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

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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

carrier always has the burden to prove a specific exclusion through competent and non-speculative evidence under an all risk policy.

The Anti-concurrent Causation (ACC) Clause

The devastation and destruction that occurred to the Gulf Coast states as a result of Hurricane Katrina was unprecedented. In fact, as of October 15, 2006, total insurance claims for the six Mississippi coastal counties of Hancock, Harrison, Jackson, Stone, George and Pearl River equaled 263,744 in number. Mississippi Insurance Department, http://www.mid.state.ms.us/katrina/claimsfigures.htm (last visited Nov. 20, 2008).

> In coastal Mississippi, there were many instance where there was little or nothing left of the structures which once existed. Many houses and buildings were reduced to nothing more than a slab or piling with debris strewn everywhere. This resulted in a complicated adjustment of the claim and rendered impossible an accurate assessment of the specific cause of damages.

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.

Although the insurance industry encountered much prior experience in handling widespread hurricane claims before Hurricane Katrina struck, the unique nature of these claims presented novel issues for both policyholders and insurers. Many insurers had not dealt with the unusual coverage questions that arose in the circumstances surrounding the wind and water scenario under Mississippi insurance law. Although the prior body of insurance law can provide a framework for dealing with these scenarios, it cannot stand as a rigid precedent for determining the situation at hand, which now requires the intervention of this Court, specifically under Mississippi law.

As explained in the original Petition to this Court, ACC clauses were developed by insurers as a result of court decisions that applied the efficient proximate cause doctrine to assess

coverage in cases of concurrent causes of loss.[2] *See Combined Petition and Brief for Interlocutory Appeal,* p. 5. Throughout the debate over the ACC clauses and how they apply to Hurricane Katrina cases, various parties have advanced arguments that the clauses are ambiguous, or that the clauses are not ambiguous. The Federal District Court judge hearing the majority of Katrina cases, Judge Senter, originally found the clauses ambiguous and inapplicable in *Leonard v. Nationwide Mut. Ins. Co.,* 438 F.Supp. 2d 684 (S.D. Miss. 2006). Subsequently, the Fifth Circuit found them unambiguous and applied the clauses broadly in *Leonard v. Nationwide Mut. Ins. Co.,* 499 F.3d 419 (5th Cir. 2007). Indeed, not only did the Fifth Circuit find the clauses unambiguous, they also loosely expanded the meaning of the clauses beyond any original intent and wrongly found that damage caused by a covered peril will not be paid by the insurer if a subsequent excluded event followed damaging the property again. *See id.* at 431.[3]

Respectfully, the position advanced by the Fifth Circuit, and adopted by insurance company counsel as a result, was not the intent of the insurance industry when these clauses were introduced, yet now their attorneys appear to have carte blanche to present this revised theory in courtrooms throughout the State of Mississippi, and judges feel compelled to adopt that reasoning.[4]

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[2] Under this theory, the primary cause which sets in motion the loss is deemed to be the cause which drives whether coverage exists.

[3] While not presented here, one must then wonder whether parts at the loss would be payable under any policy since the standard material flood policy only covers direct physical loss by or from flood. Thus, if the structure sustained wind or rain damage before flood waters came, the damage might not be not be covered under the Standard Flood Insurance Policy. Fema, http://www.fema.gov/pdf/nfip/dp126.pdf (last visited on Nov. 24, 2008). Copy attached as Appendix "B".

[4] In the instant case, counsel for the insurer is taking the position that the Fifth Circuit's analysis should be deemed applicable to the insurer's ACC clause, such that if the wind blew the roof off the house, the insurer would agree that the roof damage was covered; however, the attorney argued that even if rain had inundated the home causing extensive damage, if there any was subsequent "water damage" from a "flood", then the rain damage would no longer be covered because it was either concurrent or in sequence with the "water damage". *See* Exhibit 6 to Dr. and Mrs. Corban's Combined Petition and Brief for Interlocutory Appeal, p. 39.

Whether the clauses themselves are ambiguous is subject to much debate, and one can only wonder if so many learned people have such different understandings and beliefs about the clauses, are they anything but ambiguous? Have so many intelligent people misunderstood the true meaning of the clauses under Mississippi law? When the fact is that judges and insurance adjusters take varying interpretations of the same words, is it nothing other than a slap in the face to the public, the true "laypersons", if the clause is not found ambiguous?

Significantly, the circuit court judge in this case recognized the difficulties in determining how to apply the ACC clause, in the context of a wind versus water analysis. Judge Dodson believed that a plain reading of the clause did not comport with the expansive reading given to it by the Fifth Circuit. As she thoughtfully stated:

> 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 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.

See Exhibit 5, original Combined Petition and Brief for Interlocutory Appeal, p. 6.

Judge Dodson interpreted the clause to mean that the wind and rain damage was not the "loss" intended to be excluded by the ACC clause, and that only the "flood" damage was. Unfortunately, Judge Dodson felt bound to follow the analysis of the judges of the Fifth Circuit, as the opinions of *Tuepker* and *Leonard* were the only appellate pronouncements implicating Mississippi law in the context of the wind versus water issue following Hurricane Katrina before her. Thus, she ruled that any damage would not be covered if the property was affected by both wind and water, even if the property's wind damage occurred first, and even if the wind damage would have otherwise been recoverable under the policy.

Again, although Judge Dodson felt compelled to agree with the Fifth Circuit that the clauses are not ambiguous, she advanced an interpretation of the policy language that was quite

different from the understanding of the judges of the Fifth Circuit. One must question whether these multiple interpretations by "learned" individuals require a finding of ambiguity under the circumstances.

Indeed, after the Fifth Circuit provided its analysis of the "unambiguous" nature of the ACC clauses, the Federal District Judge hearing the majority of these cases, Judge Senter, had cause to write an opinion discussing the effect of the clauses. Judge Senter states:

> The meticulous analysis by David Rossmiller concerning the history, purpose, and meaning of the anti-concurrent cause provision, published at *New Appleman on Insurance Critical Issues In Insurance Law,* makes it clear that an anti-concurrent cause provision has no application in a situation (such as Hurricane Katrina) where two distinct forces (wind and water) act separately and sequentially to cause different damage to insured property. Each force may cause damage to different parts or items of the insured property, as occurred in the Leonard case, 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 camage. In either case, the damage caused by wind is covered under the policy while the damage cause by water is not. Water damage is the excluded "loss" referred to in the anti-concurrent cause provision of the Nationwide policy.

Dickinson v. Nationwide Mut. Fire Ins. Co., 2008 U.S. Dist. LEXIS 31153, *14-15 (S.D. Miss. Apr. 4, 2008). Interestingly, Judge Senter's analysis seems very similar to the beliefs of Judge Dodson in addressing the situation involving Dr. and Mrs. Corban. Unfortunately, under the current state of this case, Judge Dodson felt compelled to accept the overly broad explanation of the ACC as suggested by the Fifth Circuit.

Ultimately, it is difficult to imagine a more incomprehensible policy provision than the ACC clauses. They do not clarify what the policy is intended to cover, and instead, merely lead to increased litigation and opportunities for insurers and their counsel to rewrite the policy's meaning after a catastrophic loss.[5] Either these clauses' lack of clarity should result in a finding

[5] As noted by Judge Senter in the *Dickinson* case, Nationwide's counsel was taking a position for the first time in any litigation that, in his opinion, was attempting to expand the analysis of the Fifth Circuit

of ambiguity, based on Mississippi's body of case law finding that policy language that is susceptible to more than one reasonable interpretation must be construed in favor of coverage,[6] or the clauses should be interpreted so as to clarify that the Fifth Circuit's reasoning does not comport with the plain reading of the policy language. Any other conclusion will result in a loss of credibility or believability for the system of justice in this state.

A noted commentator even remarked:

> The Fifth Circuit, in these Katrina cases, proved out Prof. Boardman's thesis that those horribly befuddling passages in insurance policies are not written in any way for comprehension by policyholders, but instead are a secret language, hidden communications between insurers and courts. Having now written two articles dominated by the subject of property insurance policy causation, and having struggled at times to do so, I cannot say with any confidence anti-concurrent language, or other policy provisions for that matter, are comprehensible to the layman.

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, 106.

If this Court finds the clauses unambiguous, rather than determining that covered wind and rain damage is placed into the "excluded" category because some type of "flood" event may have followed the wind and rain damage,[7] this Court should agree with Judge Senter's reasoning from the *Dickinson* opinions, and Judge Dodson's initial impressions of the meaning of the ACC clause in this case, and find that wind and water damage are separate and only the "flood" damage is subject to the exclusion.

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beyond reasonable limits. *See* 2008 U.S. Dist. LEXIS 31153 at *13-14. *See also, Dickinson v. Nationwide Mut. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 34354 (April 25, 2008).

[6] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Scitzs,* 394 So. 2d 1371, 1372-73 (Miss. 1981); *Miss. Farm Bureau Mut. Ins. Co. v. Jones,* 743 So. 2d 1203 (Miss. 2000).

[7] This exclusion would only be found to apply if this Court does not accept Dr. and Mrs. Corban's argument that a "storm surge" is not subsumed within the policy's "water damage" exclusion.

CONCLUSION

Based on the foregoing, United Policyholders respectfully requests that this Court accept and agree with the arguments and cogent analysis of the Petitioners, and find in favor of Dr. and Mrs. Corban. The ACC clause should not be applied in the manner suggested by USAA and the Fifth Circuit Court of Appeals, as that restrictive analysis does not meet either the meaning or intent of the clauses when applied to a wind/water event such as Hurricane Katrina. Further, this Court should once again clarify the burden of proof analysis and apply the appropriate burden to prove an exclusion squarely on the insurer, where it belongs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this 24th day of November, 2008, served a true and correct copy of *Amicus Curiae* Brief of United Policyholders in Support of the Position of the

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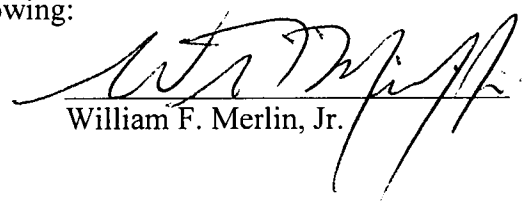

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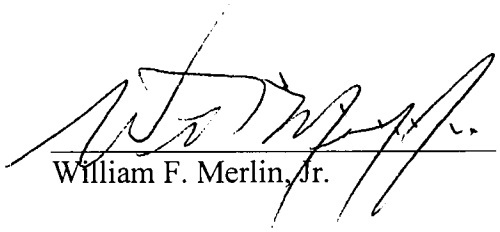

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APPENDIX "A"

MULTIPLE

PERIL PACKAGES

BY ROBY HARRINGTON

Partner and Director of Johnson & Higgins. Mr. Harrington has been in the insurance business since 1927. He first entered the brokerage business with John W. Thomas Inc., where he was made vice president and a director. Joining Johnson and Higgins in 1943, he became vice president in 1953 and a director in 1956.

HUNDREDS OF ARTICLES and thousands of words have been written about multiple-peril policy developments. This is particularly true of the output policy and other package floaters and of independent plans no matter how they are identified. My purpose is not to enlarge upon the many words already written on the subject but to emphasize the importance of this new trend. It is and will become more important to the corporate insurance firm and its development will present very interesting opportunities for the young man who wishes to make insurance his career.

Prior to the passage of the multiple-line law, the operations 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. The rapid expansion of industry during and after World War II brought about a demand for broader underwriting facilities and encouraged many of the insurance companies to expand into practically all fields of underwriting. This has been a slow and sometimes painful process but it is developing at a very rapid pace today. 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.

The rapid growth of industry in the past twenty years has stimulated a vigorous demand for more up-to-date insurance contracts. Industry has sought and is now getting simpler contracts with broader coverage and with fewer gaps between the separate policies they formerly carried in an effort to obtain full protection. During the 1920's, a corporate insurance buyer could, under the authority granted by many states, obtain an inland marine policy granting similar protection to that afforded by the multiple-line contracts now available. In the states where this authority was not granted, such contracts were illegal. 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. This development, together with the domestic inland marine underwriters who vigorously pioneered for this cover, have accelerated today's thinking.

The Supreme Court's 1944 decision against the Southeastern Underwriters Association, which declared insurance to be inter-state commerce, 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. In spite of the continually rising loss experience on physical damage exposures, the healthy post-war growth of our domestic insurance companies has been most encouraging and their new-found strength has led the industry to the point of some spectacular changes. The next five or ten years will bring about major internal changes to the average company and its organization pattern so that new and lucrative job opportunities will be open to young men in the multiple-peril field. Because this is one of the newest developments in our industry, opportunities for young men of imagination will be many, and the financial reward for those who take part in this development should be great. Even though the number of companies actively engaged in multiple-line operations is limited, a forward-looking insurance executive knows that the public interest in the advantages of this program will lead to a greatly accelerated development in the field.

The multiple-line approach is of great interest to the buying public because it attempts to give to commerce and industry the same protection the homeowner's multiple-peril policy has given to the individual householder. This dream - coverage eventually will permit the combination, under one blanket contract, of all physical damage exposures to corporate property.

What does this mean? The original concept of fire underwriting required identification of specific locations, the enumeration of values at these locations, and painfully selected individual perils for rating consideration. 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. This is true whatever the values may be, wherever they are located. In other words, the buyer obtains full automatic coverage whether or not he is aware that an exposure exists. Only specific exclusions can alter the situation.

Another important point is that the buyer gets blanket insurance and is no longer penalized for errors in declarations. Since all exposures are intended to be covered, errors simply require a corrected report without penalty to the insured. 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