

## Texas Supreme Court holds mold exclusion applies even though damage was caused by covered peril

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In an opinion and order dated August 31, 2006, the Texas Supreme Court held that a mold exclusion contained in the subject homeowners' insurance policy precluded coverage even though the mold was caused by water, a covered peril.

This decision follows the recent national trend of enforcing mold exclusions to preclude coverage even though the alleged mold was caused by a peril for which coverage would normally be available.

In *Fiess v. State Farm Lloyds*, \_\_\_ S.W.3d \_\_\_, 2006 WL 2505995 (Tex. Aug. 31, 2006), the homeowners sought insurance coverage for mold contamination in their house, which was caused by water that had leaked in through the roof and windows. Included in their homeowners' insurance policy was the following exclusion:

"We do not cover loss caused by: ...(2) rust, rot, mold or other fungi.... We do cover ensuing loss caused by the collapse of the building or any part of the building, water damage, or breakage of glass which is part of the building if the loss would otherwise be covered under this policy."

This is a standard exclusion found in most homeowner's policies. The insurer denied coverage based on the mold exclusion. The homeowners argued that, because the mold was caused by water, which was a covered peril, the ensuing loss provision provided an exception to the exclusion.

The court agreed with the insurer, holding that it "cannot hold that mold damage is covered when the policy expressly says that it is not." The court reasoned that the ensuing loss provision did not provide an exception to the exclusion because the provision "applies only to losses caused by an intervening cause (like water damage) that in turn follow from [a listed exclusion]." Thus, even though the mold

damage was caused by water, a covered loss, the exclusion still applied. The court found that the ensuing loss provision only applies to cover building collapse, water damage or breakage of glass that results from one of the listed exclusions.

The court also examined the term “water damage,” as used in the ensuing loss provision. While the homeowners attempted to construe that term broadly to include all damage caused by water, the court took a much narrower view, holding that mold caused by water does not constitute “water damage.” The court reasoned that “[m]old does not grow without water; if every leak and drip is ‘water damage,’ then it is hard to imagine any mold, rust, or rot excluded by this policy, and the mold exclusion would be practically meaningless...[A] policy exclusion for ‘mold’ cannot be disregarded by simply deeming all mold to be ‘water damage.’” Therefore, according to the court, simply because the mold damage was caused by water does not classify the mold as “water damage” subject to the ensuing loss provision.

In coming to its conclusion, the Texas Supreme Court followed the national trend of precluding coverage based upon the application of mold exclusions, despite the presence of an ensuing loss provision. As the court in *Fiess* recognized, jurisdictions in Alabama, Arizona, California, Florida, Illinois, Massachusetts, Minnesota, New York, North Carolina, New Hampshire, Ohio, Pennsylvania, Vermont, Washington and Wisconsin have all come to this same conclusion.

Insurers facing such claims should be cognizant of this trend when evaluating the applicability of mold exclusions in homeowner’s policies, and should consider whether the law applicable to a given claim supports a declination on this basis.

Should you have any questions about *Fiess*, or about the application of mold exclusions in general, please feel free to contact any member of Plunkett & Cooney’s Insurance Practice Group. A practice group directory can be found at [www.plunkettcooney.com](http://www.plunkettcooney.com), or call [Ken Newa](tel:3139834848) at (313) 983-4848 or [Chuck Browning](tel:2485946247) at (248) 594-6247.

Click here to review the *Fiess v. State Farm Lloyds* [majority opinion](#).

Click here to review the [dissenting opinion](#) in the case.

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