

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CIVIL DIVISION**

MELISSA A. WALKER and WILLIAM C.
WALKER,

Plaintiffs,

Case No.: 09 17303

vs

Division: B

TEACHERS INSURANCE COMPANY, a
foreign corporation,

Defendant.

**PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES
OR ALTERNATIVELY MOTION FOR SUMMARY JUDGMENT ON COVERAGE**

COME NOW, the Plaintiffs, MELISSA A. WALKER and WILLIAM C. WALKER, by and through her undersigned attorney and hereby moves this court for summary judgment establishing coverage for the Plaintiffs. Specifically, the undisputed facts of this case show that the policy exclusions relied upon by the defendant carrier are invalid, and/or is ambiguous and therefore unenforceable, and/or violative of Florida's public policy. As such Plaintiffs are entitled to summary judgment establishing coverage for this event.

1. Plaintiff seeks coverage for damages caused by Chinese Drywall under their homeowners insurance policy. The Florida law is well-settled that insuring or coverage clauses are construed in the broadest possible manner to affect the greatest extent of coverage. Hudson v. Prudential Prop. & Cas. Ins. Co., 450 So.2d 565, 568 (Fla. 2d DCA 1984). The specific type of insurance policy involved in this case is an all-risk policy.¹ Therefore, unless the policy expressly

¹ "We cover the residence on the insured premises. This includes additions and built-in components and fixtures and building materials and supplies located on the insured premises for use in construction of or to the residence" Coverage A – Residence on page 3. "We cover

excludes the loss from coverage, this type of policy provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts. Fayad v. Clarendon Nat. Ins. Co., 899 So.2d 1082 (Fla. 2005)². Florida law is equally well-settled and in contrast to insuring clauses that policy exclusions are to be strictly and narrowly construed against the insurer. Frontier Ins. Co. v. Pinecrest Preparatory School Inc., 658 So.2d 601 (Fla. 4th DCA 1995). Thus, the issue before the court is whether the damages caused under the policy have been specifically and expressly excluded by the language sought applied with ambiguity being resolved in favor of coverage.

2. The undisputed factual basis is that Plaintiffs' home contains Chinese Drywall. This drywall is not deteriorating and is not defective as it performs the expected functions of drywall (fire protection, sound and heat insulation, holding paint on the walls and allowing for the hanging of picture frames and other wall mounted items, etc), but it does "off-gas". These emitted gases or fumes contain particulates of suspended sulfur species. These sulfurous gases caused damage to metal components in the Walkers' home in the form of corrosion. The gases also cause odors and irritate the human body creating an unsafe condition for inhabitation. Affidavit of Dr. John T. Wolan is attached hereto as **Exhibit A**.

personal property owned by or in the care of the insured." Coverage C - Personal Property on page 4. "We pay the necessary and reasonable increase in living costs you incur to maintain the normal standard of living your household if a part of the insured premises is made unfit for use by an insured loss." Coverage D - Additional Living Costs and Loss of Rent on page 6. "We pay for loss to covered property that is moved from a premises to prevent a loss from perils insured against." Incidental Property Coverages #1 Emergency Removal on page 6

² The purpose of an 'All-Risk' policy is to insure losses when the cause of the loss is unknown or the specific risk was not explicitly contemplated by either party." Lee R. Russ & Thomas F. Segalla, 7 Couch on Insurance § 101:7.

3. The issue before this Court is whether damages caused by the drywall are covered under an all-risk insurance policy since interpretation of an insurance contract is a question of law. Jones v. Utica Mut. Ins. Co., 463 So.2d 1153 (Fla.1985).

4. The Defendant contends certain exclusions preclude damage caused by the drywall from coverage. As with any other matter involving exclusionary clauses in insurance policies, analysis is governed by the language of the exclusionary provision and well-established principles of insurance contract interpretation.³

5. An insured need only show that a loss occurred to its property while the policy was in force to shift the burden to the insurer to prove the loss arose from an excluded risk. Hudson v. Prudential Prop. & Cas. Ins. Co., 450 So.2d 565, 568 (Fla. 2d DCA 1984).

6. The Defendant seeks to avoid coverage relying upon the following bases:

- i. There was no direct physical loss
- ii. Wear and Tear Exclusion
- iii. Errors, omissions and defects Exclusion
- iv. Personal Property damage did not arise from a named peril

See Defendant's Answer and Affirmative Defenses.

7. Since this is a case of first impression in Florida, it is appropriate to look to other jurisdictions for guidance. Hogan v. Tavzel, 660 So.2d 350, 352 (Fla. 5th DCA 1995).

8. The Louisiana Courts have already addressed this issue in Finger v. Audubon Ins. Co., 2010 WL 1222273 (La.Civil D.Ct. 3.22.10) wherein the court found the very same

³ Defendant contends that "...the relevant policy issued by Teachers to Plaintiffs speaks for itself in all of its terms and conditions. Teachers also asserts that the denial letter dated June 23, 2009 speaks for itself." See Defendant's Answers to Interrogatory #4. A copy of Defendant's Answers to Plaintiffs' Interrogatories is attached hereto as Composite **Exhibit B**.

exclusions asserted by the defendant to be inapplicable to damages caused by Chinese Drywall.

A copy of the Finger decision is attached hereto as **Exhibit C**.

“Direct Physical Loss”

9. The defendant first argues that the corrosion damage sustained is not a direct physical loss caused by the drywall emissions thereby precluding coverage for those losses.

10. A proper definition of “direct loss” is a *loss proximately caused*. Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract #242/99, 930 So.2d 756, 759 (Fla. 4th DCA 2006). The term “proximate cause” as applied in insurance cases has essentially the same meaning as it does in negligence cases except that the element of foreseeableness or anticipation of injury as a result of the peril is not required. Thus, in a suit on a policy insuring for “direct loss” caused by the peril, a proper definition would be that cause which in a natural and continuous sequence unbroken by any new and intervening cause, *produces a loss*, and without which the loss would not have occurred. Id. at 759⁴

11. Applying these principles to the facts of the case, if the damages followed reasonably from the emission of gases by the drywall, and if no intermediate controlling and self-sufficient cause intervened, the damages resulted directly from the drywall. The corrosion damage in this was a “direct” consequence since the emission of the gases set into motion a

⁴ see also Gulf Portland Cement Co. v. Globe Indem. Co., 149 F.2d 196 (5th Cir.), *cert. denied*, 326 U.S. 743 (1945) (The words “direct cause” in insurance policies ordinarily are synonymous in legal intentment with “proximate cause”); Dixie Pine Products Co. v. Maryland Casualty Co., 133 F.2d 583, 585 (5th Cir.) (“It is well settled that the words ‘direct cause’ ordinarily are synonymous in legal intentment with ‘proximate cause,’ a rule applicable to causes involving the construction of an insurance policy.”); Fred Meyer, Inc. v. Central Mutual Insurance Co., 235 F.Supp. 540 (D.Or.1964) (The courts have interpreted the words “proximate” and “direct” as synonymous.)

sequence of events proximately resulting in the corrosion to the metal components within the home.⁵

12. The damage to the components in the Walkers' home in the form of corrosion and the odor clearly constitute a direct physical loss triggering the application of the policy. Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract #242/99, 930 So.2d 756 (Fla. 4th DCA 2006) (Mold damage to personal property caused by a discharge of water from a leaking pipe was a "direct physical loss" caused by a "named peril" within meaning of insurance policy, and therefore homeowners were entitled to coverage for mold damage, since accidental discharge of water from a plumbing system was a "named peril," and it proximately resulted in mold damage.); Widdows v. State Farm Florida Ins. Co., 920 So.2d 149 (Fla. 5th DCA 2006) (Abnormality of drain pipe, which was speculated to have been caused by settlement of the ground under the pipe, erosion, or a sinkhole, and which impeded the flow of water through the pipe, was a "physical loss," within meaning of property insurance policy covering "accidental direct physical loss" to the property)

13. In addition, decisions of other jurisdictions similarly support Plaintiff's position that the corrosion constitutes a direct physical loss triggering coverage. In Western Fire Ins. Co. v First Presbyterian Church, 437 P2d 52 (Colo. 1968) (the court determined that there was coverage under an all-risk policy insuring against physical loss or damage to church buildings when gasoline and gasoline vapors infiltrated the buildings, making them unusable, notwithstanding the insurer's argument that there had been no direct physical loss. The loss was the consequential result of the fact that because of the accumulation of gasoline around and under

⁵ "These sulfurous gases caused damage to metal components in the Walkers' home in the form of corrosion". Affidavit of Dr. Wolan

the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous, the court explained, holding that all of this equated to a direct physical loss within the meaning of that phrase as used by the insurer. See also Farmers Ins. Co. of Oregon v. Truitanich, 858 P.2d 1332 (Or.Ct.App.1993) (case in which odor from methamphetamine “cooking” was held to constitute “direct physical loss” to houses); Largent v. State Farm Fire & Cas. Co., 842 P.2d 445(Or.Ct.App.1992), (same); Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52 (1968) (where gasoline vapors penetrated foundation of insured church and accumulated, rendering building uninhabitable, property held to have suffered a “direct, physical loss”); Matzner v. Seaco Ins. Co., 1998 WL 566658 (Mass.Super.1998) (holding that carbon monoxide levels in apartment building sufficient to render building uninhabitable were a “direct, physical loss”); American Guarantee & Liability Ins. Co. v. Ingram Micro, Inc., Not Reported in F.Supp.2d, 2000 WL 726789, *3 (D.Ariz. 2000) (Held that the term "physical damage" included "loss of access, loss of use, and loss of functionality" in finding that computers suffered “physical damage” as required by the insurance policy where information stored in the computers' memory was destroyed and the computers' utility was hampered.); Alpine Glass, Inc. v. Illinois Farmers Ins. Co., --- F.Supp.2d ----, 2010 WL 760139 (D.Minn. 2010) (Court determined that the requirement for "direct physical loss or damage" was met in the absence of tangible injury when government regulations rendered cereal unfit for sale, resulting in "an impairment of function and value" of insured property); Gatti v Hanover Ins. Co., 601 F Supp 210 (ED Pa 1985) (All risk policy issued to apartment complex owners provided coverage for loss of water due to leakage from underground pipes after water had passed through owners' meter, such loss being a “physical loss”)

Wear and Tear Exclusion

14. The Plaintiffs' damages are caused by the sulphurous gases emitting from the Chinese Drywall and therefore relate to the drywall off-gasing, not by wear, tear and/or gradual deterioration.

15. The plain language of the exclusion is as follows:

“Wear and tear – We do not pay for loss which *results from* wear and tear, marring, deterioration, inherent vice, latent defect, mechanical breakdown, rust, corrosion, contamination, or smog. *We do pay for an ensuing loss* unless the unsuing loss itself is excluded.”

The plain language of the exclusion refers to losses *resulting or caused* by wear and tear, deterioration, rust, corrosion et al which is clearly intended to apply where the corrosion, rust or the like is the cause of the property damage and is not designed to preclude coverage when the rust or corrosion is the damage itself.

16. Here, the corrosion caused to the metals in the Walkers' home by the sulphurous gases released by the Chinese drywall is the loss, not the cause of the loss.⁶ Thus, the language of the exclusion pertaining to losses resulting from does not bar coverage.

17. Moreover, the concurrent cause doctrine is the prevailing standard under Florida law. Wallach v. Rosenberg, 527 So.2d 1386 (Fla. 3d DCA 1988). As explained in the *Wallach* decision, the concurrent cause doctrine mandates that coverage shall be provided when a loss would not have occurred but for the joinder of independent covered and excluded causes. *Id.*; see also 11 G. Couch, Couch on Insurance 2d § 44:268.

18. The subject exclusion also refers to “inherent vice” or “latent defect”. First party insurance policies typically exclude damages due to an inherent vice or latent defect in order to

prevent the insurer from having to compensate the insured for property that “has its own shelf life and will eventually wear out or break down because of intrinsic quality or nature”. Eugene Wollan, *Risks Not Taken*, John Liner Review 86, (Fall 2006).

19. Therefore, the exclusion applies to a loss due to a quality in the property that causes the property to damage or destroy itself. Such an exclusion applies to damage resulting from something within the property itself as opposed to some outside force.

20. As Dr. Wolan explained by way of affidavit, the drywall is not deteriorating and is not defective and therefore the subject language of the exclusion does not apply.

21. Significantly, all of the terminology utilized in the subject exception⁷ to describe what constitutes “Wear and tear” consist of expected natural degenerative processes demonstrating that the clear purpose of this exclusion was to prevent against insuring ordinary inevitable losses. U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871 (Fla. 2007) (principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read in pari material.)

Errors, omissions and defects

22. While one of the insidious characteristics of Chinese drywall is that, while it off-gases, it performs all of the expected functions of drywall, such as fire protection, sounds and heat insulation, holding paint on walls and allowing for hanging of picture frames and other wall mounted items.

⁶ “These sulfurous gases caused damage to metal components in the Walkers’ home in the form of corrosion”. Affidavit of Dr. Wolan

⁷ See usage of wear and tear, marring, deterioration, inherent vice, latent defect, and mechanical breakdown

23. The subject Chinese drywall is therefore not defective because the condition is not one that renders the drywall unable to perform the purpose of drywall rather the damage that the Chinese drywall causes is based upon a quality distinct from the purpose of an aesthetic or finishing material for a home. *Egan v. Washington General Ins. Corp.*, 240 So.2d 875 (Fla. 4th DCA 1970) (Fact that “thru bolt” was made of a ferromagnetic metal which in combination with bronze sea strainer and sea water deteriorated faster than if thru bolt had been made of other material did not constitute a “latent defect” under all-risk policy)

24. Here, there is no evidence that the Chinese drywall is damaging or destroying itself, demonstrating that the “inherent vice” or “latent defect” language of the exclusion does not apply.

Ensuing Loss Provision

25. The exclusionary language relied upon the Defendant in denying coverage is is immediately followed by an ensuing loss exception” to the exclusion.

26. “The only reasonable definition for the term “*physical* loss or damage” **as used in the ensuing loss provision of the clause is damage that occurs subsequent to, and as a result of, a design defect. This type of loss is covered under the policy.** *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161 (Fla. 2003); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Texpak Group N.V., 906 So.2d 300 (Fla. 3d DCA 2005) (While policy did not cover insureds' loss from business interruption and extra expense as result of contractor's defective design and installation of upgrade to paper mill; although the exclusion of coverage for the cost of making good defective design or specifications did not apply to loss or damage resulting from such defective design or specifications).

Rules of Policy Interpretation Requires Finding of Coverage

27. While Plaintiff maintains coverage exists under a plain reading of the policy, coverage also exists “[i]f the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous.” Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29, 34 (Fla.2000). An ambiguous provision is construed in favor of the insured and strictly against the drafter. *See id.*

28. Ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So.2d 467 (Fla.1993). Florida law is equally well-settled that insuring or coverage clauses are construed in the broadest possible manner to effect the greatest extent of coverage. Hudson v. Prudential Prop. & Cas. Ins. Co., 450 So.2d 565, 568 (Fla. 2d DCA 1984); Nat'l Merchandise Co. v. United Serv. Auto. Ass'n, 400 So.2d 526, 532 (Fla. 1st DCA 1981); Valdes v. Smalley, 303 So.2d 342, 344 (Fla. 3d DCA 1974); *see also* Hartnett v. Southern Ins. Co., 181 So.2d 524, 528 (Fla.1965).

29. In contrast to insuring clauses, however, exclusionary clauses in liability insurance policies are always strictly construed. Demshar v. AAACon Auto Transport, Inc., 337 So.2d 963, 965 (Fla.1976); St. Paul Fire & Marine Ins. Co. v. Thomas, 273 So.2d 117 (Fla. 4th DCA), *cert. denied*, 282 So.2d 638 (Fla.1973) (**well settled and almost universally accepted principle of construing the exclusion in a manner which affords the broadest coverage**); Smith v. General Accident Ins. Co. of America, 641 So.2d 123 (Fla. 4th DCA 1994); and Frontier Ins. Co. v. Pinecrest Preparatory School, Inc., 658 So.2d 601, 602 (Fla. 4th DCA 1995).

30. The Fourth District addressed the strict construction of exclusionary clauses in State Farm Fire & Cas. Ins. Co. v. Deni Assoc. of Florida., Inc., 678 So.2d 397 (Fla. 4th DCA 1996), *rev. granted*, 695 So.2d 699 (Fla.1997) wherein the court was confronted with

construction of a clause that purported to deny coverage for bodily injury claims caused by the “discharge, dispersal, release or escape of pollutants.” The policies further defined the term *pollutants* as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” 678 So.2d at 399. In construing the exclusion, the court stated:

“Thus, the current Florida rule is that strict construction is required of exclusionary clauses in insurance contracts only in the sense that the insurer is required to make clear precisely what is excluded from coverage. If the insurer fails in the duty of clarity by drafting an exclusion that is capable of being fairly and reasonably read both for and against coverage, the exclusionary clause will be construed in favor of coverage. If the insurer makes clear that it has excluded a particular coverage, however, the court is obliged to enforce the contract as written.”

31. It should be clear that the Defendant failed to make clear what is excluded from coverage and drafted an exclusion that is capable of being fairly and reasonably read both for and against coverage and thus must be construed in favor of coverage. Where a critical term is not defined in an exclusionary clause of the policy, as is the case here, it will be liberally construed in favor of an insured. State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So.2d 1245, 1247 n. 3 (Fla.1986) (“[W]here the term ‘theft’ is used in an insurance policy, without definition, it will be interpreted liberally in favor of the insured.”); Nat’l Merchandise Co. v. United Service Auto. Ass’n, 400 So.2d 526, 530 (Fla. 1st DCA 1981) (“insurer cannot, by failing to define the terms ‘auto accident’ or to include any additional qualifying or exclusionary language, insist upon a narrow, restrictive interpretation of the coverage provided”); St. Paul Fire & Marine Insurance Co. v. Thomas, 273 So.2d 117 (Fla. 4th DCA), *cert. denied*, 282 So.2d 638 (Fla.1973) [*Thomas*].

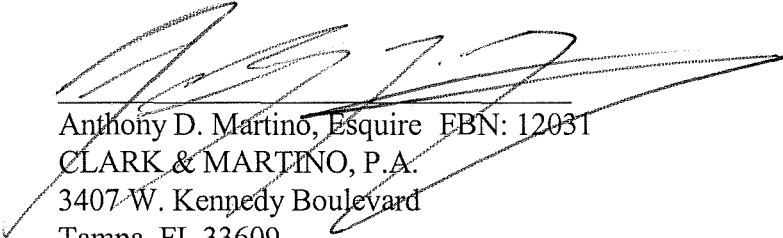
32. The Middle District of Florida has explained this concept recently in a case where it specifically found “that the term household is susceptible to two somewhat conflicting, yet

reasonable, interpretations” requiring construction against the Insurer. *Continental Ins. Co. v. Roberts*, 2004 WL 5572025 (M.D.Fla. 2004). The Court emphasized that the insurer “could have easily defined the term household, but it chose not to do so. The result of this failure is that the term household is ambiguous and must be construed against them”. *Id.* at 5; *Epstein v. Hartford Casualty Ins. Co.*, 566 So.2d 331, 333-334 (Fla. 1st DCA 1990). The 11th Circuit Court of Appeals in approval said it best by explaining that the insureds “**do not need to show that their interpretation of the [operative term] in this insurance contract is the correct one. All they need to show is that the term is ambiguous, and the existence of two competing, reasonable interpretations establishes ambiguity.**” *Continental Ins. Co. v. Roberts*, 410 F.3d 1331, 1334 (11th Cir. 2005).

WHEREFORE, Plaintiffs respectfully request the Court find coverage for the losses sustained and grant any other relief the court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing document was served upon the following parties by U.S. Mail on this 1 day of September, 2010: Butler Pappas Weihmuller Katz Craig LLP, Scott Frank, Esquire, 777 S. Harbour Island Boulevard, Suite 500 Tampa, FL 33602.



Anthony D. Martino, Esquire EBN: 12031
CLARK & MARTINO, P.A.
3407 W. Kennedy Boulevard
Tampa, FL 33609
PH: (813) 879-0700
Fax: (813) 879-5498

Attorneys for Plaintiffs

AFFIDAVIT OF JOHN T. WOLAN, Ph.D., Ch.E.

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned Authority, personally appeared John T. Wolan, who, after being duly sworn and cautioned, deposes and states as follows:

1. That I am over the age of twenty-one (21), I am competent to make this Affidavit, and have personal knowledge of the facts and opinions contained herein.

2. That my name is Dr. John T. Wolan and my professional address is the University of South Florida, 4202 E. Fowler Ave, ENB 118 Tampa, FL, 33620.

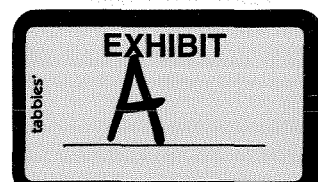
3. I am a Professor in the Department of Chemical & Biomedical Engineering at the University of South Florida. I hold a Ph.D. in Chemical Engineering from the University of Florida, a Masters in Chemical Engineering from the University of Florida and a Bachelors in Chemistry from the University of Central Florida. My Curriculum Vitae is attached hereto as Exhibit A.

4. That based upon my education, training, and work experience, I am familiar with the composition and effect of "Chinese drywall".

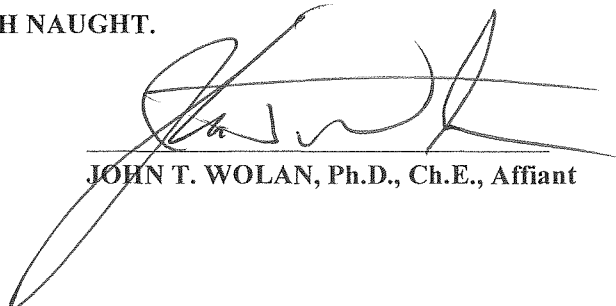
5. That I have been retained by the Plaintiff in the above-captioned action to inspect the Walker home and test the drywall and effected components, and did in fact conduct such an inspection and testing.

6. That based upon my investigation, testing and review, I have formed the following opinions:

- a. The Walkers' home contains what has become commonly known as "Chinese Drywall".
- b. That while the drywall is not deteriorating and is not defective as it performs the expected functions of drywall (fire protection, sound and heat insulation, holding paint on the walls and allowing for the hanging of picture frames and other wall mounted items, etc), it does "off-gas".
- c. These emitted gases or fumes contain particulates of suspended sulfur species.
- d. These sulfurous gases caused damage to metal components in the Walkers' home in the form of corrosion.
- e. The gases cause odors and irritate the human body creating an unsafe condition for inhabitation.



FURTHER AFFIANT SAYETH NAUGHT.



JOHN T. WOLAN, Ph.D., Ch.E., Affiant

BEFORE ME, the undersigned Authority, personally appeared John T. Wolan who is personally known to me or who produced personally known to me as identification, and after being duly sworn

and cautioned, deposes and states the statements in the foregoing Affidavit are true and correct to the best of his knowledge and belief.

DATED this 22nd day of June, 2010.

NOTARY PUBLIC-STATE OF FLORIDA
Carla M. Webb
Commission # DD701230
Expires: AUG. 01, 2011
BONDED THRU ATLANTIC BONDING CO., INC.



Carla M. Webb
NOTARY SIGNATURE

CARLA M. WEBB
NOTARY PRINTED NAME

My Commission Expires: 8-1-11

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CIVIL DIVISION

MELISSA A. WALKER and
WILLIAM C. WALKER,

Plaintiffs,

Case No. 09 17303

Division: B

vs.

TEACHERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

DEFENDANT'S NOTICE OF SERVING ANSWERS
TO PLAINTIFFS' INTERROGATORIES

TO: Anthony D. Martino, Esq.
Clark & Martino, P.A.
3407 West Kennedy Boulevard
Tampa, FL 33609-2905

Defendant, TEACHERS INSURANCE COMPANY, by and through its undersigned
counsel, files this Notice of Serving its Answers to Plaintiffs' Interrogatories propounded
on October 5, 2009, numbered one (1) through ten (10).

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP



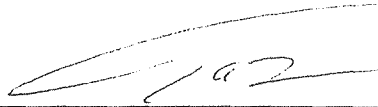
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Attorneys for Defendant
TEACHERS INSURANCE COMPANY

DEC 03 2009



CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice, together with the Answers, has been furnished to the above-named addressee, by United States Mail on ~~November~~ ^{December} 1st, 2009.



SCOTT J. FRANK, ESQ.
THOMAS A. KELLER, ESQ.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CIVIL DIVISION

MELISSA A. WALKER and
WILLIAM C. WALKER,

Plaintiffs,

Case No. 09 17303
Division: B

vs.

TEACHERS INSURANCE COMPANY,
a foreign corporation,

Defendant.
_____ /

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

1. What is your name, address, and, if you are answering for someone else, your official position?

ANSWER:

Mr. Greg Nicklas*
Teachers Insurance Company
3701 Regent Boulevard
Irving, TX 75063

*** with the assistance of counsel.**

2. List the names and addresses of all persons believed or known by you, your agents or attorneys to have any knowledge concerning any of the issues raised by the pleadings and specify the subject matter about which the witness has knowledge.

ANSWER: Objection. To the extent that this Interrogatory seeks information and/or documentation that is protected by attorney/client privilege and/or work product doctrine, Teachers objects. Further, Teachers objects to the Interrogatory on the basis of the work product privilege due to the fact that this Interrogatory seeks disclosure of non-testifying experts or experts not disclosed pursuant to Rule 1.280(b)(4), Fla. R. Civ. P. However, without waiving any of the aforementioned objections, Teachers states that the following individuals are believed to have knowledge concerning the issues regarding the instant case:

Mr. Greg Nicklas
Teachers Insurance Company
3701 Regent Boulevard
Irving, TX 75063

Mr. Nicklas is the litigation adjuster of this claim. His involvement in this matter began after the lawsuit was filed.

Mr. Gary Cucchi
Horace Mann Insurance Company
One Horace Mann Plaza
Springfield, IL 62715

Mr. Cucchi has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

Mr. Ivan Dawkins
Horace Mann Insurance Company
Post Office Box 631790
Irving, TX 75063

Mr. Dawkins has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

Mr. Chip Jelifee
Horace Mann Insurance Company
Post Office Box 631790
Irving, TX 75063

Mr. Jelifee has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

Ms. Elizabeth McCree
Horace Mann Insurance Company
Post Office Box 631790
Irving, TX 75063

Ms. McCree has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

Ms. Christine Nettler
Horace Mann Insurance Company
Post Office Box 631790
Irving, TX 75063

Ms. Nettler has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

**Mr. Guy Sledge
Property Manager
Teachers Insurance Company
3701 Regent Boulevard
Irving, TX 75063**

Mr. Sledge has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

**Mr. Mark Travis
Horace Mann Insurance Company
Post Office Box 631790
Irving, TX 75063**

Mr. Travis has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

**Mr. Manuel Velez
Horace Mann Insurance Company
Post Office Box 631790
Irving, TX 75063**

Mr. Velez has knowledge regarding the investigation and decisions made regarding Plaintiffs' claim.

**Gary H. Elzweig, P.E.
President and CEO
Capri Engineering LLC
1011 Shotgun Road
Sunrise, FL 33326**

Mr. Elzweig inspected the structural and building envelope components used in the construction of the insured residence and formulated opinions as to whether the materials used were in compliance with the Florida Building Code.

**Mr. Craig Walker
Grey Hawk at Lake Polo Subdivision
1536 Abyss Drive
Odessa, FL 33556
Named Insured**

**Ms. Melissa Walker
Grey Hawk at Lake Polo Subdivision
1536 Abyss Drive
Odessa, FL 33556
Named Insured**

Mr. Vito Claramitaro
Schear Corporation
Mr. Claramitaro was identified by Plaintiff as a person with knowledge regarding the Plaintiffs' claim.

Mr. Jeff Michael
Kimmins Contracting Corporation
1501 Second Avenue E
Tampa, FL 33605-5005
Mr. Michael was identified by Plaintiff as a person with knowledge regarding the Plaintiffs' claim.

Mr. Brian Miller
Senica Air
5121 Caribbean Drive
Spring Hill, FL 34606
Mr. Miller was identified by Plaintiff as a person with knowledge regarding claim. He is reported to have performed HVAC repairs at the Insured property.

Ms. Cheryl O'Connor
O'Connor Electric
Post Office Box 1395
Land O Lakes, FL 34639
Identified by Plaintiff as a person with knowledge regarding the Plaintiffs' claim.

Mr. Mike O'Connor
O'Connor Electric
Post Office Box 1395
Land O Lakes, FL 34639
Identified by Plaintiff as a person with knowledge regarding the Plaintiffs' claim.

3. Please state a concise factual basis for each Affirmative Defense raised in your answer to the complaint.

ANSWER: Teachers objects to this Interrogatory on grounds that it potentially seeks information protected by the work product doctrine. Without waiving the foregoing objection, Teachers responds as follows:

FIRST AFFIRMATIVE DEFENSE

A portion of the items claimed by the Plaintiffs do not fall within the terms of coverage for the insurance policy. The policy provides, in pertinent part, as follows:

Perils insured against – Coverages A, B, C and D

Coverage A – Residence and Coverage B – Related Private Structures – This policy covers the **residence** and related private structures on the **insured premises** for risks of direct physical loss unless specifically excluded.

In order for there to be coverage under the insurance policy, there must first be damage consisting of “direct physical loss.” As there is no damage to the subject drywall, coverage is not triggered.

SECOND AFFIRMATIVE DEFENSE

The claimed damage is excluded from coverage under the terms of the insurance policy. The policy provides, in pertinent part, as follows:

Exclusions that apply to property coverages

We do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.

* * *

10. **Wear and tear** – **We** do not pay for loss which results from wear and tear, marring, deterioration, inherent vice, latent defect, mechanical breakdown, rust, corrosion, contamination, or smog. **We** do pay for an ensuing loss unless the ensuing loss itself is excluded.

THIRD AFFIRMATIVE DEFENSE

The claimed damage is excluded from coverage under the terms of the insurance policy. The policy provides, in pertinent part, as follows:

Exclusions that apply to property coverages

We do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.

* * *

12. **Errors, omissions and defects** – **We** do not pay for loss which results from one or more of the following:

* * *

- b. a defect, a weakness, an inadequacy, a fault or unsoundness in materials used in construction or repair whether on or off the insured premises.

FOURTH AFFIRMATIVE DEFENSE

The claimed damage for personal property is not one of the perils covered under the insurance policy. The insurance policy provides coverage for damage to personal property attributable to a specified peril. As the damage claimed by the Plaintiffs is not one of the specified perils, there is no coverage under the terms of the insurance policy.

4. Please specify any and all language in the applicable policy of insurance upon which you rely as the basis for your denial of coverage to Plaintiffs dated June 23, 2009. (**Exhibit A** - Denial Letter dated June 23, 2009)

ANSWER: Teachers objects to this interrogatory as the relevant policy issued by Teachers to Plaintiffs speaks for itself in all of its terms and conditions. Teachers also asserts that the denial letter dated June 23, 2009 speaks for itself. However, without waiving said objections, Teachers refers to the response to Interrogatory number 3 set forth above.

5. Please state a concise factual basis which you contend supports the basis for your denial of coverage to Plaintiffs, specifically including the language of the policy asserted in your affirmative defenses.

ANSWER: Teachers objects to this interrogatory as the relevant policy issued by Teachers to Plaintiffs speaks for itself in all of its terms and conditions. Teachers also asserts that the denial letter dated June 23, 2009 speaks for itself. However, without waiving said objections, Teachers refers to the response to Interrogatory number 3 set forth above.

6. Please state all actions taken by you, including inspection and testing, to investigate the facts of plaintiff's claim and to ascertain the damages sustained by Plaintiff.

ANSWER: Objection. To the extent that this Interrogatory seeks information and/or documentation that is protected by attorney/client privilege and/or work product doctrine, Teachers objects. However, without waiving the foregoing objection, upon notice of the loss reported by Plaintiffs, Teachers opened a claim file. The Plaintiffs provided the information as to the damage being claimed and the basis

of the claim. An adjuster was assigned to evaluate the Plaintiffs' claim. Based upon the assertions made by Plaintiffs and information provided, there is no coverage for the loss reported by Plaintiffs under the terms and conditions of the policy. Teachers formally notified Plaintiffs that there was no coverage for the claim as reported.

7. Please state a concise factual basis for your denial of coverage in this matter.

ANSWER: Teachers objects to this interrogatory as the relevant policy issued by Teachers to Plaintiffs speaks for itself in all of its terms and conditions. Teachers also asserts that the denial letter dated June 23, 2009 speaks for itself. However, without waiving said objections, Teachers refers to the response to Interrogatory number 3 set forth above.

8. Do you contend any person or entity other than you is, or may be, liable in whole or part for the claims asserted against you in this lawsuit? If so, state the full name and address of each such person or entity, the legal basis for your contention the facts or evidence upon which your contention is based, and whether or not you have notified each person or entity of your contention.

ANSWER: Teachers objects base don the insinuation that it is liable to the Plaintiffs for this claim. The policy expressly excludes coverage for the Plaintiffs' claimed damages. Teachers also objects to the extent that the interrogatory seeks information protected by the work product doctrine. However, notwithstanding this, Teachers asserts that the development company responsible for developing the property, the general contractor that built the home, the sub-contractor that installed the drywall, the manufacturer of the subject drywall and the distributor of the subject drywall may have liability for the Plaintiffs' claim. Discovery is still ongoing, however, one entity that may have liability is:

**Smith Family Homes
5110 Eisenhower Blvd
Suite 160
Tampa FL 33634**

9. List the names and addresses of all person who are believed or known by you, your agents, or your attorneys to have knowledge concerning any of the issues in this lawsuit; and specify the subject matter about which the witness has knowledge.

ANSWER: Objection. To the extent that this Interrogatory seeks information and/or documentation that is protected by attorney/client privilege and/or work product protection, Teachers objects. Further, Teachers objects to the interrogatory on the basis of the work product privilege due to the fact that this Interrogatory seeks disclosure of non-testifying experts or experts not disclosed pursuant to Rule 1.280(b)(4), Fla. R. Civ. P. However, without waiving any of the aforementioned objections, please refer to Teachers' response to Interrogatory number 2 above.

10. Do you intend to call any expert witnesses at the trial of this case? If so, state as to each such witness the name and business address of the witness, the witness' qualifications as an expert, the subject matter upon which the witness is expected to testify, the substance of the facts and opinions to which the witness is expected to testify, and a summary of the grounds for each opinion.

ANSWER: Teachers has not yet determined which witnesses that it will call upon to provide testimony at trial.

Discovery is ongoing. Teachers reserves its right to supplement the foregoing answers, if necessary.

TEACHERS INSURANCE COMPANY

By: [Signature]

Greg Nicklas, Claims Consultant
(Printed Name & Title)

ACKNOWLEDGMENT

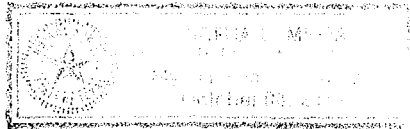
STATE OF TEXAS

COUNTY OF Dallas

BEFORE ME, the undersigned authority, personally appeared Greg Nicklas
on behalf of TEACHERS INSURANCE COMPANY, who is personally known to me
OR who has produced N/A * as identification, and who, after first
being duly sworn, deposes and says that he has read the foregoing Answers to
Interrogatories which were propounded to him by the Plaintiffs, and to the best of his
knowledge and belief are true and correct.

SWORN TO AND SUBSCRIBED before me, this 24th day of November, 2009.

**List type of identification produced or "N/A," whichever is applicable.*



[Signature]

NOTARY PUBLIC
State of Texas at Large

My Commission Expires: October 8, 2013

Civil District Court of Louisiana.
Orleans County
Simon FINGER and Rebecca Finger,
v.
AUDUBON INSURANCE COMPANY.
No. 09-8071.
March 22, 2010.

Judgment

Lloyd Medley, Judge.
DIVISION "D-16"

This matter came for hearing on March 12, 2010 on the Plaintiffs' Motion to Strike and Defendant's Motion for Sanctions and Motion to Quash;

APPEARING WERE:

Allan Kanner, Esquire, Melissa M. Fuselier, Esq., Hugh Lambert, Esq., Cayce Peterson, Esq. and Soren Giselson, Esq., for Plaintiffs, Simon and Rebecca Finger, and

Andrew A. Braun, Esq. and Margaret L. Sunkel, Esq. for Defendant, Audubon Insurance Company.

After consideration of the arguments of counsel and the briefs filed by the parties, the Court GRANTS Plaintiffs' Motion to Strike and DENIES Defendant's Motion for Sanctions and Motion to Quash as follows:

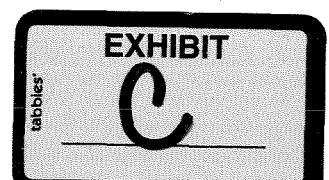
IT IS HEREBY ORDERED, JUDGED AND DECREED that Plaintiffs' Motion to Strike is GRANTED and pursuant to the plain language of the Audubon policy, Louisiana law governing insurance, and the undisputed facts, Audubon's affirmative defenses of the "Pollution or Contamination," "Gradual or Sudden Loss" and "Faulty, Inadequate or Defective Planning" are hereby stricken as affirmative defenses.

IT IS HEREBY ORDERED, JUDGED AND DECREED that the "Pollution or Contamination" exclusion which reads:

1. Pollution or Contamination

We do not cover any loss, directly or indirectly, regardless of any cause or event contributing concurrently or in sequence to the loss, caused by the discharge, dispersal, seepage, migration or release or escape of pollutants. Nor do we cover the cost to extract pollutants from land or water, or the cost to remove, restore, or replace polluted or contaminated land or water. A "pollutant" is any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and "waste." A "contaminant" is an impurity resulting from the mixture of or contact with a foreign substance. "Waste" includes materials to be disposed of, recycled, reconditioned or reclaimed.

in the Audubon policy is hereby stricken as an affirmative defense.



IT IS HEREBY ORDERED, JUDGED AND DECREED that the "Gradual or Sudden Loss" exclusion which reads:

2. Gradual or Sudden Loss

We do not cover any loss caused by gradual deterioration, wet or dry rot, warping, smog, rust or other corrosion. In addition, we do not cover any loss caused by inherent vice, wear and tear, mechanical breakdown or latent defect. However, we do insure ensuing covered loss unless another exclusion applies.

in the Audubon policy is hereby stricken as an affirmative defense.

IT IS HEREBY ORDERED, JUDGED AND DECREED that the "Faulty, Inadequate or Defective Planning" exclusion which reads:

8. Faulty, Inadequate or Defective Planning We do not cover any loss caused by faulty, inadequate or defective:

- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. Materials used in repair, construction, renovation or remodeling, grading or compaction; or
- d. Maintenance; of part or all of any property whether on or off the residence. However, we do insure ensuing covered loss unless another exclusion applies.

in the Audubon policy is hereby stricken as an affirmative defense.

IT IS HEREBY ORDERED, JUDGED AND DECREED that Defendant's Motion for Sanctions is DENIED.

IT IS HEREBY ORDERED, JUDGED AND DECREED that Defendant's Motion to Quash is DENIED.

Signed this 22nd day of march, 2010.

<<signature>>

JUDGE LLOYD MEDLEY

REASONS FOR JUDGMENT

This matter was brought before the Court on Plaintiffs, Simon and Rebecca Fingers ("the Fingers") Motion to Strike and Audubon Insurance Company's ("Audubon")'s Motion for Sanctions and Motion to Quash. Appearing were: Allan Kanner, Melissa M. Fuselier, Hugh Lambert, Cayce Peterson and Soren Giselson for the Fingers; and Andrew A. Braun and Margaret L. Sunkel for Audubon. The parties briefed the issues and presented oral argument on March 12, 2010. For the following reasons, this Court grants the Fingers' Motion to Strike, denies Audubon's Motion for Sanctions and denies Audubon's Motion to Quash:

1. The Fingers purchased Audubon's homeowners policy number AIG PCG 0001243490 for the policy period March 2009-March 2010. (*See* Petition, ¶ 4; Audubon's Original Answer ¶ 4; Audubon's Amended Answer ¶ 4).
2. On June 11, 2009 the Fingers filed a claim under the Audubon policy. (*See* Petition ¶ 8; Audubon's Original Answer ¶ 8; Audubon's Amended Answer ¶ 8).
3. On July 16, 2009, Audubon denied in writing the Fingers' claim. (*See* Petition ¶ 11; Audubon's Original Answer ¶ 11; Audubon's Amended Answer ¶ 11).
4. Audubon's letter of denial contained a list of three policy exclusions on which it relied to deny the Fingers' claim: (1) the pollution ("POL") exclusion, (2) the gradual or sudden loss ("GSL") exclusion and (3) the faulty, inadequate

or defective planning (“FIDP”) exclusion. (See Ex. C to Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment).

5. Audubon utilized the three exclusions as affirmative defenses in Audubon's Answer filed on October 5, 2009. (See Audubon's Original Answer ¶ 3, 4 and 5).

6. The Fingers filed a Motion for Partial Summary Judgment on November 3, 2009, addressing Audubon's defenses based on these three exclusions. The matter was fully briefed and argued, and the Court denied the Fingers' Motion on January 15, 2010 as premature. (See Order Denying Summary Judgment and the Court's January 15, 2010 transcript).

7. After the filing of the Fingers' Motion for Partial Summary Judgment and after the deposition of Audubon's corporate representative Kathleen Spinella, Audubon filed its Amended Answer, omitting its POL exclusion as an affirmative defense. (See Audubon's Amended Answer ¶¶ 1, 2, 3 & 4). In its Opposition to Plaintiffs' Motion for Partial Summary Judgment, Audubon argued that it did not intend to re-assert this defense. (See Audubon Insurance Company's Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment). However, since the pollution exclusion remains a part of the current case as a reason for Audubon's denial of the Fingers' claim, the Court will address all three exclusions under La. C. C. P. Art. 964.

LOUISIANA LAW GOVERNING INSURANCE

8. In reviewing the exclusions that Audubon pled as affirmative defenses, the Court is aware of certain governing principles of Louisiana law.

9. Louisiana courts adhere to the general principle that “when the language in an insurance contract is clear and unambiguous the agreement must be enforced as written.” Cent. La. Elec. Co. v. Westinghouse Elec. Corp., 579 So.2d 981, 985 (La. 1991).

10. Interpretation of an insurance contract is generally a question of law. Brown v. Drillers, Inc., 93-1019 (La. 1994), 630 So.2d 741, 749-750; Munsch v. Liberty Mutual Ins. Co., 2005-0147 (La. App. 1st Cir. 2/10/06), 928 So.2d 608, 613.

11. Audubon admitted in its Answer that “the policy speaks for itself.” (See Audubon's Original Answer ¶ 5; Audubon's Amended Answer ¶ 5). Audubon's designated corporate representative, Kathleen Spinella (“Spinella”), testified during her 1442 deposition that “the policy speaks for itself.” Spinella stated: “the policy spoke for itself.” (See Spinella Deposition, p. 58:22-25).

12. As a general rule, insurance policies should be interpreted to effect, not deny, coverage. Breland v. Schilling, 550 So.2d 609-611 (La. 1989); Reynolds v. Select Properties, Ltd., 93-1480 (La. 4/11/94), 634 So.2d 1180, 1183; In re Katrina Canal Breaches Consolidated Lit., 495 F.3d 191, 207-208 (E.D. La. 2007); Holden v. Conne-Metalna, 2001 WL 40994 *2 (E.D. La. 1/16/01).

13. If the language of the insurance contract is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. Garcia v. St. Bernard Parish School Bd., 576 So.2d 975, 976 (La. 1991); Carney v. America Fire & Indemnity Co., 371 So.2d 815, 818 (La. 1979); 15 W.McKenzie and H. Johnson, Louisiana Civil Law Treatise. Insurance Law and Practice § 2 (1986). Spinella admits this fact during her deposition when she stated:

Q: I said, given your experience in working with insureds and how they might interpret or understand the policy, do you think that a person would read this and think that they would need to buy additional coverage to cover Chinese drywall?

A: It would depend on the person. If I read it, I would know it. I'm a person. There's other persons that may not.

(See Spinella Deposition, pp. 72:24-73:6).

14. The Fingers alleged in their Petition for Damages that the Audubon policy is an all-risk policy. (See Petition, ¶ 7). Audubon answered that the policy speaks for itself. (See Audubon's Original Answer, ¶ 7; Audubon's Amended Answer ¶ 7). In Audubon's July 16, 2009 denial letter to the Fingers, Audubon cited its policy's insuring agreement, "This policy covers you against all risks of direct physical loss or damage to your house, contents and other permanent structures unless an exclusion applies." (See Ex. C to Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment).

15. Audubon's policy is an "all risk" policy. An "all risk" policy is an insurance policy which covers all risks unless clearly and specifically excluded. *Young v. United States Automotive Ass'n Cos. Co.*, 2007-1590 (La. App. 4th Cir. 6/10/09), 15 So.3d 327, 329. Under Louisiana law, it is the insurance company's burden to prove that a loss comes within a policy exclusion. *Louisiana Maintenance Services, Inc. v. Certain Underwriters at Lloyd's of London*, 616 So.2d 1250, 1252 (La. 1993). An insured who owns an "all risk" insurance policy has a "very light" burden and must only show that damage to the insured's property occurred. *Walker v. Travelers Idem. Co.*, 289 So.2d 864, 872 (La. App. 4th Cir. 1974), citing ARNOLD COUCH ON INSURANCE, 13th ed. § 48:139; *Dawson Farms, L.L.C. v. Millers Mutual Fire Ins. Co.*, 34,801 (La. App. 2nd Cir. 8/1/01) 794 So.2d 949, 951; *Cochran v. Travelers Ins. Co.*, 606 So.2d 22, 24 (5th Cir. 1992).^[FN1]

FN1. "Generally, an 'all risk' insurance policy creates a special type of coverage extending to risks not usually covered under other insurance, and recovery under an "all risk" policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." *Walker*, 289 So.2d at 868.

16. Exclusions are strictly construed, and the insurer generally has the burden of proving the applicability of the exclusion. *Garcia*, 576 So.2d at 976; *Chambers v. First Nat. Life. Ins. Co. of New Orleans*, 253 So.2d 636, 638 (La. App. 4th Cir. 1971). Once the property owner establishes that a loss occurred, the burden shifts to the insurer to establish an applicable exclusion under the terms of the policy. *Walker*, 289 So.2d at 871; *Myevre v. Continental Cas. Co.*, 245 So.2d 785, 786-787 (La. App. 4th Cir. 1971). It is the insurer who bears the burden of proving the applicability of any exclusionary clause within any policy. *Blackburn v. National Union Fire Ins. Co. of Pittsburgh*, 2000-2668 (La. 2001), 784 So.2d 637, 641; *Veade v. Louisiana Citizens Property Ins. Com.*, 2008-0251 (La. App. 4th Cir. 2008); 985 So.2d 1275, 1279; *Dickerson v. Lexington Ins. Co.*, 2009 WL 130207 (5th Cir. 1/21/09); *Grilletta v. Lexington Ins. Co.*, 2009 WL 294934 (5th Cir. 1/8/09); *Ponchartrain Gardens, Inc. v. State Farm General Ins. Co.*, 2009 WL 86671 (E.D. La. 1/13/09). Audubon agrees. Spinella testified that:

Q: Do you agree that the burden is on the insurer to show that a damage is excluded?

MR. FRANK: Was that the end of it?

MR. CASEY: Yes.

MR. FRANK: Objection to the extent it calls for a legal conclusion. If you know, you can go ahead and answer.

A: I am pretty sure that that's the way - I mean that we usually, if we feel something is not covered, we document why and explain it. That would be what we would do.

(See Spinella Deposition, p. 68:10-21).

17. Exclusions must be interpreted as narrowly as possible in order to provide maximum coverage for the insured. *Crutchfield v. Landry*, 1999-2822 (La. App. 4th Cir. 3/15/00), 757 So.2d 858, 860-861. Any ambiguity in an exclusion should be narrowly construed in favor of coverage. *Yount v. Maisano*, 627 So.2d 148, 151 (La. 1993).

AUDUBON'S POLICY EXCLUSIONS

18. The POL exclusion language in the Fingers' Audubon policy provides as follows:

1. Pollution or Contamination

We do not cover any loss, directly or indirectly, regardless of any cause or event contributing concurrently or in any sequence to the loss, caused by the discharge, dispersal, seepage, migration or release or escape of pollutants. Nor do we cover the cost to extract pollutants from land or water, or the cost to remove, restore, or replace polluted or contaminated land or water. A "pollutant" is any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and "waste." A "contaminant" is; an impurity resulting from the mixture of or contact with a foreign substance. "Waste" includes materials to be disposed of, recycled, reconditioned or reclaimed.

(See Audubon Policy, Part II, Section D(1), FING 0223).

19. The POL exclusion does not, and was never intended, to apply to residential homeowners claims for damages caused by substandard building materials. *Doerr v. Mobil Oil Corporation*, 2000-0947 (La. 12/19/00), 774 So.2d 119, 134; *State Farm Fire Ins. Co. v. MLT Construction Co.*, 2002-1811 (La. App. 4th Cir. 6/4/03), 849 So.2d 762, 770. The Louisiana Department of Insurance determined that a "pollution incident" under a pollution exclusion in homeowners' policies only refers to an incident which causes "environmental damage," or "injurious [to the environment, not the claimant] presence in an upon the land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants." (See Advisory Letter No. 97-01 Commissioner of Insurance, State of Louisiana (June 4, 1997)).

20. The fact that Chinese drywall releases various gases into the home is not sufficient to qualify as a "pollutant" under the pollution exclusion, which this Court interprets consistent with *Doerr v. Mobil Oil*. (See Mallet Affidavit, Plaintiff's Reply to Defendant's Opposition to Plaintiffs' Motion to Strike and Opposition to Defendant's Motion for Sanctions, Ex. G). Audubon acknowledged in its response to Plaintiffs' Motion for Partial Summary Judgment that its pollution exclusion was inapplicable and Audubon amended its Answer accordingly. (See Audubon Insurance Company's Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment, I; Audubon's Amended Answer ¶¶ 1, 2, 3 & 4). The Homeowners Amendatory Endorsement - Louisiana (PCHO-AELA (09/06) included in the Fingers' policy deletes the POL exclusion in its entirety. (See Plaintiffs' Memorandum in Support of Plaintiffs' Partial Motion for Summary Judgment, Ex. A).

21. The GSL exclusion language in the Fingers' Audubon policy provides as follows:

2. Gradual or Sudden Loss

We do not cover any loss caused by gradual deterioration, wet or dry rot, warping, smog, rust or other corrosion. In addition, we do not cover any loss caused by inherent vice, wear and tear, mechanical breakdown or latent defect. However, we do insure ensuing covered loss unless another exclusion applies.

(See Audubon Policy, Part II, Section D(2), FING 0223).

22. The GSL Exclusion is designed to exclude expected losses. Wilson, Bill, ed. *Forms & Substance-Coverage Concerns, Quirks and Solutions*, Independent Agent, May 2004 at p. 12. Coverage is required here because "the purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen." *Boudreaux v. Verret*, 422 So.2d 1167, 1172 (La. App. 3rd Cir. 1982); *Gulf Transp. Co. v. Fireman's Fund Ins. Co.*, 83 So. 730, 733 (Miss. 1920).

23. The Fingers' losses relate to the drywall off-gasing, not by wear, tear and/or gradual deterioration. (See Plaintiff's Memorandum in Support of Plaintiffs' Motion to Strike, Ex. I). Both Audubon's expert, Dr. Zdenek Hejzlar, and the Fingers' inspector, Al Mallet, agree that the Fingers' damages are caused by the sulphurous gases emitting from the Chinese drywall. (See Plaintiffs' Memorandum in Support of Partial Summary Judgment, Ex. B; Plaintiffs' Reply to

Defendants' Opposition to Plaintiff's Motion to Strike and Opposition to Defendant's Motion for Sanctions, Ex. G).

24. Audubon suggests that the phrase "rust or other corrosion" bars coverage. This position is rejected because the plain language of the GSL exclusion refers to: "any loss caused by...rust or other corrosion." (*See* Audubon Policy, Part II, Section D(2), FING 0223). The exclusion is intended to apply where corrosion, rust or the like is the cause of the property damage; it is not designed to preclude coverage when the rust or corrosion is the damage itself. *Trus Joint MacMillan v. Neeb Kearey*, 2000 WL 306654 (E.D. La. 2000). Here, the corrosion caused to the metals in the Fingers' home by the sulphurous gases released by the Chinese drywall is the loss, not the cause of the loss, indicating the corrosion language of the Gradual or Sudden Loss exclusion does not bar coverage. (*See* Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment, I(B)).

25. The GSL exclusion also refers to losses caused by an "inherent vice" or "latent defect." Audubon's insurance policy does not define these terms. Black's Law dictionary defines a latent, inherent, or hidden defect as: "a product imperfection that is not discoverable by reasonable inspection." *See Black's Law Dictionary*, 481 (9th ed. 2009). Again, the Louisiana jurisprudence, which is rooted in Maritime law, focuses on inevitable losses due deterioration of the thing. *See* ARNOLD COUCH ON MARITIME INSURANCE (11th ed) § 778. The inherent vice or latent defect exclusion applies to "a loss due to any quality in the property that causes property to damage or destroy itself that results from something within the property itself as opposed to some outside force." FC&S Online, *Processors Coverage Form, Insurance Services Office Non-filed IM Coverage*, December 2005, <http://www.nationalunderwriterpc.com>. First party policies typically exclude damages due to an inherent vice or latent defect in order to prevent the insurer from having to compensate the insured for property that "has its own shelf life and will eventually wear out or break down because of intrinsic quality or nature." Eugene Wollan, *Risks Not Taken*, John Liner Review 86, (Fall 2006). Here, there is no evidence that the Chinese drywall is damaging or destroying itself, indicating the "inherent vice" or "latent defect" language from the GSL exclusion does not apply. (*See* Plaintiff's Memorandum in Support of Plaintiffs' Motion to Strike, I). Audubon's expert report likewise does not evidence any damage to the drywall itself. (*See* Plaintiffs' Memorandum in Support of Partial Summary Judgment, Ex. B).

26. One of the insidious characteristics of Chinese drywall is that, while it off-gases, it performs all of the expected functions of drywall, such as fire protection, sounds and heat insulation, holding paint on the walls and allowing for the hanging of picture frames and other wall mounted items. Spinella agreed that the drywall itself was not harmed and stated during her deposition that:

Q: Were the damages to the Fingers; drywall itself direct or indirect?

A: We found no damages to the drywall.

Q: And were the damages to the Fingers' metallic components direct or indirect?

A: We found those are a direct result of the gases emitted or given off by the drywall.

(*See* Spinella Deposition, p. 74:18-24).

27. The FIDP exclusion language in the Fingers' Audubon policy provides as follows:

8. Faulty, Inadequate or Defective Planning

We do not cover any loss caused by faulty, inadequate or defective:

- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. Materials used in repair, construction, renovation or remodeling, grading or compaction; or
- d. Maintenance; of part or all of any property whether on or off the residence. However, we do insure ensuing covered loss unless another exclusion applies.

(*See* Audubon Policy, Part II, Section D(8), FING 0223).

28. Chinese drywall is not defective within the meaning of the FIDP exclusion. (*See* Plaintiff's Memorandum in

Support of Plaintiffs' Motion to Strike II). Again, Audubon did not provide a useful definition of this exclusion in its contract. (*See* Audubon Policy, Part II, Section D(8), FING 0223). Interpreting the plain language of the Audubon policy, the Chinese drywall "defect" is not one that renders the drywall unable to perform the purpose of drywall. *see also* Plaintiffs' Memorandum in Support of Partial Summary Judgment, III(C)). Indeed, it has not been alleged that the subject drywall would be defective in all geographies. The Chinese drywall here can still act as an aesthetic or "finishing" material for a home. Rather, the damage that the Chinese drywall causes is based upon a quality distinct from these roles. Audubon agrees. Spinella testified that:

Q: Did Audubon investigate as to whether the drywall was installed correctly or incorrectly?

A: No.

Q: Is there a reason why they didn't investigate?

A: It wasn't germane to the issue.

Q: Why not?

A: The question was whether the drywall was causing the problem itself, not whether it was hung correctly.

(*See* Spinella Deposition, pp. 78:22-79:6). Simon Finger testified that he did not consider the drywall "defective" and stated:

Q: Okay. Do you consider that the off-gasing, while not a structural defect or fault in the drywall, is a defect or fault in the drywall?

MR. KANNER: Object to the form of the question.

THE WITNESS: I think the drywall off-gases. I don't--I don't - that is what I think. I don't--

BY MR. FRANK: You don't consider that defective?

A: No.

Q: No?

A: No.

Q: You don't consider it faulty?

A: No, because -

Q: You think it's functioning properly?

A: As drywall, I think its functioning properly.

(*See* Simon Finger Deposition, pp. 88:22-89:16).

29. This last statement suggests that Audubon's denial was primarily based on the POL exclusion. Audubon's expert report does not mention the need to address any issue other than the fact that the Chinese drywall is off-gasing and its consequences. (*See* Plaintiffs Memorandum in Support of Partial Summary Judgment, Ex. B). Audubon's expert report does not characterize the drywall as "defective." *Id.*

30. In light of the Court's disposition of this matter, the Court need not address ensuing loss in any detail.^[FN2]

(*Id.*;FN2. Louisiana courts have permitted the ensuing loss provision to provide for coverage for damages resulting from a previous excluded loss. *See Tex-LA Properties v. South State Ins. Co.*, 514 So.2d 707, 710 (La. App. 2nd Cir. 1987); *Dawson*, 794 So.2d at 949;*Holden v. Connex-Metlana*, 2000 WL 1875338 *7-8 (E.D. La. 12/12/00); *Dawson*, 794 So.2d at 952;*Lake Charles Harbor & Terminal District v. Imperial Casualty & Indemnity Co.*, 857 F.2d 286, 288 (5th Cir. 1988).

31. All exhibits and documents referenced herein are made part of the record. In addition, the entirety of Kathleen Spinella, Simon Finger and Rebecca Fingers' depositions will also be made part of the record.

IT IS HEREBY ORDERED, JUDGED AND DECREED THAT: The Fingers' Motion to Strike Audubon's affirmative defenses No. 3, the Gradual or Sudden Loss exclusion, and No. 4, the Faulty, Inadequate or Defective Planning exclusion, is hereby granted. This Court also finds that the Pollution exclusion does not apply to the Fingers' claim.

IT IS HEREBY ORDERED, JUDGED AND DECREED THAT: Audubon's Motion for Sanctions is hereby denied.

IT IS HEREBY ORDERED, JUDGED AND DECREED THAT: Audubon's Motion to Quash the depositions of Donna Jones, Bret Resweber and Zednek Hejzlar is hereby denied.

Dated: March 22nd, 2010

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The Honorable Lloyd J. Medley

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