

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

UNITED STATES OF AMERICA ex rel.;
CORI RIGSBY; AND KERRI RIGSBY

RELATORS/COUNTER-DEFENDANTS

v.

CASE No. 1:06-cv-433-LTS-RHW

STATE FARM FIRE & CASUALTY
COMPANY, et al.

DEFENDANTS/COUNTER-PLAINTIFFS

**RELATORS' OPPOSITION TO
MOTION TO EXCLUDE THE RIGSBYS' EXPERT WITNESS LOUIS G. FEY, JR.**

Cori and Kerri Rigsby (“Relators” or the “Rigsbys”) respectfully submit this Opposition to State Farm Fire & Casualty Company’s (“State Farm”) Motion to Exclude the Rigsbys’ Expert Witness Louis G. Fey, Jr., [709] (the “Motion”).

I. PRELIMINARY STATEMENT

State Farm has moved to exclude all of Relators’ expert witnesses. In its Order dated August 4, 2010, this Court already denied two of those motions and rejected State Farm’s arguments because the proffered reports and testimony are relevant to the issues in the case.¹ State Farm’s attempt to exclude the testimony of Louis G. Fey, Jr. (“Fey”) likewise should be rejected because Fey’s report offers competent testimony on a matter central to the issues in dispute in this case: whether State Farm properly adjusted the McIntosh flood claim.

¹ [720]

II. ARGUMENT

A. Standard of Admissibility For Expert Testimony

“Trial courts have ‘wide discretion’ in deciding whether or not a particular witness qualifies as an expert under the Federal Rules of Evidence.”² Federal Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 codifies *Daubert*’s two-step inquiry requiring expert testimony to be “(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”³

While the Court has “wide discretion” in determining the admissibility of expert testimony, “rejection of expert testimony is the exception rather than the rule.”⁴ Rule 702 “is not intended to provide an excuse for an automatic challenge to the testimony of every expert.”⁵

Relators bear the burden of proving the admissibility of Fey’s testimony, but they “do not have to demonstrate . . . that the assessments of their experts are correct.”⁶ They need only “demonstrate by a preponderance of evidence that their [expert’s] opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.”⁷

² *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1050 (5th Cir. 1998).

³ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).

⁴ Fed. R. Evid. 702 advisory committee’s note (2000).

⁵ *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), for the proposition that a court can “avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted . . .”).

⁶ *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994).

⁷ *Id.*

Finally, the determination of this Court is not meant to “replace the traditional adversary system and the place of the jury within the system.”⁸ When setting forth the *Daubert* test, the Supreme Court recognized that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”⁹ The United States Court of Appeals for the Fifth Circuit also has recognized that cross-examination is the appropriate place to challenge the bases of an expert’s opinion in finding that a district court must defer to “the jury’s role as the proper arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert’s opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury’s consideration.”¹⁰

B. Kerri Rigsby’s Deposition Testimony Does Not Preclude Fey’s Analysis

As a threshold matter, State Farm’s Memorandum in Support of Its Motion, [710] (the “Memorandum”) argues that statements made by Kerri Rigsby in a deposition demonstrate that it lacked the scienter necessary to commit fraud.¹¹ This Court already has implicitly rejected that argument; State Farm made the same threshold argument in its unsuccessful motions to exclude Drs. Fitzpatrick and Blackwell.¹² Likewise, the Court should reject State Farm’s argument here for the same reasons.¹³

⁸ *Voth v. State Farm Fire & Cas. Ins. Co.*, No. 07-4393, 2009 WL 411459 at *3 (E.D. La. Feb. 17, 2009) (internal citation and quotation omitted).

⁹ *Daubert*, 509 U.S. at 596.

¹⁰ *United States v. 14.38 Acres of Land, More or Less Sit. in Leflore County, Miss.*, 80 F.3d 1074, 1077 (5th Cir. 1996) (hereinafter *14.38 Acres of Land*).

¹¹ Mem. at 6 (citing *U.S. ex rel Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008)).

¹² Order, [720].

¹³ See, e.g., Opp. to Motion to Exclude Testimony of Dr. Keith Blackwell, [323], at 5-6. Relators’ rebuttal in section II.B. of that Opposition is incorporated here by reference to the extent that this Court’s August 4 Order does not represent the law of the case regarding State Farm’s argument.

C. Fey Meets the Requirements of Rule 702

To meet the requirements of Rule 702, Fey must be qualified to testify, and his testimony must be (1) based upon sufficient facts or data; (2) the product of reliable principles and methods; and (3) rest on a reliable application of methods to facts of the case. Fey's testimony meets all of these requirements.

1. Fey is Eminently Qualified to Testify Regarding Insurance Adjusting Practices.

Fey has worked in the insurance industry for almost 30 years, beginning as a claims adjuster, becoming a supervisor and claims auditor with some 25 years of experience in making sure that claims were handled properly.¹⁴ Fey began his career with five years at Ohio Casualty, working as a claims adjuster for multiple lines, including flood claims, while at the same time acquiring a degree in claims handling.¹⁵ Fey also became a certified property casualty underwriter, which serves as a graduate insurance degree, and a certified insurance counselor.¹⁶ After working as a claims adjuster, Fey trained as a supervisor, audited files to ensure that adjusters were following proper claims-handling procedures, and trained adjusters.¹⁷ Fey literally wrote the book, drafting claims manuals for Ohio Casualty.¹⁸

Fey eventually left Ohio Casualty to start a claims department at Lumber Mutual.¹⁹ He started the unit from scratch, training adjusters on proper claims procedures and how to handle claims, and he continued to handle flood claims through that time.²⁰ In 2001, he did the same

¹⁴ Excerpt of Depo. of Louis G. Fey, Jr. dated June 4, 2010 (the "Fey Depo."), at 222:4-225:6, attached as **Exhibit A** hereto.

¹⁵ *Id.* at 23:3-8; 222:15-223:3.

¹⁶ *Id.* at 56:8-21.

¹⁷ *Id.* at 224:7-9

¹⁸ *See id.* at 225:13-19.

¹⁹ *See id.* at 224:9-16

²⁰ *See id.* at 224:9-16 (set up Lumber Mutual's claims department); 23:15-25 (handled flood claims as an adjuster for

thing at Travelers Insurance, an even larger company.²¹ Fey helped to set up the construction division at Travelers, addressing every element of the claims process.²² At Travelers, Fey adjusted and supervised claims adjustment for eight regions, was involved in litigation on behalf of the company, and was tasked with authority whenever exposure crossed the million dollar threshold.²³

Although Fey did not finish his NFIP flood certification until after he submitted his report, he noted in his deposition that general industry standards do not differ based on the nature of the claim, and he reaffirmed his report with the benefit of his completed flood certification.²⁴ Fey testified that one “can track exactly property claims handling practices and what’s considered good claim practices. There’s really no difference between the different lines.”²⁵ State Farm cannot now contend that Fey’s two decades of experience are insufficient to opine on those standards when its own employees repeatedly testified to their existence, invoking them as a defense for their actions regarding the McIntosh flood claim.²⁶ Furthermore, State Farm cannot contend that experience in the insurance industry is an inadequate basis for expert testimony when State Farm offered Michael Ferrier based on the same type of qualifications.²⁷

Lumber Mutual)

²¹ *See id.* at 224:17-25.

²² *See id.*

²³ *See id.* at 35:14-36:16.

²⁴ *See id.* at 226:3-6.

²⁵ *Id.*

²⁶ *See, e.g.,* Depo. of David Randel pursuant to Rule 30(b)(6) dated July 9, 2010, at 12:10-23 (State Farm’s designated corporate representative testified to the existence of “good claim handling practices” as an explanation for State Farm’s use of engineers) attached as **Exhibit B** hereto; Depo. of John Conser dated June 17, 2010, at 45:24-46:19 (testifying to meaning of “total loss” as an industry term justifying the use of Xact Total) attached as **Exhibit C** hereto.

²⁷ *See* State Farm’s Combined Disclosure Regarding Mike Ferrier and Report of Mike Ferrier, [277], at 2-4..

2. Fey's Report is Based on Sufficient Facts and Data

Fey's report examined State Farm's handling of the McIntosh claims and identified multiple areas in which that handling was deficient:

1. The assumption that all significant damage had been caused by flood;
2. The failure to produce a line-by-line estimate of flood damage up to the flood policy limits;
3. The instruction to engineers to assign a "predominant cause" of damage in place of an actual determination of damage;
4. The instruction to engineers to ignore eye-witness testimony; and
5. The improper efforts to coerce engineers and the failure to include contradictory evidence in the claim files²⁸

At Fey's deposition, State Farm's counsel asked "about Louis Fey's opinions" of State Farm's improper behavior, and Fey gave a detailed litany of State Farm's failings:

A: Claim handling guidelines were not followed. They didn't scope the loss. They didn't interview key witnesses. They hired retained engineers on a blanket basis, which should never be done. They disregarded the engineer's opinion once it was rendered and hired another engineer to give another opinion because they didn't like the first one. They -- they entered the process with what appeared to be a preconceived position that the damage was predominantly flood. They seemed to declare the property's total losses so they could pay the FEMA policy limit -- that -- that flood policy limit, whereas -- and they would use square footage calculations on exact total to come to that total loss evaluation. But at the same time, when they did their wind storm evaluation, they would use a -- a detailed estimate. They didn't put copies of the -- both engineering studies in both files.²⁹

²⁸ Expert Report of Louis G. Fey, Jr., dated Jan. 29, 2010, [409-5] (the "Fey Report"), at 4-6.

²⁹ Fey Depo. at 82:20-83:16.

Fey's report and testimony are based on his decades of experience in the insurance industry. That experience is an adequate basis for expert testimony.³⁰ Moreover, as noted above, State Farm itself proffered Michael Ferrier as an "expert" based on the same type of general credentials.³¹ Ferrier had no first-hand experience with Katrina claims in Mississippi generally or the McIntosh claim in particular, but State Farm alleged that he was competent to testify regarding the adjustment of the McIntosh claim.³²

3. Fey Reliably Applied His Methods to the Facts of the Case

a. State Farm's Fraud Scheme Forced It to Deviate From Industry-Standard Practices

State Farm suggests that its benign ignorance could excuse the false McIntosh claim it submitted to the NFIP.³³ But Relators do not allege that State Farm was "mere[ly]" in violation of its duties to the NFIP.³⁴ Relators allege that State Farm engaged in a concerted effort to defraud the federal government by attributing wind damage to flood damage. In doing so, State Farm seized on any "evidence" that supported its theories, rejected out of hand any evidence that contradicted them, and manipulated its procedures to produce the results it wanted. Fey's report and testimony documents those failings and demonstrates that such behavior is not an accepted practice in any part of the insurance industry. As a corollary, Fey's report and testimony also rebuts the arguments offered by State Farm's witnesses who invoked industry standards and

³⁰ See, e.g., *Kumho Tire v. Carmichael*, 119 S. Ct. 1167, 1178 (1999) ("no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience")

³¹ See State Farm's Combined Disclosure Regarding Mike Ferrier and Report of Mike Ferrier, [277], at 2-4.

³² See *id.*

³³ See Mem. at 7-8.

³⁴ Mem. at 7.

practices as a justification for their actions. Thus, the information he provides is relevant to any finder of fact examining State Farm's purported defenses.

For those reasons, Fey's testimony is clearly "anchor[ed]" to the facts and issues of this case. State Farm suggests that Fey failed to "connect his views to the facts of this case or the fundamental issues at stake" because he did not offer an opinion on the cost to repair the flood damage to the McIntosh property.³⁵ The Court rejected this argument in ruling on State Farm's Motions to Exclude Drs. Fitzpatrick and Blackwell's testimony when the Court recognized that expert testimony may be offered to establish any disputed fact."³⁶ It is not necessary that Fey testify to the "fundamental issues at stake."

But State Farm's argument also evades the central point; State Farm's manipulation of the claims-handling process precluded *anyone* from being able to offer a competent opinion on the proper cost of the flood damage to the McIntosh property so that it could justify its decision to "hit the limits" on the flood policy.³⁷ Fey's testimony explains and addresses that essential fact, noting that Alexis King, who

is an adjuster, or with an adjuster's background, looked at the photos and overruled a trained engineer's opinion who was actually out there at the scene, so I just think it's wrong. I think if you get professional opinion from an engineer, you know, let's -- let's start out with getting the -- the report and looking at it and evaluating it as -- as a supervisor sitting on a desk. I think you grab the claim file and open it up and read the claim file first. And then you read the report. Then you talk to the engineer. You talk to the witnesses mentioned in the report. You do some additional

³⁵ Mem. at 8-10.

³⁶ Order, [720] at 2.

³⁷ See Depo. of Alexis King at 119:11-120:6 (testifying that she instructed State Farm adjusters to re-run estimates of flood damage, adding items until they could pay out the entire amount of the flood policy) attached as **Exhibit D** hereto.

investigations. You try to get meeting of the minds. You don't fire the whole engineering firm.³⁸

A jury can and should use that testimony to reject State Farm's defenses.

b. State Farm's Efforts to Mislead NFIP Witnesses Demonstrate the Need for Fey's Report and Testimony

State Farm deposed several witnesses from the NFIP to support its arguments regarding its claims handling procedures. State Farm now offers their testimony as a justification for its claims-handling practices.³⁹ But the full context of those witnesses' testimony actually demonstrates the full extent of State Farm's fraud.

i. David Maurstad Did Not Defend State Farm's Practice

State Farm grossly distorts the testimony David Maurstad, the former head of the NFIP, gave during his deposition. State Farm claims that Maurstad "disagreed with Mr. Fey's view. . . that a flood adjuster must determine the extent of the wind damage to the property before paying flood policy limits, explaining that employing such grounds to deny flood insurance payments would have been an 'unconscionable act.'"⁴⁰ Maurstad was describing a very specific scenario when he referred to an unconscionable adjustment practice. Maurstad gave a hypothetical of adjusting a home along the coast that had been subjected to storm surge and reduced to a slab. He testified that to the extent a flood adjuster "can't determine" how much damage had been caused by wind before the storm surge reduced a home to a slab, it would be "unconscionable to -- for the flood program to have come in and denied hundreds of claims on that basis."⁴¹

Maurstad was not talking about homes like the McIntosh home.

³⁸ Fey Depo. at 141:4-142:18.

³⁹ Mem. at 13-14.

⁴⁰ Mem. at 13.

⁴¹ Excerpt of Deposition of David Maurstad dated June 2, 2010 (the "Maurstad Depo.") at 125-127, attached as **Exhibit E** hereto.

Maurstad also admitted testified that it would be improper for State Farm “to influence another professional to change their opinion” in a report.⁴² Fey’s report made the same point, noting that “When [State Farm was] confronted with an expert report that they felt was wrong and that didn’t conform to their preconceived opinions on causation, [State Farm employees] strong-armed the engineering firm into reversing their opinion and directed them to disregard key evidence.”⁴³ Fey also noted State Farm’s calculated blindness regarding eyewitness testimony:

State Farm had an edict out in place that nobody would take statements from any witnesses except for this unit. State Farm had the obligation to say, "We need to follow up on this witness' statement. It's a key witness statement," rather than saying, "Let's not give any weight to this witness' statement. Let's send out another engineer."⁴⁴

In total, Maurstad’s testimony actually demonstrates the manifest impropriety of State Farm’s efforts to make the flood policy pay for wind damage.

ii. Gerald Waytowich’s Testimony Demonstrated His Ignorance Regarding the Actual Facts of the McIntosh Claim

State Farm also offered the testimony of Gerald Waytowich, a person they designated as an expert on the flood policy and flood adjusting.⁴⁵ But when questioned by State Farm, Waytowich’s testimony made it clear that he had *no idea* what had actually happened to the McIntosh property. In support of his conclusion that State Farm had properly adjusted the McIntosh flood claim, he testified that State Farm did a stick build estimate of the McIntosh

⁴² Maurstad Depo. at 130:4-7.

⁴³ Fey Report at 5.

⁴⁴ Fey Depo. at 97:17-98:1.

⁴⁵ Mem. at 14; Expert Report of Gerald Waytowich dated May 10, 2010 [492-2].

house and made payments for the foundation, brick veneer, stucco, and stud wall.⁴⁶ Waytowich obviously did not realize that he was not looking at a stick built estimate or that the “payments” he was examining were nothing of the sort; they were part of the fictitious Xact Total report created by State Farm. Waytowich also agreed later that if he discovered those itemized elements “did not, in fact, match the actual McIntosh house” he would be surprised, and he would then question whether the McIntosh claim had been adjusted correctly.⁴⁷

State Farm suggests that Waytowich was one of the NFIP’s most qualified witnesses. Yet despite spending some 40 to 80 hours working on his report, Waytowich clearly did not realize that the report he examined identified non-existent damage to a fictitious house.⁴⁸ Waytowich’s testimony demonstrates that he offered an opinion even though he did not understand what State Farm actually had done.⁴⁹ Fey’s report states that the use of Xact Total was “inappropriate” because “[t]he resulting figure had no bearing on the flood damage amount.”⁵⁰ Waytowich’s testimony provided a vivid example of that fact, which a jury unquestionably could find relevant.

⁴⁶ Depo. of Gerald Waytowich dated June 4, 2010 (“Waytowich Depo.”) at 59:13-63:22, attached as **Exhibit F** hereto.

⁴⁷ *Id.* at 69:16 -70:4

⁴⁸ *Id.* at 84:10-19 (Waytowich spent a “week or two of 40-hour weeks” on his report without receiving any compensation.)

⁴⁹ Waytowich’s testimony subsequently changed after a lengthy lunch break, when he realized that the McIntosh flood file did not contain, and never had contained, a real line-by-line estimate. *Id.* at 124:15-125:14.

⁵⁰ Fey Report at 4-5.

iii. A Third NFIP Witness Corroborated Fey's Description of Normal Claims Handling Practices Regarding Line-Item Estimates

Moreover, although State Farm quotes two of its NFIP deponents in defense of its use of the Xact Total program as its "normal procedure,"⁵¹ James Shortley, the NFIP Director of Claims testified that "normal procedure" required a line-by-line estimate of damage, at least to the policy limits.⁵² Fey's report confirms and corroborates that statement; State Farm could use an estimating program like Xact Total once it had properly documented flood damage exceeding the flood policy limits. But State Farm did not follow that procedure for Katrina claims; instead, it told its adjusters to assume that *all* significant damage was flood damage and to use Xact Total in support of that assumption. That assumption and that practice were improper.⁵³

At trial, State Farm may ask the jury to give credit to the incomplete testimony offered by Maurstad and the flatly incorrect testimony presented by Waytowich. State Farm may also ask the jury to disregard Fey's opinion, which is based on the actual condition of the McIntosh property and the admittedly improper actions taken by State Farm. But juries are entitled to hear the fullness of all the arguments and decide for themselves which account to believe.

c. Fey's Opinions Regarding the Homeowner Claim Substantiate and Provide Corroboration for His Opinions Regarding the Flood Claim

State Farm argues that Fey's opinions regarding the adjustment of the homeowner's claim, including the use of engineers, are irrelevant because they have no bearing on whether the

⁵¹ Mem. at 14.

⁵² Depo. of James Shortley dated June 3, 2010, at 9:22-23; 117:4-12, attached as **Exhibit G** hereto.

⁵³ Fey Report at 4-6.

McIntosh flood claim was “knowingly false at the time it was made.”⁵⁴ The Court has repeatedly rejected this argument, and it should do so again.⁵⁵

As Relators have argued, the McIntosh flood claim was false because the payment of flood policy limits was incorrect, and the claim was knowingly false when made, at the very least, because State Farm recklessly disregarded the amount of flood damage the McIntosh home actually sustained. State Farm’s scheme involved instructing adjusters to pay flood policy limits quickly based on a presumption of flood damage, and as Fey opines, State Farm took improper steps to ensure that inconsistent evidence would never be revealed.

Although State Farm cites several cases for the proposition that the truth or falsity of a false claim is determined at the time of submission, State Farm does not cite any authority for the argument it is actually making: that everything which happened after the date the false claim was submitted is irrelevant as a matter of law.⁵⁶ *United States ex rel. Longhi v. Lithium Power Techs, Inc.* the primary case upon which State Farm relies, undermines State Farm’s position.⁵⁷

In *Longhi* the district court considered events taking place after the false claims were made to help determine whether the claims were false at the time they were submitted.⁵⁸ *Longhi* concerned, in part, several false statements in a grant proposal about particular personnel the defendant intended to hire.⁵⁹ The defendant’s grant proposal identified several scientists that

⁵⁴ Mem. at 15.

⁵⁵ See, e.g., [274] (“Relators are correct that the flood claim cannot be totally separated from the wind claim”); [343] (denying summary judgment based in part on events taking place after the flood claim was submitted); [431] (compelling State Farm to answer discovery related to its use of engineers).

⁵⁶ *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1171-72 (9th Cir. 2006); *United States v. Nat’l Wholesalers*, 236 F.3d 944, 950 (9th Cir. 1956); and *United States ex rel. Frazier v. IASIS Healthcare Corp.*, 554 F. Supp. 2d 966, 971 (D. Ariz. 2008) did not discuss whether events taking place after the false claim was submitted were relevant in assessing the truth or falsity of the claim.

⁵⁷ 513 F. Supp. 2d 866, 875 (S.D. Tex. 2007), *aff’d*, 575 F.3d 458 (5th Cir. 2009).

⁵⁸ *Id.*

⁵⁹ *Id.* at 877-879.

either “will assist” on the grant, that the defendant “expected to join” the company, or that the defendant “if possible would like to hire.”⁶⁰ The defendant argued that these statements were not literally false at the time they were made, but the court found that a reasonable jury could conclude that the defendant was at least reckless to the truth or falsity of these statements. The court explained that the truth of these statements would depend on the defendant’s intent, and because “direct evidence of a person’s intent to deceive is rarely if ever available,” in most instances a jury must “infer intent to defraud from all the facts and circumstances surrounding the transition.”⁶¹ The court found that a reasonable jury could find an intent to defraud based on facts and circumstances that took place after the statements were made, such as the fact that three of the four scientists were never hired, and one of the listed positions was never filed.⁶²

Fey’s testimony regarding State Farm’s conduct in adjusting the McIntosh homeowner claim is relevant to the falsity of the flood claim because the testimony further demonstrates the nature of State Farm’s scheme to defraud the government on the flood claim. As Fey’s testimony reveals, State Farm did not make the \$250,000 payment honestly and in good faith. State Farm ensured a finding of flood damage that exceeded the policy limits.

d. State Farm Incorrectly and Hypocritically Argues that Fey Offered Legal Opinions

State Farm suggests that Fey improperly offers expert advice on legal questions.⁶³ But Fey’s expert testimony addresses the existence of an industry standard and the actions required by State Farm to meet those established industry standards.⁶⁴ Those are typical subjects for

⁶⁰ *Id.*

⁶¹ *Id.* at 878 (citation omitted).

⁶² *Id.* at 878.

⁶³ Mem. at 16.

⁶⁴ See Fey Report at 4.

expert testimony in insurance cases, including Hurricane Katrina insurance cases.⁶⁵ That is especially true when, as here, State Farm's lay witnesses also have offered their interpretations of the industry standards and expectations as a defense for their actions.⁶⁶ Thus, Fey's testimony addresses those issues in a way that will be helpful to a jury as the finder of fact.⁶⁷

Moreover, Fey's report addresses the exact same subject matter as State Farm's own expert, Gerald Waytowich: the propriety of State Farm's handling of the McIntosh claim. State Farm cannot reasonably contend that Fey's report criticizing its claims-handling procedures is improper while at the same time offering Waytowich's expert report in support of its claims-handling procedures.

4. The Probative Value of Fey's Report and Testimony Far Outweighs Any Prejudicial Effect

State Farm complains that a jury might assign too much weight to Fey's testimony. As explained above, a jury *should* assign significant weight to his testimony; it discredits significant elements of State Farm's defenses. That is not a basis to exclude it; it is a reason to *include* it. State Farm may not hide behind Rule 403 to escape evidence harmful to its defenses.⁶⁸

⁶⁵ See, e.g., *200 S. Broad St., Inc. v. Allstate Ins. Co.*, No. 07-9237, 2009 WL 2028349 at*1 (E.D. La. Jul. 9, 2009) (expert testimony on insurance standards is appropriate in any Hurricane Katrina claim more complex than a standard homeowner's claim); *Huey v. Super Fresh/Sav-A-Center, Inc.*, 07-1169, 2009 WL 604914 at *2 (E.D. La. Mar. 9, 2009) (same).

⁶⁶ See Section II.C.1, *supra*.

⁶⁷ The cases cited by State Farm address a very different subject: duties imposed by statute or common law. Fey's report neither opines upon nor relies upon any legal issues; he cites the undisputed fiduciary duty created by federal law as a basis for the industry standards he discusses, and that ancillary reference is useful in understanding those standards, but his opinion that State Farm breached its fiduciary duty is not a necessary part of his analysis, and his opinion does not rely upon that statement.

⁶⁸ See, e.g., *Dollar v. Long Mfg., N.C. Inc.*, 561 F.2d 613, 618 (5th Cir. 1977) (Rule 403 can only exclude evidence that is "unfair[ly]" prejudicial); *U.S. v. Murillo*, 288 F.3d 1126, 1137 (2d Cir. 2008) (prejudice must result in an adverse impact beyond its tendency to prove the fact or issue that makes the evidence relevant in the first place).

III. CONCLUSION

Fey's testimony is directly relevant to the propriety of State Farm's actions in adjusting the McIntosh flood claim. His testimony shows that State Farm's defenses do not withstand scrutiny. Accordingly, State Farm's Motion should be denied.

THIS the 12th of August, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Maison Heidelberg, attorney for Cori Rigsby and Kerri Rigsby, do hereby certify that I have this day caused the foregoing document to be filed with the Court's CM/ECF system, which will cause notice to be delivered to all counsel of record.

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INSURANCE COMPANY

/s/ C. Maison Heidelberg

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

UNITED STATES OF AMERICA EX REL.
CORI RIGSBY AND
KERRI RIGSBY RELATORS/COUNTER-DEFENDANTS

VERSUS CASE NO. 1:06CV433-LTS-RHW

STATE FARM
MUTUAL INS. CO. DEFENDANT/COUNTER-PLAINTIFF

FORENSIC ANALYSIS ENGINEERING
CORPORATION; HAAG ENGINEERING CO.;
AND ALEXIS KING DEFENDANTS

VIDEOTAPED DEPOSITION OF
LOUIS G. FEY, JR.

APPEARANCES NOTED HEREIN

TAKEN AT INSTANCE OF: DEFENDANTS
DATE: JUNE 4, 2010
PLACE: BUTLER SNOW
1020 HIGHLAND COLONY PARKWAY
RIDGELAND, MISSISSIPPI
TIME: 9:00 A.M.

REPORTED BY: TODD J. DAVIS
CSR #1406, RPR

DAVIS COURT REPORTING
Post Office Box 16147
Jackson, Mississippi 39236-6147
(601) 991-0079
www.daviscourtreporting.com

1 did that?

2 A. Directly or indirectly?

3 Q. The last time you handled a flood claim.

4 A. Actually handled it as the adjuster? It
5 would have been, probably, right around 1984.

6 Q. And what carrier were you working for at
7 that time?

8 A. Ohio Casualty Insurance.

9 Q. And where were you based at that point?

10 A. Well, I take that back. It would have
11 been closer to 19 -- let's see -- 1980 -- 19 --
12 about 1993, actually. And I would have been in
13 Fort Lauderdale, and it would have been hurricane
14 Andrew.

15 Well, and I take that back because
16 I handled some when I was with Lumber Mutual
17 Insurance for the hurricanes that hit along the
18 North Carolina coast. And I was -- I was a
19 manager, but I actually got involved in handling
20 claims, too. So that -- and that would have been
21 up -- up to about the year 2000.

22 Q. The last time you handled a flood claim
23 was in the year 2000?

24 A. Yeah. Well, actually handled it as an
25 adjuster.

1 approximately December of 2001, where did you go?

2 A. Travelers Insurance.

3 Q. And at Travelers, did you ever adjust a
4 claim under the NFIP program?

5 A. No.

6 Q. Where did you -- where were you at
7 Travelers? Where -- where -- where was your
8 physical office?

9 A. Atlanta -- Duluth, Georgia.

10 Q. And what was your title?

11 A. Director of complex case, or claims.

12 Q. Were these litigated claims?

13 A. Yes.

14 Q. So you were actually involved in -- in
15 managing litigation as opposed to handling claims?

16 A. I was handling claims and there was
17 litigation involved in it, but I was -- these were
18 large exposure cases, quadraplegics and serious
19 injuries, bad fires, \$34 million fires. If it
20 went over a million dollars, it came to me.

21 Q. And how many people did you supervise?

22 A. There were -- I think we had like eight
23 regions. And I had a general obligation to help
24 train those regions, and oversee and advise and
25 mentor.

1 Q. And how many people did you supervise?

2 A. I didn't supervise any on a direct
3 basis. I was more of a resource, and I would get
4 seminars and instruct.

5 Q. So you had no report -- no employees
6 reporting to you?

7 A. Not directly.

8 Q. What was your job title?

9 A. It was complex case director.

10 Q. And your involvement was -- strike that.

11 Did you become involved in these
12 cases at the request of somebody who was handling
13 the file?

14 A. Once the -- once the exposure crossed
15 the million dollar threshold, the -- the case
16 would come to me.

17 Q. And how many others were there in the
18 organization that held the same position as you?

19 A. Approximately, eight.

20 Q. Were they housed in different places in
21 the country?

22 A. Yes.

23 Q. And how many different locations did
24 they have people with this responsibility?

25 A. Seven, I think. We had two in our

1 court reporter a copy of that, which we've made
2 and marked as Exhibit 1 to this deposition.

3 (Exhibit No. 1 marked for
4 identification.)

5 BY MR. ROBIE:

6 Q. Could you give me, please, a summary of
7 your educational background?

8 A. I graduated from the University of
9 Cincinnati with a bachelors of business degree. I
10 have a number of industry designations, starting
11 with insurance certificate, INS, then associate in
12 claims designation, charter property casualty
13 underwriter, CPCU designation, CIC, which is a
14 certified insurance counselor designation.

15 And I've, you know, attended so
16 many seminars I can't even list them all on my CV.
17 But there's a good representation of the ones I've
18 attended, classes that I've attended on the CV, in
19 addition to the classes I took for the
20 designations. I've given seminars on insurance
21 topics.

22 Q. No advanced degrees beyond your
23 bachelors degree?

24 A. The CPCU is considered the equivalent of
25 a masters in -- of insurance, but not a formal

1 wasn't fully investigated and properly
2 investigated. And that all impacts on the outcome
3 of the claim.

4 Q. I just want to focus on what you're
5 prepared to talk about in terms of State Farm's
6 violation of directives from FEMA. And the first
7 one is they used exact total on the McIntosh claim
8 rather than doing a stick and board estimate?

9 A. Correct.

10 Q. Is that it?

11 MR. HEIDELBERG: Object to the form.

12 Asked and answered.

13 A. If you're talking about violations of
14 the guidelines that were put out as far as those
15 bulletins --

16 Q. I'm talking --

17 A. -- or are you talking about FEMA's claim
18 handling guidelines?

19 BY MR. ROBIE:

20 Q. I'm -- I'm talking about Louis Fey's
21 opinions.

22 A. All right. Claim handling guidelines
23 were not followed. They didn't scope the loss.
24 They didn't interview key witnesses. They hired
25 retained engineers on a blanket basis, which

1 should never be done. They disregarded the
2 engineer's opinion once it was rendered and hired
3 another engineer to give another opinion because
4 they didn't like the first one.

5 They -- they entered the process
6 with what appeared to be a preconceived position
7 that the damage was predominantly flood. They
8 seemed to declare the property's total losses so
9 they could pay the FEMA policy limit -- that --
10 that flood policy limit, whereas -- and they would
11 use square footage calculations on exact total to
12 come to that total loss evaluation. But at the
13 same time, when they did their wind storm
14 evaluation, they would use a -- a detailed
15 estimate. They didn't put copies of the -- both
16 engineering studies in both files.

17 Q. Anything else?

18 A. Not offhand.

19 Q. And in how many claims did this occur?

20 A. I've only been asked to look at the
21 McIntosh claim.

22 Q. So to your knowledge, this happened one
23 time?

24 MR. HEIDELBERG: Object.

25 A. There's indications in the King

1 A. You've got to help me with the question
2 here.

3 Q. Let me see if I can do it this way:
4 Mr. Ford, as I recall his report, says, so and so
5 says that XYZ occurred. Is that square with your
6 recollection?

7 A. Yes.

8 Q. Does it also square with your
9 recollection that, in fact, Mr. Ford had never
10 spoken to so and so?

11 A. My understanding is that he did not
12 directly speak with the witness, that Mr. McIntosh
13 had spoken with Mr. Church.

14 Q. Right. And he doesn't include in his
15 report, "I have never spoken to this person and we
16 need to contact him," does he?

17 A. You're trying to say that an engineer
18 hired by State Farm should be in charge of the
19 investigation of the entire file. State Farm had
20 an edict out in place that nobody would take
21 statements from any witnesses except for this
22 unit. State Farm had the obligation to say, "We
23 need to follow up on this witness' statement.
24 It's a key witness statement," rather than saying,
25 "Let's not give any weight to this witness'

1 statement. Let's send out another engineer."

2 I mean, Ford reported the witness.

3 It was up to State Farm to follow up on it.

4 Q. Move to strike the answer as
5 nonresponsive. Could you read that question back
6 for me, please?

7 MR. HEIDELBERG: I object to the move to
8 strike. It is a responsive question. He
9 answered the same question about three or
10 four times now. But if you would like for
11 him to answer it again, read back the
12 question.

13 (Question was read back.)

14 A. He says that McIntosh told him about
15 Mr. Church's testimony -- or eyewitness account.
16 So are you -- you asking me does he say that I
17 never personally spoke with Mr. Church?

18 BY MR. ROBIE:

19 Q. That's one question.

20 A. He --

21 Q. What's the answer to that?

22 A. He did -- he did not say that in his
23 report.

24 Q. Right. He reports the information about
25 Mr. Church as if it's real and it's valid, right?

1 A. Yeah. I read her version of -- of how
2 she interpreted the photos. And --

3 Q. Well, did you look at the photos?

4 A. And she -- she is an adjuster, or with
5 an adjuster's background, looked at the photos and
6 overruled a trained engineer's opinion who was
7 actually out there at the scene, so I just think
8 it's wrong. I think if you get professional
9 opinion from an engineer, you know, let's -- let's
10 start out with getting the -- the report and
11 looking at it and evaluating it as -- as a
12 supervisor sitting on a desk.

13 I think you grab the claim file and
14 open it up and read the claim file first. And
15 then you read the report. Then you talk to the
16 engineer. You talk to the witnesses mentioned in
17 the report. You do some additional
18 investigations. You try to get meeting of the
19 minds. You don't fire the whole engineering firm.

20 Q. You don't look at the photos in the
21 engineering report?

22 A. Yeah. You look at them, but, you know,
23 you -- the reason they hire an engineer in the
24 first place is to do something that the company is
25 incapable of doing themselves, getting a

1 professional opinion based on a trained engineer's
2 examination of the scene. So for an adjuster to
3 sit there and overrule the engineer's opinion is
4 just wrong.

5 Q. Well, just wrong no matter how stupid
6 the opinion is on its face?

7 A. There should have been additional
8 investigation. If she had a question -- I'm not
9 saying she can't question the report, but she
10 can't just unilaterally decide it's wrong and not
11 order additional investigation, like canvassing the
12 neighborhood, talking to the witness that was
13 identified. That's where you start.

14 Q. Or calling the senior engineer from the
15 company she hired and say, "Can you take a look at
16 this"? That would be appropriate, wouldn't it?

17 A. Yeah. But what's not appropriate is
18 firing the engineering firm.

19 Q. Okay. And she got her engineering
20 report from the engineering firm that said it
21 reached all of the same conclusions. It had all
22 of the same bullet points as Mr. Kelly's -- or
23 Mr. Ford's report, except it added the addition
24 that was so obviously missing the first, which was
25 that there was flood damage.

1 VIDEOGRAPHER: We are on the record at
2 14:55.

3 EXAMINATION BY MR. HEIDELBERG:

4 Q. All right. I think Mr. Robie's finished
5 his questioning. Let me ask you, Mr. Fey, to give
6 me -- if you need to use your resume or anything
7 else in front of you that is a document to this
8 exhibit -- to this deposition, you may do so. But
9 I would like a listing that you can come up with
10 at this point of any experience, education or
11 training that you have had in your 28 years in the
12 insurance industry that would pertain to what you
13 deem to be normal claims handling procedures and
14 practices in the industry?

15 A. Well, I've actually been in the industry
16 over 29 years now. Since my report came out, I
17 had an anniversary. But I started out with four
18 months of intensive training of how to handle
19 claims as an adjuster in multi-lines in the field,
20 in the home office of Ohio Casualty.

21 I then worked out in the field for
22 approximately four and a half years before moving
23 up to supervisor. At that same time, I started
24 taking courses in claim handling and worked
25 towards my associate in claims degree, which is a

1 claims specific program that basically is soup to
2 nuts on how to handle claims properly, including
3 properly -- property claims.

4 I -- I then started working on my
5 other designations. Actually, my insurance
6 designation, INS, came first, and that's a more
7 basic program. Associate in claims is a little
8 bit more advanced to that. And then certified
9 property casualty underwriters, a very in depth
10 ten -- ten course program that covers every facet
11 of the insurance industry, including claims and
12 claims handling.

13 Certified insurance counselor
14 designation is -- is a very, very high level
15 coverage specific program that -- that goes into
16 specific coverage issues in all lines. After
17 being in the business for four and a half, five
18 years, I trained as a supervisor on how to oversee
19 claims adjusters, and to make sure they were
20 handling claims properly.

21 I audited files for two years and
22 with the sole purpose of making sure that
23 adjusters were handling claims according to proper
24 procedures and practices. You know, doing
25 neighborhood -- canvases -- canvases, when

1 warranted, getting signed statements from all
2 involved parties, making sure the scene
3 inspections were done, making sure scopes were
4 done properly, making sure claims were totally and
5 completely investigated, and that was my role for
6 the next ten years in the business.

7 I -- I oversaw claim handlers to
8 make sure that they were handling things right. I
9 trained adjusters. I then went to Lumber Mutual
10 and basically started a claims department from
11 scratch, trained them on how to handle claims,
12 proper claims procedures, brought them along to
13 the point where, when at the time I left Lumber
14 for Travelers, it was a very well run claims unit.
15 It was top notch, and it was acknowledged at
16 Lumber as being the best unit in the company.

17 Once I got to Travelers, I started
18 the process all over, helped set up the
19 construction division, which was being split off
20 from commercial lines. I went around and taught
21 adjusters how to interpret construction contracts,
22 various coverages that they needed to be focused
23 on, you know, exclusions in policies, coverage
24 issues that they needed to be aware of, focused on
25 proper claims investigative techniques, you know.

1 So, basically, my entire career
2 from the first four and a half years on has been
3 supervising, overseeing claims adjusters, teaching
4 them how to handle claims properly, making sure
5 claims were handled properly, right up until the
6 time I left travelers.

7 Q. Now -- oh, do you have more or are you
8 finished?

9 A. That pretty well covers it.

10 Q. Have you had any role or input in the
11 actual creation of claims manuals for any
12 companies that you worked for?

13 A. Yeah. In the '80s, I helped write Ohio
14 Casualty's claims manual, which included property
15 claims and proper procedures for handling property
16 claims. Of course, all the carriers have done
17 away with their claim manuals at this point. But,
18 at the time, companies had claim manuals that
19 adjusters would follow.

20 Q. And in terms of the report that you've
21 written in this case and the opinions that you've
22 given in your deposition today, to the extent it
23 would apply, have those opinions been based upon
24 your understanding of normal claims handling
25 procedures in the insurance industry?

1 A. Yes. They -- they are. They've --
2 flood claims handling practices and procedures is
3 outlined in FEMA's claims manual. You can track
4 exactly property claims handling practices and
5 what's considered good claim practices. There's
6 really no difference between the different lines.

7 You know, claims investigation is
8 across the board, and it's been existence for a
9 long time. It's only been improved upon over the
10 years.

11 MR. HEIDELBERG: I don't believe I have
12 any further questions at this time. Do you
13 have anything else?

14 MR. ROBIE: No. I don't have anything.

15 MR. HEIDELBERG: Kathryn, do you have --
16 do you have any questions?

17 MS. PLATT: No, I don't think so.

18 MR. HEIDELBERG: Yeah. I told him we
19 would read and sign the deposition.

20 VIDEOGRAPHER: Okay. This concludes the
21 deposition of Louis G. Fey, Jr. We are off
22 the record at 15:02.

23 (Ended at 3:02 p.m.)

24

25

AGREN BLANDO COURT REPORTING & VIDEO INC

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

Case No. 1:06-cv-433-LTS-RHW

TELEPHONIC 30(B)(6) DEPOSITION OF STATE FARM
FIRE & CASUALTY COMPANY

GIVEN BY: DAVID RANDEL

July 9, 2010

UNITED STATES OF AMERICA ex rel.; CORI RIGSBY; AND
KERRI RIGSBY,

Relators/Counter-Defendants,

vs.

STATE FARM FIRE & CASUALTY COMPANY, et al.,

Defendants/Counter-Plaintiffs.

APPEARANCES:

GILBERT LLP

By Derek Y. Sugimura, Esq.

Benjamin Davidson, Esq.

1100 New York Avenue NW, Suite 7001

Washington, DC 20005

Appearing telephonically on behalf of
Cori Rigsby and Kerri Rigsby.

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC

By Jeffrey A. Walker, Esq.

Renaissance at Colony Park

1020 Highland Colony Parkway, Suite 1400

Ridgeland, Mississippi 39157

Appearing on behalf of State Farm

Fire & Casualty and David Randel.

AGREN BLANDO COURT REPORTING & VIDEO INC

12

1 Q (By Mr. Sugimura) Well, sir, you say you
2 don't specifically recall.

3 Do you have any general recollection of
4 training or any understanding of training that was
5 provided regarding when to request an engineer?

6 MR. WALKER: Object to the form of the
7 question.

8 A I don't recall any training about when to
9 request an engineer.

10 Q (By Mr. Sugimura) Sir, how do you know
11 what the policy was or State Farm's policy as to
12 when to request an engineer?

13 MR. WALKER: Object to the form of the
14 question.

15 A State Farm follows the policy of good
16 claim handling practices. And that means that when
17 you need additional information in order to
18 appropriately adjust the claim, you do whatever is
19 necessary in order to gain additional information.

20 In some cases, that means you would request an
21 expert's assistance. And engineers would follow --
22 fall within that thought process of gaining
23 additional information from experts.

24 Q (By Mr. Sugimura) In the period before
25 Hurricane Katrina, were adjusters required to seek

John Gaylord Conser, 6/17/2010

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
3 SOUTHERN DIVISION
4

5 UNITED STATES OF AMERICA ex rel.;

6 CORI RIGSBY; AND KERRI RIGSBY,

7 RELATORS/COUNTER-DEFENDANTS,

8 v.

Case No. 1:06-cv-433-LTS-RHW

9 STATE FARM FIRE & CASUALTY

10 COMPANY, et al.,

11 DEFENDANTS/COUNTER-PLAINTIFFS.
12

13
14
15 VIDEOTAPE DEPOSITION OF

16 JOHN GAYLORD CONSER

17 Taken June 17, 2010

18 Commencing at 1:06 p.m.
19
20
21
22
23

24 REPORTED BY: MARY P. MITCHELL, RDR, CRR, CLR

25 www.paradigmreporting.com

1 A. Yes, it describes flood damage.

2 Q. But the damage it's describing is only with
3 respect to the policy limits, is that right?

4 MR. ROBIE: That question is ambiguous.

5 A. I'm not understanding the question.

6 Q. If you have a million-dollar home with a
7 hundred-thousand-dollar flood policy, it could be a
8 total loss even if it was still standing and intact,
9 is that correct?

10 A. That's correct, sir.

11 Q. So total loss, that word is only referencing
12 the flood policy amounts? As you said, it just
13 means that the damage exceeds the flood policy?

14 A. Correct.

15 Q. Is that a term that you'd heard before?

16 A. Total loss? Yes, sir, it's common in the
17 industry.

18 Q. When did you first hear it?

19 A. Probably with my first total loss fire.

20 Q. Do you remember what you were told about it?

21 MR. ROBIE: That assumes facts not in
22 evidence.

23 A. No, sir, I don't.

24 Q. Do you remember how you heard the phrase
25 "total loss"?

1 A. Because something wasn't there anymore, as
2 in total loss fire, total loss wind, total loss
3 flood.

4 Q. I understand how something not being there
5 anymore means that it's a total loss. But the way
6 that you just described the phrase "total loss" was
7 different. It meant a loss exceeding the policy
8 limits. So my question is, when did you learn about
9 the latter meaning of total loss?

10 A. Anytime the cost to repair something exceeds
11 the value of something, you can call it a total
12 loss, whether it's a policy amount or whether it's
13 actual structural damage.

14 Q. And you said that was just a general
15 customarily understood --

16 A. Term.

17 Q. You don't know if that's in a bulletin or a
18 memo or written anywhere, do you?

19 A. I've never seen it, sir.

20 MR. ROBIE: Is this a good time for a
21 break?

22 MR. DAVIDSON: Sure.

23 VIDEOGRAPHER: We are going off the
24 record. The time now is 1:56 p.m.

25 (Break from 1:56 p.m. to 2:06 p.m.)

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

UNITED STATES OF AMERICA,
ex rel.; CORI RIGSBY; RELATORS/
AND KERRI RIGSBY COUNTER-DEFENDANTS

V. CASE NO. 1:06-cv-433-LTS-RHW

STATE FARM MUTUAL
INSURANCE COMPANY DEFENDANT/COUNTER-PLAINTIFF

and

FORENSIC ANALYSIS ENGINEERING
CORPORATION; EXPONENT, INC.;
HAAG ENGINEERING CO.; JADE
ENGINEERING; RIMKUS CONSULTING
GROUP, INC.; STRUCTURES GROUP;
E.A. RENFROE, INC.; JANA RENFROE;
GENE RENFROE; AND ALEXIS KING DEFENDANTS

DEPOSITION OF ALEXIS B. KING

Taken at Butler, Snow, O'Mara, Stevens &
Cannada, 210 E. Capitol Street, Suite 1300,
Jackson, Mississippi, on Tuesday, May 5,
2009, beginning at 9:06 a.m.

REPORTED BY:

Elizabeth Bost Simpson, RDR, CRR, CSR 1293
Registered Realtime, Merit, and Diplomat Reporter
2100 18th Street
Gulfport, Mississippi 39501
ESimpson@SBMreporting.com

1 we paid properly under the flood policy. These we
2 had been told to pay under the flood policy, so
3 I -- my directive to our people was if there is a
4 house that has been washed off its foundation due
5 to surge because it is along these lines or along
6 a body of water, they are owed under their flood
7 policy. Be sure and pay them under their flood
8 policy. It did not at any time stop the
9 investigation into wind damage.

10 BY MR. MATTEIS:

11 Q. After the September 21st memo was sent
12 by FEMA to State Farm, did you tell State Farm
13 adjusters and other adjusters working for State
14 Farm to pay the entire limits of the flood
15 policies on a foundation-only home?

16 MR. BEERS: Object to the form.

17 A. The adjusters were told to go out and
18 pay limits. The adjusters were told that if, in
19 fact, once they did the Xactimate -- they were to
20 do the Xactimate. Once they completed that, if
21 limits were not reached, then they were to take it
22 a step further because one of two things had
23 occurred. We either -- our insureds were
24 overinsured, at which point we wouldn't owe any
25 more than the Xactimate estimate or we had made a

1 mistake and there were specialty items in the
2 house. So at that point they needed to go get
3 with the insured, be very specific about their
4 building materials, to make sure that the insured
5 was getting every advantage under their flood
6 policy.

7 BY MR. MATTEIS:

8 Q. When you're referring to the Xactimate
9 estimate that would be done on the -- on the
10 foundation-only homes, are you referring to
11 Xactimate estimate for flood damage or for wind
12 damage?

13 MR. BEERS: Object to the form.

14 A. When the adjusters were out there
15 adjusting the flood claim, it would be Xacttotal
16 based on the flood claim.

17 BY MR. MATTEIS:

18 Q. You said Xactimate the first time. Did
19 you mean Xacttotal?

20 A. Yes, sir, I did because those were -- we
21 are talking specifically, as I understand it,
22 about total losses that are gone.

23 VIDEOGRAPHER: I need to change tapes.

24 MR. MATTEIS: Okay.

25 VIDEOGRAPHER: Off record, 12:38.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
3 SOUTHERN DIVISION

4 Case No. 1:06:cv-433-LTS-RHW

5 _____
6 UNITED STATES OF AMERICA ex rel, CORI)
7 RIGSBY and KERRI RIGSBY,)
8 Relators/Counter-Defendants,)
9 v.)
10 STATE FARM MUTUAL INSURANCE COMPANY,)
11 Defendant/Counter-Plaintiff,)
12 and)
13 FORENSIC ANALYSIS ENGINEERING)
14 CORPORATION, HAAG ENGINEERING CO., and)
15 ALEXIS KING,)
16 Defendants.)

17 _____)
18
19 DEPOSITION OF DAVID R. MAURSTAD

20 Washington, D.C.

21 June 2, 2010

22
23 Reported by:

24 Mary Ann Payonk, Certified Realtime Reporter

25 Job No. 30584

1 D. Maurstad

2 there was a flooding cause of loss. And once
3 they determined that, what the value of the
4 damaged property was. That's what the flood
5 adjuster needs to do. And they don't -- that's
6 what their job is.

7 Q. But I'm not sure that answered the
8 question.

9 A. Okay.

10 Q. In order to do that, was it important
11 for the flood adjuster to understand what, if
12 any, wind damage occurred to the property?

13 MR. BEERS: Object to the form.

14 A. Let me try to answer it this way with
15 my hypothetical.

16 It would -- if an adjuster came
17 on-site and observed the property and
18 determined that flood damaged up to a certain
19 point and looked up and saw that the part of
20 the roof had been blown off, he knows and
21 understands that wind caused that and flood
22 didn't cause that, so he's not going to pay the
23 policyholder for a damaged roof. He's going to
24 pay the policyholder for that part of the
25 property that was damaged by flood.

1 D. Maurstad

2 Q. Okay. Now let me give you a
3 hypothetical.

4 If the adjuster went out to the
5 property and the home was completely destroyed
6 and there was a big strip of other homes and
7 trees and other things that were gone leading
8 right up to the home, there was also a bunch of
9 water in the area, while you were out at the
10 NFIP, would you have expected that adjuster to
11 have looked into whether any wind damaged the
12 property first?

13 MR. BEERS: Object to the form.

14 A. The -- what -- clearly, the situation
15 in Katrina on the Mississippi coast with the
16 recorded storm surge, the situation of trying
17 to parse whether, you know, wind caused that or
18 whether the storm surge caused that, it would
19 have been, in my opinion, an unconscionable
20 position for the flood program to have denied
21 claims on your hypothetical basis.

22 So the adjuster, knowing what the
23 facts are and the storm surge and the area, the
24 way it's damaged, again goes back to
25 determining there was a flood event and then

1 D. Maurstad

2 pays for the damaged property.

3 Q. So even if the flood adjuster knew
4 the home was completely destroyed by wind --

5 A. There's no way the flood adjuster
6 could know that is what I'm trying to
7 articulate in this case.

8 And if the flood adjuster can't
9 determine that, then it would be, you know,
10 again unconscionable to -- for the flood
11 program to have come in and denied hundreds of
12 claims on that basis.

13 Q. Did the flood adjuster have any
14 obligation to look into the cause of loss after
15 Hurricane Katrina?

16 A. The flood adjuster did. The flood
17 adjuster determined that storm surge caused the
18 damage and paid the flood loss accordingly.

19 Q. For every house that was damaged by
20 Hurricane Katrina was the storm surge?

21 MR. BEERS: Object to the form.

22 A. I'm not sure every house was --
23 that's the case for every house.

24 Q. Well, I'm not sure I'm following your
25 testimony, Mr. Maurstad.

1 D. Maurstad

2 MR. BEERS: Same objection to the
3 question.

4 A. I think that would certainly be
5 inappropriate for an adjuster to influence
6 another professional to change their opinion,
7 sure.

8 Q. And if that were happening with
9 respect to Hurricane Katrina claims, is that
10 something that you would have wanted the NFIP
11 to have known?

12 MR. BEERS: Object to the form.

13 A. Sure. Yes. I think that it's --
14 again, that's -- you know, you're talking
15 integrity issues, and we would certainly want
16 to know if we had adjusters out there trying to
17 influence the outcome of professional reports.

18 Q. While you were at the NFIP, had you
19 heard allegations that State Farm had
20 influenced engineers to change engineering
21 reports?

22 A. I'm pretty sure it was in the news.

23 Q. Did you do anything about that?

24 A. My recollection would be that I would
25 go to Shortley and say, What's the issue here?

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
3 SOUTHERN DIVISION

4 Case No. 1:06:cv-433-LTS-RHW

5 _____
6 UNITED STATES OF AMERICA ex rel, CORI)
7 RIGSBY and KERRI RIGSBY,)
8 Relators/Counter-Defendants,)
9 v.)
10 STATE FARM MUTUAL INSURANCE COMPANY,)
11 Defendant/Counter-Plaintiff,)
12 and)
13 FORENSIC ANALYSIS ENGINEERING)
14 CORPORATION, HAAG ENGINEERING CO., and)
15 ALEXIS KING,)
16 Defendants.)

17 _____)
18
19 DEPOSITION OF GERALD BRIAN WAYTOWICH

20 Washington, D.C.

21 June 4, 2010

22
23 Reported by:

24 Mary Ann Payonk, Certified Realtime Reporter

25 Job No. 30840

1 G. Waytowich

2 you'd be checking for to see if the policy were
3 paid properly?

4 A. If we were doing a stick-built, we
5 would look at an estimate such as this.

6 Q. Okay. But you said there wasn't a
7 line-by-line in here.

8 A. I guess I was wrong on that point.

9 Q. Okay. So there is a line-by-line
10 estimate in the McIntosh flood file?

11 A. There's a line-by-line written
12 estimate, yeah.

13 Q. Okay. And what's the total of the
14 line-by-line written estimate? Well, let me
15 ask you just in parts.

16 For foundation -- that was on
17 page 106 -- what's the total there?

18 A. Foundation's \$11,084.90.

19 Q. Okay. So that's a line-by-line
20 estimated damage of the foundation of the
21 McIntosh house; right?

22 A. It's an estimate for the slab of the
23 McIntosh house.

24 Q. Okay. And can you turn the page to
25 107, please? See on the bottom where it says

1 G. Waytowich

2 brick veneer, premium grade, ACV, \$28,813.97?

3 A. Yes.

4 Q. What's that?

5 A. That would be the price to replace
6 brick veneer.

7 Q. All right. And do you know whether
8 that item was paid under the flood policy or
9 the wind policy for the McIntosh claims?

10 A. I couldn't tell you that.

11 Q. Well, that's a pretty big item;
12 right?

13 Isn't it important to determine
14 whether the flood policy was adjusted policy
15 that you'd know where that \$28,000 went?

16 MR. BEERS: Object to the form.

17 A. I went back to the --

18 MR. BEERS: Go ahead.

19 A. I want to go back to the photographs.
20 The photographs don't show that kind of damage
21 to the structure, to the brick veneer.

22 Q. So what conclusion would you draw
23 from that?

24 A. That we didn't pay for the brick.

25 Q. Under which policy?

1 G. Waytowich

2 A. The flood policy.

3 Q. So you assume, then, that that
4 description -- again, brick veneer, premium
5 grade, \$28,813 -- was paid under the wind
6 policy?

7 A. That would be my assumption.

8 Q. Okay. How about right below it,
9 synthetic stucco, \$19,239.48? Was that damage
10 paid under the flood policy in the McIntosh
11 claim?

12 A. Which page are we on?

13 Q. 107.

14 A. For stucco?

15 Q. Yeah. It's the very last entry,
16 synthetic stucco.

17 A. Okay.

18 Q. It says \$19,239.48?

19 A. That's correct.

20 Q. Can you tell whether that item was
21 paid under the homeowners policy or the flood
22 policy from this file?

23 A. And from the photographs showing the
24 damages, that stucco would not be covered under
25 the flood. There was no damage by flood to

1 G. Waytowich

2 that stucco.

3 Q. So you assume again that that entry,
4 the \$19,239, was covered under the homeowners
5 policy?

6 A. That's correct.

7 Q. And then how about above it on that
8 same page, the very top entry, stud wall,
9 \$10,678.93?

10 A. That could be part of the flood
11 policy.

12 Q. What are you basing that on?

13 A. Again, the photographs. If you look
14 at the photographs, there is damage to the stud
15 walls inside the structure of the house.

16 Q. Where do you see that?

17 A. There's a photograph on page SJ001166
18 showing damage to studs and --

19 Q. 166?

20 A. Yeah, 166.

21 Q. Okay.

22 A. Well, again, 167.

23 Q. \$10,000 is a lot of studs, though;
24 right?

25 MR. BEERS: Object to the form.

1 G. Waytowich

2 A. Sure is.

3 Q. Do you see pictures showing anything
4 that could even come close to \$10,000 in stud
5 damage?

6 A. You have additional stud damage on
7 SJ000173, another photograph on 174,
8 continuation of stud damage, and you have on
9 SJ000175.

10 Q. Okay. And is this the type of
11 comparisons and analysis that the general
12 adjusters would do when they looked at flood
13 files, what you're doing right now, trying to
14 compare the pictures to what you've determined
15 was a line item estimate in the flood file?

16 A. That's correct.

17 Q. And they would go right down line by
18 line?

19 A. Pretty much.

20 Q. And they would try to match all of
21 the entries in the line-by-line estimate to the
22 pictures to make sure they all matched up?

23 A. That's correct.

24 Q. So when your adjusters, when you were
25 at NFIP, saw something in a State Farm file

1 G. Waytowich

2 BY MR. MATTEIS:

3 Q. Wouldn't be surprised?

4 A. No, I wouldn't -- if the estimate
5 matches the photographs and the photographs
6 match the file, so I'm saying --

7 Q. Well, my question is: Would you be
8 surprised if the estimate in this file did not
9 match the photographs?

10 A. No.

11 Q. Why not?

12 A. It's my opinion that this --
13 everything that's in here is in these
14 photographs, and this is -- you know, was
15 estimated and everything is correct in here.

16 Q. Right. So my question is: If you
17 found out that this estimate and the itemized
18 description of the McIntosh house did not, in
19 fact, match the actual McIntosh house that was
20 damaged, you'd be surprised; right?

21 MR. BEERS: Object to the form.

22 A. Oh, okay. I got you, yeah.

23 Q. You would be surprised?

24 A. Yeah.

25 Q. And if you found that out, would you

1 G. Waytowich

2 then question whether this file was adjusted
3 correctly?

4 A. Yes.

5 MR. MATTEIS: Okay. Are we about
6 out of tape? We can take a break now.

7 THE VIDEOGRAPHER: This concludes
8 tape number 1 in the videotaped
9 deposition of Mr. Gerry Waytowich.
10 Going off the record at 10:59 a.m.
11 (A recess was taken from 10:59 a.m.
12 through 11:09 a.m.)

13 THE VIDEOGRAPHER: This begins tape
14 number 2 in the videotaped deposition of
15 Mr. Gerry Waytowich. Going back on the
16 record at 11:09 a.m.

17 BY MR. MATTEIS:

18 Q. Mr. Waytowich, can you explain to
19 me -- I know you testified to some of this when
20 Mr. Beers was asking questions, but can you
21 explain to me what exactly you do right now,
22 your job?

23 A. I'm a flood claims manager. I run
24 the claims department for BinTech and Bankers
25 Insurance Company. I also, in conjunction with

1 G. Waytowich

2 Q. No?

3 And I know in your expert report that
4 you submitted in this case you said that you
5 did the report and you are participating in
6 this case without compensation.

7 A. That's true.

8 Q. Is that right?

9 A. That's true.

10 Q. How much time have you put into it so
11 far?

12 A. Maybe a week or two in the past three
13 or four months.

14 Q. A week or two of 40-hour weeks, you
15 mean?

16 A. Yeah, you could -- if you want to
17 break it down that way.

18 Q. How many hours would you estimate?

19 A. 40, 50 hours maybe.

20 Q. And do you have a normal hourly rate
21 for other work you do?

22 A. I get paid a salary.

23 Q. What's your salary?

24 A. 84,000 a year.

25 Q. And why did you agree to do this

1 G. Waytowich

2 A. Yes.

3 Q. How?

4 A. Going back to the process. If it was
5 in New Orleans, and it had -- it had the phone
6 contact information, the way process 1 was to
7 be handled, that information was in the file.

8 If it was process number 2, the way
9 process number 2 dictated the file be handled,
10 that information was in the file.

11 If it was number 3, then you got a
12 full estimate.

13 But it wouldn't designate whether it
14 was 1, 2, or 3 in the file.

15 Q. Let me ask you this: In those random
16 samplings, how did you know if it was a process
17 3 claim by State Farm? You said it got a full
18 estimate. What do you mean by that?

19 MR. BEERS: Object to the form.

20 A. It was a stick-built estimate, and if
21 it was -- they had -- they chose to, you know,
22 do a stick-built estimate and you had a
23 full-blown instrument that was based under
24 number 3 which was a normal process of handling
25 claims.

1 G. Waytowich

2 Q. And what was the McIntosh flood file?

3 MR. BEERS: Object to the form.

4 Q. Was that process 1, 2, or 3?

5 A. They did a site investigation on it
6 and did an Exact Total on it and probably would
7 have went to a process number 2.

8 Q. Why do you say that?

9 A. There was no stick-built estimate on
10 it.

11 Q. I thought when we reviewed it you
12 said that was a line-by-line estimate.

13 A. That's a line-by-line estimate on
14 Xactimate long form.

15 Q. Okay. Did you talk about what was in
16 the McIntosh flood file during our lunch break?

17 A. No.

18 Q. Not at all?

19 A. No.

20 Q. Did you talk about the McIntosh flood
21 file at all?

22 A. No.

23 Q. Did you talk about the substance of
24 this deposition at all?

25 A. No. I did talk to my attorney.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
3 SOUTHERN DIVISION

4 Case No. 1:06:cv-4331LTS-RHW

5 _____
6 UNITED STATES OF AMERICA ex rel, CORI)
7 RIGSBY and KERRI RIGSBY,)
8 Relators/Counter-Defendants,)
9 v.)
10 STATE FARM MUTUAL INSURANCE COMPANY,)
11 Defendant/Counter-Plaintiff,)
12 and)
13 FORENSIC ANALYSIS ENGINEERING)
14 CORPORATION, HAAG ENGINEERING CO., and)
15 ALEXIS KING,)
16 Defendants.)

17 _____)
18
19 DEPOSITION OF JAMES S.P. SHORTLEY

20 Washington, D.C.

21 June 3, 2010

22
23 Reported by:

24 Mary Ann Payonk, Certified Realtime Reporter

25 Job No. 30585

1 J. Shortley

2 insurance.

3 Q. And how long have you performed this
4 consulting work?

5 A. Well, I retired in November of '07,
6 and I have been doing it since then, but it's
7 not something that I do every day. I don't go
8 to an office and work every day or

9 Q. And you don't consult for one
10 specific company

11 A. No.

12 Q. or individual?

13 A. Anybody that will pay me.

14 Q. And when did you retire? November of
15 '07?

16 A. Yes.

17 Q. And what did you retire from?

18 A. The Federal Emergency Management
19 Agency.

20 Q. And could you tell me what your last
21 position was with FEMA?

22 A. I was the director of claims for the
23 National Flood Insurance Program for FEMA.

24 Q. And how long did you serve in that
25 position, please, sir?

1 J. Shortley

2 would have gone -- didn't take into account
3 anything else.

4 Q. Now, would it -- what that sentence
5 then refers to is the traditional approach of
6 sending a certified flat adjuster to the site
7 to assess damage and estimate losses with
8 required reports, worksheets and photographs to
9 document damage room by room and line item by
10 line item.

11 That was the normal procedure; right?

12 A. Yes.

13 Q. And how long would adjusting a claim
14 using that normal flood adjustment procedure
15 take an adjuster?

16 A. Depends on the claim. I mean, if you
17 have a two- or three-story house with, you
18 know, eight bedrooms, could take a lot longer
19 than a house with two bedrooms.

20 It really depends on -- that's a very
21 difficult question to answer with any degree of
22 accuracy, but we would -- you know -- in a
23 catastrophe, particularly in a catastrophe, you
24 want the adjusters to develop a rapport with
25 the policyholder and take the policyholder with