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CASE ALERT, NO. 27

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Texas Appellate Court Finds Manifestation Trigger Applicable to Mold Claims

On November 21, 2007, in a matter of first impression, a Texas Court of Appeals held that the manifestation trigger of coverage applied to a progressive damage mold claim under a homeowners' policy. *Allstate Ins. Co. v. Hunter*, 2007 Tex. App. LEXIS 9183 (2nd Dist. (Fort Worth) November 21, 2007). This is a positive development for insurers as more recent policies, which are more likely to be triggered under a manifestation theory, in general are more restrictive in relation to mold damage.

The facts of the case are simple. Defendant policyholders noticed a musty smell in their home in the summer of 2002. Their homeowners' policy at that time was in effect until its expiration in October 2002 ("1st year policy"). They were subsequently insured under a policy which, unlike the prior policy, only covered damage from "sudden and accidental" water leaks ("2nd year policy").

On February 4, 2003, a general contractor inspected the home and found water damage and mold in the home's crawlspace. The policyholders notified Allstate of the claim two days later.

The policyholders' claims under the 2nd year policy were denied because the water leak was not deemed to be sudden and accidental. Subsequent notice of claim under the 1st year policy was denied for late notice.

The trial court presented a special question to the jury asking whether "there was rot, mold or other fungi which was capable of being perceived, recognized and understood" prior to October 2002. The jury responded "yes" to this question. Allstate objected to the jury charge, arguing that the proper test was whether the mold was capable of being "easily" perceived, recognized and understood. The trial court overruled the objection.

On appeal, the Second Division relied upon *Flores v. Allstate Tex. Lloyds Co.*, 278 F. Supp. 2d 810 (S.D. Tex. 2003), in support of its holding that a manifestation trigger of coverage should apply. The *Flores* Court explained that the mold claim did not arise until the mold damage "is capable of being easily perceived, recognized, and understood." The *Flores* Court also noted that failure to utilize a manifestation trigger

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would burden the policyholders with an “unprecedented duty to conduct limitless tests and inspections for hidden defects.”

Relying on the policies in *Flores*, the Court in *Hunter* held that first party coverage for progressive damage would be triggered under a manifestation theory when “the loss was capable of being *easily* perceived, recognized and understood.” The policyholders’ recognition of a musty smell was not sufficient evidence to find the manifestation of property damage to justify triggering coverage. It was only when the contractor found mold in the crawlspace that the property damage was deemed to have manifested.

Utilization of a manifestation trigger in mold damage cases will result in more recent policies being triggered. This is a positive development for insurers as more recent policies are more restrictive in coverage for mold claims. If you would like further information about this decision, please contact Adam M. Smith, Esq. or Sally Clements, Esq. in our Morristown, New Jersey office.