

4-20-2003

Mold is Gold: But, Will it be the Next Asbestos?

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Recommended Citation

Thelma Jarman-Felstiner *Mold is Gold: But, Will it be the Next Asbestos?*, 30 Pepp. L. Rev. Iss. 3 (2003)
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Mold is Gold: But, Will it be the Next Asbestos?

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I. INTRODUCTION

It's greenish-black, slimy, and growing fast.¹ It is an emerging trend in litigation that has insurers, property owners, real estate brokers, and

1. This is a visual description of the species of toxic mold called *Stachybotrys chartarum* (also known by its synonym *Stachybotrys atra*). See Center for Disease Control, *Questions and Answers on Stachybotrys chartarum and Other Molds*, available at <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm> (last visited Sept. 7, 2002).

contractors terrified.² Yes, terrified. The trend is the dramatic rise in toxic mold lawsuits.³ One California lawyer is handling a thousand mold complaints.⁴ Virtually unheard of five years ago, today these lawsuits are featured prominently in newspapers and on news shows.⁵ Schools⁶ and public buildings are being closed across the country.⁷ Some school districts are checking all of their schools for mold.⁸

In June 2001, a Texas jury awarded homeowner Mary Ballard over \$32 million against an insurance company in connection with damage to the family's home, caused by toxic mold.⁹ The homeowners suffered the complete ruin of their twenty-two room mansion.¹⁰ The insurance company's delay in responding to the Ballard's claim intensified the property damage.¹¹ After reporting that their four year-old son was coughing up blood, a mold expert advised the Ballard family to leave their

2. See Anthony Bartell, Patrick J. Perrone, & Ira M. Gottlieb, *Builders, Subcontractors and Architects: Finding Insurance Coverage for Mold Litigation*, 15 MEALEY'S LITIG. REP.: INS.18, Mar. 13, 2001.

3. *Safety Director's Report*, IOMA, Mar. 2001.

4. Lisa Belkin, *Haunted by Mold*, N.Y. TIMES, Aug. 12, 2001, at sec. 6, p.28, col. 1 (referring to California lawyer – Alexander Robertson IV, a self-proclaimed mold litigation specialist). “The drums are beating. Mold claims are the focus of the American Trial Lawyers Association. There are an estimated 2,000 plaintiffs in mold cases in California alone,” said L.D. Simmons, head of the Insurance Practice Group at law firm Smith, Helms, Mulliss & Moore LLP.” Lynna Goch, *Mold: A Growing Problem: Toxic Mold Affects Homeowners Insurance Market*, BEST'S REVIEW, at 26 Nov. 1, 2001, available at 2001 WL 12285826.

5. David M. Governo & Steven Goselin, *Avoiding and Minimizing Mold Liability: Understanding the Dynamics of Mold and Its Remediation*, 15 MEALEY'S LITIG. REP.: INS. 22, Apr. 10, 2001; see Edward H. Cross, *Toxic Mold: The Fourth Wave of Construction Defect Litigation?* ORANGE COUNTY. LAW., Dec. 1998, at 26 (noting the extensive coverage of mold litigation stories in the media. Mold stories have been featured on *ABC's Prime Time Live*, *Oprah*, and in the *New York Times*). “As evidenced by sensational stories in [newspapers] . . . television specials on *48 Hours* and *The Today Show*, . . . toxic mold is an emotionally charged issue that has created a public frenzy over its potential health impact.” Ann Deering, *Beyond Sick Building Syndrome: Mold Litigation Enters the Main Stream*, RISK MGMT., Nov. 1, 2001, available at 2001 WL 8916049.

6. See Mary Umberger, *What Will Mold Cost Us? It's a Growing Factor in Buying, Selling Homes*, CHI. TRIB., July 22, 2001, Real Estate, at 1. Classes were canceled immediately when mold was discovered at a newly opened Wisconsin elementary school. Doug Erickson and Patricia Simms, *More Mold at Chavez; School District Cancels Classes After Findings: 14 Rooms are Now Known to be Contaminated with Mold at the Recently Opened Chavez Elementary School*, WISC. ST. J., Nov. 28, 2001, available at 2001 WL 25532874. After students and staff complained of persistent sinus, allergy, and asthma ailments, a physical inspection of the elementary school resulted in the discovery of mold in many classrooms. *Id.*

7. John Johnson, *Toxic Mold Plagues Visalia Courthouse*, LOS ANGELES TIMES, Aug. 6, 2000, §A, at 26.

8. Andy Dworkin, *Mold Leaves a Trail of Victims, Lawsuits*, THE OREGONIAN, Aug. 19, 2001, at A1, available at 2001 WL 3611638.

9. *Ballard v. Fire Ins. Exch.*, No. 99-05252 (Texas, Travis Co. Dist. Ct., June 1, 2001).

10. *Id.*

11. *Id.*

home.¹² The husband, an investment banker, alleged he was forced to quit his job because of severe memory loss and physical injuries attributed to mold exposure.¹³ This large jury verdict occurred even though the judge disallowed any medical expert testimony related to mold causing health problems.¹⁴ “[*Ballard v. Fire Insurance Exchange* is] the largest mold lawsuit against an insurer to go before a jury – and the insurance industry is bracing for more.”¹⁵

Insurance officials report mold related claims are up dramatically this year.¹⁶ Farmers Insurance settled \$85 million in mold claims through June 2001, a five-fold increase over the 2000 rate.¹⁷ Some insurance companies plan on eliminating mold coverage from all homeowner’s policies.¹⁸ Because of the growing threat of mold litigation, homes that have experienced recent water damage are now uninsurable.¹⁹ Allstate Insurance has stopped selling policies for properties with recent water damage, while Farmers and Progressive have stopped selling all new homeowner’s insurance policies.²⁰

Are insurers overreacting to the increase in toxic mold litigation? How real is the threat? Commentators claim that toxic mold litigation will be as big as asbestos litigation.²¹ Some observers believe that if “gone unchecked, mold-related cases could rival those of tobacco litigation in the not-too-distant future.”²² This comment explores the claim that toxic mold litigation

12. *Id.*

13. *Id.*

14. *Id.*

15. Christopher Oster, *Insurers Blanch at Proliferation of Mold Claims*, WALL ST. J., June 6, 2001, §A, at 19, available at 2001 WL WSJ 2865760.

16. Armando Villafranca, *Rise in Mold Claims Pits Residents Against Insurers*, HOUS. CHRON., June 27, 2001, §A, at 1.

17. Dworkin, *supra* note 8 at A1. See also Alexander Robertson IV, *Toxic Mold Litigation The Asbestos of the New Millennium*, 1 MEALEY’S LITIG. REPT.:MOLD 8, Aug. 2001 (claiming that Farmers Insurance expects mold claims will total \$85 million in 2001). Farmers made that estimate prior to the \$32.2 million verdict in the *Ballard* case. *Id.*

18. Jennifer L. Reichert, *Homeowners, Insurers Spar Over Spores in Toxic-Mold Cases*, TRIAL, Sept. 2001, available at 2001 WL 12692571.

19. *Mould Threat to US Homes*, POST MAG., Aug. 30, 2001, at 5, available at 2001 WL 8999659.

20. *Id.*

21. Text of *World News Tonight with Peter Jennings*, aired on June 26, 2001 available at http://www.wshblaw.com/doi_hearings6.htm (commenting on toxic mold problems, Jeff Greene, a public adjuster said “[t]he insurance companies thought the asbestos problem was enormous, and this [toxic mold] is going to make that look small”).

22. R. A. Byer, *Indoor Mold Called Next Health Crisis*, TEX. STAR TELEGRAM, June 27, 2001.

will be as big as asbestos litigation. Part II describes what toxic mold is and how toxic mold commonly occurs. Part III outlines the breadth of toxic mold litigation by discussing the potential causes of action against landowners, insurers, real estate brokers, and contractors in toxic mold litigation. Part IV explores the exaggerated claim that toxic mold litigation will be as large as or bigger than asbestos litigation. Additionally, Part IV outlines eight key differences between toxic mold litigation and asbestos litigation. Finally, Part V concludes that these key differences between toxic mold litigation and asbestos litigation will most likely prevent toxic mold litigation from mimicking the scope and size of asbestos litigation.

II. TOXIC MOLD

A. What is Toxic Mold?

Mold is a fungus²³ which is essentially everywhere.²⁴ Almost every breath we take contains mold spores.²⁵ Mold is essential for life on Earth; “[i]t breaks down dead plant matter [and] [w]ithout mold, we would live amid building-deep piles of dead trees instead of fields of rich soil.”²⁶ In fact, “[w]e’ll all be mold food some day.”²⁷

Mold can range from helpful to harmful. Not all mold is toxic. “The human body relies on mold for proper functioning and mold is one of the essential ingredients in some of our favorite foods, including bread, wine and beer.”²⁸ Most molds are relatively harmless, and most people will not have a strong reaction to them, unless they are allergic.²⁹

Exposure to certain types of mold, known as toxic mold, allegedly may cause a severe reaction.³⁰ “Toxic mold refers to those molds capable of producing mycotoxins, which are organic compounds capable of initiating a toxic response in vertebrates.”³¹ Toxic mold attacks through the air, the

23. Anthony Bartell, Patrick J. Perrone, & Ira M. Gottlieb, *Builders, Subcontractors and Architects: Finding Insurance Coverage for Mold Litigation*, 15 MEALEY’S LITIG. REPT.: INS. 18, Mar. 13, 2001.

24. There are over 100,000 known species of mold; at least one thousand species are commonly found in the United States. Southwestern Insurance Information Services, *SIIS Recommends Policy Reform Regarding Mold*, Oct. 2001, at <http://moldupdate.com/industry.htm>.

25. Belkin, *supra* note 4.

26. Dworkin, *supra* note 8 at A1.

27. *Id.* (quoting David Straus microbiologist at Texas Tech University Health Services Center).

28. Governo & Goselin, *supra* note 5.

29. *See id.*

30. Belkin, *supra* note 4.

31. *A Mold Primer*, Cal-Osha Reporter, Apr. 20, 2001.

mold spores become airborne and produce the dangerous mycotoxins.³² “Among these [myco]toxins are trichothecenes, which were rumored to have been used as a biological weapon during the wars in Afghanistan and Vietnam.”³³

Toxic molds are known by such names as *Stachybotrys chartarum*, *aspergillus*, *penicillium*, *trichoderma*, and *helminthosporium*.³⁴ Plaintiffs allege these toxic molds cause a multitude of health problems ranging from simple clogged sinuses, sore throats, and minor skin problems to cancer, brain damage, chronic fatigue syndrome, asthma, pneumonia, respiratory tract infections, gastrointestinal maladies, vertigo, temporary hearing loss, migraines, malaise, depression, memory loss, other cognitive dysfunctions, and hemorrhaging.³⁵

Stachybotrys chartarum (“Stachy”) is especially harmful to small children. Some health professionals believe that a potential link exists between Sudden Infant Death Syndrome (SIDS) and Stachy.³⁶ Additionally, in Cleveland, toxic molds in leaky basements were associated with infant pulmonary hemorrhage.³⁷ In 1998, the American Academy of Pediatrics told “U.S. pediatricians to be on the lookout for respiratory illnesses caused

32. Bruce Flammey & Kimberly Wind, *Breaking the Mold*, 42 ORANGE COUNTY LAW. 22, Feb.2000; Edward H. Cross, *Toxic Mold, the OCBA's Lawyer Referral Service, \$60 Sushi, and \$600,000 Cases: Heaven*, 40 ORANGE COUNTY LAW. 44, May 1998.

33. Belkin, *supra* note 4.

34. David W. Alden & Robert D. Infelise, *A Toxic Threat: Preventing Investment Dollars from Molding Away*, J. PROP. MGMT., July 1, 2001 and Edward H. Cross, *Toxic Mold: The Fourth Wave of Construction Defect Litigation?*, 40 ORANGE COUNTY LAW. 26, Dec. 1998, at 26.

35. *Id.* David M. Governo & Steven Goselin, *Avoiding and Minimizing Mold Liability: Understanding the Dynamics of Mold and Its Remediation*, 15 MEALEY'S LITIG. REPT.: INS. 22, Apr. 10, 2001. Plaintiffs' allegations of the effects of mold can seem extreme. In *Tarp v. E&W Associates III*, the plaintiff alleged that his herpes was caused by mold. Gordon M. Parkland & Christopher Lozano, *A Mold Case Study*, available at <http://www.themoldsources.com/litigation/case.html> (describing the plaintiff's allegations in the case *Tarp v. E&W. Assoc. III* (Fresno County Superior Court Case No. 5965603)). The plaintiff's explanation for his herpes was that “mold exposure had impaired his immune system, which in turn resulted in a latent herpes infection ‘manifesting’ itself). *Id.*

36. Bruce Flammey & Kimberly Wind, *Breaking the Mold*, 43 ORANGE COUNTY LAWYER 25, Feb. 2000, at 25.

37. Charles W. Henderson, *Prevention: Infectious Diseases Threats Increasing*, DISEASES WEEKLY PLUS, Apr. 28, 1997. However, the link between hemorrhage and mold is disputed. The Center for Disease Control states that “[t]o date, a possible association between acute pulmonary hemorrhage among infants and *Stachybotrys chartarum* (*Stachybotrys atra*) has not been proved. Further studies are needed to determine what causes acute idiopathic hemorrhage.” Center for Disease Control & National Center for Environmental Health, *Questions and Answers on Stachybotrys chartarum and other molds*, available at <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm>.

by spores from toxic mold that can grow in flood-damaged homes.”³⁸ Doctors were advised to ask parents about water damage and mold in the home when they discover infants with bleeding lungs.³⁹ Some insurance defense lawyers complain that “concern about mold’s impact on children, whose neurological systems are developing, fuels the media” and in turn the recent increase in litigation.⁴⁰

Although the media treats mold as an emerging problem, “mold is old.”⁴¹ Moldy homes have been a problem since biblical times.⁴² “In Leviticus, the Lord tells Moses and Aaron how to rid a house of mold: first, ask a priest to inspect it; then scrape the inside walls and throw all contaminated materials in an unclean part of town. If that doesn’t work, the house ‘must be torn down – its stones, timbers and all the plaster.’”⁴³ Additionally, some historians speculate that toxic mold caused at least ten plagues in Egypt.⁴⁴ Clearly, “excessive exposure to mold has been a health issue for humans for many years.”⁴⁵

B. How Does Toxic Mold Occur?

Toxic mold generally occurs as a result of water inundation, from sources such as plumbing problems, floods, or roof leaks.⁴⁶ Mold growth requires mold spores, relatively warm temperature, moisture, and a food source.⁴⁷ Modern construction materials provide an excellent food source for mold growth.⁴⁸ Mold growth can happen in carpets, drywall, acoustical ceiling tiles, upholstered furniture, and wall coverings.⁴⁹

38. Charles W. Henderson, *Pediatrics: Pediatricians Say Mold From Floods Can Kill Infants*, Health Letter from Center for Disease Control, Apr. 27, 1998.

39. *Id.*

40. Governo & Goselin, *supra* note 5. Others attribute the sharp increase in mold litigation to the “focus on mold by the scientific, consumer protection, and legal communities.” William F. Stewart, *Mold and You: An Introductory Guide to Mold Claims for Insurance Professionals*, 1 MEALEY’S LITIG. REP.: MOLD 9, Sept. 2001, at 26.

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

42. Belkin, *supra* note 4.

43. *Id.* (noting Leviticus 14:33-45).

44. Berger, *supra* note 41, at 17.

45. *A Mold Primer*, CAL-OSHA REPORTER, April 20, 2001.

46. Cross, *supra* note 32, at 46.

47. Anthony Bartell, et al., *Builders, Subcontractors and Architects: Finding Insurance Coverage for Mold Litigation*, 15 MEALEY’S LITIG. REP.: INS. 18, Mar. 13, 2001, at (describing the ideal temperature for mold growth to be above forty degrees Fahrenheit and below one-hundred degrees Fahrenheit); Lesley King O’Neal, et al., *Sick Building Claims*, 20 CONSTRUCTION LAW. 16 (Jan. 2000).

48. Bartell, *supra* note 23.

49. O’Neal, *supra* note 47, at 16 (noting that “[s]ome obvious signs [of mold growth] are musty, earthy odors; peeling of wall coverings or paint; pink or purple areas on wallpaper; and blistering of

Modern building methods encourage mold growth.⁵⁰ Beginning in the late 1970's, spurred by the energy crisis, architects started to design more airtight buildings that retain heat or air conditioning increasing energy efficiency.⁵¹ However, when airtight buildings with poor ventilation have water leaks, "they trap high humidity and become hothouses for passing mold spores."⁵² Traditionally, buildings had massive cross ventilation, open windows, and doors.⁵³ In the past, builders carefully designed buildings to allow adequate airflow to dry out buildings because if builders did not design well-ventilated buildings, then mold, mildew, and disease would occur.⁵⁴

With the advent of tract housing, the use of cheaper building materials, like plasterboard and plywood, became common. Plasterboard and plywood are more prone to growing mold when wet than are traditional building materials that were used in the past.⁵⁵ The Center for Disease Control states that Stachy grows well on material with a high cellulose and low nitrogen content, such as plasterboard and gypsum board.⁵⁶

Another popular construction material in current use is synthetic stucco. Certain types of synthetic stucco are prone to water penetration.⁵⁷ Synthetic stucco is used as part of a system called Exterior Insulation and Finishing System (EIFS).⁵⁸ "EIFS is designed to keep water out [of a building], but if water should get in, it essentially becomes trapped and cannot drain or

plaster walls").

50. Dworkin, *supra* note 8 at A1.

51. Gene Heady, *Stuck Inside These Four Walls: Recognition of Sick Building Syndrome Has Laid the Foundation to Raise Toxic Tort Litigation to New Heights*, 26 TEX. TECH. L. REV. 1041, 1043 (1995).

52. Dworkin, *supra* note 8 at A1.

53. See Heady, *supra* note 51, at 1041, 1087 n. 1 (noting that "[i]n 1905, Andrew Harvey, President of the American Society of Heating and Ventilation Engineers [said]: Within the next 10 years, the people of every state of the Union will have become so well informed of the necessity for properly ventilated schools and public buildings that it will be considered as great a crime to construct these buildings without providing for sufficient and proper ventilation, as it would be to erect a building without a proper foundation").

54. See Lewis W. Leeds, LECTURES ON VENTILATION AT FRANKLIN INSTITUTE, 1866-68 (New York, John Wiley and Sons 1868)(noting Benjamin Franklin's concerns that buildings be well-ventilated to prevent small-pox and other fevers).

55. Ralph C. McCullough II & Michael M. Shetterly, *Problems with Synthetic Stucco*, 10 S. C. LAW 32, 34 Nov./Dec.1998.

56. Eric Berger, *supra* note 41.

57. See McCullough *supra* note 55, at 34.

58. *Id.*

otherwise be transferred from inside the wall.”⁵⁹ The rotted and weakened infrastructure eventually becomes a breeding ground for mold.⁶⁰

III. TOXIC MOLD LITIGATION: THEORIES OF LIABILITY

Many have commented on the dramatic rise in toxic mold litigation.⁶¹ The chant of plaintiffs’ lawyers is “mold is gold.”⁶² Mold related injuries currently being litigated across the country include: “chronic headache, lethargy, gastrointestinal maladies, respiratory tract infections, asthma, post-traumatic stress disorder, chronic fatigue syndrome, malaise, depression, mental fog, brain damage and cancer.”⁶³ Even celebrities are suing; Ed McMahon and Erin Brokovich both claim toxic mold destroyed their mansions.⁶⁴

Toxic mold claims have both personal injury and construction defect components.⁶⁵ The most common claims involve negligence, construction defect, bad faith, and failure to disclose mold’s presence.⁶⁶ Additional claims include constructive eviction, workers’ compensation claims, professional malpractice, strict liability, and violations of the Unfair Competition Act pursuant to Business & Professions Code section 17200.⁶⁷

59. *Id.*

60. *Id.*

61. Deering, *supra* note 5 (noting that one attorney claims that even though no exact statistics exist on the number of mold cases currently being litigated, there are “ten thousand mold-related cases in litigation throughout the United States”). By comparison there are currently more than 200,000 asbestos cases pending. Robin Jones, *Searching for Solutions to the Problems Caused by the “Elephantine Mass” of Asbestos Litigation*, 14 TUL. ENVTL. L.J. 549 (2001) (citing Legislative Controversy, 12 Asbestos & Lead Abatement Report, Dec. 1, 2000).

62. Deon Daugherty, *Insurers Fight Paying for Mold*, AMARILLO GLOBE NEWS, June 27, 2001. “Some predict the [mold] practice will surpass asbestos matters in terms of case volume and value.” See also Stephanie Francis Cahill, *For Some Lawyers, Mold is Gold: Toxic Troubles Translate Into Millions of Dollars for a Practice That’s Bound to Grow*, 87 ABA J. 22 (Dec. 2001) (claiming in the article’s title that “mold is gold”).

63. Edward Cross, *supra* note 5.

64. Lisa Belkin, *supra* note 4 (reporting that Erin Brokovich claims that her four thousand square foot house is contaminated with mold). Ed McMahon’s mansion is also over-run with mold. He claims toxic mold caused his beloved dog’s death. See Ann O’Neill, *Ed McMahon Sues Over Mold in House*, LOS ANGELES TIMES, Apr. 10, 2002, at C1, available at 2002 WL 2467283.

65. Wood, Smith, Henning & Berman, LLP, *Toxic Mold*, at <http://www.wshblaw.com>.

66. See *infra* notes 69-94 and accompanying text.

67. Alexander Robertson, IV, *Mold an Emerging Construction Defect*, GP SOLO, Apr./May 2001, at 44.

A. Negligence

The most frequent cause of action alleged in mold litigation is negligence.⁶⁸ Landlords are often the target of mold litigation. In addition to obligations expressly written in a lease, landlords have a common law and statutory duty to make repairs and to make sure that a property is “fit for human habitation.”⁶⁹ For example, in *New Haverford Partnership v. Stroot*,⁷⁰ the Delaware Supreme Court upheld a \$1.04 million award to two women whose landlord failed to address leaks and mold problems in their apartments, resulting in asthma attacks and other health problems.⁷¹ In another negligence case, the owner of an apartment building was sued for “negligently allowing mold to grow within the units, causing residents to suffer severe personal injury and death from exposure to toxic fungi and bacteria.”⁷²

In *J.J. Acquisition Corporation v. Pacific Gulf Properties*,⁷³ a California newspaper sought \$11 million for alleged mold-related injuries. After the toxic mold discovery in the newspaper’s offices, the paper filed suit against their landlord alleging negligence, fraud, and misrepresentation.⁷⁴ The newspaper claimed that “as a proximate result of the landlord’s misrepresentations, the newspaper sustained loss of income, business interruption, extensive employee illness, and damages to its personal property and fixtures.”⁷⁵ Additionally, the newspaper sought recovery from the landlord for mold remediation and replacement costs for its personal property contaminated with mold growth, and expenses related to the suspension of its business operations.⁷⁶ The newspaper further alleged that it was forced “to evacuate and relocate to temporary space and then to operate air cleaning machines twice a week to maintain acceptable air quality once it

68. Alexander Robertson, IV, *Microbiological Contamination Litigation – a.k.a. “The Mold Monster,”* ADVOCATE 16 (May 2001).

69. *Id.*

70. *New Haverford P’ship v. Stroot*, 772 A.2d, 792, 801 (Del. 2001).

71. *Id.* at 795.

72. *Fickett v. Davis Mgmt. Corp.*, No. SC-05958, (Los Angeles Super. Ct. 2000); *California Woman Sues Apartment Owner, Alleging Personal Injury and Death*, 8 MEALEY’S LITIG. REP.: TOXIC TORTS 22, Feb. 22, 2000, at 20.

73. *J.J. Acquisition Corp. v. Pacific Gulf Props.*, No. 00-AS05036 (Sacramento Super. Ct. CA 2000).

74. *Id.*

75. *Id.*

76. *Id.*

was discovered that the temporary office was also contaminated” with mold.⁷⁷

B. Construction Defect

Construction defect litigation also represents a large portion of all mold contamination litigation.⁷⁸ In new construction of residential and commercial properties, courts recognize “an implied warranty that the structure was designed in a reasonably workmanlike manner.”⁷⁹ Additionally, “a builder or seller of real property may expressly warrant the condition of the construction and improvements, which is a contractual cause of action.”⁸⁰ Contractors, builders, developers and home sellers are the principal defendants in these suits. For example, dozens of homeowners sued a developer of fifty-eight homes for building houses contaminated with mold.⁸¹ In *Fulgham v. Merit Construction Co.* and *Merit Construction Co. v. Dunham Glass Inc.*, “after a school teacher sued a general contractor, construction manager, and building designer for construction defects that allegedly led to mold growth that caused her personal injuries the general contractor sued its subcontractors.”⁸²

C. Bad Faith

The largest jury verdict in mold litigation to date has occurred in a bad-faith, negligence suit against Farmers Insurance.⁸³ The *Ballard* verdict was for \$32 million.⁸⁴ Insurers are the primary defendants in this type of

77. *Id.* In another recent landlord negligence case, two New York apartment building owners faced approximately 125 lawsuits which sought a total of \$8 billion in damages and asserted that mold contamination caused personal injury and property damage. *Davis v. Henry Phipps Plaza South*, No. 116331/98; *Rosado v. Henry Phipps Plaza South*, No. 116568/98; *Guermo v. Henry Phipps Plaza South*, No. 116959/98; *Mason v. Henry Phipps Plaza South*, No. 116895/98; *Sotomayor v. Henry Phipps Plaza South*, No. 116800/98; *Alston v. Henry Phipps Plaza South*, No. 116958/98; *Ilse Bormann v. Henry Phipps Plaza South*, No. 115468/00 (N.Y. Sup. 2002). The plaintiffs were denied class certification; however, after a joint trial of the seven cases began, the cases were settled for 1.17 Million. *500 New York Apartment Residents Settle Mold Injury Claims for \$1.17 Million*, Jan. 11, 2002, available at http://mealeys.com/stories_tox.html.

78. Deering, *supra* note 5.

79. Robertson, *supra* note 68.

80. *Id.*

81. *Dozens Sue Developer Alleging Home Defects*, LOS ANGELES TIMES, Aug. 16, 2001, at B7.

82. *Schoolteacher Alleges Mold Caused Injuries: Sued Building Contractors*, 9 MEALEY'S EMERGING TOXIC TORTS 15, Nov. 3, 2000, at 17 (reporting on *Fulgham v. Merit Construction Co.* and *Merit Construction Co. v. Dunham Glass Inc.*, No. 00-2-11090-ISEA (Wash. Super. King Co. 2000)). In October 2000, a homeowners group settled, for \$1.3 million, toxic mold claims against builders and contractors. *Club v. Wood Ranch*, No. 21522 (.Cal. Super Ct. 2000).

83. See *supra* note 9-15 and accompanying text.

84. See *supra* note 9-15 and accompanying text.

litigation. Another plaintiff victory occurred, in *Blum v. Chubb Custom Insurance Co.*, when a homeowner settled a mold related bad-faith lawsuit against his insurer, for \$1.5 million.⁸⁵

D. Failure to Disclose in Sale of Property

Failure to disclose mold's presence on a property promises to be a popular area of mold litigation. In many states, every person who sells or transfers title to residential real estate must disclose all facts that materially affect the value or desirability of property.⁸⁶ Real estate agents are also required to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to the prospective buyer all facts materially affecting the value or desirability of the property that an inspection would reveal.⁸⁷ In *Gifford v. Matejka*,⁸⁸ the Washington Court of Appeals overturned a summary judgment for a seller alleged to have sold property without disclosing mold's presence on the property.⁸⁹ The plaintiff claimed that the real estate agents for the seller "falsely represented bleach stains on the walls and carpeting as being from ordinary housecleaning, not from mold or mildew."⁹⁰

In response to the mold litigation threat, real estate agents in California have begun to advise buyers that the presence of certain types of mold may adversely affect the property and the health of certain individuals.⁹¹ New legislation will make mold's presence on a property a mandatory disclosure

85. *Blum v. Chubb Custom Ins. Co.*, No. 99-3563 (Nueces Co., Tex. Dist. Ct. 2000). After almost three weeks in trial, the case settled. *Id.*

86. See generally *Easton v. Strassburger*, 199 Cal. Rptr. 383 (Ct. App. 1984).

87. CAL. CIV. CODE § 2079 (West 2002).

88. *Gifford v. Matejka*, 107 Wash App. 1014 (Wash. App. Div. 2 2001) 2001 WL 819067.

89. *Washington Court Overturns Judgment for Home Seller in Toxic Mold Case: Gifford v. Matejka*, 19 ANDREWS TOXIC CHEMICALS LITIG. REP. 9, Aug. 24, 2001, at 8.

90. *Id.*

91. See Toxic Mold Disclosure Advisory, Prudential California Realty. The disclosure states: Buyers are advised the presence of certain kinds of mold, fungi, mildew and/or other organisms may adversely affect the property and the health of certain individuals. These conditions, sometimes referred to as "Toxic Mold", are often the result of moisture invasion or water leakage inside the home. Buyers are advised to have the property inspected for the existence of such conditions or organisms, or the conditions that may lead to their formation, during the buyers' physical inspection contingency period. Buyers are also advised to consult with appropriate experts regarding this topic if they have any questions or concerns. Broker and its agents do not have expertise on this topic.

Id.

in California.⁹² Within six months after the establishment of permissible levels of mold exposure, all sellers and lessors in California will be required to make a mold disclosure.⁹³

Failure to disclose claims can occur in other contexts than the sale or lease of property. For example, an employee filed suit against a biotechnology company seeking \$2 million from the company alleging “it concealed the presence of toxic mold in a ‘clean room’ used to manufacture an anemia drug for kidney dialysis patients.”⁹⁴

IV. TOXIC MOLD LITIGATION V. ASBESTOS LITIGATION

There is a concern by the insurance industry and other legal commentators that toxic mold could become another asbestos issue,⁹⁵ which has cost insurers approximately \$22 billion to date.⁹⁶ Some commentators have noted that the toxic mold remediation industry appears to be at the same level of development as asbestos abatement was twenty years ago.⁹⁷

Notwithstanding these comparisons there are significant differences between asbestos and mold which may dampen the progress of mold litigation and stop mold litigation from becoming the next “pot of gold” for plaintiff’s attorneys. Eight key differences distinguish mold litigation from asbestos litigation: (A) there is a lack of scientific research or consensus in the medical community linking mold to specific medical ailments; (B) there is no signature disease associated with mold; (C) asbestos kills, mold does not; (D) there are no definitive biological markers for mold; (E) mold and mold-related illness are frequently immediately apparent; (F) there are no federal guidelines for permissible mold exposure limits; (G) there are no “mold-product” manufacturers; and (H) there are insurance coverage

92. Toxic Mold Protection Act of 2001. CAL. HEALTH & SAFETY CODE §26100 – 26156 (West 2002).

93. *Id.*

94. *California Company Accused of Concealing Toxic Mold in Anemia Drug, “Clean Room”*, 9 MEALEY’S EMERGING TOXIC TORTS 14, Oct. 20, 2000, at 12.

95. “[T]he asbestos problem was enormous, and [mold] is going to make that look small.” Stewart, *supra* note 40 (quoting a Texas public adjuster’s statement to an ABC News reporter). In the spring of 2001, the co-chair of the National Association of Independent Insurers Task Force warned “mold could be the next asbestos in terms of litigation and insurance losses.” Deering, *supra* note 5 at 12.

96. Dworkin, *supra* note 8 at A1. The insurance industry predicts that asbestos claims will total \$65 billion by the year 2020. Stewart, *supra* note 40; Jerold Oshinsky & Judith Hall Howard, *New and Emerging Areas in Insurance Coverage Litigation*, SG004 ALI-ABA 421, 434, Oct. 11-12, 2001 (citing A.M. Best’s 2001 report *Asbestos Claims Set to Dampen Earning for Commercial Insurers* which estimates that asbestos claims could ultimately cost insurance companies \$65 billion).

97. *PDG Expands Services to Capture Share of Mold Assessment Market*, ENVTL. LABORATORY WASH. REP., Sept. 13, 2001, at 17.

exclusions for mold. These eight key differences should prevent mold litigation from mimicking asbestos litigation.

A. The Lack of Scientific Research or Consensus in the Medical Community Linking Mold to Specific Medical Ailments

In mold litigation that deals exclusively with property damage, plaintiffs may not be required to show that a mold condition actually caused specific medical ailments in order to establish liability.⁹⁸ However, when litigation involves alleged personal injury due to mold's presence, the personal injury aspect of the toxic mold case is the toughest hurdle for the plaintiff.⁹⁹ A defendant's best defense in personal injury mold cases is that the alleged injuries are not causally related to mold's presence.¹⁰⁰ Most toxic tort plaintiffs have difficulty establishing causation with any certainty.¹⁰¹ It is extremely difficult to establish causation in toxic mold cases because there are no established guidelines for how much mold exposure is too much.¹⁰²

"Very few good studies have examined whether, and how, people can get sick by breathing spores from indoor molds. That's because the government and industry seldom fund indoor mold research."¹⁰³ According to Dr. Andrew Campbell, director of the Center for Immune, Environmental and Toxic Disorders, during the past decade, five hundred articles have been published in journals linking mold to health problems.¹⁰⁴ However, most of the papers "deal with the less life-threatening health effects such as allergies."¹⁰⁵

98. O'Neal, *supra* note 47 (citing *Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20 (Fla. Dist. Ct. App. 1997) ("Centex's claim that the County was required to prove that the construction defects caused an actual health hazard misses the mark.").

99. See Laurie Alberts, comment, *Causation in Toxic Tort Litigation: "Which Way Do We Go, Judge?"* 12 VILL. ENVTL. L.J. 33, 37-38 (2001).

100. Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 ST. THOMAS L. REV. 511, 528, (1996).

101. Alberts, *supra* note 99.

102. See *A Mold Primer*, CAL-OSHA RPTR., April 20, 2001 (noting that "'due to the variances in personal sensitivities and the vast array of molds, it has been impossible to set exposure limits. . . that can be applied to all humans'").

103. Dworkin, *supra* note 8 at A1.

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

105. *Id.* Of course, plaintiff's attorneys dispute the lack of scientific evidence linking mold to specific ailments. See Michael J. Bidart & Jamison R. Narbaitz, *Sickly Abodes*, L.A. DAILY J., Jan. 4, 2002 at S10 (claiming that "[m]old hazards recently have become clear. Mycologists, experts in mold behavior and analysis, confirm that exposure to toxic mold causes medical conditions.").

Much research is needed on the risk posed by mold. The key question is not simply whether mold causes a disease, but whether mold at certain exposure levels causes the disease.¹⁰⁶ “Scientific certainty that exposure to certain substances causes given diseases is often unavailable. Each person’s physical idiosyncrasies, genetic make-up, and medical history make the determination of individual causation close to impossible.”¹⁰⁷ The National Center for Environmental Health notes that “[t]here are very few case reports that toxic molds . . . inside homes can cause unique or rare, health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxic mold and these conditions has not been proven.”¹⁰⁸

Stachybotrys has killed animals, but no human fatalities have been reported.¹⁰⁹ A 1999 Mayo Clinic study found that nearly thirty-seven million Americans have chronic sinus problems because of mold.¹¹⁰ Thus, the only health problems that have been firmly associated with exposure to mold are that “[p]eople with allergies may be more sensitive to molds (and) people with immune suppression or underlying lung disease are more susceptible to fungal infections.”¹¹¹

In contrast to asbestos, there are many unanswered questions with regard to the effects of toxic mold on health. More mold medical research is needed before mold litigation can reach the level of asbestos litigation.

Based on research for this comment, the most frequent and only medical report used by plaintiff’s attorneys to bolster their mold-related illness claims is a report written by Dr. Eckardt Johannung. *Id.*

106. Geisler, *supra* note 100 at 528. “The lack of specific ‘dose-response’ data and the numerous other sources of indoor air pollution (tobacco smoke, chemicals, dust mites, and so forth) present problems in proving that exposure to a specific mold caused specific symptoms.” Lesley King O’Neal, et al., *Sick Building Claims*, 20 CONSTRUCTION LAW. 16, Jan. 2000.

107. Alberts, *supra* note 99 at 63 n.6 (citing Patricia E. Lin, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 REV. LITIG. 551, 552 (1998)).

108. *Questions and Answers on Stachybotrys chartarum and other molds*, Center for Disease Control–National Center for Environmental Health, at Q8, <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm> (last viewed June 6, 2002)

109. Geisler, *The Fungusamungus*, *supra* note 100, at 528.

110. *World News Tonight with Peter Jennings* (ABC television broadcast, June 26, 2001).

111. *Questions and Answers on Stachybotrys chartarum and other molds*, *supra* note 108, at Q6. See also Jerold Oshinsky & Judith Hall Howard, *New and Emerging Areas in Insurance Coverage Litigation*, SG004 ALI-ABA 421, 444 (2001) (noting that “[i]n the 1970s and 1980s, molds [sic] was identified as the primary cause of poor indoor air quality in only five percent of the 500 buildings [the National Institute of Occupational Safety and Health] examined. In the 1990s, mold was identified as the primary cause of poor indoor air quality in 35-50% of the buildings studied”).

B. No Signature Disease

Unlike asbestos, there is no signature disease associated with mold exposure.¹¹² Asbestos is causally linked to several deadly diseases: asbestosis, lung cancer, and mesothelioma.¹¹³ “Exposure to airborne asbestos particles has been proved to cause asbestosis, a debilitating and fatal lung disease.”¹¹⁴

A curious aspect of mold litigation is that it started before scientific research had firmly established a causal link between mold and disease. In contrast to mold litigation, the bulk of asbestos litigation started after asbestosis was discovered, not before.¹¹⁵ By the 1930s, medical studies had firmly established a link between asbestos exposure and disease.¹¹⁶ The surge of asbestos litigation began in the 1970s.¹¹⁷

The lack of a signature disease associated with mold exposure should create difficulty in establishing causation in mold cases.¹¹⁸ The success of a mold case, like other toxic tort cases, hinges on the admissibility and credibility of expert witnesses.¹¹⁹ Expert witness testimony is often essential to establish causation.¹²⁰ Thus, the biggest litigation battles are between parties over the admissibility of scientific evidence through expert testimony, which can be critical to a plaintiff’s case.¹²¹ “[R]uling against admissibility frequently sounds the death knell for a plaintiff’s cause of

112. See *supra* Part IV Sec. A and accompanying text and notes. “Mold is being compared to asbestos The big difference between the asbestos issue and the mold issue is the lack of scientific knowledge about the health effect, if any, of mold exposure.” Southwestern Insurance Information Services, *SIIS Recommends Policy Reform Regarding Mold*, Oct. 2001, at <http://moldupdate.com/industry.htm>.

113. DEBORAH HENSLER, ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 13-14 (Rand 1985).

114. *Fears Outweigh the Facts About Mold*, *The Times-Picayune*, Nov. 4, 2001, at O6 available at 2001 WL 26212603.

115. See HENSLER, *supra* note 113, at v.

116. *Id.* at 14. (noting that “[b]y 1935, asbestosis was identified, and . . . was ‘widely recognized as a mortal threat affecting a large fraction of those who had regularly worked with [asbestos]’”(second alteration in original).

117. See *id.* at 18-29.

118. It should be difficult to establish causation and win or settle a mold-lawsuit; however, even though the scientific evidence is lacking to establish a link between mold and disease, plaintiffs are winning personal injury mold lawsuits. Deering, *supra* note 5 at 12.

119. See Alberts, *supra* note 99 at 40.

120. See *id.*

121. Bob Van Voris, *It’s Not Sexy, but Mold is Catching Some Eyes*, *FULTON CO. DAILY REP.*, June 11, 2001, at 1.

action.”¹²² Experts in toxic mold cases include “mycologists, microbiologists, industrial hygienists, neuropsychologists, immunologists, toxicologists, and occupational and environmental medical doctors.”¹²³

Under current federal evidentiary standards, mold cases based on “expert” testimony can be challenged.¹²⁴ In *Minner v. American Mortgage and Guaranty Co.*,¹²⁵ defendants successfully argued that plaintiff’s expert opinions alleging a causal link between mold and chronic fatigue syndrome and fibromyalgia did not meet the standard for admissibility of scientific evidence.¹²⁶

However, even though scientific evidence is lacking to support mold injury claims and there is no signature disease, courts are finding in favor of plaintiffs and cases are often settled.¹²⁷ Why, then, do plaintiffs win or receive large settlements when scientific evidence is so weak? Ironically, the lack of scientific evidence may favor current plaintiffs. Mold litigation has been described as “a little like the Wild West right now.”¹²⁸ All parties to mold litigation have a difficult time assessing causation and the value of a

122. Alberts, *supra* note 99 (quoting Paul S. Miller & Bert W. Rein, *Wither Daubert? Reliable Resolution of Scientifically-Based Causality Issues in Toxic Tort Cases*, 50 RUTGERS L.J. 563, 567 (1998)).

123. Alexander Robertson, IV, *Mold and Emerging Construction Defect*, 3 GP SOLO 44, 49 (April/May 2001). In *Tarp v. E&W Associates III*, the parties hired at least twelve experts to litigate the case. Gordon M. Parkand & Christopher Lozano, *A Mold Case Study: Tarp v. E&W Associates III*, at <http://www.themoldsource.com/litigation/case.html>. The plaintiffs hired a structural engineering expert, a geotechnical engineer, a roofing expert, an occupational health specialist, a certified industrial hygienist, and an economist. *Id.* The defense team hired a structural engineering expert, a roofing expert, a neurologist, a neuropsychologist, a certified industrial hygienist, and a forensic economist. *Id.*

124. David W. Alden & Robert D. Infelise, *A Toxic Threat: Preventing Investment Dollars From Molding Away*, J. PROP. MGMT., July 1, 2001. State and federal courts use different evidentiary standards to determine admissibility of “expert” testimony. The test for admissibility of scientific expert testimony in federal courts was established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). The *Daubert* court held that the trial court must determine whether the expert testimony constitutes scientific knowledge by analyzing the following factors: (1) whether the theory has been subjected to peer review or publication; (2) whether the theory can be or has been tested; (3) whether there is a known, acceptable rate of error, and (4) whether the theory is generally accepted. *Id.* at 593-94. Many state courts still use the *Frye* test for admissibility of expert testimony. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The *Frye* test disallows expert opinion unless the expert opinion is based on a scientific technique “generally accepted” as reliable in the relevant scientific community. *Id.* Despite the different standards which courts use to analyze expert testimony, in most toxic tort litigation expert testimony on causation is excluded. Laurie Alberts, *supra* note 99 at 48.

125. *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826 (Del. 2000).

126. *Id.* at 854-55. The court used the *Daubert* standard for admissibility of scientific evidence. *Id.* at 846.

127. Deering, *supra* note 5 at 12. A California insurance defense attorney claims ninety-seven percent of mold claims settle. Cahill, *supra* note 62 at 22.

128. Cahill, *supra* note 62, at 22 (noting that until there is more scientific research and knowledge about the effects of mold, accurate valuation of mold cases will be difficult).

case due to the lack of scientific research and knowledge available linking mold to disease.¹²⁹ When a defendant evaluates whether to settle a mold case or litigate, the high cost of litigation must play a role in the decision. The lack of scientific evidence actually leads to intense battles of the experts.¹³⁰ The expert battles lead to costly litigation.¹³¹ Rather than go to trial, most defendants settle mold cases.¹³²

Another factor that favors current plaintiffs in mold litigation is the widespread belief that “mold is bad.”¹³³ One psychologist has observed that jurors and judges are afraid of mold.¹³⁴ News shows distribute powerful images featuring mold abatement workers in hazmat-like suits with masks and full-body protective gear.¹³⁵ These images make it “more likely [for jurors] to accept the first argument of any plaintiff’s case in [mold] litigation; namely, that mold is dangerous.”¹³⁶

However, science will eventually catch up with mold litigation. Until it does, there will be settlements to avoid costly mold litigation. With more scientific research, the health effects attributed to mold exposure should become more clearly defined. The unknowns related to mold litigation and the general public’s fear of mold will probably diminish. Without the discovery of a signature disease linked to mold exposure, mold litigation will not reach the level of asbestos litigation.

129. *See id.*

130. *See* Gordon M. Parkand & Christopher Lozano, *A Mold Case Study: Tarp v. E&W Associates III*, at <http://www.themoldsource.com/litigation/case.html>. The *Tarp* trial lasted a month, the vast majority of the time consumed by expert testimony. *Id.*

131. *See id.* The defense costs which included attorney’s fees and expert fees, totaled \$653,000. *Id.*

132. *See* Cahill, *supra* note 62, at 22 (noting that ninety-seven percent of mold claims settle).

133. *See* Dr. Matthew Milano, *Emerging Attitudes Regarding Mold and Sick-Building Litigation*, 2 MEALEY’S LITIG. REP.: MOLD 1 (Jan. 2002) (claiming judges and jurors are anxious about mold’s health effects).

134. *Id.*

135. *Id.*

136. *Id.* Dr. Milano, a clinical psychologist speculates that:

Issues surrounding mold and sick-building cases can be frightening to potential triers of fact. Mold is invisible; special equipment is needed to detect and measure it; it may exist in a judge or juror’s home or workplace; and it has the potential to make people chronically ill. In addition, it is not clear what levels of exposure are safe, what levels present health risks to sensitive individuals, and what levels present significant health risks to most individuals (whether or not they have a prior sensitivity). In an area of litigation where both plaintiffs and defendants struggle with scientific issues of measurement and causation, jurors’ fears and anxieties present an added challenge.

Id.

C. Asbestos Kills, Mold Does Not

Another significant difference between mold and asbestos is “mold related injuries are less severe and less permanent than asbestos exposure injuries.”¹³⁷ Workers who were exposed to asbestos years ago now have serious disabling injuries, and many have died of asbestos related diseases.¹³⁸ Asbestos kills, mold does not.¹³⁹

In contrast to asbestos, symptoms related to mold exposure are transient.¹⁴⁰ “Often when the mold is removed or the complainant removes himself from the mold, transient symptoms of headaches, respiratory conditions, and irritants seem to subside and even disappear.”¹⁴¹ The transient symptoms and ailments currently related to mold pale in comparison to the firmly established diseases related to asbestos, such as asbestosis, lung cancer, and mesothelioma. Comparing the severity of asbestos injuries to the severity of mold injuries, it seems logical to conclude that mold litigation will not mimic the level of asbestos litigation.

D. No Definitive Biological Markers for Mold

Another challenge that confronts mold plaintiffs is that there are no definitive biological markers for mold. Currently “there are no specific tests a doctor can order to even confirm if a person has had a toxic exposure to molds like *Stachybotrys*.”¹⁴² The logical conclusion drawn is that without definitive biological markers for mold, mold litigation will not reach the level of asbestos litigation.

137. Stewart, *supra* note 40.

138. See HENSLER ET AL., *supra* note 113, at 18 -34.

139. See Geisler, *supra* note 100, at 528.

140. Susan Hickman, *Mold: The Risk and the Reality*, 1 Mealey's Litig. Rep.: MOLD 12 (Dec. 2001).

141. *Id.* (citing a case where an individual exposed to mold developed pneumonia; yet, after the mold was removed from his home's carpet and air-conditioning unit, the individual's health improved).

142. Margie Boule, *Toxic Mold or Media Hype? Lack of Proof Leaves Worried Families in Limbo*, THE OREGONIAN, Nov. 9, 2000, available at 2000 WL 27106881 (quoting Dr. Daniel Sudakin, M.D., a medical toxicologist at OHSU. Additionally, Dr. Sudakin notes that “[t]here is a lot of conflicting and confusing information out there on the toxic effects from exposure to indoor molds like *Stachybotrys*. . . . There are still many unanswered questions.”). *But see* Cahill, *supra* note 62 at 22 (noting that a plaintiff's attorney, Guy Keith Vann of New York City, claims that mold exposure leads to an antibody buildup in the bloodstream.) Vann says, “If environmental testing of the premises shows high levels of [toxic mold], and antibody marker studies show excessively high levels of antibodies for all of those three, you can objectively and conclusively prove exposure.” *Id.* However, no scientific sources validating Vann's claims are mentioned in the article. *Id.*

E. Mold and Mold Related Illness are Frequently Immediately Apparent

The number of Americans exposed to considerable amounts of asbestos is extremely high.¹⁴³ Due to its heavy use in industrial settings, more than twenty-one million Americans were exposed to significant amounts of asbestos.¹⁴⁴ Asbestos injuries and symptoms occur many years after exposure.¹⁴⁵ Thus, industrial workers had no symptoms to alert them to the danger of asbestos.¹⁴⁶ The lack of concurrent symptoms with asbestos exposure intensified asbestos injuries; workers did not leave hazardous situations because they experienced no negative health effects during asbestos exposure.¹⁴⁷

Symptoms related to mold exposure occur in the presence of mold; there are no latent symptoms.¹⁴⁸ In fact, once an individual is removed from mold's presence, symptoms generally disappear.¹⁴⁹ Thus, unlike asbestos, an individual exposed to mold could limit their level of mold exposure at the onset of symptoms and in so doing limit the amount of personal injury suffered.

F. No Federal Guidelines for Permissible Mold Exposure Limits

Another key difference between mold and asbestos is that there are no established federal guidelines that cover acceptable levels of mold exposure.¹⁵⁰ In contrast, there are federal guidelines for asbestos exposure.¹⁵¹

143. See *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. 710, 736 (Bankr. E.D.N.Y. 1991).

144. *Id.* See also Robin Jones, *Searching for Solutions to the Problems Caused by the "Elephantine Mass" of Asbestos Litigation*, 14 TUL. ENVTL. L.J. 549, 551 (describing the evolution of asbestos litigation); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 867 (1999) (stating that thirteen to twenty-one million workers are estimated to have been exposed to asbestos). In *Ortiz*, the Supreme Court called for legislative action claiming that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation." *Id.* at 821.

145. HENSLER, & ET AL., *supra* note 113, at vi.

146. See *id.* at v.

147. See *id.* at vi.

148. See *supra* note 139 and accompanying text.

149. See *supra* note 139 and accompanying text.

150. Boule, *supra* note 142.. There is not an agreed-upon or proven safe or unsafe level of mold in the environment. *Id.* "There are no 'official' standards or guidelines for fungal or bacterial bioaerosols." Alexander Robertson, IV, *Microbiological Contamination Litigation – a.k.a. "The Mold Monster"*, Advocate 16, 20 (May 2001). "At present, there are no federal standards setting acceptable levels of exposure to toxic mold and no regulation of mold remediation." Deering, *supra* note 5.

Until recently there has been essentially no government response to the toxic mold problem.¹⁵² No federal laws regulate permissible human mold exposure limits.¹⁵³ However, in 2001, California took the lead in attacking the toxic mold problem. When Governor Gray Davis approved the Toxic Mold Protection Act of 2001, California became the first state to attempt to establish standards for permissible exposure limits to mold.¹⁵⁴ The Act instructs the California Department of Health Services (CDHS) to establish a mold task force of health and medical experts; education and county representatives; and corporate executives “to consider the feasibility of adopting permissible exposure limits to molds in indoor environments.”¹⁵⁵ If feasible, the CDHS must adopt exposure limits for mold in indoor environments.¹⁵⁶ Additionally, the CDHS is required to develop and adopt standards for the assessment of the health threat posed by the presence of

“Currently there are no Federal regulations for evaluating potential health effects of fungal contamination and remediation.” Southwestern Insurance Information, *SIIS Recommends Policy Reform Regarding Mold*, Oct. 2001, at <http://moldupdate.com/industry.htm>.

151. See generally ASBESTOS HAZARD EMERGENCY RESPONSE ACT OF 1986, Pub. L. No. 101-637, §12, 104 Stat. 4593 (1990).

152. On June 27, 2002, U.S. House Representative John Conyers Jr., a Michigan Democrat, introduced an ambitious toxic mold bill entitled the U.S. Toxic Mold Safety & Protection Act of 2002. See Toxic Mold Safety & Protection Act of 2002, H.R. 5040, 107th Cong., §1(a) 2d Sess. (2002). Also known informally as the “Melina Bill”, the proposed legislation would require the Center for Disease Control, the Environmental Protection Agency (EPA) and the National Institute of Health to jointly study the health effects of indoor mold growth and toxic mold. *Id.* at §§1(a), 102(a). Additionally, the Melina Bill would require the EPA to establish standards to prevent and detect mold. *Id.* at §§103(a)(1)-(3). The comprehensive Melina Bill would also require that (1) rental properties be inspected each year; (2) mold hazards be disclosed in residences sold or rented; (3) mold inspections occur before the federal government issues or insures a mortgage; (4) professional standards for mold removal workers be established; and (5) a mold insurance pool be created. *Id.* at §§201, 202(b), 206, 301, 601. Critics believe the Bill will not be passed because it involves too many federal agencies and too many congressional committees. See Kelly Johnson, *Congress To Get First Mold Bill; It Already Seems Stuck*, SACRAMENTO BUS. J., June 28, 2002, at www.moldupdate.com.

153. Dworkin, *supra* note 8 at A1. In 1998, the U.S. Congress directed four million dollars to preventive measures to correct moisture and mold problems in inner city housing where toxic mold exposure was linked to acute pulmonary hemorrhage and infant death. HUD’s Office of Lead Hazard Control Receives Higher Funding for FY’99, ASBESTOS & LEAD ABATEMENT REP., Oct. 13, 1998, available at 1998 WL 10112936.

154. Toxic Mold Protection Act, S.B. 732, 2001-2002 Reg. Sess. (Cal. 2001) (The act became effective on January 1, 2002); Emily Bazar, *California Governor Approves Regulation of Toxic Mold in Homes*, THE SACRAMENTO BEE, Oct. 9, 2001, available at 2001 WL 28745261. Other states that have recently tackled the problem of indoor mold include: Maryland, S.B. No. 283, 2001 Leg., Reg. Sess. (Md. 2001)(establishes a task force on Indoor Air Quality – effective July 1, 2001), Nevada, S.B. No. 584, 71st Leg., Reg. Sess. (Nev. 2001)(authorizes bond issuance to finance capital improvements for toxic mold remediation and prevention – effective June 14, 2001), and New Jersey, S.R. No. 77, 209th Leg. Sess. (N.J. 2000)(a senate resolution urges the state to develop methods to help residents identify mold and develop strategies to address it).

155. Cal. S.B. 732.

156. *Id.*

molds.¹⁵⁷ The CDHS is required to report its progress on developing the permissible exposure limits and standards for assessment for molds by July 1, 2003.¹⁵⁸ Finally, the Toxic Mold Protection Act requires landlords and home-owners to disclose in writing the presence of toxic mold when selling or renting residential, commercial, or industrial property.¹⁵⁹ The property owner's disclosure duties will begin six months after the CDHS adopts permissible exposure limits.¹⁶⁰

One state does have guidelines concerning mold removal. In 1993, the New York City Department of Health developed guidelines that deal exclusively with mold abatement.¹⁶¹ The New York guidelines *only* address how to properly assess the existence of mold and proper mold removal techniques for indoor environments.¹⁶² Unlike the Toxic Mold Protection Act, the New York guidelines do not address permissible human mold exposure limits.¹⁶³

The lack of federal government involvement in assessing the mold problem and lack of established permissible mold exposure limits create problems in establishing causation in mold litigation. The recently enacted Toxic Mold Protection Act attempts to address this problem, but it remains to be seen whether the California Department of Health Services will be successful in establishing limits for acceptable levels of mold exposure.¹⁶⁴ Until permissible mold exposure limits are developed, mold litigation will not reach the level of asbestos litigation.

G. No Mold-Product Manufacturers Means No "Deep Pockets" for Plaintiffs

An additional factor that distinguishes mold from asbestos litigation is the absence of product manufacturers as defendants in mold litigation.

157. *Id.*

158. *Id.*

159. *Id.*

160. Toxic Mold Protection Act, S.B. 732, 2001-2002 Reg. Sess. (Cal. 2001).

161. New York City Department of Health & Mental Hygiene Bureau of Environmental & Occupational Disease Epidemiology, *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*, at <http://nyc.gov/html1/doh/html/epi/moldrpt1.html> (Jan 2002).

162. *Id.*

163. Governo & Goselin, *supra* note 5.

164. The Department of Health Services is required to report its progress on developing the permissible exposure limits for molds by July 1, 2003. Toxic Mold Protection Act, Cal. S.B. 732, 2001-2002 Reg. Sess. (Cal. 2001).

Asbestos and mold are both naturally occurring substances.¹⁶⁵ However, asbestos victims were not exposed to naturally occurring asbestos; asbestos exposure occurred through the widespread industrial use of asbestos.¹⁶⁶ Asbestos is intentionally contained in products. Mold is not. Therefore, with the exception of synthetic stucco and EIFS,¹⁶⁷ mold cases cannot be filed against a product manufacturer. In contrast to mold litigation, the bulk of asbestos litigation was against product manufacturers.¹⁶⁸

Claims were filed against multiple manufacturers in asbestos litigation; asbestos lawsuits named on average twenty manufacturers.¹⁶⁹ When multiple product manufacturers are named as defendants, larger damage recoveries are possible in a lawsuit.

Additionally, asbestos manufacturers were guilty of “outrageous misconduct”.¹⁷⁰ There was evidence that some manufacturers knew about the dangers of asbestos exposure as early as the 1930s.¹⁷¹ There are no “evil” manufacturers to blame in mold litigation. Jurors in mold litigation will probably not be able to vent outrage at an industry as they have in tobacco¹⁷² and asbestos litigation. Theoretically, without the outrage, punitive damage awards should be lower in mold litigation. Thus, the lack of product manufacturers further limits mold litigation’s ability to mimic asbestos litigation.

H. Insurance Coverage Exclusions for Mold

Finally, mold coverage is often excluded from insurance policies.¹⁷³ Insurers claim mold is “an owner’s maintenance task, like dusting.”¹⁷⁴ With

165. PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 10 (1985) (noting that the Greeks and Romans were awed by “the magical mineral” known as asbestos). The word “asbestos” comes from the Greek word meaning inextinguishable. *Id.*

166. Jody L. Gallegos, note, *Three Decades of Frustration: Finally, A Solution to the Asbestos Problem*, 15 ST. JOHN’S J. LEGAL COMMENT. 61, 63 (2000) (stating that “[a]sbestos has been used in the manufacturing of hundreds of products found in dozens of American industries).

167. *See supra* notes 58-61 and accompanying text.

168. Stewart, *supra* note 40 at 24, 28 (observing that “[u]nlike in asbestos cases, the defendants in a mold case are usually not the manufacturers of a product that contained a harmful toxin”).

169. DEBORAH R. HENSLER & ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 15 (Rand 1985).

170. *See generally*, BRODEUR, *supra* note 165 (citing substantial evidence that at least some asbestos manufacturers knew about the dangers of asbestos exposure as early as the 1930s).

171. *Id.*

172. *See* Joan Biskupic, *Jurors Vent Outrage at Industry*, WASH. POST, Aug. 30, 1999, at A1 (explaining that jurors’ outrage at tobacco industry led to an \$80 million punitive damage award).

173. Sandy Stokes, *Lawyers, Builders at Odds Over Growth of Suits*, THE PRESS ENTERPRISE, Nov. 4, 2001, A9, available at 2001 WL 27541409 (noting that “[h]omeowners insurance covers mold *only* when it grows as a result of a covered event, such as a ruptured water pipe.”) (emphasis added).

174. Dworkin, *supra* note 8, at 4.

the onslaught of mold litigation, insurers are aggressively trying to limit their liability to mold claims.¹⁷⁵ In Texas, where mold-related insurance claims have skyrocketed this year, State Farm, Allstate, and Farmers have stopped writing new insurance policies covering water-related damage.¹⁷⁶ Additionally, Farmers Insurance Group will not renew homeowners' insurance policies in Texas.¹⁷⁷ If other insurers follow Farmers' lead in limiting liability in markets where mold claims are concentrated, then the deep-pockets of insurers will not be available to future mold-plaintiffs. These pro-active tactics by insurers will not only effectively limit an insurers' liability,¹⁷⁸ but will also effectively limit the size of mold-litigation. Without insurers as defendants, mold litigation will have a very difficult time mimicking asbestos litigation.

V. CONCLUSION

Unquestionably, mold litigation is on the rise around the country. Both plaintiffs and defense attorneys are gearing up their legal departments to handle the increase in litigation.¹⁷⁹ But, will it rise to the level of asbestos litigation? Probably, not. It is premature and unwarranted to label mold "the next asbestos." For the last three decades, asbestos personal injury cases have burdened many federal and state courts.¹⁸⁰ It is estimated that more than 200,000 asbestos cases are currently pending in state and federal courts.¹⁸¹ In contrast, it is estimated that there are currently only 10,000

175. Michael J. Bidart & Jamison R. Narbaitz, *Sickly Abodes: Viewpoint: As Mold Continues to Spread, Homeowners Should Know the Fungus is Not Always Covered Under Their Insurance*, L.A. DAILY J., Jan. 4, 2002, at 10 (noting that "[i]nsurance companies are eliminating coverage explicitly for water and mold damage in response to homeowner arguments that mold should be covered as an ensuing loss from water damage.").

176. Lynna Goch, *Mold: A Growing Problem*, BEST'S REVIEW (Nov. 1, 2001), at 26, available at 2001 WL 12285826.

177. *Farmers Plans to Drop Home Insurance*, AP ONLINE, Nov. 10, 2001, at 2001 WL 29792785. "Farmers reported Friday that its water and mold losses increased 158 percent from August 2000 to August [2001]. In 1999, the company had [twelve] mold claims in Texas. Last year it had 499, and already this year it has been hit with nearly 8,000 – including 1,500 in September." *Id.*

178. Stewart, *supra* note 40, at 36 (concluding that "mold-related injuries and property damage will not have extended latency periods. Thus, if broad mold exclusions are added to property and liability [insurance] policies in the near future, mold claims will be effectively minimized.").

179. See Cahill, *supra* note 62 at 22 (commenting on the growth of the legal mold practice).

180. Gallegos, *supra* note 166, at 61.

181. Robin Jones, comment, *Searching for Solutions to the Problems Caused by the "Elephantine Mass" of Asbestos Litigation*, 14 TUL. ENVTL. L. J. 549 (2001)(citing Legislative Controversy, 12 Asbestos & Lead Abatement Report, Dec. 1, 2000). The 200,000 asbestos case estimate represents a dramatic increase from the 1999 Congressional estimate of asbestos case load of 150,000 cases. See

mold cases being litigated around the country.¹⁸² The real litigation problem continues to be asbestos.¹⁸³

Unless more conclusive scientific evidence is discovered to link toxic mold with specific, identifiable health problems, the personal injury component of all mold claims will probably never reach the level of asbestos litigation. In addition, insurers, who have learned valuable lessons from asbestos litigation, are aggressively maneuvering to limit their potential liability to future mold litigation.¹⁸⁴ The insurers' strategy should limit the size of mold litigation.

Furthermore, since mold is a naturally occurring substance, there are no product manufacturers to drag into court.¹⁸⁵ Property owners, builders, contractors and developers are left as the defendants in mold litigation. Property owners can limit their liability through adequate disclosure of mold's presence and by immediately dealing with water intrusion problems that typically lead to mold related problems.¹⁸⁶

Without the deep pockets of product manufacturers and insurers, mold litigation will have a difficult time reaching the level of asbestos litigation. So, perhaps, mold is not gold, it may just be silver or bronze.

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H.R. 1283, 106th Cong. § 2 (1999).

182. Deering, *supra* note 5 at 12.

183. *See* *Ortiz v. Fibreboard*, 527 U.S. 815, 821 (1999)(labeling asbestos litigation an "elephantine mass"). In *Ortiz*, Justice Souter observes that asbestos litigation "defies customary judicial administration and calls for national legislation." *Id.*

184. *See* Lynna Goch, *Mold: A Growing Problem*, BEST'S REVIEW 26, Nov.1, 2001, at 2001 WL 12285826.

185. PAUL BRODSUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 10 (1985).

186. Deering, *supra* note 5 (explaining that by developing preventive building maintenance programs "[m]old can be managed."). Suggestions for building maintenance programs include: inspecting buildings constantly inside and out for signs of water damage, dealing with water problems expeditiously, and using a quick drying process to eliminate mold. *Id.*