

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-IA-00645-SCT

MARGARET AND DR. MAGRUDER S. CORBAN

APPELLANTS

VERSUS

UNITED SERVICES AUTOMOBILE ASSOCIATION
a/k/a USAA INSURANCE AGENCY

APPELLEE

INTERLOCUTORY APPEAL FROM THE CIRCUIT
COURT OF HARRISON COUNTY, MISSISSIPPI

APPELLANTS' REPLY BRIEF

(ORAL ARGUMENT REQUESTED)

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REQUEST FOR ORAL ARGUMENT

This case presents this Honorable Court with the opportunity to address an issue of utmost importance to all homeowners in this state. Specifically, the Court is called upon to fulfill its role as the ultimate authority on Mississippi law and public policy in the context of contracts of insurance that are essential to the welfare of our society. Thus, the import of this case goes far beyond the boundaries of Coastal counties, and the decision reached by this Court will impact all Mississippi homeowners.

Appellants request oral argument to assist this Honorable Court in its decision-making process. Such argument would further expose the positions of the parties and demonstrate the correct course of Mississippi law.

I. THE INSURANCE AFTERMATH OF HURRICANE KATRINA

The situation in which Dr. and Mrs. Corban find themselves is all too common on the Mississippi Gulf Coast. Almost four years after their home was destroyed by Hurricane Katrina, they are still underpaid by the insurance company they trusted to protect them during these difficult times. Their plight is shared by thousands of others whose lives were changed as a result of the loss of homes from Hurricane Katrina and the denial of insurance proceeds by the insurance industry. Moreover, if left uncorrected this tragic aftermath will be played out following each inevitable catastrophe occurring in the future.

Hurricane Katrina pummeled the homes on the Mississippi Gulf Coast, including the Corban home in Long Beach, for many hours on August 28 and 29, 2005. The winds of the storm of up to 150 mph were capable of and undisputedly did cause substantial damage. Hours after winds began to pound the property, storm surge added insult to injury and scattered about components of the home, outbuildings, and anything else on the property.

Advances in technology and improvements to meteorological forecasting saved lives as prudent homeowners, including the Corbans, evacuated the area. Accordingly, there were no witnesses to the destruction. There is no video documenting the loss as it occurred.

After the storm ended, the Corbans' home was found in a state of utter and virtually complete destruction. The separate garage and most of the other

substantial outbuildings on the property were completely gone, with only slabs remaining. A shell of the main home remained, although the wrap around porches, porte cochere, exterior walls, and many windows had been removed, exposing the interior of the home to the savage elements of the weather.

The Corbans' insurance policy covers risk of "direct, physical loss" subject to certain named exclusions, including loss caused by water damage. This type of "direct, physical loss" policy is also known as an "all risk" or "all perils" policy as to dwelling and outbuildings. It is undisputed that all damage to the Corban property constituted a risk of "direct, physical loss". Some of the loss could not have been caused by water, as it occurred above the level of inundation.¹ The precise cause of the bulk of the damage, however, is not objectively knowable. As Plaintiffs' expert engineer candidly admitted:

There is no absolutely precise way to divide the damages caused by wind or water. The analyses I performed in Section 3 above clearly showed that the first cause of the damages of the house and detached structures was due to the windstorm early on in the storm. The later storm waters then added to the damages.

(R. 748)²

¹USAA even denied payment for loss far above the waterline, including damage to the historic home's high ceilings, which the insurer claimed was caused by supposedly gargantuan waves atop the paltry three foot waterline, something the adjuster had never seen in any other claim. (R. 246)

²USAA grossly misrepresents the facts by claiming the Corbans' engineering expert attributed the carpet and floor damage to water. (USAA brief at p. 27 n. 4) Instead, the engineer clearly concluded that the exterior walls were destroyed before water arrived, exposing the interior, including the carpet and other flooring, to the wind and rain. (R. 743)

This is true in all homes substantially destroyed by the hurricane if water arrived on the property at some point, leading Judge Senter to conclude in an early Katrina trial that “[n]o evidence has been introduced from which any finder of fact could reasonably determine what part of the loss . . . is attributable to water as opposed to wind.” *Broussard v. State Farm Fire & Cas. Co.*, 2007 WL 113942, *3 (S.D. Miss.), *aff’d in part, rev’d in part*, 523 F.3d. 618 (5th Cir. 2008).

With covered losses of over \$1 million, the Corbans received only \$39,971.91 from their insurer of over 50 years. This payment of less than 4% of the loss constituted reimbursement for roof replacement, minor painting, and pressure washing the exterior of the home, most of which did not exist after the storm.³ USAA paid nothing for the loss of exterior walls, interior damage, or contents.⁴ As to the completely destroyed outbuildings, USAA paid only for repair to soffit and fascia despite the fact that there was nothing left of those buildings.

This catastrophic financial loss required the Corbans, and thousands of others like them, to seek redress through the courts. Unfortunately, Katrina litigation has devolved into what some describe as a “bewildering battle of the experts over the sequence of damage.”⁵ The insurers can never lose this debate,

³Although multiple windows on the first level were “busted out”, USAA’s adjuster concluded that damage was caused by flood, based solely on his conclusion that no upstairs windows were broken. (R. 250-251) The adjuster reached this conclusion despite being unaware that large portions of the house exterior removed by Hurricane Katrina were glass. (R. 258)

⁴A small amount was paid for “food spoilage” and payment was made under a special articles provision.

⁵*See*, Nationwide amicus brief at 6.

as the number of policyholders with emotional and financial resources sufficient to litigate “which came first, the chicken or the egg” pales in comparison to the number who must accept whatever is offered and get on with their lives.

As one commentator has described Katrina litigation:

[P]olicyholders whose homes and lives have been devastated, and insurers too, have engaged too long in a futile attempt to make sense out of a mishmash of conflicting and sometimes bizarre decisions. These questions should have been decided a long time ago. The expenditure of substantial time and money, and the consequent heartache, are inexcusable burdens to impose on the often homeless victims of a tragedy. Meanwhile, the problem of deciding how to decide the causation question in insurance cases drags on and on in the courts - - with different results at different times in different states. Insurers are able to push the envelope of ever-shifting, and sometimes nonsensical judgments governing concurrent causation in coverage cases. Insurers usually can afford to wait to see which way the judicial tide will turn. . . . It is time to find a better way to crack the concurrent causation conundrum that continues to vex insurance coverage disputes.

Joseph Lavitt, *“The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser’s Folly, and the Third Restatement of Torts: Cracking the Conundrum,”* 54 Loyola L. Rev. 1, p. 10 (2008).

This case will permit this Court to “crack the concurrent causation conundrum” and end the madness of Katrina litigation. The critical issue is whether “direct, physical loss” caused by Hurricane Katrina that cannot be convincingly and objectively determined to have been caused solely by water, also known as “indivisible damage”, must be paid under the homeowners’ policy.⁶ The

⁶The issue includes but is much more than who has the “burden of proof” at trial. Insurance claims should be paid without the need for litigation. Thus, a “bright line” is required relating to the insurer’s responsibility during the claims handling stage as well as at trial.

answer rests on whether Plaintiffs have the burden of proving which portions of the loss were caused by wind to the exclusion of water or whether Defendant must establish the “direct, physical loss” was caused solely by water to avoid coverage.

**II. THE INSURER MUST PAY FOR EACH PART OF THE LOSS
IT CANNOT PROVE IS EXCLUDED UNDER THE POLICY**

USAA’s brief acknowledges that under an all risk policy, such as the Corban policy, “an insurer has the burden to show that any particular peril falls within a policy exclusion.” (USAA brief at 39) While technically correct, it would be more accurate to say that “an insurer has the burden to show that any particular **[loss]** falls within a policy exclusion”, as the contract covers and excludes losses, not perils. This distinction is critical in the context of Hurricane Katrina claims, as the policy clearly requires USAA to establish not only that an excluded **peril** impacted the property but also what **loss** was caused by that peril.⁷

⁷Because USAA must prove not only an excluded peril but also the loss caused by that excluded peril, the mere acceptance of flood insurance proceeds does not constitute an admission that any particular part of the loss is excluded under the USAA policy. Otherwise, USAA could effectively shift its responsibility for paying for hurricane damage to the federal government as the decision to pay under the federal flood insurance policy was made by a USAA adjuster. (USAA brief at 8) See, Stephanie Grace, Editorial, *Flood Program Free-for-All - - Did Insurance Companies Take a Blank Check?* Times-Picayune, June 17, 2007, at B7 available on Westlaw at 2007 WL 11340468 (“Evidence is mounting that many adjusters who settle flood claims on the government’s behalf - - but actually work for the private companies that insure against wind damage - - have used their dual role to [increase the liability] of the government flood program while minimizing costs to their employers.”) At best, acceptance of flood benefits may be used as an offset so as to preclude double recovery, but is not admissible as a binding judicial admission or relevant as proof of what damage was caused by flood. USAA agrees this Court has the authority to decide whether acceptance of flood insurance proceeds in an admission. Because of the importance of this issue to a large number of Mississippi residents, the Court should exercise its discretion to decide this issue.

USAA, as drafter of the contract of insurance, was allowed to choose whatever burden of proof it desired. It could write a named perils policy and thus require the policyholder to establish coverage or it could write an all risk policy covering “direct, physical loss” and impose upon itself the burden of proving loss caused by an excluded peril.⁸ Once USAA drafted the policy, however, and once the homeowner purchased same, both parties became bound to honor the language of the contract unless contrary to public policy.

The pertinent contract provisions here provide coverage for “risk of direct, physical loss”. It is undisputed that ALL damage to the Corban home from Hurricane Katrina was a “risk of direct, physical loss” covered by the policy, unless excluded. It is also undisputed that unless USAA can prove that any particular part of the loss is validly excluded, all of it must be paid by USAA. The pertinent exclusion relied upon by USAA states:

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

...

c. Water Damage, meaning:

- (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

⁸Homeowners such as the Corbans essentially can only read the contracts available to them and choose the one they think provides them with the best coverage under the circumstances germane to them. Because it is a contract of adhesion, the policy must be construed strongly against the drafter. *J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998).

(R.E. 27, 40).⁹ The plain language of the exclusion provides that only loss caused by WATER DAMAGE is excluded. A grammatical analysis of the policy provision makes it more easily understood. When broken down, the provision simply provides:

We do not insure for loss caused directly or indirectly by [WATER DAMAGE]. Such [WATER DAMAGE] loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the [WATER DAMAGE] loss.

Or, as more eloquently dissected by the lower court:

Using the simple rules learned in middle school or high school English classes, the exclusion provides that it does not cover a loss caused by water damage. The second sentence refers to “[s]uch loss” being excluded even if in combination with or in any sequence to other causes. The term “[s]uch loss” can only refer to the loss caused by water damage mentioned in the first sentence of the exclusion. It is that loss and that loss only that is excluded by the plain language of the provision. The remainder of the second sentence goes on to elaborate on the exclusion by providing that the water damage is excluded no matter what other causes exist and whether the water damage occurs first, last, or simultaneously with some other cause. This simple, basic interpretation of the language used and sentence structure used bars coverage for water damage and **only** the water damage, whether occurring alone or in any order with another cause.

(R.E.17; emphasis in original).¹⁰

⁹Although USAA tries to distance itself from the arguments made by its amici, Nationwide, by suggesting that the interpretation of Nationwide’s ACC is not at issue here, in fact the USAA exclusion is indistinguishable from Nationwide’s provision. *Compare*, R E. 40 to *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 at 424-25 (5th Cir. 2007).

¹⁰The lower court ultimately abandoned her own “simple, basic interpretation of the language” in favor of federal court opinions that interpreted the clause as excluding all loss if water impacted the property.

USAA and its amici, aided by the flawed Fifth Circuit opinions in *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007), and *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007), seek to rewrite the policy to exclude not only water damage loss, but any other loss, including loss caused by wind, that occurs in sequence with water damage loss. This is not what the policy provides nor is it consistent with Mississippi law. USAA, its amici, and the Fifth Circuit Court of Appeals are incorrect in their construction of the policy provision. The lower court erred in binding itself to the incorrect interpretation. **All “direct, physical loss” other than that which can be proved by the insurer to have been caused by water is covered under the all risk policy and must be paid.**

While USAA pays lip service to the correct burden of proof standard, its brief demonstrates that the standard was not applied in adjusting Hurricane Katrina claims. For example, USAA boasts that it “paid for all damage to the Corbans’ property that it could identify as being caused solely by wind, regardless of whether that damage occurred before or after storm surge impacted the property.” (USAA brief at 3) The critical and repeated flaw made by USAA and other insurers, however, is that the contract is not a “named perils” policy covering wind. If it were, then it would be appropriate for USAA to pay only for that damage which could be identified as being caused solely by wind because the policyholder would have the burden of proving that the named peril, i.e., wind, caused the damage. Under the Hurricane Katrina all risk policies, however, insurers owe for all hurricane damage as it is undisputed that same constitutes a “risk of direct,

physical loss” under the policy. The only payments that can be validly withheld are those which the insurer can prove were caused by excluded water damage. In other words, **while USAA paid only for the loss “it could identify as being caused solely by wind,” it was actually obligated to pay for the entirety of the loss except that part it could identify as being caused solely by water.** While subtle, this critical distinction marks the difference between the Corbans receiving 4% of their policy proceeds or 100% of the face amount.

The error that deprived the Corbans of the benefit of the contract is vividly demonstrated by the facts of this case. Consider the substantial additional structures on the Corban property, including a large separate garage. Although the garage was reduced to a slab, thereby making it impossible to convincingly prove that the loss was excluded, USAA determined by conjecture that “the outbuildings on the property were destroyed by storm surge flooding, although they also likely experienced roof, fascia and soffit damage from wind before that destruction.” (USAA brief at 9) Accordingly, instead of paying for the full value of the garage and other destroyed outbuildings which were insured for \$135,000.00 (R.E. 29; 34 and R. 279), USAA paid only \$16,354.91 for presumed roofing, fascia, and soffit damage.¹¹ USAA assumed that none of the presumed roof damage deemed to be covered resulted in leaking into the interior. It also presumed that these buildings were intact other than this assumed minor damage

¹¹This amount is included in the \$39,971.91 paid for wind damage to all buildings.

when storm surge presumably destroyed them and their contents.¹² It would have been just as easy for USAA to presume the garage was completely destroyed by wind prior to the impact, if any, of storm surge. Neither the law nor the policy permits denials of claims under an “all risk” policy based on such unsupported presumptions.

The insurance industry’s position that only discernible or separate wind damage is covered is contrary to the policy of insurance which requires payment for all direct, physical loss unless it can be proved to be excluded. Indeed Judge Senter was correct in concluding in an early Katrina case that the insurer impermissibly “attempted to shift its burden of proof to the plaintiffs to establish the portion of their losses that were caused by wind.” *Broussard, supra*, at *3.

As correctly interpreted by Insurance Commissioner George Dale, the “all risk” policies in effect during Hurricane Katrina require payment for all damage that cannot be clearly and convincingly established to be caused by water, and any doubt regarding cause of loss must be resolved in favor of coverage. The MID bulletin issued by Commissioner Dale on September 7, 2005, provided:

¹²USAA’s presumptions were based in part on a conclusory, self-serving brief letter report from Haag Engineering, a firm whose insurer bias has been noted many times. *See, e.g., Taylor v. State Farm Fire & Cas. Co.*, 2008 WL 553173 at*2 (E.D. La. 2008) (Haag engineer required to change causation conclusion lest the company “would have his head on a platter.”); *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 957 (Tex.App. 1998) (unreasonable for insurer to rely on Haag report which was based on a test not performed and relied only on generalizations); *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444 (Tex. 1997) (evidence sufficient to conclude State Farm’s reliance on Haag report was unreasonable given proof, *inter alia*, that Haag performed over 90% of its work for insurance companies and that the only time a Haag engineer had found covered losses resulted in their not being assigned to similar claims).

In some situations, there is either very little or nothing left of the insured structure and it will be a fact issue whether the loss was caused by wind or water. In these situations, the insurance company must be able to clearly demonstrate the cause of the loss. I expect and believe that where there is any doubt, that doubt will be resolved in favor of finding coverage on behalf of the insured. In instances where the insurance company believes the damage was caused by water, I expect the insurance company to be able to prove to this office and the insured that the damage was caused by water and not by wind.

(R.E. 65)

Commissioner Dale's Bulletin correctly interprets Mississippi law as it relates to all risk insurance policies. All hurricane damage is covered unless the insurance company can prove which part was caused by an excluded peril. When an allocation cannot be conclusively determined, then all such damage must be paid. In the case *sub judice*, the lower court erred in following the erroneous Fifth Circuit decisions in *Leonard* and *Tuepker*. USAA must pay for all direct, physical loss that cannot be convincingly demonstrated to be caused by water.

III. INDIVISIBLE DAMAGE IS NOT EXCLUDED UNDER THE POLICY

After conceding its policy excludes only loss caused by water damage, USAA takes the incorrect step of arguing that "indivisible" damage¹³ is likewise excluded because the policy contains an anti-concurrent cause clause (ACC). USAA's argument that such "indivisible" damage is excluded cites only the Fifth Circuit's

¹³USAA defines "indivisible" damage as including damage "contributed to by water" or not caused "solely by wind." (USAA brief at 36)

erroneous *Erie*¹⁴-guess decision in *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007). (USAA brief at 36) Neither Mississippi law nor the policy in question support the Fifth Circuit's erroneous holding.

The policy provision relied upon for denial of over 95% of the Corban claim **does not exclude "indivisible" damage**. In fact, USAA agrees that the exclusion applies only to loss caused by water damage. USAA likewise admits that it has the burden of proving the loss that was caused by water damage. It therefore follows necessarily that any damage that is "indivisible," that is loss that cannot be determined to be clearly caused by wind or by water, must be paid.

USAA acknowledges this Court's decision in *Glens Falls Ins. Co. v. Linwood Elevator*, 130 So. 2d 262 (Miss. 1961), requires payment of indivisible damage so long as the covered cause of loss is the dominant efficient proximate cause of same in a policy with no ACC clause. *Id.* at 269-71. (USAA brief at 36)¹⁵ Nothing in USAA's ACC clause changes the result in *Glens Falls*. Indeed, Defendant admits:

The ACC clause in USAA'S homeowners policy does not affect the traditional burdens of proof that the parties will bear in this case.

Brief for Appellee at 38-39, under the heading "USAA Does Not Contend That the ACC Clause Relieves It of the Burden of Proving Excluded Damage."

¹⁴*Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

¹⁵USAA's protest that the ACC has not been the impediment to resolution of Katrina claims is belied by its assertion that the effect of the ACC is to change the result of *Glens Falls* so that indivisible damage is not covered. The amount of litigation attempting to construe the ACC speaks much more loudly than USAA's meek attempt to separate itself from the rest of the insurance industry.

Again, the ACC excludes only “[water damage loss] . . . regardless of any other cause or event contributing concurrently or in any sequence to the [water damage loss].” The ACC does not absolve USAA of the responsibility of establishing that any particular part of the loss is excluded. Indeed, Defendant admits that “USAA bears the burden by a preponderance of evidence to show applicability of its ACC clause to any particular item of damage.” (USAA brief at 39) Since only loss caused by water is excluded, and since USAA has the burden of proving which part of the loss was caused by water, “indivisible” loss, i.e., loss that the insurer cannot prove was caused solely by water, is covered under this all risk policy. In short, a holding that “indivisible” loss is excluded would impermissibly impose upon the policyholder the burden of proving that his loss was caused solely by wind under an all risk policy. *See, Broussard, supra*, at *3.

As noted by Professor Lavitt:

An insurer may not permissibly exclude from coverage under a policy of “all risk” insurance **indivisible loss** caused by a necessary and sufficient act, force, or event [AFE] not excluded by the policy of insurance. . . . Practically speaking, if the evidence is lacking to establish attribution definitively to a necessary and sufficient AFE excluded from coverage, then the simultaneity exception should prevail over doubt in these circumstances - - just as it does in cases concerning the liability of a tortfeasor.¹⁶ Thus, under an “all risk” policy, coverage will be established if a necessary and sufficient AFE not excluded from coverage is found to have factually caused indivisible harm in concert simultaneously with another AFE (or

¹⁶*Cf., D&W Jones, Inc. v. Collier*, 372 So. 2d 288, 294 (Miss. 1979) (“separate, concurrent and successive negligent acts of the appellees which combined to proximately produce the single, indivisible injury to appellant’s property (pollution of its ponds and contamination of its catfish) rendered appellees jointly and severally liable.”)

other AFEs) excluded from coverage. **In such instances, the insured can prove direct physical loss of the insured property and the insurer cannot meet its burden of proof that an exclusion applies.**

Lavitt, *supra*, at p. 15. (Emphasis added).

Had USAA wished to exclude “indivisible” loss then it clearly could have drafted an exclusion for indivisible or indeterminable loss, not a policy purporting to cover all “direct, physical loss” with limited exceptions. Having failed to do so, however, USAA may not now re-write the policy after the insured has suffered a catastrophic loss. See, *Atlantic Lines Ltd. v. American Motorist Ins. Co.*, 547 F.2d 11, 13 (2nd Cir. 1976) (all risk policy held to cover property that “mysteriously disappeared,” in the absence of language excluding “mysterious loss”). USAA owes for the totality of the “direct, physical loss” that cannot be proven to have been caused by water.

IV. “CONCURRENT” AND “SEQUENTIAL” LOSSES ARE COVERED IF NOT PROVEN TO BE WATER DAMAGE

While USAA mistakenly argues that the ACC excludes “indivisible” damage, amici Nationwide goes even further by maintaining it excludes wind damage that occurs “concurrently” or “in sequence with” water damage.¹⁷ However the ACC

¹⁷Indeed, the Nationwide brief best demonstrates how the ACC has been improperly used by insurers to deny Hurricane Katrina losses caused by covered events. In any scenario where non-witnessed storm surge contacted a structure, a question exists concerning whether the loss was caused by wind or by water. In a home like the Corbans’, for example, where walls and/or parts of walls are missing, it is impossible to say for certain whether the walls were destroyed by wind then further disfigured by water or whether the walls were undamaged when the surge arrived and then totally destroyed by excluded water. ACC clauses have been (mis)used to deny claims by avoidance of the insurer’s burden of proving that a particular loss was caused by an excluded peril (e.g., that the wall was undamaged when the water arrived).

clauses in both the USAA and Nationwide policies exclude only “water damage” loss. It is that “water damage loss” that is not covered even if the “water damage loss” occurs “concurrently” or “in sequence with” loss caused by other forces. In the context of a hurricane, the ACC **does not** exclude loss caused by wind even if acting in sequence with water.

The ACC applies only when a loss is caused by an excluded peril but coverage is sought by arguing the excluded peril was caused by a covered force. It has no application to different losses caused by different perils. In those circumstances, loss the insurer can prove was caused by an excluded peril is always excluded, even if a covered peril acted “concurrently” or in sequence with the excluded force. However, the remainder of the loss, i.e., that part that cannot be proved to have been caused by water, is always covered.

The *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067 (Miss. App. 2004), and *Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp.2d 907 (S.D. Miss. 1998), decisions relied upon by the insurers represent the use of an ACC in circumstances far afield from those under discussion. Each case involved interpretation of the following exclusion:

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from

natural or external forces, or occurs as a result of any combination of these:

...

- b. Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not.

Boteler, at 1068 -1069.

In *Rhoden, supra*, plaintiffs' home sustained a single "loss" consisting of structural damage "caused" by earth movement, an excluded peril. While it was undisputed that the loss would not have occurred "in the absence of" earth movement, plaintiffs sought recovery by arguing that the efficient proximate cause of the earth movement was the improper actions of the contractor. The federal district court found that since the loss "would not have occurred in the absence of" excluded earth movement, it was not covered regardless of whether the builder's action caused the earth movement.

Rhoden was relied upon by the Mississippi Court of Appeals in *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067 (Miss. App. 2004). There, too, a home was damaged by excluded "earth movement." The earth movement occurred because of a broken water pipe. Noting that "[t]he State Farm policy purchased by Boteler excluded all damages as a result of earth movement," the Mississippi Court of Appeals held the loss to be excluded. Again, the covered broken pipe did not result in a separate loss, it only made the earth move, which caused the loss.

The facts presented in both *Rhoden* and *Boteler* are vastly different than the facts of this case. The sequential, indirect causation on which those plaintiffs sought to rely was excluded under the insurance contracts. The policy excluded loss which would not have occurred in the absence of earth movement regardless of the **cause** of the earth movement. Neither *Boteler* nor *Rhoden*, however, presented issues relating to different **losses** occurring as a result of different causes as in Hurricane Katrina cases. In other words, neither case involved a loss caused by a covered risk followed by another loss caused by an excluded peril.

As the lower court explained in the case *sub judice*:

The *Boteler* opinion found that the language of that policy excluded damage caused from the shifting of the earth regardless of the cause of the shifting. *Id.* In other words, whether the shifting was caused by the leaking water pipe or by the clay under the home, the cause of the **damage** was the shifting of the earth, an excluded peril. This is different from the allegations made by the Corbans in this matter. They claim that the cause of the **damage** for which they seek to recover was the wind, which is a covered peril.

(R. E. 15) (emphasis in original)

The Hurricane Katrina damage to homes like the Corbans does not come from concurrent causes in the context of *Boteler*, *Rhoden*, and the ACC clauses.

As it has been explained:

The wind and the water do not constitute concurrent causes of the same damage or loss, not because they came at different times, but because each force acted separately to create unique damage. Under these circumstances, any physical damage that was due to wind was caused by wind as a distinct, direct physical force. When storm surge came later and either inundated or swept away homes, it also acted as a distinct, direct physical force that not only operated independently but caused independent damage. The fact that both

were products of the same larger phenomenon, a hurricane, is irrelevant and does not make them concurrent causes - - they did not cause the same damage and therefore they did not cause the same loss to the policyholder. Remember, a concurrent loss is, by whatever definition of that term that is used, one where distinct loss can be attributed to multiple causes. It is not one where multiple causes result in different, multiple losses, where each loss would be an issue of single causation only. The wind and the water were not concurrent merely because each came from Hurricane Katrina, any more so that damage to a home would be concurrent if a neighbor accidentally backed his truck into your home, then a few hours later accidentally burned it down merely because the acts were done by the same person. Suppose for a moment that the neighbor's burning of the house was not covered (although it would be). The separate physical damage from his backing up of the truck would not be a concurrent cause of the loss with the fire. Even though the house was entirely burned up by the later event, it does not change the character of the earlier event because provable loss is insured by a policy, not destruction of the house. The destruction is merely the degree of the loss, not the loss itself.

David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond*, New Appleman on Insurance: Current Critical Issues in Insurance Law, (Nov. 2007), at p. 65-66. (R.E. 164 - 165) Moreover, State Farm's in-house counsel Michael Bragg also explained the application of the ACC as being limited to excluded causes of loss by offering the following two hypotheticals:

- a. A home is improperly designed and constructed to withstand heavy winds common to its geographic location. If the home is subsequently destroyed by a windstorm, the loss is *paid* because the peril of wind is not excluded in the policy. The fact the improper design or construction of the home of (sic) that defective materials may also have been "causes" of the loss is immaterial to the determination for coverage; and

- b. A home is negligently constructed on a site extremely susceptible to mudslides without adequate structural precautions. If the home is subsequently destroyed by mudslide, the loss is *denied* because the peril of mudslide (as well as other forms of earth movement) is specifically excluded. As in the above example, that improper design of the home or defective materials may also have been “causes” of the loss is unimportant to the issue of property insurance coverage. Note, however, that these “causes” *are* very important factors if the homeowner attempts to recover for his loss directly from the contractor based on theories of negligence or warranty. Again, whether “causes” of a loss are significant depends greatly on the context of and reason for the inquiry.

Michael E. Bragg, “*Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*”, 20 Forum 385, at p. 7 of 11 (Spring 1985). The second scenario provided by Mr. Bragg is the *Rhoden* and *Boteler* scenarios.

In contrast, in Hurricane Katrina cases everyone knows wind caused some damage. Water possibly caused other damage to what was left when the water arrived. What is unknown is how much and precisely which damage was caused by which weather component. Were windows of the house broken by 150 mph winds resulting in massive destruction? Was the porch ripped off by hurricane winds, exposing the interior of the home and its contents to the rain waters resulting in their loss? How much of the exterior walls remained by the time the storm surge arrived? The answers to these questions are virtually unknowable, which is precisely why prudent homeowners purchase “all risk” policies - - to

avoid the type of legal wrangling so common in Hurricane Camille “named perils” cases. A “bright line” decision is required to prevent needless delay in the payment of catastrophe losses such as those suffered by the Corbans.

Plaintiffs are not attempting to create coverage where a non-excluded event causes an excluded event. Unless stricken as hopelessly ambiguous or contrary to public policy, the ACC operates to exclude loss which the carriers can prove was caused by water, even water caused by wind.¹⁸ However, if the metaphysical cause of any particular part of the loss cannot be determined, i.e., it is “indivisible” or “contributed to” by both wind and water components of the storm, it must be paid. *See, Lavitt, supra*, at p. 15 (“[a]n insurer may not permissibly exclude from coverage under a policy of “all risk” insurance indivisible loss caused by a necessary and sufficient act, force, or event not excluded by the policy of insurance.”) In short, the Corbans and other Gulf Coast residents are entitled to recover for all “direct, physical loss” that the insurer cannot prove was caused by an excluded peril.

¹⁸USAA engages in hair splitting in its contention that Plaintiffs’ counsel misrepresented Judge Senter’s opinions in *Dickinson v. Nationwide Mut. Fire Ins. Co.* The “reconsideration” opinion agrees wholeheartedly with our argument that “[t]he ACC provision does not purport to apply to losses caused separately by two forces (wind and water) acting sequentially but separately.” *Dickinson*, 2008 WL 1913957, *3 (S.D. Miss. 2008).

V. IN THE ALTERNATIVE, THE ACC IS AMBIGUOUS

Appellants' interpretation of the ACC clause, as set forth *supra*, is supported by the plain language of the policies and the overwhelming consensus of scholarly analysis.¹⁹ The differing constructions offered on behalf of USAA, Nationwide, State Farm and even court decisions, however, establish that the provision is capable of being interpreted in multiple ways. It is at least ambiguous.

The ambiguity of the ACC in the hurricane context is best demonstrated by the conflict among those who have filed briefs in this action. The dispute is much more than two lawyers arguing over how a contract should be interpreted. On file are vastly different interpretations of the same policy language by those who wrote the policies, including some of the largest insurance companies in the world. Amici Nationwide maintains that the ACC precludes coverage of all hurricane damage "where two or more perils 'in any sequence' cause a particular loss, and one of those perils is excluded." (Nationwide brief at 1) Nationwide's interpretation is boldly denounced by USAA, first in its original brief, (USAA brief at 26-27), and even more directly in its Response in Opposition to Motion of *Amici Curiae* Nationwide for Leave to Participate in Oral Argument. State Farm takes an even different tack, even though the ACC clauses in these different policies have been judicially recognized as substantially identical. *Tuepker, supra*, at 353.

¹⁹See, Lavitt, *supra*, and Rossmiller, *supra*.

There can be no doubt but that the Fifth Circuit Court of Appeals decisions exclude even wind damage if it occurred at a part of the home later impacted by water. USAA first maintains that its argument is consistent with application of the Fifth Circuit's decision in *Leonard*, despite its criticism of the decision as "less than clear" in its main brief. (USAA brief at 29) However, USAA then criticizes Nationwide as attempting "to extend the holding of *Leonard* to preclude coverage of damage caused by wind if storm surge later enters the same area of a structure." Nationwide's argument is hardly an extension since the *Leonard* decision expressly excludes damage caused by wind if storm surge inundates the same area that the rain damaged. *Leonard, supra*, at 431.

Even the lower court vacillated between differing constructions of the clause. USAA disingenuously argues that the lower court found the ACC to be "clear and unambiguous." (USAA brief at 5) The "clear and unambiguous construction" of Judge Dodson, however, was as argued herein by the Corbans - - namely that only loss caused by water damage is excluded. (R.E. 16-17). The Judge then set aside her "common sense" interpretation in favor of the Fifth Circuit opinions - - the only appellate guidance available - - knowing that the issue would ultimately be decided by this Honorable Court.

As acknowledged by USAA, a policy provision will be found to be ambiguous if (a) one of its terms is susceptible to multiple reasonable meanings; or (b) there is internal conflict between policy provisions that makes the meaning of the policy as a whole uncertain. *Mississippi Farm Bureau Mut. Ins. Co. v. Walters*, 908 So.

2d 765 (Miss. 2005). The multiple interpretations set forth in these proceedings establish the utter ambiguity of the policy provision. This Honorable Court has observed under similar circumstances:

To say this paragraph is free from doubt ignores the fact that intelligent lawyers reading it have come to opposite views. It is not clear to this Court. In the absence of the two parties who signed it informing us precisely what was meant, the most enlightened argument from here to the millennium would never remove the cloud cast by the words.

Frazier v. Northeast Miss. Shopping Center, Inc., 458 So.2d 1051, 1054 (Miss. 1984). Moreover, “this Court interprets and construes insurance policies liberally in favor of the insured, especially when interpreting exceptions and limitations.” *J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998). Where, as here, the policy is subject to more than one interpretation, this Court will apply a construction permitting recovery. *State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So. 2d 1371, 1372 (Miss. 1981). Given that the ACC provision fails the “clear and unmistakable” standard used by this Court to enforce an exclusionary clause,²⁰ it should be disregarded. USAA admits that in the absence of this provision, “an insured may recover for all damage as long as a covered peril

²⁰*United States Fidelity & Guaranty Co. v. Martin*, 998 So. 2d 956, at ¶13 (Miss. 2008). Despite insurer attempts to distinguish *Martin*, the case involved a policy provision virtually identical to the exclusion relied upon by USAA in denial of full payment. The USAA policy purported to “cover all risks of direct, physical loss”, including windstorm which was specifically named as covered. The exclusion and ACC then directly contradict that coverage by, as interpreted by USAA, excluding 95% of windstorm loss. (Nationwide says 100%). The exclusionary language concerning “such loss” caused “directly or indirectly” by water that contributes “concurrently or in any sequence” is hardly free from ambiguity, particularly in the context of hurricane losses.

was the efficient proximate cause of the loss.” (USAA brief at 13) Accordingly, all “direct, physical loss” to the Corban property must be paid by USAA.

VI. USAA’S INTERPRETATION WOULD RENDER THE POLICY PROVISION VOID AS CONTRARY TO PUBLIC POLICY

The interpretation of the ACC advocated herein comports with Mississippi law and its public policy while the above arguments establish that USAA, Nationwide and the Fifth Circuit Court of Appeals are incorrect in their interpretation. Mississippi public policy would not permit an “all perils” policy to exclude indivisible loss from the force of a hurricane merely because water **may** have contributed to the loss.

Mississippi insurance law has a long history of recognition that insurers should not be permitted to use their power and influence to extract premium dollars from Mississippi consumers who purchase a policy for protection only to subsequently learn in their time of need that such protection is illusory. An insurance policy must be more than a paper where “the big print gives it to you and the small print takes it away.” *State Farm Mut. Auto. Ins. Co. v. Nester*, 459 So. 2d 787, 793-95 (Miss. 1984). As this Honorable Court has noted:

The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous . . . and in their numerous conditions and stipulations furnishing what may be veritable traps for the unwary . . . [C]ourts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter *nor should they be slow to aid the confiding and innocent.* (Emphasis original)

Crawley v. American Public Life Ins. Co., 603 So. 2d 835, 841 (Miss. 1992), quoting *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1189 (Miss. 1990), while quoting, *Raulet v. Northwestern Nat'l Ins. Co. of Milwaukee*, 157 Cal. 213, 230, 107 P. 292, 298 (1910). As stated in this Honorable Court's own words:

What does an insurance company owe its policyholders and those it induces to become policyholders? First, simple, open honesty and fair dealing in taking reasonable steps to be certain that the insured is not being misled as to his coverage, but understands it; and second, an insurance company, just like everybody else, should pay its bills in full when they are due. The law of this state requires no more; neither will it tolerate less.

Crawley, supra.

Mississippi law has long held that damages caused by the winds of a hurricane are covered under a property insurance policy notwithstanding the contribution of other factors, so long as the wind was the proximate cause of the damage. See, *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217 (Miss. 1972); *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765 (Miss. 1971); *Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777 (Miss. 1971); *Firemen's Ins. Co. of Newark, N.J. v. Schulte*, 200 So. 2d 440 (Miss. 1967). The Mississippi legislature has declared "an adequate market for windstorm and hail insurance is necessary to the economic welfare of the State of Mississippi" and "adequate insurance upon property in the coast area is necessary." Miss. Code Ann. § 83-34-1, *legislative history*.²¹

²¹USAA argues that the MWUA policy contains an ACC clause. (USAA brief at 31) It plainly does not. In fact, the precise language of the water damage exclusion in the MWUA policy has been construed by this Court as allowing recovery for the full amount of the Hurricane Betsy loss despite the invasion of flood water. *Firemen's Ins. Co. of Newark, N.J. v. Schulte*, 200 So. 2d 440 (Miss. 1967).

Mississippi's long time insurance czar, George Dale, expressed our state's public policy as it related to payment of insurance proceeds for hurricane losses by the prompt issuance of a Mississippi Insurance Department bulletin to insurers requiring payment of claims unless clear and convincing evidence existed that a particular loss was excluded. In this regard, the bulletin stated:

In some situations, there is either very little or nothing left of the insured structure and it will be a fact issue whether the loss was caused by wind or water. In these situations, the insurance company must be able to clearly demonstrate the cause of the loss. I expect and believe that where there is any doubt, that doubt will be resolved in favor of finding coverage on behalf of the insured. In instances where the insurance company believes the damage was caused by water, I expect the insurance company to be able to prove to this office and the insured that the damage was caused by water and not by wind.

(R.E. 65) Commissioner Dale expounded on this public policy by announcing "if there is wind involved, at whatever stage of the claim, wind should be paid." (R. 1698).

More recently, the current Commissioner of Insurance reiterated that "[w]hen there are one or more perils involved, such as wind and water, and the water is excluded, it is incumbent upon the company to calculate the separate damage attributable to each peril and adjust the claim accordingly." Report of Special Target Investigation at 18. (R.E. 114) The Fifth Circuit Court of Appeals failed to consider this strong evidence that Mississippi public policy would reject its interpretation of the ACC as prohibiting coverage for "indivisible" loss.

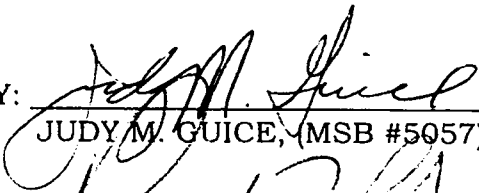
Any provision in an all risk policy that would permit the insurance company to deny, in whole or in part, coverage from damage resulting from hurricane winds merely because storm surge was a separate component of the storm would violate Mississippi public policy. If the interpretations of USAA or Nationwide were deemed to be correct, then the exclusion should be stricken and disregarded as violative of public policy thus resulting in payment of all hurricane loss.

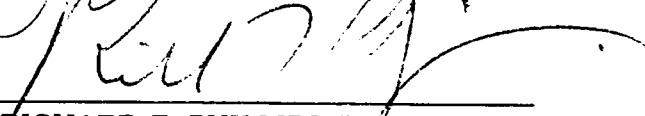
VIII. CONCLUSION


This Honorable Court should reverse the lower court ruling and issue a clear and comprehensive decision that will end the concurrent causation conundrum that has plagued Hurricane Katrina litigation and looms over homeowners nationwide. The Court should forcefully and unequivocally declare that all risk insurers owe for all “direct, physical loss” caused by a hurricane except that part, if any, they can convincingly prove was caused by water.

Respectfully submitted this the 30th day of March, 2009.

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CERTIFICATE OF FILING
APPELLANTS' REPLY BRIEF

Comes now, the undersigned attorney of record for the Appellants, Margaret and Dr. Magruder S. Corban, and certifies to this Honorable Court, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, that on this, the 30th day of March, 2009, she has delivered to the Clerk for filing in the above referenced cause, by mailing same via first class U.S. Mail, postage prepaid, the original and three (3) copies of the *Appellants' Reply Brief* to the Clerk. Upon this certification, pursuant to the aforementioned Rule, the Reply Brief of the Appellants is timely filed this day, March 30, 2009.

So Certified, this, the 30th day of March, 2009.

MARGARET AND DR. MAGRUDER S. CORBAN,

BY: _____

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CERTIFICATE OF SERVICE

I certify that I have this day forwarded by U.S. Mail, postage pre-paid, a true and correct copy of the foregoing Appellants' Reply Brief to the following:

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