INSURANCE

HOMEOWNER'S POLICY DOES NOT PROVIDE COVERAGE FOR MOLD CONTAMINATION CAUSED BY WATER DAMAGE THAT IS OTHERWISE COVERED BY THE POLICY

Fiess v. State Farm Lloyds, 202 S.W.3d 744 (Tex. 2006).

FACTS: Fiess (insured) sued State Farm Lloyds (insurer), seeking coverage for losses incurred as a result of mold contamination caused by roof and window leaks. The policy provision in question stated that the policy did not cover loss caused by, *inter alia*, rust, rot, mold, or other fungi. However, this sentence was immediately followed by an ensuing-loss clause that provided as follows: "We do cover ensuing loss caused by collapse of the building or any part of the building, water damage, or breakage of glass which is part of the building if the loss would otherwise be covered under this policy." The homeowners argued that the ensuing-loss clause provided coverage for mold caused by water damage, as long as the water damage itself is not excluded by one of the other provisions in the policy.

HOLDING: In response to a certified question from the Fifth Circuit, the Supreme Court of Texas held that a homeowner's policy that unambiguously excluded "loss caused by mold" did not provide coverage for mold stemming from small roof and window leaks.

REASONING: The court found that the ordinary meaning of the phrase "we do not cover loss by mold" was not ambiguous, and that the policy must be construed in accordance with its plain language as a matter of law. The court also found the ensuing-loss clause that followed did not change the meaning of this provision to create an exception covering the mold contamination.

In *Lambros v. Standard Fire Insurance Co.*, 530 S.W.2d 138 (Tex. App.—San Antonio 1975), the court construed the ensuing-loss clause to suggest a three-step causal formula, requiring (1) a preceding cause (one of the perils excluded by the first sentence) leading to (2) a proximate cause (building collapse, water damage, or glass breakage) resulting in, (3) an ensuing loss. The court explained that, in keeping with *Lambros*, the ensuing-loss clause could only apply in the present case if the mold contamination caused an intervening cause (water damage), which then resulted in a loss that the policy did not exclude from coverage. However, if this loss were mold contamination, it would not be covered by the ensuing-loss clause because the first sentence of the provision excludes mold losses from coverage.

The court also rejected the argument that the mold stemming from the roof and window leaks constituted "water damage," explaining that the term "water damage" in the ensuing-loss clause must be interpreted in light of the company it keeps ("building collapse" and "glass breakage"), and that it refers to something more substantial than a leak, drip, or seep.

The dissent argued that *Lambros* did not explain the meaning of the phrase "otherwise covered by this policy," and asserted that the phrase referred only to exclusion provisions in the remainder of the policy, and not the exclusions in the provision in question. If this were the case, the ensuing-loss clause would be an exception to the preceding plain-language mold exclusion, and would be evidence of an ambiguity that the court must resolve in favor of the insured. However, the majority held that construing the phrase in this way would be unreasonable, and would amount to having the court rewrite the policy.

PLAINTIFF WAS "OCCUPYING" A VEHICLE COVERED BY AN UNINSURED MOTORIST POLICY WHILE OUTSIDE OF THE VEHICLE ATTEMPTING TO AID ANOTHER MOTORIST

Goudeau v. U.S. Fid. & Guar. Co., ____ S.W.3d ____ (Tex. App.—Houston [1st Dist.] 2006).

FACTS: Louis Goudeau was an employee of a car dealership that held a business automobile policy with United States Fidelity & Guaranty Company ("USFG"). The USFG policy contained an uninsured underinsured motorist ("UM/UIM") clause. The UM/UIM clause insured any person occupying a covered auto. The clause described "covered autos" as "any auto to which are attached dealer's license plates issued to [the car dealership]." The clause described "occupying" as "in, upon, getting in, on, out or off."

While driving a covered auto, Goudeau pulled onto the shoulder of the road to assist a driver of a Pontiac that had collided with a retaining wall. As Goudeau walked between the covered auto and the Pontiac, a car struck his driver-side door, colliding with the Pontiac and pinning Goudeau between his car, the Pontiac, and the retaining wall. Goudeau sued USFG for UM/UIM coverage. USFG moved for partial summary judgment on the ground that Goudeau was not insured because he was not occupying a covered vehicle when the accident occurred. The trial court granted summary judgment for USFG. Goudeau filed a notice of appeal.

HOLDING: Reversed and remanded.

REASONING: In *McDonald v. S. County Mut. Ins. Co.*, 176 S.W.3d 464, 471 (Tex. App.—Houston [1st Dist.] 2004), the court held that when an injury occurs outside of a covered vehicle, the inquiry focuses on whether there is a causal connection between the incident that caused the injury and the covered vehicle. As the movant for summary judgment, USFG had the burden to establish that there was no causal connection between Goudeau's injuries and the covered vehicle.

To determine whether a causal connection exists, courts have considered such factors as "the physical proximity between the injured person and the vehicle, the amount of time during which the injured person was outside the vehicle, the purpose for his being outside the vehicle, and whether an impact with the covered vehicle caused the injuries." Evidence is viewed in the light most favorable to the nonmovant. In the present case, the police report indicated that the covered vehicle was involved in the accident and was a cause of Goudeau's injuries. There was also evidence that the covered vehicle helped pin Goudeau to the retaining wall. Furthermore, the evidence suggested that Goudeau had only been outside of the covered car for a short time, and that Goudeau intended to return to the covered vehicle immediately. In viewing the evidence in the light most favorable to Goudeau, the court held that USFG had not established that Goudeau was not occupying the covered vehicle. The court reversed the judgment on Goudeau's claim and remanded the case.