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

MARGARET AND DR. MAGRUDER S. CORBAN — APPELLANTS

VS.

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

APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, *EX REL.* THE STATE OF MISSISSIPPI, AS AMICUS CURIAE

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STATEMENT OF THE CASE

Jim Hood, Attorney General of the State of Mississippi files this Brief of Amicus Curiae on behalf of the State of Mississippi pursuant to M.R.A.P. 29(a). The State has an interest in the outcome of this matter based upon the State's duties to its citizens to secure an honest marketplace, promote proper business practices, protect Mississippi consumers, and advance the economic well-being of its residents. Due to the magnitude and wide-reaching effect of the issues presented in this case, the State is compelled to participate in this cause to protect the public rights.

On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast, causing unprecedented and widespread damage and destruction. In the aftermath of Katrina and in response to the thousands of insurance claims filed by devastated Gulf Coast property owners, insurance companies that had provided property and casualty insurance policies to residents and/or property owners of the Mississippi Gulf Coast asserted an interpretation of their property and casualty policies which excluded any liability for damage loss caused in whole or in part by storm surge. As a result, on September 15, 2005, the State filed suit in the Chancery Court of Hinds County, Mississippi, against defendant insurance companies[1] doing business in Mississippi, seeking to declare void and unenforceable those provisions contained in the defendants' insurance policies seeking to exclude from coverage property loss and damage brought about by Hurricane Katrina. The intended goal of this litigation was to resolve these critical state law issues of insurance coverage in an expedient and judicially economic manner.

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[1]Defendants included Allstate Property and Casualty Insurance Company ("Allstate"), Nationwide Mutual Insurance Company ("Nationwide"), State Farm Fire and Casualty Company ("State Farm"), Mississippi Farm Bureau Mutual Insurance Company ("Farm Bureau"), and United Services Automobile Association ("USAA").

Unfortunately, however, the State's lawsuit against the defendant insurance companies has been plagued by delay, beginning with a fifteen-month interruption caused by the defendants' unfounded removal of the case to federal court. Following transfer of the State's case against Allstate and Nationwide to the Rankin County Chancery Court, the State is now engaged in pending litigation in both Rankin County and Hinds County. Dispositive motions are currently pending before both chancery courts, including the same issues presented to this Court in this interlocutory appeal. In fact, the Rankin County Chancery Court has indicated that it is holding its ruling on those dispositive motions in abeyance pending the outcome of this appeal. As a result, the State now files this amicus curiae brief in support of the arguments presented by the Appellants regarding the invalidity and inapplicability of the anti-concurrent causation ("ACC") clause in insurance contracts in the context of hurricane damage.

SUMMARY OF ARGUMENT

In the wake of Hurricane Katrina, insurance companies have not disputed that their insurance policies cover damage caused solely by hurricane winds. It is their position that the policies do not cover damage contributed to or caused by hurricane storm surge, even if the damage was initially caused solely by wind. Insureds point to similarly worded water exclusion provisions containing ACC clauses as the basis for their coverage denials. However, as is fully addressed in the initial Appellants' Brief, the language of the water exclusions, including the anti-concurrent causation clauses, is void and unenforceable because it is ambiguous and is contrary to Mississippi public policy.

Alternatively, the anti-concurrent causation language in the insurance contracts is simply not implicated. Where, as in the case of hurricane wind and surge, two perils independently cause

separate damage to property, the ACC clause does not come into play even if the same item of property is damaged by both perils in some sequence. The fact that Hurricane Katrina's hurricane-force winds undisputedly occurred prior to the arrival of its maximum storm surge helps demonstrate that the wind and the water do not constitute concurrent causes of the same damage, because each force acted separately to create unique damage. Wind damage occurring before the arrival of storm surge acts in a sequence of events, but the wind damage is not caused, directly or indirectly, by storm surge flooding, so the two forces cannot be said to act concurrently with each other, and the ACC clause is not applicable. The issue then is which peril–wind or water–caused the loss. Under Mississippi law, once an insured demonstrates an accidental loss to property covered under an all-peril policy, it becomes the insurer's burden to prove that the loss was caused by a non-covered peril, to the exclusion of any covered peril, or to pay the claim in full.

ARGUMENT

I. The State Joins in the Appellants' Arguments That Mississippi Law Prohibits Interpretation of Anti-Concurrent Causation Clauses as Excluding Coverage for Hurricane Damage Proximately Caused by Wind.

Insurance companies, including USAA and the other defendants in the chancery court actions initiated by the State, sold policies to residents purporting to provide coverage for hurricane damage. It is undisputed that these insurance policies provide coverage for the peril "windstorm," and under Mississippi law a hurricane is a "windstorm" covered by that term in insurance policies. *See, e.g., Grain Dealers Mut. Ins. Co. v. Belk,* 269 So. 2d 637, 640 (Miss. 1972). Although the insurance companies admit that their policies cover damage caused solely by hurricane winds, they also claim that their policies do not cover damage contributed to or caused by hurricane storm surge. In support of this argument, the companies point to similarly-worded exclusionary clauses for damage to the

property caused by water. USAA's standard homeowners policy contains the following exclusionary language:

> 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.

The standard homeowners policy sold by Allstate, an amicus curiae in this appeal, contains a similar water exclusion with the following language:

> We do not cover loss to covered property described in Coverage A – Dwelling Protection or Coverage B – Other Structures Protection when:
>
> a) there are two or more causes of loss to the covered property; and
>
> b) the predominant cause(s) of loss is (are) excluded under Losses We Do Not Cover, items 1 through 22 above.[2]

State Farm, another amicus curiae in this case, sells policies containing the following ACC clause as part of its water exclusion:

> We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss 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 [excluded perils.]

Similarly, Nationwide's standard homeowners policy contains an anti-concurrent causation clause in advance of its exclusions for dwelling, other structures, and personal property coverages, stating, "We do not cover loss to any property resulting directly or indirectly from any of the following.

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[2]It has been contended that this language in Allstate's policies is not an anti-concurrent causation clause. As discussed below, this point is immaterial in the context of hurricane losses.

Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss."

It has been the position of the insurance companies that their similarly worded water exclusions, including ACC provisions, operate to exclude from coverage any damage caused in whole or in part by hurricane storm surge, even if the property in question also sustained wind damage–a peril specifically covered by the policies.[3] However, as is fully addressed by the Appellants in their initial brief, the language of the water exclusions, with their ACC clauses, is open to varying interpretations, and is therefore ambiguous and unenforceable. Each company's ACC clause contains language purporting to exclude coverage for any "loss" caused in whole or in part by water, but does not define the term "loss." The result is that the clauses may reasonably be interpreted in at least two distinct ways. If the "loss" is the ultimate cause of the overall destruction of the home, then application of the anti-concurrent causation language would preclude any recovery whatsoever in the case of a home completely destroyed by hurricane, even if wind contributed to the "loss." On the other hand, if "loss" means some separable portion of damage to the property, such as a missing roof or broken windows, then application of the anti-concurrent causation language would require the fact finder to apportion the damage attributable to a covered peril versus that damage caused in whole or in part by an excluded peril. In such a situation, where a policy provision can be reasonably be interpreted to have two or more meanings, it is ambiguous and a finding of ambiguity necessarily equates to a finding of coverage. *J&W Foods Corp. v. State Farm Mut. Auto.*

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[3] Insurers refused to pay for damage caused by wind, claiming that the water would have later totally destroyed the structure anyway. By way of example, many homes in the Jackson area sustained roof damage, but insurers refused to pay for similar damages in the Coast area, where the wind speeds were indisputably much greater.

Ins. Co., 723 So. 2d 550, 552 (Miss. 1998). In fact, this Court recently held that USF&G's water exclusion, when read in conjunction with the provision for sewer or drain back-up coverage, was ambiguous and therefore construed in favor of the insured because it could be reasonably understood to have two different meanings–one excluding coverage and one logically providing coverage. *United States Fid. & Guar. Co. of Miss. v. Martin*, No. 2007-CA-00193-SCT, 2008 WL 4740031, *4-5 (Miss. Oct. 30, 2008).

The ambiguity of the anti-concurrent causation language is exacerbated by the insurers' application of the anti-concurrent causation language to deny coverage even when the property sustained wind damage, because such an interpretation is void and unenforceable as contrary to Mississippi public policy. The insurance industry's attempted exclusion from coverage of property losses resulting directly or indirectly from water, whether or not driven by wind, and whether or not in combination with wind, improperly seeks to alter, abrogate or invalidate longstanding Mississippi law governing proximate causation by refusing coverage even if the covered peril windstorm was the proximate cause of the loss.

The lower court's reliance on the Fifth Circuit's opinion in *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419 (5th Cir. 2007), is misplaced on several grounds. In *Leonard*, the parties appealed from the Mississippi district court's holding that Nationwide's anti-concurrent causation clause was unenforceable as ambiguous and contrary to well-established Mississippi law on efficient proximate causation. *Id.* at 428. While acknowledging that these legal rulings had no effect on the damages recovered by the Leonards, the Fifth Circuit panel unnecessarily proceeded, in dicta, to reverse the district court's ruling. *Id.* at 428-36. The court further refused to certify these issues of state law to this Court and instead made an "Erie guess" as to how the state's highest court would

resolve the questions. *Id.* at *8. In doing so, the panel completely misinterpreted and discarded the long line of cases arising from Hurricane Camille in which this Court premised recovery for policyholders on the application of the efficient proximate cause rule. *Id.* at 431-33. Ignoring the plain language of this Court's legal analysis, the federal appellate court panel looked to the underlying facts in those cases and held that they did not support the district court's decision because the opinions "did little more than uphold jury findings that the damages suffered by policyholders were caused exclusively by wind, not by concurrent wind-water action." *Id.* at 432.

The panel also reasoned that the Camille cases were not controlling "because none of the policies they involve contain ACC clauses similar to the one at issue here, nor do those cases purport to enshrine efficient proximate causation as an immutable rule of Mississippi insurance policy interpretation." *Id.* at 433. On the contrary, the policy language at issue in the Camille cases did include anti-concurrent causation language purporting to exclude coverage for damage "[c]aused by, resulting from, contributed to or aggravated by . . . [f]lood, 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 . . . ." *See Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217, 219 (Miss. 1972); *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 765 (Miss. 1971). Yet this Court consistently applied the well-established efficient proximate cause rule in those cases. *Grace*, 257 So. 2d at 224; *Boatner,* 254 So. 2d at 767.

It is unclear what further requirement beyond nearly fifty years of case law might be necessary to "enshrine" the efficient proximate cause rule in Mississippi so as to satisfy the Fifth Circuit panel's apparent standard for establishing public policy. *See Glen Falls Ins. Co. v. Linwood Elevator,* 130 So. 2d 262, 270 (Miss. 1961) (reasoning that if the "nearest efficient cause of the loss

is not a peril insured against, recovery may nevertheless be had if the dominant cause is a risk or peril insured against"). This Court need not follow the Fifth Circuit's erroneous dicta analysis of efficient proximate causation under Mississippi law.

Although the parties to a contract generally may contract away rights, an exception exists for long-standing common law principles such as proximate causation. *See Cappert v. Junker*, 413 So. 2d 378 (Miss. 1982). Indeed, this inability to enter into contracts that violate the public policy of Mississippi has been repeatedly recognized in the specific context of insurance policies. *See, e.g., United States Fid. & Guar. Co. v. Ferguson*, 698 So. 2d 77 (Miss. 1997). Further, contrary to arguments raised by the insurance companies in the chancery court litigation filed by the State, the power of the courts to hold insurance policy provisions ineffective as violative of public policy is not nullified by the Mississippi Department of Insurance's prior approval of the policy form. *See, e.g., Ferguson, supra*; *Atlanta Cas. Co. v. Payne*, 603 So. 2d 343 (Miss. 1992); *Employers Mut. Ins. Co. v. Tompkins*, 490 So. 2d 897 (Miss. 1986); *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So. 2d 767 (Miss. 1973). "Under applicable Mississippi law, the construction of the terms of any insurance policy are subject to judicial review, notwithstanding the fact that they have been approved by the Mississippi Department of Insurance." *Leonard v. Nationwide Mut. Ins. Co.*, 438 F.Supp.2d 684, 695 (S.D. Miss. 2006); *see also Amer. Bankers' Ins. Co. of Fla. v. Wells*, 819 So. 2d 1196, 1204-05 (Miss. 2001) (the filed rate doctrine does not bar all claims by a plaintiff related to an insurance policy, even if it has been approved by the Mississippi Department of Insurance); *Ware v. Entergy Miss., Inc.*, 887 So. 2d 763, 768-69 (Miss. 2003) (only those claims requiring a determination of the reasonableness of the rate charged fall within the ambit of the filed rate doctrine). Therefore, the State joins the Appellants in their arguments before this Court seeking

reversal of the lower court's application of the ACC clause, because it is unenforceable due to its ambiguity and its contravention of Mississippi public policy.

II. The ACC Language is Not Implicated in Claims for Damage Caused by Hurricane.

Even if this Court determines that the ACC clauses contained in insurers' water exclusions are enforceable, and that the efficient proximate causation rule is not a mandatory legal principle in Mississippi, the anti-concurrent causation provisions are simply not implicated in the case of hurricane damage. The anti-concurrent causation language plainly indicates that it is applicable only where there are multiple causes of the property loss, not where the loss is caused by one cause, which obviously cannot be concurrent or in sequence with itself. In his interpretation of Nationwide's ACC provision, United States District Judge L.T. Senter, Jr., made the following analysis:

> It is readily apparent to me that the ACC provision applies only to damage to a specific item of insured property that is attributable to *both* the excluded peril of flooding and *also* another cause (in this instance wind). Any loss in which the excluded peril of flooding plays no part, i.e. wind damage that occurs in the absence of this type of excluded water damage, does not fall within the ACC provision because it is not part of "the loss" the ACC provision refers to. "The loss" the ACC provision refers to is "any loss resulting directly or indirectly from [the peril of flooding]," and this provision cannot be fairly read to exclude any loss which occurs in the absence of the excluded peril of flooding.

Dickinson v. Nationwide Mut. Fire Ins. Co., Civ. Action No. 1:06cv198, 2008 WL 1913957, *2 (Apr. 25, 2008).

A clear understanding of the ACC provisions requires application of the proper definition of "loss"–a term undefined in the policy language–in the context of insurance coverage. *See Dickinson*, 2008 WL 1913957 at *2. The loss referred to and excluded by the ACC clause is that loss (or damage) caused, at least in part, by an excluded peril–water, in the case of Katrina cases.

Id. Taking each policy in turn, then, the following is a list of the ACC provisions incorporating the specific excluded peril of water:

USAA	We do not insure for loss caused directly or indirectly by [water]. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss [from the peril water].
State Farm	We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, [water], regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of [water and] these [other excluded perils.]
Nationwide	We do not cover loss to any property resulting directly or indirectly from [water]. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss [from the peril water].
Allstate	We do not cover loss to covered property described in Coverage A – Dwelling Protection or Coverage B – Other Structures Protection when: a) there are two or more causes of loss to the covered property; and b) the predominant cause(s) of loss is (are) excluded under [the water exclusion].[4]

After similarly incorporating the specific water peril into Nationwide's ACC provision, Judge Senter held that the "clause operates to preserve the listed exclusions in the event some other factor operates *with* the excluded peril to cause a loss. The ACC is not operative and has no application to damage that is in no way caused (directly or indirectly) by an excluded peril." *Dickinson*, 2008 WL 1913957

[4]Arguably, the language in Allstate's policy is not even an ACC clause, but instead an incorporation of the efficient proximate causation doctrine into the policy provisions. As a result, Allstate insureds need not be concerned with anti-concurrent causation analysis regardless of this Court's determination of the applicability of the ACC clauses in this matter.

at *2. A reading of the other companies' ACC clauses leads to a similar conclusion–where, as in the case of a hurricane, two distinct causes (wind and water) cause distinct damage, the ACC clause is not implicated and cannot operate to exclude coverage for the covered peril of wind.

As previously discussed, the term "loss" in the ACC clauses may be interpreted to mean the overall destruction of the property or it may mean distinct and separable damage to individual parts of the insured property. If the former meaning is applied, then the water exclusions with their ACC provisions would operate to wholly preclude recovery under the policy if water contributed in any way to the loss, even if distinct wind damage also occurred. Judge Senter recognized this key concept in the context of Katrina litigation, finding that the plain language of these ACC clauses does not even "purport to apply to losses caused separately by two forces (wind and water) acting sequentially but separately." *Dickinson*, 2008 WL 1913957 at *3. "Each force may cause damage to different parts or items of the insured property . . . or the two forces may cause damage to the same item of insured property at different points in time. But the two forces, i.e. wind and water, remain separate and not concurrent causes of this damage." *Dickinson v. Nationwide Mut. Fire Ins. Co.*, Civ. Action No. 1:06cv198, 2008 WL 941783, *5 (S.D. Miss. Apr. 4, 2008) (citing 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 43 (Oct. 2007)). "In this situation, the anti-concurrent cause provision is not applicable and does not come into play because each force causes its own separate damage independent of the damage caused by the other even when the same item of property is damaged by both forces acting separately and sequentially." *Id.* at *6.

"In every litigated case tried to date, the one area of general agreement among all the weather experts who have testified is this: the strongest hurricane winds preceded the storm surge flooding." *Dickinson*, 2008 WL 1913957 at *2. The fact that Hurricane Katrina's hurricane-force winds undisputedly occurred prior to the arrival of its maximum storm surge helps demonstrate that the wind and the water do not constitute concurrent causes of the same damage, because each force acted separately to create unique damage. "Wind damage that precedes flood damage happens in a sequence of events, but the wind damage is not caused, directly or indirectly, by storm surge flooding, and the damage done by the wind is therefore not part of 'the loss' the ACC refers to." *Id.* at *4. Damage caused by Katrina's winds is a covered loss regardless of subsequent damage caused by water. *Id. See also Maxus Realty Trust, Inc. v. RSUI Indem. Co.*, 2008 WL 2098084 (W.D. Mo. May 16, 2008) ("even if the same portions of the property were previously or subsequently damaged by water, the wind damage is recoverable" in policy containing ACC provision).

This point is clearly illustrated not only in the recent Katrina cases, none of which involved concurrent causes of loss, but also in the cases arising out of Hurricane Camille. In both *Grace v. Lititz Mutual Insurance Co.*, 257 So. 2d 217 (Miss. 1972), and *Lititz Mutual Insurance Co. v. Boatner*, 254 So. 2d 765 (Miss. 1971), the primary issue in dispute was whether the loss occurred as a result of wind damage prior to the arrival of water. In each case, the finder of fact determined that the loss was attributable to wind, findings affirmed by this Court. In those opinions, the Court repeatedly referenced the well-established rule in Mississippi that causation is a question of fact for the jury–despite policy language purporting to exclude coverage for damage "[c]aused by, resulting from, contributed to or aggravated by . . . [f]lood, 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 . . . ." *See Grace,* 257 So. 2d at 219, 224; *Boatner*, 254 So. 2d at 765, 767. If the wind or a windstorm–which always exists as part of a hurricane–caused the loss, the insurer is liable for the loss, even if other factors later contributed to cause other loss to the covered property.

Moreover, because the insurer bears the burden of proving that an excluded peril in an all-risk policy caused the loss, where the insurer cannot prove that Katrina's storm surge caused the property loss or if the cause of loss is undeterminable, the ACC clause cannot be used to deny coverage.[5] As is clearly explained by the Appellants in their initial brief, Mississippi courts have long held that where an insurer denies coverage based upon an exclusion in the policy, it is an affirmative defense which must be proved by the insurer. *See, e.g., Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777, 782 (Miss. 1971) (Where insurance company pleaded as a defense to hurricane claim that damage to property resulted from or was contributed to or aggravated by water, the burden of proving that the damage was caused by the excluded peril was upon the insurer). Accordingly, it is sufficient for the insured to show that he sustained an accidental loss to covered property. *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 429-30 (5th Cir. 1980). The burden then shifts to the insurer to show that a non-covered peril caused the loss, to the exclusion of any damage caused by a covered peril. *Id.*

> "[I]t would appear that all risks insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surround the (loss of or damage to) property." It would seem to be inconsistent with the broad protective purposes of "all risks" insurance to impose on the insured, as Insurer would have us do, the burden of proving the precise cause of the loss or damage. It is not surprising, therefore, that courts which have considered claims under insurance policies with essentially the same insuring

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[5]Where the policy or particular coverage is not comprehensive or all-risk, the respective burdens of proof differ. *Lunday v. Lititz Mut. Ins. Co.*, 276 So.2d 696, 698 (Miss. 1973).

> language as the policy before us have consistently refused to require the insured to demonstrate that the loss or damage was occasioned by [a covered peril].

Id. at 430 (quoting *Atlantic Lines Ltd. v. Amer. Motorists Ins. Co.*, 547 F.2d 11, 13 (2nd Cir. 1976); *Betty v. Liverpool & London & Globe Ins. Co.*, 310 F.2d 308, 311 (4th Cir. 1962)).[6] In the context of hurricane damage, the result is that the insurer must be held liable for the full amount of the loss, unless it can meet its burden of proving that water caused the damage to the property to the exclusion of any damage caused by wind.

In fact, Mississippi Commissioner of Insurance George Dale directed insurance companies to follow this very approach to adjust claims shortly after Hurricane Katrina struck. *See* Mississippi Insurance Department Bulletin No. 2005-6, September 7, 2005, attached hereto as Appendix A. Therein, Commissioner Dale instructed:

> 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.

In other words, not only must the insurance company prove that any damage to a covered property was caused by water–it must also demonstrate that the damage was not caused by wind.

To illustrate this point, consider a situation where a structure is beginning to be inundated by storm surge at the same time that wind blows the roof or a portion of the roof off of the building, allowing the structure to be breached by wind and wind-driven rain. The wind and

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[6]Although the policy at issue in *Morrison Grain Co.* was an all-risk marine insurance policy, the same concerns are applicable to all-risk property/casualty insurance policies, such as the one at issue in the current appeal.

wind-driven rain cause the walls to cave in and the ceilings to collapse, and the storm surge subsequently moves the debris around or completely washes it away. The structure is ultimately completely destroyed, resulting in a total accidental loss of the covered property. The wind and water are separable and distinct perils which caused separate and distinct damage to the structure. The damage caused by wind is a covered loss, even though water may have subsequently caused damage to the same property. The insurer cannot be relieved of its liability to pay for that portion of the loss caused by wind merely by establishing that the structure was inundated by water. By demonstrating a total accidental loss to a covered property, the insured has met his burden of proof to recover the full policy limits. The burden then shifts to the insurance company, which may only rightfully deny the claim in toto if it can prove that the entire loss to the structure was caused by water, to the complete exclusion of damage caused by wind. If there is no evidence to support such a finding, then the insurer must pay the claim.

CONCLUSION

For the foregoing reasons, the State of Mississippi, by and through the Attorney General, respectfully requests that this Court reverse the opinion of the lower court upholding the validity and applicability of USAA's exclusionary clauses in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meredith Aldridge, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Mail, postage prepaid, a true and correct copy of the foregoing to the following:

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This the 5th day of December, 2008.

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Mississippi Insurance Department
Bulletin No. 2005-6
September 7, 2005

This Office has been working with Mississippi consumers and the insurance industry to ensure that Mississippians impacted by Hurricane Katrina are treated fairly and receive compensation in a timely manner. While a lack of housing, communications and fuel has made it difficult in many cases for adjusters to get with insureds, this situation is improving daily and the claims adjustment process is moving forward.

My Office has been contacted by Mississippians who advise that their adjusters allegedly denied their homeowners' claims without inspecting the damaged property. While there was significant water damage on the Mississippi Gulf Coast, and homeowners' policies offered throughout the United States generally contain a water damage exclusion, an adjuster cannot summarily determine the cause of damage without inspecting the damaged property. Consequently, I am instructing all companies to be aware of these issues and to fully inspect any damaged property before a coverage decision is made.

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.

These are very difficult times for our State and region, and I ask that the insurance industry construe coverage issues in a manner that will afford coverage to as many of our citizens as possible. We will continue to work with Mississippi consumers and the insurance industry to ensure that all claims are fairly and promptly processed.

This the 7th day of September, 2005.

Sincerely,

GEORGE DALE

APPENDIX A