

IN THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

JIM HOOD, ATTORNEY GENERAL
FOR THE STATE OF MISSISSIPPI,
ex rel. THE STATE OF MISSISSIPPI

FILED

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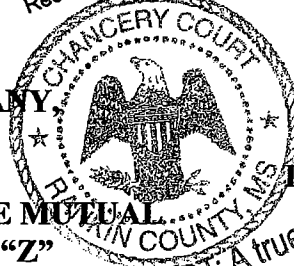
LARRY SWALES
Chancery Clerk, Rankin County
Rec. In Bk. Pg. _____

PLAINTIFFS

VS.

CIVIL ACTION NO. G2005-1642

MISSISSIPPI FARM BUREAU INSURANCE,
STATE FARM FIRE AND CASUALTY COMPANY,
ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY, UNITED SERVICES
AUTOMOBILE ASSOCIATION, NATIONWIDE MUTUAL
INSURANCE COMPANY, and "A" THROUGH "Z"
ENTITIES (M.R.C.P. 9(h) DEFENDANTS)



61,667 J.S.

ATTEST: A true copy
LARRY SWALES, Chancery Clerk
By M. Folke D.C.

OPINION AND JUDGMENT ON THE PLEADINGS

THIS CAUSE came on to be heard on the Motion for Judgment on the Pleadings filed by Allstate Property and Casualty Insurance Company on April 10, 2007, Motion for Judgment on the Pleadings filed by Nationwide Mutual Insurance Company on October 5, 2007 and Cross-Motion for Judgment on the Pleadings filed by the State of Mississippi on September 12, 2007. After lengthy consideration and repeated review of the parties' briefs, the documentation submitted and the arguments and cases cited by both parties, the Court finds the following to wit:

Factual Background and Procedural History

On September 15, 2005, Jim Hood, Attorney General for the State of Mississippi (hereinafter referred to as "Attorney General"), filed a Complaint and Motion for Temporary

Restraining Order in Hinds County Chancery Court, First Judicial District, against the above-named Defendants. The Complaint alleges that each Defendant issued insurance policies to residents and/or property owners of the Mississippi Gulf Coast purporting to insure against property loss and damage from wind storms and hurricanes. These policies contained the same or substantially similar provisions attempting to exclude coverage for hurricane loss and damage if the loss/damage resulted from water, whether or not driven by wind.¹

On August 29, 2005, Hurricane Katrina, a Category Four (4) Hurricane, made landfall at or near Waveland, Mississippi with winds and rising water that damaged and/or destroyed thousands of homes and much real and personal property located on the Mississippi Gulf Coast. The subject policies of this litigation denied insurance coverage on homes and properties damaged by rising water. The Complaint filed by the Attorney General basically alleges the following: (1) referenced exclusion provisions are void and unenforceable as violations of the public policy of the State of Mississippi in that the exclusion provisions alter, abrogate or invalidate longstanding Mississippi law; (2) the subject policies of property and casualty insurance are difficult to understand adherence contracts, depriving consumers of meaningful choices of coverage and that same are unconscionable; (3) the exclusion provisions of such policies are ambiguous on their face when read in logical conjunction with other provisions of the subject policy; (4) Defendant's action of selling insurance that attempts to exclude coverage for storm surge damage is an unfair and deceptive trade practice that violates § 75-24-5(1) and (2) of the Mississippi Consumer Protection Act; and (5) Defendants are forcing or attempting to

¹ The provisions are known as "flood exclusion" clauses or also known as anti-concurrent clauses or "ACC" clauses.

force policyholders to accept substantially reduced payments on claims in exchange for a release from further liability, causing residents to suffer immediate and irreparable harm, warranting injunctive relief by the Court.²

On September 16, 2005, a Notice of Removal and subsequently an Amended and Supplemental Notice of Removal were filed in the United States District Court for the Southern District of Mississippi, Jackson Division, by Allstate Property and Casualty Insurance Company (hereinafter referred to as "Allstate"), which was joined in by all Defendants. Plaintiff, on behalf of the State of Mississippi, filed a Motion to Remand to the Chancery Court of Hinds County, First Judicial District.

On September 16, 2005, Defendant AllState filed its Answer and Counterclaim seeking (a) a declaration that neither Hood nor the State of Mississippi has the authority to direct how flood claims are handled pursuant to the National Flood Insurance Plan (NFIP), because the handling of flood claims is exclusively a creature of federal law and regulation; (b) a declaration that any litigation to determine the scope of coverage for flood damage under the Standard Flood Insurance Policies (SFIPs) issued pursuant to federal regulation must occur in federal court pursuant to 42 U.S.C. §4207; and (c) a declaration of Allstate's rights and obligations under the "Other insurance" clause of the SFIP. The counterclaim referenced what has come to be known as the "Flood Exclusion" (hereinafter sometimes referred to as "ACC clause," standing for anti-concurrent clause) contained in its insurance policies. The exclusion is listed as follows:

² In the Attorney General's Cross-Motion for Judgment on the Pleadings and Response in Opposition to Defendants' Motion for Judgment on the Pleadings, the Attorney General abandoned Count Five, which is the only count seeking injunctive relief. *See*, Cross-Motion filed September 12, 2007 at ¶ 11.

Losses We Do Not Cover Under Coverages A and B:

We do not cover loss to the property described in Coverage A-Dwelling Protection or Coverage B-Other Structures Protection consisting of or caused by:

1. Flood, including but not limited to, surface water, waves, tidal waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.

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

Similarly, Nationwide's standard homeowners policy contains the following exclusion from its dwelling, other structures, and personal property coverages:

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.
 -
 - (b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:
 - (1) flood, surface, water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.
 -
2. We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss;
 -
 - (c) Weather conditions, if contributing in any way with an exclusion listed in paragraph 1. of this Section.

During the course of the referenced litigation, several insurance companies moved to intervene. The Attorney General, on February 6, 2006, requested a hearing on his motion for expedited review.

On March 8, 2006, United States District Judge Tom S. Lee entered an Order of Removal. On May 16, 2006, Judge Lee signed a recusal order and the case was assigned to US District Judge Henry T. Wingate. Judge Wingate transferred this matter to Senior Judge L.T. Senter. On December 26, 2006, Judge Senter remanded this matter to the Chancery Court of Hinds County, Mississippi, First Judicial District. Judge Senter's order basically stated that federal jurisdiction was not created out of an essentially state law function: interpretation of the terms of private insurance policies.

On January 23, 2007, a Settlement Agreement was entered between Plaintiff and Defendant, State Farm Fire and Casualty Company, thereby dismissing State Farm from this action.³

On February 28, 2007, Allstate filed a Motion to Dismiss Based on Improper Venue or, in the Alternative, to Transfer to the Chancery Court of Rankin County pursuant to Section 75-24-9 of the Mississippi Code of 1972, as amended, which provides that suits brought against an insurance company *shall* be brought in the Chancery Court of the county of its residence, which for Allstate is Rankin County. All Defendants to this action entered their consent to the said motion to transfer.

On April 10, 2007, Allstate filed a Motion for Judgment on the Pleadings accompanied with a Memorandum in Support thereof.⁴ The Motion to Dismiss or to Transfer, along with the Motion for Judgment on the Pleadings, was scheduled for May 18, 2007, in front of Chancellor

³ To date, all defendant insurance companies originally named as defendants have been dismissed except for Allstate and Nationwide.

⁴ Nationwide Mutual Insurance Company (hereinafter referred to as "Nationwide") filed their Motion for Judgment on the Pleadings on October 5, 2007.

Denise Sweet Owens of the Hinds County Chancery Court, First Judicial District. At that hearing, Chancellor Owens found that the Motion to Transfer to the Chancery Court of Rankin County filed by Allstate and Nationwide was well taken and granted same. Chancery Court Judge Dan H. Fairly, Place 1, was assigned this case and originally scheduled an initial hearing on September 24, 2007. However, Chancellor Fairly recused himself upon motion of Plaintiff, due to a prior shared contingency agreement by Judge Fairly with certain counsel for Plaintiff while Judge Fairly was formerly engaged in the practice of law. An Order of Recusal was later entered on October 23, 2007, by Judge Fairly.

This matter was then assigned to Chancery Court Judge John S. Grant, III, Place 2, of the Rankin County Chancery Court, where the matter was set for hearing on May 5, 2008, at 9:00 a.m. However, the Court dispensed with oral arguments by the respective parties and an Order dispensing with oral arguments pursuant to Rule 3.11 of the Uniform Chancery Court Rules was entered April 18, 2008, by Judge Grant.

Legal Issues

- (1) Whether certain “exclusion” provisions contained in Nationwide’s and Allstate’s insurance policies are void and unenforceable as violations of public policy of the State of Mississippi in that the exclusion provisions alter, abrogate or invalidate longstanding Mississippi law?
- (2) Whether Nationwide’s and Allstate’s property casualty insurance policies are difficult to understand adhesion contracts, thus depriving consumers with a meaningful choice of coverage?

- (3) Whether certain “exclusion” provisions contained in Nationwide’s and Allstate’s insurance policies are ambiguous on their face when read in logical conjunction with other provisions of the subject policies?
- (4) Whether Nationwide’s and Allstate’s actions of selling insurance policies that attempt to exclude coverage for storm surge damage are an unfair and deceptive trade practice that violates § 75-24-5(1) and (2) of the Mississippi Code of 1972, as amended?
- (5) Whether Mississippi Attorney General Jim Hood has standing to challenge private insurance contracts to which neither the state of Mississippi nor any state agency is a party?
- (1) The flood and water exclusion provisions contained in Allstate’s and Nationwide’s insurance policies are *not* void and unenforceable as violations of public policy of the State of Mississippi.**

The Attorney General argues in his Complaint⁵ that Defendants’ attempted exclusions from coverage of property losses resulting directly or indirectly from water, whether or not driven by wind, improperly seek to alter, abrogate, or invalidate longstanding Mississippi law governing proximate causation by refusing coverage even if other perils, such as hurricane winds or windstorm, were the proximate cause of the loss. Specifically, the Attorney General touts the doctrine of “efficient proximate cause,” which means essentially that if the proximate cause of a loss is a covered peril under an insurance policy, the existence of or contribution by a non-covered peril does not bar coverage. In other words, if the insured homeowner can *prove* that hurricane winds (or objects driven by those winds) and rains entering the insured premises through openings caused by hurricane winds proximately caused damage to the insured property, those losses will be covered under the policy, and this will be the case even if flood damage, which is not covered, subsequently occurred.

⁵ See, Complaint and Motion for Temporary Restraining Order at ¶ 24-28

The Attorney General's arguments on the subject issue, while stating correct legal principles, are misplaced. The Fifth Circuit has explicitly recognized that efficient proximate causation does not necessarily control Mississippi contracts for hurricane damage. *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419, 433 (5th Cir. 2007) (See also, *Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533, 34-35 (5th Cir. 1968). A general background principle of Mississippi contract law holds that parties may decline to adopt common-law causation rules so long as the contract's provisions do not offend public policy. *Miss. Farm Bureau Cas. Ins. Co. v. Britt*, 826 So.2d 1261, 1266 (Miss. 2002) Mississippi has not adopted the efficient proximate cause doctrine as a matter of public policy, thus there is no bar to an insurance company's use of an ACC clause.

Further, a contract is not invalid as contrary to public policy unless it is "prohibited by the Constitution, a statute or condemned by some decision of the courts construing the subject matter." *Heritage Cablevision v. New Albany Elec. Power Sys.*, 6546 So.2d 1305, 1313 (Miss. 1994) The Attorney General does not allege that the flood exclusion is prohibited by the Mississippi Constitution nor any Mississippi statute. Rather, his contention is that the flood exclusions are contrary to "longstanding Mississippi law and judicial precedents governing the issue of proximate causation." These longstanding judicial precedents referenced arose during post-Hurricane Camille cases in the early 1970s. However, in those cases the court did little more than uphold jury findings that the damages suffered by policyholders were caused exclusively by wind, not by concurrent wind-water action. See, *Liberty Universal Ins. Co. v. Hall*, 289 So.2d 683, 684 (Miss. 1972); *Lititz Mut. Ins. Co. v. Buckley*, 261 So.2d 492, 495 (Miss. 1972); *Grace v. Lititz Mut. Ins. Co.*, 257 So.2d 217, 224 (Miss. 1972); *Lititz Mut. Ins. Co. v.*

Boatner, 254 So.2d 765 , 766 (Miss. 1971); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777, 781 (Miss. 1971); and *Firemen's Ins. Co. of Newark, New Jersey v. Schulte*, 200 So.2d 440, 442-43 (Miss. 1967)

Moreover, Mississippi law vests with the Insurance Commissioner the exclusive authority to review and approve rates and forms for homeowners' policies. Allstate and Nationwide are required to file all rates and policy forms with the Insurance Commissioner at least thirty (30) days before they become effective. Miss. Code Ann. § 83-2-7 (Rev. 199) The Commissioner is then required by law to disapprove a policy form if it is in violation of law or contains "inconsistent, ambiguous or misleading" terms. *Id.* at § 83-2-11(1)(a), (b). This Court takes judicial notice of the fact that the Commissioner has approved Allstate's policy forms containing the flood and water exclusions. *May v. State*, 127 So.2d 423, 426 (Miss. 1961) (a "Court may take judicial notice of the official records of the... Insurance Commissioner) The Fifth Circuit recognized that the Mississippi Supreme Court has noted the "public-policy import" of the insurance regulatory approval process. *Leonard*, 499 F.3d at 435.⁶ The judicial elevation of the efficient proximate causation doctrine to a rule of contract construction after contrary policies had been approved by the state insurance commissioner would essentially usurp the legislature's authority to delegate authority to an agency. *Id.* at 436. A policy form approved pursuant to express statutory authority cannot be deemed to be contrary to Mississippi's public policy as a matter of law.

⁶ See also, *United States Fid. & Guar. Co. v. Knight*, 882 So.2d 85, 92 (Miss. 2004) ("[I]nsurance 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."

For all these reasons, the Court concludes that Allstate's and Nationwide's use of their "flood exclusion" provisions, or ACC clauses, to supplant the default causation regime is not forbidden by Mississippi case law, statutory law, or public policy. Therefore, the flood and water exclusion provisions contained in Allstate's and Nationwide's insurance policies are *not* void and unenforceable as violations of public policy of the State of Mississippi. Accordingly, COUNT ONE of the Attorney General's Complaint should be denied, dismissed and held for naught. Judgment on the pleadings should be granted to the Defendants as to COUNT ONE of the Attorney General's Complaint.

(2) The insurance policies, which include flood exclusions, issued by Allstate and Nationwide are not adhesion contracts nor are said contracts unconscionable.

The Attorney General seeks a finding in his Complaint⁷ that Allstate's and Nationwide's insurance policies that contain flood exclusions are unconscionable, thus void and unenforceable. "Unconscionability has been defined as 'an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.'" *Entergy Miss., Inc. V. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998) (quoting *Bank of Indiana Nat'l Ass'n v. Holyfield*, 476 F.Supp. 104, 109 (S.D. Miss. 1979)). Under Mississippi law, there are two types of unconscionability – procedural and substantive. *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 517 (Miss. 2005). Procedural unconscionability applies to the formation of the contract wherein the disputed clause is contained, whereas substantive unconscionability only applies to the challenged clause itself. *Id.* at 521.

⁷ See, Complaint and Motion for Temporary Restraining Order at ¶ 29-31.

The Attorney General argues that the Defendants' exclusionary policies are procedurally unconscionable and thus are contracts of adhesion. It is further contended that the exclusionary language effectively negates one's common law right to recover for losses proximately caused by a covered peril, as it is unreasonably complex to the average policyholder, is not in a distinguishable typeface, and is unreasonably favorable towards the Defendants, thereby depriving said policyholders of meaningful choice of coverage.

The Court disagrees with the Attorney General's characterization of Allstate's and Nationwide's insurance policies as contracts of adhesion, thus leading to their unconscionability. To sustain his claim for procedural unconscionability, the Attorney General must plead and prove that the following existed at the time the contract was formed: "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms." *Vicksburg Partners*, 911 So. 2d at 517. However, nothing from the pleadings indicate that any of these elements existed between insured homeowners and the insurance companies.⁸

In light of the factors set forth in *Vicksburg Partners*, there is no apparent lack of knowledge by the insureds, as Mississippi law bestows a duty upon the insured to read the policy, presuming said policy's contents to be known. *Stephens v. Equitable Life Asur. Society*, 850 So. 2d 78, 83-84 (Miss. 2003). There was no showing of a lack of voluntariness because negotiation of policy terms is contrary to Mississippi insurance law as Defendants are prohibited from selling

⁸ The Court recognizes that these elements may very well be present in individual insured homeowner situations, however, the Court cannot make such a finding when ruling on a Judgment on the Pleadings filed by the Attorney General on behalf of all insured residents of Mississippi.

policies that deviate from those approved by the Insurance Commissioner.⁹ Also, there is no evidence of inconspicuous print within the exclusionary language of the flood exclusions. To support his argument, the Attorney General relies on *East Ford, Inc. v. Taylor*, 820 So. 2d 709 (Miss. 2002). However, *East Ford* is clearly distinguishable from the case at bar as the language in its subject clause was in a considerably smaller font than that of the other contract terms, whereas the exclusionary language in the Defendants' policies is of similar typeface to the rest of the contract.¹⁰

Further, the Insurance Commissioner has within the scope of his lawful authority approved the language used in the said flood exclusions. In approving same, the said Insurance Commissioner has inherently found that they are not "inconsistent, ambiguous, or misleading."¹¹ Thus, there is no apparent use of complex language in these exclusions. Also, there is no showing of a disparity in sophistication or bargaining power between the parties since the Mississippi Supreme Court has held that it cannot re-write unambiguous policies despite "the unique dynamics of disparate bargaining power between insurance companies and consumers." *Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So. 2d 765, 769 (Miss. 2005). The last factor set forth in *Vicksburg Partners*, lack of opportunity to study the contract and inquire about the contract terms, similarly is not present since the Attorney General has plead no facts to support this element.

⁹ See, Miss. Code Ann. § 83-2-7(3) (Rev. 1999).

¹⁰ In fact, the Defendants' flood exclusions were set off and indented with headings in bold.

¹¹ See, Miss. Code Ann. § 83-2-11 (a), (b) (Rev. 1999).

After considering each factor necessary to sustain a claim of procedural unconscionability, the Court concludes that Allstate's and Nationwide's use of "flood exclusion" provisions are not procedurally unconscionable, thus the exclusionary clauses are not unenforceable.

The Attorney General further asserts that Allstate's and Nationwide's "flood exclusion" provisions are substantively unconscionable, alleging that Defendants used ambiguous language to alter the common law rights of insured homeowners. The Attorney General claims that the Defendants' "flood exclusion" provisions are contracts of adhesion, display unequal bargaining power and use of said clauses are attempts by the Defendants to sidestep all responsibility for a covered peril.

Substantive unconscionability has been upheld when "there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach." *Bank of Indiana v. Holyfield*, 476 F. Supp. 104, 110 (S.D. Miss. 1979) (citing *United State Leasing Corp. v. Franklin Plaza Apartments, Inc.*, 65 Misc.2d 1082, 319 N.Y.S.2d 531 (1971)).

The subject "flood exclusion" provisions can hardly be deemed "one-sided" since the insured homeowners maintained the option to purchase flood insurance in addition to the wind coverage contained in the subject policies, which would have covered the exact damages that Hurricane Katrina in many instances certainly caused. Since insured homeowners paid no premiums for flood and/or water damage, they cannot reasonably expect to recover for such damage caused by same, as "flood/water" damage is not a covered peril and is in fact specifically excluded in the language of the policies. Thus, the policies do not violate the "reasonable

expectations” of consumers, as the exclusions are drawn having the clear purpose of excluding the very damage for which the Attorney General seeks to recover – flood damage. As such, the policy is not “oppressive” to policy holders or “unduly favorable” to the Defendants. *Vicksburg Partners*, 911 So. 2d at 521.

Finally, the Insurance Commissioner, who maintains exclusive authority to review and approve rates and forms for insurance policies,¹² submitted his approval of the Defendants’ policy forms, which contained the flood exclusions. A recent Mississippi case featuring the same or similar types of damages as the case at bar held that “[T]he exclusions found in the policy for damages attributable to flooding are valid and enforceable policy provisions.” *Buente v. Allstate Ins. Co.*, 422 F.Supp.2d 690 (Miss. 2006). Mississippi courts have upheld similar language effectively amounting to valid and enforceable exclusionary provisions for decades. See, *Firemen’s Ins. Co. v. Schulte*, 200 So. 2d 440 (Miss. 1967); *Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696 (Miss. 1973); *Lititz Mut. Ins. Co. v. Buckley*, 261 So. 2d 492 (Miss. 1972); *Homes Ins. Co. v. Sherrill*, 174 F.2d 945 (5th Cir. 1949); *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217 (Miss. 1972); *Comm. Union Ins. Co. v. Byrne*, 248 So. 2d 777 (Miss. 1971); *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765 (Miss. 1971).

After considering each factor necessary to sustain a claim of substantive unconscionability, the Court concludes that Plaintiff’s use of “flood exclusion” provisions are not substantively unconscionable, thus the exclusionary clauses are not unenforceable because they are substantively unconscionable.

¹² See, Miss. Code Ann. § 83-2-7 (Rev. 1999).

Accordingly, the Court finds that Allstate's and Nationwide's "flood exclusion" provisions are not procedurally or substantively unconscionable. COUNT TWO of the Attorney General's Complaint should be denied, dismissed and held for naught, and Judgment on the pleadings should be granted to the Defendants, Allstate and Nationwide, to the extent that the Court finds that the subject insurance policies are not adhesion contracts nor are said policies/contracts unconscionable.

- (3) **Allstate's and Nationwide's flood exclusion provisions contained in their insurance policies are *not* ambiguous on their face when read in logical conjunction with other provisions of the subject policy.**

The Attorney General argues that the plain language of Defendants' flood exclusion provisions does not plainly and unmistakably exclude coverage for losses incurred as a result of "storm surge."¹³ The Attorney General would have this Court believe that because defendants did not state in their property insurance contracts that "storm surge" is an excluded peril, it must be *assumed* that storm surge is a covered peril. The Attorney General maintains that the subject water exclusions are ambiguous on their face when read in logical conjunction with other provisions of Defendants' policies.

Under Mississippi law, when a contract is clear and unambiguous, its meaning and effect are matters of law for court determination. *U.S. Fid. & Guar. Co. v. Omnibank*, 812 So.2d 196, 198 (Miss. 2002) A court "must refrain from altering or changing a policy where the terms are

¹³ The Attorney General does acknowledge that Nationwide's hurricane deductible endorsement states that coverage does not include "flooding"; however, Hood argues that "flooding" and "storm surge" are two separately identifiable weather perils that are not concurrent.

unambiguous, even if there is a resulting hardship on the insured party.” *Farmland Mut. Ins. Co. v. Scruggs*, 886 So.2d 714, 717 (Miss. 2004) Ambiguity cannot be forced into a policy where there is none, and courts cannot rewrite or deem a contract ambiguous where the language is clear and indicative of its contents. *Mississippi Farm Bureau Mut. Ins. Co. v. Walters*, 908 So.2d 765, 769 (Miss. 2005)

Exclusionary clauses must be written in “clear and unmistakable language” and should be strictly construed in favor of coverage. *Miss. Farm Bureau Mut. Ins. Co. v. Jones*, 754 So.2d 1203, 1204 (Miss. 2000) An insurance policy must be read even more stringently when a dispute over coverage involves exceptions or limitations on the insurer’s liability. *J&W Foods Corp. v. State Farm Mut. Auto Ins. Co.*, 723 So.2d 550, 552 (Miss. 1998)

Certainly, the majority of insurance policyholders in this case are not lawyers. The Court would therefore favor a plain, common sense reading of the policy and exclusionary language, without resort to legalese, since average citizens are expected to read and be able to understand the policy provisions. The Mississippi Supreme Court has followed the plain meaning and common sense approach when interpreting insurance clauses. See, *Noxubee County School Dist. v. United Nat. Ins. Co.*, 883 So.2d 1159 (Miss. 2004); *Blackledge v. Omega Ins. Co.*, 740 So.2d 295 (Miss. 1999); *Allstate Ins. Co. v. Chicago Ins. Co.*, 676 So.2d 271 (Miss. 1996)

“Flood” is defined as “a great flowing or overflowing of water, especially over land not usually submerged.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* (1989 ed.); see also, *In re Katrina Canal Beaches Litigation*, 495 F.3d 191, 214 (5th Cir. 2007) (“When a body of water overflows its normal boundaries and inundates an area of land that is normally dry, the event is a flood.”) “Storm surge” is generally understood to be “a rising of the

sea as a result of atmospheric pressure changes and wind associated with a storm.” *The New Oxford American Dictionary* (2d ed. 2005); *see also* FEMA’s description of “storm surge” as “water that is pushed toward the shore by the force of winds swirling around them...This rise in water level can cause severe flooding in coastal areas...” at <http://www.fema.gov/hazards/hurricanes/surge.shtm>.

Examining Allstate’s flood exclusion in a common sense, ordinary manner reveals that flood damage is not a covered loss. Flood includes, but is not limited to, surface water, waves, tidal waves, tidal water or overflow of any body of water, or spray from any of these, *whether or not driven by wind*. The referenced exclusion goes on to further state there is no coverage for water, nor any other substance on or below the surface of the ground, regardless of its source.¹⁴ Nationwide’s flood exclusion is similar. It excludes flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, *whether or not driven by wind*. The policy further states that loss resulting from water or water-borne material damage is not covered even if other perils contributed, directly or indirectly, to cause the loss.¹⁵

Using simple English, both flood exclusions do not cover a loss caused by water damage. Both policies further state that water damage is excluded even if in combination with or in any sequence to other causes. It is loss caused by flood damage that both policies clearly exclude. The ACC clauses of both defendants’ policies elaborate on the said exclusion by providing that flood damage is excluded no matter what other causes exist and whether the water damage

¹⁴ Exhibit F at p.6-8 attached to Attorney General’s Cross-Motion for Judgment on the Pleadings and Response in Opposition to Defendants’ Motions for Judgment on the Pleadings

¹⁵ *Id.* at Exhibit G, p. D1

occurs first, last or simultaneously with some other cause. This simple, basic interpretation of the subject policies bars coverage for flood damage and *only* flood damage, whether occurring alone or in combination with another peril.

Exclusions for damage caused by water, whether or not driven by wind, have been standard in Mississippi homeowner policies for more than half a century. See, *Travelers Indem. Co. v. Rawson*, 222 So.2d 131, 143 (Miss. 1969); *Cumbest v. Phoenix of Hartford Ins. Co.*, 438 F.2d 1222, 1223 (5th Cir. 1971). Recently, the United States District Court for the Southern District of Mississippi, Southern Division, dealt with an Allstate flood exclusion almost verbatim to the one at hand. In *Buente v. Allstate Ins. Co, et al.*, 422 F.Supp.2d 690 (Miss. 2006), and *Buente v. Allstate Ins. Co., et al.*, 2006 U.S. District LEXIS 23742, at *1 (S.D. Miss., Apr. 11, 2006), the Court stated that the plain, ordinary meaning of the words used in the Allstate flood exclusion is clearly broad enough to encompass “storm surge.” “The inundation that occurred during Hurricane Katrina was a flood, as that term is ordinarily understood, whether that term appears in a flood insurance policy or in a homeowner’s insurance policy. These exclusions that are found in the policy for damages attributable to flooding are valid and enforceable policy provisions.” *Id.*

Similarly worded flood and water exclusions have likewise been held by federal courts applying Mississippi law to be unambiguous and encompassing damage caused by “storm surge.” See, *Leonard*, 499 F.3d at 437 and *Tuepker*, 507 F.3d at 352-53. The *Leonard* court found that the flood exclusion provision explicitly exempts from coverage damage caused by “flood...waves, tidal waves, [and] overflow of a body of water...whether or not driven by wind.” *Id.* This Court concurs with Judge Edith Jones in the last referenced case wherein she wrote the

phrase “storm surge” is little more than a synonym for a “tidal wave” or wind-driven flood, both of which are excluded perils. The omission of the specific term “storm surge” does not create an ambiguity in the policy regarding coverage available in a hurricane and does not entitle the Leonards to recovery for their flood-induced damages. *Id.*

Accordingly, the Court finds that there is no ambiguity in Allstate’s nor Nationwide’s flood and water exclusions. COUNT THREE of the Attorney General’s Complaint should thus be denied, dismissed and otherwise held for naught. Defendants’ Motion for Judgment on the Pleadings in their favor is well-taken and should be granted as to this Court finding that their flood exclusion provisions are not ambiguous on their face when read in logical conjunction with other provisions of the subject policies.

- (4) The Mississippi Consumer Protection Act, specifically §§ 75-24-5(1) and (2), is not applicable as it applies to Nationwide’s and Allstate’s insurance policies and the subject flood exclusions.**

The Attorney General argues that the Defendants’ practice of selling insurance policies containing flood exclusions is an unfair and deceptive trade practice violating the Mississippi Consumer Protection Act (hereinafter referred to as “MCPA”) because these policies contemplate full and comprehensive hurricane coverage but then seek to exclude such coverage. *Miss. Code Ann. § 75-24-5* “prohibits a provider of goods or services from representing that those goods or services have characteristics, benefits and uses that they do not have or representing that services are of a particular standard, quality or grade, if they are of another.” *Burley v. Homeowner’s Warranty Corp.*, 773 F.Supp. 844, 863 (S.D. Miss. 1990) The Attorney

General claims that the practices of the Defendants in denying coverage for damage that was proximately caused by Hurricane Katrina are “unfair” because they offend public policy¹⁶ and are immoral, unethical, oppressive and/or unscrupulous causing substantial injury to the consumers on the Gulf Coast.

In *Burley*, the Federal District Court for the Southern District of Mississippi found that the MCPA did not apply to casualty insurance contracts, stating “the policy at issue in the case at bar is not a ‘good’ or ‘service’ and accordingly, the cited statute¹⁷ is inapplicable.” *Id.* The Mississippi Court of Appeals recently strengthened and expanded the *Burley* decision as it applies to insurance policies, characterizing the contract in *Burley* as a “homeowner’s insurance policy,” and adopted the Court’s reasoning, holding that insurance policies are not subject to the MCPA. *Taylor v. Southern Farm Bureau Cas. Co.*, 954 So.2d 1045, 1049 (Miss. Ct. App. 2007)¹⁸

In light of the foregoing, the Attorney General’s statement that “Mississippi case law has not specifically addressed the application of the MCPA to insurance policies is in error¹⁹. Further, even argumundo, should the MCPA apply to insurance policies of the type at issue, which it does not, this Court is not presented with any evidence that Allstate’s and Nationwide’s practice of selling insurance policies containing flood exclusions equates with making

¹⁶ This argument as issue has already been discussed as set forth above.

¹⁷ *Miss. Code Ann.* § 75-24-5

¹⁸ The *Taylor* opinion was rendered subsequent to the 2003 legislative amendments to the Mississippi Service Contract Act, thus superseding any argument that said amendments altered or contradicted the ruling in *Taylor*.

¹⁹ See, Attorney General’s Memorandum, p.29 in Support of his Cross-Motion for Judgment on the Pleadings and Response in Opposition to Defendants’ Motions for Judgment on the Pleadings

representations that said services have characteristics, uses or benefits that they do not have or represent that services are of a particular standard while they are of another.

In accordance with all the foregoing, the Court finds the MCPA is inapplicable as it applies to Nationwide's and Allstate's referenced insurance policies and the subject flood exclusions. COUNT FOUR of the Attorney General's Complaint should therefore be denied, dismissed and held for naught. Defendants' Motions for Judgment on the Pleadings in their favor are well taken, to the extent the Court finds that the Mississippi Consumer Protection Act, specifically Section 75-24-5(1) and (2), is not applicable as it applies to Nationwide's and Allstate's insurance policies and the subject flood exclusions.

(5) COUNT FIVE of Plaintiff's Complaint should be dismissed as to injunctive relief which is no longer sought by the State of Mississippi.

The Court further finds the Attorney General lacks standing in this case to challenge the private insurance contracts at issue to which neither the State of Mississippi nor any state agency is a party. The Attorney General maintains that he has the authority to bring the subject lawsuit, otherwise known as "standing." The Attorney General bases his standing on two separate and distinct legal ideals. First, the common law of Mississippi, pursuant to Article 6, Section 173 of the Mississippi Constitution, grants or implies standing on the Attorney General to proceed with the allegations of the Complaint. Second, the federal doctrine of "*parens patriae*" allows the Attorney General to seek the relief requested.

With regard to the Attorney General's first basis for standing, he cites Article 6, Section 173 of the Mississippi Constitution that confers upon the Mississippi Attorney General all powers vested in the attorney general at common law,²⁰ and he listed supporting case law outlining those duties.²¹ The Attorney General argues that he alone holds the right to represent the State in matters involving statewide interest and has the sole authority to decide what matters are of statewide interest so as to compel the institution of litigation on behalf of the State. Further, the Attorney General cites Miss. Code Ann. Section 7-5-1 (Rev. 2002) wherein it states in pertinent part that the Attorney General "is given the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest, and he shall intervene and argue the constitutionality of any statute when notified of a challenge thereto..." The Attorney General contends that the Mississippi Constitution, coupled with Section 7-5-1 of the Miss. Code Ann. (Rev. 2002), certainly grants him standing to pursue the relief requested.

As to the federal doctrine of *parens patriae*, meaning "parent of the country," the Attorney General points out that to maintain an action under this doctrine, the state must articulate a quasi-sovereign interest and that the articulation of that interest must be reviewed on a case-by-case basis; "neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 591, 601, 607 (1982).

²⁰ See, e.g. *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So.2d 779, 781-82 (Miss.1982); *Dunn Constr. Co. v. Craig*, 2 So.2d 166, 174-75 (Miss. 1941)

²¹ According to *Capitol Stages, Inc. v. State ex rel. Hewitt*, 128 So.2d 759, 762-63 (Miss. 1930), those common law duties include "the right to institute conduct, and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order, and protection of the public rights."

The Attorney General claims that Mississippi Courts have confirmed the authority of the Attorney General to institute litigation on behalf of the State to protect public rights “aimed at securing an honest marketplace, promoting proper business practices, protecting Mississippi consumers, and advancing Mississippi’s interest in the economic well-being of its residents.” *Hood v. Microsoft Corp.*, 428 F.Supp.2d 537, 546 (S.D. Miss. 2006). Therefore, the quasi-sovereign interest in this case is the interest in the economic well-being of Mississippi citizens--especially all Mississippi coastal property owners. As a result, the Attorney General takes the position that even though the State’s interest is based on facts involving private parties who may benefit from a favorable ruling, the State has articulated an interest sufficiently independent of individual citizens to sustain a *parens patriae* action, that interest being a threatened economic well-being of Mississippi’s citizens, imposing unnecessary and excessive costs upon the state and local governments and ultimately the taxpayers of the State of Mississippi.

The Attorney General’s argument in this instance is not consistent with Mississippi law. No statutory provision nor common law precedent that the Court is aware of allows the Attorney General of this state to pursue the claims asserted in his Complaint. That is because of the long-standing contract principle that one who is not a party to a contract lacks standing to sue for its breach or enforcement, absent a special status such as a third-party beneficiary or assignee. *See, e.g. Stewart v. City of Jackson*, 804 So.2d 1041, 1050 (Miss. 2002); *Great S. Nat’l Bank v. McCullough Envtl. Servs., Inc.*, 595 So.2d 1282, 1287 (Miss. 1992). The Attorney General is neither a party, third-party beneficiary nor assignee *of the private insurance contracts at issue*. Therefore he lacks standing necessary to pursue this matter. (emphasis added) This lawsuit involves nothing more or less than private contractual rights and obligations between those

coastal property owners and their insurance companies. The private nature of these claims is illustrated by the fact that many individual claims following Hurricane Katrina have been resolved through consensual adjustment, mediation or arbitration, all without the Attorney General's participation or intervention of any kind. Where was the Attorney General in those many cases? Must they all be undone for failure to join a necessary party? The Attorney General is acting under the guise of "public" interest, but is actually attempting to litigate local, private interests by means of a *de facto* class action not permitted under Mississippi law. *USF&G Ins. Co. of Miss. v. Walls*, 911 So.2d 463, 467 (Miss. 2005); *American Bankers Ins. Co. of Florida v. Booth*, 830 So.2d 1205, 1210 (Miss. 2002)

There is simply no specific constitutional nor statutory provision that authorizes the Attorney General to bring this action. The Attorney General in this case is not acting on behalf of a state agency nor is he representing the Mississippi Department of Insurance which, coincidentally, reviewed and approved the insurance policy provisions the Attorney General now attempts to invalidate.

Therefore, the Court finds the Attorney General has no standing to assert claims on behalf of Nationwide's nor Allstate's policyholders with regard to the subject policies, including flood exclusions. Judgment on the pleadings in regard to Defendants' argument that the Attorney General lacks standing to challenge the private insurance contracts at issue should be granted to Defendants.²²

²² Assuming, *arguendo*, that the Attorney General even had standing to assert these claims, the Court finds Nationwide and Allstate would still be entitled to judgment on the pleadings on all other counts of the Attorney General's Complaint for the reasons set forth above.

Conclusion

For all the above and foregoing reasons, this Court should deny Plaintiff's motion for judgment on the pleadings and should grant Defendants' motion for judgment on the pleadings in this case. It is, therefore;

ORDERED AND ADJUDGED that COUNT ONE of the Plaintiff's Complaint which alleges that the subject exclusion provisions of Defendants' said insurance policies are void and unenforceable as violative of public policy of the State of Mississippi is denied, dismissed and held for naught and Judgment on the Pleadings is granted to Defendants as to the said COUNT ONE of the Attorney General's Complaint.

IT IS, FURTHER, ORDERED AND ADJUDGED that COUNT TWO of the Attorney General's Complaint is denied, dismissed and held for naught and Judgment on the pleadings is granted to the Defendants, Allstate and Nationwide, to the extent that the Court finds that the subject insurance policies are not adhesion contracts nor are said policies/contracts found unconscionable.

IT IS, FURTHER, ORDERED AND ADJUDGED that COUNT THREE of the Attorney General's Complaint be denied, dismissed and held for naught and Defendants' motion for Judgment on the pleadings is granted as to this Count, finding that Defendants' referenced flood exclusion provisions are not ambiguous on their faces when read in conjunction with the other provisions of the subject policies.

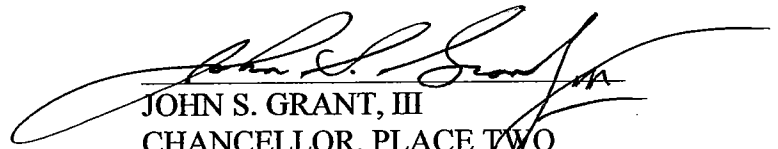
IT IS, FURTHER, ORDERED AND ADJUDGED that COUNT FOUR of the Attorney General's Complaint is denied, dismissed and held for naught and Judgment on the pleadings is

granted to the Defendants to the extent that this Court finds that the Mississippi Consumer Protection Act is not applicable as it applies to Nationwide's and Allstate's insurance policies and the subject flood exclusions.

IT IS, FURTHER, ORDERED AND ADJUDGED that COUNT FIVE of the Attorney General's Complaint is dismissed as to injunctive relief, which is no longer sought by the State of Mississippi. (See footnote 2 on page 3 hereinabove.)

IT IS, FURTHER, ADJUDICATED by the Court that the Attorney General lacks standing to bring its action herein.

SO ORDERED, ADJUDGED AND DECREED THIS THE 22nd day of December, 2008.


JOHN S. GRANT, III
CHANCELLOR, PLACE TWO
TWENTIETH CHANCERY COURT
DISTRICT, STATE OF MISSISSIPPI