

**UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

**DANIEL B. O’KEEFE, CELESTE A.
FOSTER O’KEEFE, and THE DANCEL
GROUP, INC.**

PLAINTIFFS

V.

CIVIL ACTION NO. 1:08CV600-HSO-LRA

**STATE FARM FIRE AND CASUALTY
COMPANY, and MARSHALL J.
ELEUTERIUS**

DEFENDANTS

**MOTION TO JOIN INTERESTED PARTIES
OR IN THE ALTERNATIVE, MOTION TO DISMISS**

COMES NOW, Defendant, State Farm Fire and Casualty Company (hereinafter “Defendant”) and in support of its Motion to Join would show the Court as follows:

1. State Farm issued to Daniel B. O’Keefe and Celeste A. Foster O’Keefe (hereinafter “the O’Keefes”, homeowners policy number 24-CD-9277-6, business policy 99-B5-9935-5 and flood policy 24-RC-0482-5 providing insurance, subject to the terms and conditions stated in the policies. *See* Declarations Pages from Referenced Policies attached hereto as Exhibit “1,” “2” and “3.”¹ The policies include additional insureds, mortgagees, having an interest in the property insured by the policies, namely Countrywide Home Loans Inc, ATIMA-ISAOA and Coast Community Bank, as listed on the homeowners policy, Coast Community Bank on the business policy. The flood policy no. 24-RC-0482-5, lists as an additional interest on the property, Wells Fargo Bank and its Successors and/or Assigns. It is believed that at the time of the loss the mortgagees held an interest in the subject properties.²

¹ In an attempt to prevent burdening the docket with multiple copies of the policies, State Farm has only attached the certificate pages and the applicable declarations page and/or renewal certificates from the relevant policies. Should the Court require the complete policies, State Farm is happy to provide same.

²To the extent any other entity which may be revealed during discovery has any interest in any property owned by the insureds which is subject to this lawsuit, or the proceeds from any claim that may be payable to the the O’Keefes

2. Plaintiffs have failed to join the mortgagees to this action. Pursuant to Mississippi law these parties are necessary and indispensable. The parties are necessary for a just and complete adjudication to an action such as the one brought by the O'Keefes here. *National Farmers Union Property & Casualty Company v. First Columbus National Bank*, 669 So.2d 767 (Miss. 1996) (mortgagee clause affects an independent contract); *accord, Saucier v. United States Fid. & Guar. Co.*, 765 F.Supp. 334 (S.D. Miss. 1991); *Merchants Nat'l Bank v. Southeastern Fire Ins. Co.*, 751 F.2d 771 (5th Cir. 1985); *General Star Indem. Co. v. Pike County Nat'l Bank*, 706 So.2d 227 (Miss. 1997); *Hennessey v. Helgeson*, 151 So. 724 (1934). *See Chase Nat. Bank v. City of Norwalk*, 291 U.S. 431 (1934) (litigation by mortgagor does not bind the mortgagee). *See also Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100 (1913); *Keokuk & W.R.R. v. Missouri*, 152 U.S. 301, 314 (1894); *Garcy Corp. v. Home Ins. Co.*, 496 F.2d 479 (7th Cir. 1974) *certiorari denied* 419 U.S. 843 (1974); *Lambert, Inc. v. Starbrand Sales Corp.*, 422 F.2d 621 (7th Cir. 1970). As a result of Plaintiffs failure to so join the mortgagees, the mortgagees would not be bound by an adjudication by this Court that there was no coverage under the policies for the alleged losses sustained by Plaintiffs, and thus no obligation to pay Plaintiffs, or any other person or entity, for such loss as it is not a party hereto. Thus, State Farm could be faced with defending another suit by one or all of the mortgagees, with the potential for an inconsistent result before another Court. *See Highlands Ins. Co. v. McLaughlin*, 387 So. 2d 118 (Miss. 1980). Avoidance of inconsistent results and requiring adjudication of all issues related to one claim in one venue is the rationale behind Rules 17 and 19 of the Federal Rules of Civil Procedure. Thus, there cannot be full adjudication of the State Farm's obligations under its policies of insurance absent joinder. Mortgagees and lienholders, such as those here, which are listed on the policies, are necessary

under the subject policies, Defendants reserves its right to move to dismiss the claims made against it herein as a result of the O'Keefes' failure to join the same. Defendants makes this reservation at this time so as not to waive any rights it may have that may be unknown at this time and revealed at a later date.

and indispensable parties to any suit claiming payment under the coverage of the homeowners policy.

5. The O'Keefes have been paid \$350,000.00 under their flood coverage. It appears that the O'Keefes would have been required to pay at least a portion of the flood insurance proceeds to either one or all of the mortgagees listed above. As a result, there are additional issues which must be addressed with regard to whether the mortgagees are a necessary and indispensable party in light of same.

6. As a general rule, where a mortgagee's lien has been satisfied, it ceases to be a necessary and indispensable party in an action by the policyholder, because the insurer no longer has any obligations to the mortgagee. *See Smith v. Texas Farmer Ins. Co.*, 82 S.W.3d 580, 585 (Tex. App. 2002) ("Succinctly stated, no mortgagee's indebtedness; no indebtedness or liability to mortgagee from the insurance company."); 3 *Couch on Insurance* § 42:32 (3d ed. 2006) ("Clearly, the satisfaction of the mortgage debt extinguishes the mortgagee's insurable interest in the insured property."). At this point, it is unclear whether the entirety of the O'Keefes's mortgagees were paid off with the insurance proceeds. Nevertheless, any payment to any mortgagee with flood insurance proceeds raises concerns with regard to whether the mortgagee would be allowed to retain those monies if Plaintiffs prevails on their claims in the present action. As such, there are additional issues which must be considered in making the determination as to whether the mortgagees are indispensable parties.

6. Any recovery by the O'Keefes in this action is potentially inconsistent with their recovery of benefits under their Standard Flood Insurance Policy on the homeowner's claim, as the O'Keefes have accepted payment under the flood insurance policy, and as the SFIP only pays for damage by flood and related water perils, and the subject homeowners' policy expressly

exclude such damage.³ Thus, a determination that the O'Keefes are entitled to additional benefits under their homeowners' policy could give the United States government a basis for seeking reimbursement of the flood payments made to the O'Keefes (and, by extension, her mortgagee) as having been incorrectly paid. Assuming the flood insurer succeeded in recovering those payments, the mortgagees' liens would presumably be revived, and one or all of them, would then be necessary and indispensable parties.

7. There is no question that the United States government is entitled to recover amounts erroneously paid under the National Flood Insurance Program.⁴ See *United States v. Fowler*, 913 F.2d 1382, 1385-1386 (9th Cir. 1990) (United States entitled to recover NFIP policy proceeds payments erroneously paid to insured whose property was ineligible for NFIP coverage; neither estoppel nor waiver applied because "if we were to permit [the insureds] to estop the United States, we would be permitting them to retain public funds that Congress had not appropriated" and "[u]nder federal law, it is clear that the flood examiner's error did not waive the United States right to reimbursement"); *Borges v. FEMA*, 1992 WL 425238, at *2-4 (D.P.R. Oct. 19, 1992) (in insured's action contesting denial of coverage under NFIP policy, FEMA counter-claimed to recover funds mistakenly paid on prior loss; held: "the United States has a right to reimbursement for payments made erroneously to a claimant under a NFIP policy" (citing *Fowler*) and therefore erroneous payments must be offset against other payable losses). The same rule applies whether the flood insurance policy is written directly by the government or by

³ The Standard Flood Insurance Policy provides coverage for "direct physical loss by or from flood to your insured property . . ." 44 C.F.R. Pt. 61, App. A(1). It excludes, among other things, loss caused "directly or indirectly by . . . [t]heft, fire, explosion, wind, or windstorm." *Id.*, § V., ¶ 8. By contrast, Plaintiff's rental dwelling policy specifically excludes loss that "would not have occurred in the absence of . . . water damage," including flood and storm surge.

⁴ And it is apparently quite common for the government to do so in appropriate cases. See *The News-Press v. United States Dep't of Homeland Security*, 2005 WL 2921952, at *18 (M.D. Fla. Nov. 4, 2005) (noting that "FEMA records show more than 6,500 recoupment letters seeking to recover more than \$27 million in benefits mistakenly paid by FEMA" following 2004 Florida hurricanes).

a private insurer under the "Write Your Own" (WYO) Program. *See Gowland v. Aetna Ins. Co.*, 143 F.3d 951, 953-955 (5th Cir. 1998) (WYO insurer could not waive, or be estopped from asserting, policy condition of a timely formal proof of loss statement because "although [the insured's] policy was written by Aetna, a private insurance company, payments made pursuant to that policy are a direct charge on the public treasury") (interior quotations omitted). Accordingly, if a hurricane claimant erroneously sought benefits under an SFIP when his or her loss was caused by a peril outside the scope of the flood policy, the government would be entitled to recover any benefits paid under the SFIP.

8. As a loss payee under the loss payable clause of the SFIP, a mortgage lender is likewise subject to a claim by the United States for reimbursement of erroneously paid flood proceeds. *See* 44 C.F.R. Pt. 61, App. A(1), § Q; *see also Supermercados Econo*, 359 F. Supp. 2d at 70 (where court voided SFIP for material misrepresentation by insured in proof of loss, loss payee also precluded from recovering: "A loss payee recovers to the extent the named insured recovers."); *U.S.F.&G. Co. v. Newell*, 505 So. 2d 284, 286-288 (Miss. 1987) (auto insurer entitled to stop payment on check issued to insured's lienholder after realizing it had mistakenly overpaid on insured's claim). The SFIP contains a "simple" loss-payable or "open mortgage" clause. *See Hartford Fire Ins. Co. v. Associates Capital Corp.*, 313 So. 2d 404, 407 (Miss. 1975) (contrasting "'simple' loss payable or 'open mortgage' clause and 'Union' or 'standard' mortgage clause). Under such a clause, the mortgagee "is only entitled to receive the amount due him on his mortgage out of the funds recovered by or due to the insured." *Id.* In other words, the mortgagee's right to recover policy proceeds is no greater than the insured's. *See 4 Couch on Insurance* § 65:24 (3d ed. 2006) ("Since under a simple loss-payable or open-mortgage clause the mortgagee is simply an appointee to receive the insurance fund to the extent of his or her interest, his or her right of recovery is no greater than the right of the mortgagor, so that a

breach of the conditions of the policy by the mortgagor which would prevent a recovery by the mortgagor precludes recovery from the insurer by the mortgagee."). As such, it would seem that in the event the mortgagor is required to return policy proceeds paid under the flood policy, the mortgagee would have to do likewise. If the mortgagee were allowed to retain those payments then the mortgagee would be obtaining an interest in the policy greater than that of the insured.

9. Applying the foregoing principles to the case at hand, it appears that if the O'Keefes were found to have erroneously obtained flood insurance proceeds the United States would have a viable claim to recover such funds from the O'Keefes and the mortgagees. Such a recovery would render the mortgagees' lien unsatisfied, thus restoring its insurable interest in the property at issue here and reviving State Farm's obligations under the loss payable provisions of the homeowners policy. As a result, and for the reasons addressed in State Farm's moving papers, the mortgagees are necessary and indispensable parties to this litigation because there cannot be a full adjudication of State Farm's obligations under the policies in their absence.

10. As a result of the foregoing, State Farm seeks an order similar to that which was entered in *Flettrich v. State Farm*, Civil Action No. 1:07-CV-1080, Doc. No. [22].

WHEREFORE, PREMISES CONSIDERED, State Farm respectfully requests this Court enter an order requiring ratification by or joinder of the interested mortgagees. In the alternative, in the event the indispensable and necessary parties cannot be joined or fail to ratify this action, State Farm respectfully requests that Plaintiffs' Complaint be dismissed. State Farm request all other relief to which it is entitled.

RESPECTFULLY SUBMITTED, this the 15th day of April, 2009.

WEBB, SANDERS & WILLIAMS, P.L.L.C.
363 NORTH BROADWAY
POST OFFICE BOX 496
TUPELO, MISSISSIPPI 38802
(662) 844-2137
DAN W. WEBB, MSB #7051
B. WAYNE WILLIAMS, MBS #9769
PAIGE C. BUSH, MSB #101072

By: /s/B. Wayne Williams
B. WAYNE WILLIAMS

CERTIFICATE OF SERVICE

I, B. Wayne Williams, one of the attorneys for Defendant, State Farm Fire and Casualty Company, do hereby certify that I have this date electronically filed the foregoing *Motion to Join Interested Parties or in the Alternative, Motion to Dismiss* with the Clerk of the Court using the ECF system which sent notification of such filing to the following ECF participant:

Attorney for Plaintiffs:

**Christopher C. Van Cleave, Esq.
CORBIN, GUNN & VAN CLEAVE, PLLC.
146 Porter Avenue (39530)
P.O. Drawer 1916
Biloxi, Mississippi 39533-1916**

THIS, the 15th day of April, 2009.

s/B. Wayne Williams
B. WAYNE WILLIAMS