UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LAWRENCE HARRINGTON ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-07600**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 1** **JUDGE PORTEOUS** **MAGISTRATE SHUSHAN**

PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 60(a) AND (b), FED.R.CIV.P.

NOW INTO COURT, through undersigned counsel, come plaintiffs Lawrence Harrington, Sandra Harrington Fayard, Wilfred Montegue, Christina Montegue, Teri Waggoner, and Judith A. Young and move the Court pursuant to Rule 60(a) , (b)(1) and (6), Fed.R.Civ.P., for relief from the Amended Judgment entered January 24, 2008, rec.doc. 17. In support thereof, movers urge the reasons set forth in the accompanying memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2008, I electronically filed the foregoing Motion for Relief from Judgment Pursuant to Rule 60(a) and (b), Fed.R.Civ.P., with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

David A. Strauss

/s/Maureen Blackburn Jennings
MAUREEN BLACKBURN JENNINGS
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STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 1** **JUDGE PORTEOUS** **MAGISTRATE SHUSHAN**

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 60(a) and (b), FED.R.CIV.P.

For the following reasons, plaintiffs are entitled, pursuant to Rule 60(a), and, in the alternative, Rule 60(b)(1) and, in the further alternative, Rule 60 (b)(6), Fed.R.Civ.P., to relief from the Court's Final Judgment signed January 22, 2008 and entered January 24, 2008, rec.doc. 17, dismissing with prejudice all of the claims of the six plaintiffs.

Background[1]

The six *Harrington* plaintiffs filed suit in St. Tammany Parish on August 28, 2007, seeking damages related to Hurricane Katrina from State Farm Fire and Casualty Company ("State Farm"), their homeowners' insurer. The 31 plaintiffs in the *Benit* case filed suit in St. Bernard Parish on August 21, 2007, seeking Katrina-related damages from State Farm, which was also their homeowners' insurer. State Farm removed the *Harrington* case on October 29, 2007, rec.doc. 1 (*Harrington*), and the *Benit* case on October 11, 2007, rec.doc. 1 (*Benit*). State Farm filed in each of the two cases a virtually identical motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., and both motions were set for hearing on Wednesday, January 16, 2008. rec.doc. 4 (*Harrington*), rec.doc. 5, 9 (*Benit*). State Farm filed its Answer in both cases on January 3, 2008. rec.doc. 8 (*Harrington*), rec.doc. 10 (*Benit*).

Five days later (January 8, 2008), not realizing that State Farm had joined issue in either case, plaintiffs' counsel filed in *Harrington* and in *Benit* a First Amended Complaint, rec.doc. 10 (*Harrington*), rec.doc. 12 (*Benit*), as well as a memorandum in opposition to the motion to dismiss. rec. doc. 9 (*Harrington*), rec.doc. 11 (*Benit*). The two First Amended Complaints, as well as the two opposition memoranda, were virtually identical to each other. In their opposition memoranda, both sets of plaintiffs stated that they had filed a First Amended Complaint that day, which they believed rendered moot the arguments State Farm raised in its dismissal motion, and urged that the

[1] Because of the parallel procedural course of this case and the case of *Benit v. State Farm Fire and Casualty Insurance Company*, No. 07-6738 T-5 (E.D.La.), and the similar Rule 60 motion pending in each of the two cases, this "Background" section includes a discussion of both cases. For the Court's convenience, movers have also attached as Ex. A a chronology of the filings and deadlines in the *Harrington* and *Benit* cases.

motion should therefore be removed from the Court's motion calendar:

> Plaintiffs are not filing any opposition on the merits because Plaintiffs have filed a First Amended Complaint for Damages[.] [P]ursuant to F.R.Civ.P. Rule 15(a), a party can amend its pleading once as a matter of right any time before the service of a responsive pleading . . . .
>
> In view of the above, Defendant's motion as to the original complaint is rendered moot and should be taken off calendar.
>
> Opposition to Motion to Dismiss, rec.doc. 9 (*Harrington*)

The following day, January 9, 2008, the clerk's office issued in both cases a Notice of Deficient Document ("deficiency notice") as to the First Amended Complaint, stating that the reason for the deficiency was that "Leave of court is required to file this document." *See* Clerk's notation on docket sheet following rec.doc. 10 (*Harrington*), rec.doc. 12 (*Benit*). The clerk's notations further stated: "**Attention: Document must be refiled in its entirety within five (5) working days. Otherwise, it may be stricken by the court without further notice. Deficiency remedy due by 1/16/08.**" Plaintiffs' lead counsel, Stuart Barasch, interpreted this notice according to its plain and straightforward language, and understood that plaintiffs had until Wednesday, January 16th in which to refile the First Amended Complaint, along with the required request for leave of court. *See* Declaration of Stuart Barasch, Ex. B.

On Monday, January 14th, State Farm moved in *Harrington* and in *Benit* for leave to file a Reply to Plaintiffs' Opposition to State Farm's Rule 12(b)(6) Motion to Dismiss. rec.doc. 11 (*Harrington*), rec.doc. 13 (*Benit*). The Court granted State Farm the requested leave, and defendant's reply memoranda were filed in both cases. rec.doc. 12, 13 (*Harrington*), rec.doc. 15, 16 (*Benit*). In those replies, State Farm argued (correctly) that plaintiffs did not have the right to file a First Amended Complaint as of right under Rule 15(a)(1), Fed.R.Civ.P., as State Farm had filed

an Answer. Also on Tuesday, January 15, one day prior to the hearing on State Farm's dismissal motions, the *Harrington* plaintiffs and the *Benit* plaintiffs filed a Supplemental Opposition to Motion to Dismiss, rec.doc. 14 (both cases). Although the two sets of plaintiffs labeled their filing as a "Supplemental Opposition," they requested in those filings leave to file their First Amended Complaints:

> After State Farm's Motion to Dismiss was filed Plaintiffs filed a First Amended Complaint, in the belief that it was permissible as of right. Plaintiffs' opposition to State Farm's motion indicated this and cited the authorities to this effect. The court filed a notice that Plaintiffs were incorrect and a request for leave to file the First Amended Complaint should have been filed by Plaintiffs.
>
> Accordingly, as part of their opposition to State Farm's motion Plaintiffs hereby request leave of court to file their First Amended Complaint and that the First Amended Complaint previously filed be deemed filed as of the date of the Court's order.

Plaintiffs' lead counsel, Stuart Barasch, believed that plaintiffs' January 15th request for leave to file the First Amended Complaint contained within plaintiffs' "Supplemental Opposition to Motion to Dismiss" would cure the clerk's deficiency notice (which provided that plaintiffs had to seek leave of court before filing their First Amended Complaint). *See* Ex. B. On Wednesday, January 16, 2008, the Clerk's Office issued in both cases a deficiency notice as to plaintiffs' Supplemental Memorandum citing as the reason that "Leave of court is required to file this document." The Clerk's notation further provided:

> **Attention: Document must be refiled in its entirety within five (5) working days. Otherwise, it may be stricken by the court without further notice. Deficiency remedy due by 1/24/08.** *See* Clerk's notation on docket sheet following rec.doc. 14 (both cases)

Once again, Mr. Barasch understood from the plain language of the clerk's deficiency notice

that plaintiffs had until Thursday, January 24th in which to seek leave of court to refile their "Supplemental Opposition" wherein they requested leave to file their First Amended Complaint. *See* Ex. B.

Also on Wednesday, January 16, 2008, the Court heard oral argument in both cases on State Farm's motion to dismiss and, in both cases, granted the motion as to plaintiffs' Louisiana Valued Policy Law (VPL) claims only, and deferred ruling as to all other claims. rec.doc. 15. David Strauss, counsel for State Farm, advised the Court during oral argument that "there was an effort made to amend the complaint but there was not leave of court granted." *See* transcript of oral argument, Ex. C at 5. Lawrence Centola, Jr., who appeared at the hearing for the *Harrington* and the *Benit* plaintiffs, advised the Court as follows:

> MR. CENTOLA: Your Honor, briefly in response. In response to the motion to dismiss, an attempt was made to amend the complaint to allege in paragraph seven of the amended complaint that the wind damage to the house itself was sufficient in amount and extent of excess of the policy limits. That motion to amend, if allowed, I believe, would cure the problems on this particular motion to dismiss.
>
> . . . .
>
> What I would suggest to your Honor is defer the ruling on this matter until the magistrate has had an opportunity to rule on the motion to amend.
>
> THE COURT: Counselor. It does seem that somehow we've got the cart before the horse here apparently.
>
> Ex. C at 5, 6.

At the conclusion of oral argument, Ex. C at 8, the Court announced that it would dismiss plaintiffs' VPL claims, but would defer ruling on the remaining claims pending a ruling from the magistrate judge on plaintiffs' motion for leave to amend:

> THE COURT: I am going to grant it as to the VPL aspect, the motion to dismiss clearly is granted as to that.
>
> However, with respect to this n[e]w allegation that's potentially sitting out there, I am going to defer a ruling until such time as to see what the magistrate does. If the magistrate allows the amendment, I'll still deal with it in my order. If the magistrate denied that amendment and it's there as it was, in that situation, Mr. Centola, you would be unfortunately dead in the water. So when is the magistrate taking this up?
>
> MR. STRAUSS: I don't know, Judge.
>
> MR. CENTOLA: Don't know, your Honor.
>
> THE COURT: I'll check with the magistrate's office. But your motion with respect to the VPL is clearly granted.
>
> MR. STRAUSS: Thank you, your Honor.
>
> MR. CENTOLA: Thank you, your Honor.
>
> THE COURT: All right. Thank y'all.

The transcript of the oral argument does not contain any discussion as to a deadline within which plaintiffs were to request that the magistrate judge hear their motion for leave to amend, or within which the magistrate judge was to hear the motion, or within which she was to rule on the motion. Mr. Centola understood from the Court's comments that plaintiffs had to file their motion within a reasonable time. *See* Declaration of Lawrence Centola, Jr., Ex. D. As with the transcript of the oral argument, the Court's minute order for January 16, 2008, rec.doc. 15 (*Harrington*), rec.doc. 17 (*Benit*), reveals no deadline within which plaintiffs are to act:

> DEFENDANT'S MOTION TO DISMISS. (DOC. [])
> ORDERED: MOTION GRANTED AS TO LOUISIANA VALUED POLICY LAW CLAIMS ONLY; DEFERRED AS TO ALL OTHER CLAIMS.

Wednesday, January 16 (the hearing date) was also the deficiency cure date for the First

Amended Complaint that the *Harrington* and *Benit* plaintiffs had filed *ex parte* on January 8th, according to the Clerk's identical deficiency notices issued on January 9. However, both sets of plaintiffs had sought to cure their deficiency as to the First Amended Complaint by seeking leave to file their amended complaint in the body of the document they filed on Tuesday, January 15th, which they titled " Supplemental Opposition to Motion to Dismiss." rec.doc. 14 (both cases). In the body of those identical supplemental memoranda, plaintiffs stated that they "hereby request leave of court to file their First Amended Complaint and that the First Amended Complaint previously filed be deemed filed as of the date of the Court's order." *Id.* Thus, plaintiffs' counsel reasonably believed that they had complied with the January 9th deficiency notice as to the First Amended Complaint.[2]

At this point, the sequence, dates, and events in the two cases diverge somewhat. As of the motion hearings on Wednesday, January 16th, plaintiffs in both cases had until Thursday, January 24th to cure the January 16th deficiency notices directed to their "Supplemental Opposition to Motion to Dismiss." Nevertheless, on Tuesday, January 22nd only six days after oral argument and **two days before the cure date for their Supplemental Oppositions where they requested leave to amend their First Amended Complaint, the issue that had triggered the January 9th**

[2] As discussed in detail below, it is the relief requested – and not the title – of filings in federal court that determines the type of document filed. *U.S. v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.,* 971 F.2d 974, 987 (3rd Cir. 1992), *cert. denied sub nom. Friko Corp. v. United States,* 507 U.S. 985 (1993)("The character of a motion is determined by its function, not its title."). Thus, the two documents filed January 15th – entitled "Supplemental Opposition to Motion to Dismiss" – should be treated for the purpose of this Rule 60 motion as Rule 15(a)(2) motions for leave to file a First Amended Complaint. Once these motions are recognized as Rule 15(a)(2) motions for leave to amend, the mistaken underlying premise of the district court's dismissal order – that plaintiffs had not "corrected the deficiency" related to their *ex parte* First Amended Complaint – falls away.

deficiency notices as to the First Amended Complaint the Court *signed* an order in *Harrington* and in *Benit*, granting in full State Farm's motion to dismiss. rec.doc. 18. Both dismissal orders provide in part:

> Pending before this Court is a Motion to Dismiss, filed on behalf of the defendant, State Farm Fire and Casualty Company (Rec.doc. []). The Court, after hearing oral argument on the defendant's motion on January 16, 2008, dismissed all plaintiff's claims under Louisiana's Valued Policy Law. The remaining claims were taken under advisement, so as to give the plaintiffs time to file an Amended Complaint.
>
> On January 8, 2008, plaintiffs filed First Amended Complaint (Rec.Doc. []), which was designated deficient, due to the fact that leave of court was required to file this document. Plaintiff was given five (5) days to correct the deficiency or the document would be stricken by the Court. *To date, plaintiffs have failed to correct the deficiency and, as such, the First Amended Complaint is stricken from the Court's record.*[3] (emphasis added)(footnote not in quoted material)

The district court also signed on January 22nd a document entitled "Final Judgment" in the *Benit* case.[4] Also on January 22nd, at 2:24 p.m., the Clerk noted on the docket sheet in *Harrington* that the First Amended Complaint was struck. *See* Ex. E, Notice of Electronic Filing; rec.doc. 10 ("**DOCUMENT STRICKEN** **DEFICIENT** First AMENDED COMPLAINT . . . . Modified on 1/22/2008. . . ."). Although the docket sheet in *Benit* does not contain such an entry, it shows that on January 22 at 2:20 p.m., the Clerk noted that the *Benit* plaintiffs' filing entitled "Supplemental Opposition to Motion to Dismiss" where they requested leave to file their

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[3] The First Amended Complaint in *Harrington* was stricken from the record January 22, 2008, at 2:24 p.m. rec.doc. 16. As of the date of filing this motion, the First Amended Complaint in *Benit* has not been stricken from the docket sheet in that case, despite the district court's January 22nd order. rec.doc. 18.

[4] Although the document was entitled "Final Judgment," it disposed only of the claims of Justin and Audrey Benit.

First Amended Complaint had been stricken. rec.doc. 18.[5] The docket sheet in *Harrington* does not contain such an entry, and it does not appear that the Supplemental Opposition to Motion to Dismiss in that case was stricken from the record.

On the next day, January 23rd, at 4:24 p.m.,[6] the Clerk entered a document entitled "Final Judgment" in the *Benit* case, which the Court had signed the previous day, January 22nd. rec.doc. 19.

On January 24, 2008, the Clerk entered in each case the Court's dismissal order signed two days earlier on January 22, rec.doc. 18 (*Harrington*), rec.doc. 21 (*Benit*). The Clerk also entered final judgment in the *Harrington* case at 11:49 a.m.,[7] dismissing plaintiffs' claims with prejudice. rec.doc. 17 (*Harrington*), and entered an Amended Judgment in *Benit* at 2:14 p.m.,[8] dismissing all claims of all parties. rec.doc. 20.

At midnight on that date, the time expired for both sets of plaintiffs to cure the deficiency in the documents they filed on January 15th requesting leave to file their First Amended Complaint. *See* deficiency notice following rec.doc. 14 (both cases); *see* Rule 3, Eastern District of Louisiana Administrative Procedures for Electronic Case Filing (April 2006)("Filing must be completed before midnight local time where the court is located, in order to be considered timely filed that day."), available at www.laed.uscourts.gov/cmecf/ecf.htm).

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[5] The Notice of Electronic Filing (Exh. E) e-mailed to counsel reflects that the Clerk struck the First Amended Complaint at 2:24 p.m. on January 22, more than two days before expiration of the deficiency cure date.

[6] *See* Ex. F.

[7] *See* Ex. G.

[8] *See* Ex. H.

Thereafter, plaintiffs in both cases moved for an additional 30 days in which to file their Notice of Appeal, in order to allow sufficient time for plaintiffs to file, and the district court to rule on, a forthcoming Rule 60(b) motion, rec.doc. 23 (*Harrington),* rec.doc. 24 (*Benit*). The Court granted the *Harrington* plaintiffs and the *Benit* plaintiffs an additional 30 days, or until March 26, 2008 in which to file their notices of appeal, rec.doc. 25 (*Harrington*), rec.doc. 29, 30 (*Benit*).

The Law

Standard of Review

Plaintiffs seek relief under Rule 60(a), 60(b)(1), and 60(b)(6). A district court's ruling on a motion brought under each of these three subsections of the rule is reviewed for abuse of discretion. *Jones, Waldo, Holbrook & McDonough v. Cade*, 510 F.3d 1277, 1278 (10th Cir. 2007)(Rule 60(a) motion); *Bowen Investment, Inc. v. Carneiro Donuts, Inc.,* 490 F. 3d 27, 29 (1st Cir. 2007)(Rule 60(a) motion); *Oriakhi v. Wood,* 250 Fed.Appx. 480, 481 (3rd Cir. 2007)(unpublished)(Rule 60(a) motion); *Warfield v. Byron,* 436 F.3d 551, 555 (5th Cir. 2006)(Rule 60(b)(1) motion); *Wiwa v. Royal Dutch Petroleum Co.,* 392 F.3d 812, 818 (5th Cir. 2004)(Rule 60(b)(6) motion). A district court enjoys considerable discretion in deciding all aspects of a Rule 60 motion. *Teal v. Eagle Fleet, Inc.,* 933 F.2d 341, 347 (5th Cir. 1991).

Rule 60(a)

Rule 60(a) authorizes a district court to modify a judgment "to insure that the record reflects the actual intentions of the court and the parties." *Matter of West Texas Marketing Corp.,* 12 F.3d 497, 504 (5th Cir. 1994). Rule 60(a) applies "when the record indicates that the court intended to do one thing but, by virtue of a clerical mistake or oversight, did another. The mistake to be

corrected must be clerical or mechanical, because Rule 60(a) does not provide relief from substantive errors in judgment." James Wm. Moore *et al,* MOORE'S FEDERAL PRACTICE , 60.11[1][a] (3rd ed. 2007). The district court's responsibility is to correct "errors, created by mistake, oversight, or omission, that cause the record or judgment to fail to reflect what was intended at the time of trial." *Id.*, *quoting Warner v. Bay St. Louis,* 526 F.2d 1211, 1212 (5th Cir. 1976). The mistake to be corrected may be one committed by the clerk or the court or the parties. A Rule 60(a) motion may be brought at any time before filing of a notice of appeal. *Chavez v. Balesh,*704 F.2d 774, 776 (5th Cir. 1983).

"Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature . . ." *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.,* 784 F.2d 665, 668-69 (5th Cir.)(*en banc*), *cert. denied sub nom. Southern Pacific Transp. Co. v. Harcon Barge Co., Inc.,* 479 U.S. 930 (1986), *quoting Dura-Wood Treating Co., etc. v. Century Forest Industries, Inc.,* 694 F.2d 112, 114 (5th Cir. 1982).

In applying Rule 60(a), district courts must "balance two competing concerns. Equitable considerations mandate that we interpret the Federal Rules of Civil Procedure liberally to avoid miscarriages of justice. We temper any urge toward generosity by construing Rule 60(a) narrowly." *In re American Precision Vibrator Co.,* 863 F.2d 428, 429-30 (5th Cir. 1989). The Fifth Circuit has recognized "the more practical and realistic viewpoint appropriate for Rule 60(a)." *Id.,* 863 F.2d at 432 (citation omitted). In reviewing a ruling on a Rule 60(a) motion, an appellate court must "focus on what the [district] court originally intended to do." *Robi v. Five Platters, Inc.,* 918 F.2d 1439,

1445 (9th Cir. 1990).

As shown below, this case satisfies each of the requirements of Rule 60(a), and its complicated facts fall precisely within the narrow contours of the rule.

Error to be corrected must be clerical or mechanical.

The district court's task in ruling on a Rule 60(a) motion has been analyzed as follows:

> The basic distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas the latter consist of instances where the court *changes its mind,* either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination. *Blanton v. Anzalone,* 813 F.2d 1574, 1577 n. 2 (9th Cir. 1987)(emphasis in original), *citing United States v. Griffin,* 782 F.2d 1393, 1397 (7th Cir. 1986).

A district court "may never use Rule 60(a) to correct ambiguities in a judgment or order to reflect anything other than the court's intent, as evidenced by the record, at the time the original judgment or order was entered." James Wm. Moore *et al,* MOORE'S FEDERAL PRACTICE, 60.11[1][c] (3rd ed. 2007). In this case, the district court's intent "at the time the original judgment or order was entered" was to allow plaintiffs to obtain a ruling from the magistrate judge on their motion for leave to amend.[9] The only reference anywhere in the record to a firm deadline within which plaintiffs had to seek leave to amend their pleadings was the Clerk's January 16th deficiency notice, which clearly advised plaintiffs that they had until "1/24/2008" in which to refile their

[9] Plaintiffs have produced three separate items of incontrovertible evidence of the district court's intent when it entered the judgment: (1) the transcript of oral argument at the January 16 hearing (Ex. C); (2) the district court's own order (confirming that it dismissed some claims at oral argument, but took the remaining claims "under advisement, so as to give the plaintiff time to file an Amended Complaint")(rec.doc. 18), and (3) the declaration of Lawrence J. Centola, Jr. (Ex. D).

Supplemental Memorandum, wherein they had requested leave to amend their complaint.[10]

Plaintiffs' request for Rule 60(a) relief does not run afoul of the requirement that the district court may not "change its mind" in granting Rule 60(a) relief. Plaintiffs ask only that the Court vacate its January 24th final judgment, and restore the parties and record *nunc pro tunc* to the position they were in on January 22nd, which would reinstate plaintiffs' right to seek leave to amend their pleading. Plaintiffs would not be entitled to relief under Rule 60(a) if they sought more[11] *i.e.*, if they requested *in this motion* that the Court grant them leave to amend, and deny State Farm's motion to dismiss. Both of these decisions whether to grant leave to amend, whether to dismiss

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[10] Plaintiffs concede that their "Supplemental Memorandum" would have been more appropriately titled as a motion for leave to file their First Amended Complaint. But labeling of this type is not uncommon in federal court, as demonstrated by the large number of cases that have addressed the labeling issue. These cases uniformly hold that it is the relief requested – and not the title – of motions and other filings that determines the type of document filed. *Nisson v. Lundy,* 975 F.2d 802, 806 (11th Cir. 1992)("The character of a motion is determined by its function, not its title."); *U.S. v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.,* 971 F.2d 974, 987 (3rd Cir. 1992), *cert. denied,* 507 U.S. 985 (1993). This principle has been recognized in the context of various filings. *See, e.g., Diaz v. Mayor of Corpus Christi,* 121 Fed.Appx. 36, 38 (5th Cir. 2005)(plaintiff's "Memorandum in Opposition" qualified as a Rule 59(e) motion to alter or amend judgment); *Broadway v. Norris,* 193 F.3d 987, 989 (8th Cir. 1999)(reclassifying a "Motion for Reconsideration" of a nonfinal order that was a "final disposition" of a qualified immunity defense as a Rule 60(b) motion); *Hamilton Plaintiffs v. Williams Plaintiffs,* 147 F.3d 367, 371 n. 10 (5th Cir. 1998)(Even though Federal Rules of Civil Procedure do not expressly recognize a "motion for reconsideration," such motions may properly be considered as Rule 59(e) motions to alter or amend judgments or Rule 60(b) motions for relief from judgment); *Britt v. Whitmire,* 956 F.2d 509, 512 (5th Cir. 1992)("No matter how it is labeled, a motion is treated as one made under Rule 50(e) if it 'calls into question the correctness of a judgment' and seeks to alter or amend it."); *Prop-Jets, Inc. v. Chandler,* 575 F.2d 1322, 1325 (10th Cir. 1978)(recognizing that a motion made under Rule 25© – dealing with substitution of parties – could be treated as a Rule 60(b) motion); *Noland v. Flohr Metal Fabricators, Inc.,* 104 F.R.D. 83, 86 (D. Alaska 1984)(treating a two-sentence Amended Notice of Dismissal without a supporting memorandum or affidavits as a Rule 60(b) motion).

[11] *Burton v. Johnson,* 975 F.2d 690, 694 (10th Cir. 1992), *cert. denied,* 507 U.S. 1043 (1993)(district court may not use Rule 60(a) to change its mind in the name of "clarification" of its original order.").

the case will await another day, should the Court vacate its January 24th judgment and restore the parties to the status they occupied on January 22nd.

The requested change does not affect State Farm's substantial rights.

In deciding whether Rule 60(a) relief is available, the Fifth Circuit has directed district courts to determine

> whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. As long as the intentions of the parties are clearly defined and all the court need do is employ the judicial eraser to obliterate a mechanical or mathematical mistake, the modification will be allowed. If, on the other hand, cerebration or research into the law or planetary excursions into facts is required, Rule 60(a) will not be available to salvage the [mover's] blunders.

Matter of West Texas Marketing Corp., 12 F.3d 497, 504-05 (5th Cir. 1994). As discussed in the preceding paragraphs, plaintiffs do not seek in this motion an order denying State Farm's 12(b)(6) motion. If the Court grants Rule 60(a) relief, State Farm will be afforded the opportunity of having the district court rule on its dismissal motion or even a second dismissal motion if plaintiffs are allowed to amend their complaint following the grant of Rule 60 relief. Thus, State Farm's substantial rights will not be affected by the grant of Rule 60(a) relief.

The Fifth Circuit has reversed the denial of Rule 60(a) relief in similar cases.

• ***In re American Precision Vibrator Co.,* 863 F.2d 428, 432 (5th Cir. 1989).** In this case, the Fifth Circuit was presented with an appeal "triggered by a clerical mistake in the district clerk's office that led to the dismissal with prejudice of the underlying bankruptcy action." *Id.* at 428. A creditor moved to dismiss AVCO's Chapter 11 bankruptcy petition. The court's local rules

permitted dismissal after ten days if the motion was unopposed. Although the debtor filed an opposition within the ten-day period, the clerk's office mistakenly did not docket it until the tenth day (August 27th), the same day that the bankruptcy judge granted the motion to dismiss as unopposed. For some unexplained reason, the bankruptcy judge also issued an order denying the motion to dismiss on September 10th. To add to the confusion, his judicial commission expired after September 10th, and the district court vacated the September 10th order, leaving in place the August 27th dismissal order. The Fifth Circuit found that the district court had authority to correct the record under Rule 60(a):

> The delay in docketing AVCO's opposition is indisputably a clerical mistake. Traditionally, parties have not borne the brunt of the court's clerical errors. Hence, the court could order AVCO's opposition added to the record, even at this late date. The clerk's office rectified this mistake by docketing AVCO's opposition on August 27th. That mistake is therefore not before us now. Its direct result is, however. The August 27th order dismissing the action resulted directly from the clerical mistake. Judge Leal would not have granted [the creditor's] motion had he known of AVCO's opposition. *Id.* at 431.

The Fifth Circuit clarified that "courts have power to rectify the direct consequences of their mistakes. Our earlier opinions have not addressed this question." *Id.* at 432-32.

- ***In re West Texas Marketing Corp.*, 12 F.3d 497 (5th Cir. 1994).** In this case, the Fifth Circuit reversed and remanded for the district court to consider Rule 60(a) relief. The Chapter 7 debtor and the IRS had entered into a settlement agreement as to the amount of tax owed or refund due, and the settlement was part of the record in bankruptcy court. The government later filed an adversary proceeding to recover an alleged overpayment, but both the bankruptcy and district courts denied relief, holding that *res judicata* barred the government's claim. The Fifth Circuit vacated and remanded for the district court to consider the possibility of Rule 60(a) relief:

> If the government can show that the check sent to Kellogg does not reflect the intentions of the parties, and that relief will be in the form of correcting a computational mistake, then the district court has a responsibility to make the appropriate adjustments. Our review of the case shows that the substantive rights of the parties do not seem to be in dispute since these rights were determined through the settlement . . . .

• In ***Chavez v. Balesh*, 704 F.2d 774, 776 (5th Cir. 1983),** the Fifth Circuit approved the district court's *sua sponte* grant of Rule 60(a) relief to correct its failure to include liquidated damages in a judgment despite the court's clear intention to do so as expressed in its findings of fact. The circuit court noted the two facts that persuaded it that the omission of liquidated damages was a clerical oversight by the district court: "First, the court's findings of fact, signed and entered on the same day as the original judgment, clearly stated its intention to award liquidated damages. Second, the original judgment itself begins with the recitation that it is being awarded '[i]n accordance with this Court's Findings of Fact and Conclusions of Law heretofore entered. . . .'" In the captioned case, the district court's intention (to await a ruling by the magistrate judge) was similarly set out in the record. *See* January 22 order, rec.doc. 18, and transcript of January 16th oral argument, Ex. C.

Thus, plaintiffs have demonstrated that they are entitled to relief under Rule 60(a) from the Court's judgment entered January 24th. However, in the event that the Court denies plaintiffs' request for Rule 60(a) relief, plaintiffs alternatively move for relief under Rule 60(b)(1) or Rule 60(b)(6).

Rule 60(b)

A Rule 60(b) motion "is to be 'construed liberally to do substantial justice,'" but it "is not a substitute for appeal." *Fackelman v. Bell,* 564 F.2d 734, 735 (5th Cir. 1977), *quoting Laguna*

Royalty Co. v. Marsh, 350 F.2d 817, 823 (5th Cir. 1965). Its "main application is to those cases in which the true merits of a case might never be considered because of technical error . . . . The purpose of the motion is to permit the trial judge to reconsider such matters so that he can correct obvious errors or injustices and so perhaps obviate the laborious process of appeal. *Id.*

Rule 60(b)(1)

Rule 60(b)(1) authorizes a district court, on motion and on "just terms," to relieve a party from a final judgment for, among other reasons, "(1) mistake, inadvertence, surprise, or excusable neglect." The Supreme Court addressed the contours of "excusable neglect" in its 1993 decision, *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 113 S.Ct. 1489 (1993).[12] According to the Supreme Court, the determination of

> what sorts of neglect will be considered 'excusable' . . . is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 1498 (footnotes omitted). The *Pioneer* majority specifically rejected the notion that, in order for a district court to consider the full range of equitable considerations, *id.* at 1498, n. 14, the movant must be "sufficiently blameless" in the delay, as well as the argument that "any showing of fault on the part of the late filer would defeat a claim of 'excusable neglect.'" *Id.* at 1494. *Pioneer* abrogated the Fifth Circuit's "previous caselaw stringently construing "excusable neglect." *Halicki*

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[12] Although *Pioneer* interpreted "excusable neglect" in the context of Bankruptcy Rule 9006(b)(1), which permits an "act to be done where the failure to act was the result of excusable neglect," the Supreme Court analyzed the term as used in a variety of federal rules, include Rule 60(b)(1).

v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 468 (5th Cir. 1998), *cert. denied,* 526 U.S. 1005 (1999). A review of the Supreme Court's "excusable neglect" factors enunciated in *Pioneer* confirms that plaintiffs are entitled to Rule 60(b)(1) relief.

There is no danger of prejudice to State Farm.

There is no danger that State Farm will be prejudiced by the grant of Rule 60(b)(1) relief. Prejudice in the context of "excusable neglect" is difficult to prove, and is not shown by the simple delay that will occur in the resolution of a case as a result of setting aside a judgment. *Hibernia National Bank v. Administracion Central Sociedad Anonima,* 776 F.2d 1277, 1280 (5th Cir. 1985) ("the mere possibility of prejudice from delay, which is inherent in every case, is insufficient to require denial of a 60(b)(1) motion"). Rather, a party opposing a Rule 60(b)(1) motion must show that the delay in setting aside the judgment will "result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983), *quoting* 10 C. Wright, A. Miller and M. Kane, FEDERAL PRACTICE AND PROCEDURE § 2699 at 536-37 (1983). *Accord, Home Port Rentals, Inc. v. Ruben,* 957 F.2d 126, 132 (4th Cir.), *cert. denied,* 506 U.S. 821 (1992)(holding that the opposing party would be prejudiced by grant of Rule 60(b) relief where one defendant has ceased operations (and its record keeper had disappeared with the records), and at least two other defendants could not be located). Under this high standard, State Farm could not reasonably claim that it would be prejudiced if the district court set aside its judgment of dismissal, and allowed it to reurge its 12(b)(6) motion following judicial consideration of plaintiffs' motion for leave to amend.

The length of the delay and its potential impact on judicial proceedings

Plaintiffs have moved to vacate the January 24th judgment less than seven weeks after entry

of judgment. The only substantive activity in this case prior to the dismissal consisted of the filing in state court, removal to this Court, answer, motion to dismiss, and plaintiff's attempts to amend their pleading. Discovery had not even started when the case was dismissed. Under these circumstances, the passage of less than seven weeks from the entry of judgment until the filing of plaintiffs' Rule 60 motion could not possibly weigh against the grant of Rule 60(b)(1) relief, especially in light of Rule 60(c)(1)'s provision allowing a rule 60(b)(1) motion to be filed up to one year after entry of the challenged judgment.

The reason for the delay and whether it was within the reasonable control of the movant

Less importance should attach to this factor where, as here, a party seeks Rule 60 relief within a very short period of time after entry of the judgment. Following the January 24th entry of judgment, plaintiffs retained undersigned counsel to prepare and argue post-trial motions, moved to enroll her as co-counsel, moved the Court for an extension of the appeal deadline, and then moved for Rule 60(b) relief.

Plaintiffs and their counsel acted in good faith

Plaintiffs' good faith throughout the course of events that led to the filing of this motion cannot seriously be questioned. Plaintiffs' lead counsel had a good faith belief that plaintiffs had taken the necessary steps to cure the first deficiency notice issued January 9th by requesting leave of court in plaintiffs "Supplemental Opposition" filed January 15th. *See* Ex. B. When the clerk issued the second deficiency notice on January 16th the day of oral argument Mr. Barasch relied in good faith on the clerk's written instruction on the docket sheet that "[d]eficiency remedy due by 1/24/08." *See* clerk's notation following rec.doc. 14. When the district judge advised counsel during oral

argument that he would defer ruling on the remaining claims "until such time as to see what the magistrate does," Ex. C at 8, Mr. Barasch continued to rely in good faith on the clerk's January 24th deadline for correcting the deficiency in moving for leave to file the First Amended Complaint.

Plaintiffs have a meritorious claim against State Farm.

A party requesting rule 60 relief must show that he or she has a meritorious claim or defense, *Pease v. Pakhoed Corp.,* 980 F.2d 995, 998 (5th Cir. 1993), but this does not mean that the moving party must show that he or she is likely to prevail. *Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Transportation Co.,* 953 F.2d 17, 21 (1st Cir. 1992)(while a moving party "need not establish that it possesses an ironclad claim or defense which will guarantee success at trial, it must at least establish that it possesses a potentially meritorious claim or defense which, if proven, will bring success in its wake."); *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983). "Likelihood of success is not the measure. Defendants' allegations are meritorious if they contain 'even a hint of a suggestion' which, proven at trial, would constitute a complete defense." *Keegel v. Key West & Caribbean Trading Co., Inc.,* 627 F.2d 372, 374 (D.C.Cir. 1980)(citations omitted).[13] In the *Keegel* case, the district court had refused to set aside a default judgment. The D.C. Circuit reversed, finding that defendants' proposed answer satisfied the threshold requirement of showing a meritorious defense:

[13] The *Keegel* decision addressed the "meritorious claim or defense" factor in the context of a motion under Rule 55(c), Fed.R.Civ.P., to set aside a default judgment. Although the overall standard for relief under Rule 55(c) – "for good cause shown" – is somewhat more lenient than under Rule 60(b), *see Keegel,* 627 F.2d at 375 n. 5, the "analogous" nature of the two rules (and overlapping "meritorious claim or defense" requirement) has been recognized. *See, e.g.,* James Wm. Moore *et al,* MOORE'S FEDERAL PRACTICE , 60.24[2] (3rd ed. 2007).

> In their proposed answer, defendants have alleged lack of subject matter jurisdiction and denied any misrepresentations, fraudulent acts, or securities law violations. Though somewhat broad and conclusory, those allegations adequately meet the meritorious defense criterion for setting aside the default.

Plaintiffs have attached a draft copy of the Motion for Leave to File First Amended Complaint (Ex. I) which they will file if the Court grants Rule 60 relief, as well as a copy of the proposed First Amended Complaint (Ex. J). The proposed First Amended Complaint satisfies Rule 60(b)(1)'s requirement that plaintiffs show that they have a meritorious claim against State Farm. In another E.D.La. case where the plaintiffs raised in their First Amended Complaint claims that were very similar to claims raised in the *Harrington* plaintiffs' proposed First Amended Complaint, Judge Vance denied State Farm's Rule 12(b)(6) motion to dismiss as to all claims except flood claims. *Boyd v. State Farm Fire & Casualty Insurance Co.,* No. 07-6736 R-2, [14] *See* Ex. K, Judge Vance's Order and Reasons entered February 25, 2008, rec.doc. 28. The First Amended Complaint in *Boyd* was substantially similar to the *Harrington* plaintiffs' proposed First Amended Complaint. Thus, plaintiffs have more than satisfied the rather low threshold of showing that they have a meritorious claim against State Farm.

Other courts have found excusable neglect in similar circumstances.

Other courts have found excusable neglect under Rule 60(b) in various circumstances where confusion arose about deadlines or docketing entries in the case.

- In ***Santa Fe Snyder Corp. v. Norton,* 385 F.3d 884 (5th Cir. 2004),** the Fifth Circuit

[14] The *Boyd* plaintiffs are also represented by Stuart Barasch and Lawrence Centola, Jr., counsel for the *Harrington* and *Benit* plaintiffs; David Strauss, counsel for State Farm in this case, also represents State Farm in the *Boyd* case.

recognized a district court's authority under Rule 60(b)(1) to correct its own docket sheet where it granted summary judgment two days before the opponent's reply brief was due, and to vacate the judgment that had been entered following the grant of summary judgment.[15]

• In ***Ceridian Corp. SCSC Corp.,* 212 F.3d 398, 404 (8th Cir. 2000)**, the Eighth Circuit recognized that a district court may properly find excusable neglect where the language of a rule is ambiguous or susceptible to multiple interpretations or where an apparent conflict exists between two rules. Applying that principle to this case, either the clerk's January 24th cure deadline meant what it said and the district court's judgment of dismissal was premature, or the notice was utterly meaningless (and very misleading). In either case, plaintiffs are entitled to Rule 60(b)(1) relief.

• In ***Rodgers v. Watt,* 722 F.2d 456 (9th Cir. 1983)**, plaintiff's counsel's secretary repeatedly checked the docket to see if judgment had been entered, but the final entry on the docket sheet was listed out of order so that it appeared that the matter was still under advisement. The clerk failed to give notice to counsel of entry of judgment, and plaintiff missed the deadline for filing a notice of appeal. The Ninth Circuit found excusable neglect under these circumstances, noting that "the clerk's failure to have the entries in the proper order was a factor to be considered in determining excusable neglect." 722 F.2d at 461.

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[15] The district court had granted summary judgment, then entered final judgment on January 8th, two days before the government's deadline for filing its reply brief. On January 23rd (within 10 days of entry of the January 8th judgment), the government filed a motion to amend the judgment, which Judge Trimble denied on March 14th. On March 28th, the government filed a Rule 59(e) motion, which the district court denied on April 28th. On April 29th, the government filed a motion asking the district court to vacate its January 8th judgment. On May 1st, the district court "noted the confusion that was created by its premature entry of judgment and treated the January 23, 2003 Motion as a Reply Brief (not a Rule 59(e) Motion), declared the March 14, 2003 judgment as final judgment, and the March 28 motion as a timely Rule 59(e) motion." *Santa Fe*, 385 F.2d at 887.

• In ***Cobb v. Dawson*, 2007 WL 3027399 (M.D.Ga. 2007),** a case with facts very similar to this case, plaintiff moved for leave to file an amended complaint. Defendants "responded to Plaintiff's motion to amend, expressing no desire to challenge the amendment but summarily denying the new allegations." Their entire response consisted of two sentences: "Defendants have no objection to Plaintiff's Motion to Amend the Complaint with regard to the filing of the Amended Complaint. However, Defendants deny any and all allegations alleged in Plaintiff's Amended Complaint which is attached as Exhibit 'A' to Plaintiff's Brief in Support of Motion to Amend the Complaint." *Id.* at *1. The district court granted plaintiff's motion to amend, and the Amended Complaint was filed into the record. But defendants did not file an answer to the Amended Complaint, "choosing instead to rely on the denial provided in their response." *Id.* After plaintiff moved for entry of default, which the clerk granted, defendant moved to set aside the entry of default. The district court found that the circumstances did not warrant entry of default:

> While the sufficiency of Defendants' putative response was called into question, they nevertheless did make an attempt to deny the new allegations. This attempt, sufficiency notwithstanding, belies willful default and demonstrates an intention, albeit faint, to defend the case. *Id.* at *4. [16]

As shown above, plaintiffs have demonstrated that their counsel's actions constituted "excusable neglect" and that they are entitled to relief under Rule 60(b)(1).

Rule 60(b)(6)

Rule 60(b)(6), often referred to as the "catch-all" provision of Rule 60(b), authorizes a

[16] Plaintiffs note that the issue in *Cobb* was whether there was "good cause" under Rule 55(c) to set aside entry of default, not whether there was "excusable neglect" under Rule 60(b)(1). But the similarity of the facts in the two cases supports the application of the *Cobb* holding to this case, as well.

district court to grant a party relief from a judgment for "any other reason" justifying relief. The Fifth Circuit has interpreted the language of the rule to mean that relief "is only appropriate if 'extraordinary circumstances are present.'" *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.,* 397 F.3d 334, 337 (5th Cir.), *cert. denied,* 546 U.S. 813 (2005). A district court must consider a request for Rule 60(b)(6)relief in light of the desirability of preserving the finality of judgments. *United States v. Burrell,* 2008 WL 176288 at *1 (5th Cir. 2008)(unpublished), *citing Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 402 (5th Cir. 1983). The Supreme Court has recognized that Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States,* 335 U.S. 601, 614-15 (1949). Rule 60(b)(6) "is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief but the motion is, nevertheless, timely and the reason justifies relief." *Seven Elves, Inc. v. Eskenazi,* 635 F2d at 402, *quoting* 7 MOORE'S FEDERAL PRACTICE ¶ 60.27[2].

In the event that the district court finds that plaintiffs are not entitled to relief under Rule 60(a) or rule 60(b)(1), plaintiffs argue in the alternative that this case presents extraordinary circumstances, as set forth herein, to justify relief under Rule 60(b)(6).

Respectfully submitted,

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and

/s/Maureen Blackburn Jennings
MAUREEN BLACKBURN JENNINGS
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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2008, I electronically filed the foregoing Motion for Relief from Judgment Pursuant to Rule 60(a) and (b), Fed.R.Civ.P., with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

David A. Strauss

/s/Maureen Blackburn Jennings
MAUREEN BLACKBURN JENNINGS
E-mail: jennings.maureen@gmail.com

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LAWRENCE HARRINGTON ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-07600**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 1** **JUDGE PORTEOUS** **MAGISTRATE SHUSHAN**

NOTICE OF HEARING

TO: All Counsel of Record

PLEASE TAKE NOTICE that counsel for plaintiffs will bring on for hearing the foregoing Motion for Relief from Judgment Pursuant to Rule 60(a) and (b), Fed.R.Civ.P., before Hon. G. Thomas Porteous , United States District Judge, on **Wednesday, April 9, 2008 at 10:00 a.m.** at the U.S. District Court, 500 Poydras Street, New Orleans, LA. You are invited to attend and participate as you see fit.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2008, I electronically filed the foregoing Notice of Hearing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

David A. Strauss

/s/Maureen Blackburn Jennings
MAUREEN BLACKBURN JENNINGS
E-mail: jennings.maureen@gmail.com

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LAWRENCE HARRINGTON ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-07600**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 1** **JUDGE PORTEOUS** **MAGISTRATE SHUSHAN**

ORDER

Considering plaintiffs' Motion for Relief From Judgment Pursuant to Rule 60(a) and (b), Fed.R.Civ.P.,

IT IS ORDERED that plaintiffs' Motion for Relief From Judgment Pursuant to Rule 60(a) and (b), Fed.R.Civ.P., is GRANTED. IT IS FURTHER ORDERED that the judgment entered January 24, 2008, rec. doc. 17, is hereby VACATED. IT IS FURTHER ORDERED that plaintiffs shall move not later than the ___ day of _____, 2008, for leave to file their First Amended Complaint.

New Orleans, Louisiana, this __ day of March, 2008.

_____
UNITED STATES DISTRICT JUDGE

	HARRINGTON v. STATE FARM No. 07-7600 T - 1	BENIT v. STATE FARM No. 07-6738 T-5
11.30.07		Motion to Dismiss filed (set for 01.16.08)
12.11.07	Motion to Dismiss filed (set for 01.16.08)	
01.03.08	Answer filed	Answer filed
01.08.08	• P's Opposition to Motion to Dismiss filed • First Amended Complaint filed **Note: DOCUMENT STRICKEN 01.22.08** **(Rec.Doc. 10)**	• P's Opposition to Motion to Dismiss filed • First Amended Complaint filed
01.09.08	Deficiency Notice - First Amended Complaint Reason: need leave of court; **CURE DATE 01.16.08**	Deficiency Notice - First Amended Complaint Reason: need leave of court; **CURE DATE 01.16.08**
01.14.08	State Farm moves for leave to file reply memo	State Farm moves for leave to file reply memo
01.15.08	• P's Supplemental Opposition to Motion to Dismiss filed (requesting leave to file previously-filed First Amended Complaint) **NOTE: THIS DOCUMENT NOT STRICKEN** • SF reply memo filed with leave	• P'S Supp. Opposition to MTD filed (requesting leave to file previously-filed First Amended Complaint) **NOTE: DOCUMENT STRICKEN 01.22.08**

EXHIBIT A

01.16.08	• CURE DATE FOR DEF. NOTICE - First Amended Complaint • Deficiency Notice issued – P's Supplemental Opposition (which requested leave to file First Amended Complaint) Reason for Deficiency Notice: leave of court required **CURE DATE 01.24.08** • Judge Porteous hears oral argument, dismisses VPL claims, defers as to other claims	• CURE DATE FOR DEF. NOTICE - First Amended Complaint • Deficiency Notice issued – P's Supplemental Opposition (which requested leave to file First Amended Complaint) Reason for Deficiency Notice: leave of court required **CURE DATE 01.24.08** • Judge Porteous hears oral argument, dismisses VPL claims, defers as to other claims • SF's reply memo filed with leave
01.21.08 (MLK day)		
01.22.08	• **Clerk strikes First Amended Complaint 2:24 pm** **CURE DATE 01.16.08** • Judge Porteous signs order granting Motion to Dismiss & signs Final Judgment **TWO DAYS BEFORE 01.24.08 CURE DATE FOR P'S SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS.**	• **Clerk strikes P's Supplemental Opposition to Motion to Dismiss, 2:20 pm** (which requested leave to file First Amended Complaint) **TWO DAYS BEFORE 01.24.08 CURE DATE** • Judge Porteous signs order granting Motion to Dismiss & signs Final Judgment **TWO DAYS BEFORE 01.24.08 CURE DATE FOR P'S SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS.**
01.23.08		**Clerk enters (4:24 pm) "Final Judgment" signed 01/22/08, dismissing only claims of 2 Benits, ONE DAY BEFORE 01.24.08 CURE DATE FOR P'S SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS**
01.24.08	• Clerk enters dismissal order (11:51 am) • Clerk enters Final Judgment (11:49 am), **MORE THAN TWELVE HOURS BEFORE MIDNIGHT EXPIRATION OF CURE DATE.**	• **CURE DATE FOR P'S SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS.** • **Clerk enters dismissal order (2:56 pm) & enters "Amended (final) Judgment" dismissing all claims of all Ps (2:14 pm), BOTH BEFORE MIDNIGHT EXPIRATION OF CURE DATE.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LAWRENCE HARRINGTON ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-07600**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 1 JUDGE PORTEOUS MAGISTRATE SHUSHAN**

UNSWORN DECLARATION OF STUART THOMAS BARASCH
UNDER 28U.S.C. § 1746

My name is Stuart Thomas Barasch. I am a person of the age of majority and am competent in all respects to make this declaration. I am providing this declaration in support of plaintiffs' Motion for Relief from Judgment Pursuant to Rule 60(a) and (b), Fed.R.Civ.P.

I have been a member in good standing of the Louisiana State Bar Association and of the bar of the United States District Court for the Eastern District of Louisiana since 1991. I have also been a member in good standing of the State Bar of California and the Florida Bar Association since 1977, the State Bar of Texas since 1991, and the State Bar of Georgia since 1992.

EXHIBIT B

I am lead counsel for the six plaintiffs in *Harrington v. State Farm Fire and Casualty Insurance Company*, No. 07-7600 T-1 ("*Harrington*"), and for the 31 plaintiffs in *Benit v. State Farm Fire and Casualty Insurance Company*, No. 07-6738 T-5 ("*Benit*"),both pending in the U.S. District Court for the Eastern District of Louisiana. After the defendant State Farm Fire & Casualty Company ("State Farm") filed its Rule 12(b)(6) Motion to Dismiss in the *Harrington* case on December 11, 2007, I decided to amend plaintiffs' pleading in an effort to render moot the arguments State Farm had put forth in its motion to dismiss. My law firm, the Hurricane Legal Center, filed the First Amended Complaint on Tuesday, January 8, 2008 without seeking leave of court to do so, as we had overlooked the fact that State Farm had filed an Answer three business days earlier, on Thursday, January 3, 2008. The next day, the Clerk's Office issued (and entered on the docket sheet) a Notice of Deficient Document ("deficiency notice") as to the First Amended Complaint, stating that "Leave of court is required to file this document." The clerk's notations further stated: "**Attention: Document must be refiled in its entirety within five (5) working days. Otherwise, it may be stricken by the court without further notice. Deficiency remedy due by 1/16/08.**"

I interpreted this notice to mean what it said, and understood that plaintiffs had until Wednesday, January 16th in which to refile the First Amended Complaint, along with the required request for leave of court. On Tuesday, January 15, 2008, one day before the deficiency cure deadline and one day before the hearing on State Farm's motion to dismiss, my law firm filed a Supplemental Opposition to Motion to Dismiss, rec.doc. 14. Although we labeled the document as a "Supplemental Opposition," plaintiffs requested in that document leave to file their First Amended Complaint, and that the previously filed First Amended Complaint "be deemed filed as of the date of the Court's order." I honestly believed that the request for leave to file the First

Amended Complaint contained within plaintiffs' "Supplemental Opposition to Motion to Dismiss" filed January 15th would cure the clerk's deficiency notice (which would expire at midnight on January 16, 2008). On Wednesday, January 16, 2008, the Clerk's Office issued a deficiency notice as to plaintiffs' Supplemental Memorandum, citing that "Leave of court is required to file this document." The Clerk's notation further provided: **"Attention: Document must be refiled in its entirety within five (5) working days. Otherwise, it may be stricken by the court without further notice. Deficiency remedy due by 1/24/08."** *See* Clerk's notation on docket sheet following rec.doc. 14.

Once again, I understood from the plain language of the clerk's deficiency notice that plaintiffs had until Thursday, January 24th in which to seek leave of court to refile their "Supplemental Opposition" wherein they requested leave to file their First Amended Complaint.

On Wednesday, January 16, 2008, Judge Porteous heard oral argument on State Farm's motion to dismiss and granted the motion as to plaintiffs' Louisiana Valued Policy Law claims only, and deferred ruling as to all other claims. Co-counsel Lawrence Joseph Centola, Jr. appeared for plaintiffs. Following oral argument, Mr. Centola advised me that Judge Porteous had dismissed plaintiffs' Louisiana Valued Policy Law claims, and had deferred ruling on the remaining claims pending a ruling on plaintiffs' request for leave to amend their pleading. I saw the Court's minute order for January 16, 2008, rec.doc. 15, which confirmed that Judge Porteous had deferred ruling as to all other claims, and did not mention any specific deadline for re-filing our request for leave to file First Amended Complaint, or for obtaining a hearing date or a ruling on the motion.

As of the oral argument on January 16th, plaintiffs had until Thursday, January 24th to cure the January 16th deficiency notices directed to their "Supplemental Opposition to Motion to

Dismiss." Therefore, I was shocked when I received on January 24, 2008, a copy of Judge Porteous's order, signed two days earlier, granting in full State Farm's motion to dismiss. rec.doc. 18. With all due respect to the Court, I believe that the January 22nd order of dismissal and the January 24th final judgment were issued prematurely. My belief that they were issued prematurely is based on the fact that (1) the outstanding deficiency notice did not expire until midnight on January 24, 2008, and (2) the district court had informed counsel at oral argument that he would defer ruling until the magistrate judge ruled on plaintiffs' request to amend their pleading.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 2008.

/s/ Stuart Thomas Barasch
STUART THOMAS BARASCH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

****

JUSTIN BENIT

v.

Docket No. 07-CV-6738
New Orleans, Louisiana
Wednesday, January 16, 2008

STATE FARM FIRE
AND CASUALTY COMPANY

****

LAWRENCE HARRINGTON

V.

Docket No. 07-CV-7600
New Orleans, Louisiana
Wednesday, January 16, 2008

STATE FARM FIRE
AND CASUALTY COMPANY

****

TRANSCRIPT OF MOTION PROCEEDINGS
HEARD BEFORE THE HONORABLE G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
HURRICANE LEGAL CENTER
BY: LAWRENCE J.CENTOLA, JR. ESQ
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FOR THE DEFENDANT:
KING, LeBLANC & BLAND
BY: DAVID A. STRAUSS, ESQ.
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Official Court Reporter:
Karen A. Ibos, CCR, RPR, CRR
500 Poydras Street, Room HB-406
New Orleans, Louisiana 70130
(504) 589-7776

Proceedings recorded by mechanical stenography, transcript produced by computer.

EXHIBIT C

P R O C E E D I N G S

(WEDNESDAY, JANUARY 16, 2008)

(MOTION PROCEEDINGS)

THE DEPUTY CLERK: 07-6738, Justin Benit v. State Farm Fire and Casualty Insurance. Counsel, make your appearances for the record, please.

MR. STRAUSS: Good morning, your Honor. David Strauss on behalf of State Farm.

MR. CENTOLA: Good morning, your Honor. Lawrence Centola on behalf of the plaintiffs.

THE COURT: All right. Let's take it up.

MR. STRAUSS: Your Honor, this is a motion to dismiss two Hurricane Katrina claims. The petitions are identical in both lawsuits.

THE COURT: That's Harrington and Benit?

MR. STRAUSS: That's correct, Judge.

THE COURT: Do you mind taking them up together?

MR. CENTOLA: No, that's fine.

THE COURT: They are identical.

MR. STRAUSS: They are indeed identical and the arguments are indeed the same.

This is a motion to dismiss the claim for the basis they failed to state a cause of action against State Farm. The suits are brought by various homeowners claiming damages from Hurricane

Katrina. In short, Judge, the suits allege exclusively that these folks are entitled to recover under the State Farm homeowners policy for damages excluded, flood damage from levee breaches. These issues have been squarely decided now by the Fifth Circuit. Those damages are not covered damages under the State Farm homeowners policy.

The petition is not particularly artfully drafted, but even giving the benefit of the doubt to the intent of the plaintiffs, they nevertheless failed to state a cause. The reason for that, Judge, is they very specifically say in the petition that State Farm paid for wind and wind damage alone. And the key word is alone. By saying that, the plaintiffs are necessarily seeking compensation for some peril other than wind damage, which is flood. Because of that, and I know the court's familiar with the briefs and I won't belabor it, they failed to state a cause.

It's my appreciation of looking at the record, Judge, that there was an effort made to amend the complaint but there was not leave of court granted. We nonetheless have filed a reply to that in abundance of caution. I don't know if the court would like us to address that or not, or if you want me to --

THE COURT: You can go ahead and address it briefly if you would like.

MS. BARTELS: Sure. The amended complaint does not cure the deficiencies in the original complaint. There is a claim for full policy limits alleged under the valued policy law. The

complaint doesn't create a cause of action under the VPL because it still maintains that these houses were all substantially damaged by flood, which is not a covered peril.

Under Judge Vance's ruling in Chauvin in the Fifth Circuit, if you acknowledge that water substantially damaged your house, you don't get the VPL under homeowners policy, and that's clear. The amendment did not withdraw the allegations about the claims being damaged by flood. So it doesn't create a VPL claim and that is still out.

It appears there was some effort to now claim that wind was the sole cause of the property being a total loss. Now, I presume that was intended to try and create a homeowners claim. It makes no sense because in the petition it still says flood waters substantially damaged the house and under the VPL we get our full policy limits because of a non-covered peril flood, but then there's this unique argument now that wind caused the total loss and it makes no sense.

THE COURT: Whatever the efficient proximate cause is.

MR. STRAUSS: And the efficient cause doctrine has also been addressed by our courts now thankfully. The argument that wind pushed the water over the levees and, therefore, wind was the efficient proximate cause of the damage has been rejected by the Fifth Circuit.

The Fifth Circuit has also addressed this concept of efficient proximate cause in the context of looking at the validity

of State Farm's anti-concurrent cause clause. We haven't briefed that, Judge, I don't think it's necessarily pertinent. But in the event that it's raised, the Fifth Circuit in a case called Topuer (PHONETIC) v. State Farm, which followed another case called Leonard v. Nationwide, the Fifth Circuit said that insurers can contract around this doctrine and State Farm validly did it. So we're left with an argument again that wind and water combined then to cause these damages, and under the State Farm policy there is just no cause of action. Thank you, Judge.

THE COURT: All right.

MR. CENTOLA: Your Honor, briefly in response. In response to the motion to dismiss, an attempt was made to amend the complaint to allege in paragraph seven of the amended complaint that the wind damage to the house itself was sufficient in amount and extent of excess of the policy limits. That motion to amend, if allowed, I believe, would cure the problems on this particular motion to dismiss.

When State Farm was advised of plaintiffs' intention to try to cure any defects by amending to allege that the sole cause, not the sole cause, but wind damage to the house itself was in excess of the policy limits, at that time State Farm filed an answer to the petition after they had filed their motion to dismiss to then position themselves so that they could take the position which they have, not giving consent to the motion to amend, which then requires the plaintiffs to file a notice for a motion to amend the complaint

to be brought before the magistrate which occurs at a date after today. So there is a procedural by bonding and withholding their consent forced the issue to go before the magistrate to try and have the hearing today.

What I would suggest to your Honor is defer the ruling on this matter until the magistrate has had an opportunity to rule on the motion to amend.

THE COURT: Counselor. It does seem that somehow we've got the cart before the horse here apparently.

MR. STRAUSS: We anticipated this, Judge. We went ahead and addressed the merits of the amended complaint anyway, and I've argued that it doesn't change anything. I think that the court can look at what the plaintiffs have attempted to do and see that it's not going to change anything with regard to whether they pled a cause.

THE COURT: Let's assume for the sake of argument that the magistrate would allow the amendment.

MR. STRAUSS: Yes.

THE COURT: You're saying that paragraph that the wind damage itself caused a total loss of the property is inconsistent with previous paragraphs of the petition that say that there was flood damage?

MR. STRAUSS: Yes, Judge.

THE COURT: Is the motion to dismiss the appropriate remedy is my concern, because under a motion to dismiss there is a

possibility of recovery. They technically should be dismissed. Or is a motion for summary judgment the more appropriate methodology?

MR. STRAUSS: I understand the dilemma. I think in this case because we have to assume that the facts pled are true, the facts pled are in the first complaint, and in the second complaint, that these homes suffered substantial damage from flood, from levee breaches, all of them. Taking that to be true, it's nonsense to then come to court and attempt to amend the petition --

THE COURT: The amendment didn't strike that allegation.

MR. STRAUSS: The amendment didn't strike the allegation, Judge, so you still have this allegation that these are flooded houses and now you're saying wind alone, just wind blowing caused a total loss. And that's so nonsensical I think that you can address it at this point.

I recognize what the plaintiffs are attempting to do, but it doesn't cure the defect in the pleading. I think the plaintiffs have an obligation to plead facts that they have some basis to support. And at this juncture because they recognize and acknowledge these really are flood claims that you can reach this issue now.

You certainly can reach the VPL issue without any concerns because there is no doubt that to get the VPL you have to show wind alone caused the total loss.

THE COURT: I tend to agree with that. And what's your position on that, Mr. Centola, on the VPL issue?

MR. CENTOLA: That's correct, your Honor.

THE COURT: So the VPL I could actually grant at this point in time?

MR. STRAUSS: Without any concern about whether it's appropriate.

But we do believe that because these are essentially flood cases and flood claims where there was an effort made to find coverage for levee breech but that's already been resolved, you can say it's been resolved and there is just no cause alleged.

THE COURT: I am going to grant it as to the VPL aspect, the motion to dismiss clearly is granted as to that.

However, with respect to this now allegation that's potentially sitting out there, I am going to defer a ruling until such time as to see what the magistrate does. If the magistrate allows the amendment, I'll still deal with it in my order. If the magistrate denies that amendment and it's there as it was, in that situation, Mr. Centola, you would be unfortunately dead in the water. So when is the magistrate taking this up?

MR. STRAUSS: I don't know, Judge.

MR. CENTOLA: Don't know, your Honor.

THE COURT: I'll check with the magistrate's office. But your motion with respect to the VPL is clearly granted.

MR. STRAUSS: Thank you, your Honor.

MR. CENTOLA: Thank you, your Honor.

THE COURT: All right. Thank y'all.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

* * * * * *

REPORTER'S CERTIFICATE

I, Karen A. Ibos, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Karen A. Ibos, CCR, RPR, CRR

Official Court Reporter

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LAWRENCE HARRINGTON ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-07600**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 1** **JUDGE PORTEOUS** **MAGISTRATE SHUSHAN**

UNSWORN DECLARATION OF LAWRENCE J. CENTOLA, JR.
UNDER 28U.S.C. § 1746

My name is Lawrence J. Centola, Jr. I am a person of the age of majority and am competent in all respects to make this declaration. I am providing this declaration in support of plaintiffs' Motion for Relief from Judgment Pursuant to Rule 60(a), Fed.R.Civ.P.

I have been a member in good standing of the Louisiana State Bar Association since 1972 and a member in good standing of the bar of the United States District Court for the Eastern District of Louisiana since 1975.

I am employed by the Hurricane Legal Center, which represents the six plaintiffs in *Harrington v. State Farm Fire and Casualty Insurance Company*, No. 07-7600 T-1 ("*Harrington*"),

EXHIBIT D

and the 31 plaintiffs in *Benit v. State Farm Fire and Casualty Insurance Company*, No. 07-6738 T-5 ("*Benit*"). On Wednesday, January 16, 2008, I appeared in Section T of the United States District Court for the Eastern District of Louisiana on behalf of the *Harrington* plaintiffs and the *Benit* plaintiffs to present oral argument in both cases in opposition to the defendant's Rule 12(b)(6) Motion to Dismiss.

At the conclusion of oral argument, Judge Porteous granted the motion as to plaintiffs' Louisiana Valued Policy Law (VPL) claims only, and deferred ruling as to all other claims pending a ruling by the magistrate judge on plaintiffs' request for leave to amend their pleading. Judge Porteous did not set any specific deadline within which plaintiffs were to refile their request for leave to amend their pleading, or within which the magistrate judge was to hear or rule on plaintiff's request.

Following oral argument, I advised Stuart Barasch of Judge Porteous' ruling on plaintiffs' PVL claims, and his remarks about deferring his ruling on the remaining claims.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 2008.

s/s Lawrence J. Centola, Jr.
LAWRENCE J. CENTOLA, JR.

From: Efile_Notice@laed.uscourts.gov
To: Efile_Information@laed.uscourts.gov
Subject: Activity in Case 2:07-cv-07600-GTP-SS Harrington et al v. State Farm Fire and Casualty Insurance Company et al Correction of Docket Entry by Clerk
Date: Tue, 22 Jan 2008 2:26 pm

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U. S. District Court

Eastern District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 1/22/2008 at 2:24 PM CST and filed on 1/22/2008

Case Name:	Harrington et al v. State Farm Fire and Casualty Insurance Company et al
Case Number:	2:07-cv-7600
Filer:	
Document Number:	16(No document attached)

Docket Text:
Correction of Docket Entry by Clerk re [10] Amended Complaint. Document STRICKEN - Deficiency not remedied. (gec,)

2:07-cv-7600 Notice has been electronically mailed to:
Stuart Thomas Barasch SBarasch1@aol.com, SBLawOffice@aol.com
David A. Strauss dstrauss@klb-law.com, spond@klb-law.com
Christian Albert Garbett cgarbett@klb-law.com, cguice@klb-law.com
Sarah Shannahan Monsour smonsour@klb-law.com, jroberts@klb-law.com

2:07-cv-7600 Notice has been delivered by other means to:

EXHIBIT E

From: Efile_Notice@laed.uscourts.gov
To: Efile_Information@laed.uscourts.gov
Subject: Activity in Case 2:07-cv-06738-GTP-ALC Benit et al v. State Farm Fire and Casualty Insurance Company Judgment
Date: Wed, 23 Jan 2008 4:25 pm

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U. S. District Court

Eastern District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 1/23/2008 at 4:24 PM CST and filed on 1/23/2008
Case Name: Benit et al v. State Farm Fire and Casualty Insurance Company
Case Number: 2:07-cv-6738
Filer:
WARNING: CASE CLOSED on 01/23/2008
Document Number: 19

Docket Text:
JUDGMENT - ORDERED that the claims of the plaintiffs, Justin and Audrey Benit, against defendant, State Farm Fire and Casualty Company, are DISMISSED WITH PREJUDICE. Signed by Judge G. Thomas Porteous Jr. on 1/22/2008.(gec,)

2:07-cv-6738 Notice has been electronically mailed to:
Stuart Thomas Barasch SBarasch1@aol.com, SBLawOffice@aol.com
David A. Strauss dstrauss@klb-law.com, spond@klb-law.com
Christian Albert Garbett cgarbett@klb-law.com, cguice@klb-law.com
Sarah Shannahan Monsour smonsour@klb-law.com, jroberts@klb-law.com

2:07-cv-6738 Notice has been delivered by other means to:

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Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091133085 [Date=1/23/2008] [FileNumber=2307694-0
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EXHIBIT F

From: Efile_Notice@laed.uscourts.gov
To: Efile_Information@laed.uscourts.gov
Subject: Activity in Case 2:07-cv-07600-GTP-SS Harrington et al v. State Farm Fire and Casualty Insurance Company et al Judgment
Date: Thu, 24 Jan 2008 11:50 am

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U. S. District Court

Eastern District of Louisiana

Notice of Electronic Filing

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Case Name: Harrington et al v. State Farm Fire and Casualty Insurance Company et al
Case Number: 2:07-cv-7600
Filer:
WARNING: CASE CLOSED on 01/24/2008
Document Number: 17

Docket Text:
JUDGMENT - ordered that the claims of the plaintiffs, Lawrence Harrington, et al, against defendant, State Farm Fire and Casualty Company, are DISMISSED with prejudice. Signed by Judge G. Thomas Porteous Jr. on 1/22/2008.(gec,)

2:07-cv-7600 Notice has been electronically mailed to:
Stuart Thomas Barasch SBarasch1@aol.com, SBLawOffice@aol.com
David A. Strauss dstrauss@klb-law.com, spond@klb-law.com
Christian Albert Garbett cgarbett@klb-law.com, cguice@klb-law.com
Sarah Shannahan Monsour smonsour@klb-law.com, jroberts@klb-law.com

2:07-cv-7600 Notice has been delivered by other means to:

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Original filename:n/a
Electronic document Stamp:
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d40246f2d4ed8da89807ba812ca15e26afe95b404eb7d640b2f6747066422]]

EXHIBIT G

From: Efile_Notice@laed.uscourts.gov
To: Efile_Information@laed.uscourts.gov
Subject: Activity in Case 2:07-cv-06738-GTP-ALC Benit et al v. State Farm Fire and Casualty Insurance Company Judgment
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U. S. District Court

Eastern District of Louisiana

Notice of Electronic Filing

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Case Name: Benit et al v. State Farm Fire and Casualty Insurance Company
Case Number: 2:07-cv-6738
Filer:
WARNING: CASE CLOSED on 01/23/2008
Document Number: 20

Docket Text:
AMENDED JUDGMENT - ORDERED that the claims of the plaintiffs, Justin and Audrey Benit, et al, against defendant, State Farm Fire and Casualty Company are DISMISSED WITH PREJUDICE. Signed by Judge G. Thomas Porteous Jr. on 1/24/2008.(gec,)

2:07-cv-6738 Notice has been electronically mailed to:
Stuart Thomas Barasch SBarasch1@aol.com, SBLawOffice@aol.com
David A. Strauss dstrauss@klb-law.com, spond@klb-law.com
Christian Albert Garbett cgarbett@klb-law.com, cguice@klb-law.com
Sarah Shannahan Monsour smonsour@klb-law.com, jroberts@klb-law.com

2:07-cv-6738 Notice has been delivered by other means to:

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Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091133085 [Date=1/24/2008] [FileNumber=2310114-0
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EXHIBIT H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JUSTIN AND AUDRY BENIT ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-6738**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 5** **JUDGE PORTEOUS** **MAGISTRATE CHASEZ**

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

NOW INTO COURT, through undersigned counsel, come plaintiffs Justin and Audrey Benit, Georgia Bigelow, Clarence and Ruth Bourg, Edward Braquet, Sr., Ronald Campagna, Paul and Beverly D'Antoni, Dana Duke, Elaine Ernhard, Barbara Estave, Patsy Evans, Ernesto and Clarita Hontiveros, Casey and Angela Kieff, Ronald LaHoste, Bernice Lenaris, Rose Marie Macaluso, Gaynell Marco, Evelyn Mowers, Robert Netherland, Frank and Linda Reeg, Karen Reynolds, Ramon and Ligia Ruiz, Lois Vinot, Gary J. and Milene C. Wagner and move the Court for leave to filed the attached First Amended Complaint. In support thereof, movers urge the reasons set forth in the accompanying memorandum.

EXHIBIT I

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March ___ 2008, I electronically filed the foregoing Motion for Leave to File First Amended Complaint with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

David A. Strauss

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JUSTIN AND AUDRY BENIT ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-6738**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 5** **JUDGE PORTEOUS** **MAGISTRATE CHASEZ**

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

For the following reasons, plaintiffs are entitled pursuant to Rule 15(a)(2), Fed.R.Civ.P., to an order allowing them to file the attached First Amended Complaint.

Background[1]

The six *Harrington* plaintiffs filed suit in St. Tammany Parish on August 28, 2007, seeking damages related to Hurricane Katrina from State Farm Fire and Casualty Company ("State Farm"),

[1] Because of the parallel procedural course of this case and the case of *Benit v. State Farm Fire and Casualty Insurance Company*, No. 07-6738 T-5 (E.D.La.), and the similar Rule 15(a)(2) motion pending in each of the two cases, this "Background" section includes a discussion of both cases.

their homeowners' insurer. The 31 plaintiffs in the *Benit* case filed suit in St. Bernard Parish on August 21, 2007, seeking Katrina-related damages from State Farm, which was also their homeowners' insurer. State Farm removed the *Harrington* case on October 29, 2007, rec.doc. 1 (*Harrington*), and the *Benit* case on October 11, 2007, rec.doc. 1 (*Benit*). State Farm filed in each of the two cases a virtually identical motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., and both motions were set for hearing on Wednesday, January 16, 2008. rec.doc. 4 (*Harrington*), rec.doc. 5, 9 (*Benit*). State Farm filed its Answer in both cases on January 3, 2008. rec.doc. 8 (*Harrington*), rec.doc. 10 (*Benit*).

Five days later (January 8, 2008), not realizing that State Farm had joined issue in either case,[2] plaintiffs' counsel filed *ex parte* in *Harrington* and in *Benit* a First Amended Complaint, rec.doc. 10 (*Harrington*), rec.doc. 12 (*Benit*), as well as a memorandum in opposition to the motion to dismiss. rec. doc. 9 (*Harrington*), rec.doc. 11 (*Benit*). For reasons not relevant here, the Clerk's Office issued in both cases a Notice of Deficient Document ("deficiency notice") as to the First Amended Complaint, stating that the reason for the deficiency was that "Leave of court is required to file this document." *See* Clerk's notation on docket sheet following rec.doc. 10 (*Harrington*), rec.doc. 12 (*Benit*).

. . . .

[2] Plaintiffs included in their First Amended Complaint allegations that they believed were sufficient to defeat/render moot State Farm's Rule 12(b)(6) motion.

Also on Wednesday, January 16, 2008, Judge Porteous heard oral argument in both cases on State Farm's motion to dismiss and, in both cases, granted the motion as to plaintiffs' Louisiana Valued Policy Law (VPL) claims only, and deferred ruling as to all other claims, pending the magistrate judge's ruling on plaintiffs' request for leave to amend. rec.doc. 15.

. . . .

The Law

Rule 15(a)(2), Fed.R.Civ.P., provides that, after a responsive pleading has been served, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."[3] It is within the sound discretion of the trial court to grant leave to amend. *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). The Fifth Circuit has recognized that Rule 15(a) "evinces a bias in favor of granting leave to amend" and that "the district court should err on the side of granting the amendment." *Id.*

Reasons that might justify denial of permission to amend a pleading include (1) delay, (2) bad faith or dilatory motive on the part of the mover, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to opposing party, and (5) futility of amendment. *Union Planters Nat. Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982). A court

[3] This request for leave to amend should be analyzed under Rule 15(a), rather than Rule 16(b), Fed.R.Civ.P. Rule 16(b) governs amendments after a scheduling order deadline has expired. *S & W Enterprises, L.L.C. v. SouthTrust Bank of Alabama*, 315 F.3d 533, 536 (5th Cir. 2003). Rule 16(b) requires a showing of "good cause" to modify a scheduling order. Because plaintiffs filed this motion before the Court scheduled a deadline for amending pleadings, the more "lenient" standard of Rule 15(a) should apply. *Id.* at 535.

may weigh in the favor any prejudice that will arise from denial of leave to amend. *Dussouy v. Gulf Coast Inv. Corp*., 660 F.2d 594, 598 (5th Cir. 1981). Because none of these factors is present here, plaintiffs are entitled to an order allowing them to file their First Amended Complaint.

No undue delay. The passage of time between the filing of the original and amended complaints is not sufficient alone to deny leave to amend. Rather, only *undue* delay is a proper ground to refuse leave to amend. *Id.* There has been no undue delay by the plaintiffs in this case, where the case was removed to this Court in late October 2007, the Answer was filed in January 2008, no scheduling order has been entered, and the parties have not commenced discovery.

No repeated failure to cure deficiencies by previously allowed amendments. There has been no failure much less any repeated failure to cure deficiencies by prior amendments. Plaintiffs have not previously amended their complaint.[4]

No undue prejudice. No undue prejudice would befall State Farm if leave to amend were granted. Plaintiffs seek to amend their original pleading to clear any confusion as to the claims they are raising. Further, as plaintiffs request leave to add a legal claim that is based entirely on the events that led to the filing of this suit, the amendment would not result in the need for any *additional* discovery. *See* proposed First Amended Complaint, attached hereto as EX. __. Plaintiffs do not seek to add additional parties; rather, they seek to clarify the facts as alleged in their original pleading so as to address the alleged deficiency that precipitated the filing of State Farm's motion to dismiss.

The proposed amendment would not be futile. The "futility" exception to the requirement

[4] Although plaintiffs have sought leave to file their First Amended Complaint, due to confusion surrounding deficiency notices from the clerk, the Court has not yet addressed the merits of plaintiffs' request for leave to amend.

that leave be freely granted, Rule 15(a), Fed.R.Civ.P., does not justify denial of plaintiffs' request to amend. When futility is advanced as the reason for denying an amendment to a complaint, the court usually denies leave because the theory presented in the amendment lacks legal foundation or because the theory has been adequately presented in a prior version of the complaint. *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985). Futility in this context means that the amended complaint would fail to state a claim upon which relief could be granted. *Trahan v. Lowe's, Inc*., 2002 WL 1560272, at * 7 (E.D.La. Jul. 12, 2002)(Wilkinson, J.).

In another case in the Eastern District of Louisiana where the plaintiffs raised in their First Amended Complaint claims that were substantially similar to claims raised in the *Harrington* plaintiffs' proposed First Amended Complaint, Judge Vance recently denied State Farm's Rule 12(b)(6) motion to dismiss as to all claims except flood claims. *Boyd v. State Farm Fire & Casualty Insurance Co.,* No. 07-6736 R-2, [5] *See* Ex. K, Judge Vance's Order and Reasons entered February 25, 2008, rec.doc. 28, attached as EX. __. The First Amended Complaint in *Boyd* was substantially similar to the *Harrington* plaintiffs' proposed First Amended Complaint. Thus, the proposed amendment would not be futile.

Plaintiffs will be greatly prejudiced if their proposed amendment is not allowed.

Although State Farm will not suffer any prejudice if leave to amend is granted, plaintiffs will be greatly prejudiced if leave to amend is denied. They will also have lost the opportunity of having the Court test their claims as more fully explained in the proposed First Amended Complaint under Rule 12(b)(6). Under Rule 15(a), this court may weigh, in the movers' favor, any prejudice

[5] The *Boyd* plaintiffs are also represented by Stuart Barasch and Lawrence Centola, Jr., counsel for the *Harrington* and *Benit* plaintiffs; David Strauss, counsel for State Farm in this case, also represents State Farm in the *Boyd* case.

that would arise from denial of leave to amend. Weighing the various interests at stake in the present case tips the balance in plaintiffs' favor.

Conclusion

The trial court's discretion "is not broad enough to permit denial if the court lacks substantial reason to do so." *Matter of Southmark Corporation,* 88 F.3d 311, 314 (5th Cir. 1996), *cert. denied sub nom. Schulte Roth & Zabel v. Southmark Corp.,* 519 U.S. 1057 (1997)(citing *Louisiana v. Litton Mortgage Co.,* 50 F.3d 1298, 1302-03 (5th Cir. 1995). As no substantial reason exists in this case to deny leave to amend, plaintiffs' motion for leave to file the proposed amended complaint should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JUSTIN AND AUDRY BENIT ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-6738**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 5** **JUDGE PORTEOUS** **MAGISTRATE CHASEZ**

ORDER

Considering the foregoing Motion for Leave to File First Amended Complaint,

IT IS ORDERED that plaintiffs' Motion for Leave to File First Amended Complaint is GRANTED. IT IS FURTHER ORDERED that the attached First Amended Complaint be filed into the record of the captioned suit.

New Orleans, this ___ day of March, 2008.

_____

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LAWRENCE HARRINGTON ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-07600**
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY	**SECTION T - 1** **JUDGE PORTEOUS** **MAGISTRATE SHUSHAN**

SECOND AMENDED COMPLAINT FOR DAMAGES

1.

Plaintiffs Lawrence Harrington, Sandra Harrington Fayard, Wilfred Montegue, Christina Montegue, Teri Waggoner, and Judith A. Young are residents of the Parish of St. Tammany, State of Louisiana, and are the owners of immovable property located in that parish.

2.

Defendant is State Farm Fire and Casualty Company, a foreign insurance corporation authorized and presently doing business in the Parish of St. Tammany, State of Louisiana.

EXHIBIT J

3.

On August 29, 2005, at the time of Hurricane Katrina, plaintiffs had in effect a policy of property insurance on their property issued by Defendant.

4.

The contract of insurance described in paragraph 3 above was an "all risk" policy. Therefore, under the insuring clause Defendant was required to indemnify Plaintiffs against all risks of physical loss to the real and personal property insured by the contract of insurance.

5.

On August 29, 2005, Hurricane Katrina caused total loss of each Plaintiffs' property, including but not limited to roof damage and damage to the interior, including its contents. This damage rendered the real property uninhabitable for an extended period of time. This damage was caused by wind and wind driven rain. Wind was the efficient proximate cause of all this damage, causing a total loss of the property.

6.

In addition, while the total loss of Plaintiffs' property was caused by wind and wind driven rain, flood waters from nearby levee breaches damaged each Plaintiff's real properly. These levee breaches were man-made flooding and not natural flooding. Defendant's policy of insurance provided coverage for non-natural flooding from a man-made levee breach.

7.

As a result of the aforesaid events, Defendant was required to pay each Plaintiffs that policy limit for damage to structure, other structures, contents, debris removal and loss of use/ALE(additional living expenses). Defendant was required to make these payments based upon

the total destruction of the property and, pursuant to LSA R.S. 22:695, the Valued Policy Statute, Defendant was obligated to make the aforesaid limit payments. Instead, Defendant made only partial payment based upon wind and wind driven rain alone. The partial payment did not constitute full payment of all the damage caused by wind and Defendant still owes Plaintiffs additional policy benefits for all the damage caused by wind.

8.

Based upon the aforesaid conduct of Defendant, Plaintiffs have the following causes of action against Defendant: failure to pay for all damages under the insurance policy; breach of the contract of insurance by failing to pay for all damages; failure to tender timely and sufficient payment under LSA R.S. 22:658 and LSA R.S. 22:1220; breach of duty under LSA R.S. 22:658 and LSA R.S. 22:1220; breach of duty under LSA R.S. 22:695, the valued policy statute; other causes of action that will be determined at trial.

9.

The aforesaid actions of Defendant were "arbitrary and capricious

10.

Plaintiffs request trial by jury.

11.

Plaintiffs are entitled to the following elements of damages:

(1) Payment of policy limits for structure;

(2) Payment of policy limits for other structure;

(3) Payment of policy limits for contents;

(4) Payment of policy limits for debris removal;

(5) Payment of policy limits for additional living expenses/loss of use;

(6) Double damages pursuant to LSA R.S. 22:1220;

(7) Penalties pursuant to LSA R.S. 22:658;

(8) Attorney fees;

(9) Court costs; and

(10) Any relief which this Court deems fair and equitable.

WHEREFORE, Plaintiffs pray for trial by jury, the Defendant be duly cited to appear and answer this First Amended Complaint for Damages, and, after legal delays and due proceedings had, there be judgment herein in favor of Plaintiffs and against Defendant in a reasonable amount to be determined by this Honorable Court for the damages sustained by each Plaintiff, together with special damages, penalties, court costs, attorney fees, together with legal interest from date of judicial demand and for all general and equitable relief.

Respectfully submitted,

/s/ Stuart T. Barasch
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CERTIFICATE OF SERVICE

I hereby certify that on March __, 2008, I electronically filed the foregoing First Amended Complaint for Damages with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

David A. Strauss

/s/ Stuart T. Barasch
STUART T. BARASCH, T.A.
E-mail: sbarasch1@aol.com