

La. Insurer Unsuccessful in Effort to Overturn Coverage Ruling

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NEW ORLEANS — A Louisiana appellate court on March 24 denied a writ sought by Lexington Insurance Co. to overturn a trial court's holding that a mold endorsement in a standard homeowners' policy is ambiguous and cannot be used to limit mold coverage. *Panus v. Lexington Insurance Co., et al.*, No. 2003-18007 (La. Ct. App., 4th Cir. [La. Dist. Ct., Orleans Parish]).

Lexington's motion for rehearing was pending at the time of publication.

Lexington filed its petition for a remedial writ on Feb. 21 in Louisiana's Fourth Circuit Court of Appeal, asking the court to vacate a Jan. 24 order by Orleans Parish District Judge Carolyn W. Gill-Jefferson awarding summary judgment in part to Lexington's insured on the issue of a 'Limited Mold Related Coverage' Endorsement.

In her brief order, Judge Gill-Jefferson said she adopted the reasoning of the insured, Stephen B. and Kellie W. Panus, who termed the endorsement ambiguous. In the same order, the judge denied Lexington's motion for summary judgment.

Lexington argued in its Application for Supervisory and Remedial Writ that the trial court committed an error in law that should be overturned.

Rather than limiting coverage for mold, Lexington argued, the endorsement actually provides up to \$5,000 in additional coverage for mold damage that would not otherwise be covered. Judge Gill-Jefferson's order, if allowed to stand, would create the 'absurd result' of removing

that additional coverage, the carrier maintained.

'The policy of insurance continues to provide coverage for damage, including coincidental mold, to that property otherwise damaged by a Peril Insured Against,' Lexington argued. 'Thus, the policy of insurance and the Limited Mold Related Coverage Endorsement do not violate the directives of the Louisiana Department of Insurance and, in fact, provide more coverage to Respondents than is required by the Louisiana Department of Insurance.'

The dispute arose when the Panuses sought coverage for water and mold contamination in their New Orleans home after Tropical Storm Bill damaged the roof on June 30, 2003. The Panuses contend that the mold resulted from a covered peril and that the Louisiana Department of Insurance has clearly mandated that insurers must cover mold resulting from a covered event.

Lexington's adjuster offered a preliminary estimate of remediation costs of \$18,392, in October 2003. The Panuses also sought alternative living expenses. Lexington issued a check for \$5,000 for mold coverage, but the Panuses rejected the offer.

The Panuses filed a lawsuit on Dec. 2, 2003, seeking damages for the cost of remediating the house and personal property, for personal injury and additional penalties and attorney fees. They brought claims against Lexington, Vanderbrook Engineering Co. and its principal, Kevin Vanderbrook; and Oxford Insurance Agency.

The Panuses also allege bad faith on the part of Lexington.

Stephen Panus alleged that exposure to mold in the house caused or exacerbated his diarrhea and added risk to his 38-year-old wife's pregnancy and unborn child.

In their opposition brief to the Fourth Circuit, the Panuses argued that the policy endorsement limiting mold coverage is counter to Louisiana law and the Department of Insurance's position on mold exclusions.

The Panuses also cited a letter from Lexington's adjuster to the carrier saying he was confused as to whether the mold damage was covered or excluded and recommended that Lexington consult an attorney.

The Panuses argued that Lexington incorrectly relied on *Morgan v. Auto Club Family Insurance* ([La. App. 3 Cir. 4605]). The issue in *Morgan* was mold arising from a construction defect and policy language, rather an endorsement, the Panuses said.

The policy at issue in this case, they argued, is an all-risks policy providing coverage for ensuing losses, like that in *Dawson Farms L.L.C. v. Millers Mutual Fire Insurance Co.* (34,801 [La. App. 2 Cir. 8/1/01, 794 So.2d 949, 951 writ denied, 2001-2477 [La. 12/7/01], 803 So.2d 34, and writ denied, 2001-2497 [La. 12/7/01, 803 So. 2d 37]).

The *Dawson Farms* court and other Louisiana courts have reviewed similar policies and found that they provided coverage, the Panuses contended.

Robert G. Creely and Kelly A.

Humphreys of The Creely Law Firm and Madro Bandaries, both of Gretna, La., and Mark P. Glago of The Glago Law Firm in New Orleans represents the Panuses.

Robert I. Siegel and G. Lee Henman Jr. of Geiger, Laborde & Laperouse in New Orleans represent Lexington. Joseph C. Peiffer of Correro, Fishman, Haygood, Phelps, Walmsley & Casteix in New Orleans is counsel for Vanderbrook Engineering Co. Max J. Cohen of Lowe, Stein, Hoffman, Allweiss & Hauver in New Orleans is counsel for Oxford Insurance Agency.

