UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

RICHARD FIESS and STEPHANIE FIESS,	§	
	§	
Plaintiffs,	§	
	§	
versus	§	CIVIL ACTION H-02-1912
	§	
STATE FARM LLOYDS,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

I. Introduction

Pending before the court is Defendant State Farm Lloyds's ("State Farm") Motion for Summary Judgment (#25). State Farm seeks summary judgment on Plaintiffs Richard Fiess ("Mr. Fiess") and Stephanie Fiess's ("Mrs. Fiess") (collectively, "the Fiesses") claims for violations of the Texas Deceptive Trade Practices Act ("DTPA") and the Texas Insurance Code, breach of express and implied warranties, breach of contract, fraud/intentional misrepresentation, and unconscionability. Having reviewed the pending motion, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that summary judgment is warranted.

II. Background

The Fiesses bring suit against State Farm for mold damage to their home located at 2437 Henderson Lane, Deer Park, Harris County, Texas. They are successors in interest to a homeowner's insurance policy ("the Policy") issued by State Farm. In the summer of 2001, their home sustained flooding and other damage as the result of Tropical Storm Allison. The Fiesses made a claim under their flood insurance policy with State Farm Fire and Casualty Company

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("Fire & Casualty") for damages caused by the flood. Fire and Casualty paid them $48,626.00 under the flood policy for repairs to their home and for replacement of personal property damaged by the flood. The Fiesses are not making a claim under the flood policy.

According to Mr. Feiss's deposition testimony, he and his wife began removing sheetrock one week after the flood and discovered black mold growing throughout the residence. Mold was growing in the dining room on a wall adjoining the kitchen in an area "behind the refrigerator and against the door frame" and in the middle bedroom wall and hall bathroom wall about two feet above the baseboard "running up to the outside wall on down the outside wall." Additionally, there was mold in the back bedroom about two feet up from the baseboards around three of the four walls and in the front bedroom about two feet up from the baseboards on the front and side walls. Black mold was also found on the outside wall of the master bedroom and around the baseboards in the master bathroom. After removing the cabinets in the master bathroom and laundry room, mold was observed at the bottom of the cabinets and behind the walls "along the baseboard, about two feet up." The Fiesses took samples of the mold and sent them for testing to NOVA Labs in Conroe, Texas. Paul Pearce, Ph.D. ("Dr. Pearce"), tested the mold and determined that it contained stachybotrys[1], an allegedly hazardous type of mold. He advised the Fiesses to leave their home because of the high levels of stachybotrys. Dr. Pearce subsequently inspected the home and found other types of mold, including alternaria[2], chaetomium[3],

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[1] "Stachybotrys atra" is "[a] mold that produces toxic compounds (mycotoxins). Prolonged exposure can be associated with symptoms such as fatigue, hearing loss, and memory loss." 5 J.E. SCHMIDT, M.D., *Attorneys' Dictionary of Medicine and Word Finder* S-273 (2002).

[2] "Alternaria" refers to "a genus of dematiacious Fungi Imperfecti of the order Moniliales, having dark-colored conidia. . . it causes several diseases of plants and has been reported in diseases of the lungs and in skin infection in man, and is also a common allergen in human bronchial asthma."

cladosporium[4], aspergillus penicillium[5], and all of the naturally occurring environmental molds. He identified six areas of water intrusion into the home: "flood waters, roof leaks, plumbing leaks, heating, air conditioning and ventilation (HVAC) leaks, exterior door leaks, and window leaks." Dr. Pearce opined at deposition that 25% of the mold at the time of inspection was "non-Allison related" as the "patterns of moisture of water intrusion, the presence of mold that resulted from non-Allison related, in my opinion, non-Allison-related water intrusion." He later changed his answer, however, claiming that he misunderstood the question. In his revised response, Dr. Pearce claimed that 70% of the mold at the time of inspection was non-Allison related. Nevertheless, Dr. Pearce conceded that "[t]he floodwaters left behind mold on virtually every wall and on every stud and every baseboard and every baseplate in the first 2 to 3 feet of this house."

After discovering the mold, the Fiesses made a claim under their homeowner's insurance policy for mold contamination. During the investigation of the claim, State Farm sent the Fiesses a reservation of rights letter informing them that the damage claimed might not be covered under the terms of the Policy. Ultimately, while maintaining that the claims were not covered under the

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DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 51 (28th ed. 1994).

[3] "Chaetomium" is "[a] genus of soil fungi. Some species may cause allergy." 2 J.E. SCHMIDT, M.D., *supra*, at C-183.

[4] "Cladosporium" is "[a] genus of fungi having dematiaceous or dark-colored conidiophores with oval or round spores, commonly isolated in soil or plant residues." STEDMAN'S MEDICAL DICTIONARY 348 (26th ed. 1995).

[5] "Aspergillus" refers to "[a] genus of fungi (class Ascomycetes) that contains many species, a number of them with black, brown, or green spores. A few species are pathogenic for man, other animals, and avians." STEDMAN'S, *supra,* at 156. "Penicillum" refers to "[a] genus of fungi (class Ascomycetes, order Aspergillales), species of which yield various antibiotic substances and biologicals." STEDMAN'S, *supra*, at 1321.

Policy, State Farm paid the Fiesses $34,425.00 for "non-covered mold remediation in those areas of the flood damaged house where there was evidence of small pre-flood water leaks." The Fiesses, however, assert that State Farm failed to compensate them fully for damage caused by mold attributable to pre-existing water leaks, which they contend falls within the scope of coverage of the Policy.

On April 1, 2002, the Fiesses filed their original petition in the 127th Judicial District Court of Harris County, Texas, asserting claims for violations of the DTPA, breach of contract, and fraud/intentional misrepresentation. On May 20, 2002, State Farm removed the case to federal court on the basis of diversity of citizenship, asserting that the amount in controversy exceeds $75,000.00, exclusive of interest and costs. The Fiesses filed an amended complaint on November 20, 2002, alleging additional claims against State Farm for violations of the Texas Insurance Code and breach of warranty. In the instant motion, State Farm seeks summary judgment on all the Fiesses' claims.

III. Analysis

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which it believes demonstrate the absence of a genuine

issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999); *Marshall v. East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 321 (5th Cir. 1998); *Wenner v. Texas Lottery Comm'n*, 123 F.3d 321, 324 (5th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998). A material fact is one that might affect the outcome of the suit under governing law. *See Burgos v. Southwestern Bell Tel. Co.*, 20 F.3d 633, 635 (5th Cir. 1994). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The moving party, however, need not negate the elements of the nonmovant's case. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

Once a proper motion has been made, the nonmoving parties may not rest upon mere allegations or denials in the pleadings but must present affirmative evidence, setting forth specific facts, to show the existence of a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 505 (5th Cir. 1999), *cert. denied*, 528 U.S. 1160 (2000); *Colson*, 174 F.3d at 506; *Marshall*, 134 F.3d at 321-22; *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075. "[T]he court must review the record 'taken as a whole.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 587). All the evidence must be construed "in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes." *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996) (citing *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 n.14 (5th Cir. 1993)); *see*

Reeves, 530 U.S. at 150; *Colson*, 174 F.3d at 506; *Marshall*, 134 F.3d at 321; *Messer v. Meno*, 130 F.3d 130, 134 (5th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir. 1997), *cert. denied*, 525 U.S. 1103 (1999). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 n.5 (1990); *see Christopher Vill. Ltd. P'ship v. Retsinas*, 190 F.3d 310, 314 (5th Cir. 1999); *Samuel v. Holmes*, 138 F.3d 173, 176 (5th Cir. 1998); *Marshall*, 134 F.3d at 321.

Nevertheless, "'only *reasonable* inferences can be drawn from the evidence in favor of the nonmoving party.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 n.14 (1992) (emphasis in original) (quoting *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1012 (2d Cir. 1989)). "If the nonmoving party's theory is . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Id.* at 468-69. The nonmovants' burden is not satisfied by "some metaphysical doubt as to material facts," conclusory allegations, unsubstantiated assertions, speculation, the mere existence of some alleged factual dispute, or "only a scintilla of evidence." *Little*, 37 F.3d at 1075; *see Hart*, 127 F.3d at 435; *Wallace*, 80 F.3d at 1047; *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (citing *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994)); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990) (citing *Anderson*, 477 U.S. at 247-48). Summary judgment is mandated if the nonmovants fail to make a showing sufficient to establish the existence of an element essential to their case on which they bear the burden of proof at trial. *See Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex Corp.*, 477 U.S. at 322; *Wenner*, 123 F.3d at 324. "In such a situation, there can be 'no genuine

issue as to any material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 322-23.

B. Breach of Insurance Contract

Under Texas law, the interpretation of insurance policies is governed by the same rules that apply to the interpretation of other contracts. *See Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 537 (5th Cir. 2002); *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 491 (5th Cir. 2000); *American States Ins. Co. v. Bailey*, 133 F.3d 363, 369 (5th Cir. 1998); *Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co.*, 99 F.3d 695, 701 (5th Cir. 1996); *Constitution State Ins. Co. v. Iso-Tex Inc.*, 61 F.3d 405, 407 (5th Cir. 1995); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 740-41 (Tex. 1998); *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997); *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997). The insurance contract is considered as a whole, with each part to be given effect. *See Balandran*, 972 S.W.2d at 741; *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994); *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 180 (Tex. 1965); *Tumlinson v. St. Paul Ins. Co.*, 786 S.W.2d 406, 408 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Specific provisions in the policy control over general statements of coverage. *See Forbau*, 876 S.W.2d at 133; *see also* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 545-54 (1960). Similarly, "[e]ndorsements control over conflicting general policy language." *Westchester Fire Ins. v. Heddington Ins. Ltd.*, 883 F. Supp. 158, 165 (S.D. Tex. 1995), *aff'd*, 84 F.3d 432 (5th Cir. 1996) (citing *Mutual Life Ins. Co. v. Daddy$ Money, Inc.*, 646 S.W.2d 255, 259 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)). The terms used in an insurance contract are given their ordinary and generally accepted

meaning, unless the policy shows the words were meant in a technical or different sense. *See Canutillo Indep. Sch. Dist.*, 99 F.3d at 700; *Security Mut. Cas. Co. v. Johnson*, 584 S.W.2d 703, 704 (Tex. 1979); *Tri County Serv. Co. v. Nationwide Mut. Ins. Co.*, 873 S.W.2d 719, 721 (Tex. App.—San Antonio 1993, writ denied).

If 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. *See Bailey*, 133 F.3d at 369; *Canutillo Indep. Sch. Dist.*, 99 F.3d at 701; *State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 933 (Tex. 1998); *McKee*, 943 S.W.2d at 458. This rule of construction does not apply, however, when the insurance contract is expressed in plain and unambiguous language and is susceptible to only one reasonable interpretation. *See Bailey*, 133 F.3d at 369; *Canutillo Indep. Sch. Dist.*, 99 F.3d at 701; *Iso-Tex Inc.*, 61 F.3d at 407; *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). "When there is no ambiguity, it is the court's duty to give the words used their plain meaning." *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984). If an insurance policy "is worded so that it can be given only one reasonable construction, it will be enforced as written." *Iso-Tex Inc.*, 61 F.3d at 407 (citing *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993)); *National Union Fire Ins. Co. v. CNA Ins. Cos.*, 28 F.3d 29, 32 (5th Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995). "When the terms of an insurance policy are plain, definite, and unambiguous, a court may not vary those terms." *Id.*; *see Reed*, 873 S.W.2d at 699. Thus, after considering the rules of contract interpretation, summary judgment is often appropriate in cases where unambiguous language is at issue. *See Tri County Serv. Co.*, 873 S.W.2d at 721 (citing *Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616, 617 (Tex. App.—Dallas 1991, no writ)).

The determination of whether an insurance policy is ambiguous is a question of law for the court to decide. *See Canutillo Indep Sch. Dist.*, 99 F.3d at 700; *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000) (citing *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980)). An ambiguity in a contract may be "patent" or "latent." *National Union Fire Ins. Co. v. CBI Indus. Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). A patent ambiguity is apparent upon examining the contract. *See Universal Home Builders, Inc. v. Farmer*, 375 S.W.2d 737, 742 (Tex. Civ. App.—Tyler 1964, no writ). A latent ambiguity arises when a contract is applied to the subject matter it concerns and different interpretations become apparent. *See Murphy v. Dilworth*, 151 S.W.2d 1004, 1005 (Tex. 1941); *see also Bache Halsey Stuart Shields, Inc. v. Alamo Sav. Ass'n*, 611 S.W.2d 706, 708 (Tex. Civ. App.—San Antonio 1980, no writ). Not every difference in interpretation of an insurance policy, however, amounts to an ambiguity. *See Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 465 (Tex. 1998); *Vaughan*, 968 S.W.2d at 933; *Reed*, 873 S.W.2d at 699. In addition, a contractual clause that is ambiguous as applied to certain facts may be unambiguous as applied to others. *See Vaughan*, 968 S.W.2d at 934.

The insured initially has the burden to plead and prove that the benefits sought are covered by the insurance policy at issue. *See Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466, 471 (5th Cir. 2001); *Western Alliance Ins. Co. v. Northern Ins. Co.*, 176 F.3d 825, 831 (5th Cir. 1999); *Guaranty Nat'l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998); *Data Specialties, Inc. v. Transcontinental Ins. Co.*, 125 F.3d 909, 911 (5th Cir. 1997). The insurer, however, bears the burden of establishing that one of the policy's limitations or exclusions constitutes an avoidance or affirmative defense to coverage. *See Harken Exploration Co.*, 261

F.3d at 471; *Vic Mfg. Co.*, 143 F.3d at 193; *Bailey*, 133 F.3d at 364; *Canutillo Indep. Sch. Dist.*, 99 F.3d at 701; *Sentry Ins. v. R.J. Webber Co., Inc.*, 2 F.3d 554, 556 (5th Cir. 1993); *see also* TEX. INS. CODE ANN. art. 21.58(b). The Texas Insurance Code provides:

> In any suit to recover under a contract of insurance, the insurer has the burden of proof as to any avoidance or affirmative defense that must be affirmatively pleaded under the Texas Rules of Civil Procedure. Any language of exclusion in the policy and any exception to coverage claimed by the insurer constitutes an avoidance or an affirmative defense.

TEX. INS. CODE ANN. art. 21.58(b). Once the insurer demonstrates that an exclusion arguably applies, the burden then shifts back to the insured to show that the claim does not fall within the exclusion or that it comes within an exception to the exclusion. *See Vic Mfg. Co.*, 143 F.3d at 193; *Telepak v. United Servs. Auto. Ass'n*, 887 S.W.2d 506, 507-08 (Tex. App.—San Antonio 1994, writ denied); *Britt v. Cambridge Mut. Ins. Co.*, 717 S.W.2d 476, 482 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

1. Provisions of the Policy

State Farm maintains that the Fiesses' claim for mold damage is expressly excluded from coverage under the Policy. The Fiesses, however, assert that the mold damage is covered as an "ensuing loss" under the Policy and, therefore, the mold exclusion is not operative. Under section 1 of the Policy, entitled Exclusions, sub-section f provides:

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.

* * *

i. 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.

The provisions of section 1 of the Policy explicitly remove from coverage any loss caused by mold. *See Harrison v. U.S.A.A. Ins. Co.*, No. 03-00-00362-CV, 2001 WL 391539, at *2 (Tex. App.—Austin Apr. 19, 2001, no pet.) (not designated for publication). "Thus, unless an exception to this exclusion applies, the policy does not cover [the Fiesses'] loss." *Id.* State Farm argues that the "cause of the mold growth is irrelevant" because the "plain, unambiguous language of the Policy excludes from coverage the Fiess' [sic] alleged loss due to mold." Furthermore, State Farm contends that "any argument by the Fiess' [sic] that coverage exists because their mold was *possibly* caused by covered water intrusion must be rejected as inconsistent with Texas law." (emphasis in original). In support of their argument, State Farm cites *Bentley v. National Standard Ins. Co.*, in which the court upheld the insurer's denial of coverage for damage resulting from the settling of a home's foundation caused by a severe drought, where the cause of the settlement was immaterial to the application of the settlement exclusion. *See* 507 S.W.2d 652, 654 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.). In *Bentley*, the homeowner's insurance policy excluded from coverage damage to the foundation, walls, floors, ceiling, roof structures, walks, drives, curbs, fences, retaining walls, or swimming pools caused by settling. *See id.* at 653. The

court held that the language of the contract was "clear and unambiguous . . . and must be taken in its ordinary meaning." *Id.* at 654. Hence, to bring the damage to the foundation caused by settling outside the settlement exclusion in the contract would "render this exclusion meaningless." *Id.* The language of the contract did not limit the exclusion to certain causes. *See id.* Likewise, as State Farm contends, "the mold exclusion in this case contains no language limiting it to 'certain causes,'" thus excluding from coverage any damage caused by mold.

State Farm also cites *Auten v. Employers Nat'l Ins. Co.* for the contention that the cause of the excluded loss is immaterial. *See* 722 S.W.2d 468, 468-71 (Tex. App.—Dallas 1987, writ denied). In that case, the insureds sought coverage for the misapplication of pesticide that rendered their home uninhabitable. *See id.* at 468-69. The insurance company denied their claim under the contamination exclusion in their homeowner's insurance policy. *See id.* at 469-70. Looking to the plain language of the policy, the court found that "the parties intended to exclude all losses occasioned by contamination without regard to the cause of the contamination." *Id.* at 470. Otherwise, "[t]o adopt the Autens' reading of the policy would limit this provision to exclude recovery for contamination only when the contamination itself was not the result of an excluded cause." *Id.* at 470-71. Additionally, the court reasoned, "to do so would violate the rule that insurance contracts should not be construed to render one of its terms meaningless when it is possible to construe those terms in a manner that would give meaning to all terms of the contract." *Id.* at 471 (citing *Blaylock v. American Guarantee Bank Liab. Ins. Co.*, 632 S.W.2d 719, 722 (Tex. 1982)). The *Auten* court also refused "to limit the contamination exclusion to contamination which results from otherwise excluded causes." *Id.* The court held that where "the loss results solely from contamination, then the clause excluding these losses is applicable regardless of the

cause of the contamination." *Id.* Similarly, in the case at bar, the mold exclusion is not limited to losses caused only by excluded causes. Thus, the cause of the Fiesses' mold damage does not affect the exclusion's applicability.

In light of the foregoing cases, State Farm argues that "any attempt to characterize the mold as resulting from a covered cause of loss is clearly immaterial." The clear and unambiguous wording of the mold exclusion does not limit its application to excluded causes only. As a result, according to State Farm, the mold exclusion applies, and the Fiesses' loss is not covered under the Policy. The court concurs that, considering the Policy at issue in this case, the plain and unambiguous language of the exclusion expressly excludes from coverage any loss resulting from mold. There are no limitations to this exclusion, and to interpret this clause in any other manner would render the exclusion meaningless. Consequently, the mold damage sustained by the Fiesses is excluded from coverage under the Policy's mold exclusion.

2. Ensuing Loss

The Fiesses, however, contend that the mold exclusion does not apply because the mold damage to their home falls within an exception to the exclusion as an "ensuing loss caused by . . . water damage" under the Policy. "To 'ensue' means 'to follow as a consequence or in chronological succession; to result, as an ensuing conclusion or effect.'" *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138, 141 (Tex. Civ. App.—San Antonio 1975, writ ref'd) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 852 (2d ed., unabridged, 1959)); *see Zeidan v. State Farm Fire & Cas. Co.*, 960 S.W.2d 663, 666 (Tex. App.—El Paso 1997, no writ). Thus, an ensuing loss "is a loss which follows as a consequence of some preceding event or circumstance." *Lambros*, 530 S.W.2d at 141 (quoting *McKool v. Reliance Ins. Co.*, 386 S.W.2d

344 (Tex. Civ. App.—Dallas 1965, writ dism'd); *see Zeidan*, 960 S.W.2d at 666. For coverage to be restored via the ensuing loss clause, an otherwise covered loss must result or ensue from the excluded loss. In *Lambros*, the court explained, "[i]f 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.

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. *See Zeidan*, 960 S.W.2d at 666; *Daniell v. Fire Ins. Exch.*, No. 04-94-00824-CV, 1995 WL 612405, at *2 (Tex. App.—San Antonio Oct. 18, 1995, no writ) (not designated for publication); *Lambros*, 530 S.W.2d at 141; *Merrimack Mut. Fire Ins. Co. v. McCaffree*, 486 S.W.2d 616, 620 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). "To qualify for the exception, ensuing water damage must follow from one of the types of damage enumerated in exclusion (f)." *Harrison*, 2001 WL 391539, at *2. 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. *See Daniell*, 1995 WL 612405, at *2; *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939, 941 (5th Cir. 1965); *Harrison*, 2001 WL 391539, at *2; *Lambros*, 530 S.W.2d at 142; *Merrimack*, 486 S.W.2d at 620. "Since the evidence in this case, even when viewed in the light most favorable to [the Fiesses] conclusively establishes that water damage was the cause, rather than the consequence, of [mold]," the exclusion is applicable. *Zeidan*, 960 S.W.2d at 666; *see Harrison*, 2001 WL 391539, at *2.

In the case at bar, the Fiesses argue that the mold was caused by water damage arising from leaks in the residence. "Under these circumstances, [the Fiesses'] interpretation of the ensuing loss provision conclusively establishes that the loss claimed is not a covered loss." *Daniell*, 1995 WL 612405, at *2 (citing *Yates*, 344 F.2d at 941; *McKool*, 386 S.W.2d at 345-46). The Fiesses' argument that the ensuing loss provision extends coverage for their loss "reverses the causation required by that exception." *Harrison*, 2001 WL 391539, at *2. The result of their interpretation of the ensuing loss provision "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." *Yates*, 344 F.2d at 941. "A court may not properly give the clause such an unnatural effect unless the words compel." *Id.* In *Yates*, the Fifth Circuit observed:

> We do not think that a single phenomenon that is clearly an excluded risk under the policy was meant to become compensable because in a philosophical sense it can also be classified as water damage; it would not be easy to find a case of rot or dampness of atmosphere not equally subject to that label and the exclusions would become practically meaningless.

Id. The same applies in this case with respect to mold.

Assuming that the leaks identified by Dr. Pearce constitute water damage, the leaking preceded, rather than followed, the Fiesses' excluded mold loss. The leaking water which allegedly ran from the identified areas could very well have created an atmosphere or environment which could have, and possibly did, contribute to the growth of mold which, in turn, caused the damage to the Fiesses' residence. *See Merrimack*, 486 S.W.2d at 620 (holding that leaking water causing fungus to grow and deteriorate the shower stall was not covered as an ensuing loss under the policy). The mold, however, did not cause the intrusion of water into the home and the ensuing loss. "[W]hile an ensuing loss provision will cover water damage caused by an excluded

event, it will not cover the excluded event even if it is caused by water damage." *Daniell*, 1995 WL 612405, at *2. "The ensuing loss provision therefore does not extend coverage to [the Fiesses'] loss." *Harrison*, 2001 WL 391539, at *2.

In this instance, the presence of mold arose from water intrusion and is not a loss that would "otherwise be covered under the policy." Instead, mold is specifically excluded from coverage under exclusion f of the Policy. The opinion relied upon by the Fiesses, *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), departs from this long line of authority in Texas and is contrary to the interpretation given the ensuing loss clause in other jurisdictions. *See, e.g.*, *Cooper v. American Family Mut. Ins. Co.*, 184 F. Supp. 2d 960, 964 (D. Ariz. 2002) (citing *Acme Galvanizing Co., Inc. v. Fireman's Fund Ins. Co.*, 221 Cal. App. 3d 170, 179-80, 270 Cal. Rptr. 405, 411 (Cal. Ct. App. 1990)). As the California Court of Appeals explained in *Acme Galvanizing Co., Inc.*:

> We interpret the ensuing loss provision to apply to the situation where there is a "peril," i.e., a hazard or occurrence which causes a loss or injury, *separate and independent* but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues.

221 Cal. App. 3d 170, 179-80 (emphasis added). Other courts which have interpreted the clause similarly hold that the ensuing loss provision does not reinsert coverage for excluded losses, but reaffirms coverage for secondary losses ultimately caused by excluded perils. *See Cooper*, 184 F. Supp. 2d at 964 (citing *Ames Privilege Ass'n v. Utica Mut. Ins. Co.*, 742 F. Supp. 704, 708 (D. Mass. 1990) (perils which are excluded by the policy cannot be, at the same time, perils which are not excluded, and for which the defendant would be liable for any ensuing loss); *Schloss v.*

Cincinnati Ins. Co., 54 F. Supp. 2d 1090, 1094-95 (M.D. Ala. 1999) (same), *aff'd without opinion*, 211 F.3d 131 (11th Cir. 2000); *Brodkin v. State Farm Fire & Cas. Co.*, 217 Cal. App. 3d 210, 218, 265 Cal. Rptr. 710, 714 (Cal. Ct. App. 1989) ("It is not the intent of [the ensuing loss provision] to enlarge the items which are covered under the policy"); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash. 2d 724, 734, 837 P.2d 1000, 1005 (Wash. 1992) (ensuing loss clause provides that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered; however, the uncovered event itself, however, is never covered)).

As a result, the mold damage to the Fiesses' residence is not covered under the express terms of the Policy nor under the ensuing loss exception to the mold exclusion. Furthermore, the fact that State Farm reimbursed the Fiesses for some mold remediation costs does not create coverage in the face of the express exclusion for loss caused by mold. "It is well-established under Texas law that insurance coverage may not be created by estoppel where none exists under the plain terms of the policy." *Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258, 1263 n.3 (5th Cir. 1997) (citing *Texas Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602-03 (Tex. 1988)). Summary judgment, therefore, is warranted with respect to the Fiesses' claim for breach of the insurance contract.

C. Doctrine of Concurrent Causes

State Farm alleges that, alternatively, the Fiesses cannot recover for mold damage because they cannot segregate what they contend are covered losses under the homeowner's insurance policy from non-covered causes of the mold. State Farm points out that it is the insured's burden to prove that any loss sustained is covered under the Policy and that this burden includes proving

an exception to an applicable coverage exclusion. *See Vic Mfg. Co.*, 143 F.3d at 193; *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988), *overruled on other grounds by State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996); *Telepak*, 887 S.W.2d at 507; *Love of God Holiness Temple Church v. Union Standard Ins. Co.*, 860 S.W.2d 179, 181 (Tex. App.—Texarkana 1993, no writ).

"Texas recognizes the doctrine of concurrent causes." *Wallis v. United Servs. Auto Ass'n*, 2 S.W.3d 300, 302 (Tex. App.—San Antonio 1999, pet. denied). This doctrine provides that when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. *See id.* (citing *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971); *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 319 (Tex. 1965); *Warrilow v. Norrell*, 791 S.W.2d 515, 527 (Tex. App.—Corpus Christi 1989, writ denied)); *see also State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 320-21 (Tex. App.—San Antonio 2002, no pet.) (citing *Wallis*, 2 S.W.3d at 302). "The doctrine of concurrent causation is not an affirmative defense or an avoidance issue; rather it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove that their damage is covered by the policy." *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 258 (Tex. App.—Austin 2002, no pet.) (citing *Wallis*, 2 S.W.3d at 302-03). "Thus, an insured may only recover for the amount of damage caused solely by the covered peril." *Id.* "'Because an insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden.'" *Rodriguez*, 88 S.W.3d at 321 (quoting *Wallis*, 2 S.W.3d at 303). "The insured must therefore present some evidence upon which the jury can allocate the damage

attributable to the covered peril." *Allison*, 98 S.W.3d at 258-59 (citing *Wallis*, 2 S.W.3d at 303); *see also Rodriguez*, 88 S.W.3d at 321. "Although a plaintiff is not required to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests." *Id.*

In this case, the Fiesses cannot satisfy the doctrine of concurrent causation. Damage to the residence caused by floodwaters is expressly excluded by the Policy. Although the Fiesses' expert, Dr. Pearce, belatedly attributed 70% of the mold damage to water events other than the flood, 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. 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 reasonably be drawn between any mold damage caused by the flood, which is not covered under the Policy, and any other mold damage arguably covered under the Fiesses' interpretation of the Policy. "This is fatal to their claim." *Wallis*, 2 S.W.3d at 304. Because the Fiesses are unable to meet their burden of segregating the amount of damage caused solely by the purportedly covered peril from that caused by excluded perils, their mold loss claim must fail under the doctrine of concurrent causation.

D. Duty of Good Faith and Fair Dealing

The Fiesses allege that State Farm's denial of their claim amounted to a breach of the duty of good faith and fair dealing. State Farm maintains, however, that the Fiesses are not entitled to recover on their bad faith claim because a *bona fide* dispute existed regarding State Farm's liability for mold damage under the Fiesses' insurance policy.

"Under Texas law, there is a duty on the part of the insurer to deal fairly and in good faith with an insured in the processing of claims." *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 459 (5th Cir. 1997) (citing *Arnold v. Nat'l County Mut. Fire Ins. Co.* 725 S.W.2d 165, 167 (Tex. 1987)); *see also Erwin v. Texas Health Choice, L.C.*, 187 F. Supp. 2d 661, 666 (N.D. Tex. 2002); *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 70-71 (Tex. 1997); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340 (Tex. 1995); *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990); *Vandeventer v. All Am. Life & Cas. Co.*, 101 S.W.3d 703, 722 (Tex. App.—Fort Worth 2003, no pet. h.). "A cause of action for breach of the duty of good faith and fair dealing exists when the insurer has no reasonable basis for denying or delaying payment of a claim or when the insurer fails to determine or delays in determining whether there is any reasonable basis for denial." *Higginbotham*, 103 F.3d at 459 (citing *Arnold*, 725 S.W.2d at 167); *Universe Life Ins Co. v. Giles*, 950 S.W.2d 48, 50-51 (Tex. 1997) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994)); *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex. 1994). The key inquiry in a bad faith claim is the reasonableness of the insurer's conduct. *See Giles*, 950 S.W.2d at 49; *Moriel*, 879 S.W.2d at 17-18; *Lyons v. Millers Cas. Co.*, 866 S.W.2d 597, 601 (Tex. 1993).

An insurer's liability under an insurance contract is separate and distinct from its liability for breach of the duty of good faith and fair dealing. *See Lyons*, 866 S.W.2d at 600; *Viles*, 788 S.W.2d at 567. "A *bona fide* controversy is sufficient reason for failure of an insurer to make a prompt payment of a loss claim." *Higginbotham*, 103 F.3d at 459; *see Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 195-96 (Tex. 1998). "As long as the insurer has a reasonable basis to deny or delay payment of a claim, even if that basis is eventually determined by the fact

finder to be erroneous, the insurer is not liable for the tort of bad faith." *Higginbotham*, 103 F.3d at 459 (citing *Lyons*, 866 S.W.2d at 600); *see Castaneda*, 988 S.W.2d at 196.

To succeed on a claim of breach of the duty of good faith and fair dealing, the insured must prove (1) that the insurer either denied or delayed payment of the claim and (2) that the insurer "knew or should have known that it was reasonably clear that the claim was covered." *Giles*, 950 S.W.2d at 55; *see Castaneda*, 988 S.W.2d at 195-96; *United States Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997); *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997); *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 955 (Tex. App.—Corpus Christi 1998, no pet. h.). "[A]n insurer breaches its duty of good faith and fair dealing by denying a claim when the insurer's liability has become reasonably clear." *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998); *see Williams*, 955 S.W.2d at 268; *Nicolau*, 951 S.W.2d at 448. An insurer does not breach its duty, however, merely by erroneously denying a claim. *See Tucker v. State Farm Fire & Cas. Co.*, 981 F. Supp. 461, 465 (S.D. Tex. 1997); *Williams*, 955 S.W.2d at 268; *Moriel*, 879 S.W.2d at 17. The courts of Texas have repeatedly held that bad faith does not arise simply because the insurer's construction of the policy was subsequently found to be legally incorrect. *See Williams*, 955 S.W.2d at 268 (citing *Giles*, 950 S.W.2d at 48); *Moriel*, 879 S.W.2d at 17. Similarly, evidence that shows only a *bona fide* coverage dispute does not rise to the level of bad faith. *See Robinson v. State Farm Fire & Cas. Co.*, 13 F.3d 160, 162 (5th Cir. 1994); *Simmons*, 963 S.W.2d at 44; *Williams*, 955 S.W.2d at 268; *Nicolau*, 951 S.W.2d at 448; *Moriel*, 879 S.W.2d at 17; *National Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373, 376-77 (Tex. 1994).

Nevertheless, an insurer cannot escape liability by failing to investigate a claim in order to assert that liability was never reasonably clear. *See Giles*, 950 S.W.2d at 56 n.5. Rather, the Supreme Court reaffirmed in *Giles* that "an insurance company may also breach its duty of good faith and fair dealing by failing to reasonably investigate a claim." *Id.* (citing *Arnold*, 725 S.W.2d at 167). Thus, an insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual basis for denial. *See Simmons*, 963 S.W.2d at 44; *Nicolau*, 951 S.W.2d at 448; *Lyons*, 866 S.W.2d at 601. Moreover, an insurer's reliance upon an expert report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. *See Nicolau*, 951 S.W.2d at 448.

An insurance company's obligation to investigate, however, is not unlimited. *See Simmons*, 963 S.W.2d at 44. "The scope of the appropriate investigation will vary with the claim's nature and value and the complexity of the factual issues involved." *Id.* at 44-45. If, after a reasonable investigation, the insurer has evidence showing that the insured's claim may be invalid, a bad faith action is not viable. *See Tucker*, 981 F. Supp. at 465 (citing *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988); *St. Paul Lloyd's Ins. v. Fong Chun Huang*, 808 S.W.2d 524, 526 (Tex. App.—Houston [14th Dist.] 1991, writ denied). "[I]nsurance carriers maintain the right to deny questionable claims without being subject to liability for an erroneous denial of the claim." *Higginbotham*, 103 F.3d at 459 (citing *Fong Chun Huang*, 808 S.W.2d at 526); *see Robinson*, 13 F.3d at 162; *Aranda*, 748 S.W.2d at 213.

1. Investigation

Here, in view of the nature of the incident and the value and complexity of the claim, State Farm's investigation was adequate and reasonable. *See Simmons*, 963 S.W.2d at 44-45. After the Fiesses discovered the mold on the sheetrock, State Farm sent an adjuster to inspect and evaluate the claim. Mr. Fiess testified :

> A. The insurance had instructed us to -- that we could do that and then wait for an adjustor.
> Q. Okay. And when did you see the adjustor?
> A. For a date, I'm not sure. It was within a couple of days.

Additionally, State Farm sent two experts, Steve Pituch and Richard Fahrian, of Brown Engineering to conduct tests on the Fiesses' residence. According to Mr. Fiess, these experts told him the mold damage pre-dated the flood. Consequently, State Farm, though maintaining mold damage was excluded under the Policy, paid for mold remediation where there was evidence of pre-flood leaks "in an effort to help the insureds ravaged by a terrible flood."

2. *Bona Fide* Dispute—Coverage under the Policy

The Fiesses contend that State Farm acted in bad faith by paying "only a fraction of the insured's legitimate claim," while improperly denying coverage for the remaining damage caused by the mold contamination. The Fiesses argue there is no *bona fide* dispute because the mold damage resulted from pre-flood leaks, thereby clearly establishing State Farm's liability under the ensuing loss provision of the Policy. They assert that State Farm should have interpreted the ensuing loss provision in their favor and then paid the claim.

State Farm contends that a *bona fide* dispute existed between itself and the Fiesses as to whether the alleged mold contamination of the Fiesses' residence is covered under the Policy.

Although their liability under the Policy for mold damage was not reasonably clear, State Farm paid the Fiesses for mold remediation in the areas where pre-flood leaks were identified. State Farm then promptly denied the remainder of their claim for mold remediation, citing the mold exclusion in the Policy. Under the express terms of the Policy, damage caused by mold is excluded from coverage. In any event, at the time State Farm denied the claim, it was questionable as to whether mold damage was covered under the ensuing loss provision of the Policy.

Thus, based on the facts that were before the insurer after a reasonable investigation, State Farm's liability was not reasonably clear when it denied the claim. In this situation, the Fiesses have failed to adduce competent summary judgment evidence from which it could be inferred that State Farm acted in bad faith when denying their claim. At most, there was a *bona fide* coverage dispute between the parties. Therefore, summary judgment is warranted with respect to the Fiesses' claim for breach of the duty of good faith and fair dealing.

E. Statutory Claims

The Fiesses further allege that State Farm's denial of their claim amounted to a violation of the Texas Insurance Code and the DTPA. In Texas, an individual who has been damaged by "unfair methods of competition or unfair or deceptive acts or practices in the business of insurance" may bring a statutory cause of action under the Texas Insurance Code against the "person or persons engaging in such acts or practices." TEX. INS. CODE ANN. art. 21.21, § 16; *see Transitional Hosp. Corp. v. Blue Cross & Blue Shield of Tex., Inc.*, 164 F.3d 952, 955 (5th Cir. 1999); *Storebrand Ins. Co. U.K., Ltd. v. Employers Ins. of Wausau*, 139 F.3d 1052, 1055 (5th Cir. 1998); *Higginbotham*, 103 F.3d at 460; *Douglas v. State Farm Lloyds*, 37 F. Supp. 2d

532, 543-44 (S.D. Tex. 1999); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 382-83 (Tex. 2000). A violation of the duty of good faith and fair dealing also constitutes an unfair insurance practice in violation of Article 21.21 of the Insurance Code. *See Tucker*, 981 F. Supp. at 465; *Bates v. Jackson Nat'l Life Ins. Co.*, 927 F. Supp. 1015, 1024 (S.D. Tex. 1996); *Dixon v. State Farm Fire & Cas. Co.*, 799 F. Supp. 691, 694 (S.D. Tex. 1992); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988). In addition, "the use or employment by any person of an act or practice in violation of Article 21.21, Insurance Code" is a violation of the DTPA. TEX. BUS. & COM. CODE ANN. § 17.50(a); *see Thrash v. State Farm Fire & Cas. Co.*, 992 F.2d 1354 (5th Cir. 1993); *Tucker*, 981 F. Supp. at 465; *Dixon*, 799 F. Supp. at 694; *Vail*, 754 S.W.2d at 136.

"The Texas Insurance Code and the Deceptive Trade Practices Act are in large measure statutory fleshings-out of the already existing common law requirements." *Robinson*, 13 F.3d at 162. Hence, the breach of an insurance contract does not automatically give rise to liability under the Insurance Code or the DTPA. *See Walker v. Federal Kemper Life Assurance Co.*, 828 S.W.2d 442, 454 (Tex. App.—San Antonio 1992, writ denied) (citing *South Tex. Nat'l Bank v. U.S. Fire Ins. Co.*, 640 F. Supp. 278, 280 (S.D. Tex. 1985)). Rather, the "reasonableness" requirements of common law good faith apply equally in the statutory context. *See Giles*, 950 S.W.2d at 55. "According to Texas law, extra-contractual tort claims pursuant to the Texas Insurance Code and the DTPA require the same predicate for recovery as bad faith causes of action." *Lawson v. Potomac Ins. Co.*, No. Civ. 3:98-CV-0692H, 1998 WL 641809, at *4 (N.D. Tex. Sept. 14, 1998) (citing *Higginbotham*, 103 F.3d at 460). Thus, in order to establish a statutory violation under the Insurance Code or the DTPA, the elements necessary to demonstrate an insurer's breach of

the common law duty of good faith and fair dealing must be proven. *See Higginbotham*, 103 F.3d at 460; *Lawson*, 1998 WL 641809, at *4; *Lockett v. Prudential Ins. Co.*, 870 F. Supp. 735, 741 (W.D. Tex. 1994) (citing *Vail*, 754 S.W.2d at 135; *Koral Indus., Inc. v. Security-Connecticut Life Ins. Co.*, 788 S.W.2d 136, 147 (Tex. App.—Dallas), *writ denied per curiam*, 802 S.W.2d 650 (Tex. 1990)). A statutory violation is dependent upon a "'determination pursuant to law that the insurer breached the duty of good faith and fair dealing.'" *Id.* (quoting *Koral Indus., Inc.*, 788 S.W.2d at 148); *see Higginbotham*, 103 F.3d at 460; *Lawson*, 1998 WL 641809, at *4; *see also Charter Roofing Co. v. Tri-State Ins. Co.*, 841 S.W.2d 903, 906 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

Thus, when an insured joins claims under the Texas Insurance Code and the DTPA with a bad faith claim, all asserting a wrongful denial of policy benefits, if there is no merit to the bad faith claim, there can be no liability on either of the statutory claims. *See Higginbotham,* 103 F.3d at 460; *Lawson*, 1998 WL 641809, at *4; *Beaumont Rice Mill, Inc. v. Mid-American Indem. Ins. Co.*, 948 F.2d 950, 952 (5th Cir. 1991); *Tucker*, 981 F. Supp. at 465; *State Farm Fire & Cas. Co. v. Woods*, 925 F. Supp. 1174, 1180 (E.D. Tex. 1996), *aff'd*, 129 F.3d 607 (5th Cir. 1997); *Saunders v. Commonwealth Lloyd's Ins.* Co., 928 S.W.2d 322, 324 (Tex. App.—San Antonio 1996, no writ); *Emmert v. Progressive County Mut. Ins. Co.*, 882 S.W.2d 32, 36 (Tex. App.—Tyler 1994, writ denied). Concerning the interrelationship between bad faith and statutory claims, the court in *Tucker* commented, "Plaintiff's extra-contractual claims live or die depending on whether plaintiff's bad-faith claim has any viability." 981 F. Supp. at 465. The *Tucker* court ultimately concluded:

> Given the facts alleged in this case, which were before [the insurer] when it denied Plaintiff's claim, the Court concludes that liability in this case has *not yet* become reasonably clear. It is apparent that [the insurer] had a reasonable factual basis for denying Plaintiff's claim. Whether that basis is erroneous is a factual issue for the trier of fact; however, the bad-faith issue is not. Thus, without commenting upon the strength of Plaintiff's remaining contractual action, the Court finds that no reasonable jury could conclude that [the insurer] was unreasonable in denying Plaintiff's claim, that [the insurer] did not have a reasonable basis for denying Plaintiff's claim, or that [the insurer] committed actions sufficient to constitute bad faith. Therefore, under *Giles*, Plaintiff's extra-contractual claims must fail.

981 F. Supp. at 466 (emphasis in original) (citations and footnotes omitted). Consequently, because the common law bad faith claims asserted by the Fiesses in the instant case are without merit, summary judgment is also proper as to their statutory claims under the Texas Insurance Code and the DTPA. *See id.*

F. Breach of Express and Implied Warranties

In their First Amended Complaint, the Fiesses allege that State Farm breached its express and implied warranties by intentionally and knowingly failing to compensate them fully for their mold damage and by violating certain provisions of the DTPA.

1. Express Warranties

"'An express warranty is created when a seller makes an affirmation of fact or a promise to the purchaser, which relates to the sale and warrants a conformity to the affirmation as promised.'" *McDade v. Texas Commerce Bank*, 822 S.W.2d 713, 718 (Tex. App.— Houston [1st Dist.] 1991, writ denied) (quoting *McCrea v. Cubilla Condominium Corp.*, 685 S.W.2d 755, 757 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)); *see Brandon v. American Sterilizer Co.*, 880 S.W.2d 488, 493 (Tex. App.—Austin 1994, no writ). "As a general rule in a sale of goods there is an express warranty that the goods conform to an affirmation of fact, promise or a

description of the goods made by the seller to the buyer if the affirmation or description is part of the basis of the bargain." *Calloway v. Manion*, 572 F.2d 1033, 1036-37 (5th Cir. 1978). Texas courts treat the question of whether a promise constitutes an express warranty as a question of law. *See Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.*, 832 F.2d 1358, 1372 (5th Cir.), *clarified*, 832 F.2d 1378 (5th Cir. 1987) (citing *S.I. Property Owners' Ass'n, Inc. v. Pabst Corp.*, 714 S.W.2d 358, 361 (Tex. App.—Corpus Christi, 1986, writ ref'd n.r.e.)). "'An express warranty is entirely a matter of contract, wherein the seller may define or limit his obligation respecting the subject of the sale, and provide as to the manner of fulfilling the warranty or the measure of damages for its breach.'" *S.I. Property Owners' Ass'n*, 714 S.W.2d at 361 (quoting *Donelson v. Fairmont Food Co.*, 252 S.W.2d 796, 799 (Tex. Civ. App.—Waco 1952 writ ref'd n.r.e.)). "Above all, however, an express warranty must be explicit." *Id.*

The most accessible definition of "express warranty" appears in Chapter 2 of the Texas Uniform Commercial Code ("the Code"). *See Brooks, Tarlton, Gilbert, Douglas & Kressler*, 832 F.2d at 1373 (citing TEX. BUS. & COM. CODE ANN. § 2.313 (Vernon 1968)). Section 2.313 of the Code, entitled "Express Warranties by Affirmation, Promise, Description, Sample," provides :

> (a) Express warranties by the seller are created as follows :
>
> > (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> >
> > (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(b) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Chapter 2 of the Code governs only the sale of goods. *See* TEX. BUS. & COM. CODE ANN. § 2.102; *Brooks, Tarlton, Gilbert, Douglas & Kressler*, 832 F.2d at 1373; *S.I. Property Owners' Ass'n*, 714 S.W.2d at 361. An insurance policy, however, is a contract for services, not goods. *See Brooks, Tarlton, Gilbert, Douglas & Kressler*, 832 F.2d at 1373. Contracts for services are not governed by the Code. *See Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 764 (5th Cir.), *cert. denied*, 493 U.S. 820 (1989); *Brooks, Tarlton, Gilbert, Douglas & Kressler*, 832 F.2d at 1373. Nevertheless, as the Fifth Circuit has noted, the Code's provisions on express warranties are instructive, even if they are not controlling, in other contexts. *See Brooks, Tarlton, Gilbert, Douglas & Kressler*, 832 F.2d at 1374.

The remedy provisions of the Code distinguish between situations in which the seller has completely failed to deliver the goods promised and those in which the seller has delivered the goods, but they are nonconforming. *See id.* at 1374-75. As the Fifth Circuit has observed :

> [T]he remedy provisions of the Code distinguish between when the buyer has nothing at all and when the buyer has something, but it is not what was promised. In other words, the Code's remedies distinguish based on delivery and acceptance of the goods. This distinction is important because, under the system the Code sets up, a buyer's ability to sue for breach of warranty arises only under section 2.714, where acceptance of nonconforming goods is a prerequisite. . . . Consequently, under the Code a breach of warranty does not occur when the seller completely fails to deliver. When that happens, the buyer's remedy is found under sections 2.712 and 2.713 for the seller's breach of contract.

Id. Following this reasoning, the Fifth Circuit has held that a buyer has a cause of action for breach of express warranty in a services contract "when the focus of the express promise is on the way in which the service is to be performed, but not when the focus is only on the fact that service is promised." *Id.* at 1375. In contrast, "the mere promise to perform does not constitute an express warranty." *Id.* at n.14. Therefore, nonperformance by the seller does not result in the breach of an express warranty. *See id.* Moreover, if all that the seller promises is performance, the result is not changed just because the seller attempts to perform. *See id.* As the Fifth Circuit has explained :

> Unless the seller made additional promises concerning the manner of performance—as opposed to the fact of performance—it does not matter what action the seller takes. Not performing at all, or performing incorrectly—neither leads to liability . . . for breach of express warranty because the seller has made no express warranties which can be breached.

Id. at 1375 n.14.

In this case, the Fiesses have not established the existence of an express warranty in the Policy issued to them by State Farm. As in *Brandon*, the Fiesses "[have] failed to bring forward the terms of any alleged express warranty. They do not identify the express warranty nor do they refer to any part of the record where the terms of such a warranty may be located." 880 S.W.2d at 493. A review of the Policy reveals no language that could be construed as an express warranty. *See S.I. Property Owners' Ass'n*, 714 S.W.2d at 361. Further, there is nothing to suggest that State Farm made a promise for performance to the Fiesses independent of the terms of the homeowner's insurance policy or that a promise of such performance became a basis of the bargain. The Fiesses have proffered no evidence supporting a finding of an express promise concerning the manner in which the Policy was to be performed, the only recognized basis for an

express warranty in a service contract. *See Brooks, Tarlton, Gilbert, Douglas & Kressler*, 832 F.2d at 1375. State Farm's mere promise to perform does not constitute an express warranty. *See id.* at n.14. Thus, neither State Farm's alleged lack of performance nor its purported improper performance with respect to its handling of the Fiesses' claim leads to liability for breach of express warranty, as there is no evidence that State Farm made an express warranty that could be breached. *See id.* Here, as in *Brooks, Tarlton, Gilbert, Douglas & Kressler*, "the promise of performance is simply a term of the contract which, when breached, gives rise to an action for contract damages." *Id.* at 1376.

2. Implied Warranties

While express warranties are imposed by agreement of the parties to a contract, implied warranties are created by operation of law and are grounded more in tort than in contract. *See La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984). Implied warranties are derived primarily from statute, although some have their origin at common law. *See id.* Implied warranty claims arise by operation of law for any sale of goods in Texas. *See Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 353 (Tex. 1987) (citing *La Sara Grain*, 673 S.W.2d at 565; *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968)). Chapter 2 of the Code establishes three implied warranties in sales transactions: (1) the warranty of title; (2) the warranty of merchantability; and (3) the warranty of fitness for a particular purpose. *See Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 n.2 (Tex. 1995) (citing TEX. BUS. & COM. CODE ANN. §§ 2.312, 2.314, 2.315). Liability under the latter two provisions depends on a finding that the goods are defective, meaning that they are unfit for the ordinary purpose for which they are used because

of a lack of something necessary for adequacy. *See Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989).

None of these implied warranties, however, applies to a strictly service transaction. *See Parkway Co.*, 901 S.W.2d at 438 n.2. Unlike the implied warranties imposed on sales transactions under the Code, an implied service warranty is a common law creation. *See id.* at 438 (citing *Melody Home Mfg. Co.*, 741 S.W.2d at 353). As the Fifth Circuit explained in *Suwannee River Spa Lines, Inc.*, "[a]rguably because contracts for services are not subject to the implied warranties provided by the U.C.C., it is necessary to impose a duty of proper performance in tort in order to provide the buyer of services with analogous protection from economic loss." 866 F.2d at 764. "The judicial recognition of implied warranties in service transactions in Texas has had a short and somewhat uneven history." *Parkway Co.*, 901 S.W.2d at 438. Until 1987, the Texas Supreme Court had never recognized a cause of action for breach of an implied warranty relating to services. *See id.* In *Melody Home Mfg. Co.*, the court first acknowledged a limited implied warranty relating to services, recognizing "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner." 741 S.W.2d at 354. In *Parkway Co.*, the court noted that in implied warranties relating to services, two principles apply. *See* 901 S.W.2d at 439. First, an implied warranty will not be judicially imposed unless there is a demonstrated need for it. *See id.* Second, the *Melody Home* implied warranty extends only to services provided to remedy defects existing at the time of the relevant consumer transaction. *See id.*

As to their breach of implied warranty claim, the Fiesses have failed to establish the existence of an implied warranty. They have not demonstrated a need for an implied warranty

independent of the contract of insurance. *See Parkway Co.*, 901 S.W.2d at 439. Furthermore, the Fiesses have pointed to no defect in the Policy at the time they entered into the transaction to which an implied warranty could attach. *See id.* "The terms of the policy themselves define its benefits and obligations, and no implied warranty can extend those terms." *Jay Freeman v. Glens Falls Ins. Co.*, 486 F. Supp. 140, 143 (N.D. Tex. 1980). Although State Farm owed the Fiesses an implied duty of good faith and fair dealing, it has already been determined that State Farm fulfilled that duty. With regard to any implied duty of proper performance, such a duty has never been recognized in Texas in connection with an insurance contract. Indeed, Texas courts have held that the only cause of action available to a first-party claimant for an alleged deficiency in claims handling is breach of the duty of good faith and fair dealing, whether that claim is predicated on the common law or the Insurance Code. *See Robinson*, 13 F.3d at 163; *United States Auto Ass'n v. Pennington*, 810 S.W.2d 777, 783-84 (Tex. App.—San Antonio 1991, writ denied).

Thus, the Fiesses' extra-contractual claims for breach of express and implied warranties must be rejected, as they are without factual or legal basis.

G. Fraud/Intentional Misrepresentation

The Fiesses further assert that State Farm committed fraud and intentional misrepresentation in connection with their mold claim under the Policy. They allege that State Farm's "misrepresentations regarding the terms of its contract for insurance were material and were made recklessly and/or with knowledge of their falsity, and were made in anticipation of Plaintiffs' reliance upon the same, and upon which, Plaintiffs did actually rely to their detriment." Specifically, they assert that State Farm sold them a Policy ostensibly covering mold damage if

it was an ensuing loss that was false and was known to be false. According to the Fiesses, the denial of their claim on the basis that mold damage is not an ensuing loss constitutes fraud and misrepresentation. They allege that, as a result of such fraud, they have been damaged equal to the "amount of money necessary to remediate their home." In addition, the Fiesses maintain that State Farm's misrepresentations were made intentionally and/or maliciously, thereby entitling them to punitive damages.

State Farm contends in its motion for summary judgment that there is no evidence that it "made a material representation to [the Fiesses] that was false, and upon making the representation, State Farm knew it was false, or should have known it was false." Furthermore, State Farm asserts that the Fiesses have failed to prove that any representation was made with the intent that they act on it, that the Feisses acted on such representation, and that they sustained damage as a result of such representation.

In their complaint, the Fiesses make conclusory allegations that State Farm committed fraud. In order to state a claim for fraud in federal court, the plaintiff must state with particularity the circumstances constituting the fraud. *See* Fed. R. Civ. P. 9(b); *Herrman Holdings Ltd. v. Lucent Techs., Inc.*, 302 F.3d 552, 564 (5th Cir. 2002); *American Realty Trust, Inc. v. Bagley*, No. Civ. A. 3:02CV0641-G, 2003 WL 158878, at *1 (N.D. Tex. Jan. 16, 2003). Instead of the "short and plain statement of the claim" required by Rule 8(a) of the Federal Rules of Civil Procedure, Rule 9(b) imposes a heightened standard of pleading for averments of fraud. *See ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 349 (5th Cir. 2002); *Melder v. Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994); *Whalen v. Carter*, 954 F.2d 1087, 1097 (5th Cir. 1992). Rule 9(b) states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED. R. CIV. P. 9(b); *see Tchuruk*, 291 F.3d at 349; *Hart v. Bayer Corp.*, 199 F.3d 239, 248 n.6 (5th Cir. 2000); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 632 (5th Cir. 1999); *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 491 (5th Cir. 1999). This higher standard of pleading "stems from the obvious concerns that general, unsubstantiated charges of fraud can do damage to a defendant's reputation." *Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1992) (citing *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972)).

To satisfy Rule 9(b), a plaintiff must at a minimum allege the "'"time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby."'" *Epic Healthcare Mgmt. Group*, 193 F.3d at 308 (quoting *Williams v. WMX Techs.*, 112 F.3d 175, 177 (5th Cir. 1997) (quoting *Tuchman*, 14 F.3d at 1068)); *accord Tchuruk*, 291 F.3d at 349; *Hart*, 199 F.3d at 248 n.6; *Melder*, 27 F.3d at 1100; *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993). "'[A]rticulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.'" *Tchuruk*, 291 F.3d at 349 (quoting *Williams*, 112 F.3d at 177-78); *accord Abrams v. Baker Hughes Inc.*, 292 F.3d 424, 431 (5th Cir. 2002). "'[D]irectly put, the who, what, when, and where must be laid out *before* access to the discovery process is granted.'" *Tchuruk*, 291 F.3d at 349 (quoting *Williams*, 112 F.3d at 178) (emphasis in original); *accord Hart*, 199 F.3d at 248 n.6. "Anything less fails to provide defendants with adequate notice of the nature

and grounds of the claim." *Williams*, 112 F.3d at 178 (citing *Tuchman*, 14 F.3d at 1067). "Facts and circumstances constituting charged fraud must be specifically demonstrated and cannot be presumed from vague allegations." *Howard v. Sun Oil Co.*, 404 F.2d 596, 601 (5th Cir. 1968); *see Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419-20 (5th Cir. 2001); *In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig.*, 467 F. Supp. 227, 250 (W.D. Tex. 1979). If a complaint fails to meet the pleading requirements of Rule 9(b), it must be dismissed. *See Tchuruk*, 291 F.3d at 350; *Abrams*, 292 F.3d at 430.

Under Fifth Circuit precedent, a dismissal for failure to plead fraud with particularity is treated as a dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996); *Shushany*, 992 F.2d at 520; *Robertson v. Strassner*, 32 F. Supp. 2d 443, 446 (S.D. Tex. 1998). To avoid dismissal, the complaint must contain facts showing that the plaintiff is entitled to relief on his substantive causes of action. *See McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 197 (5th Cir. 2002). A dismissal should only be granted if "it appears beyond doubt that the plaintiff could prove no set of facts in support of its claims that would entitle it to relief." *Bagley*, 2003 WL 158878, at *2 (citing *Conley*, 355 U.S. at 45-46; *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994)); *see also Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). To avoid dismissal, however, the plaintiff must plead specific facts, not mere conclusory allegations. *Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)).

Although State Farm does not allege that the Fiesses failed to comply with the heightened pleading requirements for a fraud claim, "a district court may dismiss a complaint on its own motion for failure to state a claim." *Shawnee Int'l, N.V. v. Hondo Drilling Co.*, 742 F.2d 234, 236 (5th Cir. 1984); *see also Timmons v. Special Ins. Servs.*, 984 F. Supp. 997, 1004 (5th Cir. 1997), *aff'd*, 167 F.3d 537 (5th Cir. 1998); *Lewis v. Law-Yone*, 813 F. Supp. 1247, 1249 (N.D. Tex. 1993). "Under Rule 12(b)(6), dismissal is proper only if there is either (1) 'the lack of a cognizable legal theory' or (2) 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Timmons*, 984 F. Supp. at 1004 (quoting *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988)) In making such assessment, the court cannot consider material outside the plaintiff's complaint. *See id.* (citing *Powe v. Chicago*, 664 F.2d 639, 642 (7th Cir. 1981)).

Looking strictly at the fraud/intentional misrepresentation allegation in the complaint, the Fiesses have not alleged sufficient facts to meet the requirements of a fraud claim under Rule 9(b). Thus, the Fiesses' claim against State Farm for fraud is subject to dismissal for failure to state a claim upon which relief can be granted. Moreover, aside from failing to plead fraud properly, the Fiesses have not adduced evidence from which it could be inferred that State Farm committed fraud. The Fiesses have not shown that State Farm engaged in any fraudulent conduct or made any actionable misrepresentations in connection with the homeowner's insurance policy at issue. Under Texas law, in order to establish fraud, the plaintiff must show:

1. a material representation was made;
2. it was false;
3. it was made with the knowledge of its falsity or recklessly without knowledge of its truth and as a positive assertion;

4. it was made with the intention that it be acted upon;

5. the plaintiff acted in reliance on the representation; and

6. the plaintiff thereby suffered injury.

See Norman v. Apache Corp., 19 F.3d 1017, 1022 (5th Cir. 1994); *Boggan v. Data Sys. Network Corp.*, 969 F.2d 149, 151-52 (5th Cir. 1992); *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977). "As a general rule, failure to perform the terms of a contract yields contract liability, not tort liability." *Schindler v. Austwell Farmers Coop.*, 829 S.W.2d 283, 286 (Tex. App.—Corpus Christi), *aff'd as modified on other grounds*, 841 S.W.2d 853 (Tex. 1992) (citing *International Printing Pressmen & Assistant's Union v. Smith*, 198 S.W.2d 729, 735-36 (Tex. 1946)). "[A] contract to perform in the future is actionable fraud when it is made with the intention, design and purpose of deceiving, and with no intention of performing." *Id.* (citing *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986)). Nevertheless, "a party's failure to perform the contract, standing alone, is no evidence of that party's intent not to perform at the time the contract was made." *Id.* (citing *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 596 (Tex. 1992); *Spoljaric*, 708 S.W.2d at 435)).

In the case at bar, with respect to the factual basis for their fraud and misrepresentation claim, Mrs. Fiess testified at deposition :

> Q. Okay. That's what I'm talking about right now are just things that you were told that now — and I guess the layman way of saying it would be that now you believe are lies. And there may not be anything specifically that you remember, and there might be. But I'm just trying to figure out if

there are things that you were told that you are now looking back saying, "I was lied to about that."

A. Not about my policy or anything. Perhaps if you are just talking about smart aleckness maybe or something like that —

Q. Well, we can get —

A. — that I believe was — but as far as telling me something about the policy that I feel like I've been lied to about, no.

With regard to State Farm's handling of their claim, the following exchange occurred at Mrs. Fiess's deposition:

Q. Okay. And let me talk about the other thing you were just talking about, about just the handling of the claim. And let me just talk about some general issues that seem to — in dealing with Marilyn Thompson, do you have any issues regarding how she handled the claim?

A. No, sir.

* * *

Q. Okay. But other than — other than that, you didn't have any problem with the way she handled the claim other than the fact that she denied certain parts of the mold claim?

A. No, to the way she handled the claim.

While Mrs. Fiess complained of State Farm's failure to return her repeated telephone calls in a timely manner and of its "mocking attitude" when discussing the claim, State Farm correctly points out the Fiesses' dissatisfaction with the company's denial of and lack of communication concerning their claim provides an insufficient factual basis to establish each of the elements of a viable claim of fraud.

Furthermore, there is no evidence in the record that State Farm intended not to perform its contractual obligations at the time the Policy was issued. On the contrary, Mrs. Fiess's deposition testimony establishes the absence of any misrepresentations made by State Farm when the Policy was issued. Likewise, Mr. Fiess's deposition testimony is equally silent regarding any misrepresentations made at the time the Policy was issued. A party's failure to perform in

accordance with the terms of an agreement may constitute a breach of contract, but it is insufficient to establish fraud or misrepresentation. Thus, the Fiesses' fraud/intentional misrepresentation claim grounded on State Farm's failure to pay for additional mold remediation lacks any support in the record. Thus, in addition to failing to plead fraud properly, the Fiesses have not produced competent evidence to raise a genuine issue of material fact with regard to their claim for fraud and intentional misrepresentation, rendering summary judgment appropriate.

H. Unconscionability

Finally, the Fiesses allege that State Farm's actions with regard to the sale of the policy and the failure to compensate them fully for their entire mold loss were unconscionable.

In Texas, "[a] consumer may bring a DTPA cause of action when any unconscionable action or course of action constitutes a producing cause of economic damages." *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, ___ S.W.3d ___, No. 01-00-00812-CV, 2003 WL 21197128, at *7 (Tex. App.—Houston [1st Dist.] May 22, 2003, no pet. h.) (not released for publication) (citing TEX. BUS. & COM. CODE ANN. § 17.50(a)(3)). Unlike a breach of warranty claim, an "unconscionable action or course of action" is specifically defined in the DTPA to mean "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." TEX. BUS. & COM. CODE ANN. § 17.45(5). "'To prove an unconscionable action or course of action, a plaintiff must show that the defendant took advantage of his lack of knowledge and "that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated."'" *Royal Maccabees Life Ins. Co. v. James*, ___ S.W.3d ___, No. 05-01-01372-CV, 2003 WL 1848601, at *9 (Tex. App.—Dallas Apr. 10, 2003, no pet. h.) (quoting *Bradford v. Vento*, 48 S.W.3d 749, 760 (Tex. 2001) (quoting *Insurance Co.*

of N. Am. v. Morris, 981 S.W.2d 667, 677 (Tex. 1998); *Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985))). "While a specific misrepresentation may not be required to establish unconscionability, *see, e.g., Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432, 439 (Tex. App.—Houston [14th Dist.] 1994, writ denied), unconscionability may not necessarily be established even where an insurer breaches the policy and there is evidence of bad faith." *Royal Maccabees Life Ins. Co.*, 2003 WL 1848601, at *9 (citing *Nicolau*, 951 S.W.2d at 451 (there was legally insufficient evidence to establish unconscionability even though the policy was breached and there was some evidence of bad faith)). Furthermore, "[t]he conduct constituting unconscionability must take place at the time of the consumer transaction made the basis of the DTPA claim." *Id.* (citing *Parkway Co.*, 901 S.W.2d at 441 (unconscionability requires that seller take advantage of special skills and training at time of sale)).

Here, it is undisputed that the mold exclusion is clearly set forth in the Policy, and the Fiesses conceded at deposition that they were not "lied to" about anything in the Policy. There is also no evidence that State Farm acted unconscionably due to an act that resulted in a gross disparity between the value the Fiesses received and the consideration they paid. *See Nicolau*, 951 S.W.2d at 451. Although State Farm refused to pay the Fiesses' entire claim for mold remediation, it paid in excess of $34,000.00, despite the mold exclusion, for the costs it deemed most closely related to pre-existing, non-flood related leaks. Hence, there is no basis for concluding that "State Farm took advantage of the [Fiesses] to the degree that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated." *Id.* In this situation, where there is no evidence of misrepresentation or bad faith, a finding of unconscionability clearly is not warranted.

IV. Conclusion

Accordingly, State Farm's motion for summary judgment is GRANTED. There exist no outstanding issues of material fact with regard to the Fiesses' breach of contract claim or their extra-contractual causes of action for breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code and the DTPA, breach of express and implied warranties, fraud/intentional misrepresentation, and unconscionability. Consequently, State Farm is entitled to judgment as a matter of law on all the Fiesses' claims.

IT IS SO ORDERED.

SIGNED at Houston, Texas, this 3d day of June, 2003.

Marcia A. Crone
United States Magistrate Judge