

Holding State Farm Accountable (Why McIntosh is Evidence of Fraud)

Applying the Square Corners Rule in

United States ex rel. Cori Rigsby and Kerri Rigsby

v.

**State Farm Fire and Casualty Company
(misnamed State Farm Mutual Insurance Company)**

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May 3, 2009

Mr. Barbieri is a May 2009 Candidate for the Juris Doctorate at the David A. Clarke School of Law, University of the District of Columbia. This paper is intended to meet the Advanced Legal Writing Requirement for graduation. Opinions expressed are Mr. Barbieri's and do not reflect the views of the faculty at the law school or the University of the District of Columbia. The faculty and students at the David A. Clarke School of Law have committed themselves to serving those whose lives were impacted by Hurricane Katrina.

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“Men must turn square corners when they deal with the Government.” ---Oliver W. Holmes, 1920

(I) Introduction

Hyperlink to Sub-Parts: [Structure – Road map](#), [Dual Purpose, Two Distinct Audiences](#), [Purpose #1: Helping the Rigsbys defeat the State Farm Motions to Dismiss](#), [Purpose #2: Critique of Federal Government Mismanagement of the NFIP](#), [Thesis](#), [Summary of Legal Reasoning, including Key Regulatory-Contract Provisions](#):

A. Structure – Road map:

This note is intended to meet the advanced legal writing requirement for graduation from law school and is fashioned under the Elizabeth Fajans and Mary R. Falk guidelines established in Scholarly Writing for Law Students.¹ The note follows the recommended four-part structure for a law review article: (I) Introduction, (II) Background, (III) Analysis of State Farm’s Motions to Dismiss, and (IV) Conclusion. I have added two sections for two other audiences: (V) Issues for the Administrators of the National Flood Insurance Program, (VI) Lessons for Whistleblowers based on the Rigsbys’ mistakes.

B. Dual Purpose, Two Distinct Audiences:

¹ Fajans, Elizabeth and Mary R. Falk, Scholarly Writing for Law Students, West Group, St. Paul, Minnesota, 2000.

Hurricane Katrina made landfall on the Mississippi coast on the morning of August 29, 2005. Flood insurance claims paid by the National Flood Insurance Program exceeded \$15.85 billion dollars and numbered 209,404. Questions continue to linger regarding overbilling of the National Flood Insurance Program by private insurance companies. The evidence of overcharges has been growing continuously over the nearly four years since Hurricane Katrina.

The *Rigsby* whistleblower litigation has attempted to expose fraud. Another case using the False Claims Act as the method for recovery, *Branch Consultants*, has been reinstated recently. *Branch Consultants* found overcharges in every single one of one hundred and fifty cases audited. Moreover, within the last six months, audits of wind and flood claims conducted by the Mississippi Insurance Department (targeting State Farm claims exclusively) and the Office of Inspector General in the Department of Homeland Security (“OIG”) have been made public. They provide additional documentation supporting the whistleblower lawsuits.

Throughout this period, the Department of Justice and the Federal Emergency Management Agency (“FEMA”) have been unusually silent. The whistleblower litigation and the audits have questioned the integrity of the National Flood Insurance Program. Many believe that FEMA’s flood program director David Maurstad gave the private insurance companies a free pass to overcharge the program by issuing a memo that altered established procedures. Maurstad claims that he consulted with insurance companies and trade groups, but actually the American Insurance Association admitted that it wrote the new policy and came up with the idea immediately after Katrina.²

² Rebecca Mowbray, *FEMA may have authorized flood insurance overbilling*, Times Picayune, June 14, 2007

The revised procedures allowed the insurance companies to pay the flood policy limits if the house disappeared (slab cases) in a flooded area or if the house sat in standing water for an extended period of time and the damage likely exceeded the policy limits (McIntosh). As a result of this memo, many have claimed that the private insurers systematically charged the flood insurance program even if the site investigation detected extensive preexisting wind damage.

A spokesman for the American Insurance Association claimed that there is no evidence of companies inflating flood claims, citing the OIG's preliminary report. Amazingly, the OIG's final report issued in September 2008 has documented overcharges while continuing to state that there is no "material" evidence of fraudulent overcharges.

Justice requires that we hold private insurance companies accountable for overbilling NFIP and the Federal Government accountable for poor oversight and negligence.

So this note has two goals: (1) hold State Farm accountable in *United States ex rel. Cori Rigsby and Kerri Rigsby v. State Farm Mutual Insurance Company*³ ("Rigsby") for fraudulently overcharging the National Flood Insurance Program and (2) hold the Federal Emergency Management Agency ("FEMA") and the Office of Inspector General, Department of Homeland Security ("OIG") accountable for allowing State Farm (and other insurers) to fraudulently overcharge the National Flood Insurance Program ("NFIP").

³ *United States ex rel. Cori Rigsby and Kerri Rigsby v. State Farm Mutual Insurance Company*, CASE NO. 1:06cv433-LTS-RHW (S.D. Miss. 2006).

I have no doubt that State Farm (and other insurers) will be held accountable, eventually. The *Rigsby* case could be dismissed and State Farm could still be held accountable. There are two reasons for this.

First, *United States ex rel. Branch Consultants v. Allstate Insurance Company, et al.*, Civil Action No. 06-4091 (E.D. Louisiana) (“*Branch*”) has been reinstated by the Fifth Circuit.⁴ It was dismissed under the False Claims Act “first-to-file” bar.⁵ *Branch* named fourteen insurance company defendants in their well-documented presentation of fraud under the False Claims Act. Two of the defendants, State Farm and Allstate, named in *Branch* were also named in *Rigsby*.⁶ If *Rigsby* moves to trial, then *Branch* will go forward without those two defendants.

Second, even if both cases are dismissed, OIG and the Mississippi Insurance Department (“MID”) have already conducted sufficient post-Katrina claims analysis to warrant reopening all Katrina files.

OIG⁷ published results of an audit of 131 combined wind and flood claims. In the Executive Summary, OIG “concluded that the NFIP did not pay for wind damage for structures included in our sample.” But on page six of the same report, OIG provides evidence of NFIP paying for wind damage:

“Based on the review of files in our sample, we did not find material evidence that the NFIP paid for wind damage. Although 44 out of 131 cases (34%) included errors that related to cause of damage resulting in some degree of duplication, e.g. flood and homeowners policies paying for the

⁴ *United States ex rel. Branch Consultants v. Allstate Insurance Company* No. 07-31191, United States Court of Appeals for the Fifth Circuit, February 18, 2009; REMAND to the District Court for further argument, *United States ex rel. Branch Consultants v. Allstate Insurance Company, et al.*, Civil Action No. 06-4091 (E.D. Louisiana)

⁵ 31 U.S.C. §§ 3729-33 et seq.; 31 U.S.C. § 3730(b)(5)

⁶ *Rigsby* also names USAA and Nationwide.

⁷ OIG-08-97, *Hurricane Katrina: Wind Versus Flood Issues*, Department of Homeland Security, Office of Inspector General, September 2008.

same type of damage..., only two (1.5%) of these cases clearly identified wind as the preponderant cause of damage, thus resulting in an improper payment by NFIP in the amount of \$432,600.”

It is contradictory for OIG to conclude: “we did not find material evidence that the NFIP paid for wind damage” and then reveal “an improper payment by NFIP in the amount of \$432,600” in a sample of 131 cases. Extrapolation to the total population of 209,404 Katrina flood claims (on which the Federal Government paid \$15,850,563,024) would yield in excess of \$600 million in improper NFIP overcharges.

And then there’s OIG’s reference to “some degree of duplication” of benefits where both the homeowner’s policy and the flood policy “[paid] for the same item.” This occurred in 34% of the sample cases and must have resulted in overpayments by one or both policies. OIG doesn’t document the dollar value of “duplication,” but extrapolation would mean that nearly 70,000 flood claims overpaid policyholders. Moreover, OIG might want to look at the Standard Flood Insurance Policy’s “Terms and Conditions” which stipulates that misrepresentation of the damage in making claims voids the contract.

OIG’s conclusion that there is no “material evidence” that NFIP paid for wind damage seems to be debatable. I’d like to see what Congress has to say. I guess OIG is hoping they only read the Executive Summary.

Working independently but in parallel, the Mississippi Insurance Department (“MID”) has produced the most extensive post-Katrina audit of State Farm insurance claims. MID became involved after the Rigsbys’ alleged that State Farm had systematically shifted damage caused by wind to damage caused by flooding. MID’s investigators quickly discovered that 64% of homeowners receiving no dwelling payment from their private carriers “were denied despite

indications of some wind damage.”⁸ This was particularly evident in “slab case” which, were subsequently all re-opened under mediation. Based on the evidence MID gathered, State Farm agreed to “re-evaluate hundreds of claims, at which point over \$88 million was paid to policyholders...”⁹

This kind of blanket denial where storm surge flooding had been evident, was precisely the allegation that the Rigsbys referred to as the Wind/Water Protocol (“WWP”) in their Amended Complaint¹⁰; which was a State Farm policy, never implemented before¹¹, to ascribe all damage to flooding wherever flooding could have been implicated as the cause of damage.

Fortunately for the Rigsbys, the MID investigation supports many of the Rigsbys’ allegations. The MID investigation “revealed a few instances where claims representatives advised policyholders that ‘State Farm had informed him that if water touched it, we were told not to pay wind.’”¹² Thanks to MID, the Rigsbys’ primary fraud scheme, the implications of implementing the illegitimate Wind/Water Protocol, has been documented. The MID concluded:

“The Company failed to recognize, for whatever reason, that wind caused at least some damage to most of the claims whether the damage was “discernable” or not. It should be noted once again that the Company paid millions of dollars for wind damage to the north of the surge line, only to deny some wind damage inside the surge area.”¹³

⁸ Mississippi Insurance Department, *Report of the Special Target Examination (Katrina Homeowner Claims) of State Farm Insurance Companies (Specifically State Farm Fire And Casualty Company)*, October 17, 2008. Pg 8.

⁶ Id. at 9.

¹⁰ Relator’s First Amended Complaint for Damages under the False Claims Act, 31 U.S.C. § 3729 ET.SEQ.,

¹¹ Mississippi Insurance Department, *Report of the Special Target Examination (Katrina Homeowner Claims) of State Farm Insurance Companies (Specifically State Farm Fire And Casualty Company)*, October 17, 2008. Pg 28.

“The Company acknowledged it had never used a wind/water protocol in previous catastrophes and it was never fully explained why such a protocol was integral to the handling of claims on the Gulf Coast.”

¹² Id. at 17.

¹³ Id. at 18.

From MID's efforts we can conclude that State Farm has already admitted to underpaying for wind damage in cases involving flooding. These are precisely the types of cases that the OIG should be reviewing, because we can expect there to be a concomitant reduction in damage ascribed to flood. Whether the actual flood payout would be reduced by an audit, depends entirely on the amount of damage originally attributed to flood.

The MID report highlights the fact that federal and state oversight authorities should be cooperating more extensively. The MID report doesn't provide sufficient details, so it is impossible to make any extrapolations regarding the 6,327 flood claims in their sample population. (three counties in coastal Mississippi)

The MID report was written with the Rigsbys in-mind. The methodology separating a second-tier sample of claims involving engineers, from a third-tier sample of claims where no engineer was involved, was specifically chosen to test one of the Rigsbys' allegations.

“[T]h genesis of these allegations seemed to have begun with ‘irregularities’ noted by Kerri Rigsby and Cori Moran Rigsby...who were assigned to assist State Farm with claims on the Mississippi Gulf Coast. Cori Rigsby testified to the examiners that, “...I knew that the fraud that I had witnessed revolved around engineering report.” A review of these “irregularities”, in and of themselves, revealed that while there may have been questionable decisions made by the Company, they did not appear to be a part of any scheme to systematically mistreat policyholders.”¹⁴

The MID then focused on the McIntosh case.

“In late October, when the Rigsby sisters saw two engineer reports with different conclusions on one specific claim, Kerri Rigsby testified under oath, “...that kind of sealed it...” and “I don't know how much more I need to hear to know that is going on.

¹⁴ Id. at 32-33.

The examiners questioned both engineers involved ...and each denied the presence of fraud or mistreatment or that they were asked to change these report to favor the Company. The drafter of the second engineer report specifically denied any pressure by the Company to change his conclusions[.]

Despite the concerns relating to “fraud” they had allegedly detected, the Rigsbys testified that they did not notify or contact anyone about the Company’s alleged conduct, other than a relative, until they contacted Richard Scruggs in late February 2006. The Rigsbys never made any attempt to contact the MID. As concerned as they were, they failed to do anything to stop the alleged fraud and prevent its continuation for almost four months[.]”¹⁵

The MID addressed the Rigsbys’ allegations over six pages of their forty-two page report. “[T]he absence of any corroborating evidence ...lead the examiner’s to opine that State Farm ... did not develop and carry out a plan to mistreat policyholders to the extent claimed by the “whistleblowers.””¹⁶ The MID has questioned the Rigsbys’ honesty: “The veracity of their specific allegations....deteriorated throughout the course of the investigation. Many of the specific allegations were investigated and simply could not be substantiated.”¹⁷

I make these references to the MID and OIG reports because the combination of documenting evidence supportive of the whistleblower’s claims, while at the same time condemning the whistleblower, is standard treatment for whistleblowers. (The “Shoot the Messenger” Theory) The “authorities” who are required to vet whistleblower allegations are invariably embarrassed if they prove the allegations accurate because (as in this case) they had oversight and enforcement responsibilities related to the claim’s allegations.

¹⁵ Id. at 33-34.

¹⁶ Id. at 37.

¹⁷ Id. at 33.

That is why the immediate (and most important) purpose of this note, is the Rigsbys' upcoming evidentiary Hearing. The Rigsbys need vindication.

The facts underlying their case are discussed in Section II and arguments for denial of the State Farm Motions are the subject of Section III. The secondary purpose is to criticize OIG and FEMA, the Federal Government authorities responsible for the National Flood Insurance Program. That issue is addressed in Section V.

1. Purpose #1: Helping the Rigsbys defeat the State Farm Motions to Dismiss

On April 8, 2008 State Farm filed their Answer¹⁸ (with Counterclaims) to the Rigsbys' Amended Complaint, along with various Motions to Dismiss the Rigsbys' *qui tam* claim, made under the False Claims Act. State Farm emphatically denies that they shifted liability from wind coverage (for which they have ultimate liability) to flood coverage (where liability was the responsibility of the Federal Government) through fraudulent adjustment schemes.

On May 20, 2009 the United States District Court for the Southern District of Mississippi (Judge L. T. Senter, Jr.) converted all Motions to Dismiss to Motions for Summary Judgment and will hold a Hearing on whether the flood insurance claims paid to Thomas and Pamela McIntosh "were justified as a matter of law."¹⁹ The McIntosh claim adjustment is the only first-hand evidence of a "false claim" supplied by the Rigsbys in making their fraud allegations against

¹⁸ *United States ex. rel. Cori Rigsby and Kerri Rigsby v. State Farm Mutual Insurance Company*, CASE NO. 1:06cv433-LTS-RHW, before the United States District Court for the Southern District of Mississippi, State Farm Fire and Casualty Company's Answer, Defenses and Counterclaim to Relators' Personal Claims in Relators' First Amended Complaint; Motion to Dismiss for Lack of Subject Matter Jurisdiction; Memorandum in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction; Motion to Dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b); Memorandum of Authorities in Support of its Motion to Dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b); all Filed April 8, 2008.

¹⁹ Judge L.T. Senter, Jr.; February 12, 2009 Order. (see Appendix: Attachment I)

State Farm. Since discovery has been denied, if McIntosh is not evidence of a false claim, then the Rigsbys' entire case can be dismissed (i.e., Summary Judgment for State Farm) on failure to meet the *prima facie* requirements (as interpreted by the Fifth Circuit) of the False Claims Act.

The importance of proving that McIntosh is evidence of fraud is heightened by State Farm's numerous civil and criminal counterclaims. State Farm accuses the Rigsbys of many civil and criminal offenses, including: trespass, conversion, breach of contract, extortion, violation of the Computer Fraud and Abuse Act²⁰ and violation of several sections of the Mississippi code²¹. These mistakes are mostly the fault of their former counsel, Richard "Dickie" Scruggs and his team of lawyers who have been disqualified from litigating the Rigsbys' case.

Whistleblowers, working in conjunction with a Government enforcement agency, are usually excused for similar acts ("protected activity") because they are deemed to be acting in the "public interest." But many have questioned whether the Rigsbys were ever working in the public interest because (i) they failed to provide information to the Mississippi Insurance Department, which has authority to investigate insurer fraud; (ii) they made public comments (ABC's 20/20 and print media interviews) about their claim after filing their suit under the False Claims Act and while it was under seal, undermining the Federal Government's ability to investigate their claims; (iii) they stole State Farm Katrina case files which were subsequently used by their counsel in separate civil litigation²² and (iv) they were provided with employment by their counsel at the rate of \$150,000 per year.

²⁰ 18 U.S.C.A. § 1030(a)(2) and (a)(4).

²¹ Miss. Code. Ann. 97-45-3(b), 97-45-5, 97-45-9, 97-9-10(1).

²² Mississippi Insurance Department, *Report of the Special Target Examination (Katrina Homeowner Claims) of State Farm Insurance Companies (Specifically State Farm Fire And Casualty Company*, October 17, 2008. Pg 35.

As a result of their mistakes, the Rigsbys are exposed to civil liability and criminal prosecution. The Department of Homeland Security, Office of the Inspector General, the Mississippi Insurance Department, and the Mississippi Attorney General rejected the allegation that insurers were engaged in fraud. Yet each has supplied documentation of numerous “false claims.” In order to achieve some vindication the Rigsbys need their day in court.

{Lessons for whistleblowers, based on the Rigsbys’ experience are discussed in the last section of this note (Section VI), but are not part of the legal analysis regarding State Farm liability under the False Claims Act.}

2. Purpose #2: Critique of Federal Government Mismanagement of the NFIP

The second purpose has a different audience; all the units of the Federal Government that have responsibility for managing the National Flood Insurance Program (“NFIP”). The post-Katrina claims adjustment described by the Rigsbys, and comprehensively investigated by the Mississippi Insurance Department²³ has challenged the Federal Government to show how it protects the integrity of flood claims. Despite substantial data collection by FEMA, and political (and economic) leverage over the Write-Your-Own Companies, the Office of Inspector General (“OIG”) within Department of Homeland Security (“DHS”), the Federal Emergency Management Agency (“FEMA”), and the Federal Insurance Administration (“FIA”) have not adequately performed their oversight, auditing, controls and regulatory enforcement functions vis-à-vis the Write-Your-Own Companies.

²³ Id. Pg.3 “MID complaint log..coverage for wind damage was denied for anything that had been touched by storm surge...adjuster determined it was all flood damage before the property was inspected.”

OIG's belated investigation and documentation of overcharging by Write-Your-Own Companies (like State Farm) may eventually result in all participating insurers being held accountable. However, I'm not confident after reading OIG's reports that they are competent enough to audit the Katrina claims files. Amazingly, State Farm quotes the first OIG report as if it exonerates their actions. OIG's documentation supports the Rigsbys' allegations. Issues regarding FEMA, FIA and OIG are located in Section V.

C. Thesis:

It goes without saying that we are all sick and tired of corporate fraud. From Enron to the current banking crisis, two common themes have emerged: some corporations have been violating the law with impunity and the Federal Government has been incompetent, negligent, or complicit in allowing violations to occur.

Our collective frustration is compounded by the fact that whistleblowers have come forward with specific evidence of fraud in many high-profile cases. (The Bernie Madoff affair is the most recent example.) And in almost all these cases, the whistleblowers are ignored, dismissed or worse.

My philosophy can be summed-up in two words: "Civil Society." Corruption is our enemy; transparency, integrity, and citizenship are the solutions. A civil society requires corporations, individuals and Government to assiduously observe the "rule of law" because social justice requires social accountability.

The "rule of law" principle is reflected in the "square corners rule" propounded by Justice Holmes in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*, 254 U.S. 141, 143 (1920). This principle has been the basis for

many claims filed under the False Claims Act, because corporations and individuals involved in contracts with the Federal Government often take liberties (cut corners) with terms and conditions expressed in the contract or regulatory language.

Enforcement of the square corners rule by the courts is a long-standing tradition.

“The oft-quoted observation in *Rock Island*...that “Men must turn square corners when they deal with the Government,” does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.”

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947).

Using the square corners rule, which is a contract-based theory, this paper demonstrates that the McIntosh flood insurance claim processing is evidence of fraud committed by State Farm because State Farm employees and contractors knowingly breached several fiduciary obligations owed the Federal Government under the Write-Your-Own regulations and the Standard Flood Insurance Policy. Since the Federal Government has been remiss in holding State Farm accountable, the Rigsbys *qui tam* claim under provisions of the False Claims Act, legitimately seeks justice on the taxpayers’ behalf.

D. Summary of Legal Reasoning, including Key Regulatory-Contract Provisions

Hyperlink to Legal Reasoning Sub-parts: [Contract](#), [Consideration](#), [Fiduciary relationship](#), [Duty to disclose material information and protect Government’s interest](#), [Concealment of material information is fraud](#), [Materiality Issue](#)

[discussed](#), [Intentional concealment issue discussed](#), [Federal Regulations required the Rigsbys to Report Fraud](#), [“Terms and Conditions” in the Standard Flood Insurance Policy](#), [Subscribed, sworn, notarized and Penalties emphasized](#), [Conclusion](#). [Fasle Claims Act Penalties that may be assessed against State Farm](#)

So the next questions are: “What’s in this contract?” and “How did State Farm violate its contractual obligations?” Each of these points is repeated (with proper citation) in the Analysis Section.

1. Contract:

State Farm entered into a **contract with the Federal Government** to “sell and administer” the Standard Flood Insurance Policy (“SFIP”), under the Write-Your-Own (“WYO”) Program of the NFIP. The contract terms are located at 44 C.F.R. § 62 et seq., entitled: Part 62 – SALE OF INSURANCE AND ADJUSTMENT OF CLAIMS. (“Part 62”)

2. Consideration:

Write-Your-Own Companies are handsomely compensated through commissions on sales of the Standard Flood Insurance Policy, and loss adjustment fees when claims adjustment if a catastrophe occurs. Between fifty and seventy-five percent of all flood premiums are paid out as commissions and fees to the insurance companies that sell and administer the program, without their taking any of the insurance risk.

3. Fiduciary relationship:

The contract invokes a **fiduciary relationship** between State Farm and the Federal Government in three separate locations of Part 62. Any analysis of State Farm actions requires using the legal framework applied to a fiduciary.

4. Duty to disclose material information and protect Government's interest:

The fiduciary relationship requires the Write-Your-Own company (State Farm) to **protect the interests of the Federal Government** ahead of their own interests, i.e. the conflict of interest issue in delineating wind damage from flood damage is directly addressed. The fiduciary relationship, under Mississippi law, triggers a **duty to disclose** all material information. Proving fraud by concealment requires establishing the existence of a fiduciary relationship.

5. Concealment of material information is fraud:

At the heart of the Rigsbys' fraud allegations is State Farm's **intentional concealment of material information** in Brian Ford's engineering report. Under Mississippi law, if a fiduciary relationship exists intentional concealment of material information is fraud.

6. Materiality Issue discussed:

The **"materiality"** of information is defined (by the United State Supreme Court) as "having a natural tendency to influence, or being capable of influencing, the decision of the decision-making body to which it was addressed."

Ford's investigation identified **specific and unqualified evidence** (and named an eyewitness) of preexisting wind damage prior to Hurricane Katrina's peak storm surge. Ford concluded that first floor building (and contents) damage was caused by wind prior to the storm surge. It is reasonable to assume that the concealed information would impact detailed damage information documented in

the Building Worksheet and Contents Worksheet. (FEMA Claims Adjustment Forms are attached to this document in the Appendix.) Because wind-originated damage is excluded from flood coverage, Ford's observations are precisely the type of information that the Federal Government has tasked the Write-Your-Own Company with identifying. The information directly impacts the attribution of total losses between wind and flood coverage. The Adjuster Claims Manual, which Write-Your-Own Companies are required to follow, specifically tasks adjusters to "Investigate and document all other evidence of loss."

7. Intentional concealment issue discussed:

The Rigsbys claim that Ford's report was **intentionally concealed** because State Farm selected properties for re-inspection in areas inundated by storm surge and where the engineer (or adjuster) documented evidence of preexisting wind damage or concluded that wind was the primary cause of damage. This evidences a bias against attributing damage to wind in areas impacted by storm surge.

In the McIntosh case, the property was re-inspected by John Kelly, whose observations and conclusions are in conflict with Ford's. Kelly's report became the basis for loss estimates in the Proof of Loss determination.

The information in Brian Ford's engineering report could have been "disclosed" to the Federal Government by (i) attaching it to the Preliminary Report, the Final Report, or the Proof of Loss; (ii) referencing it in any of the above reports or summarizing its contents in the Narrative Report which accompanies the Preliminary Report as an enclosure; or (iii) showing that Ford's report was vetted and then excluded or superseded for some legitimate reason. None of these actions were taken revealing State Farm's bias.

The Rigsbys do not claim that Brian Ford's report should have been the exclusive basis for the ultimate flood coverage determination, but that State Farm intentionally denied the Federal Government an opportunity to review it in deciding whether to approve the McIntosh claim, and exhibited a bias and illegitimate motive in re-inspecting the property.

8. Federal Regulations required the Rigsbys to Report Fraud:

Cori and Kerri Rigsby, were required by the regulations governing the National Flood Insurance Program and the Adjuster Claims Manual to “detect and report” fraud. The Federal Government's regulations require adjusters to “adjust claims in accordance with general Company standards, guided by [National Flood Insurance Program] Claims manuals” and “...to try to detect fraud ...and coordinate its findings with [Federal Insurance Administrator].”²⁴ And the Adjuster Claims Manual stipulates, “[i]t is the adjuster's responsibility to detect and report fraud. Any case where it is reasonably believed that there is the possibility of fraud must immediately be reported to the NFIP Servicing Agent or [Write-Your-Own] Company.”²⁵

The Rigsbys attempted to address the Brian Ford situation internally by confronting the catastrophe coordinator, Alexis “Lecky” King, an employee of State Farm.²⁶ Instead of allaying the Rigsbys' concerns, Lecky King enhanced their suspicions of fraud by dismissing Ford's report because he must have been related to the insured or had some other personal affiliation.

9. “Terms and Conditions” in the Standard Flood Insurance Policy:

²⁴ 44 C.F.R. § 62.23(1) and (5).

²⁵ Federal Emergency Management Agency, *Adjuster Claims Manual*, Section IX. Maintaining the Integrity of NFIP, B. Fraud Prevention.

²⁶ Relator's First Amended Complaint for Damages under the False Claims Act, 31 U.S.C. § 3729 ET.SEQ. Filed May 22, 2007.

If the Ford engineering report was intentionally concealed by State Farm then State Farm violated the **terms and conditions** of the Standard Flood Insurance Policy; which prohibit concealment of material information by the policyholder and their agents. The regulatory language, the Adjuster Claims Manual and the fiduciary relationship require State Farm to enforce the Standard Flood Insurance Policy's "terms and conditions" and thereby protect the Federal Government's interests. The policy's "terms and conditions" specify the penalty for concealing material information as voidance of the entire flood benefit, building and contents.

10. Subscribed, sworn, notarized and Penalties emphasized:

The adjuster-prepared Proof of Loss is subscribed and sworn to by the insured (and notarized) and the attestation clause stipulates "nothing has been doneto violate the conditions of the policy, or render it void...and no attempt to deceive the said insurer as to the extent of said loss, has in any manner been made." Further, in bold letters, it warns "...knowingly and willfully making any false answers or misrepresentations of fact may be punishable by fine or imprisonment...."

11. Conclusion:

Based on this reading of the facts and in the light of the contractual obligations, this note concludes that the McIntosh claim is evidence of a false claim, under both Section 3729(a)(1) and (a)(2).

12. False Claims Act Penalties that may be assessed against State Farm:

All of the following items may constitute pecuniary damages under the False Claims Act: (1) the entire \$250,000 flood payment to the McIntosh policyholder

for ‘building’ damage, voided by violation of the “terms and conditions” of the Standard Flood Insurance Policy, “concealing material information” (2) the entire \$100,000 flood payout for ‘contents’ damage, for the same reason cited in (1); (3) the loss adjustment expense allowance paid to State Farm on the McIntosh claim, and (4) the special allocated loss adjustment expense allowance, which covered special items including Brian Ford’s engineering report. Penalties may be trebled.

Even if no pecuniary damages were assessed, the False Claims Act stipulates a nominal fixed penalty of \$5,500 - \$11,000 for each false claim independent of actual damages.

(II) Background

Hyperlink to Sub-parts: [Hurricane Katrina and the Wind Versus Flood Attribution Dilemma](#); [Rigsbys at Ground Zero](#); [Brian Ford’s engineering report](#); [Groundswell of fraud allegation leading to the Rigsbys becoming Whistleblowers under the False Claims Act](#)

A. Hurricane Katrina and the Wind Versus Flood Attribution Dilemma:

This section discusses the nature of Hurricane Katrina’s wind and flood damage and the difficulty in delineating between them for the purpose of separating the liability between the private carrier (wind damage) and the NFIP (flood damage).

Hurricane Katrina made landfall on the Mississippi coast on the morning of August 29, 2005. Flood insurance claims paid by the National Flood Insurance

Program exceed \$15.85 billion dollars and number 209,404 as of December 31, 2008.²⁷

The nature of hurricane damage is for hurricane force winds to reach the coastline with the mid- and outer bands of the storm, followed by an increasing storm surge that peaks when the storm's eye reaches the coastline. As a result, it can be inferred that some wind-originated damage can literally be washed away by the subsequent storm surge.

At the time, most private carriers offered wind coverage under the homeowner's policy. Under the National Flood Insurance Program, the private carrier can offer flood insurance, and are tasked, under the Single Adjuster Program, with adjusting both the wind and flood claims in the wake of hurricanes.

This introduces an obvious conflict of interest where the adjuster is given the responsibility to apportion total damage between wind and flood, where the adjuster's employer has liability only for the wind damage. That has led many to suspect adjusters or their handlers of shifting wind-originated damage to the flood coverage wherever flood provided a reasonable basis for the claim.

In the wake of Congressional Hearings into these allegations, the Department of Homeland Security ("DHS") was directed by Congress to investigate the allocation of wind and flood damage. DHS's Office of Inspector General implemented a comprehensive work program studying the wind and flood

²⁷OIG-08-97, *Hurricane Katrina: Wind versus Flood*, Department of Homeland Security, Office of Inspector General, pg.4.

damage due to Hurricane Katrina.²⁸ A preliminary report was filed July 31, 2007.²⁹ A supplementary, more comprehensive report was filed on September 30, 2008.³⁰

Both reports provide meteorological charts showing wind speed and the elevation of storm surge at one hour intervals at three separate locations along the Mississippi coastline, Bay Saint Louis, Biloxi and Slidell. Because the McIntosh property is located in Biloxi, I will refer to that chart.³¹

Hurricane force winds were reported in the area of the McIntosh home starting around 7:00am and continued until approximately noon, peaking at 90 mph at 10:00am. The McIntosh home began to flood around 10:00am reaching a peak between five and six feet inside the first floor as measured by water marks on the walls. The McIntosh house is located about one-half mile from the coastline and rests at 19 feet above sea level.

B. Rigsbys at Ground Zero: A Description of the Adjuster's Job

This section discusses the Rigsbys' personal experiences as claims adjusters in the wake of Hurricane Katrina, which led to the fraud allegations against State Farm under the qui tam section of the False Claims Act.

Cori and Kerri Rigsby are both professionally trained and experienced claims adjusters. Claims adjusters are sent to disaster sites to assess damage to homes and personal contents and determine the cause of property loss. The Rigsbys' employer, E.A. Renfroe, was a contractor working almost exclusively for

²⁸ That work program is on-going in fiscal year 2009, see OIG_APP_FY09. One hundred thirty-one files from WYO providers who also supplied a homeowner's policy covering wind and/or a separate state-run program of optional "wind pool" coverage.

²⁹ OIG-07-62, Hurricane Katrina: A Review of Wind versus Flood Issues, July 2007, Department of Homeland Security, Office of Inspector General.

³⁰ OIG-08-97, *Hurricane Katrina: Wind Versus Flood Issues*, September 2008, Department of Homeland Security, Office of Inspector General.

³¹ Id. Appendix H, pg. 40

State Farm. Prior to Katrina, the Rigsbys had worked for E.A. Renfroe for nearly eight years.

After Hurricane Katrina, State Farm contracted E.A. Renfroe to handle claims in Mississippi and the Rigsbys were both dispatched to coastal Mississippi (ground zero for Hurricane Katrina) as team leaders.

When an insurer, like State Farm, has issued both a Homeowner's Policy and a Standard Flood Insurance Policy to a single homeowner through the Write-Your-Own Program, the claims adjustment will be done by a single adjuster under the "Single Adjuster Program" of the NFIP. The Homeowner's policy covers wind damage and the Standard Flood Insurance Policy covers flood damage. Because there are two separate policies, the adjuster documents the damage to the home (and the damage to the home's contents) and makes a determination as to the cause of loss, wind or flood.

This is done, first in a Preliminary Report, which is required to be filed within fifteen days and subsequently, in a Final Report. Detailed worksheets³² provided by the Federal Emergency Management Agency are usually attached to the Preliminary and Final Reports, along with the statutorily required Proof of Loss Form. (All reports can be located in the Appendix of the Adjuster Claims Manual, and are provided in editable PDF format by most software providers supporting claims adjustment.)

The adjuster, in collaboration with the homeowner completes these forms, signs the Preliminary and Final Report and presents the homeowner with the Proof

³²The Building worksheet and Contents worksheet (and other required forms, like the Final Report, Preliminary Report, and the Proof of Loss) are found in the appendix of the Claims Adjustment Manual, and is accessible on line at: http://www.fema.gov/pdf/nfip/adj_man/14saadj.pdf They are also attachments to this note.

of Loss to be signed, sworn, notarized and filed with the Federal Government within sixty days.

The Building worksheet and the Contents worksheet have six columns, allowing for a detailed listing of the building's components and a listing of the home's contents: Quantity, Description of Property, Full Cost, Depreciation, Flood Loss, and Wind Loss. Note that the worksheet requires apportioning each item between wind and flood. The worksheets accompany the "Proof of Loss" document, which is signed by the insured, subscribed, sworn and notarized. (Again, software like Xactimate or XACT Total will automatically provide a compendium of the required documents.)

The sworn statement (at the bottom of the "Proof of Loss") includes the following language:

"The said loss did not originate by any act, design or procurement on the part of your insured, *nothing has been done by or with the privity or consent of your insured to violate the conditions of the policy, or render it void*; no articles are mentioned herein or in annexed schedules by such as were destroyed or damaged at the time of said loss, no property saved has in any manner been concealed, and *no attempt to deceive the said insurer as to the extent of said loss, has in any manner been made*. Any other information that may be required will be furnished and considered a part of this proof." [emphasis added]

Usually, the adjuster (assigned by the private insurance carrier) prepares the various worksheets, Final Report, and Proof of Loss to be "certified" by the insured. The adjuster (an agent of the private insurance carrier) is acting for the insured when providing documentation of loss, under 44 C.F.R. § 61.5(e):

"Accordingly, representations regarding the extent and scope of coverage which are not consistent with the National Flood Insurance Act of 1968, as amended, or the Program's regulations, are void, and *the duly licensed property*

or casualty agent acts for the insured, and does not act as agent for the Federal Government.” [emphasis added]

Usually adjusters examine a property and determine the cause of damage, but after Katrina, along with the adjusters, State Farm hired licensed professional engineers (like Forensic Analysis and Engineering Corporation) to issue damage reports. According to the Rigsbys, the adjusters were not allowed to deal directly with the engineers, and the engineering reports were delivered to the Rigsbys’ supervisor, a catastrophe coordinator named Alexis “Lecky” King.

C. Brian Ford’s engineering report vs. John Kelly’s engineering report:

Kerri Rigsby began to suspect something was amiss when she inadvertently discovered Brian Ford’s engineering report on the McIntosh residence. Ford worked for Forensic Analysis and Engineering Corporation (“FAEC”) of Raleigh, North Carolina. The report, dated October 12, 2005 had a post-it attached which read “Put In Wind File, Do Not Pay Bill, Do Not Discuss”.

When she went to put Ford’s report in the McIntosh file, she discovered another engineering report in the folder written eight days after Ford’s report, by a different engineer at FAEC. The second engineering analysis conducted on the McIntosh home was signed by John Kelly. She characterized Kelly’s report as “completely different”³³ in their representation of damage and their conclusions.

Ford’s report includes specific and unqualified “SITE Observations” that support his conclusion. “It is FAEC’s opinion that the interior damage of the structure is *primarily the result of the failure of the windows, walls, and doors due*

³³ Relator’s First Amended Complaint for Damages under the False Claims Act, 31 U.S.C. § 3729 ET.SEQ. paragraph 70, pg 19 or 45.

to wind.” (emphasis added) Ford’s report was signed by Robert Kochan, President of FAEC.³⁴

First, Ford identified a breach to the front wall of the McIntosh home that was consistent with the eyewitness account.

“The lower front right corner of the house wall was missing – approximately three studs.”³⁵

Then Ford identified an eyewitness through his conversation with Mr. McIntosh. That eyewitness related seeing wind damage to the McIntosh home prior to flooding that explained the cause of the breach to the front wall.

“According to Mr. McIntosh, a neighbor – Mike Church – reported that houses were blown apart and *debris was thrown into the McIntosh house at approximately 8AM and the floodwater began rising at 11AM.*”³⁶ (emphasis added)

Ford concluded that wind was the primary cause of the first floor damage despite evidence of flooding on the first floor:

“The first floor elevation is approximately 20-21 feet. The watermark line in the house is approximately five and one-half feet above the main floor interior flooring.”³⁷

Kelly has a similar set of “SITE Observations” and names Mr. Craig Robertson as a witness to preexisting wind damage. Similar to Ford, after noting the first floor wall damage, he questioned Mr. Robertson on the cause. “[H]e was unsure, but stated that there was a brick wall on the south end of that room that had

³⁴ GTaylor.O&ITestimony.022807.pdf pg6.

³⁵ GTaylor.O&ITestimony.022807.pdf pg5.

³⁶ GTaylor.O&ITestimony.022807.pdf pg5.

³⁷ GTaylor.O&ITestimony.022807.pdf pg5.

blown into the house and there was lumber in that [dining] room after the storm.”³⁸
(emphasis added)

But Kelly reaches a different conclusion from Ford regarding the cause of first floor damage. “The damage to the first floor walls and floors appears to be predominately caused by rising water from the storm surge and waves.”³⁹ Kelly’s engineering report is also signed by Robert Kochan.

Kelly’s conclusion is different because he observed something that Ford did not observe: “Observations of the exterior porch columns, which also show signs of abrasion for a distance of about 4ft. above the porch floor. This is consistent with part of a roof structure rubbing against the columns which being carried by water.” These porch columns were directly in front of the first floor exterior wall that was damaged. Kelly concluded that the first floor exterior wall was damaged by the roof structure and not by the anything being blown into the wall.

In her deposition testimony Kerri Rigsby related seeing a pile of claims folders which were being rewritten or re-inspected and that Lecky King stated “we all know [wind damage] didn’t happen here....”⁴⁰ The Rigsbys concluded that the motivation behind ordering re-inspection reports was to shift liability to the government’s flood policy thus minimizing State Farm’s own liability. The Rigsbys weren’t the only ones to reach that conclusion.

D. Groundswell of fraud allegations leading to the Rigsbys becoming whistleblowers (relators) under the False Claims Act

³⁸ GTaylor.O&ITestimony.022807.pdf pg8.

³⁹ GTaylor.O&ITestimony.022807.pdf pg9.

⁴⁰ Kerri Rigsby April 1, 2007, 114:21-23 “large stack on Lecky’s desk and she said all of them had to go back.” 116:9-11 “Well, she said that they all said that there was wind damage and she said we all know that didn't happen here in a hurricane.”

Within a month of the storm, litigation was commenced in United States District Court for the Southern District of Mississippi against State Farm (and other private carriers) for wrongfully denying (or mishandling) wind claims by attributing the primary cause of damage to storm surge flooding even when evidence conflicted with that conclusion.

Several class action “breach of contract” and “bad faith” claims evolved from similar allegations. One group of plaintiffs was represented by Richard A. Scruggs, a legendary trial bar attorney credited with bringing down the tobacco industry in the 1990s. In a parallel to the tobacco litigation, Scruggs recruited the Rigsbys as his “insider,” using them to access State Farm and E.A. Renfroe proprietary databases for the purpose of scoping out the claims files of his class action plaintiffs. The information gathered was used to support the “bad faith” allegations, which if proved, trigger punitive damages. The information was also delivered to the Mississippi Attorney General, Jim Hood who threatened State farm with criminal charges.

As part of their partnership with Scruggs, the Rigsbys were encouraged to appear on ABC’s 20/20 and their “insider” story was promoted in the press. All of the publicly disclosed allegations became the elements of the Rigsbys’ False Claims Act filing in April 2006.

The False Claims Act prohibits presentation of a fraudulent claim on the United States Government and gives private individuals a right to sue on behalf of the United States Government, also known as *qui tam*.

Cori and Kerri Rigsby have alleged that State Farm “made a corporate decision to misdirect and misallocate claims from those of hurricane coverage...to

flood claims that could be submitted and paid directly from the United States Treasury.”⁴¹

Their Amended Complaint states:

“...defendant State Farm directed its employee adjusters and independent contractor adjusters ... to show flood damage whenever and wherever there was any amount of water damage, and to adjust the claim as flood insurance rather than hurricane insurance even though the primary mechanism for damage was wind, not flood waters.”⁴²

On April 8, 2008, State Farm filed its Answer to the Rigsbys’ qui tam claim under the False Claims Act⁴³, along with two Motions to Dismiss (“Motions”).⁴⁴ This paper refutes both Motions and concludes for denying both Motions.

State Farm’s Motion to Dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b) (Filed April 8, 2008) is the standard Fed. R. Civ. P. 12(b)(6) motion; “failure to state a claim” based on the Fed. R. Civ. P. 9(b) requirement that allegations of fraud must be averred “with particularity”. State Farm claims that the only admissible evidence provided by the Rigsbys is the McIntosh claim, and McIntosh can’t be a ‘false’ claim, because the \$250,000 flood benefit had a reasonable basis.

⁴¹ Relator’s First Amended Complaint for Damages under the False Claims Act, 31 U.S.C. § 3729 ET.SEQ. paragraph 56, pg 15 of 45.

⁴² Id. paragraph 59, pg 16 of 45.

⁴³ 31 U.S.C. §§ 3729-33.

⁴⁴ United States ex. rel Cori Rigsby and Kerri Rigsby v. State Farm Mutual Insurance Company, CASE NO. 1:06cv433-LTS-RHW, Answer, Defenses and Counterclaim to Relators’ Personal Claims in Relators’ First Amended Complaint; Motion to Dismiss for Lack of Subject Matter Jurisdiction; Memorandum in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction; Motion to Dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b); Memorandum of Authorities in Support of its Motion to Dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b); all Filed April 8, 2008. Source: http://www.statefarm.com/about/media/media_releases/rigsby.asp

In support of this statement they cite Kerri Rigsby's own testimony that she thought there was sufficient flood damage to warrant the maximum payout.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction cites a statutory bar to jurisdiction. The "public disclosure" bar⁴⁵ which states that evidence of prior public disclosure bars the FCA claim unless the relators show that they qualify for the "original source" exemption⁴⁶ by demonstrating they had "direct and independent knowledge" of a documented fraudulent act and voluntarily provided such information to the Government before filing their claim.

I concede that allegations of flood insurance claims fraud were disclosed in media reports, in court filings and in Congressional hearings before the Rigsbys came forward. Therefore, the Rigsbys' must demonstrate that they qualify for the "original source" exemption, by showing direct and independent knowledge of fraud and voluntarily provided that information to the U.S. Government before filing their own claim. Because Kerri Rigsby was directly involved in processing the McIntosh claim and confronted the catastrophe coordinator about the multiple engineering reports performed on the McIntosh claim, it can be stated that, if McIntosh is evidence of fraud, then she has "direct and independent knowledge" of a fraud, and the Rigsbys would qualify for the "original source" exemption to the public disclosure bar. Therefore, the outcome of the second motion rests on whether McIntosh is evidence of a false claim, and can be merged with the first motion.

⁴⁵ 31 U.S.C. §§ 3730(e)(4), "No court shall have jurisdiction over an action under this section based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, rearing, audit, or investigation, or from the news media, unless the person bringing the action is an original source of the information.

⁴⁶ 31 U.S.C. §§ 3730(e)(4)(a), "For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

In addressing State Farm’s Motions to Dismiss, the plaintiffs (nonmovinants) must show sufficient evidence of fraud, an essential element in proving their case at trial, which they bear the burden of proof, otherwise summary judgment is mandated under Fed. R. Civ. P. 56(c). Thus everything rests on the particulars of the McIntosh flood insurance claim processing.

(III) Analysis: Refutation of State Farm’s Motions to Dismiss

Hyperlink to Sub-parts: [Goal of the May 20 Hearing: Demonstrate that McIntosh is evidence of a “false claim” under the False Claims Act](#); [Legal Standard for Granting Summary Judgment](#); [There are two arguments that lead to denial of State Farm’s Motions](#); [Argument #1: McIntosh claim was “facially” false, Section 3729\(a\)\(1\) was violated, Using Greer as the template](#); [Argument #2: The McIntosh claim is “implied” false. State Farm is liable under Section 3729\(a\)\(2\) because false records were knowingly made “to get a false or fraudulent claim paid.”](#) ; [Why State Farm’s analysis of Southland is wrong](#); [Thevenot](#); [Supermercados](#) ; [Revisiting Contract and Regulatory provisions and guidance](#)

A. Goal of the May 20 Hearing: Demonstrate that McIntosh is evidence of a “false claim” under the False Claims Act:

On May 20, 2009 the United States District Court for the Southern District of Mississippi (Judge L. T. Senter, Jr.) will hold a Hearing on two State Farm Motions to Dismiss the Rigsbys’ *qui tam* claim under the False Claims Act.⁴⁷ The focus of the hearing will be the flood insurance claim prepared by State Farm

⁴⁷ Judge L.T. Senter, Jr.; February 12, 2009 Order. (Appendix: Attachment I)

adjusters for Thomas and Pamela McIntosh. The McIntosh claim adjustment is the only admissible evidence of a “false claim” supplied by the Rigsbys in making their fraud allegations against State Farm. Since discovery has been denied, if McIntosh is not evidence of a false claim, then the Rigsbys’ entire case can be dismissed (i.e., Summary Judgment for State Farm) on failure to meet the *prima facie* requirements (as interpreted by the Fifth Circuit) of the False Claims Act.

State Farm seeks Summary Judgment by arguing that the McIntosh claim cannot be representative of a “false claim” because (1) any reasonable person would have concluded that \$250,000 of building damage and \$100,000 of personal property damage was caused by flooding (refuting Count I, alleging a Section 3729(a)(1) violation of the False Claims Act), and (2) even if there were “false records or statements” made, they were not “material” to the outcome, in that they could not have influenced the Federal Government’s decision to pay the maximum allowable amounts under the policy (refuting Count II, alleging a Section 3729(a)(2) violation). State Farm cites Kerri Rigsby’s sworn testimony to support their argument that substantially more than \$250,000 of flood damage was done to the building, and that Ford’s report would not have changed the outcome.

B. Summary Judgment Standard:

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law.” Fed. R.Civ.P. 56(c). (emphasis added)

Following the procedure established in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the party seeking summary judgment has the initial burden of

explaining why the evidence demonstrates the absence of a genuine issue of material fact. State Farm has made this argument in their Motions to Dismiss as described above.

“Factual disputes that are irrelevant or unnecessary will not be counted.” *Andersen v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

To avoid Summary Judgment under Fed. R. Civ. P. 56(c), the Rigsbys must demonstrate why the McIntosh claim is a false or fraudulent claim. A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Andersen* at 248.

As stipulated by the Rigsbys’ counsel⁴⁸:

“A motion for summary judgment should be granted only “if, viewing the evidence and inferences drawn from that evidence *in the light most favorable to the non-moving party*, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” (citing, *Reagan*, 384 F.3d at 173) (emphasis added)

C. There are two arguments that lead to denial of State Farm’s Motions:

The first argument is that the McIntosh claim is facially false, i.e. either the \$250,000 payout for building damage or the \$100,000 payout for personal property were not warranted by the circumstances. The Rigsbys’ counsel has made this argument, based on the “inferences” that may be drawn from a concealed engineering report that concluded that wind was the primary cause of damage.

The second argument that leads to denial of State Farm’s Motions is that the McIntosh claim is ‘impliedly’ false, under Section 3729(a)(2) of the False Claim

⁴⁸ RELATORS’ CONSOLIDATED PRE-HEARING RESPONSE TO ALL DISPOSITIVE MOTIONS, pg. 18; March 12, 2009. C. Maison Heidelberg, Attorneys for Cori and Kerri Rigsby (Appendix: Attachment II).

Act. This argument has not been made by the Rigsbys' counsel. This argument critiques State Farm's reasoning in their Motions, particularly their own precedent case, *Southland*. (see below)

It can be shown that application of that *Southland*'s legal reasoning to the Rigsbys' fact pattern leads to Summary Judgment for the Rigsbys; in that State Farm failed to perform specific contract obligations. Once a breach of contract is established, following on *Southland*'s legal reasoning we look to whether the contract establishes a remedy or a process for abating non-compliance. The contract breach established by the Rigsbys is the intentional concealment of material facts in order to misrepresent the circumstances detected by Brian Ford. The Standard Flood Insurance Policy, which State Farm is bound by contract to protect, has only one remedy: "contract is void."

1. Argument #1: McIntosh claim was "facially" false, Section 3729(a)(1) was violated:

This argument focuses on the inferences that may be drawn from Cody Perry's (adjuster) report and/or Brian Ford's engineering report. Each made informed decisions about cause of loss, delineating wind damage from flood damage. The goal of this argument is to show how their report "Observations" and "Conclusions" did not support the final estimates of wind and flood damage in State Farm's detailed damage report; i.e. FEMA Form 81-41 Building Worksheet and FEMA Form 81-40 Contents – Personal Property Worksheet. (see Appendix. These have electronic counterparts in the Xactimate or XACT Total software used by E.A.Renfroe, the Rigsbys' employer and contractor for State Farm.)

State Farm argues that the McIntosh claim cannot be facially false, because the damage warranted both the maximum \$250,000 Building payout and the

\$100,000 Contents – Personal Property payout. This argument would be applicable exclusively to the Building (Dwelling) because Kerri Rigsby (in her testimony) believed that at least \$250,000 of flood damage was done to the McIntosh home (Building). It does not apply to the Contents – Personal Property adjustment.

According to the final adjuster’s damage estimate submitted by State Farm, total covered personal property damage (after the deductible is applied) attributed to flooding was \$105,156.70; which is nearly the allowable maximum. If more than \$5,156.70 worth of first floor Contents - Personal Property damage that was attributed to flooding, could have been attributed to wind and wind driven rain then there would be a “genuine issue of material fact.”

Reading Brian Ford’s report literally, and viewing the evidence “in a light most favorable” to the Rigsbys, the fact finder could conclude that most, if not all, first floor damage as due to wind and wind-blown rain and this would warrant denial of State Farm’s motions to dismiss.

(The Rigsbys do not possess a copy of the detailed item-by-item damage reports (cited above) underlying the \$105, 156.70 estimate. In order to obtain this report, the Rigsbys requested limited discovery under FRCP 56(f), but that Motion has been denied.)

We know that Brian Ford’s concealed engineering report specifically documented a first floor breach of the exterior wall. This is significant information (the legal term of art for ‘material’ in Mississippi) because a breach of the first floor exterior wall, if preexisting the flooding, would allow wind-blown rain to enter the house. That is precisely what Ford’s report concluded and it was supported by a named eyewitness, who purportedly saw debris thrown into the McIntosh’s front exterior wall prior to the flooding.

a. Using Greer as the template:

In *Greer v. Owners Ins. Co.*, 434 F.Supp. 2d 1267 (N.D. Fla. 2006), the court was forced to choose between four dramatically different flood adjustments. The Greer's home was impacted by both high winds and flooding in the wake of Hurricane Ivan. "During the storm, flood water invaded the interior of the house, with high water line reaching at least 21 inches up the interior walls." *Greer* at 1271. A FEMA adjuster, a Small Business Administration adjuster, an insurance company adjuster, and an adjuster hired by the homeowners attributed vastly different damage to flooding, \$27,238 from the FEMA adjuster, \$127,511.70 from the SBA adjuster, \$71,456.90 from the insurance company's adjuster, and approximately \$151,570.61 from the homeowner's adjuster.

The insurance company hired an expert, Daniel T. Sheehan, a professional engineer to inspect the property and his testimony became the basis for the court's conclusion that the insurance adjustment was the most accurate. At the center of differences was the attribution of first floor damage to wind or flooding. Sheehan concluded that the "interior of the home was not subject to damage caused by high winds because the doors and windows had remained intact." *Greer* at 1271.

"Sheehan explained that the damage caused by flood and the damage caused by wind are easily distinguishable in the plaintiffs' house because the presence of a high water mark inside the house and due to the fact that during the hurricane *none of the walls, roof, windows or exterior doors were breached* by the wind." (emphasis added)

Greer at 1271-2.

As an aside, Mr. and Mrs. McIntosh sued State Farm for fraud⁴⁹ under their Homeowner's Policy (in this very same court, with Judge Senter presiding). From the record, we know that State Farm paid \$36,228.37 for combined building and personal property damage caused by wind. This would have included observable wind damage to the roof and second floor that could not have been attributed to flooding. It seems reasonable to conclude that State Farm attributed most, if not all, first floor personal property damage to flooding.

There were residual water marks six feet high on the first floor wall, providing an irrefutable foundation for assigning the cause of damage to flooding...IF a preexisting cause of loss is not identified. That would be the motivation for concealing Brian Ford's engineering report or Cody Perry's adjustment report, which specified preexisting wind damage.

The Rigsbys do not possess the detailed damage estimates for the building and personal contents. As pointed out by the Rigsbys' counsel, according to Mississippi Supreme Court, delineation of damage between wind and flood is a fact issue to be determined by the fact finder (jury) at trial.⁵⁰ Moreover, because the detailed damage estimate is a central piece of evidence in the position of State Farm, the court should have granted the Rigsbys Motion for limited discovery under Fed. R. Civ. P. 56(f).⁵¹ These arguments have been made by the Rigsbys' current counsel, and could be the basis for an appeal.

⁴⁹ *McIntosh v. State Farm Fire and Cas. Co.*, CIVIL ACTION NO.1:06CV1080 LTS-RHW, MEMORANDUM OPINION, April 21, 2008.

⁵⁰ RELATORS' CONSOLIDATED PRE-HEARING RESPONSE TO ALL DISPOSITIVE MOTIONS, pg. 18 citing *Fonte v. Audubon Ins. Co.*, -- So.2d --, No.2008-CA-00222-SCT, 2009 WL 468584, at *5 (Miss. Feb. 26, 2009)

⁵¹ RELATORS' CONSOLIDATED PRE-HEARING RESPONSE TO ALL DISPOSITIVE MOTIONS, pg. 19-21.

2. Argument #2: The McIntosh claim is “implied” false. State Farm is liable under Section 3729(a)(2) because false records were knowingly made “to get a false or fraudulent claim paid.”

The Rigsbys’ counsel have not addressed State Farm’s arguments made in connection with Count II, Violation of Section 3729(a)(2). State Farm argues that even if a false statements or false records were made, they were not “material” to the Federal Government’s decision to pay the maximum allowable benefit under the flood policy and based on *Southland* were not made “to get” a false claim paid.

Section 3729(a)(2) reads: “Knowingly makes, uses or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved[.]”

State Farm liability under Section 3729(a)(2) of the False Claims Act is invoked because several FEMA-supplied forms, prepared and filed by State Farm’s claims adjusters (using versions in Xactimate or XACT Total software), misrepresented (or omitted facts pertaining to) the causes of damage to the McIntosh house and personal property. Specifically, these include the Building and Contents Worksheets, and the Narrative Report.

The Building and Contents Worksheets, which differentiate between wind and flood on an item-by-item basis (see Appendix), and the Narrative Report would have been impacted by the material information in Brian Ford’s “SITE Observations” section of his engineering report. Several State Farm and E.A. Renfroe employees are involved in adjusting the McIntosh flood claim. They investigated the damage and prepared these forms.

- a. Why State Farm’s analysis of *Southland* is wrong:

At the heart of State Farm’s defense (citing *Southland*⁵²) is the claim that a detailed damage estimate based on the concealed report (Brian Ford’s engineering report) would have resulted in the “flood” column (on the Worksheets) totaling *at least* \$250,000 for building damage and \$100,000 for personal property damage. Basically, their defense is that the claim was not facially false because Ford’s report may have altered the column tallying Building damage caused by flood from \$500,000 to \$400,000 or \$300,000, but certainly not below \$250,000 which was the maximum.

Therefore, Ford’s report was not material to the decision to pay the McIntosh household the maximum allowable claim of \$250,000. In other words, Ford’s engineering report did not “have a natural tendency to influence, or being capable of influencing, the decision of the decision-making body to which it was addressed.” (*Southland* at 679, citing *Kungys v. United States*, 485 U.S. 759,770 (1988) quoting *Neder v. United States*, 527 U.S. 1; the controlling definition of “materiality”.)

As a first criticism of State Farm’s analysis, they rely on Judge Jones’ concurring opinion, particularly with regard to the concept of “materiality,” which is specifically avoided in the unanimous opinion authored by Judge Reavley. Although the Fifth Circuit had relied upon the “materiality” arguments in their first look at *Southland*,⁵³ they decided to rehear the case *en banc*. This is because the Legislative History of the False Claims Amendments Act makes clear that

⁵² *United States v. Southland Management Corp.*, 326 F.3d 669 (5th Cir 2003).

⁵³ *United States v. Southland Management Corp.*, 288 F.3d 665 (5th Cir. 2002), *vacated on reh’g en banc*, 307 F.3d 352(5th Cir. 2003).

damages are not an element of proof necessary to establishing liability under the False Claims Act.⁵⁴

Southland involved a Section 8 Housing Assistance Program contract (“HAP contract”), where the rental properties were inspected in the application phase and re-inspected annually thereafter. Rental units generally deteriorate over time and the property involved in *Southland* deteriorated dramatically. The last Government inspection reported “every inspected unit failed to comply with HUD’s Housing Quality Standards.” Hence, the property was deemed “unsatisfactory.”

Because the property owners certified the habitability of each and every unit as a precondition for receiving the housing subsidy, the Federal Government attempted to apply the “implied certification” theory of the False Claims Act as a vehicle for recovering damages. Implied certification is a Section 3729(a)(2) claim, that a “false record or statement is used to get a false claim paid.” Under the implied certification theory, the “claim” is not facially false, rather an underlying precondition for receiving payment is violated.

In *Southland*, the owners were required to inspect units for habitability, record the findings on a form and certify that “to the best of [their] knowledge and belief (i) the dwelling units are in Decent, Safe, and Sanitary condition, [and] (ii) all other facts and dates on which the request for funds is based are true and correct.....”⁵⁵

The owners challenged the Government’s assertion that the certification of habitability was a misrepresentation, arguing (i) the subjective nature of the

⁵⁴ Senate Report No. 99-345, Legislative History, False Claims Amendments Act. “. . .the United States may recover one \$2,000 forfeiture for each false claim submitted in support of a claim. . . .The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of damages. . . .A forfeiture may be recovered from one who submits a false claim though no payments were made on the claim.”

⁵⁵ *Southland* at 672.

standard (ambiguity), (ii) that the Government had knowledge of the conditions through their own inspections (ratification) and (iii) that the Government had engaged a process of remediation (contract terms and course of conduct).

The court determined that, even though the “Owners” made false statements in some “certification” of habitability documents,

“[w]hen we apply [the False Claims Act] to the [Housing Assistance Payment] Contract and the course of conduct between HUD and the Owners, we conclude upon this record that the Owners were entitled to the housing assistance payments sought and, thus they made no false claims.”

Southland at 675.

State Farm quotes the preceding paragraph which seems to support their theory for dismissal or Summary Judgment:

“In this case unless the Owners submitted claims for money to which they were not entitled no False Claims Act liability arises. Although §3729(a)(2) prohibits the submission of a false record or statement, it does so only when the submission of the record or statement was done in an attempt to get a false claim paid. There is no liability under this Act for a false statement unless it is used to get false claim paid.”

Southland at 675.

Judge Reavley’s opinion in *Southland*⁵⁶ is a contract-based analysis. He agreed with the defendants’ arguments, that the contract outlines the procedure for remedying noncompliance, and that the Government had shown a continuous course of conduct in adhering to the contract-based remediation process. Judge Reavley concluded that use of the False Claims Act as an enforcement tool was inappropriate when other methods were specifically outlined.

⁵⁶ *United States v. Southland Management Corp.*, 326 F.3d 669 (5th Cir 2003).

Judge Reavley held that the Federal Government could not suspend payments unilaterally without following the contractually defined remediation process. First, the contract requires notice of noncompliance detailing the issues. Then an abatement plan must be formulated and a budget established, funded from the HAP contract subsidy payments.

Therefore, the “falsity” of the underlying certification could not have altered the Federal Government’s decision to pay the subsidy; it was not material to the Government’s decision. The court concluded that the Federal Government “got exactly what it was willing to pay for.”

Applying the *Southland* holding to the Rigsbys’ fact pattern yields a different result. Like *Southland*, *Rigsby* involves a false certification, in that the adjuster signs the Preliminary Report and the Final Report, presents the reports to the homeowner, who also signs, under the certification clause.

Unlike *Southland*, in *Rigsby*, the Federal Government has no knowledge of Brain Ford’s report or Cody Perry’s report; both were concealed, along with substitution of Ford’s engineering report with John Kelly’s engineering report.

Unlike *Southland*, in *Rigsby*, the contract contains several unambiguous “terms and conditions” that have been violated by State Farm’s actions. The Government’s claim in *Southland* involves the violation of an ambiguous or subjective phrase which is not defined in the contract: “Decent, Safe, and Sanitary condition.” In *Rigsby*, there are several contract provisions and phrases which require State Farm to perform the inspection function with due diligence, to detect material information impacting cause of loss and to disclose all material information impacting cause of loss.

Like *Southland*, in *Rigsby*, the contract contains an unambiguous remedy. If material information is intentionally concealed or misrepresented, then the contract is void.

Finally, the case law underlying the enforcement of the National Flood Insurance Program shows a consistent application of the “terms and conditions” of the Standard Flood Insurance Policy, specifically the contract penalty of voidance for misrepresentation of any fact on the Proof of Loss, or intentional concealment of an underlying circumstance. It does not matter who is responsible for the misrepresentation, the homeowner, the insurance agent, or the adjuster. (see *Supermercados*) It also does not matter whether the false claim resulted in a flood payment by the Federal Government. (see *Thevenot*)

b. *Thevenot*:

Thevenot v. National Flood Ins. Program, 620 F. Supp. 391 (D.C. La. 1985) is an application of the principle that the Federal Government need not establish any proof of damages. In *Thevenot*, the court applied the nominal FCA penalty (at that time \$2,000; now it is \$5,500 to \$11,000 per claim) to a homeowner who filed a facially false claim. The homeowner had moved her furniture to storage prior to a hurricane and subsequently claimed that the furniture had been destroyed by flood waters. Ironically, the depreciated value of the items listed in the detailed damage report did not exceed the deductible, resulting in no payment on the flood claim.

I cite *Thevenot* because it distinguishes a pure fabricated claim from an exaggerated or inflated claim. Judge Senter has cited the distinction between a

fabricated and exaggerated claim.⁵⁷ Judge Senter states that *Rigsby* does not involve a fabricated claim but rather an alleged “inflated” claim. “There is no allegation that the defendants ever submitted claims to the United States that were fabricated, only that the defendants acted in concert to inflate or exaggerate the amount of the legitimate flood insurance claims that they submitted.”

c. *Supermercados*:

Supermercados Econo v. Integrand Assur. Co., 359 F. Supp. 2d 62 (D. Puerto Rico 2005) is an example of a misrepresentation of a specific fact on the “Proof of Loss” form that results in voiding the contract benefit. The misrepresented fact would seem trivial to most, and easily correctable, yet the court deemed it “material” and applied the contract remedy of voidance. Moreover, the plaintiff, though aware of the facts underlying the misrepresented fact, had no input in filing the flood claim and never signed the “Proof of Loss.” The voidance of the contract (and benefit) seems harsh, but the court carefully walked through the Standard Flood Insurance Policy, applying the unambiguous “terms and conditions” to the admitted facts to reach their conclusion.

Supermercados is a grocery chain that stored refrigerated and dry goods at a warehouse owned by Atlantic Cold Storage (“Atlantic”). Atlantic’s insurance provider, Colonial, could not provide flood insurance but it could collect the flood premium and transfer that to Integrand Assurance Company, a Write-Your-Own Company. Supermercados requested that Atlantic include them as an additional insured and loss payee under Atlantic’s policy. Atlantic agreed to Supermercados’

⁵⁷ United States District Court for the Southern District of Mississippi, Order , February 12, 2009, Judge L.T. Senter, Jr.; in *United States ex rel. Cori Rigsby and Kerri Rigsby v. State Farm Mutual Insurance Company*, CASE NO. 1:06cv433-LTS-RHW pg. 2.

request. Integrand issued an endorsement to Atlantic's flood policy to include Supermercados as an additional insured and loss payee.

On September 10, 1996 Hurricane Hortense hit Puerto Rico and flood waters destroyed Supermercados' property at Atlantic's storage facility. Colonial's agent filed a flood claim, answering "none" to the following question on the Proof of Loss form: "Interest: No other person or persons had any interest therein or encumbrance thereon except _____".

Unfortunately, "none" was a misrepresentation. Atlantic had filed for bankruptcy and the facility was transferred to another corporation. The Colonial agent failed to inform Integrand of the change in ownership when it occurred. Integrand, not knowing about the transfer of ownership, paid Atlantic for their claimed losses, which did not include Supermercados' losses.

Supermercados subsequently filed a third party claim directly with the Federal Insurance Administrator, who upon opening an investigation discovered the misrepresentation in Colonial's flood claim. The Administrator denied Supermercados' claim and "disallowed" the Atlantic claim, requiring Integrand to return the previously paid benefits.

Supermercados then filed its claim, challenging the Administrator's denial, and in alternative suing Integrand, Colonial and Atlantic for breach of the insurance policy.

The court started its analysis by citing the square corners rule in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). "Federal law clearly establishes that an insured must strictly comply with terms and conditions of an insurance

policy issued pursuant to a congressionally mandated program.” *Supermercados* at 67, (citing *Merrill*).

The court then listed specific “terms and conditions” violated, concluding “Atlantic and its respective agents willfully and negligently misrepresented material disclosures regarding changes in ownership...” *Supermercados* at 67.

Supermercados complained that there was no intent to deceive. The court reasoned that insurance law has a standing policy of allowing insurers to void a contract “when it relies on a misrepresentation of a material fact, not only where such misrepresentation is fraudulently made, but also even though it is not fraudulently made.” *Supermercados* at 67. Therefore, a misrepresentation can void an insurance policy without showing any specific intent to deceive.

That leaves the issue of materiality. Citing 44 C.F.R. § 62.23(f), the court stated “[P]rograms mandated and subsidized by the federal government and occurrences of improper conduct by way of misrepresented facts may ultimately place a burden on the U.S. tax payer and result in a direct charge of the U.S. treasury.Additionally, the black letter language of the SFIP clearly prohibits misrepresentation in applications for coverage, renewals of coverage, or in connection with the submission of a claim. (see Section 8E1c(2))” *Supermercados* at 70.

“Therefore in the interests of justice, deterrence and to ensure the uniformity of decisions in furtherance of programs controlled by the Federal government ...this Court voids the flood insurance policy. [S]ince the flood insurance program is a child of Congress, conceived to achieve policies which are national in scope, the uniformity of decisions must be assured and courts *motu proprio* should not create exceptions.” *Supermercados* at 70.

I cite *Supermercados* because it invokes all the issues in *Rigsby*: misrepresentation (or concealment/omission), materiality of that misrepresentation, application of the “terms and conditions” in the Standard Flood Insurance Policy, leading to voidance of the contract benefit, and the absence of specific intent to deceive.

D. Revisiting Contract and Regulatory provisions and guidance:

Hyperlink to Sub-parts: [Contract](#); [Regulatory Language gives to State Farm significant authority](#); [Regulatory Language demands from State Farm: enforcement of the Standard Flood Insurance Policy, and due diligence in Claims Adjustment](#) ; [Regulatory Language provides the location of additional guidance](#) ; [Consideration: Costs of Executing the Write-Your-Own Program are borne by the Federal Government](#) ; [Fiduciary relationship](#) ; [Duty to Act Primarily for Another’s Benefit](#) ; [Duty to Disclose Material Facts](#) ; [Concealment of material information is fraud](#) ; [Materiality Issue discussed](#) ; [Intentional concealment issue discussed](#) ; [Federal Regulations required the Rigsbys to Report Fraud](#) ; [“Terms and Conditions” in the Standard Flood Insurance Policy](#) ; [Subscribed, sworn, notarized and Penalties emphasized](#) ; [Conclusion](#) ; [False Claims Act Penalties that may be assessed against State Farm](#)

1. Contract:

State Farm entered into a contract with the Federal Government to “sell and administer” the Standard Flood Insurance Policy (“SFIP”), under the Write-Your-Own (“WYO”) Program of the NFIP. The contract terms are located at 44 C.F.R. § 62 et seq., entitled: Part 62 – SALE OF INSURANCE AND ADJUSTMENT OF CLAIMS. (“Part 62”)

The WYO Program regulatory language (Article I) describes the National Flood Insurance Program as a mutual undertaking.⁵⁸

This section lists the unambiguous regulatory and contractual requirements imposed on the Write-Your-Own Company. Because State Farm has accepted its fiduciary status it should be held to the “Square Corners” Doctrine requiring compliance with all regulatory provisions.

a. Regulatory Language gives to State Farm significant authority:

The “Arrangement” between the Federal Government and WYO Companies recognizing WYO Company’s superior position and skill in handling insurance claims, delegates the authority and responsibility for executing the program’s goals.

In Article II, Paragraph C, the Federal Government authorizes the WYO Company to “adjust.... the combined flood and wind losses utilizing one adjuster under an approved Single Adjuster Program using procedures issued by the Administrator.”⁵⁹

Under Article II, Paragraph F, the WYO Company “shall investigate, adjust, settle, and defend all claims or losses arising from policies issued under this Arrangement.”⁶⁰

b. Regulatory Language demands from State Farm: enforcement of the Standard Flood Insurance Policy, and due diligence in Claims Adjustment:

⁵⁸ 44 C.F.R. § 62, Appendix A to Part 62, Article I – Findings, Purpose, and Authority. “Now, therefore, the parties hereto mutually undertake the following:”

⁵⁹ 44 C.F.R. § 62, Appendix A to Part 62, Article II- Undertaking of the Company. Paragraph C. Single Adjuster Program

⁶⁰ 44 C.F.R. § 62, Appendix A to Part 62, Article II- Undertaking of the Company. Paragraph F.

The Standard Flood Insurance Policy contract language requires compliance with all terms and conditions. The National Flood Insurance Program “will pay you for direct physical loss by or from flood to your insured property if you...2. Comply with all terms and conditions of this policy; and 3. Have furnished accurate information and statements.”⁶¹

c. Regulatory Language provides the location of additional guidance:

The “Arrangement” (Part 62) details some of the duties of the Write-Your-Own Company and specifies that additional guidance can be found in two important Manuals: The Flood Insurance Handbook, and the Claims Adjustment Manual.⁶² These sources specify the Federal Government’s expectations in carrying out the Program.

The NFIP’s Adjuster Claims Manual is very clear on several points. First, the adjuster’s responsibility is to investigate and document all evidence of loss, both flood caused and caused by “other” sources.⁶³ Moreover, the adjuster is tasked with detecting fraud, particularly misrepresentation of the circumstances and causes of loss. If the “possibility of fraud” is perceived it “must immediately be reported.”⁶⁴

⁶¹ 44 C.F.R. § 61.17, App. A(1), Section I. Agreement.

⁶² Under 44 C.F.R. § 62.23, “(i)To facilitate the adjustment of flood insurance claims by WYO companies, the following procedures will be used by WYO Companies. (1) Under the terms of the Arrangement...WYO Companies adjust claims in accordance with general Company standards, guided by NFIP Claims manuals.”

⁶³ Adjuster Claims Manual, Section VII. Basic Adjustment Issues, 2. Adjuster responsibilities, d. “Investigate and document all other evidence of loss.”

⁶⁴ Adjuster Claims Manual, Section IX. Maintaining the Integrity of NFIP, B. Fraud Prevention, “Fraud or misrepresentation is a continuing problem in the National Flood Insurance Program. It is the adjuster’s responsibility to detect and report fraud. Any case where it is reasonably believed that there is the possibility of fraud must immediately be reported to the NFIP Servicing Agent or WYO Company.” Section IX. Maintaining the Integrity of NFIP, Detecting Possible Fraud, “The following are common indications of fraud: ...g. Fraudulent cause of loss.”

In the Appendix of the Adjuster Claims Manual one finds the forms used in preparing a flood insurance claim; including: Building Worksheet, Contents Worksheet, Preliminary Report, Final Report, Narrative Report, Notice of Loss, Cause of Loss and Subrogation Report. The worksheets require differentiation of each item of loss between “Flood Loss” and “Wind Loss” and then aggregate from details to totals used on other forms.

2. Consideration: Costs of Executing the Write-Your-Own Program are borne by the Federal Government:

Execution of the Write-Your-Own Program costs the Federal Government one-third of the total premiums paid in a “good” year, according to the Government Accountability Office.⁶⁵ In fiscal year 2006, the year of Hurricane Katrina, the WYO Companies took nearly two-thirds of the total premiums. (In fiscal year 2006, commissions and adjustment fees paid to Write-Your-Own companies totaled 1.6 billion dollars of a total 2.4 billion in flood premiums.)

The payments to WYO Companies include the fifteen percent commission on policies sold and 3.3% of the total flood claim payout for claims adjustment services.

Moreover, under 44 C.F.R. § 62.23(i)(9), the government promises to pay the Write-Your-Own Company for the cost of engineering reports, and therefore is entitled to Brian Ford’s analysis: “(i) To facilitate the adjustment of flood insurance claims... (9) Special allocated loss adjustment expenses will include such items as nonstaff attorney fees, engineering fees, and special investigation fees over and above normal adjustment practices.”

⁶⁵ Government Accountability Office, National Flood Insurance Program, FEMA’s Management and Oversight of Payments for Insurance Company Services Should be Improved, September 2007.

3. Fiduciary relationship:

The first critical element in analyzing the Rigsbys' allegations, is the unique regulatory "arrangement" created between the Federal Government and State Farm as a participant in the Write-Your-Own Program. State Farm as the Write-Your-Own Company ("WYO Company") has a fiduciary relationship with the Federal Government according to the Code of Federal Regulations "Arrangement" that governs the contractual obligations of both parties. In fact, the "Arrangement" uses the word "fiduciary" in three separate locations: Article I, Article XVI, and § 62.23(f).⁶⁶

No other government insurance program places the vendor or contractor in such a position of trust. Any analysis of the Rigsbys allegations must start with recognition that the WYO Company is a fiduciary tasked with protecting the interests of the Federal Government.

At the heart of the Rigsbys allegations are two breaches of the fiduciary relationship:

⁶⁶ Under 44 C.F.R. § 62, Appendix A, Article XVI - Relationship Between the Parties (Federal Government and Company) and Insured, "[T]he primary relationship between the Company and the Federal Government is one of a **fiduciary nature**, i.e. to assure that any taxpayer funds are accounted for and appropriately expended."

Under 44 C.F.R. § 62, Appendix A, Article I – Findings Purpose and Authority, "Whereas FIA has promulgated regulations and guidance implementing the Act and the Write-Your-Own Program whereby participating private insurance companies act in a **fiduciary capacity** utilizing Federal funds to sell and administer the Standard Flood Insurance Policies, and has extensively regulated the participating companies' activities when selling or administering the Standard Flood Insurance Policies;"

44 C.F.R. § 62.23(f) "To facilitate the marketing of flood insurance coverage under the Program to policyholders of WYO Companies, the Administrator will enter into arrangements with such companies, whereby the Federal Government will be a guarantor in which the primary relationship between the WYO Company and the Federal Government will be one of a **fiduciary nature**, i.e. to assure that any taxpayer funds are accounted for and appropriately expended."

a. Duty to Act Primarily for Another's Benefit:

The fiduciary relationship requires State Farm to suppress any bias or conflict of interest in adjusting combined wind and water claims. The Rigsbys have claimed that McIntosh is symbolic of a State Farm policy (wind/water protocol) to review only the engineering or adjuster reports in areas inundated by storm surge where the engineer and/or adjuster observed preexisting wind-originated damage or concluded that wind was the primary source of damage. This shows a bias in adjusting combined wind and water claims not evidenced in any prior catastrophe and at odds with general Company standards and the NFIP Claims manual.

“A fiduciary duty is founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking.”⁶⁷

b. Duty to Disclose Material Facts:

The fiduciary relationship, under Mississippi law, triggers a duty to disclose all material information. Proving fraud by concealment requires establishing the existence of a fiduciary relationship.

The fiduciary relationship triggers a duty to disclose to the Federal Government the material information within Brian Ford's engineering report, which documented preexisting wind-originated damage, and the name of an eyewitness who supposedly saw the preexisting wind-originated damage as it happened. Breach of the duty to disclose, is misrepresentation by omission. In *Frye v. American General Finance, Inc.*, 307 F.Supp. 2d 836, 842 (S.D. Miss.

⁶⁷ *Corpus Juris Secundum*, Fraud and Deceit, Section 8.

2006), the court reiterated standing Mississippi Supreme Court jurisprudence; “since silence, in the absence of a duty to speak, is not actionable, plaintiffs’ claims for misrepresentation by omission are dependent on the existence of a duty of disclosure, which would arise if a fiduciary relationship existed.”⁶⁸

4. Concealment of material information is fraud:

At the heart of the Rigsbys’ fraud allegations is State Farm’s intentional concealment of material information in Brian Ford’s engineering report. Under Mississippi law, if a fiduciary relationship exists intentional concealment of material information is fraud.

a. Materiality Issue discussed:

Materiality is defined as “having a natural tendency to influence, or being capable of influencing, the decision of the decision-making body to which it was addressed.As *Kungys* demonstrates, the determination of materiality is context-specific and sensitive to what the government accomplishes by means of requiring disclosure of certain information.” *Southland* at 679.

Ford’s investigation identified specific and unqualified evidence (and named an eyewitness) of preexisting wind damage prior to Hurricane Katrina’s peak storm surge. Ford concluded that first floor building (and contents) damage was caused by wind prior to the storm surge. Evidence of wind-originated damage is clearly material because it directly impacts the allocation between wind and flood damage to “Building” and “Contents” items listed on worksheets underlying a valid “Proof of Loss.” (FEMA Claims Adjustment Forms are attached to this document in the Appendix.)

⁶⁸ *Chiarella v. U.S.*, 455 U.S. 222, 228 (1980).

State Farm claims that Ford's report is merely an "opinion" which cannot be construed as "fact." Ford's conclusions are professional opinions, but the observations, picture documentation, and identification of an eyewitness are specific and unqualified, and cannot be construed as opinions.

The information contained in Ford's report would have a tendency to impact the Federal Government's decisions regarding approval of settlement. Moreover, because it identifies an eyewitness to prior existing wind damage, it could easily influence the Federal Government's follow-up and oversight functions.

Based on Ford's "cause of loss" investigation, a claims representative, working entirely in the interest of the Federal Government, would have apportioned and subrogated some first floor building and contents damage to the homeowner policy insurer, i.e. State Farm.

Because wind-originated damage is excluded from flood coverage, Ford's observations are precisely the type of information that the Federal Government has tasked the Write-Your-Own Company with identifying. The information directly impacts the attribution of total losses between wind and flood coverage. The Adjuster Claims Manual, which Write-Your-Own Companies are required to follow, specifically tasks adjusters to "Investigate and document all other evidence of loss."

State Farm's primary defense is that the concealed engineering report cannot be considered material because it would not have impacted the government's final decision to pay the maximum allowable coverage under the policy terms. State Farm supports this argument with the claimant's sworn testimony that she concluded a maximum payout was deserved.

“For the reasons discussed in State Farm’s Memorandum in Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction at 15-17, the Rigsbys will not be able to allege that a false claim was submitted to the government as to the McIntosh property because it is undisputed that the McIntosh property sustained substantial flood damage, entitling the insureds to receive the limits of their flood policy. As a result, no false claim was submitted for payment.” State Farm Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b), footnote 8, pg.13.

State Farm’s “materiality” argument fails for four separate reasons:

- (i) State Farm’s conclusion that Ford’s engineering report warranted the maximum payout is pure speculation and claimant’s testimony stated that Ford’s report did not support a maximum payout.
- (ii) State Farm’s argument conflates common law tort fraud (which requires proof of actual damages, i.e. the final determination of damages would be different if the report was provided) with the elements of an actionable claim under the False Claims Act. Actual damages are not necessary in bringing an actionable claim, or in proving liability under the False Claims Act.
As shown in *Thevenot*, an insured’s flood insurance fraud scheme which did not result in a flood claim payout, nonetheless resulted in liability under the False Claims Act.
- (iii) State Farm’s arguments fail to recognize how the concealed report directly impacts the choice of properties for re-inspection oversight. State Farm’s arguments fail to recognize how the concealed report impacts downstream databases that are used for pricing risk premiums, auditing and accurate recordkeeping.
- (iv) State Farm has ignored the possibility that concealment of a material fact necessitates voidance of an otherwise legitimate flood claim, as

stipulated in the “terms and conditions” of the Standard Flood Insurance Policy.

Neither are actual damages sufficient to receiving a flood benefit.

There are a host of “terms and conditions” that, if not met, may lead to avoidance of an otherwise legitimately deserved benefit. (see *Supermercados*)

b. Intentional concealment issue discussed:

The Rigsbys claim that Ford’s report was intentionally concealed because State Farm selected properties for re-inspection in areas inundated by storm surge and where the engineer (or adjuster) documented evidence of preexisting wind damage or concluded that wind was the primary cause of damage. This evidences a bias against attributing damage to wind in areas impacted by storm surge.

In the McIntosh case, the property was re-inspected by John Kelly. John Kelly was not provided with any of the investigative documentation of Brian Ford. Kelly’s report became the basis for loss estimates in the Proof of Loss determination.

Kelly’s report was the basis for the McIntosh “Proof of Loss” requisition for flood benefits. Though the “Proof of Loss” and “Final Report” provide the opportunity and the “Claims Manual” required disclosure, State Farm did not summarize Brian Ford’s observations and conclusions or append his engineering report to the Proof of Loss, the Final Report or any of the other formal documentation underlying a valid claims adjustment file. State Farm has not

denied concealing Brian Ford's report, or made any argument addressing the accuracy or legitimacy of any specific observations or conclusion therein.

The information in Brian Ford's engineering report could have been "disclosed" to the Federal Government by (i) attaching it to the Preliminary Report, the Final Report, or the Proof of Loss; (ii) referencing it in any of the above reports or summarizing its contents in the Narrative Report which accompanies the Preliminary Report as an enclosure; or (iii) showing that Ford's report was vetted and then excluded or superseded for some legitimate reason. None of these actions were taken revealing State Farm's bias.

The Rigsbys do not claim that Brian Ford's report should have been the exclusive basis for the ultimate flood coverage determination, but that State Farm intentionally denied the Federal Government an opportunity to review it in deciding whether to approve the McIntosh claim, and exhibited a bias and illegitimate motive in re-inspecting the property.

5. Federal Regulations required the Rigsbys to Report Fraud:

Cori and Kerri Rigsby, were required by the regulations governing the National Flood Insurance Program and the Adjuster Claims Manual to "detect and report" fraud. The Federal Government's regulations require adjusters to "adjust claims in accordance with general Company standards, guided by [National Flood Insurance Program] Claims manuals" and "...to try to detect fraud ...and coordinate its findings with [Federal Insurance Administrator]."⁶⁹ And the Adjuster Claims Manual stipulates, "[i]t is the adjuster's responsibility to detect and report fraud. Any case where it is reasonably believed that there is the

⁶⁹ 44 C.F.R. § 62.23(1) and (5).

possibility of fraud must immediately be reported to the NFIP Servicing Agent or [Write-Your-Own] Company.”⁷⁰

The Rigsbys attempted to address the Brian Ford situation internally by confronting the catastrophe coordinator, Alexis “Lecky” King, an employee of State Farm. Instead of allaying the Rigsbys’ concerns, Lecky King enhanced their suspicions of fraud by dismissing Ford’s report because he must have been related to the insured or had some other personal affiliation.

6. “Terms and Conditions” in the Standard Flood Insurance Policy:

If the Ford engineering report was intentionally concealed by State Farm, then State Farm violated the terms and conditions of the Standard Flood Insurance Policy; which prohibit concealment of material information by the policyholder and their agents. The regulatory language, the Adjuster Claims Manual and the fiduciary relationship require State Farm to enforce the Standard Flood Insurance Policy’s “terms and conditions” and thereby protect the Federal Government’s interests. The policy’s “terms and conditions” specify the penalty for concealing material information as voidance of the entire flood benefit, building and contents.

The Standard Flood Insurance Policy’s “terms and conditions” stipulate: “...this policy: a. Is void; ...if, before or after a loss, you or any other insured or your agent have at any time: (1) intentionally concealed or misrepresented any material fact or circumstance; (2) engaged in fraudulent conduct; or (3) Made false statements; relating to this policy or any other NFIP insurance.”⁷¹

7. Subscribed, sworn, notarized and Penalties emphasized:

⁷⁰ Federal Emergency Management Agency, Adjuster Claims Manual, Section IX. Maintaining the Integrity of NFIP, B. Fraud Prevention.

⁷¹ Standard Flood Insurance Policy, Dwelling Form, 44 C.F.R. § 61.17, App. A(1), Section VII. General Conditions, B.1. Concealment or Fraud and Policy Voidance.

The adjuster-prepared Proof of Loss is subscribed and sworn to by the insured (and notarized) and the attestation clause stipulates “nothing has been done ...to violate the conditions of the policy, or render it void...and no attempt to deceive the said insurer as to the extent of said loss, has in any manner been made.” Further, in bold letters, it warns “...knowingly and willfully making any false answers or misrepresentations of fact may be punishable by fine or imprisonment....”

8. Conclusion:

Based on this reading of the facts and in the light of the contractual obligations, this note concludes that the McIntosh claim is evidence of a false claim, under both Section 3729(a)(1) and (a)(2).

9. False Claims Act Penalties that may be assessed against State Farm:

All of the following items may constitute pecuniary damages under the False Claims Act: (1) the entire \$250,000 flood payment to the McIntosh policyholder for ‘building’ damage, voided by violation of the “terms and conditions” of the Standard Flood Insurance Policy, “concealing material information” (2) the entire \$100,000 flood payout for ‘contents’ damage, for the same reason cited in (1); (3) the loss adjustment expense allowance paid to State Farm on the McIntosh claim, and (4) the special allocated loss adjustment expense allowance, which covered special items including Brian Ford’s engineering report. Pecuniary damages may be trebled.

Even if no pecuniary damages were assessed, the False Claims Act stipulates a nominal fixed penalty of \$5,500 - \$11,000 for each false claim independent of other damages.

(IV) Conclusion

This case is about the materiality of a misrepresentation. In *Rigsby*, the critical misrepresentation is not a lie (a commission) but rather concealment (an omission) of reports containing material information that have a “natural tendency to influence” (definition of materiality) the Federal Government’s decision to pay part of the McIntosh flood insurance claim under the National Flood Insurance Program.

I grew up hearing a lot of Yiddish Proverbs. Here’s one that applies to this case: “A half-truth is a whole lie.” Half-truths are lies by omission. They are more dangerous than outright lies. A lie can be examined, it is easier to verify; ordinary due diligence will readily expose a lie. With half-truths, you aren't given enough information to establish the whole truth of the matter. There is just enough truth to maintain credibility, get the result desired and avoid the consequences associated with telling the whole truth. Additionally, when caught in a lie of omission, the deceiver has plausible denial; they claim misunderstanding, mistake; it wasn’t intentional.

That’s why, when you take the witness stand, you “swear ...to tell the truth, the whole-truth, and nothing but the truth.”

The Rigsbys have claimed that State Farm practiced half-truth deception in preparing the McIntosh flood claim, thereby committing fraud. Using the False Claims Act as the vehicle for recovery, the Rigsbys claimed that State Farm intentionally re-inspected properties impacted by Katrina’s storm surge, where the

first adjuster and/or engineer observed evidence of preexisting wind damage or concluded that the primary cause of loss was from wind or windblown rain.

McIntosh was a claim that Kerri Rigsby supervised. She and one of her staff, Cody Perry, had been to the McIntosh property and Perry had written the first adjuster report. Subsequently, State Farm had requested an engineer inspect the property. Kerri Rigsby had no knowledge that a physical engineer (Brian Ford, Forensic) had been hired. As fate would have it, Kerri Rigsby discovered Ford's report and on returning it to the McIntosh file folder found a second engineering report done by John Kelley. It is odd to have one engineer's report, two was unheard of. After inspection, Kerri Rigsby concluded the reports were materially different. (In whistleblower literature this is the "Ah-ha Moment," the epiphany where the whistleblower senses something is amiss.)

Brian Ford's investigation "observed" a four-foot wide hole in the front exterior wall, and named an eyewitness who purportedly saw debris thrown into the McIntosh house before flooding occurred. From his investigation, Ford concluded that the primary cause of loss was due to wind and wind borne rain, liability accruing to State Farm under the Homeowners Policy.

John Kelly's report contained information about the hole in the front wall, but concluded that this had been done by storm surge. Amazingly, Kelly quotes another witness who reported wind damage as the source of the hole in the front wall. Yet Kelly concluded that the primary cause of loss was due to flooding.

As a Write-Your-Own Company, State Farm is contractually bound by the regulatory language that places them in a "fiduciary relationship" with the Federal Government in administering the National Flood Insurance Program. The regulatory language and guidance in the Claims Adjustors Manual specifically

tasks State Farm and its adjustors with identifying causes of loss other than flood and delineating between flood and wind damage on an item-by-item basis for both the building and the owners' personal property.

Under Mississippi law, a fiduciary has a duty to disclose material information and if material information is intentionally concealed the fiduciary commits fraud. If they discover information that would shift liability, they are obliged to document that information.

Brian Ford's engineering report contained specific and unambiguous facts in the "Observations" section, that State Farm, by law and by contract, is required to include in their final adjuster's report. State Farm has stated that Ford's report was incomplete and at odds with the views of the catastrophe coordinator, and to some extent with Kerri Rigsby's testimony.

Given the nature of the contractual fiduciary relationship between the Federal Government and State Farm, and the detailed procedures to be used in carrying out claims adjustment, the court should find the McIntosh flood claim is evidence of a false claim, meeting the standard of 'particularity' and the elements of a claim under Section 3729(a)(1) or Section 3729(a)(2) of the False Claims Act, thereby defeating the State Farm Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b).

Damages could include any flood benefits or loss adjustment expenses paid on the McIntosh claim, including: the \$250,000 flood payout building damage, the \$100,000 flood payout for contents damage, the loss adjustment expense allowance, and the special allocated loss adjustment expense allowance.

(V) Lessons for FEMA and DHS-OIG

The second purpose of this note has a different audience: all the units of the Federal Government that have responsibility for managing the National Flood Insurance Program (“NFIP”). The post-Katrina claims adjustment process described by the Rigsbys, has challenged the Federal Government to show how it protects the integrity of flood claims. Despite substantial data collection by FEMA, and political (and economic) leverage over the Write-Your-Own Companies, the Office of the Inspector General (“OIG”) within Department of Homeland Security (“DHS”), the Federal Emergency Management Agency (“FEMA”), and the Federal Insurance Administration (“FIA”) have not adequately performed their oversight, auditing, controls and regulatory enforcement functions vis-à-vis the Write-Your-Own Companies.

Due to Congressional Hearings looking into post-Katrina insurance company claims processing fraud, the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295) directed DHS’s Office of Inspector General to “investigate whether, and to what extent, insurance companies participating in the National Flood Insurance Program, referred to as Write-Your-Own Companies (WYOs), improperly attributed damages from Hurricane Katrina to flooding rather than to windstorms covered under homeowner policies or wind insurance pools.” This issue has been on OIG’s work program for three

consecutive years, and given their findings, is likely to stay for the foreseeable future.⁷²

An internal policy debate between FEMA and the OIG has already been started but much more needs to be done.⁷³ Although OIG has begun to ask important questions of FEMA about a growing body of evidence of overcharges, their analysis lacks understanding about adjusting claims, insurance law, and the provisions of the National Flood Insurance Program.

Criticism #1: OIG's conclusions are contradicted by the evidence provided.

OIG posted its Interim Report on July 26, 2007.⁷⁴ OIG audited ninety-eight flood claim files, reviewed FEMA's quality control reports, and interviewed homeowners, adjusters and representatives of the Write-Your-Own Companies. Because the report's content was contradictory, State Farm was able to selectively quote passages from OIG's Executive Summary that did not represent the "whole truth."

As an example, State Farm excerpted the following lines from the OIG Report: "Our review of sample flood claims did not reveal evidence that NFIP was used to subsidize wind damage," ... "there was no indication that wind damage was attributed to flooding or that flood insurance paid for wind damage."

In addressing the *Rigsby* claims, State Farm then repeated OIG's conclusion in both Motions to Dismiss and both Memorandums supporting those Motions:

"Moreover, the Rigsbys' failure to provide evidence of even one fraudulent federal flood claim is not surprising. Following its investigation,

⁷² OIG_APP_FY09, Fiscal 2009 Annual Performance Plan; Pg. 45.

⁷³ OIG-08-97 *Hurricane Katrina: Wind Versus Flood Issues*, September 2008.

⁷⁴ OIG-07-62 *Hurricane Katrina: A Review of Wind Versus Flood Issues*, July 2007

the Department of Homeland Security’s Office of Inspector General found no evidence that federal flood insurance had been used to subsidize wind claims, that wind damage had been attributed to flooding, or that flood insurance had paid for wind damage.”⁷⁵

OIG’s conclusion was not warranted by the evidence. In fact, OIG investigators had trouble obtaining wind claim documentation, and the report clearly warns against premature judgment: “Although nothing came to our attention during our limited review to indicate that WYOs attributed wind damage to flooding, we cannot rule out the possibility that it occurred”

Fifteen months later, OIG’s Final Report documented cases where “NFIP paid for wind.” Amazingly, the Final Report repeated the unsupported conclusion in NFIP’s Interim Report: “We concluded that the NFIP did not pay for wind damage for structures included in our sample.”⁷⁶

Further on in the Final Report, that statement is qualified: “Based on the review of files in our sample, we did not find *material evidence* that the NFIP paid for wind damage.”⁷⁷ (emphasis added)

Then finally, in the detailed section of the Final Report the “whole truth” emerges:

“Although 44 out of 131 cases (34%) included errors that related to cause of damage resulting in some degree of duplication, e.g., flood and homeowners policies paying for the same type of damage (ceiling repair, loss of personal property), only two (1.5%) of these case clearly identified

⁷⁵ State Farm Memo.. Subject Matter Jurisdiction, pg 3; State Farm Motion.. Subject Matter Jurisdiction, pg 4; Motion...12(b)(6), pg 3; Memo...12(b)(6), pg 3.

⁷⁶ OIG-08-97, *Hurricane Katrina: Wind Versus Flood Issues*, September 2008. pg.1, under Executive Summary

⁷⁷ OIG-08-97, *Hurricane Katrina: Wind Versus Flood Issues*, September 2008. pg.6, under Settlements of Flood Versus Wind

wind as the preponderant cause of damage, thus resulting in an improper payment by NFIP in the amount of \$432,600.”⁷⁸

If 44 out of 131 audited cases included errors...“resulting in an improper payment by NFIP in the amount of \$432,600” what can we project regarding the total overbilling for the entire population of 200,000 flood claims? As stated earlier in this note, simple extrapolation would result in an estimate of nearly \$600 million in overcharges. That seems to be “material” evidence of several problems.

First, of the 44 cases, two cases “clearly identified wind as the preponderant cause of damage.” In these two cases, OIG has concluded that NFIP did pay for wind damage.

OIG’s logic can be applied to the McIntosh case, and particularly to the question of whether there exists a genuine issue of material fact. Ford identified wind damage as the preponderant cause of damage to the first floor. Kelly also identified wind damage to the first floor prior to the flooding, but concluded that wind wasn’t the primary cause of the first floor damage. Using Kelly’s analysis, State Farm attributed all first floor damage to flooding.

OIG’s report establishes the standard that would bring into question State Farm’s attribution of first floor damage to flood. Ford’s analysis, if credible, would be “material” evidence because OIG would have rejected a flood claim for first floor damage if wind were deemed to be the predominant cause of first floor damage.

Second, according to the regulatory language, WYO Companies have a “responsibility for providing a *proper adjustment* for combined wind and water

⁷⁸ Id.

claims.”⁷⁹ And, according to the regulatory language governing the WYO Program “[i]t is important that the Company’s Claims Department verifies the correctness of the coverage interpretations and *reasonableness of the payments* recommended by the adjusters.”⁸⁰ If thirty-four percent of the files audited by OIG had “some degree of duplication” in the billing, a reasonable person would question whether the WYO Company had provided a “proper adjustment” or verified the “reasonableness of payments.”

At the very least, OIG’s analysis has identified a sloppy Katrina claims adjustment process. And WYO Companies received between \$500 million and \$1 billion dollars of fees for processing Katrina flood claims.

Criticism #2 OIG’s report does not focus on the WYO’s fiduciary obligations, and instead focuses on two ‘red herring’ issues: the anti-concurrent causation clause (“ACC Clause”) in standard private carrier insurance policies and the lack of authority to obtain the wind damage portion of a combined wind and water claim.

OIG’s analysis does not mention the word “fiduciary.” If the OIG report had started with the contract term that requires a high standard of WYO Company conduct, criticism of State Farm’s actions would be more obvious. OIG should focus on the regulatory language that describes the “fiduciary relationship” and controls interpretation of all the Write-Your-Own Company’s responsibilities.

Instead, OIG spends substantial effort on two issues that distract our attention and confuse the legal importance of two contractual terms.

a. Anti-concurrent Causation Clause and the Wind/Water Protocol

⁷⁹ 44 C.F.R. § 62.23(i)(1).

⁸⁰ 44 C.F.R. § 62.23(i)(2).

OIG devotes substantial space to the anti-concurrent causation clause (“ACC Clause”). The OIG report makes an issue of the ACC Clause:

“Our review, however, did highlight difficulties in distinguishing between wind and flood damage when they occur concurrently anti-concurrent clauses in homeowner insurance policies generally provide that wind damage will not be covered when flooding occurs concurrently.”⁸¹

According to David Rossmiller, the ACC Clause has no legal bearing on hurricane related damage, because wind damage and flood damage in hurricanes are never concurrent as that term is used in insurance contracts.⁸²

“But as the term concurrent causation is understood in legal analysis, the two chief agents of Katrina damage, wind and flood . . . are not in fact concurrent in most cases because they cause different damage and different losses.”⁸³

OIG is not alone in having concluded that the ACC Clause applied to Hurricane Katrina damage.

State Farm aggravated the misunderstanding about the ACC Clause when it issued the Wind/Water Protocol (“Protocol”) in the wake of Katrina. The Rigsbys, the media, public interest groups and Congress all assumed that State Farm was attempting to rewrite the legal impact of the ACC Clause in issuing the Protocol as guidance for handling claims. The Protocol stated “[w]here wind acts concurrently with flooding to cause damage to the insured property, coverage for the loss exists only under flood coverage, if available.”

The Mississippi Insurance Department investigated the linkage between the ACC Clause and the Protocol.

⁸¹ OIG-08-97, *Hurricane Katrina: Wind Versus Flood Issues*, September 2008; pg 5.

⁸² Rossmiller, David, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond*; September 2007.

⁸³ *Id.* at 44.

“The Protocol was developed as ‘a guide for handling various wind and/or water claims in Louisiana, Mississippi and Alabama.’ The Protocol outlined the procedures that were to be used for determining coverage where wind and water may have been involved in the loss.

The Company acknowledged it had never used a wind/water protocol in previous catastrophes and it was never fully explained why such a protocol was integral to the handling of claims on the Gulf Coast. From testimony obtained from Company officials, there were inconsistencies detected regarding the purpose of the Protocol and the message the document intended to convey.”⁸⁴

The Mississippi Insurance Department has documented, “[t]here was confusion among State Farm employees and representatives regarding the anti-concurrent causation language.”⁸⁵

“The investigation ...revealed a few instances where claims representatives advised policyholders that ‘State Farm had informed him that it would be the company policy to deny wind coverage to every policy holder in MY GENRAL AREA’ or ‘if water touched it, we were told not to pay for wind.’”⁸⁶

As a result, the MID investigation discovered that there was documented evidence of wind damage in 64% of cases that experienced combined wind and flood damage and where no wind coverage was paid by the private carrier. Some of these cases were subsequently reopened under a mediation program.

One “slab” case homeowner sued State Farm, stating that there was evidence their home had been destroyed by wind prior to the storm surge. In *Kodrin v. State Farm Fire and Casualty*, No. 08-30092 (5th Cir. 2009), the homeowner was awarded the limits of their State Farm policy coverage by demonstrating that there

⁸⁴ Mississippi Insurance Department, *Report of the Special Target Examination (Katrina Homeowner Claims) of State Farm Insurance Companies (Specifically State Farm Fire And Casualty Company)*, October 17, 2008. Pg 28.

⁸⁵ Mississippi Insurance Department, *Report of the Special Target Examination (Katrina Homeowner Claims) of State Farm Insurance Companies (Specifically State Farm Fire And Casualty Company)*, October 17, 2008. Pg 8.

⁸⁶ *Id.* at 17.

home was destroyed by wind before the storm surge arrived. (In fact, State Farm's original adjuster had stated as much. Like McIntosh, the original report was superseded by a second claims adjustment which was carried out after all the debris had been removed.) Although the Kodrin home, along with all the other homes in their neighborhood, was removed from its foundation, settling as a group in a gully, only the Kodrin home had been obliterated. All the other homes were entirely intact. Kodrin and State Farm's original adjuster had concluded that the Kodrin home had been destroyed by a tornado. State Farm altered this conclusion with a second adjuster report that stated it was more likely that the damage had been done by wave action during the storm surge.

State Farm further aggravated the misunderstanding about the ACC Clause when it allowed one case involving outside counsel to argue that "wind damage that preceded a home's destruction by storm surge would be excluded by the anti-concurrent cause language."⁸⁷

J. Robert Hunter of the Consumer Federation of America made the clearest misunderstanding of the ACC Clause:

"[I]n the wake of Hurricane Katrina, some insurers used the clause to refuse to pay for wind losses on homes that had also experienced flood damage, even if the flood occurred hours after the hurricane hit the home."⁸⁸

OIG gives credence to the notion that the ACC Clause had a legal significance. This diverts attention from the important issues.

⁸⁷ *Palmer v. State Farm*, No. 1:07-CV-00039, United States District Court for the Southern District of Mississippi, referenced in Rossmiller, David, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond*; September 2007. Pg 69.

⁸⁸ *Id.* at 79.

- b. OIG, FEMA, and FIA have the necessary legal authority to audit combined wind and water claims, and insurers must cooperate.

As another example, OIG mentions that FEMA and NFIP do not have the authority to access data on wind claims for NFIP-insured properties. NFIP also needs access to WYO insurers' policies, procedures, or instructions describing how wind damage should be determined in conjunction with flood damage when properties are impacted by both events. As a result, OIG claims that it had to issue administrative subpoenas for the wind claims on property they were auditing.

I disagree with FEMA's claim that they lack the authority to inspect wind-damage claims files. Under Article XIV – Access to Books and Records, the FIA and the Comptroller General “have access to any books, documents, papers and records of the Company that are pertinent to this Arrangement” for the purpose of “investigation, audit, and examination.”

Moreover, under 44 C.F.R. § 62.23(j)(7), WYO Companies must “[c]ooperate with FEMA's Office of Inspector General on matters pertaining to fraud.”

If *Rigsby* and/or *Branch* move forward to trial, there will be a massive audit of combined wind and flood claims. If the Mississippi Insurance Department's analysis of State Farm claims is indicative of what they are likely to discover, then FEMA, FIA and DHS-OIG need to prepare a response to accusations of negligence or nonfeasance in performance of their oversight, auditing, controls and regulatory enforcement functions.

Moreover, they need to revisit the regulatory language governing the Write-Your-Own Company (including State Farm and other private carriers) and clarify their expectations.

Criticism #3: The Waiver, the Expedited Claims Processing Method and “Relaxation of the Rules”

The record number of Katrina claims prompted FEMA to approve the Expedited Claims Processing Method, which allowed flood claims to be settled without a site visit if the structure was severely affected. Slab cases and structures that were inundated with flood waters were included in this new procedure, if satellite data showed that the depth and duration of the water in the building implied covered damage in excess of policy limits. (McIntosh would have been approved under the new criteria.)

Less than 10% of all claims were settled using this method.

In addition, in order to meet the needs of claimants, the FIA waived the requirement that property owners furnish a Proof of Loss which includes the Building and Contents Worksheets included in the Appendix of this document. These FEMA-approved Forms list item-by-item losses. The “waiver” had been instituted during the Florida 2004 storms (Charley, Frances, and Ivan).

Although the objective was “[t]o expedite claims payment” the FIA’s waiver undermined the integrity of the program by waiving “the requirement in Section VII.J.4...for policyholders to file a proof of loss prior to receiving insurance proceeds”?

Judge Senter has referred to the “waiver” as a “relaxation of the rules,” which automatically makes me very uneasy. To me, the “waiver” applies to only

one of nearly ten specific requirements listed in Section VII.J.4 of the Standard Flood Insurance Policy; “the requirement...for the policyholder to file a Proof of Loss prior to receiving insurance proceeds.” (The waiver is printed in *Shuford v. Fidelity Nat. Property & Cas. Ins. Co.*, 508 F.3d 1337 (11th Cir. 2007), the post-Hurricane Ivan precedent-setting case where the “waiver” is a central issue.)

Section VII.J.4 includes the requirements underlying the production of the Building and Contents – Personal Property Worksheets, and the Narrative Report (J.4.f, J.4.i, and J.4.b). State Farm may argue that they interpreted the “waiver” language as a suspension of all the subsections of Section VII.J.4 because the intent was to streamline the claims adjustment process. State Farm will argue that the FEMA and the FIA were not simply waiving the Proof of Loss as the legal basis of the claim and the sixty-day rule for filing the Proof of Loss, but all of the ordinary Proof of Loss filing process, including the Worksheet which require an itemized listing of property damaged.

My greatest fear is that the waiver becomes the cornerstone argument at trial exonerating State Farm of fraud. FEMA and FIA will need to revisit the waiver language and determine what the waiver was intended to accomplish.

(VI) Lessons for Whistleblowers: The Rigsbys’ Mistakes

Mistake #1: Never steal documents unless they are exclusively provided to a legal authority. There are Constitutional protections against illegal “search and seizure” for a reason. The Rigsbys stole documents which were to be used in alternative

civil litigation and the stolen documents were leaked to the press and Congressional members by Rigsbys' counsel for ulterior motive.

Mistake #2: Never take money as a quid pro quo for stealing documents. The Rigsbys agreed to receive a salary from Scruggs at the rate of \$150,000 per year; ostensibly in a capacity of expert consultants. Judge Senter decided that was a payoff for stealing documents and disqualified all the Rigsbys counsel, disqualified the Rigsbys from testifying as "fact witnesses" in any case where a file was stolen, and made the Rigsbys aware that if they were held liable, that salaries received would be considered ill-gotten gains. Moreover, stolen claims files could not be used in establishing a *prima facie* case under "claims smuggling" doctrine.

Mistake #3: Never hire counsel with concurrent litigation involving the same defendants, particularly when the issues litigated in your case directly impact the concurrent litigation.

Mistake #4: Never make accusations that are based on speculation or suspicion. The Rigsbys accused State Farm of intimidating adjusters and engineers, of editing reports, of systematically re-inspecting properties where the first report documented evidence of wind damage. As the Mississippi Insurance Department concluded, the Rigsbys claims were not corroborated by their investigators' interviews with individuals involved in the McIntosh claim adjustment. And once your credibility is in question, all of your statements and allegations suffer.

These are dark days for the Rigsbys.

In November 2007, Richard "Dickie" Scruggs, the Rigsbys' former counsel, was indicted for offering bribes to a Mississippi judge in connection with litigation over disputed lawyers fees earned during Scruggs' highly successful tobacco

litigation. Scruggs has been a complete disaster for the Rigsbys, and they are still in denial regarding the impact his poor counsel.

Not only are the Rigsbys facing the possibility of having their claim dismissed; State Farm's counterclaims include the allegation that the Rigsbys were engaged in a "conspiracy...to unlawfully extort civil settlements from State Farm." State Farm has presented several other civil and criminal counterclaims: violation of the Computer Fraud and Abuse Act, violation of various Mississippi statutes, common law fraud, conversion, trespass and breach of contract. The Rigsbys need help, and they deserve it.

Whistleblowers often face retaliation, especially when they steal thousands of claims files like the Rigsbys have admitted. That is fairly common in the world of whistleblowers; they rationalize breaking the law in order to bring an issue to public attention.

Luckily, the False Claims Act provides whistleblowers with considerable latitude when they serve the "public interest" and the Rigsbys made just that argument.⁸⁹ But the Rigsbys aren't whistleblowers because they weren't serving the public interest and because the Federal Government never intervened in the case, the protections don't apply to them as determined by the United States District Court for the Northern District of Alabama.⁹⁰

⁸⁹ *E.A. Renfroe & Co., Inc. v. Moran*, Civil Action No. 06-AR-1752-S (N.D. Ala. 2008) pg.3-4. "The Rigsbys had a right under federal law to take and use the claims documents in connection with the qui tam case..... Federal public policy reflected in the False Claims Act, by virtue of the Supremacy Clause, preempts state contract law that would hinder an employee providing evidence of fraud on the United States to the Department of Justice (DOJ) or from using that evidence to prosecute a claim as a qui tam relator on behalf of the United States. In short, Renfroe cannot invoke state law as a basis for stripping qui tam relators of their proof."

⁹⁰ *E.A. Renfroe & Co., Inc. v. Moran*, 249 Fed. Appx. 88 (11th Cir.2007). "...flagrantly violated the agreement by stealing and sharing confidential documents..." "...Rigsbys' proposed excuses for breaching [their contract with E.A. Renfroe] were ineffectual."

“Being a self-appointed representative of the United States does not commission the relator to conduct clandestine or illegal operations in furtherance of a pending qui tam action. When this theft occurred, the United States had not intervened in the qui tam case, and, as far as the record reflects, still has not intervened. In other words, these relators assumed considerable risk when they unilaterally decided that their contractual obligation to their employer gave way to a higher obligation to expose fraud and, inadvertently, to get handsomely paid for it under the sharing provisions of the False Claims Act. If the United States had formally deputized the Rigsbys to steal documents, an entirely different problem would be presented.”

E.A. Renfroe & Co., Inc. v. Moran, Civil Action No. 06-AR-1752-S (N.D. Ala. 2008) pg.5.

Unfortunately, as State Farm shows, the Rigsbys crossed the line when they began to serve their own pecuniary interest by taking a substantial salary from their attorney, Richard “Dickie” Scruggs and in return, provided him with State Farm insurance claims files for his class action civil litigation. Since the Rigsbys were not serving any public interest by taking that action, their activities were no longer protected. Hence, the State Farm and E.A. Renfroe claims of breach of contract and conversion are entirely justified. (Moreover, the Rigsbys have forfeited the right to be called whistleblowers.)

Scruggs obtained celebrity status for his part in the \$250 billion tobacco settlement, which garnered him nearly \$800 million. Scruggs is the unrepentant master of manipulation. He is quoted as saying, “. . . the judiciary is elected with

verdict money. . . .cases are not won in the courtroom. They're won on the back roads long before the case goes to trial.”

Scruggs' Katrina litigation has parallels in his tobacco litigation. In both he convinced the Mississippi Attorney General to file civil and criminal litigation. In both he recruited “insiders” to give him sensitive company documents; which he then sent to key members of Congress (as the trigger for Hearings) and to media for a massive public relations blitz. In the Katrina litigation, the Rigsbys were Scruggs' insiders.

Scruggs is now in prison. He deserves what he is getting, but the Rigsbys are also paying a heavy price. Scruggs and his associates were called “Hoods” by the Wall Street Journal. Scruggs' class action suit along with the Rigsbys' false claims suit were characterized as a Mississippi “Shakedown.”⁹¹

State Farm was correct that the Rigsbys abused their position (and probably broke the law) in accessing the State Farm's Katrina claims database in order to secure evidence supporting their contention that State Farm had systematically concealed documentation of preexisting wind damage.

Whistleblowers often rationalize breaking the law in order to enforce the law. American folklore is filled with self-righteous heroes who employ an extrajudicial brand of justice. Tony DeWitt, one of the Rigsbys' disqualified lawyers had written a law journal article on that very topic, entitled, “*Badges, We Don't Need No Stinking Badges: Citizen Attorney Generals and the False Claims Act.*” Many people are uneasy with the concept of extrajudicial justice; including several Senators, as evidenced in the Legislative History of The 1986 Amendments

⁹¹ Alan Lange, Anatomy of a shakedown: Dickie Scruggs' mighty fall, Profiles Mississippi, December 24, 2008.

to the False Claims Act, which converted otherwise illegal actions into “protected activity.”

As State Farm claims, the Rigsbys’ legal team committed numerous legal and ethical violations. In June of 2006, the Rigsbys met their legal team in a Scruggs-owned trailer to conduct a “data dump.” They searched State Farm’s Katrina claims database for cases like the McIntosh case that Kerri Rigsby supervised; cases with duplicate engineering reports, where the first report made site observations that trained engineers recognize as being caused by excessive wind, not flooding.

If the Rigsbys’ investigative work had been motivated by this concern, their actions may have been protected. But they also went through State Farm files looking for dirt on all Scruggs’ class action breach of contract clients. The Rigsbys were provided a roster of Scruggs’ clients and downloaded the claims file for each.

State Farm has listed a dozen legal and ethical violations triggered by this one action. Clearly Scruggs would stop at nothing to get what he wanted. All Scruggs’ actions were motivated by his desire to increase the value of his class action case; especially as it regards punitive damages for proving unfair claims practices.

Scruggs’ actions undermined the Rigsbys case in several ways.

First, Scruggs encouraged the Rigsbys to join his team, offering the Rigsbys a salary of \$150,000 per year. They quit their job with E.A. Renfroe, not realizing that would impact the viability of their “retaliatory discharge” allegation.

Second, by taking the salaried positions, the Rigsbys violated the False Claims Act provision that relators cannot benefit from their whistleblowing until after the case is resolved.⁹²

Third, Scruggs arranged for the Rigsbys to go on ABC's 20/20, even though that amounted to a "public disclosure" potentially "barring" their False Claims suit.

Last, Scruggs' public disclosures and leaks of claims files violated the "seal provisions" of the False Claims Act.

All of these Rigsby mistakes have been cited by State Farm in their Answer, Counterclaims and various Motions to Dismiss.

Despite these transgressions the Rigsbys still have a viable case. That is because the False Claims Act anticipates that the best insider-whistleblowers are potentially part of the fraudulent activity. There is no "unclean hands" provision of the False Claims Act. There are numerous references in the Legislative History (going back to the Civil War) that Congress had created the law under the assumption that sometimes it "takes a rogue to catch a rogue."

Affirmation of Rigsbys: Win or Lose, You Have Provided a Public Service.

The saying goes: "No good deed goes unpunished." That perfectly describes the Rigsbys current circumstances. Now unemployed, the Rigsbys are being sued by their former employer, E.A. Renfroe⁹³, for conversion and breach of their employment contract. The Rigsbys have also been accused of "extortion" (and

⁹² 31 U.S.C. § 3730(d)(2) no compensation until litigation is successfully completed.

⁹³ *E.A. Renfroe & Company, Inc. v. Cori Rigsby Moran and Kerri Rigsby*, United States District Court for the Northern District of Alabama, Southern Division, Civil Action No.2:06cv1752-WMA-JEO, September 1, 2006.

other crimes) by State Farm.⁹⁴ In spite of all the shenanigans of their former counsel, Richard A. (“Dickie”) Scruggs, and the Rigsbys’ participation in unethical and illegal activities in securing additional evidence supporting their claims of fraud, the Rigsbys should be commended for their public service. The Rigsbys found enough cases to trigger a Congressional Hearing (or two) on the subject. The outcry that followed spurred the Mississippi Insurance Department “conduct” review of State Farm. And that conduct review has revealed the high percentage of “errors.”

While the subject matter of this note is a legal claim, the ‘real’ subject matter of whistleblower litigation is the whistleblower; a modern day tragic hero. While the law ostensibly protects and/or rewards the whistleblower, statistics show that whistleblowers usually experience personal and financial destruction. To talk about the Rigsbys’ legal claim without discussing their personal plight (which is the common plight of most whistleblowers) would be unconscionable.

C. Fred Alford a professor at the University of Maryland (College Park) is an expert on whistle blowers and their subsequent misery. “Somewhere between half and two-thirds of whistleblowers lose their jobs... .. Not only do most whistleblowers get fired, but they rarely get their jobs back. Most never work in the field again.Of the several dozen whistleblowers I have talked with, most lost their houses. Many lost their families. ... Most whistleblowers will suffer from depression and alcoholism. ... half went bankrupt.”⁹⁵

⁹⁴ Answer, Defenses and Counterclaim to Relators’ Personal Claims in Relators’ First Amended Complaint, “Kerri Rigsby testified under oath that she provided State Farm’s documents to Dickie Scruggs and other Conspirators for use in policyholder lawsuits filed against State Farm.” Pg.55.

⁹⁵ Whistleblowers, C. Fred Alford, Cornell University Press, Ithaca, New York, 2001.

Because of the extensive and growing evidence of overcharges, and because of everything the Rigsbys have lost, the fraud allegations against State Farm under the False Claims Act are legally and morally justified. When corporations run amok, we depend on whistleblowers to act as our watchdogs, protecting the public from waste, theft and undesirable practices, thereby restoring the Civil Society.

TABLE OF AUTHORITIES

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Frye v. American General Finance, Inc., 307 F.Supp. 2d 836 (S.D. Miss. 2006)

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United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375
(5th Cir. 2003)

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Fed. R. Civ. P. 12(b)(6), 9(b), 56(c)

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61.1-78.14

Standard Flood Insurance Policy, Dwelling, 44 C.F.R. § 62.23, App. A(2).

False Claims Act, 31 U.S.C.A. §§ 3729-31 et. seq.

Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030.

Miss. Code. Ann. 97-45-3(b), 97-45-5, 97-45-9, 97-9-10(1).

FILINGS

Relator's First Amended Complaint for Damages under the False Claims Act, 31
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Southern District of Mississippi. Original Complaint filed April 26, 2006.

State Farm, (all Filed April 8, 2008 in United States District Court for the Southern
District of Mississippi):

Answer, Defenses and Counterclaim to Relators' Personal Claims in
Relators' First Amended Complaint

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Memorandum in Support of its Motion to Dismiss for Lack of Subject
Matter Jurisdiction

Motion to Dismiss the Amended Complaint under Federal Rules of Civil
Procedure 12(b)(6) and Rule 9(b)

Memorandum of Authorities in Support of its Motion to Dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b)

United States District Court for the Southern District of Mississippi, Order , February 12, 2009, Judge L.T. Senter, Jr.; in United States of America ex. rel Cori Rigsby and Kerri Rigsby v. State Farm Mutual Insurance Company, CASE NO. 1:06cv433-LTS-RHW

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C. Fred Alford, Whistleblowers, University of Maryland at College Park, Maryland, 2004.

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U.S. DEPARTMENT OF HOMELAND SECURITY
EMERGENCY PREPAREDNESS AND RESPONSE DIRECTORATE
NATIONAL FLOOD INSURANCE PROGRAM

O.M.B. No. 1660-0005
Expires December 31, 2003

THE NFIP REQUIRES THAT A PRELIMINARY REPORT BE RECEIVED WITHIN 15 DAYS OF ASSIGNMENT,
AND AN INTERIM OR FINAL REPORT NOT LATER THAN EVERY 30 DAYS THEREAFTER.

NARRATIVE REPORT

(See reverse side for Privacy Act Statement and Paperwork Burden Disclosure Notice)

INSURED _____
PROPERTY ADDRESS _____
ADJUSTING COMPANY _____

POLICY NUMBER _____
DATE OF LOSS _____
ADJ. FILE NO. _____

REMARKS:

U.S. DEPARTMENT OF HOMELAND SECURITY
EMERGENCY PREPAREDNESS AND RESPONSE DIRECTORATE
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Expires December 31, 2003

See reverse side for Privacy Act
Statement and Paperwork Burden
Disclosure Notice

FINAL REPORT

INSURED _____ POLICY NUMBER _____
PROPERTY ADDRESS _____ DATE OF LOSS _____
ADJUSTING COMPANY _____ ADJ. FILE NO. _____

PREMISES HISTORY	Date risk was originally constructed: _____ Insured at premises since: _____																																																																												
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Other Insurance: _____ <input type="checkbox"/> Yes <input type="checkbox"/> No	(Company) _____ (Type) _____ (Policy Number) _____ (Coverage Bldg./Conts.) _____ (Covers flood?) _____																																																																												
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	CERTIFICATION The above statements are true and correct to the best of my knowledge. I understand that any false statements may be punishable by fine or imprisonment under 18 U.S. Code Sec. 1001. County of _____ Insured _____ State of _____ Insured _____ Signed this _____ day of _____, 20 _____ Witness _____																																																																												

Date of Report _____

Adjuster's Signature _____

Adjuster's SSN _____

POLICY NO. FL _____

U.S. DEPARTMENT OF HOMELAND SECURITY
EMERGENCY PREPAREDNESS AND RESPONSE DIRECTORATE
NATIONAL FLOOD INSURANCE PROGRAM

O.M.B. No. 1660-0005
Expires December 31, 2003

POLICY TERM _____

PROOF OF LOSS

(See reverse side for Privacy Act Statement and
Paperwork Burden Disclosure Notice)

AMT OF BLDG COV AT TIME OF LOSS _____

AGENT _____

AMT OF CNTS COV AT TIME OF LOSS _____

AGENCY AT _____

TO THE NATIONAL FLOOD INSURANCE PROGRAM:

At time of loss, by the above indicated policy of insurance, you insured the interest of _____

against loss by flood to the property described according to the terms and conditions of said policy and of all forms, endorsements, transfers and assignments attached thereto.

TIME AND ORIGIN A _____ loss occurred about the hour of _____ o'clock __ M.,
on the _____ day of _____ 20__ . The cause of the said loss was: _____

OCCUPANCY The premises described, or containing the property described, was occupied at the time of the loss as follows, and for
no other purpose whatever: _____

INTEREST No other person or persons had any interest therein or encumbrance thereon except _____

1. FULL AMOUNT OF INSURANCE application to the property for which claim is presented is	\$	_____
2. ACTUAL CASH VALUE of building structures	\$	_____
3. ADD ACTUAL CASH VALUE OF CONTENTS of personal property insured	\$	_____
4. ACTUAL CASH VALUE OF ALL PROPERTY	\$	_____
5. FULL COST OF REPAIR OR REPLACEMENT (Building and Contents)	\$	_____
6. LESS APPLICABLE DEPRECIATION	\$	_____
7. ACTUAL CASH VALUE LOSS is	\$	_____
8. LESS DEDUCTIBLES	\$	_____
9. NET AMOUNT CLAIMED under above numbered policy is	\$	_____

The said loss did not originate by any act, design or procurement on the part of your insured, nothing has been done by or with the privity or consent of your insured to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss, no property saved has in any manner been concealed, and no attempt to deceive the said insurer as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

I understand that this insurance (policy) is issued Pursuant to the National Flood Insurance Act of 1968, or Any Act Amendatory thereof, and Applicable Federal Regulations in Title 44 of the Code of Federal Regulations, Subchapter B, and that knowingly making any false answers or misrepresentations of fact may be punishable by fine or imprisonment under applicable United States Codes.

Subrogation - To the extent of the payment made or advanced under this policy; the insured hereby assigns, transfers and sets over to the insurer all rights, claims or interest that he has against any person, firm or corporation liable for the loss or damage to the property for which payment is made or advanced. He also hereby authorizes the insurer to sue any such third party in his name.

The insured hereby warrants that no release has been given or will be given or settlement or compromise made or agreed upon with any third party who may be liable in damages to the insured with respect to the claim being made herein.

The furnishing of this blank or the preparation of proofs by a representative of the above insurer is not a waiver of any of its rights.

State of _____

County of _____

Insured

Subscribed and sworn before me this _____ day of _____, 20__

Notary Public

