

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

ON INTERLOCUTORY APPEAL FROM
THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF FOR APPELLEE
UNITED SERVICES AUTOMOBILE ASSOCIATION

ORAL ARGUMENT REQUESTED

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APPELLEE

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 may evaluate possible disqualification or recusal.

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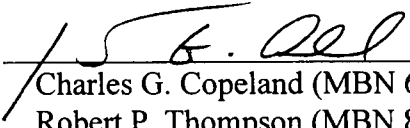
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STATEMENT OF ISSUES

1. Did the trial court correctly rule that the anti-concurrent causation (“ACC”) clause in USAA’s homeowners insurance policy is clear and unambiguous?
2. Did the trial court correctly hold that the ACC clause is consistent with Mississippi public policy, or has Mississippi law somehow changed to require use of an efficient proximate cause rule to determine covered damage?
3. Did the trial court correctly interpret the ACC clause, holding that it validly limits homeowners insurance coverage to damage caused solely by wind?
4. Did the trial court correctly hold that the USAA homeowners insurance policy validly excludes coverage of water damage caused by storm surge?
5. Did the trial court correctly hold that the USAA homeowners policy is not required by Mississippi law to cover storm surge damage simply because the efficient proximate cause of a hurricane is wind?
6. Does the trial court’s ruling cause some impermissible shift of a burden of proof to homeowners that they would not otherwise bear?
7. Did the trial court correctly rule that a property owner’s flood insurance claim and acceptance of flood insurance benefits is an admission that some flood damage occurred?
8. Did the trial court correctly hold that evidence of a homeowner’s acceptance of flood insurance benefits is not precluded at trial by the collateral source rule, since flood insurance covers distinct and different damage than homeowners insurance and does not offset the coverage limits of the homeowners insurance policy?

REQUEST FOR ORAL ARGUMENT

This interlocutory appeal presents issues important to administration of numerous USAA

homeowners insurance claims in this state following Hurricane Katrina. It also presents some issues that have not previously been addressed by this Court. USAA adjusted and paid homeowners insurance claims following Katrina in accord with its approved homeowners policy provisions which provide coverage for damage caused solely by wind. However, the Corbans as Plaintiffs/Appellants seek to invalidate certain provisions of their USAA homeowners policy so as to require that it provide coverage for hurricane damage caused or contributed to by storm surge flooding – i.e., separate damage intended to be covered by flood insurance policies issued through the National Flood Insurance program. USAA respectfully submits that oral argument would be of assistance to the Court in its consideration of these issues.

INTRODUCTION

Without citation to any record support, the Corbans wrongly claim that ACC clauses have been the largest impediment to resolution of Katrina claims. This is simply not true, at least as to homeowners insurance claims advanced by USAA insureds.

The Corbans and their supporting amici have set up a straw man to knock down. They falsely suggest that USAA uses the ACC clause in its homeowners insurance policy to exclude coverage for damage caused solely by wind during a hurricane, simply because a property is later impacted by storm surge flooding. This false suggestion is made in an attempt to fulfill the Plaintiffs' ultimate goal – the goal of achieving coverage of flood damage under homeowners insurance policies. This Court should reject that goal. The Corbans were aware that their homeowners policy did not cover flood damage. That is why they bought a separate NFIP flood insurance policy. They made a claim under that policy after Katrina and received their full flood insurance policy limits of \$350,000.

The truth is that USAA does *not* suggest its ACC clause operates to exclude hurricane

damage caused solely by wind, just because storm surge flooding later impacts a property. Whether other insurers (or their counsel) who are not parties to this matter have ever advanced such a contention based on language in non-USAA policies is of absolutely no relevance. This case is not about the policy language, contentions, or claims adjusting practices of other insurance companies, for which USAA is not responsible. The Court should disregard the attempts by the Corbans' counsel and their amici to use this case to litigate against ACC clause interpretations allegedly advanced by other insurers and claims adjusting practices allegedly used by other insurers. Affirmation of the trial court's ruling will, in fact, preclude the specter of wholesale claims denial that the Corbans conjure.

USAA's homeowners policy does, in fact, cover hurricane damage caused solely by wind, even if storm surge flooding later impacts a property and causes additional damage or destruction. Only damage caused or contributed to by storm surge flooding is excluded. This has consistently been USAA's position and reflects the way USAA adjusted its claims. Plaintiffs engage in misrepresentation when they suggest otherwise.

The Corbans' own homeowners insurance claim demonstrates that USAA does not take the ACC clause positions about which the Corbans complain in their brief. USAA 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. The Corbans were paid for wind damage to the roofs, fascia and soffits of the house and outbuildings; damage to refrigerated products when electricity went out; and additional living expenses, all totaling \$58,827.29. (Record Volume 14 at 1953.) These amounts based on wind damage were paid, despite that the property was very obviously impacted and severely damaged by storm surge flooding, for which the Corbans claimed and were paid their flood insurance policy limits of \$350,000. (RV1 at 81, 89; RV14 at

1953.) The provisions of the Corbans' USAA homeowners policy validly exclude coverage for such water damage caused or contributed to by storm surge flooding. (RV2 at 151.)

There is nothing about the ACC clause or water damage exclusion in USAA's homeowners policy that is unclear, unusual, or contrary to public policy. The trial court correctly found the policy provisions to be clear, valid, and enforceable. Those rulings should be affirmed.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

Dr. Magruder Corban and Margaret Corban filed a Complaint against United Services Automobile Association ("USAA") on October 5, 2006. The Corbans alleged that, following Hurricane Katrina, USAA breached the terms of their homeowners insurance policy covering property located at 822 East Beach Boulevard in Long Beach. (RV1 at 11-27.) USAA answered the suit on November 14, 2006, denying that it breached the Corbans' homeowners insurance contract. (RV1 at 30-39.) USAA asserted as an affirmative defense that the damages the Corbans seek in this case are excluded from coverage under the homeowners policy water damage exclusion, including its anti-concurrent causation ("ACC") clause. (RV1 at 35.)

The case was assigned to Judge Lisa P. Dodson, proceeded through discovery, and was set for trial on March 3, 2008. (RV1 at 46.) The parties filed cross-motions for summary judgment regarding the validity of the water damage exclusion and ACC clause contained in the USAA homeowners policy issued to the Corbans. (RV1 at 57-71; RV2 at 284-86; RV5 at 696-724; RV9 at 1241-56.) The parties also filed cross-motions concerning the effect of the Corbans' acceptance of flood insurance benefits under a separate NFIP flood insurance policy for damage caused by storm surge. (RV2 at 287-95; RV4 at 478-81; RV5 at 671-88; RV9 at 1257-67; RV9-10 at 1318-64.) Oral argument was held on those motions on February 22, 2008. (RV11-12 at 1506-1691.)