

**IN THE UNITED STATES COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

**MARK W. PALMER AND LESLIE G. PALMER**

**PLAINTIFFS**

**V.**

**CIVIL ACTION NO. 1:07-CV-39-LV-JMR**

**STATE FARM FIRE AND CASUALTY COMPANY**

**DEFENDANTS**

**PLAINTIFFS' MEMORANDUM RESPONSE  
TO STATE FARM'S MOTION TO DISMISS**

Plaintiffs, Mark W. and Leslie G. Palmer, submit this Memorandum response to State Farm's Motion to Dismiss.

**I. THE STATE FARM'S CLAIMS ADJUSTMENT PROTOCOL WAS SKEWED FOLLOWING KATRINA ON TOTAL LOSS PROPERTIES WHEN STATE FARM WAS THE WYO FLOOD INSURANCE ISSUER AND THE HOMEOWNER'S CARRIER.**

The manner in which most homeowners with both homeowners and flood coverage through State Farm, including the Palmers, initiated a claim for payment under their homeowner's policy after storm damage to their property was usually by placing a phone call to the State Farm hot line from whom they obtained both their homeowner's and flood policies. State Farm then dispatched an adjuster to the property. (See Exhibit E - Judy Guice deposition at 9, 11) Following prior storms, it was State Farm's practice to handle claims in such a manner that the insured received the maximum benefit from the combination of both policies the insured had paid for. In

such cases, State Farm would pay under the homeowner's policy for all damage that would have occurred in the absence of flood waters even if flood waters entered the property after the initial damage occurred. This practice comported with the reasonable understanding of coverage by policyholders, particularly in light of the first sentence of Exclusion No. 2 in the State Farm homeowner's policy which states "we do not insure under any coverage for loss *which would not have occurred in the absence of ... the following excluded events.* The clear implication leads to a reasonable expectation that the exclusion does not apply and coverage will exist if accidental direct physical loss would have occurred anyway from the windstorm. (See Exhibit E at 13-16)

Following Hurricane Katrina, many homeowners, including the Palmers and others whose homes were completely destroyed, had the reasonable expectation that State Farm would handle losses in areas subjected to both wind and water forces in the same manner as it had for prior storms. An insured would call State Farm's claims phone number and report the loss as required by their homeowner's policies. (See Exhibit E at 18) Many homeowners were told when they reported the loss what policies they had. Where the insured had both homeowner's policies and flood policies obtained through State Farm and the home or property was a total loss, and there was little left of the property to conclusively determine what damage had been caused by wind and what by water, State Farm would handle the claims in a manner that would result in the limits of the flood policy being paid and then State Farm would pay the remainder of the loss under the homeowners policy as had been State Farm's practice

for many years in the past. (See Exhibit E at 19-20, 24, 25, 73-75, 86-97)

Following Hurricane Katrina, the normal process of handling flood insurance benefits changed in several significant ways. First, FEMA anticipated a shortage of adjusters which would inevitably delay payout of benefits sorely needed for recovery. Understandably, FEMA took steps to modify the claims process to expedite placing insurance benefits into the hands of insureds. FEMA authorized WYO companies to accelerate the adjustment process under flood policies through methods such as the "Single Adjuster Program" and simplified the claims process by waiving the proof of loss requirement for payment of flood benefits. WYO insurers, like State Farm, who issued both homeowner's policies and standard flood insurance policies under the WYO program were often able to use a single adjuster to adjust both homeowners and flood insurance claims on the same property. FEMA's simplified process was applicable when homes were "washed off their foundations, affected for long periods by standing water, or when only pilings or a slab remain." Under this process FEMA waived the requirements for filing a proof of loss statement and dispensed with the use of a claim form, authorizing the WYO carrier like State Farm to procure a check for the flood policy limits on a property based solely on existence of long periods of standing water or the fact that only pilings or a slab remained. (See Exhibit A - Testimony of David Maurstad at pages 4-5 and Exhibit B - Memo from FEMA dated September 20, 2005). As FEMA stated, State Farm and other WYO insurers were:

rapidly identifying insured properties that have been washed off their

foundations, have had standing water in them for an extended period, or have only pilings or concrete slabs remaining. Under such circumstances, adjusters are waiving proof of loss requirements and fasttracking [flood] claims up to the maximum insured value.

(Exhibit A - Testimony of David Maurstad at page 4) In these three categories of cases, WYO companies like State Farm were allowed to process payments of the flood policy limits of dual insured properties without any requirement that an adjuster visit the property or conduct a cursory investigation of the loss. ( See Exhibit B - Memo from FEMA dated September 20, 2005).

FEMA's intent was to assist the insured in expediting the claim because of the shortage of adjusters and hopefully circumvent a stalemate between competing wind and water adjusters, each claiming the other policy should be responsible for the loss. Unfortunately, it gave WYO companies like State Farm unbridled power to classify losses as caused by flood as opposed to wind. It allowed State Farm to steer claims and adjustments in their own best interest toward payment of the maximum flood insurance, which would be reimbursed by the government, and away from higher homeowner's payments that would come out of State Farm's pocket. Moreover, it placed insureds with legitimate covered homeowner's losses at a disadvantage by eliminating the usual scientific investigation of the actual cause of the losses and by delaying adjustment under homeowner's policies. Furthermore, it created the appearance that insureds had actually made a determination that the cause of all losses was flood, thus electing away their right to homeowner's coverage by accepting flood

payments when, in actuality, it was State Farm who made the choice. In short, FEMA's simplified process gave State Farm a defense to payment under the homeowner's policies. Sadly enough, State Farm seized the opportunity.

There is substantial evidence to indicate that State Farm steered policy holder's claims in this manner to insure that full policy limits were quickly paid out under flood policies while the homeowner's claims were stalled. Representatives of State Farm assured homeowners that wind payments were not being handled yet; that prior practices would be followed and that they could accept the expedited flood policy checks without jeopardizing their homeowner's claim for the balance of their losses. (See Exhibit E - Deposition of Judy Guice at 25, 26, 28, 67, 73-74, 86-93, 100-108) Later, State Farm would then deny the homeowner's claim relying on its September 2005 wind water claims adjusting protocol and its newly adopted position, which is contrary to Mississippi law, that placed the burden on the homeowner to prove independent wind damage to avoid the water damage exclusion. If that did not browbeat the insured into giving up the right to the higher homeowner's coverage's, then State Farm would take the position it has here that payment under the flood insurance policy resulted in an election to forego benefits under the homeowner's policy. By accepting desperately needed cash offered by State Farm under the flood policy, although it had previously represented that it would not take that position, State Farm claims it is off the hook. (Exhibit E - Deposition of Judy Guice at 29-38, 75, 122-129).

Mark Drain, a representative of State Farm, has essentially testified, in his

deposition given in the Guice case, that if the damage was caused by flood and wind combined and the wind damage was discernable the insurance would be paid under both wind and flood. (See Exhibit F - deposition of Mark Drain attached as Exhibit C to Plaintiff's Motion for Reconsideration of Supplemental Motion for Class Certification in the Guice case). (See also Exhibits G and H, Hinkle and Haddock depositions attached as Exhibits B and E to Plaintiff's Motion for Reconsideration of Supplemental Motion for Class Certification in the Guice case and also referred to in Exhibit E). After procuring payment of the full flood policy proceeds, State Farm then closes the file on the homeowner's claim. (Exhibit E - Deposition of Judy Guice at 139-140)

Judy Guice has testified that Mark Drain told her that he was unaware of any slab case in which State Farm had not completely denied coverage under the homeowner's policy even with an engineering report establishing wind damage. (Exhibit E - at 59-60) She has been told of similar mass denials of total destruction claims in any area where there was water. (Exhibit E - Deposition of Judy Guice at 61-62) State Farms' wind-water protocol confirms that in areas where there was water at any time during the entire extended period when Katrina was affecting the area and the homeowner could not prove that wind alone caused damage to a separate area/aspect of the property, State Farm denied the entire homeowners claims. The Guice deposition offers proof that processing of benefits under the homeowners policies were stalled while processing under the flood policies were expedited. State Farm well knew that policyholders desperately needed insurance benefits to move on with rebuilding their

homes and lives, and could not afford to engage in a protracted battle because the existence of insurance coverage limited their access to other sources of funding from FEMA and the SBA.

The reality is homeowners received flood checks, but never made any sworn statements to anyone as to what part of their loss was caused by wind or flood. They never knowingly and voluntarily relinquished any rights under their homeowner's policies. They never voluntarily accepted any amount from State Farm with the intent of effecting a full settlement of their entire loss. They never intended their acceptance of the funds offered to represent anything other than a preliminary settlement of part of their losses. They fully expected their combined claims to continue on through an actual investigation during which State Farm would determine how much of the loss State Farm could prove was the result of the surge, calculate the available coverages under both policies, pay the balance due under the total of both policies, and do whatever adjustments were necessary within and between State Farm and the government to insure in the end that State Farm did not wind up with a windfall by being reimbursed under the flood program if a loss was actually caused by windstorm rather than surge or flood.

Now, State Farm comes to this court with unclean hands. Under well settled and ancient principles long accepted in both federal courts and Mississippi courts, the courts will deny equitable remedies or defenses to one who comes to the court with unclean hands. *Randall & Blake, Inc. v. Evans (In re Canion)*, 196 F.3d 579, 586 (5th Cir.

Tex. 1999); *Shelton v. Shelton*, 477 So. 2d 1357, 1359 (Miss. 1985)

## II. THE STATUS OF THIS CASE, THIS MOTION AND STATE FARM'S FACTUAL ASSERTIONS

This case has proceeded no further than a complaint, an answer and State Farm's motion to dismiss. State Farm makes many assumptions that are not supported by the Plaintiffs' Complaint and should not be considered on a motion to dismiss. For example, State Farm states that Plaintiffs' property was "fully insured" under two separate policies - a flood policy and a homeowner's policy. It then asserts that "Plaintiffs do not deny that they received the benefit of their choice of insurance coverage when their claim for proceeds as a result of a total loss by flooding resulting from Hurricane Katrina was paid by State Farm pursuant to the flood policy."

The Palmer's Complaint makes not mention of a flood policy or a payment made by State Farm, or anyone else for that matter, under a flood policy. (See Exhibit C - Complaint) State Farm's answer does mention flood insurance and alludes to the possibility that Plaintiff's have received funds to compensate for losses in Hurricane Katrina under a flood policy, but it certainly does not plead that "Plaintiffs do not deny that they received the benefit of their choice<sup>1</sup> of insurance coverage when their claim for

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<sup>1</sup>Given the dire circumstances that an insured is placed in when his property is destroyed by a hurricane, the acceptance of immediate payment of the full amount of the lesser of the two policies by an insured who has purchased both policies through the party who will adjust claims under both policies but will be totally reimbursed if the claim is paid under the smaller policy and will receive no reimbursement if the claim is paid under the larger policy is hardly voluntary. Any presumed associated relinquishment of the right to higher coverage under the larger policy is more akin to

proceeds as a result of a total loss by flooding resulting from Hurricane Katrina was paid by State Farm pursuant to the flood policy.” (See Exhibit D - Answer). Even if State Farm’s answer did plead such an assertion, under F.R.C.P. 8(d) such assertions would be taken as automatically denied since no responsive pleading is required to State Farm’s answer. Moreover, the Palmers certainly do deny that they made their choice of insurance coverage and elected flood as opposed to homeowner’s coverage. State Farm decided the cause of the loss to assign to the Palmer’s property and which policy it would implicate to cover payments made to the Palmers.

On a motion to dismiss the court must accept all well-pleaded facts as true and review the complaint in the light most favorable to the plaintiff. *United States v. Willard*,

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the type of compelled payment that can be recovered under the voluntary payment doctrine than the kind of payment which cannot be recovered under that doctrine. See *Genesis Ins. Co. v. Wausau Ins. Cos.*, 343 F.3d 733 (5th Cir. 2003) (holding that under the voluntary payment doctrine as it would currently be applied by the Mississippi courts an employer's payment of workmen's compensation insurance premium, when faced with alternative of losing all coverage; that a payment is compelled or coerced where it is made to avoid the loss of a necessity, or to prevent an injury to a person, business or property which is different and disproportionately greater than the payment. A habitable place to live is a necessity. An insured who purchased both flood and homeowner’s coverage through the same company, paid both premiums through that company, notified that company of the total loss, and then is faced with a unilateral decision by that company that under the combination of the two policies, the insured will be paid only the smaller amount which will be made available immediately while his other claim will not even be investigated for some time, is compelled to accept the lower payment in order to prevent an even greater injury to both himself and his property by remaining without shelter or the means to rebuild his shelter while he disputes his right to the larger amount even though it is undisputed that regardless of the outcome, he is at least entitled to the smaller amount. In short, if he can be said to have relinquished the rights under the larger policy, he was compelled to do so and can later recoup whatever he lost by that relinquishment. See *Genesis Ins. Co. v. Wausau Ins.*

336 F.3d 375, 379 (5th Cir. 2003). The well pleaded facts of this complaint are that the Palmer's home and all its contents were totally destroyed by tornadic winds associated with the northwest quadrant of Hurricane Katrina and that State Farm knew that plaintiff's property and the surrounding properties showed evidence of wind, tornadic, and microburst damage all of which was known to State Farm when it denied coverage under their homeowner's policy asserting that their property was destroyed by flood. Those are the facts which must be accepted as true for purposes of this motion. There is no reference to a flood insurance claim or flood insurance payments in the complaint, and such assertions should not be considered on this motion.

Nevertheless, since it is impossible to respond to State Farm's substantive motion without reference to flood insurance and flood insurance payments, Plaintiffs will address the substantive arguments in the motion based; on the proposition that despite having knowledge that plaintiff's property and the surrounding properties showed evidence of wind, tornadic, and microburst damage, despite the fact that the Palmer's home and all its contents were totally destroyed by tornadic winds associated with the northwest quadrant of Hurricane Katrina, and despite the fact that the Palmers notified State Farm of their loss and that they were making a homeowner's claim, State Farm adjusted the loss as a flood loss and made the choice to use flood insurance funds to make a payment of that part of Plaintiffs' loss.

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*Cos.*, 343 F.3d 733 (5th Cir. Miss. 2003)

**III. STATE FARM SHOULD BE ESTOPPED FROM ASSERTING THE POSITIONS TAKEN IN THIS MOTION AS A RESULT OF ITS PRACTICES IN ADJUSTING HURRICANE KATRINA CLAIMS WHERE ITS INSUREDS HAD BOTH A STATE FARM HOMEOWNER'S POLICY AND A SFIP POLICY ISSUED UNDER STATE FARM'S WYO PROGRAM**

The doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing. *O'Neill v. O'Neill*, 551 So. 2d 228, 232 (Miss.1989). The elements of equitable estoppel are (1) a false representation or concealment of a material fact; (2) a lack of knowledge of the true facts on the part of the actor; (3) the intention that the representation or concealment be acted upon; and (4) reliance thereon by the party to whom it is made, to his or her prejudice and injury. *J.P.M. v. T.D.M.*, 932 So. 2d 760 (Miss. 2006)

All elements of equitable estoppel are present here. The Palmers purchased both flood and homeowner's policies through State Farm to insure coverage for their property from weather and water related causes. They notified State Farm of their total losses as required by their homeowner's policy. They did not voluntarily elect to forego their rights to coverage under their homeowner's policies or to make only a flood insurance claim. They relied on State Farm's obligation to engage in a fair evaluation and investigation of their homeowner's claim; its obligation to consider all available evidence fairly, its obligation to promptly pay claims for accidental direct physical loss from windstorm unless it could prove that the loss was caused by an excluded peril, and most of all its obligation to handle claims fairly and without self interest. When State Farm quickly made payment in the amount of the total amount of the flood

coverage, it was accepted with the understanding that State Farm would fairly continue to consider their homeowner claims. Instead, State Farm concealed the material fact that it was electing to treat their claims as flood claims without any investigation into the actual cause of the loss and that it intended to use the flood payment against them to eliminate their rights under the broader coverage of the homeowner's policy. State Farm intended the policyholders to act on their concealment by accepting the flood payments before the homeowner's claims were even fairly considered. Palmers, and others, suffered real detriment by acceptance of the flood funds voluntarily paid. State Farm now uses this voluntary payments to argue that the Palmers, rather than State Farm, elected flood coverage thereby waiving coverage under the homeowner's policy.

#### **IV. THE DOCTRINE OF ELECTION OF REMEDIES DOES NOT JUSTIFY DISMISSAL OF PLAINTIFFS' CASE**

The doctrine of election of remedies serves to prevent a litigant from presenting inconsistent causes of action. Under the election of remedies doctrine, a plaintiff's action is barred if (1) There exist two or more remedies; (2) The remedies are inconsistent, and (3) The plaintiff has previously made a choice of one of them.

In *Coral Drilling, Inc. v. Bishop*, 260 So.2d 463, 465-66 (Miss. 1972), the Court explained the policy considerations underlying the election of remedies doctrine:

Courts will not permit litigants to solemnly affirm that a given state of facts exists from which they are entitled to a particular relief, and then afterwards affirm, or assume, that a contrary state of facts exists from which they are entitled to inconsistent relief.

At the same time, the doctrine of election of remedies is in disfavor nationwide,

and the doctrine is generally applied with caution and only in cases where the equities so dictate. One's choice between inconsistent remedies, rights or states of facts does not amount to an election which will bar further action unless the choice is made with full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. In *O'Briant v. Hull*, 208 So.2d 784, 786 (Miss. 1968), the Court noted that the doctrine of election of remedies is to be applied with caution, stating that "(t)he authorities are uniform in their holdings that the doctrine is a harsh one, that it is disfavored in equity, and that it should not be unduly extended." See also *Berry*, 669 So.2d at 72, citing *O'Briant*. Considerations of fairness and equity do not support the dismissal of a possibly meritorious lawsuit based on an earlier lawsuit which may have been filed based on a misunderstanding of the applicable facts.

*Beyer v. Easterling*, 738 So.2d 221 (Miss. 1999) at ¶¶ 8-16.

In *Blailock v. O'Bannon*, 795 So.2d 533 (Miss. 2001), the court held that an employee was not estopped from bringing a tort suit based on pursuit of a worker's compensation claim at least until the employee had voluntarily filed a Petition to Controvert. This discussion from *Beyer* and the holding in *Blailock* make it clear that there are two key components to application of the doctrine that are not present in this case. First, there has to be another proceeding in which the plaintiff has taken an inconsistent position. There has been no proceeding in which the Plaintiffs have taken a position on the flood claim. Second, there has to be a knowing choice by the plaintiff. A choice by the party who seeks to take advantage of the doctrine cannot do it. There is

no evidence that the Plaintiffs made a knowing choice to accept flood insurance benefits with full knowledge that it would cut off any recovery under the homeowner's policy.

In *Aetna Cas. & Sur. Co. v. Berry*, 669 So.2d 56, 72 (Miss. 1996), the court also found the doctrine to be inapplicable. The Court reiterated its keeping disfavor of upholding an election of remedies defense and concluded that, Ms. Berry did not litigate her claim to a conclusion that would warrant its application here." The Palmers have certainly not litigated a flood claim to conclusion.

The doctrine of election of remedies is clearly inapplicable here.

**V. PLAINTIFFS ARE NOT EQUITABLY ESTOPPED FROM ASSERTING A CLAIM UNDER THEIR HOMEOWNERS POLICY AS A RESULT OF PAYMENT OF BENEFITS UNDER THEIR FLOOD INSURANCE POLICY**

First of all, equitable estoppel is an equitable remedy. State Farm must have clean hands to invoke it, which it does not. *Randall & Blake, Inc. v. Evans (In re Canion)*, 196 F.3d 579, 586 (5th Cir. Tex. 1999); *Shelton v. Shelton*, 477 So. 2d 1357, 1359 (Miss. 1985)

Second, the doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing. What State Farm has done to try to steer unsuspecting policyholders into unwittingly giving up their legitimate claims to greater coverage under their homeowner's policy without disclosing its intent to use the flood payment as a means of summarily closing their homeowner's claim files with denials flies in the face of fundamental notions of justice and fair dealing, especially with the catastrophic conditions and need for prompt assistance in the wake of Hurricane Katrina.

Third, the four elements of equitable estoppel are not present in regard to the policyholder's actions. The insureds made no false representation to State Farm nor did they conceal material fact. If anything, they were completely open with State Farm. Clearly, State Farm did not lack knowledge of the true facts. State Farm was controlling the adjustment process for both the flood and homeowner's claims and knew what was occurring on both fronts. It knew the homeowners had made claims under the homeowner's policy and had not made a knowing and voluntary choice to give up homeowner's coverage by accepting the proffered flood benefits. If policyholders had intended to give up those claims they would not have continued to inquire about the status of the homeowner's claim. The Palmer's clearly did not expect State Farm to claim that they had relinquished their homeowner's policy claims. State Farm did not rely on any statement as to the cause of the losses by homeowners. If it relied on anything to support its determination to treat the losses as flood losses, it relied on FEMA's criteria under which FEMA was willing to waive proof of loss, but that certainly was not a waiver by the Palmers. If State Farm is prejudiced by the flood payments here, it results from its own course of conduct, and efforts to abandon its responsibilities and obligations under its contract with the Palmers. Thus, State Farm clearly cannot rely upon equitable estoppel here. *J.P.M. v. T.D.M.*, 932 So. 2d 760 (Miss. 2006)

Finally, State Farm's claim that Plaintiffs' property was fully insured under both policies with the difference being that the flood policy provided the coverage for the

same property from causes of loss excluded under the water damage exclusion of the homeowners policy is an oversimplification so gross as to be seriously misleading and approaching an intentional misrepresentation. It is comparing apples and oranges. The coverages are so different that the flood coverage cannot be accurately described as fully insuring the property insured under the homeowner's policy from losses from flood. First, the homeowner's policy includes coverages not available under the flood policy such as Additional Living Expense coverage, loss of use coverage, fair rental value of rented dwellings, loss of refrigerated products due to power interruption, personal property located in a basement, personal property not inside a fully enclosed building; fences, hot tubs, spas, pool equipment, and coverage for detached structures other than garages. These differences will almost always result in the homeowner's policy providing greater coverages than the flood policy as well as coverages for loss to property items simply not covered at all by the flood policy.<sup>2</sup> All losses excludable under the homeowner's policy water exclusion clearly would not be covered under the flood policy. In short, the damages or losses are simply not comparable.

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<sup>2</sup>Such differences are obvious in this case from Exhibits 1 and 2 relied upon by State Farm. The homeowner's policy coverage of personal property at replacement cost value and the flood insurance coverage of a more limited class of personal property at a lower actual cash value is clearly reflected in the higher \$173,625 personal property coverage limit of the homeowner's policy and the lower \$86,200 personal property coverage limit in the flood policy. The higher homeowner's policy dwelling coverage stated limits of \$231,500 as opposed to the lower flood policy dwelling limits of \$191,500 reflect the more expanded class of property covered by the homeowner's policy dwelling coverage but not the flood policy such as unattached structures other than a single garage, and other limitations on dwelling coverage found in the flood policy but

Moreover, and contrary to State Farm's position, it is not true that the two policies, by their terms, are mutually exclusive or do not provide coverage for any of the same causes of loss. The flood policy states that it will pay for direct physical loss from flood. As long as flood contributed to the direct physical loss, there is coverage.

As interpreted by the court in *Guice v. State Farm Fire & Cas. Co.*, Civil Action No. 1:06CV1-LTS-RHW , 2006 U.S. Dist. LEXIS 57571 (S.D. Miss., Aug. 14, 2006) *Tuepker v. State Farm Fire & Cas. Co.*, Civil Action No. 1:05CV559, 2006 U.S. Dist. LEXIS 34710, (SD Miss May 24, 2006) and *Lititz Mutual Insurance Co. v. Boatner*, 254 So. 2d 765 (Miss.1971), the State Farm homeowner's policy provides coverage for direct physical loss by wind.

The reality is that in most instances, the policyholders like the Palmers, did not assert any particular position as to the exact cause of their loss. They simply notified State Farm of the loss, were generally told by State Farm (often with the assistance of FEMA) that they have both homeowner's and flood policies, and waited for State Farm to adjust their losses under both policies expecting State Farm to send an adjuster to determine the exact cause of the specific losses. If their property was in the three categories included in FEMA's simplified and expedited process, they were not asked to fill out proof of loss form or sign documents or sworn statements. Nor were they asked to make a choice as to what they claimed the cause of their losses to be or which policy they were making a claim under.

State Farm, however, rapidly identified the property falling within the FEMA

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not the homeowner's policy.

three types of property for expedited processing, made a decision to either not investigate the cause of the loss at all under the homeowner's policy, cancelled its investigation or rejected any results of the investigation that had begun or ignored information, if any, provided to it by the policyholders. It categorically applied its newly adopted Katrina practices of steering all losses from these types of properties into the simplified FEMA process and expedited processing of checks for the total amount of the flood policies, tendered those checks to the insured (often with assurances that accepting the checks would not jeopardize their homeowner's claims), and then automatically closed the homeowner's claims of the policyholders under its Katrina wind-water protocol even if there was evidence the property was destroyed by wind as was the case here.

#### **VI. THE PALMER'S HOMEOWNERS' CLAIM IS NOT BARRED BY THE LANGUAGE OF THE HOMEOWNER'S POLICY**

In *Guice v. State Farm Fire & Cas. Co.*, Civil Action no. 1:06CV1-LTS-RHW , 2006 U.S. Dist. LEXIS 57571 (S.D. Miss., Aug. 14, 2006) and *Tuepker v. State Farm Fire & Cas. Co.*, Civil Action No. 1:05CV559, 2006 U.S. Dist. LEXIS 34710, (SD Miss May 24, 2006), this court rejected State Farm's interpretation of the scope of the water exclusion in a policy apparently identical to the Palmer's homeowner's policy.

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 widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

...

c. Water Damage, meaning:

(1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not; . . .

If the evidence establishes that part of the plaintiff[s] losses were attributable to wind and rain (making them covered losses under the applicable provisions of the policy), and part of the loss were attributable to flooding (which is excluded from coverage), the determination of which was the proximate cause of the damage would be a question of fact under applicable Mississippi law. . . . Likewise, if the evidence shows that the damage occurred over time, so that wind damage preceded damage from a "storm surge," the wind damage would be a covered loss, even if subsequent damage from the "storm surge" that exacerbated the loss were properly excluded from coverage.

The Palmer's complaint alleges that the destruction of their insured property was attributable to wind, tornadic, and microburst damage from Hurricane Katrina preceeding the storm surge. This is one of the scenarios in which *Guice* and *Tuepker* hold that coverage is not excluded by the language State Farm relies on.

Moreover, the Palmer Complaint alleges State Farm made a determination that the Palmer's loss was caused by an excluded flood event without investigating the actual cause of the loss and then summarily applied that determination to deny coverage under the homeowner's policy flood exclusion without investigating and

developing evidence to support its burden that the exclusion applied. Complaint at ¶¶ 18-19. Even if FEMA's simplified process permitted State Farm to make a finding of loss causation by flood without investigation, that did not permit State Farm to avoid its burden under Mississippi law to prove that the loss was caused by an excludable event. Nor did it eliminate State Farm's continuing duty under Mississippi law to act reasonably and in good faith in investigating claims under its policies and to take into consideration any information coming to it through its own investigation of a claim or otherwise. In short, the facts alleged in ¶¶ 18-19 state a claim for relief for both compensatory and punitive damages under *Gregory v. Continental Insurance Co.*, 575 So. 2d 534 (Miss.1990) and *Broussard v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 2611 (S.D. Miss. Jan. 11, 2007)

The decisions in *Guice v. State Farm Fire & Cas. Co.*, Civil Action no. 1:06CV1-LTS-RHW , 2006 U.S. Dist. LEXIS 57571 (S.D. Miss., Aug. 14, 2006), *Tuepker v. State Farm Fire & Cas. Co.*, Civil Action No. 1:05CV559, 2006 U.S. Dist. LEXIS 34710, (SD Miss May 24, 2006) and *Lititz Mutual Insurance Co. v. Boatner*, 254 So. 2d 765 (Miss.1971), demonstrate that State Farm's position that its insureds are not entitled to homeowner's coverage is untenable, as well as being contrary to State Farms own practice and course of dealing over the years.

*SCAC Transport (USA) Inc., v. Atlantic Mutual Insurance*, 652 F. Supp. 1091 (S.D.N.Y. 1987) is clearly far less applicable to the present situation than *Lititz Mutual Insurance Co. v. Boatner*, 254 So. 2d 765 (Miss.1971). *Lititz* involved a dispute over

whether a homeowner was entitled to coverage for hurricane damage under his homeowner's policy where that policy, like State Farm's policy, provided coverage for wind damage but excluded coverage for water damage. The language of the exclusion read:

This Coverage Group does not insure against loss:

(b) Caused by, resulting from, *contributed to*, or *aggravated* by any of the following: (1) flood, surface water, waves, tidal water, or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;"

The Mississippi Supreme Court held that:

We agree with the Court's opinion in *Kemp v. American Universal Insurance Company*, 391 F.2d 533 (C.A.5 1968), wherein the Court said, HN4Go to the description of this Headnote.in speaking of windstorm damage:

"\* \* \* It is sufficient to show that wind was proximate or efficient cause of loss or damage notwithstanding other factors contributed to loss." (391 F.2d at 533)

... Moreover, in the instant case, the jury had ample testimony to sustain appellees' contention that the house was destroyed by wind before the tidal wave reached the property at 11:00 to 11:30 P.M. on the night of the hurricane. See similar facts in *Firemen's Insurance Company of Newark, New Jersey v. Schulte*, 200 So.2d 440 (Miss. 1967).

The policy language quoted in *Lititz* is the equivalent of an anti-concurrent cause clause since it attempts to exclude coverage *contributed to*, or *aggravated by* flood or waves whether driven by wind or not. Nevertheless, the Mississippi Supreme Court found that coverage existed if either of two situations had occurred: 1) wind was a proximate or efficient cause of the loss regardless of whether other excluded causes also contributed to the loss or 2) the property had been destroyed by wind before the storm surge reached the property. The result should be similar under the language of the

Palmer's policy with State Farm.

Obviously, if the winds of Hurricane Camile in *Lititz* caused the loss to the property before the storm surge washed the remains away, the insureds could not have repaired the property in the midst of Hurricane Camille before the storm surge arrived. Yet the court did not find that the insured was not entitled to coverage or that recovery by the insured would result in a windfall. Clearly, both the jury and the court found the insured suffered an actual covered loss when the wind caused damage prior to the arrival of the storm surge. Thus, State Farm's argument under *SCAC Transport (USA) Inc.*, on what it considered a novel issue in that jurisdiction, is clearly inapplicable to hurricane claims under Mississippi homeowner's policies. The exact issue is not novel here.

It is State Farm who would reap the windfall here if it were allowed to avoid coverage for wind damage solely because subsequent storm surge washed away the remains. The loss occurs when the damage is sustained and at that time State Farm became liable for the loss sustained as a result of wind. What State Farm may not do is claim a windfall for itself on the theory that covered losses sustained early in a storm would have inevitably occurred later as a result of excluded causes. If State Farm's logic were valid, those prudent insureds who paid for available coverages would be left with no coverage at all.

**VII. THE NATIONAL FLOOD INSURANCE PROGRAM AND THE STANDARD FLOOD POLICY DO NOT JUSTIFY DISMISSAL OF PLAINTIFFS' CASE**

If and when the actual cause of Plaintiff's loss is fully and fairly litigated to conclusion and Plaintiffs recover their losses as they are entitled to from State Farm under the homeowner's policy, it is highly unlikely that the United States will seek to recover flood funds voluntarily paid out under the National Flood Insurance Program. Even if that right still exists notwithstanding the voluntary payment, it belongs to the United States and not to State Farm. Moreover, State Farm's position would actually hamper the United States from recovering funds paid out under the NFIP by preventing Plaintiffs from recovering from a source that would trigger the Subrogation clause of the SFIP providing the United States with a source for recoupment upon establishment that the funds recovered from State Farm actually do cover the same losses covered by prior voluntary flood insurance payments. Moreover, the voluntary payment under the NFIP compromised, if not extinguished, the subrogation/indemnity provision under the NFIP.

If funds were paid out to Plaintiffs under the NFIP, it occurred because of a combination of FEMA's waivers of the policy requirement for proof of loss by the Plaintiffs and State Farm's action in determining that the cause of Plaintiffs' loss was flood or storm surge, albeit possibly making such a determination under FEMA's waiver protocol. But Plaintiffs have not ever concealed the cause of their loss or any information related to the cause of their loss from either State Farm or FEMA. Nor have

they intentionally misrepresented any material fact or circumstance. They have not intentionally or fraudulently represented that their loss was not the result of wind, tornadic, and microburst damage from turbulent winds associated with the Hurricane Katrina which impacted and damaged their property prior to the arrival of any flood or rising or standing water. All the provisions of the flood insurance policy upon which State Farm relies in this section of their argument expressly mandate intentional conduct. The intentional conduct which has created the situation State Farm uses to support this argument is entirely State Farm's intentional conduct.

**VIII. BARRING RECOVERY UNDER PLAINTIFFS' HOMEOWNER'S POLICY FOR WHICH THEY PAID THE PREMIUM IS NOT NECESSARY TO PREVENT A WINDFALL UNACCEPTABLE UNDER MISSISSIPPI LAW**

Contrary to State Farm's arguments, Plaintiffs do not contend that they are entitled to recover and keep insurance proceeds exceeding their total losses from Hurricane Katrina. What they contend is that their total losses from Hurricane Katrina consists of the cost to replace everything they lost as a result of the hurricane plus all additional expense costs imposed by the hurricane such as cleanup, debris removal, additional living expenses or the diminution in quality of life resulting from inability to maintain their former lifestyle, other economic losses and in general the cost of returning them to the position they had been in prior to the hurricane. All these losses may not be insured, but this is the total loss they sustained from the hurricane and there can be no windfall or double recovery until such time as they are fully restored to the

position they were in prior to the hurricane.

If they paid two premiums under two policies to insure their losses, they are entitled to the benefit of what they paid for under both policies until they are made completely whole for all their losses just as if they paid for underinsured motorist coverage on two vehicle policies, which coverages are stacked until all their injuries are fully compensated. That does not constitute an unlawful windfall.

State Farm's argument under *Commercial Union Ins. Co. v. Stanmike Inv. Co.*, 475 S.W. 2d 295 (Tex. Civ. App. 1971) that an insurance contract is necessarily one of indemnity under which an insured is entitled to receive coverage only for the amount of his actual loss is not the law of Mississippi. The Mississippi Supreme Court rejected a similar argument in *Scott v. Transport Indem. Co.*, 513 So. 2d 889, 893 (Miss. 1987), holding:

there is nothing per se illegal about an insurance contract which allows the insured to state the value of his property and provides that, conditioned upon a certain event, to-wit: the complete destruction of the property, the insurer will pay to the insured the stated amount, notwithstanding that this stated amount may be substantially in excess of the fair market value of the property destroyed. If insurer and insured want to contract on this basis, we have no law that would interfere, nor should we fashion one. After all, we have for years allowed individuals and insurers to enter life insurance contracts on this premise.

It follows that there is nothing illegal in Mississippi about an insured who insures his property against actual loss upon one set of terms and conditions with one insurer to whom he pays a premium and who also decides such insurance is insufficient and insures the same property for replacement cost plus incidental or consequential

losses he might suffered related to damage of the property or who obtains a stated value policy on the same property. It also necessarily follows that where the coverages for loss by different causes in two policies are not identical, such as where one policy provides for actual cash value coverage and the other for replacement cost coverage, the recovery of actual cash value of the property under one policy should not relieve the insurer who received premiums for replacement value or a stated value from having to pay the stated value. Or if one policy provides loss of use and additional living expenses coverage while the other does not, recovery of the maximum value under the policy not providing such additional coverages should not eliminate the obligation of the insurer who was paid for such coverages. It is each individual insurance contract which determines what the insurer is obligated to pay under Mississippi law, not some concept that maximum insurance from all contracts is limited to actual loss value of the property or some concept that insurance is inherently limited to indemnity for expenses actually incurred in the absence of contractual language demonstrating the parties contracted for such limitations. *Scott v. Transport Indem. Co.*, 513 So. 2d 889 (Miss. 1987)

The total amount of all Plaintiffs losses and the causes of Plaintiffs' losses will be judicially determined and State Farm will be required to pay for the losses legitimately covered by its policy. Any flood payment will off set against the pre-Katrina value as this Court has repeatedly held. The solution for this potential conundrum created by State Farm's own conduct does not lie in creating a windfall or defense for State Farm or insulating it from legitimate claims against it. (Exhibit I - Travelers/SBA article).

While the solution set out in *Tejedor v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 84983 (S.D. Miss. Nov. 6, 2006) guards against double recovery by the insured, it does not avoid a windfall to State Farm as a result of its own inequitable conduct. The strong public policy against allowing one to profit from his own wrong calls for a solution that avoids a windfall to State Farm. *United States Fidelity & Guaranty Co. v. Moore*, 306 F. Supp. 1088 (N.D. Miss. 1969).

#### **IX. PLAINTIFFS ARE REAL PARTIES IN INTEREST**

The SBA assignment of insurance proceeds requirement of federal disaster loans was not intended to make the SBA a necessary party to proceedings to collect insurance proceeds or to inhibit an insured from fully pursuing all rights and remedies to secure the maximum available insurance benefit. It is an assignment of proceeds recovered, not an assignment of the claim. (See Exhibit J - SBA affidavit). As the SBA assignment of insurance proceeds is not an unqualified assignment, it does not transfer all right, title and interest in Plaintiffs' claims against State Farm to the SBA and the case law cited by State Farm is inapplicable. In *McKinley v. Lamar Bank*, the Court determined that the assignment was collateral security for the mortgage debt. 2004 So. 2d (2002-CA-02070-COA) (citing *Emmons v. Lake state Ins. Co.*, 484 N.W. 2d 712, 714 (Mich. Ct. App. 1992)). Further, an assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liability secured. *Id.* This is true even though the assignment is absolute on its face. *Id.* After the debt secured has been paid, the right to hold the assigned collateral ceases,

and the assignee has no interest in the collateral. *Id.* State Farm has apparently indicated some willingness to withdraw this argument in at least one other case. Plaintiffs urge State Farm to do the same here.

Plaintiffs also urge State Farm to abandon its defense that Plaintiffs are not real parties in interest.

**X. RECOVERY OF ADDITIONAL LIVING EXPENSES SHOULD NOT BE BARRED**

State Farm's arguments that Plaintiffs are not entitled to recovery of additional living expenses are dependent upon their arguments that Plaintiffs are not entitled to recovery of any losses under the homeowner's policy because of the processing of payment of flood proceeds by State Farm. For this reason, the responding arguments raised elsewhere in this brief addresses this issue as well.

**XI. STATE FARM'S INEQUITABLE PRACTICES IN ADJUSTING HURRICANE KATRINA CLAIMS WHERE ITS INSUREDS HAD BOTH A STATE FARM HOMEOWNER'S POLICY AND A SFIP POLICY ISSUED UNDER STATE FARM'S WYO PROGRAM JUSTIFY A PUNITIVE DAMAGE CLAIM**

The Palmer Complaint alleges State Farm made a determination that the Palmer's loss was caused by an excluded flood event without investigating the actual cause of the loss and then summarily applied that determination to deny coverage under the homeowner's policy flood exclusion without investigating and developing evidence to support its burden that the exclusion applied. Complaint at ¶¶ 18-19. Even if FEMA's simplified process permitted State Farm to make a finding of loss causation by flood without investigation under policies where that determination would result in

coverage instead of exclusion of coverage, that did not authorize State Farm to avoid its burden under Mississippi law to prove that the loss was caused by an excludable event under the homeowner's policy. Nor did it eliminate State Farm's continuing duty under Mississippi law to act reasonably and in good faith in investigating claims under its policies and to take into consideration any information coming to it through its own investigation of a claim or otherwise. In short, the facts alleged in ¶¶ 18-19 state a claim for relief for both compensatory and punitive damages under *Broussard v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 2611 (S.D. Miss. Jan. 11, 2007)

Thus State Farm's arguments that Plaintiffs cannot be entitled to punitive damages or attorneys fees fail.

### CONCLUSION

State Farm's arguments are all built on faulty premises. Plaintiffs are real parties in interest who have only qualifiedly assigned the proceeds of their insurance claims against State Farm to the SBA. They have suffered real losses as a result of State Farm's inequitable conduct in steering adjustment of losses for insureds with possible wind claims into the expedited flood payment process while stalling processing and investigation of homeowner's claims. Shockingly, State Farm then urged insureds to accept the proffered funds without disclosing its intent to use the acceptance of those funds as a pretext for denying their higher value homeowner's claims on the basis they are now estopped from asserting any cause for their loss other than flood. State Farm comes to this court with unclean hands seeking dismissal of Plaintiffs' entire case based

upon equitable remedies and defenses surrounding facts and issues completely outside the scope of the allegations of Plaintiffs' complaint. The Complaint states valid claims for which relief can be granted. Accordingly, State Farm's motion should be denied.

Respectfully submitted, this the 11<sup>th</sup> day of April, 2007.

MARK W. PALMER AND  
LESLIE G. PALMER

/s/ JOE SAM OWEN  
MSB # 3965

**CERTIFICATE OF SERVICE**

I, Joe Sam Owen, counsel for Plaintiff, do hereby certify that I have I electronically filed the above and foregoing pleading with the Clerk of the Court using the ECF System which sent notification of such filing to the following:

Paige C. Bush  
Post Office Box 496  
Tupelo, MS 38802

Dated this the 11<sup>th</sup> day of April, 2007.

/s/ JOE SAM OWEN

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