

<input checked="" type="checkbox"/>	FILED	<input type="checkbox"/>	LODGED
<input checked="" type="checkbox"/>	RECEIVED	<input type="checkbox"/>	COPY
JAN 25 2002			
CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA			
BY			DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Shirley Cooper,  
Plaintiff,  
vs.  
American Family Mutual Insurance  
Company, a Wisconsin corporation; John  
and Jane Does I - X, ABC Corporations I-  
X, XYZ Partnerships I-X,  
Defendants.

No. CV 00-1097 PHX-JAT

**ORDER**

Pending before this Court are Defendant's Motion for Summary Judgment (Doc. #28), Plaintiff's Cross Motion for Summary Judgment Re: Coverage (Doc. #43), Defendant's Motion to Strike Hearsay Report and Lay Opinions (Doc. #50) and Defendant's Motion to Strike Intervener[']s Citations to the FC&S Bulletins (Doc. #82). Plaintiff in *Majdanski, et al. v. American Family Mutual Insurance Company, et al.*, Case No. CIV 00-420 PHX-JAT filed a motion to intervene for the limited purpose of filing a response and sur-reply to Defendant's Motion for Summary Judgment in this case. The Court granted Majdanski's ("Intervener") motion; therefore, the Court will also take into consideration Majdanski's Intervener Brief Regarding Coverage for Mold Damage and for Toxic Pollutants Produced By Mold (Doc. # 68). Also pending is Plaintiff's Motion to Continue Discovery Deadline (Doc. #83).

(87)

1 Defendant American Family Mutual Insurance Company (“American Family”) issued  
2 a homeowners policy which insured Plaintiff Shirley Cooper’s residence. Plaintiff reported  
3 a plumbing leak on February 21, 2001, which damaged dry wall and flooring in the master  
4 bedroom and hall closet. American Family paid Plaintiff for repairs to the drywall and  
5 flooring, but denied coverage for damage caused by mold. Plaintiff sued American Family  
6 claiming that the leak also caused mold damage in her residence and sought to have  
7 American Family pay for mold remediation.

8 **I. MOTION FOR SUMMARY JUDGMENT**

9 **A. Summary Judgement Standard**

10 Under Fed.R.Civ.P. 56(c), the Court may grant summary judgment “if the pleadings,  
11 depositions, answers to interrogatories, and admissions on file together with the affidavits,  
12 if any, show there is no genuine issue as to any material fact and that the moving party is  
13 entitled to judgment as a matter of law.” Judgment for the moving party must be entered “if,  
14 under the governing law, there can be but one reasonable conclusion as to the verdict.”  
15 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). “If reasonable minds could  
16 differ as to the import of the evidence,” judgment should not be entered in favor of the  
17 moving party. *Id.* at 250-51.

18 The moving party bears the initial burden of identifying the elements of the claim that  
19 “demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477  
20 U.S. 317, 323 (1986). “A material issue of fact is one that affects the outcome of the  
21 litigation and requires a trial to resolve the parties’ differing versions of the truth.” *S.E.C.*  
22 *v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The burden then shifts to the  
23 non-moving party to establish that there is a genuine issue for trial. *Celotex*, 477 U.S. at  
24 324. More than a “metaphysical doubt” is required to establish a genuine issue of material  
25 fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

1           **B.    Exclusion From Covered Loss**

2           The American Family policy, Section I, "Perils Insured Against," covers "risks of  
3 accidental physical loss . . . unless the loss is excluded in this policy." The policy describes  
4 the particular losses not covered:

5                   We do not cover loss to the property described in Coverage A -  
6 Dwelling and Dwelling Extension resulting directly or  
7 indirectly from or caused by one or more of the following.  
Such loss is excluded regardless of any other cause or event  
contributing concurrently or in any sequence to the loss.

8           \* \* \*

9                   6.    **Other Causes of Loss:**

10                   \* \* \*

11                   c.   smog, rust, corrosion, frost, condensation, mold, wet or dry  
12                   rot ...

13                   However, we do cover any resulting loss to property described  
14 in Coverage A - Dwelling and Dwelling Extension from items  
15 2 through 8 above, not excluded or excepted in this policy.

16 (emphasis added)

17           Plaintiff claims that because water damage is a covered loss, under the "efficient  
18 proximate cause" rule, the resulting mold from the introduction of water is also covered. As  
19 such, Plaintiff contends American Family is liable for the mold remediation as well as the  
20 damage to personal property due to the mold growth and additional living expenses incurred  
21 during the mold remediation period. To the contrary, American Family contends that  
22 Plaintiff's alleged damages were caused by mold, and because the policy excludes coverage  
23 for mold regardless of the cause, Plaintiff's claim was properly denied.

24           Courts that have applied the "efficient proximate cause" rule conclude that coverage  
25 exists when the insured can identify an insured peril as the proximate cause of the loss even  
26 if subsequent or concurrent events are specifically excluded from coverage. *See, e.g.,*  
27 *Bowers v. Farmers Ins. Exch.*, 99 Wn. App. 41, 47-48, 991 P.2d 734, 738 (Wash. Ct. App.  
28 2000). However, Arizona has not adopted the "efficient proximate cause" rule and as such,  
an insurer is permitted to limit its liability with a concurrent causation lead-in clause similar

1 to that found in the American Family policy. *See Millar v. State Farm Fire & Cas. Co.*, 167  
2 Ariz. 93, 97, 804 P.2d 822, 826 (Ariz. Ct. App. 1990). Accordingly, there is no coverage  
3 for losses caused by mold, even though a covered water event may have also contributed to  
4 the loss.

5 Arguing a variation of Plaintiff's theory, Intervener asserts that the mold is not a  
6 separate *cause of loss*, but instead is *resulting loss* caused by the plumbing leak, a covered  
7 event. Intervener contends that because Plaintiff filed a claim for loss resulting from a  
8 covered *accidental* event, all ensuing loss, including mold, should be covered under the  
9 resulting loss provision.

10 In support of the *cause of loss* and *resulting loss* distinction, Intervener suggests that  
11 the "Other Causes of Loss" exclusion enumerates nonfortuitous causes of loss which are not  
12 covered, but when loss such as mold is the result of a fortuitous cause such as a plumbing  
13 leak, the resulting damage is covered. To demonstrate, Intervener argues that if, as  
14 American Family contends, the other listed causes of loss such as "marring," "scratching,"  
15 "deterioration," "cracking" and "bulging" are also excluded regardless of the event causing  
16 such loss, then the damage normally associated with a catastrophic fire, for example, would  
17 not be covered. To avoid the obliteration of protection for covered fortuitous events,  
18 Intervener urges this Court to interpret the "Other Causes of Loss" exclusion to preclude  
19 coverage only when the loss occurs independent from a covered fortuitous event.

20 However, Intervener seeks to interject a distinction into the policy that does not exist.  
21 Nowhere in the policy does American Family distinguish between fortuitous and  
22 nonfortuitous causes of loss.<sup>1</sup> While American Family excludes loss from "wear and tear"  
23 and other damage that may occur over time, the policy does not restrict the mold exclusion  
24

---

25 <sup>1</sup> Contrary to Intervener's argument that the benefit of an insured's bargain is that  
26 an insurance company pays for the damages caused by fortuitous events, American Family  
27 noted several fortuitous events which are expressly excluded from coverage in the policy,  
28 such as floods, surface water, waves, tidal water, earthquakes, landslides, volcanic eruptions,  
etc.

1 to mold resulting from nonfortuitous causes. Indeed, the policy expressly excludes coverage  
2 for loss caused by mold without limitation.

3 An insurer may limit its liability by imposing conditions and restrictions as long as  
4 those restrictions are not contrary to public policy. *Id.* at 95-96, 804 P.2d at 824-25. Thus,  
5 American Family is entitled to limit its coverage to exclude loss caused by mold without  
6 restricting the exclusion to only fortuitous loss. The cases cited by Intervener rely on the  
7 finding of a proximate covered cause which entitles the insured to coverage over the entire  
8 loss; however, as stated above, Arizona has not adopted the “efficient proximate cause” rule.

9 Moreover, Intervener offers no plausible reason for the existence of the concurrent  
10 causation provision if not to underscore the very result which American Family seeks in this  
11 case. Indeed, the position that Intervener advocates requires this Court not only to adopt the  
12 “efficient proximate cause” rule but also to ignore the concurrent causation provision in  
13 American Family’s policy. This would be a breathtaking undertaking even for a court more  
14 inclined than this one to rewrite the contract between the parties.

15 Even in the absence of the concurrent causation clause, it is clear — and should be  
16 to a layman — that loss caused by mold is excluded. Unlike some coverage issues, where  
17 analysis and rhetoric move one from a state of complexity to a state of simplicity and clarity,  
18 the reverse is true with the mold exclusion in this policy. The policy says loss caused by  
19 mold is excluded. Enforcing the policy as written, this Court concludes loss caused by mold  
20 is excluded.

21 **C. The “Resulting Loss” Clause**

22 Plaintiff argues that the so-called “resulting loss” clause contradicts the exclusionary  
23 clause relied upon by American Family. She points out that the basic insurance coverage  
24 provides:

25 **We cover risks of accidental direct physical loss to property**  
26 **described in Coverage A - Dwelling and Dwelling Extension,**  
27 **unless the loss is excluded in this policy.**

28

1           The policy then lists “losses not covered” as exclusions to 2 through 8, including 6.c.  
2 which excludes mold. Following the exclusions, is the so-called “resulting loss” provision  
3 which provides:

4                       However, we do cover any resulting loss to property described  
5                       in Coverage A - Dwelling and Dwelling Extension from items  
6                       2 through 8 above not excluded or excepted in the policy.

6           The Plaintiff argues that the resulting loss clause contradicts the exclusions. The  
7 Court disagrees. By its very wording, the “resulting loss” clause only reaffirms coverage for  
8 resulting loss “. . . not excluded or excepted in the policy.” As pointed out by American  
9 Family, courts from other jurisdictions have construed similar “ensuing loss” provisions in  
10 the same manner. For example, the California Court of Appeals explains:

11                       We interpret the ensuing loss provision to apply to the situation where there  
12                       is a “peril,” i.e., a hazard or occurrence which causes a loss or injury, *separate*  
13                       *and independent* but resulting from the original excluded peril, and this new  
14                       peril is not an excluded one, from which loss ensues. For example, in *Murray*,  
15                       the initial excluded peril was the corrosion of the pipe and leakage of water,  
16                       and the second resulting peril was the settling of soil.

15           *Acme Galvanizing Co., Inc. v. Fireman’s Fund Ins. Co.*, 221 Cal. App. 3d 170, 179-80, 270  
16 Cal. Rptr. 405, 411 (Cal. Ct. App. 1990) (emphasis added). Other courts which have  
17 interpreted this clause similarly hold that the resulting loss provision does not reinsert  
18 coverage for excluded losses, but reaffirms coverage for secondary losses ultimately caused  
19 by excluded perils. *See e.g., Ames Privilege Assoc. v. Utica Mut. Ins. Co.*, 742 F. Supp. 704,  
20 708 (D. Mass. 1990) (perils which are excluded by the policy cannot be, at the same time,  
21 perils which are not excluded, and for which the defendant would be liable for any ensuing  
22 loss); *Schloss v. Cincinnati Ins. Co.*, 54 F. Supp.2d 1090, 1094-95 (M.D. Ala. 1999) (same),  
23 *aff’d without opinion*, 211 F.3d 131 (11th Cir. 2000); *Brodkin v. State Farm Fire & Cas.*  
24 *Co.*, 217 Cal. App. 3d 210, 218, 265 Cal. Rptr. 710, 714 (Cal. Ct. App. 1989) (“It is not the  
25 intent of [the ensuing loss provision] to enlarge the items which are covered under the  
26 policy.”); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn. 2d 724, 734, 837 P.2d 1000,  
27 1005 (Wash. 1992) (ensuing loss clause provides that if one of the specified uncovered  
28

1 events takes place, any ensuing loss which is otherwise covered by the policy will remain  
2 covered; however, the uncovered event itself, however, is never covered).

3 Relying again on the resulting loss provision, Intervener argues that mold releases  
4 mycotoxins which are considered biological contaminants that constitute an environmental  
5 hazard recognized by the Environmental Protection Agency ("EPA"). Thus, Intervener  
6 asserts that the toxins released by mold spores are a separate and independent loss resulting  
7 from mold. As such, Intervener contends the toxins are an ensuing loss which is not  
8 excluded or excepted in the policy. *See Roberts v. State Farm Fire & Cas. Co.*, 146 Ariz.  
9 284, 286, 705 P.2d 1335, 1337 (Ariz. 1985) (although damage caused by bees is an excluded  
10 cause of loss, the honey seepage from the hive after the removal of bees is a covered ensuing  
11 loss). American Family, however, argues that the mycotoxins and mold spores are not  
12 distinct and separable from the mold itself. Applying the reasoning in *Roberts*, if after  
13 removal of the mold, the mycotoxins continued to exist separate and apart from the mold,  
14 then the mycotoxins would be an independent and distinct ensuing loss. However,  
15 Intervener's own EPA official publication states that the toxins are produced and released  
16 by the mold; therefore, removal of the mold would presumably also remove the mycotoxins.  
17 As such, the mycotoxins do not constitute a *separate and independent* loss resulting from  
18 mold.

19 Here, there is no separate and independent peril. The claimed damage is mold. The  
20 proposed remediation is removal of the mold. Calling it a pollutant does not change the  
21 result. It is still mold. The policy expressly excludes any losses that are caused by and result  
22 from mold. The "resulting loss" clause does not resurrect the excluded peril to provide  
23 coverage.

#### 24 **D. Personal Property Coverage**

25 Plaintiff directs the Court to COVERAGE B - PERSONAL PROPERTY and first  
26 notes that no exclusion for mold is found in the Personal Property coverage. However,  
27 COVERAGE B is coverage for ". . . risks of accidental direct physical loss to property  
28

1 described in Coverage B . . . when caused by a peril listed below, unless the loss is excluded  
2 in this policy.”

3       Though Plaintiff suggests that there would be coverage pursuant to paragraph (14),  
4 Accidental Discharge or Overflow of Water or Steam, and notes that there is no exclusion  
5 for mold found in the Personal Property coverage, Plaintiff fails to demonstrate how this is  
6 a claim for direct physical loss to personal property.

7       **E. Supplementary Coverage**

8       Plaintiff then argues for coverage under the SUPPLEMENTARY COVERAGES -  
9 SECTION I of the policy which provides:

10               (12) **Pollutant Cleanup and Removal.** We will pay up to  
11 \$10,000 to cover **your** expense to extract **pollutants**, or  
12 covered property which becomes a **pollutant**, from land, water,  
13 insured buildings or other structures, or **your** personal property.  
14 Such loss must occur on the **insured premises** and must be  
caused by or result from a covered cause of loss under Section  
I of this policy, during the policy period. This coverage is  
additional insurance. Pollutant is defined in the policy as  
follows:

15               **Pollutant** means any solid, liquid, gaseous or thermal irritant or  
16 contaminant, in any form, including, but not limited to lead,  
17 asbestos, formaldehyde, radon, any controlled chemical  
18 substance or any other substance listed as a hazardous substance  
19 by any governmental agency. It also includes smoke, vapor,  
soot, fumes, alkalis, chemicals, garbage, refuse and waste.  
Waste includes materials to be recycled, reconditioned or  
reclaimed.

20       Plaintiff fails to quote the coverage portion of SUPPLEMENTARY COVERAGES -  
21 SECTION I which provides:

22               **We** provide the following Supplementary Coverages. These  
23 coverages are subject to all terms of this policy, except where  
modified by the Supplementary Coverage.

24       Plaintiff contends that “mold clearly falls within the definition of a pollutant . . .”  
25 (Cross Mot., p. 7). However, Plaintiff fails to demonstrate why this is so clear. Pollutant  
26 is defined as any irritant or contaminant of the type which is listed as a “hazardous substance  
27 by any governmental agency.” Nowhere is it suggested that mold falls into this category.  
28

1 The definition also includes “smoke, vapor, soot, fumes, alkalis, chemicals, garbage,  
2 refuge and waste.” By listing these specific items, the insurance company is deemed to have  
3 excluded those items not listed. Mold is not listed. “Waste” is further defined to include  
4 materials to be recycled, reconditioned, or reclaimed. Again, Plaintiff fails to demonstrate  
5 how mold falls into any of these categories.

6 The policy expressly excludes mold as a cause of loss. The Court concludes that the  
7 definition of pollutant cannot be construed as covering mold; and by the stronger reasoning,  
8 fails to satisfy the language above-referenced “except where modified by the Supplementary  
9 Coverage.” Stated simply, the Supplementary Coverage section on pollution clean-up does  
10 not modify the mold exclusion so as to provide coverage for mold remediation.

11 Intervener argues, however, that even if the policy definition of pollutant does not  
12 cover mold, the mycotoxins produced by the mold are a separate and distinguishable peril  
13 that constitutes a recognized environmental pollutant. However, Intervener’s argument fails  
14 for the same reason as Plaintiff’s. Even if the mycotoxins are determined to be a pollutant  
15 within the policy’s definition, the policy expressly provides coverage only for extraction of  
16 pollutants caused by or result from a covered cause of loss. Intervener argues that the  
17 mycotoxins were caused by the water leak, which is a covered cause of loss. However, the  
18 mycotoxins are released by the mold, which in of itself is an excluded cause of loss. Thus,  
19 the supplementary coverages provision does not cover the removal of the mycotoxins.

#### 20 **F. Reasonable Expectations Doctrine**

21 Plaintiff invokes the “reasonable expectation” doctrine set forth in *Darner Motor*  
22 *Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 682 P.2d 388 (Ariz. 1984).  
23 Plaintiff claims “she understands her policy to mean that coverage exists for all damages  
24 which resulted from the water pipe break, a covered peril, including mold damages.” Her  
25 counsel argues, however:

26 Given the contradictory provisions of American Family’s  
27 policy, the ambiguity of its mold exclusion provision as  
28 opposed to the resulting loss provision, and the unambiguous  
additional coverage for pollutant clean-up afforded pursuant to

1 the Supplementary Coverage section of Plaintiff's policy,  
2 Plaintiff's understanding of the policy is clearly reasonable and  
therefore affords coverage for the mold.

3 American Family argues that Plaintiff has failed to plead a claim for reasonable  
4 expectations either in her complaint or in the case management report. Even if this theory  
5 is considered well-pleaded and properly before the Court, Plaintiff fails to set forth facts  
6 which would trigger application of the reasonable expectations doctrine.

7 While the Plaintiff has testified that she understands her policy to mean that coverage  
8 exists for all damages resulting from a water pipe break (Pl.'s SOF, Ex. O), a subjective  
9 belief developed after the loss is insufficient to create coverage where none exists under the  
10 policy. *Id.* at 390, 682 P.2d at 395. As pointed out in *State Farm Fire & Cas. Co. v.*  
11 *Powers*, 163 Ariz. 213, 216, 786 P.2d 1064, 1067 (Ariz. Ct. App. 1989), coverage cannot  
12 be defeated "by simply putting the insured on the witness stand and asking him . . . 'did you  
13 reasonably expect that you would be covered?'" Without more, the reasonable expectations  
14 doctrine does not render an exclusion unenforceable.

15 Plaintiff, however, relies on *Darner* to argue that potential circumstances exist which  
16 may preclude enforcement of a provision that conflicts with the insured's reasonable  
17 expectation of coverage. The plaintiff in *Darner* was induced by an insurance agent's  
18 representations of coverage which were contrary to the terms of the agreement. 140 Ariz.  
19 at 385-87, 682 P.2d at 390-392. Furthermore, relying on the agent's representations, the  
20 plaintiff never read the policy and believed that he did not need to. *Id.* Finally, through  
21 discussions with the plaintiff, the insurer and/or insurance agent knew or had reason to know  
22 that the plaintiff would not have purchased the agreement had he known about the exclusion  
23 provision at issue. *Id.* The only similarity between *Darner* and this case is that Plaintiff here  
24 did not read the policy before the loss occurred. Indeed, Plaintiff has testified that she does  
25 not recall purchasing the policy nor any conversations with the agent at or prior to its  
26 purchase (Def.'s Reply, Ex. 1). As such, none of the other factors that existed in *Darner* are  
27 present here. Accordingly, the reasonable expectations doctrine does not apply.

28

1 Plaintiff also asserts claims for bad faith and punitive damages arising from the  
2 wrongful denial of a covered claim. Having determined there is no coverage, the Court need  
3 not reach the issues of bad faith and punitive damages. Those claims will be dismissed with  
4 prejudice.

5 **II. MOTIONS TO STRIKE**

6 American Family seeks to strike an expert report authored by Charles R. Leathers,  
7 Ph.D., titled "Investigation of Air Quality, Water Damage & Mold Infestation at the home  
8 of Mrs. Shirley Cooper, 1607 East Libra, Tempe, Arizona 85283" (Pl.'s SOF, Ex. J).  
9 American Family further seeks to strike excerpts from Plaintiff's depositions (Pl.'s SOF, Ex.  
10 L).

11 American Family argues that the Leathers report and the depositions excerpts are  
12 inadmissible hearsay. Furthermore, American Family argues that Dr. Leather's report is  
13 inadmissible because Plaintiff failed to demonstrate that Dr. Leathers is competent to give  
14 an expert opinion and the report fails to establish the factual basis for the opinions. Plaintiff  
15 asserts that Plaintiff will file a supplemental disclosure identifying Dr. Leathers as an expert  
16 who will testify at trial. Plaintiff further argues that the deposition testimony is admissible  
17 as sworn testimony of a lay witness. However, even if the Court admits Dr. Leather's report  
18 and the excerpts of the Plaintiff's deposition, Plaintiff is not entitled to summary judgment.  
19 Accordingly, American Family's motion is denied.

20 American Family also seeks to strike Intervener's citations to the Fire, Casualty and  
21 Surety Bulletins in the Reply in Support of Intervener's Brief. American Family asserts that  
22 the bulletins are neither proper legal authority nor admissible evidence. Intervener did not  
23 respond. However, as with the Plaintiff's deposition testimony and expert report, even if the  
24 Court admits the bulletins, this Court's decision would remain the same. Thus, American  
25 Family's Motion to Strike Intervener[']s Citations to the FC&S Bulletins is denied.

1 **III. DISPOSITION**

2 **IT IS HEREBY ORDERED** granting Defendant's Motion for Summary Judgment  
3 (Doc. #28) and denying Plaintiff's Cross Motion for Summary Judgment (Doc. #43);

4 **IT IS FURTHER ORDERED** denying Defendant's Motion to Strike Hearsay  
5 Report and Lay Opinions (Doc. #50);

6 **IT IS FURTHER ORDERED** denying Defendant's Motion to Strike Intervener[']s  
7 Citations to the FC&S Bulletins (Doc. #82);

8 **IT IS FURTHER ORDERED** denying Plaintiff's Motion to Continue Discovery  
9 Deadline (Doc. #83) as moot;

10 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly.

11

12 DATED this 23 day of January, 2002.

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

  
James A. Teilborg  
United States District Judge