presence of visually identified mold or if the source of perceived indoor mold growth cannot be visually identified.

(emphasis in original)

These guidelines were prepared with the assistance of a panel of experts who commonly testify for plaintiffs in mold cases. This offers a compelling basis not to conduct environmental testing and, instead, to rely solely on visual inspections in responding to mold claims, particularly at the pre-litigation stage. We believe this approach is more cost effective, is less likely to lead to litigation and avoids potential evidentiary problems should litigation occur.

The Mold Warrior Defeated (Again)

In a continuation of a trend we reported last year, leading plaintiffs' medical experts faced more problems in 2008. Dr. Ritchie Shoemaker is a Maryland physician who is board certified in the field of family medicine. He became a national "expert" on behalf of plaintiffs in mold cases, testifying across the Country that individuals suffered from "chronic biotoxin associated illness" as a result of mold exposure.

When Dr. Shoemaker's opinions were first excluded by a Florida court, he responded by questioning the judiciary's role in evaluating scientific evidence in his 2005 book, Mold Warriors. Perhaps proving that judges don't like to be criticized, Dr. Shoemaker's record in Court has gotten worse. On September 15, 2008, Dr. Shoemaker was again excluded, this time by the Superior Court of the District of Columbia (*Racic v. Chana LLC*). The *Racic* decision cites at least four other cases from state and federal courts where Dr. Shoemaker's opinions were rejected, all on the grounds that his methods and views are not generally accepted.

In our experience, once an "expert" has been subject to enough exclusions that Courts simply rely on the prior rulings in excluding him again, his career as an expert witness is done. We won't be surprised if the mold warrior retires from the battlefield.

Its Not Over Yet: Plaintiffs' Verdicts And Settlements

Although we believe that the trends in mold litigation generally favor defendants, some plaintiffs continue to make recoveries. Last year we reported on the largest single plaintiff mold verdict affirmed on appeal, a total of \$1.8 million in *Cameron v. Merisel Properties, Inc.* (2007) 652 S.E.2nd 660.

This year's reports include a \$903,000 verdict in a single family home case in Polk County, Florida (*Arnett v. Brown*), a group of 34 tenants recovering \$883,000 from their landlords in Los Angeles (*Moran v. Norton Community Apartments, L.P.*) and a \$382,744 jury verdict on behalf of three tenants affirmed on appeal in Maryland (*Roy v. Housing Authority of Baltimore*).

We do not believe that these verdicts and settlements represent a trend. Rather, they are examples of what we expect the future holds for mold litigation and claims. Mold is not the new asbestos and it will never be a mass tort. Even those plaintiffs' attorneys who have had success with these cases have ultimately decided that they are too risky to sustain a full time practice. But when combined with construction defects, poor maintenance or habitability issues, mold can still create liability. Ignoring the problem won't mean that its gone away.



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Wood, Smith, Henning & Berman continues to have the premier mold defense practice in the Country. In 2008, the firm was again successful at trial, obtaining a defense verdict in Orange County Superior Court on behalf of a remediation contractor after almost two months of testimony.

Our practice includes the defense of mold claims at both trial and arbitration, 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 Country. We hope that this summary of the trends and developments of the past year helps prepare our clients and friends for what lies ahead. 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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