Exclusions Got You Down? Consider Coverage for Ensuing Losses

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Introduction

Exclusions are the bane of the policyholder. Catastrophic events may cause severe damage to property which, at first blush, appears to be covered by a policy. Before successfully recovering for a loss, however, the insured must successfully weave through a minefield of exclusions within the policy.

For example, during a storm, rainwater may leak through a roof that was improperly designed and constructed, ultimately causing water damage to furniture and personal belongings within the building. The policy will likely exclude coverage for repairs to the defective roof. All is not lost, however. An "ensuing loss" provision may provide coverage for the loss to personal property resulting from the defective roof.

Yet, courts have disagreed on the interpretation and scope of ensuing loss provisions. Case law demonstrates that coverage for a resulting loss in a particular case is determined based on an analysis of the facts in light of a careful examination of language used in the particular ensuing loss provision. This article will survey the competing court decisions that offer varying interpretations of ensuing loss provisions. As will be seen, not only are the facts variable, but the language of the ensuing loss provisions differ from case to case.

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Understanding the Ensuing Loss Provision

An example of an ensuing loss provision is found in the Causes of Loss—Special Form of the ISO commercial property policy.[1] The form first defines covered causes of loss as, "Risks of Direct Physical Loss unless the loss is ... Excluded...."[2] After listing the exclusions, including water, wear and tear, rust or other corrosion, etc., the ensuing loss provision reads,

> I. We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** But if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> a. Weather Conditions....
>
> ...
>
> c. Faulty, inadequate or defective:
>
> ...
>
> (2) Design, specifications, workmanship, repair, construction, renovations, remodeling, grading, compaction....
>
> ...
>
> (4) Maintenance....[3]

If weather conditions cause rainwater to leak through the poorly constructed roof, eventually resulting in water damage to the inventory inside the building, will the damaged inventory be covered as an "ensuing loss" under this provision? Likewise, if negligence in constructing or maintaining the roof causes water to leak into the interior of the structure and damage the inventory, will the loss be covered as an ensuing loss?

Case Law Interpreting the Scope of the Ensuing Loss Provision

Some courts have interpreted the ensuing loss provision broadly to find coverage for losses resulting or following from excluded or excepted losses.

A. Cases Finding Coverage under Ensuing Loss Provision

A typical case utilizing the ensuing loss provision to establish coverage was *Eckstein v. Cincinnati Ins. Co.*,[4] decided by a federal district court in Kentucky. There, the insureds' home experienced water damage due to a variety of construction-related leaks, which ultimately resulted in mold contamination. The insureds had to vacate their home. Coverage under the homeowner's policy was denied for all but one leak in the house because loss caused by mold was excluded. The policy also excluded loss caused by "an act, defect, error, or omission (negligent or not) relating to ... [d]esign, specifications, construction, or workmanship." Nevertheless, the policy provided, "any ensuing loss to property described [in the policy] not excluded or excepted in this policy is covered."[5] In other words, the policy covered losses "ensuing" from excluded losses.

Consequently, the court determined the policy clearly excluded faulty construction losses, but losses taking place afterward, or as a result of faulty construction, were covered. The court explained the connection between the exclusions and the ensuing loss provision:

> There is nothing in the polic[y] to indicate that an ensuing loss must be the result of a separate cause from the excluded loss. To the contrary, the polic[y] is clear that faulty construction losses are excluded, but losses taking place afterward, or as a result of faulty construction, are covered. The exclusions still apply despite the applicability of the ensuing loss provision. For example, water damage ensuing from a defective roof is covered as an ensuing loss, but the exclusion for faulty construction excludes coverage to repair the roof. Such an interpretation is consistent with the reasonable expectations of the insureds.[6]

The court further reasoned that the policy excluded loss "caused by" mold. The policy did not, however, exclude loss which *was* mold, rot, decay, etc. When the mold ensued from water damage, a covered loss, the mold damage was covered despite the exclusion.[7] Accordingly, damage from water infiltration, even if it was mold, was a loss ensuing from faulty construction, and thus covered by the policy.[8]

Mold damage was also found to be an ensuing loss originating with water damage in *The Home Ins. Co. v. McClain*.[9] Rainwater entered the insured's home through a leaky roof. Subsequently, the insureds discovered the leaking water had collected in and soaked the stud areas behind the interior walls, damaging the ceilings and sub floors. This, in turn, allowed mold and bacteria to grow, eventually rendering the home uninhabitable.[10]

The insurer denied coverage based, in part, on a mold exclusion. The insureds sued and moved for partial summary judgment, contending that the policy covered the ensuing loss from water damage, which in this case was mold and fungi. The trial court granted the insured's motion.

The Texas Court of Appeals affirmed. Although the policy excluded losses caused by "wear and tear, deterioration," as well as "rust, rot mold or other fungi," the policy further provided that "we do cover ensuing loss caused by ... water damage ... if the loss would otherwise be covered by this policy."[11] The insurer argued the policy did not cover mold and fungus damage, even if caused by water damage. The court disagreed, finding the mold and fungi were an ensuing loss. To be an ensuing loss caused by water damage, the mold and fungi had to follow as a consequence of the water damage.[12] The water leaking from the roof pooled in the crawl spaces and caused the mold and fungi. Consequently, the damages claimed were a consequence of water leaking from the roof. Under the facts of this case, the exclusion for mold and fungi damage did not apply.[13]

The ensuing loss provision also provided coverage in *Smith v. Westfield Ins. Co.*,[14] where damage to the interior of a house was caused by rain. The insurer denied coverage based on an exclusion for faulty construction. The court disagreed. Although losses attributable to faulty construction (i.e., the cost of replacing the stucco, windows, etc.) were not covered, ensuing losses, or those occurring as a consequence of the faulty construction (i.e., water damage to the interior of the house), were covered so long as the ensuing loss was not itself excluded under the policy.[15] Relying on *Eckstein*, the court further explained,

> This is more easily seen with an example. The contractor did not properly install the stucco on the exterior of the house. Due to this faulty construction, rainwater seeped into the house and damaged the flooring. The insurance policy covers the cost of replacing the damaged flooring but not the stucco.[16]

This was not the end of the analysis, however. The court noted that the ensuing loss itself must not be specifically excluded elsewhere in the policy.

The policy excluded recovery for mold and wet rot. Adopting reasoning that appears to directly contradict the conclusion in *McClain*, the court determined that damage to the interior of the house that was itself mold or wet rot was not covered even if the damage was an "ensuing loss" from the faulty construction. However, the loss caused by the mold or wet rot could still be covered if it was the "direct result" of one of six named perils, such as "windstorm or hail."[17] Because there was no evidence that wind or hail damaged the house, any loss to the interior of the house caused by mold or wet rot was excluded.[18] But the water damage to the walls, floors, insulation and supporting timbers in the interior of the house were covered as an ensuing loss.[19]

The Ninth Circuit addressed an ensuing loss provision in *Tento Int'l, Inc. v. State Farm Fire and Cas. Co.*[20] A contractor made repairs to the insured's roof, but neglected to place a temporary cover over the unfinished repairs. Consequently, rain damaged the insured's electronic equipment. When the insured submitted a claim, State Farm denied coverage.[21]

The policy covered accidental direct physical loss with certain exceptions. The policy's Property Subject to Limitations section limited coverage as follows:

> We will not pay for loss:
>
> . . .
>
> 6. to the interior of any building or structure, or the property inside any building or structure, caused by rain, . . . unless:
>
> a. the building or structure first sustains damage by an insured loss to its roof or walls through which the rain . . . enters. . . .[22]

Moreover, the Losses Not Insured section excluded any loss caused by a third party's "faulty, inadequate, unsound or defective . . . maintenance."[23] If, however, the direct physical loss resulted from the faulty maintenance, the insurer would pay for the resulting loss "unless the resulting loss is itself one of the losses not insured in this section."[24] The district court granted State Farm's motion to dismiss. The district court reasoned that pursuant to the Property Subject to Limitations section, the policy excluded coverage for damage to the electronic equipment caused by rain because the building did not first sustain damage to its roof by an insured loss.[25]

The Ninth Circuit reversed, concluding that the district court incorrectly focused on the rain instead of the contractor's negligence as the cause of loss. While the rain may have been the most immediate cause of the insured's damages, under California law, the efficient proximate cause[26] of the damage was the contractor's negligent handling of the roof repair. The court apparently reasoned that the contractor's failure to adequately cover the roof constituted "damage," instead of merely a cause of the damage. Nevertheless, the loss caused by the contractor's negligence was covered unless excluded under the Losses Not Insured section of the policy.[27]

A resulting loss provision was included in the Losses Not Insured section of the policy. The provision promised to pay for losses resulting from the contractor's negligence "unless the resulting loss is itself one of the losses not insured *in this section*."[28] The question was whether the resulting loss—damage to the electronic equipment by rain—was "one of the losses not insured *in this section*." Although the scope of the "in this section" language could refer to the entire basic coverage of Section I, which included the Losses Insured as well as the Losses Not Insured provisions, and thereby would exclude coverage, the court concluded that such a reading was illogical.[29] Instead, the words "in this section" referred only to the Losses Not Insured section, which did not preclude coverage for damage to the inventory by rain. Therefore, the insured's loss of inventory was covered by the policy.[30]

Finally, a slightly different factual pattern was presented in *Dawson Farms, L.L.C. v. Millers Mut. Fire Ins. Co.*[31] Dawson grew sweet potatoes. A refrigerated facility was built to store the crops during the summer months. Due to a faulty design, condensation formed and settled on the stored sweet potatoes. Dawson feared the condensation would promote the growth of bacteria. Accordingly, the crop was destroyed in May. Dawson's policy covered risks of direct physical loss except loss of or damage to property expressly excluded.[32] When Dawson sought coverage for the loss, the insurer denied the claim, contending that only water damage resulting directly from the breaking or cracking of a water system was covered, not water damage due to condensation.[33] The trial court agreed and entered judgment for the insurer.

The appellate court reversed. A decision that the insured did not prove that the condensation was an accident causing its damages and therefore an insured peril was clearly wrong.[34] The settling of the condensation on the sweet potatoes was an accident and a peril covered by the broad language of the policy. The issue was whether the insurer, not Dawson, had carried its burden of proof that the loss fell within the policy's exclusions.[35]

The resulting loss provision was meaningless unless the cost of repairing the poor workmanship and design establishing the conditions under which condensation could form was excluded from coverage, while any damage resulting from the condensation itself was covered

There were two distinct losses here: first, the cost to repair the faulty workmanship and design, and second, the resulting damage to the contents of the warehouse caused by the condensation. The policy stated: "We will not pay for physical loss of or damage to property caused directly or indirectly by any of the following (faulty design and workmanship). *We will pay for resulting 'loss' caused by a Peril Insured.*"[36]

Under this language, the accumulated condensation that eventually settled on the sweet potatoes was a peril insured. The resulting loss provision was meaningless unless the cost of repairing the poor workmanship and design establishing the conditions under which condensation could form was excluded from coverage, while any damage resulting from the condensation itself was covered.[37] Accordingly, the policy excluded coverage for the cost to repair the loss to the warehouse caused by the faulty design and poor workmanship. The policy did not, however, clearly exclude coverage for the second accident, i.e., the resulting losses caused by the accumulation of condensation and its impact on the stored potatoes.[38]

B. Cases Determining There is No Coverage under Ensuing Loss Provision

Many cases have reached a seemingly opposite conclusion by finding no coverage for resulting losses under an ensuing loss provision.

A case exemplifying the inapplicability of the ensuing loss provision is *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Texpack Group N.V.*[39] The insured manufactured paper products. Another company, ATP, was hired by the insured to design and install equipment at its New Hampshire mill. Within weeks of the upgrade, the insured discovered serious defects in ATP's design and installation. After many months of attempting to resolve the deficiencies, the plant had to be shut down.[40] Because ATP was underinsured and insolvent, the insured filed a claim with National Union.

National Union's policy covered all risks except those specifically excluded. Among the risks not covered was the cost of making good defective design or specifications.[41] Aware that the cost of repair or replacement of the new equipment was precluded by the defective design exclusion, the insured sought recovery for its business interruption and extra expense losses from the plant closure under the ensuing loss provision, which stated: "[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 specifications...."

The trial court found the insured was entitled to its economic losses under the "ensuing loss" provision.[42]

The appellate court reversed. Another ensuing loss provision in the policy covered business interruption losses "resulting from necessary interruption of business ... caused by loss ... covered herein...." Accordingly, an ensuing loss exception was not applicable if such loss was directly related to the original excluded risk.[43] Here, damage to the insured's property and, consequently, the business interruption for which the insured sought recovery, were directly related to the faulty design, and thus stemmed directly from an excluded risk.[44]

Another case in which the court found the loss suffered by the insured was not a covered ensuing loss was *Richland Valley Products, Inc. v. St. Paul Fire & Casualty Co.*[45] The insured manufactured ice cream bars. One piece of equipment used to manufacture and package the ice cream bars was a 21-year old molding machine called the "Gram II." With the use of ammonia circulated through a coil system, the Gram II was kept at temperatures well below freezing in order to make ice cream bars of good quality. Therefore, the Gram II was connected to the plant's central refrigeration system that pumped liquid ammonia refrigerant through a network of piping.

Eventually, the coil system became contaminated when brine entered the system and mixed with ammonia, creating impure ammonia.[46] This caused salts to crystallize, clogging the piping system and spreading to other parts of the refrigeration system. When it was unable to maintain low temperatures in the Gram II and other machines, the insured notified St. Paul of its losses.

St. Paul's policy excluded coverage for loss of property caused by "mechanical breakdown." The exclusion also provided, "[b]ut if a loss not otherwise excluded results, we'll pay for the loss that results directly from the covered cause."[47] The policy further excluded loss caused by contamination, but this exclusion incorporated its own ensuing loss provision, which read, "[i]f a loss that would otherwise be covered results from one of these causes, we'll pay for the direct loss that results."[48]

Had the initial contamination resulted in fire, however, that loss caused by fire would have been covered under the ensuing loss clause because such a loss was not otherwise excluded

The court first determined that because the machinery problems were due a mechanical breakdown, the resulting loss provision was not applicable unless "a loss not otherwise excluded resulted."[49] Contamination of the piping system, an excluded loss, had resulted from the mechanical breakdown. The court then considered whether there was coverage by virtue of the "ensuing loss" clause following the policy's contamination exclusion.[50] The court reasoned that the salt crystallization and clogging of the piping system was not a covered ensuing loss.[51] Although the clogging of the pipes was a direct physical loss, it was a loss that would not be otherwise covered because it was caused by additional contamination, the spreading of the crystallized salt, and loss caused by contamination was itself an excluded loss. Hypothetically, had the initial contamination resulted in fire, for example, the loss caused by fire would have been covered under the ensuing loss clause because such a loss was not otherwise excluded.[52]

Where mold was specifically excluded under a homeowner's policy, an ensuing loss provision did not establish a basis for coverage in *Malley v. Allstate Texas Lloyds*.[53] The policy's exclusions stated, "[w]e do not cover loss caused by ... mold." The listed exclusions were followed by an ensuing loss provision: "we do cover ensuing loss caused by ... water damage ... if the loss would otherwise be covered by the policy."[54] The homeowner argued that coverage for mold was not excluded if the mold was an "ensuing loss" from a covered event, such as water damage. The court disagreed. Under the policy, mold damage resulting from earlier water damage was not covered because mold damage itself was specifically excluded. If the ensuing loss provision was interpreted to allow coverage for mold, it would destroy the exclusion. An interpretation rendering the exclusion inoperative made no sense.[55]

In another case interpreting Texas law, the Fifth Circuit proposed a certified question to the Supreme Court of Texas, inquiring whether damage caused by mold was covered as an "ensuing loss." *See Fiess v. State Farm Lloyds*.[56] Although the policy did not cover, among other things, "loss caused by ... mold," ensuing losses caused by water damage were covered: "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."[57]

The insureds contended that the initial provision ("We do not cover loss caused by mold") should be disregarded because of the ending provision ("We do cover ensuing loss caused by water damage").

By its own terms, the provision covered ensuing losses caused by water *damage*, not water alone.[58] The parties disagreed, however, whether mold stemming from the small roof and window leaks constituted "water damage." The Texas Supreme Court looked to a Fifth Circuit case, *Aetna Casualty & Sur. Co. v. Yates*,[59] to determine the meaning of "water damage" in a homeowner's ensuing loss clause. In *Yates*, the court concluded that inadequate ventilation leading to condensation that eventually caused a floor to rot away was not an ensuing loss because the rot was caused by water, not "water damage."[60] The Fifth Circuit had noted,

> 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. In our case the rot may have ensued from water but not from water damage, and the damage ensuing from the rot was not the damage from the direct intrusion of water conveyed by the phrase "water damage."[61]

The ensuing loss clause was intended to provide coverage only if relatively common and usually minor risks led to a relatively uncommon and perhaps major loss, such as building collapse, glass breakage, or water damage.[62] "Water damage," like "building collapse" and "glass breakage", had to refer to something more substantial than every minor water leak or seep. Ordinary people would read the ensuing loss provision to address the kinds of uncommon and catastrophic losses for which homeowners obtained insurance, not for the common maintenance items for which they do not.[63] Accordingly, the Texas Supreme Court informed the Fifth Circuit that the ensuing loss provision did not cover mold caused by water.[64] [65]

Finally, a causation analysis was utilized to determine the applicability of the ensuing loss provision in *The Hartford Casualty Ins. Co. v. Evansville Vanderburgh, Public Library*.[66] The City Library acquired a building listed on the National Registry of Historic Buildings. Plans were made to integrate the building into the new Central Library. Industrial Contractors commenced excavation for an underground parking garage on the adjacent lot. Sheet piling was installed for an excavation retention system using a vibratory hammer. The historic building was

damaged during the installation of sheet pilings. After the damage was discovered, Industrial Contractors installed additional sheet piling with an impact hammer. When, however, Industrial Contractors excavated the dirt behind the sheet wall, the building suffered additional damage. Eventually, the historic building was condemned as a total loss requiring demolition.[67]

The Library submitted a claim, but it was denied by Hartford. The Library sued and cross-motions for summary judgment were filed. The all-risk policy at issue excluded loss caused by "design, specifications, workmanship, repair, construction, and renovation...."[68] Also excluded was loss caused by "furnishing of work, materials, parts or equipment in connection with the design, specifications, workmanship, repair, construction, renovation...."[69] An ensuing loss provision, however, read, "[i]f physical loss or damages by a Covered Cause of Loss ensues, we will pay only for such ensuing loss or damage."[70] The trial court determined the Library's loss was an ensuing loss from the defective pile-driving operations, allowing coverage under Hartford's policy.[71]

The Indiana appellate court determined the ensuing loss provision would only apply if the cause of the loss from which the ensuing loss arose was a "covered cause of loss"

On appeal, Hartford argued that loss arising out of design, specification, workmanship, construction and renovation was excluded. The ensuing loss provision did not overcome this exclusion and allow for coverage under the facts of this case.[72] The Library, on the other hand, argued that the ensuing loss provision established an exception to the exclusions, and thus retained coverage for any otherwise covered loss that might ensue or result from construction activities.[73]

The Indiana appellate court determined the ensuing loss provision would only apply if the cause of the loss from which the ensuing loss arose was itself a "covered cause of loss." The careless excavation work that set into motion the efficient proximate cause[74] of the Library's loss was unambiguously excluded from coverage. Therefore, the efficient proximate cause was not somehow covered under the ensuing loss provision.[75]

C. Review of Provision in Light of the Facts is the Key

It is difficult to draw a clear line between those cases that find coverage for ensuing losses and those that do not. It appears that a case-by-case analysis is necessary to consider the policy language in light of the particular facts presented.

The following chart may be helpful. Cases in which coverage for ensuing losses was found can be summarized as follows:

Case	Ensuing Loss Provision	Factual Background
Eckstein v. Cincinnati Ins. Co.[76]	"[A]ny ensuing loss to property not excluded or excepted in this policy is covered."	Although loss caused by faulty construction was excluded, loss following faulty construction ensued from excluded losses.
The Home Ins. Co. v. McClain[77]	"[W]e do cover ensuing loss caused by ... water damage ... if the loss would otherwise be covered by this policy."	Despite exclusion for mold, mold following water damage was the result of water leaking from a defective roof, and therefore covered.
Smith v. Westfield Ins. Co.[78]	Although losses caused by faulty construction were not covered, ensuing losses resulting from faulty construction were covered so long as ensuing loss itself was not excluded.	Because loss caused by mold was excluded, mold damage was not covered as an ensuing loss from faulty construction. Any other loss, however, resulting from faulty construction was ensuing loss.
Tento Int'l, Inc. v. State Farm Fire and Cas. Co.[79]	Resulting loss from faulty maintenance covered "unless the resulting loss is itself one of the losses not insured in this section."	Although loss caused by rain was excluded, the efficient proximate cause of the loss was the contractor's negligence; therefore, damaged inventory was covered as an ensuing loss.
Dawson Farms, L.L.C. v. Millers Mut. Fire Ins. Co.[80]	"We will not pay for physical loss of or damage to property caused directly or indirectly by any of the following (faulty design and workmanship). We will pay for resulting 'loss' caused by a Peril Insured."	Coverage for cost to repair warehouse was caused by faulty design excluded; resulting loss of potato crop caused by condensation was covered as ensuing loss.

The cases in which there was no coverage for ensuing loss can be summarized as follows:

Case	Ensuing Loss Provision	Factual Background
Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Texpack Group N.V.[81]	"[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 specifications. . . ." A second ensuing loss provision covered business interruption losses "resulting from necessary interruption of business . . . caused by loss . . . covered herein. . . ."	Cost of making good a defective design excluded. Loss to insured's factory caused by faulty design, and resulting business interruption, were directly related to the faulty design and thus stemmed directly from an excluded risk, negating coverage as an ensuing loss.
Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.[82]	Although loss for mechanical breakdown was excluded, "if a loss not otherwise excluded results, we'll pay for the loss that results directly from the covered cause." Loss caused by contamination was also excluded, but "[i]f a loss that would otherwise be covered results from one of these causes, we'll pay for the direct loss that results."	Mechanical breakdown in factory's ice cream machine led to contamination, another form of loss that was excluded. As a result, ensuing business interruption was not covered.
Malley v. Allstate Texas Lloyds[83]	After listing exclusions, policy provided, "we do cover ensuing loss caused by . . . water damage . . . if the loss would otherwise be covered by the policy."	Mold damage resulting from previous water damage was not covered as ensuing loss because mold damage was specifically excluded.
Fiess v. State Farm Lloyds[84]	"We do cover ensuing loss caused by . . . water damage . . . if the loss would otherwise be covered under this policy."	The provision covered ensuing losses from water *damage*, not water alone; mold caused by a mere leak was not an ensuing loss under this provision.
The Hartford Casualty Ins. Co. v. Evansville Vanderburgh, Public Library[85]	"If physical loss or damages by a Covered Cause of Loss ensues, we will pay only for such ensuing loss or damage."	Loss caused by workmanship, repair, construction, renovation, etc., was excluded. Since careless excavation work was the cause of loss, it was excluded from coverage.

Coverage under ISO's Ensuing Loss Provision

Returning to the ensuing loss provision from the ISO policy set forth at the beginning of the article, it reads, in part, "[If] an excluded cause of loss [i.e., weather conditions; faulty design of roof] results in a covered cause of loss, we will pay for the loss or damage caused by that covered cause of loss."[86] If weather conditions or negligence in designing or constructing the roof allowed rainwater to leak through the roof and cause damage to the inventory, would such damage be covered as an ensuing loss?[87] Where damage caused by water was specifically excluded by the policy, damage to the inventory would not be caused by a "covered cause of loss," and would not be an ensuing loss.

Now assume loss caused by water leaking from an interior drainage system is covered under the policy. If the rainwater entering through the roof eventually makes its way to the interior drainage system from which it leaks, damage to the inventory would be covered as an ensuing loss under the ISO policy.[88]

Conclusion

The cases surveyed above illustrate that special attention must be devoted not only to the facts, but also to the language used in the ensuing loss provisions to determine whether a loss ensuing from an excluded loss will nonetheless be covered.

[1] *See* ISO Form CP 10 30 04 02.

[2] ISO Form CP 10 30 04 02.

[3] ISO Form CP 10 30 04 02.

[4] Eckstein v. Cincinnati Ins. Co., 469 F. Supp. 2d 455 (W.D. Ky. 2007).

[5] *Eckstein*, 469 F. Supp. 2d at 461.

[6] *Eckstein*, 469 F. Supp. 2d at 462. The court further noted, "[a]n insured would reasonably expect that if a pipe bursts and floods his home with water, damaging walls, ceilings, carpets, floors and sub-floors, that there is insurance coverage to repair the damage but there is no coverage to fix the corroded pipe." *Eckstein*, 469 F. Supp. 2d at 463.

[7] *Eckstein*, 469 F. Supp. 2d at 462–63.

[8] *Eckstein*, 469 F. Supp. 2d at 462.

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

[10] *McClain*, 2000 Tex. App. LEXIS 969, at *2–3.

[11] *McClain*, 2000 Tex. App. LEXIS 969, at *8.

[12] *McClain*, 2000 Tex. App. LEXIS 969, at *9.

[13] *McClain*, 2000 Tex. App. LEXIS 969, at *10–11.

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

[15] *Smith*, 2007 U.S. Dist. LEXIS 43996, at *7.

[16] *Smith*, 2007 U.S. Dist. LEXIS 43996, at *7–8 (relying on *Eckstein*, 469 F. Supp. 2d at 463).

[17] *Smith*, 2007 U.S. Dist. LEXIS 43996, at *9.

[18] *Smith*, 2007 U.S. Dist. LEXIS 43996, at *10

[19] *Smith*, 2007 U.S. Dist. LEXIS 43996, at *10 n. 8.

[20] Tento Int'l, Inc. v. State Farm Fire and Cas. Co., 222 F.3d 660 (9th Cir. 2000).

[21] *Tento Int'l, Inc.*, 222 F.3d at 661.

[22] *Tento Int'l, Inc.*, 222 F.3d at 661.

[23] *Tento Int'l, Inc.*, 222 F.3d at 661–62.

[24] *Tento Int'l, Inc.*, 222 F.3d at 662.

[25] *Tento Int'l, Inc.*, 222 F.3d at 662.

[26] The California Supreme Court has defined the efficient proximate cause as "the predominating" or "most important cause of the loss." *Tento Int'l, Inc.*, 222 F.3d at 663 (quoting Garvey v. State Farm Fire & Casualty Co., 770 P.2d 704, 707 (Cal. 1989)).

[27] *Tento Int'l, Inc.*, 222 F.3d at 663.

[28] *Tento Int'l, Inc.*, 222 F.3d at 663 (emphasis added).

[29] *Tento Int'l, Inc.*, 222 F.3d at 663.

[30] *Tento Int'l, Inc.*, 222 F.3d at 664.

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

[32] *Dawson Farms*, 794 So. 2d at 951.

[33] *Dawson Farms*, 794 So. 2d at 951.

[34] *Dawson Farms*, 794 So. 2d at 951.

[35] *Dawson Farms*, 794 So. 2d at 951.

[36] *Dawson Farms*, 794 So. 2d at 952 (emphasis in original).

[37] *Dawson Farms*, 794 So. 2d at 952.

[38] *Dawson Farms*, 794 So. 2d at 952–53.

[39] Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Texpack Group N.V., 906 So. 2d 300 (Fla. Ct. App. 2005).

[40] *Texpack Group*, 906 So. 2d at 301.

[41] *Texpack Group*, 906 So. 2d at 301.

[42] *Texpack Group*, 906 So. 2d at 301.

[43] *Texpack Group*, 906 So. 2d at 302.

[44] *Texpack Group*, 906 So. 2d at 302.

[45] Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co., 548 N.W. 2d 127 (Wis. Ct. App. 1996).

[46] *Richland Valley*, 548 N.W. 2d at133.

[47] *Richland Valley*, 548 N.W. 2d at 129–130.

[48] *Richland Valley*, 548 N.W. 2d at 130.

[49] *Richland Valley*, 548 N.W. 2d at130.

[50] *Richland Valley*, 548 N.W. 2d at132.

[51] *Richland Valley*, 548 N.W. 2d at133.

[52] *Richland Valley*, 548 N.W. 2d at133.

[53] Malley v. Allstate Texas Lloyds, 347 F. Supp. 2d 346 (E.D. Texas 2004).

[54] *Malley*, 347 F. Supp. 2d at 348–49.

[55] *Malley*, 347 F. Supp. 2d at 349.

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

[57] *Fiess*, 202 S.W. 3d at 746. (emphasis added).

[58] *Fiess*, 202 S.W. 3d at 750.

[59] Aetna Casualty & Sur. Co. v. Yates, 344 F.2d 939, 941 (5th Cir. 1965).

[60] *Fiess*, 202 S.W. 3d at 750 (relying on *Yates*, 344 F.2d at 941).

[61] *Fiess*, 202 S.W. 3d at 750 (relying on *Yates*, 344 F.2d at 941).

[62] *Fiess*, 202 S.W. 3d at 750.

[63] *Fiess*, 202 S.W. 3d at 751.

[64] *Fiess*, 202 S.W. 3d at 753. The dissent discussed a practical example of where the ensuing loss provision would apply:

> An example of the practical application of this "preceding cause-proximate cause-ensuing loss" formulation is as follows: Rust, an excluded form of damage, causes a pipe to burst. The damage to the pipe is clearly excluded under the policy exclusion for rust. However, any damage resulting or ensuing from the water that escapes as a result of the rust will be covered under the ensuing-loss provision [so long as the loss is not excluded by some other provision of the policy other than an exclusion with an ensuing-loss provision . . .]. Plugging these facts into the formulation results in the following: the rust eating through the pipe constitutes the preceding cause; the water escaping from the pipe constitutes the proximate cause; and the damage caused by the escaping water constitutes the ensuing loss.

Fiess, 202 S.W. 3d at 758 (Medina, J. dissenting)(quoting Fiess v. State Farm Lloyds, 392 F.3d 802, 810 n. 30 (5th Cir. 2004)).

[65] In a subsequent case, State Farm argued that *Fiess* categorically held there was no coverage for mold under a homeowner's policy. *See* State Farm Lloyds v. Page, No. 08-0799, 2010 Tex. LEXIS 415 (Tex. June 11, 2010). *Page* involved leaks in the home's plumbing system and sanitary sewer lines, causing mold damage. The trial court agreed there was no coverage under *Fiess*. Under Coverage A (Dwelling), loss caused by mold was excluded. *Page*, 2010 Tex. LEXIS 415, at *5, 6. Coverage B (Personal property), however, covered a loss caused by mold after a plumbing leak. The Texas Supreme Court found this clear policy language persuasive. While there was no coverage for mold damage to the dwelling, personal property damage was removed from the mold exclusion when the mold emanated from a plumbing leak. *Page*, 2010 Tex. LEXIS 415, at *15. Accordingly, the insured's claim for mold damage to her personal property resulting from plumbing leaks was covered under the homeowner's policy. The Court noted that in *Fiess*, personal property coverage for mold damage resulting from plumbing leaks was not addressed because the issue was not raised on appeal by the insureds. *Page*, 2010 Tex. LEXIS 415 at *9.

[66] The Hartford Casualty Ins. Co. v. Evansville Vanderburgh, Public Library, 860 N.E. 2d 636 (Ind. Ct. App. 2007).

[67] *Evansville*, 860 N.E. 2d at 638–39.

[68] *Evansville*, 860 N.E. 2d at 641.

[69] *Evansville*, 860 N.E. 2d at 641.

[70] *Evansville*, 860 N.E. 2d at 641.

[71] *Evansville*, 860 N.E. 2d at 640.

[72] *Evansville*, 860 N.E. 2d at 641.

[73] *Evansville*, 860 N.E. 2d at 644.

[74] The court noted that the "efficient proximate cause of loss" meant that "where an insured risk itself sets into operation a chain of causation in which the last step may have been an excepted risk, the excepted risk will not defeat recovery." *Evansville*, 860 N.E. 2d at 646 (quoting McDonald v. State Farm Fire & Casualty Co., 837 P.2d 1000, 1004 (Wash. 1992))

[75] *Evansville*, 860 N.E. 2d at 647.

[76] Eckstein v. Cincinnati Ins. Co., 469 F. Supp. 2d 455 (W.D. Ky. 2007).

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

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

[79] Tento Int'l, Inc. v. State Farm Fire and Cas. Co., 222 F.3d 660 (9th Cir. 2000).

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

[81] Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Texpack Group N.V., 906 So. 2d 300 (Fla. Ct. App. 2005).

[82] Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co., 548 N.W. 2d 127 (Wis. Ct. App. 1996).

[83] Malley v. Allstate Texas Lloyds, 347 F. Supp. 2d 346 (E.D. Texas 2004).

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

[85] The Hartford Cas. Ins. Co. v. Evansville Vanderburgh, Public Library, 860 N.E. 2d 636 (Ind. Ct. App. 2007).

[86] ISO Form 10 30 04 02.

[87] *Supra.*, at 1.

[88] *See* ISO Form 10 30 04 02 at 9, § G (c).