

5th Circuit Finds Mold Claims Arising From a Covered Peril are Excluded

Harris Martin (2/27)

NEW ORLEANS — Mold claims are excluded under a standard-form Texas homeowner's policy even though leaky plumbing, which is a covered peril, caused the damage, the 5th Circuit U.S. Court of Appeals has affirmed. [*Carrizales v. State Farm Lloyds*](#), No. 06-40286 (5th Cir.).

The panel ruled on Feb. 22 that the policy's exclusion repeal provision, which lists mold as an excluded peril, is not ambiguous when read in conjunction with the covered perils provision.

However, the panel remanded the policyholders' breach of contract claims to the U.S. District Court for the Southern District of Texas for a new trial, ruling that the jury was improperly instructed that mitigation of damages is a condition precedent.

Javier and Eva Carrizales filed a claim with State Farm Insurance Co. for damages arising from a plumbing leak in their garage. Because the cost of repair was less than their deductible, State Farm did not pay any benefits. The Carrizales then submitted additional claims and State Farm, after an inspection and investigation, paid \$107,724.

For the next year and a half, the Carrizales lived in an apartment and State Farm paid an additional \$60,154 in living expenses. No significant repairs to the house were begun during that time and the air conditioner and other utilities were turned off. The Carrizales then submitted three mold remediation claims totaling more than \$200,000, which State Farm denied.

The Carrizales sued State Farm for alleged violations of the Texas Insurance Code, breach of contract and bad

faith. They alleged State Farm breached the policy by failing to adequately investigate their claims, failing to pay the cost of repair or replacement of their house and personal property and failing to pay additional living expenses.

State Farm removed the case to the District Court, which partially granted State Farm's motion for summary judgment, ruling that the Texas Standardized Homeowners Policy Form B excludes coverage for mold damage to the dwelling.

But the court granted the Carrizales' motion for summary judgment on their common law and statutory bad faith claims.

The breach of contract claims proceeded to trial. The District Court excluded evidence of mold damage and at the close of evidence, the District Court formulated the jury charge as requiring mitigation of damages as a condition precedent to State Farm's liability. The jury found for State Farm.

On appeal to the 5th Circuit, the Carrizales challenged the District Court's grant of summary judgment and its exclusion of the mold evidence. They also challenged the verdict and the jury instruction requiring mitigation of damages as a condition precedent to recovery.

The panel concluded that the Carrizales' claims for mold damage are excluded under Form B. Form B insures "all risks" to the dwelling "unless the loss is excluded in Section I Exclusions" and insures personal property against certain listed perils, including damage from plumbing leaks.

Section I Exclusions include mold damage; therefore the mold claims are excluded from coverage, the panel ruled.

"If every plumbing leak were a way around the mold exclusion, that exclusion would be meaningless," the majority explained. "Although the Carrizales ask us to adopt just such a position, the Texas Supreme Court has said that we must be wary of turning an insurance contract into a maintenance agreement."

Turning to the jury instruction on mitigation of damages, the majority agreed with the Carrizales that mitigation of damages is an issue that the jury should have decided in determining the amount of damages to award, not a condition precedent to liability.

The majority determined that the "Duties After Loss" section of the State Farm policy, which requires insureds to "protect the property from further damage," is not a condition precedent to suit but rather an offset to damages.

"The policy language firmly requires homeowners to take steps to ensure prompt, correct adjustments of loss claims, but it does not expressly render these 'conditions' as prerequisites to recovery," the majority explained. "Consequently, Texas courts have concluded that while some of the 'Duties After Loss' are conditions precedent, others are not. Even the decisions finding a condition precedent agree that prejudice is required for the term to preclude coverage."

The majority concluded that the duty to mitigate damages is an equitable doctrine, not an affirmative defense. It added that Texas Rule of Civil Procedure 94 does not list mitigation of damages among the affirmative defenses that must be pled.

"Furthermore, Texas applies the principle that the failure to mitigate damages is an offset against damages in the deceptive trade practices, employment and landlord-tenant contexts," the majority added. "Barring all recovery for failure to mitigate is an onerous consequence not in keeping with the rule that ambiguous policy provisions are construed in favor of the insured."

Judge Jerry E. Smith dissented in part, opining that the jury instruction was correct because the duty to protect property from further damage is a condition precedent to filing suit.

"No case relied on by the majority declares any provision of the 'Duties After Loss' section not to be a condition precedent, and the secondary literature indicates that it is," Judge Smith wrote. "A district judge, surveying a field in which cases addressing the issue all point in the direction that the section as a whole contains conditions precedent, would not expect to commit reversible error by assuming another provision in the same section was also a condition precedent. The majority does not see it that way."



5th Circuit Reaffirms Validity of Texas Mold Exclusion

Harris Martin, (3/4)

NEW ORLEANS — The 5th Circuit Court of Appeals has issued its second ruling on the Texas homeowners' mold exclusion in a week, reaffirming its opinion that the exclusion unambiguously bars coverage for mold damage to a dwelling. [Salinas v. State Farm Lloyds](#), No. 06-40121 (5th Cir. Ct.).

In issuing an unpublished opinion on Feb. 28, the Circuit Court quoted from a concurring opinion issued on Feb. 22 in *Carrizale v. State Farm Lloyds* (No. 06-40286, 5th Cir.), which held that the standard policy's exclusion repeal, or exception, refers to personal property, and doesn't apply to mold damage to the dwelling itself (See *related*

story on Carrizale in this issue)

Jose and Martha Salinas sued State Farm Lloyds after the carrier agreed to pay only \$10,154.25 for an air conditioning leak and \$16,355.01 for additional living expenses while the home was being repaired. The carrier denied the Salinases' claim for additional mold damage they blamed on bathroom, kitchen and roof leaks.

State Farm Lloyds removed the lawsuit from state court to the U.S. District Court for the Southern District of Texas, and successfully moved for summary judgment on the plaintiffs' mold and bad faith claims.

A jury found for State Farm on the Salinases' remaining contract and statutory claim for alleged late payment, prompting the appeal to the 5th Circuit.

In affirming the lower court's decision on the mold exclusion, the 5th Circuit noted that the *Carrizales* majority also cited the Texas Supreme Court's opinion in favor of insurance carriers in a mold case involving ensuing loss claims, *Fiess v. State Farm Lloyds* (202 S.W.3d 744, 747 [Tex. 2006])

Besides ruling on the mold exclusion, the 5th Circuit also affirmed the lower court's decisions denying the Salinases' demand for an appraisal, and affirmed the jury verdicts on

contract and statutory claims.

Savannah L. Robinson of Danbury, Texas, represented the Salinases.

State Farm Lloyds was represented by Ricky H. Rosenblum of Akin Gump Strauss Hauer & Feld in San Antonio; Christopher W. Martin and Levin G. Hovnatanian of Martin, Disiere, Jefferson & Wisdom in Houston and Carrie D. Holloway and David R. Stephens of Lindow & Treat in San Antonio.



Del. Court Reinstates Coverage Suit Over Damage to Personal Property

POA



While the Fifth Circuit Court of Appeals in New Orleans says mold is not covered, the Delaware Supreme Court says it is and vacated summary judgment awarded to a home insurer, finding that a trial court erred in ruling that mold damage to personal property was excluded from coverage. [Sullivan v. The Standard Fire Insurance Co.](#), No. 515,2007 (Del. Sup. Ct.).

John and Carolyn Sullivan filed an insurance claim with Standard Fire Insurance Co. ("SFIC") after a windstorm damaged their roof. Water gushed into the home, soaking carpets, walls, and mold spores were identified in their condo and on their furnishings and personal items.

SFIC agreed to pay for structural damage to the home, but denied coverage for any additional claims for personal property losses. The Sullivans sued in Delaware Superior Court in November 2004, contending that SFIC breached the insurance contract by denying full coverage. In August, the trial court granted SFIC's motion for summary judgment, saying that policy language governing coverage for "direct physical loss" resulting from "Windstorm or hail" did not include the claimed personal property loss.

The Sullivans appealed and the Supreme Court reviewed the decision *de novo*.

The Supreme Court said that the policy language at issue stipulates that the covered windstorm or hail peril "does not include loss to the inside of a building or the property contained in a building caused by rain, snow, sleet, sand or dust unless [i] the direct force of wind or hail damages the building causing an opening in a roof or wall and [ii] the rain, snow, sleet, sand or dust enters through this opening."

The Delaware Supreme Court reasoned that the trial court held that the Sullivans didn't show their property suffered a "direct physical loss" and the trial court didn't bother to analyze whether mold represents a "physical" loss.

"Because the record discloses evidence that the alleged loss was 'physical' sufficient to create a triable issue of fact, we conclude the trial judge should not have granted summary judgment," the higher court concluded.

"The adjective 'physical' is defined as 'having material existence,' the court added. "Mold spores and other bacteria associated with mold undoubtedly have a 'material existence,' even though they are not tangible or perceptible by the naked eye. Therefore, mold contamination constitutes a 'physical loss' within the meaning of the policy and, assuming all other policy conditions are met, the cost of removing the mold from, or of replacing the personal property may be recovered...."

The Supreme Court, however, agreed with the trial court's holding that the Sullivans cannot claim "loss of use" of the personal property as the policy language does not support it.

Iowa Court Decides for Consumers in Moldy Home Case

BY GRANT SCHULTE AND MELISSA WALKER, DESMOINES REGISTER, (FEB. 2008)



Beverly and Robert Speight knew they had a problem when they could puncture the waterlogged siding on their \$250,000 Iowa home with a fingertip.

It is the unspeakable word to builders, insurers and home inspectors. "M" for mold or mildew—no one wants to cover it or take responsibility for it.

The owner of a moldy home may discover multiple exclusions in the contract with a home inspector or that their homeowners insurance has dropped or capped mold claims. Homeowners often run into a brick wall they have to remedy with their own bank account.

Just ask Erin Brockovich, of the film by the same name. She had to move out of her California home after mold, found growing in the floor and walls, caused her family's health problems.

The [CDC says there is no such thing as "toxic mold"](#) but mold impacts those with asthma or a compromised immune system. The Institute of Medicine reports allergic and non allergic reactions in humans exposed to spores. All agree it should be removed.

Now the Iowa Supreme Court has issued a ruling that gives homeowners living in moldy conditions some hope. [Home builders can be held responsible for poor workmanship](#) that leads to mold and mildew from water seepage, long after the original buyer has moved out.

The decision comes from a lawsuit filed by the Speights of Clive, Iowa who filed against Walters Development Company, Ltd. which build the home in 1995.

The original buyer sold it to someone who later sold it to the Speights in 2000. Instead of a dream home, the Speights noticed water damage and mold growing. An inspector found that [subpar materials used for shingles](#) and rain gutters coupled with a design flaw and shortcuts in construction allowed the severe water seepage to accumulate on the walls and eventually flood the basement. The previous owners apparently did not know of the defects.

The Speights filed a lawsuit against Walters in 2003 charging breach of implied warranty of workmanlike construction which says a "building be constructed in a reasonably good and workmanlike manner and ...be reasonably fit for the intended purpose," the court said.

In other words, Walters was negligent in constructing the home.

The builder challenged the lawsuit suggesting the statute of limitations had passed and any warrantee only applied to the initial home buyer. The company refused to do any repairs.

The lawsuit against the builder was dismissed and the Speights appealed but the state appeals court upheld the lower court decision dismissing the lawsuit.

Then the Supreme Court ruled in favor of the Speights saying the statute of limitation did not apply because it was based on discovery of damage and not the sale of goods.

"We conclude ... the plaintiffs could not have gained actual or imputed knowledge of the defect in their home more than five years prior to commencing this action, and their suit is therefore not time barred under Iowa Code," the court said.

So far the couple has spent \$25,000 on home repairs. Now they are on their way to trial.

The Speights' attorney [Harley Erbe tells the Des Moines Register](#) the decision "is a great victory for consumers, because the fact that many people nowadays are buying homes that were built for somebody else, as opposed to having homes that were custom-built."

The attorney for the contractor says the ruling could "flood the court with lawsuits" from homeowners and puts a significant burden on builders who are already hurting from the downturn in the home sales.

Some states do not allow subsequent buyers to sue the original contractor. But this case could turn the tide for a growing number of people expected to move into previously owned homes.

Brookfield man nets \$190k settlement over toxic mold claim

By Karen Ali, The News Times (3/6)

BROOKFIELD, CT -- A man who sued his landlord, claiming the home he and his family were renting was poisonous, has won \$190,000 in a settlement from the landlord's insurance company, according to a lawyer involved in the case.

Gary J. Tricarico, who now lives on Vale Road, won the settlement following a mediation session, according to New Milford lawyer Harry Cohen, who originally represented Tricarico in the case.

The lawsuit was filed against landlord Miles Lynch in August 2005.

Tricarico leased a property at 89 Clearview Drive from 2003 through 2005 as a home for his family and his architectural engineering business, Cohen said.

He lived there with his wife, Julie, and a daughter who was then 8 years old.

Tricarico claims the property was "infected with toxic mold, which was not made known to him at the time of leasing, and that he had been in excellent health at the time of leasing," according to Cohen.

Cohen said when Tricarico began to have swollen and painful joints and rapidly gained weight, he thought he was having a recurrence of Lyme disease, which he'd had in 1988. But treatment of his symptoms was not successful.

Cohen said Tricarico became suspicious the house was making him sick when his family also became sick.

"The mother and the daughter also felt the

symptoms, but they were not as severe," Cohen said.

Cohen said the mold had a "devastating effect" on Tricarico's health and "impacted his work," causing a "projected loss of income."

In the lawsuit, Tricarico claimed Lynch violated state law by failing to keep the property "in a fit and habitable condition."

Lynch's lawyer, Philip O'Connor of Hartford, could not be reached for comment Wednesday, nor could Lynch himself.

Tricarico declined to comment on the case.

"I'm not going to say anything because I had a confidentiality agreement," he said.

Mold effects

PEOPLE WITH SENSITIVITY TO MOLDS: For these people, mold exposure can cause such symptoms as nasal stuffiness, eye irritation, wheezing or skin irritation.

People who have serious mold allergies may have more severe reactions, including fever and shortness of breath. Severe reactions can occur among workers exposed to large amounts of mold in occupational settings, such as farmers who work around moldy hay.

People with chronic lung illnesses, such as obstructive lung disease, develop mold infections in their lungs.

Sources: State Department of Health and Human Services, Centers For Disease Control And Prevention



Special Pricing for POA members

ARMI DNA Mold Analysis – \$125

No supplies needed. Just use your vacuum cleaner.

Clean Air Labs™ offers DNA testing using methods developed by the Environmental Protection Agency (EPA).

Results are completely confidential.



Visit this POA link to find out why confidentiality is critical:
http://www.policyholdersofamerica.org/before_I_test.htm

TO RECEIVE DISCOUNTED PRICES, YOU MUST IDENTIFY YOURSELF AS A POA MEMBER!

www.cleanairlabs.com / Toll Free: (877) 542-0885 / Fax: (865) 483-9787
EPA license #417-07