

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

TRENT LOTT AND TRICIA LOTT, )  
 )  
 Plaintiffs )  
 )  
 vs. ) No.: 1:05-cv-00671-LG-RHW  
 )  
 STATE FARM FIRE AND CASUALTY )  
 COMPANY AND JOHN DOES 1 THROUGH 10, )  
 )  
 Defendants )  
 \_\_\_\_\_ )

**STATE FARM FIRE AND CASUALTY COMPANY'S REPLY  
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ARGUMENT .....1

I. Counts One and Two for Declaratory and Injunctive Relief Fail Because Plaintiffs' Claim for Insurance Coverage Is Barred by the Plain Language of the Policy. ....1

    A. Dismissal of Plaintiffs' Complaint Is Proper as a Matter of Law .....1

    B. Water Damage Caused by Storm Surge and Flooding Is Excluded by the Clear and Unambiguous Terms of Plaintiffs' Homeowners Policy. ....2

    C. Plaintiffs' Alleged "Reasonable Expectations" Do Not Negate the Clear Terms of Their Policy. ....5

    D. State Farm's Anti-Concurrent Cause Policy Language Excludes Water Damage, Regardless of Other Alleged Causes. ....6

    E. Plaintiffs' Claim that There Is Coverage Because the Loss Would Have Occurred "in the Absence of" the Excluded Water Damage Is Erroneous. ....10

II. Counts Three to Five Fail to State a Claim. ....12

III. Counts Six and Seven, As Well As Plaintiffs' Allegations of Equitable Estoppel, Fail to State a Claim. ....13

IV. Plaintiffs' Claims Are Precluded by The Filed Rate Doctrine and Separation of Powers Doctrine and Are Preempted and Constitutionally Barred. ....14

CONCLUSION .....15

**TABLE OF AUTHORITIES**

**CASES**

*Alexander v. State ex rel. Allain*, 441 So. 2d 1329 (Miss. 1983).....14

*American Family Mut. Ins. Co. v. White*, 65 P.3d 449 (Ariz. Ct. App. 2003).....5

*American States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) .....5

*American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) .....14

*Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985).....7

*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1986) .....15

*Bolen v. Dengel*, 340 F.3d 300 (5th Cir. 2003), *cert denied*, 541 U.S. 959 (2004) .....12

*Booker v. American Gen. Life & Accident Ins. Co.*, 257 F. Supp. 2d 850 (S.D. Miss. 2003) .....13

*Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067  
(Miss. Ct. App. 2004) .....2, 3, 5, 6, 8, 11

*Brown v. Blue Cross & Blue Shield of Miss., Inc.*, 427 So. 2d 139 (Miss. 1983) .....5

*Burns v. Allen*, 31 So. 2d 125 (Miss. 1947).....14

*C.E.R. 1988, Inc. v. Aetna Cas. & Surety Co.*, 386 F.3d 263 (3d Cir. 2004).....15

*Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416 (Miss. 1987) .....5

*DeMizio v. GEICO Gen. Ins. Co.*, No. Civ.A.05-409, 2005 WL 1693938  
(E.D. Pa. July 19, 2005).....14

*Dixie Pine Prods. Co. v. Maryland Cas. Co.*, 133 F.2d 583 (5th Cir. 1943).....8

*Drs. Bethea, Moustoukas & Weaver LLC v. St. Paul Guardian Ins. Co.*, 376 F.3d  
399 (5th Cir. 2004).....12

*Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp. 2d 606 (S.D. Miss. 2001).....6, 7

*Exxon Corp. v. Crosby-Miss. Res., Ltd.*, 154 F.3d 202 (5th Cir. 1998).....1

*Findlay v. United Pac. Ins. Co.*, 917 P.2d 116 (Wash. 1996).....9

*Gallup v. Omaha Prop. & Cas. Ins. Co.*, No. 04-31213, 2005 WL 3485890  
(5th Cir. Dec. 21, 2005) .....15

*Grain Dealers Mut. Ins. Co. v. Belk*, 269 So. 2d 637 (Miss. 1972).....9

*Gulf States Utils. Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987).....14

*Harris v. Shelter Mut. Ins. Co.*, 141 S.W.3d 56 (Mo. Ct. App. 2004).....5

*Hines v. Davidowitz*, 312 U.S. 52 (1941) .....15

*Kish v. Insurance Co. of N. Am.*, 883 P.2d 308 (Wash. 1994).....6

*Landsing Properties v. OKC Apartments, Ltd.*, 496 F. Supp. 5 (W.D. Okla. 1979) .....13

*Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330 (3d Cir. 2005) .....5

*Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983) .....14

*Maalouf v. Salomon Smith Barney, Inc.*, No. 02 Civ. 4770, 2003 WL 1858153  
(S.D.N.Y. Apr. 10, 2003).....12

*MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 216 F. Supp. 2d 251  
(S.D.N.Y. 2002).....12

*Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997) .....14

*Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998).....9

*Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).....14

*Nationwide Mut. Ins. Cos. v. Lagodinski*, 683 N.W.2d 903 (N.D. 2004).....5

*O'Malley v. United States Fid. & Guar. Co.*, 602 F. Supp. 56 (S.D. Miss. 1985).....8

*O'Neill v. State Farm Ins. Co.*, No. 94-3428, 1995 WL 214409  
(E.D. Pa. Apr. 7, 1995) .....11

*Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713 (S.D. Ind. 1991).....13

*Peerless Ins. Co. v. Myers*, 192 So. 2d 437 (Miss. 1966).....7

*Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp. 2d 907 (S.D. Miss. 1998),  
*aff'd*, 200 F.3d 815 (5th Cir. 1999) .....6, 8

*Richardson v. Standard Guar. Ins. Co.*, 853 A.2d 955  
(N.J. Super. Ct. App. Div. 2004) .....14

*Richmond Printing LLC v. Director, Fed. Emergency Mgmt. Agency*, 72 Fed.  
Appx. 92 (5th Cir. 2003).....15

*Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413 (Wash. 1989) .....9

*Seismic Petroleum Servs., Inc. v. Ryan*, 450 So. 2d 437 (Miss. 1984) .....14

*Shaw v. Hyatt Int’l Corp.*, No. 05 C 5022, 2005 WL 3088438  
(N.D. Ill. Nov. 15, 2005).....12

*Spence v. Omaha Indem. Ins. Co.*, 996 F.2d 793 (5th Cir. 1993).....15

*Steadman v. Mississippi Farm Bureau Cas. Ins. Co.*, 626 So. 2d 588 (Miss. 1993).....6

*Stewart v. Gulf Guar. Life Ins. Co.*, 846 So. 2d 192 (Miss. 2002).....13

*Stidham v. Texas Comm’n on Private Sec.*, 418 F.3d 486 (5th Cir. 2005) .....15

*United States Fid. & Guar. Co. v. Omnibank*, 812 So. 2d 196 (Miss. 2002) .....1

*Williams v. WMX Techs., Inc.*, 112 F.3d 175 (5th Cir. 1997).....13

*Wooten ex rel. Wooten v. Mississippi Farm Bureau Ins. Co.*, 2005-CA-00303-  
SCT, 2005 WL 2787463 (Miss. Oct. 27, 2005).....2

*Wright v. Allstate Ins. Co.*, 415 F.3d 384 (5th Cir. 2005).....15

**STATUTES**

42 U.S.C. 4001(d) .....15

42 U.S.C. 4121(a)(1).....4

44 C.F.R. Pt. 61, App. (A)(1).....15

44 C.F.R. 62.24 (2005) .....15

Miss. Const. art. 1, §§ 1, 2 .....14

**SECONDARY AUTHORITIES**

25 Richard A. Lord, *Williston on Contracts* § 67.61 (4th ed. 2002) .....13

*American Heritage Dictionary of the English Language* (4th ed. 2000).....3

*Compact Oxford English Dictionary of Current English* (3d ed. 2005).....3

Dictionary.com, <http://dictionary.reference.com/search?q=body%20of%20water> .....3

*Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).....3

Gulf of Mexico Program, U.S. Env'tl. Protection Agency, *General Facts about the Gulf of Mexico: Location and Size*, <http://www.epa.gov/gmpo/about/facts.html#location>.....3

*Oxford American Dictionary of Current English* (1999).....3

## ARGUMENT

### I. Counts One and Two for Declaratory and Injunctive Relief Fail Because Plaintiffs' Claim for Insurance Coverage Is Barred by the Plain Language of the Policy.

#### A. Dismissal of Plaintiffs' Complaint Is Proper as a Matter of Law

Contrary to Plaintiffs' contentions, their claims do not present factual issues that are inappropriate for dismissal as a matter of law. The essence of Plaintiffs' Complaint is that Plaintiffs are entitled to recover under their homeowners policy for damage to their house caused by storm surge during Hurricane Katrina. (*See, e.g.*, Compl., ¶¶ 18-21, 23-24; Pl. Mem. at 6-25.) The issues of contract interpretation raised by Plaintiffs' contentions that storm surge damage is a covered peril under their policy are legal issues that may be decided on a motion to dismiss. As the Mississippi Supreme Court has held, where, as here, "a contract is clear and unambiguous, its meaning and effect are matters of law." *U.S. Fid. & Guar. Co. v. Omnibank*, 812 So. 2d 196, 198 (Miss. 2002); *see also Exxon Corp. v. Crosby-Miss. Res., Ltd.*, 154 F.3d 202, 205 (5th Cir. 1998) ("[the] interpretation of a contract is a matter of law").

Moreover, the issues raised by the Complaint regarding the efficient proximate cause doctrine are legal issues. Plaintiffs' Complaint, which Plaintiffs acknowledge contains the operative allegations for purposes of State Farm's motion to dismiss (Pl. Mem. at 4 n.1), consistently alleges *not* that wind directly damaged Plaintiffs' residence, but that wind "proximately and efficiently" caused the damage.<sup>1</sup> (Compl. ¶¶ 8, 10-13, 20-21.) As Plaintiffs' memorandum makes clear, by such allegations Plaintiffs mean that wind caused the storm surge that damaged Plain-

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<sup>1</sup> Plaintiffs' Complaint does *not* contain the assertion now made by Plaintiffs on page 3 of their memorandum that their house was entirely destroyed by wind before the storm surge. In their memorandum, Plaintiffs do not dispute that, as noted by State Farm (SF Mem. at 22 n.16 & Ex. F to SF Mot.), Plaintiffs have an NFIP flood insurance policy, and in fact, Plaintiffs have made a claim under that policy for flood damage to their residence. In addition, Plaintiffs' "belief" (Pl. Mem. at 2) that their policy included a hurricane deductible endorsement cannot defeat State Farm's motion to dismiss. This Court may take judicial notice of the declarations page of Plaintiffs' policy, attached as the first page of Ex. E to State Farm's Motion. (*See* SF Mem. at 3 & n.2.) The declarations page establishes that Plaintiffs' policy does not include a hurricane deductible endorsement. *Id.* Moreover, even if Plaintiffs had a hurricane deductible endorsement, that endorsement would not alter or expand the coverage provided by the policy and would not provide a ground for denying State Farm's motion to dismiss. (*See* SF Mem. at Point III.B.3.)

tiffs' residence. (*See* Pl. Mem. at 6-9.) Such allegations raise the question of whether Mississippi law even recognizes the doctrine of efficient proximate cause (which it does not) and issues regarding the interpretation of the causation language of State Farm's policy. These issues are matters of law for this Court. *See* Point I.D *infra*.

**B. Water Damage Caused by Storm Surge and Flooding Is Excluded by the Clear and Unambiguous Terms of Plaintiffs' Homeowners Policy.**

Plaintiffs attempt to evade their policy's water damage exclusion by contending that the damage to their property was caused by "storm surge" and that "storm surge" is not flooding. Plaintiffs' contentions are contradicted by the plain and ordinary meaning of the applicable words in State Farm's water damage exclusion -- "flood," "waves," "tidal water," and "overflow of a body of water," "all whether driven by wind or not." (Compl., Ex A at 10); *see also* *Wooten ex rel. Wooten v. Miss. Farm Bureau Ins. Co.*, 2005 WL 2787463, at \*3-4 (Miss. Oct. 27, 2005) (words in insurance policy should be given their "ordinary and plain meaning"). Plaintiffs' attempts to create ambiguities with respect to the clear meaning of State Farm's water damage exclusion should be rejected as a matter of law. *See* *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067, 1069 (Miss. Ct. App. 2004) ("[a]mbiguities in insurance contracts are read to favor the insured, but that principle does not permit the creation of ambiguity where there is none").

Plaintiffs disregard the plain, ordinary meaning of the policy terms, invoking instead narrowly interpreted "meteorological principles," "hydrometeorological events," and selectively culled quotations from government websites. (*See, e.g.*, Pl. Mem. at 9-17.) Plaintiffs rely most heavily upon a National Weather Service ("NWS") description of flood and storm surge. According to Plaintiffs, the NWS website shows that the word "flood" encompasses only inland freshwater flooding from inland "watercourses" or "overflow from rivers, streams and drainage

ditches." (*See id.* at 11-12.)<sup>2</sup> The very NWS Glossary upon which Plaintiffs rely, however, shows that flooding includes not only inland fresh water flooding, but "coastal flooding," which the NWS Glossary defines as "[t]he inundation of land areas along the coast caused by sea water above normal tidal actions," and numerous other types of flooding as well. (*See Ex. A hereto.*)<sup>3</sup> Moreover, the National Oceanic and Atmospheric Administration (NWS's parent agency) states that "[s]torm surge causes severe flooding in coastal areas," "storm surge . . . often result[s] in extensive coastal flooding," and "by temporarily raising sea level, storm surge permits 'dangerous and battering waves' and floating debris to access coastal areas and structures never conceived of nor built to withstand the punishing effects of open ocean waves." *See Ex. B hereto.*

Coastal or ocean flooding from storm surge is also encompassed by the ordinary dictionary definition of "flood" -- *i.e.*, "an overflow of a large amount of water over dry land," *Compact Oxford English Dictionary of Current English* (3d ed. 2005), or "a rising and overflowing of a body of water onto normally dry land." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). *See also Am. Heritage Dictionary of the English Language* (4th ed. 2000) ("An overflowing of water onto land that is normally dry"); *Oxford Am. Dictionary of Current English* (1999) ("an overflowing or influx of water beyond its normal confines, esp. over land; an inundation").

The National Flood Insurance Program ("NFIP") adopts a similar definition, *see Exhibit B hereto* ("flood" means a "general and temporary condition of partial or complete inundation of

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<sup>2</sup> The policy term "body of water" cannot be restricted to "watercourses." Its ordinary dictionary meaning clearly includes the Gulf of Mexico. *See* Dictionary.com, <http://dictionary.reference.com/search?q=body%20of%20water> ("body of water" is "the part of the earth's surface covered with water (such as a river or lake or ocean)"). In fact, the U.S. Environmental Protection Agency describes the Gulf of Mexico as "the ninth largest *body of water* in the world." Gulf of Mexico Program, U.S. Env'tl. Protection Agency, *General Facts about the Gulf of Mexico: Location and Size*, <http://www.epa.gov/gmpo/about/facts.html#location> (emphasis added).

<sup>3</sup> Plaintiffs also erroneously rely upon a study of NWS data on damage from "flooding that results from rainfall or snowmelt." (*See Pl. Mem.* at 16.) The study does not suggest that "flood" includes only such floods. Rather, the study acknowledges that there are other types of flood and (in the very passage quoted by Plaintiffs) uses the term "flood" to refer to "ocean floods" caused by storm surge. (*See id.* at 16.)

two or more acres of normally dry land area" from "[o]verflow of inland or tidal waters" or "in plain English, . . . an excess of water (or mud) on land that's normally dry"), as contemplated by the National Flood Insurance Act ("NFIA"). *See* 42 U.S.C. § 4121(a)(1) ("flood" to be defined by FEMA and may include "inundation . . . *from tidal surges, abnormally high tidal water, tidal waves, tsunamis, hurricanes, or other severe storms or deluge*") (emphasis added). Thus, storm surge by definition involves the overflow of water onto dry areas of land -- *i.e.*, "flooding."

Plaintiffs cite the Federal Emergency Management Agency ("FEMA") website for the irrelevant proposition that "storm surge is a direct product of wind." (Pl. Mem. at 12.) Plaintiffs' policy excludes water damage even if the water in question is "driven by wind." (Complt., Ex. A at 10.) Further, the passage Plaintiffs quote from the FEMA website also states (in language Plaintiffs omit) that the water that is pushed to shore in a storm surge, combined with tides, creates a rise in water level that "can cause severe flooding in coastal areas." (Ex. B, Tab 1 to SF Mot.) Finally, in claiming that it is FEMA's "official position" that storm surge is not flood, Plaintiffs improperly rely upon a map, not subject to judicial notice, prepared by a litigation consultant, Crowley Inc. *See* Pl. Mem. Ex. C. FEMA itself states that Hurricane Katrina caused "[c]oastal storm surge flooding of 20 to 30 feet above normal tide levels, along with large and dangerous battering waves" and identifies Jackson County (the location of the Lotts' house) as one of the "most severely impacted by coastal flooding." Ex. C hereto. FEMA "Flood Recovery Maps" show that Pascagoula, where Plaintiffs live, was completely inundated. *See* Ex. D hereto.

Moreover, even assuming *arguendo* that "storm surge" itself is not an excluded event under Plaintiffs' policy (which it plainly is), "flood," "waves," "tidal water," and "overflow from a body of water" are excluded under the policy even if "driven by wind" and "regardless . . . of the cause." (Complt., Ex. A, at 10.) Accordingly, Plaintiffs may not avoid the water damage exclusion by labeling their loss "storm surge" damage rather than damage from flood, waves, tidal wa-

ter or the overflow of a body of water. *Cf. Boteler*, 876 So. 2d at 1068-69 (under State Farm's policy, "the cause of the [excluded event is] irrelevant").

**C. Plaintiffs' Alleged "Reasonable Expectations" Do Not Negate the Clear Terms of Their Policy.**

"Mississippi courts do not apply [the reasonable expectations] doctrine in interpreting unambiguous insurance policies." *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 477 (5th Cir. 1996). Plaintiffs' policy clearly and unambiguously excludes damages from flood, waves, tidal water, and the overflow of a body of water, regardless of other concurrent, antecedent or subsequent causes. (See SF Mem. at Point III.B.1-2,4; see Point I.B, D *infra*.) This clear policy language negates any expectation of coverage for storm surge. Accordingly, Plaintiffs' contention that the doctrine of reasonable expectations overrides the clear language of their policy fails as a matter of law.<sup>4</sup> See *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987) (rejecting claim that insureds' alleged reasonable belief as to coverage overrode the policy's plain language).

Moreover, the doctrine of reasonable expectations requires that the policyholder's expectations be "objectively reasonable." *Brown v. Blue Cross & Blue Shield of Miss., Inc.*, 427 So. 2d 139, 141 n.2 (Miss. 1983) (citation omitted). Plaintiffs here could have no objectively reasonable expectation of coverage for damage that traditionally has been excluded from homeowners policies for decades and for which homeowners have been able, for decades, to obtain cover-

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<sup>4</sup> Plaintiffs rely chiefly on out-of-state cases in support of their reasonable expectations argument. (Pl. Mem. at 18-19.) But courts in jurisdictions that Plaintiffs invoke have also emphatically ruled that the reasonable expectations doctrine cannot be invoked where (as here) the policy at issue is unambiguous. See, e.g., *Am. Family Mut. Ins. Co. v. White*, 65 P.3d 449, 455-56 (Ariz. Ct. App. 2003) (finding "no facts to support a 'reasonable expectations' revision of th[e] insurance policy [where the] policy language [was] clear, unambiguous, and objectively reasonable," after stressing that "the reasonable expectation concept must be limited by something more than the fervent hope usually engendered by loss") (citation omitted); *Harris v. Shelter Mut. Ins. Co.*, 141 S.W.3d 56, 60-61 (Mo. Ct. App. 2004) ("[b]ecause the [insurance] policy is unambiguous, no basis exists for application of the objective reasonable expectation doctrine to the policy"); *Nationwide Mut. Ins. Cos. v. Lagodinski*, 683 N.W.2d 903, 911-12 (N.D. 2004) ("[e]ven if this Court had adopted the doctrine of reasonable expectations, [plaintiff] cannot rely on the doctrine to provide coverage under the terms of the contract because he failed to demonstrate the contract was ambiguous"); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 344-45 (3d Cir. 2005) (Pennsylvania law) (reasonable expectations doctrine could not be invoked where the insurance policy "language was clear and unambiguous").

age through the NFIP. *See Kish v. Ins. Co. of N. Am.*, 883 P.2d 308, 312-13 (Wash. 1994) ("[the insureds] knew that flood would be excluded by any insurance policy they purchased, as exemplified by the existence of the National Flood Insurance Program"); *Boteler*, 876 So. 2d at 1069 (homeowners "policies traditionally exclude certain specific categories of events that lead to damage to property"); *cf. Steadman v. Miss. Farm Bureau Cas. Ins. Co.*, 626 So. 2d 588, 591-92 (Miss. 1993) (no reasonable expectation of coverage under liability insurance for insured's own property because "ordinary" car owner knows that he needs to procure additional type of coverage if he wants to insure his own property).<sup>5</sup> In short, given the unambiguous language of State Farm's water damage exclusion and the objectively unreasonable nature of Plaintiffs' expectations of coverage, Plaintiffs cannot recover under a theory of "reasonable expectations."

**D. State Farm's Anti-Concurrent Cause Policy Language Excludes Water Damage, Regardless of Other Alleged Causes.**

Plaintiffs incorrectly contend that Mississippi adheres to the efficient proximate cause doctrine and that that doctrine mandates coverage of storm surge damage here. The Mississippi cases Plaintiffs rely upon, however, provide no basis for this Court to disavow its twice repeated holding that the efficient proximate cause doctrine is not part of Mississippi law. *See Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp. 2d 907, 912 (S.D. Miss. 1998) ("Since Mississippi courts have not adopted the doctrine of 'efficient proximate cause,' the Court declines to apply the doctrine in this case."), *aff'd*, 200 F.3d 815 (5th Cir. 1999); *accord Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp. 2d 606, 623-24 (S.D. Miss. 2001). (*See also* SF Mem. at 7-8.)

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<sup>5</sup> Plaintiffs also contend that State Farm's website supports their claim of reasonable expectations. (*See* Pl. Mem. at 21-22.) The materials cited by Plaintiffs are general advice on what to do in a hurricane. They do not purport to define "flood" or "storm surge" and do not comment on the coverage offered under homeowners policies. Such materials do not create any objectively reasonable expectation that storm surge damage would not be excluded by State Farm's water damage exclusion. Moreover, Plaintiffs here (who now assert that their house was entirely destroyed by wind before the storm surge flooding occurred (Pl. Mem. at 3)) in fact have an NFIP flood insurance policy and have made a claim under that policy for flood damage from Hurricane Katrina.

*Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), and *Peerless Insurance Co. v. Myers*, 192 So. 2d 437 (Miss. 1966), relied upon by Plaintiffs, do not even mention the "efficient proximate cause doctrine." Both *Peerless* and *Crenshaw* addressed policy language that provided coverage for "loss resulting directly and independently of all other causes from accidental bodily injury." See *Crenshaw*, 483 So. 2d at 270-71; *Peerless*, 192 So. 2d at 438-39. Interpreting this specific policy language, the Mississippi Supreme Court permitted recovery "where the accidental injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease, which in turn contributes to the disability or death for which recovery is sought, and where the accidental injury is a proximate cause of the resulting loss." *Peerless*, 192 So. 2d at 439. The Mississippi Supreme Court's analysis of what constitutes "direct" causation under the policy language at issue in *Peerless* and *Crenshaw* has no bearing on the very different anti-concurrent cause policy language at issue in this case, and nothing in either decision authorizes Mississippi courts to override or invalidate the policy language at issue here. Indeed, in the nearly forty years since the Court decided *Peerless*, it has not extended the *Peerless* and *Crenshaw* analysis to property insurance cases.

Plaintiffs incorrectly attempt to distinguish *Eaker*, *Rhoden*, and *Boteler*, all enforcing State Farm's exclusionary language, as "deal[ing] with exclusions for loss caused by earth movement, not hurricane damage." (Pl. Mem. at 23.) In fact, the *Eaker* decision found that State Farm's water damage exclusion clearly excluded flood damage sustained by the plaintiffs' residence during Hurricane Georges. See *Eaker*, 216 F. Supp. 2d at 621-24. Moreover, both *Rhoden* and *Boteler* address the identical "lead-in" language at issue in this case, which introduces both the earth movement exclusion and the water damage exclusion. These cases both hold that this language unambiguously precludes coverage for loss that would not have occurred in the absence of the excluded peril, regardless of the operation or effect of other causes of the loss. See

*Rhoden*, 32 F. Supp. 2d at 912; *Boteler*, 876 So. 2d at 1068-69.

Contrary to Plaintiffs' contentions (Pl. Mem. at 28), *Rhoden's* holding is not inconsistent with this Court's decision in *O'Malley v. United States Fidelity & Guaranty Co.*, 602 F. Supp. 56 (S.D. Miss. 1985). Plaintiffs incorrectly cite *O'Malley* as holding that "an insured can recover on an insurance policy for damage resulting from concurrent covered and non-covered risks if a covered risk 'was . . . the dominant and efficient cause of the losses incurred.'" (Pl. Mem. at 28 (quoting *O'Malley*, 602 F. Supp. at 59).) In fact, issues of concurrent or combined causes did not arise in *O'Malley*, because the allegedly covered risk in *O'Malley* (windstorm) was found by the Court not to have proximately caused or even proximately contributed to the damage in question. *O'Malley*, 602 F. Supp. at 59. The court's statement in *O'Malley* that "even if it is assumed the wind exerted some causative force . . . (which the Court has found not to be the case) such windstorm was not the dominant and efficient cause of the losses incurred," *id.*, is not an adoption of the efficient proximate cause doctrine and does not support Plaintiffs' contentions.

The other Mississippi state and federal cases cited by Plaintiffs also fail to support Plaintiffs' contention that the efficient proximate cause doctrine negates the exclusionary language in State Farm's policy. *Dixie Pine Products Co. v. Maryland Casualty Co.*, 133 F.2d 583 (5th Cir. 1943), involved a policy that covered damage from accidents but excluded damage from fire and accidents caused by fire. *Id.* at 585. The damage at issue was caused when a gas pipe ruptured, resulting first in an explosion and then in a fire. *Id.* at 584. The Fifth Circuit held that damage from the pipe rupture and the explosion was the result of an accident and therefore covered, in contrast to the ensuing fire damage, which was excluded. The court's separation of damages into those "attributable directly" to a covered event (pipe rupture/explosion) and those caused by an excluded event (fire), *see id.* at 585, is directly contrary to Plaintiffs' contention that the efficient proximate cause doctrine mandates coverage of all damages to their property.

*Grain Dealers Mutual Insurance Co. v. Belk*, 269 So. 2d 637 (Miss. 1972), also cited by Plaintiffs, is also factually and legally irrelevant. In *Grain Dealers*, a tree limb, blown by the winds of Hurricane Camille, punched a hole in the plaintiffs' roof, causing a leak. During an effort to remove the tree and prevent further damage, the tree fell on the house. Based upon the principle, irrelevant here, that the negligence exclusion in a policy "does not apply to [e]fforts to save property," *id.* at 639, the Mississippi Supreme Court upheld the jury's verdict that the proximate cause of the loss was the windstorm. However, the court made clear that its ruling was dependent upon the specific provisions and wording of the policy in question. *Id.* at 640 (if insured peril is the proximate cause of the loss, it need not be the sole cause "unless the contributing cause is expressly excluded by the terms of the policy") (emphasis added); *see also id.* ("Except where the policy stipulates that the company shall not be liable for loss caused by the neglect of insured to use all reasonable means to save and preserve the property[,] . . . mere negligence or carelessness on the part of insured . . . although directly causing or contributing to the loss, usually is one of the risks covered by the insurance.") (citation omitted; emphasis added).

In claiming that Mississippi has "long adhered" to the efficient proximate cause doctrine, Plaintiffs also improperly rely on cases decided under the law of West Virginia and Washington, such as *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1 (W. Va. 1998), and *Safeco Insurance Co. of America v. Hirschmann*, 773 P.2d 413 (Wash. 1989). These cases are directly contrary to Mississippi law as decided in *Boteler*, *Eaker*, and *Rhoden*, as well as to decisions by courts around the country. (See SF Mem. at 8 n.4, Ex. A. to SF Mot.) In any case, subsequent decisions of the Washington Supreme Court, such as *Findlay v. United Pacific Insurance Co.*, 917 P.2d 116 (Wash. 1996), would preclude the coverage Plaintiffs seek in this case under State Farm's "weather conditions" exclusion. In *Findlay*, the Washington Supreme Court upheld a policy provision excluding weather conditions when they combined with earth movement (also

excluded) to cause a loss, rejecting the insured's contention that the exclusion violated the efficient proximate cause doctrine. *Id.* at 121-22. Plaintiffs' policy contains a "weather conditions" exclusion substantially similar to that at issue in *Findlay* which excludes coverage when weather conditions contribute to, precede, or are concurrent with the excluded water perils which damaged Plaintiffs' residence. (Complt., Ex. A at 10-11; *see also* SF Mem. at 8 n.6.)

In short, Plaintiffs' contentions that State Farm's exclusionary language must be construed to incorporate the efficient proximate cause doctrine are erroneous. State Farm's clear and unambiguous exclusionary language, precluding recovery under the policy for water damage, regardless of other causes, concurrent or in any sequence, is valid and enforceable under Mississippi law and precludes coverage for Plaintiffs' loss.

**E. Plaintiffs' Claim that There Is Coverage Because the Loss Would Have Occurred "in the Absence of" the Excluded Water Damage Is Erroneous.**

Plaintiffs also erroneously contend that State Farm's anti-concurrent cause provision does not apply to State Farm's water damage exclusion (which is one of the exclusions enumerated in paragraph 2 of the Losses Not Insured section of the policy) but only to those exclusions enumerated in paragraph 1. In fact, both paragraph 1 and paragraph 2 of State Farm's exclusions are prefaced by lead-in language that defines the scope of the exclusions, and it is the paragraph 2 lead-in language, applicable to State Farm's water damage exclusion, that contains anti-concurrent cause language. Paragraph 2's lead-in language states:

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or wide spread damage, arises from natural or external forces, or occurs as a result of any combination of the [following excluded events]. (Complt., Ex. A at 10.)

Quoting only the first sentence of this lead-in language, "We do not insure under any coverage for **any loss which would not have occurred in the absence of one or more of the**

**following excluded events"** (Pl. Mem. at 27 (Plaintiffs' emphasis)), Plaintiffs argue that they are entitled to coverage because "the covered event here -- the 'windstorm' of Hurricane Katrina -- would have occurred 'in the absence' of the excluded event -- 'water' or 'flood' damage to the Lotts' property." (Pl. Mem. at 27.) Plaintiffs' interpretation of the policy language on which they rely is untenable. Under the policy language, the issue is not, as Plaintiffs claim, whether "the covered event here -- the 'windstorm' of Hurricane Katrina' -- would have occurred 'in the absence' of the excluded event" (Pl. Mem. at 27); rather, it is whether the *actual loss* that Plaintiffs sustained would have occurred in the absence of the excluded event. Under the clear policy language, the theoretical possibility that if there had been no storm surge, wind might have destroyed the Plaintiffs' house is simply irrelevant to the analysis.

Furthermore, Plaintiffs' argument improperly ignores half of the lead-in language, which expressly states that if the excluded event is a "but for" cause of the damage, there is no coverage, regardless of the cause of the excluded event, whether there are other causes of the damage, or in what sequence or combination the other causes occurred. Thus, the lead-in language to the water damage exclusion cannot be construed to allow recovery under the theory that "windstorm" was "the initial proximate cause of the loss," "irrespective of whether the actual damaging agency or an intervening cause (here, 'water' or 'flood') is excluded." (Pl. Mem. at 9.) Plaintiffs' argument is foreclosed by the plain meaning of the lead-in language, which renders the presence of other contributing or concurrent causes irrelevant. *See Boteler*, 876 So. 2d at 1068-69.<sup>6</sup>

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<sup>6</sup> Plaintiffs' also erroneously rely upon *O'Neill v. State Farm Insurance Co.*, No. 94-3428, 1995 WL 214409 (E.D. Pa. Apr. 7, 1995), in which the plaintiffs sought coverage for damage that occurred when snow and ice piled up against a basement window, broke it and entered the basement. *See O'Neill*, 1995 WL 214409, at \*1. Melted water and ice also entered the basement. *Id.* Applying State Farm's water damage exclusion and its lead-in language, the court in *O'Neill* held that only the damage caused by the snow and ice that entered the basement in frozen form was covered, because that damage was not "water damage" and would have occurred even in the absence of water damage. *Id.* at \*3. The court held, however, that the melted ice and snow that entered the basement in liquid form was "surface water" and thus the resulting damage was excluded. *O'Neill* does not hold that because a covered risk (ice and snow) was the initial cause in the chain of events leading to the damage to the insured property, all subsequent (continued...)

## II. Counts Three to Five Fail to State a Claim.

Plaintiffs' arguments regarding alternative pleading and election of remedies (Pl. Mem. at 25-26) are misplaced. Alternative pleading rules do not rescue claims from dismissal where (as here) under the facts as Plaintiffs have pled them, Plaintiffs cannot establish essential elements of their claims, whether legal or equitable. *See Bolen v. Dengel*, 340 F.3d 300, 312 (5th Cir. 2003), *cert. denied*, 541 U.S. 959 (2004). Moreover, contrary to Plaintiffs' assertions, the fact that State Farm contends that Plaintiffs "have no claim on their contract" (Pl. Mem. at 26) does not breathe life into their equitable claims. As shown in Point III.C of State Farm's opening memorandum, regardless of whether or not Plaintiffs can prevail on their contract claims (and they cannot), there is simply no basis under the facts pled by Plaintiffs for equitable claims such as unjust enrichment or constructive trust (Count Five).<sup>7</sup> Furthermore, insofar as Plaintiffs in their Complaint have incorrectly denominated the remedy of specific performance as a cause of action (Count Three), the doctrine of election of remedies cannot save Plaintiffs' claim from dismissal where (i) Plaintiffs have no right to recover under the contract in question and (ii) even if Plaintiffs could establish a breach of contract, specific performance is not available because there is an

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damage was covered. Thus, *O'Neill* contradicts Plaintiffs' contention that because "windstorm" was the "initial proximate cause," the entire loss is covered despite the fact that water was the "actual damaging agency" or "intervening cause." *O'Neill* specifically recognizes the validity and enforceability of anti-concurrent cause provisions such as present in the lead-in language to the water damage exclusion, noting that "[i]n many cases, concurrent cause exclusions work to defeat recovery in a multiple causation situation." *Id.* at \*3.

<sup>7</sup> Plaintiffs' authorities are inapplicable here. *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 216 F. Supp. 2d 251, 261 (S.D.N.Y. 2002), cited by Plaintiffs, refused to dismiss plaintiffs' unjust enrichment claim because, unlike here, it was uncertain that "the contracts at issue, in fact, cover[ed] the *subject matters in controversy*." (emphasis added). *Maalouf v. Salomon Smith Barney, Inc.*, No. 02 Civ. 4770, 2003 WL 1858153 at \*7 (S.D.N.Y. Apr. 10, 2003), also cited by Plaintiffs, denied dismissal of an unjust enrichment claim despite the existence of express contract because the services allegedly rendered plaintiff could be "found to be outside the scope" of the contract. In contrast, where, as here, there is an express contract between the parties that indisputably covers the issue at stake, the doctrine of unjust enrichment/constructive trust is inapplicable as a matter of law. *See* SF Mem. at 18-19; *see also Drs. Bethea, Moustoukas & Weaver LLC v. St. Paul Guardian Ins. Co.*, 376 F.3d 399, 403 (5th Cir. 2004) (upholding dismissal of unjust enrichment claim because valid insurance contract existed between parties); *Shaw v. Hyatt Int'l Corp.*, No. 05 C 5022, 2005 WL 3088438, at \*3 (N.D. Ill. Nov. 15, 2005) ("claim for unjust enrichment must be dismissed as a matter of law" because provisions of complaint which "are fundamental to Plaintiff's claims, point to the inescapable conclusion that the present dispute arises out of an express contract").

adequate remedy at law (*i.e.*, money damages for breach of contract). (SF Mem. at 17.)<sup>8</sup>

### III. Counts Six and Seven, As Well As Plaintiffs' Allegations of Equitable Estoppel, Fail to State a Claim.

Contrary to Plaintiffs' contentions, their claims of fraud (Count Seven) and reformation based on fraud (Count Six), as well as their allegations of equitable estoppel, fail because as a matter of law they cannot establish that they reasonably relied on an alleged assurance by their State Farm agent or on the language of their policy itself as to the purported existence of "full and comprehensive" hurricane coverage, including flood and storm surge. (*See* Compl., ¶¶ 71, 74.) Such alleged misrepresentations as to the policy's coverage would directly conflict with the policy's clear and unambiguous water damage exclusion. Plaintiffs incorrectly assert that "issues of reasonable reliance and estoppel are factual ones." (Pl. Mem. at 28.) On the contrary, courts applying Mississippi law have repeatedly held that where (as here) "the terms of all contracts were made available to Plaintiffs . . . any reliance on alleged misrepresentations of those terms is, *as a matter of law*, unreasonable." *Booker v. Am. Gen. Life & Accident Ins. Co.*, 257 F. Supp. 2d 850, 862 (S.D. Miss. 2003) (emphasis added). (*See also* SF Mem. at 21-23.)<sup>9</sup>

Plaintiffs are also not entitled to equitable estoppel because this remedy is not available to expand the extent of coverage provided by the written terms of an insurance policy. *See Stewart v. Gulf Guar. Life Ins. Co.*, 846 So. 2d 192, 202 (Miss. 2002) ("Mississippi law is clear that the

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<sup>8</sup> Plaintiffs' cited cases are inapplicable. *Landsing Properties v. OKC Apartments, Ltd.*, 496 F. Supp. 5 (W.D. Okla. 1979), deals with a contract for real property, which is clearly a unique item rendering specific performance proper because monetary damages would be insufficient. *See* 25 Richard A. Lord, *Williston on Contracts* § 67.61 (4th ed. 2002). Here, in contrast, Plaintiffs merely seek recovery of monetary damages pursuant to their insurance policy. The other case cited by Plaintiffs, *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713 (S.D. Ind. 1991), deals with claims for damages and rescission and does *not* deal with a claim for specific performance or reformation.

<sup>9</sup> In addition, contrary to Plaintiffs' contentions, their claims of fraud and reformation based upon fraud should be dismissed because they have failed to satisfy the particularity requirements of Rule 9(b). The allegations in Plaintiffs' Complaint regarding the purported misrepresentations include the "who" but do not plead with adequate specificity the "what, when, and where." *See Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177-78 (5th Cir. 1997). For example, the Complaint fails to allege whether the agent's purported misrepresentations were oral or written, what the specific content of those purported misrepresentations was, and when they were allegedly made.

doctrines of waiver and estoppel may not operate to create coverage or expand existing coverage to risks which, by the terms of the policy, are expressly excluded"). Because the policy here expressly excludes Plaintiffs' alleged loss, equitable estoppel is unavailable as a matter of law.

#### **IV. Plaintiffs' Claims Are Precluded by The Filed Rate Doctrine and Separation of Powers Doctrine and Are Preempted and Constitutionally Barred.**

Contrary to Plaintiff's assertions (Pl. Mem. at 29-30), the filed rate doctrine bars any claim that would directly *or indirectly* impact the State Insurance Commissioner's approved rates. (SF Mem. at 26-28.)<sup>10</sup> Plaintiffs do not dispute State Farm's contention that, if the Court were to invalidate the water damage exclusion and require State Farm to provide coverage that was neither contracted for nor contemplated in the approved premium, it would expand the policy's scope and reduce the approved rates.<sup>11</sup> Plaintiffs' lawsuit is precisely what the filed rate doctrine forbids: a collateral attack on a policy and rate approved by the Commissioner.<sup>12</sup>

Plaintiffs' claims also conflict with NFIP objectives such as reducing the federal flood disaster relief burden and thus are preempted. Plaintiffs fail to refute the fact that mandating

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<sup>10</sup> See also *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) ("the filed rate doctrine is not limited to 'rates' *per se*"); *Richardson v. Standard Guar. Ins. Co.*, 853 A.2d 955, 965 (N.J. Super. Ct. App. Div. 2004) (filed rate doctrine barred Consumer Fraud Act claim where relief sought would "collaterally alter the rates contained in the insurer's filings with" the Department of Insurance); *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1428 (S.D. Fla. 1997) (plaintiffs' RESPA claims were barred by the filed rate doctrine even though the court "did not have to devise a reasonable rate to supplant Florida's promulgated rate" because the relief sought would result in discrimination against other purchasers of title insurance in Florida); *DeMizio v. GEICO Gen. Ins. Co.*, No. Civ.A.05-409, 2005 WL 1693938, at \*3 (E.D. Pa. July 19, 2005) (refusing to invalidate exclusion because doing so would require insurance companies to underwrite risks for which they neither contracted nor were paid).

<sup>11</sup> The cases cited by Plaintiffs are either inapposite, see, e.g., *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465 (5th Cir. 1987) (some of plaintiff's state law claims preempted; remaining claims may be preempted based on subsequent discovery and pleading amendments); *Litton Sys., Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983) (filed rate doctrine does not immunize rates that regulatory agency has never approved and ultimately overturns); or are contrary to subsequent decisions of the United States Supreme Court and other courts, e.g., *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214 (1998)). Furthermore, Plaintiffs' reliance on the statutory construction principles discussed in *Seismic Petroleum Services, Inc. v. Ryan*, 450 So. 2d 437 (Miss. 1984), and *Burns v. Allen*, 31 So. 2d 125 (Miss. 1947), is wholly irrelevant because the filed rate doctrine is *not* a statutory enactment displacing the common law.

<sup>12</sup> In addition, contrary to Plaintiffs' contentions, State Farm's separation of powers argument does not rely on the Federal Constitution, but looks to the separation of powers provisions of Sections 1-2 of the 1890 Mississippi Constitution. (SF Mem. 28-29); see also *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1334-37 (Miss. 1983). Thus, Plaintiffs' reliance on cases addressing federal separation of powers and federal judicial review is misplaced.

flood coverage under homeowners policies would eliminate an incentive for communities to reduce flood losses through flood plain management and frustrate NFIP objectives that insurer participation in flood insurance be voluntary and that flood loss burdens be shared equitably among those affected. 42 U.S.C. § 4001(d); *see also* 44 C.F.R. § 62.24 (2005); SF Mem. at 34-35.<sup>13</sup> These and other conflicts with NFIP goals (*see* SF Mem. at 34-35) -- none of which Plaintiffs address -- compel the conclusion that their claims should be dismissed as preempted. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).<sup>14</sup>

### CONCLUSION

For the foregoing reasons, and those stated in State Farm's moving papers, Plaintiffs' Complaint should be dismissed with prejudice.

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<sup>13</sup> Although Plaintiffs argue (Pl. Mem. at 31) that the express preemption provision in the SFIP (44 C.F.R. Pt. 61, App. A(1)) only applies to certain claims, claims not subject to express preemption may still be subject to conflict preemption or field preemption. *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 389 (5th Cir. 2005). Plaintiffs misstate the law in asserting (Pl. Mem. at 32) that this Circuit has a narrow view of NFIP preemption. They cite *Spence v. Omaha Indemnity Insurance Co.*, 996 F.2d 793 (5th Cir. 1993), and cases that mistakenly rely on *Spence*, even though the Fifth Circuit has made clear that *Spence* did not decide any preemption issues. *Wright*, 415 F.3d at 389-90; *Gallup v. Omaha Prop. & Cas. Ins. Co.*, No. 04-31213, 2005 WL 3485890, \*3 (5th Cir. Dec. 21, 2005). They also cite the decision *Gallup* reversed and the unpublished decision in *Richmond Printing LLC v. Director, Federal Emergency Management Agency*, 72 Fed. Appx. 92 (5th Cir. 2003), even though *Wright*, 415 F.3d at 389-90 & n.3, and *Gallup*, 2005 WL 3485890 at \*3, make clear that *Richmond Printing's* preemption holding is not good law. The terms of the NFIA also refute the suggestion by Plaintiffs that the statute somehow does not address the business of insurance. (*See* Pl. Mem. at 35.) "Without doubt the NFIA is congressionally-enacted legislation relating to the business of insurance." *C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 267 n.3 (3d Cir. 2004).

<sup>14</sup> In addition, Plaintiffs incorrectly attribute to State Farm the claim that "it has a constitutionally-protected interest in the Insurance Commissioner's approval of State Farm's standard homeowners' policy." (Pl. Mem. at 34.) In fact, the protected interests involved are State Farm's contract rights and its interest in the funds that Plaintiffs claim State Farm should be compelled to pay for uninsured flood damages caused by Hurricane Katrina. *Cf. Stidham v. Texas Comm'n on Private Sec.*, 418 F.3d 486, 492 n.9 (5th Cir. 2005). Retroactive imposition of liability for such uninsured damages, as sought by Plaintiffs, would constitute arbitrary interference with those property interests in violation of due process and the Takings Clause. (SF Mem at 29-32.) Furthermore, Plaintiffs' contention that the Contract Clause is not implicated here ignores the fundamentally legislative nature of the action Plaintiffs seek to have this Court take. (*See id.* at 31 n.19.) In addition, contrary to Plaintiffs' contentions, lawsuits such as Plaintiffs', if successful, would significantly impair the national insurance industry and the national system of flood insurance and would thus impose an undue burden on interstate commerce in violation of the United States Constitution. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1986).

This the 6th day of February, 2006.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, ROBERT C. GALLOWAY, one of the attorneys for STATE FARM FIRE AND CASUALTY COMPANY, hereby certify that I have this day filed the above and foregoing Reply Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

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SO CERTIFIED, this the 6th day of February, 2006.

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