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Ensuing Loss Clauses in Texas Insurance Jurisprudence

New Legislation Pertaining to Homeowners Insurance

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The Journal of Texas Insurance Law is published by the Insurance Law Section of the State Bar of Texas. The purpose of the ***Journal*** is to provide Section members with current legal articles and analysis regarding recent developments in all aspects of Texas insurance law, as well as convey news of Section activities and other events pertaining to this area of law.

Anyone interested in submitting a manuscript for publication should contact Christopher W. Martin, Editor of ***The Journal of Texas Insurance Law***, at 713-632-1701 or by email at martin@mdjwlaw.com. Manuscripts for publication must be typed double-spaced with endnotes (PC-compatible disks are appreciated). Replies to articles published in the ***Journal*** are welcome.

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This is Ava.

When her parents look
in her eyes they see something
they thought was impossible,
a child of their own.

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to help with her adoption,
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Comments FROM THE CHAIRMAN

BY JAMES CORNELL
Haynes & Boone, L.L.P.

On June 20, 2003, I was honored to be elected Chair of the Insurance Law Section. I will serve the Section for the next 12 months. I am very excited about the new year. We have a lot planned and are already hard at work making those plans a reality. For example, we plan to present a series of telephonic CLE programs focusing on new developments in insurance law as well as specialized topics. You will be receiving information about these seminars shortly from our tireless CLE Chair, Karen Keltz. We are also planning three issues of this Journal. In the coming months, we plan to publish Journals dedicated to construction coverage issues and personal lines issues, among others.

As you know, Chris Martin has been the Editor-in-Chief of the Journal since its inception several years ago. The Journal is the public "face" of our Section. You should know that the Journal consistently receives high praise from the Bar leadership and our section members for the high quality of the content and its presentation. This is all due to Chris.

Publishing the Journal is a daunting project. I have served as Treasurer, Secretary, Chair-Elect and now Chair. I can tell you from personal experience in having assisted Chris from time to time that editing the Journal is the most time consuming, demanding and intense of all the positions. Over the years Chris has selflessly dedicated countless hours soliciting content, dogging authors, editing and blue-booking articles, proofing the galleys for each issue several times, designing article layouts and art, negotiating with potential sponsors, and interfacing with the publisher, among a multitude of other tasks.

On behalf of the Section, I would like to thank you, Chris, for your years of hard work and dedication to the Journal. We appreciate you.

JAMES CORNELL
Haynes & Boone, L.L.P.

BY RANDALL L. SMITH & FRED A. SIMPSON

TAYLOR & TAYLOR, L.L.P., HOUSTON, TEXAS

The Liability Insurer's Dilemma: Should a Good Faith But Mistaken Belief There Is No Coverage Absolve An Insurer of "Stowers" Liability?

INTRODUCTION

Liability insurers frequently face *"Stowers"*[1] demands with strong beliefs their policies do not cover allegations[2] in lawsuits brought against their insureds. *Stowers* demands create real dilemmatic situations for insurers, as proven by the 2002 holding in *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc*.[3] However, the dilemma can be eliminated by the Supreme Court of Texas when it rules on *Frank's*, now that the Court has given a green light for review of the Fourteenth Court's decision in that case.[4]

The object of this article is to show how the Supreme Court could provide insurers some much needed equitable relief without placing any undue burden on Texas insureds.

WHAT IS THE DILEMMA?

The dilemma is explained in the Fourteenth Court's holding in *Frank's*:

> We recognize this case carries Matagorda County to a logical conclusion that is somewhat disquieting — Frank's [the insured] was able to resolve the parties' coverage dispute in its own favor simply by sending a *Stowers* demand to the Underwriters [the insurer]. Thereafter, the Underwriters had to pay if Arco's allegations were *within* the policy, but also had to pay *if they are not* within the policy because there was no right to reimbursement. But this is a matter that the Underwriters must take up with the superior court.[6]

The *Frank's* intermediate appellate court used this language to affirm summary judgment in favor of the insured after its "excess" insurer paid $7.5 million to settle a tort lawsuit rather than risk a judgment against its insured that might exceed policy limits and the insurer's own liability for any such excess judgment under *Stowers*. The *Frank's* excess insurer paid its money to settle the underlying lawsuit and then sought declaratory relief on the coverage dispute, also requesting the trial court to order the insured to reimburse the $7.5 million. "No way!" said the trial court,[7] and so did Chief Justice Scott Brister of the Fourteenth Court, harking back to the holding in *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County.*

THE STATUS OF TEXAS LAW.

Frank's confirms the reality of Texas law. When insurers believe in good faith there is no coverage for allegations in lawsuits that underlie *Stowers* demands, insurers have no fair chance to have those beliefs safely tested. When coverage is disputed and insurers are presented with reasonable settlement demands within policy limits, insurers may fund the settlement and seek reimbursement only if they first obtain their insureds' clear and unequivocal consent to settlement, along with the insureds' consent to the insurers' rights to seek reimbursement.[8]

Randall L. Smith is a sole practitioner who has specialized in insurance coverage issues for approximately 20 years. He is the author of "Duty to Defend – An Insurance Guide," Texas Lawyer Press, 2000.

Fred A. Simpson is a partner in the Houston Litigation section of Jackson Walker, LLP., engaged in insurance law, motion practice, appellate law and mediation, who cautions that the views of the authors are not necessarily those of Jackson Walker or its clients.

Insurers appear to have absolutely no right to be wrong about whether there is coverage if they fail to honor *Stowers* demands. The only salvation for insurers is to gamble (1) that no judgments in excess of policy limits will emerge from the underlying tort lawsuits, or (2) if there are excess judgments and their insureds (or their assignees) bring *Stowers* lawsuits, there will be no jury findings that the insurers were negligent by failing to settle within policy limits when the insurers had the chance.

In other words, the lack of specific Texas case law on point at this moment denies insurers their day in court for advance tests of their good faith beliefs that there is no coverage for allegations raised in pleadings of lawsuits that are the subject of *Stowers* demands. Unless insurers are willing to assume extracontractual risks of unknown magnitudes, insurers typically pay the *Stowers* demands and move on. Does all this have any material impact on Texas liability insurance premiums?

HOW DID THINGS GET AS THEY ARE IN TEXAS?

The *Stowers* doctrine has been on the books in Texas for almost 75 years. Requiring insurers to use ordinary care in settling lawsuits arises from insurers' contractual control of the defense and their exclusive right to settle.[9] Texas law provides insurers two options when tort plaintiffs present *Stowers* settlement demands that reasonable and prudent insurers would accept (tainted as that tenuous choice may be as a result of the harshness of being proved wrong on the coverage issue). Insurers may (1) give their insureds complete control of the defense and settlement process, or (2) retain control of the defense and pay the *Stowers* demands.

Insurers appear to have absolutely no right to be wrong about whether there is coverage if they fail to honor Stowers demands.

Insurers preferring to debate questions of coverage and, accordingly, refusing to accept and pay reasonable settlement demands, encounter an obvious jeopardy. Under current rules, insurers expose themselves to heavy penalties if they refuse to defend their insureds and ignore *Stowers* demands they receive on grounds of no coverage. If trial courts later determine coverage issues in favor of their insureds, the losing insurers who took on the defense of their insureds are liable for the full resulting judgments against their insureds in the underlying tort actions, even for judgments in amounts that exceed policy limits.

Texas courts have never ruled on whether a potential lack of coverage is a defense to a *Stowers* action, although one Texas case came close to this issue. In *Riggs v. Sentry, Ins.*,[10] the Fourteenth Court rejected a jury instruction telling the jury that insurers must assume that coverage exists when tort plaintiffs make reasonable policy limit settlement offers.

The 2000 holding by the Supreme Court of Texas in *Matagorda County* was an issue of first impression in Texas.[11] *Frank's* differs from *Matagorda County* for reasons shown in "Subissue 2" to the Petition for Review submitted in *Frank's*:

> The Matagorda ruling was limited to its facts and cannot properly be extended beyond them. This Court held in the Matagorda case that a primary insurer on a Texas policy, that defends and settles a case, cannot be reimbursed for funds paid to settle noncovered claims without the insured's consent. The Excess Underwriters here had no authority to settle, no duty to defend, and did not control the defense or settlement, but settled at Frank's insistence. Frank's controlled the defense, solicited settlement, and acknowledged coverage issues reserved between Frank's and Excess Underwriters.[12]

Thus, new issues are presented with the potential for a new set of reasoning. Although it is entirely possible for the higher court to simply agree with the Fourteenth Court's decision in *Frank's* by applying the same ruling as in *Matagorda County*, we foresee a more rational outcome which will put to rest the issue of reimbursement and remove the insurers' dilemma.

THERE IS A RATIONAL SOLUTION.

We propose an evidentiary exclusion rule that would give insurers the up-front chance to disprove coverage without jeopardy of extracontractual damages. The rule would operate in the following manner. Once an insurer determines, in good faith, that its policy may not potentially cover allegations in the underlying lawsuit, the insurer would assume the insured's defense under a reservation of rights. The insurer would then immediately file a declaratory judgment action to quickly resolve the coverage dispute. Any offer to settle submitted by the tort plaintiff after the filing of the action for declaratory relief, and before the court resolves coverage issues in that action, would not be admissible as proof in a later *Stowers* action.

This proposed evidence preclusion rule would operate much like the court-created "complaint allegation rule"[13] the Supreme Court of Texas established in 1965.[14] Our proposed *Stowers* evidentiary rule would deny insureds the second element of the *Stowers* doctrine, a necessary element before insurers can be nailed with extracontractual liability,[15] *i.e.*, the rule would render as a nullity any demands on insurers to settle within the policy limits if those demands are made before coverage issues are resolved in the insurers' actions for declaratory relief.

HOW WOULD INSURERS PROVE THEIR GOOD FAITH BELIEF OF NO COVERAGE?

Insurers' good faith beliefs would be questions for triers of fact. However, evidence that insurers reasonably interpreted and compared policy coverage with allegations of the complaints or petitions in the underlying tort lawsuits would be supportable in part by opinions of competent coverage counsel. Ideally, such legal opinions would already be part of the insurers' basis to contest coverage, along with other parts of the insurers' investigation and claim files.

Insurers' good faith beliefs would be questions for triers of fact.

HOW COULD THE SUPREME COURT OF TEXAS ADOPT THE NEW RULE?

The dominant issue in *Frank's* is whether insurers can recoup from their insureds indemnity dollars paid to settle potentially noncovered lawsuits against their insureds. In its review of *Frank's*, the Supreme Court of Texas could rehash the reimbursement issue resolved in *Texas Ass'n of Counties County Government Risk Mgmt. Pool v. Matagorda County*,[16] and simply agree with the Fourteenth Court. However, that would overlook the opportunity to resolve the insurer's dilemma. A better solution would be for the supreme court to harmonize existing insurance law and provide insurers an equitable solution for the Stowers dilemma.

The Supreme Court of Texas would first have to find a proper rationale to reopen the issues of *Matagorda County* in order to avoid an advisory opinion. This could be done by remanding the case to the trial court and allowing the Frank's excess insurer to have its coverage issues decided. The reasoning would be based on the fact that the Frank's excess insurer did not control the defense or settlement processes. The court could then define the exclusionary rule that would prevent the insured from *"Stowerizing"* that insurer on remand until after the basic issue of coverage is decided.

If the Supreme Court of Texas allows insurers to reject reasonable settlement offers, provided they have good faith beliefs (even though erroneous) that there is no coverage for the underlying tort lawsuits, *Frank's* will provide a nonconflicting adjunct to the *Matagorda County* decision. Why so? Because *Matagorda County* merely denies reimbursement, it does not preclude actions for declaratory relief to determine coverage.

THE RULE WOULD BE NO BURDEN TO TEXAS INSUREDS.

The proposed rule would not be unfair or inequitable to Texas insureds who bargained only for coverage described in the policy, not for windfalls arising from *Stowers*, a court-created rule. As exemplified in *Frank's*, insureds can now easily seize control of the *Stowers* windfall, creating the unfair dilemma for insurers. The rule would substantially eliminate *Stowers* as a plaything used by tort plaintiffs to coerce insureds into seeking benefits not bargained for in their insurance contracts.

Rewriting liability insurance policies, as suggested in *Frank's*, misses the point. Reimbursement from insureds need never be an issue if the Supreme Court adopts our proposed rule. Furthermore, the rewriting of liability insurance policies would provide no real solution if insureds lack the financial resources to repay settlements. Rewritten insurance policies would discriminate against solvent insureds and would foster litigation over money rather than promote quick and equitable justice under actions for declaratory relief, most of which can be resolved by summary judgment rather than requiring full-blown trials.

If the Supreme Court of Texas ignores the problem, liability insurance coverage may tend to dry up, just as homeowners' and medical malpractice coverage suffered under uncured economic pressures.

HOW DO OTHER JURISDICTIONS HANDLE THE QUESTION OF COVERAGE AND THE DUTY TO SETTLE?

Contrary to the course of Texas insurance law, the California Supreme Court created the reimbursement mess by holding that the question of coverage is an irrelevant factor when insurers respond to policy limit settlement demands. Over the course of more than 40 years, the California Supreme Court lessened the harshness of that rule by allowing insurers

to seek reimbursement from their insureds in several different situations.[17] First, where insurers provide the funds to settle lawsuits when there is absolutely no coverage under their policies; second, where allegations in tort lawsuits are only partially covered by their policies; and, third, where insurers incur and pay defense costs where allegations in the underlying lawsuits are only partially covered.

The California Supreme Court developed a series of rules about recovery from insureds of defense costs and settlement payments:

1. Insurers may not seek reimbursement of defense costs from their insureds where there is a potential for policy coverage of the allegations in the lawsuits.

2. However, in certain instances insurers may seek reimbursement for defense costs from their insureds for noncovered allegations, but insurers bear the burden of proving proper allocation of those defense costs by a preponderance of the evidence.[18]

3. Insurers may obtain reimbursement from their insured for settlement payments allocated solely to allegations for which there is no policy coverage.

The California Supreme Court developed a series of rules about recovery from insureds of defense costs and settlement payments…

The California Supreme Court considered whether insurers act in bad faith if they refuse to accept reasonable, policy limit settlement offers, based on their good faith belief that their policies do not cover the underlying tort lawsuits. As framed by one commentator, the California Supreme Court ultimately concluded that:

> the insurer's belief that the policy does not provide coverage cannot be allowed to affect the insurer's decision as to whether a policy limit settlement offer should be accepted. Instead, the insurer should evaluate the settlement offer as if there was no doubt about coverage and reserve the defense of noncoverage if necessary. In a separate action, the insurer may then seek reimbursement from the insured if it should succeed in establishing a lack of coverage.[19]

Thus, under California law, because insurers contractually control the settlement process (the same rationale as in Texas), insurers assume the full risk of improper failures to settle within policy limits. The fact that liability policies do not cover allegations in the underlying lawsuits, in whole or in part, is not an allowable defense. The California test requires insurers to (1) presume their policies cover allegations in the underlying lawsuits, and (2) to settle if reasonable insurers would do so. If there turns out to be no coverage or only partial coverage, insurers get the chance to recover both defense costs and indemnity dollars from their insureds under principles of restitution or unjust enrichment.

A matter of California public policy arises because insurers contractually assume complete control of the defense of their insureds' under contracts of adhesion. Under California law, insurers must subordinate their disputes over coverage in absolute favor of their insureds' interests, leaving insurers with exclusive authority to respond to reasonable policy limit settlement offers. If insurers wish to dispute coverage, they must first accept reasonable settlement offers, reserve their rights to reimbursement from their insureds, and file lawsuits to have courts determine whether there was coverage for allegations settled by the insurers. Approximately 19 jurisdictions follow the "California Rule."[20]

There are also approximately 19 jurisdictions that favor a rule similar to the one we advocate for Texas. Sometimes called the "Wisconsin Rule," this rule generally comports with our hypothesis that good faith, but mistaken, refusals to accept reasonable settlement offers due to coverage defenses should insulate insurers from excess judgments.[21]

A few jurisdictions apply a variety of multifactor tests to measure the reasonableness of insurers' refusals to pay settlement demands, generally favoring the position advocated here for Texas.[22]

THE SUPREME COURT OF TEXAS ALSO HAS A PRACTICE OF CONSIDERING PUBLIC POLICY.

The rule we propose is entirely consistent with the views of the Supreme Court of Texas. Examples of how the proposed exclusionary rule harmonizes nicely with the balancing practices of court-created Texas insurance law are these:

1. The proposition that insurers have no duty to settle alleged claims that are not covered under their policies.[23]

2. The proposition that the Stowers remedy of shifting the risk of excessive judgments to insurers is inappropriate without proof that insurers were presented with

a "reasonable opportunity" to prevent the excess judgment by settling within policy limits.[24]

3. The court's decision not to burden insurers with a duty to make settlement offers under *Stowers*, supported by the public interest that favors early dispute resolution.[25]

4. The proposition that insureds and plaintiffs are not entitled to enter agreements that prevent insurers from litigating coverage defenses.[26]

5. The court's abhorrence of arrangements that present "tremendous incentive" for insureds and plaintiffs to conspire against insurers, resulting in "prolonged and confused and distorted" litigation.[27]

6. The proposition that a judgment against an insured without a fully adversial trial is not binding on an insurer, nor is it admissible as evidence of damages in later lawsuits against insurers.[28]

CONCLUSION

The Supreme Court of Texas refused to recognize a right of reimbursement in *Matagorda County*. We urge the Court to perpetuate that decision. When the Court fairly disposes of *Frank's*, the Court should observe that a good faith, but mistaken, belief that the policy does not cover the tort plaintiff's suit creates an absolute defense to a *Stowers* suit. If the Texas Supreme Court makes such a pronouncement in *Frank's*, it would fairly bridge the gap between the lack of insurers' rights to seek reimbursement of defense and settlement costs under Texas law and the perception that insurers must settle lawsuits against their insureds, when appropriate and to avoid excess judgments, even though coverage may not exist. Such an outcome in *Frank's* would strike a proper balance in Texas law between the *Matagorda County* decision of no insurer right to reimbursement and the use of "no coverage" as a defense to a *Stowers* lawsuit. Although that balance would be dissimilar to the solution in California, given the holding in *Matagorda County* which bars reimbursement, there are few other reasonable alternative solutions for the dilemma faced by Texas liability insurers.

1. *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved)(insurers must accept settlement offers within policy limits if allegations are covered and ordinarily prudent persons would accept them, considering the likelihood and degree of insureds' potential exposure to judgments in excess of policy limits).

2. The word "allegations" is used in this article in reference to the "complaint allegation rule," and is intended to mean the "claims" under/against the liability insurance policy that are potentially raised by the pleadings in the underlying tort lawsuit brought against the insured.

3. 93 S.W.3d 178 (Tex. App.—Houston [14th Dist.] 2002, pet. granted).

4. 46 Tex. Sup. Ct. J. 553-554 (Apr. 5, 2003).

5. *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.32d 128 (Tex. 2000).

6. 93 S.W. 3d at 180. (emphasis in the original).

7. The trial court initially held in favor of the insurer on cross-motions for summary judgment, but reversed its course after the Supreme Court decided the referenced *Matagorda County* case. *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W. 32d 128 (Tex. 2000).

8. *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.23d 128, 135 (Tex. 2000).

9. *See Rocor Int'l, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 263 (Tex. 2002).

10. 821 S.W.2d 701, 706 (Tex. App.—Houston [14th Dist.] 1991, writ denied). The contested instruction in *Riggs*, provided as follows:

> You are further instructed that any question at SENTRY whether or not there was coverage for RIGGS' claim against SAMUEL RAMIREZ must not be considered in deciding Question No. [5 or 6]. That is, you must consider Question No. [5 or 6] and the above instruction as though there was no question at SENTRY that such coverage existed when RIGGS made his offer to settle.

11. *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W. 32d 128, 131 (Tex. 2000).

12. 46 Tex. Sup. Ct. J. 553-554 (Apr. 5, 2003).

13. Sometimes referred to as the "eight corners rule." *See National Union Fire Ins. Co. of Pittsburgh, Pa. v.. Merchants Fast Motor Freight, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

14. *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22 (Tex. 1965).

15. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994) (*Stowers* duty not activated unless the claim against the insured is within the scope of coverage; settlement demand is made within policy limits, and the terms of the demand must be such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment).

16. 52 S.W.3d 128 (Tex. 2000).

17. *See Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P. 2d 198 (1958); *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal.3d 9, 538 P. 2d 744, 123 Cal. Rptr. 288 (1975) (reimbursement of settlements); and *Buss v. Superior Court*, 16 Cal. 4th 35, 939 P.2d 766, 65 Cal. Rptr.2d 366 (1997) (reimbursement of defense costs).

18. *Aerojet – General Corp. v. Transport Indem. Ins. Co.*, 17 Cal.4th 38, 68-78, 948 P.2d 909, 927-933, 707 Cal. Rptr.2d 118, 137-143 (Cal. 1997).

19. Glenn E. Smith, *Understanding the Tort of Third-Party Bad Faith in Wyoming: Western Cas. & Sur. Co. v. Fowler Revisited*, 26 Land & Water L. Rev. 636, 638 (1991).

20. **Alaska:** *R. W. Beck & Assoc. v. City & Borough of Sitka*, 27 F.3d 1475, 1487 (9th Cir. 1994); **Arizona:** *Farmers Ins. Co. of Ariz. v. Vagnozzi*, 138 Ariz. 443, 446, 675 P.2d 703, 706 (Ariz. 1983); *State Farm Auto. Ins. Co. v. Civil Serv. Emp. Ins. Co.*, 19 Ariz. App. 594,601-603, 509 P.2d 725, 732-734 (Ariz. App. 1973); **California:** *Comunale v. Traders & Gen. Ins.*

Co., 50 Cal.2d 654, 328 P.2d 198 (Cal. 1958); *Johanson v. California State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal.3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (Cal. 1975); **Florida:** *Thomas v. Western World Ins. Co*., 343 So.2d 1298, 1304 (Fla. App.), cert. dism'd, 348 So.2d 955 (Fla. 1977); **Iowa:** *Loudon v. State Farm Mut. Auto. Ins. Co.*, 360 N.W.2d 575, 581 (Iowa App. 1984); **Kansas:** *Coleman v. Holecek*, 542 F.2d 532, 537 -538(10th Cir. 1976); **Kentucky:** *Eskridge v. Education & Exec. Ins., Inc*., 677 S.W.2d 887, 889-890 (Ky. 1984); **Louisiana:** *Trahan v. Central Mut. Ins. Co.*, 219 So.2d 187, 192-194 (La. App. 1969); **Massachusetts:** *Jenkins v. General Acc., Fire & Life Assur. Corp.*, 349 Mass. 699, 212 N.E.2d 464 (Mass. 1965); **Missouri:** *Landie v. Century Indem. Co*., 390 S.W.2d 558, 564-566 (Mo. App. 1965); **New Jersey:** *Battista v. Western World Ins. Co*., 227 N.J. Super. 135, 147, 545 A.2d 841, 847 (N.J. Super. 1988); **New York:** *United States Fid. & Guar. Co. v. Copfer*, 48 N.Y.2d 871, 400 N.E.2d 298, 424 N.Y.S.2d 356 (N.Y. 1979); **North Dakota:** *Milbank Mut. Ins. Co. v. Schmidt*, 304 F.2d 640 (8th Cir. 1962); **Oregon:** *Radcliffe v. Franklin Nat'l. Ins. Co*., 208 Or. 1, 298 P.2d 1002 (Or. 1956); **Pennsylvania:** *Luna Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd*., 780 F.2d 1082, 1091 (2d Cir. 1986); **South Carolina:** *Smith v. Maryland Cas. Co*., 742 F.2d 167, 168-170 (4th Cir. 1984); **South Dakota:** *Luke v. American Family Mut. Ins. Co*., 325 F. Supp. 1330 (D. S.D. 1971), aff'd in part, rev'd in part, 476 F.2d 1015, 1020-1023 (8th Cir. 1972), *cert. denied*, 414 U.S. 856 (1973); **Tennessee:** *United States Fid. & Guar. Co. v. Canale*, 257 F.2d 138, 140 (6th Cir. 1958); **Virgin Islands:** *Buntin v. Continental Ins. Co*., 525 F. Supp. 1077, 1082-1083 (D. V.I. 1981).

21. **Alabama:** *Attorneys Ins. Mut. of Ala., Inc., v. Smith, Blocker & Lowther, P.C*., 703 So.2d 866 (Ala. 1996); **Illinois:** *Green v. J.C. Penney Auto Ins. Co*., 806 F.2d 759 (7th Cir. 1986) (refusal to defend not done in bad faith, no extra-contractual liability); *Aetna Cas. & Sur. Co. v. Dichtl*, 78 Ill. App.3d 970, 398 N.E.2d 582, 34 Ill. Dec. 759 (Ill. App. 1980); **Iowa:** *Dairyland Ins. Co. v. Hawkins*, 292 F. Supp. 947 (S.D. Iowa 1968); **Kansas:** *Snodgrass v. State Farm Mut. Auto. Ins. Co*., 15 Kan. App.2d 153, 804 P.2d 1012, 1022-1023 (Kan. App. 1991); **Massachusetts:** *O'Leary-Allison v. Metropolitan Prop. & Cas. Ins. Co*., 52 Mass. App. Ct. 214, 752 N.E.2d 795 (Mass. App. 2001); **Missouri:** *Ganaway v. Shelter Mut. Ins. Co*., 795 S.W.2d 554 (Mo. App. 1990); **Mississippi:** *Martin v. Travelers Indem. Co*., 450 F.2d 542, 552 (5th Cir. 1971); *Employers Reinsurance Corp. v. Martin*, 767 F. Supp. 1355 (S.D. Miss. 1991); **Montana:** *Troutt v. Colorado Western Ins. Co*., 246 F.3d 1150, 1162-1163 (9th Cir. 2001); **New Jersey:** *Universal-Rundle Corp., v. Commercial Union Ins. Co*., 319 N.J. Super. 223, 725 A.2d 76 (N.J. Super. 1999); **New York:** *Dawn Frosted Meats, Inc. v. Insurance Co. of N. Am*., 99 A.D.2d 448, 470 N.Y.S.2d 624, 625-626 (N.Y. App.), aff'd, 62 N.Y.2d 895, 467 N.E.2d 531, 478 N.Y.S.2d 867 (N.Y. 1984); **North Carolina:** *Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co. v. Robertson*, 157 F. Supp. 405, 411 (M.D. N.C. 1957); **Oklahoma:** *VBF, Inc. v. Chubb Group of Ins. Companies*, 263 F.3d 1226, 1234 (10th Cir. 2001); *State Farm Mut. Ins. Co. v. Skaggs*, 251 F.2d 356, 359 (10th Cir. 1975) (insurer not liable for refusing to settle unless it made the decision not to defend in bad faith); **Oregon:** *Warren v. Farmers Ins. Co*., 115 Or. App. 319, 838 P.2d 620, 623-624 (Or. App. 1992); **Pennsylvania:** *Beck v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 429 F.2d 813, 818-820 (5th Cir. 1970) (refusal to settle and defend); **South Carolina:** *State Farm Mut. Auto. Ins. Co. v. Arnold*, 276 F. Supp. 765, 766 (D. S.C. 1967) (refusal to settle and defend); **Tennessee:** *National Serv. Fire Ins. Co. v. Williams*, 61 Tenn. App. 362, 454 S.W.2d 362, 365-366 (Tenn. App. 1969); **Vermont:** *Farm Bureau Mut. Auto. Ins. Co. v. Violana*, 123 F.2d 692, 697 (2d Cir. 1941), *cert. denied*, 316 U.S. 672 (1942) (refusal to settle and defend); *Vermont Ins. Mgmt., Inc. v. Lumbermen's Mut. Cas. Co.*, 171 Vt. 601, 764 A.2d 1213 (Vt. 2000); **Washington:** *Dewitt Const. Inc. v. Charter Oak Fire Ins. Co*., 307 F.3d 1127, 1138 (9th Cir. 2002); **Wisconsin:** *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis.2d 496, 385 N.W.2d 171 (Wis. 1986).

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23. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 848 (Tex. 1994)(citing to *Western Heritage Ins. Co. v. River Entertainment*, 998 F.3d 311, 312 (5th Cir. 1993).

24. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994)(citing to discussing *Ranger County Mut. Ins. Co. v. Guinn*, 723 S.W. 2d 656 (Tex. 1987).

25. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 851 (Tex. 1994).

26. *State Farm Lloyds Ins. Co. v. Maldonado*, 935 S.W. 2d 805, 815 (Tex. App. — San Antonio 1996), *aff'd*, 963 S.W. 2d 38 (Tex. 1998).

27. *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 711-714 (Tex. 1996).

28. *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996).

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Ensuing Loss Clauses in Texas Insurance Jurisprudence

As everyone knows, insurance policies have a complex structure. Part of that structure involves insuring agreements, limited by exclusions, expanded by exceptions. One of the most significant complexities in property policies is the ensuing loss clause. Such clauses have caused a good deal of litigation in Texas and elsewhere. We shall attempt to elucidate the concept of *ensuing loss*. We shall do so by reference to a hypothetical clause which could appear in virtually any sort of property policy, so long as the property involves physical objects.

Our thesis is that the complexity–some might say obscurity–of ensuing loss clauses is only apparent. They are not as difficult as some suggest. In our opinion, if they are studied carefully, they are–or become–reasonably clear. Once they are understood, it can be appreciated hence that they do not often apply and that they are not a source of significant coverage under most circumstances. For example, coverage for mold and similar phenomena is not easily generated out of them. We believe–and intend to demonstrate–that Texas courts have mostly understood this. We believe that, for the most part, Texas courts have consistently and correctly applied ensuing loss clauses, although they have done so in variously deficient ways, and that their errors and misconception have caused insureds hope where there should be none. Texas courts have not allowed–and should not allow–ensuing loss provisions to "completely eviscerate and consume" specific exclusions.[1]

I. POLICY LANGUAGE EXPOSITION

Assume the following insuring agreement: "The insurer will cover risks of physical loss to any insured object, except as excluded." This sentence is a trifle disconcerting. When someone says, "we will cover risks of loss," one is inclined to ask, "What risks?" or "Which risks?" If either question were put to a property insurer, it would say, "any of them, which are not excluded. All of them, that is, but for those that are excluded." One wonders when one receives this response, why not say, "The insurer will cover all risks of physical loss . . . ." If that's what you mean, why not say it? The reason is that, several years ago, the word "all" was present in the insuring agreement of property policies. Indeed, they were called "All Risk Policies," and often still are. Unfortunately, some courts bent over backwards to find coverage, where there was clear exclusionary language, precisely because of the presence of the word "all." The cleverest thing the insurance companies could think of to eliminate this argument was to eliminate the word. In any case, *all-risk-of-physical-loss-except-as-excluded* is what is intended.

Suppose that there is an exclusionary clause which reads as follows:

The insurer does not cover loss caused by:

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(1) Inherent vice, wear and tear, deterioration, or loss caused by any quality in the property that causes it to injure, damage, or destroy itself;

(2) Rust, rot, moths, mold, or other fungi;

(3) Dampness of atmosphere, extremes of temperature;

(4) Contamination;

(5) Rats, mice, termites, vermin, moths, or other insects;

(6) Settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings, roof structures, walks, drives, curbs, fences, retaining walls, or swimming pools.

Coverage is provided for 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 the policy.

This clause, variants of which often occur in Texas homeowners' policies, is way too complicated to discuss here. We will simplify it presently.

Before doing so, however, let us consider an ensuing loss clause which does not use the word *ensue* and which is not in a homeowners' policy. The language we are about to expound appears, more or less, in the property section of the Commercial Insurance Policy issued by a major carrier. The insuring agreement states that the relevant coverage section "insures all risks of direct physical loss or damage except as excluded or limited elsewhere" in the coverage section. One of the exclusions states, in part, as follows:

> This Coverage Section [, i.e., the property insurance component of the multi-sectioned policy] does not insure against loss, damage or expense caused by or resulting from the following: wear and tear, gradual deterioration, inherent vice, latent defect, depletion, erosion, corrosion, mold, wet or dry rot[.] But if loss or damage from a "covered cause of loss" results, we will pay for that resulting loss or damage.

In addition, many other excluded causes of loss exist. (The phrase "*covered cause of loss* means a cause of loss or damage insured against by the *covered cause of loss* clause [, i.e., the insuring agreement] of the Coverage Section and not excluded or limited elsewhere in the Coverage Section.") Obviously, the phrase *ensuing loss* does not appear in this policy language. Instead the phrase *resulting loss* appears. Nevertheless, fairly obviously, this is a type of ensuing loss clause.

Let us return to the original example taken from Texas homeowner's policies. This is the paradigm with which we will mostly be working throughout the rest of the paper. As indicated, that exclusion, and its ensuing loss clause, are too complicated to discuss here fully, so they stand in need of simplification to facilitate discussion. Here is a simplification of parts of the exclusionary clause:

> This insurance covers risk of physical loss upon an insured building except as excluded. The insurance does not cover loss caused by mold. It does cover loss ensuing from mold damage and caused by water damage, so long as the ensuing loss would otherwise be covered under the policy.

This simplification focuses on mold damage and water damage, about which we have seen a good deal of controversy in recent years. The exclusion could be simplified in a variety of ways. The formula is always the same, however. We shall move to a more complex and interesting hypothetical in a moment.

The first thing to notice is that the domain of ensuing losses is precisely the losses in which an excluded state of affairs plays some causal role. This is true because the verb *to ensue* often means *to follow from*. The newish SHORTER OXFORD ENGLISH DICTIONARY (5th Ed. 2002) defines the intransitive verb "ensue" this way: "Be subsequent; occur or arise afterwards, especially as a result or consequence; resulting *from* . . . ." In a related way, the dictionary defines *ensue* as a transitive verb to mean "succeed, come after, be subsequent to; result from." *Id*. at 834. The fairly recent, and very modern, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) defines the term, in part, as follows: "to take after : follow the lead of : IMITATE[.]" In a related sense, the word is defined this way "to follow after : be subsequent to : SUCCEED[.]" Another obviously related definition is "to take place afterwards" and "to follow as a chance, likely, or necessary consequence : RESULT" or "to follow in chronological succession." *Id*. at 756.

There is of course an ambiguity in the term *ensue* given these definitions. On the one hand, event E_2 could ensue from event E_1 if it happens chronologically after it, perhaps in some sense coordinated with it. In another sense, for E_2 to ensue from E_1, E_1 must play some sort of causal role in bringing about E_2. These two different meanings of the word *ensue* could be called the "Purely Chronological

Meaning" and the "Causal Meaning." It is fairly obvious that the purely chronological meaning could have no purpose in an insurance policy. If E_2 ensued from E_1 where E_1 was an excluded event, but E_1 had nothing to do–causally speaking–with the occurrence of E_2, it would be unclear why it would be necessary to say anything special about whether E_2 is or is not covered. In order to see why this is so, it is necessary to note that the exclusionary clause which we have quoted above precisely excludes certain results which are caused by specifically excluded conditions or events. It is not events or states of affairs that have an intrinsic quality, e.g., being round or being red, which are excluded by the above-referenced exclusion. Rather, it is events or states of affairs that are caused in certain ways.

Thus, if something is an ensuing loss, in the sense of causality, it is always appropriate and sometimes necessary to ask, "from what did it ensue?" Every loss ensues from something. This proposition follows from two others: (1) every event has a cause, and (2) every loss has a beginning.

We now must ask ourselves what it is that may cause an event or state of affairs if the ensuing loss clause is to have any relevance to it. We must also ask ourselves how we decide what the scope of the ensuing loss clause is. The answer does not lie in the meaning of words. Rather, the physical positioning of the phrase *ensuing* loss in the exclusion makes it clear that excluded states of affairs, such as the existence of mold, must be somewhere in the concatenation, web or chain of states of affairs that the ensuing loss follows. Hence, a more general way to formulate the idea of *ensuing* loss is this:

> Insuring Clause: This policy covers (all) risks of physical loss to insured objects. Exclusionary Clause: This policy does not cover losses caused by *X*. Ensuing Loss Exception: This exclusion does not apply to an ensuing loss caused by *Y*, which was itself caused by *X*, so long as the ensuing loss is a state of affairs otherwise covered by this insurance (i.e., included within the insuring agreement and not within any exclusion).

Thus, an excluded state of affairs may indirectly or more or less remotely participate in causing a covered ensuing loss, but it may not be the immediate cause. Thus, the insured loss may follow from an excluded state of affairs, (as it were) at a distance, but it must make sense for ordinary language speakers to see something else as an important cause or at least the immediate (or a significant) cause. The immediate cause of the ensuing loss may itself have been caused (at least in part) by the excluded event or state of affairs.

All of this is rather cumbersome, but in the end it is reasonably clear. Perhaps another approach might be helpful. Property insurance on physical objects, including buildings, generally covers physical losses. A physical object experiences a physical loss when it is destroyed, damaged, or–quite literally–lost (accidentally misplaced, thrown away, dropped into a volcano, and so forth). Losses are states of affairs. Events cause losses. Events are not themselves losses. Physical property that has suffered destruction has suffered a loss. Physical property that has suffered physical injury or damage has suffered a loss.

Exclusions in policies are not always completely clear on this point. As a general rule, the lack of clarity is harmless. Policies exclude certain types of losses, and they exclude certain losses that are caused by specified events. It is tempting to look at the idea of loss in a different way–not as a physical state of affairs, but as a financial situation. Thus, property loss is a loss of wealth or financial value, as opposed to a kind of physical damage to property. This is a sensible way to use the word *loss*. Thus, when one is asked, "how large a loss did you sustain?" the question does not pertain to the physical size of the loss, but to the amount of money at stake. Thus, it would be inappropriate to answer the foregoing question by saying, "An area 30' by 70'." Rather, the appropriate answer is, "Around $16,000." The truth is, of course, that the ordinary English word *loss* is ambiguous as between physical loss and financial loss. We shall see courts harmlessly conflating these two meanings. The way the term fits into the aforementioned insurance policy, however, makes it clear that physical losses–not financial losses–are at issue. Usually, the ambiguity in the word *loss* is harmless. It is unacceptable to conceptualize the meaning of the word *loss* in terms of losses of wealth in the context of property insurance policies, precisely because insuring agreements say that they cover *physical losses*. Thus, losses are physical states of affairs, not financial states of affairs caused by physical states of affairs. Financial loss is a way to measure the physical losses.

In many cases, exclusionary clauses in property policies exclude losses with certain intrinsic characteristics. Others exclude losses that are caused in certain manners. These might be called, respectively, "Intrinsic Characteristic Exclusions" and "Relational Characteristic Exclusions." Still other exclusions are more or less both at the same time. Thus, the rotting of wood is a loss. The loss is the rotten wood. Moldiness on a physical object is a physical loss, even though it is, as it were, loss (partially caused) by an addition, i.e., the mold. Neither rotten wood nor moldy surfaces are thereby covered. Both types of loss are excluded. In contrast, a dampness of atmosphere is not an intrinsic feature of any loss. Rather, it is a distinct cause of a loss. Similarly, extremes of temperature are not them-

selves intrinsic losses. The phrase *extremes of temperature* does not describe physical loss to physical property. Rather, extremes of temperature are sometimes the causes of losses. The same is probably true for some types of inherent vice. In contrast, a physical object which is worn and torn has sustained either one or two kinds of loss, almost certainly caused by something else: rubbing, people walking on the structure, people urinating on it, wind action, and so forth. Rot and mold are probably not only intrinsic characteristics of kinds of losses, but also causes of losses. Thus, moldiness is caused by mold. Rotten wood is caused by the rotting of the wood.

Our elucidation of what is involved in the idea of *loss* may help in understanding the idea of *ensuing loss*. Obviously, ensuing losses are physical states of affairs. They are physical losses to physical objects. Here is a description of what it is to be an *ensuing loss*:

> If, at a time after a physical loss, L_1, has occurred, where L_1 is excluded from coverage, another physical loss, L_2, occurs which ensues upon L_1 and which is caused, at least in part, by events or processes which are covered, then there is coverage for L_2, although not for L_1.

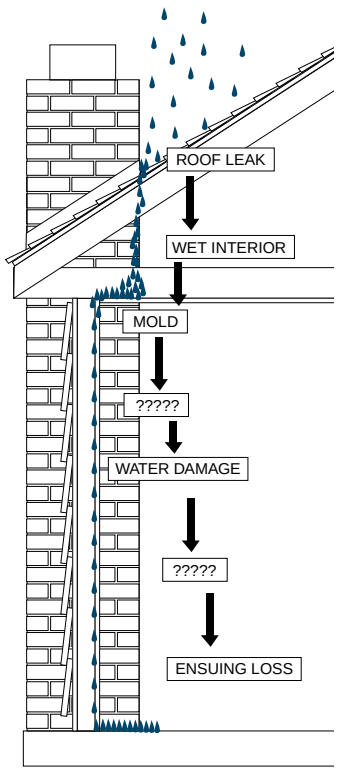
What is puzzling about this formulation is that L_1 will have been a causal antecedent of L_2, precisely by virtue of the fact that L_2 ensues upon (or from) L_1. If so, then whatever it was that caused L_1 will also be a causal antecedent for L_2. But the ensuing loss clause says that there is coverage for L_2 only if it would otherwise be covered under the policy. But if the cause of L_1 is also part of a set of causal antecedents of L_2, then there could never be coverage for L_2, and the exception to the exclusion becomes empty. Obviously, this interpretation cannot be correct. No interpretation of any contract that yields an absurd result can ever be correct. Legally absurd results are to be eschewed. Creating an empty exclusion is an absurd result. It is absurd precisely because it would suppose that the insurance industry, its regulators and the commentators which designed and critiqued the ensuing loss clause were either stupid or crooked, and that simply cannot be true.

Our solution to the foregoing puzzle is simple enough. It hinges on the idea of indirect causation:

> An ensuing loss, such as L_2, is covered when: (1) L_2 is not directly caused by an excluded cause; (2) L_2 does not have intrinsic characteristics that make it an excluded state of affairs; (3) L_2 is only indirectly caused by either L_1 or the cause of L_1; and (4) L_1 or the cause of L_1 plays some role in causing L_2, but that causal role is indirect, and at least somewhat removed.

Indirect causation occurs when one event, E_1, causes another event, E_2, which causes a third event, E3. In that case, E_2 directly causes E_3, and E_1 only indirectly causes E_3. Thus, although E_3 ensues from E_1, it is natural to say that E_1 is not the cause of E_3. This point becomes even more obvious when more events are added to the causal chain.[2] As a matter of linguistic legerdemain, it is frequently possible to "find" (or, at least, some plausibly assert the existence of) intervening causes between any two causally linked events or states of affairs. One has the sense that, frequently, this is the strategy being employed by insureds to argue for coverage through the idea of ensuing losses. It is right here – in this very conceptual spot – that the confusions about the nature of ensuing losses and the concept of *ensuing loss* arise. They arise because of confusions about the concept of causation in ordinary language and common sense. This is a well-known problem to anyone who has paid attention in first year law classes and anyone with even a modicum of conceptual-linguistic sophistication.[3] In the law, outside arcane scientific matters, all assertions of causation must be commonsensical. Hence, it must be natural and commonsensical to claim if something other than L_1 is correctly said to be the direct cause of L_2. Linguistic arabesques won't cut it, nor will phony conceptual acrobatics.

To return to our original concrete example involving mold and water damage, the sequence must go something like this. Some configuration of factors causes mold. These factors might be problems in the air conditioning. There might be a faulty design in the building. There might be standing water. There might be leaks in the roof. And so on. Let's focus on leaky roofs. In order for there to be an ensuing loss from a mold loss, the mold – however it is caused – must cause water damage, and water damage must cause the next loss. If that loss does not have intrinsic characteristics which exclude it from coverage, then it will be covered under the ensuing loss clause. Graphically, this succession of events may be represented as follows:



The downward pointing arrows represent causation. The boxes represent states of affairs. There may be other boxes intervening between the mold box and the water-damage box. It really doesn't matter. Of course, the state of affairs which is in the ensuing loss box may (must) not itself be a state of affairs which is excluded from coverage by its

intrinsic characteristics. Thus, rotten wood would not be covered as an ensuing loss because it is itself excluded. We have left the sixth box down blank because we are not quite sure what physical losses mold might cause which would then cause a covered ensuing loss. The usual candidate in the cases we will discuss below is water damage. It is extremely difficult to see how mold might cause water damage.[4]

The preceding diagram, appropriately modified, may be used to portray any ensuing loss situation. The penultimate box down – the one right before "Ensuing Loss" – might have to be multiplied. In theory, there could be any number of boxes vertically connected by arrows substituted for that single box. What is true in theory, however, is not true in practice. The more boxes plugged in, the less likely there is to be genuine causation.

II. TEXAS CASES

Let's see how courts interpreting Texas law have addressed ensuing loss clauses. We will include both Texas state courts and federal courts sitting in Texas. (We would include federal courts sitting elsewhere applying Texas law pertaining to ensuing loss clauses, but we haven't found any.) We'll take the cases in chronological order. Our narrative spans approximately 38 years – about a generation.

The first case is *McKool v. Reliance Insurance Company*, 386 S.W.2d 344 (Tex. Civ. App. – Dallas 1965, writ dism'd w.o.j.). The facts in this case were simple. The swimming pool belonging to McKool had walls. Ceramic tile was affixed to the walls. It experienced chipping and cracking when the water in the pool froze.

The issue was whether the loss was excluded by the caused-by-extremes-of-temperature exclusion or by the loss-by-cracking exclusion. McKool had argued that the exclusion was caused by ice, that ice is solidified water, and hence that there was water damage bringing the loss within the ensuing loss exception to the exclusions. The Dallas Court of Appeals sided with the insurance company, stating as follows:

> [T]he tile having cracked because of the extreme cold or ice, th[ere] could be no recovery therefor, but if water had entered through the cracks thus caused, the ensuing damage caused by the entry of the water would be recoverable. That would be a loss caused by water damage ensuing after the uninsured cracking of the tile.

Id. at 345. The court's judgment rested upon the proposition that "all ensuing losses (meaning losses which follow or come afterwards as a consequence) caused by water damage are covered[,] whereas "losses caused by extremes of temperature or cracking are not[.]" *Id.*

The Dallas Court of Appeals has it right. The cracking was not an ensuing loss. It was caused by extremes of temperature, and that's the end of the story. It seems to us that the court of appeals gets the other part of the argument wrong. The loss in the tiles was not caused by cracking. The loss was the cracking. This is a situation in which the insurance company trades on an ambiguity in the word *loss*. As explained above, the word *loss* may mean either *financial loss* or *physical loss*. There is no question at all, however, that property insurance policies insure against physical loss, and that is the sense in which the term is used in those policies.

The Dallas Court of Appeals has it right. The cracking was not an ensuing loss.

The next case is *Aetna Casualty & Surety Company v. Yates*, 344 F.2d 939 (5th Cir. 1965). What is interesting about this case is that Henry J. Friendly, a very distinguished judge from the Second Circuit, sat by designation. Judge Friendly is one of those federal circuit judges who ranks with, or close to, Learned Hand in terms of prestige and influence. Others include Richard Posner, Frank Easterbrook, David Bazelon (for a time), J. Selly Wright, and a few others.

The facts in *Yates* were, as usual, simple, and they were not particularly in dispute. The joists, sills, and subflooring of a house were substantially rotted away. The cause of damage was that the crawl space was inadequately vented. The house was air conditioned. The contact between the air trapped in the crawl space and the subfloors and sills which had been cooled produced condensation and then rotting.

The homeowner argued that this loss was caused by condensation of moist air in the crawl space into water which then damaged the sub-floors, joists and sills. Thus, the homeowner contended that it had an ensuing loss on its hands and hence had coverage.

The Fifth Circuit rejected this gambit, saying that "the rot may have ensued from water[,] but not from water *damage*[.]" *Id.* at 941. Furthermore, said the court, the damage experienced by the policyholder "ensuing from the rot was

not the damage from the direct intrusion of water, conveyed by the phrase 'water damage.'" *Id*. [Emphasis added.] Thus, Judge Friendly observed that "[a] likely case for application of the [ensuing loss] clause would be if water used in extinguishing a fire or coming from a burst pipe flooded the house and in turn caused rust or rot[.]" *Id*.

The Fifth Circuit got the result right. In fact, this case is no more difficult than *McKool*. There was no water damage independent of the rot which caused the rot. At the same time, we are not sure that the court's adumbration on what might constitute water damage is necessarily the way to think about water damage. At the same time, we are relatively certain that advocates who try to stretch the idea of water damage to include not only ice but condensation are barking up the wrong tree.

The third case is *Employer's Casualty Company v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. – Houston 1965, no writ). This case raises significant problems and may not have been correctly decided. It involved damage to a house. When the house was built, the builder, or its subcontractor, failed to include a shower pan. As a consequence, some of the water that should have flowed through it passed into and under a wood and cork flooring. That water caused deterioration and rot to the point where "good judgment dictated its replacement." *Id*. at 365. On stipulated facts, the trial court found coverage. The appellate court distinguished the *Holm* case from both *McKool* and *Yates*. The parties agreed in their stipulation of facts that the construction and installation of the shower floor and drainpipe were "inherently defective[.]" *Id*. The court found that there was ensuing loss from water damage and that the inherent vice exclusion did not apply. Each of the court's arguments for its holdings should be considered at some length.

Significantly, the court held that the provisions of the insurance policy at issue were "obscure and ambiguous, or at least susceptible of more than one construction, and that they should, therefore, be construed liberally in favor of the insured and strictly against the insurer." *Id*. at 367.

Here is what the court had to say about ensuing loss:

> It is a matter of common knowledge that the more or less continual application of water to and against the wooden flooring of a house would cause warping and cracks and water damage thereto which finally would result in rot and deterioration. The loss which ensued or followed the water damage grew out of and was caused by water damage. Hence the exception or exclusion to the exclusion at issue [which is a piece of the hypothetical exclusion formulated in this paper] should apply. The water damage in this case would be covered by the policy since it is not within [any other applicable exclusion excluding water damage]. It thus comes within the proviso in the exception to the exclusion in that the water damage loss would otherwise be covered under the policy.

Id. at 366. The exception in the exclusion is for ensuing losses caused by water damage, "provided such losses would otherwise be covered under the policy." *Id*. at 366. Alas, this argument is simply wrong.

The situation is worsened by the court's treatment of inherent vice. The insurer had contended that the damage was caused by inherent vice which was excluded under the policies. Apparently, the insurer offered this proposition on the basis of the fact that the parties had stipulated that "the construction and installation of a tile shower and drain pipe in the house was defective." *Id*. at 365.

The court was not persuaded:

> The inherent vice was in the shower stall. No recovery was allowed by the trial court for the cost of the shower pan which was installed. Recovery was allowed for replacing the damaged floor. No contention is made that there was any inherent vice in the floor which suffered water damage. It is true that the parties stipulated that the inherent defect in the shower made it inevitable that water would pass into and onto the cement below the shower and into and onto the wood and cork flooring of the assured's house. But the loss was not caused by inherent vice in the floor but by inherent vice in another part of the house for which no recovery was allowed. For example, if it be assumed that there was an inherent vice in the roof of the house, no recovery could be had for such defective roof or the repair thereof. If, however, water should leak through such roof and damage the floor of the house and the insured's furniture, there could be recovery therefore because there would be water damage not excluded by [a relevant exclusion]. The term "inherent vice" as a cause of loss not covered by the policy, does not relate to an extraneous cause but to a loss entirely from internal decomposition or some quality which brings about its own injury or destruction. The vice must be inherent in the property for which recovery is sought.

Id. at 366-67. This argument is no better than the previous one, although it more obviously hinges on what the court describes obscurely and ambiguously.

The argument which directly hinges upon a nature of ensuing losses or the meaning of the phrase *ensuing loss*, is a failure. If the actual loss has the intrinsic physical characteristics that render it subject to an exclusion, then the fact that it is an ensuing loss caused indirectly by a covered event makes no difference. Loss here was rot. Wood rotted. Cork rotted. The ensuing loss exception to the exclusions is quite clear. It is activated only if the losses in question would otherwise be covered under the policy. Rot is caused by rot. The process of rotting is the immediate cause of rotten wood. Thus, events of rot caused the state of affairs of rot. The word *rot* is, of course, ambiguous in this regard – it refers to both the state of affairs and a process and so refers to both a causal antecedent and a causal consequence – but the ambiguity is harmless. To be sure, antecedent states of water damage cause the process of rotting, which cause the end state of being rotten. Thus, the direct cause is itself excluded, and so the exception to the exception applies and there is no coverage.

The argument which directly hinges upon a nature of ensuing losses or the meaning of the phrase ensuing loss, is a failure.

It seems to us that the inherent vice argument is no better. The argument turns upon the premise that excluded inherent vice must be in the same property that sustains physical loss. We believe that this premise is true. Indeed, it would have to be true for the insurance to be property insurance, as opposed to – say – liability insurance. It is also true that the inherent vice was in – or at least under – the shower stall. It is furthermore true that physical damage to the house was caused in the wood and cork floors in the insured's house, not in the shower stall. It is perfectly clear that the house is one entity. That is the property that is insured. To be sure, the inherent vice is not in the floor which sustains the damage. Instead, it is under the shower stall – or at least that portion of the shower stall where people stand.

The court suggests an analogy. It suggests that if there were inherent vice in a roof, and water came through the roof and inflicted physical injury upon another part of the house, the damage would be covered because the inherent vice was in the roof and not in that part of the house which sustained physical injury. Of course, this argument is pure dicta. If the loss experienced by the insured is caused by rot, then there is no coverage whether or not it is also caused by inherent vice. At the same time, the concept of *inherent vice* bears some reflection. The idea of *inherent vice* has its origins in marine insurance, which was the original all-risk first-party property insurance. It began as an implied exception, and the characteristics of the implied exception carried over to express exceptions. In any case:

> The inherent-vice exception means that deterioration, either of goods or a vessel, which is due to ordinary wear and tear does not come within the coverage provided by a policy covering loss from "perils of the sea." However, when the natural decay of goods is caused (or hastened) by a peril of the sea, recovery for the loss is permitted.

ROBERT E. KEETON & ALLEN I. WIDISS, INSURANCE LAW § 5.3(c), pp. 485-86 (1988). There is not a substantial state court jurisprudence on the meaning of the phrase *inherent vice*. This is not the place to explore it, since much of it is in that portion of admiralty law which pertains to marine insurance. Nevertheless, it is not at all clear that the fact that there are different parts of the same property defeats the idea of excluded losses from inherent vice. A much better bet is that normal deterioration of the insured object, thing or building is assisted by an event that would otherwise be covered.

In chronological sequence, the next case is *Allstate Insurance Company v. Smith*, 450 S.W.2d 957 (Tex. Civ. App. – Waco 1970, no writ). In this case, a copper water pipe in a concrete slab in a house burst, causing water damage to the insured premises. Apparently, the rupture in the pipe was caused either by a defect in the manufacture of the pipe or by the way a workman crimped it when it was installed. In addition, the "[w]ater leaking from the ruptured pipe caused the wooden beams and plates in the vicinity of the pipe to begin rotting." *Id.* at 958.

The trial court found that losses resulting in water damage are a risk of physical loss not otherwise excluded. In addition, it found that rotting and deterioration of wooden beams and other components of the house resulted from water leakage. As a result, language excluding losses caused by "inherent vice, wear and tear, [and] deterioration" did not apply, precisely because that exclusion does not apply to ensuing losses caused by water damage "provided that such losses would otherwise be covered under th[e] policy." *Id.*

The Waco Court of Appeals affirmed the trial court's finding of covered loss. The argument was very simple. The burst pipe caused water damage, and the water damage caused rot. There was coverage for all sorts of physical losses, unless they were explicitly excluded. And no exclusion was invoked.

In addition, the *Smith* court subscribed to the inherent vice argument formulated by the *Holm* court. Here the argument works somewhat differently. In this case, the defective copper pipe was the inherent vice. No recovery was allowed for the pipe, just as no recovery was allowed for the shower pan in *Holm*. The compensatory damages that were allowed were for the costs of tearing out the floor and wall, finding the source of the leak, and repairing it. These, it is said, were not due to inherent vice.

This case, insofar as it is correctly reported, was correctly decided, unlike the *Holm* case. The difference here was that Allstate Insurance did not set up rot as an exclusion. Had it done so, perhaps this case would have been decided differently. It is a virtual certainty that rot was an exclusion in the policy. It was a standard exclusion in homeowner's policies in 1970. The fact that Allstate did not raise the exclusion, however, changed everything. One wonders how that could have happened.

Merrimack Mutual Fire Insurance Company v. McCaffree, 486 S.W.2d 616 (Tex. Civ. App. – Dallas 1972, writ ref'd n.r.e.) is the next case. The facts were stipulated. A 30-year-old house sat upon a pier and beam foundation. Ten to fifteen years before the lawsuit, the owners added a second bathroom at the rear of the house. As in *Holm*, there was no shower pan under the shower stall. The absence of a shower pan is an inherent vice, said the court:

> The lack of such a pan made it inevitable that when the shower was used eventually water would pass through the tile shower floor and around the drain pipe and leak onto the wood under and around the shower stall. This would happen without the intervention of any fortuity or chance occurrences, and was inevitable and is, in fact, what occurred in this portion of the dwelling.

Id. at 617.

Over a good number of years, the leaking water, the lack of ventilation in the crawl space and the absence of light led to fungus. Probably, the water leak by itself would have caused the fungus. In any case, it flourished, "living off and consuming the cellulose in the wood[.] This caused the wood "to decay and deteriorate to a condition that can be generally described as 'rotten'." *Id*. at 618. Thus, this case involves rot, caused by fungus, caused (in part) by water leaking from the shower. Eventually, the insureds noticed that the floor of the shower had sunk. This led them to have an inspection performed, so the rot was discovered, and the insured notified the insurance company. In addition to fungus and rot, there was evidence of termites. Consequently, some of the damage to the house may have been caused by them, rather than by rot, mold and other fungi. (The termites would have caused no more than 10% of the damage.) However, termites in question were "subterranean termites which are attracted to damp, moist areas and it is probable that [these] termites were attracted to the addition [to the house] by the water leaking from the shower stall." *Id*.

The Dallas Court of Appeals found that the policy contained an exclusion for both the termites and fungi. Thus, the only question left was whether the ensuing loss exception to the exclusion applied; that is, whether the ensuing loss was the result of water damage. The court thought not, partly on the basis of *McKool* and *Yates*. Said the court:

> For the loss in this case to be covered by the policy[,] it must have been "ensuing loss" caused by water damage per se. In other words, to be ensuing loss caused by water damage such would necessarily have to follow or come afterwards as a consequence. The facts do not support this situation[,] since it is agreed that the loss in question was caused by the fungi, and to some extent by termites. While it may be said that the fungi grew in a favorable atmosphere[,] the deterioration, rot, and fungi cannot be said to be "water damage," as such.

Id. at 620. As can easily be demonstrated, *McCaffree* reaches the right result, for the wrong reasons.

There is absolutely no reason why water damage must be the most immediate cause of whatever the damage is that falls within the ensuing loss clause. Water damage might cause some other state of affairs which might cause the loss, and – so long as the immediate cause of the loss did not fall within an exclusion – the fact that the water damage was not the absolutely most immediate cause would be irrelevant. As in other cases, the problem here arises from confusion about the concept of causation.

Nevertheless, the result is correct. The loss here was caused by rot, fungi and termites. The ensuing loss clause provides that certain exclusions do not apply to ensuing losses caused by water damage, but the ensuing loss exception applies only if those losses would otherwise be covered under the policy. Here, the ultimate loss may have been

caused by water damage, but it was also caused by rot, fungi and termites. The presence of these excluded causes results in the exclusion of loss.

Shortly after the Dallas Court of Appeals decided *McCaffree*, the San Antonio Court of Appeals decided *Lambros v. Standard Fire Insurance Company*, 530 S.W.2d 138 (Tex. Civ. App. – San Antonio 1975, writ ref'd.). In that case, a house suffered structural damage and slab collapse. The cause was the movement of subterranean water "exerting pressure on the foundations, floors, sidewalks, driveways, [and] walls[.]" *Id.* at 139.

The *Lambros* policy read, in relevant part, as follows:

> This contract insures against all risk of physical loss except those caused by settling, cracking, bulging, shrinkage, or expansion of foundations, although this exclusion does not apply to an ensuing loss caused by collapse of [the] building, or any part thereof, or water damage, provided that such losses would otherwise be covered under the policy.

Id. The jury found that the loss was caused by settling, cracking, bulging, shrinkage or expansion of relevant structures and parts of structures. *See id.* at 140. In addition, the jury found that the loss "'was caused by a collapse of the building or any part thereof by water damage.'" *Id.* The trial court disagreed with the jury and entered judgment *non obstante veredicto* for the insurer. The San Antonio Court of Appeals affirmed.

Insofar as the concept of *ensuing loss* is relevant, the court found that it presented some difficulty. In this case, the concept of *ensuing loss* pertained to collapses as opposed to water damage. The court thought that there were two possible interpretations of the ensuing loss exclusion. The first one may be reconstructed as follows:

> The relevant exclusions shall not apply to (1) ensuing loss caused by collapse of building or any part thereof and (2) water damage.

The second interpretation would go like this:

> The exclusion shall not apply to ensuing loss caused by (1) collapse of building or any part thereof [or] (2) water damage.

The court believed that the second of the two interpretations was the only plausible candidate. The trouble with the first interpretation is that all sorts of water damage are excepted from the various exclusions, whereas, according to the second interpretation, only ensuing losses caused by water damage are excepted. This makes no sense, given the concept of *ensuing loss*. As the court said:

> If we give the language of the exception its ordinary meaning, we must conclude that an ensuing loss caused by water damage is a loss caused by water damage where water damage itself is the result of a preceding cause. What is the preceding cause which gives to the exception the effect of taking the ensuing loss out of the reach of [the exclusion]? Again, the plain language of the exception compels the conclusion that the water damage must be a consequence, [i.e., follow from or be the result of the types of damage enumerated in the relevant exception]. "Ensuing loss caused by water damage" refers to water damage which is the result, rather than the cause, of "settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings . . . ."

Id. at 141. In the *Lambros* case, observed the court, the water damage was a cause rather than a consequence of the settling. It therefore could not possibly fit within the standard ensuing loss exception.

In *Daniell v. Fire Insurance Exchange*, No. 04-04-00824-CV, 1995 WL 612405 (Tex. App. – San Antonio Oct. 18, 1995, no writ) (not designated for publication), ensuing loss was the only issue. As is quite often the case, the material facts were undisputed. Wood siding was installed on the insured's home. The construction company failed to install felt backing between the aluminum foam sheathing and the wood siding. Heat caused the siding to buckle. That broke the paint seal and allowed water to get between the siding and the aluminum foam sheathing. The siding rotted.

The insurer denied coverage, and the trial court awarded it summary judgment in the coverage action. Justice Duncan relied upon *Lambros*, concluding that the previous court's meaning was plain: "While an ensuing loss provision will cover water damage caused by an excluded event, it will not cover the excluded event even if it is caused by water damage." *Id.* at *2. The insured's problem was not water damage caused by rot. Instead, it was rot caused by water damage. Hence, there was no coverage.

One wonders. It seems to us that the real problem here is that the physical injury to the property was rot, and it was caused by rotting. All such losses, no matter how else they are caused, are excluded by the language of the ensuing loss exception.

In 1996, the Fifth Circuit, applying Texas law, decided *Burditt v. West American Insurance Company*, 86 F.3d 475 (5th Cir. 1996). The issue there was foundation damage caused by a leaky interior copper pipe behind the bathroom wall. It allegedly caused a shift in the foundation of the house and also structural damage. The insurer paid for the repair of the water damage immediately surrounding the pipe, but it denied coverage for cracking in the foundation, walls and ceiling.

The policy covered all risks of physical loss except losses caused by deterioration, settling, shrinkage, or expansion in foundations. These exclusions were subject to an ensuing loss exception to the effect that the foregoing exclusions do not apply to water damage caused by relevantly excluded perils. There was one problem: it was very badly worded. Here is some of the exact language from the ensuing loss exception to the list of exclusions:

> This [e]xclusion… shall not apply to loss by… water damage… caused by perils excluded in this paragraph [such as settling, shrinkage, or expansion of foundations.]

Id. at 476. The plaintiffs virtually conceded that they had foundation damage in the form of deterioration and that this was an excluded peril. Their argument was "that deterioration of the pipe, also an excluded peril, caused water damage to the foundation, thus fitting within the exception to the exclusion clause." *Id*.

The Magistrate and the District Court found for the insurer, reasoning as follows:

> Only the exceptions to the exclusion clause are contingent upon causation by an excluded peril, such as deterioration or foundation damage, not the other way around. Thus[,] if foundation damage had caused water damage, it would be covered, but water damage causing foundation damage (regardless of what caused the water damage) does not except foundation damage from the exclusion. The causal connection runs in only one direction.

Id. at 476-77. The Circuit Court rejected this interpretation. It noted that if the language of the insurance policy is ambiguous, all the insured has to do is present a reasonable interpretation of the language favoring coverage in order to prevail. If the language of the policy is ambiguous, even if the insurer provides a more reasonable interpretation, the insured still wins.

According to the Fifth Circuit, the language of the exclusion-plus-exception is indeed ambiguous. This is true for two reasons. First, the insurer's interpretation of the policy would make the exception for water damage almost meaningless, because it would not include the excluded perils of rust, wet rot, and mold, regardless of their natural association with water damage. *Id*. at 477. Second, if the insurer had intended to limit recoverability for water damage excluding foundation damage, it could have done so quite explicitly.[5]

According to the Fifth Circuit, the language of the exclusion-plus-exception is indeed ambiguous.

The *Burditt* decision is simply wrong. While the exclusion-plus-exception under consideration is a perfectly ghastly example of insurance policy prose, it is not ambiguous if it is read slowly, edited correctly, and reflected upon. The Magistrate and the District Judge had it right. What seems to be troubling the Circuit Court is that there will be very few instances of water damage caused by foundation problems, just as there will be very little water damage caused by rust, wet rot or mold. The appellate judges draw the inference that the reading of the judges below of the exclusion-plus-exception renders "the exception for water damage almost meaningless[.]" *Id*. This is not the case. It is not at all rendered "almost meaningless." It is simply rendered quite rare. It seems obvious to us that foundation damage could cause water damage. The foundation damage might be caused by, say, vandalism, but once the foundation was damaged, water seeped in and there was water damage.

Shortly after the decision in *Burditt*, another decision was rendered in a federal district court. *Sharp v. State Farm Fire & Casualty Insurance Company*, 938 F.Supp. 395 (W.D. Tex. 1996), *aff'd*, 115 F.3d 1258 (5th Cir. 1997). The homeowners discovered a leak in the plumbing system of their dwelling. They believed that this leak had caused their foundation to move and that that motion had resulted in extensive damage to their home. The language of the homeowner's policy followed the usual paradigm. The exclusion ruled out coverage for losses caused by "settling, cracking, bulging, shrinkage, or expansion of foundations[,]" among other things. At the same time, the insurer agreed to cover ensuing loss caused by water damage, "if the loss would otherwise be covered under this policy." State Farm

took the position that the ensuing loss exception did not apply because it had been construed by Texas courts "to cover only water damage which is the result, rather than the cause, of foundation movement." *Id*. at 396. The Magistrate cited Lambros, and several other cases, and summarily resolved the case in favor of State Farm with dispatch:[6] "[B]ecause the [insureds] allege that their foundation shifted as a result of a plumbing leak – that is, the 'water damage' was the cause, rather than the result, of foundation movement – State Farm properly denied their claim." *Id*.

In *Zeidan v. State Farm Fire & Casualty Company*, 960 S.W.2d 663 (Tex. App. – El Paso 1997, no writ), the court of appeals was confronted with the same pattern. The insurer's residence was severely damaged by rain storms. As a result, the insured's foundation settled and shifted. That caused "cracks to windows, damage to a rock wall located in the back yard, and other cracks in the house." *Id*. at 664. The policy indicated that it did not cover settling or cracking of foundations, although it made an exception for water damage ensuing upon such property damage.

The insured argued "that the rain water was the actual cause of the damage[.]" *Id*. It did this by causing a shift in subsurface soil conditions beneath the dwelling. Those changes, said the insured, materially damaged the house. Thus, the court followed *Lambros* expressly and noted that the evidence in the case, even when formulated in a way most advantageous to the plaintiff, "conclusively establishes that water damage was the cause, rather than the consequence, of [the] settling, etc." *Id*. at 666. This means, of course, that the water damage was not an ensuing loss. If there was an ensuing loss, it was the cracking and the shifting. Those injuries, however, are not included within the ensuing loss exception to the various exclusions.

In *Jimenez v. State Farm Lloyds*, 968 F.Supp. 330 (W.D. Tex. 1997), the federal court in San Antonio again attended to the issue of ensuing loss, just as it had in *Sharp*. Indeed, Garcia, J., relied upon the Magistrate's decision in *Sharp*. In *Jimenez*, the insureds filed a claim with the insurance company alleging that they had suffered foundation damage as the result of a plumbing leak. Subsequently, based upon an engineering report, the insureds changed their claim. They alleged that their foundation damage was caused by natural variations in the soil content near their home as opposed to a plumbing leak.

Summary judgment was granted to the insurer. State Farm's policy contained the usual language. It excluded damages resulting from foundation movement. The court subscribed to the argument in *Sharp* to the effect that water damage is the cause, rather than a result, of foundation movement, thus there is no coverage. The insured also tried a different gambit here that one now sees from time to time. As is well-known, homeowner's insurance is divided into Coverage A (for dwellings) and Coverage B (for personal property). Here the insured tried to claim that a possibly helpful provision of Coverage B somehow applied to Coverage A. (The insured's argument failed, and rightly so.)

Several years passed before there was another reported case in Texas pertaining to ensuing losses. The next case is *Home Insurance Company v. McClain*, No. 05-97-014790CV, 2000 WL 144115 (Tex. App. – Dallas Feb. 10, 2000, no pet.) (not designated for publication). This is a dangerous and deeply troubling case.

In *McClain*, the homeowners suffered "mold and other fungi damage caused by rainwater entering through a leaky roof." *Id*. at *1. To be sure, the homeowners had a mess on their hands. Water leaked in and collected behind interior walls. It soaked the stud area and damaged walls, ceiling and subfloors. Mold and bacteria grew in the area made wet by the rainwater. Eventually, the insured suggested that "the mold and fungus infestation [had] rendered the residence uninhabitable." *Id*. The homeowners settled with the firm that had constructed the leaky roof. They apparently did not recover all of their damages, however, and sought recovery from their homeowners' policy.

In the parts of the opinion relevant here, the homeowners presented a motion for summary judgment to the trial court to the effect that the fungi and mold damage was not excluded under the policy. The trial court decided in favor of the homeowners, and the insurer appealed. The fundamental issue pertained to whether the homeowner's policy excluded losses caused by mold or fungi. The insurer argued that the mold-or-fungi exclusion applies even if it is caused by water damage. The insured argued that the policy covers losses ensuing upon water damage and, in that case, those losses would include mold and fungi.

The position of the courts was really quite simple. Water leaked through the roof. It had pooled in crawl spaces and other interior spaces. "The facts are uncontroverted that the damages claimed were a consequence of water leaking from the roof." *Id*. at *4. Indeed, the insured did not claim that the mold or the fungi came from any other source. Consequently, "the exclusion for fungi and mold damage does not apply." Or, if it does apply, there is an exception to it which defeats it. For this reason, the court of appeals affirmed the trial court.

There is a significant error in the reasoning in this case. In order for an ensuing loss clause to be triggered, the otherwise excluded event must be caused by water *damage*. The fact that the mere presence of water causes fungi or mold does not meet the requirements of the exception.

There must be damage first, and the damage must be the cause of the ensuing loss. All the appellate court does here is observe that "water from leaking roof pooling in the crawl spaces caused the mold and fungi." This is not enough. There would have to be actual proof of water *damage*, as opposed to proof of water *presence*. No doubt, this is merely a technical deficiency. No doubt the leaking water did in fact damage some portions of the house. Nevertheless, if the common law is supposed to be the perfection of reason, as has been suggested throughout history, these kinds of mistakes should not happen.

The problem of ensuing loss presented itself again in *Harrison v. U.S.A.A. Insurance Company*, No. 03-00-00362-CV, 2001 WL 391539 (Tex. App. – Austin Apr. 19, 2001, no pet.). In this case, caulking at the juncture between the homeowners' bathtub and the tile above it deteriorated. As a consequence, water spraying from the showerhead seeped through the caulking to the surrounding wooden structure. The seeping water caused the wood to rot. The insured replaced rotted sheet rock, floor joists, and beams, as well as old tile and flooring. The homeowners' insurer denied coverage. The homeowners' policy excluded coverage for losses caused by rot and mold, except for ensuing losses caused by water damage, if those ensuing losses would otherwise be covered. As usual, the court observed that in order

> [t]o qualify for the exception, ensuing water damage must follow from one of the types of damage enumerated in [the] exclusion . . . . In other words, the ensuing loss provision covers water damage that results from, rather than causes, rotting. Assuming that the leaking of water into the wood constitutes water damage, the leaking preceded, rather than followed, [the insured's] excluded loss.

Id. at *2. So far so good. Unfortunately, Patterson, J., goes on to say that "we determine that the event causing [the insured's] loss here is the rotting of the wood surrounding her bathtub." This observation is wrong. The rotting doesn't cause a loss. It *is* the loss! Fortunately, this error does not affect the outcome of this correctly decided case.

The final case in the historical sequence, so far, is *Fiess v. State Farm Lloyds*, No. H-02-1912 (S.D. Tex. June 4, 2003) decided by Magistrate Crone.[7] In this case, the homeowner-insured sustained mold damage which resulted from flooding and other damage produced by Tropical Storm Allison. The homeowners obtained coverage under their flood insurance policy. Thereafter, they made a claim under their non-flood, ordinary homeowners' policy. Apparently, shortly after Allison, the homeowners began removing sheetrock and discovered black mold throughout the residence. The homeowners' policy at issue covered risks of physical loss not otherwise excluded, but the policy excluded loss caused by mold, except for ensuing losses caused by water damage, if the ensuing loss would otherwise be covered under the policy. In addition, the non-flood homeowners' policy, pursuant to which this claim was being made, excluded losses caused by flood.

In her unnecessarily elaborate opinion, the Magistrate determined that an exclusionary section of the policy "explicitly remove[d] from coverage any loss caused by mold. In addition, the court found that the *McKool-Lambros-Daniell-Merrimack-Zeidan* line of cases requires that water damage be the result, and not the cause, of mold. In this case, observed the Magistrate, "it is undisputed that the water damage was not caused by the mold; instead, the mold was caused by the water damage. Therefore, the mold damage is excluded under the ensuing loss provision of the policy."

Obviously, the Magistrate has got the conclusion right, even if the formulation is defective. Contrary to the Magistrate, mold damage is not excluded under the ensuing loss provisions of the policy. Rather, mold damage is excluded by the mold exclusion in the policy, and the ensuing loss provision simply does not apply.

It is perfectly clear that most of the cases in this sequence have, at least roughly speaking, gotten to the right results, even if they have not always been perfectly clear in what they are saying, and even their arguments are not always perfectly cogent. The general theme is (1) that the ensuing loss clause in theory applies to certain kinds of causal consequences indirectly, or remotely, caused by excluded states of affairs, but (2) it does not, as it were, reinstate coverage very often.

III. CASES FROM OTHER JURISDICTIONS

Ensuing loss cases in other jurisdictions are few and far between. Why there has been such a spate of them fairly recently in Texas is mysterious. When there are ensuing loss cases in other jurisdictions, they often look much like Texas cases. Here is an example.

In *Weeks v. Co-Operative Insurance Company*, 817 A.2d 292 (N.H. 2003), the wood veneer wall of a commercial building separated from the older, asphalt shingle wall as a result of faulty workmanship. The property policy excluded losses caused by faulty, inadequate or defective workmanship. At the same time, the policy said that "if an excluded cause of loss . . . results in the Covered Cause of Loss, we will pay for the loss or damage caused by that

Covered Cause of Loss." In addition, the policy excluded property losses resulting from "hidden or latent defect or any quality in property that causes it to damage or destroy itself" and "settling, cracking, shrinking or expansion[.]" As with the previous exclusion, there is an ensuing loss clause. It goes like this: If one of the aforementioned excluded causes of loss results in a specified cause of loss or building glass breakage, we will pay for the loss or damage caused by that specified cause of loss or building glass breakage. The issues in the case pertain to what caused the brick veneer wall to separate from the asphalt shingle wall, and whether there was an ensuing loss. Following a California case,[8] the New Hampshire Supreme Court interpreted the ensuing loss clause to apply when:

> There is a "peril," i.e., a hazard or occurrence which causes a loss or injury, *separate* and *independent* but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues. Thus, the exception to the exclusion operates to restore coverage if the damage ensues from a covered cause of loss . . . accordingly, coverage will be reinstated under the exception to the exclusion when an excluded risk sets into motion a chain of causation which leads to a covered cause of loss. In that case, the policy insures against damage directly caused by the ensuing covered cause of loss.

Id. at 297. [Emphasis added.] In the *Weeks* case, the court found that the faulty workmanship was the initial, excluded cause of loss. It did not initiate a chain of causation which led to a covered loss. Consequently, the negligent work exclusion in the policy barred coverage and the ensuing loss provision did not apply.

IV. CONCLUSION

In the last several years, there has been a lot of loose talk about how mold damages in houses may be covered by ensuing loss clauses. The well-reasoned *Feiss* case stands against this proposition. If the reasoning of this article is correct, Texas courts have mostly recognized the limited reach of ensuing loss clauses and with few exceptions have enforced them properly. This means that ensuing loss clauses are not a promising avenue for mold recovery, and never were.

One wonders why there has been such exuberant hope for these clauses. Of course, hope often rests upon self-deception, but here enters the other reasons as well. Two come to mind. First, the concept of causation is inherently fuzzy and problematic. Whenever legal concepts hinge upon what causes what, there always will be some room for debate. Second, ensuing loss clauses are clumsy. Their meaning depends in part upon their physical placement and their function is not always manifest and clear. One thing is clear. Not every part of an insurance policy is as important as every other, and the number of words in the provision is no indicator of the overall importance of the change. Perhaps even the reverse might be true.

1. *Swire Pac. Holdings, Inc. v. Zurich Ins. Co*., 845 So. 2d 161, 168 (Fla. 2003) (discussion of a sue and labor clause in a builders risk policy).

2. It is well to remember that, in common sense, causation should not be viewed as a chain but as a web. *Lanasa Fruit S.S. & Importing Co., Inc. v. Universal Ins. Co*., 302 U.S. 556 (1938). Quoting Lord Shaw in his judgment in *Layland Shipping Co. v. Norwich Union Fire Ins. Soc'y*, (1918) (A.C. 350, 368-371), Chief Justice Charles Evans Hughes wrote as follows: "'Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain but--if this metaphysical topic has to be referred--it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and [the] simultaneous, meet; and the radiation from each point extends infinitely." *Id*. at 562. Complex causation is sometimes involved in ensuing loss cases. *See Jerry's Supermarkets, Inc. v. Rumford Prop. & Liab. Ins. Co*., 586 A.2d 539 (R.I. 1991).

3. *See* H.L.A. HART & A.M. HONORE, CAUSATION AND THE LAW (2d Ed. 1985).

4. How about this?: Somebody tries to wash the mold away believing that water under pressure will do the trick. These activities simply make matters worse. Nope – won't work. The worsened mold might constitute an ensuing loss, and it would certainly – but only partly and perhaps indirectly – be caused by the presence of the mold. But an ensuing loss exception works only if the loss would otherwise be covered by the policy. More mold is not covered by the policy. It's excluded. Try again.

5. The court's point is that other components of the exclusion were handled inexplicitly, so the same thing could have been done with water damage. Here's how that works: "This policy does not insure against...smoke from agricultural smudging or industrial operation. This exclusion, however, shall not apply to loss by...smoke (except as specifically excluded above..., caused by perils excluded in this paragraph[.]"

6. The court also cited a decision by Sparks, J., reaching the same result. *Buell v. State Farm Gen. Ins. Co*., No. A-95-766-SS (June 13, 1996).

7. Presently, the plaintiffs have filed their notice of appeal to the 5th Circuit and all parties have agreed to ask the Circuit Court to certify the question so that the State Supreme Court can resolve the issue.

8. *Acme Galvanizing v. Fireman's Fund Ins. Co*., 270 Cal. Rptr. 405, 411 (Cal. Ct. App. 1991).

BY WILLIAM J. CHRISS

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New Legislation Pertaining to Homeowners' Insurance

The Texas Legislature, in its recently adjourned 78th session, passed several statutes dealing with homeowners' insurance, but few will impact directly the way lawyers pursue or defend these claims. From a litigation standpoint, some of the provisions of the omnibus tort reform statute, House Bill 4, may be more significant than the legislature's amendments to the Insurance Code. Other bills that were introduced but not passed this session are also of some interest to those following this area of the law.

What follows here is an analysis of the legislation, passed and unpassed.

I. HOUSE BILL 4

House Bill 4 is voluminous and contains many provisions not related to the subject matter of this article. The provisions that may be relevant to homeowners' claims are the new Chapter 42 added to the Civil Practice & Remedies Code concerning "Settlement Offers," the amendments to Section 33 of the Civil Practice & Remedies Code regarding "Designation of Responsible Parties" and the new pre-judgment and post-judgment interest amendments to Section 304.003 of the Finance Code. From a subrogation perspective, the limitations on asbestos successor liability, the new procedures concerning malpractice cases against design professionals, the limitations of liability concerning migration or transport of air contaminants, and the products liability changes in such the act may also be relevant.

The settlement provisions of House Bill 4 set forth requirements for Supreme Court rule-making in connection with "loser pays" settlement offers. The basic notion is that, at the defendant's option, the respective settlement offers of the parties can be invoked to trigger the possibility of a "loser pays" situation with respect to the prevailing party's attorney's fees and expenses. Basically, if the losing party does 20 percent worse at trial than a rejected settlement offer, that party is liable for certain litigation expenses and attorney's fees incurred by the other party. The language of the statute appears to grant defendants a sole option to invoke this provision. Plaintiffs may have no say in the matter. It is unclear as to how the scheme would work in multiple defendant scenarios. Hopefully, the Supreme Court will use its rule-making authority under the statute to clarify these details.

Section 33 of the Civil Practice & Remedies Code has been amended to allow any defendant to designate any non-party to the litigation as a "responsible third-party" whose percentage of contribution to a cause of action based on tort may be submitted to the jury and used to reduce that defendant's liability. It is unclear what application the statute will have in extracontractual claims against homeowners' insurers. It should have no application to causes of action based upon contract or the prompt payment statute, Article 21.55 of the Texas Insurance Code.

Perhaps the most significant litigation change wrought by the 78th Legislature is the amendment to the prejudgment and

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post-judgment interest statute. The minimum percentage rate for post-judgment and prejudgment interest has been changed from 10 percent per annum to 5 percent per annum. The maximum rate is 15 percent per annum. The presumptive rate of post-judgment and prejudgment interest is equal to the prime interest rate published by the Federal Reserve Bank of New York, if it falls between 5 percent and 15 percent per annum. For the foreseeable future, this statute will cut post-judgment interest in half. In addition, prejudgment interest may not be assessed or recovered on an award of "future damages."

The legislative amendments did not repeal Section 302.002 of the Finance Code providing 6 percent effective prejudgment interest in actions based upon breach of contract or for amounts due under contract where no other rate is specified by the agreement. The legislature also did not amend Article 21.55 of the Insurance Code providing for 18 percent late payment penalties. Hence, the law with respect to homeowners' contractual claims remains 6 percent prejudgment interest for policy benefits unpaid, plus 18 percent per annum late payment damages under Article 21.55, if these can be proven.[1]

The new prejudgment interest rate of 5 percent will apply to independent extracontractual or tort damages demonstrable by proving violations of Article 21.21 or common law good faith. Also, once judgment has been rendered, all post-judgment interest will begin to accrue on the entire amount of the judgment at only the rate of 5 percent per annum. It remains to be seen whether this lower post-judgment interest rate will have a deleterious impact on settlement of homeowners' insurance claims. It may represent a boon for appellate lawyers.

II. SUBROGATION

From a subrogation perspective, various changes made by House Bill 4 will be relevant beyond those already mentioned above.

For example, there is now a 15 year statute of repose protecting manufacturers or sellers of products, running from the date of sale of the product by the defendant. Likewise, there is now a rebuttable presumption that a product manufacturer or seller is not liable for any damage, if it can show that its product complied with "mandatory federal safety standards," and that these standards governed the product risks allegedly causing the harm.

Subrogation actions against architects or engineers are now governed by a new affidavit practice similar to that which has become familiar to medical malpractice lawyers under Article 4590i. The plaintiff must file an affidavit from a practicing member of the same school as the defendant. This affidavit must attest to at least one act of negligence committed by the defendant and "the factual basis for each such claim."

The legislature also passed a couple of limitations statutes with respect to certain types of injury. There is now a monetary limitation on the amount to be recovered in an asbestos case from a "successor corporate entity." In addition, an owner or occupant of real property cannot be liable for trespass "as a result of migration or transport of any air contaminant" unless there is a showing of "actual and substantial damages by a plaintiff in a civil action." This, presumably, is designed to modify the law of nuisance, but may become relevant in unusual cases of mold exposure or contamination where subrogation is sought.

III. HOMEOWNERS' RATES, COVERAGES, AND CLAIMS

The legislature passed five bills/statutes explicitly affecting homeowners' rates, coverages and claims-handling.

A. HOMEOWNERS' RATES

Senate Bill 14 sets forth the methodology and rating criteria that are permissible for use by insurers authorized to do business in Texas. As enacted, the statute also requires a specific type of filing with respect to all rates, rating manuals, and rating information used by the insurer. This is a so-called "file and use" rate system because if the insurance commissioner does not disapprove the rate within 30 days after the filing is made, then the carrier may begin charging the rate as long as it does not represent an increase of 12.5 percent or more from the insurer's prior filed and approved rate. The statute requires insurers who intend to raise rates more than 10 percent to send 30 days advanced notice to policyholders. The same sort of "file and use" plan was also enacted with regard to policy forms for homeowners insurance.

While earlier versions of the bill had stronger prohibitions on credit scoring, the bill that actually passed only prohibits credit scoring in underwriting if it is computed "using factors that constitute unfair discrimination," and the company may not use a credit inquiry that is not initiated by the consumer, an inquiry related to insurance coverage, or a collection to account with a medical industry code in any credit scoring methodology. In addition, insurance companies "shall" on written request from an insurance applicant provide "reasonable exceptions" to the insurer's usual rate if a person's credit history has been directly influenced by catastrophic illness or injury, by the death of a spouse, child, or parent, by temporary loss of employment, or by identity theft.

Senate Bill 113 "allows" insurance companies to provide a discount of at least 3 percent in premiums for a person who has "not filed a residential property insurance claim during the 3 years before the effective date of the policy." Apparently, the legislature is now in the business of discouraging people from

making claims by encouraging insurance companies to financially reward those who do not do so.

Senate Bill 310 requires a one-time filing by all insurers "writing residential property insurance in this state" of rates and all supporting data in connection with their homeowners' policies. The purpose of this statute is to aid the insurance commissioner and the legislature in gathering information concerning the "homeowners' insurance prices" alleged to exist in the state.

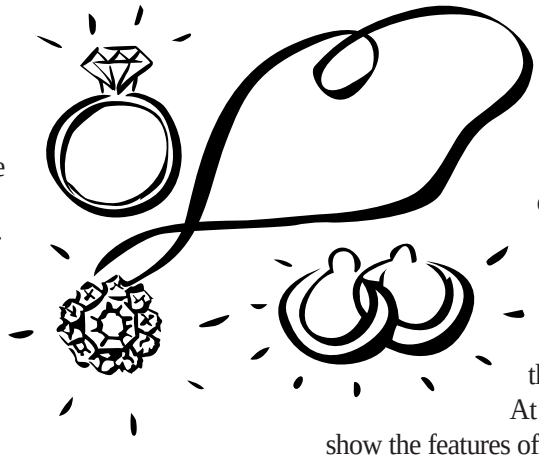
Senate Bill 581 authorizes insurers to grant discounts to homeowners whose homes are built with an "insulating concrete form system."

Senate Bill 127 relates to the use of specific water damage claim history in underwriting or setting insurance rates. It requires the insurance commissioner to adopt rules regarding the use of prior water damage claims by insurers in making underwriting decisions. It authorizes the use of premium surcharges against people who have had the audacity to make a water damage claim, but leaves the details to the commissioner.

B. CLAIMS HANDLING AND ADJUSTERS

Senate Bill 127 also authorizes the commissioner to adopt rules requiring more prompt and effective claims handling with respect to water damage claims than is required under Article 21.55 of the Code. The statute provides that a rule adopted by the Commissioner under this section "supercedes the minimum standards described by Article 21.55 of the Code," and if the commissioner passes any such rules, it is unclear whether this legislative enactment will authorize the recovery of the 18 percent statutory damages provided by Article 21.55 if a more stringent rule adopted by the commissioner is violated. It appears to this commentator that the language of the statute compels the conclusion that it does.

Senate Bill 127 also requires the licensing of "public insurance adjusters." It excludes from its purview attorneys, employees of insurance companies, and persons "employed only for the purpose of furnishing technical assistance to a licensed adjuster." Public adjuster is defined as a person who "acts on behalf of an insured in negotiating for or effecting the settlement of a claim" or who "advertises, solicits business, or holds himself, or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property." The statute enacts a licensing scheme for individuals falling within its purview. This scheme is similar to the licensing statutes governing home inspectors and insurance agents. The most relevant aspects of the statute are the provision limiting public adjuster fees to no more than 10 percent of the amount actually paid by the insurance company on the claim (apparently regardless of the fee methodology used by the adjuster), and the legislative imprimatur placed upon licensed public adjusters through their approval by the state as having "sufficient experience or training relating to the assessment of real and personal property values and physical loss of or damage to real or personal property that may be the subject of insurance and claims under insurance." In the former case, it appears that the legislature has mandated that all public adjusters be compensated on a contingent fee basis, even if they would prefer to charge a flat fee or hourly rate. In the latter case, it would appear that this licensing act will make it substantially more difficult to disqualify public adjusters as expert witnesses regarding damage extent, causation, and cost of repair. In fact, it may be impossible if the adjustor uses a methodology approved as correct by the state, through its licensing board.



C. DISCLOSURE OF COVERAGES

Senate Bill 115 requires insurance companies who renew homeowners' policies on any terms different from the original form to provide a comparison form. The various forms to be used are to be developed with the assistance of the Office of Public Insurance Counsel. At a minimum, the comparison form must show the features of the policy that are different from an HO-B or HO-A policy.

IV. PERSONAL PROPERTY – JEWELRY

House Bill 124 requires homeowners insured under policies issued after January 1, 2004 to allow their insurance companies, at the insurance company's option, to either pay the stated value of jewelry, or else to replace the jewelry item with one of "like kind and quality."

V. MORTGAGE REQUIREMENTS

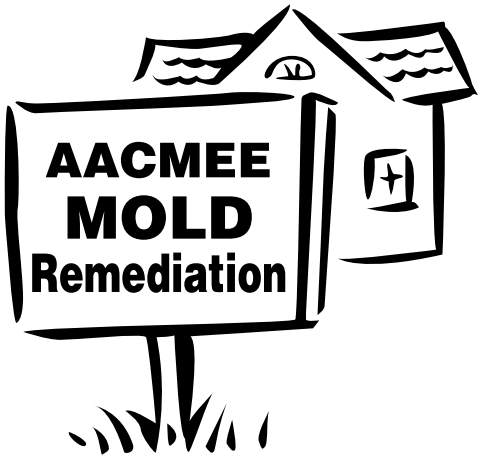
House Bill 1338 prohibits lenders from requiring borrowers to purchase homeowners' coverage in an amount that exceeds the replacement value of the dwelling and its contents, regardless of the amount of the loan.

VI. STATE CREATED INSURANCE ENTITIES

Senate Bill 463 amended the enabling statute for the Texas Windstorm Insurance Association (cat pool) to exempt condominiums, apartments, duplexes, or other multi-family residences, hotels, or resorts from automatic eligibility for cat pool insurance.

Senate Bill 1606 amended the FAIR (Fair Access To Insurance Requirements) plan to give the insurance commissioner authority to establish a FAIR plan in any part of the state where residential property insurance is not reasonably available in the voluntary market to a substantial number of insurable risks. However, the FAIR Plan may not provide windstorm and hail insurance coverage for a building eligible for coverage under the cat pool.

Senate Bill 1192 amended the statutes governing the Texas Property and Casualty Insurance Guaranty Association to make clear that the association is never required to pay attorney's fees, interest, penalties, or extracontractual amounts of any kind over and above the underlying covered claim for policy benefits. The Guaranty Association provides a fund for payment of claims against insurers who are placed in receivership or liquidation because of solvency problems. The bill also changes the statute by completely eliminating any binding effect of any judgment against the insurer taken before the insurer is designated as impaired. The statute also now contains provisions prohibiting payment by the guaranty fund of any claim which might be covered under another policy of insurance.



VII. MOLD AND INDOOR AIR QUALITY

House Bill 329 empowers the Texas Department of Health to "protect the public from the adverse health effects of mold" through public education programs, general rule-making authority, and rules regarding performance standards and work practices for "mold assessments" or "mold remediations." The department may develop mold safety standards and conduct inspections. Furthermore, the department will be licensing people who perform mold assessments and mold remediations. Mold assessments and mold remediations are illegal if not performed by a licensed holder. The bill prohibits the same individuals or companies from performing both mold assessments and mold remediations on the same property. It also establishes requirements for records to be kept by mold remediators, including photographs of the scene of the remediation, written contracts, and all invoices issued regarding the remediation. Mold remediators are required to provide owners a certificate that the mold remediation has been properly completed. As with public adjusters, mold assessors and mold remediators will now be subject to a licensing board with disciplinary power. Most importantly, a property owner can now not be held liable for damages "related to mold remediation on a property" if he has a certificate of mold remediation and can prove that the damages existed prior to the issuance of the certificate. Likewise, a person cannot be liable for damages related to a decision to allow occupancy of a property after mold remediation if he has a certificate of mold remediation and the property is owned or occupied by a governmental entity. Lastly, this bill contains an important prohibition on authorized homeowners insurers making any underwriting decision based upon previous mold damage or previous mold claims if the mold has been remediated and a remediation certificate has been issued, or the property has been inspected by an independent assessor or adjuster who determine that the property does not contain evidence of current mold damage.

Senate Bill 599 deals with indoor air quality of state buildings and sets forth a new scheme for the method by which indoor air quality is to be assessed on state buildings. It also requires the Texas Department of Health and/or the State Office of Risk Management to conduct educational seminars on indoor air quality. It requires all investigation and testing relating to indoor air quality and state buildings to be provided by the Texas Department of Health, although the department has the authority in some circumstances to out-source some aspects of these activities.

VIII. BILLS NOT PASSED

House Bill 921 was an attempt to amend the cat pool enabling statute by providing that Texas Windstorm Insurance Association policies never provide coverage for any loss "caused by, aggravated by, or resulting from" microbes. This bill did not pass, and its existence should raise serious questions for TWIA if it is claimed that microbial damage is not covered under its windstorm policies.

Senate Bill 243 was an act relating to the regulation of mold assessors and remediators. It did not pass because most of its provisions were included within House Bill 329.

Senate Bill 129 was also on the subject of mold remediation and did not pass for the same reason.

House Bill 98 sought to require the use of "mold, fire, and water resistant materials in residential building and repairs." It did not pass.

House Bill 123 related to specialized training for certain insurance adjusters and required that adjusters not handle claims involving water or mold damage unless they had successfully completed a specialized training program prescribed by the insurance commissioner. This bill did not pass.

House Bill 1590 sought to have a statewide study conducted by the Texas Department of Health on the subject of indoor mold. The bill did not pass.

House Bill 3390 attempted to amend Article 21.55 to provide more stringent time requirements for prompt handling of mold claims. It did not pass, the legislature having opted for authorizing the commissioner to pass similar rules administratively.

House Bill 747 also sought to enact specific procedures for insurers handling water damage claims, and to require certain types of investigation. It did not pass.

IX. CONCLUSIONS

Basically, rather than facing any of these issues head-on, the legislature punted rating, claims, and underwriting issues to the insurance commissioner, and actually deregulated the 5 percent of the homeowners market currently written by insurers authorized to do business in Texas. Consumer groups had lobbied for doing the reverse: regulating the 95 percent that are already unregulated. Efforts to require specific conduct of insurers in connection with the prompt good faith handling of water damage or mold claims were defeated. However, the insurance commissioner was extended authority to issue administrative rules more stringent than Article 21.55. It remains to be seen whether the commissioner will do so and whether such administrative regulations will be enforceable by private litigants.

What the legislature did focus on was not regulating the conduct of insurers, but regulating the conduct of people employed by homeowners to either assist with their water damage claims or repair their property. Other than creating additional state administrative bureaucracies to handle complaints against public adjusters by either insurers or policyholders, the primary effect of this legislation is to regularize the mold remediation process along much the same lines as was done with residential termite application in the 1960's and 70's. It is hoped that while none of these legislative changes may impact homeowners' insurance rates, availability, or the conduct of insurance companies, they will at least stabilize the real estate market's handling of risks associated with mold-damaged property.[2]

1. *Dolenz v. American General Fire & Cas. Co.*, 798 S.W.2d 862 (Tex.App.—Dallas, 1990, writ denied); *Miles v. Royal Indem. Co.*, 589 S.W.2d 725 (Tex.App.—Corpus Christi, 1979, writ ref.n.r.e.); and *Nat'l Fire Ins. Co. of Pittsburgh, Pa. v. Valero Energy Corp.*, 777 S.W.2d 501 (Tex.App.— Corpus Christi 1989, writ denied)(on reh'g).

2. By analogy, prior to the state's regulating and formalizing residential termite application, the damage and post-damage stigma associated with infestation was handled by free market principles and the general law of contracts and fraud. The promulgation, ubiquity of usage, and standardization of required forms and reports, and termite application and inspection standards had a homogenizing effect on market treatment of these issues by reducing consumer uncertainty. However, the salutary effects of this type of ancillary market stabilization are likely to be gradual because consumer attitudes and risk aversion are involved.

Comments FROM THE EDITOR

BY CHRISTOPHER W. MARTIN
Martin, Disiere, Jefferson & Wisdom, L.L.P.

Our new Chairman, Jim Cornell, provided Herculean assistance with getting this issue of The Journal completed. His efforts to work with the authors, blue book the articles, and proof the galleys made it possible for this issue to be published. I also wish to note the editorial assistance provided by Dan Mabery of Haynes & Boone in Dallas and Beth Bradley of Thompson, Coe, Cousins & Irons in Dallas. They each helped edit and blue book the articles in this issue.

Unlike some sections that have their publications edited and printed by various law schools and unlike paid-subscription publications, each issue of The Journal results solely from the volunteer efforts of multiple people. It is a far more daunting and difficult task than most people realize, primarily due to the busy professional schedules of our volunteers. For those of us who do it, however, it is a labor of love. If we did not enjoy it, none of us would do it.

A great way to get involved in the Section is to help with The Journal. Although we are always looking for authors to submit papers for publication, if you would be interested in helping with the editing or blue booking of articles, or the proofing of the galleys, we are always looking for more help in order to speed up the turnaround process. To those who have already volunteered, I want to say thank you for your wonderful contributions. For the rest of you who may like to get involved more, call or e-mail and I will be happy to get you involved in the process of publishing The Journal of Texas Insurance Law.

As always, if you have any questions or comments about what we do or how we do it, please let me know. The Insurance Section of the State Bar is here to serve you and we are always interested in how we can do that better.

Christopher W. Martin
Editor-in-Chief

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