

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LAWRENCE TROY TOMLINSON and *
ELIZABETH BOWMAN TOMLINSON * CIVIL ACTION NO.: 06-00617
INDIVIDUALLY AND AS PARENTS *
AND NATURAL TUTORS OF *
KATHLEEN K. TOMLINSON AND * JUDGE FELDMAN
SEAN V. TOMLINSON *
VERSUS * MAGISTRATE ROBY
ALLSTATE INDEMNITY COMPANY *

**ALLSTATE INDEMNITY COMPANY'S MEMORANDUM OF LAW
ON EFFECT OF MATERIAL MISREPRESENTATIONS**

Allstate Indemnity Company ("Allstate") submits this memorandum discussing the issue of whether plaintiffs' material misrepresentations made in connection with their request for Additional Living Expenses bars coverage on all of plaintiffs' requests for payment. As shown below, pursuant to the express policy language, a misrepresentation of any material fact or circumstance bars coverage for "any loss or occurrence", which includes all of plaintiffs' requests for payment arising from the occurrence, Hurricane Katrina. Accordingly, plaintiffs' misrepresentations to Allstate that they executed a lease for rental property in Gretna, which are patently false, bar coverage on all of plaintiffs' claims arising out of Hurricane Katrina.

1. Plaintiffs' Material Misrepresentations Regarding Additional Living Expenses Bar Coverage For Their Claim

Plaintiffs' Allstate Homeowner Policy expressly bars coverage for all claims arising out of an "occurrence" where a material misrepresentation is made. The Policy provides:

We do not cover any loss or occurrence in which the insured person has concealed or misrepresented any material fact or circumstance.

(Emphasis supplied).

The Policy defines "occurrence" as "an accident, . . . resulting in bodily injury or property damage". That is, "occurrence" is the event causing the property damage from which plaintiffs' claims under the Policy arise. Court after court interpreting less expansive insurance provisions has held that deliberate and material misrepresentations by an insured concerning his loss, if made with the intent to deceive the insurer, will preclude recovery by the insured. *Mamco, Inc. v. American Employers Ins. Co.*, 736 F.2d 187, 190 (5th Cir. 1984) ("It is well established... that deliberate and material misrepresentations by a claimant concerning the value of his loss, if made with the intent to deceive the insurer, will void the insurance contract and preclude the claimant from receiving any recovery"); *Southern Hotels Ltd. Partnership d/b/a New Orleans Travelodge West v. Llyod's Underwriters at London Companies*, No. 95-2739, 1997 WL 83191 (E.D. La. Feb. 24, 1997) (explaining that "misrepresentations in a proof of loss given to an insurer will void coverage under the policy only if the insured knowingly and intentionally makes such misrepresentations with the intent to deceive and defraud the insurer"); *L.D. Williams v. United Fire & Cas. Co.*, 594 So. 2d 455 (La. App. 1st Cir. 1991) (same).

The case of *Schneer v. Allstate Indem. Co.*, illustrates application of these principles. There, the court held that an insurance contract containing similar language voiding the policy if the insured willfully concealed or misrepresented any material fact would, indeed,

be voided upon finding such a misrepresentation. 767 So. 2d 485 (Fla. App. 3d Dist. 2000).¹ In *Schneer*, plaintiffs obtained a homeowners policy containing both dwelling and contents coverage. As a result of Hurricane Andrew, plaintiffs claimed both dwelling and personal property damages. *Id.* at 489. At trial, the jury found that the plaintiffs had intentionally misrepresented a material fact or circumstance in submitting their contents claim. *Id.* at 487. Although the misrepresentation only was made in connection with the contents' claim, the court held that the plaintiffs' misrepresentation of the contents claim rendered their homeowners policy entirely void. *Id.* at 490. *See also, Wong Ken v. State Farm Fire & Cas. Co.*, 658 So. 2d 1002 (Fla. App. 3d Dist. 1997) (policy void when, after Hurricane Andrew, insured fraudulently submitted claim for additional living expenses by submitting "leases" and a check purporting to represent rent payments for alternative housing when, in fact, he did not incur such expenses); *Taylor v. State Farm Ins. Co.*, No. 01-5248, 2002 WL 373762 (6th Cir. March 7, 2002) ("a material misrepresentation as to any portion of a claim precludes all recovery under the policy. Thus, [the insurer] was excused not only from paying the portion of the loss which had been misrepresented, but also from paying any portion of the claim which was not fraudulent") (citations omitted).

In like manner, plaintiffs' material misrepresentations here concerning their Additional Living Expenses, bars coverage on all of their claims arising out of the "occurrence", Hurricane Katrina. The evidence shows beyond any doubt that plaintiffs intentionally misrepresented material facts regarding their claim for additional living expenses, resulting in a

1 The policy provision read: "This policy is void if it was obtained by misrepresentation, fraud or concealment of material facts or if **you** intentionally conceal or misrepresent any material fact or circumstance, before or after loss. **We** do not cover any other **insured person** who has concealed or misrepresented any material fact or circumstance, before or after a loss. If it is determined that this policy is void, all premiums paid will be returned to you since there has been no coverage under this policy." (Emphasis in the original).

payment of over \$30,000 under their Policy. The circumstances surrounding the misrepresentation create a reasonable assumption that plaintiffs were aware of the false nature of their representations. In particular, Mrs. Tomlinson, herself an attorney, wrote a letter to Allstate's adjuster Robbie Furlow on December 9, 2005, expressly representing that the Tomlinsons had "executed a lease" for six months for a home to live in while they repaired their damaged home. Mrs. Tomlinson stated "We have also executed a lease on a three bedroom house in Gretna for \$2,500.00 per month for 6 months, from September 29, 2005 to present (2 ½ months into the lease). This lease amount includes all utilities in the home." She further represented that "we also had to purchase a refrigerator for the leased property since ours was ruined. . . ." Subsequently, on April 24, 2006, plaintiffs' attorney submitted a letter with a copy of Mr. Tomlinson's check "written in full for \$20,000 to Real Estate Network for the Tomlinsons' rental home here in Gretna for ten months at \$2,000 per month." Based upon these representations by the insureds and the check submitted as proof of their purported rental payments, Allstate paid plaintiffs \$28,300.03 for additional living expenses in May of 2006. After plaintiffs' depositions in December of 2006, Allstate learned that Troy Tomlinson personally owns the house where they are living; the house is their former residence; no six month lease was executed; Real Estate Network is a trade name used by Troy Tomlinson's solely owned corporation, Troy Tomlinson, Inc.; and no rent ever was paid to anyone than Mr. Tomlinson himself. The misrepresentations obviously were made with intent to deceive. Troy Tomlinson admitted that he never told an Allstate adjuster that they were living in their own house. Clearly, this is a material misrepresentation made with intent to deceive, entitling Allstate to deny coverage for their loss.

Plaintiffs do not dispute that a material misrepresentation may bar coverage. They argue that coverage only is barred as to the particular policy provision under which the misrepresentation is made. Plaintiffs' argument is not supported by the weight of authority or the express policy language. The weight of authority forbids recovery under an insurance policy upon a finding of misrepresentation. *See, e.g. Taylor v. State Farm Ins. Co.*, No. 01-5248, 2002 WL 373762, *1 (6th Cir. March 7, 2002) ("a material misrepresentation as to any portion of a claim precludes all recovery under the policy. Thus, [the insurer] was excused not only from paying the portion of the loss which had been misrepresented, but also from paying any portion of the claim which was not fraudulent") (citations omitted); *Johnson v. Allstate Ins. Co.*, 108 P.3d 1273, 1277 (Wash App. 2d Div. 2005) (material misrepresentation voids an entire policy when the policy cannot be severed by its plain language); *Schneer v. Allstate Indem. Co.*, 767 So. 2d 485 (Fla. App. 3d Dist. 2000) (fraud in proof of loss on contents coverage voided entire homeowners policy); *Collins v. USAA Prop. and Cas. Ins. Co.*, 580 N.W.2d 55 (Ct. App. Mn. 1998) (coverage for loss of building due to fire voided when insureds misrepresented personal property losses covered under same insurance policy); *Mutual of Enumclaw Ins. Co. v. Cox*, 757 P.2d 499, 502 (Wash. 1988) (clear language of policy provided that policy was not severable, and, therefore insured's dishonesty voided entire policy. "Insurance companies rely on insureds honestly filling out inventory lists of destroyed property. Dishonesty by insureds cannot be ignored") (citations omitted); *see also G&M Auto Supply, Inc. v. American Fidelity Ins. Co.*, No. B-82-217, 1990 WL 483668, *2 (D.Conn. Oct. 11, 1990) (material misrepresentation voided policy); *Dale v. Iowa Mutual Ins. Co.*, 254 S.E.2d 41 (N.C. App. 1979); *Webb v. American Family Mut. Ins. Co.*, 493 N.W. 2d 808 (Iowa 1992) (upon misrepresentation by one insured entire policy was voided as to even innocent coinsureds); *Sales v. State Farm Fire & Cas. Co.*,

849 F.2d 1383, 1385 (11th Cir. 1988) (same); *Short v. Oklahoma Farmers' Union Ins. Co.*, 619 P.2d 588, 589 (Okla. 1980) (same). Following the weight of authority, the Court should find that the plaintiffs' material misrepresentation as to their alleged additional living expenses which netted them over \$30,000 bars all of their claims arising from the occurrence, Hurricane Katrina. Allstate's policy language compels that conclusion here. The Policy expressly provides that:

We do not cover any loss or occurrence in which the insured person has concealed or misrepresented any material fact or circumstance.

Policy, p. 5.

The Policy defines "occurrence" as "an accident . . . resulting in bodily injury or property damage". Policy, p. 3. Thus, the Policy bars coverage to an insured for the "occurrence" which here is Hurricane Katrina's winds.² All requests for coverage as a result of the "occurrence" are no longer covered.

Plaintiffs' cases do not require a contrary conclusion. They rely heavily on *Kerr* 731 F.2d 227, 229 (4th Cir. 1984) as support for their contention that fraud should only be attributed to the policy provision upon which plaintiff has committed fraud. But there the Fourth Circuit acknowledged that most jurisdictions follow the trend supporting Allstate's contention, and that South Carolina law applicable in the *Kerr* case was a deviation from other jurisdictions.

The court explained:

The law in the majority of jurisdictions in this country forbids recovery under an insurance policy upon a finding of misrepresentation, fraud or false swearing as to any portion of the covered property. The Supreme Court of South Carolina,

² Consistent with that framework, Allstate treats all requests for payment under a policy resulting from an "occurrence" as one claim. For example, here, the Tomlinsons' requests for payment for damage to their dwelling, contents and garage, as well as additional living expenses, all are handled as one claim under Claim No. 910976873. The Claim Summary includes payment for all the items in one summary. Exh. "A".

however, has defied this trend by maintaining that the provisions of an insurance policy are severable...

Id.

Kerr according to the Fourth Circuit is an aberration. Moreover, *Kerr* is inapplicable here where the Policy itself provides that it does not cover "any loss or occurrence" in which the insured person has concealed or misrepresented any material fact or circumstance".

Plaintiffs' attempt to knock down *Wong Ken* does not hold water. Plaintiffs argue that the Florida Supreme Court "essentially overruled" *Wong Ken* (discussed above) in *Flores v. Allstate*, 819 So. 2d 740 (Fla. 2002). But the Florida Supreme Court in that decision was evaluating statutorily required automobile insurance provisions and, more importantly, specifically noted that both *Wong Ken* and *Schneer* (discussed above) were inapplicable. *Id.* at 747. The court stated that those cases did not "address the issue presented in this case because the policies in both of these cases were homeowners' policies containing clear language that the policy would be 'void' for fraud or misrepresentation whether the fraud occurred 'before or after the loss.'" *Id.* Therefore, the issue in the *Flores* case was different than that in *Wong Ken* and *Schneer* and was "one of first impression" in Florida. *Id.*

In short, in light of the law in "the majority of jurisdictions in this country," and Allstate's specific policy language, plaintiffs' intentional material misrepresentations bar coverage under the policy for any additional money. Sound policy reasons compel this conclusion. If otherwise, insureds would be encouraged to misrepresent or conceal material facts, armed with protection against total loss of coverage, an untenable result. Allstate urges

this Court to preclude plaintiffs from recovering damages under their homeowners policy due to their material misrepresentations.

Respectfully submitted,



Judy Y. Barrasso, 2814
Richard E. Sarver, 23558
Susan M. Rogge, 28203
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 1800
New Orleans, Louisiana 70112
Telephone: 504/589-9700

Attorneys for Allstate Indemnity
Company

CERTIFICATE

I hereby certify that on February 8, 2007, I electronically filed the foregoing Memorandum of Law on Effect of Material Misrepresentations with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

M. Elizabeth Bowman
bethbowman@bowmanandhowley.com

Christy M. Howley
christyhowley@bowmanandhowley.com

There are no manual recipients listed on the Court's Electronic Mail Notice List.


