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

MARGARET AND DR. MACGRUDER S. CORBAN	**APPELLANTS**
VERSUS	**NO. 2008-M-645**
UNITED SERVICES AUTOMOBILE ASSOCIATION a/k/a USAA INSURANCE AGENCY and JOHN AND JANE DOES A, B, C, D, E, F, G, AND H	**APPELLEE**

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND STATE FARM FIRE AND CASUALTY COMPANY

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

W. SCOTT WELCH, III, [redacted]
AMY L. CHAMPAGNE, [redacted]
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
4268 I-55 NORTH
MEADOWBROOK OFFICE PARK
JACKSON, MS 39211
(601) 351-2400

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal:

A. Interested Parties:

1. Margaret Corban, Appellant – Plaintiff below

2. Dr. Magruder S. Corban, Appellant – Plaintiff below

3. United Services Automobile Association, Appellee – Defendant below

B. Attorneys:

1. For Margaret and Dr. Magruder S. Corban:

   Judy M. Guice
   Judy M. Guice, P.A.

   Clyde H. Gunn, III
   Christopher C. Van Cleave
   W. Corban Gunn
   Corban, Gunn & Van Cleave, PLLC

   Richard T. Phillips
   Smith, Phillips, Mitchell, Scott & Nowak, LLP.

2. For United Services Automobile Association:

   Charles G. Copeland
   Robert P. Thompson
   Robert L. Goza
   Janet G. Arnold
   Copeland, Cook, Taylor & Bush, P.A

C. Additional Interested Persons – Amici Curiae and Counsel:

1. For United Policyholders – Amicus in Support of Appellants:

   William F. Merlin, Jr.
   Mary E. Kestenbaum
   Merlin Law Group, P.A.
   777 South Harbour Island Blvd., Suite 950
   Tampa, FL 33602

Amy Bach
United Policyholders
222 Columbus Avenue, Suite 412
San Francisco, CA 94133

2. For Jim Hood, Attorney General of the State of Mississippi, *Ex Rel.* The State of Mississippi -- Amicus in Support of Appellants:

Meredith Aldridge
Special Assistant Attorney General

Danny E. Cupit
Mary jo Woods
Law Offices of Danny E. Cupit, P. C.

Crymes G. Pittman
Pittman, Germany, Roberts & Welsh

3. For Nationwide -- Amicus in Support of Appellee

H. Mitchell Cowan
Laura Limerick Gibbes
Watkins Ludlam Winter & Stennis, P.A.

Daniel F. Attridge, P.C.
Christopher Landau, P.C.
Kirkland & Ellis LLP

4. For American Insurance Association (AIA) – Amicus in Support of Appellants

Dan W. Webb
Norma Carr Ruff
Webb, Sanders & Williams, PLLC

Stephen E. Goldman
Wystan M. Ackerman
Robinson & Cole, L.L.P.
Hartford, CT 06103-3597

5. For Allstate Property and Casualty Insurance Company – Amicus in Support of Appellants

Michael B. Wallace
Wise, Carter, Child and Caraway

William C. Griffin
Currie, Johnson, Griffin, Gaines & Myers

Reuben V. Anderson
Fred L. Banks
Debra M. Brown
Rebecca Hawkins
Phelps Dunbar LLP

6. For National Association of Mutual Insurance Companies and State Farm Fire and Casualty Company, a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company – Amici in Support of Appellants:

W. Scott Welch, III
Amy L. Champagne
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Dated: February 19, 2009.

W. SCOTT WELCH, III

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND STATE FARM FIRE AND CASUALTY CO.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Association of Mutual Insurance Companies ("NAMIC") and State Farm Fire and Casualty Co. ("State Farm") submit this brief as *amici curiae* in support of United Services Automobile Association ("USAA"). In this case, the Court has granted interlocutory review of legal issues regarding insurance policy interpretation and insurance coverage for Hurricane Katrina property losses.

NAMIC is a national insurance trade association whose members are property and casualty insurers. NAMIC's members issue property insurance policies in Mississippi as well as other states. Many of the policies of NAMIC members contain policy provisions identical or substantially similar to the water damage exclusion and anti-concurrent cause language in this case. State Farm is a defendant in numerous Hurricane Katrina litigation in Mississippi state and federal courts. State Farm's homeowners policies, like the homeowners policies of other NAMIC members, include a water damage exclusion and an anti-concurrent cause ("ACC") provision. Like the water damage exclusion in the policy issued to Plaintiffs-Appellants ("Plaintiffs") by USAA, State Farm's water damage exclusion has been held to exclude storm surge. State Farm's ACC provision is worded somewhat differently from the analogous USAA provision, but it has also been upheld as unambiguous and enforceable by the Fifth Circuit in Hurricane Katrina cases, as well as by courts around the country in a variety of factual contexts. Thus, while the interpretation and validity of State Farm's particular policy provisions are not before the Court, State Farm has a significant interest in the issues raised by the Petition.

State Farm and NAMIC urge the Court to affirm the trial court's rulings that water damage exclusions unambiguously exclude damage caused by storm surge and that ACC

language validly and unambiguously defines the scope and application of the water damage exclusion. State Farm and NAMIC believe that this *amicus* brief will assist the Court by providing a broader perspective on these issues.

STATEMENT OF THE ISSUES

1. Whether water damage exclusions and anti-concurrent cause language are unambiguous, valid and enforceable under Mississippi law.

2. Whether anti-concurrent cause language is against Mississippi public policy.

ARGUMENT

I. WATER DAMAGE EXCLUSIONS AND ACC LANGUAGE ARE VALID AND ENFORCEABLE CONTRACTUAL PROVISIONS

Although varying somewhat in their wording, the water damage exclusions and ACC language of State Farm and other property insurers have repeatedly been upheld by the courts as unambiguous, valid and enforceable. In challenging the validity and enforceability of the ACC language, Plaintiffs here are attempting to render the water damage exclusion ineffective and to compel coverage of *all* storm surge and other water damage that occurs during a hurricane. (*See* Plaintiffs-Appellants ("Pls.") Br. at 11, 50.) Plaintiffs' attempt to nullify the water damage exclusion is contrary to Mississippi law, and should be rejected by this Court.

A. Water Damage Exclusions, Including the Water Damage Exclusion at Issue in this Case, Unambiguously Exclude Storm Surge

The trial court properly held that USAA's water damage exclusion applied to exclude storm surge damage. (Record Excerpts ("RE") at 20.) That ruling accords with long-standing Mississippi precedent and should be upheld.

The Fifth Circuit has now repeatedly held that storm surge damage is excluded under water damage exclusions, as have federal district courts in Mississippi and Louisiana. *See Leonard v. Nationwide Mut. Ins. Co.*, 438 F.Supp. 2d 684, 693 (S.D. Miss. 2006), *aff'd*, 499 F.3d 419 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (U.S. 2008); *Tuepker v. State Farm Fire & Cas.*

Co., 507 F.3d 346 (5th Cir. 2007); *Bilbe v. Belsom*, No. 06-7956, 2007 WL 2042437, at *4 (E.D. La. July 12, 2007), *aff'd*, 530 F.3d 314 (5th Cir. La. 2008). *See Sher v. Lafayette Ins. Co.*, 988 So. 2d 186, 196 (La. 2008) (water damage exclusions unambiguously and validly excluded Hurricane Katrina levee breach flooding); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 221 (5th Cir. 2007) (same), *cert. denied sub nom., Xavier Univ. of La. v. Travelers Cas. Prop. Co.*, 128 S.Ct. 1230 (2008), and *Chehardy v. Allstate Indem. Co.*, 128 S. Ct. 1231 (2008).

In *Leonard*, the Fifth Circuit addressed a water damage exclusion substantially similar to USAA's and unequivocally rejected the plaintiffs' arguments that storm surge was "distinct from a flood" and that because "[t]he literal wording of the 'water damage' exclusion does not contemplate the exclusion of [damage from] storm surge, recovery is available.'" *Leonard*, 499 F.3d at 436-37 (citation omitted). The exclusionary language in *Leonard* exempted from coverage damage caused by "'flood . . .waves, tidal waves, [and] overflow of a body of water . . . *whether or not driven by wind.*'" *Id.* at 437 (citation omitted; alteration and emphasis in *Leonard*). The Fifth Circuit explained that "[c]ourts have interpreted water-damage exclusions like the one found in the Leonards' policy to encompass the peril of wind-driven inundation by water, or storm surge, for ages." *Id.* In support of its conclusion that storm surge damage was excluded, the Fifth Circuit cited, *inter alia*, *Newark Trust Co. v. Agricultural Insurance Co.*, 237 F. 788, 791 (3d Cir. 1916) (holding that wind-driven storm surge was an excluded flood peril; rejecting policyholder's contention that because "the water was made high, not by normal tidal influences, but by wind, the element insured against, and that in driving the water against the foundations of the house, the water was the passive and the wind the efficient force which proximately caused its destruction"), and Russell & Donaldson, *What Is "Flood" Within Exclusionary Clause of Property Damage Policy*, 78 A.L.R.4th 817, § 2[a] (1990) (noting "little disagreement among the courts" that "storm tide" constitutes a flood); *see also Tuepker*, 507 F.3d

at 352 (exclusion that "include[d] damages caused by, among other things, flood, waves, tidal water, and overflow of a body of water, 'all whether driven by wind or not' . . . accurately describes the influx of water in the [plaintiffs'] home that was caused by Katrina storm surge").

Here, Plaintiffs continue to assert that the water damage exclusion by its plain language does not exclude storm surge damage, but they relegate that argument to a footnote. (*See* Pls. Br. at 25 n.13.) Plaintiffs' goal is to force coverage for all storm surge damage through their arguments that USAA's ACC language and water damage exclusion are ambiguous and that the efficient proximate cause doctrine overrides such policy provisions as a matter of Mississippi public policy. The result of the holdings Plaintiffs seek from this Court would be that (i) "the efficient proximate cause of all Hurricane Katrina losses is wind," including "any loss that may occur as a result of the subsequent storm surge;" and (ii) therefore no hurricane loss (even storm surge damage) constitutes excluded water damage and all losses are covered. (Pls. Br. at 50.) As shown below, Mississippi courts have long applied exclusions that exclude water perils even if "driven by wind," and Plaintiffs' argument is contrary to longstanding Mississippi law.

B. ACC Provisions Are Valid and Enforceable

ACC provisions have been consistently upheld and applied by the courts in situations where covered and excluded perils combine to cause an indivisible loss. As shown below, Plaintiffs are incorrect in their contention that USAA's ACC language is ambiguous and unenforceable or that ACC language in general is ambiguous and unenforceable. Moreover, the conclusions Plaintiffs draw from their incorrect contentions, namely that (i) in place of the ACC language, the efficient proximate cause doctrine should apply and (ii) under the efficient proximate cause doctrine, all damage to Plaintiffs' house should be covered, including storm surge damage, are also incorrect. *See* Point II.B *infra*.

Plaintiffs improperly attempt to create ambiguity by pointing to the contentions of parties

in litigation and by asserting that there are conflicting interpretations of the ACC language in the opinions of the Fifth Circuit and the federal district courts in Hurricane Katrina cases. (*See* Pls. Br. at 14-23.) Contrary to Plaintiffs' contentions, those opinions have in fact resulted in a uniform and consistently applied set of legal rules that are based upon interpretation of the policy language under principles prescribed by this Court. The purported inconsistencies claimed by Plaintiffs are merely the result of minor differences in the wording of the provisions from insurer to insurer and of the differing factual circumstances in each case as to the damage and its causes to which the ACC language and the water damage exclusion are applied.

This Court has made clear that "ambiguities do not exist simply because two parties disagree over the interpretation of a policy." *United States Fidelity & Guar. Co. of Miss. v. Martin*, No. 2007-CA-00193-SCT, 2008 WL 4740031, at *4 (Miss. Oct. 30, 2008). This Court has also rejected the argument "that different courts from different states have reached differing opinions" on the interpretation of an insurance policy provision renders the provision ambiguous. *Wooten v. Miss. Farm Bureau Ins. Co.*, 924 So. 2d 519, 521 (Miss. 2006). Accordingly, Plaintiffs' arguments that parties and courts have taken different positions as to the interpretation of the policy provisions at issue (*see* Pls. Br. at 14-26) do not create ambiguity where there is none. Rather, the focus of the inquiry must be the policy language itself. The determination of its meaning and whether it is ambiguous is a legal question for the Court. *See Noxubee County Sch. Dist. v. United Nat'l Ins. Co.*, 883 So. 2d 1159, 1165 (Miss. 2004); *State Auto. Mut. Ins. Co. of Columbus v. Glover*, 176 So. 2d 256, 258 (Miss. 1965).

ACC language serves the function of making clear that wind alone is covered, that flood is excluded however characterized or denominated, and that the water damage exclusion applies regardless of the presence of other, covered perils contributing to the loss. USAA's ACC language states that USAA "do[es] not insure for loss caused directly or indirectly by" water

damage and that "[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." (*See* Defendant-Appellee's ("Def.") Br. at 11.) The Circuit Court correctly held that under a "plain common sense reading," this provision was unambiguous and that under that language Plaintiffs could "not recover for any damage caused by water as defined in the policy or a combination of that water and wind." (RE 16-17, 20.)

State Farm's ACC provision is also clear and unambiguous. It states:

> We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event 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: . . .

State Farm maintains that its water damage exclusion, construed together with its ACC language, does not bar coverage for separate, independent wind damage that occurs before water damage, even if a water peril subsequently destroys the house. Rather, the clause "loss which would not have occurred in the absence of one or more of the following excluded events" means that separate wind damage occurring before storm surge is covered because it would have occurred even "in the absence of" the storm surge.[1] The Fifth Circuit agrees. Considering State Farm's policy, it has held, "indivisible damage caused by both excluded perils and covered perils or other causes is not covered," but because State Farm's ACC language "by its terms applies only to 'any loss which would not have occurred in the absence of one or more of the below listed excluded events' . . . , if wind blows off the roof of the house, the loss of the roof is not excluded merely because a *subsequent* storm surge later completely destroys the entire remainder of the

[1] Plaintiffs argue that State Farm has taken inconsistent positions with regard to the meaning of its ACC language. (*See* Pls. Br. at 21.) In fact, in the *Palmer* case, which Plaintiffs cite, State Farm filed a motion before the district court correcting and clarifying the contentions made by its counsel. *See* State Farm's Motion to Alter or Amend, *Palmer v. State Farm Fire and Cas. Co.*, No. 1:08-CV-39-LTS-RHW (S.D. Miss. filed May 31, 2007) [Doc. 27].

structure; such roof loss *did* occur in the absence of any listed excluded peril." *Tuepker*, 507 F.3d at 354.

The Fifth Circuit also held that Nationwide's ACC language, which is very similar to USAA's, is clear and enforceable under Mississippi law. *See Leonard*, 499 F.3d at 430-36. The Fifth Circuit's rulings in these Hurricane Katrina cases correctly set forth Mississippi law. Mississippi courts have repeatedly rejected contentions that ACC language is ambiguous or unenforceable. *See, e.g., Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067, 1070 (Miss. Ct. App. 2004) (holding, in context of earth movement exclusion, that State Farm's ACC language was "clear" and "[u]nambiguous language of exclusion"); *Wallace v. City of Jackson*, No. 251-05-941 CIV, slip op. at 3 (Miss. Cir. Ct. Hinds County Sept. 15, 2006) (following *Boteler* in context of water damage exclusion and holding that State Farm's ACC language has been "judicially determined to be clear and unambiguous"); *see also Rhoden v. State Farm Fire & Cas. Co.*, 32 F.Supp. 2d 907, 911-13 (S.D. Miss. 1998) (upholding State Farm's ACC language under Mississippi law), *aff'd mem.*, 200 F.3d 815 (5th Cir. 1999), *text available at* 1999 WL 1095617. Courts in numerous other jurisdictions have upheld ACC language as clear and unambiguous.[2]

In short, an examination of the ACC language and water damage exclusion at issue in this case establishes that USAA's policy language is clear and unambiguous. Therefore, as a matter of Mississippi law, that language should be interpreted and enforced "as written." *See Martin*,

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[2] *See, e.g., Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1130 (D.C. 2001); *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 243-46 (Fla. Dist. Ct. App. 2002); *Toumayan v. State Farm Gen. Ins. Co.*, 970 S.W.2d 822, 826 (Mo. Ct. App. 1998); *Kula v. State Farm Fire & Cas. Co.*, 628 N.Y.S.2d 988, 990-91 (App. Div. 1995); *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1275-77 (Utah 1993); *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 313-14 (Ala. 1999); *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1045-46 (Alaska 1996); *Millar v. State Farm Fire & Cas. Co.*, 804 P.2d 822, 826 (Ariz. Ct. App. 1990); *Whitt v. State Farm Fire & Cas. Co.*, 734 N.E.2d 911, 915 (Ill. App. Ct. 2000); *Rodin v. State Farm Fire & Cas. Co.*, 844 S.W.2d 537, 538-39 (Mo. Ct. App. 1992); *Schroeder v. State Farm Fire & Cas. Co.*, 770 F. Supp. 558, 561-62 (D. Nev. 1991); *Silow v. State Farm Ins. Co.*, No. Civ. A. 94-2956, 1994 WL 709362, at *2 (E.D. Pa. Dec. 20, 1994); *State Farm Fire & Cas. Co. v. Paulson*, 756 P.2d 764, 767 (Wyo. 1988); *Moschitto v. Traveler's Prop. Cas.*, 846 N.E.2d 793 (Mass. App. Ct. 2006) (table), *text available at* 2006 WL 1275979, at *1.

2008 WL 4740031, at *4; *see also, e.g.*, *Titan Indem. Co. v. Estes*, 825 So. 2d 651, 656 (Miss. 2002) ("[A] court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured."); *Am. Bankers' Ins. Co. v. White*, 171 Miss. 677, 685, 158 So. 346, 349 (1935) ("[W]here a clause in a contract does not violate any statute, or public policy, and is unambiguous and certain in its provisions, it is enforced as written.").

II. ACC PROVISIONS ARE NOT CONTRARY TO PUBLIC POLICY

Plaintiffs also argue that the ACC language in USAA's policy is contrary to Mississippi public policy and therefore void. (Pls. Br. at 26-34.) Specifically, Plaintiffs contend that the ACC provision violates public policy as expressed in the legislation creating the Mississippi Windstorm Underwriting Association ("the MWUA"),[3] in Mississippi case law, and in post-Katrina bulletins from the Mississippi Insurance Commissioner.

Under Mississippi law, an unambiguous policy provision will not be invalidated on public policy grounds, unless it contravenes public policy as "established by statutes enacted by the Mississippi Legislature and by case law of this state." *Pace v. Fin. Sec. Life of Miss.*, 608 So. 2d 1135, 1138 (Miss. 1992) (refusing to invalidate exclusion on public policy grounds). Thus, "'[i]n Mississippi, an insurance policy's plain meaning controls unless an affirmative expression of an *overriding public policy* by the legislature or judiciary allows us to reach a different result.'" *Blakely v. State Farm Mut. Auto Ins. Co.*, 406 F.3d 747, 754 (5th Cir. 2005) (citation omitted; emphasis added). None of Plaintiffs' cited authorities support or permit invalidating the ACC provision on public policy grounds.

A. ACC Provisions Are Not Contrary to Any Purported Public Policy Expressed in Legislation Creating the MWUA

Plaintiffs argue that by creating the MWUA in 1987 (requiring private insurers to provide

[3] In connection with other amendments in 2007, the Act was renamed the "Mississippi Economic Growth and Redevelopment Act of 2007." 2007 Miss. Laws, Ch. 425, § 1.

windstorm and hail insurance to coastal residents who would otherwise not be able to obtain such coverage) and by endorsing a policy form that does not include an ACC provision, the Legislature in effect has mandated a "minimum amount of coverage for hurricanes" as a matter of public policy. (Pls. Br. at 32-34.) Thus, the argument goes, because an ACC provision operates to reduce the amount of coverage for hurricane damage in some instances, it necessarily runs counter to this legislative decree and is unenforceable.

There are several fatal flaws in Plaintiffs' argument. First, it rests on the erroneous premise that the MWUA requires private insurers to provide a prescribed level of windstorm coverage. To the contrary, the wind pool legislation 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. As one commentator explained:

> In 1987, in the aftermath of significant hurricane damage to the Mississippi Gulf Coast, many of the major property and casualty insurance companies discontinued writing home and commercial coverage in the six coastal counties. To address the problem, the Mississippi Legislature created the Mississippi Windstorm Underwriting Association . . . commonly referred to as the "wind pool." . . . The coast county residents who were unable to find private insurance through the usual markets were given the opportunity to have their properties insured through companies who were mandated to be members of the wind pool. The rates for coverage in the wind pool were slightly higher than those in the private market since its purpose was to have coverage written through the wind pool only as a last resort.

R. Peresich, *Revamping the Wind Pool*, 77 Miss. L.J. 795, 795 (Spring 2008); *see also Ass'n Cas. Ins. Co. v. Allstate Ins. Co.*, 507 F. Supp. 2d 610, 614 (S.D. Miss. 2007) ("[F]or almost two decades, in accordance with its legislative purpose, the [MWUA] has made windstorm and hail insurance available to residents of the coastal counties of Mississippi who otherwise would not have been able to get such insurance in the normal insurance market."). While the coverage provided to this special risk pool is written on a standard form, nothing in the MWUA legislation suggests an intention to prohibit private insurers from continuing to issue their own policies

(which, by the time the MWUA was enacted in 1987, commonly included ACC provisions) or to dictate the terms and conditions of such private policies.

Second, Plaintiffs rely heavily on the Mississippi Insurance Commissioner's approval of the MWUA form policy, which includes a water damage exclusion, but not what Plaintiffs consider an ACC provision. In fact, the MWUA form policy prefaces the policy's exclusions by language ("This company shall not be liable for loss caused by, resulting from, contributed to, or aggravated by any of the following . . . .") that functions as and has been characterized as an "anti-concurrent cause clause." *ABI Asset Corp. v. Twin City Fire Ins. Co.*, No. 96Civ2067, 1997 WL 724568, at *2 (S.D.N.Y. Nov. 18, 1997); *cf. Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 685-86 (Colo. 1989) (characterizing the words "contributed to" and "aggravated by" in water exclusion as "qualifying and enlarging words of causation"). Thus, Plaintiffs' suggestion that the approval of this form somehow reflects legislative or regulatory disapproval of ACC provisions is incorrect. Moreover, the Commissioner approved USAA's and State Farm's policy forms containing water damage exclusions and ACC language. Courts applying Mississippi law have cited such approval as a basis for rejecting claims that an insurance policy was void as against public policy, *see, e.g.*, *Blakely*, 406 F.3d at 754, and have done so in upholding both State Farm's ACC provision and a version of the provision nearly identical to USAA's. *See Tuepker*, 507 F.3d at 356 n.10; *Leonard*, 499 F.3d at 435-36.

Plaintiffs further erroneously assert that certain statements by then-Commissioner George Dale demonstrate that the ACC provision contravenes Mississippi public policy. (Pls. Br. at 31.) The first such statement, from a September 7, 2005 DOI bulletin, has nothing to do with the ACC provision. Rather, it addresses the question of which party has the burden of proving the cause of loss when (unlike here) only a slab remains of the insured home, leaving "very little or nothing left" to show "whether the loss was caused by wind or water." *Id.* The second statement,

reported in the *Sun Herald* ("we interpret [ACC provisions to mean] that if there's wind involved, at whatever state of the claim, wind should be paid"), also fails to support Plaintiffs' contention. Although somewhat lacking in clarity, this statement appears to mean that the ACC provision does not bar coverage for independent wind damage even if storm surge subsequently inundates the same area and destroys the house. Both State Farm and USAA take this same position. In any case, a statement in a newspaper interview — even of the Commissioner of Insurance — is not an "official" pronouncement of public policy, which "must be 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).

Finally, in amending the MWUA statutes to address a massive and unanticipated number of Katrina claims paid by the MWUA, the Mississippi Legislature has effectively reaffirmed the continued ability of private insurers to use policy forms containing ACC provisions. *See, e.g.*, Miss. Code §§83-34-9 (1), 83-34-13 (2), 83-34-13 (4). Among other changes, these amendments require the wind pool to provide "financial incentives or financial penalties, or both, . . . to encourage *voluntary writing* in the coast area." Miss. Code § 83-34-13 (4) (emphasis added); *see also id.* § 83-34-9 (1) (authorizing grouping of data in calculating assessments "to the extent that such grouping promotes the voluntary writing of essential property insurance in the coast area"); *Ass'n Cas. Ins. Co.*, 507 F.Supp. 2d at 614 (noting that, as an incentive, each insurer "receives a credit for windstorm and hail insurance it voluntarily writes in the coast area which results in a reduction of the writing member's total responsibility for general windpool losses"). In encouraging "voluntary writing" of windstorm coverage, the Legislature was clearly encouraging carriers to write coverage using their standard property coverage forms. Since virtually all of those policy forms include ACC provisions, the Legislature's failure to prohibit such provisions

while encouraging insurers to write property policies in the coastal areas negates any claim that such provisions are contrary to public policy.

In short, creation of the MWUA was never intended to preclude private insurers from issuing their own policies providing coverage for property damage (including those containing ACC provisions). Instead, it was simply designed to ensure that a coastal resident unable to secure wind coverage through a private insurer had a means of doing so. Moreover, as noted above, the MWUA form policy itself includes the functional equivalent of ACC language. To the extent the MWUA and its policy form reflect the public policy of Mississippi, that public policy supports the use of ACC provisions.

B. ACC Provisions Do Not Contravene Public Policy Expressed in Judicial Precedent

According to Plaintiffs, USAA's ACC clause "should be voided as contrary to public policy," because "Mississippi law should not permit an insurer to deny coverage for loss caused by a hurricane when the efficient proximate cause of the loss, i.e., wind is covered." (Pls. Br. at 26.) To support their argument, Plaintiffs claim that "Mississippi law has long held that damages caused by winds of a hurricane are covered under a property insurance policy notwithstanding the contribution of other factors, so long as the wind was the proximate cause of the damage." (*Id.* at 27-28.)

Plaintiffs' view of Mississippi law is not supported by the judicial decisions they cite. Indeed, the cases on which Plaintiffs rely are inapposite because, as the Fifth Circuit noted in rejecting a similar argument, "none of the policies they involve contain ACC clauses similar to the one at issue here." *Leonard*, 499 F.3d at 433. Furthermore, and most important, none of Plaintiffs' cited cases "purport[s] to enshrine efficient proximate causation as an immutable rule of Mississippi insurance policy interpretation." *Id.* Rather, as the Fifth Circuit correctly observed, the Hurricane Camille cases relied upon by Plaintiffs — including *Grace v. Lititz*

Mutual Insurance Co., 257 So. 2d 217 (Miss. 1972), *Lititz Mutual Insurance Co. v. Boatner*, 254 So. 2d 765 (Miss. 1971), and *Commercial Union Insurance Co. v. Byrne*, 248 So. 2d 777 (Miss. 1971) — "did little more than uphold jury findings that the damages suffered by policyholders were caused *exclusively by wind*, not by concurrent wind-water action." *Leonard*, 499 F.3d at 432 & n.6 (emphasis in original) (quoting, *e.g.*, *Grace*, 257 So. 2d at 224: "[T]he jury had ample testimony to sustain [the insureds'] contention that their office building was destroyed by wind before the tidal waters reached the property.") The same can be said of the non-Camille cases relied upon by Plaintiffs. *See, e.g.*, *Firemen's Ins. Co. of Newark, N.J. v. Schulte*, 200 So. 2d 440 (Miss. 1967) (affirming "because we find that whether there was a direct loss by windstorm unaffected by [the flood exclusion] was a question of fact for the jury."); *Home Ins. Co., N. Y. v. Sherrill*, 174 F.2d 945, 946 (5th Cir.1949) (upholding jury determination that "the building was destroyed by the direct and sole action of the wind before the water was high enough and rough enough to contribute thereto"); *Ebert v. Pac. Nat'l Fire Ins. Co.*, 40 So. 2d 40, 46 (La. Ct. App. 1949) (affirming judgment for insured because "the wind directly damaged the property and was alone the proximate and efficient cause of the camp being deposited in the water").[4] Thus, these cases do not mean what Plaintiffs claim they mean and do not support their argument that Mississippi does not recognize the validity of ACC language and requires coverage for water damage if wind set the water in motion. *See Leonard*, 499 F.2d at 432-33.[5]

Even *if* the Hurricane Camille cases did establish the efficient proximate cause doctrine

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[4] Tellingly, Plaintiffs have omitted from their lengthy quote from this "instructive" case (Pls. Br. at 28-29) the following sentence: "There is not one scintilla of evidence in the record of a tidal wave-where great bodies of gulf waters were blown into and against the camps causing them to be inundated and swept away by the mad fury of gargantuan waves of water." *Ebert*, 40 So. 2d at 46. The Katrina cases, of course, involve precisely that, in the form of storm surge.

[5] The Fifth Circuit has made clear its view that the efficient proximate cause doctrine only applies where two or more distinct forces combine to create the loss and does not apply under the theory espoused by Plaintiffs here, i.e., when one force (here wind) is a "factor" in bringing about the event (e.g. flood or storm surge) that causes the damage. *See In re Katrina Canal Breaches*, 495 F.3d at 223.

as Mississippi's "*default* rule,"[6] that rule would apply only in the absence of policy language to the contrary. *Id.* at 433. Where the policy contains an explicit ACC provision, the effect is to "'contract out of the efficient proximate cause'" rule, thus ensuring that the policy exclusions will be applied regardless of the presence of other, covered events contributing to the loss. *Id.* at 434 (citation omitted). Indeed, in *Grain Dealers Mutual Insurance Co. v. Belk*, this Court made clear that insurers are free to draft their policies so as to exclude coverage where there are concurrent or sequential causes of a loss and one (or more) of those causes is a peril excluded under the policy. *See* 269 So. 2d 637, 640 (Miss. 1972) (if covered peril is the dominant and efficient cause of the loss, there is coverage even if other noncovered risks contributed to the loss "*unless the contributing cause is expressly excluded by the terms of the policy*") (emphasis added).

Thus, the Fifth Circuit's "educated '*Erie* guess'" that "use of an ACC clause to supplant the default causation regime is not forbidden by Mississippi case law . . . , statutory law, or public policy," *Leonard*, 499 F.3d at 436, is well supported by *Belk* and by other state and federal cases applying Mississippi law, which have consistently enforced ACC provisions over an insured's objection that the "efficient proximate cause" doctrine should govern. *See Leonard*, 499 F.3d at 433-34 (discussing *Rhoden*, 32 F.Supp. 2d 907, 913 (rejecting "efficient proximate cause" analysis in context of earth movement exclusion), *aff'd mem.*, 200 F.3d 815 (5th Cir. 1999)); *Boteler*, 876 So. 2d at 1070 (following *Rhoden* in earth movement case); *Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F.Supp. 2d 606, 623-23 & n.18 (S.D. Miss. 2001) (following *Rhoden* in construing scope of water damage exclusion). *See also* Jeffrey Jackson, *Mississippi Ins. Law & Prac.* § 15:15 (2007) (stressing "the clear trend in Mississippi state and federal

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[6] *Kemp v. American Universal Insurance Co.*, 391 F.2d 533, 535 (5th Cir. 1968), cited by Plaintiffs here (Pls. Br. at 30 n.16), also expressly acknowledges that an insurer may use language "otherwise limit[ing] or defin[ing]" the applicable causation standard. *Kemp*, 391 F.2d at 534-35 ("[I]n order to recover on a windstorm insurance policy, *not otherwise limited or defined*, it is sufficient to show that wind was the proximate or efficient cause of loss or damage . . . .") (emphasis added).

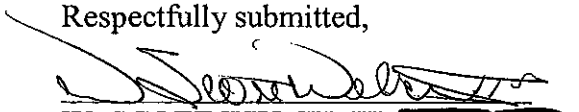
courts . . . to treat the issue of causation in this context as one controlled by the insurance policy, and not by public policy or common law").

Indeed, the vast majority of court decisions from across the country permit insurers to opt out of default causation rules by means of an ACC provision. *See Leonard*, 499 F.3d at 434-35 (collecting cases). A leading insurance treatise has also recognized the national trend to "permit the parties to an insurance contract to contract out of the efficient proximate cause doctrine." 7 Lee R. Russ, *Couch on Insurance* § 101:45 & n.4 (3d ed. 2007). In short, in Mississippi as in the overwhelming majority of other jurisdictions to consider the issue, insurers are free to draft their policies so as to exclude coverage where there are concurrent or sequential causes of a loss and one (or more) of those causes is a peril excluded under the policy. *See Belk*, 269 So. 2d 637, 640 (Miss. 1972) (if covered peril is the dominant and efficient cause of the loss, there is coverage even if other noncovered risks contributed to the loss "*unless the contributing cause is expressly excluded by the terms of the policy*") (emphasis added); *see also, e.g. Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 685 (Colo. 1989) ("the 'efficient moving cause' rule must yield to qualifying or enlarging words agreed to by the parties and included in the insurance policy"). Plaintiffs' argument that Mississippi law and public policy do not permit the efficient proximate cause rule to be displaced by an ACC provision is utterly unsupported and should be rejected by this Court.

CONCLUSION

Amici NAMIC and State Farm respectfully submit that the Court should affirm the validity of ACC provisions and the exclusion of storm surge under water damage exclusions.

Respectfully submitted,



W. SCOTT WELCH, III,

ATTORNEY FOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES and STATE FARM FIRE AND CASUALTY COMPANY

OF COUNSEL:

W. Scott Welch, III,
Amy L. Champagne
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ , P.A.
P.O. Box 14167
Jackson, MS 39236
Telephone: (601) 351-2400
Facsimile: (601) 351-2424

CERTIFICATE OF SERVICE

I, W. Scott Welch, III, one of the attorneys for National Association of Mutual Insurance Companies and State Farm Fire and Casualty Company, do hereby certify that I have this day served a true and correct copy of the foregoing Motion for Leave to File Brief as Amici Curiae by mailing the same by United States Mail with postage fully prepaid thereon to Honorable Lisa P. Dodson, Circuit Judge, P. O. Box 1461, Gulfport, MS 39502 and to the following attorneys:

Judy M. Guice
Judy M. Guice, P.A.
P.O. Box 1919
Biloxi, MS 39533

Clyde H. Gun, III
Christopher C. VanCleave
W. Corban Gun
Corban, Gunn & VanCleave, PLLC
P.O. Drawer 1916
Biloxi, MS 39533

Richard T. Philips
Smith, Philips, Mitchell, Scott & Nowak, LLP
P.O. Drawer 1586
Batesville, MS 38606

William F. Merlin, Jr.
Mary E. Kestenbaum
Merlin Law Group, P.A.
777 South Harbour Island Blvd., Ste 950
Tampa, FL 33602

Amy Bach
United Policyholders
222 Columbus Avenue, Ste 412 San
Francisco, CA 94133

Meredith Aldridge
Special Assistant Attorney General
P. O. Box 220
Jackson, MS 39205-0220

Danny E. Cupit
Mary Jo Woods
Law Offices of Danny E. Cupit, P.C.
P. O. Box 22929
Jackson, MS 39225-2929

Crymes G. Pittman
Pittman, Germany, Roberts & Welsh
P. O. Box 22985
Jackson, MS 39225-2985

Dan W. Webb
Norma Car Ruff
Webb, Sanders & Williams, P.L.L.C.
P. O. Box 496
Tupelo, MS 38802

Stephen E. Goldman
Wystan M. Ackerman
Robinson & Cole, L.L.P.
280 Trumbull Street
Hartford, CT 06103-3597

Michael B. Wallace
Wise, Carter, Child and Caraway
P. O. Box 651
Jackson, MS 39205-0651

William C. Griffin
Currie, Johnson, Griffin, Gaines & Myers
P. O. Box 750
Jackson, MS 39205

Reuben V. Anderson
Fred L. Banks
Debra M. Brown
Rebecca Hawkins
Phelps Dunbar LLP
111 East Capitol Street, Suite 600
Jackson, MS 39201

Charles G. Copeland
Robert P. Thompson
Robert L. Goza
Janet G. Arnold
Copeland, Cook, Taylor & Bush, P.A.
P. O. Box 6020
Ridgeland, MS 39158

H. Mitchell Cowan
Laura Limerick Gibbes
Watkins Ludlam Winter & Stennis, P.A.
190 East Capitol Street, Suite 800
Jackson, MS 39201

Daniel F. Attridge, P.C.
Christopher Landau, P.C.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005

This the 19th day of February, 2009.

W. SCOTT WELCH, III