

**IN THE UNITED STATES DISTRICT 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-LG-JMR**

**STATE FARM FIRE AND CASUALTY COMPANY** **DEFENDANTS**

**DEFENDANT’S REPLY TO PLAINTIFFS’ MEMORANDUM RESPONSE TO  
STATE FARM’S MOTION TO DISMISS**

**COMES NOW** Defendant, State Farm Fire and Casualty Company, (hereinafter “State Farm”), by and through counsel, and for its Reply to Plaintiffs’ Memorandum Response to Defendant’s Motion to Dismiss would show the Court as follows:

1. Plaintiffs devote seven pages of their response to a discussion of other Katrina litigation, making broad statements that read more like pleadings or closing arguments than a response to a motion. They conclude their allegations by stating that State Farm comes before the Court with unclean hands, and should be denied equitable remedies or defenses against the Plaintiffs. The Clean Hands Doctrine, however, refers to litigants who are bringing suit or seeking relief from the Court. *See New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471, 473-74 (5<sup>th</sup> Cir. 1961) (the Clean Hands Doctrine applies to a Plaintiff who brings a cause of action when he or she is “tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of defendant.”) and *O’Neill v. O’Neill*, 551 So.2d 228, 233 (Miss. 1989) (quoting V.A. Griffith, *Mississippi Chancery Practice*, §42 (2d. ed. 1950) (“The meaning of this maxim is to declare that ‘no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by willful inequity...’”). The

Plaintiffs brought this action; they are the ones seeking relief from the Court. State Farm is neither suing the Plaintiffs nor making a counterclaim against them. The Court should not have to reach an analysis of whether State Farm has clean hands or not. Plaintiffs' cases in support of their analysis also deal with Plaintiffs who brought suit with unclean hands. *In re Canion* dealt with a Plaintiff who would have had to prove their own wrongdoing to be eligible for relief. *See Randall & Blake, Inc. v. Evans (In re Canion)*, 196 F.3d 579 (5<sup>th</sup> Cir. 1999). *Shelton v. Shelton* dealt with a crossclaim for divorce where one of the parties to the action intimidated witnesses. The Court refused him his remedy which resulted from the fact that the wife's testimony was uncorroborated as the uncorroborated testimony was the result of his meddling with the witnesses. *See Shelton v. Shelton*, 477 So.2d 1357, 1359 (Miss. 1985).

2. The Plaintiffs state that if they relinquished their rights, they were "compelled to do so." The characterization of damage as wind or water after an investigation of a claim is not and was not an effort to cheat the insured out of money that they were owed.

Plaintiffs, based on the investigation of the damage, were owed the policy limits under the flood policy. They were paid the policy limits. The damage that was attributable to wind was paid under the provisions of the homeowners' policy. Plaintiffs' acceptance of the categorization of damage to their dwelling as flood damage and their attempt to recategorize the same as wind damage is what is at issue. To put it simply, the Plaintiffs cannot accept money for flood damages when the damage was caused by wind and vice versa.

3. State Farm has done nothing to merit the estoppel of any of its positions as a result of its claims practices. State Farm followed the FEMA directives when adjusting

the Plaintiffs' claim under the flood policy, applying the directives to the circumstances of the Plaintiffs' loss. Thus according to the FEMA Directive and according to the circumstances of the Plaintiffs' loss, State Farm acted appropriately. Both sides knew and accepted that proven flood damages would be paid under the provisions of the flood policy and that proven wind damage would be addressed by the homeowners policy; that was exactly what happened in this case.

4. Plaintiffs have, by claiming damages and accepting and retaining policy limits under the flood policy, taken the position that their loss was a result of flood. Insurance contracts only act to insure against covered losses; the homeowners policy at issue excludes flood damage as a cause of loss. *Tejedor v. State Farm Fire and Cas. Co.*, 2006 WL 3257526 (S.D.Miss. 2006) (slip copy) (stating that "insurance contracts insure only against covered losses"). By electing to say that the damage done to their dwelling occurred as the result of flood, Plaintiffs elected their remedy prior to the bringing of their cause of action through the decisive act of choosing to accept and retain flood policy proceeds in the amount of a total loss. *See* CJS Election of Remedies §14. They cannot now claim a total loss under their homeowners policy.

5. Plaintiffs are equitably estopped from claiming the total loss to their home was caused by wind damage as a result of their acceptance of the flood insurance proceeds. As this Court has clearly stated, "where an insurer, in this case the flood insurer, has settled an insured's claim by paying policy limits, the insured may be estopped from recharacterizing, as wind damage, losses for which he has accepted flood insurance compensation." *Sima/Signature Lake, et al. v. Certain Underwriters at Lloyds London*, 2006 WL 3538862 (S.D.Miss. December 6, 2006). Regardless of whether Plaintiffs

actually filed a claim for flood insurance, they received and retained flood insurance proceeds. Plaintiffs should be estopped from recharacterizing their loss as being caused by wind.

6. Plaintiffs assert that they would not receive a windfall if they recovered under the flood policy and the homeowners policy. The flood limits which were paid and accepted by the Plaintiffs were \$191,500.00 on the dwelling coverage and \$86,200 on the contents coverage. See Exhibit "A" – Copy of Draft issued to Palmers for flood insurance payments. Plaintiffs were paid under their homeowners policy the amount of \$2,461.27 for the dwelling coverage and \$16,325.03 for the contents coverage. Plaintiffs' limits on the homeowners policy are \$231,500.00 dwelling coverage, dwelling extension to \$38,100.00, and \$173,625.00 on contents coverage. Plaintiffs have been paid for the identifiable wind damage to their property. Now, however, Plaintiffs are seeking to recover policy limits under their homeowners policy. Plaintiffs are seeking to recover 1 ½ times the value of their dwelling and 1 2/3 times the value of their contents. Clearly, allowing Plaintiffs to recover under both policies would be a windfall in Plaintiff's favor.

7. Mississippi law is clear that an insurance policy is one of indemnity. *Sima, supra*, at 3. To allow Plaintiffs to recover in the manner upon which this lawsuit is based would be placing Plaintiffs in a much better position from which they were in prior to their loss. Clearly, allowing Plaintiffs to recover under both policies would be a windfall in Plaintiffs' favor as they would be recovering twice the value of their property.

8. Plaintiffs allege that because they paid the premium for their homeowners policy that they are entitled to coverage under the policy despite any exclusions contained in the policy. As this Court has established in *Leonard v. Nationwide Mutual Ins. Co.*, 438

F.Supp.2d 684 (S.D.Miss. 2006), the water damage exclusion is a valid and enforceable exclusion and to the extent Plaintiffs' damage was caused by water, they are not entitled to coverage under the homeowners policy. Further, a comparison between automobile insurance policies with the ability to "stack" uninsured motorist coverages and homeowners insurance policies is not appropriate as the contracts involved contain completely different language and exclusions. *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416 (Miss. 1987) states that "... the face value is to act as a ceiling; it does not irrevocably fix the amount to be awarded." Additionally, *Tejedor v. State Farm Fire and Cas. Co.*, 2006 WL 3257526 (S.D.Miss. 2006) (slip copy) states that "insurance contracts insure only against covered losses, ... '[t]he benefit derived from insurance should be no greater in value than the loss.'" (quoting *Estate of Murrell v. Quin*, 454 So.2d 437, 444 (Miss. 1984)).

9. The Small Business Administration has asserted that it has an interest in the outcome of any litigation which involves an SBA loan, and that it will seek recovery of its interests. On February 27, 2007, the United States Department of Justice filed a statement of interest on behalf of the SBA in the civil action titled *Woullard v. State Farm Fire and Casualty Company*. See Exhibit "B" – Small Business Administration Statement of Interest. Therein, the United States advised of its right under federal law to recover any monies due and owing to the SBA out of any proceeds paid by State Farm to the Plaintiffs. The United States further claimed that the assignment of insurance proceeds entitles it to receive the proceeds up to the amount of the loan balance and further requires that, "[t]o the extent that any SBA disaster loan borrower Plaintiffs are

settling their claims, the settlement should include provisions facilitating the United States' receipt of insurance proceeds assigned to it." *Id.* at 4.

10. The subject assignment, as with all contracts, must be interpreted objectively. The assignment executed by the Plaintiffs assigned to the SBA certain rights under the subject policy. The assignment was not restricted by any express language, which makes it a general assignment. The affidavit executed by the SBA regarding the intent of the SBA not to become a real party in interest is, respectfully, not as important as the language of the assignment itself. *See Huber v. Millan*, 246 F.Supp. 8 (D.C.Md. 1964) ("assignment may be restricted only by express language to that effect"). *See also, Provident Life and Acc. Ins. Co. v. Goel*, 274 F.3d 984, 992 (5<sup>th</sup> Cir. 2001) ("The most basic principle of contract law is that contracts must be interpreted by objective, not subjective standards"); *Warwick v. Gautier Utility Dist.*, 738 So.2d 212, 215 (Miss. 1999); *citing Simmons v. Bank of Mississippi*, 593 So.2d 40 (Miss. 1992) ("when interpreting a contract, the court's concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy.").

11. The SBA is a necessary and indispensable party to this action under Federal Rules of Procedure 17 and 19 which has been confirmed by its own Statement of Interest in *Woullard*. As a result of the SBA's interest in the foregoing matter, complete relief cannot be afforded to all interested parties in its absence. As such, the SBA is a necessary and indispensable party and should be joined in this matter pursuant to Rule 19. In the event this Court finds the SBA cannot be joined, Plaintiffs' Complaint should be

dismissed as in equity and good conscience this matter cannot go forward in the absence of the SBA.

12. State Farm, on finding evidence of wind damage, paid for that verified amount of wind damage. There is no evidence but that State Farm conducted an investigation into the damage to the dwelling and allocated the damages found to be paid under the policies which covered those types of damages. State Farm acted reasonably and in good faith while investigating both the Plaintiffs' homeowners and flood policy claims, took into consideration the information that was presented to it, and tendered policy limits under the flood policy and policy benefits under the homeowners policy for discernable damage that came under the auspices of that contract. Therefore, any claim for punitive damages should be denied. *See Lincoln National Life Ins. Co. v. Crews*, 341 So.2d 1321 (Miss. 1977).

**WHEREFORE, PREMISES CONSIDERED**, State Farm respectfully requests this Court require the ratification of Plaintiffs' actions by the Small Business Administration or the joinder of the SBA to this action as the SBA is necessary and indispensable to this action under Rules 17 and 19 of the Federal Rules of Civil Procedure. In the even that joinder of ratification of the SBA is not possible, the Defendant asks that the Court dismiss Plaintiffs' Complaint. Defendant further requests that Plaintiffs' complaint be dismissed so far as the Plaintiffs have no basis for recovery against State Farm. State Farm requests all other relief to which it is entitled.

**RESPECTFULLY SUBMITTED**, this the 23rd day of April, 2007.

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**BY: s/Jennifer Hinds**

**CERTIFICATE OF SERVICE**

This is to certify that I, Jennifer Hinds, the undersigned attorney for Defendant, State Farm Fire and Casualty Company, have this day electronically filed the above and foregoing *Reply to Plaintiffs' Memorandum Response to Defendant's Motion to Dismiss* which sent electronic notification to the following ECF participants:

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**THIS**, the 23rd day of April, 2007.

s/Jennifer Hinds