**IN UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF LOUISIANA**

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| Chauvin, et al. | : | CIVIL ACTION NO.: 05-6454 c/w 06-0177 |
| Plaintiffs | : | JURY TRIAL |
| vs. | : | Section "R" (5) |
| State Farm Fire and Casualty Company, et al. | : | JUDGE SARAH S. VANCE |
| Defendants. | : | |

This document relates to the following civil actions in the Eastern District of Louisiana: Nos. 05-6454, 05-6455, 05-6456, 05-6557, 05-6458, 05-6887, 05-6888, 06-0078, 06-0177, 06-0252, 06-0340, 06-0518, 06-0558; 06-0559, 06-0560, 06-0561, 06-0596, 06-0813, 06-0830, 06-0831, 06-0885, 06-1053, 06-1064, 06-1081, 06-1090, 06-1091, 06-1092, 06-1097, 06-1148, 06-1242, 06-1243; 06-1255, 06-1271, 06-1297, 06-1439, 06-1440, 06-1571, 06-1580, 06-1585, 06-1597, and all other cases transferred to this Section that contain claims under Louisiana Revised Statute 22:695.

**BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS AND THE WILLIAMS REPRESENTATIVE POLICHYOLDERS IN OPPOSITION TO DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS**

## I. STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a not-for-profit corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c) (3). UP is based in California but operates nationwide and is funded by donations and grants from individuals, businesses, and foundations and governed by an eight-member Board of Directors. UP contributes on an ongoing basis to the formulation of insurance related public policy at both the national and state level.

UP exists because businesses and individuals rely on the insurance they buy to protect themselves; their property and their livelihoods against the risk of loss

and insurance companies are in business to earn profits by assuming that risk. Insurance is a regulated industry because of this dynamic and the fact that the financial security insurance policies provide is an integral part of the fabric of our society and economy.

UP monitors the insurance sector, works with public officials, has a nationwide network of volunteers and affiliate organizations, publishes written materials, files *amicus* briefs in cases involving coverage and claim disputes and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance products. UP provides disaster aid to property owners across the U.S. via educational activities designed to illuminate and demystify the claim process. For more information about UP, please visit www.unitedpolicyholders.org.

Genevieve Williams, Rosetta and Eric Irons and Ella and Howard Foster, Jr. ("Williams representative Policyholders") filed a Class Action Complaint on June 2, 2006, on behalf of themselves and a class of homeowners insurance policyholders who, on August 29, 2005, were Louisiana residents who owned immovable property with improvements, principally houses or related residential structures which was destroyed or damaged by winds generated by Hurricane Katrina. (Complaint, ¶ 1, attached as Exhibit "A.") The Williams Representative Policyholders' Complaint names State Farm, Allstate Indemnity Insurance Company and Louisiana Citizens Property Insurance Company (collectively "Insurance Company Defendants") as defendants and is currently pending before the Honorable Ivan Lemelle. The Williams Representative Policyholders' Complaint seeks a declaratory judgment, as well as compensatory and punitive damages, both of which require the interpretation and application of Louisiana

insurance law, including the efficient proximate cause doctrine and Louisiana's Valued Policy Statute, La. Rev. Stat. Ann. 22:695 ("VPL"). (Ex. A at ¶¶ 6-8.) Insofar as the Motion for Judgment on the Pleadings of Defendant State Farm Fire and Casualty Company ("State Farm") involves issues concerning the Louisiana law and the VPL, the Court's determination on State Farm's Motion could have a significant and substantial impact on the rights and claims of the Williams Representative Policyholders and the class of policyholders named in the Williams action.

In this brief, United Policyholders and the Williams Representative Policyholders seek to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

United Policyholders previously has appeared as *amicus curiae* in over one hundred forty state and federal cases throughout the United States, including a number in Louisiana. Ducote v. Koch Pipeline Co., L.P., 730 So.2d 432 (La. 1999); Norfolk Southern et al v. California Union Insurance Co., No. 2002-CA-371 (La. Ct. App. 1st Cir. 2002). United Policyholders has appeared as *amicus curiae* in cases before the United States Supreme Court. *See Humana, Inc. v. Forsyth*, No. 97-303 (U.S. Sept. 18, 1998); *FL Aerospace v. Aetna Casualty and Surety Co.*, No. 90-289 (U.S. Sept. 13,

1990), and the United States Supreme Court cited United Policyholders' brief in *Humana, Inc. v. Forsyth* (1999) 525 U.S. 299. UP was the only national consumer organization to submit an *amicus* brief in the landmark case of State Farm Mutual. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003*).* Arguments from our *amicus curiae* brief were cited with approval by the California Supreme Court in Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999), and discussed in Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903 (Cal. 2005). UP's *amicus* brief factored into the decision in Watts Industries, Inc. v. Zurich American Insurance Co., 121 Cal. App. 4th 1029 (Cal. App. 2d Dist. 2004).

## II. STATEMENT OF THE CASE

Currently pending before the Court is State Farm's Motion for Judgment on the Pleadings which seeks to deprive the class of policyholder plaintiffs ("policyholders") in the Chauvin cases of the full value of insurance coverage which they purchased from State Farm and the other insurance company defendants (collectively "Insurance Company Defendants"). State Farm asks this Court to interpret its unclear and ambiguous policy without any extrinsic evidence and in a novel and completely unsupported manner that ignores and will eviscerate Louisiana's "efficient proximate cause" doctrine.

Moreover, the Insurance Company Defendants are attempting to evade the obligations imposed upon them by Louisiana's Valued Policy Law, La. Rev. Stat. Ann. 22:695 ("VPL"), despite having invoked the VPL when it was in their fiscal interest to do so in determining the premiums to be paid by the policyholders for their homeowners insurance coverage. The VPL provides that if an insurance company

places a value on a property and uses such value to determine the premiums to be charged, then the insurance company must compute "any covered loss of, or damage to, such property" at such valuation "without deduction or offset." La. Rev. Stat. Ann. § 22:695. The Insurance Company Defendants placed such valuations on policyholders' property to determine premiums and subsequently collected the applicable premiums based on such valuations. Policyholders paid these premiums based in part on "hurricane deductibles," in order to obtain coverage for any and all losses to their residence and personal property caused by hurricanes. Only now when faced with having to pay the full face value of such valuations in accordance with the VPL the Insurance Company Defendants contest the plain language of the statute.

Moreover, and on a more fundamental level, State Farm asks the Court to make these sweeping rulings on unclear policy language and the fact-intensive issue of causation prior to any discovery taking place in this action. At a minimum, the class of policyholders is entitled to conduct discovery on the issue of what was the efficient proximate cause of their losses and, therefore, the Court cannot rule that, as a matter of law, the policyholders cannot prove any set of facts upon which they would be entitled to relief. Moreover, that this litigation involves the interpretation of an insurance contract does not obviate the policyholders' right to conduct discovery as Louisiana courts have routinely considered extrinsic evidence in interpreting insurance policies and to determine or to resolve any ambiguities such as those contained in State Farm's standard homeowners insurance policy. The ambiguity which exists in State Farm's policy not only warrants, but requires, discovery in this matter, and State Farm cannot

short-cut that process by way of its Motion which is rife with unsupported legal theories, factual assertions and inaccurate conclusions.

The practical implications if State Farm's Motion is granted would result in potentially hundreds of thousands of homeowners insurance policyholders being deprived of the full coverage on which their insurance premiums were based and paid and reasonably expected to receive for losses caused by hurricanes, including Hurricane Katrina. Thus, in addition to seeking to shirk their collective contractual obligations to policyholders, State Farm and the Insurance Company Defendants are asking the Court to rewrite the VPL in a narrow manner that is not only insurance-company friendly, but which will contravene the express language of the VPL as drafted by the Louisiana Legislature as well as the "efficient proximate cause doctrine" as interpreted by the Louisiana courts. While such a result would be erroneous at any time, prematurely ruling on issues of this significance without the benefit of the mandatory full factual record would be unjust, unfair and reversible error.

## III. ARGUMENT

### A. Judgment On The Pleadings Is Not Proper Because Policyholders Have Pleaded Claims Upon Which Relief May Be Granted

State Farm is not entitled to judgment on the pleadings because policyholders in the Chauvin cases have sufficiently alleged claims upon which relief may be granted insofar as they have alleged that they incurred total losses to their property that were caused by covered perils under their homeowners' policies. A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is subject to the same standard as a motion to dismiss pursuant to Rule 12(b)(6), that is,

the Court must look only to the pleadings and accept all well-pleaded allegations as true. St. Paul Ins. of Bellaire v. Afia Worldwide Ins., 937 F.2d 274, 279 (5th Cir. 1991); McMillon v. Corridan, 1998 WL 560334 (E.D. La. 1998). A motion for judgment on the pleadings must be denied unless it appears certain that the plaintiff cannot prove any set of facts whatsoever that would entitle the plaintiff to relief. Rodriguez v. United States, 66 F.3d 95, 96 (5th Cir. 1995). Moreover, in considering a motion for judgment on the pleadings, the Court must view the pleadings in the light most favorable to the non-movant and all reasonable inferences must similarly be drawn in favor of the non-moving party. Bellizan v. Easy Money of La., Inc., 2001 WL 121909 (E.D. La. 2001).

The policyholders in the Chauvin cases have alleged that they suffered total losses to their property that were caused by the covered perils of winds generated by Hurricane Katrina. In Paragraph XIII of the Complaint, policyholders allege that "Plaintiffs' home (and the homes of all others similarly situated) sustained loss or damage from hurricane-related wind, which is a covered peril under the policy issued by defendant." (Chauvin Complaint at ¶ 13.) In Paragraph XIV, policyholders allege that, as a result of Hurricane Katrina, they "sustained substantial damage to their home, rendering it a total loss." (Chauvin Complaint at ¶ 14.) Taken together, and accepting these allegations as true as the Court must do in considering this motion, the Chauvin policyholders have clearly alleged that they have suffered total losses to their property as a result of a covered peril which if proven, would entitle them to relief.

State Farm disingenuously maintains that policyholders have failed to allege that their losses were caused by a peril covered by the policy. This argument is facially absurd given any fair reading of Paragraphs XIII and XIV of the Chauvin

Complaint. At best, State Farm seems to suggest that policyholders be required to plead their allegations with more specificity or in a combined paragraph to State Farm's liking. This very argument has been rejected by at least one Federal Court that held that allegations that the loss to their property was attributable to hurricane winds and wind-drive rain when it is alleged in a complaint defeats a motion like State Farm's.[1] Tuepker v. State Farm Fire & Cas. Co., 2006 WL 1442489, (S.D. Miss., May 24, 2006). Here, Policyholders have sufficiently met the notice pleading requirements of Rule 8 of the Federal Rules of Civil Procedure and are hardly required to plead their claims in a manner acceptable to State Farm. The Chauvin Policyholders have squarely alleged total losses as a result of wind generated by Hurricane Katrina. State Farm admits that "[d]irect physical loss from wind is a 'Loss Insured'" under its policies and, therefore, policyholders have alleged a valid claim under the VPL which requires that this case proceed to discovery in order for policyholders to prove their claims. Whether policyholders' losses were in fact caused by wind or any other covered peril is a question of fact and, thus, State Farm is not entitled to judgment on the pleadings as a matter of law. Rodriguez, 66 F.3d at 96.

### B. State Farm's Suggested Interpretation Of The VPL Is Untenable And Would Contravene Louisiana's "Efficient Proximate Cause" Test

The Court must reject State Farm's untenable and unsupported suggested interpretation of the VPL which, in effect, seeks to render the VPL inapplicable to situations where a covered peril and a non-covered peril were each involved in the total

[1] Unlike the policyholders in Tuepker, the Chauvin policyholders do not allege claims alleging damage from flooding and, thus, that portion of the Tuepker ruling addressed exclusions from coverage due to flooding has no application or relevance here.

loss to a covered property. The anti-concurrent causation language upon which State Farm relied in connection with its interpretation has already been deemed ambiguous as a matter of law by another Federal Court addressing similar arguments raised by State Farm. Tuepker, 2006 WL 1442489 at * 5. Furthermore, State Farm's position is in complete derogation of the "efficient proximate cause" test, which has been adopted by the Louisiana Supreme Court and provides that a policyholder is entitled to coverage if a covered peril was the proximate or efficient cause of the loss or damage, notwithstanding that other excluded or non-covered perils contributed to the damage. State Farm's position evinces both an effort to avoid the contractual obligations it owes and sold to this class of policyholders, but it also represents an attempt to have the Court effectively rewrite the VPL in an insurance-company friendly manner while abrogating or eviscerating the "efficient proximate cause" test. In essence, State Farm is seeking to have the Court rewrite Louisiana insurance law on causation and valuation of homeowners' coverage in one fell swoop. Adoption of State Farm's position would result in significant consequences not only with regard to the current and future hurricane-related insurance litigation, but with regard to insurance coverage issues in general. As such, State Farm's wholly unsupported and novel interpretation of the VPL and Louisiana insurance causation law must be rejected.

Louisiana's VPL provides, in relevant part, that:

> Under any fire insurance policy insuring inanimate, immovable property in this state, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs during the term of

> the policy at such valuation without deduction or offset, unless a different method is to be used in the computation of loss, in which latter case, the policy, and any application therefore, shall set forth in type of equal size, the actual method of such loss computation by the insurer. Coverage may be voided under said contract in the event of criminal fault on the part of the insured or the assigns of the insured.

La. Rev. Stat. Ann. § 22:695(A)(emphasis added). The plain language of the VPL provides that where a total loss exists, the insurance company shall compute, indemnify and compensate the policyholder for "any covered loss, or damage to," the property at the valuation set forth by the insurance company "without deduction or offset." The plain language of the statute requires only that a total loss occur and that under such circumstances the amount of compensation for "any covered loss" be the valuation amount, without any offset or deduction. There is no language in the VPL that limits its application exclusively to situations where a covered peril is the sole cause of the total loss. Similarly, there is no language in the VPL that restricts or apportions the valuation determination in situations where both a covered peril and an excluded or non-covered peril both cause the total loss. See Mierzwa v. Florida Windstorm Underwriting Assoc., 877 So.2d 774 (Fla. 4th DCA 2004). (holding that "if the insurance carrier has any liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy").

In the absence of any express language in the VPL which limits its application to situations where a non-covered peril contributes to the loss in some manner, State Farm instead forwards the argument that its own policy language supercedes not only the plain language of the VPL, but also Louisiana's "efficient proximate cause" test. State Farm argues that its anti-concurrent causation clause,

which State Farm tries to soft-pedal as prefatory or "lead-in" language, somehow limits the application of the VPL to instances where no excluded or non-covered peril is involved in the total loss. The relevant language relied upon by State Farm provides that:

> 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 of any combination of these:
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> * * *
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> c. Water Damage, meaning:
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> (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[.]
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> (Ex. A to State Farm's Motion, at 10.)

Under State Farm's theory, because the policy excludes coverage for water damage, the VPL does not apply if a property has become a total loss if the property sustained "some" damage from a covered peril and some damage from a non-covered peril. In other words, if the excluded peril of water damage, which is almost certain to occur in some fashion in the context of damage caused by a hurricane, has visited "some damage" upon the property, then the VPL does not apply.

This contention is not only contrary to the express language of the VPL, it is patently unfair and punitive to the extent that, if adopted by the Court, wholly

inequitable results could follow. For example, under State Farm's theory, in the event of a total loss an insurance company could literally find one square inch of "water damage" to a property and, thus, avoid paying the full face value of the property as mandated by the VPL despite, of course, having previously collected premiums that were determined based upon such valuation.

The very "water damage" and "anti-concurrent causation" language relied upon State Farm here has already been held to be ambiguous as a matter of law. In Tuepker, Judge Senter held that these provisions "purport to exclude from coverage losses that would otherwise be covered, such as wind damage, when that covered loss happens to accompany water damage" and, that this language "creates ambiguities in the context of damages sustained by the insured during a hurricane." Tuepker, 2006 WL 1442489 at * 4-5. This ambiguous language is exactly what State Farm relies upon in its arguments in the Chauvin matter, asking the Court to make radical changes to the VPL and Louisiana insurance causation law.

Moreover, the position advocated by State Farm is completely contrary to the "efficient proximate cause" test that the Louisiana Supreme Court has adopted in determining whether coverage exists. Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Continental Ins. Co., 112 So.2d 680, 683 (La. 1959). "Efficient proximate cause" has been technically defined as "the efficient or predominant cause which sets into motion the chain of events producing the loss . . . not necessarily the last act in a chain of events." Graham v. Public Employees Mut. Ins. Co., 656 P.2d 1077, 1081 (Wash. 1983). The "efficient proximate cause" analysis focuses on whether all of the losses or claims can be traced to one original causative factor, regardless of

the number of injuries or claims made. If the originating or dominant cause of the loss is a covered peril, there is coverage. Lorio v. Aetna Ins. Co., 232 So.2d 490 (La. 1970) (holding that policyholders may have coverage when covered peril causes an excluded peril).

The Louisiana Supreme Court, as well as other courts in the Gulf region, have interpreted the "efficient proximate cause" doctrine to permit coverage for hurricane-related losses where the evidence has shown that wind was the "proximate cause" of the damage, notwithstanding that flooding contributed to the loss. See, e.g., Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Continental Ins. Co., 112 So.2d 680, 683 (La. 1959); Western Assurance Co. v. Hann, 78 So. 232, 236 (Ala. 1917); Glens Falls Ins. Co. of Glens Falls, N.Y. v. Linwood Elevator, 130 So.2d 262, 270 (Miss. 1961); Evana Plantation, Inc. v. Yorkshire Ins. Co., 58 So.2d 797, 798 (Miss. 1952). Moreover, and as set forth in more detail in Plaintiffs' Consolidated Memorandum in Opposition to Defendants Motion, Florida courts have addressed this very issue in connection with Florida's Valued Policy Statute, holding that a policyholder was entitled to receive the full face value of his homeowners' policy regardless of whether the excluded peril of flood contributed to the total loss. Mierzwa v. Florida Windstorm Underwriting Assoc., 877 So.2d 774 (Fla. 4th DCA 2004). The Mierzwa court, held that "if the insurance carrier has any liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy." Mierzwa, 877 So.2d at 776.[2]

[2] The Mierzwa holding was "overruled" by the Florida legislature which amended Florida's VPL subsequent thereto. No Court overruled the Mierzwa opinion as the court there

Under these cases and the underlying rationale behind the "efficient proximate cause" test, if coverage exists where wind is ultimately shown to be the proximate cause of damage despite contribution from a non-covered peril, then the more restrictive application of the VPL being advocated by State Farm and the Insurance Company Defendants cannot be adopted by the Court. The VPL addresses the value which is to be paid when coverage exists and does not purport to address or set forth any substantive standard for determining causation. Adoption of State Farm's position will limit application of the VPL to instances where the total loss was caused solely by a covered peril, contrary to Louisiana's efficient proximate cause doctrine. Moreover, State Farm's proffered interpretation of the VPL would make the "efficient proximate cause" test an academic exercise with no practical impact as the VPL would effectively pre-empt the doctrine by adding a second layer of causation analysis at the most critical juncture – valuation of the coverage amount to be paid – a practice nowhere authorized by the Louisiana Legislature. Under State Farm's theory, a determination that wind or a covered peril was the "efficient proximate cause" of a loss would be meaningless if a Court, in applying the VPL to determine the amount of coverage owed to the policyholder, found "some damage" from an excluded peril. State Farm's interpretation of the VPL and contention that its policy exclusion abrogates the plain language of the VPL, as well as the "efficient proximate cause" doctrine, cannot and should not be adopted by the Court as it is unsupported in the statute's express

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applied and interpreted the statute as it was written at that time. Louisiana's VPL has not been amended to reflect any of the changes made by the Florida Legislature and, as such, the Court must interpret the Louisiana VPL as it is written.

language and would result in a sweeping change in the causation analysis and standard as it applies to policyholders in Louisiana.

Moreover, the principle that property damage caused by hurricanes is covered for wind-driven loss even if flooding resulted has been accepted by courts in the Gulf region and is, by nature, a fact-intensive determination that is not proper for disposition on a motion for judgment on the pleadings. In Grace v. Lititz Mutual Insurance Co., 257 So.2d 217 (Miss. 1972), the Supreme Court of Mississippi affirmed a jury verdict finding coverage for the policyholder for windstorm damages in the aftermath of Hurricane Camille. The insurance policy in Grace covered windstorm damages but excluded coverage for loss caused or aggravated by tidal water. The insurance company in Grace, like State Farm here, argued that there was no coverage because the property was destroyed by water, not by wind. There was very little physical evidence in Grace to substantiate the alleged causes of loss because the building was destroyed. In the absence of such physical evidence, the parties relied on a combination of scientific and circumstantial evidence to substantiate causation. The jury returned a verdict in favor of the policyholder, finding that the building had been destroyed by wind, not by flood, despite the lack of physical evidence to substantiate the cause of loss. The insurance company appealed, but the court affirmed the verdict on appeal, rejecting the insurance company's position that the presence of tidal waters rendered the loss excluded. The court held that "the material facts in the record were disputed therefore the jury was entitled to accept the policyholder's assertion that his office building was destroyed by wind before the tidal waters reach his property. Id. at 225.

As Grace shows, the issue of causation is a fact-intensive question which cannot be resolved as a matter of law in the context of State Farm's Motion for Judgment on the Pleadings. The issue of causation is likely to be one, if not the, central focal points of discovery in these cases in light of the massive destruction and damage caused by Hurricane Katrina. Much like the situation in Grace, there are likely to be situations where little physical evidence or eyewitness testimony exists to establish causation and the policyholders are entitled to conduct discovery to establish causation. Many Louisiana residents were left with mere slabs or foundations and will require discovery, expert testimony and investigation in order to prove causation. As such, and at a bare minimum, State Farm's Motion must be denied to the extent it seeks to put the rabbit in the hat and obtain a ruling that prohibits policyholders from establishing and proving causation by way of a completely unsupported interpretation of the VPL. Policyholders have alleged valid claims for relief that Hurricane Katrina's winds caused total losses to their property and they are entitled to conduct discovery in order to prove these claims for relief.

### C. State Farm's Policy Is Facially Ambiguous And Interpretation Of The Policy Will Require Extrinsic Evidence Obtained Through The Discovery Process

Contrary to State Farm's bald, self-serving representations, its policy is facially ambiguous and unclear to the extent the "Hurricane Deductible Endorsement" to the policy suggests coverage for loss and damage caused by hurricanes and is in conflict with an overbroad water damage exclusion which seeks to exclude the very wind and rain coverage recognized by the "Hurricane Deductible Endorsement." As a result of this facial ambiguity, State Farm cannot, as a matter of law, enforce its water

damage exclusion and, by implication, avoid the obligation to provide hurricane coverage recognized by the "Hurricane Deductible Endorsement." Moreover, policyholders are entitled to conduct discovery and present extrinsic evidence to the Court in order for the Court to interpret the terms of the policy to the extent they are ambiguous.

If the terms of an insurance contract cannot be construed based on its language because of an ambiguity, the Court must look to extrinsic evidence to determine the parties' intent. Peterson v. Schimek, 729 So.2d 1024 (La. 1999). Courts throughout Louisiana routinely look to materials outside of insurance policies when interpreting the terms of insurance policies. For example, in Doerr v. Mobil Oil Corp., the Supreme Court of Louisiana reviewed an enormous volume of extrinsic evidence in holding that the so-called "pollution exclusion" there construed should be restricted in scope by some limiting principles. Doerr v. Mobil Oil Corp., 774 So.2d 119, 124 (La. 2000). The Court there referred to extrinsic hypotheticals in finding that a strict reading of the so-called "pollution exclusion" would lead to absurd results, id., and, in overruling a prior decision construing the same exclusion, held that "in light of the origin of pollution exclusions, as well as the ambiguous nature and absurd consequences that would attend a strict reading of these provisions," id. at 135, the exclusion should be interpreted with some limiting principles. Id. Thus, the Court first based its holding on "the origins of pollution exclusions," which was, per se, determined by consulting extrinsic evidence. See id. at 126-128, 133-34 (discussing extrinsic evidence regarding origins of pollution exclusions).

Likewise, the Doerr Court cited countless other Louisiana decisions previously following its rationale. See id. at 129-32 (summarizing Louisiana jurisprudence on pollution exclusions). For instance, in South Central Bell Telephone Co. v. Ka-Jon Food Stores, Inc., 644 So.2d 357, vacated on other grounds, 644 So.2d 368 (La. 1994), the Supreme Court of Louisiana considered vast amounts of "extrinsic evidence" prior to analyzing the actual words contained in the so-called "pollution exclusion." 644 So.2d at 362-64. The Court then held that the so-called "pollution exclusion" should be interpreted consistently with the extrinsic evidence of its purpose and intent, and not its literal words. Id. at 365.

Similarly, when interpreting an insurance policy, in addition to the words of the insurance policy, courts always look to usage of trade evidence to form their interpretation. Nerness v. Christian Fidelity Life Ins. Co., 733 So.2d 146, 152, (La. App. Ct. 1999). Many courts have relied on internal claims and underwriting manuals in their decisions concerning coverage. Andover Newton Theological Sch., Inc. v. Continental Cas. Co., 930 F.2d 89, 94 (1st Cir. 1991) (relying on claims manual in finding ambiguity in the insurance policy); In re: Northeast Enterprises, Inc. v. Allstate Ins. Co., No. 91-15394, 1992 U.S. Dist. LEXIS 4800, *13, n. 4 (E.D. Bankr. Pa. Apr. 9, 1992) (utilizing claims manual to interpret key insurance policy term); Cincinnati Ins. Co. v. Clark, No. 91-0820, 1992 U.S. Dist. LEXIS 2054 (E.D. Pa. Feb. 18, 1992) (ordering insurance company to produce claims manuals pertinent to interpretation and application of key policy term); Champion Int'l Corp. v. Liberty Mut. Ins. Co., 129 F.R.D. 63 (S.D.N.Y. 1989).

Moreover, an insurance company's inconsistent interpretations and applications of policy language may evidence an ambiguity inherent in those terms, which must be construed against the insurance company:

> [T]his court finds that [other policyholder] information is relevant for the purposes of discovery since it may show that identical language has been afforded various interpretations by the insurer. It may also tend to show that the interpretations suggested by the defendants today are not the same as those of the original drafters.

Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 106-07 (D.N.J. 1990). See also Aetna Cas. & Sur. Co. v. Haas, 422 S.W.2d 316, 319-320 (Mo. 1968) (holding that where insurance company's treatment of language at issue shows uncertainty concerning its application, that would be "entirely inconsistent with its contention that the phrase was unambiguous").

Here, State Farm's policy is facially ambiguous with regard to coverage for damage caused by hurricanes and the wind and wind-driven rain that is part and parcel of any hurricane. State Farm's policy contains a "Hurricane Deductible Endorsement" which provides, in relevant part:

> The Hurricane deductible percentage (%) shown in the Declarations applies only for direct physical loss or damage to covered property caused by wind, wind gusts, hail, rain, tornadoes, or cyclones caused by or resulting from a hurricane as defined above. The deductible for loss caused by each hurricane occurrence is the amount determined by applying the deductible percentage (%) shown in the Declarations to the COVERAGE A – DWELLING limit shown in the Declarations.
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> In the event of a hurricane loss, this deductible will apply in place of any other deductible stated in the policy. In no

> event will this deductible be less than the Section I deductible amount shown in the Declarations.

(See Ex. :"A" to State Farm's Motion for Judgment on the Pleadings.) It is clear beyond any reasonable argument to the contrary that this provision contemplates coverage for loss caused by hurricanes. Moreover, based upon this language, policyholders had a reasonable expectation and belief that any and all losses and damages caused by a hurricane would be covered under the policy, subject to the deductible and policyholders paid for this deductible.

Despite this clear and express language providing coverage for losses caused by hurricanes, including wind and wind-driven rain, State Farm seeks to invalidate or exclude this coverage by selectively seeking to enforce another provision of the Policy that excludes water damage and would effectively exclude the very coverage suggested by the "Hurricane Deductible Endorsement." Section I of the policy, titled "Losses Not Insured," provides in relevant part:

> 2. We do not insure under any coverage for loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for 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 in 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.
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> .* * *
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> 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[.]

(Ex. A to State Farm's Motion at 10.) These provisions purport to exclude coverage for wind and rain damage, which are recognized as covered losses under the policy's "Hurricane Deductible Endorsement," under the erroneous theory that because an excluded loss in the form of water damage occurred, this excluded cause of loss completely invalidates the hurricane coverage paid for and reasonably expected by the policyholders in purchasing their policies. The Court cannot, as a matter of law, adopt State Farm's position and enforce the water damage exclusion as a result of the ambiguity that exists as a result of these two conflicting provisions within the policy.

At least one curt has held that an ambiguity exists in State Farm's policy as a result of the inconsistency between the "Hurricane Deductible Endorsement" and the water damage exclusion contained in the State Farm policy. In Tuepker v. State Farm Fire & Cas. Co., 2006 WL 1442489, (S.D. Miss., May 24, 2006), the Court analyzed the conflict between these provisions and held:

> I find that this language in the State Farm policy creates ambiguities in the context of damages sustained by the insured during a hurricane. These provisions purport to exclude coverage for wind and rain damage, both of which are covered losses under this policy, where an excluded cause of loss, e.g. water damage, also occurs. I find that these two exclusions are ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a "hurricane deductible" as part of the policy.

Tuepker, 2006 WL 144289 at *5. The "language" to which the Court was referring was the very "lead-in" or anti-concurrent cause language relied upon by State Farm here in support of its argument that so long as a loss involves water damage, "it does not matter whether wind or any other covered peril played a part in Plaintiffs' losses."

Because the terms of the policy are ambiguous as to what coverage is provided for losses caused by hurricanes, the Court cannot interpret State Farm's policy or make a determination as to the scope of coverage for losses caused by hurricanes from the four corners of the policy. As such, the Court should not grant State Farm's Motion, which seeks to have the Court interpret the ambiguous policy on its face and absent the consideration of extrinsic evidence. To do so would short-cut the policyholders' right to conduct discovery and obtain extrinsic evidence required to interpret this facially ambiguous policy. Included among the evidence that will be relevant or helpful to the Court is evidence regarding State Farm's prior application of these provisions, its underwriting and claims practices and procedures, manuals, guidelines, policies, and directives to provide guidance to their employees in underwriting, processing, handling, and resolving insurance claims. These documents generally contain insurance company official positions on coverage, claims, and loss control matters, as well as interpretations of relevant policy language.

Thus, because State Farm's policy is ambiguous, policyholders are entitled to discovery which relates to the interpretation, prior application and claims handling of claims made under the same provisions in order to prove that the water damage exclusion is not enforceable.

## IV. CONCLUSION

For the aforementioned reasons, this Court should deny State Farm's Motion for Judgment on the Pleadings.

Respectfully Submitted,

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