

**ORAL ARGUMENT — 2/4/98**  
**97-1093**  
**BALANDRAN V. SAFECO INSURANCE CO.**

HARRISON: I represent Joe and Dolores Balandran. The issue here today concerns the scope of coverage afforded and the standard Texas homeowner's \_\_\_\_\_ policy and specifically whether or not it provides coverage for foundation damage caused by plumbing leaks.

I don't think there is going to be any dispute that the policy is supposed to provide the coverage, and that insured's have paid for the coverage. The task here today is to see whether or not the insurance commission's intent that it provide this coverage appear in the document.

There are three very clear ways in which that intent manifest itself in the document. The clearest example is articulated by the insurance commissioner in the bulletin that he issued this summer related to the all risk nature of the policy.

HECHT: If it's so clear why has every court that has considered the issue gone the other way?

HARRISON: I don't understand it.

HECHT: A bunch of dense judges?

HARRISON: The clearest argument, I don't believe has ever been made. And if there's been a huge misdirection play in focusing on whether or not there is an exception to an exclusion which itself never really applies. And this particular policy provides coverage for your dwelling and it provides coverage for your personal property. And there are separate policy limits for both of those. But the coverage for the dwelling is set forth right here - all this is for physical loss under coverage A. I prepared a handout so you can follow along.

Coverage A insures against all risks of physical loss unless there is an excluded perils a peril operates to exclude the loss. There is no exclusion which applies in this case. The appellee will have you believe that exclusion H here excludes the coverage. But in fact, H is itself a peril. It is a peril which is excluded. It is not a type of loss.

HECHT: It says "loss?"

HARRISON: It says loss caused by the peril of if you will: settling, cracking, bulging, shrinking, etc. And we are not alleging that any loss was caused by that damage itself. That is a type of damage that we're alleging is covered, not a peril of an ensuing loss resulting from that peril.

If to adopt that reasoning, that that exclusion applies, then you effectively convert this policy into a fire policy. Because almost every damage that you have to your home that you can imagine consist of cracking of walls, or roof structures, hail hitting the roof and cracking roof tiles, a tree falling on the house and cracking elements of the structure, a car careening out of control would cause cracking of the structure of the house. Similarly, a tornado will cause the type of damage described in that peril. It's very important in any insurance policy you insure against risks, and to focus on the fact that it does matter what the parallel. And if the parallel is not itself excluded, then there is coverage. And in this particular case there is no exclusion for plumbing leaks.

PHILLIPS: Houses crack, bulge, shrink and expand because of something, because water is coming into the soil and then it gets dry, etc. And you're saying if that happens because of plumbing, then it's covered. If it happens because of rain and drought it's not covered?

HARRISON: The rain that is going to cause you a problem is if you have improper drainage. And that's going to be excluded under inherent vice. Because it's a condition of the property which causes itself to damage itself. So many of the types of foundation and damage that you have will not be covered because of construction defects, which is an inherent vice, or improper design. But if it's caused by plumbing leaks, because that is one of all risks, it's covered. That's the clearest argument. It is one that should have been made.

HANKINSON: So you're asking us to look strictly at coverage A, that part of the provision, and the exclusion section, and we should not be looking at the section entitled Coverage B Personal Property at all?

HARRISON: I don't think you need to. I'm going to ask you to look at it in a minute because that's the second place that the evidence of intent appears. I think it's important to note that Coverage B is just the opposite of Coverage. Nothing is covered unless it's named. Under Coverage A, everything is covered unless it's carved out.

HECHT: What does H mean under your theory?

HARRISON: It means that if you have a foundation that settles because of inherent vice or normal wear and tear of deterioration, one of the causes that are excluded under F, that's not covered.

HECHT: What does H add? If that's covered under F what does H mean? Under your theory, H doesn't mean anything?

HARRISON: Essentially if that is the cause of other damage. For example, if the house cracks and damages other property inside the building.

HECHT: Then?

HARRISON: The settling or cracking or bulging itself has to cause a loss. And if that loss occurs then it's not covered. That's the plain reading of exclusion H.

HANKINSON: Is this policy ambiguous?

HARRISON: I don't believe it is. I don't think it is patently ambiguous. I think there are parts of the policy that I cannot ascribe a complete logical explanation for, but I can give it some meaning. The construction urged by appellee is many aspects of the policy, no meaning whatsoever. And the particular provision that it's difficult to give complete and total meaning to is the sentence here, "Exclusion of 1A through 1H under section 1 exclusion do not apply to loss caused by this parallel." Referring to the parallel of accidental discharge or plumbing \_\_\_\_\_.

As I was saying before, under Coverage A everything is covered unless it's carved out. Either a parallel is carved out or a type of damage is carved out. Under Coverage B there is no coverage unless it's specifically added. The list of covered parallels under Coverage B, these quote parallels, every single one of those parallels is necessarily included in Coverage A, because they are part of all risks. And none of those risks in Coverage 12 in fact are excluded as parallels. They are types of damages resulting from them which are excluded.

The appellee would have you say that these 12 items have no bearing under Coverage A. You have to put on your blinders and you can't look at them in context of the entire policy, which is that those 12 parallels are but a subset of all risks. Every single one of those 12 is included within Coverage A.

Now, they will tell you that the only reasonable explanation for the location of this sentence, which says that, "Exclusion 1H doesn't apply to loss caused by plumbing leaks." The only explanation for that is to evidence an intent which is not expressed in words, but that sentence only apply to Coverage B.

There is another perfectly logical explanation for the location of that provision is that it deals with the interplay between a parallel and a list of exclusions. That parallel is described once and only once in this policy and it's described in 9. There is no other place to talk about accidental discharge unless you create another paragraph, which doesn't seem necessary because of the structure of the policy where Coverage A envelops the entirety of Coverage B.

ENOCH: Of course 1H only applies to Coverage A. So if the argument is that Coverage A and Coverage B are independent sets, one is not the subset of the other, then to say that the exclusion 1H doesn't apply to Coverage B 9 doesn't mean anything, because 1H doesn't apply to Coverage B anyway?

HARRISON: In fact most of the references in that sentence would have no meaning, not just the reference to 1H, most of them would have no meaning because of the nature of coverage B, that

you only cover B's covered parallels, you really don't carve out many parallels in the exclusion provision which affect Coverage B. Because if they are not added in the first place there is no reason to take them back out. For example, under exclusion 1A, they don't cover loss of electrical devices or wiring caused by electricity. Well electricity is never an included parallel under Coverage B. So that exclusion really has no effect on Coverage B anyway. Similarly with Coverage E, mechanical breakdown is not a covered parallel for Coverage B. So there is no reason to say that that exclusion doesn't apply to Coverage B. It's got to apply to Coverage A if it applies at all.

The other part of the structure which tells you that it is...the coverages are intermingled, is the sentence here, "A loss resulting from this parallel includes the cost of tearing out and replacing any part of the building necessary to repair or replace the system or appliance." What that typically means is that you end up having to tear out part of the building in order to get to the leak, which isn't otherwise damage. But it clearly refers to the dwelling.

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HARRELL: I am assistant AG here today representing the Texas Dept. Of Insurance. We have come to ask the court to take an unusual step today and to put aside the normal rule of construction for contracts of this nature, which would require the intent of the parties to be ascertained from the 4 corners of the document. And instead, give life to a proposition first articulated by this court in 1954 in the case of *US Insurance Co. of Waco v. Boyer*. In that case, the court noted, "As a practical matter the actual intent involved in the precise words of construing an insurance policy is as much or more the intent of the insurance commission which prescribes the wording of the policy."

OWEN: Why doesn't the insurance commission fix this? We have had these cases out here for a long time that construe the predecessor to this policy, so it's not been unknown to the insurance company what the construction was. Why didn't they clear it up?

HARRELL: It was fixed in the 1978 revisions to the policy and when they undertook the 1990 rewording it was simply to make the policies more readable, not to change any of the coverage. And they thought that they still had this thing fixed from the earlier decisions, the pre 1978 decisions. And in fact, the record will show I believe that all the insurance companies out there until I guess as recently as 1996 have operated under the assumption that this 1990 policy did cover these risks. They have paid for it. The losses have gone into the rate calculation of the benchmark rate. People are paying premiums for this coverage in the State of Texas.

HANKINSON: Do we have a record of that in this case?

HARRELL: It is not the best of records because a lot of this was not available at the summary judgment level in the TC. And what we have is some of this brought to the court through certified documents that we have requested the court to take judicial notice of records of other courts

and of the Texas Dept. Of Insurance. And I believe some of it is attached to the amicus brief of USAA in this case a lot of the orders and Texas Register publications. And we would also cite the court to the Texas Register publications which are out there.

BAKER: Are you saying, you're asking us to take judicial knowledge of things that were not before the TC?

HARRELL: Yes, we have to do that. Unfortunately the commissioner's bulletin and a lot of these matters were not even published at the time this case went through on summary judgment at the TC level.

HECHT: Instead of issuing the bulletin, why doesn't the commissioner just undertake to revise the policy?

HARRELL: That is something that certainly could be done, that is not undertaken lightly, but it certainly is something that could be done. But it does not fix the problem for those who have paid for coverage and need that coverage and are not having those claims honored today by a few companies.

HECHT: Has any effort been made to change the policy?

HARRELL: Yes there is some effort to change the policy. What has happened now is there will be an endorsement available to insurance companies who do not wish to provide this coverage. I believe it will be available in about 1 year. Though we are not changing the policy as it stands, we still contend that it provides for this coverage. There will just be a new endorsement that will allow companies to opt out of providing this coverage. So we have not taken to change this form per se, we are just allowing those companies who do not wish to provide the coverage to do so through endorsement.

ENOCH: Mr. Harrison suggested at the beginning that it was uncontested that insurance companies had been charging a premium that considered the cost of repair and replacement foundations. So that's not contested in the record?

HARRELL: That is not contested. These rates are calculated by the loss reports that these companies turn in. They have been paying these claims. They have turned in those losses as part of the calculation of the benchmark rate. And so we are paying premiums on those.

HECHT: But some companies don't pay?

HARRELL: Don't pay the losses but only since about 1996.

HECHT: And so that's in the rate base also?

HARRELL: It is for the annual rate base for 1997, 1 year. Just those few claims that they have not paid. And I wanted to make it clear that even these companies who "are not paying," are only not paying in selected cases. The majority of the cases they have been paying. Just very, very few claims that have been denied.

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APPELLEE

BLAKELY: I represent Safeco Insurance Company of America. To start, I want to address this premium issue. There is no evidence in this record about what any insurance company charges and what they don't charge in the way of premiums. There is not even any evidence presented to this court in the material that has been filed by amicus curiae and other interested parties. What we have is a lot of argument from these parties that these types of losses are figured in the premiums, and premiums are charged for this type of loss. But you do not have word one in any document from the Dept. Of Insurance or anyone else that says that a premium is charged for this type of loss, and that it is in fact, included in the premiums.

ENOCH: Are these premiums regulated by the insurance department, the amount you can charge for this type of policy?

BLAKELY: They are for some companies, and for some companies they are not. It is my understanding that there are many homeowner's policies in the state are written by what are known as "Lloyd's Companies." Those companies can charge whatever rates they want. If you're not a Lloyd's Company it is my understanding that you do have to rely on the benchmark rate.

SPECTOR: Is SAFECO a Lloyds?

BLAKELY: this particular Safeco entity is not a Lloyds Company. Safeco does have a Lloyd's company that now writes most of its homeowner's coverage in the state.

ENOCH: going to my question that I was asking Mr. Harrison. It seems to be Safeco's position that Coverage A and Coverage B are independent coverages?

BLAKELY: That is not only Safeco's position, it's the 5<sup>th</sup> Circuits position and also at least 4 separate federal district courts.

ENOCH: And so 1H applies to Coverage A?

BLAKELY: That's correct.

ENOCH: So if A and B are separate coverages and A only applies to Coverage A, then you say that the exception of 1H under Coverage B that would be meaningless because H only

applies to Coverage A anyway?

BLAKELY: It's not meaningless because this parallel No. 9 is providing a tear out and replacement coverage.

ENOCH: but you said B and A are separate coverages, they are independent coverages, right?

BLAKELY: That's correct.

ENOCH: So they are independent coverages. Then H only applies to Coverage A, it doesn't apply to Coverage B?

BLAKELY: Here again, Safeco is not the drafter of the policy. It's the Dept. Of Insurance. But I believe the reason that that exception is placed there is to avoid confusion about whether you're going to have coverage for cracked and bulging walls that are necessary to tear out and be replaced due to the plumbing leaks.

ENOCH: But H is only implicated if there is coverage under Coverage A. If there is something that's a result of a plumbing leak, it's covered by Coverage A except for what happens under H, but then you come under 9, and it says, "But H doesn't apply if it's a plumbing leak." So you've got coverage.

BLAKELY: Under 9, yes, you would have coverage. If you have a personal property loss...

ENOCH: No, but Coverage H applies to Coverage A, which is damage to the dwelling?

BLAKELY: Correct. I think the confusion is that within peril 9, peril 9 does involve repair and replacement and tear out of part of the dwelling within that limited aspect of peril 9 where they are talking about tear-out and replacement coverage.

SPECTOR: If the commissioner has prepared the policy what weight would Safeco give to his interpretation of what the policy covers?

BLAKELY: I do not believe that any weight should be given if the policy is unambiguous. This court squarely addressed that issue in the *National Union v. CBI* case. At what point do you start looking to extrinsic evidence of intent? And the court clearly held there that if the policy is unambiguous, you do not look beyond the 4 corners of the document, and you simply apply the plain meaning of the words.

SPECTOR: And your claim is it's unambiguous and does not cover foundation damage  
\_\_\_\_\_?

BLAKELY: Correct. And in fact, that's everybody's interpretation is that it's unambiguous but people have different interpretations of what unambiguously means.

HECHT: That's frequently the case. Some companies pay these claims?

BLAKELY: some companies have been paying them. Again, this is not something that's in the record except through the amicus curiae briefs. Apparently some companies have been paying them, some haven't. I think most companies are sitting on the sidelines to see what happens with this decision.

HECHT: Why do they pay noncovered claims?

BLAKELY: I cannot speak for the industry. I know that in general when these claims first began appearing around 1992 or 1993 they seemed to blossom all at once. For 50-100 years people didn't seem to have many problems with leaking pipes causing foundation damage. And then all of a sudden you had a host of these claims, which started in Corpus Christi. At the time they started, the state of the law on extra contractual exposure was not as clear as it is now, and a lot of companies decided to negotiate these claims, pay some, settle some, and move forward essentially on all fronts at once. And one of those fronts was to litigate the issue and get a clear answer from the courts as to what this means. And only after there was a clear answer from the *Sharp* court did companies begin to deny these claims based on this exclusion.

OWEN: But there is no dispute that if you have a plumbing leak and you have to tear out and replace part of the foundation to get at the plumbing leak, that's covered?

BLAKELY: There is no question that that is covered.

HANKINSON: Do you disagree with the AG's position that it is uncontested in this case that insured's have been charged for this coverage?

BLAKELY: I do not believe that. No, that is not uncontested. First of all it's not anywhere in our record.

HECHT: Just as background, aren't rates based on payments in the past?

BLAKELY: It's my understanding that it is a retrospective analysis based on what has been paid in the past.

HECHT: So if you've been paying these claims, to some extent future rates are going to be based on those payments. If you quit paying the claims, then future rates are going to be based on that?



BLAKELY: That's my understanding.

PHILLIPS: Prior to 1990, is there any question that this was covered in your mind?

BLAKELY: Yes, there is a question. You have essentially 3 different policies involved over the last several years. You have the pre-1978 policy, which is similar in structure to the current policy, and then you had a policy between 1978 and 1990, that was different. In the 1978 to 1990 policy, which is the policy that was involved in the *Nicolai* case, there is language of exception that says, "These exclusions do not apply to accidental discharge." The exception language actually appears in the section 1 exclusions to make it a little more clearer where they were meant to apply. There is no though under that policy no expressly clear intent to cover foundation damages. And I think the truth of the matter was, that at the time that policy came into effect it simply wasn't a big problem.

PHILLIPS: Are there any reported cases of a denial of this sort of claim under the 1978 through 1990 policy?

BLAKELY: There are several bad faith type decisions involving such denials, such as the *Nicolai* decision. There is also the *Telepact* decision, which I think is cited in a footnote in our brief. And also the *Price* decision which is cited in our brief. None of those cases though actually deal with the coverage issue. They are not ruling on coverage.

PHILLIPS: Under Coverage A where there is an exclusion H, under the literal language is it true that if a tree falls and it cracks your walls you don't have to pay? If a tornado hits, causes a bulging or a \_\_\_\_\_ you don't have to pay? Is that correct?

BLAKELY: No, that's not correct. What they have done is taken extreme positions that have never been applied by any insurance company...

PHILLIPS: Well I understand that. But I am just talking about the literal language of the policy.

BLAKELY: Under the literal language of the policy, you do not look to the remote cause of the loss. You look to the direct cause. There are several on tree coverage. The removal of a tree that falls is expressly covered under another portion of the policy. Damage to personal property caused by falling objects...

PHILLIPS: Well I don't want to talk about either one of those. I just want to talk about the crack.

BLAKELY: The crack in the roof. If you have a tree that falls on your roof, and you want to look and see if exclusion H applies, exclusion H involves settling, bulging, shrinkage or expansion

and also cracking. It's not going to be any of those things. It's just going to be cracking at best. If you pull that out of context and want to rely just on the cracking if you have a gaping hole in the roof, that's not going to be a crack. If you have a simple crack, a simple crack that does not cause a leak, doesn't do anything because of water damage caused by crack is going to be covered is it's an ensuing loss. If it's just a crack and it doesn't do anything else, then under the literal reading of this exclusion, it's not going to be covered.

If you have any ensuing loss whatsoever from water damage, that's going to be covered. If you have a gaping hole, that's going to be covered. But if you read the exclusion literally, then just the crack if it doesn't damage anything else is not going to be covered.

PHILLIPS: What are the nature of these funding losses if they have not caused a tearing out or replacing. I mean they call settling in the house.

BLAKELY: What typically happens is that, although there are different scenarios, what typically happens is, there will be a leak from a sewer pipe which will cause moisture to be added to the soil, which causes the soil to expand, which in turn causes the foundation to move. And this is where the remote causation argument on behalf of the TBI really fails.

PHILLIPS: When the foundation moves, I am trying to gather the extent of the loss. It doesn't cause the house to separate into two entities or a crack to appear in the wall that resuscitates leaking, etc. It doesn't get to that stage, or at least in these claims it hasn't gotten to that stage?

BLAKELY: Typically it doesn't. No, typically the foundation is way out of level. There has always been in the past a factual dispute in many cases about what caused the settling. And the settling will cause walls to crack. Typically you do not have the intrusion of water from the outside.

PHILLIPS: Once you get intrusion of water it's covered?

BLAKELY: Absolutely. Now if you rely on the remote causation argument that you don't look to the settling, you look to what caused the settling, that's what they are trying to argue here. You look to the cause of the settling, In a typical case if you take one-step back you have soil movement that has caused the foundation to move. If you take two steps back, you have a water leaking that has caused the problem. If you take three steps back, you have a deteriorated pipe that has caused the leak. So where do you stop? They would like you to skip the first step, which is soil movement, because that's excluded by exclusion F, they want you to rely on the second cause back, which is water leaking, and then they want you to ignore the third step back, which is deterioration. And what logical reason is there to skip the immediate cause and go to the second cause, but ignore the third cause? And that's the problem that you get into when you start ignoring the direct causation. And this is not a new argument. This exact argument the remote causation argument, has been made in several older Texas CA's cases and has been expressly rejected in those. For example, in the *Bentley* case, which is cited in our brief, the insured argued that he had a settling foundation,

but it was caused by drought. And therefore, there was coverage because drought was not expressly excluded. And that's exactly the argument that the Dept. Of Insurance is making here.

PHILLIPS: Isn't there a logical line between something that is caused by defect or problem within the structure itself, and something that's caused by an external force that's rather universal like drought or excessive rain?

BLAKELY: That distinction can be made. It's not made anywhere in the policy. The difficulty is that and several courts have addressed this, is that you can always take a step back further. If you're going to look at remote cause, you can always go back far enough so that you can find a cause that's not going to be covered.

PHILLIPS: Given the trouble with lawyers and judges and policyholders and insurance companies that \_\_\_\_\_ with this particular language how could this court write that there was no ambiguity?

BLAKELY: The courts have not ever had any problem with this language.

PHILLIPS: The 5 circuit did, because they were confused enough to ask us?

BLAKELY: They were not. They issued the *Sharp* decision, and they unequivocally held that the policy was not ambiguous and that there was no problem whatsoever with this policy language. When this case came before them, the insurance commissioner had issued his bulletin.

PHILLIPS: And we also had our *Nicolai* opinion.

BLAKELY: Yes. But the 5<sup>th</sup> circuit became concerned and the reason they sent this over here is because the insurance commissioner was directing insurance companies not to follow the 5<sup>th</sup> circuit opinion, and that they would be subject to disciplinary action if they did so. I think it is inaccurate to say that the 5<sup>th</sup> circuit ever expressed any concern about whether this policy was ambiguous. They emphatically rejected the notion that it's ambiguous. And no court has ever found it to be ambiguous.

HECHT: Under the rules of the 5<sup>th</sup> circuit, I guess the prior decision is binding unless they en banc?

BLAKELY: I believe that's correct. And I was a little confused procedurally as to how this question got here without an en banc decision to send it, but that was not my call.

ENOCH: You're talking about water damage overcoming the exclusion under H. If there is a pipe that bursts in the house, that's covered by Coverage A?

BLAKELY: Yes.

ENOCH: Even though under 9 there's that the discharge leakage of an overflow of water is limited to coming from a heating or air-conditioning system or household appliance. But you agree that if it comes from a pipe as far as Coverage A is concerned, that's covered if there's water damage?

BLAKELY Yes, because Coverage A is all perils.

ENOCH: It covers whatever causes damage except it doesn't cover damage that is cracking or bulging or shrinkage?

BLAKELY: Correct.

ENOCH: So if I have a plumbing leak that causes something in my wall to settle and it cracks my wall, there is no coverage for that damage to the house?

BLAKELY: There is going to be coverage if you have water damage. Water cannot leak out of a pipe and do nothing but crack a wall. It's going to water log the sheetrock, stain the sheetrock, do other things to it, which is going to be covered water damage. If by some miracle, the water leaked out and did nothing but cause a crack and did nothing else, then under the literal terms that crack would not be covered and you would have to plaster it up just like homeowners do everyday.

PHILLIPS: Say the sheetrock gets stained where is that in the policy?

BLAKELY: It's not expressly discussed because it's covered because Coverage A is an all risk coverage.

PHILLIPS: So you say that doesn't come under H, sheetrock staining?

BLAKELY: Staining, no.

ENOCH: But if the only evidence of water is that it causes the sheetrock to bulge or to shrink, that's not covered?

BLAKELY: Under the literal terms, yes. But as a practical matter those claims are handled as water damage claims. Because the water does cause other damages.

ENOCH: Except if it comes to a foundation that bulges or shrinks, then as a matter of course that's not covered, because of H?

BLAKELY: Because of the direct application of H, yes.

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### REBUTTAL

HARRISON: Under the extreme position taken by Safeco any kind of water damage is going to be excluded under Coverage H. If you have a water heater up in the attic which leaks and causes the ceiling to bulge or sag, that's not going to be covered. If the water then travels down to the floor and causes your parquet floor to buckle, that's not going to be covered. There is literally going to be no damage which is covered other than fire, smoke and explosion if you read the policy the way Safeco would have you read the policy.

Appellee \_\_\_\_\_ that we want you to ignore steps 1, 2 and 3. That's simply not the case. Typically what happens is a sewer pipe deteriorates through wear and tear, shifting of the soil, whatever reasons oftentimes we don't know. That in itself would be excluded except for the follow-up sentence which says, they do cover ensuing loss caused by water damage as a result of an ensuring loss after the deterioration of the pipe. It then causes the pipe to leak, the leak causes the soil to expand, and that damages the foundation. There is relevant case law I believe to the effect that the soils are actually part of the foundation. The foundation is not just the concrete slab, it includes the soils beneath it. The *T.R. Jones* case which I believe is cited in my brief stands for the position that this exclusion: earthquake, landslide or movement does not envision the type of minor earth movement which causes underneath your house to cause foundation damage.

What we are here today really is to determine is there a reasonable interpretation of coverage under this policy? From the commissioner's bulletin it's apparent that the committee that drafted this policy thought it was covered. The TDI thinks it's covered. The AG thinks it covered. The Texas House and the Texas Senate think it's covered because they enacted Art. 5.35-2 of the Insurance code which allowed the commissioner to exclude this type of damage for houses over 10 years old. According to TDI 313 out of 320 insurance companies think it's covered because they are paying these claims. The homeowners think it's covered, Safeco think it's covered. They spent \$30,000 investigating whether or not the plumbing leak causes the damage. How unreasonable is that interpretation.

HECHT: The 5<sup>th</sup> circuit doesn't think so. Four federal district judges don't think so and the El Paso CA doesn't think so.

HARRISON: The El Paso CA in *Zeiden* which is I don't think is published was not a case involving plumbing leaks. It was a case involving bad drainage which is an inherent vice.

PHILLIPS: What are the earth movement cases?

HARRISON: I believe it is *T.R. Jones*. If the 5<sup>th</sup> circuit stood by its ruling in *Sharp*, we

wouldn't be here today. They obviously had enough doubts about it to ask this court what the answer was.