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The Toxic Mold Terrifying Texas: Mold's Hold on the Insurance Industry.

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THE TOXIC MOLD TERRIFYING TEXAS: MOLD'S HOLD ON THE INSURANCE INDUSTRY

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I. INTRODUCTION

Mold—it's the fuzzy, slimy, greenish-black stuff found in showers, on spoiled food, and in just about any unmaintained moist environment. Mold is not usually thought of as a threatening substance; in fact, some

types of mold are actually beneficial.[1] For example, there would be no cheese, beer, or penicillin without mold.[2] Additionally, since mold consumes organic material and begins the decomposition process, a world without mold would soon yield an over abundance of rotted vegetation and dead animals.[3]

Although most mold is nontoxic, there are some species of mold that are hazardous.[4] These toxic molds have the potential of wreaking havoc in homes.[5] For instance, when wood becomes wet and then dry again, it can warp, which may result in the cracking of walls or structural weakness.[6] And in certain circumstances,[7] exposure to mold may cause adverse health effects.[8]

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1. Clifford Pugh, *The Mold That Ate Houston*, HOUS. CHRON., June 27, 2001, at 1, 2001 WL 23610771; David S. Jones, *Black Mold: Between Hype and Hysteria*, Real Estate Center, *at* http://recenter.tamu.edu/news/4-0901.html (last visited Oct. 21, 2001).

2. Clifford Pugh, *The Mold that Ate Houston*, HOUS. CHRON., June 27, 2001, at 1, 2001 WL 23610771; David S. Jones, *Black Mold: Between Hype and Hysteria*, Real Estate Center, *at* http://recenter.tamu.edu/news/4-0901.html (last visited Oct. 21, 2001).

3. *See* Sandra V. McNeel & Richard A. Kreutzer, *Fungi & Indoor Air Quality*, HEALTH & ENV'T DIG., May-June 1996, at 9, 9 (stating that molds adapt well to their surroundings and colonize dead or decaying organisms).

4. *See* Clifford Pugh, *The Mold That Ate Houston*, HOUS. CHRON., June 27, 2001, at 1, 2001 WL 23610771 (stating that there are more than 100,000 species of mold and only around twenty-four are "really terrible"); David S. Jones, *Black Mold: Between Hype and Hysteria*, Real Estate Center, *at* http://recenter.tamu.edu/news/4-0901.html (last visited Oct. 21, 2001) (indicating that there are 1,000 species of mold in the U.S. and only about twenty-four are hazardous).

5. *See* David S. Jones, *Black Mold: Between Hype and Hysteria*, Real Estate Center, *at* http://recenter.tamu.edu/news/4-0901.html (last visited Oct. 21, 2001) (quoting that "[b]uildings make perfect meals for molds" because molds are attracted to the drywall, wallpaper, insulation, carpet glue, and Formica countertops); NAT'L CTR. FOR ENVTL. HEALTH, QUESTIONS AND ANSWERS ON STACHYBOTRYS CHARTARUM AND OTHER MOLDS (2000), http://www.cdc.gov/nceh/asthma/factsheets/molds/default.htm (listing building materials that encourage mold growth).

6. CAL. DEP'T OF HEALTH SERVS., *Mold in My Home: What Do I Do?*, Mar. 1998, http://www.cal-iaq.org/mold0107.htm.

7. Mallory May, *Black Mold Is No Cause for Panic*, DALLAS MORNING NEWS, July 22, 2001, at 5J, 2001 WL 25490953 (stating that toxic mold can cause illness in susceptible humans); *see also* CAL. DEP'T OF HEALTH SERVS., *Mold in My Home: What Do I Do?*, Mar. 1998, http://www.cal-iaq.org/mold0107.htm (identifying those at a greater risk of adverse health effects upon mold exposure to be infants and children, the elderly, pregnant women, and individuals with immune deficiencies, existing respiratory conditions, and allergies).

8. *See* Randy Lee Loftis, *Breaking the Mold: Spores May Seem Harmless to Some, but They Can be Costly Health Hazards*, DALLAS MORNING NEWS, Mar. 16, 2001, at 27A, 2001 WL 16940217 (identifying common mold-related health risks, such as breathing problems, congestion, eye and skin irritation, headaches, memory loss, fever, and mood swings); Sandra V. McNeel & Richard A. Kreutzer, *Fungi & Indoor Air Quality*, HEALTH & ENV'T DIG., May-June 1996, at 9, 11 (listing health risks associated with molds); NAT'L CTR. FOR

Recently, there was a surge in the number of homeowners seeking to recover from their insurance companies for mold-damage claims.[9] This may stem from the public becoming more knowledgeable about the topic.[10] Journalists educated the public via news reports on mold-related illness, mold-infested school buildings, and related subjects such as the El Niño phenomenon.[11] In fact, weather forecasts now include mold levels

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ENVTL. HEALTH, QUESTIONS AND ANSWERS ON STACHYBOTRYS CHARTARUM AND OTHER MOLDS (2000), http://www.cdc.gov/nceh/asthma/factsheets/molds/default.htm (reiterating the potential health risks of mold exposure); David S. Jones, *Black Mold: Between Hype and Hysteria*, Real Estate Center, *at* http://recenter.tamu.edu/news/4-0901.html (last visited Oct. 21, 2001) (indicating that mold induced health problems range from headaches to memory loss and even death).

9. *See Moldering/Hysteria Should Not Drive Debate on Mold Insurance*, HOUS. CHRON., Sept. 19, 2001, at 38, 2001 WL 23629425 (recognizing the increased number of claims filed by Texas policyholders for toxic black mold within the past eighteen months); Terrence Stutz, *Insurer to Stop Selling Policies: State Farm Cites Mold Losses in Ending New Sales to Homeowners*, DALLAS MORNING NEWS, Sept. 19, 2001, at 31A, 2001 WL 27700582 (restating the Texas Department of Insurance's analysis of about 9,000 mold-related claims in the first half of 2001, which is compared to only 2,600 claims in the first half of 2000); Terrence Stutz, *Rush Put on Mold Coverage Findings: Insurance Official Orders Quick Homeowner Recommendations—Water Damages Losses Expected to Soar*, DALLAS MORNING NEWS, Sept. 13, 2001, at 41A, 2001 WL 27699290 (detailing the steady rise in mold-related claims); Terrence Stutz, *State Mold Plan Criticized: Consumers, Insurers Say Compromise Does Little to Deal with Problem*, DALLAS MORNING NEWS, Oct. 17, 2001, at 25A, 2001 WL 29581321 (stating that insurance companies' mold-related claims for the first half of 2001 have increased by five times in number as compared to the first half of the year prior); TEX. DEP'T OF INS., *Mold Data-All Claims*, Sept. 18, 2001, http://www.tdi.state.tx.us/commish/molddata2.html (reporting the increase in claims by report quarter starting in 2001 through the second quarter of 2001). Beginning in 1999, losses totaled $330 million. Terrence Stutz, *Rush Put on Mold Coverage Findings: Insurance Official Orders Quick Homeowner Recommendations—Water Damages Losses Expected to Soar*, DALLAS MORNING NEWS, Sept. 13, 2001, at 41A, 2001 WL 27699290. By 2000, losses increased to $480 million. *Id.* Further, losses for 2001 were estimated at $750 million. *Id.*

10. *See* Edward H. Cross, *Toxic Mold: The Fourth Wave of Construction Defect Litigation?*, ORANGE COUNTY LAW., Dec. 1998, at 26, 26 (stating that the mold issue has been featured in publications such as the NEW YORK TIMES as well as the subject of *ABC's Prime Time Live* and *Oprah*); Pamela Manson, *Jury Holds Insurance Company Liable in Mold Case*, TEX. LAW., June 11, 2001, at 5 (emphasizing that the media has induced a fear in people, which causes them to file claims whether or not they have mold); TEX. DEP'T OF INS., *Commissioner Montemayor Statement to Residential Property Insurers*, Sept. 18, 2001, http://tdi.state.tx.us/commish/moldinsurer.html (opining that the recent news media coverage has partially created this temporary surge in claims); David S. Jones, *Black Mold: Between Hype and Hysteria*, Real Estate Center, *at* http://recenter.tamu.edu/news/4-0901.html (last visited Oct. 21, 2001) (discussing CBS's newsmagazine *48 Hours* featuring Erin Brockovich and her battle with black mold).

11. *See* Edward H. Cross, *Toxic Mold: The Fourth Wave of Construction Defect Litigation?*, ORANGE COUNTY LAW., Dec. 1998, at 26, 26 (referring to the El Niño rainstorms and news reports regarding mold-related illness); David S. Jones, *Black Mold: Between Hype and Hysteria*, Real Estate Center, *at* http://recenter.tamu.edu.news/4-0901.html (last

for those predisposed to allergies. This increased public consciousness about toxic mold led insurance companies, and even the Texas Department of Insurance Commissioner, to assert that the claims are a product of media frenzy, which has allegedly instilled fear of the "mold monster" in policyholders.[12]

Despite the recent surge in mold-related claims, mold-related damage has been around for quite some time. Such damage is even referenced in the Bible.[13] Historians hypothesize that toxic mold caused Egypt's last ten plagues.[14] Then why, one might ask, did it take over 2000 years for this issue to become worthy of all this attention? One possibility is that this is a long-term effect of the energy-conscious 1970s.[15] It was during this time that Americans made their homes and buildings more energy

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visited Oct. 21, 2001) (accounting reports of mold found not only in schools, but also in courthouses and churches).

12. *See* Terrence Stutz, *Keep Mold Coverage, State Told: Homeowners Clash with Insurance Firms*, DALLAS MORNING NEWS, June 27, 2001, at 1A, 2001 WL 24405817 (stating that increased awareness of the mold problem has led to public hysteria, resulting in a rise of mold-related claims); TEX. DEP'T OF INS., *Commissioner Montemayor Statement to Consumers and Consumer Groups*, Sept. 18, 2001, http://www.tdi.state.tx.us/commish/moldconsumer.html (contending that fear and publicity have fed on each other, causing the dilemma at hand).

13. Eric Berger, *Scientists Disagree Over Health Hazards of Mold*, HOUS. CHRON., June 27, 2001, at 17, 2001 WL 23610684 (mentioning mold's reference in the Bible); Pamela Manson, *Jury Holds Insurance Company Liable in Mold Case*, TEX. LAW., June 11, 2001, at 5 (tracing black mold back to biblical times). The Bible states:

> If [the priest] finds bright green or reddish streaks on the walls of the house and the contamination appears to go deeper than the wall's surface, he will leave the house and lock it up for seven days . . . . If the mildew on the walls of the house has spread, the priest must order that . . . areas be removed . . . . Next the inside walls of the entire house must be scraped thoroughly and the scrapings dumped in the unclean place outside the town . . . If he sees that the affected areas have spread, the walls are clearly contaminated with an infectious mildew, and the house is defiled. It must be torn down.

Leviticus 14:35-45 (New Living Translation—Catholic) (footnotes omitted).

14. Eric Berger, *Scientists Disagree Over Health Hazards of Mold*, HOUS. CHRON., June 27, 2001, at 17, 2001 WL 23610684.

15. *See* Andrew J. Harrison, Jr., *An Analysis of the Health Effects, Economic Consequences and Legal Implications of Human Exposure to Indoor Air Pollutants*, 37 S.D. L. REV. 289, 308 (1992) (stating that Americans modified their homes and buildings to conserve energy during the oil crises of the 1970s); Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 250 (1998) (reiterating the energy conscious sentiment of the 1970s); Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 15 (noting that the Environmental Protection Agency is in agreement that some moisture problems have been associated with changes in building construction practices occurring in the 1970s).

efficient by reducing the ventilation of the structure[16] or "weatherizing" them.[17]

Another possibility is the progression in technology of construction materials. Previously, construction materials contained ingredients such as mercury and lead, which helped suppress mold growth.[18] Today, synthetic, mass-produced, and inexpensive construction materials are widely used.[19] These materials are more susceptible to mold than their predecessors.[20] In short, energy-efficient structures constructed with modern building materials present a problem that was nonexistent thirty years ago.[21]

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16. *See* Pamela Manson, *Jury Holds Insurance Company Liable in Mold Case*, TEX. LAW., June 11, 2001, at 5 (theorizing that toxic mold has become more prevalent today because homes have been built airtight since the 1970s). In these airtight homes, water is trapped when there is a leak, thus allowing mold growth. *Id.*

17. *See* Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 250-51 (1998) (explaining the mechanics of "weatherizing"). Poorly ventilated structures may fail to introduce sufficient outdoor air into the building (merely recirculating stagnant indoor air), or the air it does allow inside may be polluted if the air intakes are not properly chosen. *Id.*

18. Karen Hudgins, *Mold Renovation Begins at Home or Headquarters*, AUSTIN BUS. J., Oct. 8, 2001, http://austin.bizjournals.com/austin/stories/2001/10/08/focus2.html.

19. *See* Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 514 (1996) (listing new construction materials, such as commercial glues, adhesives, coatings, and supplies); Emanuel Gonzales, *Household Mold a Growing Concern; Rash of Claims Has Insurers, Health Community Cautioning Against Overreactions*, SAN ANTONIO EXPRESS-NEWS, July 29, 2001, at 01A, 2001 WL 24770472 (contributing to the prevalence of mold problems is the increased use of cheaper building materials that are prone to mold growth when wet); Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 15 (stating that carpet, ceiling tiles, insulation, paint, drywall, wallpaper, and wood products are examples of materials that provide conducive environments for the mold growth).

20. *See* Andrew J. Harrison, Jr., *An Analysis of the Health Effects, Economic Consequences and Legal Implications of Human Exposure to Indoor Air Pollutants*, 37 S.D. L. REV. 289, 308 (1992) (stating that "weatherizing" combined with synthetic building material use increases the level of indoor air pollutants); Colin Pope, *Mold Cases Keep Growing*, AUSTIN BUS. J., Oct. 15, 2001, http://austin.bizjournals.com/austin/stories/2001/10/15/story3.html (noting the susceptibility of new construction materials to mold).

21. *See* Karen Hudgins, *Mold Renovation Begins at Home or Headquarters*, AUSTIN BUS. J., Oct. 8, 2001, http://www.austin.bizjournals.com/austin/stories/2001/10/15/story3.html (explaining that modern building materials are more conducive to mold growth); TEX. DEP'T OF INS., *Commissioner Montemayor Statement to Consumers and Consumer Groups*, Sept. 18, 2001, http://www.tdi.state.tx.us/commish/moldconsumer.html (asserting that many of the recent claims involve new houses, which were built with materials that are more susceptible to mold growth than materials used in older houses).

Litigation of mold damage claims has also generated substantial attention to this issue.[22] A prime example is the Texas case, *Ballard v. Fire Insurance Exchange*.[23] In *Ballard*, a jury awarded thirty-two million dollars in damages to a couple whose twenty-two room mansion became uninhabitable after a toxic mold infestation.[24] Large awards such as this one, coupled with an overall increase in water-related damage claims,[25] prompted top insurance companies in Texas to implement a moratorium on issuing new policies covering water-damage claims.[26] In addition to

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22. *See* Colin Pope, *Mold Cases Keep Growing*, AUSTIN BUS. J., Oct. 15, 2001, http://austin.bizjournals.com/austin/stories/2001/10/15/story3.html (stating that Texas is among the states leading in mold-related lawsuits).

23. *See* Leo John Jordan & Jennifer K. Kenchel, *Recent Developments in Property Insurance Law*, 37 TORT & INS. LAW J. 675, 675 (2002) (discussing Ballard v. Fire Ins. Exch., No. 99-05252 (250th Dist. Ct., Travis County, Tex., June 1, 2001)).

24. *See id.* (specifying the components of the damages award). However, this judgment was subsequently vacated by the court sua sponte in the hopes of fostering settlement. Ballard v. Fire Ins. Exch., No. 99-05252 (250th Dist. Ct., Travis County, Tex., Aug. 1, 2002, order vacating judgment), 2001 WL 883550. Ultimately, the court of appeals affirmed only $4,006,320.72 of the jury's original $32,000,000 verdict. Allison v. Fire Ins. Exchange, No. 03-01-00717-CV, 2002 WL 31833440 (Austin Dec. 19, 2002, no pet. h.). The court reasoned that since there was no evidence to support that the insurance company knowingly breached its duty of good faith, the jury's award of punitive and mental anguish damages was in error. *Id.* This case is still notable as it demonstrates how costly a mold claim may be if the insurer or homeowner fails to act expeditiously in removing materials infested with mold. *See* Leo John Jordan & Jennifer K. Kenchel, *Recent Developments in Property Insurance Law*, 37 TORT & INS. LAW J. 675, 675 (2002) (discussing *Ballard*'s importance); Brian De Gatto & Robert V. Grande, *Black Mold Suits Yields Some Large Personal Injury Verdicts, but Their Future Is Uncertain*, 74 N.Y. ST. B.J. 23, 24 (2002) (discussing the significance of the *Ballard* decision).

25. *See* Lynn Goch, *Mold, Medical Liability Top Insurers' Wish List for Texas Legislature*, BEST'S INS. NEWS, Nov. 8, 2001, 2001 WL 24725625 (projecting between 40,000 and 50,000 mold claims statewide by the end of 2001); Lorraine Gorski, *Best's Review: Mold Claims Skyrocketing*, BEST'S INS. NEWS, Nov. 1, 2001, 2001 WL 24725524 (comparing Texas' average water-leak claim in 1995, which was about $4,000, to current claims ranging from $30,000 to $40,000 and sometimes even extending into the $90,000 to $100,000 range); Colin Pope, *Mold Cases Keep Growing*, AUSTIN BUS. J., Oct. 15, 2001, http://austin.bizjournals.com/austin/stories/2001/10/15/story3.html (estimating that Texas mold-related claims have increased by 135% since 1999); Terrence Stutz, *Allstate Halts New Policies: Insurer Is Latest in Texas to Cite Mold Losses in Homeowners Market*, DALLAS MORNING NEWS, Sept. 29, 2001, at 1A, 2001 WL 28629932 (reporting an increase in water and mold damage of almost 60% this year).

26. *See* Lynna Goch, *Mold, Medical Liability Top Insurers' Wish List for Texas Legislature*, BEST'S INS. NEWS, Nov. 8, 2001, 2001 WL 24725625 (stating that the leading three homeowners insurance companies are no longer writing policies covering water-related claims); Terrence Stutz, *Allstate Halts New Policies: Insurer Is Latest in Texas to Cite Mold Losses in Homeowner's Market*, DALLAS MORNING NEWS, Sept. 29, 2001, at 1A, 2001 WL 28629932 (announcing that Allstate joined State Farm Insurance and Farmers Group in ceasing to sell new comprehensive insurance policies); TEX. DEP'T OF INS., *Mold Clean-up*

this halt in new policy writing, insurance companies raised rates,[27] emphasizing that if mold-related losses continue to be covered, the rates will escalate even further.[28]

The insurance industry cannot operate effectively at the risk of insolvency.[29] Insurance companies assert that "[m]ounting mold-related losses . . . threaten the industry's financial stability."[30] Losses in Texas

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Practices Inquiry Requested, Oct. 5, 2001, http://www.tdi.state.tx.us/commish/nr10051a.html (stating that Texas' top three home insurers are either not writing new policies or they are limiting new policies to coverage not including water damage).

27. Lorraine Gorski, *Best's Review: Mold Claims Skyrocketing*, BEST'S INS. NEWS, Nov. 1, 2001, 2001 WL 24725524; *see also Mold Claims Skyrocketing*, BEST'S INS. NEWS, Nov. 1, 2001, 2001 WL 24725524 (reporting that State Farm raised its homeowners insurance rates 14½% and Allstate also increased its homeowners rates by 25% thus far in 2001). Both State Farm and Allstate assert that these increases in rates do not reflect the cost of mold claims. *Id.*

28. *Changes Sought for Mold Proposal*, INS. ACCT., Oct. 22, 2001, at 1, 2001 WL 2524593 (stating that, "Coverage for mold related losses, if mandated, would significantly increase premiums"); Lorraine Gorski, *Best's Review: Mold Claims Skyrocketing*, BEST'S INS. NEWS, Nov. 1, 2001, 2001 WL 24725524; Shonda Novak, *Insurers Urged to Rethink New Rules on Mold*, AUSTIN AM.-STATESMAN, Aug. 31, 2001, at A1, 2001 WL 4583198 (predicting an increase in Texas homeowner insurance premiums of 40% to 60% or more); Terrence Stutz, *Keep Mold Coverage, State Told: Homeowners Clash with Insurance Firms*, DALLAS MORNING NEWS, June 27, 2001, at 1A, 2001 WL 24405817 (anticipating a possible 40% increase to handle mold-related claims).

29. *Moldering/Hysteria Should Not Drive Debate on Mold Insurance*, HOUS. CHRON., Sept. 19, 2001, at 38, 2001 WL 23629425; *see also* ROBERT I. MEHR & EMERSON CAMMACK, PRINCIPLES OF INSURANCE 34 (1980) (stating that "[n]o insurer can afford to insure a type of loss likely to happen to a large percentage of those exposed to it"). Indemnifying a great number of insureds at the same time would likely yield uneconomic premiums for all of the insurance company's insureds. *Id.* at 35. Thus, if a large number of insureds are affected, even well-managed insurers may be forced into insolvency. *Id.* at 34. To help shield insurers from widespread catastrophic loss, insurers may except from coverage certain acts or occurrences, such as losses resulting from acts of war. *Id.* at 35.

30. Terrence Stutz, *Lift Freeze on Policies, Insurers Told: State Regulator Seeks Solution to Rise in Home Mold Claims*, DALLAS MORNING NEWS, Aug. 31, 2001, at 1A, 2001 WL 27698808; *see also* Terrence Stutz, *Allstate Halts New Policies: Insurer Is Latest in Texas to Cite Mold Losses in Homeowners Market*, DALLAS MORNING NEWS, Sept. 29, 2001, at 1A, 2001 WL 28629932 (quoting an industry trade group representative stating that "[o]ur industry is in the business of selling insurance, but they [sic] cannot do so when our ability to pay outrageously high mold claims threatens the financial stability of companies"); Terrence Stutz, *Farmers to Drop Home Insurance: Company Cites Texas Mold Claims in Halting Comprehensive Coverage*, DALLAS MORNING NEWS, Nov. 10, 2001, at 1A, 2001 WL 29584193 (stating Farmer's position that the mold situation must be addressed in a way which "protects the financial stability of our company"); Terrence Stutz, *State Mold Plan Criticized: Consumers, Insurers Say Compromise Does Little to Deal with Problem,* DALLAS MORNING NEWS, Oct. 17, 2001, at 25A, 2001 WL 29581321 (stating insurance company representatives claim that mold losses in the past couple of years have "threatened their financial stability and forced many insurers to restrict sales of homeowners' policies in Texas").

are exceeding the premiums collected.[31] One industry trade group representative declared, "[I]t is a simple economic fact that the current rate for home insurance cannot support mold-related claims, which can run from $10,000 to $100,000 per claim."[32]

In the fall of 2001, Texas Department and Insurance Commissioner, José Montemayor, contemplated whether to reduce mold-related claims by altering policy coverages, and if policies indeed necessitated alteration, how to accomplish this task.[33] Prior to the Commissioner's decision, Farmers Insurance Group, the second largest property insurer in Texas, took matters into its own hands by implementing a moratorium on issuing new policies in Texas.[34] State Farm, the state's leading property insurance provider, followed suit.[35] Allstate, the third largest insurance provider in Texas, also issued a moratorium.[36]

Farmers Insurance Group subsequently went a step beyond the other insurance companies.[37] Farmers not only ceased writing new comprehensive policies, but they also ceased renewing comprehensive coverage for

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31. Terrence Stutz, *Allstate Halts New Policies: Insurer Is Latest in Texas to Cite Mold Losses in Homeowners Market*, DALLAS MORNING NEWS, Sept. 29, 2001, at 1A, 2001 WL 28629932.

32. Terrence Stutz, *Lift Freeze on Policies, Insurers Told: State Regulator Seeks Solution to Rise in Home Mold Claims*, DALLAS MORNING NEWS, Aug. 31, 2001, at 1A, 2001 WL 27698808.

33. *See* TEX. DEP'T OF INS., *Montemayor Protects Consumer Choice, Availability of Mold Coverage*, Nov. 28, 2001, http://www.tdi.state.tx.us/commish/nr11281a.html (promulgating the Commissioner's decision).

34. *See* Mike W. Thomas, *Regulators, Insurers Engaged in Homeowners-Policy Showdown*, SAN ANTONIO BUS. J., Nov. 19, 2001, http://sanantonio.bizjournals.com/sanantonio/stories/2001/11/19/story3.html (stating that Farmers Insurance Group, with 20% of the Texas insurance market, ceased writing new policies on July 30, 2001).

35. Terrence Stutz, *Insurer to Stop Selling Policies: State Farm Cites Mold Losses in Ending New Sales to Homeowners*, DALLAS MORNING NEWS, Sept. 19, 2001, at 31A, 2001 WL 27700582.

36. *See* Mike W. Thomas, *Regulators, Insurers Engaged in Homeowners-Policy Showdown*, SAN ANTONIO BUS. J., Nov. 19, 2001, http://sanantonio.bizjournals.com/sanantonio/stories/2001/11/19/story3.html (setting forth a time line for which the top three insurance carriers in Texas announced their moratoriums on issuing new homeowner policies). Farmers Insurance Group, State Farm, and Allstate imposed moratoriums on writing new homeowner policies on July 30, 2001, September 18, 2001, and September 28, 2001, respectively. *Id.*

37. *See* TEX. DEP'T OF INS., *Montemayor Tells Farmers to Stop Non-Renewal Plan*, Nov. 12, 2001, http://www.tdi.state.tx.us/commish/nr11121a.html (discussing Commissioner Montemayor's disappointment in Farmers Insurance Group's action not to wait for his decision). The Commissioner stated that he "'would have appreciated the common courtesy of the company's waiting to learn of my decision before taking such an extreme action that could be detrimental to its policyholders.'" *Id.* The Commissioner went on to say, "'I'm stunned that Farmers Insurance would consider turning their back on loyal Texas customers in these times of economic uncertainty and national crisis.'" *Id.*

its current 600,000 policyholders.[38] The Commissioner responded by issuing an order halting Farmers' plan of nonrenewals.[39] In September 2002, Farmers subsequently announced that it would no longer renew Texas homeowners' policies, which leaves close to seventeen percent of Texas homeowners without coverage upon the expiration of their current annual policies.[40] The insurer's decision to abandon the Texas homeowner market, however, was temporarily suspended under an agreement Farmers made with the Department of Insurance.[41]

A mold-damage exclusion on standard homeowner's policies would bring Texas into accord with the coverage the company provides in other states.[42] Of the forty-one states that Farmers Insurance Group serves, the company has dropped mold-damage as a covered risk in at least thirty of

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38. *See Farmers Drops Texas Homeowners; Firm Says Mold Claims Caused Financial Losses*, SAN ANTONIO EXPRESS-NEWS, Nov. 11, 2001, at 01B, 2001 WL 28787278 (stating that although the top three insurers in Texas no longer sell comprehensive policies due to an increase in mold claims, Farmers is the first leading company to stop renewing comprehensive policies); Terrence Stutz, *Farmers to Drop Home Insurance: Company Cites Texas Mold Claims in Halting Comprehensive Coverage*, DALLAS MORNING NEWS, Nov. 10, 2001, at 1A, 2001 WL 29584193 (reiterating that Farmers will not renew coverage for its customers beginning December 30, 2001).

39. *See* Matt Brady, *Texas Mold Issue Shapes Up As 'Crisis,'* INS. ACCT., Nov. 19, 2001, at 1, 2001 WL 2524751 (stating the reason for the order in stopping Farmers from implementing its non-renewal plan was to allow time to examine the plan to make sure it adhered to state law). Under state law, "an insurer must provide a plan of orderly withdrawal from the market" when it will no longer offer coverage in the state. *Id.*

40. Aïssatou Sidimé, *Farmers to Abandon Texas; Firm to Stop Renewing Home Policies for 700,000 Customers*, SAN ANTONIO EXPRESS-NEWS, Sept. 26, 2002, at 1A, 2002 WL 100208767.

41. *See* THE WASHINGTON POST, Nov. 12, 2002, at E02, 2002 WL 102571227 (reporting that Farmers will extend coverage for existing customers whose policies come due from November 22, 2002 through December 10, 2002 in exchange for the State delaying imposition of a fine for unfair pricing practices). On August 13, 2002, the Texas Department of Insurance issued an emergency cease and desist order against Farmers to stop unfair pricing practices. TEX. DEP'T OF INS., *TDI Issues Emergency Cease and Desist Order to Freeze Farmers Insurance Rates*, Aug. 13, 2002, http://www.tdi.state.tx.us/commish/nr08132b.html; TEX. DEP'T OF INS., *Farmers Threatens to Non-Renew Texas Customers*, Sept. 20, 2002, http://www.tdi.state.tx.us/commish/nr09202b.html (stating that Farmers claimed they were forced to raise premiums because of "record mold loses [sic] when, in fact, those loses [sic] occurred last year under a different policy . . . not . . . offered to consumers in 2002"); *see also* TEX. INS. CODE ANN. § 83.051 (Vernon 2002) (outlining the Commissioner's authority to issue a cease and desist order).

42. LEO P. MARTINEZ & JOHN W. WHELAN, GENERAL PRACTICE INSURANCE LAW 499-500 (West Group 4th ed. 2001) (explaining what the terms "coverage" and "exclusion" mean in the insurance policy context). Coverage includes damage caused by enumerated perils (a "named peril" policy). *Id.* In the case of an "all risk" policy, "all risk is physical loss" is covered, save and except those exclusions specifically listed in the policy. *Id.* Consequently, exclusions work as a limitation of the loss coverage. *Id.*

those states.[43] The company contends that mold insurance should be offered as a separate policy, which in turn, will thwart an increase in premiums.[44]

Generally, Texans are afforded more generous coverage in standard homeowner's policies than their counterparts in other states.[45] Texas currently offers "the most comprehensive homeowner coverage possible in comparison to other states."[46] Of course, one of the stipulations for this generous coverage is higher premiums.[47]

Insurance coverage in Texas differs from other states' coverage in several respects. For example, in addition to higher premiums in Texas,[48] the Texas Department of Insurance mandates the use of standardized policy forms; forms used must either be issued by the Department or approved by them.[49] Additionally, most states do not allow mold-damage claims because it is considered a maintenance failure and hence, is unrecoverable.[50]

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43. *See* Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 15 (stating that Farmers no longer offers mold-damage recovery in thirty of the forty-one states it serves). Included in those states without mold-damage coverage are California, Maine, Louisiana, and Wisconsin. *Id.* Farmers intends to drop mold-related coverage in those remaining states that still offer the coverage. *Id.*

44. *Id.*

45. *See* TEX. DEP'T OF INS., *Commissioner Montemayor Statement to Residential Property Insurers*, Sept. 18, 2001, http://www.tdi.state.tx.us/commish/moldinsurer.html (commenting that other states no longer offer, severely restrict, or have never made mold coverage available to policyholders). On the other hand, Texans have become accustomed to generous policies covering several categories. *Id.* Other states that do not completely exclude mold-damage claims require that the water or mold-damage be "sudden and accidental." Maria McGivney Arrellaga, *State, Insurers Continue Debate on Mold Coverage*, AUSTIN BUS. J., Oct. 12, 2001, http://austin.bizjournals.com/austin/stories/2001/10/15/focus3.html; *see also* Mike W. Thomas, *Regulators, Insurers Engaged in Homeowners-Policy Showdown*, SAN ANTONIO BUS. J., Nov. 19, 2001, http://sanantonio.bizjournals.com/sanantonio/stories/2001/11/19/story3.html (illustrating that a leaky roof during a rainstorm and burst water pipes are covered losses under the "sudden and accidental" clause).

46. Maria McGivney Arrellaga, *State, Insurers Continue Debate on Mold Coverage*, AUSTIN BUS. J., Oct. 12, 2001, http://austin.bizjournals.com/austin/stories/2001/10/15/focus3.html.

47. *See* TEX. DEP'T OF INS., *Commissioner Montemayor Statement to Residential Property Insurers*, Sept. 18, 2001, http://www.tdi.state.tx.us/commish/moldinsurer.html (asserting that Texas policyholders enjoy generous policies and are willing to pay extra for them).

48. *See* Todd Mason, *Todd Mason Column*, FORT WORTH STAR-TELEGRAM, Aug. 28, 2001, 2001 WL 26628764 (reporting that in 1998, "Texans paid an average of $879" for residential insurance whereas the national average was a mere $481).

49. TEX. INS. CODE ANN. art. 5.35 (Vernon Supp. 2002).

50. Todd Mason, *Todd Mason Column*, FORT WORTH STAR-TELEGRAM, Aug. 28, 2001, 2001 WL 26628764.

By requiring insurers to issue standardized policies, the Texas Department of Insurance asserts that it is protecting homeowners from exclusionary clauses and fine print.[51] Conversely, insurers argue that competition is stifled, resulting in higher premiums to policyholders.[52] One insurance industry spokesman stated that Texas should be brought "into the 21st century, in terms of allowing competition in the marketplace pertaining to rate filing. Texas is the only state that doesn't allow companies to compete because it's so highly regulated."[53]

This Comment analyzes the current mold dilemma in Texas, which encompasses issues such as property insurance and health concerns. Part II describes the characteristics of toxic molds, the possible adverse health effects of mold infestations, and the lack of regulation of indoor mold levels. Part III of this Comment addresses the impact of mold claims on the insurance industry. Part IV discusses attempts by the Texas Department of Insurance to manage the current crisis. The final part of this Comment proposes legislation that provides standards for safe and acceptable levels of mold exposure. Consequently, scientific and medical research is needed to better understand the toxic effects of mold. Conclusive medical research will help establish causation between toxic molds and adverse health effects, which will allow juries to decide issues based on empirical, scientific evidence and not on emotional arguments or inconclusive data. Finally, the need for a comprehensive insurance policy, including coverage for mold-related ensuing damages, is consistent with public policy, and thus, should be retained.

II. MOLD

Mold is a fungus that occurs naturally in the environment.[54] Mold is usually microscopic in size and often occurs in nature in large quanti-

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51. Maria McGivney Arrellaga, *State, Insurers Continue Debate on Mold Coverage*, AUSTIN BUS. J., Oct. 12, 2001, http://austin.bizjournals.com/austin/stories/2001/10/15/focus3.html.

52. *Id.* With insurers having to use this state-mandated form, there is no flexibility and no competition, which would benefit the consumer. *Id.*

53. Lynna Goch, *Mold, Medical Liability Top Insurers' Wish List for Texas Legislature*, BEST'S INS. NEWS, Nov. 8, 2001, 2001 WL 24725625; *see also Farmers Drops Texas Homeowners; Firm Says Mold Claims Caused Financial Losses*, SAN ANTONIO EXPRESS-NEWS, Nov. 11, 2001, at 01B, 2001 WL 28787278 (quoting insurance industry representative in saying: "Competition, not artificial control of products, keeps insurance available and affordable in Texas").

54. *See* Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf (noting that mold occurs in nature in mass quantities); NAT'L CTR. FOR ENVTL. HEALTH, QUESTIONS AND ANSWERS ON STACHYBOTRYS CHARTARUM AND OTHER MOLDS (2000), http://www.cdc.gov/nceh/

ties.[55] Unlike plant matter, a fungus does not contain chlorophyll and does not produce its own food.[56] Thus, plant and animal material is nescessary for fungus to grow.[57]

Molds reproduce by releasing spores into the air, onto objects, through water, and even to insects.[58] These spores allow the mold to spread to different locations.[59] Sometimes, musty odors may signal that mold is present.[60] Other times, mold may be evident by a discoloration in the host material, usually in colors such as white, orange, green, brown, and black.[61]

For molds to thrive, certain requirements must be met. First, fungal spores must be present.[62] These spores can be found both indoors and outdoors and are produced millions at a time.[63] Second, there must be a

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asthma/factsheets/molds/moldfacts.htm (relating that molds can be in all environments year round); *Toxic Molds*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/mold.html (last visited Sept. 27, 2002) (stating that mold is found in almost every ecological place).

55. Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf; *FAQ*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/faq.html (last visited Sept. 27, 2002); *see also* TEX. DEP'T OF INS., *Commissioner Montemayor Statement to Consumers and Consumer Groups*, Sept. 18, 2001, http://www.tdi.state.tx.us/commish/moldconsumer.html (stating that mold grows quickly—to stop mold from spreading, the infected area needs to be cleaned and dried within forty-eight hours).

56. *See* CAL. DEP'T OF HEALTH SERVS., *Mold in My Home: What Do I Do?*, Mar. 1998, http://www.cal-iaq.org/mold0107.htm (listing factors, such as moisture and food sources, which allow mold to grow). Molds feed off of their hosts and multiply rapidly. *Id.*

57. *See* Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 521 (1996) (commenting that almost anything can act as a food source to mold); *Toxic Molds*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/mold.html (last visited Sept. 27, 2002) (stating that fungi need organic material to form and expand).

58. *Toxic Molds,* Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/mold.html (last visited Sept. 27, 2002).

59. *Id.*

60. *See* Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 521 (1996) (explaining that mold's odor is derived from a fungal metabolism). The smell may be unpleasant, but it is usually not a health threat. *Id.*

61. *See* Larry Sokoloff, *Mold Presence Adds Complexity to Real Estate Transactions*, SILICON VALLEY/ SAN JOSE BUS. J., Dec. 3, 2001, http://san jose.bizjournals.com/san jose/stories/2001/12/03/focus1.html (stating the tell-tale signs of the presence of mold). Dry, well-ventilated areas will usually not foster mold growth. *Id.*

62. *See* Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 521 (1996) (finding that fungal spores are needed for fungi development).

63. CAL. DEP'T OF HEALTH SERVS., *Mold in My Home: What Do I Do?*, Mar. 1998, http://www.cal-iaq.org/mold0107.htm.

food source.[64] Without a host organism, mold cannot grow.[65] Organic materials such as cotton, wool, paper, leather, and wood provide a favorable medium for mold to grow.[66] Third, water or moisture is needed to sustain the mold.[67] Humidity in the air, condensation, or moisture on the host material will provide necessary moisture for the mold growth.[68]

Once there is a conducive environment for mold growth, spores will germinate and develop into new colonies of mold.[69] If any one of the three conditions (spores, food, water) is missing, the mold will become dormant.[70] However, when the environment again becomes conducive for mold growth, the mold will regenerate.[71]

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64. Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 521 (1996); Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf.

65. *See* Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 521 (1996) (explaining that molds produce enzymes to break down its host organism and feed upon it, thus allowing it to spread).

66. Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf.

67. Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 521 (1996); Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf; *see also Toxic Mold Prevention*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/prevent.html (last visited Sept. 22, 2002) (stating that molds need moist, wet, and damp areas to thrive).

68. *See* Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf (stating that humidity levels in excess of seventy percent are conducive to growing and spreading conditions). Warm temperatures also allow molds to thrive. *Id.*

69. *See* James L. Moore, *Problems Grow Along with Mold in Bayou City's Humid Climate*, HOUS. BUS. J., Dec. 3, 2001, http://houston.bizjournals.com/houston/stories/2001/12/03/focus4.html (recognizing that mold thrives in areas of increased humidity). If remedial measures are not taken, such as ridding the area of as much moisture as possible, then mold will continue to grow. *Id.*

70. *See* Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf (illustrating that if the humidity is low, or if the food source is gone, the mold will no longer grow).

71. *See id.* (stating that molds are able to regenerate when optimal conditions are present and that mold requires oxygen in order to grow). However, molds will continue to grow even without light. *Id.*

A. *The Culprit: Toxic Mold*

Over 100,000 species of mold exist in the world today.[72] Out of this immense number, only about two dozen are toxic.[73] Under certain metabolic conditions, some types of fungi produce mycotoxins.[74] Mycotoxins are poisonous substances which cause toxic responses in vertebrates.[75] This toxic response occurs in almost all individuals who are exposed to them.[76] Allergens, unlike mycotoxins, affect only those who may have some genetic predisposition[77] or hypersensitivity to fungi.[78] A genetic

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72. Eric Berger, *Scientists Disagree Over Health Hazards of Mold*, HOUS. CHRON., June 27, 2001, at 17, 2001 WL 23610684.

73. *Id.*

74. *See Toxic Molds*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/mold.html (last visited Sept. 27, 2002) (explaining that poisonous mycotoxins are specifically known as trichothecenes). Upon inhalation or ingestion by humans, unpleasant and even serious symptoms may follow. *Id.*

75. *See* Sandra V. McNeel & Richard A. Kreutzer, *Fungi & Indoor Air Quality*, HEALTH & ENV'T DIG., May-June 1996, at 9, 10 (restating that inhalation of toxic spores is the primary way in which most humans are exposed to mycotoxins); *Toxic Molds*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/mold.html (last visited Sept. 27, 2002) (discussing mycotoxins and the health hazard they have on humans upon exposure via inhalation or ingestion).

76. *See* Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A "The Mold Monster,"* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 26 (stating that mycotoxins cause toxic responses in those who are exposed to them); *Toxic Molds*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/mold.html (last visited Sept. 27, 2002) (providing some possible reactions to mycotoxin exposure). These reactions include:

- Problems with the vascular system. Increased vascular fragility, possibility of hemorrhaging into body tissues. Possible molds include aflatoxin, satratoxin, [and] roridins.
- Problems with digestive system. Diarrhea, vomiting, intestinal hemorrhage, liver effects (such as necrosis and fibrosis). Aflatoxin results in deleterious effects on mucous membranes.
- Problems with respiratory system. Including respiratory distress, and bleeding from the lungs.
- Problems with nervous system. Tremors, lack of coordination, depression, and headaches.
- Problems with cutaneous system. Symptoms include rash, burning sensation, and sloughing of skin.
- Problems with urinary system.
- Problems with reproductive system. Including infertility, changes in reproductive cycles, etc.
- Many mycotoxins can produce changes or a weakening of the immune system.

Id. The level of danger posed to human health may vary depending on the particular individual. *Id.*

77. *See* Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A 'The Mold Monster,'* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 27 (asserting that a genetically predisposed allergic reaction to fungi is an "immediate" reaction

predisposition resulting in an allergic reaction involves chronic exposure to the fungi over a period of months or years.[79] Overreaction of the immune system may result in the overproduction of antibodies, which induces allergic reactions such as rhinitis, hay fever, or asthma almost immediately after exposure.[80] Prolonged periods of exposure to those with a hypersensitivity to fungi may even cause fibrosis in the lung tissue.[81]

There are several species of mold that are hazardous to the health of humans.[82] The most common species include Aspergillus, Fusarium, Penicillium, and Stachybotrys.[83] All four of these common molds, including other toxic molds not listed, can produce various types of dangerous mycotoxins.[84]

1. All About "Stachy"

Stachybotrys Chartarum, "Stachy" for short, is a greenish, black mold that attacks by releasing toxins into the air.[85] Stachy is found in floors, ceilings, carpets, tiles, and walls of residences and buildings.[86] It is one of

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occurring within minutes of exposure). Once an immune system has been triggered, even minimal future exposure may cause an allergic reaction. *Id.* About eight percent of adults and between twenty and twenty-five percent of children suffer an "immediate" allergic reaction to fungi. *Id.*

78. *See id.* (stating that the type of allergic reaction known as "hypersensitivity pneumonitis" or "extrinsic allergic alveolitis" involves symptoms appearing about four to eight hours after exposure). Ailments include flu-like symptoms, as well as fever, muscle, and joint pains. *Id.*

79. Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A 'The Mold Monster,'* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 27.

80. *Id.*

81. *Id.*

82. *See id.* at 26 (describing the characteristics of fungi and mycotoxins).

83. *Id.*

84. *See* Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A 'The Mold Monster,'* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 26-27 (explaining that fungi-produced mycotoxins are nonvolatile chemicals). Volatile organic compounds, or VOC's, are also produced by fungi and usually cause the musty odor most people associate with mold. *Id.* These compounds are made up of ketones, alcohols, hydrocarbons, and aromatics. *Id.*

85. *See* Randy Lee Loftis, *Breaking the Mold: Spores May Seem Harmless to Some, but They Can Be Costly Health Hazard*, DALLAS MORNING NEWS, Mar. 16, 2001, at 27A, 2001 WL 16940217 (describing Stachybotrys and the health risks associated with exposure to it).

86. *See Stachybotrys Mold*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/stach.html (last visited Sept. 22, 2002) (clarifying that Stachybotrys is not the mold found on plastic, vinyl, ceramic tiles, bread, or between shower tiles). Stachybotrys usually grows on materials that have a high cellulose content

the most dangerous molds found today.[87] If unimpeded, Stachy will continue to multiply until the area becomes too toxic for people to continue living there.[88]

Stachybotrys is one of the most notable mycotoxin-producing molds. It receives much publicity in the media due to the closing of schools and courthouses and recent mold-related litigation. By itself, Stachy can produce over one-hundred and sixty-three different mycotoxins.[89] In fact, in the war against Afghanistan, the Soviets most likely used biological weapons containing neurotoxins derived from Stachybotrys.[90]

2. Adverse Health Effects

Molds exist both inside and outside the home.[91] Although everyone is exposed to various kinds of molds on a daily basis, not everyone experiences complications upon exposure.[92] Some people may be more sensitive to molds than others, or some may have allergies to various types of mold.[93] Individuals with immune deficiencies or lung disease, infants, the

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and a low concentration of nitrogen. *Id.* The black mold found on noncellulose material is probably not Stachybotrys. *Id.*

87. *See* Bruce Flammey & Kimberly Wind, *Breaking the Mold . . .* , ORANGE COUNTY LAW., Feb. 2000, at 22, 22 (listing some common illnesses due to Stachybotrys exposure, which include: headaches, memory problems, skin rashes, vertigo, diarrhea, hemorrhagic lung disease, nosebleeds, sore throats, coughs, tight chest, as well as other respiratory infections). Children are particularly at risk since their cells are still growing and may not be able to ward off the effects of exposure. *Id.* A possible link may also exist between Stachybotrys exposure and Sudden Infant Death Syndrome (SIDS). *Id.*

88. *See id.* (stating that if the black mold covers a large area, for example, over thirty square feet, a significant health threat could be presented).

89. *See* Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A 'The Mold Monster,'* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 26 (warning that even low concentrations of Stachybotrys can cause health problems, such as pathogenic disease, cancer, immune disorders, and skin irritation).

90. *Id.*

91. *Stachybotrys Mold*, Toxic Mold & Tort News Online, *at* http://www.toxic-mold-tort-news-online.com/toxic_mold/stach.html (last visited Sept. 22, 2002) (stating that molds are found in nature, as well as indoors). Common places for mold to grow indoors include humid spaces, such as basements and showers. *Id.* According to some mold experts, some level of Stachybotrys infestation occurs in as many as fifty percent of all homes. *Id.*

92. *See* Susan Yerkes, *Readers Express Growing Concerns Over Fungus*, SAN ANTONIO EXPRESS-NEWS, Mar. 11, 2001, at 03H, 2001 WL 13520051 (recognizing that every building has some type of mold or bacteria present).

93. *See* Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf (discussing the health effects of mold exposure).

elderly, and pregnant women are at the highest risk of experiencing complications.[94]

Stachybotrys Chartarum first gained recognition when Russian and Eastern European farm workers became ill after handling moist hay.[95] Those who ate grain made from the tainted hay also suffered similar illnesses.[96] While Stachy afflicts animals more frequently than humans, humans who come in contact with the mold spores will experience the same symptoms as do affected farm animals.[97]

Toxic molds can produce toxin-induced infection, inflammation, and allergic reactions once contact with the spores is made.[98] High exposures to the mycotoxins can cause irritation of the eye, nose, and throat.[99] Repeated exposure to the toxins can even result in the inflammatory reaction of toxic pneumonitis.[100]

The number of people affected by fungal allergens in the home is probably less prevalent than the number of those affected by allergies from cats, dust mites, or cockroaches.[101] However, a considerable number of asthmatics have sensitivities to fungi.[102] Healthy individuals can also re-

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94. *See* Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 16 (stating that some groups of people may be more susceptible to the toxic effects of mold, including harm to the nervous, gastrointestinal, and respiratory systems). Other affected areas may include the skin, liver, and kidney. *Id.*

95. *See* Sandra V. McNeel & Richard A. Kreutzer, *Fungi & Indoor Air Quality*, HEALTH & ENV'T DIG., May-June 1996, at 9, 10 (listing the disease-like symptoms of toxic mold exposure: nausea, vomiting, diarrhea, burning sensations in the mouth, and abdominal pain).

96. Bruce Flammey & Kimberly Wind, *Breaking the Mold . . .*, ORANGE COUNTY LAW., Feb. 2000, at 22, 22.

97. *See id.* (associating common toxic mold symptoms with allergies, such as coughing, runny nose, wheezing, and skin rash).

98. *See* Sandra V. McNeel & Richard A. Kreutzer, *Fungi & Indoor Air Quality*, HEALTH & ENV'T DIG., May-June 1996, at 9, 10 (describing the different types of health ailments associated with mold exposure).

99. *See id.* (explaining that the irritation of the eye, nose, and throat is the mycotoxin's effect on the mucous membrane).

100. *See id.* (stating that symptoms of toxic pneumonitis include fever, flu-like symptoms, as well as fatigue). Generally, hypersensitivity pneumonitis, which is caused by inhaling large amounts of dust that includes fungal spores, is an occupational hazard in the agricultural field. *Id.* However, there have been reports of exposure to individuals in the home. *Id.*

101. Sandra V. McNeel & Richard A. Kreutzer, *Fungi & Indoor Air Quality*, HEALTH & ENV'T DIG., May-June 1996, at 9, 10.

102. *See id.* (recognizing that ten to thirty-two percent of asthmatics have allergic reactions to fungi).

sist fungal infections, although hypersensitivity pneumonitis may result from high levels of exposure.[103]

3. Lack of Medical Research Linking Mold to Illness

With the number of mold claims rising, so too are the number of mold litigation cases, which include plaintiffs seeking personal injury damages.[104] For example, a Baylor University student is suing his apartment complex for a mold problem that made him sick.[105] The student's exposure to the toxic mold occurred in the fall of 1999, which resulted in short-term memory loss, headaches, coughing, and nausea.[106] The student alleges that his medical problems persist more than two years after the toxic mold exposure ceased.[107]

The toxic effects of mold exposure are associated with the toxins themselves, as opposed to mold growth in the body.[108] Until recently, very little authority existed linking mycotoxin exposure with health problems.[109] Most people recognize that allergic reactions may result from contact with mold.[110] However, because a limited number of scientific studies exist showing just how harmful toxic mold could be, there is disagreement as to whether the harmful effects of toxic mold can compro-

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103. *Id.* at 10-11. Individuals with compromised immune systems, such as those undergoing chemotherapy, organ transplants, bone marrow transplants, and those with HIV/AIDS are especially sensitive to toxic molds. *Id.*

104. *See* Edward H. Cross, *Toxic Mold: The Fourth Wave of Construction Defect Litigation?*, ORANGE COUNTY LAW., Dec. 1998, at 26, 26 (recognizing that water damage of only a thousand dollars may produce personal injuries amounting to one hundred thousand dollars). Although mold-related personal injury claims have been looked upon with skepticism, these claims have recently produced plaintiffs' verdicts and settlements in the tens of millions of dollars. *Id.*

105. *See* Mike Copeland, *Student Sues Apartment Owner Over Mold*, CHI. TRIB., Dec. 9, 2001, at 5L, 2001 WL 30800119 (reporting on a mold-related personal injury case in Waco, Texas which has not yet gone to trial).

106. *See id.* (stating that the plaintiff student repeatedly asked the apartment complex management to fix the leak, but management refused, even when mold became visible on the walls). The president of the management company stated that he was told that the tenant student did not make management aware of the problem before leaving the complex. *Id.*

107. *Id.*

108. *See Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712, 712 (1998) (describing the mycotoxins effect after exposure to toxic mold).

109. *See id.* (recognizing the first published report in the United States associating mycotoxin exposure to adverse health effects in humans). A family whose home was infested with Stachybotrys chatarum experienced rash and upper respiratory tract irritation. *Id.* Once the mold level was significantly reduced, the symptoms vanished. *Id.*

110. Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 16.

mise the immune system to such a degree that long-term health ailments result.[111]

Veterinarians in Europe became familiar with the effects of toxic mold when several cases surfaced where animals had eaten moldy hay.[112] After eating mold-infested hay, the animals bled internally and then died.[113] Despite this correlation between Stachybotrys and gastrointestinal hemorrhaging in animals, the fungus was still not being associated with disease in humans.[114]

In 1994, doctors in Cleveland, Ohio, reported a relationship between toxic molds and acute pulmonary hemorrhage in infants.[115] In a two-year period, ten cases of acute pulmonary hemorrhage and hemosiderosis in infants were found in metropolitan Cleveland.[116] This bleeding of the lungs recurred in five of the infants once they returned to their residences.[117] Another case study from the same area revealed that infants afflicted with lung hemorrhaging were more likely to have lived "in homes with major water damage," such as flooding or chronic plumbing leaks.[118]

Due to the results in the infant study, the county coroner in Cleveland re-examined all infant deaths for the same two-year time period.[119] The

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111. *See id.* at 17 (questioning whether the harmful effects of toxic mold can include such illnesses as chronic bronchitis).

112. *See* Bruce Flammey & Kimberly Wind, *Breaking the Mold . . .* , ORANGE COUNTY LAW., Feb. 2000, at 22, 22 (stating that European veterinarians became familiar with Stachybotrys when animals got sick after eating damp, rotten hay). European veterinarians were presented with Stachybotrys cases before American medical professionals were confronted with the same. *Id.*

113. *Id.*

114. *Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712, 712 (1998).

115. *See id.* (restating the findings of the Cleveland infants with bleeding lungs); Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A "The Mold Monster,"* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 29-30 (describing the study's revelations linking toxic molds to acute pulmonary hemorrhage and hemosiderosis). Infants are especially susceptible to the dangerous effects of mycotoxins because their lungs are still growing. *Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712, 712 (1998).

116. *See id.* (reporting "a cluster of eight cases of acute pulmonary hemorrhage and hemosiderosis" in infants living in eastern metropolitan Cleveland from January 1993 through November 1994 and an additional two cases in December 1994).

117. *See id.* (noting that one of the five infants died from pulmonary hemorrhage).

118. *See id.* (supporting the assertion with a ninety-five percent confidence interval). The study also showed that there was an elevated level of toxic molds in the homes of the diseased infants, as opposed to the environment of the control group. *Id.* The risk of acute pulmonary hemorrhage is increased by simultaneous exposure to tobacco smoke. *Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712 (1998).

119. *See id.* at 713 (stating that post mortem examinations were once again conducted on all infant deaths occurring between January 1993 and December 1995). Of the 172

specimens showed an abundance of hemosiderin present in five percent of the infants' lung tissue.[120] Thus, these questionable deaths were classified as deaths resulting from Sudden Infant Death Syndrome (SIDS).[121]

Not much is known about infants and idiopathic pulmonary hemorrhaging.[122] To establish causation between toxic mold and infant disease, more studies are needed to confirm the results of the Cleveland findings in other areas of the United States.[123] Until more research is completed, infants under the age of one should not be exposed to water-damaged environments.[124]

4. Research as Evidence

Whether a plaintiff prevails on a mold-related claim depends on the admissibility of scientific evidence and the credibility of expert witnesses.[125] The lack of scientific data on fungal syndrome requires a plain-

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infant deaths during that period, 117 were classified as sudden infant death syndrome (SIDS) fatalities. *Id.*

120. *See id.* (stating that nine infants, or 5% of the total number of reviewed deaths, clearly had the presence of hemosiderin in screened specimens). Two of these deaths were the result of homicide, one resulted from child abuse, and the remaining six may have been erroneously classified as SIDS fatalities. *Id.*

121. *Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712, 713 (1998); Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A "The Mold Monster,"* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 30.

122. *See id.* (stating that the extent of acute pulmonary hemorrhaging in infants is unknown in areas of the United States not included in the Ohio study).

123. *See id.* (establishing the need for more research to both confirm the Cleveland research and prevent adverse health effects); Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 17 (quoting an attorney stating that "[a] good case obviously is one where the causation is clear").

124. *See Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712, 713 (1998), http://www.aap.org/policy/re9736.html (stressing that pediatricians should recommend that babies under a year old should not be subjected to moldy or water-damaged surroundings).

125. *See* TEX. R. EVID. 104(a) (stating that the threshold issue regarding admissibility of evidence is determined by the trial court); TEX. R. EVID. 702 (setting forth qualifications of potential expert witnesses); Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 720 (Tex. 1998) (asserting that unreliable evidence does not help the trier of fact determine an issue, and thus, is inadmissible under Texas Rule of Evidence 702); E.I. du Ponte de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (requiring that an expert's testimony be both reliable and relevant); Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 17 (asserting that once a plaintiff establishes that he has been subjected to toxic mold, he will next have to prove that the mold exposure caused the health problems); Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A "The Mold Monster,"* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 30 (stating that microbiological contamination cases will turn on the admissibility of the evidence, including any expert testimony). Examples of experts in contamination cases may involve mycologists, industrial hygienists, immunologists, microbiologists, and toxicologists. *Id. But see* Ballard v. Fire Ins. Exch., No. 99-05252 (250th

tiff to establish a link between the mold exposure and the injury via circumstantial evidence.[126] For instance, the fact that mold was present in the plaintiff's environment, coupled with common health symptoms of mold exposure, circumstantially establishes a correlation.[127]

Scientific testimony is often the only evidence linking mold to a plaintiff's illness.[128] Consequently, expert witnesses face the difficult task of explaining to the trier of fact how and why the plaintiff's injuries were caused by the exposure to unsafe levels of mold.[129] This difficult task is exacerbated by "the absence of . . . universally recognized permissible exposure level[s]" of airborne mold spores, which would act as a gauge and determine the point at which the environment is no longer safe.[130] Without a "bright-line" test such as this, litigation of mold contamination cases will continue to focus on causation defenses. In effect, the trier of fact, which is usually a jury, is left to answer the complicated question of what constitutes an unacceptable level of indoor mold spores.[131]

Dist. Ct., Travis County, Tex., Aug. 1, 2002, order vacating judgment), 2001 WL 883550 (disallowing admittance of evidence regarding scientific data linking mold inhalation to adverse health effects did not prevent the jury from finding in favor of the plaintiff); *In re* Nicholson v. Mohawk Valley Cmty. College, 274 A.D.2d 677, 678 (N.Y. 2000) (affirming Workers' Compensation Board's decision to deny claim despite admittance of expert testimony).

126. David F. Blundell, Note, *Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?*, 8 ENVTL. LAW. 389 (2002), WL 8 ENVTLAW 389.

127. *Id.*

128. *Id.*

129. *See, e.g.*, New Haverford P'ship v. Stroot, 772 A.2d 792, 800 (Del. 2001) (upholding verdict for the plaintiff despite the possibility that plaintiff's health problems could have been attributed to smoking or allergies); Polk v. Planet Ins. Co., 951 P.2d 1015, 1020 (Mont. 1997) (demonstrating the difficulty in linking mold with personal injury). In *Polk*, eight medical experts could not agree whether the plaintiff's injury was caused by heavy smoking or airborne contamination. *Id.* at 1020; *see also* Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 16 (illustrating that linking other toxins to disease, such as smoking to lung cancer and asbestos to mesothelioma, took a long time, and evidence still exists to dispute the correlation).

130. David F. Blundell, Note, *Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?*, 8 ENVTL. LAW. 389 (2002), WL 8 ENVTLAW 389.

131. *See Stroot*, 772 A.2d at 800 (leaving the jury to decide whether the overloading of an air sample machine due to the high level of mold inside the building along with an air sample indicating indoor mold levels ten times higher than the outdoor sample was excessive exposure to airborne mold spores). The court asserts that the other factor which could have resulted in the plaintiff's injuries went to the weight of the expert's opinions, not their admissibility. *Id.*

Whether evidence can be admitted at trial may depend on which admissibility test the court employs.[132] In federal cases, the test for determining scientific admissibility was set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[133] In *Daubert*, the Court noted that the trial court's primary focus should be scientific validity.[134] The Texas Supreme Court agreed and adopted *Daubert*'s rationale in *E.I. du Ponte DeNemours v. Robinson.*[135] Thus, reliability of the scientific evidence is a key consideration.[136]

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132. *See* Ballard v. Fire Ins. Exch., No. 99-05252 (250th Dist. Ct., Travis County, Tex., Aug. 1, 2002, order vacating judgment), 2001 WL 883550 (refusing to allow expert testimony under a *Robinson* standard); Mondelli v. Kendel Homes Corp., 631 N.W.2d 846, 858 (Neb. 2001) (reversing the lower court's decision to exclude expert testimony and finding that the scientific community "generally accepted" that a connection existed between mold exposure and health, despite acknowledging the nonexistence of acceptable mold level standards); *Stroot*, 772 A.2d at 799 (finding that the trial court properly exercised its function as gatekeeper in admitting the experts' testimony under a "general acceptance" by the scientific community analysis); Centex-Rooney Constr. Co. v. Martin County, 706 So. 2d 20, 26 (Fla. Dist. Ct. App. 1997) (allowing scientific evidence testimony upon meeting the *Frye* standard).

133. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-94 (1993) (recognizing scientific validity as the test for determining the admissibility of scientific evidence). The *Daubert* court held that the *Frye* "general acceptance" test was superseded by the Federal Rules of Evidence. *Id.* at 597. *See generally* Edward H. Cross, *Toxic Mold: The Fourth Wave of Construction Defect Litigation?*, ORANGE COUNTY LAW., Dec. 1998, at 26, 33 (explaining that the burden of proof in a *Daubert* jurisdiction is less stringent than in a *Frye* jurisdiction because only scientific validity need be shown, as opposed to general acceptance by the scientific community). "Arguably, if mold cases have survived a *Frye* hearing, they can readily withstand a *Daubert* hearing." *Id.*

134. *See Daubert*, 509 U.S. at 593-94 (setting forth factors for the trial court to consider); Alexander Robertson IV, *Microbiological Contamination Litigation A/K/A 'The Mold Monster,'* MEALEY'S EMERGING TOXIC TORTS, Nov. 24, 1999, at 23, 31(listing the factors set forth in *Daubert*). The trial court must determine whether the scientific theory or technique can be tested, has been subjected to peer review, has an acceptable error rate, and whether the theory is generally accepted by the scientific community. *Daubert*, 509 U.S. at 593-94.

135. E.I. du Ponte de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995).

136. *See* TEX. R. EVID. 104(a) (stating that the trial judge acts as a "gatekeeper" in determining the reliability and relevancy of the scientific evidence); *see also* Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999) (ruling that *Daubert* applies to both scientific and non-scientific expert testimony); Leo John Jordan, *Developments in Property Insurance Law*, 36 TORT & INS. L.J. 549, 550 (2001) (commenting that whether expert testimony in regard to a skill, experience, or science is no longer the determining factor for applying the *Daubert* standard).

B. *Sick Building Syndrome*

Beginning in the 1970s, Americans modified homes and buildings in an attempt to conserve energy.[137] As a result of this building "weatherization," the use of office machines, synthetic building materials, cleaning products, and central heating and air conditioning, indoor air became stagnant.[138] Without the air exchange needed to rid the indoor environment of contaminants, indoor air pollutants increased.[139] Consequently, people claimed that the buildings were making them sick.[140]

Indoor air pollution in commercial buildings is commonly referred to as "sick building syndrome."[141] What building owners and employers once dismissed as complaints from hypochondriacs, experts now view as valid health concerns.[142] Sick building syndrome may be suspected when at least twenty percent of the building occupants complain of common medical symptoms for about two weeks.[143] Another signal that the in-

137. Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 250 (1998).

138. *See id.* (stating that energy conservation features affect both air exchange rates and thermal features); Lisa G. Youngblood & Thomas K. Bick, *The Pollution Exclusion Saga Continues: Does It Apply to Indoor Releases?*, 28 ENVTL. L. REP. 10021, 10022 (1998) (reiterating that conserving energy took precedence over the need for proper ventilation). For example, windows in modern buildings usually do not open, which leaves the ventilation system to operate almost completely on indoor air. *Id.*

139. *See id.* (commenting that contaminants will become trapped inside if a building has a lack of ventilation). Thus, indoor air pollution is often a result. *Id.*

140. *See id.* (indicating that some symptoms of sick building syndrome include headaches, nausea, irritation of the eyes, ears, nose and throat, and other adverse health effects). Usually, the symptoms disappear once the individual leaves the sick building. *Id.*

141. *See* Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 518 (1996) (clarifying that it is the people in the building and not the building itself that may amplify or spread viruses); Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 338 (1998) (identifying the three main causes of sick building syndrome as sources of indoor air contaminants, poorly designed or maintained ventilation systems, and poorly planned building uses).

142. *See* Steven A. Loewy et al., *Indoor Pollution in Commercial Buildings: Legal Requirements and Emerging Trends*, 3 U. BALT. J. ENVTL. L. 29, 39 (1993) (stating that building owners may be liable for failing to minimize the level of indoor contaminants in the air).

143. *See* U.S. ENVTL. PROTECTION AGENCY, INDOOR AIR POLLUTION: AN INTRODUCTION FOR HEALTH PROFESSIONALS (1994), http://www.epa.gov/iaq/pubs/hpguide.html (expressing that common symptoms among the building occupants and the absence of symptoms once the occupants leave are key factors in recognizing whether sick building syndrome is to blame). Thirty percent of both new and remodeled buildings in the world receive excessive complaints connected to the quality of the indoor air. *Id.*

door air may be polluted is that symptoms subside or disappear once the person leaves the building.[144]

Typically, the specific cause of the illness is unknown.[145] There is also no specific illness affecting the building occupants.[146] Rather, people may experience eye, nose, and throat irritations, headaches, fatigue, bronchial asthma, rashes, odor and taste complaints, and neurotoxin symptoms.[147] Lead, radon, carbon monoxide, biological contaminants, and the most litigated-asbestos are among the indoor air pollutants that cause infirmities.[148]

1. The "New Asbestos"

Recently, mold has been compared to asbestos, which is the insulation material that was the subject of health concerns and lawsuits during the 1980s and 1990s.[149] Although there may not be many similarities be-

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144. *Id.* Poor lighting, temperature, noise, and psychological stresses may contribute to a person's adverse health effects. *Id.*

145. *See* Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 340 (1998) (stating that there is usually no identification of the cause of the illness); Lisa G. Youngblood & Thomas K. Bick, *The Pollution Exclusion Saga Continues: Does It Apply to Indoor Releases?*, 28 ENVTL. L. REP. 10021, 10022 (1998) (noting the difficulty in specifying the cause of the problem). Even though medical researchers have not been able to precisely pinpoint the origins of sick building illnesses, sick building syndrome is still regarded as "'multifactorial in nature, and the physical, psychological, and biologic factors must all be considered.'" Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 341 (1998).

146. *See* Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 340 (1998) (discussing illnesses and causes of "sick building syndrome").

147. *See id.* (listing the spectrum of symptoms which may occur after exposure to indoor air pollution). The elderly, infants, and the infirm are the groups most susceptible to health risks upon exposure. *Id.* at 249.

148. *See generally* Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181 (1993); Andrew J. Harrison, *An Analysis of the Health Effects, Economic Consequences and Legal Implications of Human Exposure to Indoor Air Pollutants*, 37 S.D. L. REV. 289 (1992) (naming and explaining the different types of indoor air pollutants).

149. *See* Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 293 (1998) (commenting that asbestos exposure is linked to asbestosis, cancer, and mesothelioma); Mallory May, *Black Mold Is No Cause for Panic*, DALLAS MORNING NEWS, July 22, 2001, at 5J, 2001 WL 25490953 (warning that "[w]e potentially have another 'asbestos' scenario" in which "asbestos phobia" resulted in settlements totaling in the millions of dollars); Colin Pope, *Mold Cases Keep Growing*, AUSTIN BUS. J., Oct. 15, 2001, http://austin.bizjournals.com/austin/stories/2001/10/15/story3.html (reporting that many attorneys are comparing recent mold cases to the stream of asbestos suits of the 1980s); Larry Sokoloff, *Mold Presence Adds Complexity to Real Estate Transactions*, SILICON VALLEY/ SAN JOSE BUS. J., Dec. 3, 2001, http://san

tween the two, the comparison is probably a result of increased public awareness, health concerns, and the impact mold has on the real estate and insurance industries. For example, unlike asbestos, mold can be created from where it did not previously exist.[150] Another distinguishing factor is that asbestos does not pose a risk if it is left intact and undisturbed, whereas mold can grow quickly and can cause immediate reactions even if not disturbed.[151] Additionally, contrary to asbestos, no scientific evidence exists explaining the effects of mold.

2. Lack of Standards for Indoor Mold Levels

No state or federal standards currently exist for "acceptable" levels of mold in a building or residence.[152] The lack of official standards may be attributed, at least in part, to the fact that some people are more sensitive to molds than others.[153] Without conclusive medical research, the toxic

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jose.bizjournals.com/san jose/stories/2001/12/03/focus1.html (stating that shipyard workers as well as others who handled asbestos developed lung diseases). Gastrointestinal cancer has also been associated with asbestos if ingested. Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 293 (1998). Most people afflicted with asbestos-related diseases have been exposed at their place of employment; however some diseases resulted from asbestos exposure brought home from work in clothing and equipment. *Id.*

150. *See* Joe Catalano, *Hazards in Your House?*, NEWSDAY, Nov. 16, 2001, at C08, 2001 WL 9261790 (stating that the environment can create mold, which is unlike lead or asbestos).

151. *See* Larry Sokoloff, *Mold Presence Adds Complexity to Real Estate Transactions*, SILICON VALLEY/ SAN JOSE BUS. J., Dec. 3, 2001, http://sanjose.bizjournals.com/sanjose/stories/2001/12/03/focus1.html (distinguishing mold and asbestos). As opposed to mold, asbestos only presents a health risk if it is not encapsulated. *Id.*

152. *See* Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, THE NEAR ENV'T (Kan. St. Univ. Agric. Experiment Station and Coop. Extension Serv.), Sept. 1995, http://www.oznet.ksu.edu.library/hous2/mf2144.pdf (stating that there are no standards for mold levels in homes and that when testing is done, the levels of mold spores inside are compared to the mold spores outside). However, on the federal level, a new bill was introduced in June 2002, aiming to protect consumers against the physical and financial effects resulting from toxic mold-exposure. U.S. Toxic Mold Safety and Protection Act, H.R. 5040, 107th Congress (2002); *Mold Safety Bill Will Help Homeowners, Michigan Congressman Says*, ANDREWS TOXIC CHEMS. LITIG. REP., July 11, 2002, at 10, 10, WL 20 No. 9 ANTCLR 10. The bill is entitled "U.S. Toxic Mold Safety and Protection Act" or alternatively, the "Melina Bill," named after the daughter of an employee working in Congressman Conyers' office whose family experienced health problems after moving into their new home. *Id.* The proposed legislation will mandate comprehensive mold growth research, as well as create education programs regarding toxic mold dangers and provide assistance to victims. *Id.*

153. *See* Eric Berger, *Scientists Disagree Over Health Hazards of Mold*, HOUS. CHRON., June 27, 2001, at 17, 2001 WL 23610684 (concluding that the reason there are no official standards for mold levels may be partly because people react in different ways to

mold problem remains unclear and is only exacerbated by this "fear of the unknown."[154]

Since no proven health standards are in existence and any science linking health problems to mold are "shaky" at best, medical bills resulting from toxic mold exposure are not paid for by insurers.[155] Although research on the effects of black mold is inconclusive, the fact that certain mold species can produce a toxin is well-established.[156] It is the effects of these toxins on human health that need to be documented and confirmed.[157]

3. Importance of Standards and Guidelines in Schools

For example, in 1999, a Texas Tech Medical Center study identified two fungi as possibly causing sick building syndrome.[158] Forty-eight United States school buildings' indoor and outdoor air qualities were analyzed in the study.[159] All of these schools had received complaints of respiratory problems and air quality concerns.[160] Study results found "a high prevalence" of Penicillium mold in twenty-five schools and Stachybotrys mold in the carpets and walls of eleven schools.[161] Similar studies are needed in order to better understand the effects of toxic mold.

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mold exposure). Those people without sensitivities to mold may not even be aware that they have been exposed to it. *Id.*

154. *See* Terrence Stutz, *Farmers to Drop Home Insurance: Company Cites Texas Mold Claims in Halting Comprehensive Coverage*, DALLAS MORNING NEWS, Nov. 10, 2001, at 1A, 2001 WL 28629646 (indicating that health concerns are compounded by the lack of government standards regarding what mold levels in a dwelling or building are unhealthy).

155. *See Moldering/Hysteria Should Not Drive Debate on Mold Insurance*, HOUS. CHRON., Sept. 19, 2001, at 38, 2001 WL 23629425 (expressing that it is not unreasonable for insurers to deny claims in excess of the mold-damaged structures).

156. *See* Cherie Bell, *Efforts on Track to Stop Mold: City Heeds Study's Suggestion to Fix Leaks in Public Buildings*, DALLAS MORNING NEWS, Sept. 27, 2001, at 1T, 2001 WL 28629646 (stating that black or toxic mold can produce a toxin despite the lack of inconclusive research).

157. *See* Kevin Carmody, *Family's Lawsuit Is Focus of Controversy over Mold*, AUSTIN AM.-STATESMAN, May 20, 2001, at A1, 2001 WL 4579668 (commenting that case reports pertaining to serious mold-related health effects exist, but have not yet been corroborated by medical studies involving humans).

158. *See Finding Causes of Sick Building Syndrome*, USA TODAY MAG., Aug. 1, 1999, at 13, 1999 WL 3675650 (discussing the results of an air quality study in schools). The finding was called "a major step" towards identifying the causes of sick building syndrome. *Id.*

159. *Id.*

160. *See id.* (stating that over half of the schools that responded had complaints of tonsillitis, bronchitis, and pneumonia).

161. *Id.*

Mold in schools is a problem across the nation, as well as in Texas.[162] School closings and remediation efforts reported by the media created a heightened awareness of the mold dilemma.[163] Although there is a lack of scientific data on the subject, few (if any) would take a chance on the presence of mold potentially harming our nation's children and future. Still, no mandatory standards exist, even for school buildings.

During the 2001 Texas Legislative Session, two bills were introduced regarding mold levels in schools.[164] House Bill 2006 would have required public schools to regularly evaluate their indoor air quality and House Bill 2007 would have mandated guidelines for new or renovated school buildings.[165] However, neither bill was signed into law.[166] Consequently, school-aged children and their parents must rely on the discretion of their school administrators in choosing to follow voluntary guidelines set forth by the Texas Department of Health.[167]

III. POTENTIAL MOLD COVERAGE UNDER FORMER TEXAS HOMEOWNERS POLICY-FORM B

Homeownership in this country, and especially in Texas,[168] is a significant policy matter.[169] For example, homeownership is encouraged via incentives such as direct and indirect subsidies.[170] Also indicative of

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162. *See, e.g.*, Kevin Carmody, *Family's Lawsuit Is Focus of Controversy over Mold*, AUSTIN AM.-STATESMAN, May 20, 2001, at A1, 2001 WL 4579668 (stating that Stachybotrys was discovered in an Austin elementary school in March of 2000 and remediation costs totaled $4.6 million); Zeke MacCormack, *Mold Adds to High School's Building Costs*, SAN ANTONIO EXPRESS-NEWS, Dec. 20, 2001, at 01B, 2001 WL 30315089 (reporting toxic mold growth at a Kerrville, Texas high school cost about $680,000 to remedy); Susan Yerkes, *Readers Express Growing Concerns over Fungus*, SAN ANTONIO EXPRESS-NEWS, Mar. 11, 2001, at 03H, 2001 WL 13520051 (recognizing the national problem of mold and mildew in school buildings).

163. *See* Kevin Carmody, *Family's Lawsuit Is Focus of Controversy Over Mold*, AUSTIN AM.-STATESMAN, May 20, 2001, at A1, 2001 WL 4579668 (indicating that after several schools in Austin, Texas were closed temporarily due to mold infestation, the parents of many children had their homes tested for mold as well).

164. Pamela Manson, *Jury Holds Insurance Company Liable in Mold Case*, TEX. LAW., June 11, 2001, at 5.

165. TEX. H.B. 2006, 77th Leg., R.S. (2001).

166. TEX. H.B. 2007, 77th Leg., R.S. (2001).

167. TEX. HEALTH & SAFETY CODE ANN. § 385.001-.003 (Vernon Supp. 2003).

168. *See* TEX. CONST. art. XVI, § 50 (regarding prohibitions on the forced sale of the homestead).

169. *See* Rob Schneider, *Consumers Union Statement on Coverage for Mold or Other Fungi*, Texas Watch Online, June 26, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=70&display=true (last visited Sept. 10, 2002) (explaining public policy reasons why mold coverage should continue to be a covered peril).

170. *Id.*

homeownership importance is the Texas Department of Insurance's regulation of insurance companies as well as the policy forms these companies provide.[171] State-authorized policy forms help ensure adequate coverage for homeowners.[172] The homeowner's policy is "a cornerstone of protecting homeownership."[173] The policy protects the family's most important asset—their home.[174] Without this safeguard, a family could be left with nowhere to live.[175]

Texas Homeowners Policy-Form B (HO-B) is the most common of the approved policies insurers offer, with about ninety-six percent of Texas homeowners insured under this policy.[176] This policy also affords its holder the most comprehensive coverage available.[177] Other policies approved for issuance in Texas, such as Form-A (HO-A), provide for limited coverage which does not include coverage for water or mold damage.[178]

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171. TEX. INS. CODE ANN. art. 5.35 (Vernon Supp. 2002); Rob Schneider, *Consumers Union Statement on Coverage for Mold or Other Fungi*, Texas Watch Online, June 26, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=70&display=true (last visited Sept. 10, 2002).

172. *See* Rob Schneider, *Consumers Union Statement on Coverage for Mold or Other Fungi*, Texas Watch Online, June 26, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=70&display=true (last visited Sept. 10, 2002) (discussing why mold coverage should continue to be a covered peril).

173. *See id.* (noting the public policy reasons for continuing to consider mold coverage as a covered peril).

174. *See id.* (asserting that the homeowner policy is essential because it protects property value and homeowners' ability to live in their homes).

175. *See id.* (stating mold infestation can render a home inhabitable in some situations).

176. *Farmers Drops Texas Homeowners; Firm Says Mold Claims Caused Financial Losses*, SAN ANTONIO EXPRESS-NEWS, Nov. 11, 2001, at 01B, 2001 WL 28787278; Shonda Novak, *Insurers Urged to Rethink New Rules on Mold*, AUSTIN AM.-STATESMAN, Aug. 31, 2001, at A1, 2001 WL 4583198; Mike W. Thomas, *Regulators, Insurers Engaged in Homeowners-Policy Showdown*, SAN ANTONIO BUS. J., Nov. 19, 2001, http://sanantonio.bizjournals.com/sanantonio/stories/2001/11/19/story3.html.

177. *Farmers Drops Texas Homeowners; Firm Says Mold Claims Caused Financial Losses*, SAN ANTONIO EXPRESS-NEWS, Nov. 11, 2001, at 01B, 2001 WL 28787278; *see also* Mike W. Thomas, *Regulators, Insurers Engaged in Homeowners-Policy Showdown*, SAN ANTONIO BUS. J., Nov. 19, 2001, http://sanantonio.bizjournals.com/sanantonio/stories/2001/11/19/story3.html (commenting that many mortgage companies require potential homeowners to secure comprehensive homeowners insurance before they can get a loan for a new house).

178. *See Farmers Drops Texas Homeowners; Firm Says Mold Claims Caused Financial Losses*, SAN ANTONIO EXPRESS-NEWS, Nov. 11, 2001, at 01B, 2001 WL 28787278 (noting that less than full coverage homeowner policies will continue to be offered by insurers).

A. *Covered Losses*

The most common insurance policy, the Homeowners Policy Form-B, provides broad coverage to the insured's dwelling.[179] The comprehensive character of the policy will provide the insured with coverage unless the damage in question occurred as a result of a noncovered event.[180] A comprehensive policy's effect "is generally to broaden the coverage."[181] The statement, "'[A]ll risks of physical loss' except those excluded, covers an almost unlimited field."[182] Thus, unless the policy specifically lists the peril as one excluded from coverage, the loss is presumably covered.[183]

B. *Exclusions from Coverage*

Insurance policies do not cover damage from mold and fungus that occur naturally in the home.[184] Texas Homeowners Policy-Form B states that loss is not recoverable if caused by "rust, rot, mold or other fungi."[185] Another common limitation in insurance policies is the absolute pollution exclusion.[186] However, courts do not always effectuate limiting lan-

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179. *See id.* (stating that ninety-six percent of homeowners have full coverage insurance policies); Terrence Stutz, *Order Restricts Mold Coverage: Insurance Companies, Consumer Groups Object to State Regulator's Plan*, DALLAS MORNING NEWS, Nov. 29, 2001, at A1, 2001 WL 30308686 (reiterating that 96% of Texas homeowners have the HO-B policy, which is usually required when obtaining a mortgage).

180. *See* TEX. INS. CODE ANN. art. 21.58(b) (Vernon Supp. 2002) (stating that "any language of exclusion in the policy and any exception to coverage claimed by the insurer constitutes an avoidance or an affirmative defense"); Telepak v. United Servs. Auto Ass'n, 887 S.W.2d 506, 508 (Tex. App.—San Antonio 1994, writ denied) (holding that once the insurer has plead an affirmative defense, it is "incumbent upon the insured to prove that his loss was in fact covered by the policy").

181. Jones v. Am. Econ. Ins. Co., 672 S.W.2d 879, 880 (Tex. App.—Dallas 1984, no writ); Millers Mut. Fire Ins. Co. v. Murrell, 362 S.W.2d 868, 869 (Tex. Civ. App.—Fort Worth 1962), *writ ref'd n.r.e.* 367 S.W.2d 667 (Tex. 1963) (per curiam).

182. *Millers Mut. Fire Ins.*, 362 S.W.2d at 869.

183. *See Jones*, 672 S.W.2d at 880 (reiterating that courts will not find a limitation in a policy when there is not one to be found); Employers Cas. Co. v. Holm, 393 S.W.2d 363, 367 (Tex. Civ. App.—Houston 1965, no writ) (stating that a court "will not write a limitation into a policy where none exists").

184. *Standing Up for Texas Homeowners*, Texas Watch Online, Aug. 20, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=72&display=true (last visited Sept. 22, 2002).

185. *See Jones*, 672 S.W.2d at 880 (citing exclusionary language).

186. *See generally* Lisa G. Youngblood & Thomas K. Bick, *The Pollution Exclusion Saga Continues: Does It Apply to Indoor Releases?*, 28 ENVTL. L. REP. 10021, 10021-22 (1998) (explaining various pollution exclusions and how courts may view them).

guage.[187] Such situations include pollution releases occurring indoors, rather than outdoors.

C. *Exceptions to Exclusions: Bringing the Exclusion Back Within Purview of Coverage*

Although a particular peril is listed as an exclusion, situations may exist in which an exception applies. Exceptions to exclusions create coverage.[188] Such instances of coverage include claims for ensuing losses or losses that come as a consequence to a covered peril.[189] Mold damage has been found by courts to be an ensuing loss of water damage.[190] Courts have also found that enumerated exclusions, such as damage caused by plumbing leaks, are covered if the damage was caused by "[a]ccidental discharge, leakage or overflow of water or steam from within a plumbing, heating or air conditioning system or a domestic appliance."[191]

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187. *See generally* Willy E. Rice, *Insurance Contracts and Judicial Decisions Over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L.J. 995, 1021-22 (2000) (explaining the general rules of contract construction and recognizing that a court may employ one or more doctrines to resolve a single insurance contract controversy).

188. *See* Telepak v. United Servs. Auto Ass'n, 887 S.W.2d 506, 507 (Tex. App.—San Antonio 1994, writ denied) (stating that exceptions to exclusions create, rather than limit, coverage).

189. *See* Bowers v. Farmers Ins. Exch., 991 P.2d 734, 738 (Wash. Ct. App. 2000) (explaining 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'").

190. *See* Pena v. State Farm Lloyds, 980 S.W.2d 949, 957 (Tex. App.—Corpus Christi 1998, no pet.) (finding that a water heater leak caused fungal growth under the Pena's wooden floor, reversing the lower court's decision in favor of the insurer, and remanding the case to the trial court).

191. *See* Balandran v. Safeco Ins. Co. of Am., 972 S.W.2d 738, 742 n.2 (Tex. 1998) (holding that underground plumbing leaks are covered losses under the homeowners policy form B); Oram v. State Farm Lloyds, 977 S.W.2d 163, 167 (Tex. App.—Austin 1998, no pet.) (holding that cosmetic damages and additional living expenses are covered losses since they were a consequence of a plumbing leak). *But see* Sharp v. State Farm Fire and Cas. Ins. Co., 115 F.3d 1258, 1264 (5th Cir. 1997) (holding that plumbing leaks from underneath a dwelling are not covered by the homeowners policy-form B); *but cf.* TEX. DEP'T OF INS., *Commissioner's Bulletin No. B-0032-97*, Aug. 22, 1997, http://www.tdi.state.tx.us/commish/b-0032-7.html (emphasizing that the Department of Insurance does not agree with the Sharp decision). Since federal court decisions regarding state law issues are not binding in Texas state courts, insurers must continue to pay claims in accordance with the Department's position. *Id.*

IV. THE QUEST FOR A DECISION

Guiding the Insurance Commissioner in his quest for a reasonable compromise between the insurance industry and its consumers were the overall goals of preventing exorbitant rate increases, while at the same time protecting the solvency of the insurers.[192] Potential plans considered by the Commissioner ranged from a simple increase in standard policy premiums based on projected mold-damage losses to stripping mold coverage from standard policies and offering it as a separate, optional policy.[193] Also considered was a plan leaving mold-damage as a covered loss but allowing homeowners to opt out of mold coverage in exchange for lower premiums.[194]

The Commissioner's staff recommended a plan that would "preserve the availability and affordability of residential property insurance in Texas by capping current coverage for mold remediation while providing policyholders an option to buy additional levels of coverage."[195] The Commissioner characterized the staff's proposal as "a judicious first step" toward keeping residential property insurance available and affordable in Texas.[196]

Compromises, by design, are not intended to make all parties involved content. However, both the insurance industry[197] and consumer

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192. *See* Terrence Stutz, *Allstate Halts New Policies: Insurer Is Latest in Texas to Cite Mold Losses in Homeowners Market*, DALLAS MORNING NEWS, Sept. 29, 2001, at 1A, 2001 WL 28629932 (stating those intentions sought by the implementation of the proposed plan).

193. *See* Terrence Stutz, *Rush Put on Mold Coverage Findings: Insurance Official Orders Quick Homeowner Recommendations: Water Damages Losses Expected to Soar*, DALLAS MORNING NEWS, Sept. 13, 2001, at 41A, 2001 WL 27699290 (discussing the Commissioner's plan options).

194. Terrence Stutz, *Farmers to Drop Home Insurance: Company Cites Texas Mold Claims in Halting Comprehensive Coverage*, DALLAS MORNING NEWS, Nov. 10, 2001, at 1A, 2001 WL 29584193.

195. TEX. DEP'T OF INS., *Montemayor Gets Mold Recommendation, Urges Calm Consideration,* Sept. 18, 2001, http://www.tdi.state.tx.us/commish/nr09181a.html.

196. *Id.*

197. *See* Terrence Stutz, *Insurer to Stop Selling Policies: State Farm Cites Mold Losses in Ending New Sales to Homeowners*, DALLAS MORNING NEWS, Sept. 19, 2001, at 31A, 2001 WL 27700582 (recognizing the insurance industry's sentiment that the $5,000 cap per year on mold damage would not solve their problems regarding overwhelming losses); *Moldering/Hysteria Should Not Drive Debate on Mold Insurance*, HOUS. CHRON., Sept. 19, 2001, at 38, 2001 WL 23629425 (reporting insurers' complaints that under the Commissioner's proposal, rates would still have to be increased by as much as fifty percent; the Commissioner's staff members' estimate that any necessary rate increase under the proposal would be between five and ten percent); Terrence Stutz, *State Mold Plan Criticized: Consumers, Insurers Say Compromise Does Little to Deal with Problem*, DALLAS MORNING NEWS, Oct. 17, 2001, at 25A, 2001 WL 29581321 (stating the insurance industry's posi-

groups[198] were critical of the proposed resolution.[199] This situation was no different. Consequently, the Commissioner opted against adopting the proposal and instead promulgated his decision on November 28, 2001, which the Commissioner characterized as "'a common-sense, middle ground approach.'"[200]

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tion that mold damage should not be covered under standard insurance polices and that if Texas policyholders desire the coverage, they should have to pay an additional premium for it). An industry trade group representative stated that "'[t]he recommendations by Commissioner Montemayor simply do not go far enough to provide many insurers with the confidence necessary to make a large commitment to [the] Texas market.'" Terrence Stutz, *Insurer to Stop Selling Policies: State Farm Cites Mold Losses in Ending New Sales to Homeowners*, DALLAS MORNING NEWS, Sept. 19, 2001, at 31A, 2001 WL 27700582. The representative further warned that "'[w]ith these overwhelming losses, there should be no doubt in anyone's mind that an insurer may choose to discontinue writing coverage in Texas.'" *Id.*

198. *See* Terrence Stutz, *State Mold Plan Criticized: Consumers, Insurers Say Compromise Does Little to Deal with Problem*, DALLAS MORNING NEWS, Oct. 17, 2001, at 25A, 2001 WL 29581321 (conveying consumer groups' and homeowners' concerns that the proposed plan "would strip most of the existing protection against mold damage and leave affected policyholders with huge repair bills"). One homeowner stated that the plan would "'only add insult to injury for families that have suffered the devastating effects of mold contamination of their homes.'" *Id.* Consumer groups, Consumers Union, and Texas Watch characterized the proposal as "woefully inadequate"; they stated that the proposal's coverage should be at least $15,000 because the average claim is around $17,000. *Id.*

199. *Id.* The staff proposal (in relevant part):

- Require[d] an amendatory endorsement that limits basic coverage to $5,000. The $5,000 would not count toward overall policy limits. Responses to a TDI data call indicate that slightly more than half of mold-related claims are under $5,000.
- Provide[d] that the cost of testing, repair, mold remediation and additional living expenses all would apply toward the $5,000 cap on basic mold coverage.
- Enable[d] policyholders wanting more than the $5,000 basic mold coverage to buy additional coverage in amounts equal to 25 percent, 50 percent and 100 percent of policy limits. The staff proposal include[d] rates that rate-regulated companies would be required to charge for the "buy back" endorsements.
- Allowe[d] multiple claims within a year up to the policy limit selected by the consumer.

TEX. DEP'T OF INS., *Montemayor Gets Mold Recommendation, Urges Calm Consideration,* Sept. 18, 2001, http://www.tdi.state.tx.us/commish/nr09181a.html.

200. *See* TEX. DEP'T OF INS., *Montemayor Protects Consumer Choice, Availability of Mold Coverage,* Nov. 28, 2001, http://www.tdi.state.tx.us/commish/nr11281a.html (describing Commissioner Montemayor's decision to keep insurance coverage for mold-related water damage claims in residential property policies). The order, however, eliminates coverage for potentially high-priced procedures, such as testing, treating, or disposing of mold further than is necessary to fix or replace the damaged property in question. *Id.* The decision gives Texas homeowners "'basic protection plus the ability to purchase additional coverage if they so choose.'" *Id.* The ruling also provides for a task force that will evaluate how mold-related insurance claims are handled and report a finding before the end of the 2003 Legislative Session. *Id.*

Under the newly promulgated order, residential insurance coverage for the removal of mold-related water damage is retained, but the coverage is not as broad as was the former coverage.[201] For example, the amendatory language includes the requirement that the damage be "sudden and accidental."[202] Additionally, only reasonable and necessary repair or replacement of personal property or the dwelling itself is covered.[203] This means that added expenses, such as the cost for remediation, are no longer a covered peril.[204]

The Commissioner's order will allow policyholders to purchase additional coverage.[205] This "buy-back" option is permitted in increments of 25, 50, and 100 percent of the policy limits.[206] Also included in the order is the elimination of claim "stacking," which previously allowed the policyholder to collect an amount in excess of 100 percent of their policy limits by submitting several mold-related claims to the insurer separately during the same policy year.[207] This new coverage may become effective as early as January 1, 2002, but not later than January 1, 2003.[208]

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201. *See* Shonda Novak, *Insurance Chief: Mold Coverage Must Stay but Homeowners May End Up Paying Cleanup Costs, Higher Premiums*, AUSTIN AM.-STATESMAN, Nov. 29, 2001, at A1, 2001 WL 4586749 (stating that although coverage will be reduced under the new plan, premiums are going to be higher).

202. *See* TEX. DEP'T OF INS., *Homeowners Amendatory Mandatory Endorsement, Exhibit B*, Jan. 1, 2002, http://www.tdi.state.tx.us/commish/multi/mendorse2.html (including a hidden or concealed physical loss in the definition of "sudden and accidental"). For coverage to apply, a concealed or hidden loss must be reported within thirty days of the date the damage is detected or should have been detected. *Id.*

203. *See* TEX. DEP'T OF INS., *Mold, Fungi or Other Microbes Coverage, Exhibit K*, Jan. 1, 2002, http://www.tdi.state.tx.us/commish/multi/mendorse11.html (stating that coverage is available for the "necessary and reasonable expenses to remediate, repair or replace covered property . . . caused by ensuing mold, fungi or other microbes resulting from water or steam damage if the water or steam damage loss would otherwise be covered under this policy").

204. *See Montemayor Orders Reform of Mold Insurance Coverage*, DALLAS BUS. J., Nov. 29, 2001, http://dallas.bizjournals.com/dallas/stories/2001/11/26/daily32.html (commenting that coverage is eliminated for testing, treating, and disposing of mold if it is unnecessary in repairing or replacing the water-damaged structures).

205. TEX. DEP'T OF INS., *Montemayor Protects Consumer Choice, Availability of Mold Coverage,* Nov. 28, 2001, http://www.tdi.state.tx.us/commish/nr11281a.html.

206. *See id.* (stating that insurers must offer all levels of this supplemental coverage in addition to the basic policy).

207. *Id.*; *see also Texas Department of Insurance Announces Decision on Future Coverage of Mold Claims*, Texas Watch Online, Nov. 28, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=82&display=true (last visited Sept. 22, 2002) (acknowledging that current policies allow "stacking" of multiple claims during one policy year).

208. *See* Tex. Dep't of Ins., *Montemayor Protects Consumer Choice, Availability of Mold Coverage*, Nov. 28, 2001, *at* http://www.tdi.state.tx.us/commish/nr11281a.html (stating that once an insurance company begins offering the new coverage, it will take effect at the time the homeowner's policy comes up for renewal). If a policyholder opts for the new

Although the Commissioner's decision substantially limits coverage for mold-related damage, Texas is still left with more mold coverage than other states.[209] Contrary to the $5,000 limit of mold coverage under the staff proposal, the Commissioner decided against imposing a cap on mold coverage in the newly approved plan.[210] With the average mold claim in Texas costing $17,700, the covered loss will not be limited by a dollar amount that falls short by more than three times the claim's cost.[211]

However, the amount covered under the new policy may still fall short of paying for the entire claim. Once the physical damage to a covered loss is paid, the homeowner may be left to pay thousands of dollars out of his own pocket for expenses such as mold testing, remediation, and alternative living expenses.[212] Thus, the new policy provides a temporary solution to a problem without providing the homeowner with the means to prevent a potentially recurring problem.

V. PROPOSAL

It seems elementary that before a problem can be solved, a thorough understanding of the problem posed is essential. Yet, with regard to the "mold issue," this requisite basic knowledge is lacking. The core of the inquiry—the nucleus from which all other mold-related underlying issues should be derived, e.g., medical and scientific research on mold—is in-

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coverage before their policy becomes due, they may be entitled to a refund for the unused part of the old policy. *Id.*

209. *See* Kelly Johnson, *Insurers Seek Tight Limits on Mold Payouts*, SACRAMENTO BUS. J., Dec. 14, 2001, http://sacramento.bizjournals.com/sacramento/stories/2001/12/17/story7.html (illustrating that insurance companies are seeking state approval to limit the amount of mold-related damage payouts). In California, Allstate Insurance Company received approval from the state to limit their damage payouts to a maximum of $5,000. *Id.* USAA, a Texas-based insurance company, has also requested approval from the state of California for permission to limit mold-damage payouts to $2,500 and a $2,000 limit for additional living expenses. *Id.*

210. *See* David Pilla, *Allstate Joins Criticism of Texas Mold-Coverage Plan*, BEST'S INS. NEWS, Nov. 29, 2001, 2001 WL 24726057 (reporting the Commissioner's decision to disapprove the proposal's dollar limit).

211. *See Texas Department of Insurance Announces Decision on Future Coverage of Mold Claims*, Texas Watch Online, Nov. 28, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=82&display=true (last visited Sept. 22, 2002) (providing data from the Texas Department of Insurance regarding the average cost of Texas mold claims).

212. *See id.* (claiming that the cost of the additional insurance coverage in percentage increments of policy limits will undoubtedly be high and because of these high prices, homeowners will opt against buying the additional coverage). Also, homeowners may not be aware of how severe mold damage can be; thus, they may choose against the supplemental coverage. *Id.* Without additional coverage, policyholders will be left having to pay additional expenses, which can reach the tens of thousands of dollars, out of their own pockets. *Id.*

complete. Without a fundamental comprehension of this complex issue, it is unlikely that an adequate solution to any mold-based quandary will be found.

A. *Conduct Medical and Scientific Research on Mold*

To better understand how mold exposure may affect human health, more research must be completed and documented. Conclusive evidence on the characteristics and propensities of mold will assist in filling gaps of knowledge, thus providing medical professionals with the data necessary to correctly diagnose and treat potential mold-related illness.

Important research topics include:

- defining how fungal toxins impair immune systems[;]
- quantifying relationship of dose and duration of exposure to airborne mycotoxins[;]
- developing efficient methods to identify and analyze mycotoxins in the field[;]
- determining effects of varying environmental conditions (substrate temperature, relative humidity, material moisture content) on mycotoxin production[;] and
- examining potential human health effects from exposure to combinations of indoor contaminants[,] such as environmental tobacco smoke, VOCs, carbon monoxide, mycotoxins[,] and other microbial components.[213]

B. *Enact Legislation Providing Standards for Acceptable Levels of Mold*

One reason the mold problem may be escalating is the lack of state and federal standards and guidelines. If the general public is unaware of what constitutes "safe" or "unsafe" levels of mold spores in the air, then it is understandable that there may be some fear or "overreacting" to potential mold outbreaks. Until air quality standards are implemented, much of this uncertainty and conjecture will continue.

Currently, there are no laws in effect regulating indoor mold levels in Texas. Nonetheless, the lack of legislation does not mean there is a lack of liability.[214] Consequently, prudence would dictate maintaining plumb-

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213. *See* Sandra V. McNeel & Richard A. Kreutzer, *Fungi & Indoor Air Quality*, HEALTH & ENV'T DIG., May-June 1996, at 9, 12 (quoting directions for future research).

214. *See* Rich Kern, *Commercial Carriers Quietly Dealing with Issues Relating to Mold*, HOUS. BUS. J., Dec. 3, 2001, http://houston.bizjournals.com/houston/stories/2001/12/

ing and ventilation systems, as well as other structured areas in which molds may thrive.

With mandated legislative standards, homeowners and business owners may be more likely to discover a potential mold problem. For example, frequent evaluations of the air quality in public buildings would determine the presence of potential health risks. Thus, early detection could mitigate any structural or consequential damages to the mold infestation.

In California, legislators introduced a bill that would set state standards regarding what would constitute dangerous levels of mold. On October 5, 2001, Governor Gray Davis signed into law the Toxic Mold Protection Act of 2001,[215] which requires the creation of a task force to research and develop permissible levels of mold exposure.[216] The task force's duties will include assessing the health risk presented by indoor molds, determining methods for the identification and sampling of molds, providing guidance for the removal of mold and abatement of water intrusion, and assessing the need for professional remediation standards.[217] In addition, Texas legislators should follow California's lead and use their recently enacted law as a template for future Texas legislation concerning acceptable levels of mold.

C. *Retain a True Comprehensive Homeowner's Policy*

Although the Texas Department of Insurance Commissioner's decision retains coverage for mold-related water damage, the newly revised policy is far from comprehensive. In theory, it is a "comprehensive" policy, but it has substantial limitations. Since this new, basic policy only covers what is necessary to remove mold and replace mold-damaged property, the homeowner may be left paying for everything the insurer no longer

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03/focus5.html (recognizing that there may still be legal consequences to mold infestations, despite the lack of legislation). Thus, the more aware people are of potential mold problems, the more protection they are giving themselves. *See id.* (indicating that an increase in mold research is causing a greater awareness of mold problems).

215. CAL. HEALTH & SAFETY CODE §§ 26100-26107 (West Supp. 2002).

216. *Id.* at § 26101.7; *see also* Larry Sokoloff, *Mold Presence Adds Complexity to Real Estate Transactions*, SILICON VALLEY/SAN JOSE BUS. J., Dec. 3, 2001, http://sanjose.bizjournals.com/sanjose/stories/2001/12/03/focus1.html (stating that the California Department of Heath Services will create the task force, which will report its progress by July 1, 2003). California has the second-highest number of mold-related insurance claims in the United States. *Id.* Texas leads the nation. *Id.*

217. Larry Sokoloff, *Mold Presence Adds Complexity to Real Estate Transactions*, SILICON VALLEY/SAN JOSE BUS. J., Dec. 3, 2001, http://sanjose.bizjournals.com/sanjose/stories/2001/12/03/focus1.html.

covers.[218] For instance, coverage is eliminated for high-priced procedures, such as mold testing and other remediation costs.[219]

Commissioner Montemayor's decision was not embraced by either consumer groups or insurance companies.[220] Not even the previously proposed generous $5,000 cap on water damage claims pleased the insurance industry.[221] Once again, the industry is still not content with this latest ruling despite the fact that its financial burden was drastically lessened.[222]

While insurers argue that the "mold issue" is relatively new and premiums were never meant to pay for mold-related damage, this argument is flawed.[223] Mold-related damage could not be completely unanticipated or unforeseen if it is a covered peril. There must have been at least some rate base for the loss, although not to the extent insurers originally anticipated.

A strong public policy argument exists in favor of the inclusion of mold-related damages as covered losses, such as the preservation of home ownership.[224] A family's home is its most valuable asset, and a mold infestation could affect the home's value or even render it uninhabitable.[225] If consequential damages to the mold infestation are no longer a covered peril, then finding the cause of the mold problem will not be a priority.

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218. *Texas Department of Insurance Announces Decision on Future Coverage of Mold Claims*, Texas Watch Online, Nov. 28, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=82&display=true (last visited Sept. 22, 2002).

219. *Montemayor Orders Reform of Mold Insurance Coverage*, DALLAS BUS. J., Nov. 29, 2001, http://dallas.bizjournals.com/dallas/stories/2001/11/26/daily32.html; *see also* Jeff Hawk, *Costly Houston Flood Raises Questions on Building Design*, TEX. CONSTR., Aug. 1, 2001, at 67, 2001 WL 13409511 (stating that remediating a building "can exceed the cost of the building itself").

220. Shonda Novak, *Insurance Chief: Mold Coverage Must Stay but Homeowners May End Up Paying Cleanup Costs, Higher Premiums*, AUSTIN AM.-STATESMAN, Nov. 29, 2001, at A1, 2001 WL 9586749.

221. *See id.* (reporting that previous mold-related decisions displeased insurance companies as well as consumer groups).

222. *Id.*

223. Terrence Stutz, *Rush Put on Mold Coverage Findings: Insurance Official Orders Quick Homeowner Recommendations*, DALLAS MORNING NEWS, Sept. 13, 2001, at 41A, 2001 WL 27699290; *see also* Lorraine Gorski, *Best's Review: Mold Claims Skyrocketing*, BEST'S INS. NEWS, Nov. 1, 2001, 2001 WL 24725524 (quoting an insurance spokesman in stating that "'[w]e base our rates on what our anticipated losses are going to be, and suddenly when something new is interjected and you [do not] have a rate base for it, the only way to handle it is through substantial rate increases'").

224. Rob Schneider, *Consumers Union Statement on Coverage for Mold or Other Fungi*, Texas Watch Online, June 26, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=70&display=true (last visited Sept. 10, 2002).

225. *Id.*

Instead, the insurer must remedy only the "necessary" structural damage, and they will not have to worry about another claim for at least another year. If another mold problem develops within the same policy year, the elimination of claim "stacking" disallows additional claims until the next policy year.[226] Furthermore, the costs associated with additional coverage will be so high—a projected sixty to eighty percent increase over current rates—that most homeowners will find it impracticable to purchase.[227]

Because expenses such as mold testing and remediation are no longer covered, the insured will have to bear the costly burden. However, few families are financially able to pay the costs associated with ridding a home of mold, which may include keeping up mortgage payments, paying for a temporary place to live, and making their homes safe to live in again.[228] For example, one attorney recalls a client who was forced out of her home due to a mold infestation.[229] She subsequently moved into a mobile home, but some of her belongings were so tainted with mold that it rendered the mobile home inhabitable.[230] She is now making payments on two homes in which she cannot live.[231]

If homeowners are meeting their responsibilities by insuring their homes, a reciprocal responsibility exists for insurers to provide coverage.[232] Yet insurers, such as Allstate, do not plan to offer comprehensive coverage to homeowners renewing their policies.[233] Insurance companies

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226. TEX. DEP'T OF INS., *Montemayor Protects Consumer Choice, Availability of Mold Coverage,* Nov. 28, 2001, http://www.tdi.state.tx.us/commish/nr11281a.html.

227. *See* Shonda Novak, *Insurance Chief: Mold Coverage Must Stay but Homeowners May End Up Paying Cleanup Costs, Higher Premiums*, AUSTIN AM.-STATESMAN, Nov. 29, 2001, at A1, 2001 WL 4586749 (commenting that insurance premiums are likely to increase).

228. Rob Schneider, *Consumers Union Statement on Coverage for Mold or Other Fungi*, Texas Watch Online, June 26, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=70&display=true (last visited Sept. 10, 2002).

229. Jennifer L. Reichert, *Homeowners, Insurers Spar over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, at 14, 18.

230. *Id.*

231. *Id.*

232. *Standing Up for Texas Homeowners*, Texas Watch Online, Aug. 20, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=72&display=true (last visited Sept. 22, 2002).

233. *See Homeowners Urged to Review Insurance Policies*, SAN ANGELO STANDARD TIMES, Dec. 29, 2001, at 7A (stating that although Allstate will not offer a comprehensive policy, they will offer their new HO-A-Plus, which provides $5,000 limit on coverage for mold damage).

should not be allowed to provide protection only when the protection will not be needed or used.[234]

Homeowners in Texas pay the highest insurance premiums in the nation.[235] Even so, rates are still expected to increase.[236] If insurance companies refuse to provide comprehensive coverage at reasonable prices, the Texas Department of Insurance should protect the consumer with rate regulation.

VI. CONCLUSION

Currently, mold is the primary concern in the environmental industry.[237] Because mold occurs naturally in nature, all buildings have some level of mold present. Additionally, Americans spend ninety percent of their time indoors.[238] Thus, it is imperative that we better understand mold and its effects.

With more extensive scientific and medical research on mold, scientists can confirm what earlier studies show and what those who experienced mold-related illness already know; there is a link between toxic mold and adverse health effects in humans.[239] Acquiring knowledge pertaining to dose and duration of exposure to toxic mold will also assist legislators in drafting future legislation regarding permissible levels of mold in buildings. Additionally, mandatory air quality standards are especially needed

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234. *Standing Up for Texas Homeowners*, Texas Watch Online, Aug. 20, 2001, *at* http://www.texaswatch.org/insurance_main.asp?insur_id=72&display=true (last visited Sept. 22, 2002).

235. Shonda Novak, *Insurance Chief: Mold Coverage Must Stay but Homeowners May End Up Paying Cleanup Costs, Higher Premiums*, AUSTIN AM.-STATESMAN, Nov. 29, 2001, at A1, 2001 WL 4586749.

236. *See id.* (acknowledging a likely increase in insurance premiums, despite a reduction in coverage); Danielle Reed & June Fletcher, *Facing Record Losses, Insurers Cut Coverage, Raise Rates; Terrorism's Covered, Not Mold*, WALL ST. J., Nov. 9, 2001, at W14, 2001 WL-WSJ 29677457 (recognizing that an increase in claims and expensive repairs have caused insurance rates to rise above inflation nationally).

237. Richard Mize, *Seminar to Focus on Toxic Mold*, THE DAILY OKLAHOMAN, Nov. 21, 2001, at 2C, 2001 WL 30084819.

238. CONSUMER PRODUCT SAFETY COMMISSION & AMERICAN LUNG ASSOCIATION, BIOLOGICAL POLLUTANTS IN YOUR HOME (1997), http://www.epa.gov/iaq/pubs/bio_1.html.

239. *See, e.g.*, *Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712 (1998), http://www.aap.org/policy/re9736.html (recognizing that although much more data is needed to conclusively link toxic mold with infant disease, the Ohio study did link the two together as the possible cause for deaths previously attributed to Sudden Infant Death Syndrome); *Finding Causes of Sick Building Syndrome*, USA TODAY MAG., Aug. 1, 1999, at 13, 2001 WL 3675650 (identifying two known mycotoxins as the cause for complaints of illness and respiratory problems in schools across the United States).

for schools because of their increased susceptibility to the effects of mold.[240]

It is not unreasonable for people to want their families to be safe. This "media-induced fear" that insurers blame, at least in part, for increased insurance claims is a step in the right direction towards educating the public about mold. With more knowledge comes less fear. Once the effects of mold are comprehended, efforts can shift from mold clean-up to mold prevention and control.

240. *See* Rich Kern, *Commercial Carriers Quietly Dealing with Issues Relating to Mold*, HOUS. BUS. J., Dec. 3, 2001, http://houston.bizjournals.com/houston/stories/2001/12/03/focus5.html (identifying young children as most at risk to mold-related illness because of their immature immune systems). Also at risk are older adults, whose immune systems are declining, and people with weakened immune systems. *Id.*