



# California Framing Contractors Association

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To protect and improve our future for the next generation.*

**CFCA Newsletter**

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## WET WOOD AND MOLD: THE "PERFECT STORM" FOR THE LUMBER INDUSTRY?<sup>1</sup>

The torrential rains, howling winds and other extreme weather that plagued the northeastern United States in the early 1990s, commonly referred to as the "perfect storm," resurfaced in southern California in the form of a legal "perfect storm." As a result of this "perfect storm," the building industry is forced to pick up the pieces and rebuild following the recent settlement of a mold lawsuit filed in Orange County, California. Most notably, the Gorman family is basking in the sunshine of a \$22.6 million settlement reached in their favor over allegations of mold which was claimed to have damaged their house and injured their infant son.

What began as a run of the mill construction defect case ended up being the largest single-family settlement in the United States as a result of mold exposure.<sup>2</sup> The settlement figure of \$22.6 million is definitely a number that shocks the system, yet that is the amount the Gorman family will be receiving from the defendants in a lawsuit initially filed in 2002.<sup>3</sup>

In order to completely understand how a lawsuit involving a single-family home could have settled for such an exorbitant amount of money, an examination into the background and facts that led to the filing of the lawsuit and its ultimate settlement must be conducted.

The Gormans moved into their custom built Manhattan Beach, California home in September 1999 with son Kellen born three months later.<sup>4</sup> In 2001, the Gormans moved out of their home alleging various construction defects and bodily injuries.<sup>5</sup> Subsequently, a lawsuit was filed by the Gorman family for construction deficiencies and bodily harm from mold exposure against 17 defendants involved in the construction of the home, including the lumber supplier, Crenshaw Lumber Co., Inc. ("Crenshaw Lumber").<sup>6</sup>

Plaintiffs alleged that Crenshaw Lumber improperly stored the wood that was used to build the frame of the home.<sup>7</sup> The Gormans claimed Crenshaw Lumber did not follow the recommendations of the Western Wood Products Association (WWPA) to prevent mold from forming on lumber used in residential and commercial construction.<sup>8</sup> These recommendations included: (1) covering the lumber; (2) separating the pieces of wood from each other; (3) keeping the wood 12 to 18 inches off the ground; and (4) keeping the wood away from water.<sup>9</sup> According to Plaintiffs, because Crenshaw Lumber did not follow these recommendations, mold allegedly formed on the wood.<sup>10</sup> The alleged mold then worsened as a result of claimed plumbing, window and/or roof leaks.<sup>11</sup> An interesting aside is that the WWPA has stressed these recommendations are not industry standards.<sup>12</sup>

Crenshaw Lumber eventually paid \$13 million of the \$22.5 million settlement. So just how did a lumber supplier get slammed for \$13 million of the \$22.5 million? To start, all of the subcontractor defendants with the exception of Crenshaw Lumber settled with the Gorman family.<sup>13</sup> This started a domino effect that would eventually undermine Crenshaw Lumber's entire defense strategy. With Crenshaw Lumber left as the last tree standing, Plaintiffs' attention could be focused completely on cutting down Crenshaw Lumber.

The attention given by Plaintiffs' counsel to Crenshaw Lumber centered on the alleged link between mold and brain damage to Plaintiffs' child. Counsel blamed the mold for Kellen's form of autism, which later was claimed to be brain damage.<sup>14</sup> The most serious allegation by the Gormans, according to their complaint, was that Kellen suffered brain damage as a result of mold originating from lumber used to construct the home.<sup>15</sup> Mold grew from the framing members through walls and floors, allegedly exposing the Gormans and their infant son to toxic mold.<sup>16</sup> However, a defense attorney for a sheet metal company in the suit, contended that the "science is clear that there is no known cause for autism."<sup>17</sup>

The defense of Crenshaw Lumber was further compromised due to the Court's ruling on Crenshaw Lumber's expert designations. The trial judge, Los Angeles Superior Court Judge Victoria G. Chaney, ruled that Crenshaw Lumber could not use 10 of its 17 experts because of alleged missed procedural deadlines.<sup>18</sup> These experts included a toxicologist, microbiologist and life planner (who gives an opinion on the long term care expenses of injured people).<sup>19</sup> Crenshaw Lumber's co-owner, Lawrence H. Olson, stated that Plaintiff's life care planner had been the last testimony heard by the jury and that the "most important of our expert witnesses [Crenshaw's life care planner] was not allowed [to testify]."<sup>20</sup>

The strength of one's position in a construction defect case and value of the claimed damages is heavily dependent upon the testimony of the experts involved. With Crenshaw Lumber's most important experts excluded from testifying, the strength of its defense was severely compromised. Crenshaw Lumber settled with the Gorman family the day after its experts were excluded by Judge Chaney.<sup>21</sup> This was most likely a major factor leading to settlement of the case. Although none of the defendants admitted liability as part of the settlement, Crenshaw Lumber did release a statement that reads, in part, "We wish to emphasize that had the judge not excluded important expert witnesses from testifying ... we believe that the jury would have completely vindicated the company."<sup>22</sup>

So what does all this mean for the lumber industry? Could there be another "perfect storm?" Generally bodily injury claims are not alleged in a typical construction defect case. What made this case different was the seriousness of the bodily injury claims. The public at large may very well make a connection between a mold claim and the \$22.6 million settlement amount, which may result in a slew of construction defect cases alleging bodily injury resulting from mold exposure.

The \$13 million settlement by Crenshaw Lumber and the Gormans does not stand for the principle that allegations of wet wood and mold will lead to astronomical settlement or judgment amounts. Rather, this settlement explicitly shows what can happen during a large multi-party construction defect case if a judge rules that important deadlines and filing requirements purportedly were not met.

It should be noted that the court system cannot rely on settlements as the benchmark in deciding the value of other construction defect cases. The facts and merits of each individual case must be examined and weighed before a judge or jury makes its final decision. Only then can a case be referenced, cited or used as influence in subsequently filed construction defect cases. The much more likely scenario this settlement represents is as a warning to defendants

and their attorneys of what not to do in defending against a construction defect lawsuit. Always plan for a filed lawsuit to be litigated to a final decision by a judge or jury. Have a litigation strategy whereby all deadlines and filing requirements are timely met. Otherwise, you will risk being caught in the rain without an umbrella.

It is important to remember this is probably a worst case scenario for defendants involved in mold litigation. Everything came together for the Gormans in this case. A combination of allegedly wet wood, mold, bodily injury allegations, alleged missed procedural deadlines and an unfavorable court ruling led to a truly “perfect storm.”

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<sup>1</sup> Les Robertson is a founding partner of Robertson • Clark, LLP, an AV Rated Southern California-based law firm whose areas of specialty are insurance coverage and insurance defense matters. Mr. Robertson has focused his practice in the area of insurance law with particular emphasis on coverage issues arising out of construction disputes and has participated in the settlement and litigation of many large exposure claims. Keith Ciceron is an associate attorney with Robertson • Clark, LLP and is involved in all areas of the firm’s practice including insurance coverage, civil defense and construction defect. Additional information about the firm and the authors can be accessed at <http://www.robertsonclark.com>.

<sup>2</sup> Ben-Yehuda, Eron. “Family Wins Record Settlement of \$22.6 Million for Toxic Mold.” Los Angeles Daily Journal. November 4, 2005 (hereinafter “L.A.D.J.”); “Settlement reached in mold suit,” (2005), available at [http://www.signonsandiego.com/uniontrib/20051105/news\\_1n5mold.html](http://www.signonsandiego.com/uniontrib/20051105/news_1n5mold.html) (last accessed December 12, 2005) (hereinafter “SignonSanDiego”).

<sup>3</sup> L.A.D.J., *supra*.

<sup>4</sup> SignonSanDiego, *supra*; LexisNexis Mealey’s Mold Litigation Teleconference, 12/15/05 (hereinafter “Lexis”).

<sup>5</sup> “Family wins record settlement over toxic mold,” (2005), available at <http://www.msnbc.msn.com/id/9926761/> (last accessed December 12, 2005) (hereinafter “MSNBC”); Lexis, *supra*.

<sup>6</sup> L.A.D.J., *supra*.

<sup>7</sup> MSNBC, *supra*; SignonSanDiego, *supra*.

<sup>8</sup> L.A.D.J., *supra*.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> “Family Settles for \$22 Million Over Moldy House,” (2005) available at <http://abcnews.go.com/GMA/print?id=1291345> (last accessed December 12, 2005) (hereinafter “ABC”).

<sup>16</sup> ABC, *supra*.

<sup>17</sup> L.A.D.J., *supra*; MSNBC, *supra*.

<sup>18</sup> *Id.*; MSNBC, *supra*; SignonSanDiego, *supra*.

<sup>19</sup> L.A.D.J., *supra*.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; ABC, *supra*; SignonSanDiego, *supra*.

<sup>22</sup> L.A.D.J., *supra*; ABC, *supra*; SignonSanDiego, *supra*.