NO. 03-20778

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD FIESS AND STEPHANIE FIESS,

Plaintiffs-Appellants

V.

STATE FARM LLOYD'S,

Defendant-Appellee

Appealed From The United States District Court
For The Southern District of Texas

BRIEF OF *AMICUS CURIAE*, POLICYHOLDERS OF AMERICA, IN SUPPORT OF REVERSAL

On Behalf of Policyholders of America:

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POLICYHOLDERS OF AMERICA'S STATEMENT OF INTEREST IN THIS APPEAL

Policyholders of America ("POA") is a nonprofit organization formed to act as a watchdog over the insurance industry, to protect the rights of insurance consumers and to provide information regarding the claims process. POA's members are insurance consumers. At last count, POA has over 1.6 million homeowner-members, including approximately 500,000 Texas resident homeowners. POA provides numerous services to its members, including:

- Guiding policyholders through the claims process;
- Sponsoring scientific research in specific target areas of concern to policyholders;
- Working to achieve lower premiums that better reflect actual coverage received; and
- Endorsing and supporting political candidates who support the rights of insurance consumers.

POA is interested in this appeal because many of its homeowner members have or may have claims arising under the same HOB Policy involved in this case. In addition, POA, together with the world's largest broker and risk manager, will be offering insurance coverage under similar terms as those contained in the HOB policy at issue within the next year.

POA files this *Amicus* brief in support of reversing the trial court's summary judgment and to specifically address the coverage issues raised under the Texas Homeowner's "Form B" Insurance Policy.

CERTIFICATE OF CONFERENCE

Pursuant to FED. R. APP. P. 29(a), POA conferred with counsel for Appellants and Appellees and all parties have given consent to the filing of this *Amicus Curiae* brief.

BRENDAN K. MCBRIDE

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STATEMENT OF THE CASE[1]

This appeal arises out of a summary judgment rendered in favor of Appellee, State Farm Lloyd's ("State Farm"), by United States Magistrate Judge Marcia Crone in a case involving an insurance coverage dispute and bad faith claims handling. Appellants, Richard and Stephanie Fiess, suffered significant water and ensuing mold damage to their home and personal property in Deer Park, Texas. (CR 0086).[2] Magistrate Crone's opinion and order in *Fiess v. State Farm Lloyd's*, Cause No. H-02-1912, is published at 2003 U.S. Dist. Lexis 10962 (S.D. Tex. June 3, 2003).

Appellants were successors in interest under a Texas "Form B" Homeowner's Insurance policy issued by State Farm. *Id.*, 2003 U.S. Dist. Lexis 10962 at *1; (CR 0140-0129). In the summer of 2001, Appellants' home was damaged from flooding caused by Tropical Storm Allison. In assessing damage to the home after the storm, Mr. and Mrs. Fiess learned for the first time of extensive mold and fungal growth caused by water damage that predated the flooding from the storm. *Id.*, 2003 U.S. Dist. Lexis 10962 at *2-4.

Richard and Stephanie Fiess made a claim for the water and mold damage to their home under both their flood policy and the HOB policy with

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[1] Pursuant to FED. R. APP. P. 29 (c), *Amicus Curiae* relies on the full Statement of Facts as set forth in Appellants' principal briefing.

[2] References to the record will be cited as "(CR ####)." The pages in each volume of the record are sequentially numbered from back to front so that, although page citations may seem backwards, these citations are consistent with the page numbering in the appellate record.

State Farm. After State Farm refused to provide coverage under the HOB policy, Appellants sued State Farm for breach of contract, violation of Texas' Deceptive Trade Practices Act ("DTPA"), violation of the Texas Insurance Code and fraudulent misrepresentation. *Id.*, 2003 U.S. Dist. Lexis 10962 at *6; (CR 0087-0082).

State Farm moved for summary judgment based on the flood exclusion, the mold exclusion, and under the doctrine of concurrent causes. (CR 0177). The Magistrate granted summary judgment for State Farm, holding: (1) there was no coverage under the HOB policy for mold damage unless it was mold damage caused by water damage caused by mold damage (*Id.*, 2003 U.S. Dist. Lexis 10962 at *24-30); and, (2) even if there was coverage for mold, Appellants failed to produce any evidence segregating the loss between damage caused by the flood and damage caused by other water intrusions in the home (*Id.*, 2003 U.S. Dist. Lexis 10962 at *31-34). On the basis of her rulings on the coverage issue, the Magistrate also dismissed the remaining claims for DTPA and Insurance Code violations and bad faith.

It is from the Magistrate's summary judgment that the Richard and Stephanie Fiess appeal to this Court.

ARGUMENT AND AUTHORITIES

The most common homeowners insurance policy in Texas, and the policy purchased from State Farm by Appellants – Texas Homeowner's "Form B" ("HOB Policy") – provides coverage for the water and ensuing mold damage to a home and its contents under either of two clauses. First, the policy specifically repeals exclusions a-h (including the "mold exclusion" in exclusion f), for those damages caused by the accidental discharge or leaking of water from plumbing, HVAC or appliances. *Balandran v. Safeco Ins. Co.*, 972 S.W.2d 738 (Tex. 1998). Second, exclusion f contains an "ensuing loss" clause that provides coverage for "ensuing loss caused by . . . water damage."

If an insured's loss was caused by covered water damage – and specifically by water damage caused by accidental discharge or leaking water from plumbing, HVAC, or appliances – the HOB Policy provides coverage under either of these two applicable clauses. Consequently, the Magistrate erred in finding that Appellants' loss was not covered. First, she did not consider the coverage provided under the policy for damage caused by accidental discharge of water from plumbing and HVAC. Thus, the Magistrate erred by applying the limited "mold exclusion," contrary to the holding of the Texas Supreme Court in *Balandran*.

Second, the Magistrate erred in finding that the "ensuing loss" clause does not provide coverage for mold caused by water damage. Several Texas courts have construed the ensuing loss clause to reinsert coverage for mold

and rot even when there exists a limited exclusion in the policy for these losses. In light of the language of the clause itself, and the fact that Texas courts have interpreted the clause in a manner inconsistent with and contrary to the Magistrate's interpretation, the clause is, at the very least, ambiguous. As such, the ensuing loss clause must be construed in favor of finding coverage for an insured's loss caused by water damage – including ensuing mold damage.

I. Any Ambiguity In An Insurance Policy Must Be Construed In Favor Of Coverage.

Texas law supplies specific rules for the interpretation of insurance policies. Insurance policies are contracts and are subject to the same rules of construction as other contracts. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995); *National Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 520 (Tex. 1995); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). A court reviewing an insurance contract must read all parts of the contract together striving to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative. *Balandran*, 972 S.W.2d at 741; *Beaston*, 907 S.W.2d at 433.

If the written instrument is worded so that it can be given only one reasonable construction, it will be enforced as written. *Am. Economy Ins. Co. v. Tomlinson*, 12 F.3d 505, 507 (5th Cir. 1994); *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex.1984). But if a policy is subject to two or more reasonable interpretations, it is ambiguous as a matter of law. *See National Union*, 907 S.W.2d at 520. Moreover, the Court must resolve any

ambiguity in an insurance policy by adopting "the construction that most favors the insured." *Tomlinson*, 12 F.3d at 507; *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 667 (Tex.1987); *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533 S.W.2d 344, 349 (Tex.1976). Specifically, all ambiguities regarding exclusions in the policy *must* be resolved in favor of coverage:

> "Where an ambiguity involves an exclusionary provision of an insurance policy, [a reviewing court] 'must adopt the construction . . . urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.'"

Balandran, 972 S.W.2d at 741 (*quoting National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)); *see also Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977).

With these principles in mind, the simple issue before the Court is whether the policy can reasonably be interpreted to provide coverage for water damage and ensuing mold damage as occurred in Appellants' home. For the reasons discussed below, such losses to a dwelling and personal property are covered under either of two clauses in a Texas HOB Policy. Therefore, the Magistrate erred in granting summary judgment on the coverage issue.

II. Under *Balandran*, The Limited "Mold Exclusion" Does Not Apply To Damage Caused By Discharge Of Water From Plumbing or HVAC.

The Magistrate failed to address the coverage provided under a Texas HOB Policy for damage caused by the accidental discharge of water from plumbing, HVAC or appliances pursuant to the Texas Supreme Court's

opinion in *Balandran*. The limited mold exclusion under the HOB Policy on which the Magistrate relied does not apply because leaking water from plumbing and HVAC caused mold damage to Appellants' home.

A. The Exclusion Repeal Provision Under Coverage B (Personal Property) Applies To Coverage A (Dwelling)

When it comes to coverage for damage to the dwelling ("Coverage A"), the Texas HOB Policy is an "all risks" policy; under Coverage A, it provides coverage for *any loss* to the dwelling unless specifically excluded by one of the enumerated exclusions of Section I. (CR 0138, 0137). Unlike the "all risks" coverage for loss to the dwelling, "Coverage B" only insures personal property against twelve enumerated perils in the policy. The ninth of these enumerated perils reads:

> Accidental Discharge, Leakage or Overflow of Water or Steam from within a plumbing, heating or air conditioning system or household appliance.
>
> A loss resulting from this peril includes the cost of tearing out and replacing any part of the building necessary to repair or replace the system or appliance. But this does not include loss to the system or appliance from which the water or steam escaped.
>
> Exclusions 1.a through 1.h under Section I Exclusions do not apply to loss caused by this peril.

(CR 0138) Thus, the ninth insured peril under Coverage B specifically repeals exclusions a-h *if* the loss is caused by accidental discharge, leakage or overflow from plumbing, HVAC or an appliance. In *Balandran*, the Texas Supreme Court held that this same exclusion repeal clause was

ambiguous and therefore applied to repeal exclusions a-h for both Coverage A and Coverage B. *Id.*, 972 S.W.2d at 741-42.

In *Balandran*, the insureds purchased an HOB Policy from Safeco Insurance Company of America. Although the HOB Policy at issue in *Balandran* was the 1991 version, the relevant provisions are the same as those at issue in this appeal. The Balandrans filed a claim against Safeco for damage to their home caused by an underground plumbing leak which caused soil expansion and damage to the foundation. *Id.*, 972 S.W.2d at 739. At trial, the jury found that the structural damage was caused by the plumbing leak and awarded the Balandrans $ 66,500. The trial court granted Safeco's motion for judgment as a matter of law based on exclusion h of the policy - regarding settling, cracking, bulging, etc. of foundations. *Id.* (*See* CR 0137).

The Balandrans appealed to this Court. While the appeal was pending, this Court issued its opinion in *Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258 (5th Cir. 1997), holding that an identical policy did not provide coverage for foundation damage from a plumbing leak despite the exclusion repeal provision located in Coverage B. *Id.*, 115 F.3d at 1262. After the Texas Department of Insurance issued a bulletin vigorously disagreeing with the Court's decision in *Sharp*,[3] this Court certified the coverage issue in the Balandrans' appeal to the Texas Supreme Court.

[3] The Texas Department of Insurance Bulletin referenced in *Balandran*, No. B-0032-97 regarding the exclusion repeal provision in Coverage B, was attached to Appellants'

the dwelling, so a repeal of that exclusion that only applied to property damage under the policy would be unnecessary. *Id.*, 972 S.W.2d at 741. The court refused to interpret the policy in a manner that would give no effect to certain terms of the contract. *Id.*

In arriving at its decision, the *Balandran* court gave considerable weight to the interpretation of the clause by the "Board of Insurance," the predecessor to the Insurance Commissioner. *Id.* The policy at issue in *Balandran* had been changed by the Board in 1990 by moving the exclusion repeal clause at issue from the "exclusion" section and placing it into the Coverage B section immediately after the itemized coverage for loss caused by accidental discharge, leakage or overflow of water from plumbing, HVAC or appliances. *Id.* At the time this change was made, the Board understood the new version of the policy it was about to promulgate would not reduce the scope of coverage provided to Texas homeowners under the HOB Policy. *Id.* Thus, the exclusion repeal provision was located in Coverage B to simplify the policy - not to restrict the scope of the exclusion repeal to personal property coverage. *Id.*

As indicated by the Texas Supreme Court, the HOB Policy provides coverage for loss to the dwelling and personal property caused by water leaks from plumbing, HVAC and appliances. As detailed below, and supported in the record, the loss was to the dwelling and personal property in part because of the leakage of water from plumbing and HVAC.

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record. (CR 0188-0185).

Consequently, the Magistrate erred in concluding there was no coverage under the policy because she did not consider that the limited "mold exclusion" is expressly repealed for certain losses.

B. Appellants' Damages Were Caused In Part By Accidental Discharge Of Water From Plumbing and HVAC

The record evidence establishes that at least some of the water damage at the home was caused by events that are specifically exempt from the mold exclusion pursuant to *Balandran*. Appelants' expert, Dr. Pearce, performed an analysis of the water damage in the house and determined that water damage and mold had resulted, at least in part, from water leaks from the kitchen plumbing and discharge of water from the HVAC system. (CR 0198-0197). Based on this evidence, the Magistrate erred in finding no mold coverage under the policy.

III. The Ensuing Loss Clause Provides Coverage For Mold Caused By "Water Damage."

In addition to the coverage for loss caused by the discharge of water from plumbing and HVAC, the HOB Policy also provides coverage for mold caused by "water damage" under the "ensuing loss clause" located after exclusion f. (CR 0137). The ensuing loss clause provides as follows: "We do cover ensuing loss caused by . . . water damage . . . if the loss would otherwise be covered under this policy." (CR 0137).

As explained below, numerous Texas courts have interpreted such "ensuing loss" language to reinsert coverage into the policy despite the limited exclusions. The Texas Department of Insurance also maintains that

the HOB Policy provides coverage for mold damage caused by water damage under the ensuing loss clause. (CR 0191) ("The Department believes that the mold coverage comes from the 'ensuing loss' language contained in exclusion 1.f. which provides an exception to the exclusion for mold or other fungi if the mold loss ensues from a covered peril . . . claims for water damage have been covered since at least 1978").

The Magistrate read additional language into the policy that would allow coverage only if the "water damage" itself was a loss that "ensued" from one the specific excluded perils. Not only is that a strained reading of the plain language of the policy, but it does not foreclose an alternative reasonable interpretation – namely that the policy covers any damages "caused by . . . water damage" regardless of whether these ensuing losses would otherwise fall within exclusion f. As noted above, Coverage A under the HOB Policy is "all risk." *Balandran*, 972 S.W.2d at 739; (CR 0138). As long as the water damage at issue is not expressly excluded, the losses that ensue from covered "water damage" are covered under the ensuing loss clause- even if they are of a type (such as mold) listed in the limited exclusion. Hence, the ensuing loss clause reinserts coverage in the all risks policy over the exclusion.

The reasonableness of this interpretation is apparent from the many Texas courts that have interpreted the same or similar clauses in the manner suggested by the Fiesses, POA and the TDI. *See e.g. Home Ins. Co v. McClain*, No 05-97-01479-CV, 2000 Tex. App. Lexis 969 (Tex. App. –

Dallas 2000, no pet.)(not designated for publication); *Nat. Fire Ins. Co. of Pitt. v. Valero Energy Corp.*, 777 S.W.2d 501, 506 (Tex. App. – Corpus Christi 1989, writ denied); *Merrimack Mut. Fire Ins. Co. v. McCafree*, 486 S.W.2d 616 (Tex. Civ. App. – Dallas 1972, writ ref'd n.r.e.); *Allstate Ins. Co. v. Smith*, 450 S.W.2d 957, 959 (Tex. Civ. App. – Waco 1970, no writ); *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. – Houston[1st Dist.] 1965, no writ); *see also Flores v. Allstate Texas Lloyd's Co.*, No. M-02-410, 2003 U.S. Dist. Lexis 13403 (S.D. Tex July 16, 2003); *but see Zeidan v. State Farm Fire & Cas. Ins. Co.*, 960 S.W.2d 663, 666 (Tex. App. – El Paso 1997, no writ); *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138, 139 (Tex. Civ. App. – San Antonio 1975, writ ref'd).

A. The "Ensuing Loss" Clause Reinserts Coverage for Mold "Caused By Water Damage."

The simple question before the Court is whether it is reasonable to interpret the ensuing loss clause to provide coverage for mold damage caused by water damage, or whether the Magistrate's interpretation is the only possible interpretation. For starters, given that several Texas courts have disagreed with the Magistrate's reasoning on this issue, her interpretation cannot be the only reasonable interpretation. If the interpretation suggested by the insureds, POA and the Texas Department of Insurance is at least reasonable, the Court must find that such losses are covered under the policy. *See Tomlinson*, 12 F.3d at 507.

Magistrate Crone opines that the ensuing loss must result from a specific exclusion named in exclusion f. Numerous Texas courts have

disagreed with her on this issue. Rather, courts have interpreted the same and similar clauses to provide coverage for an excluded peril if it is caused by water damage – the same interpretation urged by the insureds and adopted by the Texas Department of Insurance. For example, in *Holm*, the court found coverage for rot damage to the floor of the insureds' home caused by water leaking from a shower stall built without a shower pan. *Id.*, 393 S.W.2d at 366. The insurer argued that the loss was not covered because "exclusion i" excluded "loss caused by inherent vice, deterioration and rot." *Id.* "Exclusion i" contained an ensuing loss clause, however, under which the exclusion would not apply "to ensuing loss caused by water damage – provided such loss would otherwise be covered under the policy." *Id.* In finding coverage for the loss under this ensuing loss clause, the court reasoned:

> *The loss which ensued or followed the water damage grew out of and was caused by water damage. Hence the exception or exclusion to the exclusion (i) should apply.* The water damage in this case would be covered by the policy since it is not within exclusion (d) which excludes certain other kinds of water damage. *It thus comes within the proviso in the exception to the exclusion in that the water damage loss would otherwise be covered under the policy.*

Id. (emphases added). Under *Holm*, a loss caused by water damage is covered under the ensuing loss clause unless caused by a type of water damage that is otherwise specifically excluded from the "all risks" policy.

Many Texas courts have adopted and followed the rationale of *Holm* when applying the same or similar clauses. In *McClain*, the Dallas Court of Appeals found coverage for mold under the same ensuing loss clause at

issue in this appeal. The McClains suffered loss to their home from water leaking through a defective roof. *Id.*, 2000 Tex. App. Lexis 969 at *2. The McClains notified their insurer that mold and fungus growth resulting from the leaking water had rendered the home uninhabitable. *Id.* In the trial court, the McClains were granted partial summary judgment on the issue of coverage for the mold damage. The judgment was challenged on appeal based on the same "mold exclusion" relied on by the Magistrate in this case. In affirming the partial summary judgment, the court held that the ensuing loss clause provides an exception to the exclusion for mold if it is caused by covered water damage. *Id.* at *11.

The court logically explained that "ensuing losses" means "losses which follow or come afterward as a consequence." *Id.* at *9. "To be an ensuing loss caused by water damage, the mold and fungi would necessarily have to follow or come afterward as a consequence of the water damage." It concluded: "Here, the water from the leaking roof pooling in the crawl spaces caused the mold and fungi . . . Consequently, the loss that followed the water damage was caused by water damage . . . the exclusion for mold and fungi does not apply." *Id.* at *10-11. This interpretation makes sense and is a perfectly logical and reasonable interpretation of the policy.

In *McCaffree*, the court held, as this Court did in *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939, 941 (5th Cir. 1965), that the water-related loss at issue was not "water damage" under the policy and was, therefore, not covered. *McCaffree*, 486 S.W.2d at 620. However, the court interpreted the

ensuing loss clause in the same manner advocated by the insureds: "to be ensuing loss caused by water damage, such would necessarily have to follow or come afterwards as a consequence." *Id.*

In *Smith*, the Waco Court of Appeals also followed the *Holm* court's interpretation of the ensuing loss clause and found coverage for rot caused by water leaking from defective pipes. *Smith*, 450 S.W.2d at 959. The court applied the plain policy language to find that rot caused by water damage fell within the scope of the ensuing loss clause. *Id.*; *see also Nat'l Fire Ins.*, 777 S.W.2d at 506 ("However, there is coverage when the exclusion is qualified by the terms of the policy to allow recovery where the otherwise excluded peril is itself caused by a covered peril."); *Adrian Assoc. v. Nat. Surety Corp.*, 638 S.W.2d 138, 141 (Tex. App. – Dallas 1982, writ ref'd n.r.e.).

Finally, in *Flores*, United States District Court Judge Randall Crane not only adopted the interpretation suggested by the *Holm* court, but went on to specifically criticize Magistrate Crone's opinion in *this* case. *Id.*, 2003 U.S. Dist. Lexis 13403 at *8, n3. The court explained: "mold damage to the dwelling is covered as a distinct loss if it ensues from an otherwise covered loss under the Policy." *Id.* at *8. Since the policy covered plumbing and air conditioning leaks under its "all risks" coverage, the ensuing mold caused by the water damage was covered as well. *Id.*

Judge Crane further explained that the Magistrate's opinion in the case at bar relied on a mistaken reading of this Court's opinion in *Yates*. *Id.*

at n3. In *Yates*, the Court held that naturally occurring condensation was not "water damage" under the policy. "Rot" was excluded and did not fall under the ensuing loss clause because it was not caused by "water damage." *See also McCaffree*, 486 S.W.2d at 620. Explaining how the ensuing loss clause works, this Court noted:

> A likely case for the application of the clause would be *if water . . . coming from a burst pipe flooded the house and in turn caused rust or rot; loss from rust or rot so caused would be a loss ensuing on water damage.*

Yates, 344 F.2d at 941 (emphasis added).

Despite the Magistrate's assertion that *McClain* "departs from [a] long line of authority in Texas" (2003 U.S. Dist. Lexis 10962 at *28), the reasonableness of the interpretation adopted by the *McClain* court is actually supported by a long line of authority both in Texas courts and, indeed, *this Court's own interpretation of the clause.*

B. The Insureds' Interpretation Is *Per Se* Reasonable Because Numerous Texas Courts Have Actually Adopted It

Although there is ample reason for this Court to conclude that Magistrate Crone erred in finding no coverage for mold under an HOB Policy, the Court's responsibility in reviewing this case is not to determine whether the Magistrate erred in her interpretation of the policy, but *whether the interpretation offered by the insureds is reasonable.* If the insureds' interpretation of the ensuing loss clause is reasonable, the Court must adopt that interpretation and construe the policy in favor of coverage. *See Balandran*, 972 S.W.2d at 741; *Tomlinson*, 12 F.3d at 507. When different

courts have already adopted the insureds' interpretation in written opinions, this Court gives great weight to such opinions in finding that the interpretation is reasonable. *See State Farm Fire & Cas. Ins. Co. v. Keegan*, 209 F.3d 767, 771 (5th Cir. 2000); *see also State Farm Fire & Cas. Ins. Co. v. Reed*, 873 S.W.2d 698, 701 (Tex. 1993). Since at least six Texas state courts of appeal panels, one Texas federal district court applying Texas law, and this Court (in *Yates*), have all interpreted the ensuing loss clause to work in the manner suggested by the Appellants, POA, and the Texas Department of Insurance, State Farm's position that this interpretation is unreasonable is – itself – unreasonable.

Indeed, in both *Reed* and *Keegan* the alternative reasonable interpretations relied on by the courts were contained in opinions from non-Texas courts. *See Keegan*, 209 F.3d at 771; *Reed*, 873 S.W.2d at 701. Here, the case is even stronger for the insureds' interpretation of the clause. Appellants' interpretation has already been adopted by numerous Texas courts, a federal district court in Texas (applying Texas law), and even this Court. Furthermore, as noted above, it is the same interpretation adopted by the Texas Department of Insurance. (CR 0190). To find that Appellants' interpretation of the ensuing loss clause is unreasonable, would be to find that the reasoned opinions of eight different courts interpreting ensuing loss clauses under Texas law (including this Court), and the opinion of the Texas

agency charged with approving the form of, and promulgating, the HOB Policy[4], were likewise unreasonable.

C. The Magistrate's Interpretation of Ensuing Loss Clause Renders The Policy Language Meaningless.

Since the Court must adopt any reasonable interpretation of the policy that favors the insured, it is not necessary for the Court to reach the validity of the Magistrate's construction of the ensuing loss clause. However, even if the Court were to consider the Magistrate's interpretation, the judgment could not stand because the Magistrate's interpretation violates one of the fundamental canons of contract construction – it renders portions of the policy language meaningless.

The Magistrate determined that the ensuing loss clause only provided coverage for loss caused by water damage if the water damage itself was caused by one of the excluded perils in exclusion f.[5] Thus, under the Magistrate's construction, the ensuing loss clause only covers loss caused by mold caused by water damage caused by mold. Aside from turning the plain language of the clause on its head and reading into the clause language that simply is not there, this interpretation renders other ensuing loss clauses in the policy meaningless or nonsensical. Not only is Appellants'

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[4] *See e.g. Balandran*, 972 S.W.2d at 741 (explaining that the policy forms for the Texas HOB Policy are reviewed, approved and promulgated by the Agency).

[5] As the Magistrate stated: "Here it is undisputed that the water damage was not caused by the mold; instead, the mold was caused by the water damage. Therefore, the mold damage is excluded under the ensuing loss provision of the Policy." 2003 U.S. Dist. Lexis 10962 at *25 (*citing, inter alia, Harrison v. USAA Ins. Co.*, 2001 Tex. App. Lexis 2516 at *2 (Tex. App. – San Antonio 2001)(not designated for publication); *Lambros*, 530 S.W.2d at 141).

interpretation of the clause reasonable, it is the Magistrate's construction of the ensuing loss clause that is unreasonable.

1. Rules of Contract Interpretation: Must Give Meaning to All Policy Language

A court reviewing an insurance contract must read all parts of the contract together striving to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative. *Balandran*, 972 S.W.2d at 741; *Beaston*, 907 S.W.2d at 433. Generally, the parties to a contract mean every clause to have some effect. *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983); *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617 (Tex. 1954). Thus, the fundamental rule of contract interpretation is to examine and consider the entire writing to harmonize and give effect to all provisions - rendering none of them meaningless. *See Tennessee Gas Pipeline Co. v. Fed. Energy Reg. Comm.*, 17 F.3d 98, 103 (5th Cir. 1994); *City of Galveston v. Galveston Mun. Police Dep't.*, 57 S.W.3d 532, 538 (Tex. App. – Houston[14th Dist.] 2001, pet. denied).

2. If The Ensuing Loss Clause Is Limited to the Excluded Peril It Follows, Other Ensuing Loss Clauses in HOB Policy Would Be Rendered Meaningless

Rather than read the ensuing loss clause to reinsert coverage over a limited exclusion, the Magistrate would limit the ensuing loss to that caused by water damage *only if* the water damage was itself caused by one of the specific perils listed in exclusion f. The problem with this interpretation is

that it would render other ensuing loss clauses in the policy nonsensical and virtually meaningless. Consider the following examples:

(a) The Magistrate's interpretation would render meaningless the ensuing loss clauses following exclusion g, which reads:

> We do not cover loss caused by animals or birds owned or kept by an insured or occupant of the residence premises.
>
> We do cover ensuing loss caused by collapse of 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.

(CR 0137) Following the Magistrate's logic, the ensuing loss clause that follows exclusion g would only provide coverage for the collapse of a building if it was caused by animals or birds owned or kept by the insured. Thus, unless the insured actually kept animals or birds of such size as to cause the building to collapse, there is no coverage. That interpretation is nonsensical, but it does follow the Magistrate's logic.

(b) The Magistrate's interpretation would also render meaningless and nonsensical the ensuing loss clause following exclusion i, which provides:

> We do not cover loss caused by or resulting from flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water or spray from any of these whether or not driven by wind.
>
> We do cover ensuing loss caused by theft or attempted theft or any act or attempted act of stealing.

(CR 0137) Again, following the Magistrate's logic, the policy only provides coverage for loss caused by theft *if such theft was caused by flooding or overflow of surface waters.* Under this logic, there would be coverage for theft only when thieves were washed into the home by floodwater.

Clearly, the parties could not have intended such a ridiculous interpretation of these ensuing losses clauses. The ensuing loss clauses in the HOB Policy were not meant to be construed in such a manner as to tie their effect solely to the exclusions they follow. Much like the exclusion repeal provision addressed in *Balandran*, the mere location of the ensuing loss clauses after particular exclusions is not determinative of the effect of those clauses. *See id.*, 972 S.W.2d at 741.

The Court must examine the entire policy to determine the intent of the parties and harmonize and interpret the policy provisions so that all have meaning. Any ambiguity must be resolved in favor of the insured. *See Tomlinson*, 12 F.3d at 507.

D. Appellants' Damages Are Covered Under The Ensuing Loss Clause.

Under the reasonable interpretation of the ensuing loss clause, any loss (including mold) caused by covered water damage is covered under the HOB Policy. The damage to the Appellants' home is covered under the ensuing loss clause because it was caused by water damage that is not otherwise excluded under the policy. *See McClain*, 2000 Tex. App. Lexis

969 at *10-11; *Flores*, 2003 U.S. Dist. Lexis 13403 at *8, n3; *see also Holm*, 393 S.W.2d at 366.

The record establishes that the mold in the house was caused by water damage resulting from water leaking through the roof jacks, flashing around the chimney, water leaking through shingles, leaking water from the kitchen plumbing, a grout leak in the kitchen, water leaking from the HVAC, and water leaking around two windows. (CR 0198-0197). Since the "all risks" HOB Policy does not expressly exclude any of this water damage, the mold caused by the water damage is covered under the ensuing loss clause.

CONCLUSION

The Magistrate erred in concluding there was no coverage for mold under the version of the Texas HOB Policy purchased by Appellants. The Policy provides coverage under either of two provisions. First, claims for mold caused by water leaking from plumbing and HVAC are covered because the limited "mold exclusion" is expressly repealed for these types of losses. Second, claims for mold caused by water damage are expressly covered under an ensuing loss clause unless the water damage that caused the mold is expressly excluded from the "all risks" coverage of the HOB Policy. Since the record contains evidence that the mold damage in Appellants' home was caused by water damage emanating from leaking plumbing and HVAC, roof leaks, grout leaks and water damage from leaking windows and doors, the mold damage is covered under the Policy and summary judgment should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to FED. R. APP. P. 32(a)(7), this Brief of *Amicus Curiae*, Policyholders of America, In Support of Reversal has been sent by paper copy and computer readable disk this 3rd day of November 2003 via FedEx to:

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Pursuant to Fed. R. App. P. 32(a)(7)(C) and 5TH CIR. R. 32.3, the undersigned certifies this brief complies with the type-volume limitations of 5TH CIR. R. 32(a)(7)(B).

1. Exclusive of the exempted portions in FED. R. APP. P. 32(a)(7)(B)(iii), the brief contains 5,758 words.
2. The brief was prepared in proportionally spaced typeface using Microsoft Word 2000, Garamond 14 pt. for text and Garamond 12 pt. for footnotes.
4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in FED. R. APP. P. 32 (a)(7), may result in the Court striking the brief and imposing sanctions against the person signing the brief.

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