

Plain Meaning or Fuzzy Interpretation?
The Future of First-Party Property Coverage for Mold

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Introduction

“Mold.” For homeowners, it is one of the most repugnant four-letter words in the English language. The thought of mold growing beneath the sink or behind the refrigerator is decidedly unpleasant. Its unsightly appearance and foul odor make mold an unwelcome intruder in any household. Usually, homeowners who discover mold colonizing in dark, hidden spaces can kill the intruder by identifying and removing the source of moisture feeding its growth. However, if the problem is identified too late, or if the exposure to moisture is too widespread, mold-related loss may be inevitable. For example, if pipes behind drywall begin to leak and there are no signs of the escaped water, the problem will likely go unnoticed, and the homeowner may soon be dealing with a structural mold infestation that could be costly, or even impossible, to fix. In 2004, the average cost of mold remediation for a 2,000-square-foot home or business was approximately \$40,000.¹

When faced with a mold-related loss, the first question homeowners are likely to ask is whether they are insured for the expenses. Public insurance adjusters can help homeowners evaluate their coverage for mold damage and guide them through the claims adjusting process.² As representatives of the insured, it is important that public adjusters and policyholders’ attorneys understand the current state of insurance law on first-party property claims for mold damage. Often, their clients will assume that because they purchased an “all-risk” homeowner’s policy, their claim for mold-related repairs must be covered.³ What they may not realize is that

¹ Charles L. Perry, Jr., *Collateral damage: a lack of insurance coverage and growing litigation put lenders at risk when serious mold problems are discovered in buildings. But construction lenders could be part of the solution*, MORTGAGE BANKING, July 1, 2004, available online via subscription at <http://www.highbeam.com/>.

² <http://www.preferredclaimsadjusters.com/archives/mold-damage.php> (customer testimonial, April 2001).

³ Michele Derus, *Mold might not be covered: Few noticed changes in their insurance policies, exec. says*, MILWAUKEE JOURNAL SENTINEL, Oct. 18, 2006, available online via subscription at <http://www.highbeam.com/>.

between 2001 and 2005, insurance companies quietly amended homeowner’s policies by adding endorsements that exclude coverage for mold damage. According to David Dybdahl, a noted expert in the field of insurance and risk management, insurance companies “blasted through more policies than anything in history -- faster than terrorism, asbestos or pollution. They quietly excluded [mold damage coverage] from everyone’s policies, and they got away with it.”⁴ But did they? Did insurance companies, through mold exclusion endorsements, negate the coverage they formerly offered for mold damage under “all-risk” homeowner’s insurance policies?

This paper seeks to answer this important coverage question by analyzing how courts have responded to mold exclusions in “all-risk” policies. Part I examines the history behind the advent of mold exclusions, focusing on *Ballard v. Fire Insurance Exchange*, a case that drew national attention to mold as a major financial liability for insurance companies.⁵ Part II addresses ambiguity in the traditional mold exclusion through a discussion of the Supreme Court of Texas’s plain meaning analysis in *Fiess v. State Farm Lloyds*,⁶ a decision that one well-regarded authority on insurance coverage has deemed one of the ten most significant coverage decisions of 2006.⁷ In Part III, the plain meaning interpretation of the mold exclusion in *Feiss* is juxtaposed with an emerging legal analysis of ‘loss’ versus ‘cause of loss,’ which has divided the courts and cast doubt on whether the traditional mold exclusion language is unambiguous. Part IV discusses how a policyholder who reasonably believes he or she is covered for mold damage can use the efficient proximate cause doctrine to challenge a carrier’s claim denial even if the

⁴ *Id.*

⁵ *Ballard v. Fire Ins. Exchange*, No. 99-05252, 2001 WL 883550 (Tex. Dist. Aug. 1, 2001) (unpublished opinion) (reported in MEALEY’S LITIG. REPORT, Vol. 15-30, June 12, 2001).

⁶ *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006).

⁷ Randy J. Maniloff, *Coverage Gone Mild: 6th Annual Look Back At The Year’s Ten Most Significant Insurance Coverage Decisions*, 21-9 MEALEY’S LITIG. REP. INS. 11 (Jan. 9, 2007).

policy language is technically unambiguous. This section also addresses anti-concurrent causation clauses and their impact on efficient proximate cause arguments. The last Part, Part V, examines notice requirements for amendments to homeowner's policies, a critical consideration in all coverage disputes, especially as they relate to mold. The paper concludes by examining the future direction insurers are likely to take in their mold exclusion provisions and the ways public insurance adjusters and policyholders' attorneys can respond to mold exclusions.

I – *Ballard v. State Farm Exchange* and the Advent of the Mold Exclusion

The new millennium ushered in many unanticipated events: high speed Internet access, a Boston Red Sox World Series Championship, and an unprecedented rise in mold litigation. The statistics are staggering: in 1998, only 129 mold-related insurance claims were filed nationally.⁸ By 2001, this number had skyrocketed to 9,563.⁹ Despite this rapid surge in mold claims, the financial impact on insurers was minimal at first. In 2000, Texas insurers were settling most mold claims for a few thousand dollars.¹⁰ However, as attention to what some were calling “the next asbestos” grew, the potential dangers of mold spread across headlines and into the national consciousness.¹¹ “Lurking, Choking, Toxic Mold” was the cover story in the August 2001 edition of the New York Times magazine.¹² And for readers of the Washington Post, the attitude

⁸ http://www.policyholdersofamerica.org/POA_2003_mold_claims_breakdown1.pdf (mold claim statistics from Policyholders of America).

⁹ *Id.*

¹⁰ Gordon Stewart, *Was the media the medium for crisis?*, NATIONAL UNDERWRITER PROPERTY & CASUALTY-RISK & BENEFITS MANAGEMENT, Feb. 17, 2003, available online via subscription at <http://www.highbeam.com/>.

¹¹ Maniloff, *supra* note 7.

¹² Stewart, *supra* note 10.

toward mold was no less threatening: the attention-grabbing headline “Exorcizing a Mold Monster” surely had homeowners thinking about whether their property or health was at risk.¹³

As concern over mold swept across the nation, the eye of the inevitable legal storm that would pit homeowners against insurers over coverage for mold damage was forming in the most appropriate of places – Dripping Springs, Texas. There, homeowner Melinda Ballard had sued Farmers Insurance Group (“Farmers Insurance”) for failing to adequately reimburse her for the extensive mold damage to her eleven thousand square-foot home.¹⁴ Ballard accused Farmers Insurance of intentionally delaying its investigation of her claim in an effort to avoid payment. While Farmers Insurance stalled, toxic mold multiplied in Ballard’s home to the point where virtually nothing in the house was salvageable and the house itself was no longer habitable.¹⁵

Although *Ballard* was partially a dispute over coverage, the central issue was whether Farmers Insurance acted in bad faith in its handling of the claim. The jury’s verdict in June 2001 not only found that Ballard had been covered, it also heavily penalized Farmers Insurance for bad faith: Ballard was awarded \$6.2 million for her property damage claims, \$17 million for her bad faith claim, and \$8.9 million in legal fees.¹⁶ While a Texas appellate court later reduced the \$32 million award considerably,¹⁷ the jury’s decision sent property insurers scrambling to look

¹³ Deborah K. Dietsch, *Exorcizing A Mold Monster*, THE WASHINGTON POST, October 26, 2002, at H01.

¹⁴ Elizabeth L. Perry, *Why Fear the Fungus? Why Toxic Mold Is And Is Not The Next Big Toxic Tort*, 52 BUFF. L. REV. 257, 267 (2004).

¹⁵ Lisa Belkin, *Haunted by Mold*, NEW YORK TIMES, Aug. 12, 2001, Section 6, Column 1, at 28.

¹⁶ Family Wins \$32,118,525 Against Farmers in Deadly Mold Case (2002), *available at* http://www.verdictsearch.com/news/specials/0204verdicts_ballard.jsp (explaining the background and history of the unpublished *Ballard* case) (last visited April 25, 2007).

¹⁷ *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227, 264 (Tex. App. 2002).

for ways to lawfully deny coverage for future mold claims.¹⁸ Thus, from the ashes of *Ballard*, the mold exclusion was born.

II – Interpreting the Mold Exclusion: *Fiess v. State Farm Lloyds* and Plain Meaning

Today, a person examining his or her homeowner’s insurance policy, including all recent endorsements, will likely find a clause similar to the following: “We [the insurer] do not cover loss caused by ... mold.”¹⁹ This limitation on coverage, known as a mold exclusion, is the insurance industry’s answer for precluding future mold claims. During the summer of 2006, the meaning of the mold exclusion was tested in *Fiess v. State Farm Lloyds*,²⁰ another high-profile Texas insurance case involving a first-party mold claim. However, unlike in *Ballard*, this time the Texas judicial system handed the insurance industry – and the mold exclusion provision – a victory.

In *Fiess*, the claimants, Richard and Stephanie Fiess, discovered advanced black mold covering exposed interior sheetrock shortly after Tropical Storm Allison flooded their home in 2001.²¹ To learn more about the potential risks of the mold, the Fiesses hired a biological testing expert to inspect their home.²² He determined that the home was contaminated by at least six different strains of mold, including the toxic stachybotrys strain, and concluded that the house was dangerous to inhabit.²³ He further concluded that seventy percent of the mold growing in the home was caused by plumbing, roof, and other leaks, and was therefore unrelated to water

¹⁸ Joe Galanti, *Clock ticking on mold claims: New exclusions make recovery under old policies urgent*, BUSINESS INSURANCE, July 4, 2005, available online via subscription at <http://www.highbeam.com/>.

¹⁹ *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006).

²⁰ *Id.*

²¹ *Fiess v. State Farm Lloyds*, 392 F.3d 802, 804 (5th Cir. 2004).

²² *Id.*

²³ *Id.*

intrusions from Allison.²⁴ Based on these findings, the Fiesses submitted a claim to their homeowner's insurer, State Farm, for mold-related loss due to pre-Allison water damage.²⁵ They did not claim any mold-related loss caused by Allison because their homeowner's policy explicitly excluded damage as a result of flooding.²⁶ When State Farm refused to reimburse the family for the full value of their claim for pre-Allison mold damage, the Fiesses sued State Farm for breach of contract and fraud.²⁷

After a lengthy procedural history, the Supreme Court of Texas, on certification from the United States Court of Appeals for the Fifth Circuit, was asked to determine whether the policy's language provided coverage.²⁸ The language of the Fiesses' policy read as follows:

We do not cover loss caused by: ...

(2) rust, rot, mold or other fungi ...

We do cover ensuing loss caused by collapse of the building or any part of the building, water damage, or breakage of glass which is part of the building if the loss would otherwise be covered under this policy.²⁹

To understand each party's position on the coverage dispute, one must first look to the following language in the clause: "We do not cover loss caused by ... mold." In State Farm's brief, it argued that the plain meaning of this traditional mold exclusion provision excluded coverage for the Fiesses' mold damage.³⁰ Additionally, State Farm argued that the second half of the above

²⁴ *Id.*

²⁵ *Id.* at 805.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Fiess*, 202 S.W.3d at 745-746.

²⁹ *Id.* at 746.

³⁰ *Fiess v. State Farm Lloyds*, No. 04-1104, 2005 WL 688751, at *3 (Tex. March 1, 2005).

clause, known as an ensuing loss provision, did not cover the Fiesses' mold damage because the provision's causation requirements were not satisfied.³¹ The Fiesses, on the other hand, argued that the ensuing loss provision acted as an exception to the mold exclusion which covered loss caused by water damage, or in their case, mold.³²

Between each party's brief and the numerous amicus briefs filed in the case, the Supreme Court of Texas received many different opinions on the scope of coverage under the ensuing loss provision. At the center of the dispute over the provision's coverage was how the phrases "ensuing loss" and "otherwise ... covered" should be interpreted in the context of the policy. According to the Fiesses, if mold results or ensues from a covered water damage event, such as a dishwasher hose that bursts and saturates the kitchen floor, the ensuing loss provision covers any mold-related loss notwithstanding the plain meaning of the mold exclusion.³³ This interpretation does not conflict with the "otherwise ... covered" language in the provision, the Fiesses argued, because the mold exclusion and the ensuing loss provision appear in the same section of the policy. Under their interpretation, "otherwise ... covered" refers to perils covered beyond the scope of the section containing the mold exclusion and the accompanying ensuing loss provision. Because no other part of their homeowner's policy denied coverage for mold, the Fiesses argued that they were insured for their mold damage.³⁴

In its reply brief, State Farm argued that the Fiesses' interpretation of the ensuing loss provision was faulty because it attached no meaning to the word "ensuing," a material term, and

³¹ *Id.*

³² *Fiess v. State Farm Lloyds*, No. 04-1104, 2005 WL 853980, at *7 (Tex. Feb. 10, 2005).

³³ *Id.*

³⁴ *Id.* at *12.

therefore violated the rule of contract interpretation that each word be given effect.³⁵ Stated differently, under the Fiesses' interpretation, the phrases "loss caused by ... water damage" and "ensuing loss caused by ... water damage" have the same meaning, rendering the word "ensuing" redundant. Conversely, State Farm's interpretation of the ensuing loss provision was that if one's home sustains water damage, the water damage loss may still be covered even though an excluded peril, such as rust, caused the water damage.³⁶ Therefore, instead of serving as an exception to the exclusionary language, State Farm maintained that the ensuing loss provision safeguards coverage for loss from covered perils that otherwise might be denied because the covered peril arose from an excluded event.³⁷ Finally, State Farm argued that even if mold damage constituted an ensuing loss, the loss is still not "otherwise ... covered under this policy" because of the express and unambiguous language in the mold exclusion.³⁸

Though both the Fiesses' interpretation and the State Farm interpretation of the ensuing loss provision have partial intuitive appeal, neither is without flaw. The Fiesses' interpretation of the meaning of "ensuing loss" is attractive because it offers a simple, straightforward approach that finds coverage for "ensuing loss caused by ... water damage." Mold contamination certainly is a loss that can ensue or result from significant water damage, and appears to fit squarely within the meaning of the clause. On the other hand, while the Fiesses' interpretation of the meaning of "ensuing loss" is feasible, their argument regarding the "otherwise ... covered" clause is suspect. When interpreting insurance policies, one factor courts consider is how the

³⁵ *Fiess*, 2005 WL 688751, at *9. For a discussion by the Texas Court of Appeals of the rule of contract interpretation that each word be given effect, see *Gulf Metal Industries v. Chicago Ins. Co.*, 993 S.W.2d 800, 805 (Tex. App. 1999).

³⁶ *Id.* at *17.

³⁷ *Id.*

³⁸ *Id.* at *21.

general public would read the plain meaning of the language.³⁹ It is doubtful that the ordinary consumer would interpret the word “otherwise” to mean that mold damage is sometimes covered when the foregoing provision states that it is excluded. Therefore, as the Texas high court concluded, “Those exclusions (for rust, rot, mold, and fungi) are part of the policy; a policy without exclusions for rust, rot, mold, wear and tear, and termites is simply a different policy.”⁴⁰

While the Fiesses’ argument concerning the “otherwise ... covered” clause is dubious, State Farm’s argument about what constitutes an “ensuing loss” is equally unconvincing. Nothing in the provision indicates that an excluded loss must cause the water damage in order for there to be coverage for the water damage loss. Although State Farm argues that the modifier “ensuing” requires that an excluded peril cause the resultant water damage for coverage to apply, the meaning of “ensuing loss” appears limited to its relationship with water damage, a proximate cause. Therefore, the average member of the public construing the ensuing loss provision would not conclude that an excluded peril had to cause the water damage for coverage to apply to water damage loss. Nevertheless, not all of State Farm’s arguments suffered from questionable logic. As the carrier argued in its brief and as the Supreme Court of Texas concluded, the most reasonable interpretation of the “otherwise ... covered” clause in the ensuing loss provision appears to exclude coverage for mold damage.⁴¹

As the analysis above shows, much of the debate leading up to the Supreme Court of Texas’s decision in *Fiess* concerned the scope of coverage under the ensuing loss provision. While the court’s opinion does address the ensuing loss arguments, the majority was more

³⁹ *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006).

⁴⁰ *Id.* at 751.

⁴¹ *Fiess*, 2005 WL 688751, at *21.

concerned with the meaning of the language that it found clear: the language of the mold exclusion. According to the court: “The policy here provides that it does not cover ‘loss caused by mold.’ While other parts of the policy sometimes make it difficult to decipher, we cannot hold that mold damage is covered when the policy expressly says that it is not.”⁴² In this interpretation, the court found that the mold exclusion was plainly unambiguous.

III – The “Unambiguous” Mold Exclusion: A Case of False Clarity?

Though the Supreme Court of Texas in *Fiess* found no ambiguity in the policy’s traditional mold exclusion, other courts interpreting the same language – “We [the insurer] do not cover loss caused by mold” – have found the provision ambiguous under a different analysis.⁴³ In both *Liristis v. American Family Mutual Insurance Company* and *Simonetti v. Selective Insurance Company*, a covered water peril caused mold damage to the policyholders’ homes.⁴⁴ Their insurers, like in *Fiess*, denied their claims for mold coverage on the basis that loss caused by mold was excluded.⁴⁵ Thereafter, the policyholders filed claims against their insurers for breach of contract and bad faith, arguing that the traditional mold exclusions in their homeowner’s policies were inapplicable because their claims were for mold as a loss in itself (“mold loss”) rather than loss caused by mold, only the latter of which was not covered under their policies’ mold exclusions.⁴⁶

⁴² *Fiess*, 202 S.W.3d at 745.

⁴³ See, e.g., *Liristis v. American Family Mutual Insurance Co.*, 61 P.3d 22 (Ariz. 2003); *Simonetti v. Selective Insurance Co.*, 859 A.2d 694 (N.J. Super. Ct. App. Div. 2004).

⁴⁴ *Liristis*, 61 P.3d at 25; *Simonetti*, 859 A.2d at 699.

⁴⁵ *Liristis*, 61 P.3d at 25; *Simonetti*, 859 A.2d at 697.

⁴⁶ *Liristis*, 61 P.3d at 24; *Simonetti*, 859 A.2d at 698.

In agreeing with the policyholders' argument distinguishing mold as a 'loss' versus 'cause of loss,' both the *Liristis* and *Simonetti* courts found that the language in the insurers' traditional mold exclusions⁴⁷ did not exclude coverage for mold in all circumstances.⁴⁸ As the court noted in *Simonetti*:

This language does not exclude all mold. Rather, it excludes loss "caused by" or resulting from mold. The language clearly focuses on "cause" of the loss, conveying the intention to exclude mold as a cause of loss. But mold which is the loss is not mentioned.⁴⁹

Here, the *Simonetti* court implies that for an insurer to exclude all coverage for mold, the policy must specifically state that coverage for mold as both a 'loss' and 'cause of loss' is excluded. In other words, courts such as *Simonetti* and *Liristis* that follow the 'loss' versus 'cause of loss' rationale require that insurers clearly state in the mold exclusion whether mold as a 'loss,' a 'cause of loss,' or both are excluded.

Not every court that has considered the emerging 'loss' versus 'cause of loss' rationale has recognized the distinction. For example, in *Atlantic Mutual Insurance Companies v. Lotz*, the policyholders urged the court to apply the rationale to a mold exclusion that read, "[W]e won't pay for direct loss caused by deterioration or inherent vice. This includes ... mold"⁵⁰ Like in *Liristis* and *Simonetti*, the mold exclusion in *Lotz* did not differentiate between mold as a 'loss' and mold as a 'cause of loss.' The *Lotz* court, however, found the 'loss' versus 'cause of loss' distinction immaterial to the question of coverage:

⁴⁷ In *Liristis*, the language of the insurer's mold exclusion read: "[W]e do not cover loss to the property ... resulting directly or indirectly from or caused by [mold]." *Liristis*, 61 P.3d at 26. In *Simonetti*, the language of the mold exclusion read: "[W]e do not insure, however, for loss caused by ... mold" *Simonetti*, 859 A.2d at 699.

⁴⁸ *Liristis*, 61 P.3d at 26; *Simonetti*, 859 A.2d at 699.

⁴⁹ *Simonetti*, 859 A.2d at 699.

⁵⁰ *Atlantic Mutual Insurance Co. v. Lotz*, 384 F.Supp.2d 1292, 1303 (E.D. Wis. 2005).

It is self-evident that if there is a loss in the form of mold or rot, then the loss itself can be directly caused by mold or rot, and there is no reason for Atlantic Mutual to add language to its policy to make this any clearer: the meaning is obvious.⁵¹

Stated differently, the court is saying that mold is not limited to either one side or the other in the cause-and-effect relationship: mold can cause mold loss. Consequently, it found the “loss caused by mold” language in Atlantic Mutual’s mold exclusion sufficient to bar all coverage for mold.

While courts are presently divided on whether “all-risk” homeowner’s insurance policies must specify coverage availability for mold as a ‘loss’ and ‘cause of loss,’ insurers would be well-advised to use more precise policy language. To illustrate this need for greater clarity, consider how a policyholder is likely to differentiate between ‘wind’ versus ‘loss caused by wind’ and ‘mold’ versus ‘loss caused by mold.’ In the wind comparison, the two are easily distinguishable because ‘wind’ can only be a cause of loss: the loss to the policyholder is left behind in its wake. But in the mold comparison, the policyholder is unlikely to see a clear dividing line between ‘mold’ and the loss it causes, and therefore could reasonably believe that while coverage for loss caused by mold (such as replacing mold-infested drywall) is excluded, coverage for treating and eradicating the mold itself is included. Therefore, because the policyholder could reasonably believe that the phrase “we do not cover loss caused by mold” does not bar coverage for mold loss, the law should require insurers to indicate that mold is excluded as both a ‘loss’ and ‘cause of loss’ if they wish to broadly deny all coverage for mold.

IV – Causation versus Clarity in the Debate Over Mold Coverage

A. Efficient Proximate Cause

So far, this paper has shown that homeowners who become entangled in litigation with their insurers over coverage for mold damage should first examine their policies for ambiguous

⁵¹ *Id.* at 1304.

language in the mold exclusion. But what if no such language exists, and the homeowner still reasonably believes that his or her mold damage should be covered? What other arguments can the homeowner raise, besides ambiguity, to challenge mold exclusions?

The majority of jurisdictions throughout the United States apply a doctrine known as efficient proximate cause which policyholders can often use to argue in favor of coverage.⁵² The doctrine of efficient proximate cause applies when a policyholder's loss is the result of at least two identifiable causes, one covered and one excluded.⁵³ In such cases, jurisdictions that follow the efficient proximate cause doctrine will, absent other considerations discussed later in this paper, resolve the coverage dispute in favor of the insured if the covered cause of loss sets other causes in motion which, in an unbroken sequence, give rise to the loss.⁵⁴ From an insurance law perspective, one of the interesting characteristics of mold as a cause of loss is that mold is very often the last in a sequence of causes that result in damage to one's home. This characteristic of mold as a cause of loss means that homeowners can usually make an efficient proximate cause argument in favor of coverage assuming they can identify a covered cause of loss in the chain of causation that sets the other causes, including mold, in motion. Because mold, unlike some other commonly excluded perils such as earthquakes and floods, is often the product of at least one covered cause of loss, courts in jurisdictions that recognize efficient proximate cause frequently find that counsel for aggrieved homeowners raise the doctrine when arguing that their client's homeowner's policy covers damage from mold notwithstanding the policy's mold exclusion.

⁵² RICHARD ZEVIK, THE COMPLETE BOOK OF INSURANCE: UNDERSTAND THE COVERAGE YOU REALLY NEED, 70 (Sphinx Publishing) (2004). See also Mark D. Wuerfel & Mark Koop, "*Efficient Proximate Causation in the Context of Property Insurance Claims*", 65 DEF. COUNS. J. 400 (1998) (for a comprehensive discussion of efficient proximate cause and a listing of which states follow or reject the doctrine).

⁵³ Mark D. Wuerfel & Mark Koop, "*Efficient Proximate Causation in the Context of Property Insurance Claims*", 65 DEF. COUNS. J. 400, 400 (1998).

⁵⁴ *Sabella v. Wisler*, 27 Cal.Rptr. 689, 695 (Cal. 1963) (quoting 6 COUCH ON INSURANCE § 1463 (1930)).

For example, in *Bowers v. Farmers Insurance Exchange*, a landlord brought suit against her homeowner's insurer after the insurer denied her claim for mold damage to a rental house in which the tenants were secretly growing marijuana plants in the basement.⁵⁵ To encourage plant growth, the tenants had created an artificial environment of warm, moist air that caused mold to develop and spread throughout the house.⁵⁶ The insurer's proffered reason for denying coverage for the landlord's mold damage was based on her policy's mold exclusion, which read: "We do not cover direct or indirect loss from ... mold."⁵⁷ The insurer argued that the policyholder's property loss was caused by mold and therefore not covered under the plain meaning of the mold exclusion.⁵⁸ The landlord, on the other hand, reasoned that although mold was the immediate cause of her loss, the predominate cause of loss that produced the mold growth was her tenants' vandalism, a covered peril under her policy.⁵⁹ Under such analysis, the tenants' vandalism is considered both an efficient cause and proximate cause, respectively, because their heinous actions were responsible for the mold growth and there is no cause preceding their actions that could reasonably be considered so closely and sufficiently connected with the mold damage for the purpose of imposing liability.⁶⁰

The *Bowers* court agreed with the landlord's efficient proximate cause argument, noting: "Here, there can be no reasonable difference of opinion regarding the cause of Ms. Bowers' loss. It was the tenants' acts, which 'in an unbroken sequence ... [produced] the result for which

⁵⁵ *Bowers v. Farmers Ins. Exchange*, 991 P.2d 734, 735 (Wash. Ct. App. 2000).

⁵⁶ *Id.* at 736.

⁵⁷ *Id.*

⁵⁸ *Id.* at 737.

⁵⁹ *Id.*

⁶⁰ See BLACK'S LAW DICTIONARY 213 (7th ed. 1999).

recovery is sought[.]”⁶¹ Because the court concluded that reasonable minds could not disagree that vandalism constituted the efficient proximate cause of the landlord’s loss, the court rendered judgment in the landlord’s favor rather than remanding the issue as a question of fact for the jury.⁶²

B. Anti-Concurrent Causation

As *Bowers* demonstrates, in many cases it can be difficult for homeowner’s insurers to defeat first-party mold claims in states such as Washington whose courts have shown a willingness to reject the plain meaning of the mold exclusion if policyholders can show coverage using the efficient proximate cause doctrine. In an effort to shift judicial outcomes of coverage disputes back in their favor, insurers have responded by adding language to their policies known as anti-concurrent causation clauses designed to further restrict the scope of coverage.⁶³ These clauses, as the following quoted policy language shows, place exclusionary policy provisions in direct conflict with the efficient proximate cause doctrine because they deny coverage for loss caused by an excluded peril “whether or not any other cause or event contributes concurrently or in any sequence to the loss.”⁶⁴ For example, if mold, an excluded peril, contaminates a home as a result of a covered water event, the insurer will argue that the combination of the mold exclusion and anti-concurrent causation clause bars coverage for mold damage irrespective of the fact that the covered water event caused the sequence of events that produced the mold damage.

⁶¹*Bowers*, 991 P.2d at 738.

⁶² *Id.*

⁶³ David J. Rosenberg et al., *Insurance Industry Woes in the Aftermath of Hurricanes Katrina & Rita*, 73 DEF. COUNS. J. 141, 152 (2006).

⁶⁴ *Dahlke v. Home Owners Insurance Co.*, No. 239128, 2003 Mich. App. LEXIS 3424, at *3 (Mich. Ct. App. Dec. 23, 2003).

Courts often refer to the anti-concurrent causation clause as an insurer's tool for contracting out of the efficient proximate cause doctrine.⁶⁵

Since insurers began supplementing their mold exclusions with anti-concurrent causation clauses, the majority of jurisdictions have permitted these clauses to override the efficient proximate cause doctrine.⁶⁶ Some of the earliest and most insightful reasoning offered in support of giving anti-concurrent causation clauses precedence over the efficient proximate cause doctrine comes from the Supreme Court of Utah's opinion in *Alf v. State Farm Fire and Casualty Company*, a non-mold related case.⁶⁷ In its discussion of State Farm's recent addition of a "lead-in" clause, or anti-concurrent causation clause, to its policy, and the clause's relationship to the efficient proximate cause doctrine, the court noted:

We believe that the proper path to follow is to recognize the efficient proximate cause rule only when the parties have not chosen freely to contract out of it ... [Therefore], [W]e hold that the efficient proximate cause rule must yield to the qualifying words agreed to by the parties and included in the Policy.⁶⁸

The Supreme Court of Utah's rationale for upholding the insurer's anti-concurrent causation language typifies the contractual analysis that most courts use when resolving the tension between anti-concurrent causation and efficient proximate cause. So long as the meaning of a policy's exclusionary language is unambiguous and neither the exclusion nor the anti-concurrent

⁶⁵ See, e.g., *Kelly v. Farmers Ins. Co., Inc.*, 281 F.Supp.2d 1290, 1299-1300 (W.D. Okla. 2003); *Toumayan v. State Farm General Ins. Co.*, 970 S.W.2d 822, 826 (Mo. Ct. App. 1998).

⁶⁶ See, e.g., *Kelly*, 281 F. Supp. 2d at 1298 ("Among the jurisdictions that have adopted the efficient proximate cause doctrine, most permit parties to 'contract around' it."); *Thompson v. State Farm Fire & Cas. Co.*, No. 05CA2079, 2007 WL 686006, at *4 (Colo. Ct. App. March 8, 2007), quoting *Kane v. Royal Ins. Co. of America*, 768 P.2d 678, 685 (Colo. 1989) ([T]he "efficient moving cause rule [*i.e.*, efficient proximate cause rule] should not apply in a case where the exclusion includes qualifying and enlarging words of causation [*i.e.*, anti-concurrent causation]"); *Preferred Mut. Ins. Co. v. Meggison*, 53 F. Supp. 2d 139, 142 (D. Mass. 1999) ("The 'vast majority of states' uphold such [anti-concurrent causation] clauses.").

⁶⁷ *Alf v. State Farm Fire and Casualty Co.*, 850 P.2d 1272 (Utah 1993).

⁶⁸ *Id.* at 1277-78.

causation clause is hidden or surrounded by a sea of confusing provisions, courts will interpret the policy language as written.

Although insurance policies are contractual in nature, insurance companies prepare and control the terms of their policies and offer coverage to homeowners on a take-it-or-leave-it basis. Moreover, because the policy language is often complicated even to skilled experts in the field, policyholders are at an informational disadvantage in terms of policy understanding and interpretation. For these reasons, insurance policies are referred to in law as contracts of adhesion, which may call for a more consumer-oriented analysis than they receive in decisions such as *Alf*, or in the context of a first-party mold claim, *Dahlke v. Home Owners Insurance Company*.⁶⁹

In *Dahlke*, a rare mid-winter Michigan thaw caused ice and snow to melt and leak through the Dahlkes' roof, causing significant damage to their ceiling and walls.⁷⁰ In addition to the ceiling and wall damage, the water intrusion also led to extensive mold growth, rendering the home a total loss.⁷¹ Like in *Alf*, the court relied on the anti-concurrent causation language in the claimants' homeowner's policy to deny the Dahlkes' claim for mold damage despite the Dahlkes' reasonable expectation that the damage was covered under the efficient proximate cause doctrine. In denying the Dahlkes' claim, the court also acknowledged that their argument was not without merit:

We are not unmindful of the concerns expressed to us regarding the number and breadth of listed causes of loss that are excluded by the Home Owners' policy. Our interpretation of the exclusion would result in denial of coverage for damage to covered property that many insureds would ordinarily expect to be covered. ... Nevertheless, these concerns do

⁶⁹ *Dahlke*, 2003 Mich. App. LEXIS 3424.

⁷⁰ *Id.* at *2.

⁷¹ *Id.*

not provide grounds upon which we may rewrite the terms of the policy, and we must apply the unambiguous terms of the policy in this case.⁷²

Here, the court's language indicates that while it thoroughly considered the Dahlkes' efficient proximate cause argument and their reasonable expectations, it nonetheless would not read the policy differently from how it was written.

Although the courts' reasoning in *Alf* and *Dahlke* represents how most courts analyze the tension between efficient proximate cause and anti-concurrent causation in a homeowner's policy language, there are some notable exceptions. Courts in California, Washington State, and West Virginia have issued decisions refusing to uphold anti-concurrent causation policy provisions.⁷³ In each of these decisions, the courts expressed strong concern that anti-concurrent causation clauses would subvert policyholders' reasonable expectations by allowing insurers to argue that any excluded cause of loss in the chain of causation justifies their decision to deny the claim, regardless of the policyholders' competing arguments in favor of coverage. Courts that favor this view believe that anti-concurrent causation clauses should not foreclose coverage when an insured has legitimate reasons for believing he or she was covered for the loss.

V – Notification of Mold Exclusions and Other Material Coverage Diminishments

When a dispute over mold coverage arises, the policyholder, in addition to examining his or her policy for ambiguity and issues of causation, should also determine whether the insurer's proffered reason for denying coverage is based on a subsequent amendment to the policy. Many, if not all states, require that insurers notify homeowners through written policy endorsements if

⁷² *Id.* at *10-11.

⁷³ See, e.g., *Howell v. State Farm Fire & Casualty Co.*, 267 Cal.Rptr. 708 (Cal. Ct. App. 1990); *Safeco Ins. Co. of America v. Hirschmann*, 773 P.2d 413 (Wash. 1989); *Murray v. State Farm Fire and Casualty Co.*, 509 S.E.2d 1 (W.Va. 1998).

they make changes to a policy that materially diminish coverage.⁷⁴ The need to notify policyholders of material diminishment to coverage is particularly important in relation to mold because many homeowner's policies prior to *Ballard* covered mold-related loss. Not only must insurers notify their policyholders if they add a mold exclusion, but they must also notify policyholders of more subtle changes in language that materially diminish coverage, such as language related to 'loss' versus 'cause of loss' and anti-concurrent causation.⁷⁵ Most courts view an insurer's failure to provide the policyholder proper notice of a material change in coverage as grounds for denying the change's effect.⁷⁶

For example, in *Buscher v. Economy Premier Assurance Company*, the insurer amended the plaintiff's homeowner's policy through restrictions that diminished coverage for mold.⁷⁷ In Minnesota, an insurer "has an affirmative duty to notify the insured by written explanation" when the insurer makes changes to an existing policy that materially diminish coverage.⁷⁸ In fulfilling this duty, the insurer must provide the insured with a timely written endorsement, accompanied by either a cover letter or "conspicuous heading to the amendatory endorsement," which explains the change in coverage.⁷⁹ Because the insurer in *Buscher*, through its own

⁷⁴ Edward Eshoo, Jr., *First-Party Insurance Coverage For Mold*, ENVIRONMENTAL RISK RESOURCES ASSOCIATION, 2004 Newsletter, available at <http://www.erraonline.org/winter2004firstpartymold.htm> (see Section IV - "Challenging Mold-Related Exclusions and Limitations In Homeowners Insurance Policies").

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Buscher v. Economy Premier Assurance Co.*, No. Civ. 05-544 (RHK/JSM), 2006 WL 268781, at *7 (D. Minn. Feb. 1, 2006).

⁷⁸ *Id.*, quoting *Campbell v. Insurance Service Agency*, 424 N.W.2d 785, 790 (Minn. Ct. App. 1988).

⁷⁹ *Id.*

admission, failed to strictly comply with Minnesota’s notice requirements, the court ruled that the policyholder’s coverage for mold damage was not limited by the added restrictions.⁸⁰

Conclusion

The speed with which insurers have acted to eliminate first-party property coverage for mold makes the debate over mold coverage unique. Examining this recent wave of mold exclusions, some courts are finding the language to be unclear for the reasonable consumer, who is left wondering which forms of mold-related loss are excluded, and which may be covered under their homeowner’s insurance. In the wake of recent court decisions, such as *Liristis* and *Simonetti*, insurers are learning that traditional exclusion language – “we do not cover loss caused by ... mold” – is insufficient to successfully exclude all mold-related loss from their policies. It is reasonable to predict a widespread tightening of mold exclusion language as insurers refine and reshape their exclusions to specify that they do not cover mold as a ‘loss’ or as a ‘cause of loss.’

However, the inevitability of more restrictive mold exclusions in the future should not dissuade public insurance adjusters and plaintiff’s attorneys from including and arguing for mold damage as a covered loss. Though there are courts, like *Feiss*, that deny mold coverage claims based on a plain meaning interpretation of the policy, homeowners may still be eligible for coverage, as yet other courts consider the policyholder’s reasonable expectations, the efficient proximate cause doctrine, and compliance with notification requirements. In this rapidly shifting environment of mold exclusion, it is essential that public insurance adjusters and policyholders’ attorneys remain up-to-date on current legal developments to ensure that policyholders receive due consideration for their mold-related claims.

⁸⁰ *Buscher*, 2006 WL 268781 at *8.