

ENSUING LOSS:

DENY MY CLAIM IF YOU MUST, BUT COVER MY RESULTING LOSS

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Tred R. Eyerly
Damon Key Leong Kupchak Hastert
1600 Pauahi Tower
1003 Bishop Street
Honolulu, HI 96813
Telephone: (808) 526-3625
Facsimile: (808) 533-2242
www.hawaiilawyer.com
te@hawaiilawyer.com
blog: insurancelawhawaii.com

Rina Carmel
Carlson, Calladine & Peterson LLP
Wells Fargo Tower
333 South Grand Avenue
Suite 3500
Los Angeles, California 90071
Telephone: (213) 613-1191
Facsimile: (213) 617-1191
www.ccplaw.com
rcarmel@ccplaw.com

Lisa M. Shusto, P.E. LEED A.P.
Senior Managing Engineer
Exponent Failure Analysis Associates
5401 McConnell Avenue
Los Angeles, CA 90066
Telephone: (310) 754-2701
Facsimile: (310) 754-2799
www.exponent.com
lshusto@exponent.com

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Sample Provisions (following policy exclusions):

“Any ensuing loss to property described in the policy not excluded or excepted in this policy is covered.”

“If physical loss or damages by a Covered Cause of Loss ensues, we will pay only for such ensuing loss or damage.”

Hypo: 1906 San Francisco Earthquake caused gas-fed fires creating even more damage across the city.

- Because excluded peril (earthquake) caused an independent covered peril (fire), resulting fire damage was covered as a “resulting loss.”
- Earthquake damage remained uncovered.

Cases Finding The Ensuing Loss Provision Provides Coverage

- *Eckstein v. Cincinnati Ins. Co.*, 469 F. Supp. 2d 455 (W.D. Ky. 2007)

Provisions: “Any ensuing loss to property described in [the policy] not excluded or excepted in this policy is covered” (homeowners policy) and “if loss by a Covered Cause of Loss results ‘we’ do pay for the resulting loss” (builders risk policy).

Facts: (1) Construction defects led to (2) leaks and water damage which led to (3) mold contamination. Policies contained exclusions for loss “caused by” mold and construction defects.

Result: Damage from water infiltration, even if it was mold, was a loss ensuing from faulty construction.

- *The Home Ins. Co. v. McClain*, No. 05-97-01479-CV, 2000 Tex. App. LEXIS 969 (Tex. Ct. App. Feb. 10, 2000)

Provision: “We do cover ensuing loss caused by ... water damage ... if the loss would otherwise be covered by this policy.”

Facts: A defective and deteriorated roof allowed (1) rainwater to enter home, (2) pool in the crawl spaces, causing (3)(a) structural problems and (3)(b) mold to grow. Policy excluded losses “caused by” mold.

Result: Mold was covered as an ensuing loss caused by water damage because the mold followed as a consequence of the water damage. The court reasoned that the loss that followed the water damage was caused by water damage. It was not caused by mold damage. The policies here exclude loss **caused by** mold, rot, decay, etc. The policies do not exclude loss which **is** mold, rot, decay and the like.

- *Smith v. Westfield Ins. Co.*, No. 06-3077, 2007 U.S. Dist. LEXIS 43996 (E.D. Pa. June 15, 2007)

Provision: After the faulty construction exclusion: Ensuing losses, or those occurring as a consequence of faulty construction, were covered so long as the ensuing loss was not itself excluded under the policy.

Facts: (1)(a) Faulty construction and/or (1)(b) a rainstorm caused (2) water to enter the insured’s home, causing (3) damage to the interior of the insureds’ home, including mold and wet rot. Coverage denied based on exclusion for faulty construction. Policy also excluded loss caused by mold and wet rot.

Result: Damage that was itself mold or wet rot was not covered even if the damage was an “ensuing loss” from faulty construction. But water damage to the interior was covered as an ensuing loss.

- *Tento Int’l, Inc. v. State Farm Fire & Cas. Co.*, 222 F.3d 660 (9th Cir. 2000) (California law)

Provision: Resulting loss from negligence covered, “unless the resulting loss is itself one of the losses not insured in this section.”

Facts: (1) Contractor neglected to place a cover over the unfinished repairs on insured’s roof, and (2) rain damaged insured’s electronics inventory. Loss caused by rain was not covered unless the building first sustained damage by an insured loss to its roof through which the rain entered.

Result: Loss resulted from contractor’s negligence. Policy did not exclude damage to the inventory by rain, so the resulting loss to the inventory was covered. (Court also based its reasoning on fact that provisions were in different sections of policy.)

- *Dawson Farms, L.L.C. v. Millers Mut. Fire Ins. Co.*, 794 So. 2d 949 (La. Ct. App. 2001)

Provision: “We will not pay for physical loss of or damage to property caused directly or indirectly by [faulty design and workmanship]. We will pay for resulting ‘loss’ caused by a Peril Insured.”

Facts: (1) A faulty design for the refrigerated storage facility (2) allowed condensation to form, which (3) dripped on stored sweet potatoes, (4) ruining the crop.

Result: Although policy excluded coverage for the cost of repairs to the warehouse, resulting losses to the sweet potatoes caused by the accumulation of condensation were covered.

Cases Finding No Coverage Under Ensuing Loss Provision

- *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Texpack Group N.V.*, 906 So. 2d 300 (Fla. Dist. Ct. App. 2005), *rev. denied*, 919 So. 2d 436 (Fla. 2005)

Provision: “[This policy does not insure] . . . against the cost of making good defective design or specifications . . . ; however, this exclusion shall not apply to loss or damage resulting from such defective design or specifications”

A second ensuing loss provision covered business interruption losses “resulting from necessary interruption of business . . . caused by loss . . . covered herein”

Facts: After upgrading its paper mill, (1) insured discovered serious defects in contractor’s design and installation. (2) To correct defects, mill had to be shut down. Insured sought coverage for business interruption.

Result: Damage to the insured’s property, and consequently the business interruption, were directly related to the defective design, and thus stemmed directly from an excluded risk.

- *Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, 201 Wis.2d 161, 548 N.W.2d 127 (Wis. Ct. App. 1996)

Provisions: After the faulty work/mechanical breakdown exclusion: “But if a loss not otherwise excluded results, we’ll pay for the loss that results directly from the covered cause.”

After the contamination exclusion: “If a loss that would otherwise be covered results from one of these causes, we’ll pay for the direct loss that results.”

Facts: (1) Improper welding caused piping system to deteriorate, which caused (2) brine outside piping system to mix with ammonia coolant inside the piping system, which caused (3) salts to form, resulting in clogging of the piping system, which caused (4) mechanical failure of ice-cream bar manufacturing machine. Policy excluded coverage for loss of property caused by mechanical breakdown and by contamination.

Result: No coverage. Even though contamination was an ensuing loss, it was also a loss caused by mechanical breakdown and/or contamination expressly excluded by policy.

- *Malley v. Allstate Texas Lloyds*, 347 F. Supp. 2d 346 (E.D. Tex. 2004)

Provision: “We do cover ensuing loss caused by . . . water damage . . . if the loss would otherwise be covered by the policy.”

Facts: (1) The insured’s house sustained damage from plumbing leaks in the foundation during a freeze. (2) The insured then claimed damage from mold. Loss caused by mold damage to home was specifically excluded by policy. Homeowner argued that coverage for mold was not excluded if it was an ensuing loss from a covered event, *i.e.*, water damage.

Result: Mold damage resulting from earlier water damage was not covered because mold damage itself was specifically excluded.

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

Provision: “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.”

Facts: (1) Insured had small roof and window leaks, which (2) caused mold. Loss caused by mold damage to insureds’ home was excluded.

Result: “Water damage,” like “building collapse” and “glass breakage,” had to refer to something more substantial than a minor water leak. Laypersons would interpret ensuing loss provision to cover uncommon and catastrophic losses for which homeowners obtain insurance, not for common maintenance items for which they do not.

- *Hartford Cas. Ins. Co. v. Evansville Vanderburgh, Public Library*, 860 N.E.2d 636 (Ind. Ct. App. 2007), *transfer denied*, 869 N.E.2d 459 (Ind. 2007)

Provision: “If physical loss or damage by a Covered Cause of Loss ensues, we will pay only for such ensuing loss or damage.”

Facts: (1) Excavation for underground parking lot (2) damaged historic building on adjacent lot. Policy excluded loss caused by design, specification, workmanship, construction and renovation.

Result: The careless excavation work setting into motion the cause of the library’s loss was unambiguously excluded from coverage.

- *TMW Enterprises., Inc. v. Federal Ins. Co.*, 619 F.3d 574 (6th Cir. 2010) (Michigan law)

Provision: Exclusions for faulty workmanship or construction “do not apply to ensuing loss or damage caused by or resulting from a peril not otherwise excluded.”

Facts: During renovations, insured discovered (1) original builder had improperly constructed exterior walls, leaving them vulnerable to water infiltration, and (2) water had infiltrated, (3) weakening the structural integrity of the building by corroding its steel structure. The policy excluded damage caused by “construction defects” and “wear and tear.”

Result: En ensuing loss provision only applied where damages occurring later in time were “caused” by “a peril not otherwise excluded.” Here, the initial faulty workmanship was an excluded peril.

- *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 241 P.3d 429 (Wash. Ct. App. 2010)

Provision: After the faulty workmanship exclusion: “But if loss by any of the Covered Causes of Loss results, we will pay for that resulting ‘loss.’”

Facts: (1) Shoring equipment collapsed, causing (2) damage to concrete slab it supported. Policy excluded loss caused by defective design and faulty workmanship. The policy excluded loss caused by defective design and by faulty workmanship. Trial court had ruled that because the shoring equipment and concrete slab were separate and distinct, the concrete collapse was covered under the resulting loss provision.

Result: The court of appeal held that the collapse resulted directly from the initial excluded peril of faulty workmanship. Therefore, the loss was uncovered. (However, the court remanded for a finding on whether faulty equipment, a covered peril, was a factor in causing the loss.)

- *Rapid Park Indus. v. Great N. Ins. Co.*, No. 09 Civ. 8292, 2010 U.S. Dist. LEXIS 115747 (S.D.N.Y. Oct. 15, 2010)

Provision: “The Wear and Tear exclusion does not apply to ensuing loss or damage caused by or resulting from a specified peril or water.”

Facts: (1) Due to wear and tear and possibly water damage, (2) floor slab in leased parking garage deteriorated, so (3) city issued a vacate order. Insured sought coverage for business interruption losses, which was denied based on exclusions for deterioration. Insured argued there was coverage for ensuing loss caused by or resulting from water.

Result: Ensuing loss provision did not cover water damage where water was arguably a cause of the damage, but not a consequence of the otherwise excluded peril.

- *In re Chinese Manufacture Drywall Products Liability Litigation*, -- F. Supp. 2d --, No. MDL 2047, 2010 U.S. Dist. LEXIS 133497 (E.D. La. Dec. 16, 2010)

Provision: Coverage provided for ensuing or resulting losses which constitute covered losses and are not excepted from coverage by any exclusion.

Facts: (1) Chinese drywall was installed in homes, (2) allegedly emitting odors and gases that caused corrosion to metal and electronic items in homes. The Chinese drywall was a covered physical loss. Court determined the exclusions for faulty material and corrosion were applicable, however. Did the ensuing loss provision provide coverage?

Result: Odors from Chinese drywall were not ensuing because they were neither different in kind from the losses caused by the Chinese drywall, nor the result of an extraneous event. Further, even if corrosion-caused losses were ensuing, they would still not be covered because corrosion-related losses were specifically excluded.