

Allstate Wins Summary Judgment on Some Claims but Not Ensuing Loss

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HOUSTON — A federal judge in Texas on March 2 granted a home insurer summary judgment on mold contamination arising from uncovered or unproven causes but stayed a decision on the homeowners' claim for ensuing loss coverage pending a ruling on that issue by the Texas Supreme Court in *Fiess. Gordon v. Allstate Texas Lloyd's, et al.*, No. H-04-1061 (S.D. Texas).

On a question certified by the Fifth Circuit U.S. Court of Appeals, the Texas Supreme Court is considering whether a homeowner can claim coverage for mold under an ensuing loss provision, despite a mold exclusion, if the policy provides coverage for the underlying water damage (*Fiess v. State Farm Lloyd's*, 392 F.3d 802 [5th Cir. 2004]).

In this case, Joseph and Joyce Gordon sued after Allstate Texas Lloyd's denied coverage for water damage and mold growth under a standard HO-B homeowner's policy. The Gordons complained that mold was growing in their heating and air-conditioning system and that a plumbing leak caused water damage and mold in the master bedroom.

An Allstate investigator found no active plumbing leak, but concluded that an improperly sealed return was responsible for the problems in the air conditioner. Allstate denied the

claim on the grounds that there were no covered losses and that mold would be excluded in any case under a specific mold exclusion.

An inspector retained by the Gordons found additional mold damage in a ceiling under a bathtub, near a washing machine and in air conditioning ducts and surrounding wallboard. The company, PE Service Environmental, also found spore levels in the house to be significantly higher than levels outdoors.

Acting on Allstate's motion for summary judgment, U.S. District Judge Lee H. Rosenthal agreed that there was no evidence of a covered plumbing leak that could have caused mold growth under the bathtub or near a washing machine.

Allstate contended that any water leaking from the bathtub had spilled from a faulty escutcheon cover, and cited testimony from the Gordons' inspector that he did not see any active leaks or test for plumbing problems.

In ruling that there was no covered loss for the mold in the air, Judge Rosenthal also credited evidence that inspectors reported finding aspergillus and penicillium spores in the air, but stachybotrys by the washing machine and alternaria, ascospores and bi-

polaris/dreschlera in the bedroom ceiling sheetrock below the bathtub.

Judge Rosenthal also awarded summary judgment on the Gordons' bad faith cause of action, based on his findings on the contractual claims.

The judge said, however, that a ruling on the Gordons' claim that mold is an ensuing loss must await a ruling by the Texas Supreme Court in *Fiess*.

'Although this court has found fact issues as to whether mold damage to the master bedroom ceiling and to the garage wall near the washing machine resulted from covered losses, if, as Allstate argues, all mold damage is excluded from coverage, summary judgment would be appropriate on those claims as well,' Judge Rosenthal commented.

Paul E. Anderson Jr. of Houston represents the Gordons.

Stephen H. Lee of Doyle Restrepo in Houston represents Allstate Texas Lloyd's and Allstate Insurance Co.



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