

Subchapter J. Prohibited Trade Practices 28 TAC §21.1007

1. **INTRODUCTION.** The Commissioner of Insurance adopts amendments to §21.1007, concerning prohibitions on the use of unfair underwriting guidelines involving water damage claims, previous mold damage, or mold damage claims. The amendments are adopted with changes to the statutory citations in proposed text published in the February 10, 2006 issue of the *Texas Register* (31 *TexReg* 792). The Department has made changes to the text of the rule to update statutory references changed as a result of the enactment of the Texas Legislative Council's nonsubstantive Insurance Code revision by the 78th Texas Legislature, Regular Session, 2003 and the 79th Texas Legislature, Regular Session, 2005.

2. **REASONED JUSTIFICATION.** The amendments include a new definition of the term *appliance*, a mold remediation certification standard consistent with the Occupations Code and the Insurance Code, and updated references to statutory citations and agency nomenclature. The adopted amendments are necessary to implement changes enacted by the 79th Legislature, Regular Session, in HB 941, effective September 1, 2005 and HB 1328, effective May 24, 2005. HB 941 amended Insurance Code Article 5.35-4 §2 by adding a definition of *appliance* in subdivision (4). HB 1328 amended the Insurance Code Article 21.21-11 §3(4)(A) to be consistent with the Occupations Code §1958.154 by providing that a certificate of mold remediation

issued to the property owner must establish with reasonable certainty that the underlying cause of the mold at the property has been remediated.

The new statutory definition of *appliance* in Insurance Code Article 5.35-4 §2(4) requires amendment of the definition of *appliance-related* claim in current §21.1007(b)(5). Prior to the enactment of HB 941, the Department's rule excluded the failure of external attachments like hoses from the definition of *appliance-related claims*. Article 5.35-4 §2(4) defines an *appliance* as "a household device operated by gas or electric current, including hoses directly attached to the device. The term includes air conditioning units, heating units, refrigerators, dishwashers, icemakers, clothes washers, water heaters, and disposals." Therefore, current §21.1007(b)(5) is amended, in accordance with the new statutory definition of *appliance*, to provide that the term *appliance* as defined within the definition of *appliance-related claim* means a household device operated by gas or electric current, including hoses directly attached to the device.

HB 1328 enacts a consistent standard for evaluating whether or not the underlying cause of mold has been remediated. Under the Occupations Code §1958.154, an assessor must establish *with reasonable certainty* that the underlying cause of mold has been remediated. Prior to the enactment of HB 1328, under the Insurance Code Article 21.21-11 §3(4)(A), an assessor was required to establish that the underlying cause of mold had been remediated; there was no *with reasonable certainty* provision. Insurance Code Article 21.21-11 §3(4)(A) was amended in HB 1328 to add the *with reasonable certainty* provision for consistency with the Occupations

Code §1958.154. Therefore, it is necessary to amend §21.1007(e)(1)(D)(i) to incorporate the *reasonable certainty* standard into the rule.

The adopted amendments also delete obsolete statutory citations and outdated references to state agencies. Section 2, Article 21.49-1, which is referenced in the §21.1007(b)(4) definition of *insurer*, was repealed by Acts 2001, 77th Legislature, Chapter 1419, §31(a), effective June 1, 2003; therefore, the reference to the repealed statute is deleted, thereby updating the rule to reflect the correct reference to the nonsubstantive revised Insurance Code enacted by the 77th Legislature, effective June 1, 2003. Additional changes are adopted throughout the text of the rule to change the references to the Texas Board of Health and Texas Department of Health to the Department of State Health Services. These changes are necessary because the former Texas Department of Health became part of the Department of State Health Services on September 1, 2004.

3. HOW THIS SECTION WILL FUNCTION. Amended §21.1007(b)(5) provides a more expansive definition of the term *appliance* as defined within the definition of *appliance-related claim*; as amended, an appliance-related claim pertains to a household device operated by gas or electric current, including hoses directly attached to the device. Amended §21.1007(e)(1)(D)(i) incorporates a standard consistent with the language in the Insurance Code Article 21.21-11 §3(4)(A); it provides that a certificate of mold remediation is issued when it is determined with reasonable certainty that the underlying cause or causes of the mold at the property have been remediated. Amended

§21.1007(a)(4), which defines the term *insurer*, deletes the reference to the obsolete statutory citation for Section 2, Article 21.49-1 of the Insurance Code. Amended §§21.1007(d)(3)(C), 21.1007(e)(1)(d)(i)-(ii), and 21.1007(e)(2) reference the new agency name Department of State Health Services in lieu of the former agency name the Texas Department of Health.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE TO COMMENTS.

Comment: One commenter expressed support for the proposed amendments to §21.1007 because it implements statutory changes made by HB 941 and HB 1328. According to the commenter, the specific amendments make the protections afforded by §21.1007 stronger.

Agency Response: The Department agrees and appreciates the supportive comment.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTION.

For: Office of Public Insurance Counsel.

6. STATUTORY AUTHORITY. The amendments are adopted pursuant to the Insurance Code Article 5.35-4, Article 21.21-11, and §36.001. Article 5.35-4 §2(4) includes a definition of *appliance*. Under Article 5.35-4 §4 (enacted as §544.354 as part of the nonsubstantive revision of the Insurance Code by Acts 2005, 79th Legislature, Chapter 728, §11.015(a), effective September 1, 2005), the Commissioner is specifically charged with adopting rules to accomplish the purpose of this subchapter as

defined by Article 5.35-4 §1 (enacted as §544.351 as part of the nonsubstantive revision of the Insurance Code by Acts 2005, 79th Legislature, Chapter 728, §11.015(a) effective September 1, 2005). The purpose of §544.351 is to protect people and property from being unfairly stigmatized in obtaining residential property insurance by the filing of a water damage claim or claims under a residential property insurance policy. Article 21.21-11 §3(4) provides that a certificate of mold remediation is evidence of remediation if it has been established with reasonable certainty that the underlying cause of the mold at the property has been remediated. Under Article 21.21-11 §4 (enacted as §544.304 as part of the nonsubstantive revision of the Insurance Code by Acts 2005, 79th Legislature, Chapter 728, §11.014(a) effective September 1, 2005), the Commissioner has specific authority to adopt rules as necessary to implement Chapter 544 Subchapter G relating to Mold Claim or Damage. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

7. TEXT.**§21.1007. Restrictions on the Use of Underwriting Guidelines Based On a Water Damage Claim(s), Previous Mold Damage or a Mold Damage Claim(s).**

(a) Purpose. The purpose of this section is to protect persons and property from being unfairly stigmatized in obtaining residential property insurance by previous mold

damage or by the filing of mold damage claims, a water damage claim, or certain appliance-related claims, under a residential property insurance policy.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Residential property insurance--Insurance against loss to residential real property at a fixed location or tangible personal property provided in a homeowners policy, including a tenant policy, a condominium owners policy, or a residential fire and allied lines policy.

(2) Underwriting guideline--A rule, standard, guideline, or practice; whether written, oral, or electronic; that is used by an insurer or an agent of an insurer to decide whether to accept or reject an application for a residential property insurance policy or to determine how to classify the risks that are accepted for the purpose of determining a rate.

(3) Consumer--The person making the application to insure a property and includes both existing insureds and applicants for insurance.

(4) Insurer--An insurance company, reciprocal or interinsurance exchange, mutual, capital stock company, county mutual insurance company, farm mutual insurance company, association, Lloyd's plan company, or other entity writing residential property insurance in this state. The term includes an affiliate as described by §823.003 of the Insurance Code if that affiliate is authorized to write and is writing residential property insurance in this state. The term does not include the Texas

Windstorm Insurance Association, the FAIR Plan, or an eligible surplus lines insurer regulated under Chapter 981.

(5) Appliance-related claim--A request by an insured for indemnification from an insurer for a loss arising from the discharge or leakage of water or steam from an appliance that is the direct result of the failure of the appliance. An appliance means a household device operated by gas or electric current, including hoses directly attached to the device. The term includes air conditioning units, heating units, refrigerators, dishwashers, icemakers, clothes washers, water heaters, and disposals.

(6) Water damage claim--A request by an insured for indemnification from an insurer for a loss arising from the discharge or leakage of water or steam that is the direct result of the failure of a plumbing system or other system that contains water or steam.

(c) Restrictions on the use of a water damage claim in underwriting. An insurer shall not use an underwriting guideline based solely upon a single prior water damage claim either filed by the applicant or on the covered property. Nothing contained herein shall preclude an insurer from the surcharge and renewal provisions of §551.107.

(d) Restrictions on underwriting and rating and the inspection and certification process of appliance-related claims.

(1) Except as provided in §544.353(e) of the Insurance Code an insurer shall not use a prior appliance-related claim as a basis for determining a rate to be paid or for determining whether to issue, renew, or cancel a residential property insurance policy if the consumer complies with the requirements specified in §544.353(c) and

§544.353(d) of the Insurance Code. It is the consumer's option whether to have the appliance-related claim inspected and certified, however, it is the consumer's responsibility to bear the cost of such inspection and certification. An appliance-related claim that is not inspected and certified shall be subject to the provisions contained in subsection (c) of this section.

(2) Nothing contained in subsection (d) of this section shall exempt an insurer from the notice provisions contained in §551.107(e). However, appliance-related losses are a special class of non-weather related losses and the notice must be specific to the insured's appliance-related loss history.

(3) The following individuals who hold one or more of the following licenses are inspectors that may have the knowledge and experience in the remediation of water damage to inspect and certify the proper remediation of an appliance-related claim:

(A) inspectors licensed or certified through the Voluntary Inspection Program pursuant to Article 5.33B of the Insurance Code;

(B) persons licensed to perform real estate property inspections under the Real Estate Licensing Act;

(C) persons licensed as assessors or remediators by the Department of State Health Services pursuant to Chapter 1958 of the Occupations Code;

(D) licensed Texas Professional Engineers.

(4) If the consumer has an inspection and certification performed by an inspector under paragraph (3) of this subsection who is not on a list provided by the insurer, the insurer may not reject or challenge the certification unless the insurer re-inspects the property and specifies in writing the areas of deficiency to the consumer. An insurer that re-inspects the property shall maintain all documentation, including documentation that supports the areas of deficiency identified by the inspection and specified in writing to the consumer.

(5) Inspectors shall also include persons who are authorized by insurers to perform appliance-related water damage remediation inspections. An insurer who provides a list of inspectors authorized by the insurer must give verbal notice to any claimant at the time of the claimant's phone call reporting the claim and written notice to the claimant within 15 days of receiving notice of the claim that the claimant has the right to select the inspector including the right to choose an inspector who is not on the insurer's list who will perform the inspection of the appliance-related water damage remediation. If the consumer has the inspection and certification performed by an inspector from the list of inspectors authorized by the insurer then the insurer does not have the right to reject or challenge the certification.

(6) If the inspector determines by a physical inspection of the residential property that the appliance-related water damage has been properly remediated, the inspector shall issue within 10 days of the completion of the inspection a Certificate of Appliance-Related Water Damage Remediation (WDR-1).

(7) The Certificate of Appliance-Related Water Damage Remediation (WDR-1) is a form that is prescribed by the Department for use by inspectors who will provide certifications. This form may be obtained from the Texas Department of Insurance website <http://www.tdi.state.tx.us> or by requesting such form from the Automobile/Homeowners Section, MC 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104.

(8) Information regarding inspectors that may have the knowledge and experience in the remediation of water damage to inspect and certify the proper remediation of an appliance-related claim may be obtained from the Texas Department of Insurance website or by requesting such information from the Automobile/Homeowners Section.

(e) Restrictions on the use of previous mold damage or a claim for mold damage in underwriting residential property insurance.

(1) An insurer shall not use an underwriting guideline regarding a residential property insurance policy based upon previous mold damage or a prior mold damage claim filed either by the applicant or on the covered property if:

(A) the applicant for insurance has property that is eligible for residential property insurance coverage;

(B) the property has had mold damage;

(C) mold remediation has been performed on the property; and

(D) the property was:

(i) remediated in accordance with the requirements specified in Chapter 1958, Subchapter D of the Occupations Code, and any applicable rules promulgated by the Department of State Health Services pursuant to Chapter 1958 of the Occupations Code; and a Certificate of Mold Damage Remediation (MDR-1) is issued to the property owner under Section 1958.154 of the Occupations Code which certifies with reasonable certainty that the underlying cause or causes of the mold at the property have been remediated; or

(ii) inspected by an independent mold assessor or adjuster, who is licensed to perform mold assessment in accordance with rules promulgated by the Department of State Health Services under Chapter 1958 of the Occupations Code and the independent mold assessor or adjuster provides to the property owner written certification on a Certificate of Mold Damage Remediation (MDR-1) that based on the mold assessment inspection, the property does not contain evidence of mold damage.

(2) The Certificate of Mold Damage Remediation (MDR-1) is a form that is prescribed by the Department for use by mold remediators, assessors, and adjusters who will provide certifications. This form may be obtained from the Texas Department of Insurance website <http://www.tdi.state.tx.us> or by requesting such form from the Automobile/Homeowners Section or from the Department of State Health Services.

(3) Nothing contained herein shall preclude an insurer from the surcharge and renewal provisions of §551.107.

(f) Filing requirements for underwriting guidelines relating to water damage claims, previous mold damage, or mold damage claims.

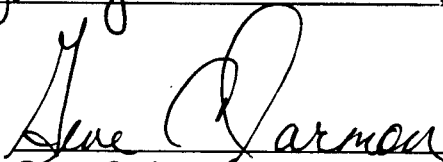
(1) All underwriting guidelines relating to water damage claims, previous mold damage, or mold damage claims shall be filed with the Department and shall comply with the requirements contained in this section and with any rules relating to underwriting guidelines that may be adopted by the Commissioner.

(2) Underwriting guidelines relating to water damage claims, previous mold damage, or mold damage claims shall be submitted to the Texas Department of Insurance, Property and Casualty Intake Unit, Mail Code 104-3B, P.O. Box 149104, Austin, Texas, 78714-9104 or to the Texas Department of Insurance, Property and Casualty Intake Unit, 333 Guadalupe Street, Austin, Texas 78701.

(g) Subsection (c) of this section applies only to a residential property insurance policy that is delivered or issued for delivery based on an application that is submitted on or after the effective date of this section.

CERTIFICATION. This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas on July 20, 2006.


Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance

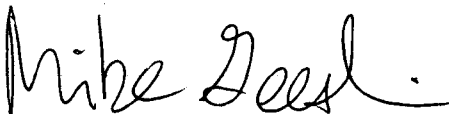
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TITLE 28. INSURANCE
Part 1. Texas Department of Insurance
Chapter 21. Trade Practices


Adopted Section
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IT IS THEREFORE THE ORDER of the Commissioner of Insurance that amendments to §21.1007 specified herein, concerning prohibitions on the use of unfair underwriting guidelines involving water damage claims, previous mold damage, or mold damage claims, are adopted.

AND IT IS SO ORDERED.


s/ Mike Geeslin
Mike Geeslin
Commissioner of Insurance

ATTEST:


Gene C. Jarmon
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance

COMMISSIONER'S ORDER NO. **06-0756**
JUL 21 2006