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November 4, 2006

ENSUING LOSS PROVISION IN HOMEOWNERS POLICY DOES NOT PROVIDE COVERAGE FOR MOLD CONTAMINATION IN TEXAS

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On August 31, 2006, the Texas Supreme Court issued an opinion in *Fiess v. State Farm Lloyds* directly addressing the question of whether an ensuing loss provision in a homeowners insurance policy provides coverage for mold contamination in Texas. *Fiess v. State Farm Lloyds*, No. 04-1104 (Tex., Aug. 31, 2006). The Court answered the following certified question from the Fifth Circuit, U.S. Court of Appeals:

Does the ensuing loss provision contained in Section I-Exclusions, part 1(f) of the Homeowners Form B (HO-B) insurance policy as prescribed by the Texas Department of Insurance effective July 8, 1992 (Revised January 1, 1996), when read in conjunction with the remainder of the policy, provide coverage for mold contamination caused by water damage that is otherwise covered by the policy?

Id. at 2.

The policy provision in question read:

We do not cover loss caused by:

- (1) wear and tear, deterioration or loss caused by any quality in property that causes it to damage or destroy itself.
- (2) rust, rot, mold or other fungi.

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- (3) dampness of atmosphere, extremes of temperature.
- (4) contamination.
- (5) rats, mice, termites, moths or other insets.

We do cover ensuing loss caused by collapse of the building or any part of the building, water damage, or breakage of glass which is part of the building if the loss would otherwise be covered under this policy.

Id.

The insureds in *Fiess* argued that the Court should disregard the first part of the policy (“We do not cover loss caused by mold”) because of the last part (“We do cover ensuing loss caused by water damage”). The Court rejected this argument, reiterating the long-held rule that all parts of a policy must be read together, giving meaning to every sentence, clause, and word to avoid rendering any portion inoperative. *Id.* at 6. The Court concluded:

In this case, it is hard to find any ambiguity in the ordinary meaning of “We do not cover loss caused by mold.” While the ensuing-loss clause that follows may be difficult to parse..., few ordinary people would imagine that it changes the meaning of the first sentence to read “We do too cover loss caused by mold.”

Id. at 4.

In supporting its ruling, the *Fiess* Court looked to the Texas appellate court opinion in *Lambros v. Standard Fire Insurance Co.*, where the Texas Fourth Court of Civil Appeals found that the only reasonable construction of this clause was that it applied when an excluded risk was followed by an intervening occurrence that in turn caused an ensuing loss. *Id.* at 6-7. The Court noted that construing the HO-B policy to cover the fifteen risks (rust, rot, mold, humidity, wear and tear, hot and cold weather, rats, termites, etc.) excluded in paragraph 1(f) would convert the HO-B from an insurance policy into a maintenance agreement. *Id.* at 9-10. Rather, the Court stated: “the ensuing-loss clause provides coverage only if these relatively common and usually minor risks lead to a relatively uncommon and perhaps major loss: building collapse, glass breakage, or water damage.” *Id.* at 10.

This decision should serve to aid insurers in their coverage determinations for mold contamination under homeowners insurance policies in Texas.