

UNITED STATES DISTRICT COURT

EASTERN OF LOUISIANA

JUDY KODRIN AND MICHAEL KODRIN	*	CIVIL ACTION NO.: 06-8180
versus	*	SECTION: "J"
STATE FARM INSURANCE COMPANY AND BRIAN R. BUBRIG INSURANCE AGENCY, INC.	*	MAG. "5"

**STATE FARM FIRE AND CASUALTY COMPANY'S MEMORANDUM IN SUPPORT  
OF MOTION FOR SUMMARY JUDGMENT AS TO OFFSET OR CREDIT FOR  
PAYMENTS PREVIOUSLY MADE TO PLAINTIFFS**

MAY IT PLEASE THE COURT:

**BACKGROUND**

The Kodrin's home located at 177 Holiday Drive, Port Sulphur, Louisiana was damaged by Hurricane Katrina. Plaintiffs made a claim under their Flood Policy issued by State Farm for the damage to their home caused by Hurricane Katrina. The Flood Policy provided \$56,800.00 in dwelling coverage and \$19,200.00 in personal property coverage. (See Exhibit A, Declarations Page for Flood Policy.) Plaintiffs' losses exceeded the policy limits for their flood policy. In September 2005, State Farm paid the Plaintiffs an advance under their Flood Policy in the amount of \$2,500.00. (See Exhibit B, Copy of State Farm Check.) In December 2005, State

Farm paid the Plaintiffs \$73,500.00, the remaining Flood Policy limits, for damage to their dwelling and personal property. (See Exhibit C, Copy of State Farm Check.)

State Farm also provided homeowners insurance to the Plaintiffs in the amount of \$105,000.00 in dwelling coverage; \$10,500.00 in dwelling extension coverage; \$78,750.00 in personal property coverage; and actual loss sustained in loss of use coverage. (See Exhibit D, Declarations Page for Homeowners Policy.)

Typically, payments for losses under the Standard Form 3 Homeowners policy issued by State Farm are on an actual cash value basis for personal property. However, the plaintiffs purchased a Replacement Cost Coverage for the Dwelling Coverage and the plaintiffs purchased a Limited Replacement Cost Coverage for Personal Property Coverage. (See Exhibit D.) The Limited Replacement Cost for Personal Property amended the policy to pay repair or replacement cost for certain items. Pursuant to the Coverage A Replacement Cost Loss Settlement, the damaged portion of the dwelling covered under this section of the policy are paid on a replacement cost basis up to the policy limits shown in the Declarations page for a covered loss under the homeowners policy. (\$105,000.00 in dwelling coverage and \$10,500.00 in dwelling extension coverage.)<sup>1</sup> Moreover, the plaintiffs homeowners policy state in order for the plaintiffs to receive any additional payments on a replacement cost basis, the insureds must complete the actual repair or replacement of the damaged part of property within two years after the date of loss, and notify State Farm within 30 days after the work has been completed. (See Exhibit E, page 11.) Unlike some policies discussed *infra*, Plaintiffs' policy does not include an

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<sup>1</sup> The specific policy provisions are as follows:

**COVERAGE A – DWELLING**

**A1 – Replacement Cost Loss Settlement – Similar Construction** is replaced with the following:

- a. We will pay up to the applicable limits of liability shown in the Declarations, the reasonable and necessary cost to repair or replace with similar construction and for the same use on the premises shown in the Declarations, the damaged part of the property covered under **SECTION 1 – COVERAGES, COVERAGE A – DWELLING**, except for wood fences.

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“increased dwelling limit” endorsement which protects the insured when replacement cost rise and exceed the policy limits. *See Ferguson v. State Farm Ins. Co.*, 06-3936, 2007 WL 1378507 (5/9/07).

In this suit, Plaintiffs allege that their property was damaged by rising water and flood following the storm surge. (See Petition, ¶ IX.) Plaintiffs further allege that a portion of their property was damaged by wind and rain and Plaintiffs seek their homeowners policy limits. (See Petition, ¶ XLII-XLIII.)

An appraisal of the Pre-Katrina value of the Plaintiffs’ property as of August 28, 2005 lists the value at \$110,000.00. (See Exhibit F, Murphy Appraisal.) Since the Plaintiffs’ homeowners policy was a replacement cost policy, the Plaintiffs are entitled to the cost to repair or replace the dwelling and dwelling extension *up to the policy limits for a covered loss* only if and to the extent they suffered a covered loss. (See Exhibit D and E, Homeowners Policy.)

Plaintiffs have coverage up to \$105,000.00 for their dwelling and \$10,500.00 for their dwelling extension. The total amount recoverable for covered damage to the dwelling and dwelling extension under the Plaintiffs’ homeowners policy is \$115,500.00, which represents the sum of \$105,000.00 plus \$10,500.00. Plaintiffs have received \$56,800.00 under their Flood Policy, excluding contents coverage.

In order to prevent double recovery, if Plaintiffs prove a covered loss under their homeowners policy, State Farm will be entitled to an offset or credit for payments that State Farm has already made to Plaintiffs under their flood policy.

## **LAW AND ARGUMENT**

### **Standard for Motion for Summary Judgment**

Summary judgment should be granted when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56 (C); *New York Life Ins. Co. v. Travelers, Inc. Co.*, 92 F.3d 336, 338 (5th Cir. 1996); *Rogers v. Int’l Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996). A party moving for summary judgment “must demonstrate the absence of a genuine issue of material fact’, but need not negate the elements of the nonmovant’s case.” *Little v. Liquid Air Corp.* 37 F.3d 1069, 1075 (5th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 323-25 (1986)). If the moving party meets this burden, Federal Rule of Civil Procedure 56 requires the nonmovant to go beyond the pleadings and demonstrate by admissible evidence that specific facts exist over which there is a genuine issue for trial. *Wallace v. Texas Tech Univ.* 80 F.3d 1042, 1046-47 (5th Cir. 1996). The nonmovant’s burden may not be satisfied by conclusory allegations, unsubstantiated assertions, or a scintilla of evidence. *Little*, 37 F.3d at 1075. The Court will not, “in the absence of proof, assume that the nonmoving party could or would prove the necessary facts.” *Little*, 37 F.3d at 1075.

**I. Plaintiffs’ Recovery Pursuant to Their Homeowners Policy. If Any, Is Limited to Any Previously Uncompensated Losses Covered By Their Homeowners Policy**

**A. Plaintiffs Are Not Entitled to a Double Recovery**

As a matter of law, should Plaintiffs succeed at trial in establishing that they have sustained a covered loss under their homeowners policy, State Farm is entitled to an offset or credit for payments that State Farm has already made to Plaintiffs under their flood policy. Although Plaintiffs maintained two separate and distinct policies of insurance, covering losses caused by two separate and distinct perils, “that does not equate to double coverage in the event of a given loss.” *Ferguson v. State Farm Ins. Co.*, Civil Action No. 06-3936, 2007 WL 1378507, at \*3 (E.D. La. May 9, 2007) (Berrigan, J.).

It is universally agreed that the fundamental purpose of property insurance contracts is indemnity. See *Wright v. Assurance Co. of America*, 31,578, p. 3 (La. App. 2d Cir. 2/24/99); 728 So. 2d 974, 975). The concept of indemnity is directed at restoring the insured to the position he or she occupied prior to the loss; “[h]ence, both the extent and the limitation of recovery is found in the concept of making good the loss which the insured has sustained.” 12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 175:5 (3d ed. 2006). Accordingly, it has long been understood that an insured is entitled to receive only the amount that will indemnify actual loss, not an additional windfall above this amount.<sup>2</sup> As explained by the Louisiana Supreme Court almost two centuries ago, “the assured may insure again and again the same property, against the same risks, if he will pay the premium; *but he can recover but one indemnity.*” *Millaudon v. Western Marine & Fire Ins. Co.*, 9 La. 27, 32 (1836) (emphasis added).<sup>3</sup>

Indeed, numerous courts that have addressed the issue in other Hurricane Katrina cases have expressly rejected the double recovery regime advanced by Plaintiffs in this case. For instance, in *Esposito v. Allstate Insurance Co.*, Civil Action No. 06-1837, 2007 WL 1125761 (E.D. La. Apr. 16, 2007), Judge Zainey granted Allstate’s motion for summary judgment in which it sought an offset for what the plaintiff, a Mr. Esposito, had previously received under his flood policy. See *id.* at \*1-2. In particular, Mr. Esposito had previously received \$185,265 under his flood policy for damage to the dwelling structure. *Id.* at \*1. He then sued Allstate under his homeowners policy, “contend[ing] that wind caused a total loss of the property and . . .

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<sup>2</sup> See *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967) (Florida law) (“[T]he cardinal principle is that the purpose of the insurance contract is to indemnify the owner against loss, that is, to place him in the same position in which he would have been if no fire had occurred.”) (citation omitted); see also 15 William Shelby McKenzie & H. Alston Johnson, III, *Louisiana Civil Law Treatise: Insurance Law and Practice* § 312 (3d ed. 2006) (“[I]nsurance should be a device for making a person whole after a loss is suffered rather than a way in which he might increase his wealth . . .”).

<sup>3</sup> See also *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1080 (La. 1992) (“As a general rule the claimant may recover under all available coverages provided that there is no double recovery.”) (quoting 15A *Couch on Insurance* § 56:34 (2d ed. 1983)).

seek[ing] the full policy limits on his homeowner's policy." *Id.* Judge Zainey granted Allstate's motion for summary judgment, explaining:

Esposito is entitled to recover in this lawsuit any *previously uncompensated* losses that are covered by his homeowner's policy *and which when combined with his flood proceeds do not exceed the value of his property*. Esposito is not entitled to obtain a windfall double recovery by now recharacterizing as wind damage those losses for which he has already been compensated by previously attributing them to flood waters.

*Id.* at \*2; *see also Weiss v. Allstate Ins. Co.*, Civil Action No. 06-3774, 2007 WL 891869, at \*3 (E.D. La. Mar. 21, 2007) (Vance, J.) (recognizing "the well-established propositions that insurance contracts are contracts of indemnity and that an insured cannot recover an amount greater than her loss").

Judge Feldman has also recently recognized that plaintiffs "may not enjoy a double recovery for the same lost property" under their flood and homeowners policies. *Wellmeyer v. Allstate Ins. Co.*, Civil Action No. 06-1585, 2007 WL 1235042, at \*2 (E.D. La. Apr. 26, 2007) (Feldman, J.); *see id.* at \*2-3 & n.2 (citing cases); *cf. also Louque v. State Farm Fire & Cas. Co.*, Civil Action No. 06-2881, 2007 WL 1343636, at \*2 (E.D. La. May 4, 2007) (McNamara, J.) (observing that "an insured cannot recover twice for a single loss"); *see also Ferguson*, 2007 WL 1378507, at \*3 (noting that "the fundamental purpose of property insurance is indemnity, not profit"); *Boudoin v. State Farm Ins. Cos.*, Civil Action No. 06-cv-01656, ECF Document 22, slip op. at 8 (Melancon, J.) (holding that plaintiffs were not entitled to a double recovery).<sup>4</sup>

Enforcing the terms of the insurance policies and applying the indemnity principle will not provide a "windfall" to State Farm. Plaintiffs paid premiums under their separate flood and

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<sup>4</sup> *See also Harris v. American Prot. Ins. Co.*, 158 S.W.3d 614, 622 (Tex. App. 2005) (owner of building covered by two policies was not entitled to receive any additional money for hail damage claim after one insurer paid the entire amount; the owner was fully compensated and was not entitled to payment from other insurer); *Holden v. Connex-Metalna Mgmt. Consulting GmbH*, 302 F.3d 358, 365-66 (5th Cir. 2002) (applying Louisiana law) (holding that where two policies (one specific and one general) provided overlapping coverage for same property, coverage under the specific policy must first be exhausted before coverage arises under general blanket policy).

homeowners policies in exchange for insurance coverage against losses caused by separate and distinct perils, but Plaintiffs' payment of such premiums does not entitle them to recover twice for the same damage on mutually inconsistent factual theories. By seeking such a double recovery, it is Plaintiffs, not State Farm, who are demanding a windfall.

**B. Plaintiffs' Homeowners and Flood Policies Provide Mutually Exclusive Coverages**

Offset is required here for the additional reason that the homeowners policy – as its language makes clear – does not cover flood damage. *See In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 762-63 (E.D. La. 2006) (holding that State Farm's Water Damage Exclusion "makes it clear that regardless of the cause of the flooding, there is no coverage provided for any flooding 'regardless of the cause'"), *appeal docketed*, No. 06-56 (5th Cir. Dec. 18, 2006); *Bilbe v. Belsom*, No. 06-7596, 2007 WL 2042437, at \*4 (E.D. La. July 12, 2007) (Barbier, J.) ("State Farm's water damage exclusion clearly and unambiguously excludes damage for all flooding – whether driven by hurricane winds or not."); *Boudoin*, slip op. at 8 ("In this instance, the coverage language in the policies is clear. The Flood Policy covers only those damages related to flooding and the Homeowner's Policy covers damages related to wind but expressly excludes flood damage."). Accordingly, to the extent that part of a plaintiff's loss is attributable to flood and is compensated under a flood policy, that portion of the loss is not covered by the homeowners policy, and the flood payment necessarily reduces the amount of the loss that might be found to be covered under the homeowners policy.

For example, in *State Farm Fire & Casualty Co. v. Griffin*, 888 S.W.2d 150 (Tex. App. 1st Dist. 1994), the plaintiffs were insured under both a fire policy (which excluded flood loss) and a flood policy (which excluded loss from fire). *See id.* at 152. Rejecting the plaintiffs' argument that evidence of a prior flood payment should not have been offset against the

aggregate replacement cost of plaintiffs' property, the court explained that failing to allow the offset would have caused the insurer to pay more than its contractual obligations. "[I]t would have allowed the [plaintiffs] to recover twice for a loss they incurred only once, and would have allowed the [plaintiffs] to recover under the homeowners' policy for a flood loss, which was a type of loss expressly excluded from coverage under the homeowners' policy." *Id.* at 157. The same principle requires offset of flood payments in the instant case.

**C. The Collateral Source Rule Is Inapplicable**

Plaintiffs may seek to circumvent the fact that they cannot collect twice for the same property loss by arguing that the collateral source rule permits them to obtain a double recovery. But the collateral source rule is not applicable to this case for at least three independent but interrelated reasons.

**1. The Collateral Source Rule Does Not Apply to Property Insurance Coverage Disputes**

"Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procurement or contribution." *Bozeman v. State*, 03-1016, p. 9 (La. 7/2/04); 879 So. 2d 692, 698. The collateral source rule – which by its terms pertains to tortfeasors or similar wrongdoers – is facially inapposite because this is a breach of contract case. "Rules applicable to recovery in tort do not apply to an action on a contract of insurance." *Campbell v. Markel Am. Ins. Co.*, 00-1448, p. 8 (La. App. 1st Cir. 9/21/01); 822 So. 2d 617, 622-23.

Numerous jurisdictions have recognized the fundamental distinction between tort and breach of contract cases and have refused to apply the collateral source rule to contract actions. *See Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 430 F. Supp. 2d 984, 986-87 (N.D. Cal.

2006); *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 145 P.3d 638, 644 (Ariz. Ct. App. 2006); *Daniel Constr. Co. v. Int'l Union of Operating Eng'rs, Local 513*, 570 F. Supp. 299, 303 (E.D. Mo. 1983), *aff'd*, 738 F.2d 296 (8th Cir. 1984).<sup>5</sup>

Plaintiffs may also argue that the wholesale expansion of the collateral source rule to cases alleging a breach of an insurance contract is justified by *Louisiana Department of Transportation & Development v. Kansas City Southern Railway Co.*, 03-2349 (La. 5/20/03); 846 So. 2d 734 (“*Kansas City Southern*”). As discussed below, nothing in the case supports this notion. Indeed, in *Bozeman* – decided a year after *Kansas City Southern* – the Louisiana Supreme Court made clear that the collateral source rule remains firmly moored to its tort-based roots:

The major policy reason for applying the collateral source rule to damages has been, and continues, to be tort deterrence. The underlying concept is that tort damages can help to deter unreasonably dangerous conduct. *Tort deterrence has been an inherent, inseparable aspect of the collateral source rule since its inception over one hundred years ago.*

*Bozeman*, 03-1016, at p. 12; 879 So. 2d at 700 (emphasis added; citation omitted). There are no grounds for this Court to break from long-standing policy and apply the collateral source rule to breach of insurance contract cases.

**2. There Is No “Tortfeasor” to Trigger the Collateral Source Rule Because the Injury to Plaintiffs’ Property Was Not Caused by State Farm**

As the authorities cited above make clear, the collateral source rule is intended to prevent a “tortfeasor” or similar “wrongdoer” from deriving a benefit from a collateral source of compensation for an injury *caused by the wrongdoer*. See *Atmel Corp.*, 430 F. Supp. 2d at

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<sup>5</sup> The Louisiana’s Supreme Court, in *Bozeman v. State*, 03-1016 (La. 7/02/04); 879 So. 2d 692 (1) recognized that Louisiana’s courts have adopted the “common-law based” collateral source rule; and (2) quoted and thereby adopted the *Restatement (Second) of Torts*’ explication of the doctrine. See *id.* at pp. 8-9; 879 So. 2d at 697-98 (quoting *Restatement (Second) of Torts* § 920A (1979)). Consequently, while non-Louisiana jurisprudence is not controlling, the Court may appropriately consider it instructive.

986-87 (N.D. Cal. 2006) (collateral source rule does not apply where the insurer is not the tortfeasor and the monies paid by the other source were not compensation for tort damages caused by the tortfeasor). In this case, the central dispute is whether the loss to their property for which Plaintiffs' seek to recover was caused by wind (as Plaintiffs contend) or flooding (as State Farm contends). However, the Court need not resolve this dispute in order to determine that the collateral source rule does not apply. Here, Plaintiffs received \$76,000.00 for flood damages pursuant to their flood insurance. Plaintiffs do not claim that this money reimbursed them for harm caused to their house and its contents by *State Farm*. To the contrary, Plaintiffs specifically allege that their property was damaged by Hurricane Katrina and that a significant portion of their damage was caused by wind, rain, storm surge, rising water, and flood. (Petition ¶ VII-IX.) As a result, the collateral source rule simply has no application to the facts of this case.

Plaintiffs cannot obfuscate the fact that there is no "tortfeasor" in this case and that the would-be "collateral source" (their flood insurance) did not reimburse them for a loss caused by State Farm by arguing that the Louisiana Supreme Court's decision in *Kansas City Southern* radically liberalized the collateral source rule in Louisiana. In *Kansas City Southern*, the Louisiana Supreme Court applied the collateral source rule in a case where the environmental contamination for which recovery was sought *was caused by the defendant*. In doing so, it saw a perfect congruity between a polluter under the environmental statutes and a tortfeasor. As the court explained, "[l]ike conventional tort cases, environmental law statutory remedies involve claims to recover damages for harm *caused by a defendant's acts*." *Id.* at p. 10; 846 So. 2d at 741 (emphasis added). Thus, the polluter, though not a traditional tortfeasor, was nevertheless a "wrongdoer" for the purposes of the collateral source rule. The court further explained that

environmental pollution cases implicated the same “compelling public policy reasons” as tort cases: “When applying environmental laws, the concern prompting the collateral source rule’s goals of tort deterrence and accident prevention is especially implicated, although in the context of deterring future acts in violation of the [environmental statutes].” *Id.* at pp. 10-11; 846 So. 2d at 741. Therefore, the court concluded that a “wrongdoer’s liability should not be reduced by the amount of collateral source payments to an injured plaintiff.” *Id.* at p. 14; 846 So. 2d at 743. The court also emphasized that its holding was “a narrow one,” confined to “the circumstances of this case.” *Id.* at p. 17; 846 So. 2d at 745.

No such congruity exists in this case. Here, the harm to Plaintiffs’ property, reimbursed by flood insurance, was not “caused by a defendant’s acts.” *Id.* at p. 10; 846 So. 2d at 741. And the goal of “tort deterrence and accident prevention” is most assuredly not served by compelling an insurer to pay a policyholder a second time for property damage caused by external events for which the policyholder has already been fully compensated.

3. **The Collateral Source Rule Has No Application to Payments Made Pursuant to Insurance Policies Providing Coverage for Mutually Exclusive Risks**

“The collateral source rule applies only when the indemnity or compensation *is for the same injury* for which damages are sought.” *Baugh v. Alexander*, 767 So. 2d 269, 272 (Miss. Ct. App. 2000) (emphasis added). Here, Plaintiffs’ homeowners policy and flood policy insured against different and mutually exclusive perils. Failure to offset the amount of flood payments received by Plaintiffs would have the effect of requiring State Farm to pay for a risk that is excluded under the policy. *See Griffin*, 888 S.W.2d at 157; *see also Ferguson*, 2007 WL 1378507, at \*4 (observing that maintenance of separate insurance policies covering distinct perils did not result in double coverage for a given loss); *Boudoin*, slip op. at 8 (holding that

plaintiffs could not recover twice for mutually exclusive risks and, therefore, the court did not need to reach the collateral source rule).

**II. Evidence of Flood Payments Is Relevant and Admissible On the Issues of Causation, Estoppel, and Plaintiffs' Credibility**

Plaintiffs previously sought and received flood insurance benefits available only for property damage caused by flood, a risk excluded from coverage under their homeowners policy. They now claim that they are entitled to benefits under their homeowners policy for damage allegedly done by wind, a risk covered only under their homeowners policy. Accordingly, evidence that Plaintiffs made a flood claim and received the limits of their flood policy is also admissible to the extent that it undermines Plaintiffs' "causation" argument, as well as for impeachment purposes.

**A. The Flood Claim and Flood Payments Are Admissible to Show the Cause of the Damage**

Plaintiffs' flood claim and payment and acceptance of their flood limits go directly to the central issue in the case: What caused the loss claimed by Plaintiffs, flood or wind? Evidence of the flood claim is admissible for this purpose, which is separate from the purpose of it being a source of compensation. *See Mayton v. Auto-Owners Ins. Co.*, No. Civ. A.3:05CV667, 2006 WL 1214831, at \*3 (E.D. Va. May 2, 2006) (flood claim admissible because it goes to material issue of fact as to cause of the damage to the home following a hurricane).

The flood policy insuring Plaintiffs' property at the time of Hurricane Katrina was issued pursuant to the National Flood Insurance Program ("NFIP") and subject to FEMA regulations. Plaintiffs' flood policy provides coverage for "direct physical loss by or from flood." "Direct Physical Loss By or From Flood" is defined in the Definitions section of the policy as: "Loss or damage to insured property, directly caused by a flood." The flood policy expressly excludes

coverage for direct physical loss caused by wind or windstorm. 44 C.F.R. Pt. 61, App. A(1), at Art. V.D.8 (2006)

As insureds under the NFIP, Plaintiffs are specifically charged with knowledge of the contents of the flood policy under which they made a claim. *See* 44 C.F.R. Pt. 61, App. A(1), Art. VII.J (2006); *see also Richmond Printing LLC v. Dir. Fed. Emergency Mgmt. Agency*, 72 F. App'x 92, 97-98 (5th Cir. 2003). As the *Richmond* court explained:

First, [the insured] was insured by the federal government through the NFIP. As the Supreme Court has stated, “those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to the law.” *Thus, the special nature of the insurance relationship in this case charges the insured with the duty of understanding the terms of the SFIP so that he may deal appropriately with the government and its appointed agents.*

*Id.* at 97-98 (emphasis added, citation omitted).

Thus, under the law and the facts of this case, Plaintiffs knew when they made their flood claim: (a) that Plaintiffs' flood policy provided coverage for “direct physical loss by or from flood”; (b) that “Direct Physical Loss By or From Flood” was defined in the Definitions section of the policy as: “Loss or damage to insured property, directly caused by a flood”; and (c) that their flood policy expressly excluded coverage for direct physical loss caused by wind or windstorm. 44 C.F.R. Pt. 61, App. A(1), at Art. V.D.8 (2006). Plaintiffs' actions in seeking, receiving, and accepting *all* or some portion of the money provided for by their flood policy, and the resulting adjustment and payments, are therefore independently demonstrative of the cause of the destruction of their home. The flood claim and resulting payments go directly to the controlling material of fact dispute of this case – was it flood or wind that destroyed their home?

**B. Plaintiffs Are Estopped from Claiming a Total Loss Due to Wind And From Denying that Flood Caused at Least the Amount of Damage that Was Paid Under Their Flood Insurance Policies**

Having been compensated under their flood policy for at least some of their losses, Plaintiffs now seek to recharacterize those same losses as having been caused either in whole or in part by wind in order to recover under their homeowners insurance policies. Plaintiffs' vacillating positions are clearly inconsistent, and the law should not permit them to gain the economic benefit of these irreconcilable factual contentions.

As noted above, all SFIP policyholders are charged by law with constructive knowledge of the policy's contents and requirements. Accordingly, in making a flood insurance claim and accepting payment thereon, Plaintiffs knowingly acknowledged that the damage to their property, or at least that portion of the damage indemnified by the flood insurance payments, was a "direct physical loss by or from flood" and was not directly or indirectly caused by "wind, or windstorm." *Id.* Although Plaintiffs now seek to prove contrary facts, "a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects." *Kaneb Servs., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 650 F.2d 78, 81 (5th Cir. 1981).

Estoppel is an equitable doctrine designed to prohibit litigants from deliberately changing positions according to the exigencies of the moment. It is intended to prevent the perversion of the judicial process and "playing 'fast and loose with the courts.'" *Lowman v. Merrick*, 06-0921, 2007 WL 858822, at \*7 (La. App. 1st Cir. 3/23/07) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted)). "[A] party cannot shift his position at will to a

contradictory one in relation to the subject-matter of litigation in order to frustrate and defeat the action of the law upon it.” *Farley v. Frost-Johnson Lumber Co.*, 63 So. 122, 129 (La. 1913).<sup>6</sup>

Similarly, the doctrine of judicial estoppel prevents litigants ““from playing fast and loose with the courts to suit the exigencies of self interest,”” *In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004) (citation omitted), by asserting ““a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.”” *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (citation omitted). The “earlier proceeding” need not have been a formal judicial proceeding, and courts have applied the doctrine to preclude a plaintiff from pursuing a legal claim that is fundamentally inconsistent with representations made in an earlier application for benefits. In *McClaren v. Morrison Management Specialists, Inc.*, 420 F.3d 457 (5th Cir. 2005), the Fifth Circuit held that a plaintiff was judicially estopped from asserting a claim for age discrimination (which requires an allegation the plaintiff would have been able to perform the job for which he was not selected) based on the plaintiff’s statements in an earlier claim for Social Security disability benefits that he was “unable to work” because of illness. *See id.* at 466; *see also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999); *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477, 480 (5th Cir. 2000). As stated by one court, “[w]e cannot permit litigants to adopt an alternate story each time it advantages them to change the facts.” *Feldman v. Am. Mem’l Life Ins. Co.*, 196 F.3d 783, 791 (7th Cir. 1999).

In sum, the factual predicate underlying Plaintiffs’ claims for and acceptance of flood insurance proceeds – under a policy that covers “direct physical loss by or from flood” and

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<sup>6</sup> *See also Bonnette v. Robles*, 32,191, p. 3 (La. App. 2d Cir. 8/18/99); 740 So. 2d 261, 263 (insured’s signing of form selecting lower uninsured motorist limits on spouse’s behalf estopped her from denying capacity to do so as named insured’s representative so as to gain benefit of higher limits than would have otherwise been applicable); *Foret v. Terrebonne Towing Co.*, 632 So. 2d 344, 348-49 (La. App. 1st Cir. 1993) (insurer estopped from taking position inconsistent with policy’s service of suit clause).

specifically excludes losses caused “directly or indirectly” by wind – is totally irreconcilable with their current claim that [their home suffered a total loss due to wind and not flood] [some or all of the same damage was caused by wind and not by flood]. Courts have recognized the inherent irreconcilability of such positions, as reflected in the following recent ruling by Judge Zainey of the Eastern District:

[Plaintiff] is not entitled to obtain a windfall double recovery by now recharacterizing as wind damage those losses for which he has already been compensated by previously attributing them to flood waters. The NFIP program did not *erroneously* make payments to Plaintiff for flood losses to his home. Plaintiff sought those payments and he obtained them by convincing FEMA that his losses were caused by flood and covered by his flood policy. Plaintiff has now been compensated for those losses based on the statements and information that he provided to FEMA. For purposes of the instant suit this Court will not allow Plaintiff to cavalierly repudiate those prior statements while nevertheless retaining the funds that he received based on those same statements.

*Esposito*, 2007 WL 1125761, at \*2.<sup>7</sup>

C. **The Flood Claim and Flood Payments Are Admissible to Challenge Plaintiffs’ Credibility**

After a determination by the adjuster that Plaintiffs’ property did in fact suffer a total loss due to flood, Plaintiffs were paid the full coverage limits under their flood policy. Plaintiffs readily accepted those payments. Despite these facts, they allege in their Petition for Damages filed on August 25, 2006 that a significant portion of their damages was caused by the wind and the rain of the hurricane. (Petition, ¶ VIII.) Furthermore, in a report prepared by the plaintiffs’ building expert Neil Hall, it is alleged that “[w]ind attacked and destroyed the Kodrin residence before the rise of the storm surge...[and] the building and garage were economically totaled by wind before the rise of the storm surge. (See Exhibit G, Neil Hall report, page 5.)

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<sup>7</sup> To the extent that Plaintiffs are permitted now to argue that all or part of the payments under their flood policy were made in error and their loss was caused by wind, they should be required to remit such payments to State Farm, so that the funds can be returned to the U.S. Treasury.

Plaintiffs' actions in seeking, accepting, and retaining payments under their flood insurance policy are, at a minimum, prior conduct inconsistent with their factual allegations and testimony in this case. To the extent Plaintiffs seek to prove in this case that some or all of the losses for which they were previously indemnified under their flood insurance policy were actually caused by wind, State Farm is entitled to respond by presenting evidence that Plaintiffs have previously advanced and/or accepted the financial benefits of the contrary factual predicate that those same losses were caused by water or flood.

For these reasons, the flood claim and receipt of the flood payments are prior inconsistent positions that are admissible to challenge Plaintiffs' credibility at trial. *See Mayton*, 2006 WL 121483, at \*3 (flood claim admissible as admission against interest in suit against homeowner's insurer with wind versus water dispute).

**D. The Collateral Source Rule Does Not Bar Evidence of Flood Payments on any of these Issues**

Plaintiffs may again rely upon the collateral source rule to exclude evidence of their flood payments. However, "[t]he collateral source rule applies only when the indemnity or compensation is for the same injury for which damages are sought." *Baugh v. Alexander*, 767 So. 2d 269 (Miss. App. 2000) (emphasis added). To the extent that evidence of Plaintiffs' prior flood payment is offered to show that all or part of Plaintiffs' losses were caused by flood, and not by wind, the collateral source rule is irrelevant.

For example, in *Baugh*, the plaintiff was injured in a motor vehicle accident and alleged that the accident resulted in an injury to her lower back. Defendant sought to introduce evidence that some of the medical expenses in question had already been submitted by the plaintiff and paid pursuant to a previous workers' compensation claim. Rejecting the plaintiff's argument that the collateral source rule barred such evidence, the court explained:

The mere fact that this earlier injury produced symptoms largely indistinguishable from those symptoms Baugh alleged to have been caused by the wreck does not make them a collateral source of compensation for injuries received in the wreck. To the contrary, evidence of such payments based on assertions of causation in another proceeding by the plaintiff that are inconsistent with her assertions of causation in this case becomes quite probative for the jury in carrying out its duty to determine whether the plaintiff has met her burden of proving that the wreck caused the injuries for which she seeks compensation from the defendant.

*Id.* at 272.

Here, Plaintiffs claimed flood water destroyed their home (*cf.*, the *Baugh* plaintiff's initial worker-related lower back injury). Now, after receiving their full flood limits, they claim strong winds destroyed their home (*cf.*, the *Baugh* plaintiff's motor vehicle accident lower back injury). As in *Baugh*, the fact that Plaintiffs made a flood claim and received their full policy limits is not only relevant and admissible, it is highly probative of the key facts related to their current contention that their home was destroyed by strong winds.

In addition, under long-standing Louisiana law, evidence of a plaintiff's insurance benefits may be used for impeachment purposes without violating the collateral source doctrine. *See Turcich v. Baker*, 594 So. 2d 505 (La. App. 5th Cir. 1992). In *Turchich*, the court allowed evidence of benefits plaintiff received from a collateral source to be presented to contradict her allegation that she discontinued medical treatment because she could not afford it. In *LeBlanc v. Acadian Ambulance Service, Inc.*, 99-271 (La. App. 3d Cir. 10/13/99); 746 So. 2d 665, the court allowed the introduction of evidence of payments from a collateral source to challenge the credibility of the witness and to show the possibility of third-party liability. Federal courts, including the Fifth Circuit, have also recognized an impeachment exception to the collateral source rule. *See Gates v. Shell Oil*, 812 F.2d 1509, 1513 (5th Ch. 1987); *Lange v. Missouri Pac. R.R. Co.*, 703 F.2d 322, 324 (8th Cir. 1983).

**CONCLUSION**

For the foregoing reasons, State Farm is entitled to summary judgment as a matter of law. Should Plaintiffs succeed at trial in establishing that they have sustained a covered loss under their homeowners policy, State Farm is entitled to an offset or credit for payments that State Farm already made to Plaintiffs under their flood policy.

	<p>Respectfully submitted,</p> <p><i>/s/ Wm. Ryan Acomb</i></p> <hr/> <p><b>WM. RYAN ACOMB (16780)</b> <b>MICHELE L. TROWBRIDGE (30974)</b> Porteous, Hainkel &amp; Johnson, L.L.P. 704 Carondelet Street New Orleans, LA 70130 Telephone: (504) 581-3838</p>
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**CERTIFICATE OF SERVICE**

**I DO HEREBY CERTIFY** that on September 20, 2007, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

John Redmann

Margaret Madere

*/s/ Wm. Ryan Acomb*  
**WM. RYAN ACOMB**  
**MICHELE L. TROWBRIDGE**