

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARGARET AND DR. MAGRUDER S. CORBAN

PETITIONERS

VERSUS

NO. 2008-M-645

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

DEFENDANT

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS
IN SUPPORT OF THE POSITION OF PETITIONERS

ON INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF HARRISON
COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT
CIVIL ACTION NO. A2401-06-404

WILLIAM F. MERLIN, JR., (MSB# 102390)
MARY E. KESTENBAUM,
MERLIN LAW GROUP, P.A.
777 SOUTH HARBOUR ISLAND BLVD.
SUITE 950
TAMPA, FLORIDA 33602
TEL: (813) 229-1000
FAX: (813) 229-3692

AMY BACH
UNITED POLICYHOLDERS
222 COLUMBUS AVENUE, STE. 412
SAN FRANCISCO, CA 94133
TEL: (415) 393-9990

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii - iv

ARGUMENT1-14

CONCLUSION.....14

CERTIFICATE OF SERVICE.....14, 15, 16

APPENDIX

“A” *Roby Harrington, Multiple Peril Packages*, 107-108 (Insurance World 1957)

“B” Fema, <http://www.fema.gov/pdf/nfip/dp126.pdf>

TABLE OF AUTHORITIES

<i>Boteler v. State Farm Cas. Ins. Co.</i> , 876 So.2d 1067 (Miss. Ct. App. 2004).....	2
<i>Broussard v. State Farm Fire & Cas Co.</i> , 2008 U.S. App. LEXIS 7419 (5th Cir. Apr. 7, 2008).....	7, 8
<i>Dickinson v. Nationwide Mut. Fire Ins. Co.</i> , 2008 U.S. Dist. LEXIS 31153, (S.D. Miss. Apr. 4, 2008).....	12
<i>Dickinson v. Nationwide Mut. Fire Ins. Co.</i> , 2008 U.S. Dist. LEXIS 34354 (April 25, 2008).....	12, 13
<i>Leonard v. Nationwide Mut. Ins. Co.</i> , 438 F.Supp. 2d 684 (S.D. Miss. 2006).....	6, 7, 10, 11
<i>Leonard v. Nationwide Mut. Ins. Co.</i> , 499 F.3d 419 (5th Cir. 2007).....	2, 6, 10
<i>Lunday v. Lititz Mut. Ins. Co.</i> , 276 So. 2d 696 (Miss. 1973).....	6
<i>Miss. Farm Bureau Mut. Ins. Co. v. Jones</i> , 743 So. 2d 1203 (Miss. 2000).....	13
<i>State Farm Mut. Auto. Ins. Co. v. Scitzs</i> , 394 So. 2d 1371, 1372-73 (Miss. 1981).....	13
<i>Tuepker v. State Farm Fire & Cas. Co.</i> , 507 F.3d 346 (5th Cir. 2007).....	2, 11

OTHER AUTHORITIES

Roger C. Henderson, <i>The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute</i> , 26 U. Mich. J.L. Reform 1, 10 (1992).....	2
Doris Hoopes, <i>The Claims Environment</i> § 2.10 (Insurance Institute of America 2d ed. 2000).....	6
Peter M. Lencsis, <i>Insurance Regulation in the United States, an Overview for Business and Government</i> viii (Quorum Books 1997).....	3
James J. Lorimar, <i>The Legal Environment of Insurance</i> 179, 180 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993).....	2, 3

Donna J. Popow, Property Loss Adjusting § 3.30 (American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America 3d ed. 2003).....6

David Rossmiller, *Katrina in the Fifth Dimension: Hurricane Katrina cases in the Fifth Circuit Court of Appeals*, New Appelman on Insurance: Current Critical Issues in Insurance Law, Sept. 2008, at 71, 100.....8, 13

Jeffrey Stempel, §1.01 Law of Insurance Contract Disputes (Aspen 2006)..... 1, 3

K. Wollner, How to Draft and Interpret Insurance Policies xiv (International Risk Management Institute 2007).....5

Mississippi Insurance Department,
<http://www.mid.state.ms.us/katrina/claimsfigures.htm>.....9

Report of the Special Target Examination of State Farm Fire and Casualty Company, Mississippi Department of Insurance, available at <http://www.mid.state.ms.us/pdf/reportspectargexam2.pdf>.....9

ARGUMENT IN SUPPORT OF THE POSITION OF THE PETITIONERS

Broad Decisional Law is Required to Address the Most Important Insurance Controversy to Arise in Mississippi

This appeal appears to be the first opportunity for this Court to provide decisional law regarding significant legal issues of great interest to all policyholders, governmental, commercial and individuals, that are embroiled with their insurers over Mississippi law following Hurricane Katrina. A broad decision by the highest court in Mississippi at this time is extraordinarily important because it will stop insurers, policyholders, and judges from “guessing” what rules of law are to be applied to the largest insurance disaster to occur in Mississippi.

Historically, insurance was first developed as a product to protect business interests in commerce through spreading the risk of known perils and preventing businesses from going into bankruptcy. The product itself was more recently developed for sale to individuals, as those individuals gained more affluence and needed the protection of their assets. *See, Jeffrey Stempel, §1.01 Law of Insurance Contract Disputes (Aspen 2006).*

As explained in a scholarly discussion on insurance law:

In a free enterprise system, economic development steadily increases the number of situations in which individuals can suffer “loss”. At the same time, economic development enhances the ability to avoid the prospect of “loss”. In other words, in a relatively affluent society, there is much more to lose in the way of property and other economic interests as the human condition improves. In such a society, however, individuals are more likely to have the requisite discretionary income to transfer and to spread the attendant risks of loss. Disruptive losses to society, as well as to the individual, are obviated or minimized by private agreements among similarly situated people. In this way, the insurance industry plays a very important institutional role by providing a level of predictability requisite for the planning and execution that leads to further development. Without effective planning and execution, a society cannot progress.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. Mich. J.L. Reform 1, 10 (1992).

Recent appellate opinions that have addressed Mississippi law in the context of the wind versus water controversy have been cases decided by the federal appellate bench, who have “Erie-guessed” how Mississippi law should apply to these cases. See *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007); *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007). Unfortunately, the Fifth Circuit would not defer to this Court to provide a state law perspective on the matter. *Tuepker* at 357, fn. 12 (refusing to certify the substantive legal questions to this Court). In doing so, this Court was not afforded the opportunity to address issues of great importance in Mississippi. Respectfully, the instant matter provides this Court the ability to correct certain overstatements of the Fifth Circuit, and to articulate how Mississippi courts and the parties to the insurance contracts must address these losses.¹ An appropriate analysis by this Court will assist those Mississippi policyholders whose claims have not yet been resolved, and will lay a foundation for future claims that will inevitably arise.

The Business of Insurance

The field of insurance is different from any other business involving commercial contracts, based on the high degree of interaction with a potentially vulnerable portion of the consuming public. As explained in an insurance industry treatise, *The Legal Environment of Insurance*, in its chapters on Insurance Contract Law:

Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations....

¹ A Mississippi court is not bound by any decision of the Fifth Circuit Court of Appeals in interpreting Mississippi law. See, e.g., *Boteler v. State Farm Cas. Ins. Co.*, 876 So.2d 1067 (Miss. Ct. App. 2004).

Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a business affected with a public interest, as reflected in legislative and judicial decisions.

State laws restrict contractual rights for insurers in the public interest....

James J. Lorimar, *The Legal Environment of Insurance* 179, 180 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993).

The insurance industry is highly regulated, in part, because of the public importance of insurance in today's modern society. From one industry expert's perspective:

Because the essence of the insurance contract is a promise to provide benefits in the future, perhaps years after the premiums are paid, the essence of insurance regulation is the enforcement of that promise in real, practical terms by making certain that insurers have adequate, liquid funds to pay claims, whether days or decades after the corresponding premiums have been paid. In addition to solvency, insurance regulation is largely devoted to making certain that all legitimate needs for insurance are met, and to promoting fairness and equity on the part of insurers in their dealings with policyholders and claimants, with regard to the content of policies, premium classifications and rates, and marketing and claim practices.

Peter M. Lencsis, *Insurance Regulation in the United States, an Overview for Business and Government* viii (Quorum Books 1997).

Because of this unique nature of insurance, jurists, regulators and legislators have promulgated a specialized field of law with numerous safeguards, rules, statutes and regulations that all must follow. The current insurance system of regulation and state common law rules benefit insurers, policyholders, and the general public. J. Stempel at §1.01. Accordingly, the public policy arguments and longstanding common law rules cited by the Petitioners are extremely critical because insurance companies conducting business in the various states know that the products they are selling are subject to and involved with the public trust.

The “All-Risk” Insurance Product

The policy at issue insures against: “risk of direct, physical loss to property described in Coverages A and B;...” When such insuring language is at issue, the policy is considered an “all risk” policy, such that the policy provides coverage for a fortuitous loss unless a specific exclusion to coverage is found to apply.

The insurance industry created “all risk” commercial and individual policies in the twentieth century to provide broad coverage as a result of the needs and wants of policyholders. This was an advancement over the previous “named peril” products that the insurance industry had previously sold. The obvious benefit the insurance industry sold to policyholders was that, in the absence of a clear and specific cause of loss found to be excluded, policyholders could obtain the peace of mind that their property risks would be covered under a broad policy. An article published at the time this form of insurance was first developed and marketed is significant to a considered analysis of these matters:

Prior to the passage of the multiple-line laws, the operation of most insurance companies were limited by their charters to selected fields of underwriting. The natural result was a narrowed self-interest which caused each company to push its particular specialization with the buying public... Some of the more conservative companies of the past, realizing that they are now at a competitive disadvantage, are currently spreading their wings and offering broadened underwriting facilities in self-defense.

...During the 20’s, the companies issuing the so-called “all risk” contract on real and personal property were relatively few; this encouraged Lloyd’s, unhampered by state controls, to enter the field and write a substantial amount of business.

...The Supreme Court’s 1944 decision against the Southeastern Underwriters Association ... brought about the passage of multiple-line laws in many states, thus clearing the legal way for full underwriting powers to insurance companies for the insuring of corporate properties.

...The package contract eliminates the dangerous guess-work by an insurance-buyer, eliminates piecemeal covers and includes automatically under practically

all risk conditions all real and personal property values... **[T]he buyer obtains full automatic coverage whether or not he is aware that an exposure exists. Only specific exclusions can alter the situation.**

... These contracts provide all-risk coverage to property with few of the old traditional exclusions. The exclusion most often used is the unusual exposure of flood, in which case a definite flood limit is inserted in the contract. You can see from the above that the buyer can collect practically all direct physical loss regardless of the cause of the loss.

... The further advantage of economy must not be overlooked. The concentration and the elimination of the burdensome handling and administration expenses accomplish a realistic reduction in overhead to the buyer, giving him the ability to pool a large segment of his insurance premium and to create his own purchasing power for the gaining of maximum consideration from the underwriters.

... This single multiple line policy greatly simplifies property insurance for the insured. It covers all risks except for those specifically enumerated in the policy. Not only does it simplify the insurance process, but it also can give more complete coverage.

Roby Harrington, *Multiple Peril Packages*, 107-108(Insurance World 1957)(emphasis added) attached as Appendix A.

The insurance industry, for valid competitive and economic reasons, sells the instant form policy at *the point of sale* knowing that it is supposed to broadly afford coverage and very narrowly limit exclusions. It does not take a rocket scientist to figure out that at *the point of performance*, the insurer could have significant economic reasons to argue out of the broad protections its “all risk” product provides.

While knowledge about contract terms is valuable in any transaction, several characteristics of insurance underscore the importance of policy wording. Insurance companies are usually in the enviable position of having to keep their promises last. By the time a loss occurs, the policyholder has already paid the premium and otherwise fulfilled its contractual obligations. There is no second chance to insure a known loss.

K. Wollner, *How to Draft and Interpret Insurance Policies* xiv (International Risk Management Institute 2007).

The Insurer's Burden to Prove Specific Exclusions with Non-Speculative Evidence

It is universally held that when such “all risk” insuring language is at issue, the policyholder bears the minimal burden to establish that a “direct physical loss” was sustained and the dollar amount of the loss. Here, where an insured demonstrates that property was damaged by a catastrophic windstorm event, the requirement of a “direct physical loss” is met. The policyholder then only needs to prove the amount of the loss, subject to policy limits. Under this Court’s prior allocation of the burden of proof, it is extremely significant that the insurer then has the burden of proof to establish what portion of the “direct physical loss” was caused by a specifically excluded event or cause. *See, e.g., Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696 (Miss. 1973).

Indeed, informative treatises used in the insurance adjusting industry identify the coverage afforded under this type of policy, as well as the burdens of proof. *See, e.g.,* Donna J. Popow, *Property Loss Adjusting* § 3.30 (American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America 3d ed. 2003) (“Coverage is provided for direct physical loss to property unless the loss is caused by a peril specifically excluded by the policy or the policy specifically limits the amount of coverage”). Doris Hoopes, *The Claims Environment* § 2.10 (Insurance Institute of America 2d ed. 2000) (“Any loss caused by a peril that is not listed among the exceptions (such as fire) is covered”).

Significantly, a policyholder is not required to disprove excluded causes of loss, nor is the policyholder required to prove that damage to the property is covered. As explained by the District Court judge in *Leonard v. Nationwide Mut. Ins. Co.*, 438 F.Supp. 2d 684, 695 (S.D. Miss. Aug. 14, 2006), affirmed on other grounds, 499 F. 3d 419 (5th Cir. 2007):

The [policyholders] have the burden of proving that the insured property was damaged or destroyed by a cause within the insuring language of the policy during

the time the policy was in force. For the structure, this requires the [policyholders] to prove that there was a direct accidental physical loss to the property.

The Fifth Circuit, in its most recent of the three Katrina decision, recognized the allocation of the legal burden of proof to an insurer/defendant to prove an exclusion as an affirmative defense. *Broussard v. State Farm Fire & Cas. Co.*, 523 F. 3d 618 (5th Cir. 2008).

When considering a policyholder's personal property/contents claim, that portion of the policy insures for "direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in Section 1 – Exclusions." This requirement was also recognized by the District Court Judge in *Leonard* when he stated: "For their contents, this requires the [policyholder] to prove that there was a direct physical loss caused by one of the perils enumerated in the policy". 438 F.Supp. 2d at 695. Significantly, one of the "perils" enumerated in the list is "windstorm or hail". In a loss stemming from Hurricane Katrina, it is without question that there has been "direct physical loss" caused by a "windstorm". And it is also true that a windstorm, such as Hurricane Katrina, contains components of both wind and flood. Thus, with a Katrina claim, the insurer should still have the burden of proving, through non-speculative evidence, that personal property damage was caused by a specific exclusion.

Unfortunately, the Fifth Circuit's recent *Broussard* decision contained some language that suggests in a personal property claim the policyholder must separate wind from water, by stating in one passage: "Likewise, a stipulation that the [policyholders'] personal property was destroyed by Hurricane Katrina is insufficient to establish that it was destroyed by a windstorm, since Hurricane Katrina unleashed both wind and water forces". 523 F. 3d 618. Respectfully, this statement confuses the burden and places an onerous requirement upon the policyholder that should not exist under Mississippi law, because it was never intended in the product. This Court now possesses the ability to rectify the statements of the Fifth Circuit in this case, and clarify that

the burden to prove water damage falls solely upon on the insurer when a “windstorm”, such as Hurricane Katrina, causes a loss.

Amicus respectfully suggests that this Court affirm the Southern District Court’s opinion in *Broussard* regarding the burdens of proof to be followed by jurists and all involved in adjusting “all risk” scenarios. One commentator has recently noted that this issue is the “real heart of the matter in Katrina litigation.” David Rossmiller, *Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals*, New Appelman on Insurance: Current Critical Issues in Insurance Law, Sept. 2008, at 71, 100.

Broussard is different than the other major Fifth Circuit Katrina cases. Its primary issue is not the validity of a flood exclusion or anti-concurrent cause language, but rather who has to prove what – the allocation of the burden of proof of damages. This as I’ve mentioned, is what I believe is the real heart of the dispute in Katrina litigation.

The absence of concurrent or sequential forces in Katrina makes the initial causation analysis simpler, but the issue of which forces were at work and whether they caused the same loss is only the beginning of sorting out the damage. Once it is determined that single forces each caused damages – presuming at least one force is covered and one is uncovered, if all the forces are covered or all uncovered, the analysis is simple, pay or don’t pay – the next step is to try to allocate the damage between them. Not surprisingly, this was the flash point for most Katrina lawsuits in Mississippi, the center of the most intense and contentious Katrina litigation.

Id.

The “all-risk” product sold by the insurance industry only works if the burden to prove exclusions is placed upon the insurance company. Otherwise, policyholders are unfairly “duped” at the time of performance because they are essentially forced to prove what the insurer assumed all along. This Court needs to address this rule of law because, similar to the overbroad arguments made regarding the Anti-Concurrent Causation Clause, insurers are having their counsel attempt to argue out of the bargain after the fact. The rule should be that the insurance

