

**Mold: Fool's Gold?**

by Thomas F. Bedsole



Although the recent flood of mold claims brought by homeowners has spawned the theory that “mold is gold”, a new study conducted by the Institute of Medicine (“IOM”) entitled “Damp Indoor Spaces and Health” (the “Report”), provides evidence that the negative health effects attributed to exposure to mold may not be as serious as many claim.

The main goal of the IOM’s study was to conduct a comprehensive review of the scientific literature regarding the relationship between damp or moldy indoor environments and the manifestation of adverse health effects, so that guidelines and recommendations could be developed. When conducting its study, the IOM limited its focus to the non-infectious health effects of fungi, including mycotoxins and other biologically active products.

The initial findings of the Report recognize that little research has been done in assessing the risks of human exposure to microorganisms. The Report confirms what builders already know--that currently no standardized, or agreed on, definitions exist to evaluate the problems associated with mold or damp indoor environments (“DIEs”). The report also noted that the entire process relating to inhalation exposure “is poorly understood, as is the significance of exposures to

fungi through dermal contact and ingestion.” Another problem cited by the Report is that methods for assessing human exposure to fungal agents are poorly developed. Even the most common methods for fungal assessment, such as counting cultured colonies and identifying and counting spores, have variable and uncertain relationships to allergen, toxin and irritant content of exposures. Because little data exists on exposure to biologic agents in the home, the Report acknowledges that it is impossible to recommend how many samples should be taken to produce an accurate assessment of risk-relevant exposure.

Despite the shortcomings in research methodology, *the Report found little evidence to support the position that exposure to DIEs causes serious adverse health conditions.* The Report did find that there was evidence of an association between DIEs and cough, wheezing, nasal and throat symptoms, and asthma symptoms in some sensitized persons. The Report also found limited or suggestive evidence of an association between DIEs and shortness of breath, asthma development and lower respiratory illness in otherwise healthy children. More importantly, the Report found inadequate or insufficient evidence to determine whether an association exists between exposure to DIEs and cancer, reproductive effects or other serious health conditions.

However, unlike the findings with DIES, the Report did find that there was sufficient evidence of an association between mold and nasal and throat symptoms, coughing, wheezing, hypersensitivity pneumonitis and asthma symptoms in sensitized or susceptible persons. This should come as no surprise since mold allergies are well known. The Report also found limited or suggestive evidence of an

association between exposure to mold or other DIE agents and lower respiratory illness in otherwise healthy children. Finally, the Report found inadequate or insufficient evidence to determine whether an association exists between exposure to mold or other DIE agents and cancer, reproductive effects and other serious health conditions.

While the Report acknowledges that mold and excessive DIEs are a public health problem, the study admits there are inherent problems when attempting to assess the risk associated with such exposure. In fact, the Report admits that insufficient information exists to assess the risks associated with exposure to mold and DIEs. The IOM’s study also reports that there is little information from which to determine exposure and dose and from which to quantify the overall magnitude of risk resulting from exposures to DIEs and their agents.

The Report demonstrates that plaintiffs face an uphill battle in their efforts to prove injury due to exposure to mold or DIEs. As this study demonstrates, the scientific community is not only unsure of the effects of exposure to mold and DIEs, but also lacks a fundamental framework to effectively study, measure and evaluate the effect of human exposure to mold and DIEs. Unfortunately, the Report fails to conclude that mold never causes health problems. Until such proof exists, builders will need to continue to carefully monitor and respond to moisture related problems.

Clearly the Report will not stop homeowners from bringing lawsuits based on exposure to mold. However, the Report does allow builders to breathe a little easier when defending a lawsuit based on exposure to mold and DIEs. ♦

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## *No “Weingarten Rights” for Non-Union Employees: The Pendulum Swings Back*

by Thomas E. Deer



The National Labor Relations Board (“Board”) recently flip-flopped its stance on “Weingarten rights” for non-union employees. “Weingarten rights” traditionally has referred to the right of a union employee to have a union representative present during any investigatory meeting with management that could lead to discipline. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). Whether that same right extends to non-union employees has been long debated among Board members, and in *IBM Corp.*, 341 N.L.R.B. No. 148 (June 9, 2004), the Board once again held that it did not.

More than 20 years ago, the Board concluded that Weingarten rights did apply to non-unionized workforces. *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982). In that case, the Board emphasized that the right of an employee to be represented stems from an employee’s right under Section 7 of the National Labor Relations Act (“NLRA”) to engage in concerted activity for mutual aid or protection, rather than the Section 9 right of a union to serve as an employee’s representative. Therefore, the right to be represented was not dependent on the presence of a union.

Three years later, the Board reversed itself in *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985), holding that Weingarten rights do not apply to non-unionized workforces. The Board reasoned that to award non-unionized employees the right to be represented by a co-worker was inconsistent with an employer’s statutory right, in the absence of a union, to deal with its employees on an individual basis.

That rationale was reaffirmed, if softened somewhat, in *E.I. DuPont & Co.*, 289 N.L.R.B. 627 (1988). In *DuPont*, the

Board reiterated its position that Weingarten rights did not apply to non-union employees. Instead of concluding that the result was compelled by the language of the NLRA, the Board concluded that it was a “permissible” rather than a “mandatory” construction of the statute. Concluding that co-workers are not as skilled as and do not represent the workforce as a whole like union representatives, the Board indicated that it believed the employer-employee relationship was better served by limiting Weingarten rights to the union setting.

Twelve years later the Board again changed its mind, deciding that Weingarten rights were indeed grounded in Section 7 and are thus available to both union and non-union employees. *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 (2000). The Board rejected as “wholly speculative” the arguments in *DuPont* that non-union employee representatives do not represent the interests of all the employees or that they cannot provide effective representation.

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*In its recent decision, the Board again changed course--denying Weingarten rights to non-union employees is a permissible, and the most harmonious, interpretation of the NLRA.*

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In its recent 3-2 decision in *IBM Corp.*, the Board again changed course and returned to its rationale in *DuPont*--that denying Weingarten rights to non-union employees is a permissible, and the most harmonious, interpretation of the NLRA. The Board expanded its rationale from *DuPont* as to why co-workers are not suited to being representatives:

First, co-workers do not represent the interests of the entire workforce because they are not “elected” representatives of the bargaining unit and have no duty of “fair representation” like their union counterparts.

Second, a co-worker cannot equalize the imbalance of power between employees and employers because she does not have the force or political clout that a union representative possesses.

Third, union representatives are typically very familiar with the employees’ rights under the parties’ collective bargaining agreement, and can facilitate the interview by eliciting favorable facts, clarifying disputes and eliminating extraneous issues. A co-worker, on the other hand, is likely chosen by the individual employee based on some personal connection and will typically provide only moral or emotional support.

Fourth, the presence of a co-worker might compromise an employer’s obligation to keep certain information confidential. The Board observed that a variety of federal, state, and local laws, administrative requirements, and court decisions require employers to provide their employees with safe and secure work environments. Investigations into such matters as substance abuse, improper computer usage, theft, violence, sabotage, embezzlement,

employee health matters and harassment require discretion and confidentiality. A union representative has a duty to not reveal or misuse such information. A co-worker, however, is under no similar obligation.

For the time being, non-union employers are free to conduct investigatory interviews that could lead to discipline without an employee’s representative being present. ♦

## New Indiana Supreme Court Case has an MPACT on Arbitration Clauses

by Steven J. Strawbridge &  
Matthew P. Voors



### Introduction

In representing general contractors, it is not uncommon to be confronted with a situation where the general contractor is involved with owner disputes and at the same time is subject to claims being asserted by subcontractors. Usually, the prime contract contains alternative dispute resolution provisions which may mandate mediation, arbitration or litigation. Issues arise when the subcontract agreements do not incorporate the prime contract alternative dispute resolution provisions or provide for alternative claims resolution procedures. A recent case from the Indiana Supreme Court addresses some of these issues.

### Case Discussion

In *MPACT Construction Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901 (Ind. 2004), the court addressed whether an arbitration clause in a prime contract was incorporated by reference into a subcontract. The owner of Flying J, Inc. ("Flying J") contracted with MPACT Construction Group, LLC ("MPACT"), a general contractor, to construct a travel plaza in Indiana. Rather than drafting their own contract, the parties used an American Institute of Architects ("AIA") Standard Form Agreement (the "General Contract") that included a provision calling for binding arbitration. The General Contract also required that the general contractor impose the same obligations on its subcontractors that the prime contractor assumed toward the project owner.

After MPACT entered into the General Contract with Flying J, it contracted with

several subcontractors to perform work on the project. Instead of using AIA contracts with its subcontractors, MPACT used its own contract, which contained no arbitration clause, but did provide that the contract between Flying J and MPACT was "made a part of this subcontract as applicable to the work stated therein."

Flying J failed to pay MPACT for the work performed and supplies used in the construction of the travel plaza. As a result, the subcontractors recorded mechanic's liens against Flying J; one subcontractor, Superior Concrete Constructors, Inc. ("Superior Concrete"), filed an action to foreclose its mechanic's lien. Subsequently, MPACT filed a motion to stay litigation and compel arbitration ("Motion"). The trial court denied MPACT's Motion, but was later reversed, in part, by the Indiana Court of Appeals. The decision was subsequently appealed to the Indiana Supreme Court (the "Court").

When deciding the case, the Court focused on "whether MPACT and the Subcontractor agreed to arbitrate disputes arising out of their business dealings." The Court determined that in the absence of any arbitration provision in the subcontract, it must determine whether the arbitration provision contained in the General Contract was incorporated by reference into the subcontracts.

Applying Indiana law, the Court found no specific provision in the subcontract that required the subcontractors to submit their disputes to arbitration. The Court noted that the subcontractors could still be obligated to submit any claims to arbitration if the subcontracts incorporated by reference the arbitration provision in the General Contract. To make such a determination the Court analyzed the language contained in the subcontract.

The Court found that the subcontract failed to incorporate by reference the arbitration clause contained in the General Contract. The Court held that while two

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*... "if a general contractor uses subcontract forms other than those provided by the AIA, it must in its own contract include a provision requiring the subcontractors to assume the same responsibilities that it assumes toward the owner."*

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clauses cited by MPACT support the argument requiring arbitration, "the larger context suggests that the Subcontractors' construction [of the subcontract] was correct" and arbitration was not incorporated by reference into the subcontracts. Article 5.3.1 of the General Contract states:

*...the Contractor shall require each Subcontractor...to be bound to the contractor by terms of the Contract Documents and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract...shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all right, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner.*

The Court found that while the above provision suggests that the subcontractors agreed to comply with the above provision and submit any claims to arbitration, the contract, by its own terms, "puts the burden on the contractor to obtain an agreement

See *MPACT* on page 4

## Construction & Real Estate Group Adds New Attorney



Locke Reynolds welcomes J. Matt Harnish to its Construction & Real Estate Group.

Mr. Harnish concentrates his practice in business and construction litigation.

He is a member of the American, Indiana and Indianapolis Bar Associations. Prior to entering the practice of law, he built and owned an insurance business, which has been in existence since 1993. Mr. Harnish received his B.S. in Economics from Purdue University, West Lafayette, Ind. He received his J.D., *cum laude*, from the Indiana University School of Law, Indianapolis, Ind., where he served as articles editor of the *Indiana Law Review*.

### Save the Date

Locke Reynolds will be co-hosting a seminar with AGC/I on Wednesday, February 9, 2005. To request additional information, please contact Ranae Stewart at 317-237-3817 or rstewart@locke.com

*MPACT* continued from page 3

from subcontractors to assume the same responsibilities as the contractor assumes to the owner.” Thus, under the Court’s reasoning, “if a general contractor uses subcontract forms other than those provided by the AIA--which MPACT did in this case--it must in its own contract include a provision requiring the subcontractors to assume the same responsibilities that it assumes toward the owner.”

### Conclusion

The Indiana Supreme Court’s decision in *MPACT* was very case specific and turned on specific contractual language set forth in the subcontracts. The general contractor could have been successful in requiring arbitration with subcontractors had alternative language been included in the subcontract agreements. On occasion, subcontractors may file mechanic’s liens and even initiate foreclosure actions when there are binding arbitration provisions in the subcontract agreement. Because Indiana law requires initiation of a foreclosure suit within one year after filing the mechanic’s

lien, foreclosure litigation can be encountered by general contractors even when arbitration is mandated in the subcontract agreement. Under those circumstances, a Motion to Stay can be filed in the litigation requesting that further activity in the lawsuit be deferred pending completion of the arbitration required by the subcontract agreement. After an arbitration award is rendered, the litigation could be dismissed upon payment of the arbitration award or used as a vehicle to foreclose upon property to enforce the terms of the arbitration award. ♦

### About the Authors

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