

**MOLD EXPOSURE:
WHO OWNS THE PROBLEM?**

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I. CURRENT STATUS OF MOLD LITIGATION

A. High Profile Cases

1. \$34 million verdict for Texas woman against her insurance carrier for mold contamination of her 22 room mansion.
2. \$18 million jury verdict for 96 year old man against his insurance carrier based on bad faith refusal to pay for mold contamination.
3. \$1.35 million settlement for a couple in Newport Beach, California against their landlord for mold contamination of their apartment.
4. \$14.2 million award against a Florida construction management company for mold contamination of a courthouse building in Martin County, Florida.

B. Recent Ohio Decisions

1. Broida vs. McGulmphy, unreported, 2002 W.L. 31015563 (App. Ohio 9th Dist. 2002), verdict for the defendants. Defendants were the sellers of a home. They disclosed water problems in the home to the purchasers. Because the purchasers were on notice of the water problems, they could not claim that they were defrauded in respect to the presence of mold in the home.
2. Duman vs. Campbell, unreported, 2002 W.L. 973095 (App. Ohio 8th Dist. 2002). Defense verdict for home sellers who disclosed leaky bathroom plumbing to purchasers who later claimed faulty plumbing caused mold infestation.
3. Bryant vs. Bulach, unreported, 2003 W.L. 1689613 (App. Ohio 12th Dist. 2003), where the doctrine of caveat emptor precluded home purchasers from recovering damages for water leaking and mold because the leakage and mold could have been discovered by

reasonable inspection, the purchasers had the opportunity to inspect the home, and the sellers made no false representations regarding the condition of the home.

II. POTENTIAL DEFENDANTS

A. Homebuilders.

Homebuilders face claims for breach of contract, breach of warranty, negligence and fraud. The breach of warranty claim is of greater significance today because a recent Ohio Supreme Court decision found that a builder of a home can face liability for emotional distress damages for a breach of warranty. Negligence claims against homebuilders will focus on the selection of materials, defects in construction and installation of components, negligent design and negligent repair. Homeowners who can prove that homebuilders knew of construction defects which later led to mold contamination may be able to recover on a theory of fraud. The fraud theory is of particular interest since it permits the plaintiff to recover punitive damages and attorney fees.

B. Sellers of Property and Realtors.

The sellers of property and their realtors face liability for breach of contract and fraud. In a residential context, standard disclosure forms eventually will address sellers' knowledge of mold contamination and moisture conditions. For now, the standard documents do not address this, so the purchasers of homes and commercial and institutional buildings may assert fraud based on omission of information by sellers and realtors.

C. Landlords.

Tenants will assert claims for breach of lease arising from the failure of the landlord to provide habitable premises. Tenants may also assert claims for fraud arising from the failure to disclose mold contamination, and for negligence arising from the failure of landlords to properly inspect, repair and maintain properties. Tenants may also be able to assert claims for violation of the Landlord Tenant Act. Such violations can result in the award of attorney fees.

D. Insurers.

Insurers have faced substantial bad faith verdicts in California, Texas and Florida. Insurers providing homeowners' policies that refuse to pay the cost of remediation and alternate housing face potential liability for the bodily injuries that arise from the exposure of homeowners to mold.

E. Owners of Commercial and Institutional Buildings.

Tenants and their employees may assert claims against the owners of commercial and institutional buildings, and the companies they hire to manage and maintain the buildings. Employees of building owners may also assert claims. Such claims would include recovery of workers' compensation benefits as well as intentional tort actions and OSHA complaints. Building owners and employers also face liability under the Americans with Disabilities Act for failure to make buildings accessible to those who have allergic reactions to mold.

III. PROOF OF CAUSATION.

A. Daubert.

The United States Supreme Court ruled that parties cannot offer "junk science" in the guise of expert testimony in Daubert vs. Merrell Dow Pharmaceuticals (1993), 509 U.S. 579, 113 S. Ct. 2786. The Ohio Supreme Court adopted the Daubert rule in Miller vs. Bike Athletic Co. (1998), 80 Ohio St.3d 607, 687 N.E.2d 735. The factors for admitting scientific testimony are:

- Whether the theory or technique in question can be (and has been) tested;
- Whether the theory or technique in question has been subjected to peer review and publication;
- Whether there is a known or potential error rate for the theory or technique;
- Whether there exists standards controlling the performance of the technique or operation in question;
- Whether the theory or technique has attracted widespread acceptance within a relevant scientific community.

Daubert at 593-594.

B. Application of Daubert to Mold Cases.

The extent to which mold causes serious adverse health effects is a matter of great debate in the medical and scientific community. See Ronald E. Gots, "Mold and Mold Toxins: The Newest Toxic Tort." 8 J. Controversial Med. Claims 1 (2001). In a lawsuit, there will be much debate over the adequacy of the scientific basis for expert opinions stating that mold exposure has caused severe respiratory injury or the aggravation of immune system disorders such as lupus. The lack of nationally-recognized standards for mold exposure and the control and remediation of mold make it more likely that courts will reject expert

testimony regarding the link between mold contamination and illness or injury.

IV. EXPERT WITNESSES.

A. Source and Cause of Moisture in Buildings.

Architects, engineers and industrial hygienists will examine buildings to determine sources of water intrusion and accumulation, and their relationship to the development of mold.

B. Extent of Mold Infiltration.

Industrial hygienists will examine building conditions, create photographic evidence, take samples, and perform analyses to determine the nature and extent of mold contamination. It is important to establish what type of mold has contaminated the building, for claimants may be allergic to some molds but not others.

C. The Link Between Mold and Injury.

Toxicologists, internists or other appropriately credentialed medical professionals will establish a link between mold exposure and symptoms suffered by injured parties. The more experienced and well-credentialed the physician, and the more careful and conservative his or her analyses, the more credible will be the opinion establishing this link.