

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

BENJAMIN HEBERT * **CIVIL ACTION NO. 23-5514 H(2)**
Plaintiff,

VERSUS * **JUDGE JANE TRICHE MILAZZO**

AMERICAN BANKERS INSURANCE * **MAG. JUDGE DONNA CURRAULT**
OF FLORIDA *
Defendant. *

* * * * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF’S CLAIMS

MAY IT PLEASE THE COURT:

Defendant, American Bankers Insurance Company of Florida (“American Bankers” or “Defendant”), a Write-Your-Own (“WYO”) Program carrier participating in the United States government’s National Flood Insurance Program (“NFIP”), pursuant to the National Flood Insurance Act of 1968 (“NFIA”), as amended¹, appearing in its “fiduciary”² capacity as the “fiscal agent of the United States,”³ and submits this Memorandum of Law in Support of its Motion to Dismiss Plaintiff’s Claims on the basis that they are time barred, as explained more fully below.

I. SUMMARY OF THE ARGUMENT

Plaintiff, Benjamin Hebert (“Plaintiff”)’s lawsuit stems from damages to his property following Hurricane Ida, which made landfall on or about August 29, 2021. After receiving notice of Plaintiffs’ claim for flood-related damages under their Standard Flood Insurance Policy (“SFIP”), American Bankers issued a written partial denial of coverage dated October 23, 2021.

¹ 42 U.S.C. § 4001, *et seq.*

² 44 C.F.R. § 62.23(f)

³ 42 U.S.C. § 4071(a)(1); *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 386 (5th Cir. 2005).

Under the SFIP and Federal law, Plaintiff had one-year from this partial denial of coverage to initiate its cause of action against American Bankers. 42 U.S.C. § 4072; 44 C.F.R. pt. 61, app. A(1), art. VII(R) (2020).⁴ However, Plaintiff did not file their lawsuit against American Bankers until September 25, 2023. Consequently, Plaintiff’s claim against American Bankers for breach of the SFIP is time-barred and must be dismissed. *Id.*

II. FACTUAL BACKGROUND

A. AUGUST 29, 2021 LOSS

In his Complaint, Plaintiff alleges that he was the owner of the property located at 1842 Highway 1 Grand Isle, Louisiana 70358 (the “Property”) that was insured under the National Flood Insurance Program (“NFIP”) bearing number 69615294192021 (the “Policy”) issued by American Bankers.⁵ On August 29, 2021, Plaintiff asserts flooding from Hurricane Ida caused certain damages to the Property which was allegedly covered under the Policy.⁶ Plaintiff claims he submitted an insurance claim to American Bankers for alleged flood-related damages and that, after inspecting the property, on October 23, 2021, American Bankers identified \$13,735.97 in damages and made a coverage determination.⁷ The Complaint alleges that Plaintiff hired a Public Adjuster, who submitted a proof of loss dated July 26, 2022, and that on September 26, 2022, American Bankers issued a letter denying the claim.⁸ Through this language, Plaintiff’s Complaint

⁴ *Cohen v. Allstate Ins. Co.*, 924 F.3d 776, 782 (5th Cir. 2019); *Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 633–37 (4th Cir. 2017); *Lionheart Holding GRP v. Phila Contribution Ship Ins. Co.*, 368 F. App’x 282, 284–85 (3d Cir. 2010); *Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 946–47 (6th Cir. 2002); *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 603–605 (4th Cir. 2002); *Hairston v. Travelers Cas. & Sur. Co.*, 232 F.3d 1348, 1349 (11th Cir. 2000); *Fino v. La. Citizens Ins. Co.*, 2008 WL 4909239, at *1–2 (E.D. La. Nov. 13, 2008); *Reef Enter. v. Wright Nat’l Flood Ins. Co.*, 2017 WL 1356332, at *6–7 (S.D. Miss. Mar. 3, 2017); *Cole v. New Hampshire Ins.*, 2012 WL 39515, at *8–10 (N.D. Miss. Jan. 9, 2012) (citing *Spence v. Omaha Indem. Ins. Co.*, 996 F.2d 793, 795 (5th Cir. 1993)); *Aguilar v. Texas Farmers Ins. Co.*, 2022 WL 10613918, at *1–2 (S.D. Tex. Oct. 18, 2022); *see also* 44 C.F.R. § 62.22(a).

⁵ Rec. Doc. 1, at ¶ 7-8.

⁶ *Id.* at ¶¶ 9-10.

⁷ *Id.* at ¶11. The Complaint incorrectly identifies the date as October 23, 2023.

⁸ *Id.* at ¶¶12-13.

asserts that American Bankers denied the Plaintiff's claim, making the letters issued by American Bankers on October 23, 2021 and September 26, 2022 integral to the claim. A true and accurate copy of the October 23, 2021 letter is attached hereto as "Exhibit 1." A true and accurate copy of the September 26, 2022 letter is attached hereto as "Exhibit 2." *See also* Exhibit 3, Declaration of James Adams.

As explained in the October 23, 2021 letter, American Bankers partially denied coverage for Plaintiff's claim; specifically, coverage was denied for damage to the meter box, excess debris and sand in the yard, and damages to the building and content items in an enclosure below the first elevated level of a post-firm building. *See* Exhibit 1. Plaintiff was also notified that he had one (1) year from when American Bankers first denied all or part of his claim to file suit. *See* Exhibit 1. Subsequently, in its letter to Plaintiff dated September 26, 2022, American Bankers referred to its letter dated October 23, 2021, in which it explained that it the policy's coverage restrictions for items located below the first elevated floor of his post-FIRM elevated home. *See* Exhibit 2.

B. THE NATIONAL FLOOD INSURANCE PROGRAM

Congress enacted the National Flood Insurance Act of 1968 (the "NFIA") which created a coordinated National Flood Insurance Program (the "NFIP"). 42 U.S.C. § 4001, *et seq.* The NFIP authorizes the federal government to arrange for the sale of federally supported flood insurance in communities which have joined the program. *Id.* The Federal Emergency Management Agency ("FEMA") oversees and implements the NFIP, which includes promulgating regulations "for general terms and conditions of insurability which shall be applicable to properties eligible for flood insurance coverage." 42 U.S.C. § 4013. These regulations also prescribe the methods by which approved losses under the NFIP may be adjusted and paid. 42 U.S.C. § 4019. Pursuant to FEMA regulations, "all policies issued under the NFIP must be issued using the terms and

conditions of the [SFIP] found in 44 C.F.R. Part 61, Appendix A.” *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 598-600 (4th Cir. 2002).

In 1983, the Director of FEMA promulgated the Write-Your-Own (“WYO”) Arrangement, which authorized private insurance companies (“WYO carrier”) to issue the Standard Flood Insurance Policy (“SFIP”). 42 U.S.C. § 4071(a)(2); 44 C.F.R. § 62.23. Pursuant to the WYO Arrangement, WYO carriers issuing the SFIP are to arrange for the adjustment, settlement, payment, and defense of all claims arising under the SFIP. 44 C.F.R. § 62.23(d). Importantly, the SFIP cannot be altered or changed by anyone—including the WYO carriers—without express written consent from FEMA. 42 C.F.R. Part 61, App. A(1)VII(D); App. A(2)VII(D); App. (A)(3)VII(D); *Gowland v. Aetna*, 143 F.3d 951 (5th Cir. 1998).

Congress underwrites all operations of the NFIP, including claims adjustment, through the United States Treasury funds. 42 U.S.C. § 4017(d)(1). Indeed, the federal government pays all flood insurance claims and reimburses WYO carriers for their costs, including defense costs, for the adjustment and payment of claims. *Grissom v. Liberty Mut. Fire Ins. Co.*, 678 F.3d 397, 402 (5th Cir. 2012) (citing *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir. 2009)); see 44 C.F.R. § 62.23(i). From a legal standpoint, WYO companies are acting as “fiscal agents” of the United States. 42 U.S.C. § 4071(a)(1); *Van Holt v. Liberty Mut. Fire Ins. Co.*, 162 F.3d 161, 166 (3rd Cir. 1998). Accordingly, the Fifth Circuit has found that a judgment against a WYO carrier constitutes a direct charge on the United States Treasury. *Gowland v. Aetna*, 143 F.3d 951, 955 (5th Cir. 1998).

III. LAW AND ARGUMENT

A. STANDARD FOR DISMISSAL

In deciding a Rule 12(b)(6) motion to dismiss, a court must first be mindful of the liberal pleading standards under Rule 8, which require only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8. Thus, a court must take “the material allegations of the complaint” as admitted and liberally construe the complaint in favor of a plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421–22, 89 S. Ct. 1843, 1849 (1969).

However, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). While Rule 8 does not require “detailed factual allegations,” a plaintiff must still provide “more than labels and conclusions” because “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 545, 127 S. Ct. at 1965 (internal citation omitted). Indeed, the legal framework of the complaint must be supported by factual allegations that “raise a right to relief above the speculative level.” *Id.* However, “‘when the allegations in a complaint . . . could not raise a claim of entitlement to relief,’” this defect should be exposed at an early stage and the claim dismissed. *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558, 127 S. Ct. at 1966).

When considering a Rule 12(b)(6) motion, a district court may consider “‘**documents incorporated into the complaint by reference or integral to the claim**, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned.’” *Stiel v. Heritage Numismatic Auctions, Inc.*, 816 F. App’x 888, 892 (5th Cir. 2020) (quoting *Meyers v. Textron, Inc.*, 540 F. App’x 408, 409 (5th Cir. 2013)) (emphasis added); *see also In re Katrina Canal Breaches*

Litigation, 495 F.3d 191, 205 (5th Cir. 2007) (holding that attaching insurance contracts to the defendants' motion to dismiss did not serve to convert the motion to dismiss into a motion for summary judgment where the contracts were referred to in the complaints and were central to the plaintiffs' claims). Plaintiffs should not preclude a court from considering an undisputedly authentic document which is integral to their claim by simply omitting specific reference to it in the complaint. Moreover, when exhibits to or referenced by a complaint contradict the allegations contained in the complaint, the exhibits control. *See Hollingshead v. Aetna Health, Inc.*, 589 F. App'x 732, 737 (5th Cir. 2014) (citing *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)). "If the appended document, to be treated as part of the complaint for all purposes under Rule 10(c), Fed. R. Civ. P., reveals facts which foreclose recovery as a matter of law, dismissal is appropriate." *Associated Builders*, 505 F.2d at 100.

B. PLAINTIFF'S CLAIM FOR BREACH OF THE SFIP IS TIME BARRED.

Federal law requires that any action for breach of an SFIP must be initiated in a United States District Court within one year of the written denial of all or part of the insured's claim. The one-year limitations period is provided in 42 U.S.C. § 4072:

In the event the program is carried out as provided in section 4071 of this title, the Administrator shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance, and upon the disallowance by the Administrator of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Administrator, may institute an action against the Administrator on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

(Emphasis added). The limitations period is also provided within the SFIP:

R. SUIT AGAINST US

You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within one year of the date of the written denial of all or part of the claim, and you must file suit in the United States District Court of the district in which the insured property was located at the time of loss. This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.

44 C.F.R. pt. 61, app. A(1), art. VII(R) (emphasis added).

In *Cohen v. Allstate Ins. Co.*, 924 F.3d 776 (5th Cir. 2019), the U.S. Fifth Circuit Court of Appeal affirmed the district court's granting of defendant's motion for summary judgment on the basis that the insured's suit filed more than one year after the defendant sent the partial denial of claim letter was untimely. The plaintiff insured's property was insured under an SFIP issued by defendant, a WYO carrier, and it sustained flood damage in April of 2016. *Cohen*, 924 F.3d at 778–79. The defendant assigned an adjuster to inspect the property, determined that the SFIP covered building damages totaling \$55,506.28, received a signed and sworn Proof of Loss for that amount, and paid the plaintiff in accordance with the Proof of Loss. *Id.* On July 19, 2016, the defendant sent a letter denying the plaintiff's claim for additional building damage because further amounts were not supported by documentation. *Id.* The plaintiff filed suit on August 14, 2017, over a year after defendant sent the denial letter. *Id.* at 779. The defendant moved for summary judgment, alleging the suit was time barred and the district court granted the motion, from which plaintiff appealed. *Id.*

On appeal, the plaintiff asserted that the denial letter issued by defendant was flawed and did not trigger the one-year limitations period because it did not identify any specific item denied, denying coverage for “various items.” *Id.* at 780–81. Plaintiff also claimed that limitations period was not triggered because the basis for the denial was invalid. *Id.* at 781–82. The Fifth Circuit

rejected these arguments, holding that the one-year limitations period began on July 19, 2016, the date of the denial letter. *Id.* at 782. The Court noted that plaintiff “disputes the adequacy of Allstate’s grounds for denial does not speak to whether the July 19 letter was itself sufficient to trigger the limitations period. Strictly construed, it was.” *Id.* at 781 (citing *Migliaro v. Fidelity Nat’l Indem. Ins. Co.*, 880 F.3d 660, 667 (3d Cir. 2018)). The Court noted that both 42 U.S.C. § 4072 and Article VII(R) of the SFIP require that a policyholder file suit within one year after the date of mailing of notice of disallowance or partial disallowance of their claim. *Id.* at 782. “[N]ot even the temptations of a hard case will provide a basis for ordering recovery contrary to the terms of [a] *regulation*, for to do so would disregard the duty of all courts to observe the conditions defined by Congress for charging the public treasury.” *Id.* (quoting *Forman v. FEMA*, 138 F.3d 543, 545 (5th Cir. 1998)). The Court affirmed the judgment of the District Court, finding that the District Court correctly determined that the suit was untimely. *Id.*

Like *Cohen*, Plaintiff’s suit against American Bankers is untimely. American Bankers first issued the partial denial of Plaintiff’s claim on October 23, 2021. *See* Exhibit 1. The October 23, 2021 letter advised Plaintiff that American Bankers was denying coverage for prior unrepaired damages, debris and sand in the yard, and items located below the first elevated floor. *See* Exhibit 1. Additionally, the letter further explained that if Plaintiff wished “to take further action concerning this denial, the Policyholder Rights document attached to this letter explains your options...” *See* Exhibit 1. Specifically, Plaintiffs were advised they could file suit in the Federal District Court where the damage occurred within one (1) year of when “your insurer first denied all or part of your claim (42 U.S.C. §4072; 44 C.F.R. §62.22).” *See* Exhibit 1. After receiving Plaintiff’s supplemental proof of loss dated July 26, 2022, American Bankers issued another letter dated September 26, 2022, rejecting Plaintiff’s proof of loss and reiterating the basis for its partial

denial, specifically referring to its October 23, 2021 letter. *See* Exhibit 2. Plaintiff's filing of this lawsuit on September 25, 2023 occurred more than one (1) year after American Bankers first denied part of Plaintiff's claim on October 23, 2021. Consequently, Plaintiff's claims are time barred and subject to dismissal.

IV. CONCLUSION

American Bankers first denied part of Plaintiff's claim on October 23, 2021; consequently, Plaintiff had one (1) year from this date, or until October 23, 2022, to file suit against American Bankers in Federal District Court for alleged breach of the SFIP. Because Plaintiff did not file suit against American Bankers until September 25, 2023, nearly two (2) years after American Bankers' issuance of a partial denial, Plaintiff's suit is untimely. Therefore, American Bankers requests this to Court to dismiss Plaintiffs' claims against American Bankers fully and with prejudice.

Respectfully submitted,

**BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, PC**

BY: /s/ Tessa P. Vorhaben

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