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Texas Supreme Court Rules Mold Claims Not Covered in Texas

Today the Supreme Court of Texas issued its long-awaited mold coverage decision and held that the Texas HO-B policy does not cover mold damage sustained by a dwelling. In *Fiess v. State Farm Lloyds*, Cause No. 04-1104, the insureds contended that their homeowners' policy covered mold damage caused by plumbing leaks, although the policy included a mold exclusion. The federal district court where the case was originally pending granted State Farm's Motion for Summary Judgment and concluded there was no coverage for mold damage regardless of the cause. On appeal, the Fifth Circuit Court of Appeals certified the coverage question to the Texas Supreme Court so the issue could be decided with finality.

In an opinion issued this morning by Justice Brister and joined by six other justices, the Court firmly rejected the assertion that the mold exclusion, which included an ensuing loss clause, was ambiguous: The Court held: "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 (a matter discussed below), few ordinary people would imagine that it changes the meaning of the first sentence to read 'We *do too* cover loss caused by mold.'"

The Court then addressed the effect of the ensuing loss clause which says "[w]e do cover ensuing loss caused by water damage if the loss would otherwise be covered under this policy." The court reaffirmed the opinion in *Lambros v. Standard Fire Insurance Co.*, 530 S.W.2d 138 (Tex. App.--San Antonio 1975, writ ref'd), which had held that an ensuing loss clause provided coverage only when the excluded event is followed by an intervening occurrence that in turn caused an ensuing loss. The Texas Supreme Court concluded that the ensuing-loss clause in *Lambros* was indistinguishable from the one in the *Fiess*' policy. Consequently, the clause did not provide coverage for any loss caused by the excluded risk itself—the mold.

The Court also emphasized that the ensuing loss clause applied only to ensuing losses from "water damage." It did not apply to ensuing losses from water alone: The Court explained: "Mold does not grow without water; if every leak and drip is 'water damage,' then it is hard to imagine any mold, rust, or rot excluded by this policy, and the mold exclusion would be practically meaningless." Thus, mold was not "water damage," so the ensuing-loss clause did not apply.

The Court also addressed the clause's requirement that the ensuing loss "otherwise be covered." The dissent interpreted the phrase to mean "if the loss would otherwise be covered under this policy *not counting the exclusions . . .*" then the resulting mold would be covered. The majority consulted the dictionary definition of "otherwise" and concluded that its meaning did not permit courts to ignore the exclusion language.

In conclusion, the Court noted that the rules for interpreting insurance policies in Texas do not change simply because potentially harsh circumstances may exist: The Court said: "If the political branches of Texas

government decide that mold should be covered in Texas insurance policies, they have tools at their disposal to do so; Texas courts must stick to what those policies say, and cannot adopt a different rule when a ‘crisis’ arises.” The court then answered “No” to the certified question asking whether mold was covered under the Texas HO-B policy.

Click here for a complete copy of the [Opinion](#). Click here for a copy of the [Dissent](#).

Note: Our firm had the privilege of representing State Farm in this case before the trial court, the Fifth Circuit and the Texas Supreme Court. Most insurers will read this decision and wish that it had been issued 4 or 5 years ago. It is important to remember that the loss in question occurred in June 2001 and it took more than **3 years** for State Farm to get from the granting of its summary judgment to the issuance of today’s decision. The wheels of justice frequently turn slow, especially for insurers. We want to recognize and express our appreciation for State Farm’s willingness to push for the resolution of these important legal issues and its patience to wait for a final decision. We also want to recognize the tremendous assistance we received from our appellate co-counsel, Mr. Bill Boyce from Fulbright & Jaworski in Houston, as well as the entire team from State Farm that made this win possible.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom L.L.P.
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