



interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.” *Mamco* was a case where the insured markedly inflated his contents loss, in an attempt to defraud the insurer.

And of course, Allstate’s policy does not specifically state as the policy did in *Mamco* that the entire policy is void if there is a material misrepresentation.

The Fifth Circuit in *Bennett v. Allstate*, 950 F.2d 1102 (5<sup>th</sup> Cir. 1992), in a case plaintiffs’ counsel assisted in during law school, specifically held in an arson case that voiding the policy was not plain error, “...given the overwhelming incriminating evidence of intent to defraud.”

The insurer bears the burden of proving the defense of intentional material misrepresentation in order to avoid coverage; *Darby v. Safeco Ins. Co.*, 545 So.2d 1022 (La. 1989). Fraud will never be presumed from acts which may be accounted for on the basis of honesty and good faith; *Clifton v. Louisiana Farm Bureau Casualty Insurance Company*, 510 So. 2d 759, 762 (La. App. 1st Cir. 1987).

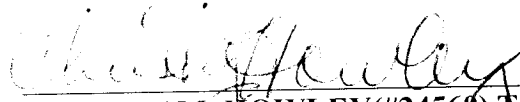
Allstate also cites to *L.D. Williams v. United Fire and Casualty Co.*, 90-2129 (La. App. 1 Cir. 1991), 594 So.2d 455, which is also terribly misplaced. The Court in that case held that essentially the plaintiff had faked his burglary claim. The Court stated, “Insurance company representatives later discovered that the police officer initially investigating the burglary found a scene quite different from the one photographed by the insurance company employees. The police officer found no empty rooms nor any obvious indication that the home had been “ransacked.” The insurance company representatives concluded that the plaintiff had intentionally claimed compensation for some items which were removed from the home by plaintiff after the burglary.”

Further, the Florida Supreme Court has essentially overruled the *Wong Ken* appellate decision cited by Allstate, in *Flores v. Allstate Ins. Co.*, 819 So.2d 740 (Fl. S.Ct. 5/13/02). The Court in *Flores* discussed material misrepresentations, and declined to apply the harsh rule Allstate asked for, which was a voiding of the entire insurance claim. The Court held that it is possible as a matter of policy interpretation to sever the structure and contents coverages from the other allegedly fraudulent claims, so that the fraud may be attributed only to the latter; see *Kerr v. State Farm Fire & Casualty Co.*, 731 F.2d 227 (4<sup>th</sup> Cir. 1984). The Court in *Flores* went on to state in dicta that it is understandable why other courts have simply refused to allow a material misrepresentation that relates to one element of a claim, e.g., additional living expenses, to void coverage of the entire claim and stated that such an interpretation of an insurance contract could produce extremely harsh results. This is of course what Allstate is asking for in this case, to deny the Tomlinsons' claim in its entirety based on fraud or intentional acts Allstate has never pled before the Pre-Trial Order.

The Tomlinsons have never committed a criminal act, never falsified a document, nor testified or represented that they were living anywhere but exactly where they are living. There was no intent to deceive, and in fact, Mr. Tomlinson testified he believed his agent knew where he was living and it was never a secret. To void the entire policy for what is essentially Allstate claiming a coverage defense at the 11<sup>th</sup> hour would produce an unbelievably harsh result, and subject the Tomlinson family to extreme financial hardship. The jury has heard all of this testimony. It should now be left to them to decide, as the Court has in its Jury Verdict Form, if this alleged misrepresentation voids the Additional Living Expense portion of their claim and not the entire claim.

Therefore, plaintiffs respectfully submit this Memorandum and request the Court find in their favor on this issue.

Respectfully submitted:

  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the above and foregoing has been served upon all known counsel of record by use of the CM/ECF system for the United States District Court for the Eastern District of Louisiana, this 3<sup>rd</sup> day of September, 2007.

  
CHRISTY M. HOWLEY