

INSURANCE UPDATE

January 22, 2008

Issue No. 80

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HOMEOWNERS INSURANCE – MOLD EXCLUSION

CALIFORNIA LAW

By Glen R. Olson

De Bruyn v. Superior Court (Farmers Group, Inc.), 2008 Cal.App. Lexis 45 (January 14, 2008)

The Second District holds that California’s efficient proximate cause doctrine does not invalidate a policy exclusion applicable to some, but not all, manifestations of water damage.

On January 14, 2008, the Second District California Court of Appeal interpreted the following exclusion in a Farmers Group homeowners’ policy: “[w]henever rust, mold, fungus, or wet or dry rot occurs, the rust, mold, fungus, or wet or dry rot and any resulting loss is always excluded under this policy, however caused.” The *De Bruyn* case arose from water damage caused by an overflowing toilet in the insured’s home. The water damage in turn caused the growth of mold.

Consistent with the terms of its policy, Farmers paid for water damage but not for the mold damage. The insured, De Bruyn, then sued Farmers alleging that it had committed acts of unfair competition by relying on the “absolute” mold exclusion contained in the policy. De Bruyn argued that the exclusion violated Insurance Code Section 530 which provides that when a loss is caused by a combination of covered and specifically excluded risks, the loss must

be covered if the covered risk was the efficient proximate cause of the loss.

After the trial court sustained a demurrer to the complaint without leave to amend, the insured filed a petition for writ of mandate. The Court of Appeal denied the petition, holding that the efficient proximate cause doctrine did not apply. The Court noted, however, that California courts have held that the efficient proximate cause doctrine must be applied to determine coverage even in circumstances in which the relevant exclusions appear to be drafted in such a way as to circumvent the doctrine. See *Howell v. State Farm Fire & Casualty Company* (1990) 218 Cal.App.3d 1446.

Farmers raised three arguments as to why the efficient proximate cause doctrine did not apply to the *De Bruyn* claim. First, it contended that under *Julian v. Hartford Underwriters Insurance Company* (2005) 35 Cal.4th 747, insurers are free to exclude certain types of losses or damages, “however

caused,” regardless of the doctrine. The Court of Appeal rejected this argument noting that it overstated the scope of the holding in *Julian*.

Second, Farmers argued that the efficient proximate cause doctrine was inapplicable because De Bruyn did not allege two distinct perils that occurred independently and combined to cause the alleged damage. The Court of Appeal agreed with Farmers on this issue, noting that the efficient proximate cause doctrine applies only where there are two or more distinct perils that cause a loss. *See, Finn v. Continental Insurance Company* (1990) 218 Cal.App.3d 69, 72. The Court then held, however, that there were two distinct perils in the case – sudden discharge of water and mold – because each could occur without the presence of the other.

The Court of Appeal agreed with Farmers’ third argument. Farmers contended that, even considering the efficient proximate cause doctrine, insurers are still permitted to limit coverage for some, but not all, manifestations of water damage. The Court noted that the Supreme Court in *Julian* had held that an insurer may limit coverage to some, but not all, manifestations of a given peril, as long as “[a] reasonable insured would readily understand from the policy language which perils are covered and which are not.” *Julian, supra*, 35 Cal.4th at 759. The Court then denied the petition for writ of mandate, affirming the trial court’s dismissal of the suit.

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