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Insurance Triggers as Judicial Gatekeepers in Toxic Mold Litigation

Gregory A. Goodman

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I. INTRODUCTION

At the dawn of the 21st century, a new plague is leeching across the nation's legal landscape. "Some call it the Perfect Storm—a confluence of events that merged into a financial crisis for the insurance industry and a politically charged catastrophe for . . . homeowners, threatening disaster for the . . . economy."¹ What exactly is this Perfect Storm quickly overwhelming both the legislative and judicial systems? Mold. Not the harmless mold growing in a neglected bathtub, but toxic mold that can ravage homes and other buildings from the inside out, while allegedly causing the inhabitants to suffer nasty fates. Mold destroying dwellings is nothing new; even the original Israelites suffered its wrath in the arid confines of the Promised Land. "[I]f the mildew has spread in the house, it is a destructive mildew; the house is unclean. It must be torn down—its stones, timbers and all the plaster—and taken out of the town to an unclean place."² As this passage illustrates, human aversion to mold is nothing new.

What is new is the growing recognition of mold infestation as a cause of action for both personal and property damage claims. Indeed, mold litigation is growing at such an alarming rate that legal commentators across the country are asking the one question sure to send insurance adjusters scrambling: Will mold cases be the next version of asbestos?³ It is still much too early to tell with any certainty.⁴ The first instance of an appellate court allowing testimony

1. R.G. Ratcliffe, *Crisis Spawns Political Storm Clouds; As Insurance Woes Rattle Homeowners, Texas Candidates Argue over Solutions to the Chaos*, HOUSTON CHRON., Sept. 29, 2002, at A1.

2. *Leviticus* 14:44-45 (New Int'l).

3. See, e.g., Stephen L. Moll & Robert M. Reed, Jr., *A Plague on Many Houses: Proliferation of Mold*, NAT'L L.J., Sept. 16, 2002, at B10. The comparison of mold to asbestos is generally appropriate given the quasi-environmental nature of both asbestos and mold, the extremely large volume of litigation in asbestos and the rapid increase of mold litigation, the large dollar amounts paid during the last thirty years in the asbestos and mold cases, and the overlapping of property and personal injury damage claims in both sorts of cases. See *infra* Section V.A.

4. Although not the primary focus, this Note proposes that courts should reject the blanket proclamation that mold is the "next asbestos." See *infra* Section V.A. There is a rapidly growing body of work to support this proposition. See generally Thelma Jarman-Felstiner, Comment, *Mold Is Gold: But, Will It Be the Next Asbestos?*, 30 PEPP. L. REV. 529 (2003) (asserting that toxic mold claims will never duplicate the volume of asbestos claims). Despite the speculative nature of the comparison between toxic mold cases and large-scale asbestos litigation, as long as actors in the toxic mold litigation arena continue to make the analogy and use their experiences with asbestos as a reference point for resolving toxic mold claims, the comparison will remain politically and legally charged.

as to the scientific legitimacy of health-related toxic mold claims was in 1997.⁵ Just four years later, a Texas jury awarded the Allison family \$32 million after finding that their insurance carrier acted in both bad faith and a deceptive manner when evaluating various mold claims for personal injury and property damage.⁶ On national television, the family claimed that toxic mold in their home caused their young son to develop asthma and scarred lungs.⁷ They invited the cameras of CBS's *48 Hours* into their home to film the alleged danger, claiming mold had contaminated all of the family's possessions, which they later abandoned along with the home.⁸ Now high-profile mold claims are spreading rapidly to other parts of the country.⁹ Indeed, many defense attorneys claim that the proliferation of mold litigation is primarily a result of overblown media coverage.¹⁰

Nevertheless, the dramatic appearance of mold litigation has the potential to severely disrupt vast sectors of the economy. In the near future, homeowners insurance may no longer be available to many Americans as more insurers conclude they cannot afford the

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

6. Allison v. Fire Ins. Exch., 98 S.W.3d 227, 237 (Tex. App. 2002). However, on appeal the award was reduced by \$17 million because the court found that the insurer did not knowingly breach its duty and thus there could be no support for the jury's \$17 million award in punitive and mental anguish damages. *Id.* at 256-58. The insurance company still faces a judgment of over \$4 million in actual mold damages plus interest and a nearly \$9 million award for attorney's fees. *Id.* at 263-65.

7. *48 Hours: Invisible Killers: Germs* (CBS television broadcast, Mar. 2, 2000). At many points in this program, and throughout many other news and legal periodicals, the Allison case is referred to as the Ballard case, because the wife Melinda Ballard has generally been the public face of the family, while her husband Ronald Allison has remained in the background. This Note refers to the family on the basis of the named plaintiff, Ronald Allison.

8. *Id.* The CBS crew toured the Allison's home only after donning protective body suits and masks. *Id.*

9. See, e.g., Marianne Bradshaw, *Toxic Mold Litigation Is in the Air*, N.J. L.J., July 8, 2002, at 10; Lori Litchman, *Mold Claims Springing Up in Pennsylvania*, PA. L. WLY., Sept. 2, 2002, at 1. One notable case involved Hollywood legend Ed McMahon, who sued his insurance company for \$20 million after a so-called "death mold" damaged his home, sickened household staff, and killed his dog Muffin. See, e.g., Ann O'Neill, *Ed McMahon Sues over Mold in House*, L.A. TIMES, Apr. 10, 2002, at C-1, 2002 WL 2467283; *Ed McMahon: 'Death Mold' Killed My Dog*, ABCNEWS.COM, Apr. 11, 2002, <http://abcnews.go.com/sections/entertainment/DailyNews/mcmahon020411.html>. McMahon's lawsuit named a total of twelve defendants for the mold damage caused by a broken water line and the subsequent faulty repair. C.A. Rules Court May Not Shorten Summary Judgment Notice Period, METRO. NEWS ENTER., Feb. 10, 2003, at 3, <http://www.metnews.com/articles/mcma021003.htm>. Famed legal advocate Erin Brockovich also took on a high-profile role warning of the perils of toxic mold after she claimed her home was rendered uninhabitable due to toxic mold infestation. See, e.g., Rochelle Sharpe, *Mold Getting a Costly Hold on Homes*, USA TODAY, June 20, 2002, at 15A.

10. See, e.g., Elizabeth Amon, *As Toxic Mold Suits Grow, Insurers Go*, NAT'L L.J., Oct. 21, 2002, at A-1; Margie Boule, *Toxic Mold or Media Hype? Lack of Proof Leaves Worried Families in Limbo*, PORTLAND OREGONIAN, Nov. 9, 2000, at E01 (quoting a medical toxicologist who is cautious of published reports that link to toxic mold to serious health problems).

risks associated with mold claims. Insurance is a statistical exercise of calculating risks, and no insurer can cover a loss that is likely to occur in a large percentage of its open policies.¹¹ Even the best-run companies will fail when an expensive loss such as losses that mold can create affects too large a number of its insureds.¹² Although the insurance industry does not typically engender much sympathy, if mold litigation is allowed to bankrupt major sureties, the entire economy will suffer.

The transaction costs associated with the mold phenomenon will also spill out into numerous other sectors of the economy, primarily because toxic mold is such a new legal frontier that is fraught with uncertainty.¹³ Lenders cannot quantify the risk of loss on a property due to toxic mold nor adequately quantify the resulting liabilities if toxic mold appears in a property in which the lender has a security interest.¹⁴ Property managers similarly cannot adequately estimate the price that should compensate for the risk of mold into everything from large-scale commercial and government leases to condominium rentals.¹⁵ Professionals such as architects and contractors will suffer as they increasingly become exposed to larger, yet still uncertain, liabilities stemming from toxic mold claims. They will not be able to adequately shoulder the risk or obtain cost-efficient insurance coverage.¹⁶

This is not to say that victims of both health-related injuries and property damage due to mold should not have legal recourse. Courts, however, have an obligation to set parameters at the outset of this new mass litigation phenomenon. They must look to both successes and failures that thirty years of unchecked asbestos litigation has created when charting a course to navigate the coming wave of mold claims. Asbestos litigation may have produced societal benefits and needed industrial reform, but it also spiraled out of control and produced disproportionate economic losses.¹⁷ Since asbestos and other large scale toxic crises have been in the legal spotlight for so long, there is a tendency to force new, yet wholly unrelated, phenomena such as toxic mold into the same category as

11. See ROBERT I. MEHR & EMERSON CAMMACK, PRINCIPLES OF INSURANCE 34-35 (1980).

12. *Id.*

13. See Walter G. Wright, Jr. & Stephanie M. Irby, *The Transactional Challenges Posed by Mold: Risk Management and Allocation Issues*, 56 ARK. L. REV. 295, 303-07 (2003).

14. *Id.*

15. *Id.* at 351-53.

16. *Id.* at 357-58.

17. Jarman-Felstiner, *supra* note 4, at 540-43.

asbestos.¹⁸ The judicial system can avoid this mistake by establishing concrete guidelines sooner rather than later.

Most mold litigation to date ultimately centers on an insurer's duty to defend, indemnify, or provide coverage. Courts often make an early decision that is potentially outcome determinative in these cases when they decide which insurance trigger of coverage theory will apply in the case. The trigger of coverage is a legal test applied by courts to determine which policy has coverage obligations under a claim brought by the policy holder.¹⁹ The trigger of coverage also determines whether numerous policies stretching over several years will also have to respond to the loss.²⁰ In the broadest sense, courts group the available trigger theories into the following four categories: the exposure theory; the manifestation or first discovery theory; the triple trigger or continuous trigger theory; and the injury-in-fact theory.²¹ A court's application of a given trigger theory depends on the jurisdiction, the type of harm or damage, and the specific facts of the case at hand.²²

Trigger theories act as judicial gatekeepers, matching particular claims to particular insurance policies.²³ Judicially constructed rules identifying which insurance policies may have to respond to particular claims will have a strong influence on the eventual resolution of those claims.²⁴ These rules have been particularly relevant in mass tort cases where the courts have actively promoted settlement instead of litigation.²⁵ Insurance becomes a sort of "judicial carrot" which a court can use to promote settlements. To the extent that insurance is available and the court indicates which policy will respond under its trigger rule, the court forces insurers to bear the burdens of settlement rather than claimants.²⁶ Uniform application of insurance triggers allows insurers to calculate with relative precision the risk of a given occurrence such as mold. It will not eliminate the transaction costs relevant to a broad spectrum of

18. *Id.* at 531-32.

19. See MITCHELL L. LATHROP, *INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS* § 1.6 (2002).

20. *Id.*

21. *Id.* § 6.04. Another approach, the wrongful act theory, has been advanced but not widely accepted, and bears no mention in the context of toxic mold claims. *Id.* For more detailed analysis of each of these insurance triggers, see *infra* Part IV.B.

22. See LATHROP, *supra* note 19, § 6.04.

23. See James M. Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate over the Appropriate Trigger Rule*, 45 DRAKE L. REV. 625, 631-32 (1997).

24. *Id.* at 632.

25. *Id.*

26. *Id.*

economic actors in the mold arena, such as accounting for mold risks when lending against property and insuring developers and contractors against potential mold claims. It could, however, eliminate much of the *uncertainty* from these costs and ensure that they do not serve as insurmountable impediments to insurance and other transactions.

This Note proposes that one way of fairly and efficiently managing large numbers of toxic mold claims, while at the same time putting reasonable safeguards in place to ensure that toxic mold never fulfills the "next asbestos" predictions, is to uniformly apply the manifestation trigger of coverage theory when construing insurance contracts. Under the manifestation rule, a claim that is discoverable or becomes apparent during a policy period will trigger that policy.²⁷ Because injury or damage can only be discovered once, only the insurance policy in force at that time will provide coverage. By uniformly applying only the manifestation trigger to insurance policies, as opposed to the exposure theories generally favored in asbestos litigation, courts would limit situations in which multiple insurance policies have to respond to the same injury.²⁸

More importantly, courts would eliminate the uncertainty plaguing the toxic mold arena and allow insurers to adequately assess their potential liabilities; in other words, the insurance industry would be able to effectively price the risk posed by toxic mold. Once the insurance industry is able to do so, then other sectors of the economy, such as lending, property management, construction, and even ordinary homeowners, will be able to assess their economic exposure to toxic mold and plan accordingly. Additionally, insurers and legal professionals will have a basis on which to negotiate settlements on pending mold claims, preventing tens of thousands of claims from clogging up the judicial channels.

Part II of this Note provides both historical and scientific background on the mold plague leeching its way across the country. Part III discusses the relatively small but rapidly growing body of case law on mold claims. Part IV of this Note traces the competing trigger theories courts have traditionally applied in asbestos claims. Part V of this Note proposes that uniformly applying the manifestation trigger theory will ultimately provide a check on uncontrolled mold litigation in the future, as well as an equitable balance between injured plaintiffs and their insurance carriers.

27. See generally *Lac D'Amiante Du Quebec, Ltee. v. Amer. Home Assurance Co.*, 613 F. Supp. 1549, 1556 (D.N.J. 1985) (explaining the manifestation theory in the context of asbestos litigation).

28. See *infra* Part IV.B.

II. BACKGROUND ON TOXIC MOLDS

A. *Scientific Overview of Toxic and Other Molds*

Molds are very simple microscopic organisms found virtually everywhere, both indoors and outdoors.²⁹ There are over 100,000 known species of mold, with at least 1,000 found commonly throughout the United States.³⁰ Most molds are not dangerous to humans at all; the majority of molds routinely encountered by humans will, in cases of overexposure, do nothing more than aggravate conditions such as hay fever, asthma, or other allergies.³¹ In fact, a number of molds are used in everyday products ranging from bread and wine to penicillin.³²

Molds require three essential elements for growth: (1) warm air, (2) a viable food source, and (3) moisture.³³ Warm air is present in most homes and buildings. Various mold species can survive in any environment where the temperature falls within a range of forty to one-hundred degrees Fahrenheit.³⁴ Certainly the need for sustainable temperatures helps to explain why mold claims have been far more numerous, at least initially, in warmer states such as Arizona, California, Louisiana, and Texas. Any number of organic materials, such as cotton, leather, drywall, insulation, and synthetic carpets and sidings, all usually found in homes and buildings, can provide a viable food source for molds to thrive.³⁵ Even dirt and wood can provide enough of a food source to sustain chronic mold growth.³⁶ The most critical ingredient is moisture, and moisture is “the only factor that

29. See, e.g., Office of Env'tl. & Occupational Epidemiology, N.Y. City Dep't of Health, Facts About Mold (Mar. 2001) [hereinafter Facts About Mold], <http://www.nyc.gov/html/doh/html/ei/eimold.html>.

30. *Id.*

31. *Id.*

32. See, e.g., Stephen A. Henning & Daniel J. Berman, *Mold Contamination: Liability and Coverage Issues: Essential Information You Need to Know for Successfully Handling and Resolving Any Claim Involving Toxic Mold*, 8 HASTINGS W.-NW J. ENVTL. L. & POL'Y 73, 82 (2001).

33. LATHROP, *supra* note 19, § 12.02.

34. See *Mold: A Growing Problem: Joint Hearing Before the Subcomm. on Oversight and Investigations and the Subcomm. on Housing and Community Opportunity of the House Comm. on Financial Services*, 107th Cong. 51 (2002) [hereinafter *Joint Hearing*] (statement of Gerald M. Howard, Executive Vice President/CEO, Nat'l Ass'n of Home Builders).

35. Marilyn Bode & Deanna Munson, *Controlling Mold Growth in the Home*, NEAR ENV'T, Kan. St. Univ. Agric. Experiment Station & Coop. Extension Serv., Sept. 1995, at 1-2, <http://www.oznet.ksu.edu/library/hous2/mf2141.pdf>.

36. See Henning & Berman, *supra* note 32, at 80-81.

can be controlled"³⁷ since little if anything can ever be done to eliminate warm temperatures or organic food sources. Moisture usually appears primarily as a result of water intrusion due to flooding, a plumbing leak, or condensation within the walls of the structure.³⁸ Miniscule amounts of trapped rainwater or even condensation from air conditioning units is enough to feed a mold outbreak.³⁹ The matter is further complicated because mold does not require actual standing water to grow, but can appear simply as a result of high humidity combined with building materials that tend to retain moisture.⁴⁰ The determination of when and why this mold-growing moisture appears is at the heart of most insurance disputes arising from mold claims.

"Toxic" mold is not a scientific term per se, but rather refers to the very limited group of molds that can cause potentially serious health problems.⁴¹ Toxic molds produce *mycotoxins*, fungal metabolites that cause a variety of respiratory and other health problems.⁴² Any toxic effects resulting from mold exposure stem from exposure to these toxins found "on the surface of the mold spores," and not from any form of mold actually infiltrating the body.⁴³ There are three varieties of toxic molds: *stachybotrys chartarum*, *aspergillus*, and *penicillium*. The first is the dominant variety in mold claims and will be the focus of this discussion.⁴⁴

Stachybotrys chartarum is generally regarded as the most prevalent of the toxic molds.⁴⁵ It is a greenish black fungus that grows in very wet environments.⁴⁶ Its spores are found in soil and enter buildings after floods or other sudden water intrusions.⁴⁷ The spores also latch onto building materials coated with dust.⁴⁸ *Stachybotrys chartarum* grows on papers, carpet, and any organic debris or material in general.⁴⁹ Because this mold occurs inside ducts, walls, or

37. *Joint Hearing*, *supra* note 34, at 51.

38. See Henning & Berman, *supra* note 32, at 80-81.

39. *Id.*

40. *Id.* at 80.

41. *Id.* at 81.

42. See LATHROP, *supra* note 19, § 12.02.

43. Ruth A. Etzel et al., *Toxic Effects of Indoor Molds*, 101 PEDIATRICS 712, 712 (1998).

44. See Henning & Berman, *supra* note 32, at 81-82.

45. Berlin D. Nelson, *Stachybotrys Chartarum: The Toxic Indoor Mold* (Nov. 2001), <http://www.apsnet.org/online/feature/stachybotrys/top.html>.

46. *Id.*

47. *Id.*

48. *Id.*

49. See Henning & Berman, *supra* note 32, at 81.

covered surfaces, it may be present without being seen.⁵⁰ *Stachybotrys chartarum* is believed by some to attack the respiratory system, causing severe or fatal lung disease, and to contain chemicals that may be neuro-toxic, causing behavioral difficulties.⁵¹ It has also been linked, albeit inconclusively, to pulmonary hemorrhage, particularly in children.⁵² There still exists considerable controversy as to the exact magnitude and scope of the health problems caused by *stachybotrys chartarum*, but the mold has been researched extensively for over sixty-five years now and there is little doubt that contaminated environments are not healthy and may pose varying health risks to humans, and children in particular.⁵³ Indeed, some of the chemical components present in the mold have been studied as potential agents of biological warfare.⁵⁴

B. Brief History of Human Contact With Toxic Molds

Toxic mold was first recognized as a serious health risk in Eastern Europe during the 1930s.⁵⁵ Horses and other farm animals were suffering a disease that caused severe shock, hemorrhage, and death.⁵⁶ Russian scientists traced the outbreaks to moldy straw or other feed that the animals consumed.⁵⁷ Soon, farm workers began exhibiting the symptoms as well.⁵⁸ This strain of toxic mold is now known to be *stachybotrys chartarum* and is the primary, although not exclusive, culprit in most reported cases of mold-related health problems.⁵⁹

Little attention was paid to toxic molds in the United States until 1986 when a Chicago family began complaining of recurring flu-

50. *Id.*

51. *Id.*; see also Facts About Mold, *supra* note 29.

52. See Nelson, *supra* note 45. *Stachybotrys chartarum* was initially blamed for a cluster of lung hemorrhages in Cleveland children during the mid-1990s. *Id.* Although the study of Cleveland children was commissioned by the Centers for Disease Control and Prevention (CDC), in 2000, the CDC published two new reports that criticized the Cleveland study for, among other things, faulty sampling techniques. *Id.*

53. *Id.*

54. LATHROP, *supra* note 19, § 12.03.

55. *Id.* § 12.01.

56. *Id.* § 12.03.

57. *Id.* § 12.01.

58. See Nelson, *supra* note 45. The exposed workers generally handled the mold-infested hay or used it as filling for their mattresses. *Id.*

59. See LATHROP, *supra* note 19, §§ 12.03-.04.

like symptoms.⁶⁰ Experts later determined that the family's home was infested with *stachybotrys chartarum*. When the mold problem was remedied, the symptoms generally subsided.⁶¹ In 1994, the Centers for Disease Control (CDC) began a study of numerous infant illnesses and deaths in Cleveland.⁶² Although the study was not wholly conclusive, investigators suspected that toxic mold was indeed responsible for causing these deaths and illnesses, putting *stachybotrys chartarum* firmly in the spotlight.⁶³ It must be stressed, however, that the majority of the medical community still believes that no firm link between *stachybotrys chartarum* and human health problems has been scientifically demonstrated.⁶⁴ The furthest that any credible scientific body has been willing to go is concluding that toxic molds *may* affect those with severe respiratory or immune deficiencies. Even then they maintain that "[c]urrent scientific evidence does not support the proposition that human health has been adversely affected by inhaled mycotoxins"⁶⁵

The appearance of toxic mold complaints follows a phenomenon common in the last few decades known as sick building syndrome.⁶⁶ As buildings and homes became more energy efficient and weatherproof while, at the same time, the use and presence of office machines, central air and heating systems, and newer cleaning products soared, indoor air stagnated and people began experiencing various maladies attributed to the "sick building."⁶⁷ No specific cause or even illness has been firmly attributed to "sick building syndrome," but it has been blamed for various eye, nose, and throat irritations,

60. See Nelson, *supra* note 45. The fungus was continually studied between the 1950s and 1980s throughout the world, but never in connection as a potential threat to homes and buildings. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* The CDC later criticized this report for questionable research methods; nonetheless it has remained influential in the scientific and medical communities as they continue to document the effects of toxic mold on humans. See *supra* Part II.A.

64. See, e.g., TEXAS MED. ASS'N, REPORT OF COUNCIL ON SCIENTIFIC AFFAIRS: BLACK MOLD AND HUMAN ILLNESS (2002), http://www.tcais.org/insurance/mold_study.php. This report concludes, among other things, that "[o]ur knowledge of mycotoxins is very incomplete regarding dose-health effects," and "there is no convincing evidence that *Stachybotrys* is a significant or even proven pathogenic antigen" *Id.* The report also notes at the outset that all of the current public attention on toxic mold has been focused on the lay press and insurance industry, and not at all on scientific or medical publications. *Id.*

65. AM. COLL. OF OCCUPATIONAL & ENVTL. MED., ADVERSE HUMAN HEALTH EFFECTS ASSOCIATED WITH MOLDS IN THE INDOOR ENVIRONMENT (2002), <http://www.acoem.org/guidelines/article.asp?ID=52>.

66. Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 339 (1998).

67. *Id.* at 338-40.

along with headaches and fatigue that subside upon leaving the building.⁶⁸ The sudden appearance and subsequent rapid increase in toxic mold claims may be partially accounted for because in searching for the potential sources of this "sick building syndrome," previously ignored molds inside of homes and buildings were suddenly put under the microscope.

III. SUMMARY OF TOXIC MOLD LITIGATION

A. *Toxic Mold as a Viable Cause of Action*

Toxic mold cases thus far have generally fit within three categories: (1) suits by home or building owners against builders for faulty design or construction; (2) suits by tenants alleging landlord negligence for failure to maintain sanitary living conditions; and (3) suits by home or building owners against insurers for breach of contract or bad faith.⁶⁹ Often, however, cases that begin in one of the first two categories end up in the third category as defendants seek coverage or indemnification from their insurance companies for the original mold claims brought against them. Toxic mold cases are just beginning to reach the appellate courts, and very few have yet resulted in published opinions.

One of the first noteworthy cases heard by a state appellate court was *Centex-Rooney Construction Co. v. Martin County*, decided by a Florida court in 1997.⁷⁰ *Centex-Rooney* was particularly significant because it was the first instance in which a court allowed scientific testimony on health risks associated with toxic mold.⁷¹ *Centex-Rooney* constructed a courthouse complex for Martin County, Florida, which subsequently developed leaks in the exterior walls and windows as well as moisture accumulation throughout the buildings' heating and cooling systems.⁷² As a result of the moisture problems, mold began to grow throughout the building complex.⁷³ Experts

68. *Id.* at 340-41.

69. See D. Chris Harkins, Comment, *The Writing Is on the Wall . . . And Inside It: The Recent Explosion of Toxic Mold Litigation and the Insurance Industry Response*, 33 TEX. TECH L. REV. 1101, 1104 (2002).

70. 706 So. 2d 20 (Fla. Dist. Ct. App. 1997).

71. See *id.* at 26. It is important to note that mere expert testimony, as was allowed in this and other cases, does not necessarily reflect the consensus of the relevant scientific community. See *supra* notes 58-59 and accompanying text.

72. *Centex-Rooney*, 706 So. 2d at 23-25.

73. *Id.* at 24-25.

retained by Martin County concluded that a number of the buildings' employees were suffering from work-related asthma likely linked to the presence of two types of unusual and toxic molds.⁷⁴

On appeal, Centex-Rooney argued that the expert testimony regarding toxic mold should never have been admitted under the long-standing *Frye v. United States* evidentiary standard, the applicable standard in Florida courts at the time.⁷⁵ The appellate court, however, felt the scientific evidence regarding toxic mold could be admitted, holding that the County had met its burden of proving by a preponderance of the evidence that the basic underlying principles had been sufficiently tested and accepted by the relevant scientific community.⁷⁶ Martin County ultimately recovered a judgment of more than \$14 million in damages, interest, and attorney fees against Centex-Rooney, several subcontractors, and their insurers.⁷⁷

In 2001, the Delaware Supreme Court likewise upheld the admittance of expert testimony and other evidence regarding the deleterious health effects of toxic mold.⁷⁸ *New Haverford Partnership v. Stroot* involved two plaintiffs who were tenants of an apartment complex infested with toxic mold.⁷⁹ Three physicians testified that one of the plaintiffs was suffering from various respiratory ailments and possible cognitive dysfunction either caused or exacerbated by her exposure to toxic mold.⁸⁰ The landlord was ultimately held liable for negligently failing to maintain the leased premises in a sanitary condition, which led to the plaintiffs' personal injuries from toxic mold exposure.⁸¹ The Delaware Supreme Court upheld an award of \$1

74. *Id.*

75. *Id.* at 26. The *Frye* standard states that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F. 1013, 1014 (D.C. Cir. 1923). This evidentiary standard has been supplanted in federal cases by the Federal Rules of Evidence, and "general acceptance" is no longer the controlling standard, which in theory should aid the admission of scientific evidence on mold even further. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). However, many state courts, such as Florida, still adhere to the older *Frye* standard. *See, e.g., Centex-Rooney*, 706 So. 2d at 26.

76. *Centex-Rooney*, 706 So. 2d at 26.

77. *See LATHROP, supra* note 19, § 12.04.

78. *New Haverford P'ship v. Stroot*, 772 A.2d 792, 799-800 (Del. 2001).

79. *Id.* at 795-96.

80. *Id.* at 796-97. The primary plaintiff, Stroot, had suffered from severe allergies and asthma since childhood. *Id.* at 796. But the frequency and intensity of these ailments were gauged to have increased significantly after she moved into the apartment in question. *Id.*

81. *Id.* at 795.

million for the primary plaintiff and \$40,000 for the second claimant, finding the awards neither unreasonable nor unconscionable.⁸²

These cases are significant because in each instance the court admitted expert testimony regarding the potential health risks associated with toxic mold, giving credibility to what many commentators considered a rather dubious cause of action.⁸³ Substantial jury awards were also upheld in both cases, giving further legitimacy to mold claims across the nation.

In 1999, a Texas jury awarded the Allison family a staggering \$32 million award which, although substantially reduced on appeal, proved that large awards were quite possible in mold cases.⁸⁴ After CBS toured the Allison's home for its *Killer Germs* television special in 2000, stories and warnings about toxic mold began to spread across the country.⁸⁵ Interestingly, the jury provided this huge award even though the trial court actually *refused* to admit expert testimony on the effects of toxic mold.⁸⁶ The appellate court upheld the trial judge's ruling that the underlying data informing the testimony offered by the Allison's experts did not meet the Texas evidentiary requirements for toxic tort cases.⁸⁷ The personal injury claim for toxic mold exposure was thus defeated by partial summary judgment before the jury ever set foot in the courtroom. The large award was based solely on the property damage and the insurer's subsequent bad faith in handling the claims.⁸⁸

Despite this exclusion, a close reading of the facts coupled with the current trends in mold litigation strongly indicates that this ruling on the admissibility of expert testimony on the health hazards of toxic mold will not stem the tide of lawsuits. It appears that the experts in

82. *Id.* at 801.

83. *See, e.g.,* Amon, *supra* note 10; Sue Reisinger, *Toxic Mold Is Good as Gold for Plaintiffs' Lawyers*, CORP. LEGAL TIMES, Sept. 2002, at 52, WL 9/02 CORPLT 52 (col. 1).

84. *See supra* Part I. Although in late 2002 a Texas court reduced the award by \$17 million, it is significant to note that the defendant insurers had to pay nearly \$9 million in attorney fees to the plaintiffs, making the partial victory hittersweet. *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227 (Tex. App. 2002); *Punitive Damages Award Reversed Absent Knowing Breach of Contract*, 3-1 MEALEY'S LITIG. REP.: MOLD 1 (Jan. 2003).

85. *See supra* Part I.

86. *Allison*, 98 S.W.3d at 240.

87. *Id.* at 240-41.

88. *Id.* The fact that no testimony was allowed regarding the health effects of the toxic mold gives further credence to the claim that mold hysteria has largely been fueled by media hype. Numerous media outlets portrayed the Allison home with ominous figures clad in full protective body suits, including Mrs. Ballard herself dressed in a bio-hazard "moon suit." But, in essence, the case was strictly an insurance breach of contract, with mold being only a sidehar. *See* Randy J. Maniloff, *Mold: The Hysteria Among Us—Exposure to Mold Causes Bad Faith Claims Against Insurers*, 14 ENVTL. CLAIMS J. 1, 3 (2002).

this case simply failed to adhere to strict procedural requirements that are particularly important in emerging toxic torts.⁸⁹ Courts appear to be more willing to accept the general medical proposition that black mold, at least in the form of *stachybotrys chartarum*, is potentially hazardous to human health.⁹⁰

In July 2002, at a Congressional Subcommittee hearing entitled "Mold: A Growing Problem," CDC scientists testified that while the direct links between toxic mold and specific health problems are still unclear, toxic molds do contain carcinogens and, in high levels, cause illness in "susceptible people."⁹¹ At the same time, a Michigan Congressman introduced the United States Toxic Mold Safety and Protection Act of 2002.⁹² The Bill would have required the CDC, in conjunction with the Environmental Protection Agency and the National Institutes of Health, to undertake a comprehensive study of the health effects of toxic mold.⁹³ However, the bill has since languished and has not been enacted to date.

In contrast to the federal government, states are taking more affirmative steps to confront toxic mold. California enacted the Toxic Mold Protection Act in October of 2001, creating a task force to set statewide mold standards.⁹⁴ Other state legislatures that have addressed toxic mold and tried to sort out the conflicting scientific data include Indiana, New Jersey, New York, Maryland, and Texas.⁹⁵ These trends suggest that many lawmakers view toxic mold as a legitimate threat to human health. Thus, the battle over expert testimony may center more on linking toxic mold to the specific cause of a given injury rather than on whether toxic mold is even capable of harming humans.⁹⁶

89. Maniloff, *supra* note 88, at 3.

90. *See, e.g.*, *New Haverford P'ship v. Stroot*, 772 A.2d 792, 799-800 (Del. 2001).

91. *See* Maniloff, *supra* note 87, at 5-6.

92. United States Toxic Mold Safety and Protection Act of 2002 (Melina Bill), H.R. 5040, 107th Cong. (2002).

93. *Id.* § 102(a).

94. CAL. HEALTH & SAFETY CODE §§ 26100-26107 (West Supp. 2004).

95. *See* Wright & Irby, *supra* note 13, at 343-44; Sylvia Peña-Alfaro, Comment, *The Toxic Mold Terrifying Texas: Mold's Hold on the Insurance Industry*, 34 ST. MARY'S L.J. 541, 571-74 (2003).

96. This note necessarily presumes that toxic mold will continue to be a viable cause of action for both personal injury and property damage claims. There is likely to be a wealth of scientific and medical research conducted in the near future on the health effects of toxic mold, and it is possible that further doubt could be cast on the legitimacy of expert testimony regarding the health hazards of mold. But the more likely scenario is that toxic mold will become firmly entrenched as a legitimate toxic tort. Even if it does not, there will still be a flood of lawsuits strictly on property damage claims, and this Note's analysis would still be applicable.

B. Insurance Carriers Take Center Stage

The mold issue is already having a profound impact on the insurance markets, with the Texas market leading the way. As a response to the increasing cost of mold, State Farm Insurance Company, the largest homeowner insurer in the country, recently declined to renew more than 700,000 individual policies in Texas.⁹⁷ It is estimated that up to 70 percent of the 10,000 mold cases pending nationwide in 2002 were in Texas state courts.⁹⁸ Mold insurance claims in Texas increased by more than 500 percent between 2001 and 2002.⁹⁹ In 2001, Texas insurers paid out an estimated \$1.2 billion to resolve mold claims.¹⁰⁰ At the same time, the average annual premiums paid by Texas homeowners increased by 35 percent to nearly \$1,000, the highest average premium in the nation.¹⁰¹

Insurance policies issued in the last few years typically address coverage for mold claims in specific terms.¹⁰² Older policies, which have more vague treatment of mold coverage, present a much more complicated issue. Unfortunately, most claims today are still being filed against policies predating the current litigation explosion. On older policies that did not specifically provide for mold, absolute pollution exclusions, catchall provisions designed to insulate an insurer from any variety of environmental ills not specifically enumerated in the policy may provide the best grounds of defense for insurers.¹⁰³ But this provision has failed when presented in similar circumstances. An example of this failure comes from *Leverence v. United States Fidelity & Guaranty*, a case predating the current trends and not even involving "toxic" mold per se.¹⁰⁴ Rather, the plaintiffs in *Leverence* lived in manufactured homes that became so water damaged that the walls were rotting and the air was contaminated with mold spores, fungus, mildew, and various other

97. Amon, *supra* note 10.

98. See Reisinger, *supra* note 83, at 52.

99. *Id.*

100. *Id.*

101. *Id.* Texas has been relatively quick in trying to ensure that insurance coverage for mold damage remains available to ordinary consumers. After heated hearings, the state's Insurance Commissioner promulgated rules capping mold coverage levels and requiring insurers to offer policy addendums providing extra coverage for mold damages. See Peña-Alfaro, *supra* note 95, at 571-74. Several mold laws were also passed in 2003, including a bill regulating the cottage mold-remediation industry, which also forbid insurers from basing underwriting decisions based on prior mold claims. H.R. 329, 78th Leg., Reg. Sess. (Tex. 2003), <http://www.capitol.state.tx.us/tlo/78R/billtext/HB00329F.HTM>.

102. See Amon, *supra* note 10.

103. See Harkins, *supra* note 69, at 1127-28.

104. 462 N.W.2d 218, 232 (Wis. Ct. App. 1990).

irritants.¹⁰⁵ The pollution exclusion clause, which the appellate court held did not apply to damages caused by the airborne mold spores, fungus, and mildew, reads as follows:

This insurance does not apply: to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.¹⁰⁶

The court ruled that the phrase “sudden and accidental” means “unexpected and unintended.”¹⁰⁷ Because the growth of the molds and other airborne fungi was certainly unexpected and unintended, the exclusion was inapplicable and the insurer was obligated to pay for the damages.¹⁰⁸ This ruling does not seem to give effect to the insurance policy because any sort of damage for which insurance coverage is sought will always be unexpected and unintended. The purpose of the exception for sudden pollution events was to protect the insured and encompass completely unforeseeable disasters. Water damage severe enough to rot walls and cause such large scale mold growth, however, certainly does not occur suddenly.

In the past several years, many insurance companies have begun altering their comprehensive general liability (CGL) policies issued to homeowners either to specifically exclude mold or to cap payments for mold claims.¹⁰⁹ This change, however, does not impact the majority of mold claims already in litigation channels based on occurrences that predate these measures. In addition, carriers are lobbying state insurance boards to allow them to eliminate mold coverage in existing policies even where the mold is caused by a covered event, such as a pipe bursting.¹¹⁰ This is a tactic by insurers to stretch the parameters for causation in future mold litigation to their advantage, because mold can result from any number of both natural and unnatural causes. *Liristis v. American Family Mutual Insurance Co.*¹¹¹ illustrates the difficulties courts and insurers face in categorizing toxic mold claims.

In *Liristis*, the insured plaintiffs’ home caught fire and suffered moderate damage.¹¹² The fire caused a leak in the roof, which in turn

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. See Amon, *supra* note 10, at A-17.

110. *Id.*

111. 61 P.3d 22, 23 (Ariz. Ct. App. 2002).

112. *Id.*

led to water damage caused by the water used to suppress the fire itself.¹¹³ Mold growth began to appear as a result, and the plaintiffs claimed they suffered from respiratory ailments and allergic reactions to toxic mold.¹¹⁴ The homeowners insurance policy contained a clause stating that the policy did not cover loss to property “resulting directly or indirectly from or caused by one or more of the following,” with an enumerated list including mold.¹¹⁵ The plaintiffs, however, argued that the mold damage was a covered “indirect physical loss” caused by, among other things, the water used to extinguish the fire in their home.¹¹⁶ They argued that the loss was not “caused by” mold, but rather the loss *was* mold and that the mold was caused by the fire, a covered event.¹¹⁷ The appellate court agreed.¹¹⁸ This ruling exemplifies the confusion both courts and insurers face in defining coverage for disasters not originally provided for and occurring in unusual manners, such as mold.

Insurers will continue to argue that damage to persons or property resulting from toxic mold is not covered under their policies. Given past precedent, insurers will certainly have some success. Beyond that argument, both plaintiffs and defendants are beginning to focus on what could be a decisive battle line in toxic mold litigation: which trigger of coverage will apply in this new arena.¹¹⁹ The outcome of this question could determine whether or not toxic mold litigation will cost the insurance industry the unprecedented sums paid out in asbestos litigation and impose the related trickle-down costs on a plethora of other service providers and related professionals.¹²⁰

In 2002, the Ninth Circuit heard a claim brought by the owners of a shopping center in California seeking reimbursement from their insurers of the \$18 million spent to repair mold-ravaged property.¹²¹ *Factory Mutual Insurance Co. v. Campbell* is being closely watched by the insurance industry, because the district court agreed with the

113. *Id.*

114. *Id.* at 23-24.

115. *Id.* at 24.

116. *Id.*

117. *Id.*

118. *Id.* at 25.

119. *See infra* Part IV.A.

120. *See infra* Part IV. Of course, it will be years and even decades before anyone can say exactly how much asbestos claims will have totaled. Right now, industry estimates are that between \$200 and \$265 billion will be paid out when all is said and done in the asbestos arena. *See* Randy J. Maniloff, 2002: *The Year's Ten Most Significant Insurance Coverage Decisions*, 17-10 MEALEY'S LITIG. REP.: INS. 12 (Jan. 2003).

121. *9th Circuit to Hear Arguments on Manifestation Theory in Mold Insurance Case*, 3-4 MEALEY'S LITIG. REP.: MOLD 8 (Apr. 2003).

insurer that the claim should be barred by the manifestation rule; in other words, the application of the manifestation trigger of coverage meant the defendant insurer did not have to respond.¹²² The defendant carrier successfully argued that the property owners were aware of ongoing mold contamination prior to the commencement of the insurance policy period and that there was no coverage for the previously manifested damage.¹²³ The owners of the shopping center countered on appeal that while the property had suffered water damage on prior occasions and even some mold contamination prior to the inception of the insurance policy in 1995, the discovery of toxic mold in 1998 was an entirely separate and distinct type of damage.¹²⁴ The Ninth Circuit's decision will doubtless impact the entire mold litigation landscape as it will be the highest federal court yet to directly address a toxic mold case.

Another victory for insurance companies in a federal court was *New Orleans Assets, L.L.C. v. Travelers Property Casualty Co.*, in which the United States District Court for the Eastern District of Louisiana threw out a claim for mold damage to a building leased to the Federal Bureau of Investigation.¹²⁵ The court ruled that the manifestation theory would apply to determine whether or not there was coverage for mold contamination.¹²⁶ The court held the plaintiffs knew of the mold damage prior to the issuance of the disputed insurance policy and that under the trigger of coverage rule adopted by the court, the insurer could not insure against a loss that was known or apparent to the insured.¹²⁷ But, while the primary insurer prevailed in this case, other defendants, including the building architects, settled out of court to avoid their own potential exposure to toxic mold liability.¹²⁸

Both *Campbell* and *New Orleans Assets* are particularly noteworthy because, as expanded upon in detail in the following part,

122. *Factory Mutual Ins. Co. v. Estate of Campbell*, No. 01-7518R ITLx (C.D. Cal. March 18, 2002) (order granting summary judgment); *California Federal Judge Bars Mold Property Damage Claims in Coverage Dispute*, 2-5 MEALEY'S LITIG. REP.: MOLD 7 (May 2002). This case will be a significant marker for the claim argued in this Note that the manifestation rule will provide the best basis for managing the future influx of mold claims, particularly because the manifestation rule was generally disfavored in asbestos litigation. See *infra* Part IV.

123. *\$18 Million Claim For Mold Barred By Manifestation Rule, Carrier Tells 9th Circuit Court*, 2-9 MEALEY'S LITIG. REP.: MOLD 3 (Sept. 2002).

124. *Id.*

125. No. 01-2171, 2002 U.S. Dist. LEXIS 25878, at *4-5 (E.D. La. Sept. 12, 2002).

126. *Id.* at *8-9.

127. *Id.* at *10-11; see also *Louisiana Federal Judge Dismisses Mold Claims in CGL Case*, 2-10 MEALEY'S LITIG. REP.: MOLD 1 (Oct. 2002).

128. See *Louisiana Federal Court to Address Dismissal Motion in Mold Coverage Case*, 2-12 MEALEY'S LITIG. REP.: MOLD 4 (Dec. 2002).

courts have been reluctant to apply the manifestation rule in toxic tort litigation. These cases could signal that the federal courts will at least take a hard initial stance against finding coverage for toxic mold claims by applying more insurer-favored trigger rules, which will be discussed in further detail below.

IV. TRIGGER OF COVERAGE THEORIES IN ANALOGOUS LITIGATION

A. *Why Coverage Triggers Will Matter in Mold*

Although mold claims include unique characteristics, a review of the most prominent toxic tort that the insurance industry has faced on a large scale, asbestos, will provide a basis for both courts and sureties to most effectively manage mold claims. Indeed, the insurance industry has aggressively negotiated with many state insurance commissioners by claiming that another round of uncontrolled litigation akin to asbestos will bankrupt them.¹²⁹ Courts involved in both asbestos and mold litigation will be forced to determine when and how a particular insurance policy is triggered.¹³⁰ Courts adjudicating asbestos claims have faced the fact that the language of older insurance policies was generally difficult to apply to asbestos-related injuries.¹³¹ Because of the latent manifestation of the disease, with serious health consequences from asbestos exposure taking up to twenty-five years to appear, it took insurers a considerable amount of time to begin adjusting their coverage terms to account for it.¹³² Insurers have been litigating asbestos injury claims since 1973, so newer insurance policies generally have explicit provisions denying coverage for any injury related to asbestos.¹³³ Mold exclusion clauses, however, have only recently become a standard component of most insurance policies, so numerous

129. See, e.g., Moll & Reed, *supra* note 3.

130. See, e.g., Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982).

131. See John P. Burns et al., Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 709-10 (1983).

132. *Id.*

133. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1092-93, 1103 (5th Cir. 1973) (upholding a judgment for an employee of an asbestos manufacturer against his employer for breach of duty to warn of the dangers of prolonged asbestos exposure). As the first significant asbestos case, "*Borel* has triggered an avalanche of law suits against the entire asbestos manufacturing industry." *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1215 (6th Cir. 1980).

insurance policies still have no provisions whatsoever for mold.¹³⁴ Courts will be called on to determine not only *if* a policy has to respond to a mold claim, but *which* policy has to respond.¹³⁵

Insurance policies generally do not contain terms such as “coverage” trigger.¹³⁶ Triggers of coverage are legal tests applied by courts to determine which policy has coverage obligations for a particular claim.¹³⁷ Courts generally group the available trigger theories into four categories: the exposure theory; the manifestation or first discovery theory; the triple trigger or continuous trigger theory; and the injury-in-fact theory.¹³⁸ The application of a particular trigger theory depends on the jurisdiction, the specific facts of the claim, and the type of harm alleged in the claim.¹³⁹

Trigger of coverage theories are described as “judicial gatekeepers,” matching specified claims to particular policies.¹⁴⁰ They identify which insurance policies may have to respond to particular claims and, consequently, have a strong influence on the ultimate resolution of the cases.¹⁴¹ These rules were particularly important in mass tort cases where the courts actively promoted widespread settlement.¹⁴²

Insurance acts as a “judicial carrot” which a court can use to promote settlements, because to the extent insurance is available and the court establishes which trigger rules will force which policies to respond, the burdens of settlement fall on insurers rather than on claimants.¹⁴³ Equally important, uniform application of insurance triggers allows insurers to calculate their risk of losses in regard to a given occurrence such as mold. While not eliminating the transaction costs relevant to economic actors in the mold arena, uniform triggers of coverage will help eliminate uncertainty caused by these costs and

134. See *supra* notes 102-103.

135. See *supra* notes 102-103.

136. *Owens-Ill., Inc. v. United Ins. Co.*, 650 A.2d 974, 979 (N.J. 1994) (explaining that as policies do not actually contain triggers, the term “is merely a label for the event or events that under the terms of the insurance policy determines whether a policy must respond to a claim in a given set of circumstances”).

137. LATHROP, *supra* note 19, § 6.01.

138. *Id.* § 6.04. Another approach, the wrongful act theory, has never been widely accepted, and bears no mention here. *Id.* See *infra* Part IV.B for a detailed discussion on each of the individual triggers of coverage.

139. LATHROP, *supra* note 19, § 6.04.

140. Fischer, *supra* note 23, at 631-32.

141. *Id.* at 632.

142. *Id.*

143. *Id.*

prevent them from being insurmountable obstacles to insurance and many other transactions.

The following hypothetical, taken from a Comment by Nicolas R. Andrea on the dilemmas posed by insurance trigger questions, illustrates the drastically different results in a environmental pollution case depending on which coverage trigger the court applies.¹⁴⁴ While not directly analogous to how a mold claim might transpire, it is nonetheless useful to highlight relevant insurance problems. Suppose that twenty years ago, Company "A," a chemical corporation, buried substantial amounts of contaminants on its property, and that the following events ensued:

1. In Year One, A, while insured by Insurer X, ineffectively disposed of certain toxic chemicals.

2. In Year Three, while A was insured by Insurer Y, the chemicals continued to slowly leak and the contamination progressively worsened.

3. In Year Five, while A was insured by Insurer Z, property damage on the surrounding properties resulting from the toxic chemicals became apparent.

The surrounding property owners sue A. All three insurance companies deny coverage. Typically, Insurer X and Insurer Y would argue for the court to adopt the manifestation theory of triggering coverage, under which liability would attach to Insurer Z. Insurer Z, however, would argue for the exposure trigger, under which liability would attach to both Insurer X and Insurer Y. Finally, the insured company A would argue for the continuous trigger theory, which would warrant coverage by all three insurers and provide for the largest recovery. The court is thus confronted with a clear dilemma over how and to whom liability should attach. The court's decision will hinge on which coverage trigger theory it chooses to apply. Under this all too common scenario, coverage disputes have "erupted, fed by the fires of the liability explosion" in the areas of toxic contamination and asbestos.¹⁴⁵

It must be emphasized that, in claims against insurers in areas such as asbestos and mold, "insurance coverage, if it exists, is created

144. Nicolas R. Andrea, Comment, *Exposure, Manifestation of Loss, Injury-in-Fact, Continuous Trigger: The Insurance Coverage Quagmire*, 21 PEPP. L. REV. 813, 813-14 (1994). Andrea provides cited examples to demonstrate the feasibility of his hypothetical situation, which have been omitted here both for reasons of brevity and because the finer distinctions between the competing insurance trigger theories are well established throughout. The following example is drawn from this Comment.

145. John P. Arness & Randall D. Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 VA. L. REV. 943, 943 (1986).

and defined by the principles of contract rather than tort law.”¹⁴⁶ This principle will not have much relevance in claims brought directly by homeowners against their insurers, because there will generally not be any tort alleged. Many mold claims, however, involve third-party disputes where a property owner brings a suit in tort against a builder or other contractor alleging faulty construction or design that led to the damage and the builder then seeks indemnification from the insurer per the terms of their contract.

B. Coverage Trigger Disputes in Asbestos

Courts adjudicating asbestos claims generally apply one of the theories discussed to determine when insurance coverage is triggered. An early influential decision, *AC&S, Inc. v. Aetna Casualty & Surety Co.*, considered the application of three possible theories to a large-scale asbestos lawsuit: exposure, manifestation, and pro-rata.¹⁴⁷ The court found that the “exposure” theory generally requires any insurer with a policy in effect at the time of a claimant’s exposure to asbestos products to defend and indemnify for any resulting judgment.¹⁴⁸ The “manifestation” theory, on the other hand, obligates the insurer to defend against only those claims which first manifested themselves during its term of coverage.¹⁴⁹ Finally, the “pro-rata exposure” theory, now known as the continuous trigger, views asbestos injuries as occurring continuously from the first exposure until death.¹⁵⁰ Under this theory, an insurer’s obligations are prorated by the ratio of its period of coverage to the total time of coverage.¹⁵¹ Each of the competing rules considered in *AC&S*, along with the injury-in-fact theory which the *AC&S* court did not discuss, has been considered and applied on numerous occasions in the last few decades of toxic tort litigation.¹⁵²

146. *Id.* at 948.

147. 544 F. Supp. 128, 129 (E.D. Pa. 1982). The “pro-rata” theory has since been incorporated into the continuous trigger theory, while the injury-in-fact theory was not yet considered by this case.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 129-30.

152. See *infra* Section IV.B.

1. The Exposure Theory

In early asbestos litigation, most courts adopted some form of the exposure theory when construing insurance contracts.¹⁵³ Courts did so for various reasons. First, determining when an insured has been exposed to an injury is simpler than is determining when an injury “manifests.” Perhaps the more compelling reason for adopting the exposure theory in an asbestos case is that the exposure theory seems most faithful to the insurance contract.¹⁵⁴ In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, the court first concluded that the common construction of health insurance contracts was most applicable to insurance claims arising out of asbestos injuries.¹⁵⁵ Most health insurance policies do not cover a condition until it is actually diagnosed.¹⁵⁶ Yet, courts usually find coverage for health conditions caused before the insurance policy has been purchased.¹⁵⁷ The court stated the proposition that the exposure theory is most appropriate by saying as follows: “[I]t is the injury and not its discovery that makes the manufacturer liable in the underlying tort suit. As noted above, such underlying liability should also trigger insurance coverage.”¹⁵⁸

The Fifth, Sixth, Ninth, and Eleventh Circuits have all continually favored the application of the exposure theory in asbestos personal injury cases.¹⁵⁹ In its simplest terms, the exposure theory states that the policy in force at the time the injured person or property was exposed to the harm provides coverage.¹⁶⁰ The theory was developed in reaction to personal injury cases involving asbestos, primarily where the injury was said by medical experts to begin upon initial inhalation of the asbestos fibers.¹⁶¹ If the exposure was said to continue throughout multiple policy periods, each policy in force could be called upon to insure the loss.¹⁶² In rejecting any approach which spans multiple policy periods, the exposure theory necessarily presumes that the harm occurs simultaneously at the moment of exposure to the hazardous substance.

153. *AC&S*, 544 F. Supp. at 130 n.1. *But see Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 24-25 (1st Cir. 1982) (adopting the manifestation theory for the First Circuit).

154. *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1221 (6th Cir. 1980).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1220.

159. *See LATHROP*, *supra* note 19, § 6.100.

160. *Forty-Eight Insulations*, 633 F.2d at 1217.

161. *See, e.g., id.* at 1217-23.

162. *See LATHROP*, *supra* note 19, § 6.04.

2. The Manifestation Theory

Under the manifestation rule, a claim that is discoverable or becomes apparent during a policy period will trigger that policy.¹⁶³ Because injury or damage can only be discovered once, only the insurance policy in force at that time will provide coverage. In the case of disease resulting from exposure to a substance such as asbestos or toxic mold, the date of manifestation that triggers the policy coverage is determined when the claimant has knowledge, actual or constructive, of the disease, or when the disease is diagnosed, whichever happens first.¹⁶⁴ In the context of a property damage claim, the manifestation theory is often referred to as the "first discovery" rule.¹⁶⁵

The following example illustrates the application of the manifestation theory to a personal injury claim resulting from exposure to a toxic substance.¹⁶⁶ A person is exposed over time to a toxic substance, which eventually results in a serious respiratory illness. When initially exposed to the substance in his home, he is unaware either that he has been exposed or that his health is beginning to deteriorate. A few years later, after subsequent repeated exposures to the toxic substance, he begins suffering health problems over a period of several weeks, finally waking up one morning heaving and coughing blood. The manifestation theory requires only the current insurance policy in effect to respond. Different insurers or different policies that were in place a few years earlier, when he was first exposed to the toxic substance, would not be applicable.

The First Circuit took a minority position in applying the manifestation theory to asbestos claims in the landmark case *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*¹⁶⁷ In adopting the exposure theory for asbestos claims, the Sixth Circuit reasoned that "it is the injury and not its discovery" that should trigger the underlying tort liability and subsequently insurance coverage.¹⁶⁸ In contrast, the First Circuit rejected the exposure trigger in *Eagle-Picher* because asbestosis is an injurious process beginning with the

163. See generally *Lac D'Amiante Du Quebec, Ltee. v. Am. Home Assurance Co.*, 613 F. Supp. 1549, 1556 (D.N.J. 1985) (explaining the manifestation theory in its general context).

164. See, e.g., *Forty-Eight Insulations*, 633 F.2d at 1216-17 (discussing the distinction between the manifestation theory and various exposure theories).

165. See, e.g., *U.S. Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1161-62 (W.D. Mich. 1988).

166. LATHROP, *supra* note 19, § 6.04. The hypothetical example is modeled on the example in this insurance treatise but modified to more readily adapt to this Note.

167. 682 F.2d 12, 18-19 (1st Cir. 1982).

168. *Forty-Eight Insulations*, 633 F.2d at 1220.

deposit of asbestos fibers in the lung and concluding with clinical manifestation of the disease up to twenty years later.¹⁶⁹ The medical experts agreed that the underlying injuries do not occur simultaneously with initial exposure and that the end result of disabling disease or death is by no means inevitable even when the asbestos fibers begin to scar the lungs.¹⁷⁰ Thus, the actual injury can occur at any point along a vast continuum of up to twenty years, or the exposure can produce no injurious effects whatsoever. It therefore makes little sense to fix the point of injury at the time of exposure.

One reason that many courts have rejected the manifestation trigger for asbestos cases is because “it ignores the fact that actual—yet undiscovered—injury or damage may occur during earlier policy periods for which those earlier policies should respond.”¹⁷¹ Subsequently *Eagle-Picher*, as well as the other limited cases involving a manifestation trigger for toxic tort claims, have been narrowly construed revealing that the general approach has been disfavored.¹⁷²

3. The Injury-in-Fact Theory

Under an injury-in-fact approach, the underlying insurance policy is triggered when the damage or injury actually occurs, regardless of the time of either exposure or discovery.¹⁷³ Like the manifestation theory, only one policy will be triggered under this approach.¹⁷⁴ A criticism of this theory is that the determination of which policy is triggered is often a difficult factual one to make—when precisely the harm occurred must be documented by technical or scientific evidence on a case by case basis.¹⁷⁵ In the context of a personal injury claim for toxic mold, the “date the injury occurred may be different from when it was [first] diagnosable or discoverable.”¹⁷⁶ Proponents argue that this is the only trigger theory requiring an actual showing of injury or disease within the disputed policy period,

169. *Eagle-Picher Indus.*, 682 F.2d at 18.

170. *Id.*

171. Anthony Bartell & Patrick J. Perrone, *Builders, Subcontractors and Architects: Finding Insurance Coverage for Mold Litigation*, 1-5 MEALEY'S LITIG. REP.: MOLD 15 (May 2001).

172. See Fischer, *supra* note 23, at 645-46.

173. See *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 197 (W.D. Mo. 1986) (adopting an injury-in-fact trigger applicable under Missouri law in a hazardous waste case).

174. See LATHROP, *supra* note 19, at § 6.04.

175. *Id.*

176. *Id.*

and that it most closely tracks the plain meaning of the insurance contracts.¹⁷⁷

The first use of the injury-in-fact trigger was, as two commentators opined, a judicial attempt to establish consistency in "the 'conceptual chaos' of the trigger of coverage controversy."¹⁷⁸ In a suit against a pharmaceutical manufacturer, the Second Circuit rejected both the manifestation and exposure theories.¹⁷⁹ In rejecting the manifestation theory, the court noted that "[s]ome types of injury to the body occur prior to the appearance of any symptoms; thus, the manifestation of the injury may well occur after the injury itself."¹⁸⁰ Similarly, in rejecting the exposure theory, the court said, "[i]njury cannot be read as the equivalent of exposure, because the policy contemplates injury caused by exposure; since a cause normally precedes its effect, it is plain that an injury could occur during the policy period although the exposure that caused it preceded that period."¹⁸¹

In general, the injury-in-fact trigger has been largely overlooked in the realm of asbestos and other environmental or toxic tort claims. The D.C. Circuit, however, applying New York law, followed the Second Circuit and applied injury-in-fact to a case involving an asbestos manufacturer.¹⁸² In *Abex Corporation v. Maryland Casualty Company*, the court examined a policy requiring exposure that "results, *during the policy period*, in bodily injury" in order for an insurer to be obligated to indemnify the insured.¹⁸³ The court concluded that the unambiguous meaning of these words was that "an *injury*—and not mere exposure—must result *during the policy period*."¹⁸⁴ The court noted that the policies made an important distinction and clearly distinguished exposure from injury, stating that "[a]ny argument that mere exposure—without injury—triggers liability is simply unsound linguistically."¹⁸⁵ Additionally, the manifestation theory was rejected as inconsistent with the policy's definition of "occurrence." The court summarized the seeming inadequacies of the manifestation theory when compared to the new

177. See *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 764-65 (2d Cir. 1984).

178. David J. Dykhouse & Joseph L. Falik, *Trigger of Coverage: The Business Context, The Plain Language, and American Home Products*, 16 CONN. L. REV. 497, 512 (1984).

179. *Am. Home Prods.*, 748 F.2d at 764.

180. *Id.*

181. *Id.*

182. *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986).

183. *Id.* at 127.

184. *Id.*

185. *Id.*

injury-in-fact doctrine: "Although the language of these policies demands that the insured prove that an exposure caused an injury during the policy period, it imposes no requirement that the injury be discovered at that time."¹⁸⁶

4. The Continuous Trigger Theory

Under the continuous trigger theory, all policies in effect (1) at the time of initial exposure, (2) during any subsequent period of continuing exposure, or (3) at the time of the physical manifestation of the harm or damage would be forced to respond.¹⁸⁷ In a sense, the continuous trigger combines the basic elements of all the other trigger theories into one comprehensive rule. The continuous trigger theory can be said to operate on the premise that indemnification and liability extend to all insurers that are at risk from the earliest initial exposure to the final manifestation of the loss or harm.¹⁸⁸ Obviously, this theory is attractive to courts that support the doctrine of construing insurance contracts to provide the insured with maximum coverage. One federal court followed another leading asbestos case in holding that "the policies were triggered if they were on the risk at any time that the claimants suffered injury from asbestos through the time of their death or the filing of their claim," concluding with the resounding proclamation that "[t]his pragmatic approach is the soundest 'theory' of all, and the one which this Court will follow."¹⁸⁹

In *Keene Corp. v. Insurance Company of North America*, the continuous trigger theory was first espoused as a way of managing ever-growing and ever-complex asbestos-related disease claims.¹⁹⁰ An insulation manufacturer faced multiple lawsuits alleging that its products gave the plaintiffs asbestosis and other diseases.¹⁹¹ Keene was insured by at least five different insurers over separate periods during the roughly twenty-five years during which it manufactured products containing asbestos.¹⁹² However, every one of Keene's

186. *Id.*

187. LATHROP, *supra* note 19, § 6.04.

188. Rebecca C. Earnest, Recent Development, *Insurance Law and Asbestosis—When Is Coverage of a Progressive Disease Triggered?*, 58 WASH. L. REV. 63, 67 (1982).

189. Dayton Indep. Sch. Dist. v. Nat'l Gypsum Co., 682 F. Supp. 1403, 1409 (E.D. Tex. 1988), *rev'd sub nom. on other grounds*, W.R. Grace & Co. v. Cont'l Cas. Co., 896 F.2d 865 (5th Cir. 1990).

190. 667 F.2d 1034 (D.C. Cir. 1981).

191. *Id.* at 1038. Keene was ultimately a defendant in some capacity to over 6,000 lawsuits as a result of its manufacturing operations from 1948-1972. *Id.*

192. *Id.* at 1038-39.

insurers either completely or partially denied coverage for the asbestos claims.¹⁹³ Several of the insurers from earlier policy periods urged the court to apply the manifestation theory, while Keene and a separate insurer contended that the exposure trigger theory would be proper, on the premise that exposure to asbestos constitutes the covered injury.¹⁹⁴

The court ultimately rejected both arguments and adopted a triple trigger theory, incorporating both the manifestation rule and two varieties of the exposure theory.¹⁹⁵ This triple trigger theory has since evolved into the formal continuous trigger theory.¹⁹⁶ The court reasoned that the manifestation trigger should apply because it comports with the reasonable expectations of the insured. The court also reasoned that the exposure theory should apply because logic dictates that the injurious process may be well under way, perhaps during a different policy period, before the injury finally manifests itself.¹⁹⁷ The court also noted that such an inclusive trigger would go the furthest toward maximizing coverage for the insured.¹⁹⁸ Finally, the *Keene* court felt that its ruling would be equitable to the individual insurers by not imposing costs on them beyond what they would potentially pay under any single trigger theory.¹⁹⁹ Ultimately an allocation of the loss would be made among the various carriers whose policies were triggered.²⁰⁰

While the continuous trigger theory has been criticized for being too broad and unfair to insurers, it has gained a strong foothold and enjoys relatively consistent application in asbestos claims.²⁰¹ Some commentators have argued that it is also ideally suited for mold claims because the nature of mold-related injury or damage is similar

193. *Id.* at 1039.

194. *Id.* at 1042-43.

195. *Id.* at 1044-47.

196. *See, e.g.*, LATHROP, *supra* note 19, § 6.04[3].

197. *Keene*, 667 F.2d at 1045-46.

198. *Id.* at 1041.

199. *Id.* at 1049-50.

200. *Id.* at 1049-50. However, the court did not make clear exactly how to apply this equitable policy and ultimately spawned confusion and criticism from other courts trying to apply the *Keene* trigger. *See, e.g.*, Owens-Ill., Inc. v. United Ins. Co., 650 A.2d 974, 985-87 (N.J. 1985). There was also no effort made to determine whether allocating the loss would cause the insurers to bear roughly the same exposure under the new continuous trigger as they would under any other single trigger. One commentator has suggested that the court waffled by not acknowledging its inapposite goals of maximum coverage and no increase in exposure to the insurers. Fischer, *supra* note 23, at 650-51.

201. Andrea, *supra* note 142, at 846-49. *But see, e.g.*, Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049, 1057-58 (Ind. 2001) (adopting an injury-in-fact trigger and allocation based on joint and several liability).

to asbestos in that the injury or damage cannot be attributed discretely to either the time of exposure or the time of manifestation.²⁰² Further, “[r]equiring all policies [at] risk to respond to mold claims spreads the occurrence... and maximizes the insurance coverage purchased by the policyholder.”²⁰³

V. DISCUSSION

A. *Mold: Is It Really the Next Asbestos?*

Courts and commentators trying to establish guidelines for resolving mold litigation should address the issue of whether it can legitimately be called the next asbestos.²⁰⁴ Insurers are claiming that the comparison is appropriate and proffering that conclusion as the justification for increasing premiums and withdrawing from certain markets, leaving sizable segments of the population searching for new coverage.²⁰⁵ It appears that the plaintiffs’ bar believes that the comparison between mold and asbestos is appropriate as well, as evidenced by the multitude of cases flooding courts across the country.²⁰⁶ The labeling of toxic mold as the “next asbestos” affects how both insurers and insureds pursue litigation while trying to establish acceptable boundaries for themselves with respect to mold liability. And, if both insurers and plaintiffs are reacting disproportionately to the crisis, it becomes very difficult for any meaningful solutions to be achieved without costly and lengthy judicial involvement. A number of commentators addressing the issue

202. Bartell & Perrone, *supra* note 171; *infra* Part V.D.

203. *Id.* However, this benefit of the continuous trigger could also be its downfall if it leads to drastically increased rates as insurers try to insulate themselves from ever-expansive judicial rules seeking to place all the risk of the insurance contracts on insurers. *See supra* Part I.

204. It is beyond the scope of this Note to fully address the myriad of factors necessary to determine whether the comparison between the infant toxic mold phenomenon and thirty years of mammoth-scale asbestos litigation is appropriate. It is possible, however, to make some broad observations and conclusions, primarily drawing on other commentators who have already tackled this point. A cursory analysis of the “next asbestos” crown is necessary to the claims of this Note because it proposes that courts need to abandon the prevailing methodology for triggering insurance coverage in traditional toxic tort cases. This is easier to do if courts are satisfied at the outset that toxic mold is an entirely different beast than asbestos. At the present, the only thing certain is that mold has the *potential* to be the “next asbestos.” Regardless of whether toxic mold wreaks havoc or vanishes from the legal horizon in ten years, this potential is sufficient to warrant both careful analysis of this Note and heightened scrutiny of courts across the country in the near future.

205. *See, e.g.*, Amon, *supra* note 10.

206. *See, e.g.*, Reisinger, *supra* note 83.

tend to group the toxic mold trends with asbestos, only briefly mentioning other possibly more analogous claims.²⁰⁷

There are obvious differences between asbestos and mold litigation. Asbestos is a substance that was incorporated into a number of manufactured construction products, while mold is a naturally occurring phenomenon.²⁰⁸ Plaintiffs who were harmed by asbestos filed lawsuits against manufacturers who incorporated the hazardous substance into products that ended up in homes or office buildings.²⁰⁹ In mold cases, the toxic substance often appeared without fault or involvement by any party other than nature.²¹⁰ Plaintiffs then seek reimbursement for mold damage from their insurers. In this sense, it is difficult to call a mold case a "tort" at all because there is no identifiable wrongdoer.²¹¹ Rather, the claim is more often a breach of contract or bad faith by an insurer, with mold being only the underlying damage that precipitated an insurer's tortious conduct.²¹²

On the other hand, there are branches of claims where the toxic mold is alleged to directly spring from a tort such as faulty or negligent design and construction of a building or home.²¹³ A homeowner in this situation would sue the builder of her home directly in tort. Or, a defendant insurer may sue the builder or other entity it sees as ultimately responsible for the mold claim to which the insurance company is forced to respond.²¹⁴ Ultimately, particularly in areas of toxic torts such as asbestos, "insurance coverage, if it exists, is

207. See, e.g., Harkins, *supra* note 69, at 1115.

208. Jarman-Felstiner, *supra* note 4, at 549-50.

209. *Id.* at 550.

210. See *supra* Part II.A.

211. Jarman-Felstiner, *supra* note 4, at 537-39.

212. See Maniloff, *supra* note 88, at 3-4.

213. See generally Mike Bischoff, Comment, *Theories of Toxic Mold Liability Facing Arizona Homebuilders*, 34 ARIZ. ST. L.J. 681, 684-85 (2002). Bischoff theorizes that homebuilders, engineers, subcontractors, architects, and others who may be responsible for constructing a home will ultimately be the primary defendants in toxic mold litigation. In fact, Bischoff suggests the cases when a homeowner directly sues her insurer regarding a toxic mold infestation will be the exception rather than the norm. *Id.* While these assertions are highly debatable given the current trends in mold litigation, they are also ultimately irrelevant to the conclusions of this Note even if taken as true. Any type of builder or contractor sued for toxic mold will seek coverage or indemnification from *his* insurer, and sue the insurer if (or, perhaps as the trends indeed suggest, when) it denies coverage. Thus, an insurance company is still a defendant in the case and trigger of coverage theories must still be considered. Also, builders will only be the defendant in cases of *new* homes or buildings becoming infested with mold, which necessarily leaves out the vast majority of potential mold claimants. *Id.* As new home warranties and applicable statutes of limitations expire, the homeowners insurance necessarily becomes their only source of recourse to mold damage.

214. *Id.*

created and defined by the principles of contract rather than tort law.”²¹⁵ So, it is perhaps irrelevant to categorize toxic mold claims as any tort at all. All of the asbestos cases referenced thus far, however, also only questioned whether insurance coverage existed for the underlying damage or disease, *not* whether there was an actionable claim or liability for a specific tort.

In this light, it seems reasonable for courts to refer to asbestos cases involving insurance disputes as a guide to toxic mold claims involving insurance disputes. Both injuries result from exposure to a harmful substance in a home or building, and the injuries usually do not manifest immediately. In the case of mold, the period from exposure to manifestation will generally be a great deal shorter than asbestos, and this should undoubtedly play a role when courts are tailoring asbestos law to fit mold law.²¹⁶

The answer to the question “is mold the next asbestos?” will shape the reaction of both insurers and injured plaintiffs.²¹⁷ This requires a consideration not of the legal issues differentiating the two types of claims, but rather the factual ones. One commentator has advanced five basic and compelling reasons why “the stars are not aligned for mold to warrant such an ambitious label” as the next asbestos.²¹⁸

First, there will simply never be enough claims to replicate the “asbestos business model,” in which a single defendant often faced thousands of lawsuits for the same action. To avoid suffocation from the sheer volume of lawsuits, the interested parties often entered into global settlements.²¹⁹ This situation simply will not be replicated with mold claims.²²⁰ Each occurrence of toxic mold will be an isolated

215. See Arness & Eliason, *supra* note 145, at 948.

216. See Jackson v. State Farm Fire & Cas. Co., 835 P.2d 786, 788-89 (Nev. 1992); Nelson, *supra* note 45.

217. Or, from a more cryptic and cynical view, the critical question is whether “plaintiffs’ attorneys have sunk to a new level in taking advantage of the mold scare.” See Reisinger, *supra* note 83, at 52. There can be no question that mold is creating a feeding frenzy right now among plaintiffs’ attorneys precisely because it has the *potential* to be the next asbestos. One commentator has opined that there will be much less of an insurance “pot” to cover mold claims, and “while certainly not preventing mold litigation—will surely make the litigation less attractive for a plaintiff’s attorney deciding how best to use the finite number of hours in his or her work day.” Randy J. Maniloff, *Mold: 5 Reasons Why It Is Not the ‘Next Asbestos,’* 2-6 MEALEY’S LITIG. REP.: MOLD 35 (May 2002).

218. Maniloff, *supra* note 88, at 25.

219. *Id.* at 25-26. Courts were often very interested, if not insistent upon, these mass settlements. *Id.*

220. This is not to say that individual insurers will not each face thousands of toxic mold claims. However, each claim will be independent and fact specific. Thus, parties will not join together in potential class action suits. But, it is impossible to predict the outcome of such massive litigation, and it is entirely possible that the sheer number of individual mold claimants

event. There will be no opportunity for the use of form pleadings and mass settlements.²²¹

Second, most mold claims are for property damage and are filed directly against the insurer.²²² The trend indicates that the majority of claims have no connection to liability at all, but rather are simply individual homeowners' insurance claims.²²³ There have been less than twenty cases thus far where mold claims against contractors or building owners have resulted in settlements or awards of \$1 million or more.²²⁴

Third, the insurance industry is reacting much more quickly to mold claims than it reacted to asbestos claims by altering policies to specifically limit or exclude mold.²²⁵ While the loss of insurance coverage for mold claims obviously does not bar lawsuits against the parties potentially responsible for the growth of toxic mold in the first place, "the likely reality is that without insurance dollars to pay any settlement or judgment, the plaintiffs bar's motivation to bring the case (and especially on a contingent fee) will be lost."²²⁶

Fourth, mold likely will have a much shorter trigger period than asbestos.²²⁷ Even if there is pressure against insurance companies to completely eliminate mold coverage, the nature of mold simply makes it unlikely that potential plaintiffs will be able to sue to enforce multiple insurance policies stretching back for decades as happened in the asbestos arena.²²⁸ The evidence to date indicates that mold does not have any latent symptoms like asbestos; in fact, symptoms connected to toxic mold often disappear if the injured party is removed from contact with the mold.²²⁹

Finally, the insurance industry simply cannot afford another asbestos.²³⁰ From 2001 to 2002, the insurance industry as a whole had

will exceed cumulative asbestos claimants. For example, the Texas Department of Insurance estimated that over 44,000 claims (not lawsuits) were filed in that state alone during 2000-01, an increase of well over 500 percent from the previous year. See Tex. Coalition for Affordable Ins. Solutions, *Mold Facts*, http://www.tcais.org/insurance/mold_facts.php (last visited Feb. 11, 2004).

221. Maniloff, *supra* note 88, at 26. But insurance companies could in fact adopt some type of "form" settlement to dispose of large numbers of mold claims creating a backlog in their claims departments. But it is highly unlikely that insurers will do this in the context of settling actual lawsuits.

222. *Id.* at 27.

223. *Id.*

224. *Id.*

225. *Id.* at 28-29.

226. *Id.*

227. *Id.* at 29-30.

228. *Id.*

229. See Jarman-Felstiner, *supra* note 4, at 547.

230. See Maniloff, *supra* note 88, at 30-31.

its first ever net loss for a full year, losing a combined \$7.9 billion after taxes.²³¹ This loss has been blamed on numerous factors, including September 11 payouts, aggressive competition throughout the 1990s, and the sharp decline in investment values as a result of stock market losses.²³² The bottom line is that insurers are taking the unprecedented action of pulling out of markets rather than risk another realm of litigation akin to asbestos, thus assuring that mold will not in fact replicate asbestos.

While mold will not likely rival asbestos litigation in terms of sheer volume and economic damage, it still could be the next major litigation crisis facing courts nationwide. Courts should only look to asbestos litigation as a model to the extent that they seek to avoid the negative results of the past thirty years including the enormous litigation costs and inefficient use of scarce judicial resources.

B. *What Trigger Is Appropriate to Act as a "Judicial Gatekeeper"?*

Trigger theories act as gatekeepers by determining which insurance policies have to respond to given claims.²³³ Thus, at the very outset of litigation, courts have the power to dismiss claims against insurers that do not fit within the particular court's trigger of coverage theory. These rules can have a strong influence on the eventual direction of mold claims by keeping possibly frivolous claims against multiple insurers out of courts in the first place. This issue is so important in the new area of toxic mold litigation because insurers are simply excluding coverage for mold or pulling out of markets rather than facing an uncertain future in which they may or may not have to respond to an endless stream of past, present, and future claims for toxic mold. It has been well established that vastly different results arise from the exact same claims brought in jurisdictions that apply different coverage trigger theories.²³⁴

When trigger theories vary from state to state and are not even applied uniformly within jurisdictions, insurers are unable to gauge their potential future obligations, which is the essence of what pricing insurance requires. One of the reasons that asbestos litigation has been so costly is that application of exposure theories led to multiple

231. In Texas alone, ground zero for toxic mold claims, the insurance industry has collectively suffered \$3 billion in underwriting losses since 1998. See Tex. Coalition for Affordable Ins. Solutions, *supra* note 220.

232. *Id.*

233. See discussion *supra* Part IV.A.

234. See *supra* Part IV.B.

insurers who issued policies years or even decades apart were being forced to respond to the same claim.²³⁵ On the other hand, the manifestation rule provides that since the injury or damage can only be discovered once, only the policy in force when the harm is first discovered or “manifests” will cover the loss.²³⁶ In the context of personal injury, the injury may manifest either when the symptoms of the disease or injury first appear, or at the time when the injury or disease is first capable of diagnosis.²³⁷ Similarly, in property damage claims, manifestation occurs when the damage is first discovered or, through reasonable care, should have been discovered.²³⁸ If exposure theories are applied consistently in mold cases, insurers may have some predictability but will likely go bankrupt. For the two year period between January 1, 2000, and December 31, 2001, Texas insurers incurred total costs of over \$1 billion dollars in mold claims.²³⁹ Those losses represent only the relative infancy of toxic mold litigation. It was enough to cause the nation’s largest home insurer to cancel an unimaginable 700,000 policies.²⁴⁰ While still nowhere near the economic costs incurred through asbestos litigation, both sides will clearly lose if this trend continues.

C. *The Manifestation Theory Is the Best Fit for Toxic Mold*

This Note proposes that a shift by courts to strict application of the manifestation trigger theory in toxic mold cases will help to stave off an economic disaster for both insurance companies and the public at large, while also providing the most equitable results for both parties. Application of this single trigger theory will provide much needed certainty in the mold arena and will allow all parties potentially coming into contact with mold to adequately quantify the economic risks involved.

235. See generally *Jackson v. State Farm Fire & Cas. Co.*, 835 P.2d 786, 788 (Nev. 1992) (explaining that where the different insurers from the periods ranging from when the damage first occurred to when it is first discovered all have to respond, there will be much greater costs involved).

236. See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 16 (1st Cir. 1982); *Jackson*, 835 P.2d at 788; LATHROP, *supra* note 19, § 6.04.

237. E.g., *Eagle-Picher*, 682 F.2d at 24-25 (stating that the illness must be “reasonably capable of diagnosis”).

238. E.g., *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986).

239. Tex. Dep’t of Ins., *Mold Data—All Claims*, (June 14, 2002), <http://www.tdi.state.tx.us/commish/news/molddata2.html>.

240. See *supra* note 97 and accompanying text.

The California Supreme Court held in *Prudential-LMI Commercial Insurance v. Superior Court* that shifting to a manifestation trigger promotes sounder public policy than previous rules, because “[t]he manifestation rule . . . promotes certainty in the insurance industry and allows insurers to gauge premiums with greater accuracy.”²⁴¹ This should reduce costs for consumers because insurers can set aside proper reserve funds for well defined coverage and avoid increasing those reserves to cover potential financial losses caused by uncertainty in the definition of covered claims.²⁴² The *Prudential-LMI* court also addressed the issue of fairness to the consumers, arguing that under the manifestation rule “the reasonable expectations of insureds are met because they look to their present carrier for coverage.”²⁴³ At the same time, the underwriting practices of the insurer are predictable because the insurer is not liable for a loss once a contract ends, unless the manifestation of loss occurred during its contract term.²⁴⁴

Proponents of manifestation triggers generally advance two broad policy arguments, similar to those of the California court, in support of the test. First, actual injuries or damages only occur when they become apparent, and insurers cannot be expected to provide coverage for preexisting injuries, of which neither the insurer nor the insured had knowledge when the policy was effective.²⁴⁵ More importantly, the test provides for certainty, allowing insurers to better gauge potential liabilities and thus respond better to all insurance consumers.²⁴⁶

Critics contend that manifestation rules effectively collapse occurrence insurance into claims-made coverage and allow insurers to exit markets and leave policy holders exposed.²⁴⁷ Another criticism of a pure manifestation rule is that it fails to provide maximum coverage for the insured.²⁴⁸

The first concern raised about the manifestation rule is more compelling, yet ultimately is not sufficient to justify adhering to the

241. 798 P.2d 1230, 1246-47 (Cal. 1990) (remanded on other factual grounds).

242. *Id.* (quoting *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277, 281-82 (Cal. Ct. App. 1988)).

243. *Id.* at 1247.

244. *Id.*

245. *See, e.g., Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1550-51 (C.D. Cal. 1992) (holding that in property damage cases, injury occurred when the claimant realized actual economic loss), *aff'd*, 41 F.3d 429 (9th Cir. 1994).

246. *See, e.g., Chemstar*, 41 F.3d at 434-35.

247. *See Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, 485 (E.D. Mich. 1989) (quoting *Developments in the Law, Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1580 (1986)).

248. *Id.*

rule. "In most cases . . . the manifestation rule would reduce coverage: insurers would refuse to write new insurance for the insured when it became apparent that the period of manifestations, and hence a flood of claims, was approaching."²⁴⁹ Another court explained the criticism by saying "[u]nder the manifestation theory, coverage can become illusory when the manufacturer of a product is faced with an increasing rate of injured persons. At a certain point, the manufacturer will be unable to secure any insurance coverage. Thus, when some of the injured persons manifest their injury, there will be no insurance."²⁵⁰

In the case of mold, this argument suggests that as the number of mold claims begins to increase precipitously, insurers would simply stop issuing policies and exit the market to protect themselves. Indeed, insurers are doing just that in Texas to avoid a spate of costly toxic mold litigation, but it has little to do with the particular trigger of coverage rule employed by Texas courts.²⁵¹ Texas does not subscribe to the manifestation rule in the case of personal injuries resulting from progressive diseases such as asbestosis and (thus far) toxic mold ailments.²⁵² In cases of personal injury due to asbestos-related disease, Texas adheres to the exposure theory.²⁵³ Thus it is arguable that insurers might try to pull out of markets to avoid a massive spate of claims regardless of which trigger theory is employed, and it makes no sense to confine this criticism to the manifestation rule. This criticism of the manifestation rule also concludes that any rule which exposes policy holders is inherently unfavorable; thus it implies that only a rule which disfavors and exposes insurers to risk is preferable.

Texas does apply the manifestation theory to pure property damage cases involving asbestos or like substances.²⁵⁴ This application is in line with emerging trends in numerous jurisdictions to adopt the manifestation trigger in pure property damage cases. California courts, for example, have increasingly been applying manifestation triggers in a wider variety of cases, including third-party damage cases and progressive damage cases.²⁵⁵

249. *Id.* at 485.

250. *Hancock Labs., Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 525 (9th Cir. 1985).

251. *See supra* Part III.B.

252. *See Guar. Nat'l Ins. Co. v. Azrock Indus., Inc.*, 211 F.3d 239, 247, 250-52 (5th Cir. 2000) (determining under the *Erie* doctrine which trigger theory applies under Texas law in asbestos cases).

253. *Id.* at 250-51.

254. *Id.* at 247-48.

255. *See County Sanitation Dist. No. 2 v. Harbor Ins. Co.*, 22 Cal. Rptr. 2d 90, 93-95 (Cal. Ct. App. 1993); *Whittaker Corp. v. Allianz Underwriters, Inc.*, 14 Cal. Rptr. 2d 659 (1992).

Insurers should have the right to choose to exit the market after such a monstrous financial hit from insurance claims. Giving insurers this option is different than allowing insurers to “refuse to write new insurance for the insured when it became apparent that the period of manifestations, and hence a flood of claims, was approaching.”²⁵⁶ “Manifestation” only occurs when the property damage is discovered or in the reasonable exercise of care *should* have been discovered. Under the manifestation trigger, therefore, it is technically impossible for insurers to foresee a period of damages or injury yet to appear.²⁵⁷

In a personal injury context, both a disease such as asbestosis and the effects of mold manifest either when discovered or when it becomes “reasonably capable of medical diagnosis.”²⁵⁸ Insurers cannot predict when a multitude of covered occurrences are about to manifest. Logic dictates that if insurers could anticipate a manifestation, then the damage or injury should be considered to have already manifested and the policy must respond. Insurers cannot thus avoid their contractual obligations and duties to provide coverage or indemnification during the policy period in question.

Even if this criticism of the manifestation theory is valid, there seems to be no favorable alternative. An insurer should not be forced to continue renewing unprofitable policies. If a thousand lawsuits have been filed against an asbestos manufacturer in each of the preceding two years, it would be absurd to demand that the manufacturer’s insurer continue to insure the manufacturer. Similarly, suppose an insurer provides homeowners insurance to five homes out of twenty on a given block, and in the past year ten homes on the block, but none covered by the insurer, have filed mold claims that cost other insurers \$30,000 each to resolve. When it comes time to renew each of the policies, the company yet to have any mold claims is nonetheless going to drastically increase the rates or cancel the policies. The company should not be forced to renew all the policies for substantially the same price; that would be inherently unfair or unjust given the almost certain likelihood that at least half of the homes will suffer \$30,000 in toxic mold damage in the coming year.²⁵⁹

256. *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, 485 (E.D. Mich. 1989).

257. *See Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986).

258. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982).

259. If state insurance regulations cap homeowners’ premiums at an unfavorable rate to insurers, the insurers may thus choose to exit the market because of an inability to raise premiums. In that situation, insurers would choose to leave a given market only after considering the cost of losing all of the business in the state; state insurance boards would not permit insurance companies to exit only selective portions of the market. *See supra* Part III.B. Regardless, the preceding examples are solely intended to serve as counterarguments to

Insurance is not meant to function in such a constrained manner. Insurance essentially shifts risk for a cost. Insurers use statistical models to determine what the cost of a particular risk should be. If person X is a seventy-year-old lifelong smoker, no reasonable person disputes the notion that her health insurance should cost substantially more than a healthy twenty-year-old. The seventy-year-old may not even be able to obtain insurance. It is unreasonable to require that a private insurer provide what is deemed reasonably affordable coverage at a debilitating cost to the company.²⁶⁰ Yet criticisms of the manifestation theory, as thus far applied to other toxic torts, would result in just such perverted outcome.

Even where a strict manifestation rule is used in the context of toxic mold claims, there is still flexibility to allow courts to technically adhere to it while avoiding what may be perceived as inequitable results to injured plaintiffs, as a recent decision by a federal judge in Texas illustrates. In *Lewis v. State Farm Lloyds*, the homeowner discovered black mold covering portions of the interior walls, just three days after closing on the home and activating her homeowners policy.²⁶¹ The insurer hired an engineering firm to investigate the mold growth.²⁶² The company concluded that prior to the purchase of the home, a toilet leak had caused extensive water damage that caused the mold accumulation.²⁶³ The insurer denied the claim on the ground that the mold damage occurred prior to the effective date of the policy.²⁶⁴ Both parties agreed that the mold damage was preexisting, but they disagreed over whether the damage was identifiable before the sale. This disagreement is relevant because manifestation occurs when the damage is first discovered or using reasonable care should have been discovered.²⁶⁵ The court refused,

criticisms of the manifestation trigger of coverage theory as applied by courts. They are not intended to implicate state regulation and other outside forces influencing the insurance market.

260. These examples are applicable to private insurers who are presumably active in the insurance marketplace to do what all companies do: earn a profit on the product or service they provide. They are not meant to make any judgment on the appropriateness or necessity of publicly funded insurance programs for either homeowners or seventy-year-old lifelong smokers.

261. *Lewis v. State Farm Lloyds*, No. G-02-246 (S.D. Tex. July 12, 2002) (order denying motion for summary judgment).

262. *Id.*

263. *Id.*

264. *Id.*

265. See *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986). This scenario also raises another relevant issue to cases involving homeowners: looking for mold as part of the standard home inspection at the time of sale. Inspectors use a device that detects moisture at certain levels in the walls of a home. Interview with E. Vanessa Edwards, Realtor, Coldwell Banker Barnes, in Franklin, Tenn. (Jan. 31, 2002). This has become standard practice

however, to make a determination of when the damage first manifested or should have been reasonably discovered, instead applying the following reasoning:²⁶⁶

The Court does not need to decide when the pre-existing mold damage occurred, however, because new mold damage, arguably at least, occurred after the Policy went into effect. Although Plaintiff bought her home after the mold growth began, the mold undoubtedly continued to grow and cause increasing alleged toxicity within the home on a daily basis. Mold is not a static condition . . . at least some portion of the offensive mold grew and caused damage that initially became “capable of being perceived, recognized and understood” during the policy period.²⁶⁷

The criticism that the manifestation rule will cause insurers to flee markets seems flimsy at best. The other broad criticism of the manifestation rule, that it fails to provide maximum coverage for the insured, has even less logical support. While some may consider this to be a sound and socially desirable goal, it does not comport with well-settled legal theory. In adopting a continuous trigger rule for asbestos cases, the *Keene* court discussed at length the manifestation theory and other rules that fail “to give effect to the policies’ dominant purpose of indemnity.”²⁶⁸ The court then noted that its analysis of any policy must proceed aided “by the well-accepted rule that ambiguity in an insurance contract must be construed in favor of the insured.”²⁶⁹ While courts should construe ambiguities in favor of the insured, they should not construe insurance contracts to provide for coverage that does not exist. Thus if a policy covers damage due to “fungus,” but is silent regarding “mold,” a court could reasonably construe the ambiguity in favor of the insured and find that mold is covered. Whether or not a manifestation trigger applies as opposed to exposure or injury-in-fact will not change this analysis in the slightest.²⁷⁰ Rather, the trigger will determine whether there was even an

in a number of mold-prone states, including Missouri, Tennessee, and Texas. *Id.* While this practice in theory could identify preexisting mold, in reality it is little more than a tool to absolve the home inspector of liability. *Id.* Toxic mold requires so little moisture to develop that is very close to impossible to detect in small pockets. *See supra* Part II.A. Although the technology to detect mold could greatly improve in the future, at present it is simply not possible to fix a point in time as certified “mold-free.”

266. Lewis, No. G-02-246 (order denying motion for summary judgment).

267. *Id.*

268. *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041-42 (D.C. Cir. 1981).

269. *Id.* at 1041.

270. Indeed, an important distinction to highlight is that insurance triggers are judicial rules, while any “ambiguities” in an insurance policy are necessarily imperfections in the contract itself. Thus, ambiguities in the actual contract should presumably be construed in favor of the weaker bargaining party, which is obviously the policy holder. But as previously noted, even if an insurance contract included specific reference to an intended coverage trigger, courts would not likely give effect to such a clause because it would be infringing upon the judicial policy of a given jurisdiction. *See supra* Part IV.A.

insurance policy in force at the time of the occurrence. A policy that promotes application of any rule that finds insurance coverage, just to promote maximum coverage for plaintiffs, is absurd.

Again, applying the manifestation rule does not have to entail abandoning insurance coverage for mold damage altogether. Rather, the central concern of the judicial system should be to provide certainty for all parties in hopes of reducing already large transaction costs. There was a time when the presence of asbestos, lead-paint, or high levels of radon in a structure posed such uncertain risks that property transactions simply could not be completed forcing many sectors of both society and the economy to suffer.²⁷¹ Today, however, all parties, from lenders to insurers to building occupants, are able to effectively quantify the risks and costs associated with those materials. As a result, these potential toxins have become just another issue to address in the relevant negotiations, albeit an issue that does and should call for concern.²⁷²

It is certainly significant that at such an early point in the development of toxic mold litigation, several federal courts have shown a willingness to apply manifestation rules, even though they were routinely cast aside in asbestos cases.²⁷³ Although most of the plaintiffs' insurance claims were defeated in *New Orleans Assets* after the court applied the manifestation rule, the claimants were still able to recover appropriate damages directly from the building architects and other defendants linked to the actual causation of the toxic mold occurrences.²⁷⁴ Similarly, in the *Centex-Rooney* case, Martin County ultimately recovered a judgment of more than \$14 million in mold damages, interest, and attorney fees against the builder, several subcontractors, and *their* insurers.²⁷⁵ In both of these landmark cases, the plaintiffs were able to recoup their losses despite their own insurance carriers not being held liable.²⁷⁶ Although the manifestation rule may ultimately limit claims against insurers, it will not prevent injured plaintiffs from recovering appropriate damages in mold cases. To complete this analysis, it is necessary to discuss not only why the manifestation rule will best guide courts in resolving toxic mold claims, but why the other available trigger theories specifically will not.

271. See Wright & Irhy, *supra* note 13, at 307.

272. *Id.*

273. See *supra* Part III.B.

274. *Louisiana Federal Judge Lets Subrogation Claims Stand in Mold Contamination Case*, 3-2 MEALEY'S LITIG. REP.: MOLD 9 (Feb. 2003); see *supra* notes 125-128 and accompanying text.

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

276. See *infra* notes 274-275.

D. *Why the Other Theories Must Wash Out in Mold Cases*

1. The Exposure Theory

The exposure theory developed in reaction to personal injury claims involving asbestos, most notably where medical experts said the injury began upon initial inhalation of the asbestos fibers.²⁷⁷ One reason for this is that determining when there is exposure is simply easier than determining when an injury “manifests.” The exposure theory necessarily presumes that the harm occurs at the moment of initial exposure to the hazardous substance. Identifying the time of initial exposure has proven difficult with a notoriously toxic substance such as asbestos.²⁷⁸ This theory has very little room for application in toxic mold claims, where there is a general dearth of scientific and medical data.²⁷⁹

Exposure to asbestos usually occurs over a period of time in either one’s home or place of employment. Regardless of the scenario, it should be possible to fix the rough time period of the initial exposure, either by determining the first date of employment in the contaminated environment or the first date of residence in the contaminated home. The date of initial exposure cannot similarly be fixed in a toxic mold case because the date when mold first began to grow generally cannot be fixed. Certainly one can attempt to date the moisture source which likely produced the mold, as in the case of a flooded basement or burst water pipe, but even then it is not possible to determine when the mold actually first appeared. The closest one might reasonably hope to determine is the date when, in the reasonable exercise of care, the mold *should* have been discovered.²⁸⁰

Asbestos and other man-made toxic substances are tangible in nature. Whether they were put in walls or buried underground, it is possible to document the precise point in time when they were put there or when the party in question first came into contact with them. Conversely, mold is naturally occurring and it is virtually impossible to pinpoint the precise point in time when it first appeared in a wall or underground. Thus the quandary arises: how can courts determine

277. See *supra* Part IV.B.1.

278. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 18 (1st Cir. 1982) (noting medical evidence which indicates that inhalation of asbestos fibers and even subsequent deleterious effects does not in all cases culminate in disabling disease or death).

279. See *supra* Part II.

280. See *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986).

whether or not a given insurance policy applies by using a rule which requires them to apply those policies that were in effect when the injured party was exposed to the toxic mold, when it is impossible to determine when the toxic mold even came into existence?

2. The Injury-in-Fact Theory

The injury-in-fact theory should not be applied in toxic mold cases because it is simply too burdensome of an analysis to undertake in large numbers of cases. On its face, a rule that only triggers the underlying policy at the time the actual injury or damage occurs regardless of when either exposure or discovery occurred seems like sound policy.²⁸¹ The determination of when precisely the injury occurred, however, is usually a very difficult factual determination.²⁸² Pinpointing the time of injury must be documented by technical or scientific evidence on a case-by-case-basis.²⁸³ The date of injury in a toxic mold claim is likely different than the dates when the victim was exposed to the mold and when the problem was first discoverable or diagnosable, and this fact can only further confuse the matter. Much like trying to pinpoint the time of exposure, fixing the date of actual injury or damage in a toxic mold case is too subjective. Although the health effects of toxic mold are not as well established as asbestosis, it is certain that they do not occur instantaneously but rather develop over time.²⁸⁴ The most a court can hope to determine in this context is when the injury from toxic mold exposure was first discovered or first manifested.

The injury-in-fact trigger was developed as a judicial attempt to establish consistency in the chaos of the trigger of coverage controversy.²⁸⁵ In fact, it is much more difficult to establish the quantum of injury necessary to trigger coverage than it is to establish manifestation or even exposure.²⁸⁶ Courts applying this trigger have to establish some guidelines at the outset as to what constitutes an "injury."²⁸⁷ Not only may the medical fact of injury be debated, but the

281. See *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 197 (W.D. Mo. 1986) (adopting an injury-in-fact trigger applicable under Missouri law in a hazardous waste case).

282. See LATHROP, *supra* note 19, § 6.04.

283. *Id.*

284. See *supra* Part II.B.

285. Dykhous & Falik, *supra* note 178, at 512.

286. See Fischer, *supra* note 23, at 642.

287. *Id.*

injury-in-fact inquiry is necessarily distinct from whether a causal relationship exists between the mold exposure and the injury.²⁸⁸ It is telling that this trigger has largely been ignored in most toxic tort and environmental cases.

3. The Continuous Trigger Theory

The continuous trigger should be discarded by courts in toxic mold cases for two reasons. First, it is not possible to fix the exact time of the initial exposure to the toxic mold, which is a necessary component of this trigger. Second, the inequitable results to insurers resulting from this rule have fueled unchecked asbestos litigation and its ensuing economic havoc. Under the continuous trigger theory, all policies in effect at (1) the time of initial exposure, (2) during any subsequent period of continuing exposure, and (3) the time of the physical manifestation of the harm or damage would be forced to respond.²⁸⁹ This Note has already proposed that the first element, the time of initial exposure, cannot in fact be fixed in toxic mold cases.²⁹⁰ If that time cannot be fixed, it can also be argued that the second element cannot be firmly established either, because if there is no concrete "initial" period, there can be no identifiable "subsequent" period. The only necessary element of a continuous trigger that can be firmly established is the time of physical manifestation of the harm or damage.

In addition, the proponents of the continuous trigger who claim that it is the most equitable to plaintiffs are the ones who would bring toxic mold the closest to becoming the next asbestos.²⁹¹ It is precisely the fact that insurance policies spanning decades were all forced to respond to a single exposure that has made asbestos claims such a boon to plaintiffs' attorneys. The potential "pot" available from the aggregate of ten or twenty years of insurance policy limits is staggering. This is not to say that all, or even the majority, of asbestos claims and developing toxic mold claims are frivolous or brought under questionable motives. Nonetheless, the potential for huge awards almost certainly produces needless litigation that overwhelms the limited resources of the nation's judicial systems. Furthermore, toxic mold simply has not been shown to be anywhere

288. *Id.* at 642-43.

289. See LATHROP, *supra* note 19, § 6.04.

290. See *supra* Part V.D.1.

291. *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1037, 1041 (D.C. Cir. 1981).

near as harmful as asbestos, which certainly eliminates most of the underlying policy concerns that fueled the development of the continuous trigger in the asbestos context.²⁹² Until there is more data on the real damage caused by toxic mold, there is no justification for imposing on insurers the harsh outcomes of the continuous trigger theory.

VI. CONCLUSION

While it is too early to gauge with certainty the scope and scale of toxic mold litigation, there can be little doubt that large numbers of claims and lawsuits will continue to be filed and large damage awards rendered. There is a major insurance crisis looming for both the average homeowner and commercial conglomerates in mold-prone states, as Texas demonstrates. While it cannot yet be said whether mold will live up to its billing as the next asbestos, it should not even come close.²⁹³ But, litigation trends are not always measured in particularly rational terms. Public perception of the toxic mold phenomenon is going to shape the vigor with which it is pursued as a cause of action; courts must not let the public mood dictate initial policy decisions that will shape the future of this developing arena.

Trigger theories act as judicial gatekeepers, and the explosion of toxic mold claims cries out for such gate keeping.²⁹⁴ These rules, identifying which insurance policies may have to respond to particular claims, have a strong influence on the progress and resolution of the litigation of those claims.²⁹⁵ This has been particularly relevant in mass tort cases where the courts actively promote settlement instead of further litigation, and finding some insurance coverage for the claim becomes the "judicial carrot" to further the policy of insurers bearing the burdens of settlement.²⁹⁶ Courts must be careful, however, to balance the legitimate interests of insurers. Uniformly applying the manifestation trigger theory will ultimately provide both a check on uncontrolled mold litigation as well as an equitable balance between injured plaintiffs and their insurance carriers. By accomplishing these goals, courts can ensure that they do not divert too many of their scarce judicial resources into adjudicating untold thousands of mold

292. See *supra* Section IV.B.4.

293. See *supra* Section V.A.

294. See Fischer, *supra* note 23, at 631-32.

295. *Id.* at 632.

296. See *supra* Part IV.A.

claims, but instead focus their efforts on more pressing legal and societal concerns.

*Gregory A. Goodman**

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