

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

MERRYL D. WEISS, wife of/and \* CIVIL ACTION NO.: 06-cv-3774  
ROBERT U. WEISS, JR., M.D. \*  
VERSUS \* JUDGE: VANCE (R)  
ALLSTATE INSURANCE COMPANY \* MAGISTRATE: CHASEZ (5)  
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**ALLSTATE INSURANCE COMPANY’S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

After their home was destroyed by Hurricane Katrina, Plaintiffs filed a claim under their federal flood insurance policy, asserting that their entire home and contents were destroyed by flood. Having been paid \$350,000 under their federal flood policy, Plaintiffs now flip-flop and contend in this suit under their homeowner policy that wind destroyed their house and contents. Plaintiffs are not entitled to double dip. As shown below, Allstate Insurance Company ("Allstate") is entitled to full summary judgment, or, alternatively, partial summary judgment declaring that Plaintiffs' recovery, if any, under their homeowner policy, should be limited to the difference between the total amount recovered under their federal flood policy and the home's and content's actual cash value<sup>1</sup> because 1) Plaintiffs are estopped from asserting that wind caused their losses

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<sup>1</sup> Under the homeowner policy, Allstate is obligated to pay the actual cash value of property and contents until the property actually is replaced. According to plaintiffs' flood claim, the actual cash value of the home and contents is \$299,148 and \$101,342.50 respectively. The actual cash value need not be resolved on this Motion.

after having made a claim under their federal flood policy and submitted a sworn proof of loss indicating that their home and contents were damaged by flood waters, an excluded cause of loss under Plaintiffs' homeowner policy, and having accepted payment of federal flood policy limits in the total amount; and 2) in any event, Plaintiffs are entitled to recover only the actual cash value of their loss, and therefore any recovery under their homeowner policy must be offset by what they have already been paid under their federal flood policy.

### **BACKGROUND**

This action arises out of the destruction of Plaintiffs' property at 13 Treasure Isle, Slidell, Louisiana during, and/or in the aftermath of, Hurricane Katrina. After their home was destroyed, Plaintiffs filed a claim under their federal flood policy, policy number 080523923 and ultimately recovered the full policy limits. To be exact, on February 22, 2006, the Weisses were paid \$250,000 for their dwelling and \$100,000 for their damaged contents under their flood policy. In determining the amount due, the flood adjuster considered the entire home and contents in every room to have been damaged by flood. Exh. A, Flood Adjuster Estimate.

Plaintiffs also instituted a claim under their Allstate homeowner policy, policy number 021969551, contending that wind damaged their home and contents. To date, Plaintiffs have been paid a total of \$42,128.18 for their dwelling and \$14,787.81 for additional living expenses under their homeowner policy. In total, Plaintiffs have been paid \$292,128.18, \$100,000 and \$14,787.81 for their dwelling, contents and ALE, respectively.

Plaintiffs nevertheless filed this suit on July 17, 2006. Flip-flopping, Plaintiffs now say that wind caused their home to be a total loss, and therefore, they are entitled to recover

their policy limits under their homeowner policy, which, at the time Hurricane Katrina hit, provided coverage of \$343,000 for the dwelling, \$34,300 for other structures, and \$240,100 in contents. They also seek damages for loss of investment funds and mental anguish, additional living expenses, and statutory penalties.

Plaintiffs are not entitled to double dip and recover more than the actual cash value of their home and contents. Instead, the Court should hold that Plaintiffs are estopped from claiming that their damages were caused by wind, or, alternatively, that Plaintiffs are not entitled to recover their full policy limits and that any recovery by Plaintiffs under their homeowner policy must be offset by amounts paid to Plaintiffs under their flood insurance policy.

## **LAW AND ARGUMENT**

### **A. Standard for Motion for Summary Judgment.**

Summary judgment should be granted where "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 Ins. 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(c) requires the nonmovant to go beyond the pleadings and show 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, metaphysical doubt as to the facts, or a scintilla of evidence. *Little*, 37 F.3d at 1075; *Wallace*, 80 F.3d at 1047. The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995).

**B. Argument and Authorities.**

**1. Interpretation of Insurance Contracts.**

As the Louisiana Supreme Court recently stated, "An insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Civil Code'." *Samuels v. State Farm Mut. Auto. Ins. Co.*, 939 So. 2d 1235, 1240 (La. 2006) (quoting *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 763 (La. 1994)). In interpreting an insurance contract, a Court must attempt to determine the parties' common intent. *Id.* The parties' intent, as reflected by the language in the policy, determines the extent of coverage. *Id.* An insurance contract must be construed as a whole, and each provision in the policy is to be interpreted in light of the other provisions, so that each provision is given meaning. *Rolston v. United Services Auto. Ass'n*, No. 2006CA0978, 2006 WL 3849949, at \*3 (La. App. 4 Cir. 2006). Further, words and phrases in insurance policies must be construed in accordance with their plain, ordinary and generally prevailing meaning. *Menendez v. O'Niell*, No. 2006CA0451, 2006 WL 3804626, at \*3 (La. App. 1 Cir. 2006).

**2. Plaintiffs Are Estopped From Claiming That Their Damage Was Caused By Wind.**

Like all homeowner insurance policies, Plaintiffs' Allstate homeowner policy excludes coverage for damage caused by flood waters. In pertinent part, the Weisses' policy provides as follows: "We do not cover loss to the property ... consisting of or caused by ... [f]lood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind." This language is clear and unambiguous and unarguably encompasses damages caused by a tidal surge, such as the one that passed over Plaintiffs' property in connection with Hurricane Katrina. *See Buente v. Allstate Ins. Co.*, No. 05CV712, 2006 WL 980784, \* 2 (finding the flood exclusion language in the plaintiffs' homeowner policy clear and enforceable); *Leonard v. Nationwide*, 438 F. Supp. 2d 684, 693 (S.D. Miss. 2006) (holding that the provisions of the plaintiffs' homeowner policy that exclude coverage for damages caused by water "are valid and enforceable terms of the insurance contract").

Plaintiffs' claim under their federal flood insurance policy included a sworn "Proof of Loss" submitted to the Federal Emergency Management Agency on behalf of Plaintiffs. *See* Exh. B. The "Proof of Loss" states that "A FLOOD loss occurred ... on the 29<sup>th</sup> day of August 2005, the cause of the said loss was: Hurricane Katrina created tidal surge causing general condition of flooding."<sup>2</sup> Plaintiffs' flood claim proceeded to be adjusted on the

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<sup>2</sup> Said statement constitutes an admission by Plaintiffs that their damages were substantially caused by flooding. *See Mayton v. Auto-Owners Ins. Co.*, No. 05-667, 2006

basis that Plaintiffs' total loss, i.e. all of the damage to their structure and contents, was caused by flood waters. Specifically, to determine the appropriate payment owed under Plaintiffs' flood policy, the flood adjuster used an independently drafted estimation of the cost to replace the *entire* structure and *all* of Plaintiffs' contents and then subtracted depreciation and applicable deductibles, which resulted in a payment to Plaintiffs of their flood policy limits of \$250,000 and \$100,000. *See* Exh. A, Flood Adjuster Estimate. Plaintiffs accepted these payments and either cashed the checks or deposited them in a personal account(s). These facts are undisputed.

Despite having been paid \$350,000 under their federal flood policy based on their own sworn proof of loss that claimed the source of the damage as "Flood", Plaintiffs now say it was wind that caused their property to be a total loss. They seek the homeowner policy limits of \$343,000 for the dwelling, \$34,300 for other structures, and \$240,100 for contents. In other words, plaintiffs seek a windfall total recovery far in excess of their actual damage.

Plaintiffs are estopped from doing so. Given their admission that their total losses were caused by flood waters and their acceptance of payments of their full flood policy limits, which payments were based on the premise that the total loss to Plaintiffs' property was caused by flooding, Plaintiffs cannot now disavow their prior sworn statements to the federal government and claim that their damage was really wind, after all. *See Glover v. Nationwide Mut. Fire. Ins. Co.*, No. 06cv85, 2006 WL 3780858, at \* 1 (S.D. Miss. Dec. 21, 2006) (recognizing that "[w]here one insurer, in this instance the flood insurer, has settled an insured's claims by paying policy limits, the insured may be estopped from recharacterizing, as wind

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WL 1214831 (E.D. Va. 5/2/2006) (holding that evidence of the flood insurance claim made by plaintiffs was an admission against interest by the plaintiffs).

damage, losses for which he has accepted flood insurance compensation"). Accordingly, Allstate requests that this Court enter summary judgment holding that Plaintiffs are estopped from claiming that their damage was caused by wind and, therefore, the total loss to the Weisses' property was caused by flooding, an excluded cause of loss under Plaintiffs' homeowner policy.

**3. Plaintiffs' Recovery Under Their Homeowner Policy, If Any, Should Be Limited To The Difference Between The Flood Payments And The Actual Cash Value Of The Home And Contents.**

At a minimum, and alternatively, Allstate requests that this Court order that Allstate's obligations under the Weisses' homeowner policy, if any, be offset by all payments made to the Weisses under their federal flood policy and limited to the difference between the total amount of flood payments and the actual cash value of the home and contents.

In interpreting insurance contracts, a fundamental principal must be considered -- "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 [loss] had occurred." *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967). *See also, Wright v. Assurance Co. of America*, 728 So. 2d 974, 975 (La. App. 2d Cir. 1999) (acknowledging "the universally recognized rule to the effect a policy of insurance on property is predominately a contract of indemnity"). Because insurance law is based on principles of indemnification and reimbursement, "the benefit derived from insurance should be no greater in value than the loss." *Tejedor v. State Farm Fire and Cas. Co.*, No. 05CV679, 2006 WL 3257526, at \* 2 (S.D. Miss. Nov. 6, 2006). *See also, State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 156 (Tex. 1st Dist. Ct. App. 1994) (stating that "[a]n insurance contract is by definition a contract of

indemnity, under which an insurer cannot be required to pay its insured more than the amount of his actual loss"); 15 La. Civ. L. Treatise § 312 (3d ed.) (stating that "insurance 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"). Consequently, the maximum recovery that a plaintiff may receive from all applicable insurance policies for a loss to both his dwelling and personal property is the value of the plaintiff's actual loss. *Id.* Where a plaintiff has collected proceeds under his flood insurance policy, his maximum loss, therefore, is measured by "the difference between the pre-storm value [of his damaged property] and the insurance benefits he has collected to compensate him for [the damaged property]." *Id.* See also, *Madere v. State Farm Prop. & Cas. Co.*, No. 06CV2889, 2006 WL 2644961, at \* 2 (E.D. La. Sept. 13, 2006) (contemplating deducting the amount paid to the plaintiffs under their flood policy from the total amount of coverage under their homeowner policy to determine the potential amount owed under the homeowner policy).

To allow greater recovery would provide plaintiffs who have flood insurance and homeowner insurance the ability to collect windfalls and double recoveries for what is a single loss to their home and contents. It further would allow plaintiffs to collect payments from one policy for damages that were not covered by that policy and for which plaintiffs did not pay premiums. See *Griffin*, 888 S.W. 2d at 157; *Chauvin v. State Farm Fire and Cas. Co.*, 450 F. Supp. 2d 660, 666 (E.D. La. 2006) (recognizing that a homeowner is not entitled to policy limits on one policy where the majority of the damage was caused by an excluded peril, which is covered by another policy). Such a result would violate clear, well-settled Louisiana Supreme Court precedent, which provides that "Louisiana law does not allow for double recovery of the same element of damages." See e.g., *Albert v. Farm Bureau Ins. Co.*, 940 So. 2d 620, 623 (La.

2006) (citing *Gagnard v. Baldrige*, 612 So. 2d 732, 736 (La. 1993)).

The analogous case of *State Farm Fire & Cas. Co. v. Griffin* is both instructive and persuasive here.<sup>3</sup> In *Griffin*, the plaintiffs' property was first damaged by flooding and then damaged by a fire several months later. *Griffin*, 888 S.W. 2d at 152. As a result of the flood damage, the plaintiffs recouped a payment under their flood policy. *Id.* Most of that money was not used to make repairs, however. *Id.* As a result of the fire damage that the plaintiffs' house later sustained, the plaintiffs' homeowner insurer tendered a check to the plaintiffs for the amount necessary to repair all damage, less the actual cash value of the unrepaired items paid for

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<sup>3</sup> The cases of *Morris v. East Baton Rouge Parish School Board*, 826 So. 2d 46 (La. App. 1 Cir. 2002) and *J.Ray McDermott Engineering, L.L.C. v. Fugro-McClelland Marine Geosciences, Inc.*, No. 04CV1335, 2006 WL 3827530 (E.D. La. Dec. 27, 2006) also are instructive here.

In *Morris*, a special education student was injured while participating in a field trip practice skating event for the Louisiana Special Olympics. *Morris*, 826 So. 2d at 46. His mother sued the chaperone, school board, school board's liability insurer, and event sponsor. *Id.* The plaintiffs settled with the Special Olympics and their insurer. *Id.* The Louisiana Insurance Guaranty Association ("LIGA") was substituted in the place of the liability insurer. *Id.* LIGA filed a motion for summary judgment, asserting that it was entitled to credit and set-off to prevent duplication of recovery. *Id.* The Court of Appeal held that LIGA was entitled to credit for the amount of settlement actually paid to plaintiffs and that a subsequent determination of the sponsor's fault might entitle LIGA to a credit greater than the actual proceeds paid in the settlement. *Id.*

In *J.Ray McDermott*, the defendant was hired to perform an engineering and foundation analysis for the construction of an offshore platform. *J.Ray McDermott Engineering, L.L.C.*, 2006 WL 3827530 at \*1. The plaintiff filed suit against the defendant in tort and contract, alleging that the defendant made erroneous calculations in its engineering report. *Id.* The insurer for the contractor on the project ("the insurer") paid the plaintiffs a substantial amount for their losses caused by the poor engineering report. *Id.* at \*2. The defendant later filed a motion to dismiss the plaintiffs' claims that had already been paid by the insurer on the theory that the insurer was subrogated to the plaintiffs' claims. *Id.* This Court ruled in favor of the defendant, finding that the plaintiff was not entitled to a double recovery. *Id.*

The facts in *Morris* and *J. Ray McDermott* are comparable to the ones in this case. Both stand for the proposition that a plaintiff may only recover once for one loss. This principle is equally applicable here.

under the flood policy. *Id.* The plaintiffs rejected that tender and filed suit, asserting that flood insurance and homeowners' insurance policies cover different risks and that the amount that they were paid under their flood policy could not be used to offset their recovery under their homeowner policy. *Id.* The appellate court disagreed, finding that the contractual measure of damages with respect to each policy was actual cash value of the loss and that the plaintiffs could have been indemnified for the portion of the home that had been damaged by flood under their homeowner policy only "if they had lost that amount a second time," which they did not. *Id.* at 157. The court, therefore, ratified the homeowner insurer's decision to offset its payment to the plaintiffs by amounts paid to them under their flood policy. *Id.*

Here, Plaintiffs were paid \$250,000 under their federal flood policy for the damage to their home and an additional \$100,000 for damage to contents for claimed flood damage.<sup>4</sup> As in *Griffin*, Plaintiffs cannot now recover under their homeowner policy payment for the same damages for which they recovered under their flood policy. Plaintiffs suffered one loss. Further, as noted above, Plaintiffs are estopped from now contending that the damage for which they recovered under their flood policy was caused by wind.

Applying these sound principles here, Plaintiffs' recovery, if any, is limited. Specifically, pursuant to an evaluation conducted by Marshall & Swift, an appraisal company, the actual cash value of Plaintiffs' loss, or the pre-storm value of their home, is \$299,148. *See* Exh. A. Because Plaintiffs were paid \$250,000 under their flood policy for the damage to their

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<sup>4</sup> Significantly, Plaintiffs' flood claim constitutes an admission that their home was substantially damaged by flood. *See Mayton v. Auto-Owners Ins. Co.*, No. 05-667, 2006 WL 1214831 (E.D. Va. 5/2/2006) (holding that evidence of the flood insurance claim made by plaintiffs was an admission against interest by the plaintiffs).

home, their maximum additional loss with respect to the structure is \$49,148. Allstate previously paid Plaintiffs \$42,128.18 under their homeowner policy for their dwelling. Therefore, Allstate's maximum additional obligation, if any, under the homeowner policy for their home is no more than \$7,019.82.

Likewise, Plaintiffs were paid \$100,000 under their federal flood policy for damaged contents. The actual cash value of Plaintiffs' damaged contents, however, does not exceed \$101,342.50. *See* Exh C. Thus, their maximum loss, and the most that Plaintiffs' could possibly be entitled to under their homeowner policy with respect to their contents is \$1,342.50.

Accordingly, to the extent that the Court deems entry of full summary judgment inappropriate, Allstate requests that this Court enter partial summary judgment to the effect that Plaintiffs' recovery, if any, under their homeowner policy is limited to the difference between the pre-storm value of their damaged property and their federal flood insurance payments. Additionally Allstate moves the Court to also order that Plaintiffs may, under no circumstance, recover in excess of \$8,362.32 under their dwelling and contents coverages provided by their homeowner policy. Finally, and to the extent not requested above, Allstate moves the Court to enter summary judgment against Plaintiffs with respect to their claims arising under the Valued Policy Law, La. Rev. Stat. 22:695, for all of the reasons set forth herein and in accordance with this Court's holding in *Chauvin v. State Farm Fire and Cas. Co.*, 450 F. Supp. 2d 660 (E.D. La. 2006).

### **CONCLUSION**

Plaintiffs, Merryl and Robert Weiss, have been paid full flood policy limits for the Katrina-related damage to their property at 13 Treasure Isle, Slidell, Louisiana. Through this

suit, Plaintiffs seek to additionally recover the limits of their homeowner policy. Due to the facts that Plaintiffs submitted a sworn proof of loss with respect to their flood insurance claim, which indicated that the cause of damage to Plaintiffs' property was flood waters, and that Plaintiffs accepted full flood policy limits with respect to their loss, Plaintiffs are now estopped from claiming that the hurricane-related damage to their property was caused by wind. At a minimum, any further payment that Plaintiffs seek under their homeowner policy must be offset by the amounts that they recovered under their flood policy.

WHEREFORE, Allstate requests that this Court enter summary judgment in its favor and dismiss Plaintiffs' claims against it, or, alternatively, order that any potential judgment against Allstate under Plaintiffs' homeowner policy must be offset by payments made to Plaintiffs under their flood policy.

Respectfully submitted,

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**CERTIFICATE**

I hereby certify that on February 14th, 2007, I electronically filed the foregoing Memorandum in Support of Partial Summary Judgment with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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