IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-IA-00645-SCT

MARGARET and MAGRUDER S. CORBAN

Appellants/Plaintiffs

vs.

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

Appellee/Defendant

On Interlocutory Appeal from the Circuit Court of Harrison County, Mississippi
First Judicial District
Civil Action No. A2401-06-404

BRIEF OF NATIONWIDE MUTUAL FIRE INSURANCE COMPANY AND NATIONWIDE PROPERTY AND CASUALTY COMPANY AS *AMICI CURIAE* IN SUPPORT OF APPELLEE UNITED SERVICES AUTOMOBILE ASSOCIATION

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INTRODUCTION

This case begins and ends with the bedrock rule that courts must construe and enforce contracts as written if their terms are clear and violate no public policy. *See, e.g., Griffin v. Tall Timbers Dev., Inc.*, 681 So.2d 546, 551 (Miss. 1996); *Ford v. Lamar Life Ins. Co.*, 513 So.2d 880, 886 (Miss. 1987). The plaintiffs here purchased a standard homeowner's insurance policy with a standard anticoncurrent causation clause that unambiguously excludes loss caused by an excluded peril "regardless of any other cause or event contributing concurrently *or in any sequence* to the loss." RE40 (emphasis added). The whole point of such clauses, as the Fifth Circuit recognized in *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 433 n.7 (5th Cir. 2007), is to avoid an intractable inquiry into causation where two or more perils "in any sequence" cause a particular loss, and one or more of those perils is excluded. Such clauses, in a nutshell, treat a loss caused by an excluded peril as an excluded loss, regardless of whether an otherwise covered peril also caused that same loss.

A hurricane, which often involves losses from both wind (a standard covered peril) and floodwater (a standard excluded peril), presents especially difficult causation issues. Indeed, plaintiffs themselves acknowledge that "it is difficult, if not impossible, to determine what portion of many Katrina losses was caused by wind and what portion was caused by water." Pls.' Br. 12; *see also id.* at 18 (same). To the extent a loss is caused exclusively by wind, it is covered; to the extent a loss is caused exclusively by floodwater, it is excluded; and to the extent a loss is caused "in any sequence" by *both* wind and floodwater, it is excluded by the anticoncurrent causation clause. Thus, to the extent that floodwater from a hurricane has

rendered an item of property a complete loss (*e.g.*, if a storm surge sweeps away a porch), it is neither necessary nor appropriate for a jury to decide whether there was any wind damage to the porch from that hurricane in the hours, minutes, or seconds before the floodwaters completely swept it away. Where a particular loss is caused by both a covered peril and an excluded peril, the "sequence" of the damage is immaterial. There is no unfairness in this, because the anticoncurrent causation clause denies coverage for loss caused by a covered peril only to the extent that the loss was caused "in any sequence" by an excluded peril, for which the policyholder had no right to expect coverage under the standard homeowner's policy in the first place.

Plaintiffs here make no serious attempt to identify any textual ambiguity in the anticoncurrent causation clause itself, but instead argue that this Court should declare that clause unenforceable either on the ground that it is ambiguous (because it has been applied differently by different litigants and courts), or violates public policy (because it departs from default common-law rules of causation). These arguments lack merit. An interpretive disagreement among litigants and courts does not, by itself, render a contractual provision ambiguous. And there is no public policy in this State (or most other States) preventing private parties from "contracting around" default common-law rules of causation. Indeed, the Fifth Circuit, applying Mississippi law, has already considered and rejected these very arguments. *See Leonard*, 499 F.3d at 429-36. This Court should now do the same.

ARGUMENT

I. The Anticoncurrent Causation Clause Excludes Losses Caused By An Excluded Peril, Even If Some Other Peril Also Contributes "Concurrently Or In Any Sequence" To That Loss.

As a threshold matter, it is not surprising that plaintiffs fail to identify any textual ambiguity in the standard anticoncurrent causation clause at issue here, because there is none. That clause provides that a "loss [resulting from an excluded peril] is excluded regardless of any other cause or event contributing *concurrently or in any sequence* to the loss." RE40 (emphasis added). This language means just what it says: the policy excludes coverage for any loss caused by an excluded peril, even if an otherwise covered peril also caused that loss "in any sequence."

Anticoncurrent causation clauses thus avoid the morass of multiple causation by excluding losses caused by both an excluded peril and an otherwise covered peril, regardless of their sequence. It is therefore irrelevant whether wind (an otherwise covered peril) caused a particular loss so long as it is also clear that floodwater (an excluded peril) "caused the *same* damage." *Leonard*, 499 F.3d at 430 (emphasis in original); *see also id.* at 430-31 (if a portion of plaintiffs' "property damage was caused by the concurrent or sequential action of water—or any number of other enumerated water-borne perils—the policy clearly disallows recovery"); *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 354 (5th Cir. 2007) ("[A]ll damage caused by water or by wind acting concurrently or sequentially with water ... is excluded."). Under these circumstances, policyholders must look to flood policies to recover for their flood losses (as indeed plaintiffs did in this very case).

That is not to say, as *Leonard* emphasized, that *all* coverage is denied if *any* part of the house is damaged by floodwater. To the contrary, the point here is only that any loss caused by floodwater is excluded regardless of whether that loss was also caused, in any sequence, by wind. Thus, where wind damages a particular part of a house (*e.g.*, the roof), and floodwater damages another part of the house (*e.g.*, the basement), the separate and independent damage caused by the wind *would* be covered. "Only if storm-surge flooding—an excluded peril—then inundates the *same area* that the rain damaged is the ensuing loss excluded." *Leonard*, 499 F.3d at 431 (emphasis added); *see also Bilbe v. Belsom*, 530 F.3d 314, 317 n.3 (5th Cir. 2008) (same under Louisiana law); *Mayton v. Auto-Owners Ins. Co.*, No. 3:05-CV-667, 2006 WL 1214831, at *7 (E.D. Va. May 2, 2006) ("If the high water was sufficient in and of itself to have caused the house to float off its foundation and render it a complete loss, regardless of any preceding wind damages, Plaintiffs' claim falls within Defendant's exclusion policy, and fails as a matter of law.").

Although the trial court below followed *Leonard*'s straightforward interpretation of the anticoncurrent causation clause, the court expressed a preference for an alternative interpretation advanced (notwithstanding *Leonard*) by the U.S. District Court for the Southern District of Mississippi. *See* RE17-20; *see also Dickinson v. Nationwide Mut. Fire Ins. Co.*, No. 1:06CV198, 2008 WL 941783, *5-6 (S.D. Miss. Apr. 4, 2008), *recons. denied*, 2008 WL 1913957, *2-4 (S.D. Miss. Apr. 25, 2008). Under that view, the anticoncurrent causation clause "does not purport to apply to losses caused *separately* by two forces (wind and water) acting sequentially but *separately*." *Dickinson*, 2008 WL 1913957, *3 (emphasis added).

With all respect, that interpretation erroneously assumes that two separate and distinct "losses" are at issue where a *single* item of property is damaged or destroyed in a *single* event by two different causes. But multiple causes are not the same thing as multiple losses. Thus, where hurricane floodwaters cause a particular loss, it is neither necessary nor appropriate to decide whether that loss was first caused by wind—by the plain terms of the clause, the "sequence" of the loss does not matter. Indeed, a contrary approach would effectively write the clause out of the policy, and plunge courts into the very causation morass (and sequencing-of-damage issues) that the clause was meant to avoid. Nothing in the text of the clause requires this self-defeating result.[1]

Appellee USAA, for whatever reason, appears to have decided not to enforce its anticoncurrent causation clause in the manner endorsed by the Fifth Circuit in *Leonard*. *See* USAA Br. 22-29. That is obviously USAA's prerogative, but this Court is not bound—on a pure question of law affecting insurers (and insureds) throughout the State of Mississippi—to defer to a particular litigant's approach. If anything, USAA's brief only underscores the illogical and unworkable nature of its position. According to USAA:

> [I]f an insured's roof is breached and rainwater comes in, damaging a carpet, USAA pays for rainwater damage to the carpet. This is so, even if storm surge subsequently breaches the walls of the house and floods it, destroying the carpet. USAA would still owe for drying and

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[1] It is inaccurate to say, as did the federal district court in *Dickinson*, that Nationwide takes the position "that the anti-concurrent cause provision in its homeowners policy prevents *any* recovery for wind damage when the insured property also sustains substantial flood damage." *Dickinson*, 2008 WL 941783, *5 (emphasis added). Rather, as explained in the text, Nationwide's position is that the anticoncurrent causation provision prevents recovery for wind damage only to the extent that the *same* loss is also caused, in any sequence, by flood damage.

> cleaning the carpet to repair the rainwater damage. It would not owe for a replacement carpet, since the destruction of the carpet resulted from the excluded storm surge flooding.

USAA Br. 27. Under this view, USAA would wind up paying a homeowner to dry and clean a carpet that no longer exists because it was completely destroyed by floodwater. That is not a workable or sensible line to draw—it simply invites a bewildering battle of the experts over the sequence of damage where there is no question that flooding rendered a particular item a complete loss. Indeed, the Fifth Circuit offered the very same hypothethical in *Leonard* to support *its* approach:

> If, for example, a policyholder's roof is blown off in a storm, and rain enters through the opening, the damage is covered. [N.B.: the policy in *Leonard* expressly covered "[d]irect loss caused by rain ... driven through roof or wall openings made by direct action of wind." 499 F.3d at 431.] Only if storm-surge flooding—and excluded peril—then inundates the *same* area that the rain damaged is the ensuing loss excluded because the loss was caused concurrently or in sequence by the action of a covered and an excluded peril.

499 F.3d at 431 (emphasis in original).

Indeed, the whole reason that anticoncurrent causation clauses were adopted was that default common-law causation rules (in Mississippi as elsewhere) fostered protracted and expensive litigation over the sequence of damage and allowed juries to avoid exclusions by attributing losses from excluded perils to covered perils. *See, e.g.*, Stuart M. Gordon & Diane R. Crowley, *Earth Movement & Water Damage Exposure: A Landslide in Coverage*, 50 Ins. Counsel J. 418, 420-21 (1983) (discussing cases that prompted the adoption of anticoncurrent causation clauses); *see also* 2 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 21.02[c], at 1313 (13th ed. 2006); *TNT Speed & Sport Ctr., Inc. v. American States Ins. Co.*, 114 F.3d 731, 733 (8th Cir. 1997); *Grace v. Lititz Mut.*

Ins. Co., 257 So.2d 217 (Miss. 1972); *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765 (Miss. 1971); *Evana Plantation Inc. v. Yorkshire Ins. Co.*, 58 So.2d 797, 798 (Miss. 1952). Anticoncurrent causation clauses contracted around these default common-law rules by allocating losses caused by both a covered peril and an excluded peril, regardless of their sequence, to the excluded peril. *See Leonard*, 499 F.3d at 431-33; *TNT*, 114 F.3d at 733; *Preferred Mut. Ins. Co. v. Meggison*, 53 F. Supp. 2d 139, 142 (D. Mass. 1999). Needless to say, causation principles that might apply in the *absence* of anticoncurrent causation clauses shed no light on the operation of such clauses. It is precisely because the insurance policies at issue in older cases were silent on this score that this Court looked to general causation principles in the first place. *See, e.g., Grace*, 257 So.2d at 219, 224; *Boatner*, 254 So.2d at 765, 767.

That is why, even before Hurricane Katrina, the only Mississippi cases interpreting anticoncurrent causation clauses held that such clauses exclude coverage for loss caused in part by a covered peril, where an excluded peril also contributed to cause the loss. *See Boteler v. State Farm Cas. Ins. Co.*, 876 So.2d 1067, 1068-69 (Miss. Ct. App. 2004) (holding that under an anticoncurrent causation clause it was immaterial "whether other causes [had] acted concurrently or in any sequence" with an excluded peril to cause property damage); *see also Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp. 2d 907, 912 (S.D. Miss. 1998) (similar), *aff'd*, 200 F.3d 815 (5th Cir. 1999) (unpublished). Both *Boteler* and *Rhoden* distinguished an earlier precedent, *New Hampshire Ins. Co. v. Robertson*, 352 So.2d 1307 (Miss. 1977), on the ground that, in that case, the policy's exclusion did not contain any prefatory clause about anticoncurrent causation. By contrast,

an anticoncurrent causation clause amounts to "[u]nambiguous language of exclusion," no matter whether a covered peril or an excluded peril "was the reason for the damage." *Boteler*, 876 So.2d at 1070; *see also Rhoden*, 32 F. Supp. 2d at 912.

To the extent that plaintiffs contend that insurers cannot exclude concurrently or sequentially caused losses from coverage because a policy is described as "all risk," *see* Pls.' Br. 35-38, 46 n.26, they are wrong. An "all risk" policy does not mean that a policyholder is insured against all risks in a metaphysical sense, but only that the policyholder is insured against all risks *except* those listed in the exclusions. The scope of an "all risk" policy, in other words, is determined by its exclusions, *see, e.g., Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 75 (3d Cir. 1989); *Gust K. Newberg Const. Co. v. E.H. Crump & Co.*, 818 F.2d 1363, 1364 (7th Cir. 1987); *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939, 940 (2d Cir. 1965) (Friendly, J.), including the anticoncurrent causation clause.

In the final analysis, plaintiffs seek to write the anticoncurrent causation clause out of their policy, and thereby to revert to the common-law regime the clause was designed to supplant. "It is axiomatic," however, "that all provisions of an insurance policy must be so construed, if possible, to give effect to each." *Continental Cas. Co. v. Hester*, 360 So.2d 695 (Miss. 1978); *see also Mississippi Farm Bureau Cas. Ins. Co. v. Britt*, 826 So.2d 1261, 1265-66 (Miss. 2002). Although this Court construes ambiguous insurance contracts in favor of the insured, "[i]t is equally important ... that we keep in mind also the long-established rule that if the insurance contract is plain and unambiguous, it should be construed as written and like any other contract." *National Bankers Life Ins. Co. v. Cabler*, 90 So.2d 201, 204

(Miss. 1956); *Farmers Mut. Ins. Ass'n v. Martin*, 84 So.2d 688, 690 (Miss. 1956). Here, the policy is plain and unambiguous, and thus should be enforced as written.[2]

II. Anticoncurrent Causation Clauses Are Enforceable Under Mississippi Law.

Because plaintiffs advance no textual argument to establish ambiguity, they urge this Court instead to hold the anticoncurrent causation clause unenforceable on the ground that (1) litigants and courts have disagreed about its meaning, and (2) it represents a departure from default common-law rules of causation. As the Fifth Circuit correctly noted, the "majority of states that have considered the matter enforce [anticoncurrent causation] exclusion clauses." *Leonard*, 499 F.3d at 434. There is no sound reason in law or logic for Mississippi to become an outlier.

A. Anticoncurrent Causation Clauses Are Not Unenforceable As Ambiguous.

Plaintiffs' principal argument is that this Court should strike the anticoncurrent causation clause of the policy as ambiguous and hence "void." They claim that "no court, party, or attorney can consistently and reasonably interpret"

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[2] In a footnote, plaintiffs argue that the policy's definition of "water" does not include "storm surge." Pls.' Br. 25 n.13. Assuming that plaintiffs have not waived this argument by raising it in such a cursory way (and omitting it from the issues presented for review), the argument is wrong. The definition of excluded "water damage" in the policy includes "flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind." RE40. Several of these terms—"flood," "waves," "tidal waves," and "overflow of a body of water" —naturally encompass "storm surge," given that a hurricane's storm surge is simply an unusually large tide of water combined with additional waves. The fact that plaintiffs have given a particular kind of flood its own name ("storm surge") does not make it any less of a flood. A veritable tsunami of precedent thus holds that similar flood exclusions encompass hurricane storm surges. *See Leonard*, 499 F.3d at 437 ("storm surge" is "little more than a synonym for a 'tidal wave' or wind-driven flood"); *Tuepker*, 507 F.3d at 352-53; *Firemen's Ins. Co. v. Schulte*, 200 So.2d 440 (Miss. 1967); *Lunday v. Lititz Mut. Ins. Co.*, 276 So.2d 696, 697 (Miss. 1973); *Lititz Mut. Ins. Co. v. Buckley*, 261 So.2d 492 (Miss. 1972); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777, 778 (Miss. 1971); *Grace v. Lititz Mut. Ins. Co.*, 257 So.2d 217 (Miss. 1972); *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765 (Miss. 1971).

the clause; that "[d]ecisions from the Fifth Circuit Court of Appeals are conflicting and varied"; and that "[p]arties and attorneys for parties have given interpretations of the policy language that later had to be retracted or 'clarified.'" Pls.' Br. 9. In their eyes, these factors combine to create ambiguity, because "[t]he inability of the courts and parties to determine the meaning of the clause demonstrates its ambiguity." *Id.* at 51. They claim, moreover, that this Court already determined in *United States Fid. & Guar. Co. v. Martin*, __ So.2d __, 2008 WL 4740031 (Miss. Oct. 30, 2008), that anticoncurrent causation clauses are ambiguous. *See* Pls.' Br. 23-25.

As an initial matter, plaintiffs' claim that this Court has already held anticoncurrent causation clauses to be ambiguous in *Martin* is incorrect. That case did not even involve the interpretation of an anticoncurrent causation clause. Rather, the Court determined that water damage caused by sewage was not excluded because of an explicit provision covering that kind of loss. The policy in *Martin* provided that the insurance company would "pay for direct physical loss ... if the loss is caused by water that ... [b]acks up through sewers or drains." *Id.* at *2. The policy excluded water damage "[u]nless otherwise stated" caused by "[f]lood, surface water, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not." *Id.* at *3. This Court observed that "one could interpret the [coverage provision] regarding sewer or drain backup to fall under the 'unless otherwise stated' exception to the general water exclusion," because the policy clearly provided that the insurance company "will pay for direct physical loss" from water damage caused by sewer or drain backup. *Id.* at *4. As a result, the policy could fairly be construed in favor of the insured. *See id.* at *5. Here, in

contrast, there is no "unless otherwise stated clause," nor is there a provision that explicitly provides coverage for a particular type of water damage caused by flooding from hurricanes. *Martin* thus has no bearing on this case.

Plaintiffs also try to infer ambiguity from the fact that different litigants and courts have construed anticoncurrent causation clauses differently. But this Court has squarely held that a difference of opinion among litigants and courts does not create ambiguity where there is none. To the contrary, "[t]he mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss. 1997) (citing *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss. 1987)). Were the law otherwise, no contract subject to litigation could ever be definitively interpreted by a court, because the mere disagreement between the two parties to the litigation would render the contract ambiguous. Nor does disagreement among courts necessarily indicate ambiguity; were that the case, no appellate court could ever reverse a lower court's determination that a contract was ambiguous, and no decision could ever hold a contract unambiguous over a dissent. *See Wooten v. Miss. Farm Bureau Ins. Co.*, 924 So.2d 519, 520-21 (Miss. 2006) (rejecting contention that differing judicial interpretation of the phrase "incurred within one year from the date of the accident" rendered the policy language ambiguous).

Plaintiffs' sole support for their argument is dicta wrenched out of context from *Frazier v. Northeast Miss. Shopping Ctr., Inc.*, 458 So.2d 1051, 1054 (Miss. 1984). In *Frazier*, this Court observed that "[t]o say th[e contract] paragraph [at

stake in the case] is free from doubt ignores the fact that intelligent lawyers reading it have come to opposite views. It is not clear to this Court." *Id.* Plaintiffs read this passage as establishing the sweeping proposition that a disagreement between parties (or courts) on the interpretation of a contractual provision renders it ambiguous. But *Frazier* says nothing of the sort. To the contrary, *Frazier* itself rejected the plaintiffs' interpretation of the contract as unreasonable, and ruled against them as a matter of law. *Id.* at 1055.

Plaintiffs also claim that the Fifth Circuit has "issued inconsistent and confusing rulings, further supporting a finding of ambiguity." Pls.' Br. 16. But that court has issued two consistent rulings, both of which reversed a single district judge's mistaken determination of ambiguity. *See Leonard*, 499 F.3d 419; *Tuepker*, 507 F.3d at 354, 355-56 (observing that "*Leonard* governs this case" and enforcing an anticoncurrent causation clause "under *Leonard*, which binds us, and with which we in any event agree").

B. Anticoncurrent Causation Clauses Are Not Unenforceable As Against Mississippi Public Policy.

Plaintiffs next argue that the anticoncurrent causation clause "is contrary to Mississippi public policy and should be stricken as void," because an insurer may not "write an all risk policy and then exclude losses where the efficient proximate cause of the loss is not excluded." Pls.' Br. 10. They purport to base this argument on "decisions from this Honorable Court, directives from the Mississippi Insurance Department (MID), and legislative declarations that coverage for hurricane losses is 'essential.'" *Id.* But none of those sources remotely supports plaintiffs' argument that anticoncurrent causation clauses violate Mississippi public policy. Indeed, the

Chancery Court of Rankin County recently rejected that argument, and this Court now should too. *See Hood v. Mississippi Farm Bureau Ins.*, Civil Action No. G2005-1642, slip op. at 7-10 (decided 12/22/08).

The overriding public policy in Mississippi is precisely the opposite of the one plaintiffs advance: "The function of the courts is to enforce contracts rather than enable parties to escape their obligations upon the pretext of public policy. This Court has adjudged contracts void only when the illegality is clearly shown." *Smith v. Simon*, 224 So.2d 565, 566 (Miss. 1969); *see also State v. Edward Hines Lumber Co.*, 115 So. 598, 605 (Miss. 1928); *Orrell v. Bay Mfg. Co.*, 36 So. 561, 564-65 (Miss. 1904). That policy is doubly relevant here, where the Mississippi Insurance Commissioner—who is required by statute to disapprove a policy form if it contains "any inconsistent, ambiguous or misleading clauses or exceptions," Miss. Code Ann. § 83-2-11(1)(b)—has specifically *approved* policies containing anticoncurrent causation clauses. *See* Miss. Code Ann. § 83-2-7(1) (requiring insurers to file policy forms and rates with the Commissioner).

Plaintiffs base their argument on cases applying the "efficient proximate cause" doctrine *in the absence of an anticoncurrent causation clause. See* Pls.' Br. 27-30, 51-52. But those cases neither hold nor remotely hint that it is against public policy for parties to adopt a rule of causation different from the default common-law rule. Rather, those cases hold that, where a policy is *silent* with respect to causation, the court will resort to the efficient proximate cause doctrine as a default matter. *See Leonard*, 499 F.3d at 433; *cf.* Jeffrey Jackson, *Miss. Ins. Law & Prac.* § 15.15 (2007) (observing "clear trend in Mississippi state and federal

courts ... to treat the issue of causation in this context as one controlled by insurance policy, and not by public policy or common law"); Comment, *Watered Down: Are Insurance Companies Getting Hosed in the Wind vs. Water Controversy?*, 2008 U. Ill. L. Rev. 777, 798 (2008) (enforcement of anticoncurrent causation clauses "ensures the contractual independence of both parties and provides the most accurate estimate of the parties' expectations of the policy coverage without rewriting the contract from the bench").

Nor is there any reason to elevate default rules of causation to the status of Mississippi public policy as a matter of first principles. As this Court has recognized, "insurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain, and to ensure that rates have been properly calculated." *United States Fid. & Guar. Co. v. Knight*, 882 So.2d 85, 92 (Miss. 2004). "The majority of jurisdictions permit the parties to an insurance contract to contract out of the efficient proximate cause doctrine." 7 *Couch on Insurance* § 101:45 (collecting cases); *see also TNT*, 114 F.3d at 733 (noting "that the most analogous and more persuasive cases from other states recognize that parties may contract out of application of [otherwise applicable common law causation principles]"); *Meggison*, 53 F. Supp. 2d at 142 ("The vast majority of states uphold such clauses."). While two state supreme courts have enshrined default causation rules in their State's public policy, *see* Pls.' Br. 30 n.17, those decisions stripped policyholders of *their* right to pay lower premiums in exchange for an insurance policy that excludes damage that occurs "concurrently or in any sequence" with

excluded loss. Stripping an insurance policy of a provision for the benefit of certain policyholders necessarily grants those policyholders a windfall at the expense of others, who will in turn face increased premiums or decreased coverage.

In a last-ditch effort, plaintiffs rely on various statements by the MID and the Insurance Commissioner and on the Mississippi Windstorm Underwriting Act (MWUA). These arguments have no merit. As to the statements by the MID, none purport to declare that anticoncurrent causation clauses violate Mississippi public policy. *See* Pls.' Br. 31-32. And in any event, none qualify as an "official" pronouncement of Mississippi public policy "found in [Mississippi's] constitution and statutes, 'and when they have not directly spoken, then in the decisions of the court and constant practice of the government officials.'" *Cappaert v. Junker*, 413 So.2d 378, 380 (Miss. 1982) (citation omitted). As to the MWUA, plaintiffs' argument simply distorts the Act, which does not prohibit private insurers from issuing, and setting the terms and conditions of, their own policies. To the contrary, the Act simply mandates that Mississippi insurers, as a group, make basic windstorm coverage available to those coastal residents who otherwise would be unable to secure such coverage, with correspondingly higher rates. *See* R. Peresich, *Revamping the Wind Pool*, 77 Miss. L.J. 795 (2008). Plaintiffs' assertion that any deviation from the standard policy form of the MWUA violates public policy would substantially undermine the private insurance market in Mississippi.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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February 17, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded by United States mail, postage prepaid, a true and correct copy of the foregoing to counsel listed below.

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