

**THE EMPIRE STRIKES BACK: THE INSURANCE
INDUSTRY BATTLES TOXIC MOLD**

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I. INTRODUCTION: IT'S HERE, IT'S THERE, IT'S EVERYWHERE

It is a slimy scoundrel known by aliases like aspergillus, stachybotrys, and trichoderma.¹ It is the alleged cause of everything from clogged sinuses and chronic fatigue to cancer and cognitive dysfunctions.² It is an Old Testament plague that has become a modern day nightmare for contractors, property owners, and, most of all, insurance companies. It is mold, and it is infesting the nation's homes and clogging court dockets.³

Mold is ubiquitous. It is on TV, in newspapers, and on the internet.⁴ Celebrities like Ed McMahon, Erin Brockovich, and Michael Jordan have filed mold-related claims.⁵ Plaintiffs' lawyers are flocking to "Mold is Gold" conferences, and for good reason—jury awards in some mold cases are astonishing. \$14 million in Florida.⁶ \$18 million in California.⁷ And an astounding \$32 million in Texas.⁸

Gigantic jury awards, as well as the cost of mold remediation, have insurance companies backpedaling. Mold claims cost insurers \$1.3 billion in 2001.⁹ In 2002, that number rocketed to a staggering \$3 billion.¹⁰ In a single state—Texas—mold claims have cost insurers an estimated \$4 billion.¹¹

One reason that mold is so costly to insurers is that a single mold infestation case can result in three different types of claims. First, property owners can file first-party claims under their

1. Thelma Jarman-Felstiner, *Mold Is Gold: But, Will It Be the Next Asbestos?*, 30 PEPP. L. REV. 529, 533 (2003).

2. *Id.*

3. Candy B. Olson, *Mold: Response to the Efficient Proximate Cause Doctrine*, HENNEPIN LAWYER, Nov. 2006, at 8 ("In 2003, according to the Insurance Information Institute, there were 10,000 mold lawsuits pending nationwide; representing a 300% increase from 1999.").

4. See Toxic Mold, <http://www.google.com/search?q=%22toxic+mold%22> (last visited Apr. 18, 2007) (yielding 814,000 hits from a Google search for "toxic mold").

5. Elizabeth L. Perry, *Why Fear the Fungus? Why Toxic Mold Is and Is Not the Next Big Toxic Tort*, 52 BUFF. L. REV. 257, 258–59 (2004).

6. Centex-Rooney Constr. Co. v. Martin County, 706 So. 2d 20, 23 (Fla. Dist. Ct. App. 1997).

7. Anderson v. Allstate Ins. Co., 45 Fed. App'x 754, 756 (9th Cir. 2002).

8. Allison v. Fire Ins. Exch., 98 S.W.3d 227, 232 (Tex. App. 2002).

9. Richard Morgan & Charles Schoenwetter, *How to Mount a Successful Defense Against Toxic Mold Claims*, CONSTRUCTION ACCT. & TAX'N, Jan./Feb. 2006, at 10, 11, available at <http://www.bowmanandbrooke.com/CM/Publications/Morgan.pdf>.

10. *Id.*

11. *Id.*

homeowners' insurance policies.¹² Second, policyholders can sue their providers for acting in bad faith.¹³ Third, insurers may be subject to third-party claims from a long list of defendants, including builders, installers, contractors, subcontractors, repairmen, architects, manufacturers, designers, distributors, building owners, sellers, inspectors, and even real estate brokers.¹⁴ Given these three different types of claims, mold litigation has, as one commentator aptly described it, "triple threat" potential.¹⁵

This Article is a fourfold look at the insurance industry's response to the mold litigation explosion. First, it offers a broad historical and scientific overview of mold.¹⁶ Second, it summarizes the key cases that opened the floodgates to today's wave of mold cases.¹⁷ Third, it examines the insurance industry's reaction to the mold litigation explosion.¹⁸ Fourth, it describes some common mold litigation strategies¹⁹ before concluding with some final thoughts on the current and future status of mold litigation.²⁰ But before one can understand the complexities of mold litigation, one must have a basic understanding of mold itself.

II. THE HIDDEN VILLAIN

A. *Biblical Origins*

Mold has been a health issue for decades, perhaps even

12. Perry, *supra* note 5, at 273.

13. *Id.* Insurers have to be careful when denying coverage in order to avoid liability for a bad faith failure to deal with mold contamination. The following could constitute bad faith in resolving a toxic mold property claim: (1) "misrepresenting pertinent facts or insurance policy provisions;" (2) failing to act promptly; (3) failing to use reasonable investigation standards; (4) denying claims "without conducting reasonable investigation;" (5) "failing to affirm or deny coverage of claims within a reasonable time;" (6) trying to settle a claim for an unreasonably low amount; (7) informing insureds of a policy of appealing unfavorable arbitration awards, thereby "compelling them to accept settlements [for] less than the amount awarded in arbitration;" and (8) denying a claim without a reasonable explanation. Daniel J. Penofsky, *Litigating Toxic Mold Cases*, 92 AM. JUR. *Trials* § 70 (2004).

14. *See* Perry, *supra* note 5, at 273-74.

15. *Id.* at 273.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

centuries.²¹ The first recorded mold remediation may appear in the Bible.²² The process was relatively simple then. Initially, a priest inspected the house suspected of mold infestation.²³ If he found “greenish or reddish” streaks on the walls, the house was closed for a week.²⁴ If, during the course of the week, the streaks spread, the priest ordered the contaminated section of the wall removed.²⁵ New stones replaced those that were removed.²⁶ If the spots subsequently reappeared, the house was destroyed.²⁷

The “reddish and greenish” matter in the Bible story was linked to leprosy.²⁸ But doctors and scientists have not clearly linked toxic mold to any specific disease.²⁹ Moreover, there are no guidelines regarding the amount of exposure likely to cause injury or harm.³⁰ Consequently, it is often difficult to establish causation in toxic mold cases.³¹ Nevertheless, there is evidence that, perhaps, the science of mold simply has not caught up to the theory.

B. *A Little Science*

Mold is classified as a fungus.³² It can grow almost anywhere; it needs only moisture and nutrients.³³ Unlike plants that produce their own nutrients through photosynthesis, fungi survive by

21. Mold may have “caused at least ten plagues” in ancient Egypt. Jarman-Felstiner, *supra* note 1, at 534.

22. *Leviticus* 14:36–45 (Authorized King James).

23. *Id.* at 14:36.

24. *Id.* at 14:37–38.

25. *Id.* at 14:39–41.

26. *Id.* at 14:42.

27. *Id.* at 14:43–45. The remediation process is much more complicated today. It includes “structural repairs to prevent additional water intrusion, removal of mold-contaminated materials that cannot be adequately cleaned and decontaminated, and cleaning and decontamination of mold-contaminated materials that can withstand such treatment.” Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, *Mold Prevention Strategies and Possible Health Effects in the Aftermath of Hurricanes and Major Floods*, MORBIDITY & MORTALITY WKLY. REP., June 9, 2006, at 22, <http://www.cdc.gov/mmwr/PDF/rr/rr5508.pdf> [hereinafter *Mold Prevention Strategies*].

28. *See Leviticus* 14:37, 44 (Authorized King James).

29. Centers for Disease Control & Prevention, U.S. Department of Health & Human Services, *Mold Questions and Answers: Questions and Answers on Stachybotrys Chartarum and Other Molds* (2004), <http://www.cdc.gov/mold/pdfs/stachy.pdf>, at 1 [hereinafter *Mold Questions & Answers*].

30. Jarman-Felstiner, *supra* note 1, at 541.

31. *Id.* at 542. For more on causation, see *infra* Part V.A.

32. *Mold Prevention Strategies*, *supra* note 27, at 2.

33. *Id.*

“secret[ing] enzymes that digest the material in which the fungi are imbedded and absorb[ing] the released nutrients.”³⁴

Mold thrives “in damp, warm environments.”³⁵ Indoor environments are well-suited to mold growth because they are warm and filled with excellent nutrient sources such as “wood, wallboard, wallpaper, upholstery, and dust.”³⁶

Modern houses provide particularly good environments for mold growth. Modern construction techniques often result in airtight structures that are not as well-ventilated as older buildings.³⁷ Accordingly, when water manages to infiltrate a modern building, it often remains there and cannot get out or dry out. Thus, newer buildings frequently have higher concentrations of mold.³⁸

1. *It's the Toxins, Stupid*

“It isn't pollution that's harming the environment. It's the impurities in our air and water that are doing it.”³⁹ That quote (often falsely attributed to former Vice President Dan Quayle)⁴⁰ is puzzling, but a similar analysis is applicable to mold. Mold itself does not cause health problems. Rather, some molds produce mycotoxins,⁴¹ and exposure to these mycotoxins can cause health

34. *Id.*

35. *Id.*

36. *Id.*; see also Jarman-Felstiner, *supra* note 1, at 534 (listing other sources of mold nutrition such as “carpets, drywall, acoustical ceiling tiles, upholstered furniture, and wall coverings”).

37. Jarman-Felstiner, *supra* note 1, at 535. In the 1970s, architects began designing “airtight buildings that retain[ed] heat or air conditioning.” *Id.* When such buildings have water leaks, they become fertile ground for mold. *Id.* Unlike traditional homes, modern houses often do not have adequate airflow to allow the building to dry out. *See id.* Moreover, developers now commonly use cheap building materials like plasterboard and plywood, which are “more prone to growing mold when wet than are traditional building materials.” *Id.*

38. Philip L. Bruner & Patrick J. O'Connor, Jr., 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 11:87.40 (2006).

39. Al Jaffee, *Future Quayle Quotes We Can Expect to Hear*, MAD MAG., Oct. 1991, at 10–11 (Oct. 1991).

40. Snopes.com, Urban Legends Reference Pages: Questionable Quotes (Quayle Quotes) (Nov. 11, 2000), <http://www.snopes.com/quotes/quayle.htm> (last visited Mar. 30, 2007) (stating that this comment—which is now widely attributed to the former Vice-President—was actually “coined by humor writers as [something] he might say”). For a list of actual “Quaylisms,” see The Quotations Page, Quotations by Author: Dan Quayle, http://www.quotationspage.com/quotes/Dan_Quayle/ (last visited Mar. 30, 2007).

41. *See Mold Prevention Strategies, supra* note 27, at 2.

problems.⁴² But the Center for Disease Control and Prevention (“CDC”) discourages the use of the popular term “toxic molds” because it is possible for molds that produce toxins to grow *without* producing them.⁴³ Of the roughly 100,000 species of fungi, “fewer than 500 [are] human pathogens that can cause infections.”⁴⁴ Of these, “the most well-known . . . is the infamous *stachybotrys chartarum* . . . [a] black mold . . . usually found growing in walls.”⁴⁵

2. *Health Effects*

Allergy-like symptoms are the most common problem caused by exposure to low levels of mycotoxins like *stachybotrys*.⁴⁶ But exposure to high concentrations of mycotoxins via inhalation, ingestion, or skin contact has allegedly caused a long list of health problems including asthma, exhaustion, sinus infections, cognitive disorders, pulmonary hemorrhage, liver damage, central nervous system damage, brain damage, and cancer.⁴⁷

While the CDC acknowledges that *stachybotrys* and other molds may cause unspecified health problems, it stresses that “there is no test that proves an association between [mold] and particular health symptoms.”⁴⁸ Moreover, an established link between mold and a particular disease may be slow in coming because government and industry rarely fund mold research.⁴⁹ Nevertheless, the CDC warns that if *stachybotrys* “or other molds are found in a building, prudent practice recommends that they be removed.”⁵⁰

C. *Modern Mold*

In the 1930s, there was an outbreak of disease among farm animals in Europe.⁵¹ Scientists linked the disease “to moldy straw

42. *Id.* at 2–3.

43. *See id.* at 17.

44. *Id.* at 2.

45. *See Perry, supra* note 5, at 263–64. “Some experts estimate that close to 5% of all homes in the United States will experience *stachybotrys* growth.” *Id.* at 263 n.26.

46. *Id.* at 263.

47. Joseph Ziemanski et al., *Emerging Property and CGL Insurance Claims Trends*, 742 *PLI/LIT* 251, 258 (2006).

48. *Mold Questions & Answers, supra* note 29, at 4.

49. Jarman-Felstiner, *supra* note 1, at 541.

50. *Mold Questions & Answers, supra* note 29, at 4.

51. *See D. Chris Harkins, The Writing Is on the Wall . . . and Inside It: The Recent*

and other feed that the animals ate.”⁵² Russian scientists concluded that the disease was “caused by stachybotrys and began referring to the disease as stachybotryotoxicosis.”⁵³

During the mid-1900s, “European scientists continued to study . . . stachybotryotoxicosis, but there was little concern about mold infestation in buildings or homes.”⁵⁴ But in 1986, a Chicago family began a five-year battle with flu symptoms and lethargy.⁵⁵ Doctors and scientists eventually concluded that the family’s home “was infested with spores of stachybotrys chartarum.”⁵⁶ The family’s health problems vanished as soon as the mold problem was remediated.⁵⁷ Soon thereafter, the first significant mold cases began appearing in the courts.

III. JACKPOT!

A. *The Next Asbestos?*

Roughly 700,000 claimants have filed asbestos-related suits against over 8,000 companies.⁵⁸ The suits bankrupted seventy companies, with total payouts surpassing \$70 billion.⁵⁹ Some observers feel that mold litigation has the potential to equal or surpass the payouts generated by asbestos litigation.⁶⁰ In fact, many commentators have opined that toxic mold will become “the next asbestos.”⁶¹ Naturally, such a comparison makes plaintiffs’ lawyers

Explosion of Toxic Mold Litigation and the Insurance Industry Response, 33 TEX. TECH L. REV. 1101, 1102 (2002). The illnesses’ symptoms included “shock, hemorrhage, and even death.” *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1103.

55. *Id.*

56. *Id.*

57. *Id.*

58. James R. Copland, PointOfLaw.com, *Asbestos* (May 21, 2004), <http://www.pointoflaw.com/asbestos/overview.php>.

59. *Id.* To put terrorism in financial perspective, the September 11, 2001 attacks cost \$40.2 billion. Robert P. Hartwig, *Mold and Insurance: Truth and Consequences*, at 25 http://server.iii.org/yy_obj_data/binary/686142_1_0/mold.ppt (last visited Apr. 11, 2007).

60. See, e.g., Jarman-Felstiner, *supra* note 1, at 540 n.95 (quoting Ann Deering, *Beyond Sick Building Syndrome: Mold Litigation Enters the Main Stream*, RISK MGMT., Nov. 1, 2001, at 12, available at 2001 WL 8916049 (stating that the co-chair of the National Association of Independent Insurers Task Force warned “mold could be the next asbestos in terms of litigation and insurance losses”).

61. Jarman-Felstiner, *supra* note 1, at 540.

salivate and insurance companies sweat. But one commentator identified eight factors that distinguish mold litigation from asbestos litigation:

(A) there is a lack of scientific research or consensus in the medical community linking mold to specific medical ailments; (B) there is no signature disease associated with mold; (C) asbestos kills, mold does not; (D) there are no definitive biological markers for mold; (E) mold and mold-related illness are frequently immediately apparent; (F) there are no federal guidelines for permissible mold exposure limits; (G) there are no “mold-product” manufacturers; and (H) there are insurance coverage exclusions for mold.⁶²

Insurers hope these factors will minimize their mold-related losses. Still, at this early stage of mold litigation, plaintiffs have already won some strikingly large jury awards.⁶³ The balance of this section examines a handful of cases that lit the mold litigation fuse.

B. *Groundbreaking Litigation*

The validity of mold-related health problems was accepted for perhaps the first time by an appellate court in *Centex-Rooney Construction Co. v. Martin County*.⁶⁴ In 1987, Martin County (Florida) hired Centex-Rooney Construction Company to manage the construction of a new courthouse complex.⁶⁵ Due to defective construction, leaks occurred throughout the buildings, causing excessive mold growth.⁶⁶ Two indoor air-quality experts found that two “highly unusual and toxigenic molds” were present.⁶⁷ After a trial, the jury awarded the County \$14,211,156.⁶⁸ Centex appealed, asserting that the County’s expert witnesses’ testimony concerning health hazards of toxic mold should not have been admitted.⁶⁹ The appeals court disagreed, holding that a preponderance of the evidence showed that “the basic underlying principles of scientific

62. *Id.* at 540–41.

63. *See, e.g., supra* notes 6–8 and accompanying text.

64. 706 So. 2d 20 (Fla. Dist. Ct. App. 1997).

65. *Id.* at 23.

66. *Id.* at 23–24.

67. *Id.* at 24.

68. *Id.* at 25. The jury awarded the County \$11,550,000, which the court reduced to \$8,800,000. *Id.* The court then added prejudgment interest of \$5,411,156. *Id.*

69. *See id.* at 26.

evidence were sufficiently tested and accepted by the relevant scientific community.”⁷⁰

Centex was followed by *Mondelli v. Kendel Homes Corp.*⁷¹ and *New Haverford Partnership v. Stroot*,⁷² two more cases in which the validity of toxic mold science was accepted by appellate courts. But the case that truly put toxic mold litigation on the map—the case that made plaintiffs’ lawyers envision dollars and insurance companies envision disaster—was a case where expert testimony was *excluded* by both the trial and appellate courts.

C. *The Shot Heard ‘Round the World: Ballard v. Fire Insurance Exchange*⁷³

In 1990, Melinda Ballard bought a large house in Dripping Springs, Texas.⁷⁴ In 1998, some hardwood flooring in the home began to buckle and warp due to a plumbing leak.⁷⁵ After several unsuccessful attempts to fix the problem, Ballard filed a claim with her insurer, Farmers Insurance Group.⁷⁶

By chance, Ballard met an indoor air quality expert on a plane.⁷⁷ The expert, after hearing of Ballard’s problems, suggested that her home might have a mold problem.⁷⁸ The expert performed some tests in Ballard’s home and discovered stachybotrys spores.⁷⁹ Soon thereafter, Ballard fled the home with her husband, Ron Allison, and their son.⁸⁰ Subsequently, Ron Allison began having concentration and memory problems.⁸¹ He was eventually diagnosed with toxic encephalopathy, a type of brain

70. *Id.*

71. 631 N.W.2d 846, 857–58 (Neb. 2001) (finding that the district court abused its discretion by refusing to allow plaintiffs’ experts to testify).

72. 772 A.2d 792, 799 (Del. 2001) (holding that the methodology used by the plaintiffs’ experts was peer-reviewed and generally accepted in the scientific community).

73. No. 99-05252, 2001 WL 883550, (Tex. Dist. Ct. Aug. 1, 2001).

74. *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 234 (Tex. App. 2002). The appellate court decision is listed under the last name of Ballard’s husband, Ron Allison. *Id.* at 233 n.1.

75. *Id.* at 234.

76. *Id.* at 234–35. Fire Insurance Exchange, the first named party of this case, is a member of the Farmers Insurance Group, another named party.

77. *Id.* at 236.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 239.

damage.⁸² Doctors determined it was caused by exposure to mold.⁸³

Ballard filed suit against Farmers, alleging negligence and bad faith in the handling of her claims.⁸⁴ The trial court excluded expert testimony relating to the health effects of toxic mold.⁸⁵ Nevertheless, the jury ruled against Farmers, awarding \$2,547,350 to replace the home; \$1,154,175 for remediation; \$2,000,000 for personal belongings; \$350,000 for living expenses; \$176,000 for appraisal costs; \$5,000,000 for mental anguish; \$12,000,000 in punitive damages; and \$8,891,000 for attorneys' fees.⁸⁶ A whopping \$32 million in total.⁸⁷

This enormous verdict sent shockwaves throughout the insurance industry, causing insurers to circle their wagons and proactively cut off avenues of attack for future mold claims.

IV. THE EMPIRE STRIKES BACK: EXCLUSIONS, EXEMPTIONS, AND EXCEPTIONS

In large part due to publicity spawned by *Ballard*, the number of mold claims in Texas rose 1306% between the first quarter of 2000 and the fourth quarter of 2001.⁸⁸ Texas, with just eight percent of the national population, had seventy-five percent of all mold claims.⁸⁹ In response, large insurers including Allstate, State Farm, and Farmers Insurance Group announced that they would stop issuing new homeowners' policies in Texas.⁹⁰ Only an agreement with the Texas Department of Insurance prevented this from occurring.⁹¹

82. *Id.*

83. *Id.*

84. *Id.* at 236.

85. *Id.* at 237.

86. *Id.*

87. *Id.* On appeal, the Texas Court of Appeals affirmed the jury's award of actual damages but reversed the award for appraisal costs as well as the awards for punitive damages and mental anguish. *Id.* at 264–65. Melinda Ballard is now the president of Policyholders of America, a nonprofit organization whose aim is to assist policyholders. The organization's web address is <http://www.policyholdersofamerica.org/>.

88. See Hartwig, *supra* note 59, at 14. See also Ziemianski et al., *supra* note 47, at 260.

89. Stephen Pate, *Mold Litigation in Texas*, in TOXIC MOLD LITIGATION 188 (Joel Herz & Kimberly Taylor eds., 2005).

90. *Id.*; Harkins, *supra* note 51, at 1129–30.

91. Harkins, *supra* note 51, at 1131. In August 2001, Progressive Home Underwriters Insurance Company announced that it would no longer issue new policies to Texas homeowners. *Id.* at 1130. Shortly thereafter, Farmers Group,

Texas was not the only state with mold-related insurance problems. As mold received greater press coverage, other states saw the frequency of mold claims grow.⁹² The number of mold lawsuits pending nationwide increased by 300% between 1999 and 2003.⁹³ Since then, however, mold claims have leveled off, due largely to a variety of provisions in first-party policies that limit or exclude mold coverage.⁹⁴

If there is no statute or rule of law to the contrary, “insurers may include in their policies whatever terms they deem appropriate.”⁹⁵ They may decide “to cover some risks while excluding others.”⁹⁶ In general, a clearly stated exception or exclusion is effective regardless of the limitations it places on coverage.⁹⁷

A. Homeowner’s Insurance 101

First-party homeowners’ insurance policies generally come in one of two types: “open perils” (also known as “all-risk”) or “named perils.”⁹⁸ “Open perils” policies provide insurance for damage to

which held roughly 800,000 homeowners’ policies in Texas, joined Progressive. *Id.* Progressive and Farmers were soon joined by State Farm, the largest insurer in Texas. *Id.* Subsequently, the Texas Insurance Commission (“the Commission”) recommended “that insurance companies continue to write policies but [put a \$5000 cap on] coverage for mold remediation.” *Id.* In addition, the Commission recommended that homeowners be allowed to purchase extra mold coverage. *Id.* Neither homeowners nor insurers were happy with these recommendations. *Id.* Consumer groups objected because the cap on coverage (\$5000) “represented less than one third of the expense of the average mold claim.” *Id.* Meanwhile, insurers were uncertain if they could afford to stay in business, even with the coverage limitation, and therefore wanted to add total mold exclusions to their policies. *Id.*; *see also infra* Part IV.A.3 (discussing mold exclusions). Ten days after the Commission issued its preliminary suggestions, Allstate, the third largest insurer in Texas, stopped issuing new comprehensive policies. Harkins, *supra* note 51, at 1130. Finally, in late November 2001, the Commission announced its final ruling, which restricted coverage “to the repair or replacement of property damaged by water or mold that results from a water leak” and gave homeowners “the option to purchase additional mold coverage at a substantially higher rate.” *Id.* at 1131.

92. See Ziemianski et al., *supra* note 47, at 261.

93. Olson, *supra* note 3, at 8.

94. See Ziemianski et al., *supra* note 47, at 262.

95. 17 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 49:111, at 5 (4th ed. 2000).

96. *Id.*

97. See *id.* § 49:111 at 5 n.27.

98. Ziemianski et al., *supra* note 47, at 263. “All-risk” does not mean the same thing as “all-loss.” *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 75

the insured's property, subject to certain exclusions.⁹⁹ The insured does not have to prove that the loss resulted from a specific peril mentioned in the policy.¹⁰⁰ Conversely, that demonstration is necessary in a "named perils" policy.¹⁰¹ Most homeowner policies are "open perils" policies.¹⁰²

With "open perils" coverage, there generally is coverage for a loss, absent an applicable exclusionary provision.¹⁰³ Therefore, "in evaluating coverage, . . . one must focus on potentially applicable exclusions."¹⁰⁴ On the other hand, with "named perils" policies, one must focus on those perils covered in the policy, and the coverage analysis centers around whether any of those covered perils caused the damage.¹⁰⁵ Accordingly, the focus is on causation.¹⁰⁶

"Named perils" policies typically do not cover mold damages.¹⁰⁷ Therefore, "the insured must identify a 'named peril' that potentially provides coverage for the loss."¹⁰⁸ Once the policyholder has made that demonstration, however, "the burden shifts to the insurer to show that an exclusion applies, or that the policyholder has not complied with a policy term or condition."¹⁰⁹

B. All Is Fair in Love, War, and Insurance Coverage

It is, of course, inconsistent, if not devious, for insurers to attempt to limit their liability by using exceptions or exclusions

(3d Cir. 1989). Accordingly, many insurers have switched their terminology to "open perils" or "open risk" instead of "all-risk." See Michael A. Hamilton, *Introduction to Property Insurance*, 690 PLI/LIT 277, 345 n.1 (2003); see also Poulton v. State Farm Fire & Cas. Cos., 675 N.W.2d 665, 670 (Neb. 2004).

99. Ziemianski et al., *supra* note 47, at 263.

100. *Id.*

101. *Id.*

102. Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 TORT & INS. L.J. 777, 784 n.27 (2001).

103. Michael A. Hamilton, *Introduction to Property Insurance*, 723 PLI/LIT 139, 157 (2005).

104. *Id.*

105. *Id.* at 158.

106. *Id.* at 157.

107. Ziemianski et al., *supra* note 47, at 263.

108. *Id.* For example, in *DeLaurentis v. United Services Automobile Ass'n*, the insurer argued that since mold was not a named peril, it was excluded from coverage. 162 S.W.3d 714, 724 (Tex. App. 2005). The court rejected that argument, noting "the undeniable fact that mold can be damage." *Id.* The court concluded that if a named peril causes mold, the damage may be a physical loss covered under the policy. *Id.* at 724-25.

109. Hamilton, *supra* note 103, at 146.

while simultaneously representing to consumers that they offer comprehensive “all-risk” coverage.¹¹⁰ For this reason, courts construe these attempted exemptions narrowly.¹¹¹ To be enforceable, any excluded risks must be clearly and conspicuously stated.¹¹² Ambiguous exclusions or exceptions are construed in favor of the insured.¹¹³

Although courts generally agree on how exclusions should be interpreted, there is, as one observer notes, “a hopeless lack of unanimity regarding the answers to such questions as whether the language used by the insurer is clear or at least sufficiently unambiguous.”¹¹⁴ In addition, as we shall see, there is a hopeless lack of unanimity among courts regarding how various exclusions should be applied to mold cases.¹¹⁵

C. Mold Exclusions

At least forty state insurance departments have approved mold exclusions or limitations in homeowners’ policies.¹¹⁶ The typical policy has an exclusion for “mold, fungus or wet rot.”¹¹⁷ In general,

110. See *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939, 940 (5th Cir. 1965) (“The description of the policy as ‘All Risk’ is rather a misnomer since it contains fourteen lettered exclusions, many of these covering a considerable number of separate items. The lettered exclusions are followed by exclusions from the exclusions. Decision requires a threading of this maze.”); see also 17 WILLISTON & LORD, *supra* note 95, § 49:111, at 14–15.

111. 17 WILLISTON & LORD, *supra* note 95, § 49:111, at 15.

112. *Id.* at 15–21. Under the “reasonable expectations doctrine,” an exclusion of a specific risk will be unenforceable unless the exclusion is so clear and conspicuous that a layperson would not reasonably expect the excluded risk to be covered by the policy. *Id.* at 21–23.

113. *Id.* at 15–21.

114. *Id.* at 25.

115. See *infra* Part IV.A.3–4.

116. Ziemianski et al., *supra* note 47, at 262. In general, consumers have not objected to these exclusions. See DAVID DYBDAHL, NEW INSURANCE EXCLUSIONS FOR TERRORISM AND MOLD CREATE UNPRECEDENTED LEVELS OF UNINSURED RISKS FOR PROPERTY MANAGERS, PROPERTY OWNERS AND LENDERS. OR SORRY WE FORGOT TO TELL YOU . . ., <http://www.armr.net/journalproperty%20.pdf> (last visited Apr. 11, 2007), at 4. It is difficult to imagine similar complacency if fire damages were excluded from homeowner policies. See *id.* In 2002, there were roughly 350,000 mold-related claims compared to approximately 500,000 fire claims. *Id.* at 3. And, like fires, mold can destroy the value of an entire building. *Id.*

117. INSURANCE SERVICES OFFICE, INC., HOMEOWNERS 3—SPECIAL FORM (1999), at 9, http://server.iii.org/yy_obj_data/binary/748905_1_0/HO3_sample.pdf [hereinafter HO-3]. The Insurance Services Office (“ISO”) “publishes insurance forms for use by insurers.” James M. Garner, *Homeowner’s Insurance Policies*, 35793 NBI-CLE 24, 25 (2007). ISO issues several basic homeowner’s policies, including

this type of exclusion is applied in favor of insurance companies.

In *Fireman's Fund Insurance Co. v. Oregon Cold Storage, L.L.C.*,¹¹⁸ the court affirmed summary judgment in favor of Fireman's Fund and denied coverage for extensive rot damage to the insured's floors based on an exclusion for "gradual deterioration, mold, and wet or dry rot."¹¹⁹ The insured argued that the rotting itself was the damage, not the cause of damage.¹²⁰ The court rejected the insured's argument, stating that, while moisture and condensation might have caused rotting, that view does not exclude rotting as a cause of damage.¹²¹

Similar reasoning was used by the court in *Aetna Casualty & Surety Co. v. Yates*.¹²² There, a crawl space under the insureds' house lacked sufficient ventilation.¹²³ Consequently, air chilled by the air conditioning system was trapped and condensed moisture, which led to rotting of the joists, sills, and subfloor of the home.¹²⁴ Rot damage was excluded under the homeowners' policy except when it was an ensuing loss caused by water damage.¹²⁵ The court held that the rotting was caused by water (because water was the catalyst for the mold growth) but was not caused by *water damage*.¹²⁶ Accordingly, the court concluded that the damage fit within the mold exclusion and was not subject to the ensuing loss exception.¹²⁷

Fireman's Fund and *Yates* demonstrate that mold exclusions generally exclude losses due to mold damage regardless of the cause of the mold or whether the event was a covered claim. But not all courts share this view. For example, in *Buscher v. Economy Premier Assurance Co.*,¹²⁸ a federal district court found a mold exclusion inapplicable where a covered water loss caused mold damage.¹²⁹ The court reasoned that "the exclusion applies to

the HO-1, HO-2, HO-3, HO-5, and HO-8. *Id.* "The ISO's most popular homeowner's insurance policy form is the 'HO-3.'" Stephen P. Groves, Sr., *Statements/Examinations Under Oath*, 1 LAW & PRAC. INS. COVERAGE LITIG. § 3:6 (2006).

118. 11 F. App'x 969 (9th Cir. 2001).

119. *Id.* at 970.

120. *Id.*

121. *Id.*

122. 344 F.2d 939 (5th Cir. 1965).

123. *See id.* at 940.

124. *Id.*

125. *Id.* at 940-41.

126. *Id.* at 941.

127. *Id.*

128. No. Civ. 05-544, 2006 WL 268781 (D. Minn. Feb. 1, 2006).

129. *Id.* at *7. The water loss in this case resulted from a chimney flashing

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physical damage *caused by* mold, rather than to the occurrence of mold due to a separate covered water loss.”¹³⁰ The court therefore held that the exclusion did not eliminate coverage.¹³¹

D. Faulty Design, Construction, and Maintenance Exclusions

Defective construction, design, and maintenance are hazards that can allow moisture to collect, thereby creating an ideal environment for mold growth.¹³² Insurers, therefore, often attempt to apply exclusions for faulty or inadequate design, workmanship, or materials.¹³³ Such exclusions in first-party property policies are often similar to the following:

We do not insure for loss to property . . . caused by any of the following

. . . .

3. Faulty, inadequate or defective:

- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. Materials used in repair, construction, renovation or remodeling; or
- d. Maintenance;

of part or all of any property whether on or off the “residence premises.”¹³⁴

The scope of this exclusion’s application varies depending on the wording of the particular exclusion. According to Michael Hamilton, there are three kinds of faulty workmanship exclusions:

- 1) a rectification exclusion, which is written to bar coverage only for the cost to rectify the faulty workmanship. However, any losses caused by the faulty workmanship are covered; 2) an exclusion which bars coverage for losses caused by or resulting from the

leak. *Id.* at *1.

130. *Id.* at *7. The court was influenced by the insurer's claims handling code, which provided that “[m]old as a result of a covered water damage loss *is* covered.” *Id.* at *7 n.8.

131. *Id.* at *7.

132. Hamilton, *supra* note 103, at 169.

133. *Id.*

134. HO-3, *supra* note 117, at 12.

defective condition; and 3) an exclusion which bars coverage for costs to rectify defective condition and any losses caused directly by defective condition, but coverage is preserved for resulting or ensuing loss.¹³⁵

Property insurance policies are designed and intended to cover physical loss or damage that occurs *fortuitously* as a result of an insured peril.¹³⁶ Courts recognize that any event that was inevitable under the circumstances was not fortuitous and is not covered.¹³⁷ Accordingly, courts have upheld defective design, construction, and maintenance exclusions when insureds' long-term failure to maintain their property leads directly to mold losses.¹³⁸

For example, in *Lexington Insurance Co. v. Unity/Waterford-Fair Oaks, Ltd.*,¹³⁹ the insured owned an apartment complex.¹⁴⁰ Many units suffered mold damage caused by a severe rainstorm and flooding.¹⁴¹ The court held that the insurer established that inadequate maintenance (an excluded cause per the insurance contract) contributed to the mold problem.¹⁴² The insurer, therefore, was exempt from liability.¹⁴³

In *Atlantic Mutual Insurance Cos. v. Lotz*,¹⁴⁴ mold and rot damage existed before the homeowners purchased their home.¹⁴⁵

135. Hamilton, *supra* note 103, at 169.

136. See, e.g., *Avis v. Hartford Fire Ins. Co.*, 195 S.E.2d 545, 548 (N.C. 1973) (holding that in order to be compensable, a loss must be fortuitous). A fortuitous event is “[a] happening that, because it occurs only by chance or accident, the parties could not reasonably have foreseen.” BLACK’S LAW DICTIONARY 680 (8th ed. 2004).

137. Jane Massey Draper, Annotation, *Coverage Under All-Risk Insurance*, 30 A.L.R. 5TH 170 § 2(a), at 205 (1995 & Supp. 2006).

138. Ziemianski et al., *supra* note 47, at 274.

139. No. CIV.A. 399CV1623D, 2002 WL 356756 (N.D. Tex. Mar. 5, 2002).

140. *Id.* at *1.

141. *Id.*

142. *Id.* at *4–5; Ziemianski et al., *supra* note 47, at 274.

143. 2002 WL 356756, at *5.

144. 384 F. Supp. 2d 1292 (E.D. Wis. 2005).

145. *Id.* at 1298. In order to be covered, damage must occur while the applicable policy is in effect. Penofsky, *supra* note 13, § 65 at 282. If property damage occurs before or after a policy’s period, the insurer may reject a damages claim. *Id.* For coverage purposes, the *cause* of loss does not determine when the loss occurs. Hamilton, *supra* note 103, at 150. Instead, the *occurrence* of physical loss or damage allows the possibility of coverage. *Id.* In many mold cases, a loss occurs gradually over multiple policy periods before it is discovered. See *id.* at 150–51. In those cases, the date of occurrence is determined by using the “triggering mechanism” or “trigger” that is applicable in the particular jurisdiction. *Id.* at 151. Courts have adopted the following trigger dates in mold

Several design defects in the insureds' home created opportunities for water intrusion.¹⁴⁶ The insurer contended that since the damage existed before the homeowners' policy inception, it could not be fortuitous.¹⁴⁷ The homeowners countered that the damage was fortuitous because neither party was aware of the damage when the policy was issued.¹⁴⁸ The court ruled in favor of the insureds, explaining that "a loss is fortuitous if neither party knew or contemplated there was a defect in the insured property at the time the insurance contract was issued."¹⁴⁹

V. LITIGATION STRATEGIES

Mold-specific exclusions may not bar a mold claim. Even in states that allow mold exclusions, homeowners have successfully argued that mold coverage exists despite mold exclusions when a covered peril leads to mold growth.

A. *The Efficient Proximate Cause Doctrine*

Causation is a key issue in first-party claims. In order to be covered by insurance, an insured's alleged loss must be proximately caused by the peril insured against.¹⁵⁰ The efficient proximate

cases:

- the date of first exposure
- the date when damages were first manifested (when they were evident or could reasonably have been detected)
- the multiple trigger theory—dates continuously from the time of exposure up to the time of damage manifestation [and]
- coverage triggered in the single policy year in which the toxic mold property damage actually occurs, whether or not that damage was discoverable or not.

Penofsky, *supra* note 13, § 65 at 282. Most courts have found that the policy term in effect when the loss becomes readily apparent is alone responsible to cover long-term progressive losses. Hamilton, *supra* note 103, at 151. This "relaxed manifestation" theory has been adopted by several Texas courts. See Pate, *supra* note 89, at 200. Under this theory, damages are considered "apparent" when they are "capable of being easily perceived, recognized and understood." *Id.* "The benefit of the relaxed manifestation theory . . . lies in the balance of providing the insured's relief from having to discover harm when it is not discoverable yet putting the insured's [sic] on notice of their duty of diligence in discovering the harm." *Id.*

146. Lotz, 384 F. Supp. 2d at 1296.

147. *Id.* at 1298.

148. *Id.*

149. *Id.*

150. See Olson, *supra* note 3, at 10–11.

cause doctrine, which is used in most jurisdictions, applies when insured and uninsured perils combine to cause a loss.¹⁵¹ “The covered peril is regarded as the proximate cause of the entire loss, even where the last step in the chain of causation is an excluded peril.”¹⁵² Homeowners often attempt to use the efficient proximate cause doctrine to navigate around mold exclusions in their property policies when there are concurrent causes of damage.

This doctrine was applied to a mold case in *Bowers v. Farmers Insurance Exchange*.¹⁵³ In *Bowers*, the plaintiff-landlord’s renters caused mold growth by attempting to grow marijuana indoors.¹⁵⁴ The court found that the tenants’ conduct was an act of vandalism, which was a covered peril, rather than a mold loss, which was excluded.¹⁵⁵ The court explained that under the efficient proximate cause doctrine, if a covered loss is the proximate cause of damage, the whole loss is covered despite events in the causal chain that may be excluded from coverage.¹⁵⁶

B. Anti-Concurrent Cause Clauses

Insurers responded to cases like *Bowers* by adding anti-concurrent causation clauses to mold exclusions to neutralize the efficient proximate cause rule.¹⁵⁷ A typical anti-concurrent cause clause provides: “Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.”¹⁵⁸

In *Cooper v. American Family Mutual Insurance Co.*,¹⁵⁹ the court found that a homeowner’s insurance policy excluded coverage for

151. *Id.* at 10. Some courts reject the efficient proximate cause rule and instead require the insured to separate covered and non-covered damages. Ziemianski et al., *supra* note 47, at 280. This rule is well established in Texas. *Id.* at 280. See, e.g., *id.* at 280 n.108 (citing numerous Texas decisions following the rule of separation). In such jurisdictions, if the insured does not comply with the rule, they will forfeit all coverage for a particular loss. *Id.* at 280.

152. Olson, *supra* note 3, at 10–11.

153. 991 P.2d 734 (Wash. Ct. App. 2000).

154. *Id.* at 736.

155. *Id.* at 737.

156. *Id.* at 738. “When the insured can identify an insured peril as the proximate cause, there is coverage ‘even if subsequent events in the causal chain are specifically excluded from coverage.’” *Id.* (quoting *Findlay v. United Pac. Ins. Co.*, 895 P.2d 32, 33 (Wash. Ct. App. 1995)).

157. Ziemianski et al., *supra* note 47, at 280.

158. HO-3, *supra* note 117, at 11.

159. 184 F. Supp. 2d 960 (D. Ariz. 2002).

mold regardless of the cause.¹⁶⁰ The homeowner claimed that a plumbing leak damaged floors and walls and led to a mold infestation in her home.¹⁶¹ The insurer paid for repairs to the walls and flooring, but denied coverage for mold damages because the policy specifically excluded mold claims.¹⁶² The homeowner argued that the efficient proximate cause rule should apply because water damage was a covered loss and that therefore the resulting mold should also be covered.¹⁶³ The court declined to apply the efficient proximate cause rule, stating that although water damage was a covered loss, there was not coverage for losses caused by mold because the policy specifically excluded coverage for mold regardless of cause.¹⁶⁴

But not all courts have enforced anti-concurrent cause clauses.¹⁶⁵ For example, in *Murray v. State Farm Fire & Casualty Co.*,¹⁶⁶ the court concluded that an insurer could not avoid liability simply by finding an excluded peril somewhere in the causal chain.¹⁶⁷ As a basis for this conclusion, the court explained that “[n]o reasonable person would pay for insurance against some future peril if it were possible for the insurer to avoid liability by discovering an excluded peril somewhere in the chain of causation.”¹⁶⁸

C. *Ensuing Loss Provisions*

Insurance policies commonly include “ensuing loss” exceptions to mold exclusions.¹⁶⁹ Such exceptions provide that if an excluded peril (e.g., mold) leads to a non-excluded loss (e.g., water damage),¹⁷⁰ then the insurer will pay for the ensuing loss (i.e.,

160. *Id.* at 963–64.

161. *Id.* at 961.

162. *Id.*

163. *Id.* at 963.

164. *Id.* In addition, the court also found that mycotoxins released by mold do not constitute a separate and independent loss unaffected by the mold exclusion clause. *Id.* at 965.

165. Ziemianski et al., *supra* note 47, at 281.

166. 509 S.E.2d 1 (W. Va. 1998).

167. *Id.* at 15.

168. *Id.* (quoting *Howell v. State Farm Fire & Cas. Co.*, 267 Cal. Rptr. 708, 728–29 (Cal. Ct. App. 1990)).

169. Ziemianski et al., *supra* note 47, at 281.

170. *See generally* Draper, *supra* note 137, § 78(a) (discussing applicability of exclusions of water-related losses).

the loss or damage resulting from the specified cause of loss).¹⁷¹ The converse, however, is not true.¹⁷² When a covered cause of loss (e.g., water damage) results in an ensuing loss caused by an excluded peril (e.g., mold), the insurer will *not* pay for the ensuing loss.¹⁷³

*Lundstrom v. United Services Automobile Ass'n*¹⁷⁴ illustrates the “one-way” direction of ensuing loss provisions. The *Lundstrom* court examined an insurer’s denial of coverage for mold damage resulting from water leakage during rainstorms.¹⁷⁵ The court held that the applicable policy’s ensuing loss exception would override its mold exclusion only if the mold caused or preceded the water damage.¹⁷⁶ The court concluded that since the mold damage followed, rather than preceded, the water damage, it was excluded from coverage.¹⁷⁷

Ensuing loss provisions do not extend coverage for excluded losses.¹⁷⁸ Damages caused only by excluded perils, therefore, are not covered.¹⁷⁹ “[An] ensuing loss clause provides coverage only if an excluded peril allows a second covered peril to occur.”¹⁸⁰ Moreover, such a clause “provides coverage only for the loss or damage which proximately results from the ensuing covered peril.”¹⁸¹

Homeowners’ insurance policies typically exclude losses caused by “mold, fungus or wet rot.”¹⁸² Therefore, “if mold is the *cause* of a loss, the exclusion applies.”¹⁸³ On the other hand, if mold is the *result* of a loss, coverage must be analyzed for the peril that

171. Ziemianski et al., *supra* note 47, at 282.

172. *Id.*

173. *Id.* at 282–83.

174. 192 S.W.3d 78 (Tex. App. 2006).

175. *Id.* at 93.

176. *Id.*

177. *Id.* at 95.

178. Hamilton, *supra* note 103, at 175.

179. *Id.*

180. *Id.*

181. *Id.* In some jurisdictions, the extra cost of obtaining access to excluded damage in order to perform repairs is not an ensuing loss. *See, e.g.,* Sanson v. Nationwide Mut. Fire Ins. Co., 770 A.2d 500, 504 (Conn. Super. Ct. 1999) (noting that “no aggravating activity or event [caused the insured’s] additional losses other than those losses arising from the repairs necessitated by the damage caused by the insect infestation”). This is significant because mold may require undamaged structures to be removed in order to access damaged areas.

182. HO-3, *supra* note 117, at 9.

183. *See* Ass’n of Trial Lawyers of Am., *Insurance Coverage Issues for Construction Defect Claims*, 1 Ann.2004 ATLA-CLE 331 (2004) (emphasis added).

resulted in mold.¹⁸⁴ There will be coverage for the mold damage if the peril is a covered peril.¹⁸⁵ Occasionally this can get a little confusing for courts, as outlined below.

In *Flores v. Allstate Texas Lloyd's Co.*,¹⁸⁶ leaks from the homeowners' air conditioning unit and bathroom and kitchen plumbing resulted in mold.¹⁸⁷ Their policy had an exclusion for "rust, rot, mold, or other fungi."¹⁸⁸ But the policy also contained an ensuing loss provision that excluded mold losses unless such losses ensued from "water damage . . . if the loss would otherwise be covered under this policy."¹⁸⁹ The *Flores* court concluded that the policy covered mold damage "that [ensued] from an otherwise covered water damage event under the Policy."¹⁹⁰

In so deciding, the *Flores* court explicitly rejected the reasoning of another Texas federal district court.¹⁹¹ In *Fiess v. State Farm Lloyds*,¹⁹² the court, referring to the provision in dispute, stated that "'ensuing loss caused by . . . water damage' refers to water damage which is the result, rather than the cause, of [mold damage]."¹⁹³ Since the mold growth was caused by water damage, the court held that the mold damage was excluded by the insurance policy's ensuing loss provision.¹⁹⁴

D. Common Defense Strategies

While plaintiffs look to navigate around mold exclusions with the efficient proximate cause doctrine and ensuing loss clauses, insurers have established their own litigation strategies, including:

1. "Avoid, shift and minimize liability" for mold claims by drafting appropriate language in contracts with subcontractors and building owners;¹⁹⁵

184. *Id.*

185. *Id.*

186. 278 F. Supp. 2d 810 (S.D. Tex. 2003).

187. *Id.* at 812.

188. *Id.* at 814.

189. *Id.*

190. *Id.* at 815.

191. *Id.* at 814 n.3.

192. No. Civ.A. H-02-1912, 2003 WL 21659408 (S.D. Tex. June 4, 2003).

193. *Id.* at *8.

194. *Id.* at *8-9.

195. Morgan & Schoenwetter, *supra* note 9, at 13.

2. Force plaintiffs' experts to admit that government health and safety departments have not declared an unacceptable level of mold exposure;¹⁹⁶
3. Force plaintiffs to produce medical studies concluding that mold is a direct cause of their claimed personal injuries;¹⁹⁷
4. "Provide alternative exposure scenarios" (e.g., the plaintiffs could have been exposed to mold at work or in their cars);¹⁹⁸ and
5. "Provide alternative sources of moisture that may have caused the mold, such as humidifiers, hot tubs or saunas, over which the plaintiffs had exclusive control."¹⁹⁹

Defense lawyers focus not only on persuading jurors with facts and alternative scenarios; they also try to influence jurors' decision-making processes. Some effective techniques include:

1. Make it seem as if the plaintiffs had a choice in their conduct.²⁰⁰ Plaintiffs will therefore seem responsible for the consequences of their choices.²⁰¹
2. Implant alternative realities in jurors' minds (e.g., "The mold damage could have been avoided if only the plaintiffs had repaired the leaky roof.")²⁰² The more easily jurors can imagine the plaintiff preventing a negative outcome, the more likely the jurors will blame the plaintiff for the damages.²⁰³
3. Educate jurors about "hindsight bias" (the idea that after something bad happens, people tend to think that it should

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. David B. Graeven, *Development of Themes in Trial, Use of Mock Trials, and Other Trial Tactics & Techniques in Mold Litigation*, http://www.trialbehavior.com/articles/Development%20of%20Trial%20Themes_Mold.htm (last visited Apr. 11, 2007).

201. *Id.*

202. *Id.*

203. *Id.*

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have been expected) to counterbalance jurors' second-guessing of a defendant-insurer's actions.²⁰⁴

These strategies will surely continue to expand as new defense tactics are wielded against the onslaught of future mold claims.

VI. CONCLUSION

The mold litigation climate is currently "a bit like the Wild West."²⁰⁵ Unsubstantiated science, unpredictable courts, and confusing insurance policies combine to produce a litigation environment lacking standards and consistency. Plaintiffs struggle to overcome causation issues and mold exclusions, while defendants face potentially devastating jury awards.²⁰⁶ Consequently, both sides lack confidence, and many cases settle.²⁰⁷

The wildcard in the mold litigation game is science. Currently, the lack of a scientifically supported link between exposure to mold and serious health problems is "a fatal blow to most claims for personal injuries."²⁰⁸ If that changes, however, and mold exposure is proven to be as dangerous and debilitating as asbestos exposure, it could lead to calamitous consequences for the insurance industry. But for now, how a given mold case will turn out is anyone's guess.

204. *Id.*

205. Kathleen L. Daerr-Bannon, *Cause of Action by Residential Owners and Tenants for Personal Injury and Property Damage Due to Toxic Mold*, 26 CAUSES OF ACTION 2D 529, § 23 (2004).

206. *See id.*

207. *Id.*

208. Morgan & Schoenwetter, *supra* note 9, at 13.