

ALERT

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Class Certification Denied in \$8 Billion Mold Case

A trial court in New York denied class certification of 495 plaintiffs who claimed personal injuries and emotional trauma¹ allegedly caused by exposure to mold and other toxic substances as a result of alleged negligence by the owner of a residential apartment building in New York City. Judge Louise Gruner Gans denied the certification in *Davis v. Henry Phipps Plaza South*, No. 116331, N.Y. Sup. N. Y. Co. by an Order dated August 8, 2001.

Class Certification Denied

The Court denied plaintiffs' motion for class certification after finding that the claims of the individual plaintiffs each required individualized inquiry. *Davis v. Henry Phipps Plaza South*, No. 116331, N.Y. Sup. N. Y. Co., slip op. at 11. The Court reasoned that while the plaintiffs' claims presented some common issues of law and fact, those questions do not predominate over questions concerning the individual members of the proposed class. *Id.* Judge Gans concluded, therefore, "the need for individualized inquiries would defeat the class actions' attribute of superiority, with its goal of saving judicial time and resources. *Id.*"

Consolidation Denied

As an alternative to class certification, the plaintiffs sought to consolidate the proposed class plaintiffs with a class defined in an earlier filed class action, *Oke v. Henry Phipps Plaza Assoc.*, Index No. 120413/96 (the "Oke" action). The *Oke* action included similar allegations of mold-related injuries, and was commenced against the same defendants on November 19, 1996. The class defined in the *Oke* action consisted of all residents of the apartment building between 1974 and the present who allegedly suffered "personal injuries and/or emotional distress as a result of exposure to various chemicals, fungi, mycotoxins, bacteria, construction debris and other toxic substances due to the defendants' negligence." *Id.* The class as defined in *Davis* consisted of those suffering similar conditions allegedly caused by similar exposure, but during the time period May 12, 1991 to present. *Id.*

The Court denied the proposed consolidation because the alleged exposures would have varied too widely. *Id.* at 12. Although the Court acknowledged that the two actions did present common questions of law and fact, the Court explained that because the exposure to mold allegedly occurred in different places and at different times over periods of many years, "[t]he specific conditions which subjected individual Plaintiffs to mold exposure vary, potentially fragmenting the issue of notice." *Id.* The Court also noted that there would be variations in the defendants' repair and remediation efforts and issues of causation and comparative negligence, which would render consolidation unworkable. *Id.*

The Court's reasoning for denying certification and consolidation is consistent with some scientific findings that question the extent to which the general public is susceptible to harm caused by mold byproducts. For example, there is literature reporting that despite considerable amounts of litigation and hundreds of millions of dollars in damage demands, molds in indoor environments are primarily minor allergens even in heavily mold contaminated buildings and homes.² Other researchers have found that epidemiological studies that report associations between health effects and exposure to mold mycotoxins in indoor air are limited, and do not contain strong evidence supporting such an association.³ Judge Gans' conclusion calling for closer scrutiny of each individual

¹ According to the Order, the individual plaintiffs also alleged that the defendants' negligence caused various forms of property damage. Those claims were not at issue in the proposed class action.

² Gots, R., "Mold and Mold Toxins: The Newest Toxic Tort," *Journal of Controversial Medical Claims*, Vol. 8 (1), (2001).

³ Robbins, C.A., et al., "Health Effects of Mycotoxins In Indoor Air: A Critical Review," *Applied Occupational and Environmental Hygiene*, Vol. 15 (10): 773-784 (2000).

case than could be afforded in a class action or large consolidated proceeding is consistent with these conclusions.

Joint Trial Approved

As another alternative, plaintiffs' counsel proposed that the Court permit the plaintiffs to select the ten oldest pending cases for a joint trial. The Court accepted this proposal. *Id.* at 16. In support of their proposal, the plaintiffs demonstrated sufficient similarity among the individual cases by directing the Court to the bill of particulars filed by each of the individual plaintiffs, which stated:

[Defendants were] negligent . . . in violating the Warranty of Habitability . . . and . . . permitting and allowing water to enter the apartment through walls, ceilings, windows and other locations in the apartment which contributed . . . in whole or in part [to] the accumulation of water and the growth of mold and fungus . . . [that] [d]efendants caused the condition to exist by reason of their failure to remedy the water leak and water infiltration problems; [and that] [t]he continued water infiltration . . . and . . . growth of mold and fungus were responsible for the damages to the plaintiff.

Id. at 15. In opposing a joint trial, the defendants contended that a joint trial would simply confuse the jury. *Id.* at 16. Despite the defendants' objection, however, the Court concluded that the plaintiffs satisfied their initial burden of establishing that there exist common issues of law and fact and, accordingly, ordered that the cases be tried jointly. *Id.*

Implications

The Court's decision in *Davis* not to certify the individual plaintiffs as class members and the Court's decision not to consolidate two pending actions is significant and may have implications for the handling of other mold-related litigation.

- *Davis* distinguished the individual factual and legal issues that must be addressed in connection with claims alleging injury as a result of exposure to mold even where that exposure was to mold in the same building over a similar time period. The order highlights that different molds may have different effects on different

persons, depending upon allergies, temperament and length of exposure. It may therefore not be possible to treat all plaintiffs claiming injury as a result of mold exposure similarly.

- Because the decision in *Davis* emphasizes the individuality of different mold claims, the decision may support an argument that each claim constitutes a separate occurrence. This implication is significant because it could require the payment of multiple deductibles or SIRs or the application of multiple limits of coverage, depending on the particular circumstances and insurance contract language.
- *Davis* also illustrates the difficulties claimants may face in establishing timely notice. For example, notice to a landlord by one tenant that there is suspected mold infestation in an apartment may be sufficient to put the insured on notice as to other instances of mold infestation in the building. Thus, insurers should investigate exactly when commercial property owners who are claiming coverage for mold-related liabilities first became aware that their property was contaminated by mold. Likewise, the timing of an insured's knowledge of mold contamination or infestation may have an effect on which policy(ies) are triggered and whether an insurer has a viable known-loss defense.

If you have any questions regarding this *Alert* or any other related matter, please contact:

Walter J. Andrews
walter.andrews@shawpittman.com - 703.770.7642

Lon A. Berk
lon.berk@shawpittman.com - 703.770.7669

Frank Winston, Jr.
frank.winston@shawpittman.com - 703.770.7672

Michael S. Levine assisted with the preparation of this *Alert*.

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