Ensuing Loss: Can It Provide Coverage?

By: Christopher J. Weiss
February 11, 2009

Most property insurance policies contain a faulty workmanship exclusion or a mold exclusion, which exclude loss caused by rust, rot, mold or other fungi. However, many policies contain provisions that provide coverage for ensuing losses. “Ensuing loss” has been defined as “a loss which follows as a consequence of some preceding event or circumstance.” *Fiess v. State Farm Lloyds*, 202 S.W. 3d 744, 749 (Tex. 2006) The issue of whether mold damage is covered under such policies is not settled in the United States.

Some jurisdictions, when faced with the question of whether mold damage should be covered, hold that there is coverage because it is an “ensuing loss.” In *Eckstein v. Cincinnati Ins*., 469 F. Supp. 2d 444 (W.D. Ky. 2007), the insured’s house experienced water damage due to a variety of construction-related issues. That water damage ultimately resulted in the house becoming contaminated with mold. The carriers took the position that the water damage and mold damage were losses that resulted from the faulty construction and were thus excluded under a faulty workmanship clause or mold exclusion clause. The court held that the ensuing loss provision restored coverage for the mold. The court recognized that “the policies here exclude loss caused by mold, rot, decay, etc. The policies do not exclude loss which is mold, rot, delay and the like.” *Id*. at 455. The court concluded that “when mold ensues from water damage which is covered under the policy, the mold damage is covered despite the exclusion.” *Id*.

Other jurisdictions, however, hold that the mold damage is not covered and refuse to apply the ensuing loss provision to trump the faulty workmanship or mold exclusion. For example, in *Fiess v. State Farm Lloyds*, 202 S.W. 3d 744 (Tex. 2006), the Texas Supreme Court held that mold was not covered. The policy contained an exclusion for “rust, rot, mold or other fungi.” The policy also contained an ensuing loss provision that provided that the policy did 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." *Id*. at 746. The Texas Supreme Court construed the ensuing loss provision to mean that the water damage itself must be the ensuing loss. The court held, "If we give to the language of the exception its ordinary meaning, we must conclude that an ensuing loss caused by water damage is a loss caused by water damage where the water damage itself is the result of a preceding cause." *Id*. at 749. As a matter of policy, the court refused to find that the ensuing loss provision could restore coverage for mold where it was expressly excluded elsewhere in the policy. The court held, "[W]hile the ensuing-loss clause that follows [the mold exclusion] may be difficult to parse, ... few ordinary people would imagine that it changes the meaning of the first sentence to read, 'We do too cover loss caused by mold.'" *Id*. at 747.

States such as New York and Florida have yet to construe ensuing loss provisions in the context of mold damage. However, in analyzing ensuing loss provisions generally, those states have seemingly adopted the Feiss approach, construing the ensuing loss provisions narrowly so as not to extend coverage to what the courts deem to be excluded under other provisions of the policy. For example, in *Montefiore Medical Center v. American Protection Insurance Company*, 226 F. Supp. 2d 470 (S.D.N.Y 2002), the court expressed concern that the "exclusion clause [would be] swallowed by the exception" were the ensuing loss provision read to cover a loss seemingly excluded elsewhere in the policy. In *Swire Pacific Holdings, Inc. v. Zurich Insurance Company*, 845 So. 2d 161 (Fla. 2003), the Florida Supreme Court considered whether expenditures to repair structural deficiencies flowing from design defects were excluded by a clause which excluded "loss or damage caused by fault, defect, error, or omission in design, plan or specification" or whether the damage was covered by the ensuing loss provision which read, "but this exclusion shall not apply to physical loss or damage resulting from such fault, defect, error or omission in design, plan or specification." *Id*. at 165. The court held that the exclusionary clause was not ambiguous and the ensuing loss provision would not be read to restore coverage. The court held that, "To hold otherwise would be to allow the ensuing loss provision to completely eviscerate and consume the design defect exclusion." *Id*. at 168.