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HEALTH EPIDEMIC HITS HOME FOR PROPERTY INSURERS: *PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY V. LILLARD-ROBERTS V. PRIMOZICH*

Vanessa Fosse*

INTRODUCTION

In the wake of the asbestos litigation, scenarios in which property insurers must concern themselves economically with their insureds' health remain rare, yet all too familiar.¹ A new toxin has inched its way into the homes and bodies of Americans, driving people out of their homes, insurance companies into a new nightmare, and a myriad of property insurance disputes into court.² This article will touch upon the prevalent issues involved in toxic tort litigation, and examine the possibilities by which courts may evaluate and respond to a certain type of toxic mold case. Specifically, this article will examine a toxic mold case in which the pivotal issues are investigation, cause, coverage, and the corresponding costs.

Toxic Mold

"Moldy homes have been around since biblical times."³ Usually the mold found within homes will only cause problems when the owner is in fact allergic to the mold.⁴ However, toxin producing strains of mold such as *Stachybotrys atra*, *Aspergillus*, and *Penicillium* have been appearing in homes in recent years causing some homeowners to suffer

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¹*Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997).

²See generally Dan Michalski, *Personal Business; Mold Can Be an Insurance Mess for Homeowners*, N.Y. TIMES, June 16, 2002, § 3, at 9.

³Lisa Belkin, *Haunted by Mold*, N.Y. TIMES, August 12, 2001, § 6, at 28.

⁴See *id.*

from resulting respiratory problems.⁵ *Stachybotrys atra* “is a greenish black fungus that grows on material with a high cellulose and low nitrogen content, such as fiberboard, gypsum board, paper, dust, and lint, that becomes chronically moist or water damaged due to excessive humidity, water leaks, condensation, water infiltration, or flooding.”⁶ *Aspergillus* is a fungus that grows within a portion of a damaged lung, “which was previously damaged during an illness such as tuberculosis or sarcoidosis.”⁷ *Penicillium* is commonly found in food, soil, paint, wall paper, insulation, and carpet.⁸ *Penicillium* can produce mycotoxins, which are dangerous toxins or “literally fungus poisons.”⁹ Serious health problems can result when humans ingest or inhale large quantities of mycotoxins.¹⁰

Toxic mold has shown up everywhere in the United States from factories, schools, courthouses, and libraries, to housing projects and the grandest of homes.¹¹ The presence of toxic mold within the home can cause serious health problems, “. . . secreting chemicals called mycotoxins, which can find their way into your body, entering through your nose, mouth and skin, lodging perhaps in your digestive tract, your lungs or your brain.”¹² These mold toxins within the home “poison slowly and erratically.”¹³ As a result, in 2002, “insurance companies estimate[d] that more than 10,000 families nationwide [were] forced out of their homes because of toxic mold in the last two years.”¹⁴

Mold Litigation

While toxic mold litigation is relatively new, the majority of suits having developed in the past two or three years, it has become apparent

⁵ See Michalski, *supra* note 2; see also Jay Romano, *Managing Mold, and Lawsuits*, N.Y. TIMES Jan. 26, 2003, § 11, at 5.

⁶ See CAL. DEP'T OF HEALTH SERV., *Stachybotrys chartarum (atra): A mold that may be found in water-damaged homes* (Infosheet) (1997), at <http://www.cal-iaq.org/LAYMEM97.html>.

⁷ See Dr. Javier Vilar, *Aspergillus*, The Aspergillus Website, at <http://www.aspergillus.man.ac.uk/>.

⁸ See Susan Lillard-Roberts, *Penicillium*, Mold-Help, at <http://www.mold-help.org/pages/submenus/molds/penicillium.htm>.

⁹ See Dr. George J. Wong, *Discovery of Mycotoxins and Common Examples*, at <http://www.botany.hawaii.edu/faculty/wong/bot135/lect11.htm>; see also George Barron, *Penicillium*, George Barron's Website on Fungi, <http://www.uoguelph.ca/~gbarron/MISCELLANEOUS/penicill.htm>.

¹⁰ See Lillard-Roberts, *supra* note 8.

¹¹ See Belkin, *supra* note 3.

¹² *Id.*

¹³ *Id.*

¹⁴ See Michalski, *supra* note 2.

that all the parties involved are not exactly sure where to turn for help or guidance.¹⁵ Meanwhile, homeowners face health problems, the necessary remedial measures, and in severe cases, the loss of their home.¹⁶ Insurance companies face complex coverage issues and policies open to differing interpretations.¹⁷ Courts face a lack of precedent in ruling upon these critical mold related issues. Similarly, courts face the challenge of setting a workable precedent, cognizant of the major health and economic implications.¹⁸ In light of this endeavor, it is imperative courts know the claims to expect, evaluate the young precedent, and assess decisions that are made outside their own jurisdictions.

While many of the active cases remain pending, an overview of recent opinions and orders provides ample indication of the breadth of what is to come.¹⁹ In *Centex-Rooney Construction Co., Inc. v. Martin County*, a 1997 Florida decision, the District Court of Appeals awarded Martin County \$11,550,000 in damages after it was determined the faulty construction of its courthouse and the resulting mold caused the building's occupants' health problems.²⁰ As sureties of the construction project, St. Paul Fire and Marine Insurance Company and the American Insurance Company were named as co-defendants, and were required to share in the ramifications of this substantial trailblazing judgment.²¹ A case pending in Texas, *Lewis v. State Farm Lloyds*, involves a couple who filed a damage claim under their insurance policy after they had unknowingly purchased a home containing toxic mold.²² However, the couple's insurance company continues to refuse to honor their claim, stating the home was infested with mold prior to the couple purchasing it.²³ In another case pending in Texas, the plaintiff's case was severely impaired when the court determined that their medical expert's opinion regarding allergies to mold was inadmissible, because it was unreliable under the *Daubert* principles.²⁴

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸See generally *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts v. Primozich*, No. CV-01-1362-ST, 2002 WL 31495830, *2 (D. Or. June 18, 2002).

¹⁹See generally *Romano*, *supra* note 5.

²⁰*Centex-Rooney Constr. Co., Inc. v. Martin County*, 706 So. 2d 20, 24-28 (Fla. Dist. Ct. App. 1997).

²¹*Id.* at 28-29.

²²*Lewis v. State Farm Lloyds*, 205 F. Supp. 706 (S.D. Texas 2002).

²³*Id.* at 707.

²⁴*Flores v. Allstate Texas Lloyd's Co.*, 229 F. Supp. 2d 697, 702-04 (S.D. Texas 2002); Under *Daubert v. Merrell Dow Pharms., Inc.*, a court must evaluate the following, non-

A theme of indecision resonates throughout the limited published opinions and orders as the courts are faced with what may either be home or business breaking decisions.²⁵ Aside from the *Centex* decision, in which the construction company was found guilty of negligence and required to pay for the resulting detriment, courts must deal with two seemingly innocent parties confronting the same catastrophic economic problem.²⁶ The question remains, who is going to pay for the remedial measures required when toxic mold takes over a family's home?²⁷ In order to answer that question, decisions and conclusions are needed to address causation and policy interpretation issues.²⁸ However, reaching even these conclusions often requires the expensive process of deconstructive testing, thus begging the question of who should be responsible for shouldering these costs.²⁹ In addition, experts qualified to testify about the health effects of mold are not only limited in number, they are also limited in the credibility they are afforded in judicial proceedings.³⁰

Prudential Property & Casualty Insurance Company v. Lillard-Roberts v. Primozych provides insight regarding the claims that may be expected from both the insurance companies and the homeowners in cases to come, as well as a prelude to the impending analysis that will be required of courts.³¹

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY V. LILLARD-ROBERTS V. PRIMOZICH

Prudential represents what will likely become the quintessential toxic mold case, in which the insured and insurer battle over coverage issues.³² Named as one of the defendants, Primozych is the insurance

exhaustive list of factors in determining whether an expert's testimony is reliable: 1) whether the theory or technique proffered can be tested; 2) whether the theory or technique has been the subject of publication or peer review; 3) the scientific standards and controls in place; 4) the potential rate of error inherent in the theory or technique; and 5) whether the scientific community has generally accepted the theory or technique offered by the expert. 509 U.S. 579, 593-94 (1993).

²⁵See generally *Flores*, 229 F. Supp. 2d at 702-04; *Centex-Rooney*, 706 So.2d at 24-28; *Lewis*, 205 F. Supp. at 707.

²⁶*Centex-Rooney*, 706 So. 2d at 24-28.

²⁷See generally *Prudential*, 2002 WL 31495830.

²⁸*Id.*

²⁹*Id.*

³⁰*Flores*, 229 F. Supp. 2d at 703-04.

³¹See, *Prudential*, 2002 WL 31495830.

³²*Id.*

agent who sold Lillard-Roberts her homeowner's insurance policy.³³ This opinion is remarkable in the sense that it covers the majority of issues and claims that are likely to appear in mold cases to come.³⁴ The *Prudential* decision is more noteworthy in that, despite ruling on various motions and eliminating several claims, the court leaves the insured in a position where it is as though they may have been just as well, if not better off, uninsured.³⁵

The chain of events that led to the *Prudential* case began in 1998, when Lillard-Roberts purchased an early twentieth century Victorian home located in the northwest corner of Oregon.³⁶ Shortly thereafter, she purchased a Prudential homeowner's insurance policy for "maximum coverage" from Prudential agent, Primozich.³⁷ The policy provided "coverage of \$158,000 for the dwelling, \$15,800 for other structures, and \$100,600 for personal property."³⁸ In November 1999, Lillard-Roberts first noticed water damage to her home, and presented a claim to Prudential's agent, Primozich.³⁹ Primozich denied this original claim, and asserted that Lillard-Roberts was not covered for the damage without making any further inquiry or investigation.⁴⁰ The following November, Lillard-Robert's home incurred additional water damage when the plumbing failed and flooded the ground floor.⁴¹ Once again, the claim was denied without further inquiry.⁴² Prior to January 2001, Lillard-Roberts and her family vacated their home on the advice of a mold expert and her doctor, who attributed her systemic fungal disease to living in her home.⁴³

Prudential received a claim from Lillard-Roberts for damages to her home resulting from water, mold, and the resulting mycotoxin contamination on January 13, 2001.⁴⁴ On this occasion, a series of investigations ensued.⁴⁵ The February 13, 2001, report of Prudential's independent adjuster indicated that "'there were active colonies of mold growing' on the garage roof," and that there was "probably some mold

³³*Id.* at *2.

³⁴*Id.*

³⁵*Id.*

³⁶*Prudential*, 2002 WL 31495830 at *2.

³⁷*Id.*

³⁸*Id.* at *3.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Prudential*, 2002 WL 31495830 at *3.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.* at *3-4.

in the house.”⁴⁶ Prudential’s mold remediation specialist’s report of March 28, 2001 stated, “mold contamination and possible growth has occurred in the home, likely resulting from water infiltration into ceiling areas from chronic roof leaks . . .”⁴⁷ Talbott Associates Inc., hired by Prudential to determine the cause of the mold, opined that the mold “was ‘probably the result of inadequate flashing or flashing installation,’ and . . . ‘inadequately maintained tile grouting inside [the] shower unit.’”⁴⁸ A final fungi study was performed by Wise Steps, Inc. at Prudential’s request.⁴⁹ It revealed that “visible fungal growth was found in three water damaged areas caused by leaks in the roof and/or skylight and shower, ‘although there [was] no testing or data to show that toxins [were] present.’”⁵⁰

Lillard-Roberts had testing of the home conducted as well.⁵¹ On April 17, 2001, Charles McConnell from the American Management Associates, L.L.C., a mold remediation firm, discovered “four types of marker toxigenic mycotoxin producing fungi in the home at levels elevated far above the outdoor level.”⁵² McConnell determined that “the mold appeared to be caused by undetermined roof and shower leaks.”⁵³ In light of his discoveries, and Lillard-Roberts’ diagnosis with systemic fungal disease, McConnell also “recommended further investigation to determine the origin and effects of the exposure and that the family should not return to the home.”⁵⁴ Southern Cascade Construction was hired by Lillard-Roberts to ascertain the extent of damage the home had incurred.⁵⁵ Southern Cascade provided an estimate of “\$127,000 based on what could be seen without removing drywall, ceilings and flooring.”⁵⁶ Another construction consultant, Ronald N. Eakin, stated that “the house may be a total loss.”⁵⁷

Lillard-Roberts also submitted the affidavit of an insurance expert, which asserted that Prudential’s adjuster deviated from the insurance

⁴⁶*Prudential*, 2002 WL 31495830 at *3.

⁴⁷*Id.*

⁴⁸*Id.* at *4.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Prudential*, 2002 WL 31495830 at *4.

⁵³*Id.*

⁵⁴*Id.* at *3-4.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

industry's standard practices in making his assessment and conclusion regarding the cause of the water damage and toxic mold.⁵⁸

In response to Prudential's request for a completed "Proof of Loss" form dated February 21, 2001, Lillard-Roberts initially returned a reiteration of her policy outlining its coverage.⁵⁹ Upon Prudential's second request for the completed "Proof of Loss" form, Lillard-Roberts returned "a Sworn Statement in Proof of Loss dated August 16, 2001, together with photographs of the damage," even though she was unable to ascertain the exact cause, or extent of the damages, for lack of additional invasive testing.⁶⁰

The Parties' Claims

Prudential may be unique because it is a case in which the insurance company sought declaratory relief, indicating that its policy did not cover the damage to Lillard-Robert's home.⁶¹ The bases of Prudential's claims represent its reasons for denying Lillard-Robert's insurance policy claims, these claims include: there was no direct physical loss, the insurance policy excludes property damage from water and sewage backup, the insurance policy excludes property damage resulting from faulty workmanship, the damage to the personal property was not caused by any named peril, the insurance policy excludes damage to personal property caused by rain, and a proof of loss was not timely submitted.⁶²

Lillard-Robert's answer to Prudential's claims included ten affirmative defenses, "including invalidity of certain exclusions under ORS 742.246, coverage through promissory estoppel or reformation, violation of the implied covenant of good faith and fair dealing, breach of the standard practices of the insurance industry, and unclean hands and/or unconscionability."⁶³ In addition, Lillard-Roberts responded with six counterclaims, including: fraud and misrepresentation, specifically post-claim misrepresentations as to lack of coverage, and pre-claim misrepresentations to induce purchase of the policy, outrageous conduct, breach of contract, negligence, declaratory relief, and reformation.⁶⁴

⁵⁸*Prudential*, 2002 WL 31495830 at *5.

⁵⁹*Id.* at *4.

⁶⁰*Id.* at *5-6.

⁶¹*Id.* at *1.

⁶²*Id.*

⁶³*Prudential*, 2002 WL 31495830 at *1.

⁶⁴*Id.*

Each of the parties' claims represents the bases and spectrum of those that might be expected in cases to come, as there are over "10,000 mold-related lawsuits pending in state courts across the country."⁶⁵ Therefore, evaluation of the District Court of Oregon's analysis of the claims within this case provides insight into the method of analysis to be expected from future courts dealing with mold claims. In addition, the court's analysis allows for hypotheses regarding the deviation of holdings/orders based upon the nuances of various state laws.

The District Court of Oregon's Prudential Analysis

Lillard-Robert's Claims

The *Prudential* opinion and Order followed Prudential's Motion for Summary Judgment and Lillard-Robert's Motion to Stay Consideration of Prudential's Motion for Summary Judgment and for Leave to Conduct Destructive Testing on Defendant's Residence at Prudential's expense.⁶⁶ Lillard-Roberts argued that prior to summary judgment, she should have been permitted to obtain documents and depositions "... on at least two issues: (1) the actual, as opposed to the possible or probable, cause of the water damage that has led to the growth of the mold; and (2) whether she failed to cooperate in submitting her proof of loss, thereby justifying Prudential to declare a forfeiture of her rights under the policy."⁶⁷ The court, satisfied that the undisputed evidence and the relevant law provided enough information to rule on several of the issues, evaluated and dismissed Lillard-Robert's first (fraud and misrepresentation), second (outrageous conduct), and fourth (negligence) counterclaims, as well as her third affirmative defense (promissory estoppel).⁶⁸

In regards to Lillard-Robert's fraud and misrepresentation counterclaim, alleging Prudential's agent, Primozich, engaged in fraudulent and misrepresentative tactics in selling the subject policy, the court determined "[a] tort-based counterclaim, such as misrepresentation, cannot stand because it is nothing more than a dispute over coverage under the policy."⁶⁹ The outrageous conduct counterclaim was also dismissed on grounds that "a tort claim cannot be based on a contractual relationship."⁷⁰ Similarly, the court

⁶⁵Romano, *supra* note 5.

⁶⁶*Prudential*, 2002 WL 31495830 at *5.

⁶⁷*Id.*

⁶⁸*Id.* at *22-4.

⁶⁹*Id.* at *16.

⁷⁰*Id.* at *17.

dismissed the negligence counterclaim stating, “[a]n injured contracting party may only sue for negligence ‘if the other party is subject to a standard of care independent of the terms of the contract.’”⁷¹ The court dismissed each of the foregoing tort-based claims because it found “. . . there was no special or heightened duty for Prudential above and beyond the terms of the insurance contract.”⁷²

Lillard-Robert’s third affirmative defense asserted “claims are either covered by the insurance policy, or should be deemed covered under the doctrine of estoppel or reformation because [Prudential] failed to provide the insurance coverage requested by [Lillard-Roberts], and which [Prudential] led [Lillard-Roberts] to reasonably believe would be provided.”⁷³ The court dismissed this affirmative defense in light of the fact that “the Oregon Supreme Court reaffirmed the general rule that estoppel cannot be used to negate an express exclusion in an insurance policy,” as well as the fact that an insured cannot succeed under an estoppel theory based on the vague assertions of their insurance agent.⁷⁴ While the “reasonable expectations doctrine” varies from state to state regarding what the insured can expect to be covered under their policy based upon the assertions of their insurance agent, a similar affirmative defense asserted elsewhere may survive summary judgment. A contrary ruling on the estoppel or reformation claims may be possible under the law of other states if they will allow alteration of the plain, unambiguous meaning of insurance contracts in order to fulfill the reasonable expectations of the insured.⁷⁵ However, the majority of courts only resort to the reasonable expectations doctrine upon encountering ambiguous policy language.⁷⁶ On the other hand, some courts have flatly rejected adopting the reasonable expectations doctrine.⁷⁷

Prudential’s Claims

The *Prudential* court denied summary judgment for each of Prudential’s claims.⁷⁸ The following claims were denied summary judgment for reasons indicated in Lillard-Robert’s Motion to Stay, as

⁷¹*Prudential*, 2002 WL 31495830 at *18 (quoting *Georgetown Realty Inc. v. Home Ins. Co.*, 313 Ore. 97, 106 (Ore. 1992).

⁷²*Id.*

⁷³*Id.* at *22.

⁷⁴*Id.* at *22.

⁷⁵See e.g., *Dibble v. Sec. of Am. Life Ins. Co.*, 590 A.2d 352 (Pa. Super. Ct. 1991).

⁷⁶See e.g., *Wolf Mach. Co. v. Ins. Co. of N. Am.*, 183 Cal. Rptr. 695 (Cal. Ct. App. 1982).

⁷⁷See e.g., *Casey v. Highlands Ins. Co.*, 600 P.2d 1387 (Idaho 1979).

⁷⁸*Prudential*, 2002 WL 31495830 at *7-12.

the cause and origin of the mold remained speculative and inconclusive: there was no direct physical loss, the insurance policy excludes property damage resulting from water and sewage backup, the insurance policy excludes property damage resulting from faulty workmanship, the damage to the personal property was not caused by any named peril, and the insurance policy excludes damage to personal property caused by rain.⁷⁹ In addition, summary judgment was denied in the claim which asserted that the proof of loss was not timely submitted.⁸⁰ The denial was based upon the fact that Lillard-Roberts had cooperated by submitting the "Proof of Loss" form to the best of her ability.⁸¹ At first blush, the court's conclusions regarding Prudential's claims appear to be a partial, or temporary, victory for Lillard-Roberts; however, the implications of the court's denial of Lillard-Robert's Motion to Stay Consideration for Leave to Conduct Destructive Testing at Prudential's Expense may negate this triumphant notion. While Oregon law imposes the "limited" burden of proving physical loss in order to recover under an "all risks" property insurance policy, the burden of proof in such mold cases is not all that limited or inexpensive.⁸²

The crux of mold litigation lies in this "limited" burden of proof. Toxic mold, as a relatively elusive contaminant, usually lurks behind the walls, ceilings, and other inaccessible places within the home it infects.⁸³ As such, the deconstructive investigation and testing requires devastation of all, or some, of the home before their can be conclusive proof.⁸⁴

Opinion Analysis

Prudential is relatively unique in that the parties did not dispute whether or not Lillard-Robert's home was actually contaminated with toxic mold.⁸⁵ Throughout the series of investigations, including those performed at the request of Prudential and Lillard-Roberts, only Prudential's investigation by Talbott Associates definitively concluded that the Lillard-Roberts home did not have dangerously unhealthy levels of mold.⁸⁶ Prudential's other investigators did not confirm or

⁷⁹*Id.* at *5-10.

⁸⁰*Id.* at *11-12.

⁸¹*Id.* at *11-12.

⁸²*Id.* at *5-7.

⁸³See Belkin, *supra* note 3.

⁸⁴*Prudential*, 2002 WL 31495830 at *5-6. See also, Michalski, *supra* note 2.

⁸⁵*Prudential*, 2002 WL 31495830 at *3-4.

⁸⁶*Id.* at *4.

deny whether the level of mold contamination in the Lillard-Roberts home had reached unhealthy, uninhabitable levels.⁸⁷ However, the adverse health effects resulting from mold contamination within the Lillard-Roberts home were made clear when Lillard-Robert's was diagnosed with "systemic fungal disease," a condition her physician attributed to living in her home.⁸⁸ As a result, the *Prudential* court was not required to evaluate the merits of competing expert opinions regarding the presence of mold or the health effects of mold.⁸⁹ The presence of toxic mold and the adverse health effects it had on Lillard-Robert's health remained undisputed.⁹⁰ Thus, the parties came before the court with competing claims disputing only cause and naturally the associated coverage issues.⁹¹ While the majority of state law, as well as the majority of insurance policies, require the insured prove the loss was caused by a covered peril, the *Prudential* court's conclusion seems objectively reasonable at first glance.⁹² However, typically when a court requires deconstructive testing in order to substantiate the insured's case, it does not require the demolition, or near demolition of a home.⁹³ Therefore, the *Prudential* court's conclusion does not represent a favorable resolution for Lillard-Roberts considering the breadth of destruction that must necessarily ensue.⁹⁴

The *Prudential* court left Lillard-Roberts with several theories of recovery.⁹⁵ Lillard-Roberts could attempt to prove that the toxic mold contamination represented a direct physical loss, contrary to

⁸⁷*Id.* at *3-4.

⁸⁸*Id.* at *3.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹See generally *Prudential*, 2002 WL 31495830.

⁹²See e.g., *Hudson v. Prudential Prop. and Cas. Ins. Co.*, 450 So.2d 565 (Fla. Dist. Ct. App. App. 1984) (holding that insured must establish loss is within the terms of all risk policy, then burden shifts to insurer to prove that loss arose from cause which is an exception to the all risks policy.); *Wexler Knitting Mills v. Atl. Mut. Ins. Co.*, 555 A.2d 903 (Pa. Super. Ct. 1989) (finding that under all risks policy, insured is placed with burden of showing that the loss actually occurred; following such, burden is on insurer to show such loss is excluded under the all risks policy.); *Reynolds v. Shelter Mut. Ins. Co.*, 852 S.W.2d 799 (Ark. 1993) (holding that following insured's prima facie case for coverage under policy, insurer has burden of proving damages fall under policy exclusion; however, insurer only has such burden if it defends itself by claiming insured's damages fall under exclusion of coverage under the all risks policy).

⁹³See e.g., *Driggin v. Am. Sec. Alarm Co.*, 141 F.Supp.2d 113 (D. Me. 2000) (involving proposed deconstructive testing of split boiler.); *U. S. ex rel. Roby v. Boeing Co.*, 100 F.Supp.2d 619 (S.D. Ohio 2000) (involving deconstructive testing of allegedly defective helicopter transmission gears.); *M-Square Theaters, Inc. v. Transamerica Ins. Co.*, No. 91 Civ. 3582 (KTD), 1993 WL 42231 (S.D.N.Y. Feb. 18, 1993) (involving proposed deconstructive testing of concrete used in building a portion of a movie theatre).

⁹⁴See generally *Prudential*, 2002 WL 31495830.

⁹⁵*Id.* at *1, 24.

Prudential's claims,⁹⁶ or she could try to prove that the toxic mold contamination was the result of damage caused by a peril named within her property insurance policy with Prudential, thus disproving all or a portion of Prudential's remaining claims.⁹⁷ However, as discussed above, each of these theories requires proof by way of deconstructive testing of the Lillard-Robert's home.⁹⁸ Thus, Lillard-Roberts would be forced to risk the loss of her home in an attempt to recover under her policy, a policy she clearly assumed would cover her for such a loss.⁹⁹

As noted earlier, toxic mold cases resemble the asbestos litigation in several respects.¹⁰⁰ Each of these toxins has invaded homes, causing deleterious health effects to the homes' inhabitants.¹⁰¹ Each of these toxins has required unique proof with respect to property insurance policies covering "direct physical loss."¹⁰² Courts were required to grapple with the concept of "direct physical loss" without a visibly obvious "direct physical loss" in the asbestos cases.¹⁰³ However, in the asbestos cases, the adverse health effects were the result of the production of a product deliberately placed in homes.¹⁰⁴ The cause for the inhabitants' ailments in the asbestos cases, although unintended, could be traced back to a product, and similarly a manufacturer.¹⁰⁵ With toxic mold, nature is the manufacturer, and the "[p]roblem is, you can't really prevent mold damage or adequately price it."¹⁰⁶ In light of the foregoing observations, it seems that courts, such as the *Prudential* court, need to provide insured parties with an alternative solution to their mold problems.¹⁰⁷ Requiring the insured to destroy their own home seems like a drastic and economically unsound proposition, especially considering that the *Prudential* court has failed to exhaust alternative possibilities.¹⁰⁸ As toxic mold presents new health and legal

⁹⁶*Id.* at *1.

⁹⁷*Id.* at *1 (proving the damage was not the result of water or sewage backup or faulty workmanship; proving the damage to personal property was not caused by any named peril or the result of rain damage.).

⁹⁸*Id.* at *24.

⁹⁹*Prudential*, 2002 WL 31495830 at *2-3, 24.

¹⁰⁰*See e.g., Sentinel*, 563 N.W.2d 296; *Cf. Prudential*, 2002 WL 31495830.

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*See e.g., Sentinel* 563 N.W.2d 296, 300 (direct physical loss does not require structural damage, and may be the result of mere injury, rather than complete destruction).

¹⁰⁴*Sentinel* 563 N.W.2d 296.

¹⁰⁵*Id.*

¹⁰⁶*See*, Tom Berry, *Attack of the toxic spores: Mold hits headlines*, ATL. BUS. CHRON., Aug. 30, 2002, at <http://atlanta.bizjournals.com/atlanta/stories/2002/09/02/focus4.html>.

¹⁰⁷*See generally Prudential*, 2002 WL 31495830.

¹⁰⁸*Id.*

problems, toxic mold litigation may require that courts entertain new legal solutions.¹⁰⁹

PROPOSAL

As stated earlier, toxic mold presents courts with new and challenging issues.¹¹⁰ Therefore, it may be necessary to formulate a new approach to remediation. Some toxic mold cases present a dispute regarding the existence of toxic mold within the home, as well as a dispute regarding whether the insureds' health problems are in fact the result of toxic mold within the home.¹¹¹ Such "[t]oxic tort cases require proof of both general and specific causation about the effects of the toxic substance."¹¹² Moreover, in the new arena of the toxic mold litigation, courts facing disputes regarding the health concerns associated with toxic mold have difficult *Daubert* issues to assess.¹¹³ Cases such as *Prudential* can be distinguished from those involving disputes regarding the existence and health effects of toxic mold because the latter involve competing expert opinions regarding the nature, cause, and extent of the toxic mold contamination.¹¹⁴ As indicated in *Prudential*, in assessing the nature, cause, and extent issues, there are "standard practices within the insurance industry."¹¹⁵ Also referenced within the *Prudential* opinion, is the assertion that failure to adhere to these standard practices of investigation in the insurance industry may result in the perpetuation of an existing and growing problem, such as toxic mold.¹¹⁶ Similarly, conclusions or possibilities based upon an investigation that does not adhere to industry standards may warrant

¹⁰⁹*Id.*

¹¹⁰*Id.*; see also *Centex-Rooney*, 706 So. 2d at 24-28; *Lewis*, 205 F. Supp. at 707.

¹¹¹See e.g., *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227 (Tex. App. 2002).

¹¹²*Id.* at 239.

¹¹³*Id.* at 238. (stating, "[T]he Texas Supreme Court recognized several nonexclusive factors enumerated by the court in *Daubert* to guide trial courts in acting as gatekeepers to assess the reliability of scientific expert testimony: the extent to which the theory has been or can be tested; the extent to which the technique relies upon the subjective interpretation of the expert; whether the theory has been subjected to peer review and/or publication; the technique's potential rate of error; whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and the non-judicial uses which have been made of the theory or technique.")

¹¹⁴*Prudential*, 2002 WL 31495830 at *3-4.

¹¹⁵*Id.* at *5.

¹¹⁶*Id.* An insurance expert hired by Lillard-Roberts suggested that Prudential's adjuster's opinion regarding the cause, nature, and extent of damage may have been askew due to Prudential's adjuster's failure to conduct an investigation of the roof of the Lillard-Robert's home. Rather, the adjuster merely based his conclusions, deemed by him as "possibilities," on a visual inspection conducted from the ground only.

inquiry into whether each party has endeavored to fulfill their agreement, as stipulated within the policy language.¹¹⁷ While toxic mold has become an increasingly desperate issue only within the past couple of years, it seems only prudent that insurance companies and their adjusters take far-sighted and proactive steps to detect and/or prevent any toxic mold problems.¹¹⁸

In cases such as *Prudential*, the insurer has taken a somewhat minimalist investigative and fully offensive position.¹¹⁹ In light of this growing problem, and the possibly devastating economic implications, this reaction by insurance companies is understandable.¹²⁰ In fact, many insurance companies have taken it a step further by completely excluding recovery for mold damage from their policy coverage.¹²¹ In response, some states have specified that “[m]old cannot be excluded from liability coverage”¹²²

Courts and state legislatures alike, must evaluate whether they will allow insurers to pass the unfortunate burden of proving irrefutable toxic mold contamination onto their insured. Technically, in most states, the law says yes; the insurance companies need only respond when the insured has proven their case for coverage.¹²³ However, perhaps it is necessary, in cases like *Prudential*, that courts take a more diligent approach to evaluating the insurer’s contribution to adequately and accurately evaluating and insured’s claim(s).¹²⁴ If an insurer has not made the painstaking, yet necessary, effort to fulfill its obligation to the insured, perhaps costly procedures such as deconstructive testing should be a shared responsibility. Or conversely, perhaps the toxic mold property insurance catastrophe necessitates court appointed adjusters to evaluate the claims so as to prevent the inevitable biases,

¹¹⁷*Id.* at *6.

¹¹⁸See Michalski, *supra* note 2.

¹¹⁹*Prudential*, 2002 WL 31495830 at *1, 5. *Prudential* seeks declaratory relief indicating that Lillard-Robert’s policy does not cover the mold damage.

¹²⁰See Michalski, *supra* note 2.

¹²¹See Cheryl Powell, *Toxic mold breeds lawsuits*, BEACON J, Oct. 22, 2002, at <http://www.ohio.wm/mld/ohio/newa/local/4339878.htm> (quoting Mitch Wilson, spokesman for the Ohio Insurance Institute, “For at least 10 years, most insurers have excluded losses caused by mold, except for when the mold is caused by a covered calamity, such as a burst water pipe.”).

¹²²See Berry, *supra* note 101 (noting that Georgia does not allow mold to be excluded from liability coverage).

¹²³See *supra* note 87.

¹²⁴See e.g., *Gilderman v. State Farm Ins. Co.*, 649 A.2d 941 (Pa. Super. Ct. 1994) (finding that insurer owes insured duty of good faith and fair dealings, which includes the insured’s obligation to make reasonable investigation into facts surrounding the claim(s)); *Cleveland v. Am. Motorists Ins. Co.*, 295 S.E.2d 190 (Ga. Ct. App. 1982) (finding that negligent inspection by an insurance company presents a cause of action in tort.).

real or presumed, which will complicate any resolution that may be reached.

CONCLUSION

As an increasing number of states are realizing the implications of the toxic mold insurance disputes, the courts continue to struggle with discovering a workable method of resolving the inherent issues involved in toxic mold cases.¹²⁵ As toxic mold litigation evolves, the reliability standards required for expert testimony regarding the health effects of toxic mold will be established. However, when the dispute revolves around the cause of the toxic mold, and the court concludes coverage resolution requires demolition of the insured's home, time and reoccurrence will not provide a workable solution for all the parties involved.¹²⁶ Discovering a solution to this issue requires that the legislature and the judiciary act to set the boundaries and policy of toxic mold insurance coverage and disputes, before toxic mold is allowed to infest the inner workings of property insurance coverage.¹²⁷ Requiring that insured parties destroy their own homes in order to ascertain any hope of insurance coverage does not create a workable solution. Decisions such as *Prudential* are communicating the wrong message to the parties involved, and perhaps destroying the faith insured parties have in the court's ability to hold property insurers responsible for coverage.¹²⁸

¹²⁵See e.g., *Prudential*, 2002 WL 31495830; *Centex-Rooney*, 706 So. 2d at 24-28; *Lewis*, 205 F. Supp. 706 at 707.

¹²⁶See generally *Prudential*, 2002 WL 31495830.

¹²⁷See *Berry*, *supra* note 101.

¹²⁸*Prudential*, 2002 WL 31495830; see also *Appeals Court Cuts Verdict Against Insurer Over Mold In Home*, N.Y. TIMES, Dec. 20, 2002, at § A, at 29 (stating that in response to a case involving toxic mold Dan Lambe, executive director of Texas Watch stated: "Unfortunately this decision sends a message to insurance companies that says you will not be responsible if you delay, deny, hassle, and mistreat Texas families or Texas claimants.").

