

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

**NORMAN J. BROUSSARD and
GENEVIEVE BROUSSARD**

PLAINTIFFS

vs.

CIVIL ACTION NO. 1:06-cv-00006-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AS TO FIDUCIARY DUTY AND PUNITIVE
DAMAGES AND EXTRA CONTRACTUAL DAMAGES CLAIMS**

INTRODUCTION

State Farm issues policies to provide coverage for direct physical loss. State Farm admits that Hurricane Katrina resulted in direct physical loss. State Farm admits that applicability of the water damage exclusion must be established by it through an examination of the facts of each loss. Nevertheless, State Farm developed and disseminated a claims procedure that required the refusal to pay claims if State Farm had evidence of a surge unless State Farm could find discernable wind damage. In the absence of State Farm's finding discernable wind damage, it refused to pay the entire claim. This procedure is clearly contrary to State Farm's policy, language requiring discernable wind damage admittedly not being found anywhere in the policy. This conclusion is also contrary to Mississippi law concerning the invalidity of a concurrent cause exclusion, Mississippi's position being clear since 1961. (If State Farm knew this

Mississippi law, it failed to follow it. If it did not know it, it breached its duty in failing to know it.) Under controlling Mississippi law which has been again explained clearly in this Court's recent decisions, State Farm was obligated to pay for direct physical loss and could avoid payment for such only if it proved that any of the loss it did not pay for was caused by water. Hence, State Farm's procedure which was applied to all Katrina claims constitutes bad faith. In addition to State Farm's bad faith procedure for handling Katrina claims, State Farm refused to pay the instant claims even after it hired an engineer and even after that engineer stated that some of the damage was done by wind. Such a refusal to pay was also bad faith.

FACTS

1. State Farm admitted that it knew that the wind came before the surge and that, in a slab case, it did not know what damage the wind did to the physical structure because it couldn't find the physical structure any more:

0020

21 Q. What you actually know from all the information
22 that you have in this case is that there was a surge;
23 correct?

24 A. We have information that there was a surge.

25 Q. You do not know whether the surge came before or

0021

1 after the winds, do you?

2 A. Well I know that the wind was coming before the
3 surge actually hit the house, but I - -

4 Q. Okay. So you know the surge came after the wind.

5 You do not know what damage the wind actually did to the
6 physical structure because you can't find the physical

7 structure anymore; isn't that correct?

8 A. That's correct.

[BLALOCK DEPOSITION– *Broussard* p.20, line 21- p.21, line 8] *Exhibit A*.

2. State Farm admitted it knew that the surge was rising water with a wave action

on top of the rising water, as opposed to a tidal wave:

0017

9 Q. Was this a rising surge with wave action mixed in
10 with it?

11 A. The best description that I've heard is it was
12 more a rising water with a wave action on top of the water,
13 and just a wave action with the rise.

[BLALOCK DEPOSITION– *Broussard* p.17, lines 9- 13] *Exhibit A*.

3. State Farm developed a wind/water protocol memo as a guideline that was used in the handling of the Katrina claims:

0012

11 - - Well we don't
12 have the memo here today, but I was wondering if you could,
13 based on your having read it and your memory of it, provide
14 me what you believe it says relating to wind/water issue
15 and the payment of claims.

16 A. Okay, what it - - it was a guideline that was
17 used as we applied the interpretation of our policy
18 language and as we talked to the claim reps that came to
19 Southern Mississippi to help us work those claims. And
20 what it said is work these claims on a case-by-case basis;
21 make an inspection, and obtain information like the
22 physical evidence. Go to the scene, inspect physical
23 evidence that is there, what damage is done to the house,
24 what it looks like in the surrounding area. Obtain, of
25 course, photographs; look and determine as best you can the

0013

1 height of the surge in that area. Examine trees; get any
2 information that the policyholder may have about what
3 happen at that location. And then make a determination as
4 to what caused the damage. And if the - - if the storm
5 surge - - if not for the storm surge, would the house still
6 be there. And if not, if the storm surge took the house,
7 then that flood damage or surge damage would be excluded
8 under the policy. And from that point, try to make a
9 determination if there's any discernable wind damage. And
10 to the extent that there is some discernable,
11 substantiated, measurable wind damage, then we would pay
12 for that based on what credible evidence we could find of
13 wind damage in that location, that specific location.

14 Q. All right, sir. And you said that that was

15 something that was given to the folks who were going to go
16 out and try to handle these claims; is that right?

17 A. That's correct.

18 Q. And you said that, if I understood you correctly,
19 you said that the position of this particular paper was
20 based upon some policy language or policy exclusions; is
21 that correct?

22 A. Well the wind/water protocol was, as I said, was
23 a guideline that discussed the policy language, and it kind
24 of discussed a process on how we applied that policy
25 language to the handling of these claims in Hurricane

0014

1 Katrina.

[BLALOCK DEPOSITION– *Tejedor* p.12, line 11- p.14, line 1] *Exhibit B*.

4. The protocol was sent from Stephen Hinkle, Bloomington, Illinois, who was the State Farm consultant over Mississippi:

0017

24 Q. Okay. And it came from State Farm some place
25 outside of Mississippi, or did it come from the Mississippi

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1 claims office; the original memo?

2 A. The original came from my claim consultant in
3 Bloomington.

4 Q. All right. And your claim consultant in
5 Bloomington is who?

6 A. It's Stephan Hinkle (Spelling) S-t-e-p-h-a-n H-
7 i-n-k-l-e.

8 Q. And how did he come to produce this memo?

9 A. He was, of course, my area, - - he's the
10 consultant over this area, and he was actually in either
11 Alabama at the very beginning right after the storm or in
12 Biloxi area shortly thereafter. And in - - he prepared or
13 authored this memo to help us with our training of our
14 folks that came in.

[BLALOCK DEPOSITION– *Tejedor* p.17, line 24- p.18, line 14] *Exhibit B*.

5. The wind/water protocol memo was developed so that the claims handler could handle the claims consistent with the policy:

0018

15 Q. And he did that so that these people could try to
16 handle these claims consistent with the policy?

17 A. That is correct.

[BLALOCK DEPOSITION– *Tejedor* p.18, lines 15- 17] *Exhibit B*.

6. The policy language which was interpreted as the basis of the protocol was as follows:

0016

18 Q. So that I can find it later and make sure we've
19 got it right. "Losses not insured. We do not insure any
20 coverage for any loss which would not have occurred in the
21 absence of one or more of the following excluded events.
22 We do not insure for such loss regardless of (a) the cause
23 of the excluded event or (b) other causes of the loss or
24 (c) whether other causes acted concurrently or in any
25 sequence with the excluded event to produce the loss or (d)

0017

1 whether the event occurs suddenly or gradually, involves
2 isolated or wide-spread damage, arises from natural or
3 external forces or occurs as a result of any combination of
4 these," and then there is a colon and we would skip to
5 subpart c which says, " Water damage, meaning:" skip down
6 to, "(1) flood, service water, waves, tidal water, tsunami,
7 seiche (Spelling) s-e-i-c-h-e, overflow of a body of water
8 or spray from any of these, all whether driven by wind or
9 not." Did I read that correctly, the parts that I read?

10 A. Yes.

11 Q. And are those the parts that the memo would have
12 been related to?

13 A. Yes, to the best - - to the best of my
14 recollection.

15 Q. Okay. And, so is it fair to say that based upon
16 that policy language that I've just read into the record,
17 State Farm developed a wind/water memo and sent that out to
18 you, and you've sent it out to some others.

19 A. The guidelines were written up based on this
20 language here and used as guidelines for application of the
21 interpretation to share with the claim representatives and
22 the claims management that was coming to our area to work
23 these claims.

[BLALOCK DEPOSITION– *Tejedor* p.16, line 18- p.17, line 23] *Exhibit B*.

7. State Farm's 30(b)(6) designee did not know whether Mr. Hinkle received legal advice in determining how to articulate what the policy language in question meant:

0019

15 Q. Thank you. So did the person at State Farm seek
16 legal advice in determining how to articulate what this
17 policy language that we've looked at earlier meant?

18 A. I do not know.

[BLALOCK DEPOSITION– *Tejedor* p.19, lines 15- 18] *Exhibit B*.

8. The 30(b)(6) designee who was head of claims in Mississippi did not seek legal advice as to what the language meant and was “going on” what Mr. Hinkle advised as to the interpretation of the policy:

0019

19 Q. All right. Did you, as head of Mississippi
20 claims, seek legal advice to determine what this policy
21 language meant? And I don't mean after a lawsuit has been
22 filed, but I mean at the time, at or about the time of this
23 September 13 memo that we've been referring to.

24 A. To the best of my recollection, I was going on
25 what Mr. Hinkle was advising us of the interpretation for

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1 the policy at that time.

[BLALOCK DEPOSITION– *Tejedor* p.19, line 19- p.20, line 1] *Exhibit B*.

9. State Farm admitted that the policies in question, insofar as dwelling was concerned, were accidental direct physical loss policies and that an accidental direct physical loss would include destruction of a house in a hurricane unless otherwise excluded:

0023

5 Q. Okay. So yours, at least insofar as the dwelling
6 was concerned, your policies were the all risk policies;
7 correct?

8 A. They were accidental direct physical loss.

9 Q. Okay. An accidental direct physical loss would
10 include destruction of a house in a hurricane?
11 A. It would include losses that are not otherwise
12 excluded.

[BLALOCK DEPOSITION– *Tejedor* p.23, lines 5- 12] *Exhibit B*.

10. State Farm admitted that if water hit the dwelling and knocked it down that would be a direct physical loss as it would be if wind hit the house and knocked it down or if water born material hit the house:

0023

20 Q. Well just anything. Because if water hit it and
21 knocked it down, that would be direct physical loss,
22 wouldn't it?

23 A. It would be.

24 Q. And if wind hit it and knocked it down, that
25 would be direct physical loss, wouldn't it?

0024

1 A. That would be accidental direct physical loss.

2 Q. And if stuff floating in the water hit it, that
3 would be direct physical loss, wouldn't it?

4 A. That would be an accidental direct physical loss.

5 Q. So all of that would be accidental direct
6 physical loss unless there is an exclusion; is that
7 correct?

8 A. All of that would be accidental direct physical
9 loss unless it was otherwise excluded.

[BLALOCK DEPOSITION– *Tejedor* p.23, line 20- p.24, line 9] *Exhibit B*.

11. State Farm admitted that exclusions are subject to the insurance company proving that they apply, which would include proving that the facts were of a certain way to fit within the exclusion:

0025

3 Q. You understood at State Farm that exclusions must
4 be - - are subject to the insurance companies proving that
5 they apply; correct?

6 A. Yes.

7 Q. And that would include proving that the facts
8 were of a certain way to fit within the exclusion; is that

9 correct?
10 A. That's correct.
11 Q. So you would have to prove that there was water
12 damage to fit within the exclusion; is that correct?
13 A. That would be what we would try to do. As what I
14 think I mentioned, we would examine the physical evidence
15 and make that application to the policy.
[BLALOCK DEPOSITION– *Tejedor* p.25, lines 3- 15] *Exhibit B*.

12. State Farm initially testified that it did not deny any claim based on concurrent cause:

0028

1 Q. Thank you, sir. Now looking at our letter, which
2 was Exhibit 2, which you have there in front of you; the
3 October 6th letter in this particular case. The first part
4 under the section that says, "2," and has the a, b, c and
5 so forth in there, includes a provision that says, "Whether
6 other causes acted concurrently or in any sequence with the
7 excluded event to produce the loss." Did you all refuse to
8 pay any claims based on your protocol because you thought
9 that the wind and the water acted concurrently or maybe the
10 wind came first and destroyed the house and then water
11 came? Did you make any decisions based on your protocol,
12 or did your protocol even address this question of this
13 subparagraph; this subpart c?
14 A. Well what it did is what I just mentioned to you
15 earlier is that we would look for all the physical evidence
16 and first - - The short answer is no; we didn't deny based
17 on that specifically. We would look at all the evidence,
18 and if we could discern wind damage, we would pay for it
19 even if flood had done damage to the home.
20 Q. So State Farm did not use this subparagraph c
21 under paragraph 2 to refuse to pay any claims; is that
22 correct?
23 A. Well correct in that we tried to find discernable
24 wind damage that we could pay for even though flood may
25 have taken the home.
[BLALOCK DEPOSITION– *Tejedor* p.28, lines 1- 25] (Emphasis added.)
Exhibit B.

13. Later, State Farm, in response to the question of whether it relied upon the

concurrent cause exclusion, stated as follows:

0031

11 Q.And you all did not rely in
12 handling these claims on the so-called concurrent clause
13 exclusion, did you?

14 BY MR. CORLEW: I object to the form of the
15 question. You can answer.

16 BY MR. WALKER:

17 A. Well we applied this total section the way that I
18 was telling you earlier and the way that it was outlined in
19 the protocol.

[BLALOCK DEPOSITION– *Tejedor* p.31, lines 11- 19] *Exhibit B.*

14. State Farm testified that it “thought” it would have taken all the legal cases into account in deciding how to determine the claim, including Mississippi cases since 1961 in which the Court had held a concurrent cause provision in an insurance policy is overridden by traditional concepts of proximate cause:

0032

9 Q. Do you know, speaking on behalf of State Farm,
10 whether State Farm was aware that Mississippi had taken a
11 position upon proximate cause in connection with wind and
12 water issue?

13 BY MR. CORLEW: I may object to the form of
14 the question to the extent it calls for legal conclusion -
15 - or legal opinion. You can answer.

16 BY MR. WALKER:

17 A. I'm not sure I understand exactly what you're
18 asking me, though.

19 Q. Okay. I'll represent to you that as early as
20 1961, and certainly again in 1971 and subsequently,
21 Mississippi has taken the position that a concurrent cause
22 provision in an insurance policy is overridden by
23 traditional concepts of proximate cause. Did State Farm
24 take that position or take that into consideration in
25 deciding how to deal with these claims?

0033

1 BY MR. CORLEW: Same objection. You can
2 answer.

3 BY MR. WALKER:

4 A. I think that we would have taken all the legal

5 cases that are out there and applied them as best we could
6 in making a determination on how we were going to handle
7 the case - - the claims that we had.

[BLALOCK DEPOSITION– *Tejedor* p.32, line 9- p.33, line 7] *Exhibit B*.

15. State Farm had no documentation to support its “thought” that it would have taken those legal cases into account:

0033

8 Q. Do you have any documents to support your thought
9 on that subject?

10 A. I do not.

11 Q. And speaking for State Farm, do you know of any
12 documents that would cover that subject or support that
13 position that you're taking on that subject.

14 A. I do not; off the top of head, I don't know of
15 such a document.

16 Q. Okay. Well how about off the bottom of your
17 head. Let's think about it.

18 A. Okay. I - -

19 Q. Let's think about it for a minute. Are there any
20 that - - you've been in claims a really long time. Are
21 there any documents that you know of - - You've got this
22 protocol. Do you know of any documents in which State Farm
23 considered Mississippi law on the viability of a concurrent
24 cause exclusion?

25 A. I have not observed any document that

0034

1 specifically addresses that, but again, I can tell you that
2 Stephan Hinkle, in writing his wind/water protocol, applied
3 the contract to the writing of that and how we should be
4 handling these claims. So - -

5 Q. Mr. Hinkle is not a lawyer; correct?

6 A. He, to the best of my knowledge, is not a lawyer.

7 Q. And you have no evidence that he consulted a
8 lawyer in connection with writing protocol, do you?

9 A. I don't know yes or no whether he talked with
10 attorneys.

[BLALOCK DEPOSITION– *Tejedor* p.33, line 8- p.34, line 10]
Exhibit B.

16. State Farm's procedure in handling these claims was to deny a claim even

though the damage was a direct physical loss, and even though the policy is a direct physical loss policy if State Farm found surge occurred and could not find "discernable wind damage."

0024

15 Q. So what you're saying is, even though it's a
16 direct physical loss policy, even though there is a direct
17 physical loss, if we find surge we pay nothing unless we
18 find discernable wind damage, correct?

19 BY MR. CORLEW: Object to the form of the
20 question. He can answer.

21 BY MR. WALKER:

22 A. The way that you describe that, that sounds like
23 what I have been saying.

24 Q. All right.

25 A. Yes.

0025

1 Q. Now that's what State Farm did as a matter of
2 policy in all of these claims; correct?

3 A. Well "all of these claims" is pretty broad.

4 Q. The Katrina claims, as a matter of policy, you
5 were implementing the policy; you did the same thing in all
6 these Katrina claims, didn't you?

7 A. We attempted to handle all claims consistently
8 following that procedure.

[BLALOCK DEPOSITION– *Broussard* p.24, line 15- p.25, line 8]
(Emphasis added.) *Exhibit A*.

17. Although State Farm admitted that there was no requirement in the policy for "discernable wind damage," once State Farm found surge, it paid nothing unless it found discernable wind damage:

0023

20 Q. There's no requirement for discernable wind
21 damage anywhere in the policy, is there?

22 A. It doesn't say the term "discernable wind
23 damage," but we have taken it upon ourselves to go beyond
24 the surge exclusion, and if we can find it - - and it even
25 says it in this activity log that we will make that

0024

1 payment.
2 Q. So what you do is, once you find there was surge,
3 you pay nothing unless you find discernable wind; correct?
4 A. That's correct.
[BLALOCK DEPOSITION– *Broussard* p.23, line 20- p.24, line 4]
(Emphasis added.) *Exhibit A*.

18. State Farm admitted that under an all-risk policy there is no need to find what the wind did, since the only thing that matters is what the water did but State Farm added a requirement for discernable wind damage before it would pay for any wind damage:

0022

1 Q. You keep saying, "We went beyond that;" you
2 really didn't go as far as that. What you did, didn't you,
3 is risk (sic) [reach] the conclusion that if surge was there, we don't
4 pay unless there is discernable wind proof; isn't that what
5 you did?

6 A. Yes. But then we went beyond that to say we
7 would look for further information or credible information
8 that we could find that supported if wind had damaged it,
9 and if we had found - - if we had found - - Let me answer.

10 Q. I'm not stopping - -

11 A. You're shaking your head like I didn't say that.

12 Q. No. No, I wasn't shaking because you didn't say
13 it. Go ahead.

14 A. Well, you go ahead.

15 Q. I was just going to say, when it's an all risk
16 policy, there's no need for you to find what wind did; the
17 only thing that matters is what water did, isn't it?

18 A. It is as far as the exclusion applies, but we
19 went beyond that to say, "We're not going to rely just on
20 that to not pay a claim. We're going to go beyond that and
21 make a wind payment if we can discern what the wind
22 damaged.

23 Q. But wait a minute. You're not going beyond that;
24 you're putting an additional requirement. Instead of
25 starting and saying "We owe it because it's all risk unless

0023

1 we can establish water," you're saying, "We don't owe it if
2 it was water unless we can find some wind;" isn't that what

3 you're doing?

4 A. No.

5 Q. Okay. Tell me what you're doing, then.

6 A. We're saying it's accidental direct physical loss
7 is what they turned it in as - -

8 Q. So it's owed.

9 A. - - unless otherwise excluded. That's what the
10 policy says.

11 Q. All right. And so now all you need to do is find
12 out if any water caused damage, correct? That's all you
13 need to do.

14 A. That's what I said. We need to determine if the
15 surge caused the damage, then that exclusion would apply
16 and it wouldn't be covered.

[BLALOCK DEPOSITION– *Broussard* p.22, line 1- p.23, line 16] *Exhibit A.*

19. State Farm stated that there had to be isolated wind damage for a claim to be paid:

0049

20 Q. Okay. Now I didn't see in your statements to the
21 paper or here in your statements concerning the memo that
22 State Farm sent out that the investigation had to reveal
23 isolated wind damage for there to be a payment for wind
24 damage. Does the investigation have to reveal isolated
25 wind damage for there to be a payment for wind damage?

0050

1 A. Yes, there has to be credible information of
2 discernable wind damage. I think that's what it did say.
3 But we will still look to see if we can find discernable
4 wind damage or credible evidence that wind damaged the
5 home. That's what the article says.

6 Q. Right - -

7 A. And that's - -

8 Q. - - but it doesn't say isolated wind damage, does
9 it?

10 A. Okay, it says - - it doesn't say isolated, no.

[BLALOCK DEPOSITION– *Tejedor* p.49, line 20- p.50, line 10] *Exhibit B.*

20. State Farm then stated that the wind did not really have to be isolated because that was no different than discernable wind damage:

0050

11 Q. Is there a difference, in your mind as State
12 Farm, or is there a difference in the State Farm memo?

13 A. I don't see the difference in any of it.

14 Q. So you don't really have to have isolated wind
15 damage as long as you have discernable wind damage; is that
16 correct?

17 A. Substantiated, measurable, something - - credible
18 information about wind damage.

[BLALOCK DEPOSITION— *Tejedor* p.50, lines 11- 18] *Exhibit B.*

21. State Farm refuses to pay for wind damage and has continued in this refusal even when there was wind damage unless it found “discernable” wind damage even though a requirement for discernable wind damage was not in the policy language:

0054

21 Q. To the date of this deposition, you all do not
22 agree that any wind damage was suffered by the Tejedor,
23 Dr. Tejedor; is that correct? To the date of this
24 deposition, you have not agreed that yes there was some
25 wind damage, have you?

0055

1 A. We have never said there was no wind damage.
2 We've said there is no discernable wind damage. Nothing we
3 could measure, nothing we could substantiate. And this is
4 new information that has been developed recently.

5 Q. Can you show me in Exhibit 2 where it requires
6 discernable wind damage?

7 A. I'm telling you the way we applied this policy
8 language here. That's the way we applied it.

9 Q. Okay. In applying it, can you look in the policy
10 itself, the language that we've been looking at and can you
11 find a requirement that there be discernable wind damage
12 before you have to pay for wind damage?

13 A. I'm just telling you the way that we applied it
14 in this case and in all the cases.

15 Q. Can you find it by looking? Can you find the
16 word discernable wind damage - -

17 A. Discernable - - the word discernable is not in
18 there.

19 Q. Okay. But y'all decided to use this word

20 "discernable" even though it's not in your policy; correct?
21 A. We handled all our cases and looked into all the
22 information, and to the extent that we could find the
23 discernable wind damage, distinguishable, substantiated
24 wind damage, we paid for it.
25 Q. And you required discernable, substantiated and
0056
1 whatever the other word you used, before you paid for wind
2 damage even though none of that language is in your
3 policy.
4 A. That specific word is not in the policy.
5 Q. Are any of those words? Substantiated; is that
6 in there?
7 A. No, the word substantiated is not in there.

[BLALOCK DEPOSITION– *Tejedor* p.54, line 21- p.56, line 7] (Emphasis added.) *Exhibit B.*

22. State Farm received an engineer's report stating that Plaintiffs' residence did experience wind damage to the roof before water arrived, but State Farm has not paid for that wind damage.

[Defendant's *Exhibit 3*]

23. State Farm's procedure, applied to a slab, resulted in no payment:

0021
15 Q. What if there is just a slab left, then in what
16 way could you determine what damage the wind did?
17 A. Well then, if there was nothing there to measure
18 or no credible information or no discernable wind damage,
19 nothing to measure, nothing that physically supported wind
20 damage that we could discern, then the storm - - the storm
21 surge exclusion would be what applied in that situation,
22 and we would deny that portion of the claim based on storm
23 surge.

[BLALOCK DEPOSITION– *Tejedor* p.21, lines 15-23] *Exhibit B.*

LAW

Failure to pay a claim for a sufficient period of time constitutes a bad faith denial

of that claim. See, *Bankers Life and Cas. Co. v. Crenshaw*, 483 So2d 254, 276 (Miss.1986):

[A]n insurance company has a duty to the insured to make a reasonably prompt investigation of all relevant facts. It has a further duty, after an adequate investigation and a realistic evaluation of the claim, to tell the insured, its customer, the plain truth. And, if the insurance company cannot give its insured a valid reason for denying the claim, it has a final duty to promptly honor it.

If an insurance company fails to promptly pay a legitimate claim, choosing to attempt to negotiate a settlement for a sum less than the insured's claim and less than the policy coverage, the insurance company is subject to punitive sanctions:

In *Weatherbee*, the insurer withheld payment in order to negotiate a settlement for a sum less than the insured's claim and the policy coverage. *Murphree v. Federal Ins. Co.*, 707 So2d 523, 531 (Miss.1997); [distinguishing *Traveler's Indemnity Corp. v. Weatherbee*, 368 So2d 829 (Miss.1979) from the instant case.]

An insurance company's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for non-payment:

The Circuit Judge never considered Continental's conduct following filing of the Complaint, and here we find he erred. An insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for non-payment. Put more bluntly, if you owe a debt the duty to pay does not end when you are sued for non-payment of it. When suit was filed the Plaintiff should have been informed by Continental, in a manner from which there could be no misunderstanding, that it recognized a sum in some amount was owed from business interruption caused by the damage to Building #1, and Continental was willing to pay whatever was due for this loss.....[S]uit was filed April 7, 1986. No payment was tendered until September 12, 1987, two days before trial. We are left to wonder why the delay?.....[W]e find that Continental owes some explanation for failure to pay the claim after the Complaint was filed, and should have been required to go forward on its proof giving some legitimate or arguable reason for the delay. If the Circuit Judge finds its reasoning insufficient, he should submit the issue of punitive damages for Continental's conduct after suit was filed to the jury. *Gregory v. Continental Ins. Co.*, 575 So2d 534, 541-42 (Miss.1990);

accord, *Odom v. Armed Forces Insurance*, CA 1:05cv669-LTS-RHW (August 31, 2006).

In other words, even if there were an arguable reason for delay at the time suit was filed, that arguable reason for delay does not continue indefinitely:

The fire occurred in the spring of 1986, and according to Lloyd's brief, it appears that the apportionment issue was resolved the first week of September 1986. After that week the reason for refusal to pay the claim is not apparent to us, and despite the language of the contract, and despite the fact that the amount became certain in September 1986, the claim remained unpaid. On September 19, 1986, Harvey-Latham filed suit....., but no tender of payment was made until August 1987, almost a year after the amount due became fixed and ceased to be in question. We find no explanation for this delay in the record or in the briefs of the parties. The case is presented as if Lloyd's believed that the rights of the parties became fixed in the early days of the dispute, and that if there was an arguable reason for delay then it would continue indefinitely, regardless of the changing facts. Clearly, after September 1986, it must have dawned on Lloyd's that it owed Harvey-Latham the money claimed in the suit, and we do not see in this record any justification for failure to pay until August 1987. *Harvey-Latham Real Estate v. Underwriters at Lloyd's, London*, 574 So2d 13, 15 (Miss.1990).

An insurance company has a duty, under Mississippi law, to know and to keep up with Mississippi law. *Richards v. Allstate Ins. Co.*, 693 F.2d 502, 505 (Fifth Cir.1982).

The failure to discharge this duty justifies a punitive award. *Id.*

Mississippi law has long held that a concurrent cause provision does not control a proximate cause analysis:

The rule is well established in this state that where the question presented to the jury was whether the loss was due to windstorm or to water, the entire question of proximate cause is treated as one of fact independent of the explicit application of any rule of law. *Commercial Union Ins. Co. v. Byrne*, 248 So2d, 777 (Miss.1971); *New Hampshire Fire Ins. Co. v. Kochton Plywood & Veneer Co.*, 242 Miss. 169, 134 So2d 735 (1961). It is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss. *Lititz Mut. Ins. Co. v. Boatner*, 254 So2d 765 (Miss.1971); *Kemp v. American Universal Ins. Co.*, 391 F.2d 533 (Fifth Cir.1968).

Grace v. Lititz Mut. Ins. Co., 257 So2d 217, 224 (Miss.1972).
(Emphasis added.)

The failure to promptly pay a legitimate claim if clearly contrary to the policy and/or to Mississippi law is bad faith. *Standard Life of Indiana v. Veal*, 354 So2d 239 (Miss.1978); *Richards v. Allstate Ins. Co.*, 693 F.2d 877 (Fifth Circuit 1983).

ARGUMENT

State Farm has refused to pay any sum for physical loss to Plaintiffs' dwelling, even though all that remained after the hurricane was a slab. Defendant created a procedure which was calculated to and did, in fact, result in non-payment for damages in slab cases. This procedure was clearly contrary to the all risk (direct physical damage) policy. Of course, a denial of a claim clearly contrary to the policy constitutes bad faith. *Standard Life of Indiana v. Veal*, 354 So2d 239 (Miss.1978).

Although Defendant has asserted that it did not rely upon the so-called concurrent cause exclusion and later implied that, in fact, it was that very exclusion that allowed it to set up the procedure it followed in handling these claims, the Mississippi Supreme Court has since 1961 held that the concurrent cause exclusion is invalid. *New Hampshire Fire Ins. Co. v. Kochton Plywood and Veneer Co.*, 242 Miss. 169, 134 So2d 735 (1961). A denial clearly contrary to law also constitutes bad faith. *Richards v. Allstate Ins. Co.*, 693 F.2d 502 (Fifth Circuit 1982).

In the instant case, State Farm knew that the policy in question was a direct physical loss policy, that Hurricane Katrina resulted in direct physical loss to their insureds' property, and that, under the policy, Plaintiffs were entitled to recover unless State Farm could establish that the water damage exclusion had factual application to

the case. In other words, State Farm knew it had to sustain the burden of proving that any damage it failed to pay for was proximately caused by water.

Although State Farm first stated that it did not deny any claim based on the concurrent cause exclusion, its actions in requiring discernable wind damage could only be logically based upon the so-called concurrent cause exclusion. State Farm, apparently, recognizing that that exclusion is invalid and has been ruled invalid on the proximate cause issue for many years, now takes the position that it did not, in fact, rely upon that exclusion. The facts suggest that it did and that it now refuses to admit that it did in an attempt to avoid punitive sanctions.

Significantly, if State Farm did not rely upon the concurrent cause exclusion, it had absolutely no basis in the policy to develop and apply the procedure it did— we pay for no damage if surge is found unless we also find, at the site, discernable wind damage.

Even if State Farm's procedural bad faith, being clearly contrary to its own policy and to Mississippi law, were not enough to establish State Farm's liability for punitive damages, State Farm's failure to promptly pay for wind damage its own engineering expert said had occurred also constitutes bad faith. *Odom v. Armed Forces Insurance*, CA 1:05cv669-LTS-RHW (August 31, 2006).

CONCLUSION

For these reasons and for the reasons set forth in Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment as to Fiduciary Duty and Punitive Damages and Extra Contractual Damages Claims, it is respectfully submitted that State Farm's Motion for Partial Summary Judgment on Punitive Damages and Extra

Contractual Damages Claims should be denied.

RESPECTFULLY SUBMITTED, this the 8th day of September, 2006.

NORMAN J. BROUSSARD and
GENEVIEVE BROUSSARD
Plaintiffs

BY: s/William C. Walker, Jr.
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CERTIFICATE OF SERVICE

I, WILLIAM C. WALKER, JR., attorney of record for the Plaintiffs, do hereby certify that I have electronically filed the foregoing pleading to the Clerk of the Court using the ECF system which sent notification of such filing to: John Scott Corlew, Esquire and John A. Banahan, Esquire.

This the 8th day of September, 2006.

s/William C. Walker, Jr.
WILLIAM C. WALKER, JR.