UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 03-20778

RICHARD FIESS and STEPHANIE FIESS

Plaintiffs – Appellants

v.

STATE FARM LLOYDS

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. H-02-CV-1912

APPELLANTS' BRIEF

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APPELLANTS REQUEST ORAL ARGUMENT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT ON ORAL ARGUMENT

Appellants request oral argument. This case presents complex issues of fundamental importance regarding Texas HO-B insurance. This widely used policy is at issue in numerous other cases pending in this Circuit and accordingly merits oral argument. Further, the Magistrate's opinion in this case has been contradicted by a published decision by Judge Crane in the McAllen Division, creating a split of authority within the Districts in the Fifth Circuit. Only through a thorough presentation can these critical issues be effectively examined.

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STATEMENT OF JURISDICTION

The District Court had diversity jurisdiction pursuant to 28 U.S.C. §1332.

This Court has jurisdiction under 28 U.S.C. §1291 because a final judgment was entered in this matter on June 3, 2003. Docket No. 33, page 313. The Fiesses filed a timely motion to alter or amend the judgment on June 13, 2003. Docket No. 34, page 336. The District Court denied the motion to alter or amend the judgment on July 1, 2003, prior to its submission date and prior to the Fiesses' timely filed reply to State Farm's response. Docket No. 36, page 353. The Fiesses timely filed this appeal on July 30, 2003. Docket No. 38, page 363

STATEMENT OF THE ISSUES

1. The District Court erred in holding that mold damage is excluded from coverage in the Fiesses' homeowners' insurance policy. The exclusion does not apply to a loss caused by water leaks from plumbing, heating or air conditioning system or household appliances.

2. The District Court erred in holding that mold damage is not covered under the ensuing loss provision of the Fiesses' homeowners' insurance policy. The provision (1) does not require a "preceding cause" or (2) it is ambiguous and should have been interpreted in favor of providing coverage.

3. The District Court erred in holding that the Fiesses failed to meet their initial burden to create a genuine issue of material fact regarding the concurrent causation doctrine. The summary judgment evidence shows that the mold damage was caused in large part by covered losses. Apportionment is a jury issue.

STATEMENT OF THE CASE

The Fiesses filed suit against State Farm in state district court in Harris County, Texas on May 3, 2002, seeking damages they suffered as a consequence of State Farm's denial of their mold claim. Docket No. 1, pages 10-24. State Farm removed the case to federal district court in the Southern District of Texas, Houston Division, on May 20, 2002. Docket No. 1, page 30.

On June 3, 2003, Magistrate Crone granted State Farm's motion for summary judgment, holding that the mold exclusion in the Fiesses' insurance policy excluded the mold damage in issue from coverage, and that the ensuing loss exception to the mold exclusion did not bring mold damage back into coverage. Docket Nos. 32 and 33, pages 271-313. Furthermore, Magistrate Crone held that, regardless of the coverage issues, the Fiesses' failed to satisfy the doctrine of concurrent causation in that they could not segregate the amount of mold damage that ensued from the covered losses from that resulting from non-covered losses. Docket Nos. 32 and 33, pages 271-313. The Fiesses filed their motion to alter or amend the judgment pursuant to Rule 59 on June 13, 2003, Docket No. 34, page 314-336), which was denied prior to its submission date and prior to the Fiesses' timely filed reply to State Farm's response thereto. Docket Nos. 36 and 37, pages 353-361. The Fiesses filed their notice of appeal on July 30, 2003. Docket No. 38, page 363.

STATEMENT OF FACTS

The Fiesses reside in a modest home located at 2437 Henderson Lane, Deer Park, Texas. Docket No. 25, page 153. The home was insured by a homeowner's policy of insurance issued by State Farm (State Farm Policy No. 53-G7-4617-5). Docket No. 25, page 153.

The Fiesses' home was damaged by tropical storm Allison during the summer of 2001. Docket No. 25, page 153. Approximately four inches of water flooded the Fiesses' home during the storm. Docket No. 26, pages 222, 226. The Fiesses immediately swept out the floodwater and removed the wet carpet, but they had to convince State Farm to allow them to remove the sheetrock. Docket No. 26, page 221.

During the remediation process following the flood, the Fiesses discovered various and voluminous forms of toxic mold throughout their home. Docket No. 25, page 153. Without the Fiesses' knowledge, the mold had been growing over a long period of time before the flood. Docket No. 25, page 153. The mold made their home unlivable. Docket No. 25, page 153.

The Fiesses filed a claim with State Farm for repair of the damage caused by the toxic mold (State Farm Claim No. 53-Q373-195). Docket No. 25, page 153. While State Farm made some payment to the Fiesses for flood damage and the

repair of certain leaks, it refused to compensate the Fiesses fully for their damages caused by the mold. Docket No. 25, page 153.

SUMMARY OF ARGUMENT

This is a dispute over coverage. The Fiesses filed a claim for mold damage caused by plumbing leaks that occurred prior to the flood. The Magistrate erred in holding that the claim is not covered due to an exclusion for mold damage.

The Fiesses claim is covered by the "ensuing loss provision," an exception to the mold exclusion. The Texas Department of Insurance, this Court and several Texas courts have determined that a reasonable construction of the ensuing loss provision provides coverage for mold caused by water damage.

The mold exclusion does not apply to mold caused by plumbing leaks. Even if the ensuing loss provision does not cover mold caused by other types of water damage, the policy still covers the mold that was caused by plumbing leaks.

In addition to mold caused by plumbing and other leaks, flooding caused mold in the Fiess house. Flood damage is not covered by the policy. The Magistrate erred by holding that the Fiesses cannot, as a matter of law, show any mold caused exclusively or primarily by plumbing leaks and holding that the Fiesses' claim is barred by doctrine of concurrent causation. The Fiesses produced summary judgment evidence of damage unrelated to the flood, and apportionment of the flood and non-flood damage is an issue of fact for a jury.

ARGUMENT

1. The District Court erred in holding that mold damage is excluded from coverage in the Fiesses' homeowners' insurance policy. The exclusion does not apply to a loss caused by water leaks from plumbing, heating or air conditioning system or household appliances.

Standard of Review.

The appellate court reviews a summary judgment *de novo*, applying the same standard as the District Court. *Estate of Martineau v. ARCO Chemical Co.*, 203 F.3d 904, 912 (5th Cir. 2000). Further, the proper interpretation of a contract is a question of law subject to *de novo* review. *Fina, Inc. v. ARCO*, 200 F.3d 266, 268 (5th Cir. 2000). In Texas, whether a statutorily-required insurance policy covers a certain loss is a legal question that is reviewed *de novo. Ranger Ins. Co. v. Ward*, 107 S.W.3d 820, 825 (Tex. App. – Texarkana 2000, motion pending). Courts "must adopt the construction ... urged by the insured as long as the 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 v. Safeco Ins. Co. of America,* 972 S.W.2d 738, 741 (Tex. 1998).

Mold Exception Does Not Apply to Plumbing Leaks.

The Magistrate noted that "plumbing leaks, heating, air conditioning and ventilation (HVAC) leaks" caused mold damage to the Fiesses' house. Memorandum and Order at 3, Docket No. 32, page 310 (page 1 in Westlaw). The

mold exclusion, exclusion 1(f) in the standard Texas HOB policy, "does not apply to loss caused by the accidental discharge, leakage or overflow of water or steam from within a plumbing, heating or air conditioning system or household appliance." *Balandran,* 972 S.W.2d at 742.

Nonetheless, the Magistrate held that "the mold damage sustained by the Fiesses is excluded from coverage under the Policy's mold exclusion." Memorandum and Order at 13, Docket No. 32, page 300 (page 7 in Westlaw). The Magistrate erred in holding that Section 1(f) removes from coverage any loss caused by mold, even though the mold was caused by plumbing leaks. Memorandum and Order at 11, Docket No. 32, page 302 (page 6 in Westlaw). Exclusion 1(f) is in the policy attached to State Farm's motion for summary judgment. Docket No. 25, page 137.

Balandran interpreted Coverage B (Personal Property) in the standard Texas HO-B policy. *Id. at* 740. The policy attached to State Farm's motion is the same policy interpreted in *Balandran*. Docket No. 25, page 138. Coverage B includes as a covered peril, "Accidental Discharge, Leakage or Overflow of Water or Steam from within a plumbing, heating or air conditioning system or household appliance." *Id.* The policy further provides that "Exclusions 1.a through 1.h under Section I Exclusions do not apply to loss caused by this peril." The Texas Supreme Court decided this language means exactly what it says: exclusions 1.a

through 1.h do not apply to damage caused by plumbing leaks. *Id.* at 742. "In other words, the exclusion repeal provision, on its face, applies to any 'loss,' not just personal property losses." *Id. at* 740. Therefore, the Magistrate erred in relying on exclusion 1(f) because it does not apply to the Plaintiffs' loss from plumbing and HVAC leaks.

2. The District Court erred in holding that mold damage is not covered under the ensuing loss provision of the Fiesses' homeowners' insurance policy. The provision (1) does not require a "preceding cause" or (2) it is ambiguous and should have been interpreted in favor of providing coverage.

Standard of Review.

The appellate court reviews a summary judgment *de novo*, applying the same standard as the District Court. *Estate of Martineau v. ARCO Chemical Co.*, 203 F.3d 904, 912 (5th Cir. 2000). Further, the proper interpretation of a contract is a question of law subject to *de novo* review. *Fina, Inc. v. ARCO*, 200 F.3d 266, 268 (5th Cir. 2000). In Texas, whether a statutorily-required insurance policy covers a certain loss is a legal question that is reviewed *de novo. Ranger Ins. Co. v. Ward*, 107 S.W.3d 820, 825 (Tex. App. – Texarkana 2000, motion pending). Courts "must adopt the construction ... urged by the insured as long as the 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.

Ensuing loss provision.

As discussed above, exclusion 1(f) for mold does not apply to the plumbing leaks in this case, so loss due to plumbing leaks is covered by the policy. Further, **all** loss caused by water damage, including loss caused by roof leaks, is covered under the policy through the ensuing loss provision. Exclusion 1(f) states in its entirety:

> f. We [State Farm] do not cover loss caused by:
>
> (1) wear and tear, deterioration or loss caused by any quality in property that causes it to damage or destroy itself.
> (2) rust, rot, **mold** or other fungi.
> (3) dampness of atmosphere, extremes of temperature.
> (4) contamination.
> (5) rats, mice, termites, moths or other insects.
>
> 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 the policy.

Memorandum and Order at 10-11; Docket No. 32, page 303-02 (emphasis added; page 6 in Westlaw). The last paragraph of the exclusion is called the "ensuing loss provision." Memorandum and Order at 14; Docket No. 32, page 299 (page 7-8 in Westlaw). The ensuing loss provision is an exception to exclusion 1(f). *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. -- Houston 1965, no writ). An exception to an exclusion brings the loss back into coverage. *Telepak v. United Services Auto. Ass'n,* 887 S.W.2d 506, 507 (Tex. App. -- San Antonio 1994, writ den'd).

Therefore, the ensuing loss provision provides coverage for perils otherwise excluded by exclusion 1(f). Different courts have interpreted the ensuing loss provision in two different ways, and this split in authority is based on whether the ensuing loss provision requires a "preceding cause."

The better reasoned line of cases interprets the ensuing loss provision to provide coverage for losses described in the ensuing loss provision (loss caused by water damage), even if the loss (mold) is listed in the exclusion. *E.g. Flores v. Allstate Texas Lloyd's Co.,* 278 F. Supp. 2d 810 n. 3 (S.D. Tex. 2003). Therefore, correctly reasoned cases require two elements to establish coverage through the ensuing loss provision: (1) a loss (such as mold) (2) that is caused by water damage.[1] In other words, these cases hold that the ensuing loss provision covers **mold caused by water damage**.

The Magistrate follows a different line of cases that require an additional element of "preceding cause." Memorandum and Order at 13, Docket No. 32, page 300 (page 7 in Westlaw). The "preceding cause" requirement originated in

[1] The ensuing loss clause also requires that the "loss would otherwise be covered under the policy." "Plumbing and air conditioning leaks and overflows are presumably included under the "all risk of physical loss" language of Coverage A, because they are not otherwise specifically excluded in Section I Exclusions." *Flores,* 278 F. Supp. 2d at ___ (page numbers were not yet available when this brief was submitted; this quote is from headnote 4). Roof leaks and window leaks are likewise not specifically excluded and would likely fall under the windstorm coverage.

Lambros v. Standard Fire Ins. Co., 530 S.W.2d 138, 141 (Tex. Civ. App. -- San Antonio 1975, writ ref'd). *Lambros* reasoned that:

> Assuming that plaintiffs' loss resulted from the action or presence of water beneath the surface, it nevertheless cannot be contended that such loss was an "ensuing loss" caused by water damage. Such a conclusion would involve "a backward application of the ensuing loss exception." Gollaher, Op. cit., 24 Sw. L.J. at 651. Such a construction, in effect, reads "ensuing" out of the exception. 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**.

Lambros, 530 S.W.2d at 141 (emphasis added). Therefore, *Lambros* requires the "ensuing loss" to have two causes, a proximate cause and preceding cause. First, the "ensuing loss" must be caused by water damage, so water damage is the proximate cause of the loss. *Id.* Second, the water damage must be the result of a "preceding cause." *Id.*

Lambros further holds that the "preceding cause" must be one of the types of damage enumerated in the exception, such as mold.[2] *Id.* Therefore, *Lambros* and its progeny require three elements to establish coverage through the ensuing loss provision: (1) a loss (2) that is caused by water damage (3) where the water damage itself is the result of a "preceding cause" enumerated in exclusion 1(f),

[2] *Lambros* construed "exclusion k", an exclusion for foundation damage analogous to exclusion 1(f) for mold. *Lambros*, 530 S.W.2d at 139, 141.

such as mold. In other words, *Lambros* holds that the ensuing loss provision covers **water damage caused by mold**.

State Farm claims that Plaintiffs "improperly read into *Lambros* a requirement for proximate and preceding causes. *Lambros,* however, **never** makes such a dichotomy. In fact, *Lambros* never mentions the term 'proximate cause' in its analysis." Docket No. 35, page 348 (emphasis in original). State Farm tries to obfuscate its reliance on the "preceding cause" element from *Lambros* because close examination reveals that the "preceding cause" requirement simply makes no sense.

It is disingenuous for State Farm to claim *Lambros* "**never** makes such a dichotomy." *Lambros* says an "ensuing loss caused by water damage is a loss **[1] caused by water damage** where the water damage itself is the result of **[2] a preceding cause.**" *Lambros*, 530 S.W.2d at 141 (emphasis added). That is two different causes. The "preceding cause" comes before the water damage causes a loss. *Lambros* does not use the term "proximate cause," but it requires two different causes occurring in sequence, and the cause that stands next in causation to the effect is the proximate cause. BLACK'S LAW DICTIONARY 1103 (1979).

Lambros and its progeny have rephrased the "preceding cause" element in several ways, which result in the following holdings by the Magistrate in this case:

1. "For coverage to be restored via the ensuing loss clause, an otherwise covered loss must result or ensue from the excluded loss." Memorandum and Order at 14, Docket No. 32, page 299 (page 7 in Westlaw).

2. "Accordingly, 'ensuing loss caused by ... water damage' refers to water damage which is the result, rather than the cause, of one of the types of damage enumerated in exclusion f, in this case, mold." Memorandum and Order at 14, Docket No. 32, page 299 (page 8 in Westlaw).

3. "To qualify for the exception, ensuing water damage must follow from one of the types of damage enumerated in exclusion (f)." Memorandum and Order at 14, Docket No. 32, page 299 (page 8 in Westlaw).

4. "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." Memorandum and Order at 14, Docket No. 32, page 299 (page 8 in Westlaw).

The "preceding cause" requirement can be rephrased in terms of requiring that the water damage referenced in the ensuing loss provision must "ensue from", "follow from", "result from" or be "caused by" mold or some other enumerated peril, but each of these statements is merely another way of saying that the mold or other enumerated peril must be a "preceding cause" of the water damage. *See Lambros*, 530 S.W.2d at 141. However it is reworded, the Magistrate's ruling on the ensuing loss provision is based exclusively on *Lambros'* requirement 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.* State Farm tries to deny

it, but the "preceding cause" requirement of *Lambros* is the foundation of every argument State Farm makes about the ensuing loss provision.

The Texas Supreme Court has not considered whether the ensuing loss provision requires a "preceding cause," and Texas appellate courts are split on this issue. "Accordingly, this Court must make an *Erie* determination regarding Texas law on this subject." *Niehous v. Arkansas Glass Container Corp.*, 154 F. Supp. 2d 1006, 1011 (S.D. Tex. 2001). Therefore, this Court must determine whether the insured (Fiesses) have advanced a reasonable construction of the ensuing loss clause. If so, this Court "must adopt the construction ... urged by the insured as long as the 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.

The interpretation of the ensuing loss provision advanced by the Fiesses, without a "preceding cause" requirement, is reasonable because:

(1) The ordinary meaning of "ensuing loss" does not involve a preceding cause;

(2) The better reasoned authority, including the Fifth Circuit, does not interpret the ensuing loss provision to require a preceding cause;

(3) The ensuing loss provision is ambiguous and must be interpreted to provide coverage;

(4) Exclusions do not apply to preceding causes of loss; and

(5) The Texas Department of Insurance ("TDI") rejected the "preceding cause" requirement.

(1) The ordinary meaning of "ensuing loss" does not involve a preceding cause.

The Magistrate does not discuss whether the interpretation of the ensuing loss provision advanced by the insured is reasonable. Memorandum and Order at 10-17, Docket No. 32, page 303-296 (pages 6-9 in Westlaw). The Magistrate rejects "the opinion relied upon by the Fiesses, *Home Ins. Co. v. McClain.*"[3] Memorandum and Order at 16, Docket No. 32, page 297 (pages 9 in Westlaw). The Magistrate does not specifically say *McClain* is not reasonable, but it is implicit in the Magistrate's ruling that the "preceding cause" requirement of *Lambros* is the **only** reasonable construction of the ensuing loss provision. However, analysis of *Lambros* does not support that conclusion.

Lambros reasons that the "ordinary meaning" of "ensuing loss" refers to a "preceding cause", in addition to the proximate cause. Several cases have adopted the holding of *Lambros,* but the cases never analyze its logic or lack thereof. The "ordinary meaning" reasoning of *Lambros* remains the only rationale for the "preceding cause" requirement.

Numerous cases refer to an "ensuing loss," "ensuing accident" or some other "ensuing" event caused by a prior event. Except for *Lambros* and its progeny, **none** of these cases infer that a preceding cause, in addition to the proximate cause,

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[3] *McClain* is not the only opinion supporting the Fiesses' interpretation of the policy. *See* page 17-18 infra.

is needed to result in an "ensuing" event. *E.g. Henderson v. Kibbe,* 97 S. Ct. 1730, 1734 n. 7 (1977) (defendants' actions must be a sufficiently direct cause of the ensuing death); *Messer v. L. B. Foster Co.,* 254 F.2d 412, 415 (5th Cir. 1958) (sole proximate cause of the ensuing injury); *Lone Star Cab v. Catham,* 449 S.W.2d 790 (Tex. Civ. App. – Houston [14th Dist.] 1970, no writ) (taxicab driver's failure to yield right-of-way was a proximate cause of ensuing accident); *Erving v. Reistine,* 448 S.W.2d 770 (Tex. Civ. App. – Waco 1969, writ ref'd n.r.e.) (failure to keep a lookout was a proximate cause of the ensuing fire).

None of these cases assume that an "ensuing" event necessarily implies a more remote or preceding cause, in addition to the proximate cause. One proximate cause is sufficient for subsequent events to "ensue" from the proximate cause. Therefore, the ordinary meaning of "ensuing" does not imply the existence of a "preceding" cause.[4]

In fact, the notion that the word "ensuing" implies a preceding cause, in addition to the proximate cause, is entirely unique to *Lambros* and the cases citing *Lambros*. State Farm claims the *Lambros* interpretation is "ordinary," but State Farm cannot cite a single other example of this "ordinary" meaning. Docket No.

[4] "Ensuing" may sometimes refer to events that result from more than one cause. *E.g. Connell v. Rosales,* 419 S.W.2d 673, 676 (Tex. Civ. App. – Texarkana 1967, no writ) (negligence of gas company and builder were each a proximate cause of ensuing damages, but neither cause preceded the other). However, a remote or preceding cause is never **required** in order for events to "ensue." One proximate cause is enough.

35, page 347. *Lambros'* "preceding cause" meaning of "ensuing" is apparently an "ordinary meaning" that has been used only once in Texas jurisprudence. This Court should not hold that this unusual interpretation of "ensuing" is the **only** reasonable meaning.

(2) The better reasoned authority, including the Fifth Circuit, does not interpret the ensuing loss provision to require a preceding cause.

The Magistrate erred because the "preceding cause" interpretation is not the only reasonable interpretation of the ensuing loss provision. The Magistrate cites *Lambros* and cases that follow *Lambros*, but the Magistrate's only attempt to explain why *Lambros* makes any sense is based on its interpretation of *Aetna Casualty and Surety Co. v. Yates,* 344 F.2d 939, 941 (5th Cir. 1965).

In *Yates*, the crawl space under the house did not have enough vents, so the trapped air "produced condensation of moisture and subsequent rotting." *Id. Yates* distinguished between water and "water damage." Condensation is water, but it is not "the direct intrusion of water conveyed by the phrase 'water damage.'" *Yates* held that the condensation was not water damage, but clearly explained that real water damage would be covered:

> A likely case for application of the clause would be if water used in extinguishing a fire or 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.

Id. This analysis does not require a "preceding cause." *Yates* considered this construction to be reasonable, so this Court has already determined that a reasonable interpretation of the ensuing loss provision does not require a "preceding cause."

Yates explains that the effect of considering **condensation** to be water damage "would be that a clause intended to narrow the exclusions for 'rust, rot, mould or other fungi' and 'dampness of atmosphere' would very nearly destroy them." *Id.* The Magistrate disregarded the distinction between water and water damage, and held that *Yates'* holding as to condensation applies equally to the Fiesses' plumbing leaks. Memorandum and Order at 15, Docket No. 32, page 298 (page 8 in Westlaw).

The Magistrate's reliance on *Yates* has already been repudiated. *Flores v. Allstate Texas Lloyd's Co.,* 278 F. Supp. 2d at n. 3 ("This Court declines to follow the reasoning of *Fiess v. State Farm Lloyds."*). *Flores* held

> Like the *Yates* court, this Court construes the mold exclusion as precluding coverage for mold occurring naturally or resulting from a non-covered event, but not for mold "ensuing" from a covered water damage event.

Id. In addition to *Flores,* other Texas courts have likewise construed an ensuing loss provision to provide coverage for mold and other excluded damages, regardless of whether they are caused by a "preceding cause." *Home Ins. Co. v. McClain,* No. 05-97-01479-CV, 2000 WL 144115, at 3 (Tex. App.-Dallas Feb. 10,

2000, no pet.) (not designated for publication); *Merrimack Mut. Fire Ins. Co. v. McCaffree*, 486 S.W.2d 616, 620 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) ("For the [fungi] loss in this case to be recovered by the policy it must have been 'ensuing loss' caused by water damage per se."); *Allstate Ins. Co. v. Smith*, 450 S.W.2d 957, 958–59 (Tex. Civ. App.—Waco 1970, no writ) (affirming judgment that "deterioration" exclusion did not apply where water damage caused deterioration); *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. -- Houston 1965, no writ); *Cf. Nat'l Fire Ins. Co. of Pittsburgh v. Valero Energy Corp.*, 777 S.W.2d 501, 506 (Tex. App. – Corpus Christi, writ denied) ("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").

(3) The ensuing loss provision is ambiguous and must be interpreted to provide coverage.

The Magistrate recognized that "[I]f an insurance policy is ambiguous and is susceptible to more than one reasonable interpretation, under the 'contra-insurer rule,' it will be construed in favor of the insured." Memorandum and Order at 8, Docket No. 32, page 305 (page 4 in Westlaw). As discussed above, two different interpretations of the ensuing loss provision (with and without "preceding cause") have been reasonably advanced. Either the provision covers:

(1) a loss (such as mold) (2) that is caused by water damage,

or

(1) a loss (2) that is caused by water damage (3) where the water damage itself is the result of a "preceding cause" enumerated in exclusion 1(f), such as mold.

The Magistrate states that "the plain and unambiguous language of the exclusion expressly excludes from coverage any loss resulting from mold." Memorandum and Order at 13, Docket No. 32, page 300 (page 7 in Westlaw). That is true; the language of the exclusion is unambiguous. However, the Magistrate did not specifically state whether the ensuing loss provision (the exception to the exclusion) is or is not ambiguous. Nonetheless, the Magistrate granted State Farm's motion for summary judgment based on the "preceding cause" element, so it is implicit in the Magistrate's ruling that the ensuing loss provision has only one meaning and that meaning requires the "preceding cause."

A contract is not ambiguous "merely because the parties advance conflicting contract interpretations." *Kelley-Coppedge, Inc. v. Highlands Ins. Co.,* 980 S.W.2d 462, 465 (Tex.1998). However, a contract is ambiguous if "after applying the applicable rules of construction, a contract term is susceptible of two or more reasonable interpretations." *Id.* As discussed above, numerous courts have applied rules of construction to the ensuing loss provision and have reached different results. This split of authority regarding the ensuing loss provision supports a

finding that the policy is susceptible to more than one reasonable interpretation, and is therefore ambiguous. *State Farm v. Keegan,* 209 F.2d 767, 771 (5th Cir. 2000); *State Farm Fire & Cas. Co. v. Reed,* 873 S.W.2d 698, 701 (Tex.1993). It must therefore be interpreted to provide coverage. *Balandran*, 972 S.W.2d at 741.

(4) Exclusions do not apply to preceding cause of loss.

The ensuing loss provision is an exception to an exclusion. *Lambros,* 530 S.W.2d at 141. It clearly states that the exception applies to losses that arise from a specific proximate cause, water damage. *Lambros* infers that this clearly identified proximate cause must be the result of a preceding or remote cause. However, an exclusion for itemized risks (such as mold) applies "only when such risks are a proximate as distinguished from an indirect or remote cause of the loss." *Stroburg v. Insurance Co. of North America*, 464 S.W.2d 827, 831-32 (Tex. 1971); *See also Blaylock v. American Guarantee Bank Liability Ins. Co.*, 632 S.W.2d 719, 722 (Tex. 1982).

A remote or indirect cause must be clearly identified by stating that the exclusion applies when the excluded risk "directly or indirectly" causes the loss. *Stroburg*, 464 S.W.2d at 831. Otherwise, a policy "does not go so far as to require the court to search beyond the active, efficient, procuring cause to a cause of a cause." *Id.* at 830-31. *Stroburg* and *Blaylock* narrowly construe exceptions to coverage and do not allow a remote cause to deny coverage. *Blaylock*, 632 S.W.2d

at 722. An exclusion applies only when the excluded peril is a proximate cause of loss.

The same logic applies to the ensuing loss provision, an exception to an exclusion. This Court must construe the exception to the exclusion in order to provide maximum coverage. *Burditt v. West American Ins. Co.*, 86 F.3d 475, 477 (5th Cir. 1996). The exception to exclusion applies when the covered peril (water damage) is the proximate cause of the loss. This Court should not limit coverage by requiring a remote cause that is not explicitly stated in the ensuing loss provision.

If the ensuing loss provision required mold to be a preceding cause, it should have clearly and unequivocally stated the requirement. For example, the exception to the exclusion in *Burditt v. West American Ins. Co.* stated:

> This policy does not insure against ... Loss by ... wet or dry rot; mould; ... this Exclusion, however, shall not apply to loss by ... water damage, and glass breakage, **caused by perils excluded in this paragraph**;

Id. at 476. This policy, in *Burditt,* states a "preceding cause" requirement in plain language. The water damage must be caused by mold or another peril in the exclusion. Without such clear language, the Court should not deny coverage by inferring the requirement of a remote or preceding cause.

(5) The Texas Department of Insurance ("TDI") rejected the "preceding cause" requirement.

This Court can consider the opinion of the TDI when deciding whether the Fiesses' interpretation of the policy is reasonable. *Balandran,* 972 S.W.2d at 741. The Texas Department of Insurance does not interpret the ensuing loss provision to require a "preceding cause."

Under the *Erie* doctrine, this Court must give the same weight to the position of the TDI that the Texas Supreme Court would give. The Texas Supreme Court has relied on the TDI position when construing standard policies and the Texas Insurance Code. *Schaefer v. American Mfrs. Mut. Ins. Co.* __ S.W.3d __ n. 5 (Tex. 2003); *Argonaut Insurance Company v. Baker*, 87 S.W.3d 526, 531 (Tex. 2002). The Texas Supreme Court noted that the TDI is the agency charged with regulating the business of insurance and was the agency trusted to ensure that the Texas Insurance Code and other laws regarding insurance are executed. *Id.* In *Argonaut*, the Texas Supreme Court gave the TDI's position "serious consideration." *Id.* (citing *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)).

In addition to the Texas Supreme Court, the Fifth Circuit and the United States Supreme Court both have recognized and employed the long-standing principle of giving controlling weight and deference to administrative interpretations. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 475 (5th Cir. 2002).

The TDI plainly stated that the ensuing loss provision provides coverage for mold damage that ensues from a covered peril, such as plumbing and HVAC leaks. *See Texas Department of Insurance Commissioner's Order No. 01-1105* (Adoption Order dated November 28, 2001; Docket No. 26, page 191-189); *see also Texas Department of Insurance Commissioner's Bulletin No. B-0032-97* (Docket No. 26, page 188-1185). The Magistrate gave **no** consideration to the TDI.

3. The District Court erred in holding that the Fiesses failed to meet their initial burden to create a genuine issue of material fact regarding the concurrent causation doctrine. The summary judgment evidence shows that the mold damage was caused in large part by covered losses. Apportionment is a jury issue.

Standard of Review.

The appellate court reviews a summary judgment *de novo*, applying the same standard as the District Court. The decision must be reversed if there is any genuine issue of fact material to the resolution of the case in dispute. *Estate of Martineau v. ARCO Chemical Co.*, 203 F.3d 904, 912 (5th Cir. 2000).

Issue of fact

The Magistrate held that the Fiesses cannot satisfy the doctrine of concurrent causation. The Magistrate explained:

> [1] Although the Fiesses' expert, Dr. Pearce belatedly attributed 70% of the mold damage to water events other than the flood, [2] the Fiesses have adduced no evidence that would provide a reasonable basis for distinguishing mold caused by the flood from mold caused by non-flood events. [3] Dr. Pearce conceded at deposition that there was mold on every wall, stud, baseboard, and base plate throughout the residence caused by the flood. Thus, there is insufficient evidence from which a distinction can be reasonably drawn between any mold damage caused by the flood, which is not covered under the policy, and any other mold arguably covered under the Fiesses' interpretation of the policy.

Memorandum and Order at 19, Docket No. 32, page 294 (page 10 in Westlaw). Therefore, the Magistrate based the decision on three distinct grounds: (1) Dr. Pearce's opinion is not evidence; (2) there is no basis to distinguish between mold caused by the flood from mold caused by non-flood events, and (3) the flood damaged the entire house. The decision must be reversed if there is an issue of fact as to any of these three points.

(1) Dr. Pearce's Opinion

Dr. Pearce testified that 70% of the mold damage was from non-Allison related water events. Docket No. 26, page 195. State Farm never raised a *Daubert* challenge to Dr. Pearce's opinions. The testimony of Dr. Pearce was sufficient to satisfy the doctrine of concurrent causation, and it should have been construed in the light most favorable to Richard and Stephanie Fiess. *See Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996).

The doctrine of concurrent causation requires only that the plaintiff present *some* evidence founded upon *some* reasonable basis upon which the jury can allocate the damage attributable to the covered peril (in this case, leaks). *See Wallis v. United Servs. Auto. Ass'n.*, 2 S.W.3d 300, 302-304 (Tex. App. -- San Antonio 1999, pet. denied). Richard and Stephanie Fiess did just that. Dr. Pearce's testimony regarding the downward direction of insect trails, watermarks and the like, formed a reasonable basis for his opinion that 70% of the mold damage was attributable to leaks. Docket No. 26, page 195.

The Magistrate belittled Dr. Pearce's credibility, but that is a question for the jury. The Magistrate should not determine on summary judgment whether the expert testimony is credible. *See State Farm v. Rodriguez*, 88 S.W.3d 313, 319 (Tex. App. – San Antonio 2002, pet. denied) (expert's characterization of his testimony as a "wild-ass guess" did not make his opinions unreliable). Dr. Pearce's testimony, although unimpressive to the Magistrate, was sufficient to survive summary judgment. The Magistrate is required to view the evidence in the light most favorable to the non-movant. Dr. Pearce's testimony stated a question of fact for the jury. Apportionment is a jury question. *See Rodriquez,* 88 S.W.2d at 320.

State Farm has overemphasized Dr. Pearce's testimony that Allison brought mold with it. For example, State Farm cited Dr. Pearce's deposition at Page 72,

lines 19-25, for the proposition that he could not segregate the mold damage from flood versus non-flood events. Docket No. 26, page 145. However, if one keeps reading to Page 73, line 15, it becomes evident that leaks (not flood waters) more significantly contributed to the mold damage.[5] Docket No. 26, page 144. It was this line of thinking that led Dr. Pearce to the ultimate conclusion that 70% of the mold damage was from non-Allison related water events (covered losses).

(2) Distinguishing Between Flood and Non-Flood Damage

The Magistrate stated that the Fiesses have adduced no evidence that would provide a reasonable basis for distinguishing mold caused by the flood from mold caused by non-flood events, but the Magistrate does not discuss any specific evidence. In fact, the summary judgment evidence provides numerous examples of specific non-flood damage in the Deposition of Dr. Pearce. *See* Exhibit "C" to

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[5] While looking at a particular picture of a room in the Plaintiffs' home, Dr. Pearce testified as follows: "You can't – in this case (referring to the particular picture), you really can't differentiate. ***But*** the only concern I have about this is the extent – or one of the concerns I have about this is the extent of water damage to this stud. **So there was water routinely coming in to this, to this wall cavity.** And because of the amount of mold growth in this particular wall cavity, I suspect that water had been coming from the top for quite some time and had pooled, had kept this sill plate, this baseplate wet. And that's what contributed to this more significant growth of mold on this particular wall. This is typical of what, of what I saw all across the wall. So there's more water coming into this wall than any other wall in the, that I saw, in the house. **And that tells me that there's a routine source of water intrusion, a regular source of water intrusion.**" Deposition of Dr. Pearce, Page 72, line 23 through Page 73, line 15 (emphasis and parenthetical added); Docket No. 26, page 145 & 209.

Plaintiff's Response to State Farm's Motion for Summary Judgment. Docket No. 26, page 218-196. For example, Dr. Pearce explained that:

1. Specific damage was due to water leaking down on a regular basis over a long period of time. Deposition of Pearce at 56-57; Docket No. 26, page 215.
2. There was evidence of mold caused by water seeping from a window. Deposition of Pearce at 69; Docket No. 26, page 210.
3. The evidence showed long-standing water damage resulting in significant mold growth due to the structure being wet for a long time. Deposition of Pearce at 79-80; Docket No. 26, page 208-07.
4. Water running down the studs from a roof leak due to a consistent presence of water, **not a flood**. Deposition of Pearce at 84; Docket No. 26, page 203.

State Farm acknowledged that some mold was caused by leaks unrelated to the flood. *See* Deposition of Richard Fiess at 33:7-34:13; Docket No. 26, page 219. S*ee also* Richard Fiess' Response to Interrogatory No. 12 (Docket No. 26, page 183); *see also* State Farm Document #000244 ("MOLD DUE TO PLUMBING LEAKS IN HOME"); Docket No. 34, page 321. In fact, the attorney for State Farm summarized seven separate areas of water intrusion unconnected to Tropical Storm Allison. Deposition of Pearce at 102-03; Docket No. 26, page 198-97. It is disingenuous for State Farm to claim there is no evidence of damage unrelated to Tropical Storm Allison when its own attorney listed seven examples.

(3) Extent of Flood Damage

The Magistrate noted that "there was mold on every wall, stud, baseboard, and base plate throughout the residence caused by the flood," but did not

specifically explain why that evidence justifies summary judgment. Memorandum Opinion at 19, Docket No. 32, page 294 (page 10 in Westlaw). The Magistrate appears to imply that (1) there is no part or component of the house that was not damaged by the flood and (2) that the policy cannot cover damage to any stud, baseboard or other component of the house damaged by the flood. Neither of these assertions is true.

First, the flood did not damage every component in the home. The flood did not reach the ceiling of the Fiesses' home, but water intrusion from faulty roofing and flashing around the chimney caused damage to the ceiling. *See* Deposition of Pearce at 63-64. Water damage to the ceiling could not by any stretch of the imagination be attributed to the flood. Summary judgment was improper for this reason alone. Even if there was no other damage unconnected to the flood, the Fiesses would still be entitled to recover for water damage to the ceiling.

Second, the Magistrate appeared to imply that the policy cannot cover damage to any specific stud, baseboard or other component of the house touched by the flood because flood damage is not covered. **That is not Texas law.** Where a loss occurs due to a cause within coverage of a policy, coverage is not defeated under Texas law because an excluded risk contributes to the loss. *Dow Chemical Co. v. Royal Indem. Co.*, 635 F.2d 379, 388 (5th Cir 1988). Therefore, non-flood water damage is still a covered loss, even if flood water contributed to the damage.

The insured may still recover when a non-covered peril contributes to the damage by (1) securing jury findings that the damage was caused solely by the insured peril, **or** (2) segregating the damage caused by the insured peril from that caused by the excluded peril. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971). It may be impossible to segregate damage done to a specific stud, baseboard or other component of the house. For example, the whole stud must be replaced when part of it is damaged. However, the loss is still covered if the plaintiff proves that the dominant cause of the loss is the covered risk. *Id.*

Under the doctrine of concurrent causation, when covered and excluded perils combine to cause an injury, the insured must present "some" evidence affording the jury a "reasonable" basis upon which they can allocate the damages. *Lyons v. Millers Casualty Insurance Company of Texas*, 866 S.W.2d 597, 601 (Tex. 1993); *Wallis,* 2 S.W.3d at 303. "This does not mean that the insured has to segregate out such covered damages by percentages or any other method." William J. Chriss, *Homeowners Insurance – Coverage and Conditions, Residential Construction Law*, University of Texas School of Law CLE, September 4-5, 2003, Chapter 12, page 12 (Tab 5 in Record Excerpts).

As discussed above, the Fiesses went beyond their burden under the doctrine of concurrent causation by providing a percentage that was more than mere subjective belief or unsupported speculation. Docket No. 26, page 195; *see*

Wallis, 2 S.W.3d at 320. In *Wallis*, the Court held that the homeowners' expert was not required to assign precise percentages. *Wallis*, 2 S.W.3d at 320. However, the expert in *Wallis* went above the call of duty and assigned percentages (as did Dr. Pearce). *Wallis*, 2 S.W.3d at 318 (assigning 100% of the damage to covered losses). State Farm's expert in *Wallis*, naturally, opined that 0% of the damage could be assigned to covered losses. *Id.* The jury considered the testimony of both experts and found that 25% of the damage could be assigned to covered losses. Based on the jury verdict of 25% covered losses, the court rendered judgment for the homeowners. *Id.* Apportionment is a jury question, and even 25% non-flood damage would be sufficient for a judgment in favor of the Fiesses.

PRAYER

WHEREFORE, Appellants pray the judgment be reversed and remanded for new trial and for such other relief which is just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that a true and correct copy of Appellants' Brief was served, along with an electronic copy of Appellants' Brief, on all counsel of record, by first class mail, postage prepaid, on October 31, 2003, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2.7(b)(3), THE BRIEF CONTAINS 7,373 **WORDS.**

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING **MICROSOFT WORD XP** IN **TIMES NEW ROMAN, FONT SIZE 14.**

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