

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

LYDIA D. SCHULTZ,
Plaintiff,

CASE NO.: 1:06cv449LTS-RHW

vs.

STATE FARM FIRE &
CASUALTY COMPANY,
Defendant,

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO
DEFENDANT'S LIABILITY UNDER THE POLICY'S ADDITIONAL
COVERAGE FOR "COLLAPSE"**

Plaintiff, Lydia D. Schultz ("Ms. Schultz"), pursuant to Fed. R. Civ. P. 56, hereby files this Motion for Partial Summary Judgment¹ as to Defendant's, STATE FARM FIRE & CASUALTY COMPANY ("State Farm"), Liability Under the Policy's Additional Coverage for "Collapse". For the following reasons, the matters of record, including the pleadings, discovery and other related documents, demonstrate that there is no genuine issue of material fact, and the Plaintiff is entitled to a partial summary judgment as matter of law that she is entitled to policy benefits under the additional coverage for "collapse", with no deduction or offset for "water damage".

UNDISPUTED FACTUAL BACKGROUND

Ms. Schultz's home, located at 1011 Breeden Place in Bay St. Louis, Mississippi, was completely destroyed by Hurricane Katrina. At that time, State Farm's policyholder

¹ Since the Motion cites supporting legal authorities, no separate memorandum is file.

had in effect an all risk homeowner's policy issued by State Farm with the following policy limits:²

| | |
|--------------------------------------|------------------------------|
| Coverage A: Dwelling | \$182,500 |
| Dwelling Extension | \$ 18,250 |
| Coverage B: Personal Property | \$136,875 |
| Coverage C: Loss | Actual Loss Sustained |
| Increased Dwelling Coverage | \$ 36,500 |

A copy of the State Farm policy is attached as Exhibits "A".

After Ms. Schultz's insured property was totally destroyed by the hurricane, she presented a claim to State Farm, and State Farm sent a representative to view the property. State Farm has refused to pay Schultz the benefits of her homeowner's policy and has no arguable reason for denying those benefits.

State Farm's denial of Ms. Schultz's claims following the storm was based on a cursory review of the insured properties, and was based on the so-called "anti-concurrent causation" clause and "water damage" exclusion of its policy. When State Farm denied coverage for Ms. Schultz's losses, she filed the instant lawsuit to recover damages, claiming a breach of the insurance contract, among other related causes of action.

An estimate of the replacement cost for the Schultz property has been prepared on Ms. Schultz's behalf. A copy of that estimate is attached as Exhibits "B". According to the estimates, the total replacement cost for the Schultz property is \$311,201.68.

During the course of litigation in another Hurricane Katrina lawsuit against State Farm, this insurer's claim consultant for the Southern Zone, Stephan Hinkle, was

² These limits may or may not reflect adjustment for inflation protection, and have been taken from documents provided to Ms. Schultz by State Farm. State Farm's corporate representative, Lansing Vargo, also validated that adjustments are made as part of the inflation guard. (30(b)(6) Deposition of State Farm, Dec. 4, 2006, taken in Chapoton v. State Farm, cause No 1:06cv471-LTS-RHW at p. 132-33 attached hereto as Exhibit "C").

deposed. (See Deposition of Stephan Hinkle, March 16, 2007, taken in *Illing v. State Farm Fire & Cas. Co.*, No. 1:06 cv 513-LTS-RHW (S.D. Miss.), which is attached as Exhibit “D”). Mr. Hinkle conceded in his deposition that the State Farm homeowners policy form provides an additional coverage for “collapse” caused by “windstorm”. (See Hinkle Deposition, pp. 150-51.) Mr. Hinkle also conceded that State Farm’s policies and procedures consider “windstorm” and “wind” to be two different things. (See Hinkle Deposition, pp. 146-47). In addition, according to Mr. Hinkle, a common term for “windstorm” is “hurricane”, such as Hurricane Katrina. (See Hinkle Deposition, pp. 146-47.)

In other Katrina litigation, State Farm has previously stipulated that Hurricane Katrina is a “windstorm”. See *Broussard v. State Farm Fire & Cas. Co.*, 1:06cv6-LTS-RHW (S.D. Miss. Jan. 11, 2007) (opinion on Rule 50 motions for judgment as a matter of law).

During the litigation, Forrest Masters, (“Masters”) an engineering expert for State Farm, was deposed. During the deposition, Masters admitted that during his site visit, there was not much information to work with in attempting to determine damage to the residence caused by wind. (Please see Excerpts of the Deposition of Forrest Masters, Page 117:17-24, which is attached as Exhibit “E”.) Therefore, he used aerial imagery to look at the state of damage to other structures above and below the surge rack line. *Id.* Masters resorts to aerial imagery of surrounding structures to make a “reasonable estimate” on “what happened.” *Id.* Further, Masters admitted that he had insufficient data to determine the amount of damage to the Schultz residence that was caused by wind

driven rain. (Please see Excerpts of the Deposition of Forrest Masters, Page 147:18-23, which is attached as Exhibit “E”.)

THE POLICY

The State Farm policy contains the following pertinent terms and conditions:

SECTION I – COVERAGES

COVERAGE A – DWELLING

- 1. Dwelling. We cover the dwelling used principally as a private residence on the residence premises shown on the declarations.

* * *

- 2. Dwelling Extension. We cover other structures on the residence premises, separated from the dwelling by clear space.

* * *

SECTION I – ADDITIONAL COVERAGES

* * *

- 11. Collapse.** We insure only for direct physical loss to covered property involving the sudden, entire collapse of a building or any part of a building.

Collapse means actually fallen down or fallen into pieces. It does not include settling, cracking, shrinking, bulging, expansion, sagging or bowing.

The collapse must be directly and immediately caused only by one or more of the following:

- a. perils described in **SECTION I – LOSSES INSURED, COVERAGE B – PERSONAL PROPERTY.** These perils apply to covered building and personal property for loss insured by this Additional Coverage;

* * *

SECTION I - LOSSES INSURED

COVERAGE A - DWELLING

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in **SECTION I - LOSSES NOT INSURED.**

COVERAGE B – PERSONAL PROPERTY

We insure for accidental direct physical loss to property described in Coverage B caused by the following perils, except as provided in **SECTION I – LOSSES NOT INSURED:**

* * *

- 2. **Windstorm or hail.** This peril does not include loss to property contained in a building caused by rain, snow, sleet, sand or dust. This limitation does not apply when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

* * *

SECTION I - LOSSES NOT INSURED

- 1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss 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:
 - a. Collapse, except as specifically provided in **SECTION I ADDITIONAL COVERAGES**, Collapse.

* * *

- 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 events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the excluded event; 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;

* * *

3. We do not insure under any coverage for any loss consisting of one or more of the items listed below. Further, we do not insure for loss described in paragraphs 1. and 2. immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:

* * *

c. weather conditions

However, we do insure for any resulting loss from items a., b., and c. unless the resulting loss is itself a Loss Not Insured by this Section.

* * *

ARGUMENT

Pursuant to Fed. R. Civ. P. 56, Ms. C bears the burden of proving the nonexistence of an issue of material fact, and that she is entitled to a judgment as a matter of law. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Mississippi Rules of Policy Construction Govern this Issue.

Importantly, insurers sell standardized insurance policy forms, and the ability of a potential policyholder to negotiate the policy's terms or to comparison shop for an insurance policy is unrealistic in today's marketplace. Because of the complex nature of the business of insurance, and in order to protect policyholders and create consistency,

courts utilize recognized rules of policy construction in their dealings with insurance policy litigation.

Mississippi courts view insurance policies as contracts of adhesion and therefore understand that the protection of the policyholder is paramount. *See, e.g., Lewis v. Allstate Ins. Co.*, 730 So. 2d 65 (Miss. 1998).

It is a matter almost of common knowledge that a very small percentage of policyholders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous and in their numerous conditions and stipulations furnishing what may be veritable traps for the unwary. Courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent.

Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1188-89 (Miss. 1990) (citations omitted). Thus, courts in Mississippi utilize rules of policy construction to protect the weaker policyholder from overreaching by the stronger insurer. Jeffrey Jackson, *Mississippi Insurance Law and Practice, Mississippi Practice Series* § 1:3 (Thomson/West 2006).

Tuepker v. State Farm Fire and Casualty Company, 2006 U.S. Dist. LEXIS 34710 (S.D. Miss. May 24, 2006), explained that the interpretation of an insurance policy is a question of law, since an insurance policy is considered a written contract. If an insurance policy is clear and unambiguous, the policy's meaning and effect is a matter of law which is to be determined by the court. *See, e.g., Overstreet v. Allstate Ins. Co.*, 474 So. 2d 572, 575 (Miss. 1985). In such a situation, the policy is to be interpreted and enforced as written. *See Jackson v. Daley*, 739 So. 2d 1031, 1041 (Miss. 1999); *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985).

Only if language in a policy is deemed ambiguous are rules of construction employed or extrinsic evidence introduced. *See, e.g., Burton v. Choctaw County*, 730 So. 2d 1 (Miss. 1997). Policy language will be found ambiguous if it is reasonably susceptible to more than one interpretation. *See Universal Underwriters Ins. Co. v. Buddy Ford Lincoln-Mercury, Inc.*, 734 So. 2d 173, 176 (Miss. 1999) (citations omitted).

Where there is doubt as to the meaning of an insurance contract, it is universally construed most strongly against the insurer, and in favor of the insured and a finding of coverage. The basic reason that uncertainty is decided in favor of the insured is that the insurer prepares the policy and should not be allowed by the use of obscure or ambiguous exceptions to defeat the purposes for which the policy was sold. Thus, “in accord with the general standard of giving effect to the purpose of the contract, the rule is that provisos, exceptions, or exemptions, and words of limitation in the nature of an exception, are strictly construed against the insurer, where they are of uncertain import or reasonably susceptible of a double construction.”

Id. at 176-77 (internal citations omitted).

A court is to give ambiguous policy language an interpretation favoring the insured, and an interpretation providing a greater indemnity to the insured should be adopted. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Scitz*, 394 So. 2d 1371, 1372-73 (Miss. 1981). It is for this reason that exclusions are strictly construed against the insurer and in favor of the insured. *Miss. Farm Bureau Mut. Ins. Co. v. Jones*, 743 So. 2d 1203 (Miss. 2000).

Rules of policy construction require a court to look at the policy in its entirety, and ascertain if an ambiguity exists. Mississippi law allows for a finding of ambiguity where two or more policy provisions cannot be reconciled. *See, e.g., Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So. 2d 765, 769 (Miss. 2005). “An insurance contract is to be considered as a whole, and each of its provisions should be given a reasonable

interpretation that is, to the extent possible, consistent with the other terms of the contract.” *Tuepker v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 34710 (S.D. Miss. May 24, 2006), citing *Glantz Contracting Co. v. General Electric Co.*, 379 So. 2d 912 (Miss. 1973). Mississippi law further allows a finding of ambiguity where a policyholder’s objectively reasonable expectations of coverage would be thwarted by a ruling in favor of the insurer. *See, e.g., Brown v. Blue Cross & Blue Shield of Miss.*, 427 So. 2d 139, 141 (Miss. 1983).

The Policy’s “collapse” coverage, which is not limited by the water damage provision of the Losses not Insured section of the Policy, provides coverage for Ms. Schultz’s loss as a matter of law.

Although a loss caused by “collapse” is listed under subsection (1) of “Losses not Insured”, that portion of the Policy tells the insured that coverage will be afforded if the contingencies of the Policy’s additional coverage for “collapse” are triggered. That additional coverage is triggered if the “collapse” involves the sudden entire collapse of a building or a part of a building. The Policy’s “collapse” coverage must also be caused by certain enumerated actions. In this case, it is undisputed that Ms. Schultz’s property was reduced to a slab, or that the insured dwelling sustained a “collapse”, as that term is defined in the Policy. It is also undisputed that the “collapse” of Ms. Schultz’s insured home was caused by one of the required events listed in the Policy, a peril described in Section 1 – Losses Insured, Coverage B – Personal Property. According to the language of the Policy, State Farm’s “collapse” coverage is triggered by a “windstorm”. In this case, the loss was caused by a “windstorm” event, Hurricane Katrina. State Farm’s insured is, therefore, entitled to rely upon the Policy’s additional coverage for “collapse” as an alternative theory under which to obtain policy benefits.

Sadly, in this case, State Farm was too busy looking for ways to deny coverage, and its representatives never even considered the Policy's additional coverage for "collapse" in assessing all available coverages under the Policy. As such, State Farm should not now be able to argue coverage does not exist under this portion of the Policy, as there was no argument prior to litigation that the Policy's "collapse" coverage does not apply to afford coverage for Ms. Schultz's loss. Under the doctrines of waiver, estoppel, and "mend the hold", State Farm cannot assert a new position to save its defense of no coverage under the Policy. As was explained by the United States Supreme Court:

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.

Railway Co. v. McCarthy, 96 U.S. 258, 267-68 (1877).

The "mend the hold" doctrine has especially been found applicable to insurance companies that change their reason for refusing to pay a claim. *See, e.g., Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990); *Heimer v. Travelers Ins. Co.*, 400 So. 2d 771 (Fla. 3d DCA 1981). Courts find that if a carrier had sufficient information at the time of its coverage determination to assert certain positions under the policy, yet did not do so, the carrier may not later assert those positions as defenses to coverage. *Trans Ocean Container Corp. v. Yorkshire Ins. Co., Ltd. "C" Account*, 81 F. Supp. 2d 1340, 1347 (S.D. Fla. 1999).

In this case, it is Ms. Schultz's position that State Farm should not be allowed to rely on any defenses to the Policy's "collapse" additional coverage since State Farm did not raise any such defenses before this litigation was filed. However, should the Court

determine that State Farm is not estopped from attempting to raise exclusions to coverage, then the next question to consider is whether State Farm's "water exclusion" defense can apply to defeat coverage, or if the Policy must be interpreted, as a matter of law, to preclude such reliance. Ms. Schultz's position is that, for several reasons, the Policy's "water damage" exclusionary language cannot apply at all to this additional coverage benefit.

Initially, it is important to note that the "water damage" exclusionary language is found under Subsection (2) of the Policy's Losses not Insured. The introductory language of Subsection (2) contains State Farm's notorious, and so-called, "anti-concurrent causation" clause. Yet if this Court studies the Policy, it will note that the Policy's "collapse" provision is grounded under Subsection (1)'s Losses not Insured language, and the authority to add the coverage back in is found there. As Subsection (1) contains different lead-in language, with a much different level of exclusionary authority, it does not make sense for the Policy's Subsection (2) lead-in language to apply to a "collapse". Essentially, the provisions conflict, creating an ambiguity with respect to the additional "collapse" coverage and, as this Court has already noted, will require a finding that the conflicting language must be read so that it cannot apply against the policyholder. *See, e.g., Tuepker v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 34710 (S.D. Miss. May 24, 2006) (conflicting policy provisions must be construed so as to afford coverage). With such an ambiguity, the Court must rule in favor of the policyholder, and find that the lead-in language of Subsection (2) and its resulting "water exclusion" cannot be used to defeat coverage in any way.

Importantly, the Policy must be read as a whole, and all policy provisions must be harmonized. The additional coverage for “collapse” allows coverage for a “windstorm”, not just for “wind”. Yet, if State Farm is allowed to rely upon either its interpretation of the anti-concurrent causation language, and/or its “water damage” exclusion as applying to the additional “collapse” coverage, the coverage for “windstorm” would be illusory and meaningless. *See Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684 (S.D. Miss. 2006) (explaining that an interpretation that will render a coverage provision illusory would be contrary to Mississippi law). *See also York Ins. Co. v. Williams Seafood of Albany, Inc.*, 544 S.E.2d 156 (Ga. 2001) (explaining, under Georgia law, that an insurer cannot rely upon an exclusion contained in a separate section of the policy as a way to defeat coverage for an additional coverage provision, when the applicability of the exclusion would render the additional coverage meaningless).

Further, in this case, if the “water damage” exclusion and the “anti-concurrent causation” clause were to apply under the circumstances, there would be no need to have the additional coverage for “collapse” caused by “windstorm”. The provision would be meaningless and illusory.

A “windstorm” typically implicates and involves some type of water damage. This Court previously noted that the use of a “hurricane deductible endorsement” creates an ambiguity when it is viewed in the context of the Policy’s “weather exclusion”, since the hurricane itself is a weather condition that would completely relieve State Farm of any coverage obligations if applied as State Farm sought. *See Tuepker supra*. Similarly in this instance, the coverage obligation for “windstorm” creates an ambiguity when looking at the exclusionary language at hand. State Farm chose its words carefully,

recognizing that a “windstorm” is different from “wind”. There is no question that the Policy’s confusing and ambiguous provisions require this Court to find in favor of its policyholder. The policy’s “collapse” coverage cannot allow State Farm to rely upon the limitation contained within the policy’s Losses not Insured section relating to “water”, or the policy’s infamous “anti-concurrent causation” clause. There need be no concern as to what portion of Ms. Schultz’s total loss and collapse involved storm surge or wind. As a matter of law, Ms. Schultz’s total loss is covered under the Policy.

CONCLUSION

Based on the foregoing, Ms. Schultz respectfully requests that the Court grant her motion and enter a partial summary judgment in her favor, finding that State Farm is liable under the Policy’s “collapse” additional coverage, as it is undisputed that Ms. Schultz’s home sustained a total collapse due to a windstorm event, and that the policy’s limitation for water damage does not apply to this additional coverage.

Respectfully submitted this 23rd day of July, 2007.

LYDIA D. SCHULTZ

/s/ Deborah R. Trotter
Deborah R. Trotter, Esquire
MS Bar No.: 101360

Merlin Law Group, P.A.
718 Dunbar Avenue
Suite 1A
Bay St. Louis, MS 39520
Telephone: 228-469-9040
Facsimile: 228-469-9039
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

We, the undersigned counsel, do hereby certify that we on July 23, 2007, we have electronically filed the foregoing with the Clerk of Court of Mississippi, Southern Division via the Courts ECF system, which served a true copy upon the following via the Courts ECF system:

Hickman, Goza & Spragins, PLLC
Post Office Drawer 668
Oxford, MS 38655-0668
(662) 234-4000

SO CERTIFIED, this 23rd day of July, 2007.

/s/ Deborah R. Trotter
DEBORAH R. TROTTER

WILLIAM F. MERLIN, JR. (MSB#102309)
JOHN R. SANTA CRUZ (MSB#8392)
DEBORAH R. TROTTER (MSB#101360)
MERLIN LAW GROUP, P.A.
718 Dunbar Avenue, Suite 1A
Bay St. Louis, Mississippi 39520
Telephone (228) 469-9040
Facsimile (228) 469-9039
Email cmerlin@merlinlawgroup.com
Email rsantacruz@merlinlawgroup.com
Email dtrotter@merlinlawgroup.com
Attorneys for Plaintiff