

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

JACK TIBLIER and GLENDA TIBLIER, *
*
Plaintiffs, *
*
vs. * NO. 1:08cv0493 LG-RHW
*
LEXINGTON INSURANCE COMPANY, *
*
Defendant. *

**DEFENDANT LEXINGTON INSURANCE COMPANY'S
ANSWER TO PLAINTIFFS' COMPLAINT**

COMES NOW Defendant Lexington Insurance Company (hereinafter "Lexington"), by and through undersigned counsel, and answers Plaintiffs' Complaint as follows:

FIRST DEFENSE

Plaintiffs have failed to state a claim for which relief may be granted.

SECOND DEFENSE

Lexington responds to the allegations in Plaintiffs' Complaint as follows:

GENERAL ALLEGATIONS

1. Lexington admits that Plaintiffs' Complaint is an action for damages, declaratory judgment and other equitable relief, but denies that Plaintiffs are entitled to any of the remedies sought. Any other allegations in this paragraph are denied.

2. Lexington admits that this Court has jurisdiction over the claims asserted against it by Plaintiffs and all jurisdictional requirements for diversity jurisdiction are satisfied. These admissions are not intended to and should not be construed as a waiver of any contractual requirements/obligations of the parties concerning resolution of disputes arising out of the

insurance policy. Lexington specifically reserves any and all objections to venue in this district relating to Lexington's ability to obtain a fair and impartial jury due to the fact that many of the potential jurors would have sustained some sort of property loss due to Hurricane Katrina.

3. Upon information and belief, admitted.

4. Lexington admits that it is a foreign insurance company. Lexington denies the allegation that it is duly authorized to conduct business in Mississippi and avers that it is a non-admitted, surplus lines carrier that issues policies providing coverage for property located in the State of Mississippi. Lexington denies any remaining allegations contained in this paragraph.

5. Lexington admits that Plaintiffs purchased a homeowner's HO3 policy bearing policy number LE 0581474 02, which was in effect on August 29, 2005. The terms and conditions of the insurance policy govern the coverage provided by the policy and the policy speaks for itself. To the extent Plaintiffs' allegations are inconsistent with the policy, the allegations are denied. All remaining allegations of paragraph five are denied.

6. Admitted that Plaintiffs' residence sustained certain damages as a result of Hurricane Katrina, which were covered under the subject insurance policy. Lexington denies all remaining allegations of this paragraph and demands strict proof thereof.

7. Lexington avers that the terms and conditions of the insurance policy govern the coverage provided and that the policy speaks for itself. Furthermore, Lexington avers that the insurance policy contained certain exclusions, including but not limited to an exclusion related to damage caused by flood/storm surge. Lexington denies any remaining allegations contained in this paragraph.

8. Lexington admits that the Plaintiffs filed a timely claim under the policy. Lexington denies any remaining allegations contained in this paragraph.

9. Lexington admits that it assigned claim number 198973 to the Plaintiffs' claim. Lexington further admits that, pursuant to the terms, conditions, exclusions and endorsements of the policy, it denied full benefits under the policy. Lexington denies any remaining allegations contained in this paragraph.

10. Lexington is without sufficient information to admit or deny the allegations in this paragraph. To the extent that a response is required, denied.

11. Denied.

12. Denied.

13. Lexington admits that it is entitled to assert any and all exclusions provided for in the insurance policy and that the policy speaks for itself. The remaining allegations in this paragraph contain interpretations of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the remaining allegations are denied.

14. Lexington avers that the terms, conditions, exclusions and any applicable endorsements of the insurance policy govern what is covered by the policy, and that the policy speaks for itself. The remaining allegations in this paragraph contain interpretations of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the remaining allegations are denied.

15. Denied. Lexington avers that the terms, conditions, exclusions and any applicable endorsements of the insurance policy govern what is covered by the policy, and that the policy speaks for itself. Further, some of the allegations in this paragraph contain interpretations of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the allegations are denied.

16. The allegations in this paragraph are conclusions of law and do not require a response from Lexington. To the extent a response is required, denied.

17. The statements in this paragraph are editorial in nature such that a response is not required. To the extent that a response is required, denied.

18. The statements in this paragraph are editorial in nature such that a response is not required. To the extent that a response is required, denied.

19. The allegations in this paragraph are conclusions of law and do not require a response from Lexington. To the extent a response is required, denied.

20. The statements in this paragraph are editorial in nature such that a response is not required. To the extent that a response is required, denied.

21. Denied.

COUNT I – DECLARATORY JUDGMENT

22. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through twenty-one of the Complaint.

23. Admitted that Plaintiffs have filed an action for declaratory judgment, but denied that Plaintiffs are entitled to such relief.

24. The allegations in this paragraph contain interpretations of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the allegations are denied.

25. Lexington admits that Plaintiffs' residence sustained damage as a result of Hurricane Katrina. Lexington denies any remaining allegations contained in this paragraph. Further, Lexington avers that it is entitled to assert any and all exclusions provided for in the insurance policy and that the policy speaks for itself.

26. Lexington avers that it is entitled to assert any and all exclusions provided for in the insurance policy and that the policy speaks for itself. To the extent the allegations in this paragraph allege any wrongdoing by Lexington, the allegations are denied.

27. Denied.

28. The allegations in this paragraph contain interpretations of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the allegations are denied.

29. Lexington avers that the terms, conditions, exclusions and any applicable endorsements of the insurance policy govern what is covered by the policy, and that the policy speaks for itself. To the extent the allegations in this paragraph allege any wrongdoing by Lexington, the allegations are denied.

30. Lexington avers that the policy speaks for itself. To the extent the allegations in this paragraph allege any wrongdoing by Lexington, the allegations are denied.

31. The allegations in this paragraph contain conclusions of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the allegations are denied.

32. Lexington admits that a portion of the Plaintiffs' loss is covered under the policy and avers that Plaintiffs have been compensated for their covered losses. The remaining allegations are denied.

33. Denied.

34. Lexington avers that the terms, conditions, exclusions and any applicable endorsements of the insurance policy govern the parties' rights and obligations under the policy,

and that the policy speaks for itself. To the extent the allegations in this paragraph allege any wrongdoing by Lexington, the allegations are denied.

WHEREFORE, as to the final unnumbered paragraph of COUNT I, including subparts (a) through (g), Lexington denies that Plaintiffs are entitled to any such declaration of the conclusions of fact or law included in subparts (a) through (g), as stated, in any manner whatsoever.

**COUNT II – NEGLIGENCE/GROSS NEGLIGENCE/
RECKLESS DISREGARD FOR RIGHTS OF PLAINTIFF**

35. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through thirty-four of the Complaint.

36. Lexington admits that it had certain duties imposed by the terms, conditions, exclusions and any applicable endorsements of the policy as well as Mississippi law. Lexington avers that it has satisfied its duties under both in the handling of the claim. Lexington denies any remaining allegations contained in this paragraph.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

WHEREFORE, as to the final unnumbered paragraph of COUNT II, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

COUNT III – BREACH OF CONTRACT

53. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through fifty-three of the Complaint.

54. Lexington admits that it had certain duties imposed by the terms, conditions, exclusions and any applicable endorsements of the policy as well as Mississippi law. Lexington avers that it has satisfied its duties under both in the handling of the claim. Lexington denies any remaining allegations contained in this paragraph.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

WHEREFORE, as to the final unnumbered paragraph of COUNT III, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

COUNT IV – BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

68. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through sixty-seven of the Complaint.

69. Denied.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. Denied.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

WHEREFORE, as to the final unnumbered paragraph of COUNT IV, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

COUNT V – POLICY REFORMATION

85. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through eighty-four of the Complaint.

86. Lexington admits that Plaintiffs seek reformation of the terms of the subject policy, but denies Plaintiffs' allegations and that Plaintiffs are entitled to such relief. Any remaining allegations are denied.

87. Lexington avers that the terms, conditions, exclusions and any applicable endorsements of the insurance policy govern what is covered by the policy, and that the policy speaks for itself. To the extent the allegations in this paragraph allege any wrongdoing by Lexington, the allegations are denied.

88. The statements in this paragraph are editorial in nature such that a response is not required. To the extent a response is required, Lexington denies any and all allegations and that Plaintiffs are entitled to the relief requested.

89. Lexington lacks information sufficient to admit or deny Plaintiffs' allegations, therefore the allegations are denied. All remaining allegations of this paragraph are denied.

90. Denied.

91. Denied.

92. Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever, including the relief sought through policy reformation.

WHEREFORE, as to the final unnumbered paragraph of COUNT V, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

COUNT VI – PROMISSORY ESTOPPEL

93. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through ninety-two of the Complaint.

94. Lexington admits that Plaintiffs have asserted that the theory of promissory estoppel should be applied in the instant case, but denies Plaintiffs' allegations and that Plaintiffs are entitled to such relief.

95. Any representations made by Lexington are contained in the subject policy by its terms. Lexington avers that the terms, conditions, exclusions and any applicable endorsements of the insurance policy govern what is covered by the policy, and that the policy speaks for itself. Lexington is without sufficient information to admit or deny the remaining allegations in this paragraph. To the extent that a response is required, the remaining allegations are denied and Lexington demands strict proof thereof.

96. Lexington admits that the insured property sustained damage as a result of Hurricane Katrina. Lexington denies the remaining allegations contained in this paragraph.

97. Denied.

98. Lexington denies that Plaintiffs are entitled to the relief requested.

WHEREFORE, as to the final unnumbered paragraph of COUNT VI, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

COUNT VII – AGENT NEGLIGENCE

99. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through ninety-eight of the Complaint.

100. Lexington admits that it had certain duties imposed by the terms, conditions and exclusions of the policy and any applicable endorsements as well as Mississippi law. Further, Lexington avers that it has satisfied its duties under both in the handling of the claim. Lexington further avers that it is a non-admitted, surplus lines carrier that issues policies providing coverage for property located in the State of Mississippi, but denies that Lexington owed Plaintiffs a duty as a result of any transactions between Plaintiffs and their agent. Lexington denies the remaining allegations contained in this paragraph.

101. Denied.

102. Denied.

103. Denied.

WHEREFORE, as to the final unnumbered paragraph of COUNT VII, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

COUNT VIII – BAD FAITH

104. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through one hundred three of the Complaint.

105. Lexington admits that Plaintiffs have asserted claims of bad faith and/or breach of the covenant of good faith and fair dealing and seek compensatory and punitive damages and attorney fees, but denies Plaintiffs' allegations and that Plaintiffs are entitled to any such relief.

106. Admitted that the subject lawsuit arises out of the damages Plaintiffs sustained as a result of Hurricane Katrina, but denied that Lexington has breached the standard of care in anyway in adjusting and investigating Plaintiffs' loss.

107. The allegations in this paragraph contain interpretations of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the allegations are denied. Lexington avers that it is a non-admitted, surplus lines carrier that issues policies providing coverage for property located in the State of Mississippi. Any remaining allegations are denied.

108. The allegations in this paragraph contain interpretations of law, to which Lexington is not required to respond. In the event Lexington is mistaken in this belief, the allegations are denied. Any remaining allegations are denied.

109. Any representations made by Lexington are contained in the subject policy by its terms. Lexington avers that the terms, conditions, exclusions and any applicable endorsements of the insurance policy govern what is covered by the policy, and that the policy speaks for itself. The remaining allegations are denied.

110. Denied.

111. Lexington admits that the Mississippi Insurance Department issued Bulletin 2005-6 on September 7, 2005, and avers that the bulletin speaks for itself. To the extent the allegations in this paragraph allege any wrongdoing by Lexington, the allegations are denied.

112. Denied.

113. Denied.

114. Denied.

115. Denied.

116. Denied.

117. Denied.

WHEREFORE, as to the final unnumbered paragraph of COUNT IX, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

**COUNT IX – NEGLIGENT/INTENTIONAL
INFLICTION OF EMOTIONAL DISTRESS**

118. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through one hundred seventeen of the Complaint.

119. The allegations in paragraph one hundred nineteen are legal conclusions and not allegations of fact and, therefore, do not require a response from Lexington. To the extent a response is required, the allegations are denied.

120. Denied and Lexington demands strict proof thereof.

121. Denied.

WHEREFORE, as to the final unnumbered paragraph of COUNT IX, Lexington denies that Plaintiffs are entitled to recover in any manner whatsoever.

X – REMEDIES

122. Lexington incorporates and adopts by reference its response to each allegation in Paragraph one through one hundred twenty-one of the Complaint.

123. Lexington denies that Plaintiffs are entitled to any relief whatsoever.

124. Denied. Lexington denies that Plaintiffs are entitled to any relief whatsoever, including any and all relief included in subparts (A) through (I).

125. Lexington denies that Plaintiffs are entitled to any relief whatsoever.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Lexington committed no act that proximately caused or contributed to any damages sustained by Plaintiffs.

SECOND AFFIRMATIVE DEFENSE

The injuries and damages complained of herein resulted from the acts or omissions of persons or entities other than Lexington. Alternatively, said acts or omissions of persons or entities other than Lexington constitute an independent, superseding cause of the injuries and damages complained of herein; hence Plaintiffs ought not to recover.

THIRD AFFIRMATIVE DEFENSE

Lexington has not breached any duty owed to Plaintiffs by virtue of any applicable Mississippi statute.

FOURTH AFFIRMATIVE DEFENSE

Lexington has not breached any duty owed to Plaintiffs by virtue of any applicable state or federal rules, regulations, or standards.

FIFTH AFFIRMATIVE DEFENSE

Pursuant to MISS. CODE ANN. § 85-5-7, § 11-7-15, and all other Mississippi law, including but not limited to *Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264 (Miss. 1999), Lexington asserts all claims that it may have for contribution among joint tortfeasors, apportionment of fault and other safeguards contained therein and/or set-off of any amount paid in settlement or reimbursement by any other person or entity.

SIXTH AFFIRMATIVE DEFENSE

Each and every claim stated in Plaintiffs' Complaint is barred in whole or in part by the applicable statute of limitations and/or the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to recover to the extent that any damages were caused by Plaintiffs' failure to mitigate damages.

EIGHTH AFFIRMATIVE DEFENSE

Lexington is entitled to a set-off and credit for any and all sums paid to or on behalf of Plaintiffs by any other party or collateral source as a result of or related to this lawsuit.

NINTH AFFIRMATIVE DEFENSE

Pursuant to MISS. CODE ANN. § 85-5-7(8), 1) fault shall be allocated to all joint tortfeasors, including all named, absent and immune parties; 2) Lexington is only severally liable for non-economic damages; 3) if Lexington's allocated fault for economic damages is determined by a trier of fact to be less than thirty percent (30%), then liability is several only; however, if Lexington's allocated fault is thirty percent (30%) or more, then liability is joint and several, but only to the extent to allow the Plaintiffs to recover fifty percent (50%) of the recoverable damages; and 4) fault allocated to an immune defendant is not reallocated among other tortfeasors.

TENTH AFFIRMATIVE DEFENSE

Lexington pleads accord and satisfaction and/or payment and release.

ELEVENTH AFFIRMATIVE DEFENSE

Lexington pleads that Plaintiffs assumed the risk of bearing the loss of flood by their failure to obtain flood insurance or an adequate amount of flood insurance.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs have not complied with the conditions of the insurance policy, including but not limited to, the provision for Appraisal in the event the parties cannot agree on the amount of a loss. Under the terms and provision of the insurance policy, Plaintiffs are obligated to comply with the Appraisal provision to resolve a dispute over the amount of a loss. Plaintiffs' failure to comply constitutes a breach of the insurance contract; hence, Plaintiffs are not entitled to recover for any alleged breach of contract or any other alleged claims, including but not limited to any allegations breach of duty of good faith, arising out of the handling of the claim by Lexington.

THIRTEENTH AFFIRMATIVE DEFENSE

Lexington contests venue on the grounds that due to recent events surrounding Hurricane Katrina, Lexington cannot obtain a fair trial in this venue. Lexington further contends that it would be impossible to have an unbiased jury venire in the current venue given the media attention to the adjustment of hurricane claims and the current legal and political climate on the Mississippi Gulf Coast. As such, Lexington would be denied its rights to both procedural and substantive due process in this venue.

FOURTEENTH AFFIRMATIVE DEFENSE

The terms, conditions and exclusions contained in the applicable policy exclude coverage for damage to the Plaintiffs' home, including but not limited to damage due to flood/storm surge.

FIFTEENTH AFFIRMATIVE DEFENSE

Lexington defends on the basis of the language contained in the applicable insurance policy, including but not limited to the applicable exclusions.

SIXTEENTH AFFIRMATIVE DEFENSE

Lexington defends on the basis that the applicable insurance policy does not cover damages caused by flood/storm surge, whether or not such water was driven by wind.

SEVENTEENTH AFFIRMATIVE DEFENSE

The imposition of punitive damages in this case would violate the Due Process Clause of Amendments V and XIV to the United States Constitution and Article Three, Section Fourteen of the Constitution of the State of Mississippi because the authorization for unlimited punitive damage awards has a substantial chilling effect on the exercise of the fundamental rights to ordered liberty and access to the courts.

EIGHTEENTH AFFIRMATIVE DEFENSE

The imposition of punitive damages in this case would violate the equal protection clauses of Amendments V and XIV of the United States Constitution and Article Three, Sections Fourteen, Twenty-Six and Twenty-Eight of the Constitution of the State of Mississippi; would deprive Lexington of the right to equal protection under the laws because, among other reasons, criminal defendants are placed in a position of distinct advantage over civil defendants of comparable culpability due to the disparity in punitive treatment for similar conduct; and, because the absence of sufficiently specific and objective standards for the imposition of punitive damages fails to insure equality of treatment between and among similarly situated civil defendants in the same case or in different cases.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs seek punitive damages in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in one or more of the following respects; (1) the punitive damages claimed are or may be vastly disproportionate to any actual damages; (2) the award of punitive damages would constitute an arbitrary and capricious taking of Lexington's property, a taking which is unjustified by any rational state purpose; and (3) the award of punitive damages would violate Lexington's substantive due process rights.

TWENTIETH AFFIRMATIVE DEFENSE

The award of punitive damages claimed by Plaintiffs under current Mississippi procedure would violate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, separately, of the Constitution of the United States and Article Three, Section Fourteen of the Constitution of the State of Mississippi on each of the following separate and several grounds: (1) the procedures may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing; (2) the procedures fail to provide means for awarding separate judgments against alleged joint tortfeasors; (3) the procedures fail to provide a limit on the amount of the award against Lexington; (4) the procedures permit multiple awards of punitive damages for the same alleged act or omission; (5) the procedures fail to provide a clear and consistent appellate standard of review of any award of punitive damages; and (6) the procedures may permit the admission of evidence relative to punitive damages in the same proceedings during which liability is determined.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs' demands for punitive damages violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that the claim for punitive damages is vague and not rationally related to any legitimate governmental interest.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs' demands for punitive damages violate the Fifth Amendment to the United States Constitution, which prohibits deprivation of life, liberty or property except by due process of law in that the claim for punitive damages is vague and not rationally related to any legitimate governmental interest.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs' demands for punitive damages are unconstitutional under the Fifth Amendment to the United States Constitution and Article Three, Section Twenty-Six of the Constitution of the State of Mississippi in that damages claimed are penal in nature, while Lexington may be compelled to disclose documents and/or other evidence without the constitutional safeguard against self-incrimination set out in said passages.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

The imposition of punitive damages against Lexington in an amount exceeding any actual and potential harm by an excessive and/or unconstitutional ratio violates Lexington's substantive due process rights as guaranteed by the United States Constitution.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

The imposition of punitive damages under Mississippi's current system fails to provide fair notice to Lexington that the alleged wrongful conduct could subject Lexington to punishment and also fails to provide fair notice of the severity of the punishment that the state could impose through an award of punitive damages. This lack of fair notice violates Lexington's due process rights, both procedural and substantive, as guaranteed by the United States Constitution.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

The imposition of punitive damages against Lexington in this case, if any, violates Lexington's due process rights as guaranteed by the United States Constitution because the award of punitive damages is excessive in light of the following criteria: (1) the degree of reprehensibility of the Lexington's alleged wrongful conduct; (2) the disparity between the harm

or potential harm and the punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in other cases.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

The procedure for determining punitive damages specified under Mississippi law violates Lexington's right to due process, and otherwise violates the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, because the procedure for determining punitive damages under Mississippi law does not provide meaningful guidance to a jury in the determination of an appropriate punitive damages award and does not constrain a jury or otherwise reduce the risk of an arbitrary or grossly excessive punitive damages verdict.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

The assessment and adjudication against Lexington of any punitive damages other than those measured according to its sole, individual wrongdoing would be improper and impermissible.

TWENTY-NINTH AFFIRMATIVE DEFENSE

The imposition of punitive damages under Mississippi law would violate the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, in each of the following ways:

- (a) The imposition of unlimited punitive damages that are vastly disproportionate to any actual or compensatory injury violates the Fourteenth Amendment of the U.S. Constitution.
- (b) Disproportionate punitive damages constitute an arbitrary and capricious taking of property, which is unjustified by any rational governmental interest, thereby violating the Fifth and Fourteenth Amendments of the U.S. Constitution.
- (c) The award of any punitive damages without specific standards to guide the jury's discretion in determining the amount of damages is contrary to due process under the Fourteenth Amendment of the U.S. Constitution.

- (d) Mississippi does not provide a reasonable limit on the amount of any punitive damages award, thus violating the Fourteenth Amendment of the U.S. Constitution.
- (e) The substantive standards of liability under which punitive damages are sought in this case are ambiguous, subjective, and not reasonably ascertainable, and are thus “void for vagueness” under the Fourteenth Amendment of the U.S. Constitution.
- (f) Mississippi fails to provide a clear, objective and consistent appellate standard for post-verdict review of punitive damages thus violating the Fifth and Fourteenth Amendments of the United States Constitution.
- (g) Mississippi law permits civil punishment upon a standard of proof less than that required for the imposition of criminal sanctions.
- (h) Mississippi law permits joint and several punishment of defendants who are guilty of different acts and degrees of culpability.
- (i) Mississippi law permits multiple awards of punitive damages for the same alleged act or omission.
- (j) Mississippi law permits the award of punitive damages in an amount that constitutes an “excessive fine” thereby violating Defendant’s Eighth Amendment rights.

THIRTIETH AFFIRMATIVE DEFENSE

Although cognizant of MISS. CODE ANN. § 11-1-65, as amended, Lexington avers that no legislation has been enacted specifically authorizing punitive damages in a civil action such as this or placing any reasonable limit on the amount of punitive damages awardable. The imposition of punitive damages in this action would violate Amendment V, VI, VII and XIV of the Constitution of the United States of America and Sections 14, 26 and 28 of Article III of the Constitution of the State of Mississippi and assess a fine, criminal penalty and deprivation of equal protection, property and due process.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to punitive damages pursuant to the holdings in *State Farm Mut. Auto. Insur. Co. v. Campbell*, 123 S.Ct. 1513 (2003) and *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).

THIRTY-SECOND AFFIRMATIVE DEFENSE

Pursuant to the Fifth Circuit’s opinion in *Leonard v. Nationwide*, the anti-concurrent cause provision of the Lexington policy excludes any damage caused by flood/storm water, including but not limited to any damage previously caused by wind. Accordingly, Plaintiffs are not entitled to any additional benefits/payments under the Lexington policy.

THIRTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to recover from Lexington any losses or portions of losses that have already been paid for by flood insurance and/or any other source.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

To the extent the damages to the Plaintiffs' residence were caused by faulty, inadequate or defective: design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; materials used in repair, construction, renovation, or remodeling; or maintenance – they are not covered.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

Lexington defends on the basis of the language contained in the applicable insurance policy, including but not limited to the applicable exclusions. A certified copy of that policy is attached hereto as Exhibit “A.”

THIRTY-SIXTH AFFIRMATIVE DEFENSE

Lexington reserves the right to amend its answer and assert any additional defenses that may be applicable to Plaintiffs' claims.

Respectfully submitted,

/s/ Larkin H. Peters
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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2008, the foregoing document was electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of such filing to the following:

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/s/ Larkin H. Peters
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