

POLICYHOLDER ADVOCATE

INSIDE THIS ISSUE:

Ramifications of the outrageous Fiess decision	1-2
8 fatal mistakes made by lawyers in bad faith cases	3-4
Whistleblowers finger State Farm	5
State Farm's long history of wrongdoing	6
State Farm's own adjusters turn on them	7-8
State Farm lets loose of Haag Engineering	9
Election '06 Endorsements	10-11
The all <u>new</u> New York Guidelines for mold	12-22
Insurers get an earful from Senator	23-24
New book sheds light on medical and political issues of mold	24
Household levels of mold and bacteria surpass waste-water treatment and ag plants	25
Mold: a mushrooming problem	26-27
The two faces of mycotoxicosis	28-30
AAAAI big enough to apologize but not big enough to withdraw their trashy paper	31-32
Molds associated with asthma in water damaged homes	33
What is hypersensitivity pneumonitis?	34
Link between allergies and asthma	35
Legal wranglings/courtroom drama	36-38
LA Governor wants to issue refund	39-40
On the lighter side	41-42

***Fiess v. State Farm Lloyds* - Mold Coverage - Texas Supreme Court says Texas Insurers, Homeowners, and Texas Department of Insurance Misread Policy**

by John F. Melton, Attorney

Another POA exclusive

The long awaited decision on mold coverage by the Texas Supreme Court, *Fiess v. State Farm Lloyds*, has arrived. See *Fiess v. State Farm Lloyds*, — S.W.3d —, 2006 WL 2505995 (Tex.), 49 Tex. Sup. Ct. J. 996. Basically the Court said that mold damage in certain instances, such as mold resulting from roof leaks and window leaks, was never covered under the Texas Standard HO-B Insurance policy in the first place. A dissenting opinion was written which argued that the policy was ambiguous and therefore had to be interpreted in favor of coverage for mold. But the majority outnumbered the dissent by a 7-2 vote. Overall the decision is obviously not helpful for homeowners dealing with their insurers regarding mold claims.

Some good news for Texas homeowners to come out of this opinion is that the Court left open the question of whether or not mold that was caused by water damage from plumbing, heating or air conditioning leaks was covered under the policy. Policyholders arguing for mold coverage in the past have relied on two separate clauses contained in the policy: (1) the "ensuing loss" clause, and (2) the "plumbing leak" exception. The *Fiess* decision means that the first argument is likely no longer valid in this State. As to the "plumbing leak" exception, the Court stated in a footnote that the *Fiess*'s had not properly preserved that issue for appeal, and thus it was not addressed. Presumably those types of claims are still covered. See *Balandran v. Safeco Insurance*, 972 S.W.2d 738 (Tex. 1998). Although the *Balandran* decision supports the argument that mold resulting from plumbing leaks is covered, the Court in that case did not specifically discuss coverage for mold, but rather coverage for foundation damage. Therefore, a final decision has not been made.

The Court in *Fiess* stated that the policy language was clear and unambiguous; that mold was not covered. The Court stated that the "ensuing loss" clause, which is found immediately after the exclusion for mold and which

Continued on page 2

Fiess...

continued from page 1

many other courts had interpreted to provide coverage for mold, did not provide coverage after all. See *Flores v. Allstate Tex. Lloyd's Co.*, 278 F.Supp.2d 810, 814 n.3 (S.D.Tex.2003) (finding that mold is covered if it results from a covered water damage event); *Salinas v. Allstate Tex. Lloyd's Co.*, 278 F.Supp.2d 820, 824 (S.D.Tex.2003) (same); *Home Ins. Co. v. McClain*, No. 05-97-01479-CV, WL 144115 (Tex.App.-Dallas, Feb. 10, 2000) (not designated for publication) (holding that the ensuing loss provision provides coverage for mold damage resulting from covered water damage). The Court did not discuss these prior decisions in its opinion.

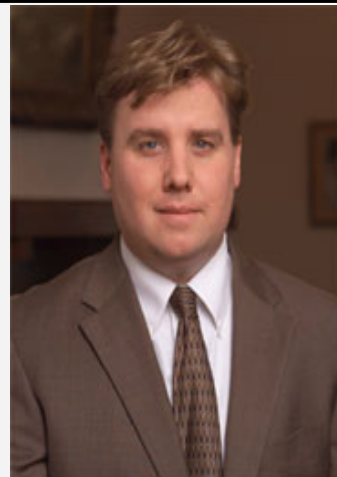
The Court also stated that just because the Texas Department of Insurance had construed the policy differently to provide coverage for mold, that did not make the policy ambiguous. Instead, the Court stated the policy unambiguously excluded coverage for mold and partly relied on the 1975 appellate court decision in *Lambros v. Standard Fire Insurance Company* and its subsequent writ

history to argue that the Court was, at least in part, bound by prior precedent.

The San Antonio Court of Appeals in *Lambros* held that the ensuing loss clause for water damage, found after the settlement exclusion, did not provide coverage for the excluded loss. See *Lambros*, 530 S.W.2d 138, 141-42 (Tex.Civ.App.-San Antonio 1975, writ ref'd). Thirty years ago the Texas Supreme Court refused writ in *Lambros* (as opposed to denying writ or noting its refusal by indicating *no reversible error*). By refusing writ, under Texas Rules of Appellate Procedure the opinion is to be given the same weight as if it had been decided by the Texas Supreme Court. SEE TEX. R. APP. P. 56.1. The Supreme Court declined to overrule the *Lambros* decision.

The *Fiess* decision will affect some, but not all, pending claims and lawsuits regarding mold damage in Texas. For claims of mold damage arising from plumbing, heating or air condition leaks, the decision does not mean those claims are not covered. There is still a good argument that those claims are covered based on the Texas Supreme Court decision in *Balandran*.

For claims based solely on mold resulting from roof leaks and window leaks under the former Texas HO-B policy, however, the decision may affect coverage in certain cases. A policyholder can still argue in those cases that the insurer has violated the Texas Insurance Code or violated its common law duty of good faith and fair dealing. Whether or not that argument can be successful, however, will depend on the individual facts of the case and how the claim was handled by the insurance company.



John F. Melton is a shareholder in the firm Ross, Melton, Denosky & Balcezak located in Austin, Texas. Mr. Melton has worked with Daniel Ross since 1999, practicing with a focus on Insurance Bad Faith, Employment Law, Consumer Law and Personal Injury cases. In the course of their prosecution of clients claims for Insurance Bad Faith, the firm has handled more than a hundred cases stemming from water loss, hurricane damage, and mold damage. The firm's lawyers have tried numerous first party insurance bad faith cases to verdict, and is currently handling first party insurance bad faith cases in Texas, Florida and California.

Mr. Melton graduated from the University of Texas at Austin with a B.A. in 1996, and in 1999 received his Juris Doctor from the University of San Diego, where he was a Comment Editor of the San Diego Law Review. He was admitted to the Texas Bar in 1999, and admitted to Federal practice in the U.S. District Court, Western District of Texas, in 2000.

John F. Melton
 Ross, Melton, Denosky & Balcezak, P.C.
 1104 San Antonio Street
 Austin, Texas 78701
 (512) 474-7677 Telephone
 (800) 634-8042 Toll-Free
 (512) 474-5306 Facsimile