

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

REGINALD EDWIN BOSSIER,

Plaintiff,

v.

STATE FARM FIRE AND CASUALTY
COMPANY,

Defendant.

No.: 1:08-CV-00408-LTS-RHW

**STATE FARM FIRE AND CASUALTY COMPANY'S MOTION *IN LIMINE* NO. 7:
TO PRECLUDE TESTIMONY OR EVIDENCE RELATING TO INTERPRETATION OF
INSURANCE POLICY PROVISIONS OR PRINCIPLES OF MISSISSIPPI LAW AND TO
EXCLUDE THE WIND WATER CLAIM HANDLING PROTOCOL**

State Farm Fire and Casualty Company ("State Farm") moves this Court for an *in limine* order excluding any evidence, testimony, or argument relating or referring to the meaning or interpretation of any provision in the homeowners policy issued by State Farm to Plaintiff or to the interpretation of principles of Mississippi law and excluding the Wind Water Claims Handling Protocol.¹

I. Introduction

State Farm anticipates that Plaintiff may attempt to introduce testimony and/or evidence that purports to establish Plaintiff's view of the proper interpretation of the relevant policy language and its application to the facts of this case, including such issues as the enforceability and effect of the anti-concurrent cause lead-in provision to the water damage exclusion, and other pertinent policy provisions, as well as principles of Mississippi insurance law and tort law. All such testimony must be excluded because it would violate well-

¹ No separate memorandum in support is filed with this motion as the motion speaks for itself, and all relevant authorities are cited therein.

established Mississippi law holding that testimony of this kind constitutes a legal conclusion and as such is inadmissible.

Furthermore, State Farm anticipates that Plaintiff may attempt to introduce testimony and/or evidence regarding a State Farm document known as the Wind Water Claim Handling Protocol. *See* Wind Water Claims Handling Protocol (attached as Ex. A). That document, however, should not be used for any purpose during the trial of Plaintiff's claims. First, the document should not be used during the coverage phase of trial because how an adjuster investigates a claim has no bearing on what damage wind or flood caused to Plaintiff's property or on whether those damages qualify for coverage under the plain terms of the homeowners policy. Second, the document is also inadmissible during the later phase of trial (if any) involving claims for extra-contractual and punitive damages because (1) introducing the protocol would inject unfair prejudice against State Farm and needlessly confuse the jury by introducing a purported investigatory process alongside the controlling Mississippi investigatory standard beyond the ability of any instruction by the Court to cure and (2) the document does not evidence bad faith or other culpable conduct. Accordingly, the Court should issue an order *in limine* excluding the Wind Water Claims Handling Protocol.

III. Testimony on Legal Issues Is Inadmissible

In earlier Hurricane Katrina cases, this Court has agreed that:

[I]ndependent expert testimony concerning the interpretation of policy provisions is not appropriate. The interpretation of policy provisions is an issue of law and is within the province of the Court, not the jury.

Tejedor v. State Farm Fire & Casualty Co., 2007 WL 162180, *1 (S.D. Miss. Jan. 16, 2007); *accord Payment*, 2008 WL 5381925, at *3.² State Farm respectfully submits that this Court should follow its earlier

² *See also Huynh v. State Farm Fire & Cas. Co.*, No. 1:06cv1061-LTS-RHW, Order at 1 (S.D. Miss. Jan. 7, 2008) [*Huynh* Doc. 166]; *Killeen v. State Farm Fire & Casualty Co.*, 2007 WL 1725428 (S.D. Miss. June 12, 2007). The

rulings and exclude in this case all testimony, expert or otherwise, purporting to interpret the policy provisions at issue in this case. Plaintiff may attempt to offer such evidence in this case. But all such evidence and testimony on the meaning of Plaintiff's homeowners policy should be excluded because it is purely a question of law and would invade the province of this Court. It necessarily follows from this principle that Plaintiff's witnesses should also be precluded from testifying that State Farm's Wind Water Claim Handling protocol is contrary to the provisions of State Farm's policy, as such testimony would necessarily require a legal opinion as to the interpretation of the policy provisions.

III. Evidence of State Farm's Claim Handling Guidelines or Procedures Is Not Admissible for Plaintiff's Coverage Claim

State Farm anticipates that Plaintiff may incorrectly argue that evidence of claim handling guidelines or procedures might be relevant or admissible on the question of coverage. The question of coverage is to be decided according to what forces caused damage to Plaintiff's property and whether that damage is covered by the language of the policy. Any claim handling guidelines or procedures that State Farm may have used in adjusting or handling Plaintiff's claim shed no light on either of these questions. These materials are,

Court's ruling in *Tejedor, Killeen* and other cases on this question is consistent with federal law on the issue. *See, e.g., BG Real Estate Servs., Inc. v. Monticello Ins. Co.*, 2006 WL 461706, at * 3 (E.D. La. Feb. 27, 2006) ("Testimony by an expert that requires him to construe an insurance contract usurps the function of the Court, and is therefore inadmissible"; court would thus not consider expert's opinion that insurers did not have right under liability policy to settle underlying action against insured); *Young v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 33537177, at * 2 (N.D. Miss. Feb. 16, 1999) (striking expert's affidavit opining that insured's daughter "was covered under the automobile insurance policy and the defendants had no arguable basis to deny coverage [because such opinion] is merely a conclusion of law [and thus] is inadmissible"); *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 421 (W.D. Pa. 2006) (excluding testimony from plaintiff's expert "as to his opinions on the application of the [first-party] insurance policy to [plaintiff's] loss"; expert's "opinion on the issue of contract construction would not assist the jury in understanding coverage, are based solely on [expert's] subjective interpretation of the policy language, and are impermissible legal conclusions"); *Breezy Point Coop., Inc. v. Cigna Prop. & Cas. Co.*, 868 F. Supp. 33, 36 (E.D.N.Y. 1994) (excluding expert testimony as to whether insured violated policy's timely notice requirement because the proffered testimony "requires [the expert] to construe provisions of the insurance contract and thus contains inadmissible legal opinions as to the meaning of the contract terms at issue. Moreover, . . . [the expert] necessarily will

therefore, irrelevant to the coverage issues before the Court and jury and may not be admitted into evidence for purposes of determining coverage. *See, e.g., Hartford Underwriters v. Williams*, 936 So. 2d 888, 897 (Miss. 2006).

To the extent State Farm's claim handling guidelines or procedures have any potential relevance here, it is only with respect to Plaintiff's claims for extra-contractual and punitive damages. Accordingly, this evidence may be admitted (if at all) only if the trial proceeds to those separate issues. As the Mississippi Supreme Court held in *Williams*, 936 So. 2d at 896-97 (emphasis added):

[O]ur punitive damages statute mandates that *all* evidence regarding the punitive damages issue be tried in a separate evidentiary hearing before the same trier of fact, if but only if, the jury has awarded some measure of compensatory damages. As such, the clear intent of the legislature was to *prevent issue confusion and to create a barrier between testimony regarding the fundamental issue of liability and the inflammatory issue of egregious conduct*. . . . [O]nly if the jury has determined that compensatory damages are appropriate, may the jury hear the evidence concerning the issue of punitive damages.

The Mississippi Supreme Court held in *Williams* that the trial court committed reversible error by failing to separate both the evidence and the issues related to insurance coverage from the evidence and the issues related to claims handling:

By allowing all issues to be tried in a single phase of the trial, the trial court allowed the jury to hear inflammatory evidence regarding alleged abuses committed by Hartford in handling and ultimately denying Williams's UM claim. Moreover, Williams had the benefit of introducing evidence of the manner in which Hartford handled her claim instead of focusing on the simple issue of whether Hartford breached the parties' insurance contract.

Id. at 897.

The heightened risk of unfair prejudice and issue confusion that moved the Supreme Court in *Williams* to require a wall of separation between the issues and evidence of coverage and the issues and

offer *his* version of what New York law requires or prohibits [and thus] clearly invades the Court's domain" (emphasis added).

evidence of claims handling are also heightened risks that are present in this case. To divert the jury's attention from coverage matters – evidence regarding what forces caused Plaintiff's damages and whether those damages are covered – to how State Farm adjusted Plaintiff's claim would be manifestly improper under *Williams*. Plaintiff would thereby be permitted to commingle the issues of coverage and punitive damages, which, under *Williams*, must be strictly separate. *See also Bradfield v. Schwartz*, 936 So. 2d 931, 938 (Miss. 2006) ("If punitive damages are indeed to be awarded within the limitations prescribed by [the punitive damages] statute, then evidence which does not pertain to compensating the plaintiff but only pertains to proof that a punitive damage award is appropriate, should not be heard until liability has been determined."); *Bridges v. Enter. Prods. Co.*, 2007 WL 571074, at *3 (S.D. Miss. Feb. 20, 2007) (excluding evidence relevant only to punitive damages from liability and compensatory damages portion of trial); *Beck v. Koppers, Inc.*, 2006 WL 2228876, at *1 (N.D. Miss. Apr. 3, 2006) (noting that "the court will not admit evidence during the first stage of the trial that is only relevant to punitive damages").

For these reasons, the Court should rule that claim handling guidelines and procedures, including the Wind Water Claims Handling Protocol, cannot be used for any purpose in the coverage phase of trial.

IV. State Farm's Wind Water Claim Handling Protocol Is Not Admissible for Any Purpose

A. Plaintiff Cannot Supplant the Standard for a Reasonable Claims Investigation Under Mississippi Law

In addition to its inadmissibility during the coverage phase of trial, the Wind Water Claims Handling Protocol is also inadmissible during the later phase of trial (if any) involving claims for extra-contractual and punitive damages. It is anticipated that Plaintiff will attempt to introduce the document as the stand-alone criterion for whether State Farm's investigation was reasonable. But the controlling standard for whether an insurer's claims investigation was reasonable is set by Mississippi law, not by State Farm. *See, e.g.*,

Broussard v. State Farm Fire & Casualty Co. 523 F.3d 618, 627-28 (5th Cir. 2008); *see also Garvey v. Nat'l Grange Mut. Ins. Co.*, 167 F.R.D. 391, 396 (E.D. Pa. 1996) (Pennsylvania law) ("Moreover, the fact that the defendant may have strayed from its internal procedures does not establish bad faith on the part of the defendant in handling the plaintiff's loss...."); *Thorsen v. Farmer's Ins. Exch.*, Cause No. DV 97-428 & Cause No. DV 98-372, 2001 Mont. Dist. LEXIS 2810, at *8-9 (Mont. Dist. Ct. May 25, 2001) (granting insurer's motion in limine to exclude claims manuals because "an insurer's non-compliance with internal procedures is not evidence of bad faith" and "claims manuals are therefore irrelevant to the issue of whether coverage should have been extended").

The Mississippi Supreme Court has clearly set forth the governing standard for a reasonable claims investigation, and that standard controls, not the Wind Water Claims Handling Protocol: insurers "are simply required to perform a prompt and adequate investigation and make a reasonable, good faith decision based on that investigation." *Liberty Mut. Ins. Co. v. McKneely*, 862 So. 2d 530, 535 (Miss. 2003). "To qualify for punitive damages for negligent claim investigation," Plaintiff bears the burden of proving "that a proper investigation by the insurer would easily adduce evidence showing its defenses to be without merit." *Broussard*, 523 F.3d at 630. To be sure, in *Broussard*, the Fifth Circuit reversed a punitive damage award against State Farm that was partially based on admitting the Wind Water Claims Handling Protocol. *See id.* at 630.

Plaintiff cannot supplant the controlling legal standard with one of his own. To permit Plaintiff to introduce the Wind Water Claims Handling Protocol as the criterion for State Farm's claims investigation would only create a conflict between controlling Mississippi law and Plaintiff's standard for a reasonable claims investigation. Not only does Plaintiff lose that argument, *see id.*, such a conflict would needlessly

confuse the issues and mislead the jury, *see* Fed. R. Evid. 403, beyond the power of any jury instruction to reasonably or actually cure.

B. The Wind Water Claims Handling Protocol Is, as a Matter of Law, Not Probative of Bad Faith

In any event, the Wind Water Claims Handling Protocol correctly reflects Mississippi law and is, therefore, not probative of Plaintiff's bad faith claim. Proffered evidence that is not probative of a material issue in the case is not admissible. Fed. R. Evid. 401-402. The Fifth Circuit has endorsed the principles in the Wind Water Claims Handling Protocol and reversed judgment where punitive damage awards were partially based on the document. That document was designated merely as a tool for handling various wind and/or water claims. The document merely counsels that each claim should be handled on its merits, that a causation investigation should be conducted in each case, and that the adjuster should document evidence of wind and/or water damage. *See* Ex. A. It recommends that adjusters consider "any available information" in making their coverage determinations, including, among other things, evidence gathered at the inspection; documentation of any available physical evidence such as water lines, debris, and physical damage to the structure; evidence gathered at neighboring locations, if any; data obtained from reports describing damage to the area; information from any witnesses and policyholders; and input from any experts retained to provide guidance. *Id.* By implication, if the information were not "available," it need not have been (and could not have been) considered. *Id.*

In addition to the available steps an adjuster may take, the document also sets forth the following categories of damage: (i) damage to the property caused by wind (covered); (ii) damage to separate portions of the property that can be attributed to either wind (covered) or water (excluded); (iii) damage to the property caused by excluded water, with no available coverage; and (iv) damage to the property caused by

floodwaters and covered by an available flood policy, *id.*, all of which closely accords with the Fifth Circuit's construction of anti-concurrent cause clauses and water damage exclusions. *Leonard v. Nationwide*, 499 F.3d 419, 430 (5th Cir. 2007).

The Fifth Circuit's decisions in *Tuepker*, 507 F.3d at 346, and *Leonard*, 499 F.3d at 419, both endorse the principles set forth in the Wind Water Claims Handling Protocol. The Fifth Circuit held that "damage caused *exclusively* by a nonexcluded peril or event, such as wind, not concurrently or sequentially with water damage, is covered by the policy while all damage caused by water or by wind acting concurrently or sequentially with water, is excluded." *Tuepker*, 507 F.3d at 354 (emphasis in original); *see also Leonard*, 499 F.3d at 430 ("The only species of damage covered under the policy is damaged caused *exclusively* by wind.") (emphasis in original). The Fifth Circuit also held that "the ACC [anti-concurrent cause] Clause in combination with the Water Damage Exclusion clearly provides that indivisible damage caused by both excluded perils and covered perils or other causes is not covered." *Tuepker*, 507 F.3d at 354. The Wind Water Claims Handling Protocol, which states that there is coverage where there is only wind damage or where there is independently distinguishable wind damage to separate portions of the property, closely parallels the Fifth Circuit's holdings in *Tuepker* and *Leonard* that only damage caused "exclusively" by wind is covered. As such, because the Fifth Circuit has endorsed the very principles contained in the Wind Water Claims Handling Protocol related to Katrina claim handling, the use of that document with respect to Plaintiff's punitive damages claim would be inappropriate and should be prohibited by *in limine* order. *See Broussard*, 523 F.3d at 630 ("State Farm cannot be liable for punitive damages solely for relying on a legally valid and enforceable clause in its insurance contract."). Any attempt to base a punitive damage claim on the Wind Water Claim Handling Protocol is foreclosed by *Broussard*, *Tuepker*, and *Leonard*.

V. Conclusion

Accordingly, State Farm respectfully requests that this Court enter an *in limine* order precluding Plaintiff and his counsel from introducing testimony or evidence as to the meaning and interpretation of State Farm's policy provisions or as to principles of Mississippi insurance law. State Farm requests that the Court extend this order to any guidelines or procedures for claims handling, which are not relevant to coverage issues. *See* State Farm's Motion *in Limine* No. 1. State Farm requests that the Court rule that the Wind Water Claim Handling Protocol is (i) inadmissible during the coverage phase of trial because it is not relevant to Plaintiff's breach of contract claim and is (ii) inadmissible during further phases of trial because it is not probative of bad faith or punitive or extra-contractual damages as a matter of law and would only cause substantial unfair prejudice to State Farm, confusions of the issues, and mislead the jury.

Dated: October 1, 2009

Respectfully submitted,

/s/ H. Benjamin Mullen

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CERTIFICATE OF SERVICE

I, **H. BENJAMIN MULLEN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have on this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED, October 1, 2009.

/s/ H. Benjamin Mullen
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Date: September 13, 2005
To: State Farm Claim Associates handling CAT PL in the Central and Southern Zones
From: Property and Casualty Claim Consulting Services
Subject: Wind/Water Claim Handling Protocol

*****ACTION REQUIRED*****

Summary

Because of the combination of wind and water damages many homes sustained from Hurricane Katrina, the following materials have been developed and are intended for use as a guide for handling various wind and/or water claims in Louisiana, Mississippi and Alabama.

Action

The protocol below outlines the process that should be used for determination of coverage in those locations.

Protocol Detail

Each claim should be handled on its merits. A causation investigation should be conducted and appropriate claim file documentation is required. Any available information should be considered in making a coverage determination. This information will include, but is not limited to:

- Evidence gathered at the on site inspection. This includes documentation of physical evidence such as water lines, an examination of the debris, and an analysis of the physical damage to the structure.
- Evidence gathered at neighboring locations.
- Data obtained from reports describing damage to the area.
- Information from witnesses and policyholders.
- Input from experts that may be retained to provide guidance.

The damage to insured properties will fall into the following categories and should be handled as detailed below:

- Damage to the property was caused by windstorm.
- Damage to separate portions of the property can be attributed to either windstorm or excluded water.
- Damage to the property was caused by excluded water; with no available coverage.
- Damage to the property was caused by flood waters; covered by an available flood policy.

Damage Caused by Windstorm

When the investigation indicates that the damage was caused by windstorm, the claim will be handled under the applicable provisions of the involved property policy. Consideration should be given to determine if a hurricane deductible or a windstorm or hail exclusion endorsement is involved and the claim handled accordingly.

Damage to Separate Portions with Distinguishable Wind or Excluded Water

Each type of damage should be documented in the claim file. The claim representative should calculate the separate damage attributable to each peril and handle the adjustment accordingly. In those cases where the policyholder has policies for both a windstorm and a flood, payments should be issued under the applicable policy.

Damage Caused by Excluded Water

When the investigation indicates that the damage was caused by excluded water and the claim investigation does not reveal independent windstorm damage to separate portions of the property, there is no coverage available under the homeowners policy pursuant to the following language in *Section 1 Losses Not Insured*:

"2. 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 to 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 . . ."

Other Losses Not Insured may be applicable, including 2.c.(2) & (3), 3.(a), (b) & (c).

Damage to Property Caused by Flood Waters with available Flood Policy

Where wind acts concurrently with flooding to cause damage to the insured property, coverage for the loss exists only under flood coverage, if available. The flood damage claim should be handled consistent with the terms of the flood policy providing coverage as outlined in Operation Guide 71-06.

Claims where the causation investigation is ongoing

Payment can be made under a reservation of rights for ALE or Loss of Income under the property policy until the final coverage decision is made. The policyholder should be advised in writing that:

- The investigation is ongoing.
- No coverage decision has been made.
- In the event it is determined that there is no covered damage, no further payment will be made on ALE or Loss of Income.
- They may undertake an independent investigation.

All claims in this category must be reviewed by the Claim Team Manager before a final decision is made. Management should be involved in any claim where it is deemed necessary to retain an expert to assist in the determination of causation.

For More Information

Any question on this protocol should be directed to your Claim Team Manager.

- C. P & C Claims Executive
 - Southern Zone Executive & Claim Managers
 - Central Zone Executive & Claim Managers
 - P & C Claims Directors and Consultants
 - Catastrophe Services Claim Managers
 - Catastrophe Services Section & Team Managers
 - Zone Section Managers