

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

<b>JUDY KODRIN AND</b>	)	<b>CIVIL ACTION 06-8180</b>
<b>MICHAEL KODRIN</b>	)	
	)	<b>JUDGE BARBIER</b>
<b>VERSUS</b>	)	
	)	<b>SECTION "J" 5</b>
<b>STATE FARM INS. CO., ET AL.</b>	)	<b>MAGISTRATE CHASEZ</b>

**MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT REGARDING BURDEN OF PROOF**

**May it please the Court:**

The Law Office of John W. Redmann, on behalf of Plaintiffs, submits the following Memorandum in Support of its Motion for Partial Summary Judgment Regarding Burden of Proof:

**Facts**

On August 29, 2005, Hurricane Katrina ravaged the Gulf Coast. Plaintiffs' home suffered extensive damage due to the storm. At the time of Hurricane Katrina's landfall, Plaintiffs' home was insured by Defendant under a Homeowner's Insurance Policy.

To date, Defendant has paid nothing unto Plaintiffs. The destruction wrought upon Plaintiffs' home was far more substantial. Defendant alleges that the destruction was wholly due to damage that was excluded by the Homeowner's Insurance Policy.

Defendant has refused to budge from its stance, and Plaintiffs have not been made whole. Thereby this suit has been brought.

**Pertinent Law**

**Summary Judgment**

Summary judgment is proper if the pleadings, depositions, interrogatory answers and admissions, together with any affidavits, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law.<sup>1</sup> A genuine issue exists if the evidence would allow a reasonable jury to return a verdict for the non-movant.<sup>2</sup> Although the Court must consider the evidence with all reasonable inferences in the light most favorable to the non-moving party, the non-movant must produce specific facts to demonstrate that a genuine issue exists for trial.<sup>3</sup> The non-movant must go beyond the pleadings and use affidavits, depositions, interrogatory responses, admissions, or other evidence to establish a genuine issue.<sup>4</sup> Accordingly, conclusory rebuttals of the pleadings are insufficient to avoid summary judgment.<sup>5</sup>

### **All-Risks Insurance Policies**

A Homeowner's Insurance Policy is a type of All-Risk Insurance Policy.<sup>6</sup> A "policy of insurance insuring against 'all risks' creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage."<sup>7</sup>

In the present case, there are no allegations of fraud or misconduct by the Plaintiffs. Therefore to exclude any loss of coverage the policy must contain a specific provision expressly excluding that loss.

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<sup>1</sup> Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2554-55 (1986).

<sup>2</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

<sup>3</sup> *Webb v. Cardiothoracic Surgery Associates of North Texas*, 139 F.3d 532, 536 (5<sup>th</sup> Cir. 1998).

<sup>4</sup> *Id.*

<sup>5</sup> *Travelers Ins. Co. v. Liljeberg Enter., Inc.* 7 F.3d 1203, 1207 (5<sup>th</sup> Cir. 1993).

<sup>6</sup> *In Re Katrina Canal Breaches Consolidated Litigation*, November 27, 2006 Order, p. 9.

<sup>7</sup> *Alton Ochsner Medical Foundation v. Allendale Mut. Ins.*, 219 F.3d 501, 504 (5<sup>th</sup> Cir. 2000), *citing U.S. Indus., Inc v. Aetna Cas & Sur. Co.*, 690 F.2d 459, 461 (5<sup>th</sup> Cir. 1982) (construing Louisiana law and citing *Dow Chem. Co. V. Royal indem. Co.*, 635 F.2d 379, 387 (5<sup>th</sup> Cir 1981) (construing Texas law)); *see also: Trinity Indus., Inc. V. Ins. Co. Of N. Am.*, 916 F.2d 267, 269 (5<sup>th</sup> Cir. 1990).

## **Burden of Proving the Applicability of a Policy Exclusion**

“It is also well-settled Louisiana law that the insurance provider has the burden of proving that an exclusion unambiguously applies”<sup>8</sup>

This proposition was first articulated in 1935.<sup>9</sup> In *Lado*, the Louisiana Supreme Court held that it is the responsibility of the Insurer to prove that an exclusion barred the rights of the insured.

70 years later, this concept has been applied numerous times by various Louisiana courts, and in such a degree that it has become Jurisprudence Constante.

“The Insurer has the burden of proving that a policy exclusion precludes recovery.”<sup>10</sup> Further, ambiguous policy provisions are generally construed against the insurer and in favor of coverage.<sup>11</sup> Equivocal provisions seeking to narrow an insurer’s obligation, such as an exclusion from coverage, are strictly construed against the insurer.<sup>12</sup> Therefore, as stated in *Alton*, the Insurer must prove not only that the exclusion is applicable, but that it is unambiguous.<sup>13</sup>

## **Conclusion**

The Louisiana Supreme Court held, and the 5<sup>th</sup> Circuit has recognized that, an insurance provider

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<sup>8</sup> *Cochran v. B.J. Servs., Co.*, 302 F.3d 499 (5<sup>th</sup> Cir. 2002), citing *Arnette v. NPC Servs., Inc.*, 2000-1776 (La. App. 1 Cir. 2/15/02) citing *Gaylord Chem. Corp. V. ProPump, Inc.*, 98-2367 (La. App. 1 Cir. 2/18/00).

<sup>9</sup> *Lado v. First Nat. Life Ins. Co.*, 162 So. 579 (La. 1935).

<sup>10</sup> *Capital Bank & Trust Co. v. Equitable Life Assur. Soc. Of U.S.*, 542 So.2d 494 (La. 1989).

<sup>11</sup> *La. Civ.Code art. 2056; Carrier v. Reliance Ins. Co.*, 99-2573, p. 11 (La.4/11/00), 759 So.2d 37, 43; *Louisiana Insurance Guaranty Association v. Interstate Fire & Casualty Company, et al*, 630 So.2d 759, 764 (La. 1/14/94).

<sup>12</sup> *Carrier*, 759 So.2d at 43.

<sup>13</sup> *Alton Ochsner Medical Foundation v. Allendale Mut. Ins.*, 219 F.3d 501, 504 (5<sup>th</sup> Cir. 2000)

bears the burden to show that (1) an exclusion exists in the policy; (2) the exclusion is unambiguous, and (3) the exclusion is applicable to the loss claimed. Accordingly, the Plaintiffs implore this Honorable Court to recognize the Defendant's burden to prove a specific exclusionary provision exists, is not ambiguous and is applicable, since the contract in contention is an All-Risk Insurance Policy.

RESPECTFULLY SUBMITTED:

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**CERTIFICATE of SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served upon counsel for all parties to this proceeding by CM/ECF, facsimile, hand-delivery, and/or by mailing the same to each by first class United States mail, properly addressed, postage prepaid, at the last know address.

New Orleans, Louisiana, this 12th day of September, 2007.

/s/ Margaret E. Madere  
MARGARET E. MADERE