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THE MOLD RUSH: THE ONSLAUGHT OF MOLD-RELATED
BAD FAITH SUITS AGAINST INSURERS AND THE
PRICE FOR HOMEOWNERS

I. INTRODUCTION

A home is a place of solace and refuge for the average homeowner.¹ Perhaps this is why when faced with an intruder to their home, homeowners often feel violated, reacting vigorously to expel the intruder and regain their safe haven.² This feeling may explain homeowners' increasingly intense reactions to the discovery of toxic mold invading their homes.³ Although the human species has evolved in the presence of mold, we have refused to accept the presence of mold in our homes.⁴ Even in biblical times reaction to mold was severe.⁵ The Lord instructed Moses to scrape walls, throw contaminated materials into unclean parts of town and, if necessary, ultimately tear down the home: "its stones, timbers and all the plaster."⁶ Mold victims continue to follow these instructions today.⁷

While mold has existed for at least four million years, mold litigation is a relatively recent phenomenon that has increased dramatically in the past few years.⁸ As of August 2002, claimants had

1. See Alexander Robertson IV, *Microbiological Contamination Litigation a/k/a 'The Mold Monster'*, 8 MEALEY'S LITIG. REP. EMERGING TOXIC TORTS 16, Nov. 24, 1999 (reporting that Americans spend 75% to 90% of their time indoors).

2. See Lisa Belkin, *Haunted by Mold*, N.Y. TIMES, Aug. 12, 2001, (Magazine), available at <http://rvclaw.com/mag1p.asp> (interviewing homeowner who expected home to be her "sanctuary").

3. See ABCNews.com, *Toxic Intruder: Black Mold Panic Has Families Fleeing Their Homes* (Nov. 29, 2002), at http://more.abcnews.go.com/sections/2020/2020/2020_toxicmold021129.html [hereinafter ABC News] (reporting Oregon family asked local fire department to burn down their \$450,000 home after discovering black mold inside); see also Belkin, *supra* note 2 (reporting that family in Austin, Texas burned down their home due to mold).

4. See Belkin, *supra* note 2 (discussing moldy homes since biblical times). In the Bible's Old Testament, the Lord tells Moses how to rid a house of mold. See *id.* (referencing *Leviticus* 14:33-45).

5. See *id.* (explaining that instruction in *Leviticus* 14:33-45 ultimately directs tearing down house).

6. *Id.* (quoting *Leviticus* 14:33-45); see also *Mold and the Bible*, at <http://www.mold-help.org/moldbible.htm> (last visited Oct. 4, 2003) (quoting *Leviticus* 14:39-47 referring to homes infested with mildew).

7. See Centers for Disease Control and Prevention (CDC), *Questions and Answers on Stachybotrys chartarum and other molds*, at <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm> (last visited Oct. 4, 2003) [hereinafter CDC] (describing methods of removing mold).

8. See Robert P. Hartwig, Ph.D., *Mold and the Insurance Industry: Truth and Consequences*, Insurance Information Institute, at <http://www.iii.org/media/presenta>

filed six thousand toxic mold suits in the United States.⁹ The surge in mold claims is best illustrated in Texas where, statistically, the number of mold claims grew 1,306% in two years.¹⁰ The majority of mold suits arise under first-party homeowners' coverage.¹¹ Fearing the adverse health effects mold may cause, homeowners file these suits seeking financial support from insurers to assist in the effort to keep mold out of their homes.¹²

The significant increase in mold litigation and subsequent payouts from insurers carry important ramifications for the rest of the country, even to those homeowners whose homes are unaffected by mold.¹³ Litigation has raised homeowners' awareness of the potential for mold in their homes.¹⁴ Litigation against insurance companies (insurers) has forced policyholders (insureds) throughout the country to share the expenses of litigation and resulting large payouts because of risk distribution — a fundamental

tions/mold (last visited Aug. 8, 2003) (explaining entire evolution of human species occurred in presence of mold); see also Belkin, *supra* note 2 (discussing mold references in Bible). Mold litigation refers to suits filed by those negatively impacted by mold against: (1) insurers; (2) former owners of sold homes; (3) builders for construction defects; (4) homeowners associations for improper maintenance as a few examples. See Hartwig, *supra*.

9. See Hartwig, *supra* note 8 (providing pie chart for types of documented mold suits).

10. See *id.* (tracking Texas' estimated number of mold claims between first quarter 2000 and fourth quarter 2001); see also ABC News, *supra* note 3 (describing hysteria over mold in past two years). Texas' warm, wet climate has been described as "a perfect breeding ground" for mold. See Belkin, *supra* note 2.

11. See Jeffrey Jarman, *Mold — The Next Asbestos?*, at <http://www.themold-source.com/litigation/moldnext.html> (last visited Oct. 4, 2003) (describing insurance policies under which most mold claims to date have been filed); see also Randy Maniloff, *Mold: 5 Reasons Why It Is Not The 'Next Asbestos'*, at http://www.mold-help.org/submenus/mold_and_insurance/mold.htm (last visited Oct. 4, 2003) (finding most mold claims for property damage under first-party policies); William F. Stewart, *Mold and You: An Introductory Guide to Mold Claims for Insurance Professionals*, 15 MEALEY'S LITIG. REP. INS. 46, Oct. 9, 2001 (finding first-party mold claims rising exponentially and constituting substantial threat for insurance industry). First-party coverage refers to insurance "covering losses suffered directly by the insured as opposed to losses to third-parties for which the insured may be held legally liable." JOHN F. DOBBYN, *INSURANCE LAW* 315 (3d ed. 1996) (explaining first-party insurance in reference to bad faith cause of action).

12. See ABC News, *supra* note 3. ABC News reports that a family in Oregon "asked their local fire department to burn their \$450,000 home to the ground after black mold was found inside," claiming that the house's mold contamination poisoned their family. *Id.*

13. See Hartwig, *supra* note 8 (explaining role of homeowners' fear of mold).

14. See Sarah Sue Ingram, *Mold May Have Growing Effect on Homeowners: Insurers All Over Are Raising Costs*, DAILY PRESS, Oct. 9, 2002, available at http://www.mold-help.org/submenus/mold_and_insurance/mold_may_have_growing_effect_on.htm (citing \$32 million jury verdict on mold claim in Texas and explaining that seventy percent of 2001's mold claims in United States came from Texas).

principle of the insurance industry.¹⁵ In an effort to protect the industry from enormous payouts from loss claims and lawsuits, insurers react to these suits by reducing homeowners' coverage, sharply increasing policy premiums and sometimes failing to renew homeowners' policies altogether.¹⁶ Plaintiffs continue to be undeterred from bringing mold suits and have successfully litigated mold suits, despite the fact that there currently exists no authoritative, scientific evidence demonstrating a causal relationship between mold and particular health problems.¹⁷ Without firm proof of mold's adverse health consequences, homeowners should carefully consider the ramifications of mold suits and measure the benefits of legal action against the actual threats posed by mold.¹⁸

This Comment focuses on toxic mold suits, specifically bad faith claims, brought by homeowners against their insurers.¹⁹ Bad faith claims account for fifty-percent of all toxic mold suits in the United States.²⁰ They result in some of the largest payouts by insurers because they enable insureds to recover extra-contractual damages.²¹ This Comment begins by answering the question "what is

15. See *id.* (describing consequences of spread of mold problem in Texas); see also DOBBYN, *supra* note 11, at 2-3 (describing how insurance seeks to distribute risk of economic loss among as many as possible who are subject to same kind of risk). By paying a premium, each insured (a member of the group subject to the same kind of risk as other members, e.g., homeowners) "contributes to a small degree toward compensation for losses suffered by any other member of the group." *Id.* at 2. "[The] broad sharing of economic risk is the principle of risk distribution." *Id.* at 3.

16. See Ingram, *supra* note 14 (describing effect of gigantic payouts on insurance industry).

17. See Bill Wilson, *The Insurance Implications of Toxic Mold Claims*, Independent Insurance Agents & Brokers of America, at <http://vu.iiiaa.net/Lib/Ins/PL/Homeowners/WilsonToxicMold.htm> (last visited Aug. 8, 2003) (concluding problem of litigating bodily injury claims for toxic mold compounded by lack of evidence); see also CDC, *supra* note 7 (asserting no test presently exists to prove association between *Stachybotrys chartarum* and particular health symptoms).

18. See Ingram, *supra* notes 14-15 and accompanying text (explaining negative effects of increase in mold litigation).

19. For a discussion of bad faith claims, see *infra* notes 113-150 and accompanying text.

20. See Hartwig, *supra* note 8 (citing Guy Carpenter's www.toxlaw.com for types of documented mold suits).

21. See Hartwig, *supra* note 8 (citing Guy Carpenter's www.toxlaw.com for types of documented mold suits). For a further discussion of the damages available in a bad faith cause of action arising under first-party insurance, see DOBBYN, *supra* note 11, at 323-28. "In bad faith causes of action under first-party insurance, awards fall into the following" categories: policy proceeds, emotional distress, economic harm, punitive damages and attorney's fees. DOBBYN, *supra* note 11, at 323-28.

mold?”²² Part II then discusses mold’s health risks, mold removal and mold litigation generally.²³ Part III analyzes the availability of mold coverage under standard homeowners’ insurance policies.²⁴ Further, Part III dissects the bad faith cause of action generally and then specifically through two recent mold cases.²⁵ Finally, Part IV discusses the economic repercussions on homeowners nationwide as well as recent legislative efforts confronting the toxic mold problem.²⁶

II. BACKGROUND

A. What is Mold?

Molds are fungi that produce furry growths on the surfaces of organic matter.²⁷ Molds reproduce by producing tiny spores that continually waft through indoor and outdoor air.²⁸ Molds land on damp spots and begin growing and digesting whatever they land on in order to survive.²⁹ Mold growth poses particular problems for homeowners because many building materials provide nutrients suitable to mold growth.³⁰

22. See *infra* notes 27-36 and corresponding text (explaining molds are fungi some of which produce toxic substances).

23. See *infra* notes 37-81 and corresponding text (discussing link between fear of health risks and incentive to litigate).

24. See *infra* notes 82-112 and corresponding text (discussing difference between covered and non-covered perils and relevance of mold’s source).

25. See *infra* notes 113-94 and corresponding text (explaining appeal of bad faith cause of action generally and as seen through two suits).

26. See *infra* notes 195-214 and corresponding text (discussing risk distribution resulting in increased costs of homeowners’ insurance).

27. WEBSTER’S NEW WORLD DICTIONARY COLLEGE EDITION 380 (3d. 1990) (defining mold).

28. See U.S. Environmental Protection Agency (EPA), *Indoor Air- Mold/Moisture*, at <http://www.epa.gov/iaq/pubs/moldresources.html> (last visited Aug. 3, 2003) [hereinafter EPA] (providing introduction to molds).

29. See *id.* (describing mold). Mold spores enter homes through doorways, windows, heating, ventilation, and air conditioning systems. See CDC, *supra* note 7. Spores may also be carried indoors on clothing, shoes, bags and pets. See *id.*

30. See CDC, *supra* note 7 (describing how molds get indoors and grow). *Stachybotrys chartarum*, so-called “toxic mold,” grows best on materials high in cellulose and low in nitrogen. *Toxic Mold & Tort News Online*, at http://www.toxic-mold-news.com/toxic_mold/stach.html (last visited Aug. 3, 2003) (describing *stachybotrys* mold). Such materials include: carpet, wallpaper, thermal insulation, fiberboard and dry wall. *Id.* Some experts claim that the mold problem is significantly greater in newer buildings “possibly due to poor construction practices, increased use of substandard materials, and increased air tightness of structures that facilitates the accumulation of moisture.” Wilson, *supra* note 17 (describing why mold problem greater in newer buildings).

“Toxic molds” are molds that produce toxic substances called mycotoxins.³¹ Mycotoxins enter the body through inhalation or contact with skin.³² Experts in many toxic mold cases have identified the mycotoxins associated with *Stachybotrys chartarum*, a type of mold, as the agents causing harm to human health.³³ Despite *stachybotrys*’ toxic reputation, the Centers for Disease Control (CDC) currently maintains, “the hazards presented by molds that may contain mycotoxins should be considered the same as other common molds which can grow [in one’s home].”³⁴ The CDC further asserts that indoor mold exposure does not always present health problems.³⁵ Similarly, the Environmental Protection Agency (EPA) does not consider *Stachybotrys chartarum* or any other mold to amount to a threat requiring standards or threshold limit values (TLVs) for airborne concentrations of mold or mold spores.³⁶

31. See *What Is It All About*, at <http://www.mold-help.org> (last visited Aug. 24, 2003) [hereinafter *Mold-Help*] (defining mycotoxins). Specifically, mycotoxins are metabolites — chemicals formed by fungi either when breaking down complex materials into simpler ones, or building new complex molecules. See *id.* See also *Allison v. Fire Insurance Exchange*, No. 03-01-00717-CV, 2002 Tex. App. LEXIS 8957, at *19, note 2 (Tex. App. Dec. 19, 2002) (defining mycotoxin). Experts disagree on the degree of harm mycotoxins can cause. See Jarman, *supra* note 11 (discussing effect of mycotoxins on health). According to the CDC, “[t]he hazards presented by molds that may contain mycotoxins should be considered the same as other common molds which can grow in your house.” CDC, *supra* note 7. Further, the CDC states, it is unnecessary to determine the particular type of mold. *Id.* “All molds should be treated the same with respect to potential health risks and removal.” *Id.*

32. Robertson, *supra* note 1 (discussing human contact with mycotoxins).

33. See *Mold-Help*, *supra* note 31 (describing mold which may impact human health). *Stachybotrys chartarum* is a greenish-black mold that can grow on material with a high cellulose and low nitrogen content, such as fiberboard, gypsum board, paper, dust and lint. See CDC, *supra* note 7 (addressing what is *Stachybotrys chartarum*). Trichothecenes, mycotoxins that may be produced by *stachybotrys*, are effective in destroying cellular material and have been used as chemical warfare agents. See *Mold-Help*, *supra* note 31 (describing so-called toxic mold). “The Soviets are alleged to have used neurotoxins from [*stachybotrys*] . . . as a biological weapon in Afghanistan.” Jarman, *supra* note 11 (emphasis added) (discussing mycotoxins generally); see also Belkin, *supra* note 2 (discussing use of trichothecenes in biological weapons); Robertson, *supra* note 1 (discussing use by Soviets of neurotoxins from *stachybotrys*).

34. CDC, *supra* note 7 (calling for equal treatment of all molds).

35. See *id.* (responding to inquiry regarding potential health effects of mold in buildings and homes).

36. See EPA, *supra* note 28 (declaring lack of EPA regulation or standards for airborne mold contaminants).

B. Health Effects of Mold

The scientific community is divided regarding the effect of mold on human health.³⁷ Some scientists maintain that exposure to mold may cause a myriad of health problems ranging from benign to fatal.³⁸ The scientific community, however, has thus far failed to offer conclusive proof of a causal relationship between mold and many of its alleged health effects.³⁹ The EPA and CDC currently recognize only allergic reactions, asthma and other respiratory complaints as potential adverse health effects associated with mold exposure.⁴⁰ The CDC further suggests that fever and short-

37. See ABC News, *supra* note 3 (discussing differing views on effects of mold).

38. See Hartwig, *supra* note 8 (listing alleged health effects of *stachybotrys*). Hartwig's inventory of the alleged health effects of *stachybotrys* includes: burning eyes, headache, nausea, nose bleeds, allergic reactions, asthma, exhaustion, sinus infections, cognitive disorders, pulmonary hemorrhage, liver damage, central nervous system damage, brain damage, cancer, death. *Id.*

39. See Wilson, *supra* note 17 (recounting problem in bringing bodily injury claims for toxic mold); see also Jarman, *supra* note 11 (discussing standards for admissibility of scientific evidence and emphasizing that "currently [there are] no epidemiological studies nor peer review articles tending to show a causal connection between mold and the illnesses allegedly associated with it"). The CDC emphasizes that a causal link between the presence of toxic mold and pulmonary hemorrhage and memory loss has not been proven. See CDC, *supra* note 7. In a 2001 interview, the chief of the air-pollution-and-respiratory-health branch at CDC stated: "[t]here's a diversity of opinion. Our opinion is that not enough is known about [mold]." Belkin, *supra* note 2 (noting CDC recanted former report). The chief went on to say that declaring causation without proof would be irresponsible. *Id.* In 1994, CDC initiated a controlled study of ten infants in Cleveland, Ohio, who died of pulmonary hemorrhage. See D. Chris Harkins, Comment, *The Writing is on the Wall . . . and Inside It: The Recent Explosion of Toxic Mold Litigation and the Insurance Industry Response*, 33 TEX. TECH L. REV. 1101, 1104-05 (2002) (describing CDC case study concerning suspicious infant illnesses and deaths in Cleveland); see also Robertson, *supra* note 1 (discussing Cleveland study); Belkin, *supra* note 2 (discussing Cleveland study). The study found that the homes of the ten infants exhibited elevated levels of toxic mold resulting from water damage. Harkins, *supra* note 39, at 1104. These results led the CDC to theorize that there was "a causal connection between infant pulmonary hemorrhage and the toxic mold [*S*]tachybotrys atra." *Id.* at 1105 (emphasis added). Ultimately, the CDC was unable to conclusively prove this theory due to the study's finding of an increase in pulmonary hemorrhage in "infants exposed to other triggers such as second-hand cigarette smoke." *Id.*

40. See EPA, *supra* note 28 (recognizing health effects as one of ten things one should know about mold); CDC, *supra* note 7 (reciting potential health effects of mold in buildings and homes). The CDC explains that mold does not always present a problem indoors but some people may be sensitive to molds and those experience symptoms such as nasal stuffiness, eye irritation or wheezing when exposed to molds. *Id.* It is generally accepted that mold is an allergen affecting allergy sufferers predisposed to reacting to environmental triggers. See Jarman, *supra* note 11 (recounting what is known about mold). The above symptoms are said to disappear when exposure to mold is discontinued. See *id.*

ness of breath are two of the more severe reactions to mold.⁴¹ These reactions sometimes occur in occupational settings and in people with pre-existing chronic diseases who may develop respiratory mold infections.⁴² Until more studies are conducted on mold's adverse health effects, the scientific community will likely remain divided over the seriousness of mold exposure.⁴³

Lack of scientific proof does not prevent plaintiffs from arguing that exposure to mold caused their serious health problems.⁴⁴ In Texas' seminal case, *Allison v. Fire Insurance Exchange*,⁴⁵ the plaintiff alleged that exposure to *stachybotrys* mold caused his brain damage and introduced supportive expert testimony.⁴⁶ Further, many courts have agreed that serious health problems can result from exposure to mold.⁴⁷ For example, the Delaware Supreme Court upheld a one million dollar jury award to a plaintiff who alleged that exposure to mold caused permanent cognitive impairment, increased risk of tuberculosis and osteopenia.⁴⁸ Plaintiffs throughout

41. See CDC, *supra* note 7 (answering question of potential health effects of mold in buildings and homes).

42. See *id.* (answering question of potential health effects of mold in buildings and homes).

43. See ABC News, *supra* note 3 (reporting divergent beliefs of scientists). A microbiologist at Texas Tech has attested to seeing mucosal bleeding, hair loss and in some individuals, cognitive dysfunction as the result of inhaling mold spores. See *id.* (acknowledging lack of conclusive proof). A University of Texas immunologist insists that the mold issue has been blown out of proportion, there is no cause for alarm and reports of serious health effects have been based on testimonials and conjecture rather than scientific evidence. See *id.* (reporting immunologist's beliefs regarding mold).

44. See, e.g., *New Haverford P'ship v. Stroot*, 772 A.2d 792, 795-97 (Del. 2001) (recounting alleged health problems of tenants suing landlord for damages arising from landlord's negligence in allowing mold to develop by failing to maintain safe and sanitary conditions in apartments); *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 237 (Tex. App. 2002) (demonstrating plaintiffs' allegations of serious health problems). See Hartwig, *supra* note 8 (describing plaintiffs' claims for personal injuries); see also Maniloff, *supra* note 11 (asserting that despite lack of coverage homeowners allege bodily injuries). Ed McMahon, former *Tonight Show* co-host, alleged that mold exposure in his home caused illness to himself and his staff, and that his dog died from mold-related illnesses. See *Ed McMahon Sues Homeowners Carrier Over Mold Contamination*, 16 MEALEY'S LITIG. REP. INS. 24 (Apr. 30, 2002) (detailing McMahon's action against homeowners' carrier).

45. *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 233 (Tex. App. 2002).

46. See *id.* at 239 (reciting plaintiff's claims for personal injury damages due to toxic encephalopathy). For an interview with plaintiff in *Allison*, see Belkin, *supra* note 2 (reporting story of Allison/Ballard family).

47. See Harkins, *supra* note 39, at 1106-12 (discussing cases where courts believed toxic mold to have had scientifically demonstrable detrimental health effects upon people).

48. See *id.* at 1109 (citing *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001), where court upheld jury award concluding that mold caused cognitive impairment).

the country have followed suit, alleging that exposure to mold has affected their health, despite the fact that most homeowners' policies do not cover personal injuries.⁴⁹

C. Removal of Mold

Whether exposure to mold causes adverse health effects remains unclear.⁵⁰ Nevertheless, both the EPA and CDC agree that a homeowner should remove mold found in their home.⁵¹ Because mold needs moisture to survive, leaks or moisture problems in one's home may indicate a mold problem.⁵² Homeowners should address this problem in a manner that controls the moisture, thus controlling indoor mold growth.⁵³

The steps taken after a moisture problem is discovered are crucial to effectively prevent exacerbating the problem.⁵⁴ If handled ineffectively, both the insured and the insurer may face more difficult issues.⁵⁵ If the homeowners' policy covers the source of the moisture problem, the insurer should avoid delay in settling the claims, enabling the homeowner to remedy the problem.⁵⁶ When the insurer's delays result in damages, the policyholder may have a

49. See Hartwig, *supra* note 8 (describing plaintiffs' claims for personal injuries); see also Maniloff, *supra* note 11 (asserting that despite lack of coverage homeowners allege bodily injuries).

50. See *supra* note 39 and accompanying text.

51. See EPA, *supra* note 28 (explaining that mold must be cleaned); see also CDC, *supra* note 7 (responding to question of what people should do if mold is found in their homes). Removal methods depend on where the mold is found. See CDC, *supra* note 7. The CDC recommends cleaning mold off general surfaces with a weak bleach solution. *Id.* Mold found under carpets, in insulation, in wall-board or other absorbent materials will typically require removal and replacement of those materials. *Id.* In flooded areas, walls and flood-damaged items require prompt cleaning with water and chlorine bleach to prevent mold growth. *Id.* (recommending cleaning with mixture of ten parts water to one part bleach). The CDC also recommends discarding moldy items. *Id.*

52. See *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 236 (Tex. App. 2002) (finding mold problem in home after extensive leaks); CDC, *supra* note 7 (responding to mold found in homes).

53. See EPA, *supra* note 28 (describing ways to control moisture in homes). The EPA describes typical scenarios that result in mold growth: water leaking or seeping through basement floors, showers or cooking adding moisture to air, and condensation of water on cold surfaces due to low temperatures. *Id.*

54. See *Allison*, 98 S.W.3d at 234-37 (describing events taking place after homeowner detected leaks).

55. See *id.* (discussing how insurer's mishandling of claims regarding mold damage eventually led to lawsuit against insurer for breach of duty of good faith and fair dealing in claims handling process).

56. See *id.* at 250 (holding that insurer failed to attempt in good faith to effectuate prompt settlement of plaintiff's claims after liability had become reasonably clear and this failure caused damages to plaintiff).

bad faith claim against the insurer.⁵⁷ If successful, such legal claims can result in large extra-contractual payouts from insurer to insured.⁵⁸ Consequently, the insurer's role in facilitating mold removal is crucial in determining the insured's legal rights.⁵⁹

D. Mold Litigation

Several elements may have contributed to what some have termed "the mold rush" — a nationwide spike in mold-related litigation.⁶⁰ These elements include: (1) an increased awareness of mold's presence in homes; (2) an increased awareness of mold's possible health effects; and (3) the desire to hold someone accountable for homeowners' problems.⁶¹ A non-profit organization reports that from January 1987 to February 2002, claimants filed 16,059 first-party insurance mold claims.⁶² Despite the numerous potential defendants in mold suits, the majority of homeowners bringing mold suits do so over loss claims arising under homeowners' insurance policies.⁶³ The potential damages sought by homeowners for mold claims vary widely.⁶⁴ Potential damages include: containment and remediation expenses, direct damage claims, loss

57. See *id.* (finding insurer's failure to settle claims caused damages to insured).

58. See *id.* (discussing damages awarded to plaintiff).

59. See DOBBYN, *infra* notes 122-25 (discussing court's consideration of insured's bad faith claim against insurer who failed to provide benefits within policy).

60. See Ingram, *supra* note 14 (reporting recent spike in mold claims in several states).

61. See *id.* (reporting recent spike in mold claims in several states). Increased awareness of mold and its effects may be attributed to increased media attention in recent years. See Hartwig, *supra* note 8 (documenting increased media attention on toxic mold). From January 2000 through May 2002, the media created more than eight thousand articles on toxic mold. *Id.* (citing figures from Insurance Information Institute based on Nexis search).

62. See Maniloff, *supra* note 11 (quoting figures of Policyholders of America). These claims consisted primarily of homeowners' claims. *Id.* First-party claims are those in which the insured seeks indemnification from the insurer for a personal loss. DOBBYN, *supra* note 11, at 301 (defining first-party claims).

63. See Maniloff, *supra* note 11 (explaining that most mold claims are for property damage under first-party policies); see also Hartwig, *supra* note 8 (charting percentages of mold suits brought against types of defendants). According to Hartwig, as of August 2002, fifty-percent of all documented toxic mold suits in the United States were bad faith claims brought against insurers. *Id.* (citing www.toxlaw.com). In addition to claims brought against insurance companies, other possible defendants include property owners and managers, architects, engineers, contractors, developers, construction materials manufacturers, distributors and suppliers, former owners of sold homes and homeowners associations. See Wilson, *supra* note 17 (listing potential defendants in lawsuits); see also Hartwig, *supra* note 8 (stating types of documented toxic mold suits in United States).

64. See Wilson, *supra* note 17 (discussing potential damages in mold suits).

of use claims, medical expenses and emotional distress/mental anguish claims, among others.⁶⁵

It is estimated that fifty-percent of toxic mold suits involve bad faith claims against insurers.⁶⁶ The damages available under these claims are particularly severe.⁶⁷ In a bad faith cause of action, the policyholder alleges that the insurer breached the implied covenant of good faith and fair dealing under insurance contracts.⁶⁸ The breach allegedly arises because the insurer has unreasonably withheld payments due to the policyholder under their policy.⁶⁹ Although jurisdictions consider the bad faith cause of action to arise under tort principles, the insurance policy forming the basis of the suit is a contract between insurer and insured.⁷⁰ Because of its tort classification, the damages a plaintiff may recover in a bad faith cause of action may be extra-contractual and thus more expansive than the policy proceeds withheld by the insurer.⁷¹

Available remedies in bad faith causes of action fall into the following categories: policy proceeds, emotional distress, economic harm, punitive damages and attorney's fees.⁷² The large number of available remedies may explain why the majority of toxic mold suits are brought against insurers as bad faith causes of action.⁷³

Homeowners have indicated that they are determined to hold insurance companies responsible for remedying mold in their homes.⁷⁴ Whether homeowners seek to recover contractually (under homeowners' insurance policies) or in tort (under bad faith causes of action), these suits have important ramifications for all

65. *Id.* (listing potential damages). Other potential damages include: investigation expenses, testing costs, abatement and mitigation expenses, relocation expenses, diminution of value claims and loss of earnings potential. *Id.*

66. *See* Hartwig, *supra* note 8 (charting percentages of mold suits brought against various defendants).

67. *See generally* DOBBYN, *supra* note 11 (describing remedies available in bad faith causes of action).

68. *See id.* at 299, 318 (explaining foundation for complaint in bad faith cause of action).

69. *See id.* (explaining source of insurer liability).

70. *See id.* at 299 (describing theory behind bad faith causes of action). The majority of courts hold that the bad faith failure to pay an insured on first-party insurance claims is a tort. *Id.* at 318-19.

71. *See id.* at 318-19 (explaining majority view regarding bad faith causes of action arising under first-party insurance).

72. *See* DOBBYN, *supra* note 11, at 323-38 (discussing categories of awards available in bad faith causes of action under first-party insurance policies).

73. *See Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 239 (Tex. App. 2002).

74. *See* Ingram, *supra* note 14 and accompanying text (discussing large jury verdicts in mold cases and increase in mold claims against insurance companies).

homeowners.⁷⁵ The recovery by some insureds against insurers affects the cost of insurance to all homeowners because of risk distribution.⁷⁶ Two important questions arise when insureds attempt to hold insurers accountable: (1) do standard homeowners' insurance policies cover these claims; and (2) is a homeowner likely to prevail under a bad faith cause of action?⁷⁷ The answers to these questions shed light on the merits of mold litigation.⁷⁸ When determining the merits of these claims, one must remember that while the effects of mold on health have not been conclusively proven, the effects of mold litigation on the insurance industry are clear.⁷⁹ Increased mold litigation and payouts result in greater costs to all homeowners in the form of higher homeowners' insurance premiums.⁸⁰ At the same time, the effects of living with mold remain open to debate.⁸¹

III. ANALYSIS

A. Mold Coverage Under Standard Homeowners' Insurance Policies

Homeowners that find mold in their homes most often turn to their insurer for recovery.⁸² An insurer's responsibility to a homeowner for mold remediation, however, depends on: (1) whether the direct physical loss associated with the mold occurred while the policy was in force; and (2) whether or not the homeowners' insur-

75. See Ingram, *supra* notes 14-15 and accompanying text (explaining ramifications of mold litigation).

76. For further discussion of risk distribution, see DOBBYN, *supra* note 11, at 2-4 (explaining that insurance seeks to distribute risk of economic loss among members contributing to general fund).

77. See Wilson, *supra* note 17 (examining standard homeowners' policy to determine whether it will cover direct damage to property).

78. For a discussion of the impact of mold litigation, see *infra* notes 200-06 (discussing economic repercussions on both insurers and insured homeowners).

79. See Ingram, *supra* note 14 (discussing effects of payouts and lawsuits for mold claims on Texas insurance industry and its insureds).

80. See Maniloff, *supra* note 11 (discussing financial troubles of insurance industry). Maniloff reports that courts awarding damages to homeowners in order to overcome limitations in coverage will "be passing the industry's losses back onto the insurance consumer, in the form of even higher premiums." *Id.*

81. *E.g.*, Jarman, *supra* note 11 (recounting what is known about mold). Jarman states: "the actual toxicity of certain molds in the indoor environment remains uncertain. Some experts claim that high levels of [*s*]tachybotrys are toxic for all individuals. Others state that the scientific data does not support this idea." *Id.* (emphasis added).

82. See *supra* note 12 and accompanying text (describing homeowners' recourse to insurance companies).

ance policy covers the property damage.⁸³ Although policies can vary among homeowners and insurance companies, examining standard policies helps gauge the likelihood of coverage for mold claims.⁸⁴

The Insurance Services Office's (ISO) 1991 Homeowners' Policy provides an example of a standard comprehensive "all risks" policy — the type of policy that ninety-six percent of homeowners choose.⁸⁵ ISO's 1991 policy included mold in an exclusionary category with smog, rust and other corrosion.⁸⁶ The policy stated that there would be *no* coverage for direct loss to property if caused by "[s]mog, rust or other corrosion, mold, wet or dry rot."⁸⁷ Insurance industry experts agreed that the insurers drafted the exclusion to exclude coverage where mold arises naturally over a period of time due to an already excluded cause of loss (e.g., wet or dry rot).⁸⁸ The exclusion does not preclude coverage in cases where mold arises naturally over a period of time due to an otherwise covered loss occurring in the form of a fortuitous event.⁸⁹ Grouping mold with other naturally occurring and gradually developing phenomena, such as smog, rust, corrosion and rot, bolstered this theory.⁹⁰ Thus, the policy language provides coverage if the mold is the *result*,

83. See Stewart, *supra* note 11 (examining three principal coverage defenses to consider when evaluating first-party property claim involving mold damage); see also Wilson, *supra* note 17 (discussing "big question" regarding mold claims).

84. See Wilson, *supra* note 17 (examining major Insurance Services Office (ISO) forms in ISO Homeowners' Program).

85. See *id.* (examining ISO's 1991 HO-3 form providing "all risks" coverage); see also Sylvia Pena-Alfaro, *The Toxic Mold Terrifying Texas: Mold's Hold on the Insurance Industry*, 34 ST. MARY'S L.J. 541, 569 n.179 (2003) (referencing most common homeowners' insurance policies). ISO provides statistical, actuarial, underwriting and claims information and analyses for "a broad spectrum of commercial and personal lines of insurance." Insurance Services Office, *About ISO*, at http://www.iso.com/about_iso/index.html (last visited Mar. 16, 2003).

86. See Wilson, *supra* note 17 (examining 1991 ISO Homeowners' Program (HO-3 form)).

87. *Id.* (quoting language of 1991 ISO Homeowners' Program).

88. See *id.* (discussing effect of exclusion 2.e.(3)).

89. See *id.* (discussing effect of exclusion 2.e.(3)); see also Jarman, *supra* note 11 (referencing industry consensus regarding ISO 1991 homeowners' policy); Stewart, *supra* note 11 (finding argument that policy bars coverage for mold occurring gradually but not mold associated with fortuitous event to be one of two arguments available to insureds to challenge application of mold exclusion).

90. Wilson, *supra* note 17 (theorizing when mold would be covered by policy); see also Jarman, *supra* note 11 (arguing that "the intent of the exclusion is to bar coverage for damage that occurs gradually, not a fortuitous event such as water damage").

and not the cause, of a direct physical loss *and* only if the cause of the resulting mold is itself a covered peril.⁹¹

In its 2000 Homeowners' Policy, ISO placed mold, wet rot and fungus into their own exclusionary category.⁹² This policy also disclaimed coverage for loss *caused by* mold.⁹³ Within this new exclusionary category, however, the policy provided an exception to the mold exclusion.⁹⁴ Although the policy disclaimed loss caused by mold, it insured the loss if the mold resulted from accidental discharges of plumbing, heating, air conditioning or sprinkler systems.⁹⁵ The 2000 policy therefore treated mold as an *effect* of these enumerated causes and provided coverage for the loss.⁹⁶

Another possible exclusion of coverage for mold damage is the "pollution exclusion" included in ISO's 1991 and 2000 policies.⁹⁷ Under the pollution exclusion, several conclusions must be reached in order to deny coverage for the loss.⁹⁸ The conclusions are: (1) mold is a pollutant; (2) the discharge, dispersal, seepage, migration, release or escape of this pollutant caused the loss; and (3) a "Peril Insured Against under Coverage C of [the] policy" did not cause the discharge, dispersal, seepage, migration, release or escape.⁹⁹ Arguments in favor of classifying mold as a pollutant as-

91. See Jarman, *supra* note 11 (examining practical consequence of policy language). A burst water pipe is an example of a covered peril whereas flooding and defective construction are examples of excluded losses. *Id.*

92. See Wilson, *supra* note 17 (examining 2000 ISO Homeowners' Program).

93. See *id.* The policy states: "[w]e do not insure, however, for loss: c. Caused by: (5) Mold, fungus or wet rot." *Id.*

94. See *id.* (noting explicit exception to exclusion).

95. See *id.* (insuring against resulting mold even if mold is hidden). The policy states:

However, we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within: (a) A plumbing, heating, air conditioning or automatic fire protective sprinkler system, or a household appliance, on the "residence premises"; or (b) A storm drain, or water, steam or sewer pipes, off the "residence premises.

Id.

96. See *id.* (examining exclusion in 2000 policy that provides for exception if mold results from "the accidental discharge or overflow of water or steam from within" certain enumerated sources).

97. See Wilson, *supra* note 17 (discussing second possible exclusion in 1991 and 2000 HO-3 policies).

98. See *id.* (describing issues to be determined in deciding whether coverage for loss is excluded under pollution exclusion).

99. See *id.* (providing language of HO-3 form). The policy defines pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." *Id.*

sert that it is: (1) a type of matter, (2) a contaminant, and (3) an irritant.¹⁰⁰ Those against classifying mold as a pollutant claim that the pollution exclusion does not intend for a pollutant to be a living organism.¹⁰¹ Arguments are also made both for and against finding mold, if considered a pollutant, to have seeped, migrated, released, escaped, been discharged or dispersed, thus causing damage as required under the pollution exclusion.¹⁰² Because there are no definitive answers to such questions, courts have questioned the applicability of the pollution exclusion to mold-related claims.¹⁰³ In fact, some jurisdictions strictly require industrial environmental pollution for the exclusion to apply.¹⁰⁴

Many questions still exist as to whether standard homeowners' policies cover mold claims.¹⁰⁵ With no clear answers, coverage for first-party mold liability claims must be evaluated on a case-by-case basis.¹⁰⁶ In one situation, however, insurers should have pre-determined responses.¹⁰⁷ When mold is connected to a water damage claim, insurers should take "immediate and aggressive action to encourage mold removal."¹⁰⁸ Insurers' refusals to cover claims in these situations have "resulted in ongoing exposure of insureds to mold, exacerbating personal injuries."¹⁰⁹ Situations where insurers have delayed or refused to provide coverage give rise to homeowners' bad faith claims against insurers.¹¹⁰ In bad faith claims, courts

100. *Id.* (explaining case for classifying mold as pollutant); *see also* Stewart, *supra* note 11 (classifying mold as pollutant).

101. *See* Wilson, *supra* note 17 (offering counter-argument to classifying mold as pollutant).

102. *See id.* (explaining that there has been no definitive answer).

103. *See* Stewart, *supra* note 11 (discussing applicability of pollution exclusion).

104. *See* Wilson, *supra* note 17 (listing jurisdiction requiring environmental pollution for this type of exclusion to apply).

105. *See id.* (explaining insurance industry response to potential ambiguity regarding mold claims).

106. Stewart, *supra* note 11 (recommending how to evaluate first-party mold liability claims).

107. *See id.* (relating that largest mold verdicts have resulted when insurers refused to cover first-party water damage claims therefore necessitating pre-determined responses by insurer to reduce financial risk).

108. *Id.* (directing insurers to take immediate action to encourage mold removal where it accompanies covered water damage loss).

109. *Id.* (cautioning insurers on how to handle first-party water damage claims).

110. *See* DOBBYN, *supra* note 11, at 321 (discussing reasons courts take unreasonable delay in insurers investigating claims as serious matter in context of bad faith cause of action); *see also* Maniloff, *supra* note 11 (stressing importance of insurance industry's handling of mold claims so as to prevent property damage claims under homeowners' policy from "mushrooming" into bad faith claims).

have awarded plaintiffs the largest judgments against insurers.¹¹¹ In some cases, plaintiffs recover damages exceeding their policy's scope and, at times, where the homeowners' policy would not even have covered the claim.¹¹²

B. The Bad Faith Cause of Action

The large judgments courts award to plaintiffs in bad faith causes of action help explain why insureds opt for this action against insurers and why they account for fifty-percent of all toxic mold suits in the United States.¹¹³ For example, in January 2001, a district court in California awarded three million dollars to a homeowner in a mold-related bad faith claim against an insurer.¹¹⁴ In June 2001, a Texas jury awarded thirty-two million dollars to a homeowner in a similar action.¹¹⁵ In December 2002, in another Texas court, a homeowner settled a mold-related bad faith claim for one and a half million dollars.¹¹⁶

1. Theory of Liability

The bad faith cause of action arises from the contract law doctrine that "implied on both sides of every contract [is] a covenant of 'good faith and fair dealing' to see that the other party to the contract is not hindered in reaping the benefits of the contract."¹¹⁷ When policyholders sue insurers, courts apply this doctrine as the foundation for bad faith causes of action.¹¹⁸ The covenant of good

111. See *supra* notes 64-65 and accompanying text (discussing damages available in bad faith suits).

112. See *id.* (discussing damages available in bad faith suits).

113. See *supra* notes 20-21 and accompanying text (discussing payouts in mold suits).

114. See *Anderson v. Allstate Ins. Co.*, No. 01-15330, 2002 U.S. App. LEXIS 18379, at *756 (9th Cir. Sept. 3, 2002) (reporting district court's reduction of jury award of approximately 18.5 million dollars). The Ninth Circuit Court of Appeals later affirmed the compensatory damage award of approximately \$500,000 and reversed the punitive damages award. *Id.*

115. *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 233 (Tex. App. 2002) (reporting decision of trial court later reduced by appellate court reversing jury's punitive and mental anguish damages awards).

116. See *Toxic Mold & Tort News Online*, at <http://www.toxic-mold-news.com/> (last visited Mar. 16, 2003) (reporting unreported decision of *Blum v. Chubb Custom Ins. Co.*, No. 99-3563 (Nueces Co., Texas Dist. Ct.)).

117. *DOBBYN*, *supra* note 11, at 299 (explaining theory of bad faith cause of action).

118. *Id.* (determining applicability in insurance context). To date, "the courts have never held that there is a reciprocal cause of action in the insurer for breach of duty by the insured." *Id.* at 329 (discussing reciprocal causes of action). For a further discussion on the reasons for this one sided approach, see *DOBBYN*, *supra* note 11, at 328-29.

faith prohibits insurers from unreasonably withholding payments owed to policyholders under first-party insurance policies.¹¹⁹ Courts find the duty of good faith and fair dealing implied by law and it follows that the breach of this duty constitutes a tort separate from any action under the policy terms.¹²⁰ Accordingly, it is possible for insureds to collect damages under a bad faith claim exceeding the damages collected under a contractual claim for the same policy.¹²¹

2. *Standard of Proof*

A successful claim of bad faith requires a level of breach higher than a mere negligence standard.¹²² Courts require deliberate conduct on the part of the insurer, though it need not be unlawful or malicious.¹²³ To sustain a claim of bad faith, an insured must prove two elements: (1) that the insurer had no lawful basis for refusing to pay the insured's claim; and (2) that the insurer possessed actual knowledge of this fact or intentionally failed to determine whether a lawful basis existed for refusing to pay the claim.¹²⁴

Courts judge the first element of the standard of proof at the time of the claim's refusal.¹²⁵ Consequently, the anomaly exists that "the insured could wind up collecting on the bad faith claim and ultimately losing on the contract claim for proceeds under the policy."¹²⁶ This anomaly exists because the insurer may have refused to pay the claim before it conducted an investigation as to whether

119. *See id.* at 317-18 (discussing *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973) as leading precedent for bad faith cause of action for failure to pay claim of insured).

120. *Id.* at 318 (discussing precedent set by *Gruenberg*).

121. *See id.* at 318 (explaining bad faith cause of action constitutes action separate from action in contract under policy). The majority of jurisdictions reason that "the failure to exercise good faith in deciding whether or not to pay a claim is a breach of the implied duty of good faith and fair dealing, and therefore actionable as a tort." *Id.* at 319 (discussing *Gruenberg* line of reasoning).

122. *See DOBBYN, supra* note 11, at 320 (examining standard of proof for bad faith actions).

123. *Id.* (discussing standard of conduct required for insurer to be found acting in bad faith).

124. *See id.* (citing *Chavers v. Nat'l Sec. Fire & Cas. Ins. Co.*, 405 So. 2d 1 (Ala. 1981) to explain plaintiff's burden of proof in bad faith action against insurer under first-party insurance policy); *see also* Harkins, *supra* note 39, at 1126 (discussing plaintiff's burden of proof).

125. DOBBYN, *supra* note 11, at 320-21 (discussing definitions of required standards of proof adopted by courts).

126. *Id.* at 320-21 (describing anomaly in recovering under bad faith cause of action).

a lawful basis existed for denying the claim.¹²⁷ Under these circumstances, the court may find that the plaintiff meets both elements of the standard of proof.¹²⁸ Accordingly, the plaintiff could win on a tort claim of bad faith.¹²⁹ The possibility exists that, had the insurer adequately investigated the claim before refusing it, evidence might have been produced that the plaintiff did not have coverage under the policy.¹³⁰ Thus, the plaintiff would lose the contract action and yet win on the tort claim of bad faith.¹³¹

An insurers' unreasonable delay in investigating claims is significant in bad faith actions.¹³² Courts find it "places inordinate economic stress on the insured at the time of a serious financial loss, and squeezes the policyholder into acceptance of an unfair compromise of its claim against the insurer."¹³³ In the context of mold claims, this sort of unreasonable delay may have serious effects for both insurer and policyholder.¹³⁴ In addition to the consequences above, delay may cause the policyholder to endure continued mold exposure and increased infestation, which will exacerbate personal injuries, emotional distress and property damage.¹³⁵ The consequences of delay have important ramifications for the insurer because they may contribute to a larger verdict for the policyholder if the delay amounted to bad faith.¹³⁶

3. Damages

The wide array of damages available in a bad faith cause of action make this legal action particularly attractive to plaintiffs.¹³⁷ Though plaintiffs may recover the same policy proceeds under an

127. *See id.* at 321 (discussing possibility of loss to insurer by unreasonably delaying investigating insured's complaint).

128. *See id.* (explaining how insured could win tort claim of bad faith).

129. *See id.* (discussing result of insurer's refusal to pay claim without conducting adequate investigation).

130. DOBBYN, *supra* note 11, at 321 (explaining possibility of bad faith recovery despite policy's non-coverage of claim).

131. *Id.* (explaining consequences for insurer if it unreasonably delays investigating plaintiff's claim).

132. *Id.* (explaining seriousness of insurer's delay in investigating claim on policy).

133. *Id.* at 321-22 (explaining why courts find insurer's delay in investigating insured's claim to be serious matter).

134. *See* Stewart, *supra* note 11 (examining actions by insurance industry to avoid or minimize exposure to mold claims).

135. *See id.* (providing examples of immediate and aggressive action which should be taken by insurer).

136. *See id.* (discussing "mold verdicts").

137. *See supra* notes 64-65 and accompanying text (discussing potential damages in mold suits).

action on the contract, the remedies for a bad faith action are more expansive.¹³⁸ For example, a court may compensate the insured for emotional distress resulting “from the insurer’s bad faith failure to pay [policy] proceeds.”¹³⁹ The insured may further recover any economic damages that were the direct and foreseeable result of the insurer’s bad faith refusal to pay the policy proceeds.¹⁴⁰

Punitive damages provide courts the greatest leeway in compensating plaintiffs for insurers’ bad faith.¹⁴¹ Within the bad faith context, punitive damages’ purpose is to exact a civil form of punishment on insurers, and their intended effect is to deter insurers from future “wanton, reckless, or grossly negligent conduct.”¹⁴² While local state statutes regulate punitive damages, their purpose and intended effect do not vary between jurisdictions and often appeal to juries in mold cases, resulting in large verdicts for insureds.¹⁴³ Furthermore, some courts additionally allow recovery of attorney’s fees when an insured retains an attorney so as “to compel the insurer to pay the proceeds that are due under a policy and are being withheld by the insurer in bad faith.”¹⁴⁴

4. *Preemptive Actions and Defenses*

As discussed in Part III. A., the circumstances in which first-party homeowners policies will cover mold claims are often unclear.¹⁴⁵ An insurer can avoid a bad faith verdict for refusing to pay policy proceeds by preemptively bringing a declaratory judgment

138. See DOBBYN, *supra* note 11, at 323 (describing remedies available in bad faith cause of action). An advantage to seeking policy proceeds under a bad faith cause of action is that many courts “permit recovery of the present value of the future proceed installments” which could not be recovered in a breach of contract action. *Id.*

139. *Id.* (explaining that second major category of recovery is emotional distress). Unlike recovery for emotional distress in tort actions, in the insurance context courts often do not require the insured to prove “that the distress was severe and accompanied by other provable harm,” one reason being that the insured purchased peace of mind when purchasing an insurance policy. *Id.* at 324.

140. *Id.* at 324 (discussing another category of compensation for economic damages). “Such resulting losses have included loss of rents, loss of credit, loss of profits, and loss of business good will.” *Id.*

141. See *id.* at 324-26 (discussing punitive damages).

142. See *id.* at 115 (discussing purpose and effect of punitive damages generally).

143. See DOBBYN, *supra* note 11, at 115, 324 (describing that local state statutes specify plaintiff’s burden of proof).

144. See *id.* at 326-27 (examining reasoning of jurisdictions allowing recovery of attorney’s fees by insureds in bad faith causes of action).

145. See *supra* notes 82-112 and accompanying text (examining coverage of mold claims under standard homeowners’ insurance policies).

action against the insured to determine coverage.¹⁴⁶ In such an action, the court decides the issues that determine coverage.¹⁴⁷ When utilized appropriately, this type of litigation permits insurers “to cost-effectively ascertain [their] obligations early on, thereby eliminating much of the risk associated with bad faith.”¹⁴⁸

While insureds retain the right to bring bad faith causes of action, insurers retain the right to contest these claims when a reasonable basis exists for denying payment of proceeds under a policy.¹⁴⁹ An insurer’s defenses include: (1) arguable questions of non-coverage; (2) disputes over interpretation of policy language; (3) failure of the insured to supply information regarding the claim; and (4) questions of lapse of the policy.¹⁵⁰

C. Mold Plaintiffs and the Bad Faith Cause of Action

1. *Allison v. Fire Insurance Exchange: The Thirty-Two Million Dollar Bad Faith Verdict*

Melinda Ballard¹⁵¹ is one of many plaintiffs to have successfully litigated a mold-related bad faith cause of action against her homeowners’ insurance company.¹⁵² At trial, a Texas jury awarded Ballard thirty-two million dollars against her insurer.¹⁵³ Even though the Court of Appeals of Texas reduced this award to four million dollars, the court upheld the jury’s finding that the insurer breached its duty of good faith and fair dealing.¹⁵⁴

146. See Stewart, *supra* note 11 (discussing problems in determining coverage under mold claims).

147. See DOBBYN, *supra* note 11, at 266 (listing declaratory judgment action as method of self-protection for insurer).

148. Stewart, *supra* note 11 (explaining value of bringing declaratory judgment action in first-party mold claims).

149. See DOBBYN, *supra* note 11, at 319-20 (emphasizing courts’ caution in adopting bad faith causes of action under first-party policies).

150. *Id.* at 322 (listing defenses available to insurers).

151. See *Allison v. Fire Ins. Exch.*, 98 S.W.3d at 233, n.1 (Tex. App. 2002) (explaining that Mary Melinda Ballard and her husband Ronald Allison are plaintiffs). Because Ballard owns title to the house and the homeowner’s insurance is in her name, she is most often referred to as the plaintiff in this action though Allison’s name appears in the caption. *Id.*

152. See *id.* at 233 (finding sufficient evidence to uphold finding of bad faith on part of insurer). *Allison* was an early and high profile toxic mold case. See Harkins, *supra* note 39, at 1112.

153. *Allison*, 98 S.W.3d at 233 (describing how original claim was for water damage to floor and it evolved into entire house becoming mold contaminated). Ballard sued Fire Insurance Exchange, a member of the Farmers Insurance Group, for its handling of her homeowners’ insurance claims. *Id.*

154. *Id.* at 233, 248 (examining legal and factual sufficiency of evidence to support jury’s finding of bad faith on part of insurer).

Ballard filed a claim with her insurer regarding water damage to her hardwood floor.¹⁵⁵ An outside adjuster initially found that the damage resulted from the foundation settling, a non-covered cause.¹⁵⁶ The adjuster then quickly reconsidered and determined that a series of leaks had caused the damage.¹⁵⁷ Ballard's homeowners' policy provided coverage for leaks, therefore the adjuster's change in position marked the point at which the insurer's liability for the claim became reasonably clear.¹⁵⁸ Despite determining coverage, the insurer delayed payment of the hardwood floor claim for more than two months.¹⁵⁹

Approximately one month after payment, Ballard again found water damage and was assigned another claim number.¹⁶⁰ On further inspection, the insurer's technician found additional damage.¹⁶¹ While awaiting payment of this claim, Ballard met with an indoor air quality consultant who, upon hearing of the house's damage and the family's physical symptoms, suggested to Ballard that she might have a mold problem.¹⁶² Air samples taken in the Ballard house were found to contain mold spores, including *stachybotrys*.¹⁶³

Over the next three months, Ballard submitted claims for multiple leaks and water damage.¹⁶⁴ In response, the insurer invoked the policy's appraisal provision, which is applied when the parties do not agree on a claim's valuation.¹⁶⁵ This appraisal process lasted

155. *See id.* at 235 (filing claim on December 17, 1998 for water damage to her hardwood floor).

156. *See id.* (recounting initial finding of outside adjuster responding to plaintiff's claim under homeowner's insurance policy).

157. *See id.* (explaining that adjuster changed his opinion after seeing two areas of water damage).

158. *See Allison*, 98 S.W.3d at 248 (finding that insurer's liability was only debatable for brief time when investigator expressed preliminary view that claim might not be covered).

159. *See id.* at 235 (finding insurer paid Ballard for accidental water discharge damage to floor on February 24, 1999).

160. *Id.* at 235-36 (recounting March 4, 1999 inspection of newly-discovered damage).

161. *Id.* at 236 (finding additional water damage behind refrigerator).

162. *See id.* (describing Ballard's chance encounter with Bill Holder in April 1999).

163. *Allison*, 98 S.W.3d at 236 (describing mold spores that cause health problems).

164. *See id.* at 237 (noting claims submitted from May through July 1999).

165. *Id.* (listing events transpiring after unsuccessful mediation process). While the insurer estimated that remediation and repair of the house and its contents would cost \$382,000, "Ballard's expert estimated that remediation would cost approximately \$1,015,500." *Id.* at 236.

eighteen months.¹⁶⁶ During these months, the insurer did nothing to remediate the mold and the existing mold continued to grow.¹⁶⁷

At trial, a Texas jury awarded Ballard thirty-two million dollars against her insurer.¹⁶⁸ On appeal, the Texas Court of Appeals upheld the jury's finding of bad faith on the part of the insurer.¹⁶⁹ The court held that the evidence supported the jury's finding that the insurer "failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of Ballard's claims after its liability had become reasonably clear and that this failure caused damages to Ballard."¹⁷⁰ Further, the court found that the evidence supported the jury's finding that Ballard sustained her burden of proof under the bad faith cause of action.¹⁷¹ Ballard successfully proved: (1) that the insurer had no reasonable basis for delaying payment of the policy benefits; and (2) that the insurer knew or should have known that it had no reasonable basis for delaying payment.¹⁷² Finding a bad faith breach, the court upheld the jury's award of \$4,006,320 in actual damages.¹⁷³

2. *Anderson v. Allstate Insurance Co.: An Insurer's Unreasonable Handling of Mold Claims*

The plaintiff in *Anderson* also successfully litigated a mold-related bad faith claim against his insurer.¹⁷⁴ At trial, a jury awarded Anderson \$484,853.96 in compensatory damages and eighteen million dollars in punitive damages.¹⁷⁵ The insurer appealed both

166. *Id.* at 249-50 (explaining that eighteen-month appraisal process is one of plaintiff's primary complaints).

167. *Id.* (describing primary acts that Ballard complains of in her bad faith action). Ballard further alleged that "every payment from [insurer] was insufficient to pay for the damage, leading to further delays that caused the mold to spread." *Id.* at 250.

168. *Allison*, 98 S.W.3d at 233 (reviewing Travis County jury's thirty-two million dollar verdict against insurer).

169. *See id.* at 250 (viewing evidence in light most favorable to Ballard).

170. *Id.* (explaining that jury judges witnesses' credibility and weight of their testimony).

171. *Id.* (detailing evidence from which jury could determine insurer delayed in paying claims causing additional damage to plaintiff's home).

172. *Id.* (applying standard for bad faith established in *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988)).

173. *Allison*, 98 S.W.3d at 250 (upholding award of actual damages in addition to prejudgment and postjudgment interest).

174. *See Anderson v. Allstate Ins. Co.* No.01-15330, 2002 U.S. App. LEXIS 18379, at *757 (9th Cir. Sept. 3, 2002) (revisiting jury verdict in favor of insured).

175. *Id.* at *756 (discussing outcome of jury trial in district court).

awards.¹⁷⁶ The Court of Appeals for the Ninth Circuit found sufficient evidence supporting the jury's finding that the insurer, Allstate, breached its duty of good faith and fair dealing by acting unreasonably when handling Anderson's claim.¹⁷⁷ The court affirmed the jury's award of both economic and non-economic compensatory damages, but reversed the award of punitive damages.¹⁷⁸

At issue in *Anderson* was the plaintiff's claim for water damage to his home caused by frozen pipes.¹⁷⁹ A broken water pipe sprayed into Anderson's home for several days, damaging carpeting, cabinets and walls.¹⁸⁰ Mold eventually covered all the surfaces.¹⁸¹ The claim's adjustment process became contentious due to a dispute between insured and insurer over: (1) whether the home was occupied; and (2) whether the owner had taken reasonable care to maintain heat.¹⁸² The policy excluded coverage if these two requirements were not met.¹⁸³

The insurer disputed its obligations to Anderson throughout the entire claim process and, at the same time, refused to resolve the matter or counter Anderson's testimony that he had fulfilled the requirements for coverage.¹⁸⁴ When the insurer finally provided the plaintiff with payment, it did so with a check insufficient to cover the cost of known repairs and offered it on a "take it or

176. *Id.* at *756, note 1 (explaining that insurer contested amounts awarded to plaintiff but did not contest finding that it breached its contract with plaintiff).

177. *Id.* at *758 (affirming jury's finding of bad faith breach by insurer).

178. *See id.* at *761 (reversing punitive damage award because not supported by substantial evidence). The court found that plaintiff did not establish that the defendant acted fraudulently, maliciously or oppressively by clear and convincing evidence as required by California law to recover punitive damages. *Id.* at *760-61.

179. *See Anderson*, 2002 U.S. App. LEXIS 18379, at *756-57 (discussing factual background of case). Anderson purchased an Allstate Deluxe Homeowners' Policy in June 1996 that covered water damage from frozen pipes, but not if the house was neglected or unoccupied at time of rupture. *Id.* at *756. The burst pipe responsible for the damage to Anderson's home broke sometime in January 1997. *Id.* at *757.

180. *See id.* at *757 (describing documentation by Allstate's independent adjuster).

181. *See id.* (describing home as encountered by emergency service company employed by Allstate).

182. *See id.* (explaining Allstate's questioning of coverage for claim).

183. *See id.* (recounting claims adjustment process of Anderson's claim). The independent adjuster who had inspected the Anderson home noticed "the near-total absence of furniture or other amenities." *Id.* Anderson's son told the emergency service company hired by Allstate that the furniture was removed from the home while the home was being renovated and repainted. *Id.*

184. *Anderson*, 2002 U.S. App. LEXIS 18379, at *757 (reviewing exchanges between plaintiff and insurance company where plaintiff accused insurer of inaction with regard to his claims).

leave it" basis.¹⁸⁵ Additionally, when the plaintiff discovered more extensive mold damage, the insurer rejected the evidence of damage and refused to provide for the additional loss.¹⁸⁶ The Ninth Circuit found this evidence sufficient to support a jury finding of bad faith liability.¹⁸⁷

On appeal, the Ninth Circuit focused on the unreasonableness of the insurer's actions.¹⁸⁸ The court found that the adequacy in investigating a claim is one of the most decisive ways to judge an insurer's reasonability.¹⁸⁹ It further stated that the jury could find the insurer guilty of bad faith.¹⁹⁰ The court found that Allstate's pattern of investigation evinced that the company was looking for reasons to deny the plaintiff's claim rather than reasons to find coverage.¹⁹¹ Moreover, the unreasonableness of several other actions strengthened the finding of the insurer's bad faith.¹⁹² The court examined the insurer's consistent and inflexible position in handling plaintiff's claim.¹⁹³ It surmised that the insurer's: (1) refusal to discuss coverage issues; (2) refusal to review additional evidence of loss; and (3) offer to settle the claim only with an expensive appraisal partly at plaintiff's expense, supported a finding that the insurer acted unreasonably and in bad faith.¹⁹⁴

IV. CONCLUSION

Jury verdicts in cases like *Allison* and *Anderson* have prompted thousands of plaintiffs to pursue bad faith actions against their in-

185. *Id.* (reviewing interactions between plaintiff and insurance company as other example of insurance company's uncooperative attitude towards plaintiff's claim).

186. *Id.* (citing further exchange between plaintiff and insurance company where insurer refused to take information about newly discovered mold damage).

187. *Id.* at *758 (declaring evidence sufficient for jury to find that insurer's conduct "amounted to more than a simple mistake or legitimate dispute as to coverage and damages").

188. *See id.* at *758 (listing insurer's unreasonable actions).

189. *Anderson*, 2002 U.S. App. LEXIS 18379, at *758.

190. *Id.* (noting Allstate's inadequate response to plaintiff's claim).

191. *See also id.* (explaining that Anderson's evidence of Allstate's poorly executed investigations was at least as sufficient as Allstate's evidence showing that Anderson's home was unoccupied).

192. *See id.* at *759 (discussing Allstate's dilatory tactics during the settlement process).

193. *Id.* (finding that actions of insurer "in failing to consider evidence supporting coverage, and in maintaining a consistent and inflexible position with the insured, can amount to bad faith").

194. *Anderson*, 2002 U.S. App. LEXIS 18379, at *759 (summarizing insurer's unreasonable behavior while settling plaintiff's claim). For a further discussion of Allstate's unreasonable actions, see *id.* at *758-59.

surers.¹⁹⁵ Among these plaintiffs are Erin Brockovich and Ed McMahon, both of whom claimed toxic mold infested their homes.¹⁹⁶ Many of these mold claims, and most multimillion-dollar mold verdicts, involve claims of bodily injury as well as claims of property damage, as both Brockovich and McMahon alleged.¹⁹⁷ Given the insufficiency of scientific evidence linking mold to alleged negative health effects, the validity of these claims remains questionable.¹⁹⁸ Many attribute the symptoms of mold exposure to the power of suggestion and attribute the fear over mold to lawyers and mold cleanup companies.¹⁹⁹

While the health effects of mold remain uncertain, the economic repercussions of mold claims are clear.²⁰⁰ Many insurance carriers have ceased operations in states with high incidences of mold claims.²⁰¹ Other carriers have stopped writing new policies or stopped renewing the policies of previously insured homeowners.²⁰² In Texas, which leads the nation in mold claims, homeowners now pay an additional \$444 per year in insurance premiums for mold coverage.²⁰³ Many insurance carriers have introduced more "absolute mold exclusionary endorsements" in their homeowners'

195. See Maniloff, *supra* note 11 (reporting that between January 1987 and February 2002 there have been 16,059 first-party mold claims filed where policyholders have retained counsel).

196. See Belkin, *supra* note 2 (interviewing Brockovich's attorney); *Ed McMahon Sues Homeowners Carrier Over Mold Contamination*, 16 MEALEY'S LITIG. REP. INS. 24, Apr. 30, 2002 (detailing McMahon's action against his homeowners' insurance carrier).

197. See Stewart, *supra* note 11 (discussing typical elements of toxic mold claims); see also *supra* note 44 (discussing McMahon's allegations); Belkin, *supra* note 2 (discussing Brockovich's allegations).

198. See *supra* notes 37-43 for a discussion of the lack of scientific evidence linking mold exposure to illnesses.

199. See Belkin, *supra* note 2 (highlighting medical debate over true effects of toxic mold exposure); ABC News, *supra* note 3 (noting potential for fraudulent claims and possibility for profiteering). See *supra* notes 37-43 for a discussion of the lack of scientific evidence linking mold exposure to illnesses.

200. See Hartwig, *supra* note 8 (attributing increases in homeowners' insurance premiums to increased toxic mold litigation).

201. See Jarman, *supra* note 11 (describing insurance carriers' reaction to toxic mold litigation). See also Ingram, *supra* note 14 (reporting that State Farm stopped writing new homeowners' policies in Texas or renewing existing policies in October 2002).

202. See Jarman, *supra* note 11 (describing effects on insurance companies); see also Ingram, *supra* note 14 (reporting that State Farm has stopped writing new homeowners' policies in Texas).

203. See Ingram, *supra* note 14 (noting seventy-percent of mold claims in United States are brought in Texas); see also Hartwig, *supra* note 8 (highlighting \$444 "mold tax" or increases on homeowners in homeowners' insurance premiums in Texas between 2000 and 2001).

policies.²⁰⁴ In this new market, insureds pay greater premiums for reduced coverage.²⁰⁵ The increase in mold claims has caused the entire country to share the expense.²⁰⁶

State legislatures have intervened in an effort to protect homeowners from the increased insurance costs resulting from mold claims.²⁰⁷ In 2001, California passed the Toxic Mold Protection Act to help stymie mold claims sparked by “mold diggers” and regulate what is considered a dangerous level of mold.²⁰⁸ The Act orders California’s Department of Health Services to “establish licensing standards for professionals who go into the business of measuring and cleaning out toxic mold.”²⁰⁹ The Act also requires “creation of a task force to research and develop permissible levels of mold exposure.”²¹⁰ Since the passage of California’s mold Act, Louisiana and Texas have laws regulating mold assessors and remediators and many more states have passed resolutions creating task forces on mold and mold remediation.²¹¹ In March 2003, Representative John Conyers, Jr. of Michigan introduced the United States Toxic Mold Safety and Protection Act in the United States House of Representatives and the bill has since been referred to several House committees and subcommittees for review.²¹²

204. See Wilson, *supra* note 17 (discussing insurers’ attempts to avoid liability in toxic mold cases by making policy language more specific).

205. See generally Ingram, *supra* note 14 (examining effects of mold claims on homeowners’ insurance policyholders).

206. See *id.* (linking nationwide increases in homeowners’ insurance premiums to massive toxic mold payouts in Texas).

207. See Belkin, *supra* note 2 (reporting efforts of California legislature to regulate emerging mold cleanup industry and establish acceptable mold exposure levels).

208. See Pena-Alfaro, *supra* note 85, at 575-76 (discussing recent toxic mold legislation).

209. Belkin, *supra* note 2 (outlining requirements of California Toxic Mold Protection Act).

210. Pena-Alfaro, *supra* note 85, at 776 (describing public health goals of California Toxic Mold Protection Act); see also Harkins, *supra* note 39, at 1132 (discussing further goals of Toxic Mold Protection Act such as educational programs and disclosure of known mold presences).

211. See The National Association of Mutual Insurance Companies, *2003 Mold Legislation*, at <http://www.moldupdate.com/legislation.htm> (last visited Oct. 13, 2003) (providing table of recent mold legislation). The Illinois and Oklahoma legislatures have passed resolutions creating task forces on mold and mold remediation. *Id.* Several other states, including Indiana, New York and New Jersey, have also proposed mold legislation. Harkins, *supra* note 39 (noting that these three states may soon have similar versions of legislation in place).

212. See The Library of Congress, *Thomas: Legislative Information on the Internet*, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.01268>: (last visited Oct. 14, 2003) (providing bill summary and status for H.R. 1268).

If publicity regarding the dangers of mold continues to be a media focus and if plaintiffs' lawyers mobilize, the recent trend of increasing mold litigation may continue.²¹³ If this becomes a reality, the insurance industry's response can only be assumed and America's homeowners, whether owning mold-infested homes or not, will pay the price.²¹⁴

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213. See Stewart, *supra* note 11 (speculating on trend of mold litigation).

214. See *id.* (predicting probable future costs of first-party toxic mold claims).