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COURT HOLDS *FIESS* TRUMPS *BALANDRAN* – MOLD DAMAGE TO DWELLING EXCLUDED EVEN IF CAUSED BY PLUMBING LEAK

In one of the first decisions following the Texas Supreme Court's ruling in *Fiess v. State Farm Lloyds* (See *Texas Insurance Law Newsbrief*, August 31, 2006), a Federal District Court Judge in Houston recently found mold damage is excluded under the standard Texas Homeowners' Form B Policy even if caused a plumbing leak. In *Gordon v. Allstate Texas Lloyds*, 2006 WL 2827233 (S.D.Tex. September 27, 2006), the court abated the case pending a ruling in *Fiess* and reopened the case after *Fiess* was decided by the high court of Texas to address the remaining claims in light of the ruling. The only claims remaining related to mold damage to the dwelling.

The insureds argued mold damage to the dwelling caused by plumbing, air conditioning or household appliance leaks should be excepted from the mold exclusion by application of the "exclusion repeal provision" found under Coverage B – Personal Property, Peril B 9, which was also addressed eight years ago by the Texas Supreme Court in *Balandran v. Safeco Ins. Co. of America*, 972 S.W.2d 738 (Tex. 1998). The Houston court observed that *Balandran* addressed a different exclusion, 1(h) dealing with foundation damage, and the high court of Texas found an ambiguity in that case because a Coverage A exclusion was addressed by an exception in Coverage B. In doing so, the Houston court noted: "*Balandran* concerned the application of section 1(h), which deals with damage to the dwelling itself. Section 1(f) precludes coverage for damage to the dwelling or to personal property from an enumerated cause. *Fiess* did not address personal property coverage under the accidental discharge provision because that issue was not on appeal….But *Fiess* did hold that mold damage to a dwelling is excluded regardless of whether the water damage causing the mold was otherwise covered." Accordingly, the Houston court held that mold damage to the dwelling, even if caused by a plumbing leak, was excluded by the policy and the court and granted summary judgment in favor of Allstate.

INSURED MUST ESTABLISH CONTRACTUAL CLAIM BEFORE PURSUING EXTRA-CONTRACTUAL DAMAGES

Recently, in *In re Miller*, 2006 WL 2789255 (Tex.App.- Tyler September 29, 2006), the Tyler Court of Appeals rejected an insured's efforts to pursue extra-contractual claims without first establishing the claims were covered under the policy. The insured was involved in an auto accident with an uninsured motorist and presented a claim to his own insurer, State Farm. A settlement offer was made and rejected by the insured who ultimately filed suit based on alleged violations of the Texas Insurance Code but without asserting any contractual claims against the carrier. After the insured refused to sign a stipulation that he was no longer seeking contractual damages, State Farm filed a declaratory judgment action on the contractual claims and a motion to sever and abate the extra-contractual claims. The trial court granted the motion to sever and the insured filed a mandamus action to overturn the severance order.

The Tyler Court of Appeals rejected the insured's argument that with a four year statute of limitations on the contractual claims, and a two year statute of limitations on the extra-contractual claims, he should be able pursue the extra-contractual claims first. The court found Texas law "supports State Farm's argument that to

prevail on a bad faith claim, a plaintiff must show that there is a contract between the insurance company and the insured covering the claim." In response to the insured's contention that the rules requiring a liberal construction of the Texas Insurance Code allowed him to pursue his claims in the manner sought, the court stated: "No matter how liberally we might construe an insurance code provision, a contract underlies any cause of action involving insurance. This is an inescapable fact." Accordingly, the order severing the contractual and extra-contractual claims was upheld. **Note:** Our firm had the privilege of assisting State Farm in its efforts to obtain this significant decision.

WHAT ARE "GARAGE OPERATIONS" AND "REPOSSESSION OPERATIONS"

In *Classic Performance Cars, Inc. dba Performance Mustangs v. Acceptance Indemnity Insurance Company*, H-05-3929 (S.D. Tex. Sept. 13, 2006), one of the Federal District Courts for the Southern District addressed what qualifies as "garage operations" and "repossession operations" in a garage keepers policy. In *Classic Performance*, the insured had coverage under a garage keepers policy issued by Acceptance. Classic Performance was sued in two separate suits for alleged injuries and damages purported suffered during the repossession of a vehicle.

The first suit was brought against Classic Performance by the debtors. The debtors alleged that Class Performance took steps to repossess their vehicle. Classic Performance allegedly hired a company to repossess the vehicle, and that this company then delegated the job to two individuals. These two individuals purportedly went to the debtors' home to take the car away from them. Allegedly, while driving the vehicle away, one of the men hit a travel trailer which was parked in the debtors' driveway and, in the process, damaged both the repossessed vehicle and the trailer. Allegedly, before leaving, the driver supposedly sped through the yard and damaged the debtors' property. Additionally, one of the debtors claimed that she was hit with the vehicle as she attempted to stop the repossession. The other debtor began to chase the vehicle in his own truck. During this chase, the debtor swerved into oncoming traffic and collided with another car, which was occupied by the Kenny family. The Kennys filed the second suit claiming that the collision with the debtor not only resulted in injuries to each of them, but that it also caused Mrs. Kenny to suffer a miscarriage. The debtors brought the first suit and the Kenny family brought the second suit against Classic Performance. Each suit alleged that Classic Performance was negligent in the manner in which it handled and/or performed the repossession of the vehicle.

The carrier denied coverage upon the policy exclusion for repossession operations. Classic Performance argued that the repossession operations exclusion meant only that it could not, through its own employees, repossess automobiles. Classic Performance argued that because it hired a third party to repossess the vehicle, the policy exclusion did not apply. Instead, Classic Performance argued, had the insurer intended to limit coverage for *any* repossession conduct the exclusion should have been written to exclude repossession operations "even if contracted to a third party."

The Court found that "a review of the plain language of the policy exclusion shows Plaintiff's [Classic Performance] interpretation to be hopelessly strained." The repossession exclusion was clear on its face – there was no coverage for repossession operations. "It is unreasonable to conclude that the provision does not exclude those activities if delegated to a third party." Noting that regardless of the particular legal theory articulated by the claimants, all of the injuries related to the attempt to repossess the debtors' vehicle. Mere allegations of negligence are insufficient to mandate coverage – scrutiny falls on the factual allegations that detail the origin of the damages. Because all of the state court claims undeniably arose from the repossession of the vehicle, and because the insurance contract unambiguously excluded any repossession operations, conduct which purportedly arose from such actions did not trigger any duty to defend by Acceptance, and the insurer was not liable for any claims under the DTPA, for breach of contract, or under the Texas Theft Liability Act.