

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 09-8071

DIVISION "D-16"

SIMON FINGER AND REBECCA FINGER

-VERSUS-

AUDUBON INSURANCE COMPANY

FILED: _____

DEPUTY CLERK

JUDGMENT

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

APPEARING WERE:

Allan Kanner, Esquire, Melissa M. Fuselier, Esq., Hugh Lambert, Esq., Cayce Peterson, Esq. and Soren Giselson, Esq., for Plaintiffs, Simon and Rebecca Finger, and Andrew A. Braun, Esq. and Margaret L. Sunkel, Esq. for Defendant, Audubon Insurance Company.

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

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

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

1. Pollution or Contamination

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

mixture of or contact with a foreign substance. "Waste" includes materials to be disposed of, recycled, reconditioned or reclaimed.

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

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

2. Gradual or Sudden Loss

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

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

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

8. Faulty, Inadequate or Defective Planning

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

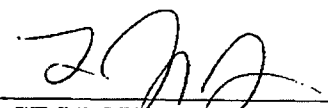
- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. Materials used in repair, construction, renovation or remodeling, grading or compaction; or
- d. Maintenance; of part or all of any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

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

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

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

Signed this 22nd day of Mar., 2010.


JUDGE LLOYD MEBLEY

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 09-8071

DIVISION "D-16"

SIMON FINGER AND REBECCA FINGER

-VERSUS-

AUDUBON INSURANCE COMPANY

FILED: _____

DEPUTY CLERK

REASONS FOR JUDGMENT

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

1. The Fingers purchased Audubon's homeowners policy number AIG PCG 0001243490 for the policy period March 2009-March 2010. (See Petition, ¶ 4; Audubon's Original Answer ¶ 4; Audubon's Amended Answer ¶ 4).
2. On June 11, 2009 the Fingers filed a claim under the Audubon policy. (See Petition ¶ 8; Audubon's Original Answer ¶ 8; Audubon's Amended Answer ¶ 8).
3. On July 16, 2009, Audubon denied in writing the Fingers' claim. (See Petition ¶ 11; Audubon's Original Answer ¶ 11; Audubon's Amended Answer ¶ 11).
4. Audubon's letter of denial contained a list of three policy exclusions on which it relied to deny the Fingers' claim: (1) the pollution ("POL") exclusion, (2) the gradual or sudden loss ("GSL") exclusion and (3) the faulty, inadequate or defective planning ("FIDP") exclusion. (See Ex. C to Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment).
5. Audubon utilized the three exclusions as affirmative defenses in Audubon's Answer filed on October 5, 2009. (See Audubon's Original Answer ¶ 3, 4 and 5).
6. The Fingers filed a Motion for Partial Summary Judgment on November 3, 2009, addressing Audubon's defenses based on these three exclusions. The matter was fully briefed

and argued, and the Court denied the Fingers' Motion on January 15, 2010 as premature. (*See* Order Denying Summary Judgment and the Court's January 15, 2010 transcript).

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

LOUISIANA LAW GOVERNING INSURANCE

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

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

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

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

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

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

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

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

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

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

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

¹ "Generally, an 'all risk' insurance policy creates a special type of coverage extending to risks not usually covered under other insurance, and recovery under an "all risk" policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." *Walker*, 289 So.2d at 868.

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

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

MR. FRANK: Was that the end of it?

MR. CASEY: Yes.

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

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

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

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

AUDUBON'S POLICY EXCLUSIONS

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

1. Pollution or Contamination

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

mixture of or contact with a foreign substance. "Waste" includes materials to be disposed of, recycled, reconditioned or reclaimed.

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

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

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

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

2. Gradual or Sudden Loss

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

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

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

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

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

25. The GSL exclusion also refers to losses caused by an "inherent vice" or "latent defect." Audubon's insurance policy does not define these terms. Black's Law dictionary defines a latent, inherent, or hidden defect as: "a product imperfection that is not discoverable by reasonable inspection." See *Black's Law Dictionary*, 481 (9th ed. 2009). Again, the Louisiana jurisprudence, which is rooted in Maritime law, focuses on inevitable losses due deterioration of the thing. See *ARNOLD COUCH ON MARITIME INSURANCE* (11th ed) § 778. The inherent vice or latent defect exclusion applies to "a loss due to any quality in the property that causes property to damage or destroy itself that results from something within the property itself as opposed to

some outside force." FC&S Online, *Processors Coverage Form, Insurance Services Office Non-filed IM Coverage*, December 2005, <http://www.nationalunderwriterpc.com>. First party policies typically exclude damages due to an inherent vice or latent defect in order to prevent the insurer from having to compensate the insured for property that "has its own shelf life and will eventually wear out or break down because of intrinsic quality or nature." Eugene Wollan, *Risks Not Taken*, *John Liner Review* 86, (Fall 2006). Here, there is no evidence that the Chinese drywall is damaging or destroying itself, indicating the "inherent vice" or "latent defect" language from the GSL exclusion does not apply. (See Plaintiff's Memorandum in Support of Plaintiffs' Motion to Strike, I). Audubon's expert report likewise does not evidence any damage to the drywall itself. (See Plaintiffs' Memorandum in Support of Partial Summary Judgment, Ex. B).

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

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

A: We found no damages to the drywall.

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

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

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

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

8. Faulty, Inadequate or Defective Planning

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

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

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

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

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

A: No.

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

A: It wasn't germane to the issue.

Q: Why not?

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

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

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

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

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

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

A: No.

Q: No?

A: No.

Q: You don't consider it faulty?

A: No, because —

Q: You think it's functioning properly?

A: As drywall, I think its functioning properly.

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

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

30. In light of the Court's disposition of this matter, the Court need not address ensuing loss in any detail.²

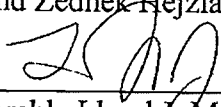
31. All exhibits and documents referenced herein are made part of the record. In addition, the entirety of Kathleen Spinella, Simon Finger and Rebecca Fingers' depositions will also be made part of the record.

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

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

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

Dated: March ^{22nd}, 2010


The Honorable Lloyd L. Medley

ENTERED ON MINUTES

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