

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2008-M-00645**

MARGARET AND DR. MAGRUDER S. CORBAN

APPELLANTS

v.

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

APPELLEE

On Interlocutory Appeal from the  
Circuit Court of Harrison County, Mississippi, First Judicial District

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**BRIEF OF *AMICUS CURIAE***  
**ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY**  
**IN SUPPORT OF THE BRIEF OF APPELLEE**  
**UNITED SERVICES AUTOMOBILE ASSOCIATION**

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Michael B. Wallace (MB #6909)  
WISE CARTER CHILD AND CARAWAY  
Post Office Box 651  
Jackson, MS 39205-0651  
401 East Capitol St., Suite 600  
Jackson, MS 39201  
Telephone: (601) 968-5535  
Facsimile: (601) 968-5519

William C. Griffin (MB #5021)  
CURRIE JOHNSON GRIFFIN GAINES  
& MYERS  
Post Office Box 750  
Jackson, MS 39205  
Telephone: (601) 969-1010  
Facsimile: (601) 969-5120

Reuben V. Anderson (MB #1587)  
Fred L. Banks, Jr. (MB #1733)  
Debra M. Brown (MB #10629)  
Rebecca Hawkins (MB #8786)  
PHELPS DUNBAR LLP  
111 East Capitol Street, Suite 600  
Jackson, MS 39201-2122  
Post Office Box 23066  
Jackson, MS 39225-3066  
Telephone: (601) 352-2300  
Facsimile: (601) 360-9777

*Attorneys for Amicus Curiae Allstate Property and Casualty Insurance Company*

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. All Parties interested in the case of *Corban v. United Services Automobile Ass'n*, No. A2401-06-404, pending in the Circuit Court of the First judicial District of Harrison County, Mississippi. Those parties are identified in the Certificate of Interest persons found on page i of the Combined Response and Brief of Untied Services Automobile Association Regarding Petition for Interlocutory Appeal;
2. Allstate Property and Casualty Insurance Company, defendant in *Hood v. Nationwide Mutual Insurance Company*, No. 61667, pending in the Chancery Court of Rankin County (hereinafter "*Hood*");
3. Michael B. Wallace and the Wise, Carter, Child & Caraway Law Firm, counsel for Allstate Property and Casualty Insurance Company in *Hood*;
4. Rueben V. Anderson, Fred L. Banks, Jr., Debra M. Brown, Rebecca Hawkins and the Phelps Dunbar Law Firm, counsel for Allstate Property and Casualty Insurance Company in *Hood*;
5. Robert H. King, Jr. Sonnenschein, Nath & Rosenthal LLP, counsel for Allstate Property and Casualty Insurance Company in *Hood*;
6. William Griffin and the Currie, Johnson, Griffin, Gaines & Myers Law Firm, counsel for Allstate Property and Casualty Insurance Company;
7. Nationwide Mutual Insurance Company, defendant in *Hood*;
8. Mickey Cowan, Laura Gibbes and Watkins Ludlam Winter & Stennis Law Firm, counsel for Nationwide Mutual Insurance Company in *Hood*;
9. Jim Hood, Attorney General of Mississippi, plaintiff in *Hood*;
10. William H. Liston, Jr., and Liston/Lancaster Law Firm, counsel for Jim Hood in *Hood*;
11. Crymes G. Pittman and Pittman, Germany, Roberts & Welsh, counsel for Jim Hood in *Hood*; and
12. Danny Earl Cupit and the Law Offices of Danny E. Cupit, attorney for Jim Hood in *Hood*.

SO CERTIFIED, this the 17<sup>th</sup> day of February, 2009.



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MICHAEL B. WALLACE,  
Attorney of Record for *Amicus Curiae* Allstate  
Property and Casualty Insurance Company

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**SUMMARY OF ARGUMENT  
IN SUPPORT OF THE POSITION OF THE RESPONDENT**

Much of Appellants' and Appellee's Briefs is devoted to discussing the so-called "anti-concurrent cause" ("ACC") clause found in the United Services Automobile Association ("USAA") homeowners policy. Amicus Allstate Property and Casualty Insurance Company ("Allstate") is the second largest provider of homeowners' insurance in Mississippi. Its policy, Allstate Exh. A,<sup>1</sup> does not contain an ACC clause.<sup>2</sup> But Allstate believes that there are two other issues raised by this appeal that are of importance to its policyholders, the citizens of Mississippi and the development of Mississippi law.

*First*, like the Circuit Court below, the courts of this state, including this Court, have historically enforced flood/water exclusions found in homeowners' policies, recognizing that such provisions excluded damage caused by rising water associated with hurricanes, sometimes referred to as tidal or storm surge. Flood/water exclusions have been a standard feature of Mississippi insurance law and practice for decades. Most recently, on December 22, 2008, the

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<sup>1</sup> The documents cited in this brief as "Allstate Exhibits" are all attached as appendices hereto and listed in the Table of Contents. All are documents of which this Court may take judicial notice pursuant to Miss.R.Evid. 201(b). Exhibit A was part of the earlier filed Allstate amicus regarding interlocutory appeal, and Exhibit B is the Rankin County Chancery Court's Opinion and Judgment contained in the *Hood* case. This Court may take judicial notice of matters within its own and other courts' files. *See, e.g., In re McMillan*, 642 So.2d 1336, 1338 (Miss. 1994); *Smith v. Dorsey*, 599 So.2d 529, 548 (Miss. 1992). The remaining Exhibits C through K, are all documents issued by governmental entities and/or contained within their records. This Court may take judicial notice of records of state agencies and other such entities. *See Thompson v. Jones*, 2008 WL 4879176, No. 2007-EC-01989-SCT, 19 (Miss. Nov. 13, 2008); *Ditto v. Hinds County, Mississippi*, 665 So.2d 878, 881 (Miss. 1995); *May v. State*, 240 Miss. 361, 365, 127 So.2d 423, 426 (1961); *Stone v. Robinson*, 219 Miss. 456, 461, 69 So.2d 206, 208 (1954).

<sup>2</sup> Amicus the Attorney General of Mississippi (the "AG") incorrectly suggested in the initial portion of his brief that Allstate's policies contained an ACC clause. (AG Brief, p. 5). In fact, the Allstate provision the AG refers to provides only that if a loss is caused concurrently by both covered and non-covered perils, there is no coverage if the non-covered peril is the predominant cause of the loss. *See* Allstate policy, p. 8 (Allstate Exh. A hereto). As the AG ultimately acknowledges, such an exclusion is not an ACC clause, and is consistent with Mississippi law. (AG Brief, p.10 fn. 4.) *See also* discussion *infra* at p. 6, fn. 4.

Chancery Court of Rankin County expressly upheld Allstate's flood/water exclusion, and dismissed the AG's lawsuit, which had alleged that Allstate's flood exclusion was contrary to Mississippi public policy, unconscionable, ambiguous, and violated the Mississippi Consumer Protection Act. See Opinion and Judgment on the Pleadings, *Jim Hood v. Mississippi Farm Bureau Insurance Company, et al.*, Chancery Court of Rankin County.<sup>3</sup> (Allstate Exh. B.) Recognizing that homeowners' insurance did not provide coverage for flood, the United States Congress enacted the National Flood Insurance Program ("NFIP") to provide affordable flood coverage. For many years, Gulf Coast residents have been reminded that flood was not covered under their homeowners' policies, and that if they wanted flood coverage, they should purchase a flood policy through the NFIP.

For over fifty years, Mississippi hurricane-related litigation has focused upon a simple issue: whether wind was the direct cause of the loss, or whether water, in the form of "tidal water," was the direct cause of loss. If wind was the direct cause of the loss, there was coverage; if flood/water was the direct cause, there was not. Appellants' argument (Appellants' Brief at p. 25, fn. 13) that, even in the absence of an ACC clause, "storm surge" is not a species of "flood" or "water" that is excluded by the flood/water exclusion is thus wholly at odds with Mississippi decisions in hurricane-related litigation and long-settled principles of Mississippi contract interpretation.

**Second**, Appellants' assertion that "because the efficient proximate cause of all Hurricane Katrina losses is wind, Katrina losses cannot be 'caused' by excluded water" is at odds with longstanding principles of Mississippi law. (Appellants' Brief, p. 11.) Not only does this

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<sup>3</sup> Obviously, and contrary to the AG's representation to this Court (AG Brief, p. 2), the Rankin County Chancery Court did not "hold" its ruling in abeyance pending the outcome of this appeal. The cross-motions for judgment on the pleadings had been taken under advisement by the court after both parties submitted proposed orders in August 2008.

argument ignore the plain language of the flood/water exclusion, which excludes flood/water “whether or not driven by wind,” but it is also at odds with Mississippi proximate causation law and this Court’s prior rulings in hurricane-related litigation.

As shown more fully below, the Circuit Court’s determination in this case that that damage caused by “storm surge” is excluded from coverage is correct and should be affirmed.

## ARGUMENT

### I. HISTORICAL BACKGROUND OF THE FLOOD/WATER EXCLUSION IN MISSISSIPPI.

#### A. **The Mississippi Insurance Department Has Either Mandated or Approved Homeowners’ Insurance Policies Containing Flood/Water Exclusions for Decades.**

A flood/water exclusion has been a mainstay of Mississippi homeowners’ insurance policies for decades. Prior to 1987, the Mississippi Insurance Department required that any insurance company selling homeowners insurance in the state use a state-mandated policy form developed by the Insurance Services Office, Inc. (“ISO”) that excluded “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....” (Allstate Exh. C.)

Effective January 1, 1988, insurance companies were directed to submit their own policy forms and rates to the Mississippi Department of Insurance for approval by the Commissioner. *See* Miss. Code Ann. §83-2-7(1) (1988). Since that time, Allstate has submitted policy forms to the Department of Insurance, which it has approved, containing an exclusion for “flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.” (*See, e.g.*, Allstate Exh. A.)

Since 1987, the legislatively-created Mississippi Windstorm Underwriting Association (“MWUA”) has also issued policies containing a water exclusion that excludes loss caused by “flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of

water, or spray from any of the foregoing, all whether driven by wind or not.” (USAA Record Excerpts at Tab 6; Record Vol. 3, page 337.)

Accordingly, a flood/water exclusion has been a fixture of Mississippi insurance law and practice for decades.

**B. Congress Created the National Flood Insurance Program Because It Recognized that the Private Sector Could Not Economically Provide Flood Coverage.**

The reason for such an exclusion in homeowners’ policies is not difficult to divine. Flood insurance poses unique problems related to risk assessment. The geographically limited market area and catastrophic nature of flood losses make setting a rate that reflects expected losses too expensive to market. As the House of Representatives reported when considering the Federal Flood Insurance Act of 1956:

*Private insurance companies do not write flood insurance on real property and only to a limited extent is flood loss coverage available on personal property. The private companies feel that the virtual certainty of the loss by flood, its catastrophic nature, and the problems of making this line of insurance self-supporting prevents them from prudently engaging in this field of insurance. Also insurance companies have indicated that they have not entered this line of insurance because a flood disaster of considerable magnitude during the early years of any flood-insurance operation could bankrupt a company before sufficient reserves were accumulated.<sup>4</sup>*

Congress recognized that “many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions.” 42 U.S.C.A. § 4001(b)(1). Accordingly, Congress enacted the National Flood Insurance Act which created the National Flood Insurance Program (“NFIP”).

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<sup>4</sup> HR. REP. 84-2746, P.L. 84-1016, FEDERAL FLOOD INSURANCE ACT OF 1956, 4473 (July 17, 1956)( emphasis added).

**C. Mississippians Have Been Repeatedly Advised By The Department of Insurance And By Gulf Coast Municipalities That Flood Damage Is Not Covered By Their Homeowners' Policies.**

The Mississippi Department of Insurance (“DOI”) has issued a variety of press releases reminding Mississippians that homeowners’ insurance policies do not cover flood damage, and encouraging Mississippians to consider whether they need to purchase flood insurance from the NFIP. *See, e.g.*, Allstate Exhs. D-G. The DOI has also published consumer guides that similarly recognize that standard homeowner’s policies do not cover flood, and urge Mississippians to consider purchasing flood insurance if they live in low-lying areas. *See, e.g.*, “Insurance Consumer’s Hurricane Checklist,” (Allstate Exh. H), and the “Homeowners Insurance Consumers Guide” (Allstate Exh. I.)

Various municipalities along the Gulf Coast routinely issue publications in advance of the hurricane season reminding Gulf Coast residents that homeowner’s policies do not cover flood damage. For example, in June 2005, three months prior to Hurricane Katrina, the City of Biloxi issued a “Storm & Flood Preparedness” brochure that stated:

If you don’t have flood insurance, talk to your insurance agent immediately. Homeowners’ insurance policies do not cover damages caused by flooding. However, because the City of Biloxi participates in the National Flood Insurance Program, you can purchase a separate flood insurance policy that will cover the structure and contents of your home. (Allstate Exh. J.)

The City of Biloxi sent similar information to its citizens in a June 2004 publication entitled “Storm & Flood Preparedness.” (Allstate Exh. K.)

