

Mold: The Hysteria Among Us

Exposure to mold causes bad faith claims against insurers

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Mold is a naturally occurring fungus. Mold litigation, on the other hand, is quite man-made. Take the ingenuity of the plaintiffs' bar, mix in a few high-profile plaintiffs, intense media coverage (including misinformation), and uncertain science. Then stir in a pinch of legislative involvement, public hysteria, and various collateral opportunists hovering above. Finally, pour the mixture into a tort system run amok, where the only prerequisite to making a settlement demand is having a docket number. The result is litigation over mold — self-fulfilling — but real nonetheless.

Mold, as is the case with most injury and damage litigation, will set a place at the table for the insurance industry. Notwithstanding how simple the recipe, however, mold claims, in and of themselves, should not pose a serious threat to the insurance industry. Indeed, such claims are likely to involve relatively small amounts of money or perhaps not even be covered by insurance. And, if covered, they may be subject to a mold “sublimit”. Consider the following. In Texas, where mold claims have been particularly acute — likely caused by, among other things, a standard homeowners' policy that has been more generous to policyholders than most other states — the average mold claim for the 2-year period from January 1, 2000 to December 31, 2001 was \$22,740, inclusive of allocated loss adjustment expenses.¹ While a \$22,000 homeowners' claim is probably large enough to grab the attention of underwriters, actuaries and claims personnel, it is unlikely to whet the appetite of a plaintiff's lawyer, especially when the claim is probably too unique to lend itself to the use of form pleadings and other time-saving devices that enable plaintiffs' attorneys to turn a profit on small cases.

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Then why are some in the plaintiffs' bar hyperventilating over mold, and, in particular, mold insurance claims? Because they bring with them the opportunity to include a "bad faith" count against the insurer. Indeed, it would not be surprising if the property damage component of mold homeowners' claims are viewed by plaintiffs' attorneys as "loss leaders" for the bad faith case. According to information reported by the Insurance Information Institute, 50% of all types of lawsuits involving mold are bad faith cases against insurers.² Three justices of the Texas Supreme Court have even gone so far as to characterize any lawyer that pursues an insurance coverage claim without including a bad faith count as *incompetent*.³ A debate is presently raging over the causative link between a person's exposure to mold and bodily injury. However, while the jury is still out on *that* causation question, the verdict is in on another — exposure to mold causes bad faith claims against insurers.

Mold and bad faith insurance claims are litigation peas and carrots. An examination of the standards governing bad faith, in conjunction with some of the ingredients that have enabled mold to reach the point where it is today, and is projected by some to climb in the future, makes it easy to see why.

MOLD: A LITIGATION PERFECT STORM

If mold has been around forever, as so many articles on the subject are fond of pointing out, then why only now has it become a source of litigation? And not just *any litigation*. However, litigation that some project could even give asbestos — the mother of all mass torts — a run for its money.⁴ Mold's recent grand entry onto the litigation scene, with promises to stick around for a while, is the result of a confluence of several external events, some having nothing to do with the actual merits of the cases. Mold is a litigation perfect storm.

The Media Blame

According to an August 8, 2002 *Wall Street Journal* article, "Insurance companies contend that the spike in mold claims is nothing but heightened public awareness, fueled by trial lawyers and the media." There is no doubt that the media has contributed — and, for that matter, substantially — to the public's awareness of the potential hazards of mold, to both person and property. The media has also fueled the public's percep-

tion that, like most other problems in this country, the solution to mold lies in a lawsuit.

The media's role in the proliferation of mold as a basis for litigation is twofold. First, the number of media and information outlets have grown like, well — mold. Cable television and the internet have led to a tremendous expansion in the amount of news and other information to which the public is exposed on a daily basis. As a result, there are simply more opportunities for people to hear about mold. And while anyone with access to the internet can become an instant “expert” on the subject, the internet's absence of any barrier to entry is also the perfect environment for misinformation to flourish.

The media is not to be blamed for their abundance. After all, our market economy dictates that we have as many media sources as audience and advertising revenue can ultimately support. The media, however, deserves substantial criticism for inaccurate reporting on mold, in terms of its scientific aspects, the underlying litigation and insurance claims. Take the Texas mold insurance data, for example. In arriving at an average claim figure of \$22,740, the Texas Department of Insurance stated that the total amount incurred for mold claims during 2000 and 2001, including allocated loss adjustment expenses, was \$1,007,038,839. However, in footnotes accompanying the data, the Department made it clear that this amount could in fact be much higher or much lower. Specifically, the Department of Insurance stated the following:

1. Losses are total losses on claims where the presence of mold is known or alleged. The losses include costs directly related to mold (remediation, testing, etc.) as well as costs not related to mold, such as underlying non-mold water damage, slab damage, and other repairs not associated with mold per se.
2. Incurred Losses and ALAE [allocated loss adjustment expenses] do not include any provision for loss development. Ultimate loss & ALAE for the most recent quarters may be substantially greater than those shown above.
3. Mold claims may be understated because most companies were unable to report their non-water damage and freezing

mold claims for much of the period in question.

Nonetheless, it did not take long after this data was released for two of the largest newspapers in the United States to report, *without a single mention of the possible impact of the footnotes* — one of which specifically stated that the figures include costs *not* related to mold — that mold claims in Texas had exceeded the billion dollar mark. Obviously, talking about insurance claims in terms of a billion dollars makes for good newspaper copy. Footnotes don't. Moreover, neither newspaper mentioned that, until quite recently, Texans have had the benefit of a more generous homeowners' policy form than many other states when it comes to coverage for water damage claims.⁵

The media blame does not end there. The most famous mold case to date involves that of Melinda Ballard, who, in June 2001, was awarded in excess of \$32 million by a Texas jury that concluded that her homeowners' insurer acted in an unfair, deceptive and fraudulent manner when evaluating a mold property damage claim. The lion's share of the damages awarded by the *Ballard* jury were for the bad faith component of the case.⁶ Yet, plenty of articles have been written about *Ballard* without sufficiently distinguishing between the bad faith aspect of the case and the component for property damage caused by mold. As a result, the media has done an excellent job of creating the impression that the *Ballard* verdict involved \$32 million for mold damage, period.⁷

In addition, Melinda Ballard's story was the subject of an August 12, 2001 article in *The New York Times Magazine*, which included a dramatic cover photo, presumably of her, standing inside her home, wearing a bio-hazard "moon suit" that looks sufficient to protect a Chernobyl employee.⁸ *The Times Magazine* article also included a photo of Mrs. Ballard's young son, standing outside the family home, wearing a gas mask-like respirator. Very powerful images.

Reality check — the trial judge in the *Ballard* case precluded the plaintiffs' medical experts from testifying. The court granted the defendant's motion to exclude such experts on the basis of insufficient evidence linking the health problems at issue to mold exposure.⁹ Thus, *none* of the \$32 million awarded by the *Ballard* jury was for bodily injury allegedly caused by the presence of mold in the Ballard residence. Again, a significant fact omitted from much of the media's coverage of the *Ballard* case.¹⁰ As for

The New York Times Magazine article, which focused so heavily on Mrs. Ballard's husband's mold-caused injuries, it did finally mention, briefly and toward the end, that the *Ballard* court disallowed all medical evidence on the basis of lack of causation. However, if a picture is worth a thousand words, and one of a person dressed in a "moon suit" probably a few more, the interest of balanced reporting required that more — and better placed — words be devoted to the *Ballard* court's ruling on the bodily injury–causation issue.

The *Ballard* court's order precluding the medical experts from testifying did not set forth its reasons, except to cite certain cases from the Texas Supreme Court.¹¹ The defendant's 32-page brief, which successfully served to exclude the plaintiffs' medical causation opinions, argued, in general, that the plaintiffs were unable to establish both "specific causation" (whether a factor caused a particular individual's injury) and "general causation" (whether any substance is capable of causing a particular injury or condition in the general population).¹² Recognizing that the court could have relied on any number of reasons for precluding the plaintiffs' experts from testifying on causation between exposure to mold and bodily injury, it is noteworthy that the defendant's brief devotes several pages to attacking the validity, from an admissibility standpoint, of two epidemiological studies prepared by one of the plaintiffs' experts.

The media's lack of reporting on the fact that the *Ballard* verdict was really one involving insurance bad faith and that the court precluded the plaintiffs' medical causation testimony may seem like the kinds of technicalities that could only bother a lawyer. However, this is much more than mere legal minutiae. To the contrary, these omissions are likely some of the most important reasons why there is so much hysteria surrounding mold at this time. Therefore, while the insurance industry is right to point to the increase in mold claims as being the result of heightened public awareness that has been fueled by the media, the media has done much more than simply make people *aware*. The mainstream media's imprecision in its reporting on the *Ballard* verdict deserves substantial blame for contributing to both the public's hysteria and misunderstanding concerning mold.¹³

Would *Ballard* be having the same effect if the verdict were being reported for what it really was — one involving the breach of an insurance contract, for an underlying claim that just so happened to involve

mold? Consider the following. In May 2001, a Florida jury awarded Dr. John Tedesco, an ophthalmologist, \$36.7 million in punitive damages in a bad faith action against his disability insurer over a \$265,000 claim.¹⁴ In March 2002, a West Virginia jury awarded Charles Kocher \$39 million in compensatory and punitive damages in a bad faith action involving an \$11,300 disability claim under a credit life and disability policy.¹⁵ Both of these verdicts, while larger than *Ballard*, paled in comparison in subsequent media coverage.

For example, a search on Google.com at the time of this writing for the terms “Melinda Ballard” and “mold” revealed 608 hits. A Google search for “John Tedesco”, “disability” and “verdict” generated four hits. A search for “Charles Kocher”, “disability” and “verdict” — none. Clearly, when the story is only about “bad faith” damages against an insurance company, the media does not have the same interest as when something as ubiquitous as mold and the ability to frighten are involved. Moreover, Google searching also offers further evidence that the media has been less than forthcoming in distinguishing between the “mold” and “bad faith” aspects of the *Ballard* verdict. Note that the 608 hits for “Melinda Ballard” and “mold” is reduced to 111 when “bad faith” is added as an additional required search term.¹⁶

The media’s contribution to the hysteria surrounding mold is not limited to the *Ballard* verdict. The July 19-21, 2002 issue of *USA Weekend* contained a cover story entitled “When Mold Takes Hold”. On the cover was a large colorized photo of *Stachybotrys*, a type of mold, as seen under an electron microscope, along with the words “Mold: Is Your Apartment Building Infected? Memory loss. Dizziness. Asthma. Those are just some of the ailments renters are experiencing as they join the battle against this toxic, microscopic enemy.” Given that *USA Weekend* is distributed in 580 newspapers and reaches 48 million readers¹⁷, it is worth taking a look at what this article had to say about the subject.

Actually, it is what the *USA Weekend* article does not say about mold that makes it significant. The article contains a litany of stories of individuals and families who are suffering from serious illnesses and whose lives have been turned upside down, allegedly on account of the presence of mold in their residences. Considering what is known about the link between exposure to mold and bodily injury, it is possible that each situ-

ation described in the *USA Weekend* article does in fact involve mold-caused injuries.

However, given the amount of uncertainty concerning the link between exposure to mold and bodily injury, especially serious injury, as discussed below, the *USA Weekend* cover story was remiss to virtually ignore the fact that there is presently a serious debate going on concerning causation between exposure to mold and bodily injury. *USA Weekend* devoted all of twelve words to this fact, stating, “Many doctors believe they [certain types of mold] cause a raft of serious ills, including flulike symptoms, chronic fatigue, memory impairment, dizziness, and bleeding in the nose and lungs, while others say the science isn’t there yet to make that claim.”¹⁸

Scientific Uncertainty

At least for purposes of courtroom admissibility, *Ballard* demonstrated the flaws in attempting to prove causation between exposure to mold and bodily injury. Outside the courtroom, things aren’t much clearer.

Recognizing that many involved in the mold – bodily injury debate have a bias, here is what the Center for Disease Control has to say about the issue in its publication “Questions and Answers on *Stachybotrys chartarum* and other molds”:

Q 1. I heard about toxic molds that grow in homes and other buildings. Should I be concerned about a serious health risk to me and my family?

A. The hazards presented by molds that may contain mycotoxins should be considered the same as other molds which can grow in your house. There is always a little mold everywhere - in the air and on many surfaces. There are very few case reports that toxic molds (those containing certain mycotoxins) inside homes can cause unique or rare, health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxic mold and these conditions has not been proven. ...

* * *

Q 10. What are the potential health effects of mold in buildings and homes?

A. Mold exposure does not always present a health problem indoors. However some people are sensitive to molds. These people may experience symp-

toms such as nasal stuffiness, eye irritation, or wheezing when exposed to molds. Some people may have more severe reactions to molds. Severe reactions may occur among workers exposed to large amounts of molds in occupational settings, such as farmers working around moldy hay. Severe reactions may include fever and shortness of breath. People with chronic illnesses, such as obstructive lung disease, may develop mold infections in their lungs.¹⁹

The Center for Disease Control recently had another opportunity to address the question of causation between exposure to mold and bodily injury. Testifying on July 18, 2002 before the Congressional Subcommittees on Housing and Community Opportunity and Oversight and Investigations at a joint hearing entitled “Mold: A Growing Problem,” Dr. Stephen Redd, the lead CDC scientist on air pollution and respiratory health echoed the “susceptibility” sentiment of the CDC’s earlier Q&A publication. In his introductory comments, Dr. Redd stated, “While there remain many unresolved scientific questions, we do know that exposure to high levels of molds causes some illnesses in susceptible people.”

Dr. Redd, in his testimony, went on to describe some examples of the CDC’s conclusions.

- Molds can cause infections in susceptible people, particularly in hospital settings where 9% of hospital-acquired infections are caused by fungi.
- Respiratory infections due to the inhalation of the fungus *Aspergillus* have been documented mostly in immunocompromised individuals.
- Two mold produced toxins have been classified by the National Toxicology Program as human carcinogens, the chronic ingestion of which from eating contaminated foods has been associated with liver and kidney tumors in animals and people.
- In industrial and agricultural settings, various forms of hypersensitivity pneumonitis and other allergic responses and infectious respiratory diseases have been reported.

- Outbreaks of hypersensitivity pneumonitis have been reported in office buildings in relation to exposures to mold-contaminated humidifiers and ventilation systems.
- In its 1993 report, “Indoor Allergens,” the Institute of Medicine concluded that airborne fungal allergens were most often associated with allergic diseases, such as allergic rhinitis/conjunctivitis, allergic asthma and hypersensitivity pneumonitis.
- The CDC does not know whether molds cause adverse health effects, such as pulmonary hemorrhage, memory loss or lethargy.
- CDC research has concluded that there is insufficient evidence of any association between exposure to *Stachybotrys atra* and bleeding from the lungs of very young children.

While there are no bright-line rules coming out of the CDC, their loudest message seems to be that a person’s risk for bodily injury on account of exposure to mold is related to his or her susceptibility to such injury. In other words, unlike many other hazardous materials, the exposure to which form the basis for litigation, mold may pick and choose its victims in a more discriminating manner. If so, the “eggshell plaintiff” rule will likely assist plaintiffs in the susceptible category.²⁰ On the other hand, if causation is linked to susceptibility, it should also result in a reduction in the total number of plaintiffs that are capable of bringing actions.

When the CDC talks about causation between exposure to mold and bodily injury, it is likely that they are assuming that a person has in fact actually been exposed to mold. In the litigation arena, such a threshold issue may not be so clear-cut, but, rather, hotly contested. The Defendant’s Motion to Exclude Causation Opinions and Brief in Support in *Ballard*, addressing plaintiffs’ inability to establish specific causation, makes this point clear, stating as follows:

The Plaintiffs’ experts opinions are based upon an assumption of mycotoxin exposure. The Plaintiffs must assume their exposure to mycotoxin because there is no way to prove that they ever touched it, ingested it or inhaled it. These

assumptions are wholly inadequate to explain whether the mold was toxic, how it became airborne, how it got out from behind the wall boards or the refrigerator, how it traveled to any of the Plaintiffs and how it entered their bodies. Under the *Robinson/Havner* analysis, the Plaintiffs are not permitted to rely upon their assumptions that, because their house contained mold, they were actually exposed to mycotoxins.²¹

One final, and very important, point on causation. The link between exposure to mold and various types of bodily injury is not the only aspect of uncertainty concerning causation that has enabled an environment of hysteria to flourish. Mold claims are typically for the repair of property that has been damaged by the presence of the fungus. In doing so, the remedial objectives are the abatement of an unpleasant and/or unsightly condition, with the collateral objective being the prevention of potential future bodily injury (either real or perceived). However, there are no federal standards governing the investigation, testing and remediation of mold. In the words of Sue Kelly, Chair of the Congressional Oversight and Investigations Subcommittee, testifying on July 18, 2002 about the consequences of the fear created in homeowners by the lack of definitive evidence of what safe or potentially dangerous levels of mold may be, such uncertainty “has created a window of opportunity for unethical lawyers and contractors to prey upon vulnerable populations.” To put it another way, a person finding mold in their house is left to wonder if the solution is a bottle of Clorox or a bio-hazard “moon suit” from the Melinda Ballard collection.

High-Profile Plaintiffs

Undoubtedly, the publicity surrounding the *Ballard* verdict has been a substantial factor in creating a heightened-interest in mold. However, it is not the only high-profile mold case that has caught the attention of the media. In April 2002, Ed McMahon filed suit against his homeowners’ insurer, insurance adjuster and companies hired to remediate mold and water problems in his home.²² Not surprisingly, McMahon’s suit generated tremendous publicity. The complaint, while primarily concerned with the way in which McMahon’s insurer handled mold abatement work in his house as a result of a burst pipe, also alleges that the presence of mold caused him, his wife and their staff to become seriously ill, as well as the death of his dog.

Further fueling the media's coverage of mold, Erin Brockovich (yes, *that* Erin Brockovich) filed suit against the builder and former owner of her 5200 square foot suburban Los Angeles home, alleging that construction defects led to the presence of high levels of mold, resulting in more than \$600,000 in repair costs, as well as causing her to be constantly fatigued and suffer from respiratory problems and sinus infections. She also alleges that her young daughter has suffered severe coughing spells and watery eyes.²³ In addition, Brockovich has hit the lecture circuit to discuss the consequences of mold²⁴ and was active in California's passage of the Toxic Mold Protection Act of 2001, discussed *infra*.

Mold: Congress and State Legislatures Step-In

Considering the present fervor over mold and the legal system's track record for handing out enormous sums of money, it can hardly be surprising that Congress and some state legislatures²⁵ have now stepped-in to address the situation. Mold legislation is likely a double-edged sword. On one hand, it is intended to address some of the aspects of the problem that have enabled an environment of hysteria to exist, such as the lack of permissible exposure limits and uncertainty surrounding the science of mold. On the other hand, there is a risk that such proposed legislation, and the resulting media headlines, could exacerbate the hysteria by sending the message that mold *must be* a serious problem, otherwise the government would not have become involved.

Most legislation, no matter how well intended, will never please everyone. Legislation over mold, both enacted and proposed, is likely no exception. Take California's legislative solution. Given the state's reputation for being cutting-edge in matters health-related, it is not surprising that in October 2001, when California Governor Gray Davis signed into law the Toxic Mold Protection Act of 2001 (SB 732) ("the California Act"), it made his state the first in the country to attempt to establish, among other things, permissible exposure levels for mold.

The California Act, effective January 1, 2002, calls for the State Department of Health Services ("the Department") to convene a task force, comprised of an extremely diverse group, to advise the Department on the feasibility of adopting permissible exposure limits to mold in indoor environments.²⁶ In general, the California Act provides that if the Department concludes that adopting permissible exposure limits to

mold in indoor environments is feasible, then the Department, in consultation with the task force, shall adopt permissible exposure limits to mold for indoor environments that avoid adverse effects on health, with an adequate margin of safety, and avoid any significant risk to public health.²⁷

Additionally, the California Act provides that the Department, in consultation with the task force, shall adopt mold identification guidelines for the recognition of mold, as well as develop and disseminate remediation guidelines for molds in indoor environments. The California Act also contains various requirements concerning disclosures that must be made by sellers of property and landlords of the presence of mold that exceeds the permissible exposure limits established by the California Act.

While California certainly looks concerned about mold and committed to tackling the problem, it has, thus far, not put its money where its mouth is. According to an August 6, 2002 Implementation Update from the Department concerning the California Act, while 133 individual “stakeholders” have volunteered for the mold task force, there is no funding in the state’s 2002–2003 budget to provide for the activities that the Act is designed to accomplish.²⁸ The best news that the Department can offer in its Update is to mention that a section of the budget trailer bill, if passed during the 2002 legislative session and signed by the Governor, will create the “Public Health Protection from Indoor Mold Hazards Fund.” This fund would accept *voluntary contributions* from anyone or any entity that wished to support the Department’s indoor mold-related activities, including those specified in the Toxic Mold Protection Act of 2001.

On June 27, 2002, Congressman John Conyers, Jr. (D - MI) introduced the United States Toxic Mold Safety and Protection Act of 2002 (H.R. 5040) (“the Conyers Bill”). Congressman Conyers described his motivation for introducing the bill as follows:

My office has gotten hundreds of letters from home owners who have unwittingly bought homes contaminated by hazardous levels of toxic mold and found that they have no protection under our current laws. They have a house they can't live in and nowhere to go for help. All too often consumers who have purchased home owners' (sic) insurance find that their policy will not cover expenses related mold (sic) infestation.²⁹

An in-depth discussion of the nuts and bolts of the 57-page Conyers Bill is beyond the scope of this article. A summary of the bill, provided in a statement issued by Congressman Conyers³⁰, provides, in part, as follows:

- The Bill directs the Environmental Protection Agency (EPA) and Centers for Disease Control (CDC) to examine the effects of different molds on human health and develop accurate scientific information on the hazards presented by indoor mold.
- The Bill directs EPA and the Department of Housing and Urban Development (HUD) respectively, to establish guidelines that identify conditions that facilitate indoor mold growth and measures that can be implemented to prevent such growth. The guidelines will also address mold inspection, testing, and remediation.
- The bill asks EPA and HUD to establish guidelines for certifying mold inspectors and remediators.
- The Bill authorizes programs to educate the public about the damages of indoor mold.
- The Bill requires mold inspections for multiunit residential property and mold inspections for all property that is purchased or leased using funds that are guaranteed by the federal government. The Bill also requires mold inspections in public housing.
- The Bill requires, to whatever extent possible, that local jurisdictions modify building codes to minimize mold hazards in new construction.
- The Bill authorizes grants for mold removal in public buildings.
- The Bill authorizes tax credits for inspection and/or remediation of mold hazards.
- The Bill creates a National Toxic Mold Insurance Program administered by the Federal Emergency Management

Agency (FEMA) to protect homeowners from catastrophic losses.

- The Bill enables States to provide Medicaid coverage to mold victims who are unable to secure adequate health care.

While Congressman Conyers' summary of his bill does not say so, it should be noted that it also provides that before every sale and lease of real property, a mold inspection must be conducted by a State certified mold inspector, with the results of the inspection being disclosed to the purchaser or lessee of the property. In other words, what is presently a mandatory part of home sales in many states concerning termites would become mandatory in every state concerning mold.

Surely there is no doubt that there are companies currently engaged in the business of mold testing and remediation that are using the present confusion surrounding mold to their business advantage. According to the Air Conditioning, Heating and Refrigeration News website, "A whole new carrot is dangling in front of hvacr contractors, with the promise of millions of dollars in new business — that is, if you believe the prognostications of Melinda Ballard, president of the Policyholders of America."³¹ Speaking at the Healthy Indoor Environments 2002 Conference in Austin, Texas, Ms. Ballard spoke out in favor of the importance of education for those in the mold testing and remediation business. "It's like dangling money in front of these people. But they shouldn't grab the money unless they know what they are doing. If it takes 40 hours a year to generate \$40 million in business, is it worth the extra \$1 million per hour the training can generate?"³² Even the president of a building analysis company, which has seen his business quadruple over the last several years due to mold, acknowledges the current situation. "A lot of people are profiting by instilling panic in the marketplace about mold. Mold is gold. Unfortunately, people's panic and fear about mold in almost all cases is not warranted."³³

If the health hazards of mold are proven to be a serious enough issue to justify the need for State certified mold inspections before the sale of property, then this aspect of the Conyers Bill, while creating an enormous mold inspection industry (and everything that comes with it, including regulatory issues and negligence claims), may at least offer the public some protection from any unscrupulous and opportunistic companies.

The National Association of Independent Insurers (NAII) and the Independent Insurance Agents & Brokers of America (IIABA) have spoken out against the Conyers Bill. Both organizations have stated that there is no established link between the presence of mold and health concerns, and that the Conyers Bill does not allow for adequate scientific research to establish such a link.³⁴ Melinda Ballard, on the other hand, supports the Conyers Bill wholeheartedly. Pointing to the national insurance program aspects of the bill, she states that, "If insurance companies no longer are liable for toxic mold clean up, state legislators must mandate rate reductions by a corresponding 60% over premiums charged in 1999 (the year that saw a sudden increase in mold-related property damage claims)."³⁵

The present environment surrounding mold, whether it is overblown or not, makes perfect sense. Considering the uncertainty surrounding the science and mold's ubiquitous nature, giving it the ability to make virtually every person in the country a potential plaintiff against some type of defendant (not many mass torts can boast that fact), it is no wonder that mold is getting so much attention from lawyers and the media. And it is likely that the present brouhaha surrounding mold will not subside until the science is clarified and permissible exposure levels to indoor molds are established, both by credible governmental agencies, notwithstanding that debates may exist over the precise manner in which to accomplish such tasks. While the clarification of such issues will still likely leave open questions about individual susceptibility, proof of one's exposure to mold, and the proper identification, testing and remediation of mold, it should at least introduce some rationality to the situation.

EXPOSURE TO MOLD CAUSES BAD FAITH CLAIMS

If the average mold claim in Texas for the 2-year period from January 1, 2000 to December 31, 2001 was \$22,740, inclusive of allocated loss adjustment expenses (but could be more or less, on account of shortcomings in the data collection techniques), then why are some lawyers so anxious to get their hands on mold insurance claims? Easy — because mold insurance claims make ideal bad faith cases.

As discussed above, the *Ballard* case, despite its status as the *Marbury v. Madison* of mold litigation, was really a bad faith insurance claim. Even Melinda Ballard would likely say so. Testifying on July 18, 2002 before the Congressional Subcommittees on Housing and Community Oppor-

tunity and Oversight and Investigations, she stated, “[B]y early February of this year, there were more than 16,000 homeowners with insurance claims that began as relatively inexpensive water damage claims and because of wrongful denials or disputes over proper repairs, the claims turned into expensive claims requiring remediation of toxic mold.” Shortly thereafter, in an August 5, 2002 open letter to the insurance industry, posted on her Policyholders of America website, Ms. Ballard put it a little more bluntly. Describing the nearly 19,000 American families that are members of her organization, she stated, in part, as follows:

All of our members are homeowners who have been victimized by wrongful delays, denials and disputes over coverage. In every situation, the actions of the insurance company involved turned simple water damage into massive toxic mold infestations. None of us wanted to get into a pissing match with our insurance company. We were content with our lives and are not litigious people. But, none of us are going to lay down and let someone or something run all over the top of us, destroy our property and health and then blame us for the problem. Our goal is not to cause financial turmoil. We want insurance companies to be healthy and strong. Otherwise, you could not pay claims. However, we are adamantly against bad faith and fraud, regardless of who commits it. Unfortunately, our group sees far too many instances where the insurance company did not honor its policy and the result was the destruction of property and health.³⁶

Melinda Ballard’s message is simple — water damage, left unabated, is likely to cause mold. Therefore, water damage claims must be handled by insurers expeditiously. Moreover, Texas Insurance Commissioner José Montemayor has sent the same message to insurers. In a September 18, 2001 statement to residential property insurers addressing mold, Commissioner Montemayor offered the following advice:

Insurers can help reduce mold exposures by improving your response time in water damage cases. Testimony by experts at my public hearings indicated that mold can be stopped from forming if the moisture source is eliminated within 48 hours. Testimony from some homeowners indicated that it sometimes takes a week or more for a company’s insurance adjuster to answer the policyholder’s call. In some cases, the policyholders were told to do nothing until the adjuster arrived. This type of slow reaction and bad advice must stop. Company staff must be trained to react quickly to water damage claims and to tell policyholders to proceed quickly to stop the flow and begin the drying process before the adjuster arrives.³⁷

While it is easy to say that if the moisture source is eliminated within 48 hours, mold will not form, coverage determinations in actual water damage claims are likely to be far more complex and far less cut and dry. As a threshold matter, mold caused by water damage may not be covered under the policy. Without getting into a full-blown analysis of homeowners' and other first-party property coverage, it is generally recognized that mold is not covered under such policies, unless it is the result of a covered peril, such as a burst pipe. Mold that is not the result of a covered peril is considered to be a home maintenance issue, which is not covered by insurance.³⁸

However, even this seemingly straightforward "covered" or "not covered" inquiry can sometimes be anything but. In *Shirley Cooper v. American Family Mutual Insurance Company*, 184 F. Supp. 2d 960 (D. Ariz. 2002), the court examined coverage for what appears to have been a garden-variety mold homeowners' claim. A plumbing leak damaged dry wall and flooring in the master bedroom and hall closet of the insured's residence. American Family paid for repairs to the dry wall and flooring, but, citing a policy exclusion, denied coverage for mold damage caused by the leak. While some might say that this looks like a situation where the mold damage should be covered because it is the result of a covered peril and not a home maintenance issue, the federal district court did not agree.

The *Cooper* court noted that some courts have applied the "efficient proximate cause" rule to conclude that coverage exists when an insured can identify an insured peril as the proximate cause of the loss, even if subsequent or concurrent events are specifically excluded from coverage. Arizona, however, has not adopted the "efficient proximate cause" rule. Therefore, the court precluded coverage, notwithstanding that the policy at issue, which contained a mold exclusion at item 6 c., provided, "However, we do cover any *resulting loss* to property described in Coverage A – Dwelling and Dwelling Extension from items 2 through 8 above, not excluded or excepted in this policy." *Cooper* at 962 (italics added).

The *Cooper* court held that the "resulting loss" provision does not reinsert coverage for excluded losses, but reaffirms coverage for secondary losses ultimately caused by excluded perils. "We interpret the ensuing loss provision to apply to the situation where there is a 'peril,' that is, a hazard or occurrence which causes a loss or injury, *separate and independent* but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues." *Cooper* at 964 (citation omitted).³⁹

Compare *Cooper* with *Bowers v. Farmers Insurance Exchange*, 991 P.2d 734 (Wash. App. 2000). In *Bowers*, the insured sought coverage under a Landlord's Protection policy for mold damage to her home that resulted when her tenants converted her home into a marijuana-growing operation. The nature of the operation required that all heat in the house be diverted to the basement. This, and other related aspects of the operation, caused mold to grow throughout the house. *Bowers* at 736.

The policy at issue provided coverage for vandalism and malicious mischief, but excluded coverage for mold. The insurer paid for warped wall paneling, but denied the claim for mold-related damage. The insured argued that the "efficient proximate cause" of her loss was not the mold, but the vandalism of her tenants. The court agreed with the insured, holding that 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. The *Bowers* court concluded that, "It was the tenants' acts, which 'in an unbroken sequence ... [produced] the result for which recovery is sought[.]'" *Bowers* at 738.

While the "covered peril" issue can sometimes be a complex *legal* aspect of mold claims, the coverage picture is subject to even further complexity by certain *factual* aspects of the claims. The American Insurance Association (AIA), testifying recently before the Florida Department of Insurance at a hearing to address an appropriate regulatory response to mold and its effects on the insurance industry, described the following problems associated with mold claims in some cases:

- Mold grows quickly, but the most likely places for growth are in locations not easily or normally accessible, so it may not be found for some time;
- Once mold is discovered, it is often difficult to fairly ascertain whether remediation measures are covered under a typical insurance policy – in many if not most instances, determination of causation is at best uncertain;
- Given the lack of standards, insurers are not certain when remediation is necessary and, even when necessary, how it should be done;

- It is not at all uncommon to have mold occur as a result of faulty repairs done at the direction of the property owner (which ostensibly would not be covered under a typical property insurance policy); and,
- Property insurance policies require an owner to mitigate damages – yet application of this requirement is problematic given the difficulty in discovering the problem itself.⁴⁰

As these potential scenarios make clear, water damage/mold claims are extremely fact intensive and anything but black and white. Furthermore, the standards that govern whether an insurer has acted in bad faith in handling a claim are also less than crystal clear. Since Texas seems to get the most attention when it comes to mold, consider what it takes for an insured to establish bad faith in the Lone Star state.⁴¹ An insurer breaches its duty of good faith and fair dealing when it fails to settle a claim if it knew or should have known that it was reasonably clear that the claim was covered. *The Universe Life Insurance Company v. Giles*, 950 S.W. 2d 48 (Tex. 1997).⁴²

Given that the fact intensive nature of water damage/mold claims may make their determination anything but “reasonably clear”, as dictated by the bad faith standard, along with science that is up for grabs, the lack of permissible mold exposure standards, a jittery public and lawyers eager to fan the flames, it is easy to see why the deck is stacked against insurers handling such claims. And don’t forget that while homeowners’ policies do not provide coverage for bodily injury to the residents of the home, such coverage may become available in the form of damages for bad faith.

There is no better description of the cause of the frenzy over mold bad faith claims in Texas (and, no doubt, other states) than that provided by Justice Hecht in his dissenting opinion in *State Farm Lloyds v. Nicolau*, 951 S.W. 2d 444 (Tex. 1997). In a dissent joined by three other justices (although only two joined in the following quote), Justice Hecht aptly summarized the mold – bad faith situation as follows (that he did so about 3 years before mold’s emergence in earnest on the litigation scene only make his dissenting opinion that much more impressive):

The Texas tort of bad faith is — to borrow Judge Alex Kozinski's observation in a related context — 'so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window than a rule of law.' *Oki America, Inc. v. Microtech International, Inc.*, 872 F. 2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring)... The only flaw in Judge Kozinski's metaphor is the implication that bad faith liability is limited to hapless passersby. A more accurate comparison would be to an assault weapon fired into a crowd at random.

That, needless to say, is the defendants' perspective. For plaintiffs, bad faith is more like Hollywood television's Wheel of Fortune, or closer to home, like the Texas lottery: it costs almost nothing to play, you can play whenever you want, and if you win you hit the jackpot — tens, maybe hundreds, of thousands of dollars for the awful mental anguish that invariably seems to accompany denial of even the smallest insurance claim, and millions in punitive damages. And like the lottery, bad faith liability is paid ultimately by the public. Insurance companies have not been authorized to print their own currency; the money to pay successful plaintiffs and their attorneys comes from policyholders, and they obtain the money to pay premiums from wages or sales. In effect, bad faith is a levy on everyone to benefit a few — what some have called a tort tax.

But whether bad faith is seen from the recovery end or the liability end, its principal feature is the same: it is chancy, far more so than any rule of law ought to be. A legal cause of action should not be a game of roulette, either casino-style or the Russian variety. Individuals and entities, even insurance companies, are entitled to know before they act what the law expects of them, what behavior is culpable and what is not. A legal cause of action must be adequately defined by principles and standards. The bad faith tort for first-party insurance relationships in Texas does not approach minimum requirements.

This is not a small problem. Every lawsuit in Texas by an insured against an insurer almost always includes an allegation of bad faith — at least every one filed by a competent lawyer. Why? Is it because the insurers who venture to do business in this State are a uniformly sorry lot? No; it is because the odds of recovery are always decent and the stakes — unlimited tort liability — are always high. The threat of liability also increases the settlement value of any policy claim and may make settlement less likely. Why is the threat viable in every case filed? Because this Court will not define the limits of the tort.

Nicolau at 453-454.

Clearly, water damage is a breeding ground not only for mold, but the threat of bad faith claims as well. And a *threat* is really all that they

need to be for the plaintiff's attorney to have tremendous settlement leverage over the insurer. After all, what adjuster wants to take their chances with a jury when it comes to something as fact intensive and subjective as bad faith, and risk having a *Ballard*-like verdict on their resume.⁴³

Considering all this, is there any wonder why State Farm, the nation's largest home insurer has eliminated coverage for mold in 33 states, even if it is the result of storm damage covered by the policy. And way Allstate, the nation's second largest home insurer, has added language to its policy to clarify that it doesn't cover "mold, fungus, wet rot, dry rot or bacteria", unless the problems arise from events already covered by the policy. And in such cases, clean-up costs are limited to \$5,000.⁴⁴ Insurers have taken heat for reacting to the explosion in mold claims by quickly seeking to preclude or limit coverage. But given the litigation environment in which they must operate — where, by their nature, virtually every mold claim, no matter how it is handled, can potentially satisfy a nebulous bad faith standard — such criticism is unjustified.

CONCLUSION

The present mold climate is reminiscent of the stock market in the late 1990s, when the shares of technology and internet companies, despite their lack of present earnings, and none in sight, went through the roof. What enabled this situation to happen was Wall Street's temporary abandonment of its time-honored basis for measuring a stock's worth — earnings. But once the Street went back to valuing technology and internet companies in this traditional manner, the air in the shares came out very quickly and only those companies with substance were left standing. Likewise, the uncertain science and the lack of standards for permissible exposure levels to indoor molds have enabled an environment of "irrational exuberance" over it to exist. However, the clarification of such issues will likely have the same effect as Wall Street's return to sanity and an objective standard for stock valuation. Once there exist permissible exposure levels to mold, it is likely that only those claims that are legitimate will survive.

(ENDNOTES)

¹ "Mold Data — All Claims," Texas Department of Insurance, June 14, 2002, available at <http://www.tdi.state.tx.us/commish/molddata2.html>. The Texas Department of Insur-

ance recently granted permission to certain insurers to offer their national homeowners' policy form in Texas, in lieu of the more generous Texas standard HO-B form. For an in-depth look at how these forms differ in the water damage context, at least in State Farm's case, see "Texas Department of Insurance Exempt Filing Notification Pursuant to the Insurance Code Chapter 5, Subchapter L, Article 5.96," available at <http://www.tdi.state.tx.us/commish/statefarm.html>.

² Robert P. Hartwig, Ph.D., "Mold and the Insurance Industry: Truth and Consequences," Presentation at the American Insurance Association Emerging Trends Conference, McLean, Virginia, May 20, 2002, available at http://iisrv.thing.net/yy_obj_data/binary/580641_1_0/mold.pdf.

³ *State Farm Lloyds v. Nicolau*, 951 S.W. 2d 444 (Tex. 1997), discussed *infra*.

⁴ Many articles that have been written about the potential financial impact of mold litigation refer to it as the "next asbestos". For an examination of whether mold is worthy of such an ambitious label, see Randy J. Maniloff, "Mold: 5 Reasons Why It Is Not the 'Next Asbestos'," *Mealey's Litigation Report: Insurance*, Vol. 16, Iss. 25 (5/7/02) at p. 25, available at <http://www.cpmv.com/articles/In1625cm.pdf>.

⁵ See Dan Michalski, "Mold Can Be an Insurance Mess for Homeowners," *The New York Times*, June 16, 2002, at BU 9 (noting that insurers in Texas paid \$1.2 billion for mold claims in 2001 alone) and Rochelle Sharpe, "Mold getting a costly hold on homes," *USA Today*, June 20, 2002, at 15A.

⁶ The *Ballard* jury awarded damages as follows: (i) cost to replace the home - \$2,547,350; (ii) cost to remediate the home - \$1,154,175; (iii) cost to replace the contents of the home - \$2,000,000; (iv) cost of past and future additional living expenses - \$350,000; (v) cost of the appraisal process - \$176,000; (vi) damages for improper claims handling - \$12,000,000, plus \$5,000,000 for mental anguish; and (vii) attorney's fees - \$8,891,000. When the term "bad faith" is used herein to describe the *Ballard* verdict, it is being used in a generic sense, given that the *Ballard* complaint set out several causes of action, including violations of the Texas Deceptive Trade Practices and Consumer Protection Act and the Texas Insurance Code.

⁷ Ms. Ballard has since founded an organization called Policyholders of America, which describes itself as a take charge organization that helps policyholders get the coverage they have paid for and deserve. Her website states, "We don't whine. We get results. In the process, we make insurance companies madder than hell. We don't care." <http://www.policyholdersofamerica.org/index2.html>.

⁸ *The New York Times Magazine* article does not specifically say that the woman on the cover wearing the bio-hazard suit is Melinda Ballard. The woman's face, while partially obscured by the suit's head piece, resembles the picture of the woman in the article that is clearly identified as being Ms. Ballard. The table of contents provides the following note on the subject, "On the cover: When mold invaded Melinda Ballard's dream house in Dripping Springs, Tex., it went from modern-day Tara to biohazard."

⁹ *Mary Melinda Ballard and Ronald Allison v. Fire Insurance Exchange, et al.*, In the District Court of Travis County, Texas, 345th Judicial District, Order Granting Defendant's Motion to Exclude Causation Opinions, Dietz, J., May 9, 2001.

¹⁰ While the absence of an award for bodily injury means that the *Ballard* verdict could have been even higher, the lack of reporting on this aspect of the case, when the public's concerns over mold are likely much more related to the risks of bodily injury than property damage, is troubling.

¹¹ Judge Dietz hand wrote the following case citations on his order precluding the medical experts from testifying in *Ballard: E.I. du Pont Nemours & Co. v. Robinson*, 923 S.W. 2d 549 (Tex. 1995); *Gammill v. Jack Williams Chevrolet*, 972 S.W. 2d 713 (Tex. 1998); *Merrell Dow v. Havner*, 953 S.W. 2d 706 (Tex. 1997); *Helena Chemical Co. v. Wilkins*, 2001 Tex. Lexis 38 [now reported at 47 S.W. 3d 486 (Tex. 2001)].

¹² *Mary Melinda Ballard and Ronald Allison v. Fire Insurance Exchange, et al.*, In the District Court of Travis County, Texas, 345th Judicial District, Defendant's Motion to Exclude Causation Opinions and Brief in Support at 8, 23.

¹³ And it is not just the mainstream media that is at fault for imprecise reporting on the *Ballard* verdict. Consider the inaccurate description of the verdict that appeared in an article published by The Cima Companies, who describe themselves as one of the largest property/casualty and employee benefits brokers in the United States. "Despite the lack of science, plaintiffs have been very successful. The big jackpot so far has been a \$32 million award in Texas, against an insurer. The jury found that the insurer did not adjust a water-damage claim properly, allowing a mold infestation and resulting respiratory illness and memory loss to occur. Plaintiff Melinda Ballard survived, and founded the activist group called Policyholders of America." "The Mold Buffet," *The Cima Letter*, Summer 2002, available at <http://www.cimaworld.com/cimaletter>.

¹⁴ *Dr. John Tedesco v. Paul Revere Life Insurance Company*, No. 99-CV-2552, M.D. Fla. Reported in *Mealey's Litigation Report: Insurance Bad Faith*, Vol. 15, Iss. 4 (6/13/01) at p. 4.

¹⁵ *Charles Kocher v. Oxford Life Insurance Co.*, No. 00-C51-K, W. Va. Cir., Wetzel Co. Reported in *Mealey's Litigation Report: Insurance Bad Faith*, Vol. 15, Iss. 24 (4/17/02) at p. 3.

¹⁶ These searches were undertaken on Google.com on September 4, 2002. Of course there is nothing scientific about these results, but they still provide useful anecdotal evidence of the degree of media buzz surrounding different stories.

¹⁷ <http://www.usaweekend.com/about/index.html>.

¹⁸ The *USA Weekend* article stated that molds "are primary suspects in the tripling asthma rate over the past 20 years." Dr. Redd of the CDC, in his July 18, 2002 testimony before Congressional subcommittees stated that a 2000 report from the Institute of Medicine concluded that while there is sufficient evidence of an association between exposure to mold and exacerbation of asthma, there was inadequate evidence that molds cause people to become asthmatic.

¹⁹ Center for Disease Control, "Questions and Answers on *Stachybotrys chartarum* and other molds," available at www.cdc.gov/nceh/airpollution/mold/stachy.htm.

²⁰ The "eggshell plaintiff" rule provides that tortfeasors must take their plaintiffs as they find them and may not escape or reduce damages by highlighting the injured party's susceptibility to injury. See *Primm v. United States Fidelity & Guaranty Assurance Corp.*, 922 S. W. 2d 319 (Ark. 1996).

²¹ *Mary Melinda Ballard and Ronald Allison v. Fire Insurance Exchange, et al.*, In the District Court of Travis County, Texas, 345th Judicial District, Defendant's Motion to Exclude Causation Opinions and Brief in Support at 12.

²² *Ed McMahon, et al. v. American Equity Insurance Co., et al.*, No. BC271423, Calif. Super., Los Angeles County.

²³ Anastasia Hendrix, "Erin Brockovich Crusades Against Mold, State lawmakers told of potential health dangers," *San Francisco Chronicle*, March 8, 2001.

²⁴ Christina Littlefield, "Life mirrors art: Brockovich says don't shy away from challenges," *Las Vegas Sun*, June 27, 2002.

²⁵ According to the website www.moldupdate.com, as of August 6, 2002, the following states have introduced legislation in some way connected to mold or indoor air quality: Arizona, California, Connecticut, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York and Pennsylvania. Such legislation has either been enacted, defeated or is currently in-progress.

²⁶ The task force is to be comprised of representatives of public health officers, environmental health officers, code enforcement officers, experts on the health effects of mold, medical experts, certified industrial hygienists, mold abatement experts, representatives of government-sponsored enterprises, representatives from school districts or county offices of education, representatives of employees and representatives of employers, and affected consumers, which include, but are not limited to, residential, commercial and industrial tenants, homeowners, environment groups, and attorneys, and affected industries, which include, but are not limited to, residential, commercial and industrial building proprietors, managers or landlords, builders, realtors, suppliers of building materials and suppliers of furnishings, and insurers. Considering that insurers likely have the most at stake financially for the risks of mold, it is ironic that they are last on the list of stakeholders in the California Act.

²⁷ In adopting such limits, the Department is to consider, among other criteria, the adverse health effects of exposure to molds on the general population, including specific effects on members of subgroups that comprise a meaningful portion of the general population, which may include infants, children age 6 years and under, pregnant women, the elderly, asthmatics, allergic individuals, immune compromised individuals, or other subgroups that are identifiable as being at greater risk of adverse health effects than the general population when exposed to molds.

²⁸ SB 732 (Toxic Mold Protection Act of 2001), Implementation Update, August 6, 2002, available at <http://www.cal-iaq.org/SB732update.htm>.

²⁹ “Conyers Convenes Citizens Meeting on Toxic Mold,” Press Release From the Office of Congressman John Conyers, Jr., #107-178, undated (but issued to announce a meeting to be held on June 3, 2002).

³⁰ “Congressman John Conyers, Jr. Introduces H.R. 5040: The United States Toxic Mold Safety and Protection Act (“the Melina Bill”),” available at <http://www.house.gov/conyers/mold/htm>.

³¹ John R. Hall, “IAQ Testing, Mold Remediation Could Offer Profits,” May 23, 2002, available at http://www.achrnews.com/CDA/ArticleInformation/features/BNP__Features__Item/0,1338,77835,00.html.

³² *Id.*

³³ Linda Goodspeed, “‘Hysteria’ over mold growth is boon to air-quality firms,” *Boston Business Journal*, August 16, 2002.

³⁴ “NAII Urges Caution on Federal Legislative Move to Address Mold,” July 9, 2002, <http://www.insurancejournal.com/html/ijweb/breakingnews/national/na0702/na0709021.htm>; “IIABA Cites Problems with Conyers Mold Bill,” July 12, 2002, <http://www.insurancejournal.com/html/ijweb/breakingnews/national/na0702/na0712021.htm>.

³⁵ <http://www.policyholdersofamerica.org/index2.html>.

³⁶ http://www.policyholdersofamerica.org/message_to_insurers.html.

³⁷ Texas Department of Insurance, “Commissioner Montemayor Statement to Residential Property Insurers,” September 18, 2001, available at www.tdi.state.tx.us/commish/moldinsurer.html.

³⁸ There are no shortage of articles that provide in-depth discussions of the various coverage issues surrounding mold. Two excellent ones are Bill Wilson, “Toxic Mold Claims,” available at <http://vu.iaaa.net/Lib/Ins/PL/Homeowners/WilsonToxicMold.htm> and “Mold – An Overview,” *FC&S Bulletins, Personal Lines Volume*, May 2002, available at www.insurance-portal.com/051502fcs mold.pdf.

³⁹ *Cooper* rejected the insured’s argument that mycotoxins released by mold spores are a separate and independent loss resulting from mold.

[I]f after removal of the mold, the mycotoxins continued to exist separate and apart from the mold, then the mycotoxins would be an independent and distinct ensuing loss. However, Intervener’s own EPA official publication states that the toxins are produced and released by the mold; therefore, removal of the mold would presumably also remove the mycotoxins. As such, the mycotoxins do not constitute a *separate and independent* loss resulting from mold.

Here, there is no separate and independent peril. The claimed damage is mold. The proposed remediation is removal of the mold. Calling it a pollutant does not change the result. It is still mold. The policy expressly excludes any losses

that are caused by and result from mold. The 'resulting loss' clause does not resurrect the excluded peril to provide coverage.

Cooper at 965.

⁴⁰ "Groups Urge Regulatory Constraint at Fla. Mold Hearing," August 21, 2002, <http://www.insurancejournal.com/html/ijweb/breakingnews/regional/southeast/se0802/se0821021.htm>

⁴¹ Bad faith case law varies considerably from state to state, with statutes and regulations sometimes being an additional component of the equation. The discussion of bad faith contained herein is merely the tip of the iceberg.

⁴² While the Texas bad faith standard is that simple, various cases have provided additional guidance on the issue. A recent Court of Appeals of Texas decision succinctly summarized some of these guidelines as follows: "[A]n insurer does not breach its duty by delaying payment when there is a bona fide controversy as to liability. As long as the insurer has a reasonable basis to deny or delay payment of a claim, even if that basis is eventually determined by the fact finder to be erroneous, the insurer is not liable for the tort of bad faith. The key inquiry in a bad faith claim is the reasonableness of the insurer's conduct. Reasonableness is determined using an objective standard of whether a reasonable insurer under similar circumstances would have delayed or denied the claimant's benefits." *Johnson v. Essex Insurance Company*, 2002 Tex. App. LEXIS 588 (citations omitted).

⁴³ For an example of a recent Texas bad faith decision involving mold, see *Maynard v. State Farm Lloyds*, 2002 U.S. Dist. LEXIS 12026. While the insurer prevailed in *Maynard*, it is easy to see how fact-intensive and subjective this coverage litigation is, not to mention expensive. These are three factors that are likely to drive many insurers to the settlement table, no matter how strongly they believe in the merits of their cases.

⁴⁴ Christopher Oster, "Insurance Companies Just Say 'No' to Covering Mold," *The Wall Street Journal*, August 8, 2002, at D1.